Digest

SOUTH SQUARE

Brexit: Where are we going?

Recognition and enforcement during transition and beyond

Risky Business
Unpacking “pre-pack” administrations

Shut Up?
Privilege and company dissolution

Jersey Update 2018
Recent developments

Paul Heath QC
New Associate Member

www.southsquare.com

A regular review of news, cases and articles from South Square barristers

In this issue

GDPR ALERT:
CONTINUE TO RECEIVE YOUR SOUTH SQUARE DIGEST

The General Data Protection Regulation came into force in May this year. We are taking this opportunity to let you know that you will continue to receive the Digest from us, and we will hold your details on our database for this purpose as you are a valued contact of South Square.

However, if at any time you decide you don't wish to receive it, or that you don't want us to hold your contact details, please let us know and will we remove you from our database and mailing list.

If you would like to know more about how we protect the privacy of our clients and other individuals whose personal data we collect, please visit our website to see our Privacy Policy.

Designed and produced by Creative Interpartners, London

SOUTH SQUARE

From the Editors

Welcome to the June edition of the South Square Digest

Alongside the Royal Wedding, this season sees the commencement of another great partnership, as we begin our joint editorship of the Digest. We hope that, like the royal marriage, our friends and family will support and uphold it.

Three things stand out from the news agenda since the Digest last went to print in early March: Novichok, North Korea and "No Customs Union".

First, the attempted murder of a Russian double-agent and his daughter with Soviet-designed nerve agent after a quiet Sunday lunch at Zizzi in Salisbury gripped the media for much of March/April. Le Carré-esque spy expulsions on a level not seen since the Cold War ensued; followed by targeted US sanctions against a core of Russian 'oligarchs', leading to steep falls in the rouble and reported losses to one individual alone – Oleg Deripaska – of up to $10 billion. And finally, a no show by Roman Abramovich at the FA Cup Final. But after government promises of tougher measures, it remains to be seen whether the booming Russian IPO market in the Square Mile and Belgravia/Mayfair property prices will really suffer.

Second, the meeting of North Korean leader Kim Jong-un and South Korean president Moon Jae-in marked a glimmer of hope in a regional war nearing its 70th year which undoubtedly affects us all. However, beneath the promises of a halt to nuclear testing, can the world realistically expect the North to give up its nuclear arsenal? And will the US recent decision to tear up 2015's Joint Comprehensive Plan of Action on Iran's alleged efforts to develop nuclear weapons scupper any deal before it's even on the table? The recent scrapping of the US-North Korean summit in Singapore feels like a classic case of one step forwards and two steps backwards.

Finally, in the ever-present Brexit saga, it looks like our departure from the Customs Union has been given a stay of execution until after 2021. Nearly two years on from the Brexit referendum, one asks oneself how much (if any) air time the prospect of an Irish "hard border" was given in the run up to the vote; and reminds oneself how much there is still to be done. As we go to press the Foreign Secretary is visiting Chile, Peru and Argentina, feeding manatees and in search of trade deals. But perspective is everything: UK

Marcus Haywood & William Willson

exports to those three countries are the equivalent to approximately 6% of its annual exports to the Netherlands alone. It's going to be a big job.

Editing the Digest is a smaller, but nonetheless big job, and for our first edition we are assisted with some outstanding contributions from our friends and colleagues. We have Mark Phillips QC on "Brexit: Where Are We Going?", which considers the brave new world we will face when the UK loses Member State status on 31 December 2020. New recruits to our list of offshore contributors, Ogier's Nicola Roberts and Leon Hurd, provide an invaluable overview of recent developments in Jersey in both insolvency and civil procedure. Toby Brown tackles the complex question of whether legal professional privilege survives the dissolution of a company. David Alexander QC considers just and equitable winding up, and Andrew Shaw unpacks pre-packs. Finally, Hannah Thornley, who has acted as a specialist legal adviser to the Work and Pensions and Business Select Committees on the BHS and Carillion enquiries, reviews the recent Government Consultation on Insolvency and Corporate Governance arising out of those two collapses. We also have the usual case digest section, edited by our most recent tenant, Rose

Lagram-Taylor, and the latest South Square Challenge (following on the heels of a bumper number of entries in our March edition).

On 16 May 2018, the Work and Pensions and Business, Energy and Industrial Strategies Committees published their final report of their inquiry into Carillion's spectacular collapse. It presents Carillion's rise and fall as a story of *"recklessness, hubris and greed"* and Carillion's business model as "a relentless dash for cash" driven by acquisitions, rising debt and exploitation of suppliers. It concludes that the government has *"lacked the decisiveness or bravery"* to address the failures in corporate regulation which allowed Carillion to become a *"giant and unsustainable corporate time bomb"* – and calls upon the government to carry out an "ambitious and wide-ranging set of reforms" to "reset our systems of corporate accountability". It further criticises the government for having recognised the weaknesses in the regulatory regimes exposed by Carillion and other corporate failures, but suggests that responses to date have been cautious, largely technical, and characterised by seemingly endless consultation.

Carillion could happen again – and soon. However, it remains to be seen what, if any, reforms will come about as consequence of the report and the company's collapse. Indeed, the report itself has received far from universal support. What is plain is that effective corporate accountability will remain a central issue where there is pressure for both reform and development in the law.

Having started with wedding prayers, we finish with a funeral eulogy – and thank our recently departed predecessor, Mark Arnold QC, for his hard work, wisdom and expansion of our readership during his tenure as editor from November 2016 to March 2018. Mark has now gone on to better things (assuming his new role as joint Head of Chambers can be described as such), but we look forward to filling the big shoes he leaves behind.

On a final, positive, note we are delighted to announce, at the time of going to press, that Michael Crystal QC has been awarded with the Global Restructuring Review Lifetime Achievement award, which will be presented to him on 26 June.

Our thanks to everybody who has contributed to this edition of the Digest. It is only right to emphasise, however, that the views expressed by individual contributors are theirs and theirs alone.

It also goes without saying that if you have any feedback to give us in relation to the Digest – positive or negative – we would be delighted to hear from you.

Many thanks, and happy reading. If you find yourself reading someone else's copy and wish to be added to the circulation list, please send an email to kirstendent@southsquare.com and we will do our best to make sure that you get the next edition and all future editions thereafter.

William Willson and Marcus Haywood






Brexit: Where are we going?

MARK PHILLIPS QC[1]

Any parent of young children can tell you that one of the most frequently asked questions on any car journey that takes longer than 15 minutes is "are we there yet?"

Often it isn't an easy question to answer because there are several variables, the traffic, the number of breaks, and whether the journey straddles mealtimes. There is also the possibility that something goes wrong with the car. Something that is not a variable (usually at least) is the destination. When it comes to Brexit, we are on a journey. There are many variables. There are several possible routes. We even have the scenario, familiar to all parents, of the children squabbling in the back *"Boris keeps taking my best single market toy"*, *"Well Theresa keeps changing the game," "David, give Michel the map back, it's been agreed he's in charge of the route." "Michel what's the matter?," "Boris has taken my green marker pen." "Boris, let Michel have the yellow one and we can talk about it later." "Liam, what's the matter?," "Michel won't let me play with Donald."* Unlike the journey to a family holiday, the Brexit destination hasn't yet been agreed. At the moment the best we can do is agree that by a particular time we are going to stop off at a convenient service station on the motorway. So the answer to the question *"are we there yet?"* is no. The full answer is ***"we haven't yet worked out where we are going."***

At 11pm on Friday 29 March 2019, absent agreement between Parliament and the EU to the contrary, the UK will "exit" the EU[2]. At that moment the UK will cease to be a Member State. The [Draft Agreement on the withdrawal of the UK from the EU]() of 19 March 2018 (the "Draft Withdrawal Agreement")[3] provides "This Agreement shall enter into force on 30 March 2019."[4] It is now agreed that there will be a "transition or implementation period" that ends on 31 December 2020.[5]

In this article I focus on the law applicable in the UK and the 27 remaining EU countries relevant to the recognition and enforcement of insolvencies in the 28 current EU member states during the transition or implementation period and, to the extent that it is possible, after 31 December 2020. When considering the question of recognition in the 27 remaining EU countries, I consider it from the perspective of the applicability of the [Recast EU Regulation on Insolvency Proceedings (848/2015)]() ("the EU Insolvency Regulation"), the [Recast Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (1215/2012)]() ("the Brussels Regulation"), [Rome I on the law applicable to contractual obligations (593/2008)]() ("Rome I"), and in passing the UNCITRAL Model Law. I am not qualified to comment on the domestic laws of the 27 remaining member states, although it remains the case that in the majority of the remaining member states, the enforcement and recognition of UK insolvencies and schemes could become a matter of domestic law.[6]

The European Union (Withdrawal) Bill

The European Union (Withdrawal) Bill[7] provides that on or after exit day direct EU legislation, so far as operative immediately before exit day,[7] forms part of domestic law on and after exit day. Direct EU legislation includes any EU regulation as it has effect in EU law immediately before exit day subject to certain exceptions.[9] The effect of section 3(1) of the European Union (Withdrawal) Bill[10] will be that the EU Insolvency Regulation, the Brussels Regulation and Rome I "forms part of domestic law" after 11pm on 29 March 2019. The incorporation of these EU Regulations into English domestic law is not conditional upon the EU giving equivalent reciprocal effect to English insolvencies or proceedings. The position of contracts under Rome I is different because its application is not dependent on the country of the law of the contract being a Member State.

There are provisions intended to enable Ministers to alter the operation of EU law in the UK, but the circumstances are limited and it is hard to imagine how they could apply to these three EU Regulations, but in theory they could. Section 7 of the European Union (Withdrawal) Bill provides that a "Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate – (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law, arising from the withdrawal of the UK from the EU."[11] Sub-section 7(2) identifies seven types of deficiency. Sub-sections (c), (d) and (e) might become relevant in the present context. Those subsections identify as deficiencies *"where the Minister considers that retained EU law"*:

1) "makes provision for, or in connection with, reciprocal arrangements between ...the UK... and the EU... which... are no longer appropriate."[12]

2) "makes provision for, or in connection with, other arrangements which... involve the EU... or are otherwise dependent on the United Kingdom's membership of the EU... and which are no longer appropriate."[13]

3) "makes provision for, or in connection with, any reciprocal or other arrangements not falling within paragraph (c) or (d) which... are no longer appropriate, as a result of the United Kingdom ceasing to be a party to any of the EU Treaties."[14]

The provisions governing deficiencies in retained EU law range widely. Amongst other things, they apply to reciprocal arrangements.

However, the Minister, with Parliamentary approval, is only able to address deficiencies as a matter of English law.[15] Where the deficiency with reciprocal arrangements lies in the fact that other EU jurisdictions no longer

1 I gratefully acknowledge the assistance and advice given by my colleague [Riz Mokal](), who helped me avoid too many mistakes and provided me with his October 2017 paper to the ABI on Cross-Border Practice Post-Brexit.

2 Section 1 of the European Union (Withdrawal) Bill provides that *"The European Communities Act 1972 is repealed on exit day."* Section 14(1) provides that *"exit day"* means 29 March 2019 at 11.00pm. Section 14(4) of the European Union (Withdrawal) Bill provides that *"A Minister of the Crown may by regulations ... (a) amend the definition of "exit day" in subsection (1) to ensure that the day and time specified in the definition are the day and time that the Treaties are to cease to apply to the United Kingdom."* Schedule 7 paragraph 10 provides that any such regulation must be laid before Parliament.

3 Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made (coloured version; I explain the colour scheme in footnote 15, below) in the negotiation round with the UK of 16-19 March 2018.

4 Article 168 of the Draft Withdrawal Agreement.

5 Article 121 of the Draft Withdrawal Agreement.

6 In the cases of Greece, Poland, Romania, Slovenia and Serbia when it becomes a member, it will be governed by the UNCITRAL Model law which has been adopted in those 5 member states.

7 I refer to the version of the EU (Withdrawal) Bill in the form that it took when it went from the House of Commons to the House of Lords.

8 Section 3(1) of the European Union (Withdrawal) Bill.

9 Those exceptions are *"(i) [the EU regulation] is not an exempt EU instrument"* which are defined in section 14(1) and schedule 6; (ii) applies to EU decisions, *"(iii) the EU regulation is not reproduced in an enactment to which section 2(1) [of the European Communities Act 1972] applies."*

10 I refer to sections because I assume in this article that the bill is enacted in something like its present form. They are clauses of the bill.

11 Section 7(1) of the European Union (Withdrawal) Bill. Section 7(9) provides that the reference in (a) to a failure or other deficiency arising from the withdrawal of the UK from the EU *"includes a reference to any failure or other deficiency arising from withdrawal taken together with the operation of any provision, or the interaction between any provisions, made by or under this Act."*

12 Section 7(2)(c) of the European Union (Withdrawal) Bill.

13 Section 7(2)(d) of the European Union (Withdrawal) Bill.

14 Section 7(2)(e) of the European Union (Withdrawal) Bill.

FEATURE ARTICLE: BREXIT

> "After 31 December 2020, as a non-member state, the UK will give effect to the EU Insolvency Regulation as English domestic law"

recognise or give effect to aspects of English insolvencies, or to certain rights of English creditors, there is little a UK Minister can do. The Minister could perhaps withdraw the equivalent reciprocity afforded to EU insolvency regimes by virtue of the EU Insolvency Regulation, or less likely, make the reciprocal effect given to EU insolvency regimes dependent on reciprocity being given to English proceedings. The same could be done in relation to judgments by making recognition and enforcement in the UK dependent upon recognition of UK judgments through the Brussels Regulation. By its nature reciprocity requires give and take by both parties. The provisions of section 7 can only enable unilateral action, and the action that might be taken is so extreme that it must be unlikely.

In addition, there are provisions in section 9 of the European Union (Withdrawal) Bill that enable a Minister of the Crown, by regulations, to make *"such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement"*. Schedule 7 gives Parliament the power to scrutinise. In addition section 17(5) provides that *"a Minister of the Crown may by regulations make such transitional, transitory or saving provision as the Minister considers appropriate in connection with the coming into force of any provision of [the Act]."* In the context of the EU Insolvency Regulation it is difficult to conceive of transitional arrangements the UK government might want to introduce in relation to the UK's continued application of the EU Insolvency Regulation.

Given that the EU Insolvency Regulation, the Brussels Regulation and Rome I will continue during the transition or implementation period in the draft Withdrawal Agreement with the EU, there is no reason for the Government to alter the operation of those regulations before 31 December 2020. After 31 December 2020 the effect of the EU (Withdrawal) Act (as it then would be) would be that subject to the provisions of sections 7 and 9 to make alterations, the EU Insolvency Regulation the Brussels Regulation and Rome I would be in force in England as a matter of domestic law.

The Draft Withdrawal Agreement

On 19 March 2018 the EU and the UK published the Draft Withdrawal Agreement. Where the Draft Withdrawal Agreement provides for the application of EU law in the UK *"it shall produce in respect of and in the UK the same legal effects as those which it produces within the EU and its Member States."*[16] A fair reading of the Draft Withdrawal Agreement is that it contains transitional and implementation provisions that will apply until 31 December 2020. Whether or not it is an indication of what might happen after the end of the transition and implementation period is a *"known unknown"*. All that can be said at this stage is that we know that some agreement will be made in relation to the ongoing application of the EU Insolvency Regulation, the Brussels Regulation and Rome I, but we do not know where in the spectrum between no application and full application the EU and UK will agree to go forward.

In the context of insolvency the three regulations that matter are the EU Insolvency Regulation, the Brussels Regulation and Rome I. Article 63 of the Draft Withdrawal Agreement is concerned with jurisdiction, recognition and enforcement of judicial decisions, and related cooperation *"between central authorities"*. As regards the EU Insolvency Regulation, article 63(4) provides that a number of provisions *"shall apply"*, including under Regulation 63(4)(c):

"Regulation (EU) 2015/848[17]*… shall apply to insolvency proceedings provided that the main proceedings were opened before the end of the transition period."*

This provision is not yet agreed.[18] It applies only to insolvency proceedings where the main proceedings were opened before 31 December 2020.[19]

As regards the Brussels Regulation, article 63(1) identifies *"acts or provisions"* that *"shall apply in respect of legal proceedings instituted before the end of the transition period"* which is before 31 December 2020. The *"acts or provisions"* referred to include *"the provisions regarding jurisdiction"* of the Brussels Regulation,[20] the provisions relating to choice of jurisdiction,[21] and the recognition and enforcement of judgments.[22] In addition the arrangements between the EU and Denmark continue to apply to the UK by article 65(2).[23]

As regards Rome I, article 62(a) of the Draft Withdrawal Agreement provides that Rome I shall apply in respect of contracts concluded before the end of the transition period.

The EU Insolvency Regulation

After 31 December 2020 the UK will be a non-member state, no longer a Member State. However, unlike other non-member states, the UK will give effect to the EU Insolvency Regulation as English domestic law. There are provisions in the EU Insolvency Regulation that apply to both Member States and non-member states. There are other provisions that apply only to Member States (excluding Denmark which is not a Member State for the purposes of the EU Insolvency Regulation).

Questions of Interpretation

Before turning to the provisions of the EU Insolvency Regulation that will apply to the UK as a non-member state, the question arises how the English Courts should approach the interpretation

> A fair reading of the Draft Withdrawal Agreement is that it contains transitional and implementation provisions that will apply until 31 December 2020

15 Schedule 7 of the European Union (Withdrawal) Bill provides for the scrutiny by Parliament of regulations made by a Minster under section 7(1). The detail is not relevant for present purposes. In this article I focus on English law, although the EU (Withdrawal) Bill applies to the UK as a whole.

16 Article 4(1). The Draft Withdrawal Agreement is presented in three colours. A preamble provides: “The colouring of the text corresponds to the following meanings: text in green is agreed at negotiators' level, and will only be subject to technical legal revisions in the coming weeks. For text in yellow, negotiators agreed on the policy objective. Drafting changes or clarifications are still required. Test in white corresponds to text proposed by the Union on which discussions are ongoing. The text quoted here is in white. The Draft Withdrawal Agreement has to be treated with circumspection, not only because it is not yet a complete agreement, but some of the issues on which there is not yet agreement are politically charged and controversial. However, it is the best guide we have. In this article I try to analyse what the EU and the UK have said is going to be agreed rather than project what I might like them to agree.

17 The EU Insolvency Regulation.

18 It is in white.

19 It will not apply where secondary proceedings are opened before 31 December 2020 even if a main proceeding is opened subsequently. Whilst rare, this is possible.

20 Article 63(1)(a). EU Regulation No 1215/2012.

21 Article 63(2)(a), giving effect to article 25 of the Brussels Regulation.

22 Article 63(3)(a).

23 These transitional provisions are not yet agreed (they are in white) aside from the ongoing position in relation to Denmark (which is in green).

of the EU Insolvency Regulation. After exit day the EU Regulation becomes English domestic legislation, but it has not been drafted as English domestic legislation.

The principle of the supremacy of EU law will no longer apply to any enactment or rule of law passed after exit day.[24] Section 6(1) provides that a court or tribunal *"is not bound by any principles laid down or any decisions made, on or after exit day by the [CJEU], and cannot refer any matter to the [CJEU] after exit day."* Section 6(2) goes on to provide that a court or tribunal *"need not have regard to anything done on or after exit day by the CJEU... but may do so if it considers it appropriate to do so."*

Section 6(4) of the EU (Withdrawal) Bill provides that the Supreme Court and the High Court sitting as a court of appeal (apart from some circumstances not relevant here) are not bound by any retained EU case law (subject to the rules in section 6(5) referred to below). It is conceptually possible for the higher English courts to decide not to follow a CJEU decision on a particular point. However, the circumstances in which the higher English courts might do that are prescribed by section 6(5) of the EU (Withdrawal) Bill. If the Supreme Court or Court of Appeal want to depart from any retained EU case law the English court *"must apply the same test as it would apply in deciding whether to depart from its own case law."* Accepting the test laid down by section 6(5) of the EU (Withdrawal) Bill, the circumstances in which the higher English court might refuse to follow a decision of the CJEU made prior to exit day are limited.

By contrast under the draft Withdrawal Agreement provisions *"referring to [EU] law or concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the [CJEU] handed down before"* 31 December 2020.[25] Article 4(5) provides that in the interpretation and application of the draft Withdrawal Agreement *"the [UK's] judicial and administrative authorities shall have due regard to relevant case law of the [CJEU] handed down after the end of the transition period."* Nothing in Article 4 is yet agreed[26] and there are a number of tensions between those provisions of the Draft Withdrawal Agreement and the EU (Withdrawal) Bill. The EU Draft Withdrawal Agreement provides that in the period before 31 December 2020 UK courts *"shall"* apply EU concepts consistently with EU case law and after 31 December 2020 UK courts *"shall have due regard"* to relevant CJEU case law. The UK EU (Withdrawal) Bill provides that the UK courts are *"not bound"* to apply EU principles after exit day. There is also a temporal question that will need to be ironed out. The EU (Withdrawal) Bill applies from exit day. The draft EU Withdrawal Agreement applies through the transition period and beyond. That should be ironed out by changing the provisions in the EU (Withdrawal) Bill so that they apply from the end of the transition and implementation period, not from exit day. The tensions between the EU's wish that UK courts apply CJEU decisions and the UK's wish that UK courts should no longer be bound by CJEU decisions cannot be solved by drafting alone.

However, this highly charged debate is more symbolic than substantive. Whatever the form of the final agreement, in order to give effect, as a matter of English domestic law, to the EU Insolvency Regulation, the Brussels Regulation and Rome I, the English courts are highly likely to adopt the EU's purposive approach, and are highly likely to have regard to relevant decisions of the CJEU and the courts of other Member States. It makes no sense for the English Courts to continue to apply the EU Regulation, the Brussels Regulation or Rome I, without having regard to how those regulations have been interpreted and understood by the other states in which they apply and by the CJEU. In an insolvency proceeding in England and one or more other EU jurisdictions it would make no sense for the English court to give a different answer to that given the EU Member States to the same question[27]. Experience of the English courts when faced with such an issue, is that the Judges take a common sense approach. They would avoid a conflict between the

> It is unlikely we have got to the end of the journey on how EU law should be interpreted after exit day

English court and the courts of the EU Member States and the CJEU, particularly if the question arose in the same case, for example, a cross border insolvency that raised questions about the centre of main interests ("COMI") of entities in a group operating across England and other EU states[28]. It follows that, in the context of the EU Insolvency Regulation, the 33 recitals will retain their significance as will the Virgos-Schmit report[29]. Moreover, existing, and possibly future, judgments in other European countries and judgments of the CJEU will continue to be instructive. UK courts will no longer be able to refer questions to the CJEU. The courts of other member states dealing with the same insolvency will be able to refer questions to the CJEU. The result of any such references will not be binding on the English court, but will be binding on the other EU courts dealing with the same insolvency and would very likely be applied by the English court. It is unlikely we have got to the end of the journey on how EU law should be interpreted when the English courts come to interpret what has become, after exit day, a matter of English domestic law.

One final matter worthy of note in the context of questions of interpretation. Article 8 of the UNCITRAL model law on cross border insolvency, applied in England by the Cross-Border Insolvency Regulations 2006, provides that in the interpretation of *"this Law"*, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith. Article 3 provides that to the extent *"this Law"* conflicts with an obligation of the United Kingdom under the EU Insolvency Regulation, the requirements of the EU Insolvency Regulation prevail. Whilst *"this Law"* is a reference to the UNCITRAL model law, and where there is a conflict the EU Insolvency Regulation prevails, there are several concepts that apply both to the EU Insolvency Regulation and to the UNCITRAL model law. Of significance is the concept of COMI. The English courts are obliged by Article 8 to have regard to the decisions of the CJEU and other European courts in relation to common concepts. The Cross-Border Insolvency Regulations 2006 may apply to all insolvencies, whether in an EU country or not. It is possible that the English court will have regard to decisions made by EU courts after 31 December 2020 to the extent that they deal with concepts common to the UNCITRAL Model law.

