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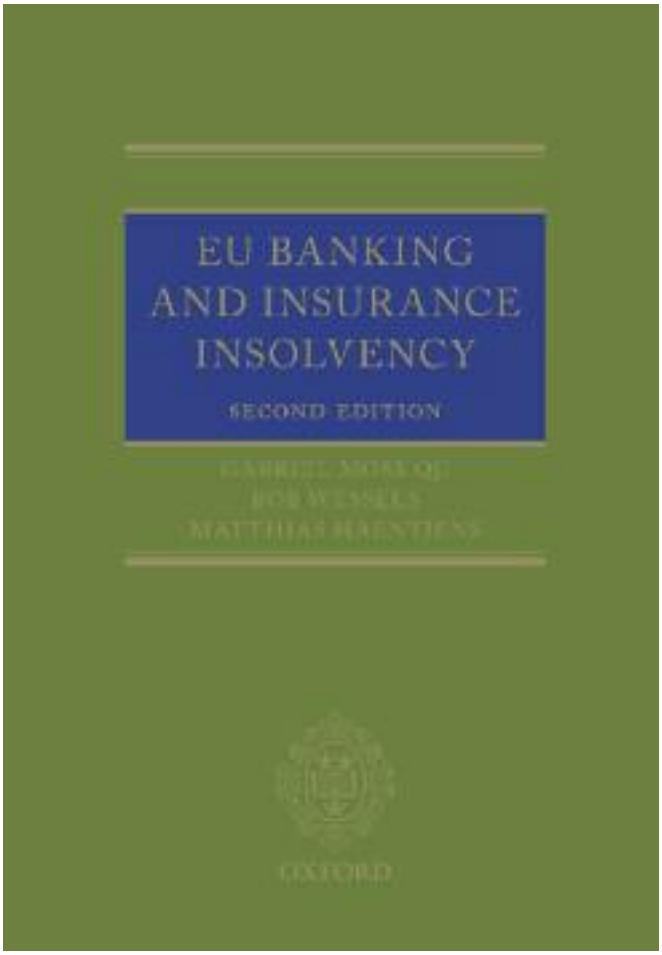

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FROM THE EDITOR

MARK ARNOLD QC

The geese that laid the golden eggs

Welcome to the first edition of the South Square Digest of 2017. At the time the last edition went to print, the judges of the Divisional Court had decided that the UK Government could not trigger Article 50 by resorting to the Crown's prerogative powers, but must first obtain the consent of Parliament. They had been labelled as "Enemies of the People" for their pains, although the Government agreed the question was one of law fit to be determined by the courts. Since then, the Supreme Court has, by a majority of 8 to 3, confirmed that, legally, their neighbour in Downing Street, to the east of Parliament Square, must first obtain the consent of their neighbours to the south (but – with emphatic unanimity – not those in the devolved assemblies of Scotland, Wales and Northern Ireland).

Has this led to constitutional crisis? Gratifyingly, no: at least, not yet. The Crown in Parliament is supreme. Our judges (although disgruntled) are still independent and uncowed. And, thankfully, our press is still free.

The European Union (Notification of Withdrawal) Bill is on its way through the House of Lords, having passed through the Commons after lengthy debate but ultimately no change. In commendably brief terms, it authorises the Prime Minister to notify the UK's intention to withdraw from the EU under Article 50(2), despite the European Communities Act 1972. It will undoubtedly receive all proper scrutiny in the Upper House, and there will be some parliamentary "ping-pong" (*lutte à la corde*, if you prefer) between Lords and Commons, before being presented for Royal Assent (probably just) in time for the PM to abide

PM THERESA MAY WATCHES FROM THE SIDELINES AS THE LORDS HAVE THEIR SAY

AU REVOIR ECJ?: 'WE WILL TAKE BACK CONTROL OF OUR LAWS AND BRING TO AN END THE JURISDICTION OF THE EUROPEAN COURT OF JUSTICE IN BRITAIN'

by her stated wish to give notice by the end of March 2017.

As to the kind of Brexit that will follow, gone is "Brexit means Brexit" (red, white and blue). We have grown up and moved on. The Government has published a White Paper on the UK's exit from and new partnership with the European Union. The aspiration now is for a "Global Britain". That is surely a laudable aim, although it is not new. What is new in this manifestation, however, is that this will not involve membership of the Single Market but would involve access to it. There's a challenge. According to the Prime Minister, we will take back control of our laws and bring to an end the jurisdiction of the European Court of Justice in Britain. As the European Communities Act 1972 is repealed, so the body of existing EU law will be converted into British law, such that "the same rules and laws will apply on the day after Brexit as they did before. And it will be for the British Parliament to decide on any changes to that law after full scrutiny and proper Parliamentary debate."

As previously suggested, this approach may well work in relation to much EU legislation which presently has direct effect in the UK. If EU law were then to change, Parliament would no doubt have to consider whether to adopt the change. Fair enough. Difficulties will arise, however, where something is done here in respect of which recognition is required elsewhere in the EU. Whatever UK domestic legislation may provide in future, it cannot require recognition abroad of the judgment or order of a UK court, for that is in the gift of the recognising state. That means that either a carve-out for these matters is required, which may be difficult if the ECJ's future here is as bleak as midwinter, or alternatives must be found. Some have

suggested that adoption of the UNCITRAL Model Law would be a good start. No doubt. But, while the UK did just that in 2006, of the remaining 27 EU member states only Greece, Poland, Romania and Slovenia have so far done so. In any event, while it contains provisions for co-ordination and co-operation which are very useful, it does not yet provide a basis for recognition and enforcement of foreign insolvency judgments.

So much for the law. What of the judges? No longer enemies they, but "Champions of the People". Admittedly, this new epithet was reserved for the three justices forming the minority, but even the majority survived with their integrity unimpugned. Not only that, but the latest comments from this same pillar of the fourth estate emphasise just how important the rule of law is, as well as an independent judiciary. After the occasionally ill-informed and irresponsible comments of recent times, and despite continuing references to the judiciary being an unelected elite, that is reassuring. Let's hope it continues.

Across the pond, a different appointments system has not saved certain distinguished members of the US federal judiciary from executive rebuke. In the wake of his ruling temporarily suspending President Trump's executive order in relation to immigration, one was referred to as "this so-called judge" by President Trump himself, who then berated the members of the US 9th Circuit Court of Appeals for their "political" decision and for being a "bad court". "Courts seem to be so political," he said "and it would be so great for our justice system if they would be able to do the right thing." Others within the administration complain of a "juristocracy", a "judicial usurpation of power". Such comments undermine confidence in an independent judiciary and the rule of law itself. Falling from the lips of those governing the great democracy whose Constitution attaches so much importance to both principles, they seem extraordinary; but probably no more so than other things that have been said, read, written and tweeted since 20 January.

For the rule of law to work as it should, it is necessary…that the laws themselves are fair and just

Whilst in the UK some judges are 'Champions of the People', across the pond their counterparts are receiving executive rebuke

For the rule of law to work as it should, it is necessary not only that everyone is subject to it, but that the laws themselves are fair and just. It should not go unremarked, therefore, that on the first day the new Brexit bill was debated in the Commons, another Act of Parliament received Royal Assent: the Policing and Crime Act 2017, otherwise known as Turing's Law.

The story of Alan Turing is widely known, at last, and justly so. With others in Huts 6 and 8 at Bletchley Park (ULTRA), and building on work already begun by Polish cryptanalysts, he played a crucial part in decrypting the Enigma code used by the German armed forces during the Second World War. When visiting on 6 September 1941, Churchill is said to have told the codebreakers they were the geese that laid the golden eggs.[1] According to the CIA's website, Eisenhower told the British intelligence chief in July 1945, that ULTRA "saved thousands of British and American lives and, in no small way, contributed to the speed with which the enemy was routed and eventually agreed to surrender."

Although his other contributions to computer science were recognised long before, Turing's war work remained secret until the 1970s, 80s and 90s, on some aspects longer still. His conviction for consensual homosexual activity in 1952, however, did not. Rather than go to prison, he was put on probation and ordered to submit to treatment, which resulted in chemical castration: as cruel and unusual a punishment as ever there was. In 1954, he died of cyanide poisoning. In 1967, the

TURING'S LAW RECEIVED ROYAL ASSENT ON THE FIRST DAY THE BREXIT BILL WAS DEBATED IN THE HOUSE OF COMMONS

activity for which he had been convicted was decriminalised. In 2013, by the exercise of the Crown prerogative of mercy, he was posthumously pardoned.

Now, by Turing's Law, a person convicted of, or cautioned for, an offence under various statutes dating back as far as 25 Hen. 8 c. 6 (that's 1533) is pardoned if the activity took place between consenting adults and would not otherwise constitute an offence under s 71 of the Sexual Offences Act 2003. It is said that the pardon applies to some 50,000 gay men, including (in relation to certain of his convictions) Oscar Wilde. One wonders what pithy remark he would make, as he contemplates his neighbours to the north, south and east, from his window in Westminster Abbey, to the west of Parliament Square.

We cannot compete with Wilde, but there is still much to savour in this edition, as a glance at the contents page will confirm. I particularly welcome the contribution from Smitha Menon and Stephanie Yeo of Wong Partnership, Singapore, reviewing the new restructuring and corporate regime introduced there in 2016. I also draw your attention to our News in Brief, from which you will see that, as we bid farewell to Ron Barclay-Smith with deep gratitude for all that he has achieved over the past five years, we welcome William Mackinlay MVO as our new Chambers Director.

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

1/. Alan Turing Decoded by Dermot Turing (The History Press, 2015) at p. 139. For the no less inspirational roles played by Lieutenant Tony Fasson GC RN, Able Seaman Colin Grazier GC and the 16-year old Tommy Brown GM, on 30 October 1942, see Enigma by Hugh Sebag-Montefiore (Weidenfeld & Nicolson, 2000).

Powers of investigation in a cross-border context

William Trower QC and Edoardo Lupi review the options available to foreign office-holders seeking information in England and the options available to English office-holders seeking information abroad

Introduction

During the course of his judgment in *Re Rolls Razor Ltd*,[1] Buckley J said that powers conferred on the court by the predecessor to section 236 of the Insolvency Act 1986 ('IA 1986') were directed towards helping a liquidator to:

"discover the truth of the circumstances connected with the affairs of the company, information of trading, dealings, and so forth, in order that the liquidator may be able, as effectively as possible, and, I think, with as little expense as possible…to complete his function as liquidator."

The observations made by Buckley J in 1968 are as true today as they were then, although they now of course extend to administrators as well as liquidators. The underlying principles apply not just in a domestic context, but also in the context of cross-border investigations, both where foreign insolvency office holders are seeking information in England and where English insolvency office holders are seeking information abroad. As the complexity and sophistication of cross-border dealings continue to increase, there is a growing need, where insolvency supervenes, for all insolvency office-holders to make full use of the armoury of powers available in English law to assist them in obtaining the information they require.

There are many different situations in which a foreign office-holder may need to call on the assistance of the English court. They range from situations in which the English court has made orders for the examination of a former English based professional adviser by an Australian office-holder to be conducted before an Australian judge according to Australian law[2] to cases in which BVI joint liquidators have obtained orders for the production of certain documents from the English administrative receivers of certain related companies.[3]

Many of the cases which have been decided since 1986 have arisen under the co-operation provisions contained in section 426 of IA 1986. More recently, the English court's approach to assisting foreign office-holders with information gathering has been explained and developed by the decision in *Singularis Holdings Ltd v PricewaterhouseCoopers*,[4] where, in the absence of a relevant statutory power, the Privy Council recognised a power at common law to assist a foreign court of insolvency jurisdiction by ordering the

1/. *[1968] 3 All E.R. 698, 700.*
2/. *England v Smith 2001 Ch 419. There was a similar outcome in Re Duke Group Ltd [2001] BCC 144.*
3/. *Re Trading Partners Limited [2002] 1 BCLC 655.*
4/. *[2014] UKPC 36 [2015] AC 1675.*

production of information in oral or documentary form which is necessary for the administration of a foreign winding up. This newly discovered power of assistance was said to exist "*for the purpose of enabling those courts to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of each court's powers*."[5]

In addition to inward requests from foreign office-holders seeking to obtain information in England and Wales, an English office-holder will often need to obtain information in the form of documents situated abroad or from individuals resident overseas. This is because English law has always regarded the English statutory insolvency scheme as having worldwide, not merely territorial effect, even in relation to a foreign company subject to an English insolvency proceeding[6]. In these circumstances, the English court may request assistance from the relevant foreign court based, for example, on a reciprocal provision to section 426 IA 1986. To the extent that requests of this sort engage questions of foreign domestic law they are not dealt with further in this article.

There is, however, a further possible avenue for office-holders seeking the assistance of the English court to obtain information abroad, namely, reliance on an extraterritorial order of the English court without resorting to international arrangements, or the domestic law of the foreign country. The court's jurisdiction to make orders with extraterritorial effect under the IA 1986 to assist an office-holder to obtain information overseas is not settled. The most recent decision in this area[7] suggests that the English court's power to order the production of documents under section 236(3) IA 1986 may be exercisable in respect of documents situated abroad, even if the power under section 236(2) cannot be exercised to summon persons resident overseas to be examined in this jurisdiction.

Section 236 of the Insolvency Act 1986

A range of powers under the IA 1986 are available to office-holders.[8] The focus of this article is the statutory powers conferred on the English court under section 236 IA 1986 to assist an office-holder to obtain information. These powers have been described in the leading case as '*extraordinary*',[9] and to be inquisitorial in nature.[10] Under section 236 the court is entitled to grant relief to the office-holder[11] in respect of the three categories of person mentioned at section 236(2)(c), including the broad category of any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company. The relief available to the court is to:

(a) summon a relevant person to appear before it for an examination under oath;

(b) order a relevant person to submit to it an account of his dealings with the company; and

(c) require the relevant person to produce any books, papers or other records in his possession or under his control relating to the company or concerning the promotion, formation, business, dealings, affairs or property of the company.

These powers are conferred to assist office-holders to obtain information required to carry out their statutory duties and functions.[12] The office-holders' functions include collecting in

5/. Ibid., at [25].
6/. Stichting Shell Pensioenfunds v Krys [2015] AC 616 at [34] and in re BCCI (No 10) [1997] Ch 213, 241, a case in which the English proceeding was an ancillary winding up.
7/. Re Omni Trustees Limited; Official Receiver v Norriss [2015] EWHC 2697.
8/. These include (i) a power under section 133 IA 1986 to summon an officer of the company and persons who have been concerned or taken part in its promotion, formation or management for public examination; and (ii) a power under section 235 IA 1986 requiring such persons as mentioned in that section to provide the office-holder with such information concerning the company and its promotion, formation, business, dealings, affairs or property as the office-holder may at any time reasonably require, and attend on him at such times as he may reasonably require. Unlike section 133 and 236, section 235 is an informal procedure.
9/. British & Commonwealth Holdings plc (Joint Administrators) v Spicer & Oppenheim [1993] A.C. 426, 439.
10/. In Re Metropolitan Bank (1880) 15 Ch.D. 139 at 142.
11/. For these purposes an 'office-holder' includes an administrator, administrative receiver, provisional liquidator, or a liquidator, including the official receiver: sections 234 (1) and 236 (1) IA 1986.
12/. Re Hellas Telecommunications (Luxembourg) II SCA [2013] BPIR 756 at [11], citing Re RBG Resources Limited, Shierson v Rastogi [2002] EWCA Civ 1624 at [23].

the company's assets, realising them and distributing the net proceeds, investigating potential legal claims, and probing the reasons behind the company's failure, including the former directors' conduct.

The principles according to which the English court grants relief under section 236 IA 1986 are well established. They are set out in the leading case of *British & Commonwealth Holdings plc (Joint Administrators) v Spicer & Oppenheim.*[13] The court's discretion is unfettered but it is required to carry out a careful balancing exercise of the factors involved. First, it asks itself whether the office-holder reasonably requires the information to carry out his task. The office-holder's view as to whether information is reasonably required is entitled to a good deal of weight.[14] Second, in carrying out the balancing exercise, the court will be astute to avoid making an order which is wholly unreasonable, unnecessary or oppressive. Distinguishing between the powers available to it under section 236, the court has recognised that an order for production of documents is much less likely to be oppressive than an order for the private examination of the respondent.[15] In addition, it will ordinarily be oppressive to order the examination of an examinee against whom the office-holder has already commenced proceedings.[16]

The Foreign Office-Holder's Options

A foreign office-holder seeking to gather information relating to the insolvent company within the jurisdiction of the English court may rely on one of the following sources of cross-border insolvency law, depending on the particular facts of the case and the availability of the regime. Some but not all of these sources of law enable the office-holder to rely on the broad powers under section 236 IA 1986 set out above:

(a) Section 426 IA 1986.

(b) The UNCITRAL Model Law as incorporated into English law by the Cross Border Insolvency Regulations 2006 ('CBIR').

(c) The EU Regulation on insolvency proceedings (the 'Insolvency Regulation').[17]

(d) The common law as explained in *Singularis Holdings Ltd v PricewaterhouseCoopers.*[18]

Section 426 of the Insolvency Act

This is perhaps the most flexible option for foreign office-holders seeking the assistance of the English court in the conduct of their investigative role. Under section 426(4) IA 1986 the English court is under a duty to assist the requesting court of a relevant country or territory. The court is entitled to apply in relation to the matters specified in the request either English insolvency law or the corresponding insolvency law of the relevant country or territory. Section 426 IA 1986 only applies, however, to the Channel Islands and the Isle of Man or any other country or territory designated as such by the Secretary of State.[19] The designated countries or territories are made up principally of former or present members of the Commonwealth.[20]

On the application of a foreign office-holder, the court of a relevant country or territory may issue a letter of request seeking the assistance of the UK court under section 426. The request by the court of the relevant country or territory is authority for the UK court to apply either its own insolvency law or the insolvency law of the relevant county or territory and, in either case, its own jurisdiction and powers.[21] The UK court has a discretion over whether to assist the requesting court (despite the mandatory wording of section 426(4)) and, if so, under which system of law.[22] Ordinarily, however, the request by the court of the relevant country or territory will be a weighty factor in favour of

13/. [1993] A.C. 426, 439.
14/. Sasea Finance Ltd (Joint Liquidators) v KPMG [1998] BCLC 216 at 220.
15/. Cloverbay Ltd v Bank of Credit and Commerce International S.A. [1991] Ch. 90, 103.
16/. Re Spiraflite Ltd [1979] 2 All E.R. 766.
17/. Council Regulation (EC) 1346/2000.
18/. [2014] UKPC 36 [2015] AC 1675.
19/. Section 426 (11)(b).
20/. At present, the following have been designated as relevant countries or territories by the Secretary of State: Anguilla, Australia, the Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, the Republic of Ireland, Montserrat, New Zealand, St Helena, Turks and Caicos Islands, Tuvalu, the Virgin Islands, Malaysia, South Africa and Brunei Darussalam.
21/. England v Smith [2001] Ch 419 at [21].
22/. Re Duke Group Ltd [2001] BCC 144, 150.

the UK court exercising its discretion,[23] provided that it has not been vitiated by, say, some non-disclosure by the office-holder before the requesting court.[24]

The office-holder therefore has a choice whether to apply for relief pursuant to section 236 IA 1986 or according to the law of the requesting country. The flexibility this choice affords the office-holder is well illustrated by the English court's decision in the leading case of *England v Smith*[25], a case which arose out of the insolvency of an Australian company, Southern Equities Corporation Ltd.

In *England*, the Australian liquidator obtained an order from the English Court of Appeal pursuant to section 426 IA 1986 for the examination under Division 1 of Part 5.9 of the Australian Corporations Law of the company's former English based accountant by a specialist Australian judge. The liquidator had already commenced proceedings against the accountant's firm. The practice of the Australian and English court in relation to private examinations diverged in one important respect. The evidence before the court showed that the Australian practice was to permit an examination even where the office-holder had already commenced proceedings against the examinee, subject to the judge's control of the examination to prevent oppression. As noted above, the established practice in England is to refuse to order an examination under oath in such circumstances because the examination would amount to an unfair litigation advantage such as to be oppressive.

Notwithstanding the divergent practice, Morritt LJ said that the relevant '*insolvency law*' of Australia, section 569B of the Corporations Act, included the principles in accordance with which the Australian court exercised its jurisdiction under that provision.[26] To circumscribe the operation of the Australian provision with reference to the limitations imposed by the English court's practice in relation to section 236 IA 1986 would deprive section 426 of much of its intended effect. The Australian provisions had their own means of avoiding oppression, namely, their emphasis on the judicial supervision of the examination.

WILLIAM TROWER QC

The flexible approach taken in respect of section 426 IA 1986 in *England v Smith* was followed in *Re Duke Group Ltd.* In the latter case, an Australian liquidator obtained an order pursuant to section 426 IA 1986 for the examination of various respondents by an Australian judge under section 541 of the South Australian Companies Code. All of the respondents worked in Poland and one of them lived in Poland. Jonathan Parker J was

23/. Hughes v Hannover Ruckversicherungs-Aktiengesellschaft [1997] BCC 921, 939D.
24/. Re Duke Group Ltd [2001] BCC 144.
25/. [2001] Ch 419.
26/. England v Smith [2001] Ch 419 at [24].

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prepared to order the examination of the respondents where the practice of the English court in the circumstances disclosed by the evidence would have been to refuse to make an order under section 236 IA 1986 on the grounds of oppression. Despite counsel for the respondents raising a question of jurisdiction as to the court's power to summon the Polish based respondent, the judge nevertheless ordered the examination on the basis that the particular respondent had accepted service and had appeared on earlier hearings of the application.

The Model Law

Where the foreign insolvency proceeding has been recognised by the English court as a foreign proceeding under the CBIR, the court has the power pursuant to article 21 to grant any appropriate relief where necessary to protect the assets of the debtor or the interests of the creditors.

Relevantly, upon recognition of the foreign proceeding, whether as a foreign main or non-main proceeding, the court is empowered to grant the following relief on an application by the foreign representative under article 21(1): (i) to provide for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities (article 21(1)(d)); and (ii) to grant any additional relief that may be available to a British insolvency office-holder under the law of Great Britain (article 21(1)(g)). Where the relief is sought by a liquidator in non-main proceedings the investigation must relate to assets which (under the law of Great Britain) should be administered in those proceedings or concerns information required in those proceedings[27].

In *Re Chesterfield United Inc*,[28] Newey J considered the relationship between articles 21(1)(d) and 21(1)(g) in the context of an application by the joint liquidators of two companies registered in the BVI, who applied for the production of documents from Deutsche Bank AG. Rejecting the respondent's submissions, the judge said that neither article 21(1)(d), nor the limiting words under article 21(1) ("*where necessary to protect the assets of the debtor or the interests of the creditor*") significantly curtail the court's ability to grant relief under section 236 IA 1986, on which the liquidators could rely via article 21(1)(g). Article 21(1)(d) was intended to set a common minimum standard, regardless of whether the office-holder would be entitled to seek such relief under the local law. The usual *British & Commonwealth* test of whether the documents were reasonably required by the office-holders to carry out their functions applied to the liquidators' application.

By contrast with the position under section 426 IA 1986, the present state of English law is that a foreign representative making an application under article 21 is not entitled to relief which would not otherwise be available to the English court when dealing with a domestic insolvency.[29] It is not, however, clear whether this restrictive approach to the construction of article 21 would be applied in circumstances similar to *England v Smith*, where the application of Australian law led to a

27/. Article 21(3).
28/. [2012] EWHC 244 (Ch).
29/. Re Pan Ocean Co Ltd [2014] EWHC 2124 at [108] per Morgan J.

different result from that which would have been reached in England not because of differences in the substantive jurisdiction, but because of differences in the way in which an Australian court and an English court would have exercised that jurisdiction. In any event, the ability of the English court to apply foreign law and procedure under section 426 is a consideration office-holders would do well to keep in mind where both section 426 and the Model Law are available to them, particularly where the practice of the English court in the circumstances of the case would ordinarily be to refuse relief under section 236 IA 1986.

The Insolvency Regulation and the Post-Brexit Position

An office-holder appointed in main proceedings is entitled to exercise in the UK all of the powers conferred on him by the law of the state of the opening of proceedings (article 18(1))[30]; this will extend to his investigatory powers. Likewise, under article 25 of the Insolvency Regulation[31], a judgment by the courts of the main proceedings which derives directly from insolvency proceedings and which is closely linked with them is recognised automatically across EU members states and is enforceable pursuant to articles 38 to 58 (except article 45(2)) of the Regulation on Civil Jurisdiction and Judgments (44/2001)[32]. This will include court orders designed to assist an insolvency office-holder in his investigation of the affairs of the insolvent debtor. Thus an order of the English court pursuant to the bankruptcy equivalent of section 236 IA 1986 has been said by the Supreme Court of the Netherlands to fall within article 25.[33] The same principle should apply to an order for the disclosure of information made in secondary proceedings, so long as the information sought relates to assets situated in the territory of the member state which opened those proceedings[34].

The position may change, however, when the UK eventually completes the process of withdrawal from the EU, because the Insolvency Regulation[35] may no longer form part of English law. If and when that occurs, European office-holders will, subject to recognition, still be able to rely on the CBIR. With one exception they will not be entitled to rely on section 426, given that, apart from the Republic of Ireland, no other EU member state has been designated as a relevant country or territory by the Secretary of State. There is a further possibility that European office-holders might choose to rely on the specific common law power of assistance outlined further below.

Of greater concern going forward is the position regarding requests by English office-holders seeking to exercise investigative powers abroad

Of greater concern going forward is the position regarding requests by English office-holders seeking to exercise investigative powers abroad, and the enforceability of the English court's orders under section 236 IA 1986 across the EU. Only a handful of EU member states have enacted the Model Law.[36] Reliance may have to be placed on the domestic law arrangements of each member state in which recognition and assistance are sought. In these circumstances, just as European office-holders may increasingly need to rely on the common law power of assistance as regards inward requests, English office-holders may find themselves having to rely on any equivalent principles in other European states, and possibly, (to the extent that such a jurisdiction exists as to which see below), the English court's jurisdiction to make extraterritorial orders under section 236 IA 1986.

Common Law Power of Assistance

If foreign insolvency office-holders are not

30/. This will be replaced by article 21 of 2015/848/EU with effect from 26 June 2017.
31/. This will be replaced by article 32 of 2015/848/EU with effect from 26 June 2017.
32/. With effect from 26 June 2017, enforcement is to be in accordance with articles 39 to 44 and 47 to 57 of Regulation (EU) No 1215/2012: see article 32 of 2015/848/EU.
33/. Handelsveen BV v Hill and others [2011] BPIR 1024.
34/. It is thought that this follows from the general limitation on the effect of secondary proceedings spelt out in article 3(2).
35/. or more precisely the recast Regulation 2015/848/EU.
36/. Romania, Poland, Great Britain, Slovenia and Greece.

entitled to rely on any of the above regimes to seek the English court's assistance in obtaining information, they may be able to rely on the English court's common law power to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up[37].

The nature and extent of this jurisdiction was explained in the Privy Council's decision in *Singularis Holdings Ltd v PricewaterhouseCoopers*[38] in which it was stressed that this newly discovered power of assistance was subject to a number of important limitations, two of which are particularly relevant for present purposes. First, the common law power does not enable the office-holders to do something which they could not do by the law under which they were appointed. Secondly, the order sought must be consistent with the substantive law and public policy of the assisting state.[39] The important practical consequence of this second limitation is that the power cannot be exercised in England as a mode of obtaining material for use in actual or anticipated litigation, because that is a matter governed by rules of forensic procedure which insolvency office holders must accept like all other litigants[40]. This means that the English common law power does not extend to the grant of relief in the types of circumstances under consideration in *England v. Smith*,[41] where the litigation in Australia was already anticipated.

By setting these limitations, the majority thereby rejected the proposition for which *Cambridge Gas*[42] had appeared to be authority that an assisting court has a common law power to assist the foreign court by doing whatever it could have done in a domestic insolvency.[43] It follows that decisions like *In re Phoenix Kapitaldienst GmbH*,[44] where the court held that a German office-holder could rely on section 423 IA 1986 by virtue of the court's common law power of assistance, in circumstances where none of the Insolvency Regulation, the Model Law nor section 426 IA 1986 applied, were wrongly decided, because they involved '*an impermissible application of legislation by analogy*'.[45]

Despite these limitations, the recognition of this specific common law power of assistance in the context of information collection demonstrates the common law's dynamism and ability to adapt to meet the challenges posed by cross-border insolvencies. This common law power may yet prove to be of importance to office-holders seeking to obtain the English court's assistance to carry out the task of information collection post-Brexit.

