SOUTH SQUARE DIGEST

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

What is a Financial Institution?

Repudiatory breach claim upon contractual termination

The Work of the Insolvency Office

Banks' liability for fraudulent withdrawals

The Carlyle Case

MARCH 2018

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SOUTH SQUARE

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FROM THE EDITOR

MARK ARNOLD QC

"A unique bedfellow"

Welcome to the March edition of the South Square Digest. The Prime Minister has set out her confident and optimistic vision of the post-Brexit future. A customs partnership or a "highly stream-lined" customs agreement; but no customs union, no hard border between Northern Ireland and Ireland, and no customs or regulatory border down the Irish sea. We have reached a crucial moment. We need to "look beyond the precedents, and find a new balance": neither the Canada nor the Norway model will do. There are difficulties ahead, but it is "pragmatic common sense" to work together to deliver the best outcome for both sides. There is much to be done, and compromise will be necessary on all sides. "So let's get on with it."

"SO LET'S GET ON WITH IT"
(THE PRIME MINISTER)

One of the brighter moments of recent weeks has been provided by the President of the European Commission, Jean-Claude Juncker himself. Responding to a question from the attendant press, he said that he was not a British Prime Minister. No indeed. But it would be good for Britain if he was, he added. A mischievous suggestion. Surely?

Personally, I do not fancy his prospects. But if precedent is any guide, his foreign heritage would certainly be no bar. Quite the contrary. Liverpool's grandmother was Indian. Wellington and Palmerston were of Anglo-Irish descent. Disraeli's grandparents were Italian. Bonar Law was born in Canada. Churchill's mother was American ...

We have even more form when it comes to our sovereigns. One only has to think, in recent times, of the Saxe-Coburg-Gothas, the House of Hanover, the Stuarts, the Tudors, even the Plantagenets. William the Conqueror, Duke of Normandy did not attend by invitation, but he was a special case. Less recently the picture appears less polite: the Vikings, the Angles, the Saxons, the Jutes and the Romans all just came anyway. Pity the long-suffering Celts, if there are any of us left.

Others thought about turning up without an invitation, and made preparations to do so. But then they turned their attentions to Russia instead, and paid the price. Napoleon was one of them. Although a keen student of the past, he was not a stickler for precedent. There must be a first time for everything. Article 2 of the Constitution of the Year XII (1804) declared him to be Emperor of the French. That Constitution was short-lived for reasons that we need not dwell on. Article 2 of the current French Constitution (1958) provides instead, amongst other things, that the language of the Republic shall be French. Now, 60 years later, it seems that it is to change – as English comes to a courtroom in Paris.

In a charm offensive that might have caused members of the Académie Française to spill their cognac, the French authorities have opened a new specialist International Chamber within the Paris Court of Appeal to deal with appeals in international commercial matters, to be heard in English and applying the common law. Speaking in New York last summer, the French finance minister Bruno Le Maire extended a warm invitation to those "with experience in common law, regardless of where they come from".

"When the UK leaves the EU, it could lose its access to the single legal space and London's courts could see their attractivity overtaken by European courts," the French justice minister Nicole Belloubet said when opening the court recently. Perhaps. We will see.

France is not alone in embracing the English language into its legal system. Other fellow members of the EU are implementing similar ideas. The planned Brussels International Business Court, offering opportunities to settle cross-border disputes in English, applying Belgian law and with no right of appeal, was announced in October. In November, Germany announced the creation of a new, English-speaking commercial court in Frankfurt. The new Netherlands Commercial Court in Amsterdam, the working language of which is to be English, is expected to launch in mid-2018. France is alone (at least for the moment), however, in its apparent preparedness to apply the common law and employ those with expertise in it.

NAPOLEON: NOT ON THE INVITATION LIST

Pleasing as it is to realise that this aspect of our "Anglo-Saxon" heritage is in such rude good health that our European partners, no longer content just to admire it through the shop window, are rushing to open their own shops in a bid to start selling something similar (Napoleonic rumblings about the nation of shopkeepers too distant to be heard), we cannot rest on our laurels.

True it is that we think our judiciary is amongst the best. Why? Because of its

We cannot rest on our laurels. Recruitment of the best is critical

English is presenting itself as 'a unique bedfellow'

competence, confidence, independence and integrity. In a word, its maturity. But we must ensure that it stays that way. We cannot take it for granted. Recruitment of the best is, and has always been, critical. It is not about money, although the pensions position certainly needs attention. It is about making the judicial working environment as attractive as it ought to be for the discharge of any public duty. Practically, that includes assistance and having sufficient time to write judgments. Publicly, it includes encouraging in others a proper understanding of the importance of judicial independence and the rule of law. In human terms, it means making people feel appreciated.

The high quality of the judiciary is a necessary ingredient in the recipe for success; but it is not sufficient. The justice system itself must be efficient and effective: it must be comprehensible, and it must work. Despite what he said, the fog of Chancery was clearing even in Dickens' time, and its last vestiges have long since vanished. Even Chancery itself has now been swept aside by the new Business and Property Courts of England and Wales, operating not only from the Rolls Building in London but in Manchester, Birmingham, Leeds, Bristol and Cardiff, and now also in Liverpool and Newcastle upon Tyne. Business has been divided into 10 lists, and with titles such as the Financial List, the Business List and the Company and Insolvency List, it is easy to tell which covers what. This is the new face of the domestic and international dispute resolution jurisdictions of UK plc that will (in the Chancellor's words)

THE ROLLS BUILDING: "THE LARGEST BUSINESS COURT CENTRE IN THE WORLD" (HAMBLIN LJ)

"facilitate the flexible cross-deployment of judges with suitable expertise and experience to sit in business and property cases" throughout England and Wales.

Having obtained judgment, it must be enforceable. It may be here that our EU partners think they have identified a chink in our armour. The UK has already signalled its desire to agree a framework of civil judicial co-operation with the EU which would "mirror closely the current EU system". That includes the Brussels Recast Regulation and the Insolvency Recast Regulation. The draft treaty prepared by the Commission, so troublesome to HM Government in other ways, proposes such a regime for proceedings instituted or opened before the end of the transition period. All this has yet to be agreed – "nothing is agreed until everything is agreed" – but its desirability is obvious and is recognised on both sides.

Finally, the language. English is the recognised lingua franca of the commercial world. No doubt there are many reasons for that, and we should be proud of some of them. But British English is but one of many Englishes, and they're all developing all the time. Even British English. Speaking English to other people speaking English is not always straightforward. As George Bernard Shaw once said: "England and America are two countries divided by a common language".

In a fascinating recent article in the journal World Englishes, Marko Modiano[1] has advanced the view that Britain's exit from the EU will clear the space for the emergence of an authentic European English. English will not become moribund. It is already the prevalent second language in Europe. "English is presenting itself as a unique bedfellow," he says; "no other language can currently compete with [it] when it comes to its usefulness as a tool in communication within the larger framework of intra-European affairs, and this holds true for the rest of the world". And, what's more, liberated by Britain's absence as "an arbiter of correctness and standardization", the Europeans will make it their own, establishing their own conventions for spelling, punctuation and pronunciation.

"BON-HOMMY.FRENCH WORD MEANING BONHOMMY" [ILLUSTRATION BY EH SHEPARD]

Before we allow ourselves to get too perturbed by that, we should think how we ourselves have welcomed French (to take but one example) into our own English:

"'*Bon-hommy*,' went on Eeyore gloomily. '*French word meaning bonhommy*,' he explained. '*I'm not complaining, but There It Is*.'" (Winnie-the-Pooh, AA Milne).

We hope you enjoy this edition of the Digest. It contains much learning and informed comment: my thanks as ever to everybody who has contributed. It is only right to emphasise once again, however, that the views expressed by individual contributors are theirs and theirs alone, and that includes mine as editor. And on that note, Marcus Haywood and William Willson will be taking up the reins of editorship in the next edition. I wish them every success.

1/. onlinelibrary.wiley.com/doi/10.111/weng.12264/full

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The Carlyle Case:

The Duty Of Loyalty Revisited

A role for objectivity in a subjective world? **Simon Mortimore QC** discusses the Carlyle Case.

The trial of the claim brought by Carlyle Capital Corporation Ltd (CCC) and its liquidators against its directors and others gave the Royal Court of Guernsey a relatively rare opportunity to explore the directors' common law fiduciary duty to act in good faith in the best interests of the company. I shall call this duty "*the duty of loyalty*", as did Arden J in her Law Commission Paper,[1] because calling it "*the duty of good faith*", as the Lieutenant Bailiff did in the Carlyle case, emphasises one aspect of the duty at the expense of others. Usually such a claim against directors is combined with more potent allegations of breach of fiduciary duty concerning improper purpose, lack of independent judgment, secret profit or conflict of interest. But in the Carlyle case the duty of loyalty was centre-stage. The judgment of the Lieutenant Bailiff, Her Honour Hazel Williamson QC, which was published on 4 September 2017, extends to 2,643 paragraphs spread over 524 closely typed A4 pages, so most lawyers without an immediate interest in the case will have better things to do with their time than to read it. But for those with an interest in the law of directors' duties, the judgment includes a valuable and thought-provoking discussion of the duty of loyalty and of the role played by objective considerations, which is well-worth studying.[2]

In the United Kingdom, the duty of loyalty has been replaced by the duty to promote the success of the company in s 172 of the Companies Act 2006, which is not a simple statutory paraphrase of familiar expressions of the common law duty. When performance of those duties is in issue, the court's primary inquiry is a subjective one, into the director's state of mind, since it is for the director to decide how to advance the company's interests. That does not mean that the court has no control over directors' decisions or that there is no place for objective inquiry. On the contrary, the court can investigate the decision-making process: whether the director considered the company's interests and other relevant matters and whether the decision was made in good faith. If the court is not satisfied about the process, the court may find the director in breach of duty or intervene, if the outcome of the process is a decision that no reasonable director, acting in good faith, could have come to. English case law on these issues is not extensive, so it is worthwhile seeing how the court controls the exercise of discretionary powers in the analogous cases of liquidators and trustees (but not so useful to seek guidance from the *Wednesbury* principle which applies to public law decisions).

1/. As it was called in *Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties* (Law Commission Consultation Paper No 153) at [11.4].
2/. [367]-[471] and [544]-[547].

CARLYLE CAPITAL CORPORATION WAS AN INVESTMENT VEHICLE SET UP BY THE CARLYLE GROUP IN 2006

The Carlyle case

In 2006 the Carlyle group, a major US private equity business, decided to establish CCC as a Guernsey company, which would operate as a closed-ended investment fund. To provide investors with an attractively high but steady return, CCC prepared a business plan under which, with the capital raised from the issue of its shares and substantial borrowings through repo financing, it would invest in bank loans, other credit assets and US residential mortgage-backed securities. By July 2007, CCC had raised US$945m of capital from private placements of its shares and a public offering, after which it shares were listed on the Euronext Exchange in Amsterdam. With the benefit of hindsight, CCC had embarked on its chosen venture at the worst possible time. In July 2007, there was a crisis in the financial markets, following the failure of some Bear Stern funds, and another even more serious crisis in early 2008, which CCC could not survive. It had a short and disastrous career, going into liquidation in March 2008 with a deficiency against creditors of more than US$350m. Over eight months CCC had lost a remarkable US$1.3bn.

It is not surprising that the liquidators looked for suitable targets to sue. In 2010, they launched a US$2bn damages claim in Guernsey against the four executive directors, three non-executive directors and three Carlyle group entities who were alleged to have been shadow or de facto directors.[3] CCC and its liquidators alleged that the defendants were guilty of breach of fiduciary duty and gross negligence as well as misfeasance and wrongful trading

3/. Civil Action No. 1510. CCC also made a contractual claim against one of the Carlyle entities which was its investment manager and an unjust enrichment against the Carlyle entities, but these claims failed and no more need be said about them.

under the Guernsey Companies Laws 1994 and 2008.[4] They did not suggest that CCC's business model was fatally flawed from the start. Rather, they alleged that from the end of July 2007 onwards the directors were guilty of deliberate or reckless breach of duty in failing to heed and respond adequately to the difficult trading conditions affecting financial markets and that from November 2007 CCC was inevitably doomed, so that after that time the directors were guilty of wrongful trading as well as breach of duty.

The trial before the Lieutenant Bailiff took up 67 sitting days between June and December 2016. The paperwork comprising documentary evidence, pleadings and written submissions was gargantuan. The pleaded claim, in its final form, ran to over 250 pages and the defences were even longer. There were 14 witnesses of fact, including all the defendant directors, and 16 experts. The directors explained their conduct and decisions in their witness statements and were subjected to extensive cross-examination. Closing written submissions ran to nearly 3,000 pages and more than 300 authorities were cited.

On 4 September 2017, the Lieutenant Bailiff handed down her judgment, in which she dismissed all the claims, holding that all decisions and actions complained of were not only within the range of decisions or actions which a duly diligent, skilful, conscientious and loyal director of CCC might reasonably have made, but were undertaken with appropriate skill and care, and in the bona fide belief that they were in the best interests of CCC and, where appropriate, its creditors. The judgment concentrates on the allegation of breach of the duty of loyalty, because there does not seem to have been a great deal to be said for the alleged breaches of other fiduciary duties, and a finding of mere negligence would not have helped, because of the lawful protections contained in CCC's constitution. The wrongful trading claim failed, because CCC was not inevitably doomed to go into insolvent liquidation until a few days before it did so. In any case, CCC had failed to satisfy the Lieutenant Bailiff that any of the alleged breaches of duty had caused CCC any demonstrable damage or loss. In short, the outcome was a comprehensive victory for the defendants.

All the decisions and actions complained of were undertaken … in the bona fide belief that they were in the best interests of CCC

The Lieutenant Bailiff's conclusions of law about the duty of loyalty

Since Guernsey company law is modelled on English law,[5] the Lieutenant Bailiff looked at English authorities for assistance. Having said that the duty to act in good faith in the best interests of the company is the fundamental duty of a director, the Lieutenant Bailiff said that it is well-established that the duty is subjective with the result that "*a management or governance decision of a director, honestly and responsibly made, amounts to due performance of that director's duty of good faith*".[6] It is worth emphasising the phrase "*responsibly made*", because she returned to the theme when she said that the duty is performed "*primarily and centrally by subjective honesty and conscientiousness*".[7]

The Lieutenant Bailiff turned to the three ways in which the plaintiffs argued that objective considerations apply to the duty of loyalty. *First*, she accepted that the court takes an objective view to any issue whether the directors did honestly and genuinely consider their actions to be in the best interests of the company. Where the decision is clearly and objectively not in its best interests, the court may infer, as a matter of evidence, that the directors did not genuinely believe that it was. But this is not a back-door way of importing into the test any requirement that the decision must be in the best interests of the company as determined objectively by the court.[8]

4/. Gross negligence had to be alleged because CCC's constitution contained provisions, valid under Guernsey law, as it then was, protecting the directors from claims for negligence; see [32], [343]-[347], [620]-[712].
5/. At [350], [351].
6/. At [370], [373], [374].
7/. At [544].
8/. At [381], [382], [393].

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Second, the Lieutenant Bailiff accepted what she called the *Charterbridge* principle[9] under which, if the directors had not considered the interests of the company at all, the court will examine their decision objectively to see whether it was within the range of decisions which a hypothetical director, acting in good faith in the apparent best interests of the company, could reasonably have made in all the circumstances. The directors are only liable for the breach, if the decision they took was outside the ambit of objectively reasonable decisions. She appeared to accept that "*it is part of the fiduciary duty of a director to consider the company's best interests, and it is therefore a breach of duty not to do so*".[10] The *Charterbridge* principle also applies in circumstances where the directors should have, but did not, have proper regard to the interests of creditors.[11]

The Lieutenant Bailiff then turned to the question of what level of thought amounts to consideration of the company's best interests, even though this was not a point that had any practical significance in the Carlyle case. The directors contended that the principle only applies where no consideration at all is given to the company's best interests (i.e. where those interests were overlooked entirely) and that there is no breach of fiduciary duty if the directors gave some, but arguably inadequate, consideration to its best interests.[12] On the other hand, the plaintiffs argued that the *Charterbridge* principle applies where the directors gave no meaningful consideration to the company's best interests. The word "meaningful" implies that some consideration was given, but it would amount to no consideration if it was minimal, cursory, superficial or fleeting. The only authority cited on this question was the Australian case *Bell Group v Westpac Banking (No 9),*[13] where Owen J said that the consideration of the company's interests must be "*more than a mere token*". The Lieutenant Bailiff concluded that the principle only applies where the director gave no consideration to the company's interests, but with the caveat that there would be no consideration if the director simply thought of the point, but then dismissed it "*without some mental process of deliberation*".[14] This requirement of deliberation reflects her view that the directors' decision must be "*responsibly made*" and that they must act with

9/. *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62, 74, per Pennycuick J.
10/. At [383], [384], [544].
11/. [446], [455], [458], [470].
12/. In such a case, the directors might be in breach of the non-fiduciary duty to exercise reasonable, care, skill and diligence.
13/. (2008) 70 ASCR 1 at 265.
14/. At [385]-[391].

"*conscientiousness*".

Third, the Lieutenant Bailiff turned to the plaintiffs' argument that objectivity is material to a judgment whether there has been a breach of the duty of loyalty where it can be shown that the director acted unreasonably or irrationally in deciding what course of conduct would be in the company's best interests.

The Lieutenant Bailiff was unimpressed by concerns about lunatics running companies[15] or Australian authority suggesting that courts do not show as much deference as they once did to decisions of directors.[16] She also rejected the plaintiffs' invitation to apply to a question of breach of the duty of loyalty the *Wednesbury* principle, under which "*a public law decision is void if it is so unreasonable or irrational a decision that the court concludes that no reasonable decisionmaker, in the particular circumstances, could have made it*".[17] Nor was she impressed by the suggestion in *Mortimore: Company Directors: Duties, Liabilities and Remedies* that a director who acts perversely or irrationally in making his decision, will be in breach of his duty under s 172 of the Companies Act.[18] Although she recognised that the *Wednesbury* principle has been extended to contractual discretions,[19] she regarded its extension to directors' fiduciary duties as unsound, not supported by authority and contrary to Nourse LJ's view that it is unrealistic to apply a public law test to commercial decision-making by business men.[20]

The Lieutenant Bailiff concluded "*that if the court is satisfied, on all the evidence, that the Directors acted honestly, and gave consideration to the interests of CCC, then they would not be liable for breach of fiduciary (I emphasise) duty, even if their actions had been incompetent or arguably unreasonable*".[21]

The bright line between fiduciary duties and the duty of reasonable care, skill and diligence

A key theme of the Lieutenant Bailiff's judgment is the need to maintain a bright line between fiduciary duties, including the duty of loyalty, and the duty of skill and care (in the UK, the duty of reasonable care, skill and diligence in the Companies Act 2006, s 174).[22] That is certainly important, because the legal consequences of breaches of the two types of duty differ, but the conduct complained of may engage more than one duty.[23] In causing the company to buy or sell property, a director may be not merely negligent, but also disloyal or acting for an improper purpose and therefore in breach of his fiduciary duties. In many such cases, as the Lieutenant Bailiff noted, an award of damages for negligence against the director will be a sufficient remedy, but there may be some cases where that is not so. It may benefit the company to prove breach of fiduciary duty as well, to give the court power to set aside the transaction, award an account of profits or give a proprietary remedy which may be effective against third parties. Further, breach of fiduciary duty may constitute unfairly prejudicial conduct for a petition under Part 30 of the Companies Act 2006, whereas an allegation of negligence is usually insufficient, because shareholders take the risk that directors may make bad business decisions or be incompetent.[24]

While a bright line should be maintained between the fiduciary duty of loyalty and the non-fiduciary duty of reasonable care, skill and diligence, that can be achieved by identifying what is required to prove a breach of each duty and then determining whether the facts necessary to prove it are made out.

15/. At [397], [399], [404], referring to *Hutton v West Cork Railway Co* (1883) 23 Ch D 654, 671, discussed below.
16/. At [398], [405]-[409], referring to *Westpac Banking Corp v The Bell Group Ltd* [2008] WASC 239, per Owen J, and (2012) 44 WAR 1 in the Western Australian Court of Appeal.
17/. At [396], [398]-[403], [405], [411], referring to *Associated Provincial Pictures Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 233, 234, CA, per Lord Greene MR.
18/. (3rd ed, 2017) [12.21]-[12.22].
19/. At [411], referring to *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661, SC.
20/. *Re Edennote Ltd* [1996] BCC 718, 722, CA.
21/. At [412].
22/. At [363]-[366], [403].
23/. Companies Act, 2006, s 179.
24/. *O'Neill v Phillips* [1999] 1 WLR 1092, 1098H-1099A, HL, per Lord Hoffmann; *Re Saul D Harrison & Sons plc* [1995] 1

The common law duty of loyalty

In 1998, as chairman of the Law Commission, Arden J identified various heads of fiduciary duty owed by a director, the first of which was the duty of loyalty (to act in the best interests of the company).[25] She referred to Lord Greene MR's well-known statement of the duty in *Re Smith and Fawcett Ltd*:[26]

"They must exercise their discretion bona fide in what they consider – not what a court may consider – is in the interests of the company, and not for any collateral purpose."

There have been several subsequent similarly expressed statements of the rule,[27] which has been called the "*time-honoured rule*".[28] Later, in *Item Software (UK) Ltd v Fassihi*, Arden LJ described the duty of loyalty as the fundamental duty of a director and added that it is expressed in very general terms, is dynamic and is capable of applying in new situations. [29]

The primary inquiry is into the state of mind of the director, so that the duty of loyalty is complied with if the court is satisfied that "*the director honestly believed that his act or omission was in the interests of the company*".[30] That is so even if the director's belief is unreasonable or his actions injure the company.[31] Lord Wilberforce has explained the underlying reason why the test is subjective:[32]

"**...***[I]t would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision, on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within powers of management honestly arrived at.*"

This does not mean that there is no scope for an objective inquiry. On the contrary, as the Lieutenant Bailiff recognised, the court may inquire objectively into (i) whether the directors made their decision in good faith, (ii) whether they had regard to and considered the best interests of the company, and, if the court is not satisfied as to those two matters, (iii) whether, nevertheless, their decision was one that a director, acting in good faith in the interests of the company could have reached (i.e. the *Charterbridge* principle).

LADY JUSTICE ARDEN

If the court is satisfied as to the first two matters, the weight of authority supports "*the principle of good faith business judgement*",[33] under which it will defer to the directors' judgment and will not intervene, however

BCLC 14, CA, 18, per Hoffmann LJ and 31, per Neill LJ; *Re Tobian Properties Ltd* [2013] 2 BCLC 567, CA at [22], per Arden LJ; *Re Elgindata Ltd* [1991] BCLC 959, 993, 994, per Warner J.

25/. *Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties* (Consultation Paper No 153) at [11.4], [11.5].

26/. [1942] Ch 304, 306. She also cited Lord Selborne's passing reference to it *Hirsche v Sims* [1894] AC 654, 660, 661, PC.

27/. *Regentcrest plc v Cohen* [2001] 2 BCLC 80 at [120], per Jonathan Parker J; *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598 at [89], per Jonathan Crow QC, sitting as a deputy High Court judge; *Madoff Securities International Ltd v Raven* [2014] Lloyd's Rep FC 95 at [188], per Popplewell J.

28/. *Mutual Life Insurance Co of New York v Rank Organisation Ltd* [1985] BCLC 11, 21, per Goulding J.

29/. [2005] 2 BCLC 91 at [41], CA.

30/. *Regentcrest plc v Cohen* [2001] 2 BCLC 80 at [120].

31/. *Extrasure Travel Insurance Ltd v Scattergood* [2003] 1 BCLC 598 at [87], [90], [97].

32/. *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 832, PC.

33/. *Buckley on the Companies Acts* at [918], commenting on s 172.

damaging implementation of the directors' decision may have been to the company. Against that, Lewison J has suggested that the court can intervene in exceptional circumstances even though the directors have acted in good faith and within their powers.[34] He relied on Bowen LJ's well-known statement in *Hutton v West Cork Railway Co*:

"*[b]ona fides cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company … in a manner perfectly bona fide yet perfectly irrational*".[35]

Fortunately, Bowen LJ's concern remains a theoretical one and there is no reported case of a company being damaged by the management of amiable lunatics. The power of the court to intervene in such a case was debated, but not resolved in *Pavlides v Jensen*.[36] Danckwerts J raised the example of "*rabid teetotallers*" taking control of a brewery company and selling off its beer stocks below cost price. In such a case, I suggest that they would be in breach of their duty of loyalty, because the court, reviewing the directors' decision-making, would find that, even though they may have acted in good faith, their views about the pernicious effects of alcohol had led them to ignore the company's best interests and to pursue an improper purpose and that no reasonable director would have done what they did.

There have been several cases where the court, in reviewing the directors' decision-making process, has found that their decision was flawed, because, although they were honest, they had failed to take account of the company's interests or other relevant matters.