Provisions applying to member states and non-member states

The structure of the EU Insolvency Regulation regime is well known. The courts in a Member State of the EU debtor's COMI have an exclusive right to open 'main' proceedings.[30] The main proceedings extend to all of the debtor's assets. Where the debtor has an establishment in another Member State, secondary proceedings may be opened in relation to local assets.[31] Secondary proceedings may protect the interests of local stakeholders, respond to the complexity of the debtor's estate or the differences between the legal systems of the COMI and establishment states. The proceedings and recognition and enforcement of those proceedings over the debtor's assets and creditor claims depend upon the debtor's COMI or establishment being in a Member State. There are some provisions that apply the laws of non-member states.

After 31 December 2020 the UK will be a non-member state and the transitional and implementation provisions will no longer apply. If the COMI of a debtor is in England, insolvency proceedings opened in England will not be recognised by EU Member States under the EU Insolvency Regulation. If the COMI of a debtor is in a Member State and the debtor has an establishment in England, the English courts will recognise insolvency proceedings opened in the country of the COMI and any secondary proceedings opened in a Member State in which there is an establishment, because the EU Insolvency Regulation has become a part of English domestic law under the EU (Withdrawal) Bill. However, EU Member States will not recognise a secondary insolvency proceeding opened in England on the ground of an establishment in England, because England is not a Member State. Whilst England will recognise orders made by the courts of the EU Member States in an insolvency that falls within the EU Insolvency Regulation, English court orders will not be recognised in EU Member States, other than under any applicable domestic legislation (including, in the case of Greece, Poland, Romania, Slovenia, and one day Serbia under UNCITRAL).

The basic rule is that the lex concursus in both main and secondary proceedings governs both procedural and substantive matters.[32] The main and secondary proceedings must be in a Member State, so this basic rule applies to the laws of Member States. UK courts will give effect to this

24 Section 5(2) EU (Withdrawal) Bill.

25 Article 4(3) of the draft Withdrawal Agreement. There is a further provision in article 4(4) that refers to "Union law or concepts or provisions" but aside from the words being in a different order it is difficult to discern what the difference is between the two provisions.

26 It is in white.

27 This is also consistent with the general principle that domestic statutes giving effect to instruments of an international character should be interpreted in light of that character.

28 After 31 December 2020 the English courts will be bound to apply the rules found in the EU Insolvency Regulation regarding the opening of main and secondary proceedings dependent upon the location of the COMI and an establishment. That is because of the effect of the EU (Withdrawal) Bill. Other Member States will not be bound by decisions of the English courts on those questions, although the English courts are bound to have regard to any decisions of the courts of other Member States because those courts would be considering questions that apply to the case by virtue of the UK having adopted the EU Insolvency Regulation.

29 The Report on the Convention on Insolvency Proceedings, prepared by Professor M. Virgos and M.E. Schmidt, EU Council document 6500/1/96.

30 Article 3(1) of the EU Insolvency Regulation.

31 Article 3(2) of the EU Insolvency Regulation.

32 Article 7(1) of the EU Insolvency Regulation. This includes the Member State's law of applicable law ('conflicts'). So if the Member State's law of applicable ('conflicts') law says that the lex situs governs rights in movable assets, and the assets are situate in England, then 7(1) requires (*"shall be that..."*) that English law governs.

FEATURE ARTICLE: BREXIT

> "There are exceptions to the basic rule that apply the laws of Member States other than the lex concursus"

basic rule in relation to insolvency proceedings opened in Member States. So, for example, UK courts will apply article 7(2) of the EU Insolvency Regulation, which provides that the law of the state opening the proceedings determines, amongst other things, *"the assets which form part of the insolvency estate", "the conditions under which set-offs may be invoked",* and *"the effects of the insolvency proceedings on current contracts".*

There are exceptions to the basic rule that apply the laws of Member States other than the lex concursus. However, after 31 December 2020 the UK will not be a Member State and so these exceptions will not apply in the UK. That means that in the EU27 the lex concursus will apply. There are several examples:

(a) UK courts will apply article 8 of the EU Insolvency Regulation which applies to rights in rem in respect of assets situated within the territory of a Member State. By contrast Member States will not be bound to recognise rights in rem of assets situated in the UK unless the lex concursus points to English or other UK law as the governing law[33].

(b) Article 10 provides that insolvency proceedings shall not affect sellers' ROT rights where *"at the time of the opening of proceedings the asset is [in a Member State]."* UK courts will recognise the ROT rights of the seller if the assets are in a Member State, but EU courts will only recognise the ROT rights of a seller whose assets are in the UK if the lex concursus points to English or other UK law.

(c) Article 11 concerns the effects of insolvency proceedings on a contract conferring the right to acquire or make use of immovable property. That is governed by the law of the Member State where the immovable property is situated. UK courts will apply this provision to immovable property in a Member State. EU courts will not apply this provision to immovable property in the UK. A contract conferring the right to acquire or make use of immovable property in England will almost certainly be governed by English law[34]. Applying the rule in *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) LR 25 QBD 399, the effect of EU insolvency proceedings on an English law contract is limited. There is considerable scope for uncertainty as to the effect of EU Insolvencies on such contracts.

(d) The EU Insolvency Regulation provides that the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market *"shall be governed solely by the law of the Member State applicable to that system or market"*[35] although English law would govern securities that are publicly registered in England[36]. Article 12 provision will not be applied by the EU27 to the UK's payment systems and markets after 31 December 2020. This could lead to different legal systems being applied to some aspects of the London markets by the UK courts and by the courts of the EU. It is difficult to see how this problem could be solved by the UK alone, because the problem is primarily the failure of the EU27 to apply English law to the London markets.

(e) Another area of concern is the effects of an insolvency on contracts of employment. Article 13 provides that *"the effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment."* After 31 December 2020 the UK will no longer be a Member State. If the COMI of a company is in an EU Member State, the effect of the insolvency on contracts of employment, for example whether the employment contract has terminated, will be governed by the law in the COMI[37]. The exception that would otherwise have resulted in the application of English law to the effect of the insolvency on the contract would be inapplicable. In the UK there would be a question whether the incorporation into UK law of the EU Insolvency Regulation meant that the English courts were bound to apply the law of the COMI to the effect of the insolvency on employment contracts of English employees. However, as a matter of contract law in England, contracts governed by English law, could not be discharged or terminated by the foreign insolvency the contracts.[38] The political problems that would arise if English employees were to be told that their employment contracts had been terminated by an insolvency proceeding in a Member State of the group of which the English company is a part, are obvious.[39] In the circumstances this might be an area in which Ministers would identify a deficiency in the application of the EU Insolvency Regulation in England under section 7(2)(c) of the EU (Withdrawal) Bill.

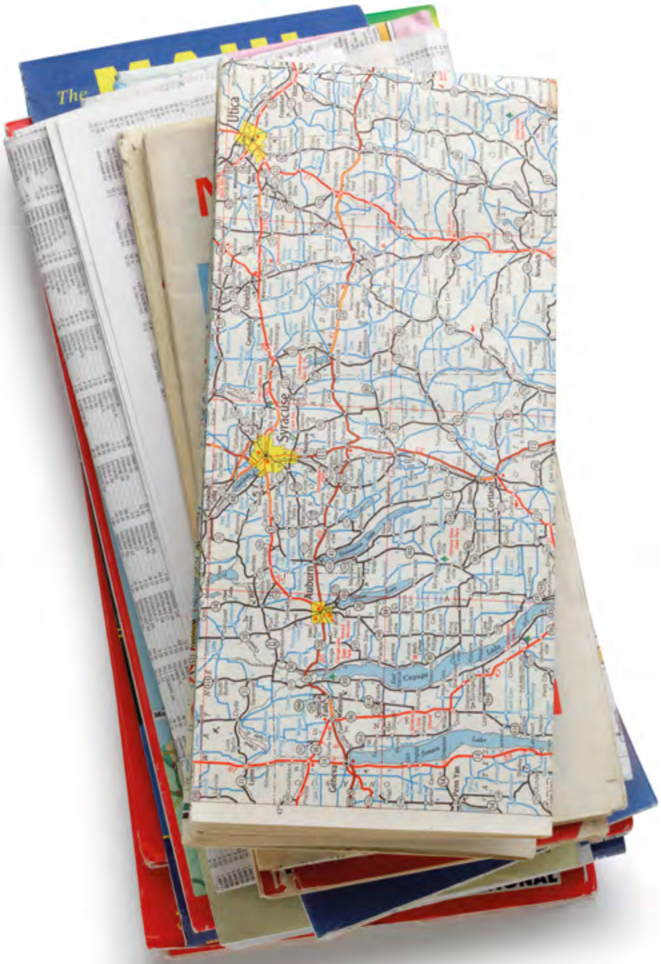
There are also provisions in the EU Insolvency Regulation that also appear to apply the law of a non-member state.

(a) Article 9 provides that set-off is available where *"a set-off is permitted by the law applicable to the to the insolvent debtor's claim."* If set off applies in England to an English law claim[40], that should be recognised by the EU Member States.

(b) Article 17 gives protection to third party purchasers[41] in relation to acts concluded after the opening of insolvency proceedings where a debtor disposes of an immovable asset, a ship, an aircraft or securities. The validity of the disposition is governed by the law of the State within the territory where the immovable asset is or where the register is kept. This is not restricted to Member States and so will continue to apply to assets in the UK or registered in the UK.

Denmark

The position of Denmark is unaffected by Brexit. That is because the EU Insolvency Regulation does not apply to Denmark.[42] Moreover, Denmark has not given effect to the UNCITRAL Model law. Whilst the English Courts could give effect to a Danish Insolvency under the Cross-Border Insolvency Regulations 2006 (SI 2006/1030) the Danish Courts



33 Purssuant to article 7.

34 Rome I, Art 4(1)(c).

35 Article 12 of the EU Insolvency Regulation.

36 Article 12(1), read with article 8(3) of the EU Insolvency Regulation.

37 The law of the contract would be recognised under Rome I article 8 and would almost certainly be English law.

38 Because of the rule in *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) LR 25 QBD 399, considered further below.

39 Such a structure is not fanciful. Take for example a large car manufacturing group headquartered in Germany with manufacturing companies in England employing thousands of English workers. It is possible that the COMI of the group would be in Germany and the exception for employment contracts would not apply.

40 Rome I would continue to apply to determining the law of the contract.

41 Rome I will continue to apply to determining the law of the purchase contract.

42 As a consequence of articles 61(c) and 67(1) of the EC Treaty.

FEATURE ARTICLE: BREXIT

could only give effect to an English insolvency under its domestic law. That is the position today.

UNCITRAL – Greece, Poland, Romania, Slovenia and prospectively Serbia

Greece, Poland, Romania, Slovenia and Serbia have implemented the UNCITRAL Model Law. After 31 December 2020, English insolvency proceedings may be recognised and enforced in those countries by an application made to their courts under the local laws giving effect to the UNCITRAL Model Law.

The Brussels Regulation & Rome I

The recognition and enforcement of schemes of arrangement has depended on both the Brussels Regulation and Rome I. Rome I enables the parties to a contract to choose the law applicable to their contract and provides that the chosen law governs *"the various ways of extinguishing obligations"*[43] Rome I applies to non-member states,[44] and will continue to apply to contracts with an English choice of law after 31 December 2020. The rule in *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) LR 25 QBD 399 is that an English law contract will not be discharged by a foreign insolvency. This has been upheld in several cases, most recently in *Bakhshiyeva v Sberbank of Russia* [2018] EWHC 59 (Ch). In the context of a scheme of arrangement, where English law has been chosen only an English scheme will be effective to extinguish or vary the debt.[45] Applying Rome I, where there is an English choice of law, and a scheme of arrangement varies or extinguishes that debt, that contractual effect will continue to be recognised across the EU.

Rome I is only effective in relation to English law contracts. A scheme of arrangement often also involves contracts subject to other systems of law and there may not be recognition of the effect of the scheme under the contract.[46] In relation to the recognition and enforcement of orders sanctioning a scheme of arrangement reliance is place upon the Brussels Regulation. The EU Insolvency Regulation and the Brussels Regulation are complimentary. Article 2(b) of the Brussels Regulation provides that it does not apply to *"bankruptcy, proceedings in relation to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings."*[47] The list of insolvency proceedings to which the EU Insolvency Regulation applies does not include schemes of arrangement.[48] The general provisions on jurisdiction in the Brussels Regulation apply to persons domiciled in a Member State.[49] After 31 December 2020 those rules will cease to apply to persons domiciled in the UK. However, they will continue to apply to persons domiciled in another EU member state. The *"special jurisdiction"* provisions that enable a person domiciled in a Member State to be sued in another Member State[50] will no longer apply to England. Recognition of a judgment or order of the English Court, pursuant to Article 36(1) of the Brussels Regulation, will no longer be automatic. After 31 December 2020 judgments by other Member States will be recognised in England, but judgments given or orders made in England, will not. Article 36(1) of the Brussels Regulation is the provision pursuant to which recognition is given to orders convening scheme meetings and sanctioning schemes of arrangement. After 31 December 2020, that provision will no longer apply. The enforceability of schemes of arrangement made in England will thereafter be governed by the domestic laws of the EU27.

The Brussels Regulation also completes the scheme for recognition and enforcement of judgements and orders made during the course of insolvency proceedings. Article 25(1) of the EU Insolvency Regulation provides that judgments handed down by the court concerned with the opening, course of and closure of the insolvency proceedings, and compositions approved by that court, shall also be recognised. They are enforced in accordance with the Brussels Regulation.[51] Articles 36 to 57 of the Brussels Regulation deal with the recognition and enforcement of judgments given in member states. The effect of the EU (Withdrawal) Bill is that after 31 December 2020 England will give effect to judgments and orders made in insolvency proceedings in the remaining 27 EU Member States (including, for this purpose, Denmark) but the enforceability and recognition of judgments and orders made by the English courts in English insolvency proceedings will be governed by the domestic laws of the member states in which it is sought to have the orders recognised or enforced.

> "The enforceability and recognition of judgments and orders made by the English courts will be governed by the domestic laws of the member states in which it is sought to have them recognised"

Are we there yet?

The answers to the questions touched on in this article are politically charged. There will be different views about the destination of the journey we are on. Having no agreements in place after 31 December 2020 is theoretically possible, but the effect would be asymmetric. The insolvency processes, contracts and proceedings of the EU27 would continue to be recognised and given effect in the UK but aside from those states

that have adopted the UNCITRAL Model Law (Greece, Poland, Romania, Slovenia and prospectively Serbia), only a few aspects of UK processes and proceedings would be given effect in the remaining EU Member States. As for English law contracts, they could only be restructured in England, but the order sanctioning a scheme of arrangement would only be recognised if that is what the domestic laws of the EU27 provide. At the other end of the spectrum, it might be argued that the systems we have in place, that took many years to discuss and agree, should be continued. It might be argued that these provisions do not relate to the single market but are the result of a need, recognised internationally, to make cross border insolvency efficient and effective. It may not be possible to predict where in the spectrum between those two extremes we may find is our destination. It seems likely that the answer to that question will remain a *"known unknown"* until quite late in the Brexit piece.

Meanwhile, the squabbling in the back of the car gets worse and the children start threatening to stop playing with each other.

Mum says to Dad: *"Nigel, I said that we should not set off without a proper route and a proper itinerary. We should have had a family discussion where we want to go before jumping into the car and setting off. We might run out of petrol and there isn't a service station for miles."*

Dad replies: *"Gina, if we run out of petrol we can have a picnic at the side of the road, put out a crisp checkered picnic blanket, fold out the deck chairs, get out the wicker basket, have proper pork pies and drink Robinson's Barley water. It will be just like one of those scenes from the cover of an Enid Blyton book." "But Nigel, we'll be on the side of a motorway! The children will get hit by a Continental lorry!"*

Perhaps Nigel thinks that wouldn't be such a bad thing. ■

43 Articles 3(1) and 12(1)(d) of Rome I.

44 Article 2 of Rome I.

45 Subject to the untested question whether an EU composition would discharge the debt because of the wider language used in article 32 EU Insolvency Regulation. Post Brexit this would mean that a discharge by a composition in an EU27 country of an English law contract would be recognised in England as a matter of English law. This highlights the asymmetry that might result from the continued application of the EU Insolvency Regulation in the UK but the UK no longer being a Member State.

46 See the discussion of this in R Mokal "Shopping and scheming, and the rule in Gibbs" (2017) South Square Digest (March 2017) 58–63.

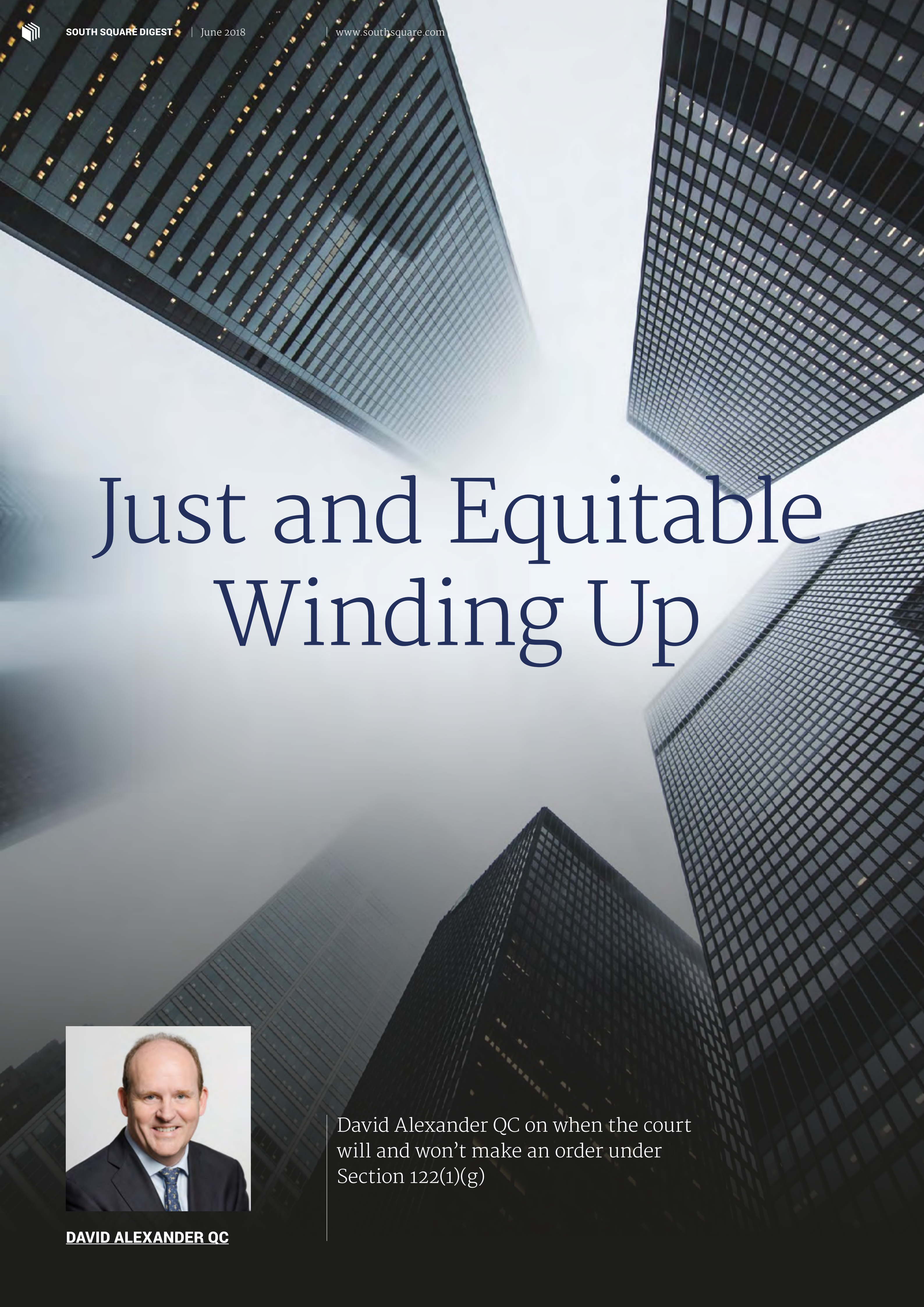
47 Schemes of arrangement do not fall within UNCITRAL it is not a *"foreign proceeding"*, which is defined as *"a collective judicial or administrative proceeding in a foreign state ... pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation."*

48 Annex B.

49 Articles 4, 5 and 6.

50 Articles 7, 8 and 9.

51 The EU Insolvency Regulation refers to the Brussels Convention. That was superseded by the Brussels I Regulation. Recital (19) to that that regulation states *"Continuity between the Brussels Convention and this Regulation should be ensured..."*. Brussels I Regulation was superseded by the Recast Brussels Regulation on 12 December 2012.



Just and Equitable Winding Up

David Alexander QC on when the court will and won't make an order under Section 122(1)(g)

DAVID ALEXANDER QC

Introduction

When a shareholder dispute emerges in a company, a disgruntled shareholder has a number of possible means of seeking redress in England and Wales. Depending on the facts and the nature of the dispute, he or she may have a personal remedy (e.g. an injunction). He or she may have a right to enforce articles or a shareholders' agreement. He or she may have the ability to bring a derivative claim on behalf of the company. He or she may have the ability to bring a statutory based claim, namely an unfair prejudice claim under Section 994 to 996 of the Companies Act 2006 ("the 2006 Act") or to present a winding up petition against the company under Section 122(1)(g) of the Insolvency Act 1986 ("the 1986 Act") which provides that a company may be wound up by the court if ***"the court is of the opinion that it is just and equitable that the company should be wound up".***

The last of these possibilities, namely presenting a winding up petition on the just and equitable ground under Section 122(1)(g) of the 1986 Act, has diminished in importance over time in England and Wales since the introduction of an alternative remedy for shareholders, firstly by Section 210 of the Companies Act 1948 (a member could complain that the affairs of the company were being conducted in an "oppressive" manner), then by Section 75 of the Companies Act 1980 (which for the first time introduced a statutory remedy for unfairly prejudicial conduct) and then by Section 459 of the Companies Act 1985 and Section 994 of the 2006 Act (both of which maintained the unfair prejudice remedy). However the just and equitable winding up remedy still remains a significant one where, for example, winding up is the petitioner's preferred choice of relief or where the petitioner considers that it may be the only relief that he or she may be entitled to. It is also significant and important in jurisdictions which do not have alternative unfair prejudice provisions, for example, in the Cayman Islands.

Who May Petition?

Winding up petitions on the just and equitable ground can be presented both by contributories ("every person liable to contribute to the assets of a company in the event of its being wound up: section 79 of the 1986 Act) and creditors. They can also be presented by the company itself and by its directors. However the most common use of the just and equitable winding up petition is where it is presented by a contributory.

Where a winding up petition on the just and equitable ground is sought to be presented in England and Wales by a contributory, under Section 124(2) of the 1986 Act that can only be done in certain circumstances, namely if:

1. The contributory is the sole shareholder of the company;
2. The shares which the contributory holds were originally allotted to him or her;
3. The shares which the contributory holds have been held by him or her and registered in his or her name for at least 6 months out of the 18 months before the presentation of the petition; or
4. The shares have devolved on him or her through the death of a former holder.