Extraterritorial Effect of section 236

What then are the options available to the English court seeking to assist an office-holder to obtain information beyond the territorial limits of its jurisdiction in circumstances where there are otherwise no sources of cross-border insolvency law on which the office-holders can rely, and the domestic law of the relevant country does not provide any assistance? One possibility is that the English court might recognise that some of its powers under section 236 IA 1986 have extraterritorial effect, leaving it to its own discretion to keep the use of such powers within reasonable bounds. A number of other provisions of the IA 1986 are settled as having extraterritorial effect, but the position as regards section 236 is far from clear.[46] As H.H. Judge Pelling QC, sitting as a judge of the High Court, said in a recent case involving an application under section 236 for the production of documents situated in Thailand,

37/. Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36 [2015] AC 1675.
38/. [2014] UKPC 36 [2015] AC 1675.
39/. [2014] UKPC 36 [2015] AC 1675 at [25].
40/. per Lord Sumption at [25].
41/. [2001] Ch 419.
42/. Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditor of Navigator Holdings Plc [2007] 1 AC 508.
43/. [2014] UKPC 36 at [18] per Lord Sumption.
44/. [2013] Ch 61.
45/. [2014] UKPC 36 at [95] to [98] per Lord Collins.
46/. By contrast, it is established that section 133 IA 1986, which enables the court to order the public examination of officers of the company and persons who have been concerned or taken part in its promotion, formation or management, does have extraterritorial effect: In re Seagull Manufaturing Co Ltd [1993] Ch 345, approved as correct by the Privy Council in Bilta (UK) Ltd v Nazir [2016] AC1 at [214].

"*the extra-territorial effect of that provision* [section 236] *is much less straightforward because there are two conflicting High Court decisions concerning that issue*".[47] Before turning to those two High Court decisions, it can be seen that the tension in the authorities on the question of the extraterritoriality of the English court's different inquisitorial powers in this context is hardly new.

In *In re Tucker (RC) (A Bankrupt)*,[48] the question was whether section 25(1) of the Bankruptcy Act 1914 gave the court power to summon before it the debtor's brother, a British subject resident in Belgium. The Court of Appeal set aside the order obtained by the trustee in bankruptcy for the examination of the Belgium based examinee. Dillon LJ noted that (i) there is a general practice in international law that the courts of a country only have power to summon before them persons who accept service or are present within the territory of that country when served with appropriate process; (ii) it was difficult to construe section 25(1) to empower the English court to '*haul*' before it persons who could not be served with the necessary summons within the jurisdiction of the English court; and (iii) conclusively, section 25(6) of the Bankruptcy Act 1914 provided that "*The court, may, if it thinks fit, order that any person who if in England would be liable to be brought before it under this section shall be examined in Scotland or Ireland, or in any place out of England*". The wording carried the connotation that if the person is not in England he is not liable to be brought before the English court under the section.[49]

The corporate insolvency equivalent of section 25(6) is now section 237(3) of IA 1986. There will be occasions on which this provides an appropriate remedy, but it will not be straightforward, not least because, before making any such order, the court will need to be satisfied that the case is covered by available procedural machinery in the foreign jurisdiction by which the respondent can be compelled to comply with the order[50].

In re Tucker does not appear to have been cited to the Court of Appeal in the later case of *Re Mid East Trading Ltd.*[51] In that case, the company was incorporated in the Lebanon and was the subject of winding up proceedings there. The company was then wound up in an ancillary liquidation in England. The English liquidators applied for disclosure of documents situated in New York by various London based companies in the Lehman Brothers group. Chadwick LJ accepted that in so far as the making of an order under section 236 IA 1986 in respect of documents which were abroad did involve an assertion of sovereignty, then it was an assertion which the legislature must be taken to have intended the court to make in an appropriate case. This flowed from the fact that the court was given the power to wind up an overseas company under the IA 1986, and the liquidator enjoyed all of the powers under section 236. In these circumstances, "*it must have been in contemplation that, in relation to an overseas company, an investigation into its affairs for the purposes of winding up would require information and documents which would be abroad; and that subject to questions of service, the court would be able to – and, in appropriate circumstances, would – exercise those powers*".[52] The court should carry out the ordinary balancing exercise under *British & Commonwealth*, though in this context, in exercising its discretion it would be mindful to give weight to any risk that compliance might expose a respondent to claims for breach of confidence or criminal penalties in the foreign jurisdiction.[53]

The Current Position

The first of the two recent conflicting High Court decisions is *Re MF Global UK Ltd (in special administration (No 7)*,[54] where English special administrators sought an order under section 236 IA 1986 for a company

47/. *Re Sahaviriya Steel Industries UK Ltd* [2015] EWHC 2877 (Ch) at [12].
48/. [1990] Ch 148.
49/. Ibid., 158.
50/. *In re Tucker* [1990] Ch 148, 159-162.
51/. [1998] 1 All E.R. 577.
52/. Ibid., pages 753H to 754A.
53/. Ibid., page 754C.
54/. [2015] EWHC 2319 (Ch) [2016] Ch 325.

Where do the conflicting authorities of Re MF Global and Re Mid East Trading leave the law in relation to s236 IA 1986?

incorporated in France with no presence in England to produce various categories of documents and an accompanying witness statement. The Insolvency Regulation did not apply because the company was an investment undertaking excluded under article 1(2). David Richards J considered there was a principle of construction that where a statutory provision is re-enacted in substantially the same terms, the re-enactment is intended to carry the same meaning as the predecessor. The wording of section 237(3) IA 1986 corresponds to section 25(6) of the Bankruptcy Act 1914, which the Court of Appeal in *In re Tucker* had found conclusive against the extraterritorial effect of section 236's statutory precursor in bankruptcy. Considering himself bound by the decision in *In Re Tucker*, the judge held that section 236 does not have extraterritorial effect and that therefore the court could not make an order under that section against the French company. David Richards J reached this conclusion with a degree of reluctance, saying at [32]: "*there would in my view be a good deal to be said for concluding that section 236 was intended to have extraterritorial effect, leaving it to the discretion of the court to keep its use within reasonable bounds.*

Several months later, H.H. Judge Hodge QC, sitting as a judge of the High Court, gave an *ex tempore* judgment in *Omni Trustees Limited; Official Receiver v Norriss*[55] on an application by the official receiver under section 236 IA 1986 for an order that the respondent, a Hong Kong resident, produce a witness statement with supporting documents. The judge was satisfied that the documents were reasonably required by the office-holder, subject to the issue of the extraterritoriality of section 236. He proceeded to distinguish section 25 of the Bankruptcy Act 1914 and section 236 IA 1986 on the basis that the latter, but not the former, confers a freestanding power to submit an account of dealings and to produce books, papers and records, independent of the power to summon a person for an examination. The judge drew support from *Re Mid East Trading*, for the proposition that section 236(3) should be taken to have extraterritorial effect. The judge recognised a distinction between requiring a respondent to attend court to be examined, and producing documents and giving an account of dealings. The latter power fell outside the scope of the decision in *In re Tucker*, which was confined to compelling someone to come to the jurisdiction. Declining to follow David Richards J's decision in *MF Global* '*with considerable reluctance and some hesitation*', the judge held that section 236(3) was capable of extraterritorial effect, subject to the usual balancing exercise set out in *British & Commonwealth*.[56] There is one oddity, however, which casts doubt on the conclusion reached by HHJ Hodge QC. He said that it was crucial to his decision that *Mid East Trading* was not cited to David Richards J in *MF Global*[57]. This is not correct; although *Mid East Trading* was not referred to in his judgment, it appears that the case was cited to him,[58] although the nature of the submission is not apparent from the face of the report.

Where do these authorities leave the law in relation to the extraterritoriality of section 236 IA 1986? It is unclear whether none of the powers under section 236 should be taken to have extraterritorial effect (*Re MF Global*), or whether the extraterritoriality of the section should be limited to the court's power to order the production of documents and the submission of an account of dealings under section 236(3) (*Re Mid East Trading; Official Receiver v Norriss*). The latter position would appear to be the preferable one and in keeping with the court's tendency to recognise the extraterritorial effect of provisions of the IA 1986 in circumstances where more and more insolvencies raise

55/. [2015] EWHC 2697.
56/. Ibid., at [21].
57/. Ibid.
58/. [2016] Ch 325, 327 and 329

UNDER SECTION 236(2) THE COURT MAY SUMMON PERSONS FOR EXAMINATION BEFORE IT

cross-border issues.[59] The distinction between section 236(3) and the power to summon persons for examination under section 236(2) may be supportable on the basis that the courts have historically considered the power to summon a person to be examined under oath as being more oppressive than an order to produce documents,[60] and, in this context, might amount to a more intrusive assertion of sovereignty by the English court. Confirmation that section 236(3) IA 1986 is capable of having extraterritorial effect would lead to a welcome addition to the range of the English court's powers to assist office-holders in the performance of their investigative role.

Conclusion

Despite the uncertainties surrounding the Insolvency Regulation following the UK's exit from the EU, it is suggested that the English court will continue to be in a position to provide office-holders with effective investigatory tools to discharge their functions. The court's powers to grant relief under section 426 IA 1986 or pursuant to article 21 of the Model Law, upon recognition of a foreign proceeding, will be unaffected by withdrawal from the EU. The dynamism of the common law in response to the increasingly international dimension of insolvency proceedings is demonstrated by the recognition of the newly discovered common law power to assist foreign office-holders to gather information. It is to be hoped that the power under section 236(3) IA 1986 will be definitively recognised as having extraterritorial effect, subject to the exercise of the court's discretion to keep that power within reasonable bounds, so as to ensure the continued ability of the court to assist office-holders with information collection in cross-border insolvencies.

59/. See for example Bilta (UK) Ltd v Nazir (No 2) [2016] AC 1, where the Supreme Court held that section 213 IA 1986 in respect of fraudulent trading has extraterritorial effect.
60/. Cloverbay Ltd v Bank of Credit and Commerce International S.A. [1991] Ch. 90, 103.

Learning from the mistakes of others

Glen Davis QC reflects on the lessons to be drawn from two recent wrongful trading claims in which liquidators came back empty-handed

The familiar provisions of section 214 of the Insolvency Act dealing with 'wrongful trading' are in some ways an example of what would nowadays be called 'nudge' legislation.

They impose no explicit duty on the director of an insolvent company to avoid causing loss to creditors, but rather encourage appropriate conduct by the threat that an order to contribute to the estate will be made if the director does not take every step the court considers he ought to have taken after the point of no return to minimise the potential loss to the company's creditors. As the Supreme Court has recently observed, these are part of the set of statutory provisions which operate 'to restore the insolvent estate for the benefit of creditors as a whole'[1]. Since 1 October 2015, and in respect of trading after that date, they don't only apply in liquidation; the court also has power to direct contribution in an appropriate case where a company has entered administration[2].

There is no doubt that these provisions do concentrate the minds of (at least, most) directors of companies in distress. As a result, advice about potential 'wrongful trading' liability and responsibilities inevitably comes high up the list of subjects whenever we are advising directors of companies which may be (or are about to become) insolvent.

In most cases, directors will be able to satisfy the test of taking every step which objectively ought to have been taken by seeking and following the advice of insolvency practitioners and/or expert insolvency lawyers, and so rely on the defence in section 214(3) (in administration, s246ZB(3))[3]. The cases which cause difficulty are likely to be those where the directors do not appreciate their position until too late, or where, despite taking advice, they are intent on carrying on regardless.

The broad principles guiding an exercise of the court's wide discretion under section 214 are reasonably clear from a line of cases since 1986 which have considered the scope of the section (and the corresponding jurisdiction in the context of directors' disqualification). As long ago as the *Produce Marketing Consortium* litigation in 1989, Knox J clarified that the objective component of liability under section 214 meant that a director could not rely on the general defence of acting honestly and reasonably under section 727 of the Companies Act 1985[4]. Following a subsequent hearing, he said that the court would assume that a director possessed a certain minimum level of knowledge, being the knowledge he would acquire if the company complied with its statutory obligations, and emphasised that the function of the court under section 214 is compensatory rather than penal[5]. This was the first case to come to judgment under section 214, which Knox J recognised had been introduced (originally as section 15 of the Companies Act 1985) to widen the court's powers beyond the fraudulent trading provisions which had existed since the Companies Act 1929[6]. Knox J considered that, prima facie, the appropriate amount for a director to

1/. Per Lord Sumption in Angove's Pty Ltd v Bailey [2016] 1 WLR 3179, at [25]
2/. See section 246ZB of the Insolvency Act, introduced by section 117(1),(2) of the Small Business, Enterprise and Employment Act 2015
3/. see eg Re Continental Assurance Co of London plc [2007] 2 BCLC 287, in which, among other factors, the directors had taken appropriate advice when considering whether to carry on trading
4/. Re Produce Marketing Consortium (in Liquidation) Ltd (No 1) [1989] 1 WLR 745
5/. Re Produce Marketing Consortium (in Liquidation) Ltd (No 2) (1989) 5 BCC 569. The Court of Appeal confirmed that the court has no power to include a punitive element when ordering an amount of contribution in Morphitis v Bernasconi [2003] Ch 552, a section 213 case
6/. nowadays, of course, in section 213 of the Insolvency Act 1986

PRODUCE MARKETING CONSORTIUM, THE FIRST UK INSOLVENCY LAW CASE UNDER THE WRONGFUL TRADING PROVISION OF S.214 INSOLVENCY ACT 1986, IMPORTED FRUITS FROM CYPRUS.

contribute would be:

'the amount by which the company's assets can be discerned to have been depleted by the director's conduct which caused the discretion under 214(1) to arise'[7]

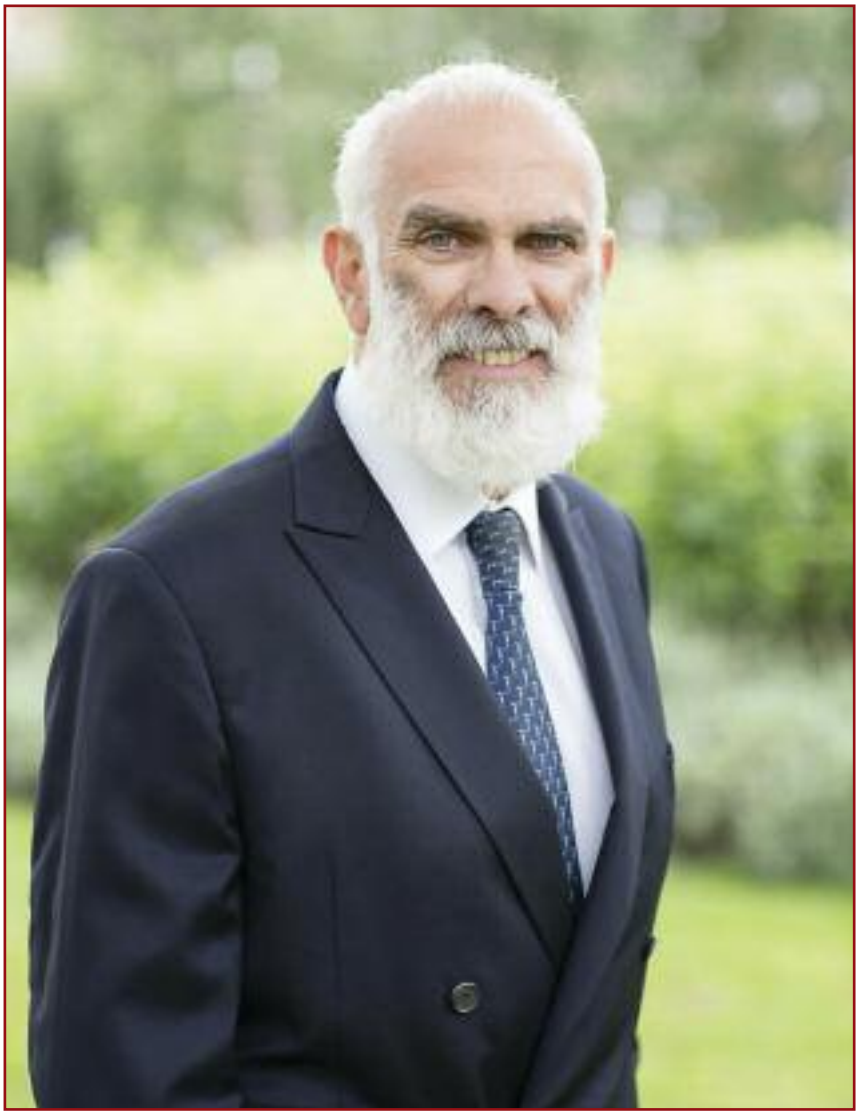
This in fact accepted submissions of Mary Arden as counsel for the applicant liquidator. As she put it in her submissions, the jurisdiction was an enhanced version of the right which any company would have to sue its directors for breach of duty, enhanced in the sense that, under section 214, the standard of knowledge, skill and experience is made objective[8]. This introduced an element of causation into the exercise which does not appear on the face of the section, but serves as a rational starting point for quantification. However, the court has a discretion to adjust the amount of contribution so as to avoid unjust results. These could include situations where full repayment would produce a windfall to third parties, or would involve money going round in a circle or passing through the hands of someone equally culpable[9], but in the final analysis the discretion is unfettered. As Knox J also observed:

'But Parliament has indeed chosen very wide words of discretion and it would be undesirable to seek to spell out limits on that discretion…'

Given the frequency with which questions about potential wrongful trading liability arise in the course of day-to-day practice, it is in some ways surprising that there have been relatively few cases over the 30-year history of section 214 which have proceeded as far as judgment. Many prospective cases either fail at an early stage of analysis, or settle once the contours of the claim have become clear, or are not pursued because the directors are insufficiently worth powder and shot.

Against that background, it is interesting to consider two recent cases – the only two cases of which I am aware in which the High Court gave judgments on wrongful trading claims in 2016 - to see what practical lessons can be drawn. They are both cases in which, as the judgments stand[10], the wrongful trading claims failed.

7/. see Re Produce Marketing Consortium (in Liquidation) Ltd (No 2) (1989) 5 BCC 569 at 597
8/. ibid
9/. cf Liquidator of West Mercia Safetywear Ltd v Dodd (1988) 4 BCC 30 per Dillon LJ at 33, a case under section 333 of the Companies Act 1948 to which the Judge's attention was drawn.
10/. I understand one may be appealed.



GLEN DAVIS QC

The first decision is Snowden J's judgment in *Grant v Ralls*[11], which was handed down in February 2016. This case involved a building company which had made trading losses since the year to 31 October 2009. By (and for some time before) 31 July 2010, it was insolvent on both a balance sheet and a cash flow basis. At a meeting on 2 August and in a letter of 6 August 2010, the directors received expert advice from an insolvency practitioner (who subsequently became one of the joint administrators, and then one of the joint liquidators). They carried on trading while pursuing a prospective share acquisition and injection of capital by an apparently-wealthy third party, which in the event did not materialise. The company entered administration on 13 October 2010, and subsequently went into liquidation. The statement of affairs in the administration showed a net deficiency of £884,000.

The joint liquidators contended that the directors ought to have realised that there was no reasonable prospect of avoiding insolvent liquidation by the end of July 2010, or at the latest the end of August 2010.

However, the directors had sought advice from an appropriate insolvency practitioner. His advice, early in August, did not suggest that it was unreasonable to continue to trade while the possible investment was pursued (and in the meantime, the company would have been able to complete various contracts). In Snowden J's view, that was fatal to the liquidators' case that the directors ought to have concluded as at 31 July that there was no reasonable prospect of avoiding insolvent liquidation[12]. However, Snowden J considered that, by the end of August, a realistic assessment should have led the directors to conclude that the investor could not be relied on, so that there was no reasonable prospect of avoiding insolvent liquidation from that time.

The onus was then on the liquidators to establish that continued trading by the company after 31 August 2010 and up to the time it entered administration on 13 October 2010 had caused a loss to the company. However, the liquidators had not limited their pleaded claim to loss caused to the company caused by the wrongful trading[13].

In their points of claim the liquidators' main item of claim was the alleged increase in the net deficiency of the company over the alleged period of wrongful trading. But they sought to quantify that, not by balance sheets drawn as at 31 August and 13 October, but rather by two schedules with computations of creditor movements and cash receipts, apparently on the basis that, if the company had entered administration on 31 August 2010, the money would have been received but

11/. *[2016] EWHC Ch 243 (Ch), [2016] BCC 293*
12/. *Grant v Ralls* at *[206]*
13/. *ibid* at *[253]*

214 Wrongful trading.

(1) Subject to subsection (3) below, if in the course of the winding up of a company it appears that subsection (2) of this section applies in relation to a person who is or has been a director of the company, the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.

(2) This subsection applies in relation to a person if -

(a) the company has gone into insolvent liquidation,

(b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and

(c) that person was a director of the company at that time;

but the court shall not make a declaration under this section in any case where the time mentioned in paragraph (b) above was before 28th April 1986.

(3) The court shall not make a declaration under this section with respect to any person if it is satisfied that after the condition specified in subsection (2)(b) was first satisfied in relation to him that person took every step with a view to minimising the potential loss to the company's creditors as (assuming him to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation) he ought to have taken.

(4) For the purposes of subsections (2) and (3), the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both -

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and

(b) the general knowledge, skill and experience that that director has.

(5) The reference in subsection (4) to the functions carried out in relation to a company by a director of the company includes any functions which he does not carry out but which have been entrusted to him.

(6) For the purposes of this section a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up.

(7) In this section "director" includes a shadow director.

(8) This section is without prejudice to section 213.

would not have been spent. On that basis, their claim was put at £1,045,039, which was subsequently reduced at trial to £895,212.

In the alternative, the liquidators claimed that the directors should contribute £600,522, being the aggregate of trade debts incurred by the company after 31 August 2010. They also sought to pursue an ancillary claim to recover all the administration and liquidation costs and expenses, a total sum of £287,071.

The directors advanced a defence under section 214(3), arguing that they had done everything that they ought to have done. Snowden J also said that it was plain that this provision is intended to be a 'high hurdle' for directors to surmount, and that it was therefore right to construe it strictly. A director who wishes to take advantage of the defence is required to demonstrate not only that continued trading was *intended* to reduce the net deficiency of the company, but also that it was '*designed appropriately so as to minimise the risk of loss to individual creditors*.'[14] He thought that the directors were not entitled to an outright defence under section 214(3) on the facts of this case, because the manner in which they chose to continue trading meant that the bank and some existing unsecured creditors were paid at the expense of others.

That required him to go on and consider whether the liquidators' case on quantum was made out.

Snowden J said, following the decisions of Vinelott J in *Re Purpoint Limited*[15] and Park J in *Continental Assurance*[16], that the correct approach to determining whether the directors should be required to contribute is (as the directors had contended):

'*...to ascertain whether the company suffered loss which was caused by the continuation of trading after 31 August 2010 until the company went into administration on 13 October 2010, and that as a starting point this should be approached by asking whether there was an increase or reduction in the net deficiency of the company as regards unsecured creditors between the two dates.*'[17]

14/. ibid at [245]
15/. Re Purpoint Limited [1991] BCC 121
16/. Re Continental Assurance Co of London plc [2007] 2 BCLC 287

The liquidators' primary claim in Grant v Ralls failed because they had not analysed their evidence with sufficient vigour...

Snowden J also considered that:

'*... there has to be some causal connection between the amount of any contribution and the continuation of trading. Losses that would have been incurred in any event as a consequence of a company going into a formal insolvency process should not be laid at the door of directors under s. 214.*'[18]

Approached on that basis, the liquidators' numbers had been prepared on the wrong basis and their claims were hopelessly optimistic. The figures before the court ranged between a *reduction* in the net deficiency of about £132,833 over the period to an increase in the net deficiency of £45,000. Snowden J was not convinced that the continued trading had caused any, or any material, increase; if anything, the evidence suggested that there had been a modest improvement[19]. He considered it entirely plausible that the continued activity did not cause loss to the company overall or worsen the position of creditors overall[20].

The real vice identified in *Grant v Ralls* seems to have been that continuing to trade facilitated repayment of the company's bank and some existing creditors while leaving new creditors unpaid. Whatever else might have been said about this conduct, Snowden J considered that it did not justify requiring the directors to make any contribution under section 214[21].

So, after an expensive trial which had lasted some 15 days, the liquidators' primary claim in *Grant v Ralls* failed. In retrospect, it failed because they had not analysed their evidence with sufficient rigour at the outset, and they had not put their financial case on the correct analytical basis.

There was a sequel, because the liquidators also claimed to be entitled to recover, under section 214, administration and liquidation costs and expenses. As originally framed, this was asserted in respect of all the costs of the insolvency. On any view that was too wide in the light of the view Snowden J had taken of the scope of section 214(1), and at the start of the trial the liquidators restricted their claim in this regard to the extent to which the costs and expenses of the administration had been unnecessarily increased by any wrongful trading. The liquidators sought assessment of this sum by the court, but had not provided any detailed evidence or disclosure at the time of the trial, and Snowden J held this aspect over until after his decision on the main issues.

In the event, there were two more days of argument, and Snowden J gave a further judgment, *Grant v Ralls (No 2)*[22].

By the time of the second hearing, the liquidators had adduced evidence that their additional costs and expenses of dealing with the wrongful trading claim were some £256,160. The bulk of these costs did not relate to the initial investigation but to the involvement of the liquidators and their firms in the conduct of the claim until, and during, the trial. Essentially, their argument was that there was power to order these costs to be paid by the directors under section 214 to avoid them increasing the net deficiency of the company to the detriment of the unsecured creditors[23].

There is a well-established principle that a litigant in conventional litigation cannot recover their expenses other than by way of a costs order[24]. Snowden J saw no reason why a section 214 claim should be treated any differently from a claim in tort or contract. As he put it:

'*A claim under section 214 is simply one of the statutory tools available to a liquidator or administrator to seek to restore the value of the insolvent estate for distribution to creditors, and wrongful trading claims are often made together with or as an alternative to, a claim brought in the name of the company itself for damages for breach of a director's duty of care or breach of his fiduciary duty in connection with transactions entered into prior to insolvency. Such claims all fall to be investigated and to be instituted by the office-holders in fulfilment of their statutory duties, and it would be illogical if different principles as to the recovery of costs and expenses applied to such claims,*

17/. Grant v Ralls at [241]
18/. ibid at [242]
19/. ibid at [268]
20/. ibid at [279]
21/. ibid at [279]
22/. In re Ralls Builders Ltd (in liquidation) (No 2) [2016] 1 WLR 5190
23/. Grant v Ralls (No 2) at [14]
24/. Cockburn v Edwards 18 Ch D 449 (tort); Al-Rawas v Pegasus Energy Ltd [2009] 1 All ER 346 (contract); Avrahami v Biran [2013] EWHC 1776 (Ch) in which the relevant authorities are considered by Newey J

especially if brought together as part of the same case.'

As an aside, the liquidators had sought to rely on David Richards J's decision in *4 Eng Ltd v Harper*[25]. That was a case in which investigatory costs in a fraud case were allowed, but in rather special circumstances. Snowden J readily distinguished it on the basis that, in *4 Eng*, the work for which damages were awarded had been completed three or four years before the claimant issued proceedings, so there was no question of it having been undertaken in the context of pending litigation, whereas in the instant case, the possibility of a claim under section 214 had been mooted at the outset of the liquidation and was the very reason that one of the liquidators had been brought in as joint liquidator.

Snowden J also accepted that the time costs of the liquidators would not have been recoverable as costs in the litigation (following the extensive analysis of this point by Warren J in *SISU Capital Fund*[26]). This was not one of those exceptional cases where a corporate party *may* be able to recover direct costs of specialist employees if they are the most suitable or convenient experts to employ, the so-called *Nossen* principle[27]. In the case before Snowden J, both sides had had their own independent expert who gave evidence at the trial.