- In *Charterbridge*,[37] the directors considered the interests of the group, but not the company itself, when deciding that it should charge its property to secure group borrowing, but the charges were valid (and there would have been no breach of fiduciary duty), because a director, acting in good faith, could have decided that granting the security was in the company's interests.
- In *Extrasure*,[38] the deputy judge rejected the directors' explanations of the impugned money transfer and therefore concluded that they had not considered the interests of the company. The directors were ordered to repay the money, because no reasonable director would have made the transfer.
- In *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd*,[39] the deputy judge, Leslie Kosmin QC, found that, at the time they were considering settling a dispute, the directors were obliged to consider the interests of creditors and that their duty of loyalty to the company was modified to require them to think that their decision was in the interests of creditors. The directors breached their duty of loyalty, because they were wilfully blind to the company's interests, failed to give proper regard to the interests of its creditors and no reasonable director would have agreed to the settlement.
- In *Re Blackwood Hodge plc*,[40] Jonathan Parker J found that the directors were in breach of duty, because they had failed to consider the merits of merging two pension schemes, but no loss resulted.
- In *Bermuda Cablevision Ltd v Colica Trust Co Ltd*,[41] the Privy Council held that an allegation that the company was carrying on an unlawful business may sustain an unfair prejudice petition, so it would seem to follow that directors who acted in good faith, but failed to ensure that the company's business is lawful would be in breach of their duty of loyalty.
- In *Item Software (UK)Ltd v Fasihi*,[42] the Court of Appeal held that the duty of loyalty

34/. *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1294].
35/. (1883) 23 Ch D 654, 671, CA.
36/. [1956] Ch 565, 570. This was a derivative claim based on an allegation of negligence against the directors, which was struck out. In argument Raymond Walton QC referred to "*amiable lunatics*".
37/. [1970] Ch 62, 74.
38/. [2003] 1 BCLC 598 at [103]-[139].
39/. [2003] 2 BCLC 153 at [70]-[90]. As to when the duty to consider creditors' interests arises: *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1, SC, at [123], per Lords Toulson and Hodge.
40/. [1997] BCC 434, 458.
41/. [1998] AC 198, PC. Directors commit a breach of trust if they make an unlawful redemption payment: *DD Growth Premium 2X Fund v RMF Market Neutral Strategies (Master) Fund Ltd* [2017] UKPC 36 at [59], [64], [66].
42/. [2005] 2 BCLC 91 at [41], [44], per Arden LJ. In *GHLM Trading Ltd v Maroo* [2012] 2 BCLC 369 at [192]-[195], Newey J followed *Item* and held that the duty of disclosure extended to other information of which it was in the interests of the company to know.

included a duty to disclose a director's own wrongdoing and that the defendant was in breach of that duty, since he had not disclosed it and no director could have concluded that it was not in the interests of the company to know what the director had done.

The duty of loyalty also covers directors' decisions that affect members' rights, such as declaring dividends, forfeiting shares and convening general meetings. In these cases, which do not involve business decisions, the court has been willing to intervene where directors have failed to consider relevant matters.[43]

As the Lieutenant Bailiff held, when inquiring into the directors' decision-making process, the court should be satisfied that the directors acted not merely in good faith but also responsibly and conscientiously, by applying some process of reasoning to their consideration of the company's best interests or other relevant matters. It is at this point in the inquiry that rationality, as discussed below, could be relevant. If the directors' decision is inexplicable or the court rejects their explanation for it (as in *Extrasure*), it may proceed on the basis that the directors did not consider the right matters.

If the court is not satisfied with the directors' decision-making process, it moves on to consider the outcome of their decision, because, under the *Charterbridge* principle, the directors will only be in breach of their duty of loyalty if no reasonable director would have decided as they did. Thus, the case law demonstrates that the court defers to the directors' judgment and does not intervene, or find them in breach their duty of loyalty, unless (i) their decision-making process is flawed, having been made in bad faith or without considering the best interests of the company or some relevant matter, and (ii) the outcome is a decision which no reasonable director would have made. It is very hard to envisage a case where the directors' decision was utterly unreasonable and damaging to the company and yet the court was satisfied that they had honestly considered the company's best interests and all the right matters. If such a case were to arise the only explanation would be irrationality or perversity, as discussed below, and it is hard to believe that the court would not act to protect the company from harm.

Liquidators and administrators

As the Lieutenant Bailiff noted, cases about court supervision of liquidators are analogous to cases involving complaints about directors' decisions.[44] The court's control over decision-making by liquidators is statutory,[45] but the principles under which it exercises control have been developed by the court. Although the court defers to the liquidator's commercial judgment, in *Re Edennote Ltd* Nourse LJ said that it will interfere where the liquidator, even though acting in good faith, has "*done something so utterly unreasonable and absurd that no reasonable man would have done it.*"[46] Applying that test, Nourse LJ held that the court could interfere where a liquidator sold company property without testing the possibility that a third party might make a better offer or obtaining legal advice, since no reasonable liquidator would do such a thing. This was a case where the liquidator had made an absurd and unreasonable decision, because his decision-making process was flawed and perverse. In an earlier case, Nourse J held that the mere fact that the liquidator had not obtained a valuation was insufficient to justify court intervention.[47] In other words, it is not necessarily unreasonable or absurd to sell property without a valuation.

Lightman & Moss suggest that "*[t]he legal basis for interference is the office-holder's perversity or irrationality*" and that "*in*

43/. *Re a Company, ex p Glossop* [1988] BCLC 570, 577, per Harman J (failure to have "*regard to the right of members to have profits distributed so far as was commercially possible*"); *Byng v London Life Association Ltd* [1990] Ch 170, CA (failure to appreciate that, in order to obtain members' approval of a transaction, an AGM did not have to be adjourned to a different venue on the same day, but could be adjourned to a meeting on a later date for which members could be given notice); *Re Senate Support Services Ltd* [2005] 1 BCLC 175 (failure to have regard to alternatives to forfeiting shares for non-payment of calls).

44/. At [400].

45/. Insolvency Act 1986, ss 112, 167 and 168. The same rule applies to administrators: *Lightman & Moss: The Law of Administrators and Receivers of Companies* (6th ed) at [12-038] and Insolvency Act 1986, Sch B1 at [63], [74], [75].

46/. [1996] BCC 718, 722, CA.

47/. *Harold M Pitman & Co Ltd v Top Business Systems (Nottingham) Ltd* (1985) 1 BCC 99,345.

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exercising powers for their proper purposes, the administrator is under a duty to act rationally".[48] While the *Edennote* liquidator's conduct could be described as irrational, the difficulty about *Lightman & Moss's* suggestion is that Nourse LJ decided *Edennote* on a different basis and rejected guidance from the *Wednesbury* principle, which includes a rationality test.[49] His test is similar to the law about the director's duty of loyalty, in that, where the liquidator has acted in good faith, the court will only intervene if the decision-making process is seriously flawed and the consequence is an absurd and unreasonable decision.

Court control of a trustee's discretionary powers

The rules about directors' fiduciary duties derive from the law of trusts and it is not surprising that Lord Greene's formulation of the duty of loyalty in *Smith & Fawcett* reflects judicial statements about the duty of a trustee exercising a discretionary power. A trustee owes a duty of good faith, which goes to the scope of his powers, because a bad faith action is outside their scope.[50] In 1758 Lord Northington, the Lord Keeper, explained this duty when he said: "*a person having a power must exercise it bona fide for the end designed, otherwise it is corrupt and void*".[51] In *Re Smith*, where trustees had power to make investments as they thought fit, Kekewich J said that they could not think fit to make an investment they knew to be wrong, but that they discharge their duty if they act "*honestly and with due regard to their fiduciary position as holding money in trust for other persons*" by making investments capable of being within the scope of their power.[52]

Following the landmark decisions of the Court of Appeal and Supreme Court in *Pitt v Holt*,[53] it is now apparent that a fiduciary also owes a distinct fiduciary duty, in relation to decision-making within his powers (i.e. when acting in good faith), to take account of relevant matters and desist from taking into account irrelevant matters.[54]

A director's common law duty of loyalty and his duty under s 172 combine the features of the trustee's fiduciary duties of good faith and to take account of relevant matters in decision-making. Several points about these duties of trustees are relevant to directors:

- A fiduciary is in bad faith and therefore acts outside the scope of his powers, not only by intentionally or consciously harming the economic interests of the person for whom he acts, but also if he fails to act in a way that he subjectively believes will positively advance those interests, or exercises his powers

48/. At [12-038]. They refer to court's control of the exercise by trustees of discretionary powers; see below.
49/. *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661, SC at [22]-[30], per Lady Hale.
50/. *Snell's Equity* (33rd ed) at [10-019].
51/. *Aleyn v Belcher* (1758) 1 Eden 132, 138.
52/. [1896] 1 Ch 71, 76.
53/. *Pitt v Holt* [2012] Ch 132, CA; [2013] 2 AC 108, SC.
54/. *Snell* at [10-032].

capriciously or spitefully.[55]

- The fiduciary's defective deliberation must be sufficiently serious to amount to a breach of duty. It is not enough to show that the fiduciary has fallen below the highest standards or that the court, if the discretion had been surrendered to it, would have acted differently.[56]
- If the fiduciary takes legal advice regarding a relevant matter, he will not breach his duties if he acts on the advice, unless it leads to him doing something beyond his powers or in breach of the general law.[57]

There is one major difference between the law about the court's control of a trustee's discretionary powers and its willingness to review compliance by a director with his duty of loyalty. In both cases the court investigates the decision-making process, but for directors, the court also investigates the outcome and will only intervene or find the director in breach of duty if the decision is one that no reasonable director would have reached.

The Wednesbury principle

Under the *Wednesbury* principle the court may set aside a public law decision, or the exercise of a contractual discretion, if there is a flaw in the decision-making process, through considering the wrong matters, or if the outcome is a decision that is so outrageous that no reasonable decision-maker could have reached it.[58] In a few cases concerning the exercise of directors' discretionary powers, the court has invoked the *Wednesbury* principle.[59] In all those case, the same answers could have been achieved by more orthodox means (identifying a flaw in the decision-making process or implying a term restricting the exercise of the discretion) without reference to *Wednesbury*. An English court, dealing with a case about alleged breach of a director's duty of loyalty is likely to be as unimpressed by submissions based on *Wednesbury* as was the Lieutenant Bailiff.[60]

Rationality applies a minimum objective standard to a person's mental processes

Even so, when investigating what the Lieutenant Bailiff called the director's mental processes and conscientiousness, the court may be assisted by Lady Hale's discussion of the *Wednesbury* principle in *Breganza v BP Shipping Ltd*,[61] where she places rationality as part of the decision-making process. She cited from Lord Sumption's judgment in *Hayes v Willoughby*,[62] where he explained that rationality applies a minimum objective standard to a person's mental processes:

"*It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will be usually the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse.*"

A possible example of irrational decision-making by directors in this sense would be where, in the face of clear and competent legal advice that the company's claim or defence is bound to fail, they decide to pursue the claim or persist in the defence, which duly fails with costs. In such a case the directors had considered the right matters (the merits of the claim), but there would be no logical connection between their ostensible reasons for the decision to pursue the claim or persist in the

55/. *Snell's Equity* (33rd ed) at [10-019].
56/. *Pitt v Holt* [2013] 2 AC 108 at [73].
57/. *Pitt v Holt* [2013] 2 AC 108 at [43], [80].
58/. For the two limbs of the *Wednesbury* principle, see *Breganza v BP Shipping Ltd* [2015] I WLR 1661, SC, at [24], [29] and [30], per Lade Hale, with whom Lord Kerr agreed; as did Lord Hodge [53] and Lord Neuberger at [103], with whom Lord Wilson agreed. In this case the court adopted the *Wednesbury* principle as an implied term in a contract.
59/. See cases in footnote 43 above and *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, in the judgment of Lord Woolf MR in the Court of Appeal at [17]-[21].
60/. In *Pitt v Holt* [2012] Ch 132 at [77] and [235] Lloyd LJ and Mummery LJ disapproved of drawing analogies with the *Wednesbury* principle when dealing with a case about a trustee's decisions, since trust law provided the answers. In the Supreme Court, [2013] 2 AC 108 at [11], Lord Walker said that the analogy "*should not be pressed too far*".
61/. [2015] 1 WLR 1661 at [29].
62/. [2013] 1 WLR 935, SC, at [14].

s 172(1) indicates that a director is expected to think carefully about the matters he is required to consider

defence (e.g. stubborn refusal to back down) and the evidence (the advice that the company's case was doomed to fail). In such a case the directors would have been not merely negligent, but disloyal to the company's best interests.

Section 172

The duty in s 172 is a fiduciary one.[63] It covers much the same ground as the common law duty of loyalty and should be interpreted and applied in the same way as that common law duty.[64] The statutory statement of the duty to promote the success of the company has four elements: (i) the director's conduct, (ii) the director's deliberations, (iii) the objective of the deliberations, and (iv) the other matters to which regard must be had.

The director's conduct

The primary focus of sub-s 172(1) is on the director's acts or omissions. He will be in breach of duty in the improbable event that his conduct departs from what he considers most likely to promote the success of the company. If he has failed to consider what would be most likely to promote the success of the company, he will be in breach unless what he does is within the range of reasonable decisions that a director could make; i.e. the *Charterbridge* principle applies to s 172.

The director's deliberations

It seems clear that the section incorporates a fiduciary duty to actively consider the way most likely to promote the success of the company. That duty is plainly a subjective one; it is what the director considers most likely to promote the success of the company that matters. But the court may conduct an objective inquiry into the decision-making process to determine whether the decision was made in good faith and whether the director positively considered how best to promote the success of the company.

The trust principles, discussed above, indicate that a decision will have been made in bad faith (and therefore disloyally) if (i) the director consciously intended to harm the company or its prospects of success, (ii) he did not make the decision with the positive belief that it would promote the success of the company, or (iii) he made it for reasons of caprice or spite.

Even if the director is acting in good faith, that is not the end of the matter, because the director's fiduciary duty requires positive consideration of the way most likely to promote the success of the company. The phrase "*he considers*" in s 172(1) indicates that a director is expected to think carefully about the matters he is required to consider. As the Lieutenant Bailiff observed, the director must make his decision responsibly, with "*conscientiousness*" and "*some mental process of reasoning*", so that noting, but then ignoring, some relevant matter would not be sufficient. I suggest that, in the context of decision-making by a fiduciary, this amounts to saying that the decision must be made rationally. That will not be the case if, to paraphrase Lord Sumption, the court can see no logical connection between the facts and the director's reasons for the decision or if the decision is arbitrary, capricious or perverse. If the director made the decision in any of these ways he would be disloyal. Usually, the court will have the opportunity to hear the director's explanation. If the director's explanation is unconvincing, the court may conclude, as in *Extrasure*, that he had not considered the company's best interests, or, if he had, he had not thought about them in a rational or coherent way and was therefore disloyal.

The objective of the director's deliberations

For most companies, the objective that the director must consider is "*the success of the company for the benefit of the members as a whole*". This replaces, in rather clearer language, "*the best interests of the company*", which was the objective of the common law duty of loyalty, and is reflected in a trustee's duty to have regard to the purpose of the trust. Sub-section 172(2) recognises that some companies, particularly charitable companies, are formed for purposes other than the benefit of its members. In those cases, the objective is the purposes for which the company is established. The director's

63/. Companies Act 2006, s 178(2).
64/. Companies Act 2006, s 170(4).

consideration should be focused on the way that is most likely to promote those objectives. In other words, the director's decisions should all be directed towards the continuing financial success of the company (or fulfilment of charitable or other purposes). If he does not keep those objectives in mind, his decision-making may be flawed and he may find that he is in breach of duty.

Sub-section 172(3) preserves the common law rule about considering and acting in the interests of creditors when the company is insolvent or bordering on insolvent, as it had been explained in the *Colin Gwyer* case. The language of the subsection indicates that where directors are obliged to consider and act in the interests of creditors, their duty under the section is modified so that they must act in the way they consider would be most likely to be in the interests of creditors.

Other relevant matters

Subsection 172(1) obliges the director, when considering how to promote the success of the company, to have regard to other relevant matters, including those listed in paragraphs (a)-(e), which are concerned with share-holder value, the interests of employees, the company's reputation and fairness between members. The phrase in brackets, "*among other matters*", indicates that the director should have regard to all relevant matters. This part of the duty under s 172 is comparable to the duty of a trustee, acting in good faith and within his powers to have regard to relevant matters and to exclude the irrelevant. If the principles in *Pitt v Holt* are applied to directors, two points may reassure directors:

- they will not be exposed to liability for breach of fiduciary duty, unless their failure to have regard to some matter, whether specified in paragraphs (a)-(e) or generally, is a serious one; nor should they be exposed to trivial complaints about their decision making; and
- they should not breach their duty to promote the success of the company if they take, and act on, competent legal advice in relation to a relevant matter.[65] Taking legal advice indicates loyalty.

The first point is reinforced by the *Charterbridge* principle, because, even if the director's decision was flawed, for failure to have regard to some relevant matter, he will not be in breach of duty, if his conduct was within the range of reasonable decisions that could have been made by a director complying with his duty under s 172.

Conclusion

The *Carlyle* case seems to be the first time that the court has been invited to adopt a rationality test when deciding whether directors had complied with their duty of loyalty. The sophisticated CCC directors were far from ideal material on which to test such a proposition and it is not surprising that the Deputy Bailiff rejected the invitation. I suggest that rationality does have a role to play, albeit a limited one, since the occasions when a director honestly considers the right matters and yet does so irrationally are probably as remote as "*rabid teetotallers*" becoming directors of a brewery company. I have given one example, concerning flouting legal advice, and it is difficult to think of others. It is much more likely that, where a director has made a wholly unreasonable, absurd and damaging decision, his attempt to explain it will not convince the court, which will conclude that he had failed to consider how best to promote the success of the company. So, the question of whether the common law duty of loyalty or the statutory duty to promote the success of the company incorporate a rationality standard may never be resolved.

As things stand the law works reasonably satisfactorily without a rationality standard, because a court may apply objective standards to its inquiry into the director's decision-making process to see if he was in good faith and considered the right matters and, if not, whether the outcome was a decision that no reasonable director, complying with his fiduciary duties, could have reached. By restricting its objective inquiries to those issues, the court avoids trespassing into the territory of a director's business judgment.

65/. In *Byng*, noted above, the directors' decision about adjourning an AGM was invalid even though they took and acted competent, but mistaken, legal advice. The decision could be explained because the relevant matter was the time available for obtaining the decision of the meeting. That was a commercial matter on which the board would be expected to make up its own mind.

The Work of the Insolvency Service

William Trower QC, appointed as a non-executive director to the Insolvency Service in 2017, summarises the wide range of functions carried out under the umbrella of this public agency.

Readers of the Digest will know that the Insolvency Service is the government agency responsible for the work of the official receiver, but many will be less familiar with its other responsibilities. This article gives an overview of the functions of the Service and summarises the way in which it operates.

The legal status of the Insolvency Service is that of an executive agency of the Department for Business Energy and Industrial Strategy, better known by the acronym BEIS. It is headed by the Inspector General and Chief Executive who is also its accounting officer. The present holder of that office is Sarah Albon, whose civil service career has included senior positions at the Ministry of Justice and at HM Courts and Tribunal Service. As an executive agency, the Insolvency Service has a significant degree of autonomy with its own board of directors, five of whom are executive (including the Inspector General) and six of whom are non-executive. The board fulfils both advisory and supervisory functions and is required to provide strategic leadership for the work of the Insolvency Service. I was appointed to be one of three new non-executive directors during the course of last year.

The Insolvency Service employs approximately 1,500 staff at 22 offices across England, Wales and Scotland. Its accounts for the last financial year showed total operating income of approximately £87 million. It has a senior management team of experienced civil servants, some of whom have spent their whole career in the Insolvency Service, but several of whom have spent parts of their career in other public and private sector organisations.

Many of the functions carried out by employees of the Insolvency Service are the legal responsibility of the Secretary of State, but many are also the statutory responsibility of the official receiver. Official receivers and deputy official receivers are statutory office holders (see sections 399 to 401 of the Insolvency Act 1986). They are also officers of the court to which they are attached. There is a succinct description of their status, and how they interrelate with the Insolvency Service in the speech of Lord Millett in *In Re Pantmaenog Timber Co Ltd* [2004] 1 AC 158 at paragraph 43:

"The office of official receiver was established by the Bankruptcy Act 1883 (46 & 47 Vict c 52). His role was originally confined to personal

bankruptcy, but it was extended to companies in compulsory liquidation by the Companies (Winding up) Act 1890 (53 & 54 Vict c 63). It is a statutory office held by persons appointed by the Secretary of State from among the civil servants employed within the Department of Trade and Industry. They are members of the Insolvency Service, which is an executive agency of the Department with overall responsibility for the administration of insolvency in England and Wales, and acts under the ultimate direction and control of the Secretary of State. The Insolvency Service is headed by the Secretary of State but her involvement in day to day matters is normally exercised on her behalf by officials. She must make arrangements to ensure that there is at least one official receiver attached to each court having bankruptcy jurisdiction. The official receiver is an officer of the court to which he is attached and is answerable to the court for the carrying out of its orders and for the discharge of his statutory functions. As the holder of a statutory office, he has standing to bring proceedings and has a right of audience before the court to which he or she is attached. He sues and is sued not in his personal name but as "the official receiver". The definite article is appropriate because in the case of each company there is only one official receiver."

There are 20 offices across England and Wales where an official receiver is responsible for the administration of bankruptcies and compulsory liquidations ordered by the court to which he is attached. His primary role is to realise and distribute assets, and to enforce the insolvency regime

THE SERVICE WILL TAKE ON CASES WHERE NO PRIVATE ORGANISATION CAN, AS WITH CARILLION

The official receiver is often appointed where no member of the private sector is prepared to act

through sanctions and appropriate enforcement action. Amongst the powers available to the official receiver is the power to apply for and conduct public examinations where there has been non-cooperation or there is a need to enforce attendance. In many instances a private sector IP will be appointed as trustee or liquidator but that is often not the case where there are insufficient assets. It follows that many of the estates administered by the official receiver are small, but official receivers have also been required to take an active role as office holders in much larger insolvencies. This is particularly the case where the lack of assets, or the potential for uncontrolled expense (or other personal) liabilities is such that no member of the private sector is prepared to take the appointment. Two recent examples of this are the appointment of the senior official receiver as liquidator of Carillion Plc, and the earlier appointment of the official receiver to act as liquidator of Sahaviriya Steel Industries UK Ltd, the owner and occupier of a huge steelworks in Redcar.

Separate from the work of the official receivers is the work of the investigation and enforcement services unit. This division operates from 11 offices in England and Wales and has approximately 300 staff. It is responsible for the investigation of misconduct by directors and the taking of disqualification proceedings on behalf of the Secretary of State. Its work will sometimes have been initiated by information initially obtained by the official receiver in administering the relevant bankruptcy or compulsory liquidation, but it may also have been initiated by information obtained from elsewhere including any private sector IP. It has conducted a number of high-profile investigations over the years, most recently investigations relating to the affairs of British Home Stores and Keeping Kids Company, but the bulk of its work is on a much smaller

BHS WAS ONE OF THE LARGER INVESTIGATIONS THE IN WHICH THE INSOLVENCY SERVICE WAS INVOLVED scale. Approximately 1,200 directors per year are disqualified by court order or give an undertaking. This unit is also responsible for fact-finding enquiries into companies which are still operating, and bringing proceedings for a winding up in the public interest where the circumstances warrant that course of action being taken. This will normally be where some form of fraud, scam or sharp practice is being perpetrated on the public. During 2016-17, some 85 companies were wound up on public interest grounds.

On the personal insolvency side, the Insolvency Service is responsible for obtaining bankruptcy and debt relief restriction orders and undertakings, where misconduct is established against the bankrupt or debtor as the case may be. These can be made on the application of the Secretary of State or the official receiver acting on the direction of the Secretary of State. In practice the work required to apply for such orders is carried out by civil servants employed by the Insolvency Service. Some 480 of these orders were obtained during 2016-17, the vast majority of which were BROs.

With effect from the beginning of 2017, the criminal enforcement team from BEIS was transferred to the Insolvency Service. This team is responsible for bringing prosecutions where criminal misconduct has been discovered in both corporate and personal insolvencies. The categories of offence which they are responsible for prosecuting are those relating to the prevention of abuse of the company and insolvency systems. Investigations proceed on the basis of reports from a number of different sources, including referrals from other parts of the Insolvency Service, Companies House, the Employment Agency Standards Inspectorate and the police. They liaise with the police when they need to make arrests or act upon search warrants. There are approximately 100 members of this team based in a limited number of locations; they include investigators, lawyers and law clerks. As with other prosecutions, the test applied in deciding whether or not to bring criminal proceedings is whether there is a realistic prospect of conviction, and that prosecution is in the public interest.

Another of the Insolvency Service's more recently acquired functions is that of the new bankruptcy adjudicator, whose work started on 6 April 2016. This unit is headed by the Adjudicator herself, who is a deputy director of the Insolvency Service and a former official receiver. Subject to any appeals, the adjudication process has replaced the court in the procedures by which individual debtors were entitled to apply to make themselves bankrupt. It is an online digital service and aims to make a bankruptcy order within 2 working days. Over 11,000 orders were made in the first year of its operation.

Another high-volume aspect of the work of the Insolvency Service is the making of debt relief orders, which are made by the official

WILLIAM TROWER QC

THE INSOLVENCY SERVICE IS BASED IN CROYDON, SOUTH LONDON AND IS HEADED BY CEO SARAH ALBON (RIGHT)

receiver on the application of debtors with low levels of unmanageable debt, low levels of income and little by way of assets. The process for making a DRO requires the intervention of an approved intermediary known as a DRO adviser. The vast majority of these orders are made within 48 hours of the applications being made and over 25,000 DROs were made by the official receiver during the course of 2016-17.

The part of the Insolvency Service's work with which individuals are most likely to come into contact is its administration of the redundancy payments service. This is the unit which administers the process by which ex-employees of insolvent employers are entitled to payment of statutory redundancy out of the National Insurance Fund. There are two stages to the work which the Insolvency Service is required to carry out. The first is the processing of claims by former employees, and the second is the lodgment of claims in the relevant insolvency for reimbursement of the amounts so paid. The claims in the relevant insolvency are made on behalf of the Secretary of State, who is subrogated in respect of the amounts paid out to former employees. The work of this unit also extends, in exceptional cases to the making of redundancy payments under the Financial Assistance Scheme, where an employer is not insolvent, but seeks a loan for payment of redundancy amounts to ensure that further additional redundancies are avoided. During 2016-17, over 60,000 individuals had their redundancy claims administered by the redundancy payments service, which paid out more than £250 million from the National Insurance Fund.