Where there is a dispute as to whether or not a petitioner falls within one or other of these categories, the position used to be that the court would require that dispute to be resolved before allowing a winding up petition to proceed. But since Alipour v Ary [1997] 1 BCLC 557 that has changed. Instead, since then, the court has two choices. It can either allow the question of standing to be decided on the hearing of the petition. Or it can insist that the question of standing be decided in other proceedings commenced for that specific purpose. In making that decision the court has to consider all the circumstances, including the likelihood of damage to the company if the petition is not dismissed.

In addition to the above, a shareholder is not permitted to petition to wind up a company unless he or she has a tangible interest as a shareholder in the winding up of the company: *Re Rica Gold Washing Co Ltd* (1879) 11 Ch D 36 at 42-43 This is usually demonstrated by showing that there will be more than a negligible surplus for shareholders after payment of all of the company's creditors (which facts should be expressly alleged in the petition and proved at the hearing: *Re Martin Coutler Enterprises Ltd* [1988] BCLC 12). However it may also be capable of being demonstrated by showing that the shareholder will achieve some advantage, or avoid or minimise some disadvantage, which would accrue to him by virtue of his membership of the company: *Re Chesterfield Catering Co Ltd* [1997] Ch 373; *Hamilton v Brown* [2017] 1 BCLC 269.

Grounds for Winding Up on the Just and Equitable Basis?

There are no rigid categories or headings under which cases must be brought in order to seek a just and equitable winding up. For as Lord Wilberforce said in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, HL at 374h:

"… there has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of the particular instances."

Instead when a petition is presented on the just and equitable ground, the court should have regard to the full factual matrix of each case: *Re Sino Strategic International Ltd* [2015] FCA 709 (Aust Fed Ct).

Notwithstanding this, and despite the fact that it is therefore obviously impossible to set out all the situations where a court may make a winding up order on the just and equitable ground, it is undoubtedly helpful to at least consider the types of cases where courts have and have not made winding up orders in the past.

> "Where the whole thing is gone, the majority cannot bind the minority to enter into an entirely new speculation"

Where winding up orders have been made on the Just and Equitable basis

Winding up orders have been made in, among other instances, the following circumstances:

1. Where there had been a loss or failure of substratum or objects (e.g. a company was formed for a particular purpose which had been abandoned, come to an end or had otherwise become impossible to pursue): *Re Suburban Hotel Co* (1867) 2 Ch. App. 737 at 750-751; *Re German Date Coffee Co* (1882) 20 Ch D 169; *Re Haven Gold Mining Co* (1882) 20 Ch D 151; *Re Perfectair Holdings Ltd* [1990] BCLC 423; *Re Amalgamated Syndicate Ltd* [1897] Ch 2; *Kingjade Holdings Pty Ltd v Pineridge Nominees Pty* Ltd (1997) 15 ACLC 910. Thus:

a. As it was put by Sir George Jessel in *Re Haven Gold Mining Co*, supra, at 164:

"where the whole thing is gone, the majority cannot bind the minority to enter into an entirely new speculation."

b. As it was put by Jenkins J in *Re Eastern Telegraph Co Ltd* [1947] 2 All ER 104 at 109:

"…if a shareholder has invested his money in the shares of the company on the footing that it is going to carry out some particular object, he cannot be forced against his will by the votes of his fellow shareholders to continue to adventure his money on some quite different project or speculation."

2. Where the company's principal objects had been achieved: *Re Abbey Leisure Ltd, Viridi v Abbey Leisure Ltd* [1990] BCLC 342. In such circumstances, again, the majority are not entitled against the wishes of the minority to seek to achieve different or new objects and a petitioner is entitled to have his or her investment returned.

3. Where the company was a mere "bubble" company (e.g. one which was only formed for the purpose, not of work, but of getting money from shareholders and which was from the beginning a "sham, a bubble, a trap": per Lord Esher in *Re Neath Harbour Smelting & Rolling Works* (1886) 2 TLR 366 at 339 or one which was fraudulent from its inception): *Anglo-Greek Steam Co* (1866) LR 2 Eq 1; *Re West Surrey Tanning Co* (1866) LR 2 Eq 737; *Re London and County Coal Co* (1867) LR 3 Eq 355.

4. Where a company was formed to carry on an illegal business: *Re International Securities Corpn* (1908) 99 LT 581.

5. Where the company's only business was ultra vires the company: *Re Crown Bank* (1890) 44 Ch D 634.

6. Where there was "deadlock" (e.g. where there has been a total breakdown of relations between two equal partners): *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426, CA.

7. Where it had become impossible for a company to carry on business owing to failure of its internal constitution to work: *Kingjade Holdings Pty Ltd v Pineridge Nominees Pty Ltd* (1997) 15 ACLC 910.

8. Where there had been justifiable loss of confidence in management, for example, on account of fraud, serious misconduct and/or serious mismanagement of the affairs of the company by the directors and/or majority shareholders: *Loch v John Blackwood Ltd* [1924] AC 783; *Re TE Brinsmead & Sons* [1897] 1 Ch 406.

9. Where there had been a breach of the agreement contained in the articles and/or any shareholders' agreement and/or any relevant statutory provisions: *Re A & BC Chewing Gum Ltd* [1975] 1 WLR 579.

10. Where there had been a serious breach or breakdown in the underlying basis upon which the company was set up, such basis involving a relationship of mutual trust and confidence (often described as a "quasi-partnership") justifying the imposition of equitable considerations. As Lord Wilberforce explained in *Ebrahimi v Westbourne Galleries Ltd*, supra, at 379e-379g, typically the imposition of equitable considerations requires one of more of the following elements:

a. An association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will

often be found where a pre-existing partnership has been converted into a limited company;

b. An agreement, or understanding, that all, or some (for there may be ‘sleeping’ members), of the shareholders shall participate in the conduct of the business; and

c. Restriction upon the transfer of the members’ interests in the company – so that if confidence is lost, or one member removed from management, he cannot take out his stake and go elsewhere.

11. Where there had been exclusion from management (in a quasi-partnership): *Thomson v Drysdale*, 1925, SC, 311; *Re A & BC Chewing Gum Ltd*, supra.

12. Where there had been a failure to pay reasonable dividends in circumstances where (a) the company could afford to pay reasonable dividends and (b) the directors were paying themselves excessive remuneration: *Re a Company (No 00370 of 1987) Ex p. Glossop* [1988] 1 WLR 1068.

13. Where a company had been placed into voluntary liquidation but a minority satisfied the court that there are grounds for an investigation into the company’s affairs: *Re Internet Investment Corp Ltd* [2010] 1 BCLC 458.

What is Not Enough for Winding-up on the Just and Equitable Basis?

Just as it is possible to give illustrations of what will amount to grounds for a just and equitable winding up order, so it is possible to collect together illustrations as to what will not be enough to justify the grant of a winding up order on that basis. Among other things, the following would not appear to be sufficient:

1. A winding up order will not be granted just because the company is a small company: *Ebrahimi v Wesbourne Galleries Ltd*, supra, at 381f.
2. A winding up order will not be granted just because the company is a private company: *Ebrahimi v Westbourne Galleries Ltd*, supra, at 381f.
3. A winding up order will not be granted unless the petitioner comes to the court with "clean hands": *Ebrahimi v Westbourne Galleries Ltd*, supra, at 387.
4. Mere lack of confidence on the part of the petitioner in those who conduct the company's management is not enough to justify the making of a winding up order.
5. A winding up order will not be granted just because some shareholders take a pessimistic view of a company's prospects but where the majority do not share that view: *Re Agriculturist Cattle Insurance Co ex p. Spackman* (1849) 1 Mac & G 170.
6. A winding up order will not be granted if the breakdown in confidence between members is because of the conduct of the petitioner: *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at 387.
7. A petitioner is not entitled to have a company wound up merely because the petitioner wishes to turn shares into money.
8. The breakdown of a relationship of trust and confidence between shareholders probably cannot of itself justify winding up on the just and equitable ground: Hollington, *Shareholders' Rights*, 9th Ed, at 10-01.
9. A winding up order will not be granted where the directors (without conferring on themselves any benefit apart from reasonable remuneration) decline to pay reasonable dividends for good commercial reasons.
10. A winding up order will not be granted where a petitioner seeks to protect interests other than his or her interests as a member: *Re JE Cade & Son Ltd* [1991] BCC 360.
11. A winding up order will not be granted where a petitioner uses the proceedings to put pressure on a company, or for an improper purpose: *Charles Forte Investments Ltd v Amanda* [1964] Ch 240.
12. A winding up order will not be granted if the petition was not presented "bona fide" but in order to achieve some collateral purpose and not genuinely to bring about the winding up of the company: *Re JE Cade & Son Ltd*, supra.
13. A winding up order will not be granted if the petition is designed to vindicate personal or business reputation (save where it is incidental to a decision as to whether relief sought is justified or not): Re FI Call Ltd [2015] EWHC 3269 (Ch) at [64].
14. A winding up order will not be granted merely because a company is not prosperous: *Re Langham Skating Rink Co* (1877) 5 Ch D 669.

> Even in circumstances where a petitioner appears to have a plainly good and obvious reason why a winding up order should be made, the court can refuse to make that order

15. A winding up order will not be granted merely because a company's chances of success are small: *Re Kronand Metal Co* [1899] WN 15.
16. A winding up order will not be granted if there is an alternative remedy and the petitioner is acting unreasonably in failing to pursue that remedy: For Section 125(2) of the 1986 Act provides as follows:

    2. *"If the petition is presented by members of the company on the ground that it is just and equitable that the company should be wound up, the court, if it is of the opinion –*

    a. *That the petitioners are entitled to the relief either by winding up of the company or by some other means, and*

    b. *That in the absence of any other remedy it would be just and equitable that the company should be wound up, shall make a winding up order; but this does not apply if the court is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy".*

The last of these reasons is particularly important. For the granting of a winding up order is a drastic and draconian remedy. It is also a fairly blunt instrument. It simply brings about the end or death of the company. As a consequence there is a natural reluctance to make winding up orders if there is a realistic alternative such as, for example, a buy-out of one party's shares by another. The same is true if satisfactory relief could be obtained by bringing a petition under Section 994 of the 2006 Act, by bringing alternative court proceedings or by some other means. The statutory provision plainly assists a court to avoid making a winding up order if it wishes to do so. In this regard, so far as a court is concerned, winding up on the just and equitable ground is a remedy of last resort.

Other Matters

Three further matters merit a mention in relation to just and equitable winding up petitions:

1. A winding up order should not be sought in England and Wales in conjunction with an application for relief under Section 994 of the 2006 Act unless winding up is the petitioner's preferred remedy or the petitioner takes the view that winding up may be the only relief which he or she may obtain.
2. The question whether it is just and equitable to wind up a company is to be determined as at the date of the hearing of the petition. As a result a winding up order may be refused if circumstances have changed since the date on which the petition was presented: *Re Fildes Bros Ltd* [1970] 1 WLR 592.
3. Where the dispute in a just and equitable winding up petition is one which is really between rival shareholders, it is a misfeasance for those in control of the company to spend the company's money in the proceedings, save in relation to things with which the company is directly concerned (e.g. giving disclosure of documents in the company's possession or in relation to any necessary application under Section 127 of the Insolvency act 1986).

Discretion

Finally, it should always be appreciated that the court has a broad discretion as to whether or not a winding up order should be made or not. Thus even in circumstances where a petitioner appears to have a plainly good and obvious reason why a winding up order should be made, the court can nevertheless refuse to make that order. ■

Jersey Update

Nicola Roberts (Counsel) and Leon Hurd (Senior Associate) of Ogier provide a brief update on some key developments in Jersey

NICOLA ROBERTS

LEON HURD

1. Jersey restructuring and insolvency

As a jurisdiction, Jersey is at the heart of cross-border insolvency and restructuring.

Inevitably, situations arise where insolvent companies' assets or possibly important evidence are located overseas or an overseas liquidation regime would be best for creditors. Conversely there will be situations where a foreign insolvency process will require steps to be taken in Jersey.

The Bankruptcy (Désastre) (Jersey) Law 1990 ("the Law") contains an assistance provision which gives the Royal Court of Jersey discretion to provide assistance to the courts of prescribed jurisdictions (currently British Isles jurisdictions, Western Australia and Finland). Also, as a matter of comity the Jersey Court has consistently shown itself to be willing where appropriate to assist overseas liquidators or other appointed officers by recognising those office holders in Jersey. Examples of recognised office holders have included liquidators, administrators and receivers from a variety of jurisdictions.

During recent years applications have also successfully been made to the Jersey Court for the grant of letters of request to the English Court to place a Jersey company into administration where creditors' interests would be best served thereby "passporting" the insolvency of the Jersey company to England. Whether this trend will continue however is unclear in light of the Jersey Court's decision last year, whereby for the first time in nearly 40 years it granted a request from the Viscount (the Chief Executive Officer of the Royal Court (and its enforcement arm)) to issue letters of request to the English High Court to seek her recognition in England to administer the désastre of a Jersey company (and a local resident) involved in a major cross-border insolvency case:

Representation of the Viscount [2017] JRC 025

The high profile insolvency of Jersey company Orb a.r.l ("Orb") and its sole shareholder Dr Gail Cochrane ("Dr Cochrane"), a local GP, has firmly placed Jersey's insolvency regime in the spotlight. The matter commenced in late 2016 and has continued to build throughout the course of 2017 and 2018, with related proceedings in the BVI and before the High Court in England and interested parties ranging from the Serious Fraud Office to law firms.

By way of brief background, the proceedings relate to the theft of around £35 million from a company called Izodia by Dr Cochrane's former husband Dr Gerald Smith in late 2002 – most of the proceeds of the theft were misapplied to the benefit of Orb. Once the theft had been discovered, Orb sold a substantial proportion of its assets to a third party, who transferred them into a complex structure – it is asserted that there was an oral agreement between Orb and the third party, not reflected in the sale agreement, that Orb would continue to benefit from the assets that it had sold and the proceeds of their development.

Following an investigation by the Serious Fraud Office in the UK, Dr Smith pleaded guilty to a number of charges and was sentenced to an eight year prison term, and was the subject of a £41 million confiscation order.

The proceedings before the Royal Court of Jersey arose from litigation funder Harbour Fund II LP's ("Harbour") efforts to recover money and assets from Dr Cochrane and Orb.

The matter has gone before the Jersey Court three times and the court's judgments have shown a clear desire to promote the capability of Jersey's insolvency regime and its ability to deal with complex cross-border matters. The judgments issued in this saga have been as follows:

i. In *Representation of Harbour Fund II LP* [2016] JRC 171, the Royal Court declined an application by Orb's litigation funder, Harbour, to place Orb into English law administration. On examination of the facts it did not consider there was any advantage of using English administration in favour of Désastre (i.e bankruptcy in Jersey), particularly in circumstances where there was no expressed desire to maintain Orb as a going concern ("the First Proceedings").

ii. In *Harbour Fund II LP v Orb a.r.l and others* [2017] JRC 007, Harbour duly returned to the Royal Court to seek declarations en désastre of Orb and Dr Cochrane. Notwithstanding the potential scope and complexity of the two bankruptcies and the burden that would be imposed upon the Viscount and her department in respect of dealing with assets and actions around the world, the Royal Court declared both Orb and Dr Cochrane en désastre. The Court stated it was important that Jersey, as a well-respected financial centre, discharged its responsibility for dealing with the affairs of a Jersey company and its own resident ("the Second Proceedings"). The combined creditor claims filed to date equate to in excess of £1.2 billion.

iii. In *Representation of the Viscount* [2017] JRC 025, the Viscount sought and was granted two Letters of Request to be issued by the Royal Court to the High Court of England and Wales requesting the assistance of the High Court in accordance with Section 426

> The high profile insolvency of Jersey company Orb a.r.l. has firmly placed Jersey's insolvency regime in the spotlight

UPDATE: JERSEY

> "It is clear that the Royal Court of Jersey will not lightly permit Jersey's insolvency regime to be circum-vented in favour of other jurisdictions"

of the Insolvency Act 1986 in respect of each of the désastres of Orb and Dr Cochrane. The Letters of Request broadly sought the recognition of the Viscount in England with authority to exercise various powers to include: ascertaining information about the assets of Orb and Dr Cochrane, to gather in relevant documents and to exercise various powers of investigation ("the Third Proceedings"). The Letters of Request were issued and the Viscount is now exercising her various powers in relation to her function within England.

In the First Proceedings, the Royal Court found that there was no advantage to using English administration in favour of désastre and did not accept that Orb had substantial connections with England. The court considered that the majority of assets, listed by an accountant, were situated outside England and Wales. Accordingly, the Royal Court held that initiating the English administration process over a Jersey company that had no substantial connection to England was unjustified.

The Second Proceedings were concerned with a claim that was filed in the English courts by Dr Cochrane and Orb against Harbour for a sum of £73 million. Dr Cochrane and Orb instructed Jersey Advocates to assist with resisting Harbour's application for a declaration en désastre, on the basis that they had a significant claim against Harbour in England. The Royal Court refused to allow Dr Cochrane and Orb to frustrate the Jersey désastre process by engaging in English proceedings that it considered to be a 'last gasp' attempt to avoid bankruptcy.

In the Third Proceedings, the Royal Court granted an application by the Viscount for the issue by the Royal Court of two letters of request, pursuant to which the Viscount sought recognition in England and authorisation to exercise her powers and functions as administrator of the désastres of Dr Cochrane and Orb. The Court was prepared to grant a wide request for assistance including asking the English Court to authorise the Viscount to exercise such of her powers and functions as may be necessary (including the power to intervene in and prosecute or defend or apply for a stay in various sets of proceedings currently before the English Courts and to ascertain information and gather in relevant documents relating to the assets of Dr Cochrane and/or Orb).

The saga is ongoing and there will undoubtedly be further judgments and authority arising from this interesting and complex insolvency. What is certainly clear from the tenor of the judgments issued to date is that the Royal Court of Jersey will not lightly permit Jersey's insolvency regime to be circumvented in favour of other jurisdictions. It is a clear indication to the international insolvency community that Jersey is confident in its ability to have conduct of complex cross-border insolvency matters of this nature.

2. Other Interesting Developments

A) Draft Forfeiture of Assets (Civil Proceedings) Jersey Law 201

Following MONEYVAL's inspection of Jersey's AML regime in 2015 and its subsequent report issued in May 2016 there has been a focus in Jersey to implement law and policy that will lead to more prosecutions related to financial crime. One of the key recommendations in the MONEYVAL report was the introduction of a non-conviction based confiscation regime in Jersey to apply in parallel with the conviction based system. The Draft Forfeiture of Assets (Civil Proceedings) Jersey Law 201- ("the Draft Law"), which has been debated and approved by the States (Jersey's legislature), seeks to achieve the objectives set by MONEYVAL.

The Draft Law broadly provides for three procedural tracks by which civil forfeiture might be sought:

i. preserving the existing procedure for the seizure of tainted cash under the Proceeds of Crime (Cash Seizure) (Jersey) Law 2008;

ii. creating a procedure for the forfeiture of property in bank accounts which have been subject to a 'No Consent' by the relevant police authority for 12 months.

iii. creating a procedure for the forfeiture of property in bank accounts which is suspected to be proceeds of unlawful conduct or intended to be used for such conduct.

The Draft Law also introduces the concept of a "civil forfeiture investigation". A civil forfeiture investigation extends to both proceedings under the Draft Law and also non-conviction based proceedings being brought (i) under legislation in force in any country or territory other than Jersey, (ii) relating to the forfeiture of property in Jersey, (iii) by a court of that country or territory. The investigation must be in relation to one or all of the following matters:

i. the question of whether any property is tainted property;

ii. the identity, or suspected unlawful conduct, of any person who holds property which is suspected of being tainted property, or to whom such property belongs; and

iii. the extent or whereabouts of such property.

Where a civil forfeiture investigation is initiated, the Draft Law provides the Attorney General, or an authorised officer acting with the Attorney

Royal Court States Building,
Saint Helier Jersey

> "In summer of 2017, Jersey's Royal Court Rules were amended and 11 new Practice Directions were implemented to improve access to justice and streamline the civil justice process"

General's consent, with the ability to apply for various investigative orders including:

i. Production orders;

ii. Disclosure orders;

iii. Account monitoring orders against banks; and

iv. Customer information orders against banks.

The scope for orders against banks will, it is anticipated, prove an effective tool in obtaining evidence and identifying and recovering tainted assets. It is anticipated that the Draft Law will become a widely used piece of legislation and banks in Jersey should certainly take note of the direct impact that the Draft Law may have on their businesses and further take steps to ensure that they can readily comply with any of the civil forfeiture investigation orders that may be made against them.

B) Reform – Important changes to Jersey Civil Procedure

Last summer Jersey's Royal Court Rules ("the Rules") were amended and 11 new Practice Directions (PD) came into force to improve access to justice, to streamline the civil justice process and, where possible, reduce the risks and costs associated with litigation by encouraging the early resolution of cases to avoid the need to resort to court proceedings. The changes that were introduced by Amendments No.20 are addressed below.

Overriding Objective

There is an now an overriding objective for the Royal Court to deal with cases "justly and at a proportionate cost", and a requirement that the parties must assist the Court to further this overriding objective.

UPDATE: JERSEY

> “One of the largest areas of contention in litigation is costs”

Pre-Action Communication

The purpose of this new PD is to encourage parties to exchange material information about a legal action being considered by a potential plaintiff and to allow parties an opportunity to settle the claim prior to the commencement of proceedings. Non-compliance may result in an adverse costs order.

Placing Cases on the Pending List and Adjournment by Consent Prior to Pleadings

This relates to adjournments and provides for parties to agree to a matter that has already been tabled, to be adjourned for a period up to four weeks without leave of the Court. If a longer period is needed the parties are required to file an agreed written statement justifying the time period required.

Applications for Summary Judgment

This new PD broadens the summary judgment power in Jersey. The amendments include the introduction of a “no real prospect” of success test and provisions enabling a defendant to seek summary judgment against a plaintiff.

Requests for Information

The Court’s power has now been extended to require any party to provide clarification of any matter in dispute in the proceedings, or give additional information in relation to any such matter, whether or not the matter is contained or referred to in a pleading. Such a request must be concise and only relate to matters that are reasonably necessary and proportionate. It must also be served on the other party prior to making any application to the Court.

Directions Hearing

In the past a directions hearing would only be fixed after pleadings had closed. The new amended PD now provides the court with the power to notify automatically the parties of the date when such a hearing is to take place after the matter has been placed on the pending list – usually within 3 months. The PD also provides guidance as to what the parties should consider in an application for directions. It imposes a duty on the parties to (i) consider what directions are required, (ii) endeavour to agree appropriate directions for case management, and (iii) submit agreed directions to the Court for approval. If directions are not agreed the parties are required to set out the directions they require and give a summary of the reasons why such a direction is required with supporting material.

Budgets

One of the largest areas of contention in litigation is costs, be it hourly rates, the threat of significant adverse cost orders or lack of appreciation of how much litigation might cost. The new direction applies to any case where the value of the claim, including any counterclaim, is less than £500,000, or where it is disputed by one of the parties on bona fide grounds that the value of the claim is less than £500K. A costs budget must be filed by all parties within seven days prior to the hearing of the first summons for directions.

Discovery – Hard Copy and Electronic

Previously, the discovery obligation was absolute and extended to all ‘relevant’ documents. The new PD now provides the Royal Court with power to limit the disclosure obligations of a party to what is reasonable and proportionate.