In *Continental Assurance*, Park J said that it was not enough for a liquidator claimant merely to say that, if the company had not still been trading, a particular loss would not have been suffered[28], and Snowden J agreed that section 214 requires something more than just a 'but for' test of causation:

SNOWDEN J

'A director's conduct is not wrongful for the purposes of section 214 simply because there is a relevant date at which he actually concluded or ought to have concluded that insolvent liquidation was inevitable. Nor is it wrongful per se for a director not to put the company into administration or liquidation once that relevant date has been reached ...

Accordingly, I cannot see that merely establishing that there was a relevant date beyond which the directors did not immediately place the company into administration provides any basis for characterising their conduct as "wrongful" for the purpose of section 214, or that of itself it provides a basis for ordering them to pay for the fees and costs subsequently incurred by the joint liquidators in investigating or pursuing litigation to establish when the relevant date occurred in this case.'[29]

For good measure, Snowden J rejected the liquidators' very late application to amend their pleadings, give late disclosure and adduce further evidence to enable the issue of the quantum of the additional costs and expenses to be determined at another hearing.

And for completeness, there had also been an application for an order to be made under the Company Directors Disqualification Act 1986. As Snowden J had not made an order for contribution under section 214, the jurisdiction to make such an order did not arise. But Snowden J said that, if it had arisen, he would in any event have adjourned his decision to give the Secretary of State an opportunity to make any submissions as might be thought appropriate (with copies to the parties)[30].

The second recent case, which also failed, is *Brooks and anor (Liquidators*

25/. [2009] Ch 91
26/. SISU Capital Fund v Tucker [2006] BCC 463 at 577 et seq
27/. after In re Nossen's Letter Patent [1969] 1 WLR 638
28/. Re Continental Assurance Co of London plc at [378]-[380]
29/. Grant v Ralls (No 2) at [31]-[32]

IN BROOKS V ARMSTRONG THE COMPANY OPERATED A ROBIN HOOD-THEMED TOURIST ATTRACTION

of Robin Hood Centre plc) v Armstrong and anor[31], a decision of David Foxton QC sitting as a Deputy Judge of the Chancery Division.

The relevant Company, as its name suggests, had operated a 'Robin Hood themed' tourist attraction in Nottingham until it went into creditors voluntary liquidation in February 2009. The liquidators originally advanced a claim for compensation of some £596,704, and by the time they served their Points of Claim that had increased to £701,646, which was their best estimate of the entire deficiency in the liquidation. After a seven-day trial before Mr Registrar Jones in July 2015, the Registrar ordered the respondent directors to contribute £35,000 to the estate. By the start of the trial, the liquidators' costs were apparently of the order of £1 million. At a subsequent hearing, the Registrar decided that there should be no order as to costs. Both sides appealed aspects of those decisions, and it was those appeals which came before the Deputy Judge, who allowed the directors' appeal because, he said, the liquidators had not established that the wrongful trading had caused any increase in the Company's net deficiency.

From 1999, the Company had operated a form of VAT-avoidance scheme. Entry tickets were sold for a price which included the value of discount vouchers that could be redeemed at a future date for purchases inside the Robin Hood tourist attraction. VAT was applied to that part of the ticket price attributable to the entry tickets, with VAT only attributed to the voucher value should the voucher be used. However, there was a change in the relevant VAT regulations in 2003. The Company became aware of the change when HMRC visited in February 2006, and in a letter in September 2006, HMRC took the view that VAT should have been charged on the full ticket price for the previous 3 years. This left the Company with a £150,000 liability for historic VAT, and it was this debt which was ultimately the background to the Company's collapse.

Before the Registrar, the question of when the directors ought to have concluded that they had no reasonable prospect of avoiding insolvent liquidation (which he styled the 'Knowledge Condition') turned really on how long the Company was entitled to investigate its options, in circumstances in which "subject to the VAT liability the Company was commercially solvent and making a

30/. ibid at [42], cf In re Idessa (UK) Ltd [2012] 1 BCLC 80
31/. Brooks and anor (Liquidators of Robin Hood Centre plc) v Armstrong and anor [2016] EWHC 2893 (Ch)

consistent profit".

The Liquidators' pleaded case alleged that the Knowledge Condition was met on five dates: 31 January 2005, 31 January 2006, 9 October 2006, 31 January 2007 and 3 May 2007. The Registrar found that the condition was satisfied for 31 January 2007, and independently for 3 May 2007, but not for any earlier date.

The second issue raised in the proceedings was the directors' defence under section 214(3): ie whether the Court was satisfied in relation to the relevant Director that he took every step with a view to minimising the potential loss to the Company's creditors as he ought to have taken. The Registrar referred to this as "the Minimising Loss Defence". The Registrar had held that this succeeded up to 3 May 2007, but not thereafter.

On appeal, the liquidators sought to pull the Knowledge Condition date back to 9 October 2006, and contended that the Minimising Loss Defence also ought to have failed at an earlier date. The principal argument for the liquidators was that the directors could not reasonably have proceeded on the basis that the Company was making and would continue to make an operating profit after that date, without taking account of the effect of HMRC's position that the VAT scheme was ineffective as regards future trading as well as regards its historic effect.

The Deputy Judge regarded this as a point of substance, but the difficulty he found with it was that it had not been taken before the Registrar or put to the directors in cross-examination. The issue of whether any measures taken were or might have been sufficient to preserve the operating profit of £40,000 otherwise disclosed by the Registrar's analysis of the accounts had not been considered at the hearing. It was not possible under those circumstances (and would not have been fair to the Directors) to seek to resolve it on the appeal. By that time, it was too late.

Brooks v Armstrong is a particularly salutory example of what can go wrong

The substantive issue of interest on the appeal concerns the discussion of how any compensation payable under section 214 is to be calculated. The Deputy Judge noted that, as section 214 is a compensatory rather than punitive provision, it is necessary to consider what effect the wrongful trading had[32], and he referred both to Park J's comments in *Continental Assurance* and to Snowden J's comments in *Grant v Ralls*.

The Deputy Judge then went on to consider the cases which deal with what happens when the maximum amount cannot be determined.

In *Re Purpoint Limited*[33], Vinelott J was concerned with an application under section 212 of the Insolvency Act, in which it was impossible to ascertain the precise extent of the company's liabilities at the relevant times because of the misfeasant director's '*total failure to ensure that proper records were kept and that proper cash flow calculations and net worth calculations were made*'[34]. Against that background, he thought the only solution was to quantify the loss caused by the continuation of trading by aggregating the debts owed to creditors and the crown debts incurred after the relevant date.

In *Re Idessa (UK) Ltd*[35], an unreported decision of Leslie Anderson QC sitting as a Deputy, the Deputy Judge held that, once the liquidators had proved that a relevant payment had been made, the evidential burden was on the particular director to offer a satisfactory explanation. The directors had submitted that they could not offer that explanation because of the absence of relevant books and records. She considered that the directors were 'authors of their own misfortune' who were 'using the absence of books and records as a smokescreen'[36].

Thirdly, in *Re Kudos Business Solutions Ltd*[37], Sarah Asplin QC sitting as a Deputy heard a wrongful trading case brought under section 214 in which no accounts had been compiled for one of the financial years. She followed *Re Purpoint* and ordered the director to make a contribution quantified in terms of the aggregate of the company's debts after the relevant date[38]

Finally, David Foxton QC referred to *Grant v Ralls*, in which Snowden J had rejected a submission based on *Re Purpoint* and *Re Kudos*.

The liquidators in *Brooks v Armstrong* had also sought to rely on *Re Purpoint* and *Re Kudos*, and contended that the court should quantify the maximum loss as all unpaid debts incurred after the date on which the company should have stopped trading.

32/. Robin Hood Centre at [63]
33/. [1991] BCC 121
34/. Purpoint at p128
35/. [2011] EWHC 804 (Ch)
36/. Idessa at [34]
37/. [2012] 2 BCLC 65
38/. Kudos at [62]

The mere fact that a company is insolvent... does not mean the director will be liable for wrongful trading

The Deputy Judge considered this ground of appeal to be misconceived, and said it failed at a number of levels. The liquidators had not contended at the hearing that it was impossible to perform an 'increase in net deficiency' calculation. The Registrar himself had been able to perform, and had performed, such a calculation, by using accounts available as at 1 January 2007 and comparing these with the position at the date of liquidation. There was no finding by the Registrar that there had been a failure to keep records contemporaneously; such records had been kept, although there was a dispute about who was responsible for not collecting them which the Registrar had felt unable to resolve. Moreover, the liquidators had not searched computer hard drives until very late in the day, and had been refused permission to adduce material emanating from that search because it had only been produced at the very last minute, so that '*it is simply not possible to say what, if any, documents relevant to the enquiry before the Registrar were not in fact provided or available to the liquidators*'[39]. And finally, it would not have been right for the court on appeal to substitute its view of the honesty of a director for that of the Registrar before whom he had been cross-examined.

The Deputy Judge was also highly critical of the manner in which the liquidators' case on causation and quantum had been advanced. They seem to have assumed that compensation issues would be hived off for an enquiry into damages at a later stage, although this had never been sought or ordered[40]. The liquidators' case on quantum was not set out for the directors to see clearly the case against them, despite repeated complaints in correspondence on their behalf. It was only under cover of a 'without prejudice save as to costs' letter in June 2015, just under three weeks before their skeleton was served, that the liquidators served what were described as draft schedules including 'five calculations of loss that will serve as useful tools to the parties and the Court at trial'[41]. In their skeleton, the liquidators took the stance that 'actual figures will only be arrived at once the relevant dates are fixed'[42].

This simply wasn't good enough. As the Deputy Judge recorded[43]:

'*...the approach taken by the Liquidators to setting out and particularising their case as to the amount of compensation which the Directors should be ordered to pay was fundamentally deficient throughout. The importance of one party setting out the parameters of the case it is advancing so that the other party may prepare for the case it has to meet, both in its evidence and its argument, is obvious...*'.

The Registrar himself dismissed the Liquidators' calculations as 'wrong and wholly unrealistic'[44]. Faced with these deficiencies in the Liquidators' case, the Registrar did not rely on their schedules, but arrived at his own conclusions based on the materials before him. The Deputy Judge had some sympathy with the Registrar's quandrary:

'*The Liquidators had neither properly set out a case on these issues, nor grappled with many of the issues which the claim raised and which the Registrar himself identified*'[45].

However, the problem was that the Registrar reached his conclusions following an analysis which had not been advanced by either party, and which had not been the subject of submissions at the hearing. This was procedurally unfair, and the Deputy Judge was driven to the conclusion that, unless the analysis adopted by the Registrar was one to which the directors could have raised no legitimate objection had it been raised at the hearing (which was not the case), the directors were entitled to succeed on that limb of their appeal.

The Deputy Judge also considered that the Registrar's analysis did not properly identify what, on the findings he had made, was the 'increase in net deficiency', and if the Registrar was concluding that section 214 gave relief in respect of individual creditors whose position had been worsened by wrongful trading even though the net deficiency had not increased, that was wrong in law[46]. As he put it:

'*the Registrar should not have ordered any payment by the Directors to the Liquidators under s. 214 (a) because the Liquidators failed to*

39/. Brooks v Armstrong at [85]
40/. see Brooks v Armstrong at [96]
41/. see Brooks v Armstrong at [105]
42/. ibid at [106]
43/. ibid at [114]
44/. ibid at [108]
45/. ibid at [116]
46/. ibid at [120]

advance and establish a properly formulated case that there had been any increase in net deficiency during the period of wrongful trading, and (b) on the approach and facts found by the Registrar, there was no such increase.'[47]

So the Registrar's order that the directors were jointly and severally liable to pay compensation of £35,000 was set aside.

It is always easy to be wise after the event, and we do not know the reasons for tactical decisions that were taken in preparation for, and at, the trial, but it is difficult to escape the conclusion that *Brooks v Armstrong* is a particularly salutary example of what can go wrong when those advising liquidators do not analyse with sufficient rigour what they will need to prove at trial, and in particular do not identify the points which need to be put in cross-examination.

So what general lessons can we draw from these cases?

First, as Snowden J observed[48] referring to *Eurosail*[49], the mere fact that a company is insolvent (on a balance sheet or cash-flow basis) and carries on trading does not mean that a director – even one with knowledge of that fact – will be liable for wrongful trading if the company fails to survive:

'Many companies show a balance-sheet deficit from time to time, but nevertheless have every real prospect of trading out of that position or otherwise recovering from the deficiency and thereby avoiding an insolvent liquidation…'

Second, the relevant question is not whether the directors knew or ought to have known that the company was insolvent. The question is whether they knew or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation[50]. That question is to be answered objectively[51].

CLEAR ANALYSIS WILL BE REQUIRED AT AN EARLY STAGE

Third, the court does not approach that question with the benefit of 20:20 hindsight. It accepts that directors are not clairvoyant: the fact that they fail to see what eventually comes to pass does not mean that they are guilty of wrongful trading[52].

Fourth, the court will place weight ('some weight') on the evidence of whether directors took professional advice and if so, what that advice was[53]. If an IP has not advised in terms against continuing to trade, it is unlikely that the court would conclude that it was unreasonable for the directors acting on advice to do so.

Fifth, the starting point for any calculation of the amount of contribution will be the amount of loss caused to the company by the continued trading after the relevant date.

Sixth, directors who wish to rely on the section 214(3) defence will need to show, not only that continued trading was intended to reduce the net deficiency of the company, but also that it was designed appropriately so as to minimize the risk of loss to individual creditors.

And on a practical level, the pleadings for a wrongful trading claim must set out clearly the case which the directors will have to meet. As so often in litigation, there is just no substitute for cold-eyed and clear analysis at an early stage.

47/. ibid at [121]
48/. Grant v Ralls at [168]
49/. BNY Corporate Trustee Services Ltd v Eurosail-UK2007-3BL plc [2013] UKSC 28, [2013] 1 WLR 1408
50/. Grant v Ralls at [169]; cf Re C S Holidays Ltd; Sec of State for Trade and Industry v Gash [1997] 1 WLR 407 per Chadwick J at 414 and Re Hawkes Hill Publishing Co Ltd (in liq.) [2007] BCC 937 per Lewison J at [28]
51/. Grant v Ralls at [171]
52/. ibid at [171] to [173], citing Lewison J in Hawkes Hill at [41]
53/. ibid at [176] and [206], cf Re Continental Assurance Co of London plc per Park J at [107] and [269]

Case Digests

For those of our readers who have already planted their spring bulbs and are enjoying the rains which have come to water their treasures, we have in this Digest of Caselaw some alternative enjoyments to the garden, while waiting for the Spring – as they say "A book is like a garden carried in the pocket" – and we have, as always, a varied set of cases helpfully compiled by members of Chambers: Toby Brow, Alex Riddiford, Charlotte Cooke, Madeleine Jones, Henry Phillips, Edoardo Lupi, Ryan Perkins, Riz Mokal, Matt Abraham, Andrew Shaw and Robert Amey.

The cases this time around show the breadth of work of members of Chambers, along with other cases of interest, with a particular emphasis on the continuing difficulties faced construing contractual clauses and determining the meaning of contractual phrases in their proper context: see Black Diamond Offshore Ltd v Fomento De Construcciones, Credit Suisse Asset Management LLC v Titan Europe, Commerzbank Aktiengesellschaft v Liquimar Tanks Management, Transgrain Shipping v Yangtze Navigation, and Teal Assurance Co Ltd v W R Berkley Insurance.

The insolvency work in Chambers continues in good health, with case reviews of Macrae v KPMG LLP, which concerned an order for disclosure pursuant to s 236 of IA 1986, read with Art 21 (1)(d) of the CBIR, Kean v Lucas, which concerned the test to be applied as regards a creditor's standing to convene a meeting of creditors under s 171 (2) of IA 1986, and Thomas v Frogmore Real Estate which concerned the power of the court to terminate an administration under Sched B1, para 81 of IA 1986.

Of particular interest to insolvency practitioners, if the estate in issue is or includes a trust fund, will be the decision of Morgan J in Gillan v Hec Enterprises Ltd (in administration) [2016] EWHC 3179 concerning the developing jurisdiction in relation to Berkeley Applegate orders. It will be remembered that in Re Berkeley Applegate (Investment Consultants) Ltd (No 2) (1988) 4 BCC 279, Edward Nugee QC declared that the liquidator was entitled to be paid his proper expenses and remuneration out of the trust assets if the assets of the company were insufficient (p.292), but it is often forgotten that this declaration meant that the first port of call for the payment of the expenses and remuneration was therefore the insolvency estate, and it was only if the insolvency estate was exhausted that the trust assets could be charged. Gillan v Hec Enterprises serves as a further warning, since Morgan J held that the administrators in question did not in fact confer any real benefit on the relevant beneficiaries and the judge refused to indemnify the administrators from trust funds for certain work streams claimed. The judge made the general observation that the administrators ought not, in any event, to be able to recover out of the trust assets remuneration and charges for work they did for the benefit of unsecured creditors, whose interests were adverse to the interests of the beneficiaries of the trusts. The judge also determined that as regarded costs of the administrators which were properly to be characterised as costs of ordinary litigation, those should be dealt with under the court's ordinary powers to determine litigation costs, rather than pursuant to the Berkeley Applegate jurisdiction. Therefore before administering or carrying out other work in respect of a trust estate, insolvency practitioners need to consider with care the proper and appropriate way forward as regards the ultimately likely payment of expenses and remuneration, if the insolvency estate has a shortfall.


ADAM GOODISON

In the meantime, and perhaps for our next South Square Digest, we await the Supreme Court's decision in the Lehman waterfall litigation, where the Supreme Court will determine the following issues: (1) the proper ranking of certain subordinated debt in the insolvency 'waterfall'; (2) whether the creditors of a company in administration whose provable claims are denominated in a foreign currency are entitled to payment (as non-provable liabilities of the company) of the balance of such claims which remains outstanding following the process of proof as a result of a decline in value of sterling against the currency of the claim between the commencement of the administration of that company and the dates of dividend distributions and, if so, the proper ranking of such claims; (3) whether statutory interest accruing but unpaid during a company's administration is payable in that company's subsequent liquidation; (4) the scope of liability of members in an unlimited company under s.74 of the IA 1986; (5) whether an unlimited company in administration can submit a proof of debt in a distributing administration or liquidation of one of its members, with respect to a contribution claim pursuant to s.74 of the IA 1986; (6) and whether the 'contributory rule' (whereby a contributory of a company in liquidation could not recover anything in respect of any claims he might have as a creditor until he had fully discharged his obligations as a contributory) extends to administrations.

Adam Goodison

BANKING AND FINANCE

Digested by TOBY BROWN & ALEXANDER RIDDIFORD


FELICITY TOUBE QC


TOBY BROWN

Black Diamond Offshore Ltd v Fomento De Construcciones Y Contratas SA [2016] EWCA Civ 1141 (Court of Appeal, 22 November 2016)

Bonds – construction – insolvency event of default

This was an appeal by the borrower under a loan note against a decision that there had been an event of default, as defined in the note.
The borrower, having entered into the note, entered into a finance agreement. It subsequently proposed a restructuring which adversely affected certain creditors under the finance agreement, whereas it did not affect the note. The claimant (the respondents on the appeal) contended that there had been an event of default for the purposes of clause 10 of the note, which provided (insofar as material) that there would be an event of default if the borrower "*is insolvent or ... proposes or makes any agreement for the deferral, rescheduling or other readjustment of all its debts, proposes or makes ... an arrangement or composition with or for the benefit of the relevant creditors in respect of any such debts ...*" Barling J had held that there had been an event of default in that there had been an arrangement or proposed arrangement with or for the benefit of the relevant creditors, namely those creditors under the finance agreement affected by the restructuring.
On appeal, the borrower argued that Barling J had erred in identifying the "*relevant creditors*" as those in respect of whom the arrangement had been made and that only an arrangement made in respect of all the borrower's debts could amount to an event of default (i.e. on the basis that "*any such debts*" in clause 10(f) meant "*all its debts*"). The Court of Appeal unanimously dismissed the appeal. The draftsman could have used the words "*all of its debts*" (as had been used elsewhere in the relevant clause) if it was intended that only an arrangement made with all the borrower's creditors would amount to an event of default. Further, if the borrower's construction were correct, odd commercial consequences would follow, such as an arrangement of a single very large debt not counting as an event of default. In effect, the parties had agreed that a wide range of possible arrangements could justify sufficient apprehension as to the borrower's financial health and possible non-payment of the notes as to entitle a noteholder to rely on them as an event of default.

[Felicity Toube QC]


JEREMY GOLDRING QC


STEPHEN ROBINS

Credit Suisse Asset Management LLC v Titan Europe 2006-1 Plc [2016] EWCA Civ 1293 (Court of Appeal, 20 December 2016)

Interest rates – interpretation – securitisation

This was an appeal against a decision of the Chancellor ([2016] EWHC 969 (Ch)) concerning the extent of the interest entitlement of holders of Class X notes issued by the respondent (Titan) as part of a commercial mortgage-backed securitisation (CMBS). The appellant (Credit Suisse) was the investment manager of the fund which held the Class X notes.
Titan was a special purpose vehicle incorporated to acquire a portfolio of commercial loans secured against real estate. Titan issued 10 classes of notes, including the Class X notes (which had priority of payment, both as to interest and as to capital, over the other others), and obtained investments from subscribers. The aggregate nominal amount of all of the notes exceeded €723M. The Class X Noteholder's right to interest was distinct from that of other Noteholders. The Class A-H notes had fixed rate interest coupons which, together, came to less than the interest received by Titan so that, to this extent, Titan made a "profit" on interest receipts/ payment obligations. By contrast, the Class X notes were a mechanism designed to enable the originator of the securitisation to share in that profit by entitling Class X noteholders to the payment by Titan of the difference between: (a) the rate of interest payable by the borrowers to Titan; and (b) the interest payable of the Class A-H notes. There had been extensive defaults on the underlying loans and Titan had insufficient funds to pay all of the interest due on the notes. The Class X Interest Rate was defined with reference to various other defined terms but its correct interpretation, insofar as the present dispute was concerned,

turned on the meaning of the words "the related per annum interest rate due on such loan" in the definition of "Net Mortgage Rate". The Chancellor accepted that default interest amounted to "interest" and that the words "interest rate" included the default interest rate. However, he decided that the phrase "per annum interest rate" (for the purposes of the definition of Class X Interest Rate) did not include default interest, and was limited to interest that was ordinarily payable by borrowers. As a result of the Chancellor's decision on construction the Class X noteholders' interest entitlement was reduced and more interest would be available for other noteholders.

The Court of Appeal held (Briggs LJ dissenting), dismissing the appeal, that default interest payable on the underlying loans was not to be taken into account in calculating the Class X interest Rate. Insofar as the question of the correct approach to contractual construction is concerned, the majority (Arden LJ giving the leading judgment, Underhill LJ agreeing but adding some comments of his own) observed that it was necessary to find the contextual meaning of the parties' words; that the Court should not attempt to rewrite a contract simply to avoid a party being bound by an unwise bargain; that, as part of the process of interpretation, it was appropriate to perform a cross-check of the natural meaning of any provision against its commercial common sense, although commercial common sense should not lightly be given precedence over the natural meaning of the parties' language (*Arnold v Britton* [2015] UKSC 36 followed). Indeed, Briggs LJ's approach to the principles of contractual interpretation was broadly the same as that adopted by the majority. See Underhill LJ's comment at [57]: "*It is simply that the crucial words, read in their context, strike us differently*." The majority held, in effect, that the Chancellor's interpretation of those words was correct on the natural meaning of the language used and that that result was compatible with the commercial logic of the transaction. The majority considered that the appellant's interpretation failed primarily because the documentation treated "per annum interest" as being ordinary interest (i.e. not including default interest), or as associated with ordinary interest. It was clear that the appellant's interpretation would ensure a larger entitlement for the Class X noteholder. However, it was difficult to conceive what the commercial rationale would be for rewarding a party to a contract by reference to the default of a third person. Moreover, it was difficult to see why the Class X noteholders should have the benefit of default interest payable under the terms of the underlying loans free of any of the expense related to default. Moreover, the majority did not consider that the ordinary interest only interpretation was incompatible with commercial logic.

Briggs LJ's dissent was, as mentioned above, predicated only on a different application of the principles of contractual interpretation from that adopted by the majority (and not on a different understanding of what those principles are). In particular, Briggs LJ's interpretation of the crucial words "*the related per annum interest rate due on such loan*" relied upon an observation of Snowden J in *Hayfin Opal Luxco 3 SARL and another v Windermere VII CMBS plc and others* [2016] EWHC 782 (Ch) (a case considering the extent of Class X noteholders' rights in a similar CMBS), to the effect that the general purpose of the formula for calculating the Class X Note interest rate is to identify, strip out and pay that excess to the Class X noteholders. Briggs LJ considered that the language of the relevant phrase, when considered in light of the Class X notes' commercial purpose, pointed quite firmly toward the interpretation which includes default interest or, as he preferred to put it, "*to a conclusion that the whole of the interest rate contractually due on the relevant Payment Date is included, even if attributable in whole or in part to the existence of a default*".

[Jeremy Goldring QC; Stephen Robins]

National Infrastructure Development Company Ltd v Banco Santander SA0121
2016 EWHC 2990 (Comm) (Mr. Justice Knowles CBE, 9 November 2016)

Standby letters of credit – fraud exception

The Defendant issued standby letters of credit in favour of the Claimant for a total sum of $38m. The letters were subject to International Standby Practice ISP 98, with additional matters governed by English law. The context for their issue was a major highway construction contract between the Claimant and OAS governed by the law of Trinidad and Tobago. The Claimant claimed the contract had been abandoned, leading to an ongoing arbitration with OAS. The letters of credit stated that: "*The presentation of a Demand shall be conclusive evidence that the amount claimed is due and owing to you by the Contractor*." The Claimant accordingly made a demand for $35m from the Defendant. A court in Brazil issued an injunction requiring that the letters of credit not be honoured for the time being. The Claimant issued proceedings in the High Court and

sought summary judgment. The Defendant resisted, arguing that false notification had been given by the demands in that they were made recklessly in the sense of indifference as to what was due and owing. Under the "fraud exception", the case law required that it be seriously arguable that the only realistic inference is that the beneficiary could not honestly have believed in the validity of its demands under the letter of credit. First, the Defendant argued that in truth no sums were due and owing. Knowles J held that it was not a question of whether the sum was due and owing under the law of either England or Trinidad. Rather what really mattered was the belief of the Claimant. It was not seriously arguable that the Claimant did not honestly believe both in the validity of the demands and that the sums were due and owing. Second, it was argued that the Claimant knowingly or recklessly over-claimed under the letters. This was based on the Defendant's analysis that under the underlying construction contract the Claimant only had an entitlement of £31m. Knowles J was not prepared to conclude it was seriously arguable that the Claimant did not honestly believe in the validity of the demands for $35m rather than $31m. As to the Defendant's contention that a trial with cross-examination was warranted to allow states of mind to be explored, the Judge held there was no foundation for this, and any such foundation would need to be particularly strong. Third, the Defendant argued that the law should develop a different approach for standby letters of credit and in effect admit an exception for unconscionable conduct in addition to fraud. This was rejected, on the basis it was important that the Court apply the law as it is. The Defendant's request for a stay of execution was also refused, because its effect would be to "*undo the straightforwardness for which the parties…bargained*". Standby letters of credit, whether described as "*the life blood of commerce*" or otherwise, had to work in accordance with their terms, including working on time. Judgment was therefore entered for the Claimant.