As is well-known, a person may not act as an IP without being qualified to do so, which means that he must be authorised to act as such by a recognised professional body. There are five such bodies, three of which are based in England and Wales (the ICAEW, the ACCA and the IPA), one of which is based in Scotland (the ICAS) and one of which is based in Northern Ireland (the ICAI). The Secretary of State has oversight of the recognised professional bodies and his functions in relation to their oversight are assisted by the Insolvency Service. It has overall responsibility for monitoring the activities of the recognised professional bodies and improving standards within the insolvency profession in its capacity as oversight regulator. It also operates a complaints gateway for capturing information on the professional regulators' own complaints handling procedures.

The Insolvency Service also fulfils the function of advising the government on insolvency policy. This role is different from many other parts of government, where policy is developed by the relevant department as opposed to the agency with responsibility for delivery of the relevant service. In the case of insolvency, the Insolvency Service has a specialist team of policy-makers and advisors. The team concerns itself with all aspects of policy ranging from points of detail to aspects of the system which can have significant ramifications on the way that insolvency is administered. In recent years, it has fulfilled an increasing role in cross-border policy issues in which the UK is generally regarded as one of the principal global players. It also works with other government departments, such as the Foreign and Commonwealth Office and the Department for International Trade, in assisting other countries on the development of their own insolvency systems. This is a particularly important function in relation to those jurisdictions with which the UK is keen to expand its own trading relationship. The Insolvency Service is also responsible for the Insolvency Rules (which can only be made with the concurrence of the Secretary of State), and provides administrative and secretarial support for the work of the statutory Insolvency Rules Committee.

In recent years the Insolvency Service has fulfilled an increasing role in cross-border policy issues

The work of the Insolvency Service is funded from a number of different sources. The functions of the Official Receiver are paid for through the statutory fees that are charged to the petitioner or applicant at the commencement of the insolvency and thereafter by reference to the value of asset realisations. The making of DROs is also funded by fees (the £90 application fee), as is the work of the Adjudicator. Criminal enforcement and disqualification proceedings do not lead to significant recovery from the directors and others who are the objects of the process, and the bulk of this work is funded by BEIS, which also funds the policy work of the Insolvency Service. The administration of the redundancy payments scheme is funded out of the National Insurance Fund, while the work which the Insolvency Service carries out in monitoring the recognised professional bodies in its capacity as oversight regulator is paid for by fees charged to the RPBs themselves.

In the short period of time in which I have been involved in the affairs of the Insolvency Service, I have come to appreciate that it is a public agency with very considerable strengths, providing a number of complex services with great skill. Like many public bodies its resources are stretched, but the essence of what it does, is done by a skilled team with considerable commitment and expertise.

Case Digests

GEORGINA PETERS

The last few months have seen members of Chambers appear in a large number of significant decisions.

David Allison QC and Georgina Peters succeeded in the Commercial Court in a judgment handed down in *Phones 4U Limited v EE Limited* [2018] EWHC 49 (Comm). It related to a dispute between Phones 4U Limited, the well-known telecoms intermediary, and EE Limited, one of the major mobile network operators in the UK. In a detailed and characteristically articulate decision Mr Justice Andrew Baker rejected EE's counterclaim against Phones 4U, in which it sought damages for repudiatory breach in reliance on what was held to be no more than a contractual termination notice.

The Judge took the opportunity to examine from first principle the necessary ingredients required to constitute the cause of action for repudiatory breach, deciding an issue which was without precise precedent. Perhaps unsurprisingly given the level of academic scrutiny which this issue has attracted in recent years, the decision has garnered substantial interest in the legal market. The decision is discussed in detail in an article appearing on page 48 of this Digest.

Tom Smith QC, Matthew Abraham and Andrew Shaw appeared in the Chancery Division in *Re Olympia Securities Commercial plc* [2017] EWHC 2807 (Ch), a decision ruling on the definition of "financial institution" for the purpose of an assignment provision contained in a loan agreement. It is also discussed in detail in an article on page 54 of this Digest.

The pages which follow reveal a large number of decisions r eflecting the high-profile cases in which members have acted. They include the following.

Of substantial importance is the Commercial Court's landmark decision in *Golden Belt 1 Susuk Co BSC(c) v BNP Paribas* [2017] EWHC 3182 (Comm). Robin Dicker QC appeared for BNP Paribas in a lengthy trial before Mr Justice Males. In an extensive and wide-ranging judgment, the Judge found there to exist a tortious duty of c are on the part of an arranging bank for the valid execution of a specific structured finance transaction, drawing a distinction with previous "advice" cases in which such a duty has not been held to exist.

Of significant (and timely) importance is the first reported judgment to consider the basis on which the term of office of an administrator may be extended, in which William Trower QC appeared before Mr Justice Snowden: *Re Nortel Networks UK Ltd* [2017] EWHC 3299 (Ch). The Judge approached his task by setting out the relevant factors to which the court should have regard, and was additionally influenced by the uncertain position in which Brexit would place the administrators after 29 March 2019.

An important judgment on the rule in *Gibbs* was delivered in *Re OJSC International Bank of Azerbaijan* [2018] EWHC 59 (Ch), concerning the largest bank in Azerbaijan. Mr Justice Hildyard rejected the bank's attempt to (in effect) discharge or vary contractual rights governed by English law in reliance on the CBIR, in proceedings in which Gabriel Moss QC, Barry Isaacs QC, Daniel Bayfield QC, Richard Fisher, Alexander Riddiford and Ryan Perkins appeared.

The lawfulness of redemption payments made by an insolvent fund was determined under the Cayman Companies Law by the Privy Council (Cayman Islands) in *DD Growth Premium 2X Fund v RMF Market Neutral Strategies (Master) Ltd* [2017] UKPC 36, in which Tom Smith QC and Adam Al-Attar appeared.

The particular considerations arising in relation to groups of companies were examined on a successful (and disputed) application to recognise a Croatian administration in the Chancery Division in *Re Agrokor DD* [2017] EWHC 2791 (Ch), in which Tom Smith QC, David Allison QC, William Willson and Adam Al-Attar appeared.

A creditor's application to remove administrators succeeded in *Re VE Interactive Ltd* [2018] EWHC 186 (Ch) in the Chancery Division. Ba rry Isaacs QC and Andrew Shaw appeared for the successful applicants, the Court ruling on a conflict of interest in connection with a 'pre-pack' sale.

Finally, the trial of (what is believed to be) the first case in which one creditor has sought to challenge the admission of another creditor's proof of debt is pending before the Chancery Division in *Wentworth Sons Sub-Debt SARL v Lomas* [2017] EWHC 3158 (Ch), in which David Allison QC, Daniel Bayfield QC, Richard Fisher, William Willson and Ryan Perkins have appeared to date.

On the eve of publication of this edition, the Court of Appeal handed down judgment in the appeal against Mrs Justice Asplin's decision in *Property Alliance Group Ltd v The Royal Bank of Scotland Plc:* [2018] EWCA Civ 355. The Court of Appeal unanimously dismissed PAG's appeal on each of its three claims. Importantly, however, the Court did not agree with all of the Judge's conclusions. The decision will be fully analysed in the next edition of the Digest.

BANKING & FINANCE

Digested by TOBY BROWN


TOBY BROWN

Re Olympia Securities Commercial plc, Chancery Division (Companies Court), [2017] EWHC 2807 (Ch) (23 November 2017)

Assignment – Debentures – Financial institutions – Interpretation

Loans advanced to a borrower by Anglo Irish Bank and associated swaps and security had been assigned to an investment fund. The fund as assignee claimed repayment of loans and the early termination amounts due under the swaps. Held that, although the terms of the loan restricted assignments to bank or other financial institutions, the assignee was a "financial institution". Although the assignee was a special purpose vehicle, with no share capital, established for the purpose of the transaction in question, its business concerned commercial finance and it was therefore within the broad definition of "financial institution". So far as the swaps are concerned, the fact that a bankruptcy default had occurred in relation to Anglo Irish Bank, did not prevent the Bank from subsequently relying on a default which occurred in relation to the borrower in order to terminate the swaps. The borrower had not terminated the swaps following the default which occurred in relation to the Bank In these circumstances Section 6(a) of the ISDA Master Agreement did not preclude the Bank from relying on an event of default which occurred in relation to the borrower, even though it had itself been the subject of an earlier default. **[Tom Smith QC, Matthew Abraham]**

Tiuta International Ltd v De Villiers Surveyors Ltd [2017] UKSC 77 (Baroness Hale PSC, Lord Kerr, Lord Sumption, Lord Lloyd-Jones, Lord Briggs JJSC) 29 November 2017

Claim by lender – Negligent valuation – Measure of damages – Collateral benefit

The claimant was a specialist lender and entered into an initial loan facility agreement with a property developer for c. £2.5m, with security provided by a charge over the development. The facility was made on the basis of a valuation of the development by the defendant valuers. Shortly before the facility was to expire, the lender entered into a second facility agreement with the developer for c. £3m, of which c. £2.8m was for the refinancing of the indebtedness under the first facility and £289,000 was new money advanced. A fresh charge was taken over the development. This second facility was made on the basis of a further valuation by the defendant. The facility expired shortly after the lender went into administration, and none of the indebtedness has been repaid.

The lender brought a negligence claim against the valuers, claiming that it negligently valued the development for the purposes of the second facility, and but for that negligence, the advances would not have been made. It was common ground there could be no liability in damages in relation to the first valuation, given there was no such allegation of negligence and in any event the advances under the first facility were discharged out of advances made under the second facility. The valuers sought summary judgment to dismiss the part of the claim that arose out of the refinancing element of the second facility. The application proceeded on the assumption that, but for the assumed negligence in relation to the second valuation, the second facility would not have been made.

At first instance, Timothy Fancourt QC (sitting as a deputy High Court judge) acceded to the application, holding that the lender's loss was limited to the new money advanced under the second facility. However, the Court of Appeal by a majority (Moore-Bick and King LJJ, McCombe LJ dissenting) allowed the appeal, holding that the advances under the second facility stood apart from the first facility and the "basic comparison" for ascertaining the loss was between the amount of the second loan and the value of the security.

Lord Sumption gave the judgment of the Supreme Court. He stated that the result was "perfectly straightforward and turns on ordinary principles of the law of damages." The basic measure of damages is that which is required to restore the claimant as nearly as possible to the position that they would have been in if they had not sustained the wrong. In a case of negligent valuation where, but for the negligence, the lender would not have lent, this involves what Lord Nicholls in *Nykredit Mortgage Bank* [1997] 1 WLR 1627 called the "basic comparison". Frequently, but not always, the claimant would not have entered into the relevant transaction had the defendant valuers fulfilled their duty of care. When this is so, a professional negligence claim calls for “the basic comparison” i.e. between the claimant’s position had they not entered into the transaction in question and their position under the transaction.

If the valuers had not been negligent in reporting the value of the property for the purpose of the second facility, the lenders would not have entered into the second facility, but they would still have entered into the first. On that hypothesis, therefore, the lenders would have been better off in two respects. First, they would not have lost the new money lent under the second facility, but would still have lost the original loans made under the first. Secondly, the loans made under the first would not have been discharged with the money advanced under the second facility, so that if the valuation prepared for the first facility had been negligent, the irrecoverable loans made under that facility would in principle have been recoverable as damages (although this point did not arise given there was no allegation of negligence in relation to the first facility). Accordingly, the lender’s loss is limited to the new money advanced under the second facility.

The lender argued, however, that the Court should disregard that the advance under the second facility was used to discharge the outstanding indebtedness under the first, because the application of those funds was a “collateral benefit” to the lender, which they were not obliged to take into account in computing their loss. This argument was rejected by Lord Sumption. The general rule is that where the claimant has received some benefit attributable to the events which caused their loss, it must be taken into account in assessing damages, unless it is collateral. In *Swynson Ltd v Lowick Rose LLP* [2017] 2 WLR 1161 it was held that as a general rule, collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss.

In the present case, Lord Sumption held that the discharge of the existing indebtedness out of the advance made under the second facility was plainly not a collateral benefit. It did not confer a benefit on the lender and so no question arose of either taking it into or leaving it out of account. Lord Nicholl’s “basic comparison” required one to look at the whole of the transaction which was caused by the negligent valuation. Here, one must have regard to the fact that the refinancing element of the second facility both increased the lender’s exposure under the second facility by c. £2.5m, and reduced its loss under the first facility by the same amount. Its net effect on the lender’s exposure and ultimate loss was therefore neutral. Only the new money advanced under the second facility made a difference. Lord Sumption concluded that the concept of collateral benefits is concerned with collateral matters, and cannot be deployed so as to deem the very transaction which gave rise to the loss to be other than it was.

Accordingly, the appeal was allowed, and the first instance decision restored.

Singularis Holdings Ltd (In Official Liquidation) v Daiwa Capital Markets Europe Ltd [2018] EWCA Civ 84 (Sir Geoffrey Vos C, Gloster LJ, McCombe LJ) 1 February 2018

Quincecare duty of care of bankers – Defence of illegality – Attribution for one-man companies

This unusual case is of interest because it appears to be the only case where a court has found against a bank in respect of the *Quincecare* duty. On appeal, the central issue was whether the defence of illegality was available to allow the defendant (“the Bank”) to defeat a claim in negligence and breach of contract brought by its former customer (“Singularis”). The Bank had paid away US$204m to other companies within the Saad Group at the instigation of Mr Al-Sanea, the sole shareholder and one of the directors of Singularis. It was common ground that Mr Al-Sanea was acting fraudulently.

At first instance, as reported in the June 2017 edition of the Digest, Rose J gave judgment against the Bank for c. US£153m, having found that it was in breach of its duty of care as adumbrated in the *Quincecare* decision. The Judge rejected the Bank’s contention that Mr Al-Sanea’s knowledge and the fraud should be attributed to Singularis, and so the defence of illegality failed.

On appeal, the Chancellor, with whom Gloster LJ and McCombe LJ agreed, considered six issues. First, the primary question was whether Mr Al-Sanea’s knowledge and fraudulent conduct should be attributed to Singularis in order to bar its claim on grounds of illegality. Applying the Supreme Court’s decision in *Bilta (UK) Ltd v. Nazir* [2016] AC 1, a “one-man company” was a company where there were no innocent directors or shareholders, and since the Bank did not appeal Rose J’s findings that the other directors were not complicit, Rose J had correctly found that Singularis was not a “one-man company”. In any event, on the facts of the case and considering the context, Singularis had operated as a genuine business over a number of years and had few similarities to the case of *Stone & Rolls* [2009] 1 AC 1391, and accordingly it would have been wrong to attribute Mr Al-Sanea’s

conduct to Singularis. The Chancellor also commented that he did not find the concept of a "one-man company" particularly helpful in this context.
Second, the Court of Appeal considered whether if, however, knowledge was to be attributed, whether the claim should be barred under the three-stage test from *Patel v. Mirza* [2016] UKSC 42. It held that Rose J proceeded on the correct legal basis and took into account the relevant considerations, and accordingly upheld her decision.
Third, the Chancellor considered whether the claim was defeated by the lack of causation because, assuming Mr Al-Sanea's fraud is attributed, Singularis was not relying on performance by the Bank of its duty. In contrast to the decision in *Berg Sons & Co v Adams* [1992] BCC 661, here there was no need for Singularis to allege reliance, all it had to allege was that the Bank failed in its duty to refrain from making the payments whilst the circumstances put it on inquiry. Moreover, there were innocent directors who were entitled to rely on the due performance of the *Quincecare* duty. Had the Bank refused to make the payments, the independent directors would have become aware of the fraud and the losses would have been avoided. Accordingly, the claim was not defeated by a lack of causation.
Fourth, the appellate court considered if knowledge was attributed, whether the claim was defeated by an equal and opposite claim by the Bank against Singularis for the tort of deceit. The Chancellor stated that Evans-Lombe J's reasoning in *Barings plc v. Coopers & Lybrand* [2003] PNLR 34 applied with equal if not greater force to the present case. Ordinarily, a third party who was misled by Mr Al-Sanea into a transaction would be able to recover all losses flowing therefrom. Here, the Bank was not an ordinary third party, rather it was in breach of a pre-existing duty to Singularis to refrain from making payments whilst the circumstances put it on inquiry. It was this breach, rather than Mr Al-Sanea's previous deceit, which caused the Bank's exposure to suit. The Chancellor commented that since the existence of fraud was a precondition for the breach of a *Quincecare* duty claim, it would be a surprising result if the Bank having breached its duty could escape liability by placing reliance on the existence of that fraud. Accordingly, the claim was not so defeated.
Fifth, the appeal considered whether the *Quincecare* duty applied where only the company's creditors would stand to benefit in practice. The Chancellor held that the duty was owed to Singularis alone, namely to protect the funds in its account from fraudulent disposition, and the fact that vindicating this right would benefit only creditors rather than the company was nothing to the point. It was hard to see why the duty should vary depending on the state of solvency of the customer, although conversely the circumstances that may put the banker on inquiry may vary depending on whether (to the banker's knowledge) the customer is solvent or insolvent.
Sixth, the Chancellor considered that the Judge's assessment of 25% contributory negligence was not an error of law or wholly outside the range of reasonable possibilities.
Accordingly, the appeal was dismissed and judgment against the Bank was upheld.

CIVIL PROCEDURE

Digested by ROSE LAGRAM-TAYLOR


ROSE LAGRAM-TAYLOR

Libyan Investment Authority v Societe Generale SA [2017] EWHC 2631 (Comm) (Teare J, 25 October 2017)

Civil Evidence – Collateral use of documents – Receivers' powers and duties

The Receiver acting for the Libyan Investment Authority (the "LIA") applied for permission to be released from the prohibition against documents being reviewed for a collateral use. This prohibition is contained in the CPR, whereby the collateral use of documents is restricted without the consent of the other party to cases where the court gives permission. However, permission is only given in 'special circumstances'.
Accordingly, the LIA applied to court to obtain this permission, in order to use documents disclosed to it by Société Générale ("SocGen") in one set of proceedings where fraud, bribery and corruption allegations had been made, so as to investigate whether to seek permission to use those documents in separate proceedings against further parties. Whilst the judge here held that the Receiver did not have the power to make the application, he nevertheless went on to consider whether the application should have been granted had the requisite power existed.
In so doing, the judge noted in particular that case law, namely the House of Lords decision of *Crest Homes Plc v Marks* [1987] AC 829, has established that in the absence of injustice, the public interest in facilitating the investigation of offences will take precedence over the public interest of encouraging

disclosure of material documents. In the current case, the LIA argued that there was compelling public interest in investigating potential fraud, bribery and corruption. On this basis, it was held that if the Receiver had had the necessary power to bring the application, then the required special circumstances did exist in circumstances where the application was merely to review documents. This was furthered by the fact that the review of the documents would be conducted by those who had already had access to the documents previously, and so there was no reason to consider that such a review would cause any harm.

This judgment therefore demonstrates that a court may be willing to allow the collateral use of documents where fraud is alleged, with the strong public interest in such claims justifying the use of documents obtained in one set of legal proceedings in a different set of proceedings.

BNM v MGN [2017] EWCA Civ 1767 (Sir Terence Etherton MR, Longmore LJ, Irwin LJ) 7 November 2017

Civil procedure – Costs – Proportionality

This was a long-awaited appeal, whereby the Master of the Rolls, Sir Terence Etherton, held that the senior costs judge Gordon-Saker had been wrong in principle to subject recoverable base costs and additional liabilities to the new proportionality rule. More specifically, it was held that the new proportionality rules contained in CPR r.44.3(2) and r.44.3(5) did not apply on a standard basis of assessment to a "pre-commencement funding arrangement" as defined in r.48.1. Instead, the former proportionality test contained in the old CPR r.44.4(2) applied.

The appellant appealed against a decision that the new proportionality test applied to the assessment of her costs following the settlement of her claim against the defendant newspaper publisher. As to the relevant background, the applicant had instructed solicitors 2 years after she discovered that the publisher had access to certain private information (although to note this was not published). The applicant had entered into a conditional fee arrangement ("CFA") with her solicitors, and also purchased after the event ("ATE") insurance. Her solicitors also entered into a CFA with counsel. The success fees under both the CFAs and the ATE insurance increased significantly if proceedings were issued, which they duly were, although without giving notice to the publisher. Proceedings were then settled within 12 months with the publisher undertaking not to disclose confidential information, to pay damages, and to pay the claimant's costs on the standard basis, whereby the claimant sought to recover success fees and the ATE insurance premiums.

Whilst at first instance it was held that this was not possible on the new proportionality rules, on appeal it was held that the assessment should have been conducted on the old proportionality rules. This was because, as Etherton MR held "[i]f it had been intended that the new proportionality test was to apply to funding arrangements to which the statutory saving and transitional provisions applied, that would have been made clear in the statutory provisions of the new costs rules or both and it was not." The publisher had argued that the new proportionality test applied as success fees and ATE expenses could be regarded as 'fees' and 'expenses' for the purposes of the current definition of costs. However, this was rejected.

Accordingly, the Court of Appeal remitted the assessment back to the senior costs judge to consider proportionality again. Whilst an interesting and eagerly anticipated judgment, ultimately, guidance was regrettably not provided on the wider application on how the test of proportionality is to be applied in practice.

Premier Motorauctions Ltd (in liquidation) & another v PricewaterhouseCoopers LLP & another [2017] EWCA Civ 1872 (Longmore LJ, Kitchin LJ and Floyd LJ) 23 November 2017

Civil procedure – Insurance – Insolvency

In an application for security for costs, the Court of Appeal was required to determine whether after the event ("ATE") insurance constituted adequate security for costs.

The underlying claim is a complex one. The claimants, companies in liquidation, allege that the defendants, PwC and Lloyds Bank, had entered into an unlawful means conspiracy to force the companies into administration so that their business and assets could be sold at an undervalue by the administrators for the benefit of the bank. In view of this claim, the Claimants obtained ATE insurance for £5 million. The policy stated that it could be avoided for non-disclosure or misrepresentation, and excluded payment of an order for security for costs. The defendants subsequently sought security for a total of £7.2 million.

At first instance, the application was refused on the grounds that the existence of the relevant ATE policies meant there was no good reason to believe that the claimants would not be able to pay costs, the judge holding that he had no jurisdiction to order the security. The defendants had argued that the ATE insurance was no more than a contingent asset, and so could not be taken into account. It was also argued that the question the judge should have asked when reaching judgment, was whether the ATE insurance gave the defendants substantially the same security as payment into court, a bank guarantee or a deed of indemnity from the insurers.

On appeal, the Court of Appeal overturned the first instance judgment of Snowden J. Despite there being little authority on the point, such as there was, it was held that an appropriately framed ATE insurance policy could be an answer to an application for security (*Nasser v United Bank of Kuwait (Security for Costs)* [2001] EWCA Civ 556, [2002] 1 WLR 1868 considered). The question that must be asked is whether the ATE policy provides the defendant with "*sufficient protection*". If sufficient protection is given, there would be no reason to believe that the company would be unable to pay the defendants' costs if ordered to do so. The defendants' contention that the ATE insurance was not sufficient given it was only a contingent asset, was held to go too far, it being wrong to state that the ATE insurance could not be taken into account.

However, with regards to whether the policy in question did provide sufficient protection, the Court of Appeal decided that it did not. This was because the policy contained no anti-avoidance provisions, with the defendants not having any assurance that the policy relied on could not be avoided, especially for non-disclosure or misrepresentation by the claimants. It followed that there was reason to believe that the claimants would not be able to pay the defendants' costs if so ordered.

Security for costs was therefore duly ordered in the sum of £4 million, it being held by Longmore J in his leading judgment that "*[o]nce one is satisfied that the Companies are insolvent, that there is jurisdiction to order security for costs and that ordering security will not stifle the claim, it is normally appropriate to order security and I see no reason not to do so in this case*."

W Portsmouth and Co Ltd v Lowin [2017] EWCA Civ 2172 (Sir Geoffrey Vos C, McCombe LJ, Asplin LJ) 19 December 2017

Civil procedure – Costs – Indemnity basis – Part 36 offers

The Court of Appeal was required to consider whether or not the costs cap in CPR r.47.15(7) applied in circumstance where a receiving party had beaten their own Part 36 offer on costs.

More specifically, the claimant made an offer to settle her costs in the sum on £32,000. She was subsequently awarded £32,255.35 on a provisional assessment. The issue remaining between the parties was whether the cap on the assessment of costs of £1,500 plus VAT and court fees still applied when a receiving party beat their own offer.

The defendant was ordered to pay the claimant's costs of the assessment on an indemnity basis pursuant to CPR r.36.17(4). However, by holding that the claimant's entitlement to indemnity costs were subject to r.47.15(5), this capped the costs payable on a provisional assessment at £1,500. On appeal to the High Court, the judge found that there was a conflict between r.47.15(5) and Part 36, holding that despite this conflict, there was no derogation from the entitlement to have costs assessed on an indemnity basis as the draftsman had not expressly stated that the Part 36 costs provisions were to be displaced by the costs cap. It was therefore held that the claimant was entitled to uncapped indemnity costs.

On appeal, it was held that the judge had erred in holding that there was a tension between r.47.15(5) and Part 36. It was explained that the costs cap did not prevent costs being assessed on the indemnity basis and did not affect the quantum of the costs being assessed. Instead, it merely inhibited the amount that could be awarded once the assessment had been made.

Kennedy v National Trust for Scotland [2017] EWHC 3368 (QB) (Sir David Eady) 17 January 2018

Civil procedure – Service of claim forms – Forum non conveniens

The court had to determine two primary issues arising during a claim for defamation, negligence and breaches of the Data Protection Act 1998 following the publication of certain statements across numerous jurisdictions. They were (i) whether service of the claim form was valid, and (ii) whether the action should be stayed on the basis that Scotland would be the more appropriate forum.