A further Practice Direction has been introduced which deals with documents held in electronic form (previously documents in electronic and

“The changes to the Rules and introduction of new Practice Directions mark a sea change in civil procedure in Jersey”

hard copy form were not distinguished). This new Practice Direction codifies the general principles and process for providing discovery of electronic documents in a proportionate and cost effective manner. It emphasises the need for the parties to discuss cooperatively the approach to electronic discovery and agree the process to be followed using appropriate technology (as far as possible in advance of the first directions hearing). The Practice Direction also imposes obligations on parties to ensure electronic documents are preserved from the time when litigation is contemplated.

Expert Evidence

This new PD provides guidance on the approach to applications to adduce expert evidence under Rule 6/20. In particular, it limits the number of expert witnesses that may be called and it requires, where possible, that the parties endeavour to instruct the same expert where the claim involves more than one plaintiff or defendant. Thus the parties are encouraged to explore instructing a single joint expert in light of the overriding objective to deal with cases fairly and expeditiously.

Offers to Settle

New rules have been introduced to encourage parties to put forward a proposal to settle a matter. If such an offer is declined, it may be taken into account when the Court addresses the question of costs.

Summary assessment of costs

This PD has been amended. A new process has been introduced pursuant to which the costs of interlocutory hearings (other than in respect of a summons for directions) of less than a day can be summarily assessed.

Comment

The changes to the Rules and the introduction of the new PDs mark a sea change in civil procedure in Jersey and bring the Jersey process more into line with the principles of and approach to case management as set out in the Civil Procedure Rules in England and Wales.

C) English High Court rules that the limitation period for breach of directors duties under Jersey Law is 10 years

The Jersey limitation period for claims against directors for breach of duty under Article 74 of the Companies (Jersey) Law 1991 (“the Law”) has not been definitively decided by the Royal Court in Jersey. In the past it has only ever been considered obiter and on a relatively tentative basis in 2 Jersey cases, In the matter of *Northwind Yachts* 2005 JLR 137 and *Alhamrani v Alhamrani* 2007 JLR 44. However, last year the English High Court in *O’Keefe & Anor v Caner & Ors*[1] [2017] EWHC 1105 (Ch) (which addressed the law of prescription in Jersey applicable to claims for breach of directors’ duties) found that the prescription period for claims against directors of Jersey companies for breach of their duties under Article 74 of the Law is 10 years.

The 10 year period was held to apply to both claims for: breach of a director’s fiduciary duty to act honestly and in good faith with a view to the company’s best interests (Art. 74(1)(a)); and claims for breach of the director’s duty of care, skill and diligence (Art. 74(1)(b)).

Whilst this decision of the English High Court is not binding on the Jersey courts, it is likely to carry considerable weight and will no doubt be given close attention to by the Jersey Bar. ■

1 Antony Zacaroli QC (as he then was), William Willson and Ryan Perkins acted for the successful claimants

The Honourable Paul Heath QC

South Square is delighted to announce that The Honourable Paul Heath QC, a recently retired Judge of the High Court of New Zealand, joined chambers as an Associate Member from 9 April 2018.

Paul has a special interest in cross border insolvency. He was a member of the New Zealand Law Commission (an independent statutory law reform agency) from 1999 until 2002. During that time, he was responsible for preparation of a report recommending that the New Zealand Government adopt the UNCITRAL Model Law on Cross Border Insolvency. The Government acted on that recommendation when the Insolvency (Cross-border) Act 2006 was enacted to come into force at the same time as comparable legislation in Australia. As part of his duties on the Law Commission, Paul was also responsible for the preparation of advisory reports to the Ministers of Commerce and Economic Development respectively on various aspects of insolvency law, including priority debts and voluntary administration.

Paul's time on the Law Commission followed an extensive practice in commercial litigation from 1978 until his appointment to the High Court in late March 2002. Paul's first connection with South Square was in 1990, when he and Gabriel Moss QC appeared against each other in the Privy Council. Their association has continued over the years. Paul and Gabriel have spoken on panels together at international conferences; most notably at the INSOL Quadrennial Congresses in London and Sydney, in 2001 and 2017.

During a period of sabbatical leave in 2010, Paul was a Visiting Scholar at UNCITRAL in Vienna. During that time he prepared the first draft of the Judicial Perspective on the UNCITRAL Model Law. The text was adopted by the General Assembly of the United Nations on 9 December 2011. The publication is available on the UNCITRAL website. An acknowledgement of Paul's involvement appears in the preface to the publication.

After practising as a barrister and solicitor (in New Zealand's fused profession) between 1978 and 1998, Paul took Silk on 1 June 1998. He was appointed to the High Court of New Zealand in late March 2002 and retired on 6 April 2018, after 16 years' service. During his time on the Bench, Paul also sat as an ad hoc member of the Criminal and Civil Appeal Divisions of the Court of Appeal of New Zealand between 2003 and 2016. In all, he sat on over 400 appeals. During his period in the High Court, he gave a number of important insolvency decisions, including three that were also

reported in the United Kingdom: *Williams v Simpson* [2011] BPIR 938, *Re Ced Ex Foods (formerly Cedenco Foods) (in liq)*; *ANZ National Bank v Sheahan* [2013] BCC 321 and *Batty (Trustee in Bankruptcy of Reeves) v Reeves* [2015] BCC 568. All three of those cases involve aspects of cross-border insolvency.

In 2000, Paul was elected as a Fellow of the American College of Bankruptcy. He is also the co-consulting editor of the leading New Zealand text on insolvency law, *Heath & Whale on Insolvency.*

Paul is delighted to have been offered a position as an Associate Member of South Square.

Paul intends to undertake dispute resolution work, primarily arbitration. Although he will be based at Bankside Chambers in Auckland, Paul will also, given his international reputation, be available to provide strategic advice arising out of cross border insolvencies, neutral assistance with the facilitation of international disputes and the provision of expert evidence on New Zealand law. ■

Any inquiries about Paul's availability to accept instructions in any particular case may be directed to practicemanagers@southsquare.com

Case Digest Editorial

Rose Lagram-Taylor

It has been a busy time for South Square since the last edition of the Digest, particularly in the world of corporate insolvency, where thirteen of our members have appeared in cases included in this edition's case digests.

In the latest bout of Waterfall proceedings, Antony Zacaroli QC (as he then was), Robin Dicker QC, David Allison QC, Daniel Bayfield QC, Adam Al-Attar, Henry Phillips and Robert Amey all appeared for parties in Re Lehman Brothers International *(Europe)* [2018] EWHC 924 (Ch) which considered the question of costs arising out of the Waterfall IIC proceedings in the LBIE administration. Waterfall IIC concerned the construction and effect of various standardised pre-administration agreements on creditors' entitlement to statutory interest. In judgment, the fourth respondent prevailed on many of the issues. They contended that they should be entitled to their costs, the usual principle being that costs follow the event. They also asserted that the senior creditor group and sixth respondent should not be allowed their costs out of the estate, as they had essentially conducted adversarial litigation. In giving judgment, Hildyard J held that as the Waterfall IIC application had been made in the interests of the general body of creditors, the usual principle that costs follow the event was not appropriate, and so costs were determined to be payable out of the LBIE estate. As to the senior creditor group and sixth respondent, the judge agreed that they had essentially conducted adversarial litigation meaning they had been acting largely for their own benefit and so should incur a costs liability.

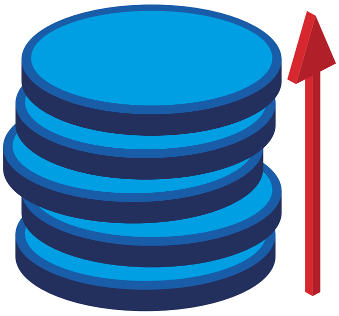
Gabriel Moss QC, Daniel Bayfield QC, Richard Fisher, Alexander Riddiford and Ryan Perkins acted for various parties in Re OJSC International Bank of Azerbaijan [2018] EWHC 792 (Ch), a case in the context of ongoing litigation between the International Bank of Azerbaijan and two "hold-out" creditors who are seeking to enforce their claims in England. The judgment is in effect supplemental to a previous decision of Hildyard J's where it was held that a moratorium preventing the commencement or continuation of any action against the Bank pending the resolution of restructuring proceedings in Azerbaijan could not be continued. An appeal on this is also now pending. Accordingly, in the present application, the "hold-out" creditors applied to lift the existing moratorium, and in the circumstances, Hildyard J held that a stay pending the appeal should be imposed, effectively "staying the lifting of the stay", on the provision of undertakings by the "hold-out" creditors.

As with all cases involving the insolvency of well-known high street brands, those relating to BHS are always of interest. Stephen Robins recently appeared in Re SHB Realisations Ltd *(formerly BHS Limited)* [2018] EWHC 402 (Ch), in which the court was asked to determine the effect of certain provisions in the BHS CVA. One such clause of the CVA allowed the company to pay reduced rents to landlords. However, by a further clause, if the CVA was terminated in accordance with that clause, landlords were entitled to claim against the company for the original, full rents. On entering administration (and subsequently liquidation), the CVA was accordingly terminated. The liquidators argued that this further clause in effect operated as a penalty clause such that it shouldn't be allowed to stand because it infringed the pari passu principle. However, in giving judgment, the court held that the clause was not a penalty clause, the rule against penalties in contracts not applying to CVAs.

Finally, Tom Smith QC appeared in both *Re Herald Fund SPC, Primeo Fund v Pearson* in the Court of Appeal of the Cayman Islands, and in Dunbar Assets plc v Davey [2018] EWHC 766 (Ch). In *Re Herald Fund*, the Court of Appeal held that s.112 of the Cayman Companies Law did not confer a broader power on a liquidator to rectify the share register of an investment fund whenever necessary in the interests of justice, in the context of the distribution methodology to be used in the liquidation of Herald (a Madoff "feeder fund"). It was determined that this power would only arise where there was fraud or default which had the effect of vitiating the contractual relations between the fund and shareholder, rather than where the NAVs at which the fund had issued or redeemed shares were affected by fraud in some way. In *Dunbar Assets*, a case arising out of the advancement of lending for the funding of a development site in Canary Wharf, London, an administrator's powers and duties were analysed. In a detailed judgment, Snowden J considered the objective of an administration, the use of agents, the realising of secured property, and the liability of secured creditors, with the case re-emphasising the requirement for an administrator to exercise independent judgment, not being bound to follow the wishes of creditors.

This by no means summarises all of the very interesting cases which are digested in this edition, and so it leaves me to say, happy digesting! ■

Case Digests



Banking and Finance

Digested by Toby Brown

JSC BTA Bank v Ablyazov

(No 14) [2018] UKSC 19 (Lord Mance, Lord Sumption, Lord Hodge, Lord Lloyd-Jones, Lord Briggs JJSC) 21 March 2018

Alleged embezzlement by bank's chairman – tort of conspiracy to injure by unlawful means – jurisdiction

The first defendant Mr Ablyazov was the chairman and controlling shareholder of the claimant bank ("the Bank"). The Bank alleges that he embezzled US$ 6 billion of its funds. In 2009 Mr Ablyazov fled to England and obtained asylum, and the Bank commenced various proceedings against him and others in the English courts alleging misappropriation of funds. The Bank obtained against Mr Ablyazov a disclosure order, a worldwide freezing order and subsequently a receivership order. In 2011, the Bank applied for and was granted an order committing him for contempt of court for breaching these orders. Mr Ablyazov fled England and default judgment was entered against him for over US$ 4.6 billion, though little has been recovered.

In the present proceedings, Mr Ablyazov's son-in-law, Mr Khrapunov, is the second defendant. The Bank alleges that Mr Khrapunov has at all times been aware of the freezing order and the receivership order, and in 2009 entered into and actively participated in an understanding with Mr Ablyazov to dissipate and conceal his assets. On this basis the Bank brought an action based on the tort of conspiracy to cause financial loss by unlawful means, namely by serial contempt of court through breaches of the freezing and receivership orders. The appeal concerned an application by Mr Khrapunov, a resident of Switzerland, in which he contested the jurisdiction of the English court to entertain this claim.

First, Mr Khrapunov argued that contempt of court cannot constitute unlawful means for the purpose of the tort of conspiracy and accordingly there was no good arguable case on which to found jurisdiction. In their jointly delivered judgment, Lord Sumption and Lord Lloyd-Jones considered the history of the tort. Since the decision of *Quinn v Leathem* [1901] AC 495 it had been recognised that the tort took two forms: (i) conspiracy to injure where the overt acts done pursuant to the conspiracy may be lawful but the predominant purpose is to injure the claimant; and (ii) conspiracy to do by unlawful means an act which may be lawful in itself, albeit that injury to the claimant is not the predominant purpose. Once it is established that a conspiracy has caused loss, it is actionable as a distinct tort, as primary and not secondary liability.

As to what makes the tort actionable, their Lordships stated that the more useful test was the absence of "just cause or excuse". A person has a right to advance his own interests by lawful means even if the foreseeable consequence is to damage the interests of others. The existence of that right affords a just cause or excuse. Where, on the other hand, he seeks to advance his interests by unlawful means he has no such right. The position is the same where the means used are lawful but the predominant intention of the defendant was to injure the claimant rather than to further some legitimate interest of his own.

In the present case, the unlawful means relied upon are criminal contempt of court, albeit punishable in civil proceedings. Whilst the Bank did not contend that the defendants' predominant purpose in hiding Mr Ablyazov's assets was to injure it, Lord Sumption and Lord Lloyd-Jones held that damage to the Bank was necessarily intended. The object of the conspiracy and the acts pursuant to it were to prevent the Bank from enforcing its judgments against Mr Ablyazov. The Supreme Court therefore held that the cause of action in conspiracy to injure the Bank by unlawful means was made out. This was subject to the argument that such a cause of action was consistent with public policy; however, Lord Sumption and Lord Lloyd-Jones held that it was. Accordingly, the Bank's pleaded allegations disclosed a good cause of action.

The second issue on appeal was whether there was jurisdiction under the Lugano Convention 2007. Under the Convention, the general rule in Article 2 is that a person should be sued in his or her state of domicile; however, special jurisdiction is provided for, including in Article 5 that

"A person domiciled in a state bound by this Convention may, in another state bound by this Convention, be sued: ...(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur." The only event said to have occurred in England was the conspiratorial agreement itself, and Mr Khrapunov contended that it was the alleged events done outside England pursuant to the agreement that were harmful.

Lord Sumption and Lord Lloyd-Jones stated that it was well established that the special jurisdiction provisions must be strictly interpreted. The decisions of the European Court of Justice showed that the expression *"place where the harmful event occurred"* had an autonomous interpretation, and covered both (a) the place where the damage occurred and (b) the place of the event giving rise to it. The result was that the defendant may be sued either in the courts of the place where the damage occurred or in the courts of the place of the event which gives rise to and is at the origin of that damage.

Their Lordships considered that the Court of Appeal correctly identified the place where the conspiratorial agreement was made as the place of the event which gives rise to and is at the origin of the damage. In entering into the agreement Mr Khrapunov would have encouraged and procured the commission of unlawful acts by agreeing to help Mr Ablyazov to carry the scheme into effect. The making of the agreement in England should, in their view, be regarded as the harmful event which set the tort in motion. Accordingly, the English courts had jurisdiction and the appeal was therefore dismissed. ■

Openwork Limited v Alessandro Forte

[2018] EWCA Civ 783 (Arden LJ, Simon LJ and Newey LJ) 18 April 2018

Financial adviser – payment of commission – enforcement of incomplete contractual terms

The primary issue on this appeal was the extent to which the court can give effect to a contractual term whose overall effect is explicit, but whose detailed terms are incomplete. The claimant ("Openwork") is a company associated with Zurich Assurance Limited, which runs a network of franchised financial advisers. The defendant ("Mr Forte") is a financial adviser. In 2005 the parties entered into a written agreement under which Mr Forte became one of Openwork's franchisees.

Upon a sale by Mr Forte of a particular investment to a client, Openwork was entitled to a commission from the investment provider, and Mr Forte was entitled to a proportion of the commission from Openwork. Under the contract, if the investor withdrew a "no exit penalty bond" within 3 years, Mr Forte was obliged to repay a proportion of his commission to Openwork ("the clawback provision"). Two particular clients withdrew such investments within this period, and so Openwork brought proceedings to clawback commission paid to Mr Forte.

The contract provided that *"where funds are withdrawn within 3 years of the most recent investment, a percentage of the initial commission will be debited to your Commission Account. The amount of initial commission clawed back relates to the amount invested, length of time invested and amount withdrawn."* As the Judge (Mr Recorder Blohm QC) held at first instance, the clawback provision was "vague" in that it did not provide any express formula by which the calculation is to be made. Further, it was inherently unlikely that a franchisee would have agreed to confer on Openwork a general discretion to claw back such sums as Openwork considered reasonable. These findings were not challenged on appeal.

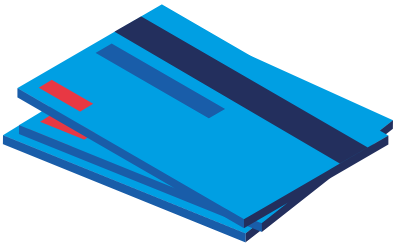
Mr Forte did, however, challenge the Judge's finding that since the clawback was to be calculated on the basis of three identified factors, the intent of the provision was clear, and that commission would be clawed back on a straight-line reducing basis from the full commission at the date of investment to zero at three years. Mr Forte argued that it was not open to the Judge to invent his own calculus, relying on the proviso referred to by Lord Wilberforce in *Cudgen Rutile (No.2) Pty Ltd v Chalk* [1975] AC 520 PC: *"...in modern times, the Courts are readier to find an obligation which can be enforced, even though apparent certainty may be lacking as regards some terms such as the price, provided that some means or standard by which that term can be fixed can be found."*

Simon LJ (with whom Newey and Arden LJJ agreed) delivered the judgment of the Court of Appeal. He stated that the court should strive to give some meaning to contractual clauses agreed by the parties if it is at all possible to do so. The authorities were reviewed, with Simon LJ ultimately citing with approval the commentary in Lewison, *Interpretation of Contracts*: *"A provision in a contract will only be void for uncertainty if the court cannot reach a conclusion as to what was in the parties' minds or where it is not safe for the court to prefer one possible meaning to other equally possible meanings, while bearing in mind that what is in the parties' mind is a legal construct and not an enquiry into subjective intent."*

Applying this approach to the present case, Simon LJ held that the Judge was correct to find that the parties' intention was reflected in a straight-line calculation of entitlement to clawback, which although not expressed, gave effect to the identified criteria. This was for four reasons.

First, the parties plainly intended the clawback provision to have some effect, but if it was treated as being so vague as to give Openwork no rights, it would defeat the intent. Second, the intent was that Openwork would be entitled to recover commission paid to Mr Forte if his client's funds were withdrawn within three years. Third, a definite meaning on which the court could safely act could be extracted from the criteria expressed in the clause. Thus, fourth, the amount of the clawback is expressed as a percentage of the amount of the commission paid. If funds are withdrawn after three years there is no clawback and the advisor retains 100% of the commission. Conversely, if the funds are withdrawn the day after the most recent investment, the advisor would not be entitled to any commissions. Accordingly, the straight-line basis reflected the parties' intentions. Together with other issues, the appeal was therefore dismissed. ■

CASE DIGESTS



Civil Procedure

Digested by Rose Lagram-Taylor

Akcine Bendrove Bankas Snoras v Vladimir Antonov & Ors

[2018] EWHC 887 (Comm) (Peter Macdonald Eggers QC sitting as a Deputy High Court Judge) 20 April 2018

Freezing Orders – undertakings

This case concerned proceedings dating back to 2012 where the claimant had commenced proceedings against the defendants seeking relief for alleged breaches of the defendants' duties as directors, officers and shareholders, applying for a worldwide freezing order against Mr Antonov. This application was granted by Teare J with the freezing order referring to a number of undertakings given by Snoras including that it would not seek to enforce the order in any country outside England and Wales, or seek a similar order including orders conferring a charge or other security against Mr Antonov or his assets without the permission of the court. The proceedings were stayed by consent at the end of 2012 without prejudice to the freezing order.

In 2017, Snoras commenced fresh proceedings and in support of those proceedings obtained orders against Mr Antonov in Lithuania and Switzerland restricting Mr Antonov's use of his assets in those countries.

Accordingly, the matter before the court was whether, on the application of the claimant, the orders obtained in Lithuania and Switzerland constituted a breach of its earlier undertaking.

In querying whether Snoras failed to comply with the undertaking, the court was required to first consider the meaning of the undertaking. It was contended by Snoras that the undertaking only intended to require it to obtain the court's permission before taking any steps abroad which actually or substantially amounted to the enforcement of the freezing order overseas, it not requiring it to obtain permission if the application to the foreign court did not rely upon the existence of the English freezing order.

The court concluded that the purpose of the undertaking was to (i) avoid the oppression of the defendant by the institution of multiple proceedings for the enforcement of the English freezing order, and (ii) prevent the enforcement of the freezing order in a foreign jurisdiction having a more far-reaching effect in that jurisdiction than in England.

As the orders obtained in Lithuania and Switzerland were not direct means of enforcing the freezing order the remaining question for the court was whether they were orders "of a similar nature". On this, the claimant submitted that the undertaking's reference to a "similar order" was intended to prevent an applicant from framing an application before a foreign court for fresh relief, when in reality the application was merely seeking to enforce the English freezing order. The court accepted this and concluded that the words were apt to deal with foreign court orders which were only directly or in substance enforcing the freezing order, rather than those orders having to be anything more than enforcement.

The second question for the court was whether Snoras had failed to comply with the undertaking having obtained the Lithuanian and Swiss orders. On this, the claimant submitted it had not such that there was no breach. Having considered the nature of the orders, the court relied on the fact that the orders, even if similar in effect to the freezing order, were obtained pursuant to rights engrafted in Lithuanian and Swiss law and independent to the freezing order obtained in England, and so could not be viewed as being obtained for the purpose of enforcing that freezing order or of being an order of a similar nature. Accordingly, the court found there to be no breach of the undertaking.

In the alternative, the court also considered the question of whether it would have granted retrospective permission for the order, should there have been a breach of the undertaking. As to this and in reaching the decision that permission would have been given, the court placed emphasis on (i) the fact that the breach was inadvertent and unintended, (ii) that as soon as Snoras realised the breach it made this application, (iii) that there was no evidence of prejudice or oppression to Mr Antonov on his ability to defend the proceedings, (iv) that the court was previously satisfied of the risk of dissipation of assets and the possibility for further freezing orders being sought abroad, and (v) that the allegations against Mr Antonov involved serious wrongdoing. ■

[Robert Amey]

Loson v Stack

[2018] EWCA Civ 803 (Patten LJ, Floyd LJ) 17 April 2018

Civil Procedure Rules – bankruptcy petitions – judgment debts – enforcement

A judgment debtor appealed against a decision that her application to pay a judgment debt by instalments pursuant to CPR r.40.9A should have been refused.

The case arose following a dispute over an unpaid parking fine where the appellant was ordered to pay £5000 in costs. After failing to pay these costs, the respondents served a statutory demand. Following an unsuccessful application to set aside the statutory demand, the appellant was ordered to pay a further £3000. The appellant applied to vary the costs order so as to pay by instalments.

The respondents served the appellant with a bankruptcy petition on the basis of the unpaid costs. On hearing the appellant's application, the district judge held that the costs order should be varied, ordering the debt to be paid in monthly instalments of £50 (this being the maximum the appellant could afford).

On the respondent's appeal of the instalment order, a circuit judge held that the district judge's decision had been perverse, the instalments of £50 not even discharging the statutory interest accruing on the costs order. Accordingly, the circuit judge concluded that the interests of the judgement creditors had not been properly balanced against those of the judgment debtor and set aside the instalment order.