Irish Bank Resolution Corp Ltd v Camden Market Holdings Corp [2017]

EWCA Civ 7 (Longmore LJ, Beatson LJ, Sales LJ,19 January 2017)

ANTONY ZACAROLI QC

Facilities Agreement – implied term – sub-participation

Pursuant to a Facilities Agreement dated 2005 and restated in 2008, the Defendant IBRC provided a loan of £195m to the Claimants, members of the Camden Market Group ("CMG"), to purchase and develop properties at Camden Market. A Supplemental Deed was executed in 2012 to extend the maturity date, which incorporated the terms of the Facilities Agreement. In 2013 IBRC was placed into special statutory liquidation in Ireland, and the Liquidators were instructed to sell off IBRC's loan book. The Liquidators began marketing the CMG loan, which was to be sold through sub-participation. Some of IBRC's loan book comprised "distressed" debts, but the loan to CMG was not. CMG were at the same time marketing the properties and considered that marketing the loan in a package of distressed debt gave rise to market uncertainty. It claimed potential purchasers had indicated they would acquire the loan rather than purchase the property (i.e. adopting a "vulture fund" approach to obtain the properties for less than their market value). Against that background, CMG commenced proceedings alleging that there was an implied term in the Facilities Agreement that IBRC should not do anything to hinder CMG's marketing of the properties they were developing to achieve the best price "*by marketing the sale of the loans under the …Facilities Agreement in competition*" with CMG.
IBRC applied for summary judgment, alternatively to strike out the claim, but this was dismissed by HHJ Raeside QC who held it was arguable that the term should be implied. They key point on appeal was whether the implied term was inconsistent with the express terms of the Facilities Agreement, in particular Clause 26 which permitted IBRC to sell the loans with the consent of CMG; to offer sub-participations in the loan without consent; and to provide information in relation to the loans to perspective purchasers or sub-participants. Beatson LJ, giving the judgment of the Court of Appeal, highlighted that there were two types of inconsistency in relation to implied terms: linguistic inconsistency and substantive inconsistency. It was well established that where the contract is lengthy and carefully drafted, the courts will be very reluctant to imply a further term even if it does not actually conflict with the express terms. Beatson LJ accepted that the implied term was not linguistically inconsistent with Clause 26, because there could be situations where marketing of loans by IBRC was not in competition with the marketing of the properties by CMG.
However, the implied term was in substance inconsistent with IBRC's rights under Clause 26. IBRC had an express and unrestricted power to market the sale of loans by disclosing information to potential counter-parties. There was no requirement on

IBRC to inform let alone obtain the consent of CMG before doing so. It would be difficult to construe this express provision against the implied term in a coherent way, and the implied term would be a significant restriction on IBRC's power to deal with its assets. The Judge at first instance failed to apply the principle from *Reda v Flag Ltd* [2002] UKPC 38 that "*an express and unrestricted power cannot in the ordinary way be circumscribed by an implied qualification*". IBRC's express power to disclose information could not as a matter of law be circumscribed by an implied qualification. The Court of Appeal therefore allowed the appeal, and summary judgment was entered for IBRC.

[Antony Zacaroli QC, Stephen Robins]

CIVIL PROCEDURE

Digested by ALEXANDER RIDDIFORD

Clearway Drainage Systems Ltd v Miles Smith Ltd [2016] EWCA Civ 1258 (Court of Appeal, 8 November 2016)

ALEXANDER RIDDIFORD

Judgments and orders – relief from sanctions – witness statements

This was an appeal against a decision of HHJ Moulder dismissing the application for the claimant ("Clearway") for relief from sanctions in respect of its failure to serve witness statements on 8 April 2016 and its failure to serve a witness summary. The appeal was made on the basis that the Judge had failed to apply properly the principles in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926.

Clearway had brought a claim against its former insurance broker for breach of contract and breach of duty of care. The parties had been ordered to exchange witness statements on 8 April 2016. Clearway stated on 8 April 2016 that the statements should not be served until issues surrounding disclosure were resolved. The broker responded by letter notifying the company that it was in breach of the order, and at a pre-trial review on 26 May, applied to strike out the claim. The hearing was adjourned to 14 June. On 9 June, Clearway applied for relief from sanctions. It served the witness statements on 13 June. At the 14 June hearing it emerged that the statements were in a password-protected format. This meant that the broker could not read them. It also became apparent that Clearway intended to rely on a witness summary of a fourth witness but had not served a copy of the summary in accordance with CPR 32.9. The matter was adjourned. On 16 June the company unsuccessfully applied for relief from sanctions. The Judge ruled that there was no good reason for the witness statements and summary being submitted more than two months late (and just one month before trial) or for the statements having been provided in an inaccessible form. Further, the application for relief had not been made promptly. In any event, an application for an extension of time could have been made if the company was not ready to exchange statements in light of the disclosure issue it identified.

On appeal Clearway contended that the Judge had placed undue weight on CPR 3.9(1)(a) and (b); did not follow the statement of principle in *Denton*; did not give due weight to the fact that the broker was employing opportunistic litigation tactics; wrongly concluded that the breach was serious and significant; and had exercised her discretion in the wrong way.

Sir Terence Etherton (giving the Court of Appeal's judgment) held that the Judge's judgment had been impeccable. The Judge had correctly applied the three-stage test in *Denton* to the instant case. She had not ignored the litigation tactics employed altogether. She referred to the company's allegation of the broker's litigation tactics and the broker's letter notifying the company of its breach of the order. She also noted that if the company had made an application to extend time for service of witness statements, it would have been granted. Further, where a trial date could still be kept, in spite of non-compliance, CPR 3.9(1)(a) and (b) were still important and could be conclusive. This was the approach that the Judge had adopted. Late service of the witness statements did not affect the trial date but it did affect the progress of litigation and, even if no prejudice had been identified, it was still a serious and significant breach. Further, the Judge had made a case management decision and the Court of Appeal should not interfere unless there was an error of law or principle. In this regard, the Judge had been right to refer to the lack of promptness of the company's application for relief.

Blue Tropic Ltd v Chkhartishvili [2016] EWCA Civ 1259 (Court of Appeal, 9 December 2016)

Amendments – causes of action – particulars of claim

This was an appeal against a decision of Peter Smith J, granting permission for a late amendment to a claim, pursuant to an application made shortly before the start of the trial. The claim succeeded on the amended basis but, in light of the Judge's findings of fact and foreign law, the claim would have failed without the amendment. The amendment was made after the expiry of the applicable foreign (Georgian) law limitation period. Accordingly, it was common ground that the combined effect of section 35 of the Limitation Act 1980 (the "1980 Act") and CPR 17.4(1) and (2) was that the Court had no jurisdiction to allow the amendment if it added a new claim which introduced a new cause of action, unless the new cause of action arose out of the same (or substantially the same) facts as were already in issue on any claim previously made in the action. The Judge decided that the new cause of action arose out of the same (or substantially the same) facts as were already in issue and, given that this test was satisfied, he decided to exercise his discretion to permit the amendment, in particular on the basis that it did not prejudice the Defendant.

The Court of Appeal allowed the appeal. The new claim introduced a new cause of action. A "cause of action" comprised every fact that was material to be proved in order to succeed (*Cooke v Gill* (1872-73) LR 8 CP 107 applied). In determining whether an amendment introduced a new cause of action for the purposes of section 35 of the 1980 Act, the court had to examine the pre and post-amendment pleading of the essential facts that had to be proved (*Savings & Investment Bank Ltd (In Liquidation) v Fincken (Statement of Claim)* [2001] EWCA Civ 1639 followed). Applying this test, the new (Georgian) claim pleaded amounted to a new cause of action. Further, the new cause of action did not arise from the same (or substantially the same) facts as those in issue in the claim as originally pleaded. In particular, the amended claim required a finding of dishonesty, which was not required for the purposes of the claim as originally pleaded. For these reasons, the Judge had no jurisdiction to grant permission to amend.

Boreh v Djibouti [2017] EWCA Civ 56 (Court of Appeal, 9 February 2017)

Permission to appeal – non-parties – findings of dishonesty

This was an application for permission to appeal by Mr Gray, a non-party to proceedings, against certain findings of fact made by Flaux J in the course of a successful application made by the Defendant (Boreh) in a Commercial Court action: (a) to set aside a freezing order which had been made against him; and (b) for an order for wasted costs against Gibson Dunn & Crutcher LLP. Boreh's application had been made on the ground (amongst others) that the claimants in the action, the Republic of Djibouti and others, had dishonestly misled the Court through their solicitor, Mr Gray, a partner in the Dubai office of Gibson Dunn at the material time, in connection with the application for the freezing order. Mr Gray was not himself personally a party to the application made by Mr Boreh to set aside the freezing order, and no relief was sought against him. He served factual evidence - initially on behalf of the claimants, and later on behalf of Gibson Dunn - concerning the circumstances in which the court had been misled. Mr Gray was permitted to make representations through his own leading counsel at the hearing of Mr Boreh's set aside application. However, he was only formally joined to the proceedings following the hand down of Flaux J's judgment on the application.

The Judge found that Mr Gray, who was cross-examined at the hearing, had deliberately and dishonestly misled the Court. Mr Gray contended on appeal that the procedure adopted by the Judge had been unfair, in particular because: (a) he had not known the case he had to meet; (b) he had had no opportunity to address the Judge's findings of fact as they had not been pleaded, and there were no witnesses or disclosure; and (c) the Judge had made a finding of dishonesty without being asked to do so and Mr Gray's counsel had not made submissions on it because he had believed that it was not being pursued.

The issue turned on whether the court had jurisdiction to hear an appeal by a non-party to proceedings in respect of a finding of dishonesty where he was not seeking to have the judgment set aside. The Court of Appeal refused Mr Gray's application. The Court of Appeal had jurisdiction to grant permission to appeal on the ground that Mr Gray

had been denied fair process which engaged his article 8 rights. However, insofar as the Court of Appeal's discretion was concerned, the Court of Appeal considered that, even if Mr Gray obtained permission, he had no real prospect of establishing that the Judge had been "fundamentally" unfair. Gloster LJ also observed, obiter (paragraph [50]), that permitting a non-party witness in a commercial case to exercise an independent right of appeal, challenging adverse factual findings by a first instance judge merely because they affected his reputation, could lead to undesirable satellite litigation that would waste court resources and bring the administration of justice into disrepute.

COMMERCIAL LITIGATION

Digested by CHARLOTTE COOKE AND MADELEINE JONES


CHARLOTTE COOKE

Commerzbank Aktiengesellschaft v Liquimar Tanks Management Inc [2017] EWHC 161 (Comm) (Cranston J, 3 February 2017)

Shipping – conflict of laws – jurisdiction agreements

Loan agreements between the parties contained asymmetric jurisdiction clauses under which the Claimant was entitled to bring proceedings against the Defendants in any jurisdiction, but the Defendants were only allowed to bring proceedings in England. Notwithstanding the clauses, the Defendants brought proceedings against the Claimant in Greece. The Claimant then commenced proceedings in England. The Defendants applied to stay the English proceedings pending determination of the proceedings in Greece on the basis of Article 29(1) (Brussels I Recast), which states that "*without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established*".

The Defendants' application was dismissed. Article 29(1) states that it is "*without prejudice*" to Article 31(2), which provides that "*...where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.*" This, it was held, could only mean that Article 29(1) gives way to Article 31(2) where it applies. Moreover, the natural meaning of the words "*an agreement [which] confers exclusive jurisdiction*" included asymmetric jurisdiction clauses.

Spire Healthcare v Liquimar Tanks Management Inc [2016] EWHC 3278 (Comm) (Judge Waksman QC, 19 December 2016)

Insurance – aggregation – professional negligence

Following a number of complaints against a surgeon it employed, the Claimant applied for declaratory relief as to the effect of certain provisions of the insurance policy it held with the Defendant insurer. In particular, the Claimant argued that there was no operative aggregation clause insofar as any limit on cover was concerned, but that aggregation did apply in respect of the excess payable. The Defendant's position was that there was aggregation in respect of the limit on cover, but not insofar as the excess payable was concerned.

It was held that the wording Proviso 5(a) of the policy (which stated that the total amount payable by the defendant in respect of damages arising out of claims attributable to one source or original cause was not to exceed the limit stated in the schedule) was clearly that of aggregation; it operated so as to aggregate linked claims and subject them to a lower liability limit that would have applied if the claims were counted separately. However, although the aggregation of a claim for the purpose of limiting cover would normally have the same effect in respect of the payment of any excess, so that the aggregation would benefit both insurer and insured in different ways, it was also held that, as there was no express wording to aggregate the excess payable, the insured had to make a separate contribution in respect of each of the linked claims.

National Bank of Abu Dhabi PJSC v BP Oil International Ltd [2016] EWHC 2892 (Comm) (Carr J, 18 November 2016)

Prohibitions on assignment - warranties

In *National Bank of Abu Dhabi PJSC v BP Oil International Ltd* [2016] EWHC 2892 (Comm), D had a contract for the sale of oil to a third party. This contract contained a prohibition on assignment.
However, by a letter of purchase, D purported to make an irrevocable equitable assignment to C of 95% of the receivable under that contract. By the letter, D also warranted and represented that it was not prohibited by any other security or agreement from disposing of the receivable. C paid for the receivable. The third party became insolvent.
Carr J found that the purchase letter assigned not future proceeds or an expectancy of performance but the contractual entitlement to payment by the third party. It was therefore the assignment in equity of an existing debt. She affirmed that contractual terms limiting or prohibiting assignment of a debt are valid and not contrary to public policy and any assignment in breach of such a prohibition is ineffective (*Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85, 109C-D). A prohibition of this kind applies to both legal and equitable assignments.
Accordingly, the assignment in the purchase letter was ineffective. This meant that the warranty and representation in the purchase letter that there were no prohibitions on D's disposing of the receivable were false. The fact that C may have additional methods of recourse (or disposal) unaffected by any prohibition on assignment did not affect this position.

Transgrain Shipping (Singapore) Pte Ltd v Yangtze Navigation (Hong Kong) Co Ltd [2016] EWHC 3132 (Comm) (Teare J, 7 December 2016)

Contractual construction

C had chartered a vessel for a time charter ship but ordered it to wait in the discharge port for four months with the cargo already loaded, during which time it was damaged. D, the ship-owners, settled a claim for damage to the cargo and brought their own claim under the Inter-Club New York Produce Exchange Agreement 1996 (the "ICA") against C. Clause 8(d) of the ICA provided that liability was to be apportioned equally between C and D unless there was clear evidence that the claim arose out of the act or neglect of one or the other party.
The arbitration tribunal had found that "act" in this context means a culpable act in the sense of fault. D had not been at fault by loading the cargo and having it sit in the dock, although this was what caused the damage. Accordingly, D was not liable under cl. 8(d).
Teare J considered the term "act" here. Previous decisions as to the meaning of the word in other contracts could not be determinative. The word must be construed having regard to the language of the ICA as a whole.
Teare J looked at the other parts of the clause. Clauses 8(a) to (c) apportioned liability to one party or the other without any suggestion that this apportionment was based on fault or the fact that the matter was in one or the other party's sphere or risk. Clause 8(d) also did not refer to a matter in either party's sphere of risk.
On the other hand, neglect probably does require proof of fault, because the ordinary and natural meaning of "neglect" is a failure to do that which one ought to do. "That therefore raises the question, does the reference to "neglect" colour the word "act"?" [25]
Teare J found that it did not. "Neglect" (and "pilferage", found elsewhere in the clause) were exceptions to the general scheme of the clause which was envisages a "more or less mechanical apportionment of liability" without any need to investigate questions of fault.
That this gave "act" a different construction to the word "act" in a different context in the ICA 1984 made no difference. Nor, even if were true, would the fact that the proviso would apply in almost every circumstance (though in fact Teare J thought evidential difficulties in apportioning liability would be common). Nor is it uncommercial to make ship-owners responsible for the acts of the crew. Damage may be as easily ascribed to the circumstances prompting harmful action of a ship's master than to the actions of the master himself. There is no unfairness in one side taking contractual liability for the consequences of these circumstances arising.

Teal Assurance Co Ltd v WR Berkley Insurance (Europe) Ltd [2017] EWCA Civ 25 (Lewison LJ; Arnold J; Sir Stephen Tomlinson, 25 January 2017)

Contractual construction – determination of liability

"*No obligation on the part of the insurer arises until the liability of the assured to a third party is established and quantified by judgment, arbitration award or settlement*" (*Cox v Bankside Members Agency Limited* [1995] 2 Lloyd's Rep 437, 442 per Phillips J).

Sir Stephen Tomlinson, giving the judgment of the Court, held that for the purposes of this principle a loss is not "quantified" or ascertained at the point when an insured is obliged to put a certain amount of money into escrow pursuant to a payment deed and escrow agreement.

On the facts of the case, the money put into escrow represented the insured's maximum liability. However, its liability to pay the insured had not yet arisen.

"*The right of [an] insured to "sue for an indemnity" against a liability insurer only arises once it can demonstrate loss. But an insured cannot demonstrate loss if it cannot show the existence and amount of liability to the third party by judgment, award or settlement.*" *Enterprise Oil Limited v Standard Insurance Co Limited* [2007] Lloyd's Rep IR 186, 219, Aikens J.

The fact that the right to have the money put in escrow was a gain to the counterparty to the payment deed and escrow agreement was irrelevant. Nor could the obligation to hold the fund in escrow be said to be analogous to an order for an interim payment, since the latter constituted a determination by the court that the defendant was liable in damages for at least the amount of the interim payment. The payment deed drew a clear distinction between the amount to be held in escrow and the amount to be paid to the claimant. The escrow amount might well exceed the defendant's final liability, and the defendant was itself entitled to the interest on the amount held in escrow.

The liability was therefore not "quantified" or determined so as to give rise to a claim by the insured against the insurer.

COMPANY LAW

Digested by HENRY PHILLIPS AND EDOARDO LUPI


HENRY PHILLIPS

Brian John Harris v Microfusion 2003-2 LLP & others [2016] EWCA Civ 1212 (Court of Appeal, 6 December 2016)

Derivative claims – Foss v Harbottle – fraud on the Minority

The Claimant was a member of a limited liability partnership and sought to bring a derivative claim for the benefit of the LLP against two companies, collectively referred to in the proceedings as 'Future Films'.

The intended action was based on allegations of breach of duty by those companies as 'Designated Members' of the LLP.

The underlying facts involved a film financing scheme into which wealthy individuals were invited to invest in order to obtain certain taxation advantages from investment in the British film industry. There were 32 individual investor members of the LLP, and the two Future Films companies were appointed as 'Designated Members'. The partnership deed conferred on Future Films as Designated Members a veto on any decision to bring or conduct litigation on behalf of the LLP.

The Claimant alleged that Future Films had day to day control over the management of the LLP and had acted in breach of duty in relation three matters. The first two matters concerned the payment of allegedly excessive fees to entities for their administrative and marketing services. The third matter concerned the LLP's payment to a third party as a rebate. At first instance, the judge gave permission to proceed with the claim in respect of the first two matters, but refused permission in relation to the third. The claimant appealed the refusal, and Future Films cross-appealed.

Chapter 1 of Part 11 of the Companies Act 2006 does not apply to limited liability partnerships. The question before the Court of Appeal therefore was whether any of the putative claims fell within the exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461. The Claimant relied on the fraud on the minority exception to the rule.

The judge at first instance had relied on David Richards J's judgment in *Abouraya v Sigmund* [2014] EWHC 277 (Ch) as correctly summarizing the ambit of the fraud exception. Ordinarily in order to fall into the fraud exception actual fraud was required, namely, a deliberate and dishonest breach of duty. However, in the absence of actual fraud, derivative actions were also

permissible where the alleged wrongdoers benefitted from the breaches of duty, and the company suffered a loss as a result of the alleged wrongdoing. The judge granted permission in respect of the first two matters on the basis that the draft particulars amounted to allegation of deliberate and dishonest breach by Future Films, but refused permission to proceed with the third matter.

Before the Court of Appeal, counsel for the Claimant said that he had not intended to submit before the first instance judge that there had been actual fraud by Future Films. Accordingly, counsel sought to uphold the judge's decision on the grounds that the requirement of 'fraud' for the purpose of the exception was overly narrowly stated in *Abouraya,* and it sufficed for the proposed claim to involve a breach of fiduciary duty and/or an abuse/misuse of power.

Giving the decision of the Court of Appeal, McCombe LJ held that the ambit of the fraud exception was correctly stated in *Abouraya.* There was no allegation of deliberate and dishonest breach of duty, and no personal benefit to Future Films could be alleged. Accordingly, the judge should have refused permission to proceed with the first two claims. The judge had been correct to refuse permission in respect of the third claim, given that there was an insufficient averment of 'benefit' to Future Films. Accordingly, none of the putative claims properly fell within the fraud on the minority exception to the rule in *Foss v Harbottle.*

The Baltic Exchange Limited [2016] EWHC 3391 (Ch) (Snowden J, 7 November 2016)

Schemes of Arrangement – sanction

The Scheme was a transfer takeover scheme, the object of which was to enable a Singapore company to acquire all of the issued shares in the Baltic Exchange Limited (the "Company"). The Company was the leading source of maritime market information for trading and settlement of physical and derivative shipping contracts. The Company was unlisted and there was no ready liquid market for the transfer of its shares.

At the single meeting of shareholders, 240 shareholders were present and voting, holding 421,830 shares out of a total number of shares in issue of 483,100. 228 shareholders voted in favour of the resolution, representing 416,080 shares such that the statutory majorities under Part 26 of the Companies Act 2006 were comfortably achieved.

At the sanction hearing, Snowden J first considered whether the provisions of the Companies Act 2006 had been complied with. His Lordship was satisfied that all shareholders whose shares were to be acquired under the Scheme had been entitled to attend and vote, despite the existence of certain provisions in the Company's Articles of Association which restricted voting at Company meetings on the part of a shareholder who held over ten per cent of the total voting rights. In the circumstances, however, there was no reason why such a voting restriction would prevent all such shareholders considering together the commercial terms of the Scheme as regards the price to be paid for the shares.

A more difficult issue related to contractual rights given to the Company's 'panellists' conditional on the sanction of the scheme. These panellists produced or contributed to the freight market indices known as 'Baltic Indices'. Conditional arrangements were entered into between the panellists and a subsidiary of the bidding company, which would give them free membership of the Baltic Exchange and continued free access to certain date to enable them to perform their role. Snowden J asked himself whether these collateral benefits were such as to require the panellists to be put into a different class.

The judge held that it was appropriate for a single class of shareholders to hold a meeting because the additional contractual benefits to the panellists could not conceivably be said to make it impossible for them to discuss the fundamental merits of the takeover with the non-panellist shareholders. The financial benefit under these arrangements was in the order of several thousand pounds, whereas the panellist shareholders held approximately 28% of the Scheme shares, entitling them collectively to £23,360,000.

Snowden J held that the class voting on the Scheme was fairly represented by those who attended at the meeting, and that there was no suggestion that any members of the majority were acting in any way adverse to the class of shareholders as a whole.

As to the final question of whether an intelligent and honest man, a member of the class concerned, and acting in respect of his own interest might reasonably approve the Scheme, the judge was satisfied that though the Company's shares were unlisted such that there was not a liquid marketplace against which the Scheme proposal could be readily assessed, the Company's board had gone some distance to investigate the merits of the bid and to explain its view in the explanatory statement. Accordingly, Snowden J sanctioned the Scheme on the bidder company giving the requisite undertakings.

Zavahir and others v Shankleman and others [2016] EWHC 2772 (Ch) (Mr John Baldwin sitting as Deputy Judge, 25 November 2016)

Derivative Claims – permission – Directors' powers and duties

The claimants applied for permission to continue a derivative claim on behalf of the Company under section 261 of the Companies Act 2006 ('CA 2006'). C1 and C2 had a 25% shareholding in the Company, with the remaining shareholding controlled by the Defendants. In addition, C1 and D1 were directors of the Company at the material time. The Company had been incorporated for the purposes of owning and managing the freehold of a property. The parties to the action were successors in title to the original shareholders. In 2007, the parties agreed to extend their leases for nominal consideration. In 2012 the leasehold owners of the flats comprising the property (except the defendants) served notices on the Company to purchase the freehold of the Property and formed a NewCo to effect the purchase. The purchase price paid to the Company by the NewCo was £224,000. Just prior to completion, however, D1 in his capacity as director of the Company, arranged for extension of 999 years to the leases held by himself and his wife (D2) as well as those held by D3 and D4, for the consideration of £1 each. The evidence before the court was that the total value of the lease extensions was £136,500.

At the time of the application, the Company had £20,000 in cash assets remaining. In these circumstances, C1 and C2 sought to bring an action against D1 in his capacity as a director of the Company and against the remaining Defendants in their capacity as shareholders. The complaint against D1 was that he had procured the grant of long lease extensions for nominal consideration at a time when the Company had no available profits for distribution and was liable under section 830 CA 2006. The complaint against the Defendants concerned their knowledge of the said extensions such as to make them liable to reimburse the Company for the distributions under section 847 CA 2006.

Mr John Baldwin QC, sitting as a Deputy Judge of the High Court, refused to grant permission to the Claimants to pursue the derivative claim, despite being satisfied that there was a *prima facie* case on the merits.

First, the judge considered that the Claimants' costs to date were £156,000 and they were seeking an indemnity from the Company in respect of their costs. Second, he noted that pursuant to section 263(2)(a) CA 2006, permission must be refused if the court is satisfied that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim. Third, the judge considered that the Claimants did not pass the section 263(2) gateway: the Claimants' costs of £156,000 to date exceeded the best possible recovery the Company could make of £136,500, and if the action failed it would be a '*complete disaster*'. In the circumstances, the Company had few assets and no future prospects such that the downsides and costs of failing on the claim far outweighed the benefits of winning, even if there was factored in a significantly greater chance of winning than losing. Accordingly, no prudent director carrying out a normal risk/benefit analysis would seek to continue the claim. Continuance of the proceedings was, in the judge's judgment, neither sensible nor proportionate.

Stanley Wootliff v Martin Rushton-Turner & others [2016] EWHC 2802 (Ch) (Mr Registrar Briggs, 3 November 2016)

Unfair Prejudice – wrongful dismissal – joinder

The six respondents sought to strike out a wrongful dismissal head of claim included in an unfair prejudice petition (the 'Petition').

The Petitioner had been dismissed as an employee of the Company in October 2013 and was subsequently removed as a director. In January 2014, the Petitioner started a claim in the Employment Tribunal for, among other things, wrongful dismissal. The Petitioner eventually decided to withdraw all remaining claims in April 2015, but reserved his right to pursue the claim for wrongful dismissal in an alternative jurisdiction under rule 52(a) if the Employment Tribunals Rules of Procedure 2013.

The Petitioner then presented the Petition in June 2015, alleging that the Company had no grounds to dismiss him and his removal constituted unfairly prejudicial conduct. He sought a remedy within the Petition for the wrongful dismissal such that he be compensated for the loss of income for the remaining term of his service contract with the Company. The Respondents contended that the Petitioner was precluded from pursuing his wrongful dismissal

claim in the Petition.
Mr Registrar Briggs considered the relevant authorities, acknowledging that the point before him was a novel one, and no case was directly on point concerning a challenge to a wrongful dismissal claim in the context of an unfair prejudice petition. First, he relied on *Gamlestaden Fastigheter AB v Baltic Partners Limited and others* [2007] UKPC 26 as authority for the proposition that in certain circumstances it was open to a member of a company to make an unfair prejudice application for relief where the relief sought would confer no financial benefit on the Applicant *qua* member. Next the Registrar considered that in the context of a quasi-partnership the exclusion from management and breach of employment rights may be grounds for unfair prejudice: the Petitioner had indeed advanced a case of quasi-partnership in the pleadings.
Further, the Registrar noted that under section 996 of the Companies Act 2006, the court was able to make such order as it sees fit to grant relief, commenting in relation to the statutory language that "*as the language is so wide it cannot be said in my judgment, it shuts out relief for compensation for breach of a service agreement. When considering the interests of the petitioner much will depend upon the relationship with the other members*" (para 34).
Mr Registrar Briggs noted that Petitioner would have to show that the affairs of the Company had been conducted in such a way that were both unfair and prejudicial to the interests of members. It was possible that when evidence was to be heard subsequently, the court would treat the '*separateness*' of the Petitioner as member and the Petitioner as employee as excluding him from the relief he was seeking.
Notwithstanding this possibility, in light of the propositions to be taken from the authorities, the Registrar refused to strike out the wrongful dismissal claim. It would have been inefficient, disproportionate and a waste of court time to require the wrongful dismissal claim to be heard separately from the Petition.