As to service, the claim form was issued on the final day of the limitation period. It was then sent by first-class post to the defendant's registered office in Scotland on 23 August 2017. The six-month period (given service was out of the jurisdiction) of the claim form's validity was due to expire at midnight on 24 August 2017 and the documents arrived at the defendant's office on 24 August. The key question here centred on whether there remained a distinction between the actual date of service and the deemed date under the CPR, and specifically the interplay between r.6.14 and r.7.5(2). This was important because the deemed date of service pursuant to r.6.14 was 25 August 2017 (i.e. two days after the claim form was posted, and after the expiry of time for valid service), despite the actual date of service being 24 August 2017.

It was noted by the court that this issue would not have arisen had the claim form been served within the jurisdiction. This was because of a distinction between the wording of r.7.5(1) dealing with service in England and Wales, and r.7.5(2) dealing with service outside the jurisdiction. Whilst r.7.5(1) only requires the relevant step to be completed (in this case posting the claim form), r.7.5(2) specifically requires the claim form to be served. The court reflected that there was an "*unfortunate tension*" between these CPR provisions, suggesting that greater clarity in the drafting of these rules would be helpful. Nevertheless, overall the court found in favour of the claimant, reasoning that to find otherwise would be counter-factual and that "*[m]erely because the rule requires the court and the parties to proceed on the fictitious basis that the date of service was 25 August, it does not follow, as a matter of logic, that service took place after expiry*".

With regards to forum non conveniens, the claimant argued that the English court had no discretion to stay on grounds on forum non conveniens because the case was not purely domestic, it therefore being governed by the Brussels Recast Regulation 2012/2015 (the "Regulation"). The court rejected this argument, concluding that the only competing jurisdictions were those within the UK which were matters for internal determination by the UK courts. This meant the Regulation was not engaged, and instead the court was able to refer to the Civil Jurisdiction and Judgments Act 1982 to decide the issue. In so doing, the key question for the court was whether Scotland was the more appropriate jurisdiction for resolving the issue, in the interest of the parties and justice. On balance, it was decided that Scotland was the more appropriate forum, this being where both parties were domiciled, with the Scottish courts being able to deal with all the causes of action and remedies sought. Importantly, although the facts of the case pointed to publication of the relevant material occurring in multiple jurisdictions, the mere reliance on this did not provide a sufficient international element to engage the Regulation and move the matter from outside a purely domestic setting.

COMMERCIAL CASES

Digested by MADELEINE JONES

MADELEINE JONES

Dana Gas PJSC v Dana Gas Sukuk Ltd & Ors [2018] EWHC 278 (Comm) (Leggatt J) 1 February 2018

CPR 39.3(3) – Islamic finance

In November 2017, Leggatt J handed down judgment on a preliminary issue of law: see [2017] EWHC 2928 (Comm). His decision was reached without having heard oral submissions from the claimant (Dana Gas), which was prohibited from participating in the proceedings as a result of an anti-suit injunction issued by the Sharjah Court in the UAE. As explained in the November judgment, the Sharjah anti-suit injunction was obtained in curious circumstances by the shareholders of Dana Gas, and Dana Gas did not take any steps to oppose the Sharjah anti-suit injunction at the time when it was granted. The Sharjah anti-suit injunction was subsequently lifted. In those circumstances, Dana Gas asked Leggatt J to set aside the November judgment under CPR 39.3(3), which provides: "Where a party does not attend [the trial] and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside." Pursuant to CPR 39.3(5), Dana Gas had to establish that three conditions were satisfied: (a) that it acted promptly; (b) that it had a good reason for not attending the trial of the preliminary issue; and (c) that it had a reasonable prospect of success on the preliminary issue. Leggatt J focused on the third part of the test, and held that the arguments of Dana Gas on the preliminary issue were unsustainable. On that basis, he refused to set aside the November judgment. The judge also repeated his observation (expressed in the November judgment) that Dana Gas itself bore a significant degree of responsibility for becoming subject to the anti-suit injunction.

The relevant preliminary issue concerned the validity of a deed that formed part of an Islamic finance transaction. Dana Gas, an energy company incorporated in the UAE, had raised finance through the issue of certificates known as sukuk. The finance structure involved a trustee, which was the formal issuer of the certificates (pursuant to a declaration of trust), and a "delegate" to which a number of the trustee's functions were delegated. The trustee and Dana Gas also entered into a mudarabah agreement, in which the trustee provided capital (viz. the proceeds of the certificates) and Dana Gas provided its own resources (viz. its energy business) with a view to sharing the resulting profit. The trustee's share of the profits would then be distributed to the certificate-holders in accordance with the terms of the certificates. The mudarabah agreement was governed by UAE law, and was intended to be Sharia compliant. Further, Dana Gas entered into an undertaking by deed governed by English law (the Purchase Undertaking), which effectively created a "put option" in favour of the trustee. Pursuant to the Purchase Undertaking, the trustee could require Dana Gas to purchase the trustee's interest in the mudarabah at a specified price (the "exercise price") if certain enforcement events occurred. An enforcement event occurred, and the trustee sought to trigger the put option under the Purchase Undertaking. Dana Gas argued that it had no obligation to pay the exercise price to the trustee. Three arguments were relied on by Dana Gas: (1) an argument that, on the proper interpretation of the Purchase Undertaking, Dana Gas had no obligation to pay the Exercise Price; (2) an argument that the Purchase Undertaking was void for mistake; and (3) an argument that any obligation of Dana Gas to pay the exercise price was unenforceable as a matter of English public policy. In the November judgment, the judge rejected each of these arguments. For the purposes of its application to set aside the November judgment under CPR 39.3(3), Dana Gas only sought to rely on the first and third arguments. Both were rejected as having no reasonable prospect of success.

[David Allison QC, Ryan Perkins]

Dana Gas PJSC v Dana Gas Sukuk Ltd & Ors [2018] EWHC 277 (Comm) (Leggatt J) 1 February 2018

Anti-suit injunctions – Concurrent proceedings

For the factual background, see the previous judgment (above). Having rejected the application by Dana Gas to set aside the November judgment, Leggatt J was required to determine the forum in which the remaining issues in the case should be tried. There were two candidates: England and the UAE. Dana Gas contended that, even if the Purchase Undertaking was valid, the mudarabah agreement itself was invalid as a matter of UAE law; and that a "reconciliation" or accounting process should take place in which the liabilities of Dana Gas, the trustee and the delegate could be determined. Dana Gas argued that these issues should be determined in the UAE (given that they raised important issues of UAE law); the defendants argued that the issues should be determined in England with the benefit of expert evidence of UAE law. The latter course of action was expressly ordered by HHJ Waksman (sitting as a Judge of the High Court) at an earlier stage in the proceedings. Dana Gas contended that the Waksman order should be varied.

Leggatt J held that the remaining issues should be determined in England, and granted an anti-suit injunction restraining Dana Gas from litigating in the UAE. Leggatt J stated that it was always preferable, other things being equal, for questions about the law of another country to be decided by the courts of that country. That is particularly so where there are substantial differences between the jurisprudence of the two systems, as there are between English common

law and the principles of UAE law that were relevant in this case. However, Leggatt J was satisfied that it was nevertheless appropriate for the remaining issues in the case to be tried in England rather than the UAE. The critical factor was that some of the key documents in the large suite of transaction documents (particularly the declaration of trust) were governed by English law, and contained a number of exculpatory provisions upon which the trustee and the delegate sought to rely. The relevant issues of English law could not sensibly or realistically be disentangled from the other issues of UAE law. Moreover, the declaration of trust contained an exclusive jurisdiction clause in favour of the English courts. Finally, Dana Gas itself had commenced proceedings in England, and had effectively chosen England as the appropriate forum for the dispute. It would not be appropriate to allow Dana Gas, having failed on the preliminary issue in England, to pursue its other arguments before a different tribunal in the UAE. In all the circumstances, the better course was to try the entire matter in England.
[David Allison QC, Ryan Perkins]

Ivey v Genting Casinos UK Ltd (t/a Crockfords Club) [2017] UKSC 67 Supreme Court, (Lord Neuberger JSC; Lady Hale JSC; Lord Kerr JSC; Lord Hughes JSC; Lord Thomas JSC; Judgment of the Court delivered by Lord Hughes JSC) 25 October 2017

Gambling - Dishonesty

Supreme Court considered whether a professional gambler had cheated.
Mr Ivey and another professional gambler spent two evenings playing a variety of baccarat at a casino in Mayfair. Pretending to be superstitious, they had the croupier use the same deck of cards for all their games. In fact, Mr Ivey had, while observing the table, minutely scrutinised this deck, noted miniscule differences in the edges of the cards in it, and was therefore able to recognise high value cards before they were turned over, which gave him a significant advantage in the game. This is a technique known as “edge-sorting.”
Mr Ivey won over £7.7m. The casino realised afterwards how he had done it, and withheld the winnings. Mr Ivey did not consider that he had cheated and sued the casino for the money. The casino argued it was entitled to withhold the money, because Mr Ivey had cheated, contrary to the Gambling Act 2005 s.42, which makes it an offence to “cheat at gambling”. There was no unanimity in the gambling industry as to whether edge-sorting is cheating.
The Supreme Court (Lord Hughes delivering the unanimous judgment) upheld the Court of Appeal’s finding that Mr Ivey had cheated. It did not matter that he had not considered himself to be behaving dishonestly.
The old test for dishonesty was found in *R v Ghosh*[1982] EWCA Crim 2. It had two limbs:

1. Was the act one that an ordinary decent person would consider to be dishonest (the objective test)? If so,
2. Must the accused have realised that what he was doing was, by those standards, dishonest?

The second limb of the test was overruled, bringing the criminal law in line with civil law, in which the test for dishonesty is objective and as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and by Lord Hoffmann in *Barlow Clowes International Ltd v Eurotrust International Ltd*[2006] 1 WLR 1476 at [10].
The correct approach in both civil and criminal cases is as follows [74]:
“*When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.*”

Golden Belt 1 Sukuk Co BSC(c) v BNP Paribas [2017] EWHC 3182 (Comm) (Males J) 7 December 2017

Bank's duty – Bond issues – Islamic finance

A bank had arranged an Islamic financing transaction called a Sukuk, equivalent in economic effect to a Eurobond issue but structured so as to conform to the principles of Sharia law, intended to raise $650m for a company registered in Saudi Arabia. Under the Sukuk, a $650m promissory note (the "PN"), governed by Saudi law, was to be issued. The Sukuk was marketed in an Offering Circular (the "OC"), but the PN was not properly executed, in that it did not have an original signature, which made it unenforceable under Saudi law. This meant that investors were unable to enforce their rights under their Sukuk certificates when the issuer defaulted.

The investors sued the arranging bank in negligence. Mr Justice Males considered whether the bank had had a duty of care to the investors. He found that it did: see [168] and following. The bank had agreed to provide the service of arranging for the execution of the PN. It is normal for an arranging bank to do this, and not particularly complicated or onerous. The point of the service was to protect the certificate-holders, so that they would have a claim against the issuer in the event of default. This made it especially important that the PN was properly executed.

Prospective investors were required to decide whether to invest based only on the information in the OC. In this, they were told that they would have the benefit of the PN, but they could not inspect the PN before investing. The issuers expressly took responsibility for the contents of the OC, but this did not absolve the arranging bank of responsibility for ensuring proper execution of the transaction documents. The bank had insisted that its name was prominently displayed on the OC. Investors would assume the bank would ensure that the PN and other transaction documents had been properly executed. The bank was the only entity the investors could rely on to do this: they could not rely on the issuer, as the purpose of the PN was to give them a claim against the issuer.

Accordingly, it was reasonable for investors to rely on the bank to ensure the PN was properly executed. The bank knew this. It was foreseeable that if they did not so, the certificate holders would suffer loss. The relationship between the bank and certificate holders was sufficiently proximate for a duty to be imposed. It was fair, just and reasonable to impose a duty. The bank owed a duty to certificate holders to take reasonable care to ensure that the PN was properly executed. The duty was owed to certificate holders who had bought their certificates on the secondary markets as much as to those who had bought them in the initial offering. The bank had breached the duty. The certificate holders succeeded in negligence and could recover the difference between the recovery, which they would have made if the PN had been valid and the recovery, they would in fact achieve.

Ehrentreu v IG Index Ltd [2018] EWCA Civ 79 (Davis LJ; Lindblom LJ; Flaux LJ (Judgment of the Court delivered by Flaux J)) 31 January 2018

Contract – Implied terms – Economic torts

A customer ("E") traded against a spread betting company ("IG"), pursuant to IG's standard terms. The terms entitled but did not oblige IG to close out bets where E had failed to pay a margin call within five working days. IG made a margin call, but E did not pay it and persuaded IG to keep his positions open for nearly a month after the call was made. Over this time, E's position deteriorated significantly and he ended by owing IG £1.2m. IG and E entered into a settlement agreement. E defaulted, IG sued him for the amount owing. E entered a defence and counterclaim alleging that IG in failing to close out his account was in breach of contract, of tortious duty and of a duty under the COBS Rules to act in E's best interest.

At first instance, Mr Justice Supperstone held that there was no breach of duty in tort or under the COBS Rules (E was experienced and had made promises to pay), but that there was a breach of contract: although there was a contractual discretion (under cl.16(4)) for IG to keep E's account open, there was no evidence that this discretion had been exercised in the sense that anyone had applied their mind to the question of whether this was a good idea. However, this breach had not caused the loss, so the counterclaim

failed; similarly, even if there had been any breach of the COBS Rules, recovery would be precluded because of E's contributory negligence.
The Court of Appeal E's appeal aganst the dismissal of his counterclaim. E contended that Supperstone J had failed to appreciate that cl. 16.4 was intended to protect the customer, and therefore that its breach had caused his loss. The Court of Appeal dismissed his appeal.
It was implicit in Supperstone J's reasoning that cl. 16.4 was not there to protect the customer, and if it was not, then the Appeal Court so decided. The clause contained the words, "you acknowledge that", signaling that it was for IG's benefit; the purpose of the clause was to give IG the option to close E's position in the circumstances stated, and deprive E of any reason to complain if it did so.
In tort, a duty of care to protect the other party from deliberately inflicting economic harm on themselves was "truly exceptional." In contract, there was no reported case of such a duty being implied, and express words would have been required in this case to introduce such a duty.

Interactive E-Solutions JLT v O3B Africa Ltd [2018] EWCA Civ 62 Court of Appeal (Arden LJ; Lewison LJ; Asplin LJ (Judgment of the Court delivered by Lewison LJ)) 30 January 2018

Contract – Exclusion clauses

A telecommunications infrastructure provider ("I") appealed against a judge's decision to refuse permission for it to amend its defence and counterclaim and to grant summary judgment to a provider of global satellite services ("O") on its claim for fees under a master services agreement.
I provided O with bandwidth in Pakistan, subject to a contract which limited O's liability to I "excluding fraud". Did this clause exclude I's ability to claim for repudiatory breach of contract, where O had purported to terminate the contract in circumstances where in fact it, O, was in breach of its obligations.
The Court of Appeal considered the exclusion clause. The courts were more accepting of these now than in the past, as they were important tools for parties of equal bargaining power to allocate risk. A clause of this nature indicated that a party would assume the risk of another side's negligence but not their fraud. The phrase "liability arising from fraud" must mean liability in relation to which fraud is a necessary averment, otherwise the "liability" would not arise from fraud. All causes of action, except those to which fraud was necessary, were thus excluded.

COMPANY LAW

Digested by EDOARDO LUPI


ADAM AL-ATTAR


EDOARDO LUPI

DD Growth Premium 2X Fund (In Liquidation) v RMF Market Neutral Strategies (Master) Ltd, [2017] UKPC 36, Privy Council (Cayman Islands), 23 November 2017

Investment funds – Share premium account – Legaility of redemptions – Remedy for unlawful return of capital

An investor in a Cayman incorporated hedge fund (DD Growth) had redeemed its investments and received redemption payments from the fund prior to the fund going into liquidation. The fund argued that it had been insolvent at the time when the redemption payments were made, and that the redemption payments were therefore unlawful as being contrary to section 37 of the Cayman Companies Law. It argued that the payments had not been made from profits or from the proceeds of a fresh issue of shares and, insofar as the payments had been made from the fund's share premium account, this required a solvency test to be satisfied in order for the payments to be lawful. The respondent investor argued that the payment from the share premium account not require the satisfaction of a solvency test or, alternatively, that the company was not insolvent. Having lost its claim before the Grand Court and the Cayman Islands Court of Appeal, DD Growth appealed to the Privy Council.
The Privy Council held firstly that the fund had been insolvent at the time of the payments. Whilst the test referred to debts payable in "the ordinary course of business", this was not apt to exclude redemption debts

owed to former shareholders, not least because such debts were in the ordinary course of business of an investment fund. Further, on the correct construction of the Companies Law which was in force at the time, it was a requirement in relation to the redemption of shares funded from a company's share premium account that the company be solvent at the time of the making of the payments. It followed that the payments made in the first case to the investor had been unlawful. However, there was no statutory remedy to recover the payments and the fund did not have a claim in restitution to recover the illegal payments as the payments had been made for lawful consideration. The funds remedy lay in the law of knowing receipt. Accordingly, the appeal would be allowed, and the case remitted back to the Grand Court in order to determine the knowing receipt claim.

[Tom Smith QC, Adam Al-Attar]

Staray Capital Limited and another v Cha, Yang [2017] UKPC 43 – Privy Council (Lords Mance, Sumption, Carnwath, Hodge & Briggs) 18 December 2017

Shareholder Dispute – Amendment of Articles – Material Misrepresentation

In early 2010, the Respondent (Mr Cha) and the Second Appellant (Mr Chen) agreed to go ahead with a project to mine coking coal in Canada. The First Appellant, Staray Capital Ltd ("Staray"), had been incorporated to give effect to the project, with Mr Chen being allocated 80% of the shares and Mr Cha 20%. By July 2011, the relationship between Mr Chen and Mr Cha had broken down. Mr Chen passed a shareholder's resolution amending Staray's memorandum and articles, inserting a sub-regulation which permitted Staray compulsorily to redeem the shares of a 'Defaulting Shareholder' provided the shareholder was found to have either (i) made material misrepresentations in the course of acquiring its shares or (ii) committed an act that may result in Staray suffering certain specified forms of disadvantage or liability or negative publicity. The Defaulting Shareholder was thereafter entitled to fair value for its shares.

Staray gave notice purporting compulsorily to have redeemed Mr Cha's shares and claimed to be entitled to do so under both limbs of the relevant sub-regulation. The Privy Council was required to decide two points: first, the validity of the resolution amending the articles; and, second, the validity of the notice of the same date. Only the first limb concerning material misrepresentation was relied on at trial as justifying the notice of redemption. At first instance in the BVI, the judge upheld the validity of the resolution amending the articles but held that no event had occurred falling under either limb of the sub-clause. The decision was upheld by the Court of Appeal.

Before the Privy Council, an initial point arose concerning the Respondent's cross-appeal regarding the validity of the amendment, for which the Respondent had not sought permission. The Privy Council granted permission to cross-appeal in its judgment having considered submissions on the point at the hearing *de bene esse.* As to the amendment issue, having considered the principles previously stated by the Board in *Citco Banking Corp NV v Pusser's Ltd* [2007] UKPC 13, the Board held that the amendment resolution could not be attacked on the basis of not being *bona fide* in Staray's interests: Mr Chen's view that the alteration of the articles was for the benefit of the company was determinative and it could not be said that his view was one no reasonable person would have held.

Turning to the validity of the notice of compulsory redemption and the alleged misrepresentations, the misrepresentations identified were that Mr Cha was a partner in a well-known law firm, and that he was licensed to practise in China and New York. To succeed, Mr Chen had to establish that the representations were both false and "material" within the meaning of the sub-clause. The judge at first instance held that only the first statement had been a misrepresentation and none of the representations had been material. On appeal, having permitted new evidence to be adduced, the Court of Appeal held that Mr Cha had not been qualified to practise in China at the relevant time, but upheld the judge's holding that none of the representations were material.

On the key issue of materiality, the Board held that this was "*not to be judged by reference to abstract textbook definitions, but in its particular context*", specifically by looking at the sub-clause the circumstances of Staray (para 49). The sub-clause looked at the matter from the point of view of the company to which the remedy was given, not from that of the individual shareholders. The judge had been right to regard the issue of materiality as turning less on Mr Chen's subjective reactions to what he was told, than on the practical relevance to Mr Cha's expected role within the company. In short, the technical ability to carry on formal practice in China or New York at any particular time was of no practical significance to the company. There was also nothing to throw doubt on Mr Cha's abilitiy to carry out the specific tasks which he was expected to perform. No material misrepresentation within the meaning of the sub-clause had occurred rendering the notice invalid. Accordingly, both the appeal and cross-appeal were dismissed.

Super-Max Offshore Holdings v Malhotra [2017] EWHC 3246 (Comm) (Popplewell J) 13 December 2017

Breach of Shareholders Agreement – Gross Misconduct – Contractual Discretions

The proceedings arose out a dispute between the shareholders of Super-Max Offshore Holdings ("SMOH"), one of the world's largest manufacturers of razor blades. The Defendant, Mr "Rocky" Malhotra, was the heir to the family business. A private equity investor, Actis, made a substantial investment in the Super-Max group by which it acquired 40.17% of SMOH. The remaining shares were held by Mr Malhotra.

Actis, Mr Malhotra and SMOH entered into a subscription and shareholder deed (the "SSD"). Mr Malhotra became the executive chairman of SMOH pursuant to a Service Contract. Both the SSD and Service Contract were governed by English law. The SSD provided that the removal of the group CEO was a 'Reserved Matter' and thus the CEO could only be removed with Actis' consent.

A falling out between Actis and Mr Malhotra followed the group's poor financial performance, which Mr Malhotra attributed to the incompetence of the CEO and senior management. Having purported to suspend the CEO and terminate the employment of a number of senior managers, Mr Malhotra held himself out as CEO. Actis sought and obtained two injunctions from the English court restraining Mr Malhotra from implementing the suspensions and from holding himself out as CEO. Actis considered Mr Malhotra to have acted in repudiatory breach of his Service Contract. Purporting to exercise rights under the SSD to take certain actions on SMOH's behalf, Actis caused SMOH to treat Mr Malhotra's behaviour as gross misconduct and terminated the Service Contract.

The issues before Popplewell J were whether (i) Mr Malhotra had been guilty of gross misconduct or that SMOH itself had any right to terminate his employment as executive chairman; and (ii) Actis had the right to cause SMOH to terminate the Service Contract with Mr Malhotra. In turn, Mr Malhotra brought a counterclaim against Actis for unreasonably refusing its consent to the removal of the group CEO.

The SSD provided that all decisions and discretions which could be exercised by SMOH as against Mr Malhotra in respect of the SSD and the Service Contract were exercisable at Actis' discretion. In turn, the Service Contract required Mr Malhotra to comply with SMOH's rules and policies. It also enabled the termination of Mr Malhotra's employment for "*gross misconduct within the meaning of applicable law*".

Popplewell J held that various actions taken by Mr Malhotra constituted breaches of the Service Contract. Further, the judge held that the breaches amounted to gross misconduct. The breaches included Mr Malhotra's staging of a coup against the CEO and installation of himself as CEO, a sustained campaign of aggressive abuse and disparagement against the CEO, and the attempt to maintain a parallel system of management after the CEO had been re-installed. Counsel for Mr Malhotra argued that by the time the Service Contract was purportedly terminated, Mr Malhotra had cured the breaches, or SMOH had either waived or affirmed them. As to cure, the judge held that he was bound by Court of Appeal authority to the effect that English law does not permit a party to a repudiatory breach unilaterally to cure the breach once it has been committed, unless the innocent party has lost the right to accept the repudiation because of an election to affirm. Further, on the facts, the judge held there was no waiver or affirmation of the contract either. Therefore, SMOH had been entitled to terminate the Service Contract for gross misconduct at the time when Actis had caused it to do so.

The next question was whether Actis had the power under the SSD to exercise the right to terminate on behalf of SMOH. Popplewell J held that read together SMOH's articles and the SSD conferred Actis' nominee director on SMOH's board with the power to take the decision to terminate Mr Malhotra's employment on behalf of SMOH at Actis' direction.

By way of counterclaim, Mr Malhotra's case was that there was an implied term of the SSD that Actis would not refuse its consent arbitrarily, capriciously, irrationally or unreasonably. Relying on the line of authorities on contractual discretions culminating in the Supreme Court's decision in *Braganza v BP Shipping* [2015] 1 WLR 1661, Popplewell J accepted that the rationale for implying such a term (namely, to prevent the abuse of the power conferred on one party), was engaged in the present case. On the facts, however, no written request for Actis to give its consent to the CEO's removal had been made by Mr Malhotra. As Popplewell J put it, *"there can have been no decision to refuse written consent unless such written consent was requested."* Accordingly, the counterclaim was dismissed.

CORPORATE INSOLVENCY

Digested by RYAN PERKINS AND RIZ MOKAL


RIZ MOKAL


RYAN PERKINS

In re VE Interactive Ltd [2018] EWHC 186 (Ch) (Mr Registrar Jones) 8 February 2018

Administration – 'Pre-pack' sale of business – Application to remove administrators – Need to investigate whether directors and/or removed administrators acted in breach of duty

The directors of a distressed company ('VE') engaged the Respondents' firm ('S&W') to advise on insolvency options. A 'pre-pack' sale of VE's business was the preferred option. Some two weeks later, the Respondents, acting as administrators, committed VE to the sale in favour of a company ('Rowchester') controlled by two of VE's directors. In the period between the decision to pursue the pre-pack option and the sale, there were delays and deficiencies in the provision of information bearing upon the sale by the directors to S&W. Further, Rowchester had a head-start over any competitors in preparing for the purchase and also received certain information from S&W not made available to other potential purchasers. These matters appeared not to have been disclosed to the court making the administration order. The Applicants, certain of VE's creditors, applied some months later for the removal of the Respondents as administrators to enable appointment of new administrators and the investigation of the directors and the Respondents' firm in relation to the pre-pack sale. The Respondents, with support from certain other creditors, initially argued that the application was misconceived, but in light of evidence emerging at trial, notified the Court of their intention to resign prospectively on grounds of conflicts of interest. They also accepted personal liability for litigation costs on an indemnity basis, and agreed to defer applying for discharge under paragraph 98 of Schedule B1 to the Insolvency Act 1986. The Court held that it should have been apparent to the Respondents from the date of their appointment or soon thereafter that both the directors' and S&W's conduct in relation to the pre-pack required independent investigation, as did the adequacy of the marketing and sale of the business. Given the need to investigate S&W, the Respondents were conflicted and ought to have managed that conflict, for example, through the appointment of an additional non-S&W administrator. They had not done so, and indeed had failed to acknowledge the conflict until well into the trial. For this reason, creditors had no cause for confidence in them, and the Court ordered their immediate removal from office and the appointment of new administrators. The Court was not deterred from ordering removal by its recognition that administrators should not be too readily removed, and that removal would have an impact on the Respondents' professional standing and reputation.