The appellant's appeal before the Court of Appeal was dismissed.

Firstly, it was held that the circuit judge had been correct to consider that the district judge had incorrectly exercised his discretion under r.40.9A. The district judge was wrong in believing that the instalment order would not interfere with the bankruptcy petition. Whilst it was correct that the petition had not been secured or compounded pursuant to s.271(1)(a) of the Insolvency Act 1986 on the basis that the sum was due and payable at the date of the presentation of the petition, the effect of the instalment order was nevertheless that the petition debt would no longer be due and payable. It was considered by the Court of Appeal that the district judge should have balanced the judgment debtor's desire to extend time for payment and avoid enforcement against the judgment creditors who had an order for costs with no prospect of the principal or interest ever being paid.

Secondly, the correct approach a court should take when considering a r.40.9A application where the debtor could not really afford to pay anything was not to interfere with the judgment creditor's right to seek enforcement through whatever means were available to them. The court's power under r.40.9A has to be exercised in a way which properly respects the judgment creditor's rights. Should a judgment creditor wish to obtain the benefit of an instalment order, the court has to be presented with a sensible and realistic repayment schedule. ■

Best Friends Group & Anor v Barclays Bank Plc

[2018] EWCA Civ 601 (Arden LJ, Simon LJ) 28 March 2018

Civil Procedure Rules – limitation – substitution of parties

This case concerned an application under CPR r.17(4) to amend the name of a party after the expiry of the limitation period. R.17(4) provides that the court may allow an amendment where that amendment is to correct a mistake as to the name of the party where that mistake is genuine and does not cause reasonable doubt as to the identity of the party in question.

The party concerned was an unlimited company owned by a vet. The bank had paid compensation to the vet in relation to certain swap transactions he had entered into with the bank in his own name. However, as consequential loss had not been agreed, proceedings were issued, naming the unlimited company as claimant. An amendment was purportedly made to the claim form under CPR r.17.1 to add the name of the vet as claimant, but in the bank's defence, they claimed that the swaps had only been entered with the vet personally, that the cause of action was time barred and that permission for the substitution or addition of the vet to the claim outside of the limitation period had not been obtained. Following the service of a strike out application from the bank, the vet then sought the permission to substitute his name outside of the limitation period, asserting that he had always intended that he would claim as an individual. However, in giving judgment, it was held at first instance that the naming of the unlimited company as the claimant was not a genuine mistake and would have caused reasonable doubt as to the identity of the claimant.

The Court of Appeal dismissed the vet's appeal. In considering the facts, particular emphasis was given to the fact that (i) the vet must have given instructions for the claim to be brought, and (ii) no evidence was provided by the vet. Further, as to the court's discretion, whilst the court should not exercise its discretion so as to punish a party for a harmless error by its legal representative, this was not what had occurred. In this case, it was clear that there had been delay in making the r.17(4) application, the claim not being conducted with any sense of urgency. This was particularly the case seeing as the issue of the proper claimant had been raised in the defence, and yet no steps were taken to rectify the matter. ■

CASE DIGESTS

Civil Procedure

Burnden Holdings (UK) Ltd v Fielding

[2018] UKSC 14 (Lord Kerr, Lord Sumption, Lord Carnwath, Lord Lloyd-Jones, Lord Briggs JJSC) 28 February 2018

Limitation – trusts – insolvency

The Supreme Court considered s.21(1)(b) of the Limitation Act 1980 which provides that no limitation period is applicable to actions by a beneficiary under a trust to recover trust property in the possession of the trustee or previously received by him and converted to his use.

The claim concerned a transfer of shares. The defendants were the former directors and controlling shareholders of the claimant holding company. Following the transfer of certain shares from one of the claimant's subsidiaries to a new holding company of which the defendants were also majority shareholders, the claimant went into liquidation. Six years later, the liquidator issued proceedings against the defendants for the unlawful distribution in specie of the claimant's shareholding in that subsidiary, his case being that the defendants had received trust property belonging to the claimant and had converted it to their own use. The defendants were granted summary judgment on the ground that the liquidator's claim was statute barred. However, this was set aside by the Court of Appeal which applied s.21(1)(b) such that no limitation period applied to the claim. The sole issue before the Supreme Court was whether the defendants were precluded by the operation of s.21(1)(b) from relying on the six-year limitation period specified in s.21(3) of the Limitation Act. The appeal was dismissed by the Supreme Court.

First, on the scope and application of s.21(1)(b), it was held that the starting point was to pay due regard to its purpose, this being that it gave a trustee the benefit of the lapse in time where he had done something legally or technically wrong, but not morally wrong or dishonest. The provisions had not been intended to enable a trustee to gain something that they should never have had. Whilst s.21 was primarily aimed at express trustees, it was applicable to company directors by analogy.

Secondly, on whether s.21(1)(b) applied to the current case, it was held that it did as the defendant had participated in the unlawful distribution of the shares when the claimant's shareholding in its subsidiary was converted to the new holding company. In assuming the distribution was unlawful, it represented a taking of the claimant's property in defiance of the claimant's ownership rights to the economic benefit of the defendants. ■

Barton v Wright Hassall LLP

[2018] UKSC 12 (Lady Hale (President), Lord Wilson, Lord Sumption, Lord Carnwath, Lord Briggs JJSC) 21 February 2018

Civil Procedure Rules – service – litigants in person

The Supreme Court set out the approach to be taken to applications under CPR r.6.15(2) for an order validating service of a claim form which has not been properly served.

The appellant, a litigant in person, appealed against a decision refusing his application for an order to validate the service of the claim form which he had issued. The claim form had been issued on 25 February 2013 with the time for its service expiring on 25 June 2013. On 24 June 2013, the appellant purported to serve the claim form on the respondent's solicitors by email. However, those solicitors had not stated they were prepared to accept service by that means. As it was common ground that service using this method was not good service, the appellant made his application for validation. However, this was refused by a district judge, county court judge and Court of Appeal.

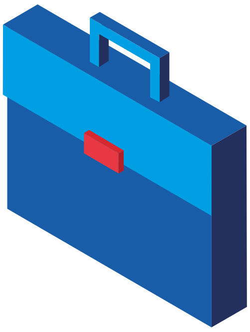
The Supreme Court also dismissed the appeal, Lord Briggs and Lady Hale dissenting.

Firstly, on deliberating the proper approach under r.6.15(2), the court had to decide whether there was a "good reason" for validating service, this being a matter of fact. In considering the case of *Abela v Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043 which set out the relevant principles, the relevant factors for the court's consideration included (i) whether the claimant had taken reasonable steps to effect service in accordance with the rules, (ii) whether the defendant or their solicitor were aware of the contents of the claim form at the time when time for service expired, and (iii) whether the defendant would suffer any prejudice by the retrospective validation bearing in mind their knowledge of the claim form.

It was held to be insufficient that the claimant's mode of service did bring the claim form to the defendant's attention, as the manner in which this is done is important, with rules of the court having the purpose of identifying necessary formal steps which should be taken.

As to the fact that the claimant was a litigant in person, it was considered that their lack of representation would not usually justify departing from the expected standards of compliance with the rules which provide a framework intended to balance the interest of the parties. The balance would be disturbed should a litigant in person be given greater indulgences than his represented opponent which could affect their legal rights. Accordingly, it was determined that unless the rules and practice directions were particularly inaccessible and obscure, it was reasonable to expect a litigant in person to familiarise themselves with the relevant rules which applied to the steps they were intending to take. As to the rules of service, these were not inaccessible or obscure.

Accordingly, on the basis that the appellant made no attempt to serve in accordance with the rules, and only issued at the very end of the limitation period, this meant that prejudice could be caused to the respondent as they would be retrospectively deprived of a limitation defence should service be validated. Given the appellant could have been more diligent, there was no reason why the appellant should be absolved from his errors at the respondent's expense. ■



CASE DIGESTS

Commercial Litigation

Digested by Madeleine Jones

Morris-Garner and another v One Step (Support) Ltd

[2018] UKSC 20 (Lady Hale (President), Lord Wilson, Lord Sumption, Lord Reed, Lord Carnwath JJSC)
18 April 2018

Damages

The Supreme Court considered the correct measure of loss in damages for breach of a restrictive covenant prohibiting the appellants from competing with the respondent. In so doing Lord Reed, with whom Lady Hale, Lord Wilson and Lord Carnwarth agreed (Lord Sumption agreeing that the appeal should be allowed but giving a separate judgment), reviewed the principles relating to damages in general before considering so-called Wrotham Park or negotiating damages, which are damages awarded to reflect the sum that the claimant could have negotiated in return for releasing the defendant from the obligation which he failed to perform and which are dealt with in a line of cases following *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798.

Summing up the discussion, Lord Reed laid down the following principles, at [95]:

"(1) Damages assessed by reference to the value of the use wrongfully made of property (sometimes termed "user damages") are readily awarded at common law for the invasion of rights to tangible moveable or immoveable property (by detinue, conversion or trespass). The rationale of such awards is that the person who makes wrongful use of property, where its use is commercially valuable, prevents the owner from exercising a valuable right to control its use, and should therefore compensate him for the loss of the value of the exercise of that right. He takes something for nothing, for which the owner was entitled to require payment.

"(2) Damages are also available on a similar basis for patent infringement and breaches of other intellectual property rights.

"(3) Damages can be awarded under Lord Cairns' Act in substitution for specific performance or an injunction, where the court had jurisdiction to entertain an application for such relief at the time when the proceedings were commenced. Such damages are a monetary substitute for what is lost by the withholding of such relief.

"(4) One possible method of quantifying damages under this head is on the basis of the economic value of the right which the court has declined to enforce, and which it has consequently rendered worthless. Such a valuation can be arrived at by reference to the amount which the claimant might reasonably have demanded as a quid pro quo for the relaxation of the obligation in question. The rationale is that, since the withholding of specific relief has the same practical effect as requiring the claimant to permit the infringement of his rights, his loss can be measured by reference to the economic value of such permission.

"(5) That is not, however, the only approach to assessing damages under Lord Cairns' Act. It is for the court to judge what method of quantification, in the circumstances of the case before it, will give a fair equivalent for what is lost by the refusal of the injunction.

"(6) Common law damages for breach of contract are intended to compensate the claimant for loss or damage resulting from the non- performance of the obligation in question. They are therefore normally based on the difference between the effect of performance and non-performance upon the claimant's situation.

"(7) Where damages are sought at common law for breach of contract, it is for the claimant to establish that a loss has been incurred, in the sense that he is in a less favourable situation, either economically or in some other respect, than he would have been in if the contract had been performed.

"(8) Where the breach of a contractual obligation has caused the claimant to suffer

CASE DIGESTS

Commercial Litigation

economic loss, that loss should be measured or estimated as accurately and reliably as the nature of the case permits. The law is tolerant of imprecision where the loss is incapable of precise measurement, and there are also a variety of legal principles which can assist the claimant in cases where there is a paucity of evidence.

"(9) Where the claimant's interest in the performance of a contract is purely economic, and he cannot establish that any economic loss has resulted from its breach, the normal inference is that he has not suffered any loss. In that event, he cannot be awarded more than nominal damages.

"(10) Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. That may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed. The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment.

"(11) Common law damages for breach of contract cannot be awarded merely for the purpose of depriving the defendant of profits made as a result

"(12) Common law damages for breach of contract are not a matter of discretion. They are claimed as of right, and they are awarded or refused on the basis of legal principle." ■

Crowther v Arbuthnot Latham & Co Ltd

[2018] EWHC 504 (Comm) (HHJ Waksman QC) 27 February 2018

Contractual construction

Disputes regarding a loan facility secured on a property had been settled on the terms of a Tomlin order. This contained a provision that the lending bank would not unreasonably withhold its permission to the sale of a property.

The property-owner received an offer for sale in line with valuations of the property. The bank refused to consent to the sale without proposals for securing the remaining indebtedness and an agreed repayment plan. The sale was lost.

The court held that the bank was in breach of the order by having withheld its consent unreasonably. When assessing this the test was one of objective reasonableness, not the lower standards of rationality or Wednesbury unreasonableness. In determining objective reasonableness it was necessary to look at the background and purpose of the provision. At the time the order was agreed the parties knew that the property did not secure the entire debt and the sale would leave an unsecured shortfall. There was no reason to think a better offer would soon be obtainable, as the property market was slow. In this case reasonableness meant that the sale should be at arm's length and at fair market value. The desire for further security was collateral to the purpose of the relevant provision, and therefore not something that could reasonably be taken into account in relation to it. ■

Rehman v Santander UK PLC

[2018] EWHC 748 (QB) (HHJ Klein) 12 April 2018

Bank valuations – duty of care

The claims of the former directors and shareholders of a company (Cs) were dismissed in a summary judgment application by a bank (S) and the valuer (B) of a nursing home (Ds) and S obtained judgment under a personal guarantee. Cs' company had run two nursing homes. The company refinanced its debt with S. B valued the homes for S in a report that stated it was private and confidential and could not be disclosed or relied on by a third party without B's prior written consent. The company defaulted on the loan and then went into administration and liquidation. S sought to enforce under a personal guarantee.

The Cs sought to rescind the guarantee on the ground that:

1. S had breached its duty to ensure the valuations were performed by a competent valuer, by sending the valuations to the Cs;
2. S made the fraudulent or negligent implied misrepresentation that the valuations were a true and fair estimate of the nursing homes' market value and provided adequate security for the company's liabilities and that the Cs could rely on them;
3. S was in breach of a fiduciary duty to advise the Cs to obtain their own valuations; or
4. The guarantee had been discharged by operation of the rule in *Holme v Brunskill* (1878) 3 QBD 495 (a guarantee is discharged if the guaranteed contract is altered without the guarantor's consent).

The Court found that none of Cs' arguments had any real prospect of success:

1. This was an ordinary commercial transaction that did not impose a duty to ensure the valuation was competently performed. The provision of valuation reports also did not give rise to such a duty of care;
2. The bank had not made any implied representation about the accuracy of the valuation. In circumstances where it had engaged a third party to undertake the valuation on its behalf, it was not reasonable to conclude that simply passing on the valuation reports could constitute a representation about the veracity of the contents of those reports;

3. The bank/customer relationship is not inherently a fiduciary relationship. The fact that the parties had done business over a long period of time did not make the relationship a fiduciary one. A fiduciary relationship could only arise if the bank could reasonably be expected to subordinate its interests to those of the customer or prospective guarantor. This was not alleged.

4. *Holme v Brunskill* did not apply: the parties' dealings had stayed within the scope of the contract.

The claim against B failed as Cs had no real prospect of showing that B consented to or knew of S giving the reports to the prospective guarantors and therefore knowing that they were likely to rely on the reports in entering into the guarantee. The disclaimers in the report were anyway enough to prevent any duty of care arising.

All the claims were dismissed and S' counterclaim under the guarantee succeeded. ■

Al Nehayan v Kent

[2018] EWHC 333 (Comm) (Leggatt LJ) 22 February 2018

Duress

C claimed from D amounts due under a promissory note and joint venture agreement. D alleged that his consent to the agreement and the note was obtained by unfair means, including threats of physical violence and economic duress. D pleaded duress, a defence in contract which entitles the party pleading it to rescind a contract.

Leggatt LJ restated the law on duress at [184]-[191].

He approved the following definition in *Chitty on Contracts* (32nd ed), vol 1, para 8-046, as applied in in *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2017] EWHC 1367 (Ch):

"there can be no doubt that even a threat to commit what would otherwise be a perfectly lawful act may be improper if the threat is coupled with a demand which goes substantially beyond what is normal or legitimate in commercial arrangements."

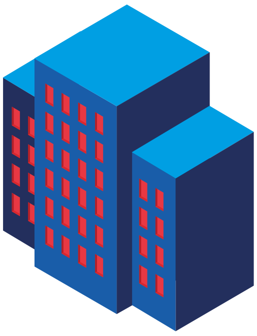
There is no reason the distinction between lawful and unlawful behaviour should be decisive of whether the defendant can retain money or other benefits demanded from a claimant in a situation of extreme vulnerability. It is appropriate to take account of the legitimacy of the demand and to judge the propriety of the defendant's conduct by reference not simply to what is lawful but to basic minimum standards of acceptable behaviour.

The test in *Chitty* could be made more precise by transposing into objective requirements the elements of the offence of blackmail: a demand coupled with a threat to commit a lawful act will be regarded as illegitimate if (a) the defendant has no reasonable grounds for making the demand and (b) the threat would not be considered by reasonable and honest people to be a proper means of reinforcing the demand.

Further, he concluded that, contrary to earlier views, the better view is that the doctrine of duress is based not on lack of consent but on showing that a party's consent was obtained in circumstances which make it unjust to allow the other party to enforce the agreement. Therefore that legal advice was taken or rational or independent judgment exercised in entering into a contract does not preclude a finding of duress. What is necessary is that the illegitimate pressure caused the claimant to enter into the contract.

As to causation, a threat of violence causes a party to enter a contract if it is "a" reason for entering it. With economic duress the "but for" test applies.

It is not necessary that the claimant had no reasonable alternative to giving in to the illegitimate pressure. What is required is very strong evidence of whether the claimant was induced by the threat or other illegitimate pressure to enter into the contract. This is also a relevant factor in deciding whether use of pressure was illegitimate even though there is no illegality. ■



CASE DIGESTS

Company Law

Digested by Edoardo Lupi

Mohamed v Abdelmamoud

[2018] EWCA Civ 879 (Longmore LJ, McCombe LJ, Newey LJ) 23 April 2018

CPR r. 40.9 – Locus standi of company directors – derivative actions

This case concerned the question of when individual directors or members of a company can be *"directly affected"* by a judgment or order against the company for the purposes of CPR r. 40.9, pursuant to which a non-party may apply to have a judgment or order set aside or varied.

The company in question was the Egyptian Association of Great Britain limited ("EAGB"), a registered charity. Its articles provided that EAGB was to be *"managed by the trustees"*, where the *"trustees"* were defined to refer to EAGB's directors. A judgment in default was obtained against EAGB by a Mr Abdelmamoud. Certain members of EAGB, three of whom had purportedly been directors/trustees, applied to have the default judgment set aside. At first instance, the default judgment was set aside. The applicants were also granted permission to defend the claim on EAGB's behalf. Subsequently, Mr Edward Murray, sitting as a Deputy High Court Judge, allowed an appeal against that decision on the basis that the applicants lacked standing to apply under CPR r. 40.9

The applicants contended that they were *"directly affected"* by the default judgment against EAGB both because they were members of the company, and three of them had been directors/trustees. The Court of Appeal unanimously dismissed the appeal, holding that the applicants were not directly affected by the default judgment and thus could not apply to have it set aside under CPR r. 40.9.

As to the contention that some of the applicants were directly affected by virtue of being some of EAGB's directors, Newey LJ concluded that the management of a company is conventionally entrusted to its board as a whole, and not to individual directors – EAGB was no exception. He considered that allowing individual directors to apply under CPR r. 40.9 would subvert the allocation of responsibility for management to the board, given that such an application would make little sense unless the applicant director could be given permission to defend the claim in the relevant company's name. There was no evidence that the applicants had been authorised by the board to apply to set aside the judgment against EAGB, and if there had been, they would not have needed to resort to CPR r. 40.9

As to the contention that the applicants were directly affected by virtue of being members of EAGB, the applicants argued that the judgment should be set aside to allow them to institute a derivative action and consolidate those proceedings with the defence of Mr Abdelmamoud's claim, so as to permit the merits of the latter to be properly ventilated. Newey LJ noted that no such derivative claim had been launched several years after the application to set aside the default judgment had been made. Moreover, EAGB's articles specifically provided for the company's business to be *"managed by the trustees"*, not by the members. It followed that individual members of EAGB or, for that matter, of any ordinary commercial company cannot be considered directly affected by a judgment or order against the company: any other conclusion would allow particular members to take upon themselves matters allocated to the board and, furthermore, to do so without having to satisfy requirements such as those laid down by the Companies Act 2006 in relation to derivative actions. ■

Toone v Robbins

[2018] EWHC 569 (Ch) (Norris J) 20 March 2018

Unlawful dividends – disguised remuneration – burden of proof

Pinetum Ltd (the "Company"), entered liquidation in February 2011. During the months prior to entering insolvency, the Company made substantial payments to the directors. One of the Company's directors was also its sole shareholder. Having entered liquidation, the joint liquidators sought to recover the sums paid to the Company's directors as unlawful dividends. The directors argued that the payments were disguised remuneration.

At first instance, Chief Registrar Baister considered that £94,000 of the sums paid to the directors were unlawful dividends based, among other things, on the fact that Company's own books and records described the payments as dividends.

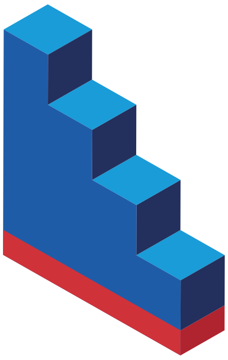
A further £50,122 had been paid to the directors in 2009 (the *"2009 payments"*). Of the 2009 payments, the Company's Sage records recorded £40,094 as being *"wages"* whereas a further £10,098 were left uncategorised. The Company's articles contained two articles which respectively provided that: (i) where the company had one member and that member took a decision required to be taken in general meeting, then the decision would be valid as if a general meeting had taken place; and (ii) a decision taken by a sole member under (i) *"shall be recorded in writing and entered in to the company's minute book"*.

No record of any general meeting was in evidence, nor did the minute book contain a record of any decision by the sole shareholder to pay the remuneration. Chief Registrar Baister held that the 2009 payments could nevertheless be retained by the directors on the basis that the evidence pointed to the sole shareholder authorising the payments of remuneration under article (i) above, and in any event the principle in *Re Duomatic* was available notwithstanding that the proper procedure under article (ii) above had not been followed. As to the uncategorised £10,098, there was no clear evidence either way but the Chief Registrar gave the directors *"the benefit of the doubt"* such that that sum was also to be treated as remuneration paid to the directors.

On appeal, the directors' cross-appeal in respect of the characterisation of the dividends as being unlawful dividends failed. It was not open to the directors to re-characterise the payments as instalments of salary. The fact that there were other routes not in fact employed by which the Company could have transferred assets to the directors did not avail the directors when the route chosen was the payment of (unlawful) dividends.

As to the 2009 payments, Norris J considered what the effect was of non-compliance with article (ii). Norris J held that on the face of article (ii), the validity of a decision under article (i) was not dependent upon the formal requirement of recording such a decision in the minute book: a resolution of a sole shareholder at a formally convened meeting would not have been invalidated by a failure to comply with the duty to keep records under section 355 of the Companies Act 2006, so there was no reason why a decision under article (i) should be invalidated by a failure to observe the procedure under article (ii). Accordingly, the appeal in respect of the £40,094 designated as *"wages"* was dismissed, albeit for different reasons from those given by the Chief Registrar.

As to the remaining uncategorised £10,098, Norris J considered that the Chief Registrar had erred in law in holding that the burden lay on the joint liquidators to show that payments were made by the Company, and that the burden then shifted to the directors to explain them. Norris J pointed to the case of *Re Idessa (UK) Ltd* [2011] EWHC 804 (Ch) for a statement of the proper approach to the burden of proof in the absence of clear evidence in such cases: once the liquidator has proved that a relevant payment has been made, the burden is on the director to explain the transaction in question. Accordingly, the benefit of any doubt in relation to the £10,098 had to be given to the joint liquidators and not to the directors. ■



CASE DIGESTS

Corporate Insolvency

Digested by Ryan Perkins

Re Herald Fund SPC, Primeo Fund v Pearson

Court of Appeal of the Cayman Islands (Goldring P, Martin, Newman JJA) 27 February 2018

Investment funds – rectification of the share register – distribution methodology in liquidation

The issue before the court concerned the distribution methodology to be applied in the liquidation of an investment fund, Herald. Herald had been a "feeder fund" to Madoff and, as a result of the collapse of Madoff, had gone into liquidation. The Liquidator of Herald argued that under the Cayman Companies Law he had power to rectify the share register of Herald on a net cash basis, reflecting the cash payments and withdrawals they had made from the fund, rather than by reference to their shareholdings shown on the register.