CORPORATE INSOLVENCY

Digested by RYAN PERKINS & RIZ MOKAL

Gordon Macrae, Eleanor Fisher (The joint official liquidators of Primeo Fund (in liquidation)) v KPMG LLP, David Yim[2016] EWHC 2432 (Ch) (Mr Justice Nugee, 14 September 2016)


DANIEL BAYFIELD QC

Cross-border insolvency proceedings — inquiry into insolvent company's dealings — order against third parties

Two HSBC entities were administrators and custodian of Primeo, a Cayman Island investment fund. It went into liquidation in Cayman Island in early 2009, and the liquidation was recognised in England and Wales under the Cross-Border Insolvency Regulations 2006 ('**CBIR**'). The liquidators commenced proceedings against the two HSBC entities, alleging breaches of duty in relation the Primeo money supplied to and lost at the Ponzi scheme operated by Bernard L Madoff Ponzi Investment Securities ('**BLMIS**'). The HSBC entities argued as part of their defence that they had twice instituted investigations into BLMIS through the London offices of KPMG and been assured each time that no fraud was involved. In order to test this defence, the liquidators wished to obtain KPMG's version of events, which KPMG denied them on the basis that it owed the HSBC entities a duty of confidentiality. The liquidators applied under section 236 of the Insolvency Act 1986, read with Article 21(1)(d) of Schedule 1 to the Cross-Border Insolvency Regulations, to compel a KPMG partner, Mr Yim, to answer questions and produce documents. The Court ordered this relief. It reasoned that it was necessary to strike a careful balance between the reasonable requirements of the liquidators undertaking their tasks and the need to avoid making an unreasonable, unnecessary or oppressive order toward Mr Yim. The Court agreed that the liquidators reasonably required the information they were seeking, and held that it was not unreasonable, unnecessary, or oppressive to order KPMG to disclose the relevant documents, nor oppressive for Mr Yim to respond to questions. Nor in this case was it unfair for the liquidators qua litigants against the HSBC entities to use the section 236 power to obtain information they could not otherwise have obtained.

[Daniel Bayfield QC; Richard Fisher; Robert Amey]

Kean v Lucas [2016] EWHC 2684 (Ch) (Mr Registrar Briggs, 28 October 2016)


ANDREW SHAW

Creditors' voluntary liquidation — test applicable to creditor's standing to be counted for purpose of requisitioning creditors' meeting

The former director ('**Mrs Kean**') of a company in creditors' voluntary liquidation invited the liquidator to convene a creditors' meeting under section 171(2) of the Insolvency Act 1986 to consider his removal as liquidator. The liquidator refused on the basis that the request to convene the meeting was not supported by 25% in value of the company's creditors. In particular, he subjected one claim to extensive scrutiny and put the claimant to strict proof. Counsel for Mrs Kean challenged this on the basis that the test that applies to determine a creditor's entitlement to vote at a meeting is different to that which entitles a creditor to be counted for the purpose of convening a meeting. The Court agreed. While a creditor's voting entitlement does require a degree of scrutiny by the liquidator, its entitlement to be counted for the purpose of requisitioning a meeting should be accepted unless it is a connected party or the claim appears obviously wrong or mala fide.

[Andrew Shaw]

Brooks v Armstrong [2016] EWHC 2893 (Ch) (David Foxton QC, sitting as a Deputy Judge of the Chancery Division), 15 November 2016)

Wrongful trading — requirement to establish increase in company's net deficiency

The appellants were liquidators of a company which had operated a Robin Hood-themed tourist attraction in Nottingham. At first instance, the directors had been held liable for wrongful trading. The liquidators appealed against, among other things, the first instance court determination of the wrong date for the triggering of the directors' duty under section 214 of the Insolvency Act, as well as the quantum of their liability. The directors cross-appealed. The Court rejected the appeal since the liquidators had failed timeously to establish an increase in the net deficiency suffered by the company as a result of any breaches of

Re Cadmus Management Ltd [2016] EWHC 3330 (Ch) (Registrar Jones, 20 December 2016)

Court's power to vest disclaimed property

A company which had held the 999-year head lease of certain property was dissolved, and the applicants, who held the unexpired terms of three 125-year underleases applied for an order under section 181 of the Insolvency Act 1986 for the head lease to be vested in them or for a trustee for their benefit. This, however, would confer a windfall upon them in the form of an extended lease of the entire property. The Court held that its discretion under section 181 was unfettered and permitted it to vest property on such terms as it deemed fit, but that it was to be exercised to the extent practicable not to allow a party to improve its position nor to cause injustice to anyone holding proprietary interests. The submission to the Court as to how to vest property in the instant case did not meet these criteria. The application was therefore adjourned to enable presentation of any revised proposals, or else was dismissed.

Gillian v Hec Enterprises Ltd [2016] EWHC 3179 (Ch) (Morgan J, 9 December 2016)

Costs – trusts – "Berkeley Applegate" Orders

This is the latest decision on the rule in *Berkeley Applegate (Investment Consultants) Ltd (No. 1)* [1989] Ch 32, whereby a liquidator or administrator may be allowed to recoup the costs of administering a trust fund (which the company holds as trustee) from the fund itself. The Court confirmed that liquidators and administrators can be indemnified for their reasonable remuneration, costs and expenses out of assets that the companies hold on trust for others: but only to the extent that such costs relate to the management

of trust assets.
Work done in relation to litigation brought by the beneficiaries of the trust should, by contrast, be dealt with under the Court's usual jurisdiction as to the costs of the litigation. Where the office-holders adopt a position in trust litigation which would favour the interests of the company's general estate, the *Berkeley Applegate* principle has no application.

Dickinson v NAL Realisations (Staffordshire) Ltd [2017] EWHC 28 (Ch) (HHJ David Cooke, 16 January 2017)

Directors' duties – duties to creditors – contingent liabilities

In this case, the Court held that directors do not have a duty to give priority to the interests of creditors simply because there is a recognised risk of adverse events that would lead to the company's insolvency. The Court noted that, in one sense, the directors must always have regard to the company's liabilities if the business is to continue and prosper. But in ordinary circumstances this does not entail any divergence between the interests of members and creditors. Thus, where the company faces a disputed claim which is believed to lack merit, but which could (if successful) render the company insolvent, the directors' duty to consider the interests of creditors does not automatically arise.

Thomas v Frogmore Real Estate Partners GP1 Ltd [2017] EWHC 25 (Ch) (Philip Marshall QC, 17 January 2017)


DAVID ALLISON QC


RYAN PERKINS

Administration – improper motive – COMI

This is the first fully-reasoned decision on the meaning of paragraph 81 of Schedule B1 to the Insolvency Act 1986 (which empowers the Court to terminate an administration if the appointor had an "improper motive"), and the latest decision to consider the circumstances in which the "registered office" presumption on COMI will be rebutted.
Administrators were appointed over three companies out-of-court by a bank under a floating charge. The administrators applied for a declaration as to the location of the companies' COMI. The companies were registered in Jersey for tax reasons. Each company appointed two professional directors based in Jersey, together with a third director based in England. The companies owned shopping centres in England, and did not carry on any significant business in Jersey. The companies' day-to-day operations were conducted by an asset manager based in London.
The directors and the sole shareholder argued that the companies had their COMI in Jersey (relying on the registered office presumption), such that the administrations were invalid pursuant to paragraph 111(1A) of Schedule B1. In addition, the shareholder and directors argued that the bank had an "improper purpose" for appointing the administrators within paragraph 81 of Schedule B1, such that the administrations should be terminated. It was alleged that the bank appointed the administrators to stifle high-value litigation brought by the companies against the bank.
As to COMI, the Court held as follows: (1) A debtor's COMI is the place where the debtor conducts the administration of its interests on a regular basis (in a manner ascertainable by third parties). (2) There were a number of facts that led to the clear conclusion that the companies' COMI was in England: the day-to-day conduct of their business and activities had been placed in the hands of an asset manager appointed in London under an advisory agreement (*Re ARM Asset Backed Securities SA* [2013] EWHC 3351 (Ch) applied); the asset manager had full responsibility for providing a very large range of services to the companies; the bank's debentures were governed by English law and expressly referred to the power to appoint administrators; although board meetings were held in Jersey, a third party would not have known where they were taking place, and would not have regarded the directors as of particular significance (*Re Northsea Base Investment Ltd* [2015] EWHC 121 (Ch) applied). (3) Accordingly, the COMI was in England.
As to paragraph 81 of Schedule B1, the Court held as follows. (1) Paragraph 81 was a somewhat unusual provision, and its purpose could not be gleaned from Hansard or any other pre-legislative materials. The provision had to be considered on its own terms, and should not be construed by reference to the common law principles on abuse of process. (2) Paragraph 81 did not provide that establishing an improper motive would

automatically (or even ordinarily) lead to an order requiring the administration to cease, but simply that the jurisdiction would be engaged. (3) It was invidious to attempt to pinpoint precisely what form the motivation had to take for the statutory jurisdiction to be invoked. It was sufficient that there was a motive that was not in harmony with the statutory purpose of administration and was causative of the decision to appoint. (4) If there was no disharmony, it would be difficult to see why the motive then had to be treated as improper militating towards the administration's termination. (5) Most importantly, whilst it was conceivable that establishing an improper motive might lead to the termination of the administration, the court would, before doing so, have regard to the nature of the administration as a process which potentially affected other parties. Where paragraph 81 was invoked, it was unlikely to lead to an order that the administration would cease where the statutory purposes could properly be achieved, irrespective of the appointor's motivation (*Cursitan v Keenan* [2011] NICh 23 applied). (6) In the instant case, there had been no improper motive on the bank's part. Indeed, the bank had offered to extend the date for repayment by six months. The deadlines set had not been unreasonable. Even if there had been any improper motive, there was no satisfactory evidence that the statutory purposes of the administration were not likely to be achieved.

[David Allison QC, Ryan Perkins]

South Coast Construction Ltd v Iverson Road Ltd [2017] EWHC 61 (TCC) (Coulson J, 19 January 2017)

Administration moratorium – adjudication

This is a decision of the Technology and Construction Court on the status of the administration moratorium in disputes relating to construction contracts. The judgment establishes that, where a litigant applies to lift the administration moratorium under paragraph 43(6)(b) of Schedule B1 in order to continue with proceedings to enforce an award granted by a construction adjudicator, the stay is likely to be lifted.

The Court held that proceedings to enforce the decision of a construction adjudicator differ in significant respects from other kinds of commercial proceedings or monetary claims, and have no real parallel in other parts of the High Court. Adjudication enforcement proceedings presuppose that there has already been a decision, on the merits, by an adjudicator, that there was a sum of money which, *prima facie*, was due and owing under the contract or pursuant to statute. Moreover, although they are described as "enforcement proceedings", the claimant remains an unsecured creditor and does not acquire any proprietary interest against the company's property.

PERSONAL INSOLVENCY

Digested by MATTHEW ABRAHAM

Sands (Trustee) v Layne and Anr [2016] EWHC Civ 1159 (Court of Appeal, 29 November 2016)

Powers of courts exercising jurisdiction to review, rescind or vary an order under s.375(1) of the Insolvency Act 1986

This case clarifies and expounds the powers of courts exercising insolvency jurisdiction to review, rescind or vary an order under s.375(1) of the Insolvency Act 1986. The Court of Appeal held that the jurisdiction of the courts under this provision is not limited to orders made by a court of first instance but also applies to orders made by courts on an appeal from a lower court. Lady Justice Arden interpreted this statutory provision by examining the function of s.375(1) in the context of other provisions of the Insolvency Act 1986 and the language used in s.375(1). Lord Justice Lewison and Lord Justice McCombe agreed with Lady Justice Arden's determination. In this case a bankruptcy order was obtained from a district judge by a creditor without any other creditors present or represented. The bankrupt made an offer of security and payment by instalments but the creditor rejected the offer. The bankrupt appealed to the High Court on the basis that he had made a reasonable offer. Prior to the appeal hearing a trustee was appointed. By the time of the appeal hearing there was a change in the trustee with the appellant becoming the new trustee (the "Appellant" or the "Trustee"). Mr Donaldson QC, sitting as a deputy High Court judge, did not hear the appeal as the creditor and the bankrupt debtor came to an agreement compromising the appeal before the hearing began. The judge was instead asked to, and did, make a consent order discharging the earlier

bankruptcy order (the "Subject Order"). The first trustee was informed of the appeal hearing by the creditor and the bankrupt but not the Appellant. Upon news of the Subject Order the Trustee made an application to the County Court to rescind the Subject Order as he considered that it ought not to have been made because there were other creditors. The district judge ruled that he had no jurisdiction to rescind the Subject Order approved by a High Court judge and so he transferred the application to the High Court.

The matter came before Mr Donaldson QC again and it was argued that if the Subject Order had not been made, or if it is rescinded, the other creditors and the Trustee's fees and expenses will be paid out of the assets which under the Subject Order were charged to the creditor. The judge held that the High Court had power to rescind an order as set out in s.375(1) if it was made "by it" and not an order made on appeal. The judge relied upon *Appleyard* v *Wewelwa [2012] EWHC 3302 (Ch)* and held that the language of s.375(1) only contemplated rescission by a court at first instance and could not under that section rescind an order made in the course of an appeal from an order of a lower court.

The Court of Appeal found that the High Court judge was wrong to hold that he had no power and what Briggs J had stated in *Appleyard* was *obiter*. Lady Justice Arden interpreted the words "every court" in s.375(1) as including the High Court, whether it is sitting at first instance or on appeal. Lord Justice McCombe agreed to that and added, "*I see nothing shocking in a High Court Registrar in Bankruptcy having jurisdiction to review, rescind or vary an order made in the High Court, even if that order was originally made by the High Court judge*." It was further noted by the Court that the Applicant should have been joined to the set-aside application so that provision could be made for his costs and expenses out of the assets held by him as trustee.

Harris v Official Receiver [2016] EWHC 3433 (Ch) (Andrew Simmonds QC, sitting as Deputy Judge, 4 November 2016)

Interplay between indefinite suspension of discharge subject to condition under s.279(3)(b) following a suspension for a fixed period under s.279(3)(a)

In this case Andrew Simmonds QC sitting as a Deputy Judge of the High Court determined the scope of s.279 of the Insolvency Act 1986. The appellant in the case was adjudged bankrupt by an order on 9 August 2013 and his appeal against this order was dismissed by the High Court on 20 June 2014. On 4 August 2014, before the automatic discharge took effect, the County Court made an order under s.279(3)(a) suspending the discharge of the bankruptcy order until a specified time on 31 October 2014. As a result of the bankrupt's continued failure to cooperate with the Official Receiver, the Official Receiver made an application under s.279(3)(b) for an order for indefinite suspension on 30 September 2014. On 17 October an order was granted suspending discharge of bankruptcy until 18 January 2015 to allow for proper service on the bankrupt and the matter was adjourned to 5 January 2015. At the adjourned hearing District Judge Wilkinson gave an order suspending the operation of the statutory discharge indefinitely until the bankrupt complies to perform his obligations to cooperate with the Official Receiver. The bankrupt challenged that order on appeal.

At the appeal hearing before Andrew Simmonds QC, the bankrupt failed to show up in court to present his appeal. However, the Deputy Judge of the High Court determined the case taking into consideration the bankrupt's grounds of appeal and skeleton argument.

Andrew Simmonds QC held that s.279 does not expressly provide that only one application under subsection (3) may be made, or indeed that if an order is made under s.279(3)(a), the Official Receiver cannot then apply under s.279(3)(b). According to the judge, there is no good reason to imply a limitation to the section as sought by the bankrupt when such a limitation is not expressly stated. To do so would make the operation of the section inflexible and would operate as a disincentive to the making of orders under s.279(3)(a). The judge did not find any good policy reason for reading such a limitation into the section particularly in this case where it was the bankrupt's failure to cooperate with the Official Receiver before the expiry of the specified suspension period which prompted the further application.

Avonwick Holdings Ltd v Shlosberg [2016] EWCA Civ 1138 (Court of Appeal, 18 November 2016)

The trustee in bankruptcy's right to waive legal professional privilege of the bankrupt on documents vested in the trustee

On an application made by the bankrupt, Mr Justice Arnold of the High Court had ordered the solicitors for the creditor and the trustees not to deploy in third party proceedings documents vested in the trustees, some of which were subject to the bankrupt's legal professional privilege. The application of the bankrupt raised the issue of whether the privilege that attached to information and documents of a bankrupt was property which vested in the trustees in bankruptcy such that the trustee could provide that information to third parties and waive the privilege.

In this case, the trustee wished to provide the information obtained to a creditor of the bankrupt that had commenced conspiracy proceedings against the bankrupt and others. The solicitors who acted for the trustees also acted for the creditor. Mr Justice Arnold reviewed a number of authorities and set out eleven factors relevant to the exercise of the court's jurisdiction and concluded that an injunction should be granted requiring the solicitors to cease acting for the creditor. He said that he did not consider that the bankrupt's rights in respect of the privileged information would be adequately protected by granting an injunction restraining the solicitors from using the privileged information unless a strict information barrier were created within the solicitors firm and an entirely new team was assigned to work for the creditor.

The appellants before the Court of Appeal were the creditor and the trustees. The creditor and the trustees appealed on five grounds before the Court of Appeal on the issue of legal professional privilege that devolved from the bankrupt to the trustees. Two key issues focused on by the court were whether privilege fell within the definition of "property" in s.436(1) vested in the trustees and whether Parliament's intention in the words used in parenthesis in s.311(1) entitled the trustees to use the privileged documents in a manner that waived privilege.

Sir Terence Etherton, Master of the Rolls, found the issue at the heart of this case was the inter-relationship between two public interest policies: the public interest that the trustees of a bankrupt are able to get in, realise and distribute the bankrupt's estate in accordance with the statutory scheme in the Insolvency Act 1986, and the public interest that a person is able to consult their lawyer in confidence in the knowledge that what is told to the lawyer will never be revealed without their consent. Sir Etherton MR found in favour of upholding the bankrupt's legal professional privilege and found that privilege was not "property" of the bankrupt that vested in the trustees. He applied the principle as examined by Lord Taylor in *R v Derby Magistrates' Court ex p. B* [1996] 1 AC 487 where he described privilege as a fundamental condition on which the administration of justice as a whole rests, and he acknowledged it as a fundamental human right by the European Convention on Human Rights. The Master of the Rolls also relied upon the decision in *R (Morgan Grenfell &Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21 where Lord Hoffmann said that the courts will ordinarily construe general words in a statute as not having been intended to override fundamental rights, even though capable of having that effect if read literally, and that an intention to override such rights must be expressly stated or appear by necessary implication. Accordingly, the Master of the Rolls saw no reason why the privilege principle should not override the statutory scheme.

In relation to whether or not s.311(1) permitted the trustees to use the documents in a way that would waive privilege the court held that the documents had to be used in a way that would not amount to waiver of privilege. The court noted that the parenthesis in s.311(1) permitted the trustees to look at the documents covered by privilege but there was nothing implicit in the words that permitted them to waive the bankrupt's legal professional privilege in taking steps against third parties for the benefit of the bankrupt's estate.

PROPERTY & TRUSTS

Digested by ANDREW SHAW

Matchmove Limited v Dowding [2016] EWCA Civ 1233 (Sir Terence Etherton MR, Lloyd-Jones LJ and Arnold J, 7 December 2016)

Real property – Constructive trusts

In 2002, Mr Francis, the controller of Matchmove Limited ("Matchmove") began negotiations of the purchase of a plot of land (the "Land") and a ten-acre meadow (the "Meadow"). The purchase was delayed because the vendor, Mr Grist, wanted to obtain planning permission for the Land.

By late 2003, Mr Francis reached an agreement with two of his friends, Mr Dowding and his partner, Ms Church, that they would buy part of the Land (the "Plot") and the Meadow for £200,000. The Meadow was important to Mr Dowding and Ms Church, because Ms Church wanted to keep horses on it.

On 21 April 2004, Matchmove completed the sale of the Land and the Meadow from Mr Grist and that same month Mr Dowding and Ms Church paid Matchmove (in part by transferring a car) £66,600 towards the purchase of the Plot and the Meadow. Between around 2004 and October 2006 there was a dispute between Matchmove and a Mr and Mrs Wiltshire over the latter parties' purported right of way over the Meadow. The Wiltshires eventually abandoned their claim but not before Mr Dowding and Ms Church had paid Matchmove £5,000 towards the legal costs associated with this dispute.

In February 2005 planning permission was granted for the construction of a three-bedroom house on the Plot and another on the remainder of the Land, which a Mr and Mrs Jukes intended to buy. The planning permission over the whole of the Land was granted in the Jukeses' names; although, Mr Dowding and Ms Church had cooperated with the Jukeses in making the applications for planning permission.

On 27 April 2005, Matchmove's solicitors sent Mr Dowding and Ms Church a draft contract for the sale of the Plot and the Meadow, though this subsequently went missing. In May 2005, Mr Francis allowed Mr Dowding and Ms Church to begin construction on the Plot and also allowed the Jukeses to start building on the remainder of the Land.

On 5 September 2005, the contracts were exchanged for the Plot and for the remainder of the Land. Between October 2005 and November 2006, Mr Dowding and Ms Church made payments totalling £80,000 for the Meadow. However, Mr Francis fell out with Mr Dowding and Ms Church in January 2007 and subsequently wrote to them to say that they could only buy half the Meadow. Mr Francis sent enclosed a cheque for £40,000 with this letter.

Mr Dowding and Ms Church sought a declaration that Matchmove held the Meadow upon trust. Matchmove denied that any binding agreement had been reached in relation to the Meadow, relying upon section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (the "Act"), which stipulates that contracts for the sale of land can only be made in writing.

At first instance, HHJ McCahill QC held that Mr Dowding and Ms Church were entitled to the Meadow on the basis of a proprietary estoppel and/or constructive trust. Matchmove appealed, inter alia, on the ground that the proprietary estoppel or constructive trust did not fall within section 2(5) of the Act, which stipulates that the requirement of writing does not affect "the creation or operation of resulting, implied or constructive trusts."

Counsel for Matchmove sought to interpret the judgment of Arden LJ in *Herbert v Doyle* [2010] EWCA Civ 1095 as setting out three different situations where section 2(5) of the Act could not be relied upon, namely: (i) where the parties intended to make a formal agreement; (ii) if further terms for the acquisition were to be agreed between the parties; and (ii) if the parties did not expect their agreement to be immediately binding. The Court of Appeal disagreed, holding that Arden LJ had intended to describe the earlier decision in *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1252 in three different ways. On each analysis, further matters fell to be agreed and so the agreement in question was not immediately legally binding. Accordingly, there was no constructive trust upon which section 2(5) of the Act could bite.

In the present case there had been an oral agreement between the parties which had been intended by all to be binding immediately and was complete in all its essential terms. Mr Dowding and Ms Church had relied on this agreement to their detriment by paying £66,600 for the Plot and the Meadow in April 2004 and by other acts, such as their contribution towards Matchmove's costs of the claim by the Wiltshires. Accordingly, there was a constructive trust and so section 2(5) of the Act had effect. Mr Dowding and Ms Church had relied solely on a constructive trust argument on appeal, and so the Court did not have to decided whether section 2(5) of the Act would also apply to a proprietary estoppel.

SPORT

Digested by ROBERT AMEY


ROBERT AMEY

Sibel Özkan Konak v International Olympic Committee (Court of Arbitration for Sport, 21 November 2016)

Doping – automatic disqualification

The appellant, Sibel Özkan Konak, was a professional weightlifter, who had won a silver medal at the Beijing Olympics in 2008. Until 2016, she had undergone drug testing on numerous occasions, always with negative results.

On 18 May 2016 she was informed by the Turkish National Olympic Committee that her urine sample tested at the Beijing Olympics had been reanalysed and now showed the presence of Stanozolol metabolite, a prohibited substance, both then and now under the Word Anti-Doping Code ("WADC"). The B Sample analysis carried out on 27 May 2016 confirmed that positive result.

On 21 July 2016 the IOC Disciplinary Commission handed down its decision finding the appellant guilty of an anti-doping rule violation ("ADRV") by use of Stanozolol, contrary to Article 2.1 and 2.2 of the Rules applicable to the Games of the XXIX Olympiad, Beijing 2008 ("the Rules"), disqualifying her results obtained at the Beijing Olympics, and ordering her to return her silver medal, pins and diploma obtained thereat.

The appellant appealed to the Court of Arbitration for Sport, arguing that she had limited financial resources and relied on her experienced coach to advise her on vitamin and medications which she could take in compliance with the WADC. Her evidence was that she always additionally checked such vitamins and medications against the WADC list and purchased them from a well-known laboratory, and always informed the Doping Control Officer on her Doping Control Form ("DCF") including at the Beijing Olympiad of what she had taken. She said she had sought, despite the passage of time and limited financial resources, to identify the source of the Stanolozol, and argued that the likely source of the drug was a contaminated whey protein supplement she took on a regular basis both before and during the Beijing games. She said that the low level of Stanozolol in the sample - a concentration of 2.5.pg/mL – could not have been of assistance in increasing her sporting performance, and that in all the circumstances she was not at fault or negligent at all, or, if, contrary to her primary contention, she was held to be so, her degree of fault was minimal. She had already suffered loss and damage to her reputation, and if she lost her silver medal, would lose sponsorship and her career would be prematurely ended.

The appeal was dismissed. Article 2.1 of the Rules makes the presence of a metabolite of a prohibited substance in the Athlete's system an ADRV. Stanozolol is such a substance. Article 8 of the Rules makes disqualification and forfeiture of medals, points and prizes an automatic sanction for such an ADRV. That was sufficient to dispose of the appeal. The tribunal declined to consider issues of how and why the Stanozolol was in the appellant's system or the existence or degree of fault, if any, on the part of the appellant for its presence.

However, the tribunal declined to award the IOC its costs, noting the vast disparity between the appellant's resources and those of the IOC.

Tony Pulis v Crystal Palace [2016] EWHC 2999 (Comm) (Sir Michael Burton, 18 November 2016)

Football managers – performance-related bonus – fraud – challenge to decision of the Premier League Managers' Arbitration Tribunal

Mr Pulis had been employed as manager by Crystal Palace FC. Under his contract of employment he was due to be paid a bonus of £2 million gross if (1) he successfully kept Crystal Palace in the Premier League after the 2013/2014 season; and (2) he remained in employment on 31 August 2014.

Mr Pulis satisfied the first condition for the award of the bonus.

However, in early August 2014, *i.e.* some two weeks before the date of 31 August, Mr Pulis requested early payment of the £2 million bonus and the club acceded to this request, paying him on 12 August 2014. On the following evening, 13 August, the Mr Pulis informed the club for the first time that he wanted to leave Crystal Palace and he did so the following day.

Unsurprisingly, Crystal Palace sought repayment of the bonus, and commenced proceedings before the Premier League Managers' Arbitration Tribunal.

The club claimed that Mr Pulis had deceived it into paying him his bonus early, claiming that Mr Pulis had

assured the Chairman, Mr Parish, on 8 August that he was committed to the club and would consequently be remaining until at least 31 August 2014 (the first misrepresentation); and that he urgently needed the money early so that he could buy some land for his children (the second misrepresentation), and that the club paid the bonus to him on the basis of these misrepresentations.

Mr Pulis argued that he had been committed to the club at the time he was paid the bonus, but that a meeting on 12 August (the "Heated Players' Meeting") caused him, for the first time, no longer to be prepared to commit himself to the club.

The Arbitrators found that the Heated Players' Meeting had in fact taken place on 8 August, and so could not explain Mr Pulis' sudden change of mind on 12 August. It therefore found that the first misrepresentation was untrue. It also found that there was no imminent land transaction, and so the second misrepresentation was also untrue. The tribunal concluded that Mr Pulis had obtained the £2 million bonus by fraud, describing his conduct as "disgraceful".

Mr Pulis challenged the arbitrators' findings of fact (in particular, as to the date of the Heated Players' Meeting) under s.68 of the Arbitration Act 1996. Counsel for Mr Pulis accepted that such a challenge "can only exceed in exceptional circumstances", and that she would essentially have to persuade the court that the evidence in Mr Pulis' favour as to the date of the Heated Players' Meeting had been was "altogether ignored" or "entirely overlooked".

The Court held that the evidence of Mr Pulis' witnesses had not been ignored, and had been given appropriate weight. Moreover, even if that were not correct, that still left Mr Pulis' dishonest representations concerning the land transaction, which was on its own a sufficient basis for the arbitrators' finding of fraud. Accordingly, Mr Pulis' s.68 challenge to the arbitrators' award was dismissed.

TONY PULIS (LEFT) - WITH CRYSTAL PALACE BOSS STEVE PARISH. CHALLENGE DISMISSED

Navigating Singapore's restructured restructuring and insolvency framework

Smitha Menon and **Stephanie Yeo** of WongPartnership, Singapore, review the landscape for a foreign corporate debtor in Singapore under the new restructuring and corporate regime implemented in the jurisdiction in 2016, whilst **Mark Arnold QC** and **Matthew Abraham** provide a comparative reference with the laws in UK.