[Barry Isaacs QC, Andrew Shaw]

Ward v Hutt [2018] EWHC 77 (Ch) (HHJ Paul Matthews, sitting as a Judge of the High Court at the Chancery Division District Registry (Bristol)) 24 January 2018

Liquidation – Misfeasance claim abandoned – Subsequent preference claim – Whether founded on substantially the same facts – Whether liquidator should be retroactivity permitted to pursue it – Henderson v Henderson – Abuse of process

The Applicant, the liquidator of a company, had in previous proceedings ('the misfeasance action') sought a declaration that the Respondents, the company's directors and shareholders, had in breach of their fiduciary and other duties to the company caused it to pay over several sums to themselves and to certain entities they controlled. The misfeasance action was abandoned part way through the trial, and the Applicant now challenged one of the payments as a voidable preference under section 212 of the Insolvency Act 1986 ('the preference action'). The Court held that the misfeasance and preference actions arise from the same or substantially the same facts, notwithstanding that the preference claim requires establishing a desire to prefer which might well be inferred from the primary facts proved. Having discontinued the misfeasance action, the liquidator was required to seek permission under Civil Procedure Rule 38.7 in order to commence the preference action, which he had not done. As a result, the preference action was irregular though not a nullity, and was liable to being struck out under CPR 3.4(2)(c). The Court refused to give retroactive permission under CPR 38.7, and struck out the action as an abuse of the process on the basis that the Applicant, while discharging statutory duties, was the only economic beneficiary if the preference action were to succeed and that he had not made adequate disclosures regarding his fees and costs. However, the 'principle in *Henderson v Henderson*', which requires a claimant to pursue his entire claim at the same time rather than litigating it bit by bit as convenient, is part of the rules of *res judicata* and was irrelevant on the facts since there had been no decision in the misfeasance action.

In re Nortel Networks UK Ltd [2017] EWHC 3299 (Ch) (Snowden J) 14 December 2017


WILLIAM TROWER QC

Administration – Test for extension of administrator's term of office – Brexit uncertainty

This is the first reported judgment to consider the basis on which the term of office of an administrator may be extended. In extending the terms of office of the administrators of companies in the Nortel group, the Court noted that the discretion under paragraph 72(2)(b) of Schedule B1 to the Insolvency Act 1986 is not explicitly circumscribed. It should, however, be exercised in the interests of the company's creditors as a whole, having regard to all the circumstances, including whether the purpose of the administration remains reasonably likely to be achieved, whether extension would result in prejudice to creditors, and any views expressed by the creditors themselves. Where the administrators would be in a position to make distributions to unsecured creditors, their term of office should generally be extended to permit them to do so, thereby saving the costs and delay entailed by requiring the company to be placed in liquidation. The Court accepted that, since Britain would likely withdraw from the European Union on 29 March 2019, there was uncertainty after that date as to the recognition in the European Unison of the UK administrations and company voluntary arrangements. In view of this uncertainty, it was prudent not at present to extend the administrations beyond that date.

[William Trower QC]

Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd [2017] EWHC 2663 (Comm) (HHJ Waksman QC, sitting as a Judge of the High Court) 27 October 2017

Transaction at an undervalue to place assets beyond creditors' reach – Service outside jurisdiction

The claimant applied (among other things) under section 423 of the Insolvency Act 1986 to set aside a purported transfer of a vessel as a transaction at an undervalue to place assets beyond the reach of creditors. Permission was sought to serve the proceedings out of the jurisdiction and the question was whether there was a good arguable case that the section 423 claim fell with a relevant 'gateway' under CPR Practice Direction 6B. It was common ground that such a claim does not constitute "insolvency proceedings" for the purposes of rule 1.1(2) of the Insolvency Rule 2016. The Court held that none of the PD6B gateways was available. In particular, it rejected the argument that the claim fell under the residual para 3.1(20)(a) of PD6B, which provides for service with the court's permission in relation to a claim "*under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to this paragraph*". The enactment under which the claim arose must expressly contemplate proceedings against persons not within the Court's jurisdiction. This was not true of section 423.

New Plantations Limited v Emerald Plantation Holdings Limited BVIHC (Com) 112 of 2017, 22 November 2017


TOM SMITH QC

Application to set aside statutory demand – Set-off/cross-claim – Arbitration clause

EPHL served a statutory demand on NPL claiming a debt of US$23 million (the "Debt"), dfue under the terms of a share purchase agreement ("SPA"). NPL claimed a set-off or cross-claim arising from misrepresentation or breach of warranty, which claims were the subject of an arbitration clause contained in the SPA. However, as a matter of BVI law, the existence of the arbitration clause did not prevent a creditor from presenting a statutory demand in respect of the relevant debt (C-Mobile Service Ltd -v- Huawei Technologies Co Ltd). NPL had failed to proof that it had a reasonable prospect of showing that the quantum of damages payable on any cross-claim equalled or exceeded the debt, and accordingly its application to set aside the statutory demand would be dismissed.

[Tom Smith QC]

Re Dalnyaya Step LLC [2017] EWHC 3153 (Ch) (Sir Geoffrey Vos) 5 December 2017


DANIEL BAYFIELD QC

The liquidator of a Russian company obtained an order from a Registrar recognising the Russian liquidation as a foreign main proceeding under the Cross Border Insolvency Regulations 2006 (CBIR). The recognition order was obtained without notice to the so-called "Hermitage Parties", who contended that the Russian liquidation was part of an ongoing retaliatory campaign of unlawful intimidation against them orchestrated by the Government of Russia. The plight of the Hermitage Parties is a matter of public record, and has attracted the attention of numerous international organisations and governments (including the United States, which enacted the so-called "Magnistky Law" in response to the affair). Had the Hermitage Parties been notified of the liquidator's recognition application, they would have opposed it on the basis that the relief sought was manifestly contrary to the public policy of Great Britain (within Article 6 of Schedule 1 to the CBIR). At the hearing of the recognition application, the liquidator failed to inform the Court that the Hermitage Parties would be likely to raise a public policy issue. After the recognition order was granted and served upon the Hermitage Parties, the Hermitage Parties applied to set aside the recognition order. Having obtained security for the costs of their application (see the previous decision of Rose J in *Re Dalnyaya Step LLC* [2017] EWHC 756 (Ch)) and having prepared for a substantial trial, the Hermitage Parties were informed that the liquidator was content for the recognition order to be terminated. The liquidator also agreed to pay the costs of the Hermitage Parties on the indemnity basis. The liquidator anticipated that this would be the end of the matter, but the Hermitage Parties continued to seek a declaration that the liquidator had breached his duty of full and frank disclosure at the hearing of the recognition application before the Registrar by failing to disclose the public policy issue. The Hermitage Parties also argued that the recognition order should be set aside *ab initio* rather than merely terminated with prospective effect. The liquidator argued that the Court had no jurisdiction to grant a declaration relating to full and frank disclosure, or should not exercise its discretion to do so.

The Court granted the declarations sought by the Hermitage Parties, and held as follows: (i) There was a live albeit narrow dispute between the parties (namely whether the recognition order should be prospectively terminated or set aside ab initio) which gave the Court jurisdiction to grant the declarations sought by the Hermitage Parties. (ii) Where there were serious allegations of wrongdoing, the Court could not stand by without deciding whether there had been inappropriate conduct. It was in the public interest for that issue to be determined, whatever effect it had on private parties to the litigation, in the circumstances of this wholly exceptional case. The Hermitage Parties had good reason for wanting the issue to be determined, and the liquidator had no good reason for not wanting it determined. The court could not accept a situation in which one party could prevent it determining, where it was in the public interest to do so, whether its procedures had been flouted or abused. (iii) The liquidator had plainly breached his duty of full and frank disclosure. When seeking recognition, full and frank disclosure must be made in relation to any consequences for third parties that are not before the Court that may flow from the recognition of the foreign proceeding, including from intended future applications enabled by the recognition order (*Re OGX Petróleo e Gás* [2016] EWHC 25 (Ch) considered and applied). The liquidator knew that the actions he was taking were highly charged politically. That was enough to make it incumbent upon him to tell the Court that political issues involving the Russian state might arise. He had failed to do so, and there was no adequate explanation for his failure.

[Daniel Bayfield QC (who did not appear at the hearing of the recognition application)]

Wentworth Sons Sub-Debt SARL v Lomas [2017] EWHC 3158 (Ch) (Hildyard J) 6 December 2017


RICHARD FISHER

Challenging the admission of a third party's proof – Rule 14.8 IR2016 – Preliminary issues

Wentworth, the joint venture entity with the economic interest in the subordinated debt of Lehman Brothers International Europe (LBIE), applied to challenge the decision of LBIE's administrators to admit a proof of debt filed by another creditor (Olivant) in the sum of £555 million. The challenge was made pursuant to rule 14.8(3) of the Insolvency Rules 2016, and was founded on the proposition that Olivant's proof had been admitted for the wrong amount. This is believed to be the first case in which one creditor has sought to challenge the admission of another creditor's proof under rule 14.8(3).

The administrators contended that Wentworth's application was flawed. In particular: (i) since Olivant's proof of debt had been admitted pursuant to a contractual compromise known as a "claims determination deed" (CDD), and since Wentworth had not applied to challenge the CDD itself, the administrators argued that the proof had in fact been admitted for the correct amount – namely the sum stated in the CDD – whatever the underlying merits of Olivant's claim may have been. (ii) Further, given that Wentworth's application was made almost five years after the administrators admitted Olivant's proof, the administrators argued that the application had been made out of time. Under rule 14.8(3), there is a 21-day time limit running from the date that the applicant becomes aware of the office-holder's decision to admit the proof. The administrators contended that Wentworth's beneficial owners (Elliott and King Street) had become aware of the relevant decision several years ago, and that such knowledge should be attributed to Wentworth. This was disputed by Wentworth, which contended that its *de jure* directors based in Luxembourg had only recently been made aware of the admission of the Olivant proof, and that the knowledge of Wentworth's beneficial owners could not be attributed to Wentworth.

The administrators contended that these matters should be determined as preliminary issues before any substantive challenge was tried. Wentworth, by contrast, contended that the Court should not direct a trial of any preliminary issues, and that all of the issues should be tried together at a single trial. Shortly before the hearing, a Cayman company known as "Lehman Brothers Opportunity Holdings Inc" (LBOH) applied to be joined to the application as a co-applicant. LBOH was an entity connected to Wentworth which purported to be the assignee of a small claim against LBIE (although its claim could not be verified due to erroneous assignment documentation), and which claimed to have only recently become aware of the administrators' decision to admit the Olivant proof.

In agreement with the administrators, the Court held that a number of matters should be determined as preliminary issues, and deferred its decision as to whether certain other issues should be determined as preliminary issues (pending a future case management conference). The Court did not reach any substantive conclusion as to the merits of the rival arguments on the construction and effect of rule 14.8(3). The Court also deferred its decision as to whether LBOH should be joined to the application.

[David Allison QC, Daniel Bayfield QC, Richard Fisher, William Willson, Ryan Perkins]

Glasgow (Bankruptcy Trustee) v ELS Law Ltd [2017] EWHC 3004 (Ch) (Mr Robin Dicker QC (sitting as a Deputy Judge of the High Court)) 28 November 2017

Liens – ATE insurance

A foreign company commenced litigation for professional negligence against its accountants in England. The company had entered into ATE insurance policies with three insurers, with total premiums of £3m. The litigation was successful, and the company recovered damages and costs of £10.5m. These funds were paid into court. During the course of the litigation in England, the company entered into a restructuring in its home jurisdiction (St Vincent & The Grenadines), which was recognised in England as a foreign main proceeding under the Cross Border Insolvency Regulations 2006. The foreign representative applied for directions as to the beneficial ownership of the funds. The insurers claimed to be entitled to a lien over them for the premiums due, by analogy with the right of a solicitor to a lien in respect of fees and costs. The foreign representative, by contrast, contended that the insurers were unsecured creditors and had no lien. In agreement with the foreign representative, the Court held that no lien arose. It would be a radical step to extend the solicitors' lien to cover ATE insurance premiums, particularly because of its effect on the normal rules of distribution in insolvency. Such a step should be left to Parliament. In any event, the insurers had entered into a contract which expressly renounced any proprietary interest in the relevant funds. The rule in *Ex parte James* (1874) LR 9 Ch App 609 had no application, because the foreign representative was not an officer of the English Court, and it was not appropriate to use the rule in *Ex Parte James* to elevate an unsecured creditor into a secured creditor.

Re: Agrokor D.D; Sberbank of Russia v Ante Ramljak [2018] EWHC 348 (Ch)


DAVID ALLISON QC


WILLIAM WILLSON

"Final Determination" - Cross-Border Insolvency Regulations – Consent order

Agrokor had applied for recognition of Extraordinary Administration proceedings in England (the "Recognition Application") under the Cross-Border Insolvency Regulations 2006 (the "CBIR"). Sberbank had commenced arbitration proceedings in London against Agrokor and contested the Recognition Application. However, by a consent order made by Barling J on 3 August 2017, Sberbank had agreed that "pending final determination of the Recognition Application" it would take no steps in any arbitration proceedings against Agrokor or its subsidiaries (the "Undertaking"). The Extraordinary Administration was recognised as a foreign main proceeding under the CBIR (the "Recognition Order"). Sberbank sought to appeal the Recognition Order to the Court of Appeal, and had also applied to lift the automatic stay on proceedings under Article 20(6) of the CBIR. Agrokor argued that, since the Recognition Order had been appealed it had not been finally determined and therefore the Undertaking prevented Sberbank from continuing the arbitration. Sberbank contended that the Recognition Order was a "final determination" of the Recognition Application and that the Undertaking had come to an end.

The Judge noted that there were no authorities directly addressing the construction of the phrase "final determination" in a consent order, but took some assistance from the decision in Foneshops v HMRC [2015] UKFTT 410 (TC); as well as Global Distressed Alpha Fund v Bakrie [2013] SGHC 30, where it was suggested that the word "final" in that context means that there are no further avenues of appeal; and the decision in Trinidad of Tobago in Water and Sewerage Authority v Waite (1972) 21 AIR 498), where the word "determined" did not itself exclude the possibility of subsequent appeals. The Judge rejected Sberbank's construction, which rendered the word "final" superfluous, and did not distinguish between a "determination" and a "final determination.", and he held that the phrase "final determination" referred to a point in time when the determination could no longer be changed. Therefore, as a result of Sberbank's pending application for permission to appeal, the Undertaking had not yet come to an end and the application for permission to stay would serve no purpose and would be adjourned.

[David Allison QC and Adam Al-Attar for Sberbank; Tom Smith QC and William Willson for the Extraordinary Commissioner]

Re OJSC International Bank of Azerbaijan[2018] EWHC 59 (Ch) (Hildyard J) 18 January 2018


GABRIEL MOSS QC


ALEXANDER RIDDIFORD

Cross Border Insolvency Regulations 2006 – The rule in Gibbs – Discharge of debts and stay of execution

This is an important decision on the rule in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399 and the Cross Border Insolvency Regulations 2006 (CBIR). According to the rule in *Gibbs*, a debt governed by English law cannot be discharged by a foreign insolvency proceeding (even a foreign insolvency proceeding in the place where the debtor is incorporated and carries on business) unless the creditor submits to the jurisdiction of the foreign court. The merits of the *Gibbs* rule are the subject of considerable academic debate, but the rule is binding on all courts below the Supreme Court. In the present case, the debtor company (IBA) sought to mitigate the effects of the rule in *Gibbs* by applying for a permanent stay under the CBIR.

IBA is the largest bank in Azerbaijan. It entered into a restructuring proceeding under Azeri law. On 6 June 2017, Barling J made an order recognising the restructuring proceeding as a foreign main proceeding under the CBIR. The recognition order imposed a wide-ranging moratorium preventing creditors from commencing or continuing any action against IBA or its property without the permission of the Court. As part of the restructuring proceeding, IBA proposed a plan to restructure its financial indebtedness, amounting to approximately US$3.34 billion (the Designated Financial Indebtedness). The plan provided for IBA's Designated Financial Indebtedness to be discharged in return for various entitlements, including a number of new debt instruments. At a creditors' meeting in Azerbaijan on 18 July 2017, the plan was approved by 99.7 percent of those voting at the meeting (in person or by proxy), holding 93.9 percent of the total Designated Financial Indebtedness. On 17 August 2017, the plan was approved by the Nasimi District Court in Azerbaijan. Accordingly, as a matter of Azeri law, the plan became binding on all affected creditors, including those who did not vote and those who voted against the plan. The first respondent (Sberbank) was a lender to IBA under a US$20 million loan facility. The second to seventh respondents (Franklin Templeton) were beneficial owners of debt securities issued by IBA with an aggregate principal value of about US$58m. The claims held by the respondents constituted Designated Financial Indebtedness for the purposes of the plan.

However, the respondents did not vote on the plan at the creditors' meeting in Azerbaijan, and did not appear before the Azeri Court when the plan was approved. It was common ground that the respondents had not submitted to the jurisdiction of the Azeri Court, and that (by virtue of the *Gibbs* rule) their claims had not been discharged as a matter of English law.

The restructuring proceeding was due to terminate at the end of January 2018. In those circumstances, IBA's foreign representative issued an application under Article 21(1) of Schedule 1 to the CBIR for a permanent stay of the Designated Financial Indebtedness.

The respondents opposed the application. They contended that the application was a back-door attempt to overrule *Gibbs*, and that the CBIR could not be used to achieve the substantive effect of a discharge.

Dismissing the application, Hildyard J held that the CBIR cannot be used to impose a stay which has the same effect as a substantive discharge or variation of contractual rights governed by English law (*Re Pan Ocean Co Ltd* [2014] Bus LR 1041 and *Rubin v Eurofinance SA* [2013] 1 AC 236 applied). The relief available under the CBIR is purely procedural, and cannot be used to permanently impede the enforcement of substantive rights. Unless and until the *Gibbs* rule is abolished by the Supreme Court, the CBIR cannot be used to undermine the effect of that rule. An appeal against Hildyard J's judgment is due to be heard in October 2018.

[Gabriel Moss QC, Barry Isaacs QC, Daniel Bayfield QC, Richard Fisher, Alexander Riddiford, Ryan Perkins]

PERSONAL INSOLVENCY

Digested by MATTHEW ABRAHAM


MATTHEW ABRAHAM

Frédéric Marino v Bruton Lloyd LLP, the Official Receiver v FM Capital Partners Ltd [2017] EWHC 3458 (Ch) (Ms Lesley Anderson QC (Sitting as a Deputy High Court Judge)) 8 December 2017

Bankruptcy Orders - Applications for Annulment

The appellant was a defendant to Commercial Court litigation concerning investment services provided to the Libyan Investment Authority. The appellant was, however, adjudged bankrupt on an unpaid debt relating to tuition services provided to his son. The appellant applied to annul bankruptcy, having paid the petition debt. However, the application was opposed by the claimant in the Commercial Court litigation which claim to be a substantial unpaid contingent creditor. The appeal against the dismissal of the annulment application was refused.

The grounds under section 282(1) for annulment could be relied on in the alternative. However, in the present case the court had been entitled to dismiss the application, as there was a lack of evidence supporting the contention that the relevant debts had been paid or secured.

[Tom Smith QC]

Bank and Clients Plc v King [2017] EWHC 3099 (Comm) (Lionel Persey QC (Sitting as a Deputy Judge of the High Court)) on 1 December 2017

Bankruptcy - Freezing Injunctions – Dissipation of assets

A private bank applied for summary judgment against the Defendants under two personal guarantees and for a worldwide freezing injunction. In the course of those applications the Court addressed the issue of granting freezing injunctions where bankruptcy petitions had been filed. At paragraphs 66 to 68 the Court noted that bankruptcy proceedings are an important factor in considering whether to grant injunctive relief. In particular the Court noted that it will often be appropriate to discharge, or not to make, a freezing order where the defendant is the subject of a bankruptcy order or has applied to be made bankrupt. The question the Court must answer is whether it is just and convenient to grant an injunction notwithstanding the actual or pending bankruptcy of the relevant individuals.

In reaching its decision the Court noted the decision of Mr Richard Salter QC (sitting as a Judge of the High Court) in *Eco Quest Plc v GFI Consultants Ltd and others* [2014] EWHC 4329 (QB). In that case a freezing injunction was granted against the defendants even though bankruptcy orders had been made. The claim there was made in fraud. In the present case the Court was advised that the Bank intends to proceed against the Defendants in fraud. The Court noted that the Bank may well have a greater incentive to locate, trace and to bring into account the Defendants' assets than any Trustee in bankruptcy. As a result, the Court found that the just and convenient course was to grant a freezing injunction which was to be appropriately framed so as to make it clear that any assets that are caught by the injunction will be held for the benefit of the creditors of the Defendants as a whole and not just the Bank. The Court also made it clear that the order must include a proviso which expressly permits the Trustee(s) in Bankruptcy to perform his or their duties for the creditors of each Defendant as a whole without further reference to this Court.

PROPERTY & TRUSTS

Digested by ANDREW SHAW

ANDREW SHAW

Sackville UK Property Select II (GP) No. 1 Limited & Or v Robertson Taylor Insurance Brokers Limited & Or [2018] EWHC 122 (Ch) (Fancourt J) 30 January 2018

Landlord and tenant – Break clauses

The Claimants (together, "Sackville") granted a lease to the First Defendant ("Robertson") which was subsequently registered at the Land Registry (the "Lease"). The Lease contained a break clause that allowed the "Tenant" to terminate the lease on 9 months' notice to the "Landlord". The terms "Landlord" and "Tenant" were defined in the Lease as:

"The expressions "Landlord" and "Tenant" shall include their respective successors in title, "Tenant" shall include the personal representatives of the Tenant and any person in whom this Lease may from time to time be vested by whatever means…"

Robertson obtained a licence to assign the Lease to the Second Defendant ("Integro") and subsequently assigned the Lease to Integro. Before Integro was registered as proprietor of the Lease, it purported to terminate the Lease under the break clause. Sackville contended that the notice of termination was invalid because Integro was no the "Tenant" at the time it purportedly gave the notice but was just the beneficial owner of the Lease.

Fancourt J held that the Lease created a new tenancy to which the provisions of the Landlord and Tenant (Covenants) Act 1995 applied (the "Act"). Since the Act applies to equitable assignments, Integro obtained the benefit of the Landlord's obligation to treat the Lease as terminated from a specified date on receipt of a valid break notice from the "Tenant". However, the Act did not vary the definition of "Tenant" in the Lease. Integro was not the successor-in-title to Robertson nor was the Lease vested in Integro and so was not the "Tenant".

The Defendants also argued that s.24 of the Land Registration Act 2002, which permits a person *"entitled to be registered as the proprietor"* of a registered estate to exercise the owner's powers in relation to that estate (which include the power to

make a disposition of any kind allowed by the general law), meant that Integro was entitled to serve the break notice. The judge held that service of the break notice was not the kind of disposition to which s.24 applied as it was not a disposition permitted by the general law but was rather the exercise of a contractual right.
Accordingly, the break notice should have been given by Robertson as "Tenant".
The same solicitors acted for Robertson and Integro. The Defendants argued that the break notice had therefore been given on behalf of Robertson. Fancourt J considered that this amounted to an argument that Robertson was either an unidentified principal of its solicitors or an undisclosed principal of Integro. The Defendants therefore needed to demonstrate that the solicitors or Integro intended the break notice to be given on behalf of Robertson. There was no evidence before the court that this was in fact the case.
Finally, the Defendants argued that a reasonable person in Sackville's position would have understood the notice to have meant "Robertson" where it stated "Integro". The judge rejected this argument and granted summary judgment to Sackville.