Under the Cayman Companies Law (section 112), a liquidator has the power to rectify the share register of an investment fund, and under the Winding Up Rules, the power is exercisable where the relevant Net Asset Values at which the fund issued or redeemed shares are net asset values (NAVs) which are not binding by reason of fraud or default.

However, the Court of Appeal rejected the conclusion of the Judge at first instance that section 112 also conferred a broader power on a liquidator to rectify the register whenever necessary in the interests of justice. It was only where there was fraud or default which had the effect of vitiating the contractual relations between the fund and the shareholder that the power to rectify would arise, and it would not arise merely because the NAVs at which the fund had issued or redeemed shares were affected by fraud in some way (such as where the fund had invested in an entity which was fraudulent). ■

[Tom Smith QC]

CASE DIGESTS

Corporate Insolvency

Re SHB Realisations Ltd (formerly BHS Limited)

[2018] EWHC 402 (Ch) (Christopher Pymont QC, sitting as a Deputy High Court Judge) 6 March 2018

Administration – CVA – penalty clauses – pari passu rule

The Court was asked to determine the effect of various provisions in the "BHS" CVA. The CVA was proposed for the usual purpose of imposing rent reductions on some of the company's landlords. Clause 9 of the CVA provided for the company to pay reduced rents, and set out the duration of the rent concession period. Clause 25 identified the circumstances in which the CVA could be terminated. If the CVA was terminated in accordance with Clause 25, then the reduced rents were deemed never to have been agreed, and the landlords were entitled to claim against the company for the original, full rents (less any payments made during the CVA).

The company entered into administration (and subsequently liquidation), and the CVA was terminated pursuant to Clause 25. The liquidators submitted that Clause 25 operated as a penalty, and that it infringed the *pari passu* principle. These contentions were rejected by the respondent (one of the landlords bound by the CVA). The respondent also argued that the outstanding rent fell to be paid as an expense of the administration for the period during which the original administrators had continued to trade from the relevant premises.

The Court held as follows. (1) Clause 25 did not infringe the rule against penalties. The fact that a CVA has contractual effect does not mean that it has every attribute of a contract or that every principle of the law of contract applies to it. The rule against penalties has no application to CVAs. In any event, Clause 25 could not be regarded as penal. The Judge relied upon the statement of Lord Westbury in *Thompson v Hudson* (1869) LR 4 HL 1 at 28 that *"if a man submits to receive, at some future time and on the default of his debtor, that which he is entitled to receive, it is impossible to understand how that can be regarded as a penalty"*. (2) Clause 25 did not infringe the *pari passu* principle. The termination of the CVA could not properly be said to have increased the landlords' claims in the company's administration or liquidation; the true position was that the rent concession which might have applied if the company's finances had been re-structured was brought to an end and the original rent (and other sums) continued to have effect. The liquidators could not seek to *"pick and choose"* between the terms of the CVA: all these terms were required to be viewed and given effect as a whole. (3) The additional sums falling due to the landlords upon the termination of the CVA were payable as administration expenses for the period during which the original administrators were in possession of the premises for the purposes of the administration. This was a necessary consequence of Clause 25, which operated to restore the rent payable under the relevant leases with retrospective effect. ■

[Stephen Robins]

Burnden Group Holdings Ltd v Hunt

[2018] EWHC 463 (Ch) (Norris J) 14 March 2018

Contributories – inspection of proofs

The sole shareholder of the company, whose shares were fully paid-up, applied to examine all of the proofs which had been lodged in the company's liquidation pursuant to rule 4.79 of the Insolvency Rules 1986. The liquidator was suspicious of the shareholder's motives in making the request and refused, stating that the proofs were confidential. He also argued that a shareholder whose shares were fully paid-up was not a "contributory" within rule 4.79(b).

The Court held as follows. (1) A fully paid-up shareholder is a contributory for the purposes of rule 4.79(b). This is clear from a long line of authorities, starting with *Re Anglesea Colliery Co* (1866) LR 2 Eq 379. Authorities pointing to the contrary conclusion, such as *Re Marlborough Club Co (Contributories)* (1867-68) LR 5 Eq 365 and *Re Aidall Ltd* [1933] Ch 323 should not be followed. Accordingly, the shareholder had standing to apply for the inspection of proofs. (2) Nevertheless, the shareholder should not be permitted to inspect the proofs. Relief would only be granted if the shareholder had a real interest in the relief sought (*Deloitte & Touche AG v Johnson* [1999] 1 WLR 1605 applied), and no real interest had been demonstrated. In particular, the evidence did not establish that the liquidation would be likely to yield a surplus which could be distributed to the shareholder. ■

Dunbar Assets plc v Davey

[2018] EWHC 766 (Ch) (Snowden J)
11 April 2018

Administrators' powers and duties – valuation

A bank (Dunbar) had advanced lending to a company (Angel House Developments Limited) for the purposes of funding a development site in Canary Wharf, which had potential for development from an office block into a residential tower. The loan was guaranteed in part by the sole shareholder and director, Ms Davey. Events of default occurred under the loan, and the bank appointed Administrators pursuant to its security. The Administrators subsequently sold the property.

Dunbar brought a claim against Ms Davey for the recovery of its enforcement costs under the guarantee. Ms Davey counterclaimed against Dunbar and against the Administrators. It was alleged that the Administrators had breached their duties by conducting a "light touch" administration in which they failed to exercise independent judgment and instead followed the instructions of Dunbar, and that they sold the property at an undervalue using unsuitable agents whom Dunbar had selected. Against Dunbar it was alleged that it interfered in the administration so as to make the Administrators its agents and was therefore liable for their breaches, that it had procured breaches of duty by the Administrators and that it had conspired with the agents to cause loss by unlawful means, namely a sale of the property at an undervalue.

The claims were dismissed in their entirety. The judgment establishes the following points:

Objective of administration: In deciding how to run the administration, an administrator is required to have regard to the interests of all of the company's creditors, and he can only limit the objective to seeking to realise assets to repay the secured creditor if he thinks that it is not reasonably practicable to achieve anything else. Even then, he must not unnecessarily harm the interests of the creditors as a whole.

However, an administrator's decision as to which objective to pursue will only be open to challenge if it is one which is irrational or not taken in good faith and an administrator will be permitted to exercise his commercial judgement in deciding which objective(s) to pursue.

This standard of review does not however apply to the *methods* by which an administrator then carries out the objectives.

Use of agents: In relation to the use of agents, there is no hard and fast legal rule requiring a selection process to be held, or prohibiting the appointment by administrators of agents who have been recommended by the secured creditor(s). The essential question in all cases will be whether the agents to be appointed are competent and able to discharge their fiduciary duties to the company.

An administrator will not be liable for breach of duty if he reasonably relies on advice which appears to be competent, even if that advice turns out to be wrong.

Realising secured property: In relation to the pursuit of the third objective of administration, administrators owe the usual duty to take reasonable steps to obtain a proper price for the property being disposed. However, they also owe a duty to avoid unnecessary harm to the general body of creditors. This imposes a more stringent duty including as to the timing of realisations.

Accordingly, an administrator cannot simply decide to sell the company's assets at a time to suit the interests of the secured creditor, if by doing so he causes harm to the unsecured creditors which is not necessary for the protection of the interests of the secured creditor. The interests of the unsecured creditors therefore receive enhanced protection in an administration compared with a receivership.

In relation to the marketing of property, there is no invariable requirement that the property must be advertised for sale publicly, and what is appropriate will depend on the facts of each case.

Generally: an administrator must exercise independent judgment. He must not simply allow another person to dictate to him how he should exercise his powers as administrator. Nor should he unquestioningly act in accordance with the wishes of another. This does not mean that an administrator cannot take account of the wishes of the relevant creditor(s) whose interests are likely to be affected by the decisions he takes. An administrator is entirely at liberty to consult with those creditors to ascertain their views, and in many cases it will be entirely sensible that he should do so. He is not, however, bound to follow their wishes.

Liability of secured creditors: In principle a secured creditor may become liable for breaches of duty by an administrator, at least where the administrator is selling property subject to a fixed charge, pursuant to the line of authority providing for the liability of a mortgagee for interfering with a receiver. However, the point remains open in relation to liability for other steps in an administration or sales of property subject to a floating rather than fixed charge. The level of interference required in order for liability to arise requires something going beyond the legitimate involvement that a secured creditor could expect to have in the administration process by reason of his legal status and rights. ■

[Tom Smith QC]

Re OJSC International Bank of Azerbaijan

[2018] EWHC 792 (Ch) (Hildyard J) 12 April 2018

Cross-Border Insolvency Regulations 2006 – lifting the stay

This judgment is the latest episode in the litigation between the International Bank of Azerbaijan and two "hold-out" creditors who are seeking to enforce their claims in England. The Bank promulgated a restructuring plan under the law of Azerbaijan, which was approved by a substantial majority of its creditors. The plan provided for the release of the Bank's financial liabilities, some of which were governed by English law. Two creditors (Sberbank and Franklin Templeton) contended that their English law debts had not been discharged (relying on the rule in *Gibbs v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399), and sought to enforce their claims in England.

CASE DIGESTS

Corporate Insolvency

The Bank sought to resist enforcement by relying on the Cross-Border Insolvency Regulations 2006 (the "CBIR"), which implement the UNCITRAL Model Law on Cross-Border Insolvency. On 5 May 2017, the Bank appointed one of its officers to act as its Foreign Representative, who applied to the English Court for the recognition of the Bank's restructuring proceeding in Azerbaijan. On 6 June 2017, Mr Justice Barling made an order recognising the Bank's restructuring proceeding as a foreign main proceeding under the CBIR, and imposing a moratorium on actions against the Bank or its property for the duration of the restructuring proceeding (the "Recognition Order"). On 15 November 2017, the Foreign Representative applied for a permanent moratorium under the CBIR so as to prevent Sberbank and Franklin Templeton from taking action against the Bank or its property after the termination of the restructuring proceeding (the "Moratorium Continuation Application"). On 18 January 2018, Mr Justice Hildyard held that the Moratorium Continuation Application should be dismissed on the basis that it sought to achieve an impermissible form of substantive relief which was contrary to the rule in *Gibbs*: see [2018] EWHC 59 (Ch), summarised in the previous edition of the Digest. An appeal from that decision is due to be heard in October.

Following the January judgment, Franklin Templeton and Sberbank applied to lift the existing moratorium under the Recognition Order. Mr Justice Hildyard granted those applications, and held as follows: (1) Given that the Bank's restructuring plan had already been approved in Azerbaijan (such that the restructuring proceeding was, in substance, complete), there was no basis or justification for continuing the moratorium under the CBIR. The moratorium should therefore be lifted, and Franklin Templeton and Sberbank should be given permission to enforce their claims. (2) However, it was important to ensure that the Bank's appeal against the dismissal of the Moratorium Continuation Application would not be rendered nugatory. In those circumstances, a stay pending appeal should be imposed – in effect, "staying the lifting of the stay". Sberbank and Franklin Templeton would only be permitted to issue proceedings against the Bank upon a satisfactory undertaking that would prevent any judgments or arbitral awards being obtained against the Bank prior to the final determination of the appeal. ■

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





Re Lehman Brothers International (Europe)

[2018] EWHC 924 (Ch) (Hildyard J)

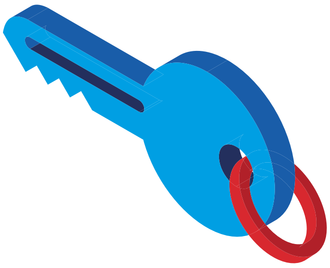
Waterfall proceedings – costs

This judgment deals with a question of costs in relation to the "Waterfall IIC" proceedings in the LBIE administration. Waterfall IIC concerned the construction and effect of various standardised pre-administration agreements (and especially two forms of ISDA Master Agreements) on creditors' entitlement to statutory interest: see *Lomas & Ors v Burlington Loan Management Ltd & Ors* [2016] EWHC 2417 (Ch).

In the Waterfall IIC proceedings, the arguments of one particular respondent ("Wentworth") prevailed on most of the issues. Wentworth contended that it should be entitled to its costs under the usual rule that a successful party is entitled to its costs from the unsuccessful party. Wentworth opposed the applications made by the Senior Creditor Group ("SCG") and Goldman Sachs ("GSI") for their costs to be paid out of the LBIE administration estate, contending that the proceedings were no different in substance from ordinary adversarial litigation. The SCG and GSI, on the other hand, contended that it would be unfair to characterise the process instigated by the Joint Administrators as adversarial litigation. They submitted that the issues in the Waterfall IIC proceedings, like the issues in the earlier proceedings before David Richards J (as he then was) in *Waterfall IIA* [2015] EWHC 2269 (Ch) and *Waterfall IIB* [2015] EWHC 2270 (Ch), should properly be characterised as necessarily brought for resolution by the court to enable the Joint Administrators to proceed further with the administration of the estate, and as on that footing being within a category of cases where, as a general proposition, the costs of all respondents should be paid as expenses of the administration of LBIE.

The Court held as follows: (1) The general rule that costs should follow the event was a starting point from which the court may depart, having regard to all the relevant circumstances. The court had been disposed to depart from that general principle and allow costs as an expense in the administration process where the proceedings had in effect been sponsored by the estate's administrator and the parties' involvement had been by way of contribution to a judicial inquiry. The question was ultimately one of discretion, the exercise of which should be guided by the characterisation of the proceedings, *Kostic v Chaplin* [2008] 2 Costs LR 271 applied. (2) Applying that approach, it was necessary to consider each set of issues in the Waterfall IIC proceedings and to determine, in relation to that set of issues, how the costs burden should be distributed between the parties. (3) The issues relating to the effect of the ISDA Master Agreements were necessary for the distribution of the surplus in LBIE's estate. Accordingly, in the interests of fairness, the costs of the SCG and GSI would be paid out of the estate, subject to the proviso that only one set of costs was allowed for the SCG, even though its members were represented by a number of different solicitors. (4) By contrast, the issues relating to the effect of the German Master Agreements (the "GMA issues") were to be characterised as essentially a commercial claim by the SCG for its own benefit, and contrary to the interests of the estate. Therefore, that part of the claim should be characterised as adversarial commercial litigation, notwithstanding the form of the application, and the SCG was liable for costs accordingly. ■

[Antony Zacaroli QC (as he then was), Robin Dicker QC, David Allison QC, Daniel Bayfield QC, Adam Al-Attar, Henry Phillips, Robert Amey]



Property and Trusts

Digested by Andrew Shaw

English & Ors v Keats & Ors

[2018] EWHC 637 (Ch) (HHJ Hacon sitting as a Deputy High Court Judge) 28 March 2018

Deeds of appointment – proprietary estoppel

Alan Thunder and his wife June each made three settlements of shares they owned in Thunder Investments Limited. The beneficiaries under the settlements included their three children (together with their children and remoter issue) and a number of charities. Each of the settlements made one of Alan and June's children a prime beneficiary. Subsequently, it was decided that to obtain perceived tax advantages, each of Alan and June's three children would be given an interest in possession under the settlement in which he or she was a prime beneficiary. This change was purportedly made by the execution of six deeds of appointment. However each deed only was only signed by three of the four trustees of the settlements; neither Alan nor June signed the deeds of appointment of the settlements of which they were trustees.

The errors in the deeds of appointment relating to the three settlements of which Alan was a trustee were identified and rectified. However, June died before the deeds of appointment relating to her settlements could be corrected. Alan and June's three children consequently brought claims against the trustees of June's settlements alleging that there was a proprietary estoppel binding the trustees to act consistently with the valid execution of the relevant deeds of appointment or, alternatively, that the relevant deeds of appointment should be treated as having been executed by June on the principal that equity will remedy the defective exercise of a power of appointment.

In support of their primary case, the claimants argued that a proprietary estoppel could apply to a representation made by trustees to beneficiaries and that in the present case the claimants had been allowed by the trustees to proceed on the basis that the deeds of appointment were effective. In reliance on this representation, the claimant maintained that they paid tax on their income from the settlements, which amounted to a detriment. Alternatively, the claimants argued that they were subject to a contingent detriment because HMRC might require back payment of tax from the settlements and money would have to be paid by the claimants to advisers to sort the matter out.

HHJ Hacon held that there was no proprietary estoppel; while the fact that the trustees had proceeded on the basis that the deeds of appointment were valid and had allowed the claimants to proceed on the same basis could amount to a representation, the claimants had suffered no detriment. The deeds of appointment had been executed in order to improve their net financial position so the fact that the claimants had been caused to pay tax themselves was not indicative of a net financial detriment. Leaving aside the question of whether an estoppel could arise by reason of a contingent or unconscious detriment suffered, HHJ Hacon held that there was insufficient evidence to establish any such detriment. Further, the effect of the estoppel would be to bind persons to whom no representation was made, including HMRC, a stranger to the settlements. This was impermissible.

The claimants' alternative argument was that the trustees had the power to execute the deeds of appointment but the execution was defective. Accordingly, the court could rectify the defective execution under an equitable doctrine that dated back to at least *Tollet v Tollet* (1728) 2 Peere Williams 489. HHJ Hacon held that the four trustees of the relevant settlements had intended to exercise their power to amend the settlements but the exercise of the power was defective because the deeds of appointment had not been signed by June Thunder and this defect could be corrected by the court. A potential difficulty arose because, on the authorities, the power to rectify the defect could only be exercised in favour of certain classes of beneficiary. While children were included in those classes, the claimants were not the children of two of the trustees. However, the judge held that two of the trustees were the claimants' parents and the defect was associated with June Thunder's failure to sign the deed of appointment, so there was no bar to the relief sought. ■

Risky Business:

An examination of some of the difficulties that pre-pack administrations present to insolvency practitioners

In the recent case of Ve Vegas Investors IV LLC v Shinners [2018] EWHC 186 (Ch), Mr Registrar Jones considered an application under paragraph 88 of Schedule B1 to the Insolvency Act 1986 (**'Schedule B1'**) to remove the administrators of Ve Interactive Limited (the **'Company'**). The application was made by a number of creditors who were concerned that the pre-packaged sale of the Company's business and assets to an entity with links to the Company's management was at an

ANDREW SHAW

undervalue

In granting the application, Mr Registrar Jones held that these concerns gave rise to a serious issue requiring investigation. As the incumbent administrators had advised on the sale (prior to their appointment) and subsequently implemented it, they had a conflict of interest and could not carry out the necessary investigations.

Pre-packaged sales ('pre-packs') whereby an administrator sells the business and assets of a company in administration without the approval (or even knowledge) of the company's creditors have a mixed reputation. Although pre-packs undoubtedly offer a number of commercial advantages as a restructuring process, including preservation of the value of the company's business and, consequently, of employees' jobs, the absence of creditor involvement in the sales process is controversial, particularly where the sale is to a connected party. This article considers the development of the oversight of pre-packs, the duties placed on insolvency practitioners engaged in relation to a pre-pack, the risks posed by such an engagement and how those risks might be mitigated.

Legal basis

Even when administration was a nascent insolvency process, it was recognised that an administrator could sell the business and assets of the company in administration before the creditors' meeting. It was initially thought, though, that administrators should not carry out any sale that could frustrate consideration of their proposals by creditors without directions from the court. However, in Re T & D Industries plc [2000] 1 WLR 646, Neuberger J held that an administrator was able to exercise all of the statutory powers set out at section 14 of the Insolvency Act 1986, including the power to sell the company's business and assets, without the need for prior approval of the administrator's proposals by creditors or the sanction of the court.

The same question was considered by Lawrence Collins J in In re Transbus International [2004] 1 WLR 2654, which was heard after the reforms to the administration regime effected by the Enterprise Act 2002 had come into force. Applying *Re T & D Industries*, he held that an administrator could sell the business and assets of a company before his proposals had been approved by creditors and without any need for directions from the court.

It has thus been clear for some time that administrators have been able to effect pre-packs and that the entry into force of the Enterprise Act 2002 did not affect this power. However, this statute did introduce a number of reforms which reduced the involvement of both creditors and the court in administrations (and, concomitantly, the scrutiny of the administrator's acts): for example, the introduction of out-of-court appointments and the ability of administrators to dispense with a creditors' meeting to consider their proposals under paragraph 52 of Schedule B1. Lawrence Collins J referred to these changes in *In re Transbus International:*

"There will be many cases where the administrators are justified in not laying any proposals before a meeting of creditors. This is so where they conclude that the unsecured creditors are either likely to be paid in full, or to receive no payment, or where neither of the first two objectives for the administration can be achieved... The Enterprise Act 2002 reflects a conscious policy to reduce the involvement of the court in administrations, where possible."

Criticisms

An oft-cited advantage of a pre-pack is that the value of the company's business and assets is not affected by the stigma of insolvency because their sale occurs on the appointment of an administrator. This should enable the administrator to realise a higher value for the company's assets and can also preserve the jobs of the company's employees, who are often transferred to the purchasing entity.

Notwithstanding these potential benefits, pre-packs have proved controversial, with much of the controversy stemming from the lack of transparency involved. It is understandable that a creditor might react adversely on discovering that not only is the debtor company insolvent but that its business and assets have already been sold. Compounding such dissatisfaction is the fact that the majority of the buyers in pre-packs are connected in some way to the company[1]; very often they are the insolvent company's management.

This gave rise to concerns that pre-packs facilitated 'phoenixism', whereby unscrupulous directors effectively resurrect insolvent companies by appropriating the business and assets via a sale and leaving creditors to seek what they can from an insolvent shell. If any such sale were at the proper value, then there would be no detriment to creditors; however, the absence of transparency in pre-packs to connected parties frequently leads to suspicions that such sales are at an undervalue.

SIP 16

To counter these concerns, the Joint Insolvency Committee commissioned and adopted Statement of Insolvency Practice 16 ('SIP 16'), which was first promulgated in January 2009.[2] SIP 16 gives directions to insolvency practitioners as to the conduct of work for which they are engaged prior to their appointment and requires administrators who have effected a pre-pack to provide detailed information to creditors at the earliest opportunity (which is usually when the creditors are notified of the administration) in the form of a SIP 16 statement to enable the creditors to be satisfied that the administrator has had due regard for their interests.[3] SIP 16 was also adopted as a benchmark by the courts: in Re Hellas Telecommunications (Luxembourg) *II SCA* [2010] BCC 295, Lewison J held that it was good practice for the same information as would be provided to creditors to be put before the court on an application for an administration order in the context of a pre-pack.[4]

The Graham Review

The introduction of SIP 16 did not eliminate criticism of pre-packs, not least because there was substantial non-compliance with SIP 16 by insolvency practitioners.[5] In its report on the Insolvency Service published on 6 February 2013, the BIS Select Committee recommended that BIS and the Insolvency Service commission research to *"renew the evidential basis for pre-pack administrations."* This research was undertaken by Teresa Graham CBE, who published her report on 30 June 2014 (the 'Graham Review').