2016 has been a busy year for the Singapore legal system with multiple reforms and sweeping legislative changes. Among the numerous reforms to key legislation including the Companies Act and Securities and Futures Act, a major reform is in the works for the restructuring and insolvency framework of Singapore (the "Reforms"). The Reforms seek to draw on the best elements from the existing UK styled creditor friendly insolvency and restructuring framework and that of the more debtor friendly US framework to achieve a balanced restructuring regime that on the one hand promotes restructuring in Singapore and on the other hand is protective of interests of existing secured and unsecured creditors. This article will orientate a foreign corporate debtor to the new restructuring and insolvency regime through all the major steps of a restructuring in Singapore with a comparative reference to the restructuring and insolvency laws in UK.

A quick look at the existing restructuring toolkit

The two main tools of restructuring in Singapore that debtor companies can avail themselves of are (1) schemes of arrangement and (2) judicial management.

A scheme of arrangement ("SOA") is broadly a court sanctioned agreement between a debtor company and its creditors that binds all relevant classes of creditors and/or shareholders. The framework for SOAs is set out in s.210 of the Companies Act (Cap. 50 of Singapore) (the "CA") and requires the debtor company to achieve approval (to the extent of the required statutory threshold) from relevant classes of creditors and/or shareholders in court directed scheme meetings. The scheme thereafter becomes binding on the relevant classes of creditors and/or shareholders after the court has approved the same by way of a court order. Prior to the approval and implementation of the scheme, the debtor can seek a court ordered stay on all enforcement actions by creditors. SOAs are available to both Singapore and foreign companies.

Judicial management ("JM") is essentially a court supervised management of a distressed Singapore company with an aim to rehabilitate the company or to preserve all or part of such company's business as a going concern or wind down its affairs in a more advantageous manner than in a liquidation (unlike companies in winding up, companies in judicial management can continue trading as a going concern). Upon commencing a JM by filing a JM application, an automatic statutory moratorium comes into effect and binds all creditors. The mechanisms for JM are set out in Part VIIIA of the CA and are similar in nature to administration in the UK prior to the Enterprise Act 2002.

SINGAPORE IS A SIGNIFICANT GLOBAL BUSINESS HUB

Accessing the jurisdiction of the Singapore courts

While a foreign corporate debtor cannot apply to the Singapore court for JM as the Singapore court's jurisdiction to make JM orders is expressly limited by statute to companies incorporated in Singapore, a foreign corporate debtor may apply to the Singapore courts for leave to convene a meeting of creditors/shareholders to consider a SOA and, if approved by the requisite majority, sanction of the SOA.

While s.210 of the Companies Act merely provides that SOA orders can be made in respect of "*any corporation liable to be wound up under* [the Companies] *Act*" which includes foreign companies pursuant to s. 350 and s.351 of the Companies Act, the Singapore court has held that it would only exercise its discretion to make such orders in respect of a foreign company where the company in question has assets in Singapore or has sufficient connection to Singapore.

The relevant factors to be taken into account in determining whether there is sufficient connection have developed through the case law in Singapore, typically with reference to English authorities. This was most clearly seen in the recent case of *Re Pacific Andes Resources Development* [2016] SGHC 210 ("*Pacific Andes*"), where the Singapore High Court considered the question of whether the presence of creditors within jurisdiction, particularly the branches of foreign banks, was sufficient to provide nexus.

The jurisdictional position in relation to administration proceedings and schemes in the courts of England and Wales is broadly comparable with the position in Singapore.

In relation to administration applications, the jurisdiction of the courts of England and Wales includes, but extends beyond, companies registered under the Companies Act 2006 to include both (1) a company incorporated in an EEA State other than the UK and (2) a company not incorporated in an EEA State but having its centre of main interests (COMI) in a member State other than Denmark: see paragraph 111(1A) of Schedule B1 to the Insolvency Act

WONG PARTNERSHIP'S SMITHA MENON

1986. In relation to (2) a company's centre of main interest is presumed to be the place of its registered office in the absence of proof to the contrary. An example of the potential width of the jurisdiction can been seen by the recent example of the English court placing a US company called Ronin Development Corporation into administration on the basis that, despite its place of registration, the company's centre of main interest was in the UK.

WONG PARTNERSHIP'S STEPHANIE YEO

As regards schemes, the position in England and Wales is similar to that in Singapore. The scheme jurisdiction is exercisable in relation to any company liable to be wound up under the Insolvency Act 1986: s 895(2)(b) of the Companies Act 2006. This includes any foreign company, which may be wound up as an unregistered company, under section 221 of the 1986 Act. As in Singapore, the English courts have made it clear that they will only exercise their scheme jurisdiction if the company has a sufficient connection with England and Wales: see *Re Drax Holdings* [2004] 1 WLR 1049.

Sufficient nexus/connection

As part of the Reforms, the mechanism of JM will be opened up to foreign corporate debtors and greater guidance will be provided to foreign corporate debtors on the factors that a Singapore court would take into account in determining whether sufficient nexus exists for its jurisdiction to be invoked. A non-exhaustive list of such factors includes where the foreign corporate debtor has:

(a) established or moved its head office to Singapore or has registered as a foreign company in Singapore;

(b) opened a bank account in Singapore and transferred funds into such account;

(c) chosen Singapore law as the governing law for the resolution of disputes arising out of or in connection with the loan or other transaction; and/or

(d) submitted to the jurisdiction of the Singapore courts through choice of forum clauses in loan documents.

With the aforesaid guidelines, foreign corporate debtors will have greater clarity as to when they can access the Singapore court's restructuring jurisdiction. However, it is to be noted that the above-listed connecting factors have not been tested in court yet and it is presently uncertain how much weight the courts would assign to each factor. That said, the Singapore courts have taken a commercial and facilitative view in respect of debt restructurings and have in a series of cases illustrated the progressive nature in which they approach and deal with cross border restructuring matters:

- In *Re Opti-Medix Ltd* [2016] SGHC 108, the Singapore High Court granted recognition to a Japanese bankruptcy trustee's powers over a

company incorporated in the BVI with assets in Singapore on the basis of COMI principles in the absence of a winding up order or recognition of the Japanese bankruptcy order in the BVI.

■ In *Re Taisook Suk (as foreign representatives of Hanjin Shipping Co Ltd)* [2015] SGHC 195, the Singapore High Court granted an interim stay of proceedings against Hanjin Shipping and its Singapore subsidiaries in support of Korean restructuring efforts.

In that regard, it would not be unrealistic to expect that the Singapore courts would be open minded and facilitative in respect of foreign restructuring in Singapore and the courts would likely be flexible and progressive in rulings on whether sufficient nexus exists in each case. Foreign corporate debtors may therefore look to Singapore to restructure by establishing the required nexus with Singapore through *inter alia*, establishing the suggested connecting factors.

In particular, to establish nexus, a foreign corporate debtor may utilise the upcoming inward-domiciliation regime to change its registration to Singapore. The Ministry of Finance and Accounting and Corporate Regulatory Authority of Singapore has recently proposed an inward re-domiciliation regime in which foreign companies may transfer their registrations to Singapore. Upon said transfer, the foreign company would be regulated under the CA as a Singapore company limited by shares.

Alternatively, in the case where the governing law and forum selection clauses in loan documents do not elect Singapore law or, as the case may be, Singapore courts as the governing law or dispute resolution forum, a foreign corporate debtor may consider amending the governing law and foreign selection clauses to select Singapore law as the governing law or the forum to resolve disputes so as to establish nexus.

Such a practice is not uncommon in the US, and in the UK the English courts have made it clear that a sufficient connection can be established by the relevant agreement to be compromised being governed by English law, including where the original governing law has been changed to English law for the purposes of the restructuring itself: see *Re Apcoa Parking Holdings GmbH* [2014] EWHC 1867 (Ch); *Re DTEK Finance BV* [2015] EWHC 1164 (Ch) and *Re TORM A/S* [2015] EWHC 1749 (Ch). It remains to be seen if the Singapore courts would be facilitative and extend jurisdiction in such situations.

To this end, it is pertinent to note that Singapore recently ratified the 2005 Hague Convention on Choice of Court Agreements (the "Convention") and enacted the Choice of Court Agreements Act 2016 (Act 14 of 2016) which implements the Convention's provisions. Under the Convention, where a court is the chosen court of an exclusive choice of court agreement covered by the Convention, the dispute must be heard by that court. Further, the courts of the other contracting states will be obliged to recognise and enforce the judgment by that court on that dispute.

Singapore's ratification of the Convention will therefore widen the recognition and enforceability of judgments issued by the Singapore court and is likely to greatly facilitate cross-border restructuring efforts. In a similar vein, Singapore has also just launched the judicial insolvency network for cross-border insolvencies: a framework for communication and co-operation between Courts in cross-border insolvencies where multiple processes are filed across various jurisdictions.

Staying existing creditor claims

In order to be able to put in motion any restructuring plan or measure, it is absolutely essential that prior to such rehabilitation, creditors are restricted from taking any steps to enforce their claims as against the corporate debtor. Under the current laws, an automatic stay against creditors only arises on application for JM but JM applies only to companies incorporated in Singapore. In contrast, a SOA is accessible by foreign corporate debtors, but under current laws, in respect of a SOA, a stay is only granted after specific application to the court for a moratorium.

There are, however, several existing limitations under the current framework. First, subsidiaries of a company with sufficient nexus must establish sufficient connection independently even if the group of companies intend to present a group restructuring with a composite, inter-dependent and inter-connected restructuring plan (as was the case in Pacific Andes) in order for the court to

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exercise its discretion and grant a stay on the back of a SOA. This results in a cumbersome restructuring process where each individual company has to apply before the courts of its respective country of incorporation to seek the relevant stay.

Second, any orders restraining proceedings made prior to the sanction of a SOA only apply to proceedings in Singapore and would not restrain creditors subject to the Singapore court's jurisdiction from commencing or continuing proceedings elsewhere. While the court in Pacific Andes suggested that it could be possible to invoke the equitable jurisdiction of the Singapore court to restrain proceedings in other jurisdictions where the Singapore court has sanctioned the SOA, the inability to prevent creditors from commencing or continuing proceedings at the early stages of restructuring greatly hampers any restructuring efforts.

With the Reforms, corporate debtors can look towards enhancements to stave off creditor actions and prevent decline in value of the distressed entity due to creditor enforcement actions. The Reforms seek to, among other things, (i) extend the mechanism of JM to foreign companies and (ii) enhance the moratorium in respect of SOAs by, among other things, specifically allowing for applications for a moratorium to be made prior to an SOA application (provided that the corporate debtor intends to make such applications) via the proposed new s.211B(1) of the CA. Pursuant to the proposed s.211B(8) of the CA, an automatic stay will arise for a period of 30 days from the making of the s.211B(1) application. Furthermore, the stay of creditor actions will be extended to the subsidiary of a corporate debtor (s211C).

The stay of actions is intended to have extraterritorial effect through the exercise of the Singapore court's *in personam* jurisdiction in respect of any act that takes place inside or outside of Singapore by a person in Singapore or within the jurisdiction of the Singapore courts pursuant to the proposed s.211B(5) CA. In addition, extra territorial effect can be achieved through cross border recognition arising from Singapore's adoption of the UNCITRAL Model Law on Cross-Border Insolvency.

In the UK, a statutory interim moratorium comes into effect when an administration order is applied for or notice is given of an intention to make an out of court appointment, which becomes permanent when the company is placed in administration: paragraphs 43 and 44 of Schedule B1 to the Insolvency Act 1986. There is currently no statutory provision for a moratorium pending consideration and approval of a scheme. This is an issue that has been highlighted for potential reform, and (although the details still need to be worked out) there was broad support in principle for the general proposal contained in the Insolvency Service's consultation paper last year. In the meantime, a company in litigation before the courts of England and Wales may apply for a stay of the whole or part of those proceedings either generally or until a specified date. The court will be prepared to grant such a stay in circumstances where the company can demonstrate that it wishes to propose a scheme which has a reasonable prospect of going ahead, pursuant to the court's general powers of management as set out in Rule 3.1 of the Civil Procedure Rules: see *BlueCrest Mercantile BV v Vietnam Shipbuilding Industry Group* [2013] EWHC 1146 (Comm). In

THE SINGAPORE SUPREME COURT BUILDING, DESIGNED BY FOSTER + FOSTER TO CONVEY THE DIGNITY, TRANSPARENCY AND OPENNESS OF THE LEGAL SYSTEM

addition, it is also open to the company and the scheme creditors to enter into a standstill agreement while the scheme is being formulated and considered, and they not infrequently do so.

Transparency to protect the interests of creditors

While there will be greater liberalisation to the granting of moratoriums, this is accompanied by various safeguards. First, the moratoriums under the proposed s.211B(1) of the CA is limited in time and may be either absolute or limited by conditions imposed by the courts. Second, under the proposed s.221B(6), prior to ordering a stay applied for under the proposed s.211B(1), the court is required to order the corporate debtor to submit to the court within a time specified by the court information relating to the debtor's finances as may be necessary to enable creditors to assess the feasibility of the proposed compromise or arrangement including:

(a) reports on the valuation of the company's significant assets;

(b) information relating to the acquisition, disposal of or grant of security over property of the corporate debtor within 14 days after such acquisition, disposal or grant;

(c) periodic financial reports of the company and the company's subsidiaries; and

(d) forecasts of profitability and cash flow of the corporate debtor and the corporate debtor's subsidiaries.

Thus, while corporate debtors can reap the benefits of enhanced stays, the interests of existing creditors are also taken into account and protected by way of the various safeguards that can be put in place simultaneously. Creditors can also take an active approach to safeguarding their interests by taking advantage of the enhanced information flow by way of the mandatory information provision regime under the proposed s.211B(6) to initiate an application to set aside the stay if necessary.

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Let the funds flow—opening the tap for rescue financing

As much as credit is a lifeline to solvent businesses, financial support to a distressed corporate debtor is essential for restructuring. The distressed corporate debtor would need funds to meet among other things its general corporate expenses while it attempts to trade back into solvency pursuant to whichever rescue measure it ultimately adopts. The current Singapore legal system is modelled after a UK style system wherein creditor rights and pre-insolvency entitlements are respected with very limited redistribution. There are no provisions allowing rescue financing to obtain super priority status and the approach has largely been that such matters should be agreed between the creditors of the company. This presents a huge hurdle to the debtor company in its bid to obtain rescue financing as it would typically have a sizeable number of creditors, making it difficult to obtain the consent of all the creditors. Further, while it would theoretically be possible for the debtor to propose a SOA to cram down on dissenting creditors, in practice, the process of putting in place a SOA would take more time than the debtor can afford.

With the Reforms, Singapore has fine-tuned its restructuring and insolvency framework to encourage rescue financing by adapting the US features of super priority and super priority liens in respect of rescue financing. Existing creditor interests are balanced by way of the safeguards adopted and the general UK style creditor friendly framework that the Singapore restructuring and insolvency framework was based on.

The Reforms introduce the concept of super priority liens and super priority. The proposed S.211E(1)(d) to the CA allows the corporate debtor to apply for super priority lien status in respect of security interests granted to rescue financiers subject to the safeguards specified therein. The super priority lien essentially allows the rescue financier's security interest over a previously secured asset to rank either *pari passu* or ahead of the security interest of the existing secured creditor. The proposed s.211E(1)(a) and s.211E(1)(b) of the CA on the other hand provides for super priority in respect of unsecured rescue financing (subject to the conditions specified therein) by providing that credit obtained to keep the company as a going concern and other rescue financing are to be accorded (i) preferential status as an expense of winding up mentioned in s.328(1)(a) of the CA and (ii) to have priority over all preferential debts specified in s.328(1) of the CA respectively.

From the point of view of the distressed corporate debtor, inclusion of super priority and super priority liens to the Singapore restructuring and insolvency landscape is a welcome change as its restructuring efforts are no longer limited to seeking a compromise or rescue financing from its existing creditors.

As for lenders and specialist investors, the extension of super priority or super priority liens would likely encourage and facilitate the provision of rescue financing to distressed corporate debtors given that the previous regime did not provide for much credit

protection in respect of new rescue monies where a distressed corporate debtor's assets were already subject to pre-existing global security interests. Furthermore, super priority and super priority liens are well established and central to US-style debtor-in-possession ("DIP") rescue financing and allowing such measures may be attractive to US-type DIP rescue financiers.

In the UK there is currently no provision for strict super-priority given to corporate rescue funders similar to that to be found under Chapter 11 or under the Singapore law reforms. The UK Government published a consultation in 2009, but the response was such that the proposals were not taken forward. The Insolvency Service's consultation last year included proposals for super-priority for rescue funding. Of those who responded to the consultation, however, 73% disagreed with the proposals, some of which included overriding negative pledge clauses in existing security arrangements in certain circumstances. It was pointed out that the existing framework does permit rescue finance, and that there is currently a market for rescue financing in the UK. It remains to be seen, therefore, whether (and in what form) the proposals will be taken forward.

Funds flow not a torrent that sweeps away creditor rights

At first blush, an existing creditor may genuinely express concern at a rescue financier jumping the queue and attaining the same or better priority in its claims. However, super priority and super priority liens are imposed by courts subject to rather wide-ranging safeguards which uphold the rights of existing creditors and achieve a balanced approach.

Specifically, to obtain super priority under the proposed s.211E(1)(b), it must be shown that:

(a) it is necessary for the credit to be extended to the corporate debtor for it to continue as a going concern; and

(b) the corporate debtor is unable to obtain the credit from any other party unless that debt has super priority status.

As regards granting super priority liens under the proposed s.211E(1)(d), it must be shown that:

(a) it is necessary for the credit to be extended to the corporate debtor for it to continue as a going concern;

(b) the corporate debtor is unable to obtain the credit from any other party unless the credit is secured and subject to a super priority lien; and

(c) there is adequate protection of the interest of existing secured creditors in relation to property over which the super priority lien attaches.

With the Reforms, Singapore has fine-tuned its restructuring of the insolvency framework

The adequate protection of existing secured creditors may be provided pursuant to the proposed s.211E(5) by way of:

(a) requiring the corporate debtor to make cash payments or periodic cash payments to the existing secured creditors to the extent that the grant of super priority lien results in a diminishing of value of the existing secured creditors' interest in the property;

(b) provision of additional or replacement security interests in the property of the corporate debtor to the extent that the grant of super priority lien results in a diminishing of value of the existing secured creditors' interest in the property; and

(c) the granting of other relief (other than entitling the existing secured creditors to compensation) that would result in the realisation by the existing secured creditors of the equivalent of those creditors' existing secured interest in the property.

Further, in the event that the restructuring is successful and the corporate debtor is traded back into solvency, the position of existing creditors will likewise be enhanced. Instead of facing write downs or having to prosecute claims and realise the breakup value of the debtor's assets, creditors may be able to have their claims satisfied in full and continue to maintain the relationship with the corporate debtor (and the yields associated therewith).

In addition, it is envisaged that with the new provisions on the super priority liens, hedge funds and other specialist investors can play a more active role in the turnaround of companies undergoing restructuring. This

could take the form of strategies similar to the "loan-to-own" strategy currently employed in analogous restructurings under Chapter 11 in the U.S. where an activist investor provides financing with the intention of converting debt into equity upon the borrower's emergence from Chapter 11.

Even banks which had previously extended loans to the debtor company can take advantage of the new provisions by engaging in "loan-to-loan" strategies currently employed by banks in American Chapter 11 restructurings where a bank's distressed lending group provides super-senior or exit financing with the intention of improving the operating performance of the distressed debtor, and potentially increasing the chance that they recover their pre-distress loans.

Adding more tools to the insolvency toolkit

While access to creditor stays and rescue financing are necessary conditions for a successful turnaround of a corporate debtor, they are by no means exhaustive. The next essential element of a successful rescue is the implementation of the compromise or arrangement. Such implementation can be done by way of a SOA. Under the current regime, a SOA can be approved by the courts only after achieving approval from (i) a majority in number of the creditors and/or shareholders in the relevant meetings and (ii) a majority representing three fourths in value of the creditors and/or shareholders in the relevant meetings. These creditors and/or shareholders, however, must be classified based on the similarity or dissimilarity of their legal rights against the company and the abovementioned majority approval must be obtained in each separate class for the court to have jurisdiction to sanction the SOA. While this classification requirement was intended to protect minority creditors whose rights might be crammed down, there are various difficulties with this strict approach. In this regard, not only does it allow creditors with comparatively smaller exposures to block the SOA and thwart a *bona fide* restructuring, there is also scope for a deadlock where different classes withhold their consent as a bargaining tool to be resolved.

Similarly, in the UK (where the Singapore system stemmed from) a scheme can only be sanctioned by the court under section 899(1) of the Companies Act 2006, if there is a majority in number representing 75% in value of the creditors or class of creditors (or members) present and voting either in person or by proxy that agree to the scheme proposal. In addition to the statutory requirements, the court exercising its power to sanction a scheme will also ensure that the class was fairly represented by those attending the meeting and that the statutory majority are acting bona fide and are not coercing the minority, and that the scheme is such as an intelligent and honest man, being a member of the class concerned and acting in respect of his interest, might reasonably approve: see *Telewest Communications plc (No. 2)* [2005] 1 BCLC 772 at [20] – [22].

Similar to Singapore, the test adopted by the English courts when determining whether more than one meeting of creditors is necessary is whether the rights of those creditors against the company are so dissimilar as to make it impossible for them to consult together with a view to their common interest: see *Re Hawk Insurance* [2001] 2 BCLC 480 at [26]. The English courts have also emphasised that for the purposes of determining classes the relevant rights are the legal rights of the creditors against the company rather than their interests not derived from rights against the company. Where a scheme is proposed as an alternative to an insolvency procedure, the approach taken by the courts is to consider the rights which the creditors would have against the company in an insolvency: see *Re Hawk Insurance* [2001] 2 BCLC 480 at [42].

Court-approved cram down

Apart from enhancing stays and the instituting of super priority and super priority liens, the Reforms in Singapore also enhance the courts' powers to intervene in SOA approvals which would solve problems such as hold out creditors who can stall an SOA to the detriment of the corporate debtor and creditors who are aligned with the proposed rescue plan. Among other things, the Reforms:

(a) empower the courts through the proposed s.211G of the CA to order a re-vote in respect of a meeting to approve a compromise or arrangement on such terms as the court may

order and among other things, to make orders shifting the weight attached to the vote of any creditor in that further meeting where necessary;

(b) give the courts power to order a cram down in respect of dissenting creditors on an application by a creditor or the corporate debtor so long the court is satisfied that the compromise or arrangement does not unfairly discriminate between two or more classes of creditors and is fair and equitable in respect of each dissenting class and the other conditions specified in the proposed s.211H of the CA are met;

(c) allow the courts to approve a compromise or arrangement without the conduct of a meeting of creditors under the proposed s.211I of the CA upon an application by the corporate debtor subject to the safeguards specified therein; and

(d) enable the courts to review acts and/or omissions as well as reverse or modify decisions or acts of the corporate debtor or scheme manager where there exists a breach of any term of the compromise or arrangement on an application by the company, a creditor bound by the scheme or the scheme manager pursuant to the proposed s.211J of the CA.

As seen from the above outline, the courts will take on the role as facilitators to aid corporate debtors in putting in place a SOA and to ensure that the terms of the approved SOA are complied with. Difficulties caused by non-cooperating holdout creditors can be eliminated and courts can have greater oversight in respect of restructuring efforts. This is particularly desirable given the Singapore court's track record of being commercial minded and more so given that the Reforms also contemplate the setting up of specialist insolvency courts staffed by judges with specific experience in restructuring work and augmented by leading international insolvency judges who may be appointed in the Singapore International Commercial Court as international judges.

In the UK, the cram-down of a rescue plan on to 'out of the money' creditors, where appropriate, is already possible through a combination of a scheme and an administration. The Insolvency Service's consultation last year also included a proposal for a court-approved cram down in certain circumstances. The proposal was broadly welcomed in principle by 61% of those responding, although there was resistance to change to the scheme jurisdiction itself (which has existed in essentially unchanged legislative form for well over a century). It was also widely acknowledged that valuation (necessary to determine the fairness of a plan being crammed down on dissenting classes) is a contentious topic, with a sizeable proportion of respondents expressing the view that the relevant comparator should be a 'next best alternative value' rather than a liquidation value test.

Exciting times lie ahead for insolvency practitioners in Singapore

What lies ahead

With the upcoming reforms, exciting times lie ahead for insolvency practitioners in Singapore. Foreign corporate debtors can look forward to a more facilitative regime for restructuring and specialist financiers and lenders can look forward to the opening up of the market for rescue financing with the schemes under the watchful eye of highly skilled and specialist judges. In this regard, it is noteworthy that the Reforms have not prohibited the making of credit bids in the sale of the debtor's entire business or that of specific assets. It would therefore be possible, in theory, for special situation investors to participate in the bidding process by acquiring the rights of a secured creditor through a legal assignment and making a credit bid for the business or assets.

As for existing creditors, they can take solace in the extensive statutory safeguards and the commercial mindedness of the insolvency judges for their interests to be protected and can also leverage on the enhanced rescue financing framework as an option to provide further financing in attempts to turn the distressed corporate debtor around. In adopting the best features of UK and US style insolvency frameworks, Singapore aims to set up a balanced restructuring framework which safeguards the interests of each constituent in a corporate insolvency and enhances the efficiency of the restructuring process.

Shopping and scheming and the rule in Gibbs

In the aftermath of the Singapore High Court's judgment in *Pacific Andes Resources Development Ltd*, **Riz Mokal** discusses the deficiencies of the 'rule in *Gibbs*'.

The Singapore High Court's decision in *Pacific Andes Resources Development Ltd [2016] SGHC 210* ('*Pacific Andes*') provides the opportunity to examine the origin, rationale, limits, and defensibility of the so-called 'rule in *Gibbs*', named after though considerably pre-dating the judgment of the Court of Appeal of England and Wales in *Gibbs v Societe Industrielle* (1890) 25 QBD 399 ('*Gibbs*'). The focus is exclusively on the rule's application to the indebtedness of distressed debtors, that is to say, those who are actually or imminently insolvent. A principled way is proposed of distinguishing objectionable from legitimate forum shopping, and the application of the rule in the context of schemes of arrangement receives particular attention.

The rule in *Gibbs*

Pursuant to what law may debts be discharged? The obvious answer is the proper law of the debt. As far back as 1726, in *Burrows v Jemino* 93 ER 815, King LC accepted that a plaintiff discharged by a Leghorn court from liability under a bill of exchange drawn in Leghorn could not be sued in England. Lord Mansfield in *Ballantine v Golding* (1784) Cooke's Bkpt Laws 8th ed 487 extended the same rule to bankruptcy: no action lay in English courts on an Irish law-governed debt discharged in Irish proceedings. The rationale, expounded by Lord Esher MR in *Gibbs*, at p. 405, rests in the assumption that the parties have agreed to the application to the debt of all elements of the debt's proper law, including that governing discharge. This reasoning ('the reasoning in *Gibbs*'), already artificial in relation to contractual debts, would be stretched to breaking point if applied to the discharge of tortious and other non-voluntary liabilities (see e.g. *Phillips v Eyre* (1870) LR 6 QB 1, 28, and compare Pt III of the Private International Law (Miscellaneous Provisions) Act 1995, and the 'Rome II' Regulation No. 864/2007).