Steven John North & Ors v Geoffrey John Wilkinson & Ors [2018] EWCA Civ 161 (Gloster and Richards LJJ) 9 February 2018

Trusts – Certainty of intention – Certainty of subject matter

The Appellants appealed against a decision that their father ("Mr North") had validly declared a trust over undivided shares in a business venture carried on by him as sole trader.
The Appellants argued that the subject matter of the trust was uncertain:
(1) There were insurmountable difficulties in identifying the assets said to be subject to the trusts because without a separate business structure it was impossible to distinguish with sufficient certainty between the Mr North's personal and business assets.
(2) The assets of the business were constantly changing.
(3) A trust over an undivided share in a business could not take effect because there was insufficient identification of the assets subject to the trust (cf *Hunter v Moss* [1994] 1 WLR 452).
Richards LJ rejected these arguments; while these issues raised potentially difficult questions, the courts were capable of resolving these. On the authorities none of the issues raised prevented the subject matter of a trust being identified with sufficient certainty.
Richards LJ acknowledged that the creation of a trust of a share in a sole trader's business undoubtedly raised certain difficulties but held that these went more to the question of certainty of intention rather than to the issue of certainty of subject matter.
The documents said to create the trust were concerned with the issue of shares in companies formed by Mr North to operate his business to the purported beneficiaries. However, such companies were never incorporated and Mr North had continued to operate his business as a sole trader.
The first-instance judge did not accept that the agreements were intended to have no effect if companies were not formed and concluded that they therefore manifested an intention to create a trust on the part of Mr North.
Richards LJ considered that the first-instance judge had erred in not considering that the agreements might instead give rise to personal obligations on the part of Mr North rather than creating a trust and that he had not considered the difficulties involved in a finding of trust:
(1) The documents were concerned with the issue of shares. Shares did not confer a proprietary right in the assets of the company on the shareholder. A shareholding does not therefore provide a template for a direct proprietary interest in the assets of the business carried on by Mr North as sole trader.
(2) There was no provision for dealing with the liabilities of Mr North's business. If a trust were intended, it was to be expected that provision would have been included to address how liabilities should be treated.
(3) No thought had been given as to how the business would be managed if a trust were created. If it were intended that the purported beneficiaries were to have a proprietary interest in the business assets, it was to be expected that this would have been specifically addressed.
(4) No thought was given as to how the purported beneficiaries were to withdraw their shares in the business as they would be entitled to as trust beneficiaries (but not as shareholders).
(5) The language of the documents was inapposite to create a trust.
The appeal was therefore allowed.

SPORT

Digested by ROBERT AMEY


ROBERT AMEY

Massimo Cellino v The Football Association, FA Rule K Arbitration, 2 October 2017

Payment to an unauthorised agent – Chairman of football club fined and suspended by FA Regulatory Commission – Appeal against decision of the Regulatory Commission

At all material times, Mr Cellino was the President, director and Chairman of the board of Leeds United Football Club ("LUFC"). In July 2014, LUFC sold a player, Ross McCormack, to Fulham FC. In connection with the transfer, a fee was paid to a Mr Barry Hughes, a person who was not authorised under the FA Football Agents Regulations. In order to disguise the payment to Mr Hughes, LUFC (acting through Mr Cellino) entered into a "Scouting Agreement", so that it would appear to the FA that Mr Hughes was being paid not for acting as an (unauthorised) agent, but for scouting.

At first instance, the Regulatory Commission accepted that Mr Cellino had initially been unaware that Mr Hughes was not an Authorised Agent. However, it held that Mr Cellino had clearly intended to deceive the FA when he signed the Scouting Agreement, such that he had breached Regulation C.2 ("*A Club, Player or Authorised Agent must not so arrange matters as to conceal or misrepresent the reality and/or substance of any matters in relation to a Transaction or Contract Negotiation*"). Mr Cellino was fined £250,000, and suspended from acting as a director of a football club for 18 months.

Mr Cellino initially appealed to the Appeal Board (which reduced the sanction to a £100,000 fine and a 12-month suspension), but then commenced Rule K proceedings challenging the decision of the Appeal Board on the ground of apparent bias (a member of the Appeal Board was a member of the FA Council). The FA compromised the apparent bias challenge, and agreed that the Rule K tribunal should hear the appeal de novo.

Mr Cellino's first ground of appeal was based on the way in which the relevant charge had been framed. The charge on which Mr Cellino had been convicted alleged that he had entered into the Scouting Agreement *"in order to facilitate the payment of [Mr Hughes], an Unauthorised Agent*". But the Commission had found that Mr Cellino was unaware that Mr Hughes was unauthorised, and so, argued Mr Cellini, an essential element of the charge had not been made out. This submission was rejected: the gist of the charge was the entry into the bogus Scouting Agreement. Although the fact that Mr Hughes was not authorised to act as an agent formed the background against which the Scouting Agreement was signed, it was not an essential element of the charge.

Mr Cellino's second ground of appeal argued that there was no evidence before the Commission to support the finding that Mr Cellino had been told that Mr Hughes could not be paid without LUFC breaching the FA rules. This ground was also rejected. The tribunal held that the relevant question was whether Mr Cellino knew that the Scouting Agreement was improper. Mr Cellino had presented a sham agreement to the FA in an effort to conceal the truth – he must have known that was improper.

The third ground of appeal argued that Mr Cellino had not had a fair hearing; he argued that the allegation that he had previously been told that paying Mr Hughes would breach the FA rules had not been put to him. This was rejected. Mr Cellino had squarely addressed the point in his witness statement, and in any event, the tribunal had already found (in relation to the second ground) that whether Mr Cellino had been fully aware of the relevant FA rules was not the point.

The fourth ground of appeal argued that the penalty imposed by the Commission had been excessive. The tribunal upheld this ground: based on other cases, the appropriate sanction was a 12-month suspension and a £100,000 fine.

Repudiatory breach claim upon contractual termination

Window dressing or valid basis for claiming damages for loss of bargain?

Georgina Peters discusses the Commercial Court's recent rejection of an attempt to claim loss of bargain damages upon a contractual termination.

Introduction

The established position in contract law is that an innocent party, faced by a repudiatory breach, has a choice: he can either treat the contract as continuing, or he can bring it to an end and claim damages for the loss of his bargain. If he elects to bring it to an end, where there is an anticipatory breach or breach of an executory contract, he must "accept the repudiation". Such acceptance requires no particular form, though it must be clear and unequivocal.

There may also be circumstances in which the contract makes express provision for its own termination. The parties may have agreed for there to be a contractual right of termination which is engaged by a breach of contract by either party. There may be a contractual right of termination which is engaged by actions or events that are wholly distinct from a breach of contract, such as an event of default or change in control.

Since a successful common law action for repudiatory breach will entitle the innocent party to loss of bargain damages, it is unsurprising that this will usually be a claimant's preferred option. But what of the claimant who has validly exercised a contractual right of termination, but whose legal team subsequently advises him that as at the time of termination the other party had in fact committed a repudiatory breach? Will his contractual termination notice operate equally to "accept the repudiation"?

One line of authority holds that a party which has terminated a contract for a wrong or invalid reason may retrospectively support its termination by a good or valid reason. This is known as the *Boston Deep Sea Fishing* principle: *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339. It has typically been applied in employment cases concerning wrongful dismissal. In such cases, the (defendant) employer has been permitted to rely on after-acquired information to justify a dismissal which would otherwise have been invalid.

However, the position is different where a claimant seeks actively to mount a claim for damages, asserting that his reliance on the contractual term should be treated as a termination for repudiatory breach. A distinct line of authority has shown that it is not sufficient that the innocent party has communicated an intention simply to terminate the contract: for the cause of action to be complete, it must be demonstrated, in context, that the innocent party both did and intended to accept the repudiation.

Quite what this requires in practice will to some extent be case-sensitive, as that line of authority has demonstrated. A number of those decisions have given rise to significant academic controversy: see, for example, Peel [2013] LMCLQ 519.

Recently, the Commercial Court has had to decide a claim where the defendant, EE, launched a counterclaim against the claimant, Phones 4U, seeking damages for repudiatory breach in reliance on a contractual termination notice: *Phones 4U Limited v EE Limited* [2018] EWHC 49 (Comm). The distinctive feature of this case was that the contractual termination was not engaged by a breach of contract; rather, by an (insolvency) event of default.

The Commercial Court took the opportunity to examine from first principle the necessary ingredients required to constitute the cause of action for repudiatory breach. This was because, whilst not the first case in which a claimant sought to recover

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loss of bargain damages upon a contractual termination which arose independent of, and was not triggered by, any breach, its particular facts were without precise precedent. The decision will thus be of general application for commercial counterparties holding simultaneous rights to terminate a contract contractually and for repudiatory breach.

Background

The background to the *Phones 4U* decision was in many ways a classic example of a party seeking to avoid its contractual liability by contriving a counterclaim for repudiatory breach. The case had the following features.

Until September 2014, the Claimant, Phones 4U, was a well-known retail name. It operated a core business of selling mobile phone contracts to customers, known in the telecoms industry as network connections. Its primary revenue stream comprised commissions or revenue shares in respect of network connections it sold.

The Defendant, EE, is one of the major mobile network operators in the UK. At the relevant time, it provided network connections and services both under its newer "EE" brand and also under the longer-established "Orange" and "T-Mobile" brands. One of the main independent intermediaries through which EE's services were sold, until September 2014, was Phones 4U.

On Monday 15 September 2014, Phones 4U entered into administration. The primary trading relationship between Phones 4U and EE at that time was governed by a written agreement relating to consumer pay monthly acquisition, retention and in-life management dated 8 October 2012 (the Trading Agreement). It contained a series of highly complex provisions regulating the revenue share and other sums payable by each of the parties to the other.

On the morning of appointment of Phones 4U's administrators (15 September), Phones 4U's retail stores did not open for business and online trading was suspended. A major issue in the proceedings was whether it was permanent, or was likely (and if so how likely) to be or become permanent, as of 1 pm on 17 September. That date was critical for the following reason.

At 1.02 pm on 17 September, EE sent Phones 4U's administrators an email indicating *inter alia* that EE was terminating the contract by an attached letter. The termination letter was sent in terms which expressly terminated the Trading Agreement in accordance with clause 14.1.2.

That provision (clause 14.1.2) granted each party a right of termination exercisable, on notice, upon standard events of default occurring with regard to the other party (primarily, insolvency events). Whilst not expressly referring to the administration, it was common ground between the parties that the appointment of administrators gave

> *The necessary causation is created by the innocent party choosing to treat itself as discharged from the bargain*

EE the right to terminate under clause 14.1.2.

Under the Trading Agreement, Phones 4U had very significant claims against EE which had accrued and would continue to accrue until a run-off date in 2021, in the total estimated sum of some £120 million. In the face of EE's refusal to pay the accrued sum, Phones 4U brought proceedings against EE for the payment of its claim to those revenue shares.

EE's complaint

EE issued two substantial counterclaims against Phones 4U. The primary counterclaim was for damages for its loss of bargain allegedly resulting from the termination of the Trading Agreement on 17 September, in the sum of some £200 million. Phones 4U applied for summary judgment on that counterclaim.

EE's primary counterclaim was founded on a contention that Phones 4U had failed, as of 17 September, to perform its alleged obligations under the Trading Agreement, following the suspension of trading on 15 September. The alleged obligations were said to comprise obligations to market and sell EE's products and services for the entire term of the Trading Agreement. Such failure was said to place Phones 4U in repudiatory breach of contract, alternatively that Phones 4U had renunciated the contract.

Phones 4U contended that the counterclaim was flawed as a matter of both fact and law and had no real prospect of success. First, that on the facts it was incontrovertible that Phones 4U had committed no repudiatory breach nor renunciation as at 17 September. Secondly, that the reality of EE's position was that it had expressly terminated the contract under clause 14.1.2 on the basis of the administration. It had therefore failed to "accept the repudiation" (as alleged), because the termination notice could not have this effect.

The existence of the alleged obligation to market and sell EE's products and services under the contract, or its precise content if it existed, was also a key issue in dispute in the underlying proceedings. However, that ground was not pursued on summary judgment, because of the extent to which EE sought to rely on matters of background fact (which Phones 4U contended were, in any event, inadmissible).

The two principal grounds of dispute at summary judgment were therefore (assuming the existence of the alleged obligation):

(1) Was there a breach of the alleged obligation by Phones 4U as at 1pm on 17 September, and if so, was it repudiatory? Alternatively, was there a renunciation by Phones 4U of the contract?

(2) Did the terms of EE's termination letter defeat any claim by EE for damages for loss of bargain?

The decision of the Commercial Court

The application for summary judgment was determined in the Commercial Court by Mr Justice Andrew Baker. The Judge dismissed EE's repudiatory breach counterclaim, and granted summary judgment in favour of Phones 4U. He concluded that EE's counterclaim for loss of bargain damages was necessarily bad in law.

The Judge found in favour of EE on the first issue, finding there to be a real prospect of success that Phones 4U had committed a repudiatory breach of contract as at 17 September. This issue would require a full trial.

However, he rejected EE's case on the second issue, concluding that its termination letter did not have the effect, as a matter of law, of terminating the contract for repudiatory breach. This second finding was fatal to the counterclaim.

First principles

The Judge began with an analysis of how a right to damages for loss of bargain accrues at common law in the first place. He therefore approached his task of deciding how the exercise of a contractual right of termination can be capable of preventing the common law right from accruing, by applying first principles.

In so doing, the Judge criticised the long-established terminology of "accept the repudiation" as imprecise. He described the central elements of the cause of action as follows:

(1) The cause of action is for damages for the repudiatory breach of contract committed by the guilty party or anticipated by its renunciation;

(2) Those damages are for the loss of the innocent party's bargain;

(3) Such damages are recoverable only if that loss *resulted from* the breach;

(4) There will be cases where the necessary causation is independent of any action or decision by the innocent party. For example, in respect of a failure to deliver under a sale of goods contract where time is of the essence, the buyer's damages claim for non-delivery requires no

"acceptance of repudiation";

(5) In all other cases, the necessary causation is created by the innocent party *choosing to treat itself as discharged* from further performance of the bargain and *communicating that choice* to the guilty party. If the innocent party elects to treat the bargain as at an end, the law treats the repudiatory breach as *causing* the loss of bargain notwithstanding that party's freedom of choice. That communication requires no particular form, but it must be clear and unequivocal: *Vitol SA v Norelf Ltd (The Santa Clara)* [1996] AC 800.

This part of the decision therefore emphasised the critical importance of the termination notice *communicating* the termination for repudiatory breach. That is an issue ultimately resolved by the construction of the notice in its proper context. It put beyond doubt a principle of general application, which had not been articulated with the same measure of clarity in previous cases.

The Judge went on to identify the characteristic features of the *Phones 4U* case, being that:

(1) A contractual right to terminate existed, triggered otherwise than by breach (actual or anticipatory);

(2) That right was expressly exercised;

(3) At the time of termination, (a) no mention was made of any breach, but (b) a repudiatory breach and/or renunciation existed (subject to any contrary findings at trial).

Given those features, the Judge considered in detail the relevant line of authority (in particular, the Court of Appeal decisions in: *Stocznia Gdanska SA v Latvian Shipping Co et al* [2002] 2 Lloyd's Rep 436; *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2010] QB 27; *Leofelis SA et al. v Lonsdale Sports Ltd et al.* [2012] EWCA Civ 985; and *Cavenagh v William Evans Ltd* [2013] 1 WLR 238).

GEORGINA PETERS

At the core of the Judge's analysis were the following conclusions:

(1) First, as a matter *"of first principle", "the key question … was whether it is necessary, for the common law claim for damages for loss of bargain made here, that EE terminated for breach (actual or anticipatory) by Phones 4U …* [and communicated] *to Phones 4U that it was doing…. I would say that is indeed what EE must show. The loss of bargain damages claim… in turn requires EE to show that the contract was terminated by its exercise of its common law right to terminate for that breach, respectively that renunciation".*

(2) Secondly, the issue was one of construction of the relevant termination notice. More specifically, as the Judge put it, whether by its notice *"EE purported to exercise a common law right to terminate for the repudiatory breach and/or renunciation now alleged".*

(3) Thirdly, and perhaps unsurprisingly given the features of this case, on its proper construction EE's termination letter *"communicated unequivocally that EE*

was terminating in exercise of, and only of, its right to do so under clause 14.1.2, a right independent of any breach".

Consequently, the Judge concluded that the terms of EE's termination letter rendered unsustainable in law its claim for loss of bargain damages premised upon a repudiatory breach or renunciation extant when the letter was sent. That the contract could have been terminated for repudiatory breach could not be used to re-characterise the facts.

Counter indications

In his extensive analysis of the case law, the Judge grappled with certain *dicta* that could be read as supporting the contrary proposition. Namely, the proposition that it is sufficient that the claimant should have communicated unequivocally that he treated the contract as discharged, whatever he might say as to why. Such *dicta* emerged from the judgments of Rix LJ in *Latvian Shipping* ([32]) and Moore-Bick LJ in *Gearbulk* ([44]-[45]).

This did not withstand the scrutiny of the Judge. He did not depart from the principle that "acceptance" of repudiation requires no particular formality or form of words. However, on the basis of his first principles analysis, he held that the claimant must still communicate a decision to terminate for the repudiation later said to found the claim.

Otherwise, as the Judge put it, *"the claimant cannot say the termination and therefore its loss of bargain resulted from the repudiation sued upon"*. Or as Pill LJ concluded in *Leofelis* ([44]): *"If the premature determination of the contract is for reasons other than those that subsequently emerge, a claim for post-termination loss cannot be sustained"*.

Same conduct

The Judge did, however, recognise that different issues will arise in the case where the contract is contractually terminated for a breach of contract, which is also held to be a repudiatory breach or renunciation. If only the contractual right is cited in the notice as justifying the termination, then a similar dispute is likely to arise. Indeed, such a scenario occurred in several of the authorities considered.

The central importance of construction which will bear on this issue

The Judge identified two issues which will arise. First, whether on the proper construction of the relevant contract, the innocent party *only had the contract right*, i.e. whether its common law right was excluded or replaced, not merely supplemented. This question, often referred to as the "complete code" issue, commonly arises in such cases. Secondly, whether the express reliance on the contractual right defeats the common law claim.

Following the decision of Christopher Clarke J in *Dalkia Utilities Services plc v Celtech International Ltd* [2006] 1 Lloyd's Rep 599, the Judge held that in such a case, the termination is founded upon the conduct allegedly giving rise to the repudiatory breach. For that reason, the innocent party *"can therefore say that the termination resulted from that repudiation; nothing more is required prima facie to found the common law loss of bargain damages claim. Reliance on a contractual right of termination is not inherently inconsistent with the subsequent pursuit of the claim".*

Even in such a case, it will still be a question of construction as to whether the innocent party was or was not *"intending to accept the repudiation and was only relying on the contractual clause".*

The contractual right invoked in *Phones 4U* (clause 14.1.2) arose upon the appointment of administrators. Critically, the appointment of administrators was not, nor as a matter of law would it inevitably result in, a breach of contract by Phones 4U. The contractual right to terminate exercised by EE was not therefore triggered by breach.

Election between two rights?

One issue which the case threw sharply into focus was the consideration given by certain Judges (both first instance and Court of Appeal) to the consequences of termination. More specifically, whether the consequences of contractual termination and termination at common law were so *"inherently inconsistent"* or *"markedly different"* as to preclude the notice operating to effect both.

The Judge firmly rejected any notion of this constituting the test (i.e. that if the consequences are *not* inconsistent, then the notice should be valid to exercise both rights). In particular, he interpreted the emphasis placed on consequences of termination in *Dalkia* (in that case, held to be diametrically opposing) as simply forming part of the construction exercise with regards to the termination letter.

Potential injustice?

The Judge also dealt with policy arguments founded on injustice which had some academic support. Namely, that it might be thought unjust for an innocent party to be *"deprived"* of loss of bargain damages where the guilty party has committed a repudiation, and the contract has in fact been terminated: Liu [2011] LMCLQ 4.

EE LAUNCHED A COUNTERCLAIM AGAINST PHONES 4U

Such an argument was firmly rejected. The Judge considered that the innocent party is taken to have chosen to exercise his contractual right alone, a decision carrying, as the Judge put it, *"a different set of risks and rewards, as built into the contract by the parties, as against a decision to terminate at common law alleging repudiation"*.

He did not consider it unsatisfactory to hold the innocent party to that element of the bargain. That is perhaps unsurprising in circumstances where a party who wrongfully elects to terminate the contract for repudiation may himself be at risk of repudiating the contract, causing him to exercise the contractual right alone.

Boston Deep Sea Fishing principle

It was implicit in the Judge's conclusions that the *Boston Deep Sea Fishing* principle had no application in such a case. That was because EE's termination was valid and effective under clause 14.1.2. It was also because EE was not defending a claim against it seeking damages for wrongful repudiation, by showing that at the time of termination the other party was guilty of repudiation. Following the decisions in both *Cavenagh* and *Phones 4U,* it is now clear that the principle will not operate in this way as a sword, rather than a shield, and in the context of a lawful termination.

Conclusion

The *Phones 4U* decision provides welcome reconciliation of the case law. The case brought into sharp focus the essential principles at play when a party seeks retrospectively to rely on a contractual termination notice as effective to serve as an acceptance of the other party's repudiatory breach.

The decision makes clear that if, on its proper construction, a termination letter communicates a decision to terminate only under an express contractual right to terminate that has arisen irrespective of any breach, it cannot be said that the contract was terminated for breach. A damages claim will fail on that basis. However, it is likely that disputes such as arose in *Phones 4U* will continue to occur, not least given the central importance of construction which the decision has confirmed will bear on this issue.

David Allison QC and Georgina Peters acted for the successful claimant, Phones 4U/PricewaterhouseCoopers LLP, instructed by Allen & Overy LLP (Marc Florent, Mark Sterling, Victoria Williams and Jon Turnbull).

What is a financial institution?

Matthew Abraham comments on the recent decision of the High Court in *Re Olympia Securities Commercial plc* (In administration) [2017] EWHC 2807 (Ch).

Introduction

Following the recent decision in *Re Olympia Securities Commercial plc* [2017] EWHC 2807 (Ch) the High Court has confirmed that a "*financial institution*" for the purposes of an assignment provision of a loan agreement can be: (i) a newly incorporated company with a share capital of only £1; (ii) an entity that has not traded; and (iii) an entity that has been established for the purpose of acquiring debt.

The decision by HHJ Pelling QC affirms and expands the decision of the Court of Appeal in *Argo Fund Ltd v Essar Steel Ltd* [2006] EWCA Civ 241. It provides assurance to those who trade in the secondary debt market that current practices match the existing law.

The ability of a lender to assign its rights under a facility agreement to a third party is central to the secondary debt market. In the case of lenders, it allows for the management of lender risk by allowing primary lenders to recoup the majority of a risky debt faster than they would if they waited. As for borrowers and co-lenders (for example as part of a syndicated credit agreement) restrictions on assignment provisions are essential to ensure a lender with a similar mind set, both in terms of continual borrowing as well as enforceability, takes the place of an existing lender.

It has become common practice for facility agreements to permit transfers of the lender(s) position to "*banks or other financial institutions*" in order to seek to balance the interests of lenders and borrowers as identified above. This was in fact the position in relation to the LMA standard form facility agreement prior to 2001. The term "*financial institution*" however is rarely defined in facility agreements and as a result there has been uncertainty as to what exactly qualifies as a "*financial institution*". This uncertainty is one of the reasons that in 2001 the LMA standard form agreement was revised to include a broader category of approved third parties.

The Decision in Argo Fund

In 2006 the Court of Appeal in *Argo Fund* went some way in addressing the question of what constitutes a "*financial institution*".

In *Argo Fund* the Court was concerned with a syndicated loan agreement, on a 1997 LMA standard form agreement, that had been acquired by Argo Fund Limited (an established trading company that acquired commercial debt of various types in the secondary market with a view to realising more by enforcing collection in whole or part than had been expended on acquiring the debt). The relevant loan agreement permitted a syndicated member to transfer its interest to a "*bank or other financial institution*".

At first instance, the judge found that Argo Fund Ltd was a financial institution as the phrase was used in the relevant agreement and concluded that a transferee had to share at least some characteristics of a bank if it was to be a "*financial institution*" and that to satisfy that requirement it had to have at least the following characteristics:

> *"(1) be a lender of money, though not necessarily in the primary lending market, since 'institutions who buy debt in the secondary market thereby become lenders by definition';*
> *(2) have a lending office, though the Agreement did not specify any particular form for it;*
> *(3) maintain accounts of money lent to, and of amounts, in capital and interest due from, borrowers, which, by clause 20.5 of the Agreement, were to be 'in accordance with its usual practice';*
> *(4) have the 'capabilities, financial, technical and capacity of lending money during the draw-down period, as 'quasi- primary lenders' in accordance with the terms of the Agreement'; and*
> *(5) be a 'financial institution' in the sense of having 'a legally recognised form or being, which carries on its business in accordance with the laws of its place of creation and whose business concerns commercial finance'."*
> (See paragraph 38)

The Court of Appeal upheld the judge's conclusion but did so by adopting a significantly wider test than that set out by the first instance judge. There were two substantive judgments in the Court of Appeal which are worth addressing here as they played a role in the way the arguments were run before the

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Court in *Re Olympia Securities*.

Auld L.J. (with whom Hallett L.J. agreed) held that:

> "*it is not a necessary characteristic of a transferee that its business should include bank-like activities, such as the lending of money, whether on the primary or secondary debt market or otherwise, or indeed that it should exhibit any particular standard of suitability or probity as a financial institution*"
> (See paragraph 49)

He also held that the requirement was as satisfied by:

> "[P]*roof that the putative transferee met the broad fifth criterion* [the judge] *identified in paragraph 38 of his judgement, namely having 'a legally recognised form or being, which carries on its business in accordance with the laws of its place of creation and whose business concerns commercial finance', and whether or not its business included the lending of money on the primary or secondary lending market.*"
> (See paragraph 51)

Auld L.J. clearly came to his decision based on the commercial reality of the case as he noted at paragraph 52:

> "[A] *dispute such as this is that a lender under a syndicated loan agreement, whether original or by way of transfer or assignment, may and should be entitled to recover from the borrower monies lent when they become due and that the borrower, whether distressed or otherwise, has and need have little interest as to the commercial or financial status of the body to which the role of lender has passed.*"

Rix L.J. gave a more restrictive interpretation of the phrase "*financial institution*" than that of Auld L.J.:

> "*...the essential characteristic of a 'financial institution' is that it provides capital to financial markets ... regularly makes,*

THE OLYMPIA JUDGMENT HAS DEFINED THE NATURE OF A FINANCIAL INSTITUTION

purchases or invests in loans, securities or other financial assets. As such, such institutions are likely to be professional, more or less regulated, and of a certain size. It seems to me that the word 'institution' denotes an entity of a certain substance. As such it is a rather unsatisfactory word to use in a contract: how substantial does a company have to be to be an institution? How long is a piece of string? In the circumstances, I am not surprised that the expression has since 2001 been dropped by the LMA. I would suggest that the only satisfactory way to regard this element is to say that the word is intended to exclude entities which are insubstantial."