The Graham Review concluded that *"the benefits that pre-packaging brings to the UK's insolvency process is worthwhile, however, there should be some major improvements to how they are administered."* In particular, pre-packs lacked transparency, there was often insufficient marketing carried out and in many cases of connected party sales, the purchase price often matched the valuation figure *"leading to a suspicion that a purchaser has set a valuation as an indicator of how much it is prepared to pay, rather than the market value of the assets in question."*

> "The Graham Review concluded that *"there should be major improvements"* to how pre-packs are administered"

The Graham Review also identified that pre-packs to connected parties were associated with worse outcomes both for creditors and the purchaser. It made six recommendations:

1) Creation of a 'pre-pack pool' of experienced business people, so that, on a voluntary basis, connected parties can approach a pool member before the sale and disclose details of the deal for the pool member to opine on.
2) The voluntary completion by connected party purchasers of a viability review stating how the purchaser will survive for at least the next six months.
3) The consideration of a redrafted SIP 16 by the Joint Insolvency Committee.
4) All marketing of pre-packs comply with six principles of good marketing and that any deviation from these principles be brought to creditors' attention.
5) SIP16 be amended to the effect that valuations must be carried out by a valuer who holds professional indemnity insurance.
6) The withdrawal of the Insolvency Service from monitoring SIP16 statements and that monitoring be picked up instead by the Recognised Professional Bodies.

The Graham Review also proposed that if the recommended changes did not have the desired impact, then the Government should consider legislation.

Following the Graham Review, a revised SIP 16 was promulgated that included considerably more detailed guidance on marketing the business and assets to be sold and set out more detailed requirements on the content of the SIP 16 statement. In addition, section 129(4) of the Small Business, Enterprise and Employment Act 2015 contains a reserve power for the Secretary of State to make regulations to prohibit connected party sales or to impose requirements or conditions to allow such a sale to proceed.

IP / office-holder duties

As well as the regulatory obligations imposed by SIP 16, insolvency practitioners engaged to act in relation to a pre-pack owe a duty of care to the company to act with reasonable skill and care.

Similarly, administrators also owe the company a duty to exercise reasonable skill and care but in addition are subject to various statutory duties, including a duty to select the purpose of the

administration[6] and a duty to act in the interests of the company's creditors as a whole.[7] As agents of the company,[8] administrators also owe it fiduciary duties and so must act in good faith; must not make a profit out of their position; must not place themselves in a position where their interest and their duty conflict and may not act for their own benefit or the benefit of a third party without the informed consent of the company. In addition, as officers of the court[9] administrators are subject to further duties, including a duty to be entirely candid with the court.

Risks to IPs and office-holders involved in pre-packs

Non-compliance with SIP 16 can lead to insolvency practitioners being reported to their regulatory body, which might levy a fine: between January 2010 and around May 2012, 6 fines were imposed on insolvency practitioners for non-compliance with SIP 16 ranging from £250 to £2,500.[10]

Of far more risk financially (and, arguably, reputationally) is the possibility that the company or its creditors might bring a claim against the administrators in relation to their pre- and post-appointment conduct in relation to the pre-pack. A claim in relation to pre-appointment conduct would need to be made by the company against the insolvency practitioners who advised it (who will usually have been appointed subsequently as administrators). A claim in relation to post-appointment conduct could be brought by the company or, under paragraph 74 of Schedule B1, by members or creditors of the company. If it were established that a breach of duty by an insolvency practitioner or administrator resulted in a pre-pack at an undervalue, their liability could potentially be very substantial indeed.

While incumbent administrators might feel fairly confident that the company will not bring a claim against them, as this would effectively amount to them suing themselves, such confidence would be misplaced. Under paragraph 88 of Schedule B1 the court has the power to remove an administrator. The statutory discretion is very wide and although it will be necessary for an applicant under this provision to show sufficient cause, the grounds relied upon do not necessarily have to include misconduct. It is enough for the applicant to show, for example, that there is a serious issue requiring investigation and that due to an actual or perceived conflict of interest, the incumbent administrator is unable to carry out such an investigation. In the context of a pre-pack, it is easy to see how such a situation could arise because any allegation that the pre-pack was at an undervalue will necessarily impugn the conduct of the insolvency practitioners advising upon it and the administrators who effected it. Indeed, it is notable that the only two reported cases in which applications under paragraph 88 of Schedule B1 were ultimately successful concerned allegations by creditors that a pre-pack was at an undervalue.[11] Once removed, the former administrators are obviously exposed to an action by the company brought at the behest of their successors. In addition, following a successful removal application remuneration drawn by the former administrators might be at risk.

Risk mitigation

The best way for insolvency practitioners and office-holders to avoid liability in relation to pre-packs is for them to take all reasonable steps to ensure that the best possible price is obtained for the company's business and assets. However, this trite statement is, of itself, of little practical use. Insolvency practitioners engaged in relation to pre-packs frequently have to balance the type and duration of any marketing period against that risk that widespread knowledge of the company's situation could destroy the value of the assets being marketed. The insolvency practitioners will therefore be working to tight deadlines and usually with incomplete knowledge of the company's situation. In such circumstances, what steps can reduce the risk of subsequent litigation?

1) Initial assessment of the company's options

When engaged, insolvency practitioners should ensure that they have enough information to be confident that a pre-pack is the best option for the company's creditors. While the engagement might be limited to advising on a pre-pack, if a pre-pack is subsequently effected the insolvency practitioners (as administrators) will have to justify why they have not pursued the primary statutory objective of rescuing the company as a going concern. Indeed, it might be the case that a pre-pack is not in fact a viable option because the timescale within which it would need to be carried out is simply too short.

2) Obtaining enough information to market and value the company

Without robust valuations and a proper marketing exercise, it will be difficult for an administrator to justify the pre-pack price and thus that the pre-pack was in the best interests of the company's creditors. Both valuation and marketing require detailed information about the company which will need to be obtained from the company's management. If this information is unavailable in the time required, then serious consideration

1 According to The Pre-Pack Pool Annual Review 2016 dated March 2017, in the period 1 November 2015 to 31 December 2016, there was a connected party purchaser in 51% of pre-packs. This represents a marked decrease from 2011, when 79% of pre-packs were to connected parties.

2 SIP 16 was subsequently amended with effect from 1 November 2013 and again from 1 November 2015.

3 The current version of SIP 16, in effect from 1 November 2015, requires the SIP 16 statement should contain sufficient information *"such that a reasonable and informed third party would conclude that the pre-packaged sale was appropriate and that the administrator has acted with due regard for the creditors' interests."*

4 However, compliance with SIP 16 alone will not necessarily be sufficient for the Court to make an administration order where a pre-pack is contemplated: *Re UK Steelfixers Ltd* [2012] BCC 751.

5 In its *Report on the Operation of Statement of Insolvency Practice 16 1 January to 31 December 2011*, the Insolvency Service found that in 32% of pre-packs reviewed, insolvency practitioners had not complied with SIP 16 in some way.

6 Paragraph 3 of Schedule B1.

7 Paragraph 3(2) of Schedule B1.

8 Paragraph 69 of Schedule B1.

9 Paragraph 5 of Schedule B1.

10 BIS Select Committee report on the Insolvency Service dated 6 February 2013.

11 *Clydesdale Financial Services v Smailes* [2009] BCC 810 and Ve *Vegas Investors IV LLC v Shinners*. In *Coyne v DRC Distribution Ltd* [2008] BCC 612, which did not concern a pre-pack, the Court of Appeal held that an application under paragraph 88 of Schedule B1 would have succeeded had it not been rendered nugatory by the entry of the company into compulsory liquidation.

FEATURE ARTICLE: AN EXAMINATION OF PRE-PACK ADMINISTRATIONS

> "Insolvency practitioners engaged to advise on or implement pre-packs are vulnerable to claims by disgruntled shareholders and creditors"

should be given as to whether a pre-pack should be pursued.

3) Valuation and marketing

In order to obtain the best price for the company's assets, the administrator will obviously need to know the value of those assets. Valuation by reputable and independent third parties will be of great assistance in reassuring creditors subsequently that the best possible price for the company's business and assets was obtained. While it is a truism that the most accurate valuation of an asset is the price someone is willing to pay for it, this is only true if a proper marketing process has been carried out to allow all interested parties time to assess the value of the company and then bid against each other. Where it is not possible to carry out such a marketing process, serious consideration should be given as to whether a pre-pack will achieve the best outcome for the company's creditors.

4) Connected party purchasers

The most obvious difficulties arise where a potential purchaser is connected to the company and, in particular, where the company's management are connected to the potential purchaser because there is an obvious conflict for the management between assisting the insolvency practitioners in obtaining the best possible price for the company and their desire for the purchaser to buy the business and assets as cheaply as possible There is also an obvious information asymmetry between the connected party and other prospective purchasers, which can hinder the latter in producing competitive bids.

Where there is a prospective connected party purchaser, a key function of the insolvency practitioners will be to ensure that there is a level playing field with other potential purchasers in order that an effective marketing process can be carried out. In particular, insolvency practitioners should avoid a situation where they are negotiating with a connected party before the business and assets have been marketed to other potential purchasers.

5) SIP 16

Full compliance with SIP 16 is not only a regulatory requirement for insolvency practitioners but is also likely to go a considerable way to limiting the risk of future litigation in relation to the pre-pack. However, this will only be so if compliance is with both the substance and spirit of SIP 16. Compliance with SIP 16 should be built into the pre-pack plan from the outset so that plans can be made in advance to mitigate any areas of potential difficulty; for example, where the time available for marketing the assets is short. Attempts to reverse engineer compliance with SIP 16 after the sale has completed are unlikely to survive the scrutiny of the court if proceedings are subsequently brought in relation to the pre-pack.

6) Responding to a challenge to the pre-pack

If allegations are made by aggrieved shareholders or creditors in relation to a pre-pack, administrators should resist the urge aggressively to defend the pre-pack on account of their involvement in it. Rather, the administrators should consider dispassionately whether the allegations raise any serious issues that require investigation and then decide how such investigation should be carried out. For example, if the allegations concern the administrators' conduct, either pre- or post-appointment, then it might be appropriate for a conflicts administrator to be appointed to investigate this.

Conclusion

Pre-packs remain controversial and various regulatory reforms have not assuaged concerns about them. The Government is undertaking an assessment of the voluntary measures introduced by the Graham Review. If these have not had the desired impact, it might well be that statutory regulation is introduced under the reserve power in the Small Business, Enterprise and Employment Act 2015.

Insolvency practitioners engaged to advise on and (as administrators) implement pre-packs are vulnerable to claims by disgruntled shareholders and creditors. In order to avoid such claims, insolvency practitioners should satisfy themselves that the pre-pack is genuinely in the best interests of the company and its creditors before implementing it. ■

Barry Isaacs QC and Andrew Shaw acted for the applicant creditors in Ve Vegas Investors IV LLC v Shinners [2018] EWHC 186 (Ch)

10% discount

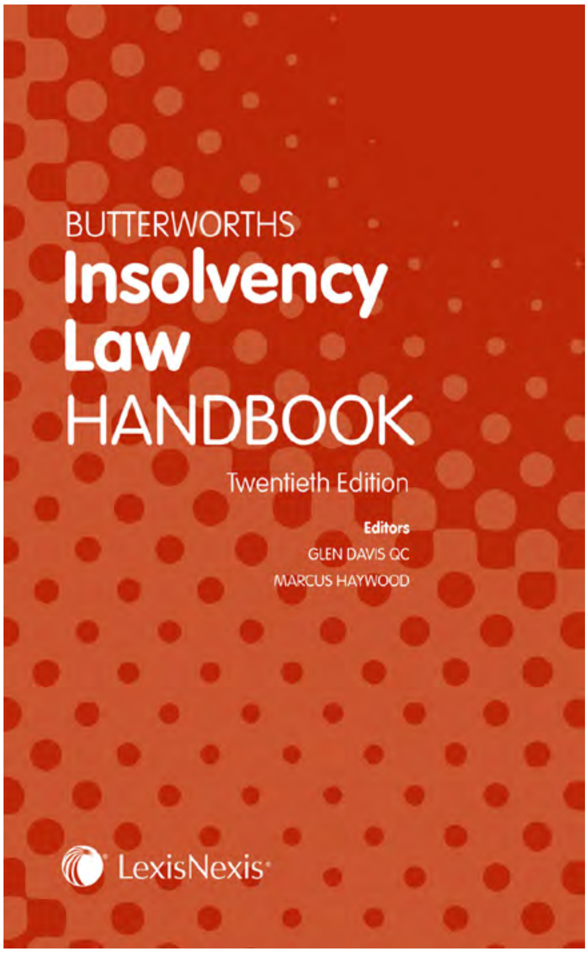
Butterworths Insolvency Law Handbook

Twentieth Edition Edited by Glen Davis QC and Marcus Haywood

Butterworths Insolvency Law Handbook is the most comprehensive single collection of statutory source material and practice directions relating to insolvency law in England, Wales and Scotland. It is the essential reference source for lawyers, accountants, insolvency practitioners, regulators and students.

Why Butterworths Insolvency Law Handbook?

- Have it all covered with the most important statutes, statutory instruments and European legislation
- Advise clients with confidence as legislation is printed as currently in force with all amendments, repeals and revocations
- Save time with detailed, technical annotations regarding commencement as well as cross-references to other legislation, commencement tables and forms tables
- Work more efficiently with a user-friendly, chronological and industry recognised layout



What's New?

Now in its 20th edition, the Insolvency Law Handbook is fully brought up to date to April 2018 to include all recent amendments and new legislation including:

- Insolvency Amendment (EU 2015/848) Regulations 2017 which contain substantial amendments to the insolvency legislation for England & Wales, and Scotland to make it compatible with the recast European Insolvency Regulation
- Amendments brought about by the Insolvency (Miscellaneous Amendments) Regulations 2017 to, amongst other things, the Limited Liability Partnerships Regulations 2001, the Insolvent Partnerships Order 1994, and the Administration of Insolvent Estates of Deceased Persons Order 1986, in order to bring them into line with the insolvency procedures applicable to other entities
- The new Insolvency Proceedings Practice Direction 2018
- Relevant insolvency related provisions of the Risk Transformation Regulations 2017, which concern Insurance Linked Securities businesses
- The Alteration of Judicial Titles (Registrar in Bankruptcy of the High Court) Order 2018
- Amendments to the Directive of the European Parliament and of the Council 2014/59/EU (establishing a framework for the recovery and resolution of credit institutions and investment firms) made by Directive 2017/2399/EU of 12 December 2017
- Scotland Act 1998 (Insolvency Functions) Order 2018 which devolves certain previously reserved insolvency powers to the Scottish Ministers and a Minister of the Crown

Publication details:

Publication scheduled: May 2018
Formats available:

- Print (paperback): ISBN: 9781474307611 – Price: ~~£159.99~~ £143.99
- Ebook: ISBN: 9781474308236 – Price: ~~£159.99 + VAT~~ £143.99 + VAT
- Print + Ebook: ISBN: Z000050784496 – Price: ~~£200 + VAT~~ £180 + VAT

For more information:

www.lexisnexis.co.uk/insolvency20

orders@lexisnexis.co.uk

0330 161 1234

When placing your order, please quote your unique code 100932

The Future of Law. Since 1818.

LexisNexis® | 200

BHS, Carillion and the Government Consultation on Insolvency and Corporate Governance

Hannah Thornley was appointed as a specialist legal adviser to the Work and Pensions and Business Select Committees for the BHS inquiry in 2016 and for the Carillion inquiry in 2018. Here she reviews what has happened post-BHS, what happened at Carillion and discusses the different areas of insolvency and corporate governance law in the consultation on which the Government seeks the views of different stakeholders by 11 June 2018

HANNAH THORNLEY

Introduction

The failure of BHS in 2016 seemed to catch the nation's collective attention. Therefore the Work and Pensions Select Committee and the Business Innovation and Skills Committee, now the Business, Energy and Industrial Strategy Committee ("the Committees") chose to investigate BHS because the failure encapsulated many of the Committees' ongoing concerns about the regulatory and cultural framework in which business operates, including the ethics of business behaviour, the governance of private companies, the balance of risk and reward, mergers and acquisitions practices, the governance and regulation of workplace pension schemes, and the sustainability of defined benefit pensions.

The collapse of Carillion in January 2018 was unexpected as it simply seemed too big to fail. However, the government were ultimately unprepared to bail it out as it was a private company. At the end, there was so little cash left in the company that none of the insolvency practitioners at the big four accountancy firms were prepared to accept appointments as administrators and the company was put into compulsory liquidation with special managers appointed. Therefore, it will in any event end up costing the taxpayer many millions of pounds.

After the collapse of BHS in 2016 and the collapse of Carillion in 2018 amongst others, the Government has been looking at ways to tighten up the laws which allow the winners in these massive collapses to retain big pay-outs and which leave the losers with worthless shares, claims, jobs or pensions. However, the Government also wishes to retain the competitiveness of the UK market.

After the collapse of Carillion, on 20 March 2018, the Government issued a consultation on insolvency and corporate governance, seeking the views of a number of stakeholders on the proposals, including amongst others, a vast majority of those who read this Digest, such as: insolvency professionals (both legal professionals and insolvency practitioners); business representative bodies; professional bodies and members of the public.

The collapse of BHS

Sir Philip Green owned BHS privately through a holding company within a complex corporate structure for 15 years before he sold it to Dominic Chappell (a former bankrupt) through his company, Retail Acquisitions Limited, for £1 in March 2015, having taken out substantial monies in dividends. The BHS report found that Mr Chappell had very little credibility.

Having been stripped of its assets, BHS then entered into administration on Monday 25 April 2016 leading to the loss of 11,000 jobs and a pension deficit estimated at £571m.

A report on the collapse of BHS was published on 25 July 2016.

The BHS report noted that breach of duty, wrongful trading and disqualification in the public interest may all apply regarding the former and current directors of BHS.

Eventually, Sir Philip Green paid over £363m in cash to help rescue the BHS pension scheme.

On 27 March 2018, the Insolvency Service confirmed the outcome of its investigation into the directors of BHS. A spokesperson for the Insolvency Service said: *"We can confirm the Insolvency Service has written to Dominic Chappell and three other former directors of BHS and connected companies informing them that we intend to bring proceedings to have them disqualified from running or controlling companies for periods up to 15 years. We can also confirm that we have written to Sir Philip Green, also a former director of BHS, informing him that we do not currently intend to bring disqualification proceedings against him. As this matter may now be tested in the Court it is not appropriate to comment further. The intention to bring disqualification proceedings follows an investigation by the Insolvency Service, an executive agency of the Department for Business, Energy and Industrial Strategy. Leading counsel has confirmed all our findings".*

The collapse of Carillion

Carillion was the second largest construction firm in the UK in 2017. It was a public company with a complex group of subsidiaries. This was mainly due to acquisitions of rival companies over the past 10 years or so. However, with those acquisitions came additional pension schemes that were in deficit, to add to the Carillion deficit.

As at the sign off and publication of its March 2016 accounts on 2 March 2017, Carillion appeared to be perfectly healthy. However, it was said by the directors of the company that problems began to arise between March and June 2017 which led to the profit warning in July 2017. On 10 July 2017, Carillion suddenly announced that they would be including a provision for £845m against at least 18 contracts in their interim financial results. The share price fell from 192p on Friday 7 July 2017 to just 57p by Wednesday 12 July 2017 (a 70% fall). The share price never recovered, falling further to 14p by the time the company sought a winding up order. When further interim results were released in September 2017, £200m was added to the provision which

FEATURE ARTICLE: BHS AND CARILLION

completely wiped out the company's equity and left it with net liabilities of £405m.

The company sought to negotiate with the Government for assistance, which was ultimately not forthcoming. Clearly it was not considered *"too big to fail"*. Carillion went into compulsory liquidation on 15 January 2018. The estimated pension deficit at the time of the liquidation was £2.6bn. Debt had also risen from £689m in 2016 to £961m in 2017.

In the evidence sessions before the Committees, MPs were particularly critical of the directors and the auditors of Carillion. A report on the Carillion collapse was published on 16 May 2018.

The Insolvency and Corporate Governance Consultation

As a result of both the BHS and Carillion collapses, the Government has been motivated to suggest ways in which the current law might be improved in order to catch the worst offenders when the big firms go bust.

The government is already working to implement reforms to improve the corporate governance regime in relation to executive pay, strengthening the employee and stakeholder voice in the boardroom, and corporate governance in large privately held businesses.

As noted above, on 20 March 2018, the Department for Business, Energy and Industrial Strategy issued a consultation paper entitled: *"Insolvency and Corporate Governance"*. The aim of the consultation paper is to deliver: *"a strong business environment…by seeking views on new proposals to improve the governance of companies when they are in or approaching insolvency"*. It is recognised that the insolvency regime is an important part of the UK's business regime, but that it must be continually improved.

The consultation looks at:

- Sales of businesses in distress;
- Reversal of value extraction schemes;
- Investigation into the actions of directors of dissolved companies; and
- Strengthening corporate governance in pre-insolvency situations, including:
    - Group structures;
    - Shareholder Responsibilities;
    - Payment of Dividends;
    - Directors' duties and the role of professional advisors; and
    - Protection for company supply chains in the event of insolvency.

Each of these areas in the consultation are reviewed and commented upon in the following paragraphs.

Sales of Businesses in Distress

This section of the consultation seeks views on whether directors of a parent company should be held to account and penalised where the sale of an insolvent subsidiary causes harm to creditors, where this was foreseeable at the time of sale. This section arises as a result of the scenario that occurred in BHS, where Sir Philip Green through his Taveta Group sold BHS (the subsidiary) to Dominic Chappell for £1 through Mr Chappell's vehicle Retail Acquisitions Limited, which had no real funding or capital to rescue or improve the position of BHS and its huge pension deficit. There is currently no requirement for a holding or parent company (or its directors) to do any due diligence regarding the purchaser of a subsidiary. The proposal in this section is that directors of holding companies should be held to account if they conduct a sale which harms the interests of the subsidiary's stakeholders, such as employees or creditors, where that harm could have been reasonably foreseen at the time of the sale and the subsidiary enters administration or liquidation within two years of the completion of the sale. In line with the current law the appropriate penalties might include disqualification and/or personal liability.

> The BEIS consultation paper seeks to deliver *"new proposals to improve the governance of companies when they are in or approaching insolvency"*

Reversal of Value Extraction Schemes

This section of the consultation seeks views on whether new powers should be introduced in addition to those that already exist to undo a transaction, or a series of transactions, which unfairly strips value from a company. The Government wishes to provide ways of undoing transactions which unfairly strip value from an ailing company. The concern is that where an ailing company has been "rescued" by investors, they then extract value to return at least part of their investment quickly and to lessen their potential loss should the company fail. These arrangements could take the form of management fees or excessive interest on loans (as happened with Retail Acquisitions and its failed "rescue" of BHS). The proposal in this section is that alongside the current antecedent transaction powers, new powers might be introduced which allow an office-holder to apply to reverse a transaction or series of transactions which are considered to have unfairly removed value from a company in the approach to insolvency.

Investigation into the Actions of Directors of Dissolved Companies

This section of the consultation explores the Government's proposal to extend existing investigative powers into the conduct of directors to cover directors of dissolved companies. This section is not a reflection of findings relating to BHS or indeed the circumstances of the Carillion collapse. There are a number of ways in which a company can enter into dissolution. There are approximately 400,000 company dissolutions annually. Complaints are regularly received from the public about alleged wrongdoing by directors of companies after they have been dissolved and often in relation to successive company failures. There is also evidence that points to a recurring theme of directors using dissolution to avoid debts, including tax, civil penalties and employment tribunal awards or other judgments. The current legislative framework does not provide for the investigation of the conduct of directors where their company has been dissolved. Also, as there is no office-holder's report in the case of a dissolved company, the trigger for investigation will be complaints from members of the public, a creditor or other government department, or in relation to an existing investigation. The proposal in this section is that the Secretary of State be given the power to: (i) require information to allow investigation of former directors of a dissolved company; (ii) seek disqualification of such directors; (iii) seek orders for financial compensation for creditors; (iv) seek prosecution where there is evidence of criminal conduct.