What about a debtor bankrupted and discharged in her place of domicile or another jurisdiction with which she has a close and established connexion? The matter came to a head in November 1800 in *Smith v Buchanan* 102 ER 3. The defendants had previously petitioned for their own bankruptcy under the insolvency statute of the State of Maryland, where they lived; had duly executed a deed in favour of their trustee in bankruptcy; and had delivered up their assets to him. In return, the Maryland court had discharged them of their indebtedness. They were subsequently sued in England for payment under an English law-governed contract for goods sold and delivered. The defendants' counsel argued forcefully that just as the English court would recognise the statute's effect in divesting the defendants of what used to be their property, so it should take cognisance of the discharge, "*the benefit of the condition on which [their property] was so divested*". Lord Kenyon CJ rejected the argument on the basis that "*a contract made in one country [cannot] be*

THE SINGAPORE HIGH COURT IN *PACIFIC ANDES* SHOWS THE WAY, AWAY FROM THE RULE IN *GIBBS* AND TOWARD A MORE UNIVERSALIST APPROACH

governed by the laws of another." That the English court would recognise the trustee's title to the defendants' former assets he explained on the basis that "*the right to personal property must be governed by the laws of that country where the owner is domiciled.*"

Leaps of logic over gaps in reasoning

There are at least four problems here. The first is the rational gap between the proposition that a debt may be discharged under its proper law, and the different proposition enshrined in the rule in *Gibbs*, that the debt may *only* be discharged under that law. The first rule is potentially inclusive, whereas the second is clearly exclusive. The reasoning in *Gibbs* does not justify the rule in *Gibbs*. It explains at most that some farsighted parties might reason to the conclusion that the debt's proper law would govern not merely its construction but also potentially its discharge. It does not justify restricting discharge solely to that one situation. (The difference is analogous, respectively, to that between a non-exclusive and an exclusive choice of forum.) After all, *thoughtful* farsighted parties might recognise other, potentially competing, bases for the discharge of their claims, such as the importance cost-effectively of protecting the debtor from creditor harassment and, in appropriate circumstances, of affording the debtor a chance at rehabilitation that might benefit all its stakeholders as a group.

Second and in any case, there is the substantive unfairness highlighted by the defendants' counsel in *Smith v Buchanan*. English law recognises the effect of the debtor's divestment under foreign bankruptcy proceedings while still holding her to the obligations acquittal from which was an intended consequence of that divestment, and fulfilment of which that divestment might decisively have rendered impossible.

Thirdly and relatedly is the double standard of denying to those claiming the benefit of a foreign law discharge precisely what English law confers on those able to

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invoke its protection: *"A foreign certificate"* of discharge, states Pollock CB in *Armani v Castrique* (1844) 153 ER 185, 186, *"is no answer to a demand in our Courts; but an English certificate is surely a discharge as against all the world in the English Courts. The goods of the bankrupt all over the world are vested in the assignees; and it would be a manifest injustice to take the property of a bankrupt in a foreign country, and then to allow a foreign creditor to come and sue him here."* The same injustice, needless to say, is manifest regardless of the nationality of an otherwise competent court ordering the bankrupt's divestment. Relatedly, there is the awkwardness of expecting recognition of English law discharges of foreign law obligations in other jurisdictions, in such cases as *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch) and *In Re Magyar Telecom BV*, Case No 13-13508 (SHL) (Bankr. S.D.N.Y. Dec. 11, 2013), while refusing that courtesy to discharges issued in those same jurisdictions.

What if the English position is not hypocritical? Just as English courts recognise the universal effect of an English discharge, it may be said, they would recognise the universal effect *from the perspective of a foreign court* of discharge under that court's law.

Even assuming the meaningfulness of this exotic scenario, we are confronted with the fourth problem. A debtor with obligations governed by the laws of more than one jurisdiction may need either to incur the expense and delay of obtaining a discharge separately in each of those jurisdictions, or else remain at the mercy of some of its creditors. This problem, though not new, is particularly acute in insolvency systems committed to affording distressed but viable debtors with the chance of trading out of their difficulties. Such rehabilitation might depend on an effective restructuring of debts governed by multiple laws, and might be sunk by the additional financial and time costs of multiple proceedings in several jurisdictions. This could be harmful not merely to the debtor, its employees and equity holders, but also to its creditors, who as a group could lose the benefit of an ongoing relationship with a rehabilitated counterpart.

Pacific Andes

This provides the context for examining the Singapore High Court's decision in *Pacific Andes*. Four members of the Pacific Andes corporate group ('the Applicants') applied pursuant to section 210(10) of the Singapore Companies Act for moratoria on any action or proceeding against any of them. Section 210 governs schemes of arrangement similar to those under the UK counterpart statute though with the added benefit of a discretionary moratorium. Each of the Applicants was incorporated outside Singapore and, at the relevant time, several were subject to foreign insolvency proceedings. The great majority of the debt of one Applicant was denominated in Singapore dollars and raised and traded on

the Singapore Exchange. This debt was, however, governed by English law, the rest of the relevant debts were subject to Hong Kong law, and none fell under Singapore law.

Unsurprisingly, the rule in *Gibbs* formed one of the bases on which the Bank of America, a lender to some of the Applicants, opposed the application. It also submitted that the Singapore court ought in any case not to sanction a scheme since Hong Kong courts, which also apply the rule (see *Hong Kong Institute of Education v Aoki* [2004] 2 HKLRD 760), would not recognise or give effect to it.

Judicial Commissioner Kannan Ramesh of the Singapore High Court was not persuaded. He adverted to the scholarly criticism to which the rule in *Gibbs* has been subject. Two of Ramesh JC's sources constitute indispensable reading on the topic. (Writing extra-judicially Ramesh JC himself has subsequently made an important contribution: 'The *Gibbs* principle: A tether on the feet of good forum shopping', *Singapore Academy of Law Journal* (forthcoming).)

The first, which received a detailed citation, is Look Chan Ho's *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell, 2016), paras 4-096 to 4-107. Ho notes that while the rule in *Gibbs* regards bankruptcy discharge exclusively as a contractual matter, this jars with the nature of bankruptcy itself as a forum for the resolution of inter-creditor matters, not merely or even primarily creditor/debtor ones. Creditors do not characteristically have contractual relations inter se, which renders contractual analysis inapposite. Further and in any case, the reasoning in *Gibbs* attributes to parties a partial or even mistaken understanding of the law of applicable law. They are regarded as expecting the extrapolation into insolvency proceedings of the proper law of their claims, yet it is the law of the debtor's centre of main interest ('COMI') that may govern discharge under the European Union's Regulation on Insolvency Proceedings ('the Insolvency Regulation'). Ho also points out that the rule in *Gibbs* has an affinity with 'territoriality', that is, with the view that the law of a particular jurisdiction governs those

The legal corpus has outgrown the Gibbs rule limb

elements of an insolvency which have the requisite connexion with that jurisdiction, and which ought to be addressed in proceedings opened in that jurisdiction's courts. This is to contrasted with universalism, which supports universal recognition and effect for one proceeding in relation to a debtor, usually that opened in its COMI. Not only is English law committed, for the moment, to the universalist Insolvency Regulation, it has also incorporated the even more universalist Model Law on Cross-Border Insolvency ('the Model Law') promulgated by the United Nations Commission on International Trade Law. The legal corpus has outgrown the *Gibbs* rule limb.

Ramesh JC's second scholarly source is Professor Ian Fletcher's *Insolvency in Private International Law* (Oxford University Press, 2nd ed, 2005), paras 2.127 and 2.129. After subjecting the rule in *Gibbs* to penetrating criticism, Professor Fletcher proposes the development of an additional rule by which parties to a contractual relationship governed by the law of a jurisdiction adhering to the rule and reasoning in *Gibbs* would be attributed with the expectation that their claims might be discharged in proceedings in a jurisdiction with which the debtor has an established connexion of residence or business ties.

This proposal commended itself to Ramesh JC, who also noted that the English High Court in *Global Distressed Alpha Fund I Ltd v PT Bakrie Investindo* [2011] 1 WLR 2038, [14], while upholding the rule in *Gibbs*, did so only reluctantly and because constrained by precedent. Not being so constrained, Ramesh JC was minded to accept Professor Fletcher's proposal. He also took the view that if the Applicants were content to seek to restructure their liabilities in Singapore notwithstanding doubts about efficacy in Hong Kong courts, the Singapore court should feel free to assume jurisdiction so long as it has subject matter jurisdiction and sufficient nexus to justify its exercise.

Forum shopping is objectionable if it represents an attempt by some stakeholder constituencies to secure sectional benefits, when this is to the detriment or at the expense of others with accrued claims available in the exisiting forum but lost or diminished in the one being shopped for

Forum shopping

In another interesting element of his judgment, Ramesh JC noted that the rule in *Gibbs* could prove an impediment to "*good forum shopping*". He cited from *Re Codere* [2015] EWHC 3778 (Ch), [17]-[18], where the English High Court mentioned several recent attempts, all successful, to bring a company under the English court's scheme jurisdiction. These included COMI shifts on the eve of the application to convene a meeting (*Re Indah Kiat International Finance Company BV* [2016] EWHC 246); changes in the governing law of the debt to be schemed (*Re Apcoa Parking Holdings GmbH* [2014] EWHC 3849 (Ch)); and the creation of new entities and voluntary assumption of new liabilities governed by English law (*Re AI Scheme Limited* [2015] EWHC 1233 (Ch); *Re Codere* itself). In each of these cases, the attempt to shop for the English forum was "*not in order to evade debts but rather with a view to achieving the best possible outcome for creditors*" (ibid). The supplemented rule in *Gibbs* would, opined Ramesh JC, form part of and complement this global move toward value-enhancing insolvency processes.

I respectfully agree, and would venture the following principled understanding of objectionable and legitimate forum shopping.

Steps taken to facilitate the assumption of jurisdiction by a court are *objectionable* if intended or reasonably likely to secure sectional benefits to one or more stakeholder constituencies (say, the debtor's directors and shareholders) but to the detriment or at the expense of one or more categories of claimant (say, trade creditors, employees, or tax authorities) with accrued claims against the debtor that are available in the existing forum but would be lost or diminished in the forum being shopped for.

By contrast, forum shopping is *legitimate* if intended or reasonably likely to maximise the value available for the benefit of all relevant claimants considered together without resulting in prejudice to any class of accrued claim holders. Value might be maximised because of enhanced prospects for the restructuring of the debtor's liabilities and/or operations and thus its survival, or for a going concern sale of its business.

Distress, insolvency proceedings, and schemes of arrangement – Developing the law

The critique of the rule in *Gibbs* outlined above has no application to the restructuring of the liabilities of a solvent debtor. Crucially, however, the critique is not limited to the indebtedness of debtors who are in insolvency *proceedings*. What matters is whether the debtor is factually distressed in the sense defined in the Introduction. With this in mind, the following five scenarios are worth considering. The intention is to explore development of the law that is sound in principle and that advances fundamental policy objectives.

First, where the debtor is subject to insolvency proceedings in its COMI and a scheme of arrangement is proposed under the COMI court's jurisdiction, or where the scheme process itself is classified as an insolvency proceeding, the foregoing analysis applies seamlessly. Discharge and *a fortiori* variation of debt by order of the COMI court should be accepted as valid and effective by other courts worldwide.

Second, the debtor is not yet in insolvency proceedings, is unfortunate enough for its COMI to be located in a jurisdiction whose laws and/or practices would not permit value preservation, but is fortunate enough to have the resources to engineer a COMI shift. Its decision makers may legitimately facilitate assumption of jurisdiction by a court under whose insolvency law the debtor's distress could best be addressed. That court should accept jurisdiction so long as it has subject matter jurisdiction and there (now) exists a sufficient connexion between it and the debtor. Again, discharge and variation by order of such court should in principle enjoy

LEGITIMATE FORUM SHOPPING BAKES EVERYONE A BIGGER PIE, WHEREAS OBJECTIONABLE FORUM SHOPPING INVOLVES SNATCHING ANOTHER'S SLICE OF THE SAME SMALL PIE.

worldwide validity and effect.

Third, no insolvency proceedings are open in relation to the distressed debtor, none is intended, the insolvency law(s) applicable to the debtor permit(s) this, and a self-standing scheme is proposed in the debtor's COMI. That the debtor's decision-makers do not wish to open insolvency proceedings could be for any of several legitimate reasons. Paradigmatically, the decision makers might wish to avoid subjecting the debtor to the 'stigma of insolvency', that is to say, adverse responses from counterparties such as suppliers refusing discounts, buyers discounting warranties and therefore reducing what they were willing to pay, the exodus of key employees, and also adverse entries on credit history records that would make it costlier and more difficult to raise credit. Notwithstanding the absence of insolvency proceedings, it would seem appropriate for the court to consider and sanction a suitable scheme, and for courts elsewhere to recognise and give effect to this scheme. This would, by hypothesis, be in the interests of the stakeholders as a group.

Fourth, no insolvency proceedings are intended but the COMI is located in a jurisdiction lacking an efficient scheme process. Here, it may be appropriate for a different court with subject matter jurisdiction and a close and stable connexion with the debtor to permit and oversee the scheme process even in the absence of a COMI shift, and also appropriate for a resulting scheme to be accorded worldwide effectiveness.

Fifth and finally, two courts in different jurisdictions sanction mutually inconsistent schemes, and a third court is required to decide whether to give effect to either of them. In this improbable scenario, the court should make that choice by reference, first, to standard law of applicable law principles, and subject to that, to the principles of legitimate and objectionable forum shopping, so as to identify which sanctioning court had been better placed to have notified and convened creditors, ensured a fair process, and sanctioned a value-maximising scheme.

** I am deeply grateful to Look Chan Ho, Professor Irit Mevorach, Judicial Commissioner Kannan Ramesh, and Antony Zacaroli QC for discussion, comments, and advice. The views expressed here, the mistaken ones in particular, are mine alone.*

Litigation privilege and the underlying rationale

Served witness statements are compellable in the hands of the server at the suit of a third party who is not a party to the litigation in which they were served. Primeo Fund (in official liquidation) v Bank of Bermuda (Cayman) Ltd & Anr, 16 November 2016, Cayman Islands Court of Appeal (President Sir John Goldring, Newman and Morrison JJA) No. 10 of 2016. By **Richard Fisher**

Primeo is a Cayman Islands mutual fund that placed investments with Bernard L. Madoff Securities Limited ("BLMIS"). It has brought proceedings against its former administrator and custodian, members of the HSBC Group, for breach of duty seeking damages of up to almost $2 billion. A four-month trial has just concluded in the Cayman Islands involving five members of chambers (Tom Smith QC, Richard Fisher, William Willson, Toby Brown and Robert Amey). Judgment is awaited.

The continuing importance of the Cayman Islands as a jurisdiction for resolving major commercial disputes is illustrated by the ongoing Primeo and SAAD litigation (a year-long trial involving a further four members of chambers), and the fact that, before Christmas, the litigation support providers Magnum (whose electronic trial bundle systems are being used in both pieces of litigation) had over half of their staff located in Cayman dealing with Primeo, SAAD and other matters. In terms of commercial banking or insolvency disputes going to trial, Cayman is currently as active as any other common law jurisdiction in the world.

The recent appointments to the Cayman Islands Court of Appeal ("CICA") of various senior former English appeal judges (including Sir John Goldring and Sir Bernard Rix) lend further strength to the jurisdiction. One of the many preliminary skirmishes in the Primeo litigation came before the CICA in August last year, with judgment delivered in mid-November (when the Primeo trial had already started).

The issue raised is of general importance to all litigators in any jurisdiction and, surprisingly, one that has not been the subject of recent consideration by any English or Cayman Islands appellate decision. It arose in circumstances where an Irish fund ("Thema"), which had acted as a feeder fund to BLMIS, had previously brought proceedings in Ireland against an HSBC group entity ("A") seeking damages in broadly similar circumstances to the claims made in the Primeo litigation. The defendant in the Thema proceedings was a different HSBC Group entity to the defendants in the Primeo proceedings ("B" and "C"). Witness statements were exchanged between the parties in the Thema proceedings, which then settled before the witnesses were called to give evidence at trial.

The defendants in the Primeo proceedings served witness statements from certain of the same individuals who had produced witness statements in the Thema litigation. A had provided B and C with copies of the witness statements served in the Thema litigation. B &

C asserted litigation privilege against Primeo in the Cayman Islands proceedings on the basis that (i) the served witness statements remained subject to litigation privilege in the hands of A unless and until the witnesses were called to give evidence at trial; (ii) the statements had been provided by A to B & C on a common interest basis.

The issues that the Court was asked to determine on appeal were (i) whether the final version of witness statements that had been served were capable of attracting litigation privilege; and (ii) if so, whether the act of service amounted to a waiver of privilege (and if so, to what extent)? It was common ground that Cayman Islands law determined whether or not the statements were privileged. The ultimate issue on either analysis was "whether the statements become compellable in the hands of the server at the suit of someone not a party to the litigation in which they were served" ([20]).

Overturning the decision of Mr Justice Jones QC, the CICA concluded that litigation privilege does not apply to signed witness statements at the time that they are exchanged by parties to litigation in advance of trial. It was not therefore necessary to consider the second stage argument regarding waiver of privilege.

Although the recipient of the witness statements may be subject to restrictions on use arising from the applicable Court rule/the implied undertaking, the party that has produced the witness statements is unable to assert litigation privilege in the final exchanged versions of the statements. As such, if engaged in subsequent litigation with a third party, A will not be able to assert litigation privilege in the served versions of the witness statements. Equally, whether or not A provided the statements to B&C on a common interest basis, such statements are not capable of attracting litigation privilege and therefore, in this instance, were required to be disclosed by B&C to Primeo.

In so holding, the CICA followed the reasoning in a prior English Court of Appeal case (*Visx v Nidex* [1999] FSR 91) and a decision of the Federal Court of Australia (*Australian Competition and Consumer Commission ("ACCC") v Cadbury Schweppes* (2009) 254 ALR 198).

When giving the Court's judgment, Sir John

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Goldring emphasised the importance of the essential rationale for litigation privileged: "the public interest in parties and their lawyers having the freedom properly to prepare their case" (see the classic statement of Sir George Jessel MR in *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 at 649). The Court proceeded on the basis that "since **...** an assertion of privilege represents an inroad on the general principle that justice is better served by the disclosure rather than the suppression of relevant documents and evidence, the courts have emphasised that the scope of privilege should not be viewed expansively" ([16]).

In *Visx*, Aldous LJ had emphasised (in the context of a claim to privilege made in respect

'The purpose of creating the finalised proofs of evidence is different from the purpose for preparing drafts...'

of depositions and answers to interrogatories in prior proceeding in the US) the importance of this underlying rationale for litigation privilege to any analysis of whether documents were compellable. In that instance, the English Court of Appeal had concluded that the documents should be disclosed because they were not of a type that fell within the scope of the rule as explained in *Anderson* (*Visx* at page 12). That was because they were not communications made by a party to his lawyer, or part of the confidential preparations by a party of his case. As such, the starting point (before any question of waiver arose) was to consider whether the document in question was of a type that required litigation privilege to attach in light of the purpose of that doctrine.

Agreeing with Primeo, the CICA accepted that there is a material difference between a draft witness statement (clearly subject to litigation privilege) and the finalised version that is served. The served witness statement is not a document that the public interest (in accordance with the *Anderson* rationale for litigation privilege) requires be treated as subject to litigation privilege. Thus, where service has occurred, the character of the served document is different, or has changed, from that of the draft (see [25]-[26]).

The *ACCC* case involved facts more similar to those in issue in the current proceedings. The issue was resolved in terms broadly consistent with the analysis in *Visx*. In prior litigation, ACCC had served on Visy (and other parties) a large number of finalised proofs of evidence of witnesses upon whom it intended to rely. The Court had ordered that the same implied undertaking as to confidentiality applied to the statements as to any other document disclosed during discovery. None of the witnesses gave evidence because the case was decided on the basis of agreed facts. In the subsequent Cadbury proceedings, Visy was joined by way of a cross-claim and sought to be released from the implied undertaking in respect of the statements. ACCC intervened and asserted privilege in respect of the statements, which claim to privilege was denied. The essential reasoning of the Federal Court (on appeal from the judge) was the same as that in the *Visx* case – that (see [37], [38], [45]):

"it is impossible for litigation privilege to apply to the finalised proofs of evidence, when the finalised proofs were created for the purpose of serving them on the ACCC's opponent and when they were in fact served on that opponent. The rationale for litigation privilege is different from that of advice privilege, and rests on the basis that, in the adversarial system, the legal representatives and their clients generally control and decide for themselves which evidence they will adduce at trial, without any obligation to make disclosure to the opposing party or parties of the material acquired in preparation of the case.

...

the purpose of creating the finalised proofs of evidence is different from the purpose for preparing drafts..."

The Federal Court's conclusion (again, based on the underlying rationale for litigation privilege) in that instance was clear (see [63]):

"... Once a document in question (here the finalised proof of evidence) is intended to be given to an opposing party, it is not a document in which privilege subsists. As a matter of principle, this is sufficient to conclude that no privilege attaches to the finalised proof of evidence."

The CICA rejected the Defendants' submissions to the contrary, based principally on the decision of Hobhouse J in *Prudential Assurance v Fountain Page* [1991] WLR 756. In *Prudential*, Hobhouse J was required to rule on whether a former defendant to proceedings in England who had received copies of documents including witness statements from the plaintiff, after which the proceedings had settled, was free to use those statements and an expert report for the purpose of proceedings in Texas where it was being sued in subsequent proceedings. Importantly, that decision was made at a time when the applicable rules did not provide a restriction on use of such materials (which provisions were changed shortly after the decision so as to include such a restriction). At page 774A of

the report, the learned judge (who was looking for a basis on which a restriction on use could be identified) alighted upon the language of privilege, and said:

"In my judgment when a statement is served pursuant to a direction … and the witness … is never called by that party to give evidence … that statement remains a privileged document in the same way as without prejudice communication remains privileged. The party serving the statement may not be compelled to disclose the statement to any person and is entitled to prevent any other person using that evidence without his consent and, in particular, using it as evidence against the person who originally served the statement."

He indicated (at page 774G) that he considered there to be a restriction on use arising both as a matter of inference from the then applicable rules, as well as from the confidential and privileged character of the statements/reports prior to service (p 774G), and concluded that "It may well be thought desirable to express the duty as an implied undertaking to the court".

In *ACCC*, the Court accepted (at [75]) that, despite the occasional reference to privilege, Hobhouse J's analysis was in fact a description of a form of implied undertaking. The CICA agreed that the decision in *Prudential* was not determinative of the issues in light of the state of the rules then applicable, and difficulties to which the language used by Hobhouse J potentially gave rise. In doing so, and ordering discovery of the statements, the CICA departed from the views expressed in Hollander's Documentary Evidence (12th Edition) at para 23-21 and Phipson on Evidence (18th Edition) at para 26-17 as to the likely analysis that a Court confronted with this issue would adopt. The reasons for so doing (see [71]-[81]) included that:

- The statements were served on a voluntary basis and contain material relevant to the proceedings in both Ireland and the Cayman Islands.
- The essential reasoning of the Federal Court in *ACCC* was correct, albeit the CICA expressed no view on what the position would be in relation to finalised statements prior to service.
- There was no good reason for litigation privilege to apply to finalised witness statements created for that purpose and unconditionally served: to so order was not inconsistent with the underlying rationale for litigation privilege as it would not prevent candour in the preparation of a case, or prejudice such preparation, or damage the public interest lying behind legal professional privilege.

It is clear that this is the result that the CICA considered reflected the underlying justice of the case. As Sir John Goldring observed at [17] (see also at [72]):

"[17] This case well illustrates why the scope of the privilege should not be viewed expansively. The previous statements deal with the same, or very similar issues, which the judge has to resolve in the present proceedings. The judge (as is agreed) would not even know the witnesses had made previous statements. He would be deprived of the fullest possible account of events. He would not know if the witnesses had been consistent in their accounts. He might in the result be deprived of a possible touchstone regarding the veracity of the witnesses' accounts. The context of the judge's ignorance would be a multi-million dollar claim by innocent investors."

Moving forward, and assuming that other common law courts will adopt the same approach, parties to litigation should be advised that served witness statements created in prior litigation are likely to be discoverable documents to which no litigation privilege subsists. Whilst the recipient of served statements will remain subject to the applicable court rules/implied undertaking on use, the server of the statements cannot rely on those rules as an answer to a subsequent application for disclosure. Although the language of the CICA judgment suggests that it might be argued that the position is different if and to the extent that the witness statements were served on a conditional basis, the rationale for treating such a case differently is difficult to discern. Where litigation has been commenced against different entities within a single corporate group, careful consideration needs to be given to the scope of the disclosure obligations of the particular defendants and whether any documents held elsewhere in the group fall within those obligations.

The Insolvency Rules 2016

Madeleine Jones summarises the key changes in the modernised Insolvency Rules which come into force next month.

As at the time of writing, the Insolvency Rules 1986 have been in force for a little more than 30 years. On 6 April 2017, they will be replaced by a new set of rules, the Insolvency Rules 2016 (dated by their passage by Parliament in October 2016). Schedule 2 of the 2016 Rules contains the Transitional and Savings Provisions relating to the rules (applied by Introductory Rule 4). Aside from the exceptions laid out in this Schedule, the 2016 Rules apply immediately on their commencement to all insolvencies, and not just those commenced after the commencement date.

The new Rules will not oblige practitioners to forget everything they know about insolvency procedure. Their primary function is to consolidate the existing rules and amendments. The stated aims of the re-drafting of the Rules are to restructure them, update their language to reflect gender neutral drafting practice, and modernise them to take account of amendments to the 1986 Act by the Deregulation Act 2015 ("DA") and the Small Business, Enterprise and Employment Act 2015 ("SBEE") (Explanatory Memorandum 2.2). After 28 amendments, the 1986 Rules have become a byzantine and cumbersome document, replete with repetition where similar or identical provisions apply to different insolvency procedures and exceptions to exceptions.

The draftman's desire to produce a user-friendly document is evident throughout. One unusual feature of the new Rules is the insertion of notes in square brackets into their text. These notes mainly give guidance as to the relationship of particular rules with sections in the Insolvency Act. The Explanatory Memorandum acknowledges that this practice is not the norm for a statutory instrument, but states that it is something that members of the Insolvency Rules Committee and other interested parties found useful (3.2).

Where processes are common to several insolvency procedures the provisions governing them stand in their own right, rather than being repeated in different sections for every insolvency proceeding. Thus, Part 14 treats "Claims by and distributions to creditors in administration, winding up and bankruptcy", Part 17 "Creditors' and liquidation committees" and Part 18 "Reporting and remuneration of office holders (administrators, liquidators and trustees in bankruptcy)", for example. The result is a leaner document in which general rules and exceptions to these are much easier to discern.

The Rules do not only reorganize existing procedure. They also make a number of changes to insolvency procedure. Some of the most significant are as follows:

- The Rules dispense with statutory forms for use in insolvency proceedings. Part 1 of the new Rules deal with the standard contents of documents for insolvency proceedings, so practitioners will need to find the rules governing the content of the document they wish to draft rather than locate a standard form.
- Proceedings are further simplified by the provision regarding "small debts" defined as less than or equal to £1,000 (r. 14.1(3)(c)). This


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concept is one newly introduced by a provision inserted into Sch. 8 of the Insolvency Act 1986 by SBEE which enables the Rules to make provision for a creditor with such a debt to be treated as having proved without going through the process of actually doing so (para. 13A). This provision is enacted in r. 14.3.

■ Schedule 9 of SBEE amends the 1986 Act by eliminating the requirement for certain meetings of creditors. Paragraphs 18, 29 and 38 replace the requirement for final meetings in MVL, CVL and compulsory liquidation with the requirement of a "final account" to be produced by the liquidator "showing how [the liquidation] has been conducted and [that] the company's property has been disposed of." Paragraph 21 omits section 98, which provided for a meeting of creditors to approve the liquidator in a CVL. The 2016 Rules make provision for these amendments. Rule 6.14 gives the requirements for an appointment of a liquidator in a CVL. Rules 5.10, 6.28, 7.71 and 18.14 state the requirements for the final accounts.

■ Rule 12.3 explains that the combined effect of section 117 of the 1986 Act (giving the county court concurrent jurisdiction with the High Court to wind up a company where its share capital does not exceed £120,000: s.117(2)) and section 251 (defining "the court" as "a court having jurisdiction to wind up the company") is to grant the County Court jurisdiction to deal with any of the insolvency proceedings in Parts 1 to 7 of the Act (CVAs, Administrations, Receiverships as well as Liquidations). Schedule 10 of the Rules give the destination of appeals from decisions of District Judges in corporate insolvency matters.

■ The Rules also encourage the use of modern forms of communication. By r. 1.46(4), a creditor is deemed to have consented to communication by email where the creditor customarily communicated with the debtor by email prior to the commencement of insolvency proceedings. Rule 1.50 entitles an office-holder to give notice to creditors that documents will be available for viewing on a website, other than where the rules require that the document be personally delivered, is a notice under rule 14.29 of intention to declare a dividend or is a document delivered to some or all of the members, contributories or creditors, or any class of these.