See paragraph 68

As the Court of Appeal was focusing on whether a hedge fund was a financial institution" the difference between the judgments of Auld L.J. and Rix L.J. was not pertinent. As a result, the issue of whether companies that were purely set up for the purpose of purchasing and holding a debt were excluded from the phrase "*financial institution*" was not determined. This issue remained undetermined until the decision in *Re Olympia Securities*.

Re Olympia Securities Commercial plc

Background

The administrators of Olympia Securities Commercial Plc (**Olympia**) made an application for directions in relation to, amongst other things, the assignment of a facility agreement (the **Facility Agreement**) between Olympia and Anglo-Irish Bank Corporation Plc (now Irish Bank Resolution Corporation Limited) (**IBRC**). The Facility Agreement was one of many non-performing loan portfolios that were held by IBRC.

Clause 23 of the Facility Agreement provided that:

"23.1 The benefit of the Facility is personal to the Borrower, who may not assign or otherwise part with it in whole or part without the prior written consent of the Lender.

23.2 The Lender may (and the Borrower shall assist as required and irrevocably appoints the Lender to execute any requisite document on its behalf) at any time transfer, assign or novate all or any part of the Lender's rights, benefits or obligations under this agreement <u>to any one or more banks or other financial institutions</u>. All agreements, representations and warranties made in this agreement shall survive any transfers made pursuant to this clause. The Lender may sell down its participation in respect of the Finance Documents without the consent of the Borrower."

(Emphasis added)

...How substantial does a company have to be to be a 'financial institution'?

On 7 February 2013, the Minister of Finance in the Republic of Ireland placed IBRC in Special Liquidation under s.4 of the Republic of Ireland's Irish Bank Resolution Corporation Act 2013 for the purpose of achieving an orderly wind up of IBRC which necessarily included the sale of its assets. On 16 February 2014, IBRC acting by its Special Liquidators agreed to sell a portfolio of assets that included the loan to Olympia, the subject of the Facility Agreement, to an entity called LSREF III Wight Limited (**LSREF**).

On 2 May 2014, WDW 3 Investments Limited (**WDW**), the First Respondent, was incorporated in England and Wales with share capital of £1. The agreement between IBRC and LSREF was completed on 16 May 2014 and pursuant to which IBRC's rights under the Facility Agreement were assigned to WDW as nominee of LSREF.

The Issue and arguments before the Court

In respect of the Facility Agreement, the issue that the Court had to address was whether WDW was a "*financial institution*" for the purposes of clause 23.2 of the Facility Agreement.

WDW maintained that it fell within clause 23.3 of the Facility Agreement such that the assignment of the Facility Agreement to it was valid. In support of this WDW relied on the dicta of Auld L.J. in *Argo Fund* set out above.

A contrary position was taken by Arazim (Gibraltar) Limited (**Arazim**), the Second Respondent, who is the sole shareholder of Olympia's sole shareholder and an unsecured creditor of the Olympia. It was submitted on behalf of Arazim that to be one of the "*financial*

A requirement of capitalisation is contrary to commercial common sense

institutions" to which IBRC was permitted to assign, the entity concerned had to operate on its own behalf in the field of regulated finance. Arazim argued that WDW failed the test on the basis that: (1) it was non-trading at the date when the assignment took place; and (2) it did not operate in the field of regulated finance either before or after the purported assignment because its only purpose was to hold assets on trust for a third party. In support of its submission Arazim sought to rely on both the dicta of Auld L.J. and Rix L.J. in *Argo Fund*.

The administrators remained neutral on the issue and sought directions in order that the dispute could be resolved and all appropriate distributions made.

The Decision of the Court

Prior to reviewing the dicta in *Argo Fund*, the judge noted that there was no provision within the Facility Agreement that supported either construction advanced by the Respondents and that the phrase was ambiguous. He also noted that it was "*difficult to discern any relevant commercial context that could be said to illuminate how the concept of a financial institution would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made.*" As a result, the best that could be said was that "*it is plain that the language used indicates that the parties intended to limit the class of potential assignees*." Paragraphs 13 to 15 of the judgment provide a useful summary of the current principles applicable to the construction of a contract governed by English law.

HHJ PELLING QC

Although noting that, in the technical sense, the conclusion of the Court of Appeal in *Argo Fund* was not determinative of the issue, the judge found that the differences between the cases were slight and as result there was no distinction of substance between the facts of the cases that should lead to the conclusion that the meaning of the phrase "*financial institution*" should be wider in one case than in the other.

HHJ Pelling QC held that, as it was part of the majority decision, the test that ought to be applied was that set out by Auld L.J. in *Argo Fund*.

In relation to Arazim's argument about WDW's lack of capitalisation, he held that:

(1) a qualification based on capitalisation was not supported by the reasoning of the majority in *Argo Fund* which merely required that the entity "*… a legally recognised form or being, which carries on its business in accordance with the laws of its place of creation …*";

(2) there was no immediately apparent way to distinguish between those entities which are capable of being institutions by reason of their capitalisation and those that are not and so a requirement of capitalisation does not take matters further;

(3) there is no necessary connection between the capitalisation of a company or other incorporated entity and its trading volumes or commercial reputation;

(4) it would have been simple for parties who wished to limit the scope of the financial institutions phrase to corporations with a minimum capitalisation to do so by express provision but the parties had chosen not to do so; and

(5) the requirement of capitalisation assumes that only a company or corporation is capable of being a financial institution. The judge noted that "*that is not only not justified by the formulation of the majority in Argo but is contrary to commercial sense once it is remembered that many internationally recognised financial institutions adopt partnership models*".

THE ADMINISTRATORS OF OLYMPIA MADE AN APPLICATION FOR DIRECTIONS IN RELATION TO THE ASSIGNMENT OF A FACILITY AGREEMENT BETWEEN OLYMPIA AND ANGLO-IRISH BANK

In relation to Arazim's argument that WDW was not trading at the date when the assignment took place and so was not a "*financial institution*", HHJ Pelling QC held that such a requirement was unwarranted. In particular he held, at paragraph 24, that:

> *"In deciding whether a newly formed entity is or is not a financial institution for the purposes of clause 23 of the Facility Agreement it is necessary only that the entity should have been formed for the purpose of carrying on a business that concerns "commercial finance", as long as it is a legally recognised form or being, which carries on its business in accordance with the laws of its place of creation. There is no suggestion that WDW does not satisfy these last two requirements. In my judgment this definition is wide enough to encompass a party buying and selling debt in the secondary debt market and it is wide enough also to include corporate entities incorporated by such institutions to carry into effect their commercial activity."*

Conclusion

The approach by the Court in *Re Olympia Securities plc* will be welcomed by lenders and those trading in the secondary debt market. Those parties now have the comfort of a High Court decision in support of the current practice of selling and purchasing debt through special purpose vehicles (**SPVs**) so long as the SPVs are properly incorporated and operated in accordance with the laws of its place of incorporation. For borrowers the decision is a reminder that for there to be meaningful protection against sales to aggressive "vulture funds" clear and precise wording is required in the transfer provisions of the loan documentation.

Although not discussed in this case comment, the decision in *Re Olympia Securities plc* also provides helpful guidance on the interpretation of clauses 2(a)(i) and 6(a) of the 1992 ISDA Master Agreement. In particular, HHJ Pelling QC held that a party is entitled to serve an Early Termination notice under clause 6(a) notwithstanding the fact that it had committed an Event of Default prior to the serving of that notice but before the other party had served a notice. Attention is drawn to paragraphs 33 to 44 of the judgment.

Matthew Abraham, led by Tom Smith QC, acted on behalf of WDW. Andrew Shaw acted on behalf of the administrators of Olympia.

Banks' liability for fraudulent withdrawals by authorised individuals

Madeleine Jones comments on the recent Court of Appeal decision involving the duty of care owed by a bank to its customer to prevent fraudulent transactions.

The Court of Appeal has recently handed down in judgment in *Singularis Holdings Ltd (In Official Liquidation) v Daiwa Capital Markets Europe Ltd* [2018] EWCA Civ 84, upholding a bank's liability in negligence for authorising fraudulent payments out of a company's account. In *Singularis* the payments were requested and the fraud committed by the Company's sole shareholder, who also served on its board of directors, so the case grapples with a number of interesting questions: when is a bank negligent for following the instructions of a fraudulent individual who is nonetheless authorised to give instructions in relation to a company bank account? When will the knowledge of an owner or controller of a company be attributed to that company, and so make the company privy to that owner or controller's fraud?

Background to the judgment

Ahmad Hamad Al-Gosaibi & Brothers Company ("AHAB") started life in 1940 as a trading company in Al-Khobar, Saudi Arabia. By the turn of the millennium it had diversified into hospitality, soda-bottling, oil-field services, real estate and financial services. In 2009, AHAB and a related Saudi business, the Saad Group ("Saad"), defaulted on loans worth over $15.7 billion. The default was precipitated by the financial crisis, but as the high waters of global credit receded, something murkier was revealed: a $9 billion dollar fraud, orchestrated, according to AHAB, by the Saad Group's head, Maan Al-Sanea, or "Sheikh Maan" (as he apparently insisted employees address him).

Mr Al-Sanea, a billionaire himself, had married the daughter of one of AHAB's founders and ran AHAB's financial services businesses. Throughout the boom years preceding 2009 he easily obtained enormous amounts of unsecured credit, relying upon the reputation of AHAB and Saad. One of the AHAB businesses he ran was the Money Exchange, a foreign exchange business through which billions of dollars of funding flowed between 2000 and 2009. Some of these funds were diverted to the Saad Group, for no apparent commercial reason. Another was the International Banking Corporation (TIBC), in Bahrain, which would funnel money through the Money Exchange, even funds destined for borrowers to whom a direct transfer could easily have been arranged.

Matters came to a head suddenly and dramatically in mid-2009. On 28 May 2009, it was reported that the Al-Gosaibi family had defaulted on a $1 billion debt in Saudi Arabia. On 31 May 2009, all of Mr Al-Sanea's assets were frozen by the Saudi Arabian Monetary Authority. The Saad Group had been kept afloat by regular injections of wealth by Mr Al-Sanea, and with this source of funding abruptly cut off, Saad Group companies also found themselves in crisis. On 2 and 3 June 2009, Moody's and S&Ps cut their ratings on the Saad Group to junk and D (default) respectively, before withdrawing them completely due to lack of information.

Following AHAB and Saad's default, creditors around the world marshalled their legal teams in preparation for what would turn out to be nearly a decade (so far) of claims and counterclaims arising from the economic fall-out, in Saudi, the US, Bahrain, Switzerland and the Cayman Islands (from where Michael Crystal QC, Mark Philips QC and Marcus Haywood of this chambers recently returned, following a year-long trial in *Saad*). Mr Al-Sanea himself has remained absent from all proceedings and is now in detention in Saudi Arabia for unpaid debts; he denies allegations of fraud.

Singularis Holdings Ltd

On 1 February 2018, the English Court of Appeal handed down judgment in the latest round of a set of proceedings in the *Saad*-saga. These proceedings concerned a Cayman Islands-incorporated company, "Singlularis", which was wholly owned by Mr Al-Sanea. It was not part of the Saad Group, but was set up to manage Mr Al-Sanea's personal assets. Mr Al-Sanea sat on Singularis' board along with a number of well-known and respected figures from the fields of banking and law.

Singularis had an account with the London branch of a Japanese stockbroker, "Daiwa", which held funds for it in a segregated client account (that is, not an ordinary bank account).

Daiwa had had a relationship with the company since 2006. In 2007 it entered into a master securities lending arrangement with Singularis, under which the bank provided Singularis with funds to buy shares, which it held as security for the loan. In fact, Daiwa's relationship with Singularis was "*the single most profitable relationship for Daiwa over the years 2007 to 2009*" [21]; Singularis was also the only client of comparable importance which was a private company owned by a high net worth individual rather than a financial institution [22].

Following the widely reporting freezing of his assets in Saudi Arabia, Daiwa immediately sought to unwind its position under the securities agreement clearly out of a concern that Singularis would be unable to meet future margin calls, due to a stemming of funds from Mr Al-Sanea himself, which had previously sustained the company.

In June and July 2009, Mr Al-Sanea instructed Daiwa to pay funds from Singularis' account to three companies within the Saad Group. Eight payments were made ranging in size from $1m to $180m. There was no clear commercial purpose for the payments, and indeed, it later became clear the payments were fraudulent: with his own wealth frozen, Mr Al-Sanea was transferring Singularis' money to Saad Group companies which he could no longer sustain from his own funds. However, Daiwa authorised the payments.

The liquidators of Singularis brought an action against Daiwa for breach of its duty of care to Singularis in permitting the payments to be made. The case, at first instance and on appeal, raised questions regarding the nature and extent of a bank's duty to a corporate customer whose officer or employee is perpetrating a fraud on it.

AHAB'S MOHAMMED AL-GOSAIBI

MADELEINE JONES

First Instance

At first instance, before Mrs Justice Rose, Singularis' liquidators founded their claim against Daiwa on two bases: firstly they claimed Daiwa's employees' dishonestly assisted Mr Al-Sanea's breach of fiduciary duty, and secondly that Daiwa was in breach of the duty of care owed by a bank to its client by negligently failing to realise the payments were fraudulent.

The first claim was dismissed: Mrs Justice Rose found that the two employees who were alleged to have acted dishonestly, had not. Subjective dishonesty is a requirement for dishonest assistance (*Twinsectra Ltd v Yardley* [2002] AC 164, [27]), including dishonesty in the sense of turning a blind eye to obvious fraud.

Most of Rose J's judgment therefore focused on the second claim and Daiwa's defences to it.

A scope of a bank's duty to its customer

Mrs Justice Rose relied upon the statements of the duty of care owed by a bank to its customers set out by the Court of Appeal in *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340 and by Mr Justice Steyn in *Quincecare* [1992] 4 All ER 363.

In *Lipkin Gorman* a bank allowed a partner at a law firm to withdraw money from the firm's account, of which he was a signatory; the partner then lost them gambling. The bank manager knew that the partner in question had a gambling problem because of his withdrawal of funds from his personal account. The Court of Appeal held that although the circumstances in which a bank would come under a duty of care when asked to draw a cheque by someone authorized to do so under the bank mandate were exceptional, such a duty could arise. Rose J cited the following passages from the Court of Appeal's judgment at [164], [166] and [167]:

May LJ stated that he "*hesitated*" to lay down detailed rules on when the duty does or does not apply. He further said that where the bank is simply operating a current account, where the "*basic obligation on the banker is to pay his customer's cheques in accordance with his mandate*", and given "*the vast numbers of cheques which are presented for payment every day in this country*", it is "*only when the circumstances are such that any reasonable cashier would hesitate to pay a cheque at once and refer it to his or her superior, and when any reasonable superior would hesitate to authorise payment without inquiry, that a cheque should not be paid immediately on presentation and such inquiry made.*"

Parker LJ described the duty thus:

"*If a reasonable banker would have had reasonable ground for believing that [the partner] was operating the client account in fraud, then, in continuing to pay the case cheques without inquiry the bank would, in my view, be negligent and thus liable for breach of contract, albeit neither [the bank manager] nor anyone else appreciated that the acts did afford reasonable grounds and was thus innocent of any sort of dishonesty.*"

Parker LJ went on:

"*I would not, however, accept that a bank could always properly pay if it had reasonable grounds for a belief falling short of probability. The question must be whether, if a reasonable* *and honest banker knew of the relevant facts, he would have considered that there was a serious or real possibility, albeit not amounting to a probability, that its customer might be being defrauded, or, in this case, that there was a serious or real possibility that Cass was drawing on the client account and using the funds so obtained for his own and not the solicitors' or beneficiaries' purposes. That, at least, the customer must establish. If it is established, then in my view a reasonable banker would be in breach of duty if he continued to pay cheques without inquiry. He could not simply sit back and ignore the situation. In order so to establish the customer cannot, of course, rely on matters which a meticulous ex post facto examination would have brought to light.*"

In *Quincecare*, which the Court of Appeal cited approvingly in *Lipkin Gorman*, Barclays Bank loaned £400,000 to a company, of which the company's chairman drew down and fraudulently misapplied £340,000. The bank sued the company for the funds; the company claimed that the bank had breached its duty to it in allowing the funds to be drawn down in the first place. Steyn J held that there was an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing the customer's orders.

Steyn J (cited by Rose J at [169]) stated the duty as follows:

"*In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that a banker must refrain from executing an order if and for as long as the bank is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company.* **...** *And, the external standard of the likely perception of an ordinary prudent banker is the governing one. That in my judgment is not too high a standard.*"

Daiwa's breach

At [191]-[205] Rose J considered whether Daiwa's conduct had breached this duty of care. She found that it had: "*any reasonable banker would have realised there were many obvious, even glaring, signs that Mr Al-Sanea was perpetrating a fraud on the company*" [192]. The following factors were relevant:

THE SAAD GROUP'S MANN AL-SANEA

(1) The factors cited in *Lipkin Gorman* and *Quincecare* as to when it would be impractical to impose to heavy a duty on a bank did not apply to Daiwa: Daiwa was not operating a current account, and it was not operating hundreds of payment accounts with thousands of payment instructions each week. It was not impractical for Daiwa to look at the payment instructions in relation to this account. It was "highly unusual, if not unique" for funds in a customer account to be paid back to a third party account. [191]

(2) Daiwa's senior management knew that Mr Al-Sanea and the Saad Group were in serious financial difficulty at the time the payments were made.

(3) Daiwa was aware that Singularis was dependent upon Mr Al-Sanea for funding, even though it was not in the Saad Group. Indeed, Daiwa itself sought to limit its exposure to Singularis once the difficulties of Mr Al-Sanea and the Saad Group were publicized.

(4) Although, "*the Quincecare duty does not require a bank to become paranoid about the honesty of those it does business with in normal circumstances,* **...** *[it] does require a bank to do something more than accept at face value whatever strange documents and implausible explanations are proffered by the officers of a company facing serious financial difficulties.*" The explanations and behavior of those involved in the payments – including an officer of one of the recipient companies slamming down the phone on Daiwa's initially refusing to make the payments – should have raised the

THE LIQUIDATORS OF SINGULARIS BROUGHT AN ACTION AGAINST DAIWA FOR BREACH OF ITS DUTY OF CARE TO SINGULARIS IN PERMITTING THE PAYMENTS TO BE MADE

alarm.

(5) A "Hospital Expenses Agreement" supposedly justifying some of the payments was produced, although no one had ever heard of this before. As the possibility that the payments to the hospital did not arise from a genuine obligation had been raised by Daiwa management, this agreement should have been regarded with more suspicion.

(6) There was a marked discrepancy in how the disputed payments were treated and how other payments had been handled, in that the disputed payments were waved through whereas other payment requests had been discussed extensively. Daiwa had structural failings which meant that although a wealth of emails were sent back and forth internally regarding Singularis, no one in fact took responsibility for monitoring the relationship. Daiwa had "*a dysfunctional structure leading to a sequence of events where everyone assumes that someone else is dealing with and investigating the disputed payments but no one troubles to check whether that is right or not*" [204]. This problem had been highlighted in an internal review a year earlier.

Attribution and the Fraud Exception

Daiwa raised two related defences relating to Mr Al-Sanea's status as both the fraudster and the effective controller of Singularis. Firstly, it stated that Mr Al-Sanea's knowledge of his fraud had to be attributed to Singularis, and that therefore Daiwa's duty did not arise, as it could not have had a duty to protect Singularis from a fraud of which it had knowledge. Secondly it argued that, again because Mr Al-Sanea's knowledge could be attributed to Singularis, Daiwa could rely on the illegality defence to defeat the claim.

Daiwa claimed that Singularis was effectively a "one-man company." Mr Al-Sanea wholly owned it, and although it had a board of directors, Mr Al-Sanea alone was responsible for authorizing the payments. In fact, Rose J found, Singularis had not been a one-man company: the rest of the board had not been involved in the fraud, and the fact that they had been passive did not mean they could be disregarded entirely.

If Singularis were a one-man company, Daiwa submitted, the duty could not arise, because the company could not claim to be a victim of fraud. In this Daiwa relied on the judgment of Hobhouse J in *Berg Sons & Co Ltd & ors v Adams & ors* [1992] BCC 661: the auditors of a company whose sole director was also its sole shareholder were not liable to it in negligence for having failed to detect the director's fraud: "*Any company must as a last resort if it is to allege that it was fraudulently misled, be able to point to some natural person who was misled by the fraud*" (cited by Rose J at [176]).

Daiwa also found support in the speech of Lord Sumption in *Jetivia SA & anr v Bilta Limited (in liquidation) & ors* [2015] UKSC 23. There Lord Sumption had said that where a company is suing a third party who was not involved in the director's' breach of duty for an indemnity against its consequences, "*as between the company and the outside world, there is no principled reason not to identify it with its directing mind in the ordinary way*" [180].

However, Rose J found that *Bilta* was not authority for the proposition "*at in any proceedings where the company is suing a third party for breach of a duty owed to it by that third party, the fraudulent conduct of a director is to be attributed to the company if it is a one-man company*" and that in fact there is no such principle of law: [182]. Elsewhere in *Bilta* Lord Sumption had affirmed the statement of Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 that whenever an agent's thoughts or actions were proposed to be attributed to a company, it was necessary to consider the purpose for which the attribution was sought.

In the light of this, Rose J concluded at [184]:

"*The issue for the court in this case is therefore whether, in the context of a claim by the company against a bank for breach of the Quincecare duty, the director's fraud should be attributed to the company in order to defeat the claim. In my judgment it would not be right to do so because such an attribution would denude the duty of any value in cases where it is most needed. The duty is only relevant in a situation where the instructions to pay out the money are given by the person who has been entrusted by the company as a signatory on the bank account. If there were no properly authorised instruction to transfer the money, the company would not need to rely on the Quincecare duty. The existence of the duty is therefore predicated on the assumption that the person whose fraud is suspected is a trusted employee or officer. So the duty when it arises is a duty to save the company from the fraudulent conduct of that trusted person. This is a very different duty from the duty on auditors to report to shareholders about the affairs of the company*."

> *Rose J applied the three-part test for the operation of the illegality defence set out in Patel v Murza [2016] UKSC 42*

Thus, Singularis was entitled to rely on Daiwa's Quincecare duty.

For similar reasons, the illegality defence failed: Mr Al-Sanea's wrongdoing could not be attributed to Singularis. Again, Rose J emphasised that attribution is not something that happens automatically or mechanistically (other than in narrowly defined circumstances, such as where an act is done by an employee or agent in the scope of their employment or agency), but the courts must make a value judgment as to whether it is right for a person's knowledge to be attributed to a company in given circumstances, a position for which she found support in both *Bilta* and *Stone & Roles* [2009] AC 39. The latter case was held to be without a *ratio* in *Bilta* (and was said by Lord Neuberger at [30] to be "*put on one side and marked 'not to be looked at again'*"), but Rose J held that the Justices had agreed that where there were innocent directors, the illegality defence was unavailable.

In this context, Rose J applied the three-part test for the operation of the illegality defence set out by the Supreme Court in *Patel v Mirza* [2016] UKSC 42. Although the notion of a three-part test sounds like comfortingly certain ground amidst these difficult legal issues, the test is not one that can rigidly or formalistically be applied to a given set of facts, but involves consideration of broad public interest concerns. In *Patel*, Lord Toulson stated the test as follows:

"*The essential rationale of the illegality doctrine is that it would be contrary to the public*

The Court of Appeal held that there was no error of law in Rose J's finding Singularis was not a one-man company

interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

On the basis of this test, Rose J held that the illegality defence should not be allowed:

(a) "*The purpose of the prohibition on breach of fiduciary duty is clearly to protect the company from becoming a victim of the wrongful exercise of power by the officers of the company. That purpose will certainly not be enhanced by preventing Singularis from claiming the money back*." [218]

(b) "*[D]enial of the claim would have a material impact on the growing reliance on banks and other financial institutions to play an important part in reducing and uncovering financial crime and money laundering*." [219]

(c) "*[D]enial of the claim would be an unfair and disproportionate response to the wrongdoing on the part of Singularis*." [220]

Thus, Rose J held that Daiwa *was* liable to Singularis in breach of duty – though she reduced the amount of the claim by 25% for contributory negligence.

The Court of Appeal

Daiwa challenged the judgment in the Court of Appeal. The Chancellor, Vos LJ, who gave the judgment of the Court, characterized the issues as follows:

i) Should Mr Al-Sanea's fraudulent knowledge and conduct be attributed to Singularis so as to bar its claim on grounds of illegality?

ii) If so, should Singularis's claim be barred by the illegality defence, applying the test in *Patel v. Mirza*?

iii) If not, is Singularis's claim defeated by lack of causation, because the company (with Mr Al-Sanea's fraud attributed to it) was not relying on Daiwa's performance of its duty?

iv) If not, is the claim defeated by an equal and opposite claim by Daiwa against Singularis (with Mr Al-Sanea's fraud attributed to it) for the tort of deceit?

v) Does the *Quincecare* duty apply where only the creditors of a company, to whom it is not directly owed, stand to benefit from it in practice?

vi) Was the judge's assessment of contributory negligence an error of law or wholly outside the range of reasonable possibilities?

The questions of illegality, attribution and the scope of the *Quincecare* duty were therefore central to the appeal.

Attribution in the Court of Appeal

On the first issue, attribution, Daiwa argued that Singularis was a one-man company and the existence of innocent, though supine, board members did not change this. Thus, it submitted, Mr Al-Sanea's knowledge should have been attributed to it. However, the Chancellor held that the definition of a "one-man company" in *Bilta* was authoritative: "*a company in which, whether there was one or more than one controller, there were no innocent directors or shareholders*": [53]. There was no error of law in Rose J's finding that Singularis was not a one-man company, nor in her finding that this meant that attribution was not ineitable.

The Chancellor also highlighted that in *Bilta*, Lord Sumption had stated that the illegality defence is available "on some occasions" where there are no innocent members or directors: [56]. Thus, even with a true one-man company, attribution in the context of the illegality defence is not inevitable. Vos LJ gave the view that it was right to have regard to the purpose of attribution in such cases too, and that the policy reasons which Rose J had pointed to in disallowing the illegality defence in response to the *Quincecare* duty applied to one-man companies too. He noted that the term "one-man company" is not a useful one: a company *always* has a separate legal personality, and attribution may occur even where a company is not a "one-man company": [59].

The illegality defence

Next, the Chancellor considered Daiwa's appeal on the illegality defence and *Patel*. The Chancellor held that given the need for a trial judge to consider proportionality in the *Patel* test, "*an appellate court should only interfere if the first instance judge has proceeded on an erroneous legal basis, taken into account matters that were legally irrelevant, or failed to take into account matters that were legally relevant*" [65]. There was no justification here for the appeal court to interfere, and in any case, the Chancellor considered that Rose J had reached the correct conclusion on the test [67].

Causation

In its argument on causation, Daiwa again were relying on attribution: once Singularis was identified with Mr Al-Sanea's fraud, it was a dishonest company, and was not relying on Daiwa to perform its *Quincecare* duty. Following *Berg*, Daiwa argued, the claim had to fail. However, Daiwa had failed to show that Mr Al-Sanea's fraud should be attributed to Singularis. Furthermore, the Chancellor emphasized that the auditor's duty in *Berg* was of a different character to the *Quincecare* duty. "*The normal duty of an auditor is to report on the accuracy of the financial statements of the company, whereas the Quincecare duty is to "refrain from executing an order if and for as long as the banker is 'put on inquiry'*"" [71]. Further, there was no need for Singularis to plead reliance. Also, if the auditors had done their duty and pointed out the fraud to the company it would not have made any difference; if Daiwa had done its duty and stopped the payments, the funds would have been available to creditors. Here again, Daiwa's argument failed.

Deceit

Again, Daiwa's claim that Singularis was liable to it in deceit relied upon the attribution of Mr Al-Sanea's fraud to the company, and given Vos LJ's finding that there had been no such attribution, it could not succeed. However, the Chancellor stated that even if this had not been the case, this argument would have failed: "*The existence of the fraud was a precondition for Singularis's claim based on breach of Daiwa's Quincecare duty, and it would be a surprising result if Daiwa, having breached that duty, could escape liability by placing reliance on the existence of the fraud that was itself a pre-condition for its liability*" [79].

Does the Quincecare duty exist where only creditors can benefit from it?

The Chancellor held that the fact that only creditors would benefit from the duty did not affect the existence of the *Quincecare* duty. It was not the fraudster who was to benefit, and beyond this, as Rose J had said at [173] in her judgment: "*there was no principle of law which required the court to consider what a party who had a valid cause of action for a loss intended to do with the money*" [89].

Finally, the Chancellor endorsed Rose J's finding on contributory negligence.

Conclusion

As is clear from the above, the Court of Appeal whole-heartedly endorsed Rose J's approach to the *Quincecare* duty and to attribution and illegality.

The *Quincecare* duty will thus potentially affect institutions which hold funds for customers and make payments on demand. Where these institutions are approving thousands of payment requests a week, the duty is unlikely to arise, but where the institution, or members of it, has knowledge of facts that make a payment request suspicious, it may be subject to the duty. If it is so subject, the illegality defence will be of no assistance, even if the customer is a "one-man company" and the fraud was perpetrated by its member-director.

Where a party seeks to rely on attribution of the fraud of an agent to a company and the illegality defence, other than where there is a well-established precedent for doing this, the courts must apply the test in *Patel* and undertake an examination of the policy implications of the defence.

INSOL International Annual Regional Conference

South Square is delighted to be one of the sponsors of the INSOL International Annual Regional Conference which takes place in at the Grand Hyatt New York between 29 April and 1 May 2018.

The theme of the conference is that the only thing that seems certain in the current climate is the unexpected. With that in mind, breakout and plenary sessions have been arranged to cover some of the most pertinent of current topics. South Square's Felicity Toube QC will chair a breakout session on the Monday entitled "The empire strikes back: European jurisdictions on their way to modernise their insolvency regime". Have your light-sabres at the ready!

Other topics include a 'jargon-free' explanation of what fintech, blockchain, cryptocurrency and cloud all mean for insolvency practitioners, professional services and the law; the ever-popular "Hot Topics and Trends" session, where an international panel of experts will discuss the latest cutting-edge developments in the restructuring world; and "The Good, The Bad and the Brexit".

In addition to Felicity Toube QC, David Alexander QC, Mark Arnold QC, Tom Smith QC, Hilary Stonefrost, Richard Fisher, Henry Phillips and Rose Lagram-Taylor 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 INSOL alike, and further information can be found at https://www.insol.org/page/800/insol-new-york. We very much look forward to seeing you there.


FELICITY TOUBE QC


DAVID ALEXANDER QC


MARK ARNOLD QC


HILARY STONEFROST


TOM SMITH QC


RICHARD FISHER


HENRY PHILLIPS


ROSE LAGRAM-TAYLOR

INSOL VENUE THE GRAND HYATT, NEW YORK

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INSOL International
Annual Regional Conference

29 April – 1 May 2018

New York, USA

NEWS in brief

Carillion specialist legal advisers appointed from South Square

Gabriel Moss QC and Hannah Thornley have been appointed as Specialist Legal Advisers to the Work and Pensions and Business Energy and Industrial Strategy Select Committees in relation to the Carillion Inquiry in January 2018. Their roles involve opining on the law, research, reviewing evidence, assisting with briefs and questions, briefing MPs and attending evidence sessions. As the Digest goes to print, the Inquiry have questioned the Insolvency Service, the FRC, the Pensions Trustees and the key board directors of Carillion. The Inquiry will also be questioning KPMG and the head of the audit committee of Carillion. Hannah and Gabriel will also assist in the production of the Report on the Inquiry in due course.

HANNAH THORNLEY

GABRIEL MOSS

Picking over the carrion of Carillion

The most significant liquidation (so far) of the current year is the collapse of Carillion Group, the British multinational facilities management and construction services company.

Plagued by substantial debt as a result of a slowdown in many of its markets, Carillion also blamed its collapse on cost overruns on three significant construction projects: two hospital projects in Liverpool and Birmingham, and the Msheireb Downtown Doha project in Qatar. In 2017 it was forced to issue three profit warnings, but hedge fund managers had already begun to bet against the firm up to five years ago when analysts noticed unusual delays in payments to sub-contractors.

It recorded a more than £1.4bn loss during the first half of its financial year and the departure of its chief executive also contributed to an investor exodus, sending shares plummeting from around 230 pence a year ago to just over 14 pence at its market close.

Engaged in on-off negotiations with lenders for months Carillion announced on 15 January 2018 "that it had no choice but to take steps to enter into compulsory liquidation with immediate effect".

Carillion is one of several companies that have expanded rapidly in the past decade providing public services on private sector terms, from feeding schoolchildren and cleaning prisons to building roads and laying railway track.

Following Carillion's collapse there were immediate calls for a public inquiry from politicians and financial analysts in the UK and, on 16 January 2018, the UK government ordered a fast track investigation into the directors at the construction firm to look into possible misconduct. Carillion's auditors will have their role examined by the Financial Reporting Council.

The demise of the group leaves a huge pension black hole, believed to be approaching £1bn. In a 2010 letter, the company maintained it could afford to pay no more than £23m per year to reduce the pension deficit – £12m less than the minimum the trustees said was affordable. The Pensions Regulator opened a formal investigation into Carillion on 18 January 2018, three days after it went bust.

CARILLION: COLLAPSE DUE TO DEBT AND COST OVERRUNS

Toys R Us and Maplin go into administration

Electronics chain Maplin and the UK arm of the toy retailer Toys R Us both entered into administration on the last day of February. Both brands have been seeking buyers for several weeks.

Toys R Us (whose US owner filed for Chapter 11 bankruptcy protection last September) had managed to stave off administration in December last year after it struck an agreement with the Pension Protection Fund to inject £9.8m into its retirement scheme over three years in an effort to plug its funding shortfall. Talks with private equity funds and restructuring specialists to raise the £15m needed for a VAT liability which fell due in March collapsed, and the Pension Protection Fund is now expected to have to inject in excess of £35 million on taking over the company's pension fund. The largely out-of-town retail park stores have increasingly struggled to keep pace with the shift in British shopping habits, were toys are increasingly bought online or in supermarket aisles.

For Maplin, Edinburgh Woollen Mill had been a potential buyer but walked away from the table on 27 February. Graham Harris, chief executive of Maplin, blamed three "macro factors" for Maplin's downfall. He said "The business has worked hard over recent months to mitigate a combination of impacts from sterling devaluation post Brexit, a weak consumer environment and the withdrawal of credit insurance." Suppliers providing goods to a retailer typically take out credit insurance to cover against the risk that the company goes bust and is unable to pay them. Unavailability of credit insurance could jeopardise a retailer's ability to stock its stores. One insurer, QBE, stopped providing cover for suppliers to Maplin in October last year, and Euler Hermes and Atradius also scaled back their exposures.

Both Maplin and Toys R Us UK stores will stay open whilst administrators determine their future.

MAPLIN: SEEKING A BUYER

Lucy Frazer QC appointed Parliamentary Under-Secretary of State in the Ministry of Justice

Lucy Frazer QC, formerly a member at South Square and now MP for South East Cambridgeshire, was appointed as Parliamentary Under-Secretary of State in the Ministry of Justice at the start of January this year. All at South Square wish Lucy every success in her new position.


LUCY FRAZER QC MP

The rolling Moss gathers awards

We are delighted that Gabriel Moss QC has recently won two awards from Lawyer Monthly:

The 2017 Legal Awards Lawyer of the Year for Restructuring and Insolvency, and the 2018 Private Client Awards Barrister of the Year for Banking & Finance.

Faiz's 'First' Failure

Faiz Siddiqui, an Oxford history graduate who sued the university over his failure to get a first and, therefore, become a high-powered international lawyer, had his claim dismissed by the High Court.

Siddiqui claimed that "inadequate teaching" was to blame for his 2:1 grade seventeen years ago, which he claimed cost him a place at a top US law college and therefore a lucrative legal career. He sought £1 million in compensation from the university.

Mr Justice Foskett concluded that Siddiqui deserved "sympathy and understanding" but that the claim must be dismissed as he was not convinced that the teaching was "negligently inadequate". Foskett warned students against using the courts to settle grievances about their university education, stating that "… establishing a causative link between the quality of teaching and any alleged 'injury' is fraught with difficulty."


FAIZ SADDIQUI

Bar Placement Scheme

South Square is once again delighted to support the Bar Placement Scheme which pairs talented sixth form students, from non-traditional backgrounds for the Bar, with practising barristers. Students spend three days shadowing their barrister in chambers and in court. On the final day of the scheme, students attend talks by barristers and/or judges, and receive advocacy training from the Inns of Court College of Advocacy. Prizes are awarded for the best student advocates by a senior member of the Bar.

David Alexander, joint Head of Chambers at South Square, said "as a profession, it is vital that we demonstrate that a career at the Bar is for any person, regardless of background, who excels academically. South Square is proud to be accepting two student placements this summer."

DAVID ALEXANDER QC

Mayhem in the Maldives

The three Supreme Court Judges of the Maldives were allegedly forced to take shelter in the court buildings in Male on 6 February after the country's chief justice and another Supreme Court judge were arrested on bribery allegations. The Maldives has faced upheaval since 1 February, when the Supreme Court ordered the release of President Yameen Abdul Gayoom's imprisoned political opponents and the reinstatement of 12 lawmakers, sacked after they sided with the opposition. Yameen refused to comply with the court order and instead declared a state of emergency, as his ruling party may have lost a majority in the 85-member parliament if the 12 lawmakers were allowed to participate in voting.

MALDIVES' PRESIDENT YAMEEN ABDUL GAYOOM

The prisoners include Mohamed Nasheed, the country's first president elected in a free election, who could have been Yameen's main rival in his re-election bid later in 2018. The Maldives became a multi-party democracy in 2008 after decades of autocratic rule. However, Yameen has rolled back much of the country's democratic gains and freedoms since being elected in 2013.

As we go to press, the president is seeking to extend the state of emergency for a further 30 days.

Casual dining crunch

The casual dining restaurant sector has been under significant strain since the start of the year. A medley of ingredients, including rising labour costs, business rates, rent and food inflation have been taking an ever-increasing bite out of restaurant takings. In the first two months of 2018 alone Byron Burgers, Jamie's Italian and Jamie Oliver's Barbecoa have all resorted to company voluntary arrangements or other restructurings in order to stay afloat. Barbecoa Piccadilly went into administration with 80 staff losing their jobs. Barbecoa St Paul's was bought back immediately by Mr. Oliver under a so-called pre-pack arrangement, which allows the purchase of the best assets of a business before it actually goes into administration.

Have you seen this trophy?

Boris Becker, who was declared bankrupt in June of 2017, has appealed for assistance in finding some of the trophies he won over the course of his tennis career. Becker has vested his trophies and other memorabilia in his joint trustees so they can be sold to settle his debts, but some 8 remain 'unaccounted for' as he is 'unable to recollect where they are located'. The missing trophies include those for his Wimbledon victories in 1985, 1986 and 1989. The joint trustees of the bankruptcy estate of Mr. Becker issued a statement requesting that "Anyone with any information relation to the whereabout of the missing trophies, or any other memorabilia or other information of relevance to Mr. Becker's bankruptcy estate are encouraged to contact [us]."

Alteration of Judicial Titles

In an Order made on 31 January 2018, which came into force on 26 February 2018, the title 'Registrar in Bankruptcy of the High Court' became 'Insolvency and Companies Court Judge'. The purpose of the name change is to provide judicial titles which better reflect what those judges do, provide clarity to court users and bring the titles of these judicial offices in line with the name of the Bankruptcy and Companies Courts in which these judges sit.

The Bankruptcy and Companies Courts are part of the Chancery Division of the High Court. It is responsible for the Insolvency and Companies List within the Business and Properties Courts. The Bankruptcy Court deals with the insolvency of individuals, while the Companies Court deals with the insolvency of companies, applications in company law and applications for the disqualification of company directors. The work is, for the most part, dealt with by five Bankruptcy Registrars and approximately twelve fee paid Deputy Registrars. Appeals from the decisions of these judges are to a single judge of the Chancery Division.

The creation of the Business and Property Courts in June 2017 brought together the specialist courts and lists of the High Court, including the Commercial Court, the Technology and Construction Court, and the courts of the Chancery Division (including those dealing with financial services, intellectual property, competition, and insolvency). It was a key step in bringing transparency to the specialist courts. The alteration of judicial titles follows on from that. It will replace the title of 'Registrar' with 'Judge" so that both the businesses and individuals using the court are clear that their case is being heard by a judge, giving greater clarity to court users and bring the judicial title in line with the name of the court itself.

Stark raving mad

Many young ladies whose billionaire-investor fathers tell them that they would be "stark raving mad" to set up another fashion label after the failure of their first might heed that wise advice. Not so Petra Ecclestone. Instead, Petra ignored sage Bernie's words and was inspired to create a range of python- and alligator-skin handbags studded with crystals and gold, which she launched at New York Fashion week in 2011 under the brand name "Stark". In February of this year papers were lodged at Companies House to voluntarily dissolve Stark & Co Ltd, with debts of £4.2 million settled.

PETRA ECCLESTONE

Rising tide of insolvencies

Figures from the Insolvency Service for the 12 months ending Q3 2017 showed that one in 196 companies entered liquidation. Although total corporate insolvencies decreased by 12.5% compared to Q2 of 2107, these figures were skewed by 1,131 connected Personal Service Companies entering liquidation simultaneously in Q2. Removal of these PSCs shows that the underlying liquidation rates have actually risen by 15% compared to Q2 and by 14.5% compared with Q3 in 2016. In the main this rise was driven by a 21.2% rise in Creditors Voluntary Liquidations.

According to the Insolvency Service the Q3 figures reflect that the construction industry continues to be the area in which the majority of companies will become insolvent, followed by the wholesale and retail trade (including vehicle repair), with accommodation and food service industries being placed third most at risk.

Judges advised on Equal Treatment

The Equal Treatment Bench Book, published by the Judicial College, responsible for training judges, has been updated for 2018. The book is an update to the equality rules first issued under Lord Irvine of Lairg in 1999. The book quotes former US Supreme Court judge Harry Blackmun who said "In order to treat some persons equally, we must treat them differently". The guidelin es instruct judges to no longer refer to a postman but a "postal operative" and that the term "lady" is patronising. It also instructs judges to consider decisions made by Islamic Sharia tribunals in family cases, despite the discrimination faced by many women in Sharia divorce settlements.

Crackdown on Cryptos

At the beginning of February Lloyds Banking Group and Virgin Money declared that their customers could no longer buy Bitcoin or other cryptocurrencies on their credit cards. This move follows recent sharp falls in the value of digital currencies, leading Lloyds and Virgin to be concerned that they could end up footing the credit card bill if prices continue to fall. The ban does not extend to users of debit cards.

Speculation at the start of 2018 around the Chinese government's plans for a major bitcoin crackdown, cutting off domestic access to platforms and exchanges that enable people to trade digital currencies, contributed to the huge declines in value that have happened across the board. The South Korean government followed suit, but following popular protests swiftly reversed their decision.

RECENT FALLS HAVE PROMPTED BANKS' BANS.

Only 12 of the 195 countries of the world have openly tried to ban bitcoin and crypto at various levels: Brazil, Indonesia, China, Vietnam, Israel, Morocco, Bolivia, Algeria, Ecuador, Kyrgyz Republic, Bangladesh, and Nepal.

However, not all governments have banned cryptocurrency in the same way. Israel, for example, has effectively prevented crypo stocks from being listed on its indices and aided the practice of its banks not allowing bitcoin business accounts. However, the government has made positive comments about cryptocurrencies and has advocated making Israel a welcoming environment for bitcoin.

First, let's thank all the lawyers!

One tale, which might be as embroidered as the linen panels themselves, has it that during the French Revolution the panels of the Bayeux Tapestry were used to cover military wagons until their eventual rescue by a local lawyer who then sent them to Paris for safe-keeping. It is also reputed that Napoleon himself then paraded up and down before the tapestry as he planned an invasion of Britain.

BAYEUX TAPESTRY WILL BE DISPLAYED IN THE UK FOR THE FIRST TIME IN 952 YEARS.

So, it could be claimed that it is only thanks to a fast-acting lawyer that the Bayeux tapestry will be displayed in the UK for the first time in 952 years.

President Emmanuel Macron announced the loan of the artefact, which depicts the Norman build-up and subsequent success in the Battle of Hastings in 1066, at the Anglo-French summit in January.

An Elysée official said that whilst the loan was agreed in principle, it would not happen for several years to enable work needed to stabilise the tapestry to be carried out.

The date of the loan would probably be 2022 when, it is understood, the Bayeux Museum closes for refurbishment.

The Judgment of Paris?

In further cross-channel news, the French justice ministry has opened an international commercial appeal chamber in Paris in which both litigants and lawyers will be permitted to speak English instead of French, and judgments will be bilingual. French courts traditionally base their judgments on the country's civil and criminal legislation but, according to Nicole Belloubet, the country's justice minister, the new chamber will also be allowed to take account of international law, including the common law of England & Wales.

This move has irked traditionalists attached to France's constitution, which stipulates that French is the only official language. The chamber may also be seen as an affront to Napoleon, who codified the laws that have underpinned the legal system ever since.

It is, however, one of many initiatives the French have designed to exploit Brexit, including authorising bankers moving from London to opt out of French state pension schemes and the opening of international schools where lessons are in English.

FRENCH JUSTICE MINISTER, NICOLE BELLOUBET

PRIME Finance conference

Jeremy Goldring QC reviews the recent PRIME conference at the Palace in the Hague

As in previous years, the PRIME Finance Conference took place over two days in January, in the Hague, a distinguished gathering of many financial law experts (academics, judges and practitioners) from jurisdictions around the world, large and small. The venue was the Peace Palace, the home of various international courts over the years including, currently, the Permanent Court of Arbitration and the Internati onal Court of Justice. The neo-renaissance building was completed in 1913 with financing from Andrew Carnegie. Described on its website as a temple of peace and justice, it is a monument to the hopes, not always realised, of lawyers with an internationalist bent.

PEACE PALACE IN THE HAGUE

Some might think the concerns of financial lawyers, focusing on their latest transaction or dispute, somewhat prosaic by comparison. But both the fact of the conference, and its subject matter, illustrated the worldwide nature of the law and practice that facilitates the financial markets, even in less outwardly globalist times. Lord Briggs, recently elevated to become a judge of the Supreme Court, gave the opening keynote address, on Dispute Resolution in Uncertain Times. It was an excellent tour d'horizon, its theme the ongoing conflict between unive rsalist and territorial tendencies in dispute resolution. A second keynote address was given by Philip Wood QC, identifying the division of the globe between four or five different broad legal systems, each with its own well established and distinctive approach to creditor rights, set-off and security.

Other sessions tended to deal with narrower topics, with a panel format allowing contributions from many di fferent national perspectives. These included a judicial panel (with contributions from the US, England, Switzerland and the Cayman Islands); a financial litigation panel (with contributors from France, Italy, the US and England); a regulatory update; and a panel on arbitration. All were of high quality, even if the enthusiasm of some speakers, and audience members, meant coffee breaks were in short supply. In short, a memorable conference worthy of its surroundings.

Jeremy Goldring QC is a PRIME Expert. He spoke at the conference as part of an international panel discussing 'Highlights in Recent Financial Litigation'.

1/. the Lord Briggs talk can be read on the Supreme Court website: https://www.supremecourt.uk/docs/speech-180122.pdf

SOUTH SQUARE CHALLENGE

Welcome to the March 2018 South Square Challenge. On this occasion, all you need to do is identify who is in the picture, of what they are a patron saint and then work out the connection between them all. As ever, the prize for the winner (drawn from the wig tin if we have more than one correct entry) is a magnum of champagne and a much-coveted South Square umbrella.

Please send your anwers by e-mail to Kirstendent@southsquare.com, or by post to Kirsten at the address on the back page. Entries to be in by 7 May please. Best of luck!

Marcus Haywood

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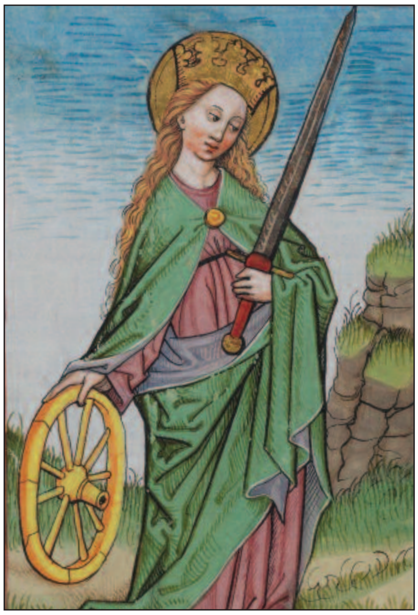

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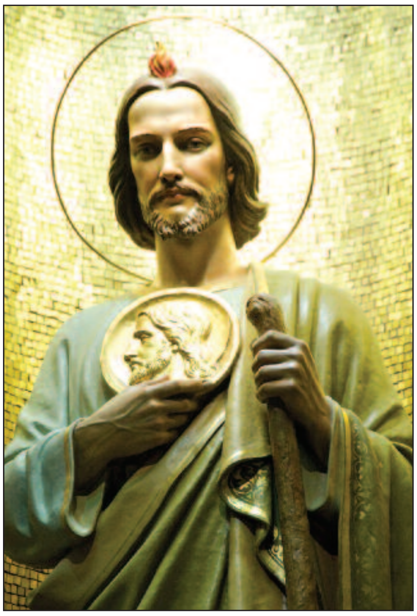

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The connection is?

NOVEMBER CHALLENGE

The answers to the November 2017 challenge were: 1/. Re Waterfall I. 2/. Re Waterfall II. 3/. Re Webinvest. 4/. Leeds v Lemos. 5/. Akers v Samba Financial Group. 6/. Re Peak Hotels and Resorts. 7/. Thomas v Frogmore Real Estate. The connection between these answers were that they were all major matters from 2017 in which Members of South Square appeared. The lucky winner, drawn from the wig tin, is Bhavesh Patel of Travers Thorp Alberga to whom goes a magnum of champagne and a South Square umbrella.

Diary Dates

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

American College of Bankruptcy Class 29 Induction Ceremony and Educational Sessions
15-17 March 2081 – Washington

R3 Annual Dinner 2018
22 March 2018 – 8 Northumberland Avenue, London

ILA Academic Forum and Annual Conference 2018
20-21 April 2018 – London

INSOL New York Annual Regional Conference
29 April-1 May 2018 – Grand Hyatt Hotel, New York

R3 28th Annual Conference
23-25 May 2018 – Villamoura, Portugal

GRR Live Offshore - Cayman
12 June 2018 – Cayman Islands

INSOL International Channel Islands One Day seminar
3 July 2018 – St. Helier, Jersey

South Square/Mourant Ozannes Litigation Conference
20 September 2018 – London

International Insolvency Institute 18th Annual Conference
23-25 September 2018 – New York

International Bar Association Annual Conference 2018
7-12 October 2018 – Roma Convention Centre La Nuvola, Rome

INSOL International Hong Kong One Day Seminar
7 November 2018 – Hong Kong

RISA Conference 2018 in association with South Square
19 November 2018 – Ritz Carlton, Grand Cayman

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

CHAMBERS & PARTNERS COMPANY/INSOLVENCY SET OF THE YEAR 2017

SOUTH SQUARE

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