■ Costs are further saved by the entitlement of a creditor to opt out of correspondence with an office holder: r. 1.37.

■ Following privacy concerns (Explanatory Memorandum 7.10-11), details of employees, ex-employees, and customers who are consumers must be contained within a separate schedule to statements of affairs to be filed with the Registrar of Companies under paragraph 47 of Schedule B1 of the 1986 Act, and will not be available for public inspection (r. 3.30(4)-(6)).

■ SBEE also amends the 1986 Act by providing that the Official Receiver will immediately be appointed trustee on the making of a bankruptcy order, unless the court appoints a supervisor as trustee: s.291A. There is therefore now no period in which the bankrupt's property does not vest in a trustee before one is appointed by the court. Previously the Official Receiver was "receiver and manager." The Rules reflect this amendment: r. 10.75. Similarly, the 1986 Act has now been amended to permit the court to appoint an insolvency practitioner as interim receiver ahead of a bankruptcy petition hearing in all circumstances, and the rules reflect this change: rr. 10.48-54.

International Insolvency Institute comes to London


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South Square is delighted to be one of the sponsors of the III 17th Annual Conference, which takes place between 18 – 20 June 2017. South Square's Mark Phillips QC is co-chair of the London Organising Committee, and the primary venue is the Rosewood Hotel, in the heart of London's legal district.

Expert panellists have been drawn together from every region of the world to create an exciting programme of events. Lord Neuberger, President of the Supreme Court, will open the conference with a keynote speech.

With the UK due to give notice to the EU this month, the conference schedule kicks off with an analysis of Brexit from the point of view of the UK, the EU, the US and other major jurisdictions, and the impact on international insolvencies involving UK companies.

Antony Zacaroli QC will be taking part in a mock joint hearing concerning a primary insolvency and recognition, with the session being taken by Judges from both the High Court in London and the Southern District of New York. Other topics will include Insolvency in The Conflict of Laws, Financial Institution Failure, and a review of the year and looking to the future.

In addition to Mark Phillips QC and Antony Zacaroli QC, Michael Crystal QC, Robin Dicker QC, Felicity Toube QC, Hilary Stonefrost, Richard Fisher, Marcus Haywood and Riz Mokal will be attending from South Square, with further members keen to participate as commitments allow.

Registration is open to both Members and non-members of III alike, and further information can be found at www.iiiglobal.org/node/2012

We very much look forward to seeing you there.


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EU/EEA LAW UPDATE

GABRIEL MOSS QC

Gabriel Moss QC looks the ENEFI case and the consequences of not proving in a main proceeding

Use it or lose it

Enefi Energiahatékonysági Nyrt v Direcţia Generală Regională a Finanţelor Puplice Braşov (DGRFP), Case c-212/15 – Judgment of the Fifth Chamber of the Court of Justice of the European Union ("CJEU"), 9th November 2016

The ENEFI case raises the interesting question of the consequences of the insolvency law governing the main proceedings extinguishing a debt due to a government party in another Member State where the debtor has an establishment.

The scheme of the Insolvency Regulation, continued in the case of the Recast Regulation which comes into force on the 26th June 2017, is one which allows main proceedings to be opened in the place whether the Centre of Main Interest ("COMI") is located and secondary proceedings, subject to certain conditions, in a place where the debtor has an establishment. A creditor can in principle prove in either or both proceedings. However, the insolvency laws of some countries not only have time limits for proving a debt but also extinguish any debts not claimed within the time limit. That is the position in the case of Hungarian insolvency law, which governed the main proceedings in respect of ENEFI .

In this case, the Romanian tax authority for the area in which ENEFI had an establishment in Romania lodged two claims in the insolvency proceedings outside of the time limit. Subsequently, it issued a tax notice and tried to enforce the tax demand via Romanian court proceedings. The regional court for Mure in Romania referred questions for the Court of Justice of the European Union. The narrow question was whether the Romanian tax authority, having had its claim forfeited under the law of the main proceeding, could nevertheless exercise its enforcement rights in another Member State and whether it was relevant that the claim was a tax claim.

The CJEU answered the narrow question by stating that once Hungarian law as the insolvency law of the main proceedings had forfeited the Romanian tax authority's claim, the Romanian tax authority could not enforce its claim in Romania.

The Court's discussion is more wide-ranging and of considerable interest. In particular, it faces the question of whether the law of the main proceeding can in effect prevent secondary proceedings being opened or any claim being made in those proceedings. Judging by the combination of main and secondary proceedings allowed by the Regulation, one might have thought that questions as to the validity and proof of a claim would be dealt with separately in the two jurisdictions. However, the CJEU took the view that the main proceedings were the dominant proceedings and that if the law of those proceedings, applicable pursuant to Article 4 of the Regulation, forfeited the claim of a creditor, that claim cannot be used to apply for the opening of secondary proceedings in another Member State.

Although the list of matters governed by the law of the main proceedings set out in Article 4(2) makes no specific reference to creditors who have failed to make a claim, the CJEU says that there is no doubt that such effects must be assessed on the basis of the law governing the main proceedings. The wording of Article 4(2) makes it clear that the list is not exhaustive.

On the question of why the law of the main proceedings can govern the rights of creditors in other member states, the CJEU states that if the law of the main proceedings did not affect the rights of creditors who failed to claim in those proceedings, that was a risk seriously undermining the effectiveness of the main proceedings. It would mean that once the main proceedings had closed, the non-participating creditors could still require full payment of their claims and that would give rise to the unequal treatment of creditors. Above all, such an interpretation, according to the CJEU, would have the effect of frustrating all compositions or other

THE CJEU RULING IN ENEFI SHOULD ENCOURAGE EVERY CREDITOR TO PUT ITS CLAIM INTO THE MAIN PROCEEDINGS.

comparable restructuring measures in main proceedings.

The CJEU does not mention in this context the effect of Article 25 of the Regulation, which provides for the mandatory recognition of compositions approved by the court in charge of the main proceedings to be recognised in other Member States without further formalities. However, the CJEU may have been thinking of situations where a creditor fails to prove in the main proceedings but puts in a claim in secondary proceedings, thus potentially undermining any composition in the main proceedings to the extent of the assets contained in the secondary proceedings.

Indeed one of the arguments put against the Court's eventual ruling was that allowing the law of the main proceedings to extinguish a claim would prevent the opening of secondary proceedings even where there was an establishment in another Member State. At paragraph 25 the CJEU rejects that argument by saying that giving effect to the extinction of a claim not proved in the main proceedings only prevents the admission of a request seeking the opening of secondary proceedings brought by a creditor who has failed to observe the time limit for the lodging of his claim in the main proceedings. Secondary proceedings can always be opened at the request of another creditor or the liquidator in the main proceedings.

With regard to the ability to provide in the national insolvency law for the forfeiture of debts in respect of which proof is not submitted, at paragraph 30 the CJEU says it is for the national law of each Member State to decide whether or not there is such a rule, providing that the rules of proof for foreign creditors are not less favourable than those for domestic creditors and providing the national rules do not make it excessively difficult or impossible in practice to exercise the right of proof conferred by EU law. The CJEU cited its own case of Nike (C-310/14) at paragraph 28 and the case law cited therein.

The Court also goes on to an interesting discussion of Article 15 of the Regulation, the "lawsuit pending" exception to the application of the law of the main proceeding pursuant to Article 4. The Court points out that Article 15 must be read in conjunction with Article 4(2)(f) of the Regulation. The net result of the provisions is that the exception in Article 15 does not cover enforcement proceedings. Those fall within the law of the main proceedings and in particular any stay, which of course takes effect throughout the European Union. In coming to this interpretation, the Court notes that Article 20(1) of the Regulation requires a creditor who obtains "in particular through enforcement" satisfaction of a claim from the assets belonging to the debtor in another Member State is obliged to return to the liquidator the benefit that he has obtained.

With regard to the further question

posed to the Court as to whether it makes any difference that the forfeited claim is a tax claim, the Court held simply that it is not. Article 39 of the Regulation provides that tax authorities of Member States other than the State where the insolvency proceeding is opened have the right, on the same basis as any creditor who has his habitual residence or registered office in a Member State other than the State of opening, to lodge claims in the insolvency proceedings. The provisions of the Regulation give the claims of foreign tax authorities within the EU a special right which they might not have under the law governing the main insolvency proceedings, but the Regulation does not give tax authorities any special status. In particular they cannot use enforcement proceedings, if those are stayed by main insolvency proceedings.

There are important lessons to be learned here for all creditors, governmental or not. Despite the general fact that the Regulation allows proof in a main or secondary proceeding or both, a creditor cannot simply sit back and wait for the opening of a secondary proceeding, if the law of the main proceeding is going to forfeit his claim if it is not proved in the main proceeding. To be safe therefore, every creditor should put its claim into the main proceedings, whether or not there are or are likely to be secondary proceedings.

Foreign property taxes can be taxing

SCI Senior Home v Gemeinde Wedemark (CJEU, 26th October 2016, Case C-195/15)

Under German domestic law, German property taxes or rates are given the status of a charge or security interest against land in Germany. In this case, the French company which owned land in Germany tried to enforce the stay on the realisation of the company's assets in Germany. That stay in principle had EU-wide effect (apart from Denmark) pursuant to Articles 16 and 17 of Regulation 1346/2000 on Insolvency Proceedings.

The defendant Germany local authority however had other ideas, and after the opening of administration proceedings in France applied to the German court for a compulsory sale of the property by public auction in order to recover arrears of property tax. The German court ordered the compulsory sale of the property. The French administrator on behalf of the French company appealed this decision up the German court system to the German Federal (Supreme) Court.

Although pursuant to Article 4 of Regulation 1346/2000 the main insolvency proceedings in France were generally governed by French law as the law of the proceeding, there was an important exception under Article 5, which relates to rights *in rem*, including security interests in other Member States. Under German law, the charge to recover property taxes is regarded as a right *in rem*, i.e. a proprietary security interest in the land. However, the German Federal Supreme Court asked the CJEU whether the question of a right being a right *in rem* for the purposes of Article 5 was to be assessed in accordance with German law or whether it was to receive an autonomous interpretation.

The CJEU took the view that "*...* the basis, validity and extent of such a right *in rem* must normally be determined according to the law of the place where the asset concerned is situated". This was based on the CJEU's previous judgments in *Erste Bank* C-527/10 at paragraphs 40-42 and *Lutz* C-557/13 at paragraph 27.

In terms of process, the CJEU considered that "it is a matter for the referring court to find and assess the facts in the case before it and to interpret and apply national law *...* in order to determine whether the real property tax debt at isuue in the main proceedings may be regarded as a right *in rem* under German law".

Next, the CJEU pointed out that whilst Article 5 of Regulation 1346/2000 did not define the notion of a "right *in rem*", "it does, however, explain through a number of examples of rights described in that Regulation as "*in rem*", the scope and therefore the limits of the protection afforded by that provision to privileges, guarantees or other rights

under the national law of the Member States of the creditors of an insolvent debtor".

The CJEU considered that "in order not to render ineffective the limitation on the scope of Article 5 of that Regulation to rights "*in rem*", the Court considers that the rights regarded as "*in rem*" by the national legislation at issue must satisfy certain criteria in order to fall within that Article".

In the case being considered, the charge created by German law satisfied the criteria listed in Article 5(2) in that "it is the charge which directly and immediately encumbers taxed real property and, secondly the owner of the real property must accept enforcement against that property, pursuant to [German law]". The CJEU goes on to state that in insolvency proceedings the tax authorities have the status of "a preferential creditor" on the basis of the charge over the property. In English law terms, this appears to mean "priority" creditor by reason of the charge.

In a number of cases the CJEU has said that exceptions, such as that contained in Article 5, to the general rule that insolvency proceedings are governed by the law of the proceeding "must be interpreted strictly". This does not appear to have any great effect and in the present case also had no real effect. The relative non-effectiveness of the "strict interpretation" principle for exceptions is neatly explained by the Court:-

"Although in accordance with settled case-law the derogation must be interpreted strictly, it is nonetheless appropriate to ensure that the exception is not deprived of its effectiveness…"

The CJEU also dealt firmly with the argument that Article 5 is only intended to protect rights *in rem* given as part of a commercial transaction. The Court points out that there is nothing expressly in the Regulation which contains such a limitation. The argument for such a limitation would be based on Recital 24 which points out that exceptions to the general rule in Article 4 seek to "protect legitimate expectations and the certainty of transactions". Recital 25 refers to the need for an exception in the case of rights *in rem* on the basis that they are of "considerable importance for the granting of credit". However the CJEU considered that limiting Article 5 to rights *in rem* with a commercial origin would actually be contrary to the objective of protecting legitimate expectations and the certainty of transactions. It would also amount to unfavourable treatment of the holders of rights *in rem* granted in the context of transactions other than commercial transactions. This would be contrary to the principle of "equal treatment of creditors" and the principle that the provisions of the Regulation must be applied irrespective of the nature – commercial or otherwise – of the debts secured by the rights *in rem*. Note that the English version of the judgment has a common mistranslation. Instead of speaking of debts being "secured" by rights *in rem* it speaks of debts being "guaranteed" by rights *in rem*.

The CJEU makes the connected point that Article 39 of the Regulation specifically allows tax authorities and social security authorities to make claims in insolvency proceedings.

The CJEU has thus clarified several aspects of the application of Article 5 and the protection of rights *in rem* in other Member States. Insolvency practitioners acting in relation to a debtor which has land in other Member States, need to find out whether property taxes in the relevant jurisdictions turn property taxes into security interests which could lead to the land being sold and taken out of the control of the insolvency practitioner.

IN SCI SENIOR HOME THE CJEU DECIDED THAT RIGHTS IN REM SHOULD BE INTERPRETED IN ACCORDANCE WITH GERMAN LAW, DESPITE INSOLVENCY PROCEEDINGS HAVING BEEN OPENED IN FRANCE.

New Chambers Director for South Square

At the end of March William MacKinlay joins South Square as its new Chambers Director, taking over from Ron Barclay-Smith who retires after 5 sterling years of service.

William, who joins us from UBS, started his career in the Armed Forces and spent some years as Equerry to TRH The Prince of Wales and The Duchess of Cornwall. Leaving the Army in 2011 William then worked for a number of ultra-high net worth individuals before joining the Strategic Communications division of FTI Consulting. In 2015, William joined UBS as Chief of Staff to the CEO of the Investment Bank, where he remains until he joins South Square.

William looks forward to meeting our friends and clients over the coming months.

■ Head of Chambers, William Trower QC says "We are very grateful to Ron Barclay Smith for his leadership over the past 5 years. He has made a significant contribution to the smooth running of Chambers, overseeing a radical improvement to our reception areas and conference rooms, and helping to create a strong and flexible staffing structure which serves both us and our clients extremely well. We wish Ron all the very best for his retirement in his native Scotland."

SOUTH SQUARE CHAMBERS DIRECTOR, WILLIAM MACKINLAY

Neuberger fears 'refuseniks' place judicial quality under threat

In a speech to the Oxford Law Faculty in February, Lord Neuberger, President of the Supreme Court, warned that the increasing number of 'refusenik' barristers who opt not to pursue a place on the Bench is risking the quality of the judiciary by reducing the pool of talent from which judges are chosen. He said that "a first class judiciary" was essential for the "whole financial and professional services industries" which were "so vital to the fortunes of this country, perhaps particularly in the post-Brexit world". Lord Neuberger also, in an interview with BBC Radio 4's Today programme in early February, said that some of the wrath directed at the judiciary following the ruling against the government in November was "undermining the rule of law". He added that politicians "could have been quicker and clearer" in their defence of the judiciary.

LORD NEUBERGER

Study shows spike in lawyers' helpline usage

A recent study has shown that the number of male lawyers seeking advice from helpline LawCare has increased. Phone calls from male lawyers have risen from 35 per cent in 2015 to 38 per cent in 2016, with the subject matter of the phone conversations remaining relatively the same. The most common concern being stress whilst depression followed suit.

Elizabeth Rimmer, CEO of LawCare has said the charity want to 'encourage people in the legal profession to talk about their mental health.

'We support all branches of the legal profession and we also offer advice to friends and families to cope with the increasing pressures they face."

Disillusioned but dedicated – the state of the UK Judiciary today

In February of this year the second UK Judicial Attitude Survey was published, providing statistical evidence of attitudes within the judiciary which many have known for some time.

Whilst almost all judges feel they provide an important service to society, are committed to doing their job as well as they possibly can and have a strong personal attachment to being a member of the judiciary, only 3 per cent feel valued by the media and a mere 2 per cent feel valued by the government.

More than three-quarters of respondents to the survey, which was conducted amongst all serving salaried judges in the UK, and attracted a 99 per cent response rate, feel that their working conditions have deteriorated over the past two years. No specific working conditions were rated as Excellent, or even Good, by the majority of judges and yet 64 per cent rated the morale of court staff as Poor, with over 40 per cent rating both maintenance of court buildings and the amount of administrative support they received as Poor.

Perhaps most alarmingly, the majority of judges (51 per cent) have concerns for their personal safety whilst in court, and 37 per cent have concerns for their safety outside the courtroom.


JUDGES FEEL UNDERVALUED BY MEDIA AND GOVERNMENT

Some 36 per cent of the judiciary say that they are considering leaving their positions early – rising to 47 per cent of High Court judges, 41 per cent of the Court of Appeal judges – with influencing factors cited as limits on pay awards and cuts in pension benefits. Most serving judges also said that whilst on the one hand they would discourage suitable lawyers from joining the bench (citing pension cuts, reduced pay, constant policy changes and lack of administrative support), many senior judges have expressed concerns at the difficulty of persuading high-quality candidates to apply for appointment to specialised areas of High Court work. Successive cuts to earnings, changes to pension arrangements and deteriorating working conditions have given rise to a "strong level of disenchantment" in all judicial ranks.

Fraudster stole £120,000 from footballers

It wasn't until ex- Manchester city manager, Manuel Pellegrini had his card declined at a restaurant that he realised a fraudster had stolen £120,000 from him.

Fraudster Jonathan Reuben posed as a premier league footballer when withdrawing thousands of pounds in cash from banks in Greater Manchester as well as obtaining a card in Pellegrini's name in order to purchase a £27,000 watch from the Trafford Centre. Reuben was able to transfer money between accounts by impersonating Pellegrini on the phone as well as ordering a new card and intercepting it before it reached Pellegrini's home address. Following his arrest, Reuben declared he felt no guilt towards the football professionals as 'they could afford it.'


PELLEGRINI: IMPERSONATED BY FRAUDSTER

However, Reuben is now facing a 20-month sentence following three counts of fraud including a previous 14 week suspended sentence for posing as a company director.

Judge Field sentencing Reuben stated "Fraud can and does have devastating consequences and those who benefit at the demise of others will be brought to justice."

A cut in trust for lawyers

A new study has revealed that the most trusted profession is nursing with the public trusting several other professions more than lawyers.

Market research company Ipsos MORI questioned over 1000 people about their thoughts and feelings towards certain professions which uncovered that the public were most likely to be trustful of hairdressers and priests than to lawyers, with even the ordinary man/woman in the street earning a 65 per cent trust level.

However, with lawyers winning the trust of 52 per cent of those surveyed they are regarded more honourable than charity chief executives, bankers and estate agents. Interestingly Judges attained 81 per cent revealing them to be perceived as more trustworthy than the police.

LAWYERS - TRUSTED LESS THAN HAIRDRESSERS AND PRIESTS.

A state of Emojional pride

A Texan state lawmaker has filed a resolution urging people to think before they text and stop using an emoji of the Chilean flag, which resembles the Lone Star State flag, as a symbol of Texas pride.

Tom Oliverson's resolution calls on lawmakers: "to reject the notion that the Chilean flag, although it is a nice flag, can in any way compare to or be substituted for the official state flag of Texas and urge all Texans not to use the Republic of Chile flag emoji in digital forums when referring to the Lone Star Flag of the great State of Texas."

Whilst the Chilean flag is available on the standard set of emojis, the Texas flag is not. Both flags have a single white star on a blue field on the left with a horizontal white stripe on top of a red stripe. On the Texas flag, the blue goes from top to bottom while on the Chilean flag, the red horizontal stripe stretches across the bottom.

Nobody likes a tired judge...

A joint study by the Universities of Washington and Virginia, published in the December 2016 issue of Psychological Science, suggests that a tired judge is a harsh judge. Sentencing decisions in the US given on 'sleepy Monday' – the day after the switch to daylight saving – are consistently 5% longer than those given on any other day of the year. The researchers were unable to find any other reason than tiredness for the disparity.

Earlier research published by the Louisiana State University found that judicial decisions in the state were affected by unexpected losses by the local college football team, the Tigers. Wins or expected losses had no effect on sentencing, and the research team concluded that it was the unexpected disappointment that judges carried into the courtroom.

More worrying, perhaps, is the 2011 study by Ben-Gurion University of the Negev, Israel and Columbia Business School, which studied more than 1000 parole decisions given by 8 judges. Here, the judges worked for three sessions a day interspersed with a morning snack break and a break for lunch. The results were that at the beginning of each session a prisoner had a 65 percent change of getting parole. That chance then declined to almost zero by the end of the session, returned after the break to about 65 percent again only to decline once more to almost zero as the session progressed. The study found that the food and drink breaks were the only explanation for this pattern, which applied to each of the 8 judges used in the study. Length of custody, severity of crime and ethnicity had no such effect.

Plugging a pension hole to close 'a sorry chapter'

Sir Phillip Green has agreed with the Pensions Regulator to pay £363m to help plug the void left in the BHS pension scheme, following the sale of the high street retailer to Dominic Chappell for £1. This makes it the largest settlement that the Pensions Regulator has agreed, higher than the £255 million arrangement made in December last year with Coats Group.

When BHS collapsed last April 11,000 people lost their jobs and 22,000 pensions were put at risk, which unleashed a major investigation by the pensions regulator. The settlement will allow all BHS pensioners the option to receive pensions at the full starting level that they were promised by the company's schemes, which is higher than what they would have received from the Pension Protection Fund.

In a statement at the end of February Sir Philip said that his decision to make the contribution followed lengthy and complex discussions with the pensions regulator and the pension protection fund. "Once again I would like to apologise to the BHS pensioners for this last year of uncertainty, which was clearly never the intention when the business was sold in March 2015," he said, adding that he hopes that "this solution puts their minds at rest and closes this sorry chapter for them".

SIR PHILLIP GREEN: £363M PENSION PLUG

HMRC focusing on middle class households

HMRC is facing accusations that they are targeting middleclass households following figures obtained through a Freedom of Information Act request.

It has been revealed that the number of penalties issued has tripled since the 2012-2013 tax year surging from 55,000 fines to 143,000 due to people filing inaccurate information and not taking 'reasonable care.' As a result of this increase the taxman is facing accusations of concentrating too much attention on middleclass taxpayers whilst 'super-rich' receive a lenient approach.

Charlie Elphicke, Tory for Dover stated: 'HMRC needs to focus less on small business and hard-pressed families. Instead they need to crack down on the super-rich people and multinational companies who game the tax system.'

Last year it emerged that Google had paid HMRC only £130 million for ten years of back taxes despite its estimated annual sales of £5.3 billion. Although a spokesperson for HMRC insists the 'rules are designed to create a level playing field.'

National Debt rises by £1,400 per head

According to figures released by the Office for National Statistics, the UK National debt rose by £1,400 for every person in Britain last year. During 2016 the national debt figure surpassed £1 trillion, rising to a mammoth £1.7 trillion in December. As a share of the economy the current national debt is 86.2 of GDP, and is expected to rise above 90 per cent next year. The Chancellor, Philip Hammond, has committed to decrease debt as a share of the economy by 2020/21.

Price of Apples to rise

Seb James, CEO of technology giant Dixson Carphone, believes that Apple fans are prepared to swallow allegedly-Brexit-fuelled price increases of 25 per cent. Apple and its rivals Dell and Microsoft, have said that prices for some goods will need to rise this year due to the decrease in value of the pound following the EU referendum.

Troublesome Thursday

The worst day of the week for the stock market in 2016 was, on average, Thursdays. On average the FTSE 100 dropped almost 0.2 percent on the fourth day of the trading week – an even more dismal performance that on Mondays. Over a period of more than a year, Monday still takes the medal for worst performer, with Fridays going for gold as statistically the best performing day.

....But it is Premium Friday in Japan

The Japanese government have launched a 'Premium Friday' campaign in a bid to persuade its citizens to work less hard. It hopes that by encouraging workers to leave work by 3.00 p.m. on a Friday not only will deaths from overwork will be reduced, but that workers will use the extra time to go shopping and boost consumer spending.

SOUTH SQUARE CHALLENGE

Welcome to the South Square Challenge for March 2017. Your task this time is to correctly identify each of the films in the pictures below and work out the connection between them. Please send your answers to Kirsten by 11 May 2017, either by post to the address on the back page, or by e-mail to kirstendent@southsquare.com. To the winner, if necessary drawn from the wig tin, will go a Magnum of Champagne and a much-coveted South Square umbrella. Good luck!

Jeremy Golding QC

1

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And the connection is?

NOVEMBER CHALLENGE

The correct answers to the November 2016 were: 1/. Lord Donaldson. 2/. Lord Denning. 3/. Lord Bingham. 4/. Sir Terence Etherton. 5/. Lord Phillips. 6/. Lord Clarke. 7/. Lord Neuberger. 8/. Lord Dyson 9/. Lord Woolf. The correct connection was that they are the last nine Masters of the Rolls. We received many correct entries but the winner this time is Cowan Ervine, Honorary Teaching Fellow at the Dundee School of Law.

Jersey Gold Competition

The winner of the Jersey Gold competition is Sue Sorrell of CRV Global, who wins a copy of the 5th Edition of Jersey Insolvency and Asset Tracking for correctly identifying that Francesco Castellucicio, Tommy DeVito and the authors of the Jersey Insolvency and Asset Tracking are all 'Jersey Boys'.

Diary Dates

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

R3 Annual Dinner
9 March 2017 – Landmark London Hotel

INSOL 2017 TENTH WORLD QUADRENNIAL CONGRESS
19-22 March 2017 – International Convention Centre, Sydney

ILA Annual Conference and Academic Forum 2017
31 March and 1 April – Royal College of Physicians, London

R3 27th Annual Conference 2017
26-28 April 2017 – Clayton Hotel, Burlington Road, Dublin

International Insolvency Institute 17th Annual Conference
18-20 June 2017 – Rosewood Hotel, London

INSOL International Channel Islands Seminar
13th September 2017 – Duke of Richmond Hotel, Guernsey

INSOL Europe Annual Congress
5 October 2017 – Warsaw

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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Edited by Simon Mortimore QC, Barrister, *South Square Chambers*

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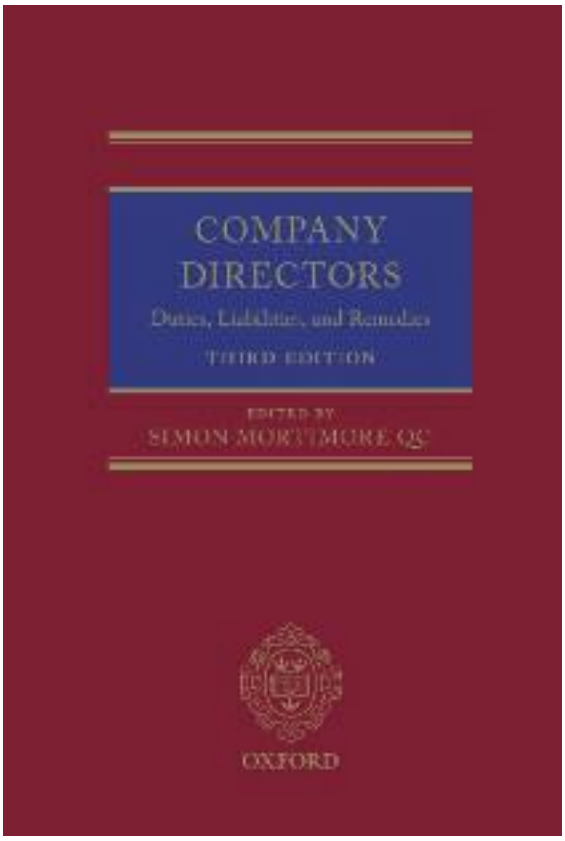

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