> "The report found Carillion wanting in respect of its corporate governance and transparency"

Strengthening Corporate Governance in Pre-insolvency Situations

This section of the report in the main reflects the Government's response to the collapse of Carillion.

1. Group structures

It is important that as companies grow, their group structures remain effectively managed and governed. Groups should have clear records regarding identity of directors and ownership of assets. This was found wanting in respect of Carillion. In this section it is proposed that stronger corporate governance and transparency measures are required, such as large companies and their subsidiaries disclosing their corporate governance arrangements.

2. Shareholder Responsibilities

A large corporate failure can give rise to questions about whether shareholders, particularly large institutional shareholders, should have been more alert to the warning signs, more engaged with long term company strategies and done more to challenge boards to take timely remedial action. Although there has been some progress in investor engagement in recent years, recent corporate failures like Carillion demonstrate that institutional investors should be more actively engaged. The proposal in this section is that shareholders should be challenging directors on management and mitigation of risks as well as ensuring executive remuneration policies align the interests of the directors with the interests of the company. An update of the Stewardship Code may assist with strengthening the quality of investor engagement.

3. Payment of Dividends

In this section the appropriateness of payment of dividends in certain situations is considered, especially where a company is approaching insolvency and/or has high debts and a large pension deficit as with Carillion. The law on the payment of dividends is well-established and is set out in the Companies Act 2006 and the relevant accounting rules. However, examples of large companies like Carillion continuing to pay out large dividends in the period immediately before their insolvency raises questions about whether reform is needed. The proposal in this section is that there may need to be changes to the legal, governance and technical framework within which companies determine dividend payments.

4. Directors' Duties and the Role of Professional Advisors

In this section the Government is interested in views on whether some directors are commissioning and using professional advice without a proper awareness of their duties as directors, and in particular the requirement to apply an independent mind.

5. Protection for Company Supply Chains in the Event of Insolvency

Small and medium-sized companies in the supply chain were one of the main losers in relation to the Carillion collapse where 120-day payment terms had often been enforced on those smaller suppliers. In this section views are sought as to whether more should be done to help protect payments to suppliers, particularly smaller firms, in the event of insolvency of a customer and whether there would be any wider consequences of such protection. ■

The consultation can be found on the BEIS section of GOV.UK:
www.gov.uk/government/consultations/insolvency-and-corporate-governance

Is the lawyer's mouth shut forever?

TOBY BROWN

Toby Brown explores whether legal professional privilege subsists upon dissolution of a company and thus whether a lawyer can be compelled to divulge privileged information of a dissolved client

Every lawyer will be aware they must maintain the privilege of their client. Legal professional privilege is not just an esoteric rule – it is a principle that is firmly established in popular knowledge, not least thanks to TV and film from the USA (where it is termed "attorney-client privilege"). The concept has featured many times on the silver screen, arguably the best is the 1993 adaptation of John Grisham's book "The Firm", where Tom Cruise's character must work out how to bring down his mafia-representing law firm without getting disbarred for breaching the privilege of his clients. Fast forward to (the apparently non-Hollywood reality of) April 2018 and President Trump is complaining on Twitter that *"Attorney Client privilege is now a thing of the past"*, following the arrest of his lawyer and the seizure by investigators of apparently privileged material.

Back in England, modern jurisprudence has held that privilege is not just a procedural right to resist compulsory disclosure of information, but it is a fundamental right, and one absolute in nature in that privilege cannot be overridden once established (save through clear legislation). Further, it is the right of the client, rather than something in the gift of the lawyer to waive unilaterally. But absent a waiver by the client, is the lawyer's mouth shut forever regardless of what happens to the client? In particular where the client has died, or (in the case of a company) has been dissolved, does formerly privileged material suddenly become fair game? This was the situation the Upper Tribunal had to consider in late 2017, when a solicitor (represented by the present author) received a witness summons in relation to proceedings before the Upper Tribunal in the matter of Ford v FSA, requiring him to attend and give evidence as to communications between his law firm and its former client, a company which had since been dissolved.

Previous case law

The position in relation to individuals (as opposed to companies) has been clear for over 100 years, following the decision in *Bullivant v Attorney General of Victoria* [1901] AC 196, where the House of Lord held that privilege (there legal advice privilege) was not lost by the death of the client because the executors were the deceased's

Donald Trump speaking at CPAC 2011 in Washington, D.C. *Gage Skidmore*

successors in title. The wider principle is that successors in title can assert privilege, and this may extend beyond a personal right to the situation where the privilege is an incident of a property right, so that the successor in title to the property may be able to assert the privilege: *Crescent Farm (Sidcup) Sports v Sterling Offices* [1972] Ch 553 (a principle we will return to).

Similarly, litigation privilege is not limited – a document privileged from disclosure in one action is privileged from disclosure in a subsequent action in which the document is relevant. The extreme example is *Calcraft v Guest* [1898] 1 QB 759 which concerned documents prepared for the defence of an action for assault in 1787, where the successor in title was entitled to assert the privilege in a related trespass action 110 years later. In that case Lord Lindley MR stated that *"I take it that, as a general rule, one may say once privileged always privileged"*. And thus, the textbooks enjoy quoting the dicta of Buller J from *Wilson v Rastall* (1792) 100 ER 1283 that *"the mouth of [the attorney] is shut for ever"*.

> In 2016-17, some 85 companies were wound up on public interest grounds.

Garvin Trustees

The question of whether privilege subsists upon dissolution of a company appears almost never to have been directly addressed by the courts. The exception is in the Upper Tribunal, where in *Garvin Trustees Ltd v Pensions Regulator* [2015] Pens LR 1 a director of a Northern Irish company which had been dissolved sought directions as to whether he was required to maintain privilege over the company's documents. Judge Timothy Herrington stated that the starting point was that the company itself could not assert any right to privilege as it no longer existed, but that the previous Northern Ireland legislation (the equivalent of s. 1012 of the Companies Act 2006) was *"sufficiently wide to include as bona vacantia vested in the Crown a right to assert legal professional privilege which still persisted at the time of the dissolution of the Company"*. That legislation provided as follows, and is identical to the current s. 1012 (save for the lack of reference to the Duchy of Lancaster and Duke of Cornwall):

> *"When a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property, but not including property held by the company on trust for another person) are deemed to be bona vacantia and (a) accordingly belong to the Crown, and (b) vest and may be dealt with in the same manner as other bona vacantia accruing to the Crown."*

The Crown Solicitor of Northern Ireland had declined to take part in the proceedings. The Judge suggested that the Crown's role was akin to that of a custodian entrusted with assets for safekeeping, save that it is permitted by legislation to dispose of property. However, the response of the Crown indicated that where the right (such as privilege) was not capable of being turned to account, the Crown would neither assert nor waive that right, something the Judge said was consistent with the statutory scheme since the Crown has no power to act on behalf of a company which no longer exists. The Judge therefore concluded that the Crown is not a successor in title in the same way as an executor of a deceased's estate. If any person has an interest in the right being asserted the appropriate course would be to restore the company, albeit the 6-year deadline had passed. The Upper Tribunal therefore concluded that *"the Crown having no interest in asserting the privilege [the director] is under no obligation to maintain the privilege simply because the right has been vested in the Crown"*.

FEATURE ARTICLE: IS THE LAWYER'S MOUTH SHUT FOREVER?

> "The Upper Tribunal decided that the solicitor could not assert privilege and that the witness summons would not be set aside"

Ford v FCA

The issue was considered again by the Upper Tribunal in the case of *Ford v FCA*, when a solicitor challenged a witness summons requiring evidence to be given in relation to a former client which had since been dissolved. In an extemporary and unreported judgment delivered on 18 October 2017, Judge Berner accepted the submission that solicitors have a duty to maintain the privilege on behalf of a former client, but, applying the Tribunal's previous decision in *Garvin* held that *"the duty to maintain confidentiality cannot survive dissolution of the company"*. Whilst the privilege vested in the Crown as *bona vacantia*, the Judge stated that the Tribunal's previous decision made clear that the Crown has no power to act to assert the right. Whilst here the company could still be restored given it was less than 6 years after dissolution, the Judge decided that the mere possibility of restoration did not alter the analysis. Further, there was no suggestion any steps had or would be taken to restore the company. Accordingly, the Upper Tribunal decided that the solicitor could not assert privilege and that the witness summons would not be set aside.

A subsequent application to the Tribunal for permission to appeal to the Court of Appeal was successful. However, the appeal did not progress, becoming academic shortly afterwards when the applicant for the witness summons asked the Tribunal to set aside the summons in particular because of the potential delay and costs of the appeal. The two decisions of the Upper Tribunal, which is a superior court of record, therefore stand and so the arguments remain to be tested another day.

The arguments

As to these arguments, there is logic to the reasoning employed by the Upper Tribunal that the company no longer exists and so cannot itself assert privilege, and nor it appears will the Crown seek to do so. There is also an obvious simplicity and clarity in a conclusion that upon dissolution privilege does not subsist in any enforceable manner. But there are also potential issues with the conclusion of the Tribunal, four of which will now be discussed and which highlight the uncertainty that remains.

First, it might be questioned why there should be a different position for corporate clients as opposed to individuals, given the key policy reason for protecting privilege as a fundamental right is to support access to legal advice and representation. In reality, it is still people who seek legal advice on behalf of a company, and its officers and employees should not be deterred from communicating with the company's lawyer. As Lord Taylor stated in *R v Derby Magistrates' Court* [1995] 1 AC 87 *"….a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus… a fundamental condition on which the administration of justice as a whole rests."* On this basis it might be argued that the importance of the principle means that the law should continue to protect privilege (particularly where the information is still held by lawyers) even though it cannot be asserted by the company nor will be asserted by the Crown. One potential solution to the problem might be for directors to claim joint privilege with the company as in *Ford v FSA* [2011] EWHC 2583 (Admin). However, this is likely to be unusual.

Second, whilst it might be argued that a different rule should exist for individuals because after death there continue to be people (i.e. the executors) in whom the privilege vests and who can assert it, the Upper Tribunal in both cases decided that in principle the right to privilege vests in the Crown as *bona vacantia*. This is on the basis that s. 1012 of the Companies Act 2006 refers not just to the company's property vesting in the Crown but *"all…rights whatsoever vested in…. the company"*. Whether and to what extent this provision does indeed vest the right to privilege in the Crown (or the Duchy of Lancaster or Duke of Cornwall) remains to be tested in future cases. One argument may be that privilege only vests where it is incidental to specific property that passes to the Crown i.e. in accordance with *Crescent Farm*, whilst an alternative position might simply be that all privilege is extinguished upon dissolution. The Tribunal drew a distinction based on an analysis that the Crown's role was not to assert or waive privilege either on its own behalf or on behalf of the company. However, it is conceivable in other cases the Crown might (unusually) wish to assert privilege, for example because valuable property has become its property as *bona vacantia* and the Crown becomes successor to the rights of privilege relevant to that property.

Third, unlike the death of an individual (which on current science is permanent), a dissolved company may potentially be restored to the register by the court, the general effect of which is that *"the company is deemed to have continued in existence as if it had not been dissolved"* (s. 1032, Companies Act 2006). This could occur within 6 years of dissolution (or at any time for personal injury claims). Thus if indeed privilege has vested in the Crown as *bona vacantia,* the right should revest in the company upon restoration (or if instead privilege was extinguished upon dissolution, it would presumably be revived).

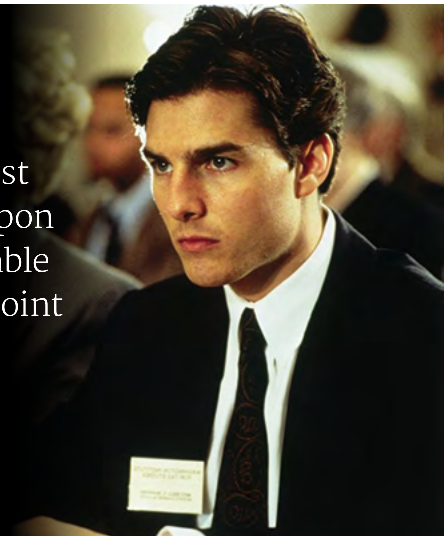
Potentially *bona vacantia* property may have been sold by the Crown to a third party who may claim that they succeeded to the privilege incidental to that property under the *Crescent Farm* principle. A further issue is that even if the privilege did revest in the company, during the period following dissolution material may have been disclosed to third parties or made public and so have lost its essential confidential nature. It seems unlikely that a claim would be brought against the company's lawyer for breach of duty if they divulged information during the intervening period (though potentially the court could assist the lawyer under s. 1032(3) which provides that *"The court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register.")*

Fourth, where lawyers retain privileged information (in documents or in memory), they have a positive duty to assert the former client's privilege, irrespective of whether the client has any interest in asserting privilege. So held Blackburne J in *Nationwide Anglia Building Society v Various Solicitors* [1999] PNLR 52, albeit not in the context of a dissolved client *("…it is the lawyer's duty to claim the privilege on behalf of the client, or former client, whose privilege it is, at any rate where it is at least arguable that the privilege exists").* It might prove detrimental to the standing of the profession if a lawyer's lips were suddenly loosened upon their former client being dissolved. However, the answer may require a more careful distinction between a duty to protect privilege as opposed to a duty of confidence, and a distinction between a legally enforceable obligation as compared to a professional obligation sanctionable only by the regulators. Thus the true position based on *Garvin* may be that, following dissolution, lawyers continue to have a professional obligation of confidence and so their mouth will ordinarily be "shut forever", but since the client's right to assert privilege can no longer be asserted, the court may order a lawyer to divulge the information.

Subsequent consideration of *Garvin*

These are some of the issues with the Upper Tribunal's two judgments in *Garvin* and *Ford,* which decisions appear to have received little attention. There is sparse commentary relating to the reported decision in *Garvin*. The

"Whether privilege can subsist upon dissolution depends upon the material still being capable of being privileged at that point"



Tom Cruise, *The Firm* © Paramount HE

commentary by *Matthews and Malek on Disclosure* 5th Ed suggests that *"Presumably, in the absence of any other relevant transfer, the Crown will succeed to the rights of privilege relating to the property of a dissolved company as bona vacantia, although subject to a revesting in the company if it is revived"* and cites the *Garvin* decision in a footnote for the proposition *"What the Crown may or will do with the privilege is quite another matter."*

The only judgment to cite *Garvin* is the first instance decision in Shlosberg v Avonwick Holdings Ltd [2016] EWHC 1001 (Ch) (a case in which Tom Smith QC and Henry Phillips appeared). Arnold J referred to the decision in *Garvin* without criticism, commenting that *"…given that the company had ceased to exist, then its privilege had either to cease to exist or to be transferred to someone else. Furthermore, [the bona vacantia provision] expressly vests not only property, but also 'all . . . rights whatsoever' in the Crown"*. It is noteworthy that Arnold J contrasted the *bona vacantia* legislation to the bankruptcy provisions under the Insolvency Act 1986, where the bankrupt's estate (as defined) vests in the trustee upon appointment but without comparable language vesting *"all the rights"* of the bankrupt in the trustee. The Court of Appeal in [2016] EWCA Civ 1138 dismissed an appeal against Arnold J's decision (though without reference to *Garvin*), holding that the effect of the Insolvency Act 1986 is not to vest privilege in the trustee in bankruptcy (a point which required the clarification provided by *Leeds v Lemos* [2017] EWHC 1826 (Ch), a case in which Felicity Toube QC appeared. The position of a deceased's executor, or potentially of the Crown in relation to a dissolved company, must now be contrasted to that of a trustee in bankruptcy, who is no longer (at least on the first instance decision in *Leeds v Lemos*) to be considered the successor in title to the bankrupt's privilege under the *Crescent Farm* principle.

Concluding thoughts

Before completing this discussion, it should be remembered that whether privilege can subsist upon dissolution (or for that matter death) depends upon the material still being capable of being privileged at that point. There are routes through which privilege may be lost in the intervening period, such as through waiver. In relation to a company, a liquidator or administrator has the power to assert or waive privilege during their time in office (and so for practical purposes is the successor in title). A further, albeit unusual route by which privilege may be "lost", is if it is decided that privilege never existed because the communications with the lawyer were in furtherance of a criminal or fraudulent proceeding (the iniquity exception). The equivalent US version of this principle is, according to commentators in the John Grisham-esque drama unfolding in Washington DC, how a judge could have been satisfied to issue the recent warrants for the search and seizure of material held by President Trump's lawyer.

But returning to the topic of this article, the question of whether privilege subsists following dissolution of a corporate client has for now been addressed by the Upper Tribunal. Pending consideration in a future case, the prudent advice for lawyers would be to continue to protect privileged information even after a corporate client has been dissolved, unless and until a court directs that such information must be divulged.

Past Events

Insolvency Lawyers' Association Annual Conference 2018

CHARLOTTE COOKE

Reviewing last year's ILA Conference in the South Square Digest Jeremy Goldring QC questioned what might happen by the time the 2018 Conference came round. Jeremy Corbyn as Prime Minister? Mike Pence as US President? Well, neither of those have come to pass, but there have been lots of developments in the world of insolvency and restructuring.

On one of the hottest April days in recent years, members of the ILA, including a number from South Square, gathered at Mary Ward House for the 2018 Conference to listen to stimulating presentations about those developments, and to catch up with colleagues and friends during coffee breaks in the sunshine.

Richard Levin (Jenner & Block) anchored the conference by sharing his insight into how certain key restructuring issues are addressed in the US by Chapter 11, generating much discussion as to whether and how the US Bankruptcy Code might be used as model for reform in the UK.

Developing issues raised by that debate, Joanne Rumley (Foot Anstey) and Felicity Toube QC (South Square) considered whether the UK should ban ipso facto clauses in executory contracts. A show of hands at the end suggested they succeeded in persuading the audience that, whilst we need to keep an eye on the development of the pari passu and anti-deprivation principles, on balance a flexible regime is to be preferred.

Focusing on the UK, Camilla Lamont (Landmark Chambers) provided an interesting perspective on restructuring leasehold estates and, in particular, the strengths of CVAs in preventing a minority of dissenting creditors disrupting proposed restructuring arrangements that the majority support, and which ultimately seek to preserve value for the collective value of all creditors.

After making the most of the weather enjoying lunch outside, we reconvened to listen to a presentation by sponsors GLAS, following which Neil Golding (Freshfields), Nick Segal (Judge of the Grand Court in the Cayman Islands) and Brendan O'Neill (Goodmans) shared their insights into assisting the court with valuation disputes in restructuring in the UK, the Cayman Islands and in Canada.

Mark Arnold QC (South Square) and I spoke about the coherence of directors' duties in England after *Re Ralls Builders* and the Small Business, Enterprise and Employment Act 2015, hopefully persuading the audience that focusing on loss to the company in the context of wrongful trading deprives the relevant provisions of much of their utility and that there is a case for further reform.

Finally, before the Conference Chair, Lord Justice Newey, brought the day to a close, we were treated to a lively panel session chaired by Sarah Paterson (ILA Vice President) and featuring Ian Johnson (Slaughter and May), Nick Herrod (Maples and Calder), Richard Levin (Jenner & Block) and Sophie Vermeille (Droit et Crossance). For those worried that Brexit didn't feature in the programme, the panel considered recognition of a typical leveraged debt restructuring implemented in the US, England or an offshore jurisdiction and the implications of various post-Brexit scenarios for the analysis.

As always, the varied sessions made for an extremely interesting day and many thanks must, of course, go to the ILA Committee for organising it. And who knows what might happen by the time the 2019 Conference comes round. Jeremy Corbyn as Prime Minister? Mike Pence as US President? We shall have to wait and see. ■

"As always, the varied sessions made for an extremely interesting day"

ROBERT AMEY

“The first INSOL event aimed specifically at more junior practitioners”

Junior G36 Event 2018

Events organised by INSOL International have always attracted eminent, senior practitioners from the world's leading restructuring and law firms. Building on this success, INSOL International, Brown Rudnick LLP and South Square recently held their first event aimed specifically at more junior practitioners from G36 firms, who might not normally attend INSOL events.

Kindly hosted by Brown Rudnick at their London offices on 12 April, the evening began with a presentation from Alex Leicester of private equity firm, Alchemy Partners, on UK and worldwide macroeconomic situation. Then, Brown Rudnick associate Grégoire Hansen chaired a discussion between Alex Leicester, Brown Rudnick associate Sabina Khan, and South Square's Robert Amey, about how commercial and legal considerations might interact in the context of a cross-border restructuring.

The scenario, which contained elements from a number of recent, real cases, concerned a German company which wished to restructure its New York law-governed debt in England, despite the fact that its only connection with the jurisdiction was that one of its creditors was domiciled in England. To complicate matters, disgruntled employees had purchased some of the debt with the intention of blocking the proposed restructuring. The panel discussed commercial and legal strategies for ensuring a successful restructuring and avoiding damage to the operating business in the process, before taking questions from the audience.

The evening concluded with drinks and canapes, giving attendees an opportunity to network with their contemporaries at other G36 firms. ■

GDPR ALERT:

CONTINUE TO RECEIVE YOUR SOUTH SQUARE DIGEST

The General Data Protection Regulation came into force in May this year. We are taking this opportunity to let you know that you will continue to receive the Digest from us, and we will hold your details on our database for this purpose as you are a valued contact of South Square.

However, if at any time you decide you don't wish to receive it, or that you don't want us to hold your contact details, please let us know and will we remove you from our database and mailing list.

If you would like to know more about how we protect the privacy of our clients and other individuals whose personal data we collect, please visit our website to see our Privacy Policy.

Future Events

INSOL Channel Islands One Day Seminar

The INSOL International Channel Islands Seminar will take place on Tuesday 3 July 2018 at the Radisson Blu, St. Aubin's Bay in Saint Helier. South Square is delighted to be sponsoring the networking breakfast.

As always, INSOL has drawn together speakers from onshore and offshore jurisdictions across the globe who will contribute to an informed commentary on the issues that touch and concern the practices of restructuring professionals today and in the future, with an emphasis on offshore issues. This year the sessions will be focused on the common theme of looking to the future of insolvency processes and the environments we will operate in.

South Square's Tom Smith QC will be part of a panel entitled "Locking the stable door before the horse has bolted", looking at the developing role of the provisional liquidator and equitable receiver as a first port of call to guard against asset jeopardy.

We hope to see you there. ■

III 18th Annual Conference, New York

Following the success of the first III to be held in London last year, the 18th Annual International Insolvency Institute's Conference will be held between 23 and 25 September 2018 in New York.

Marking the tenth anniversary of the 2008 financial crisis, this year's Conference activities will focus on Wall Street. The opening reception will be held at the historic Alexander Hamilton US Custom House, current home for the US Bankruptcy Court for the Southern District of New York.

Keynote speakers include Steven Rattner, the 'car czar' of the US during the bail-out of the automobile industry, and Justice Sundaresh Menon, Chief Justice of the Supreme Court of Singapore.

Michael Crystal QC and Mark Phillips QC will be attending. ■

"Keynote speakers will include Steven Rattner and Justice Sundaresh Menon"

Non-members are welcome to attend and registrations can be made at: www.iiiglobal.org/2018conference

News in brief

Not every tale condemns me for a villain

Tony Gardner and Caleb Roberts and Lady Justice Hallett

Richard III has been found 'not guilty' of multiple murders following a West End trial at the Novello Theatre on 29 April 2018. The trial, in support of the Shakespeare Schools Foundation, was presided over by Lady Justice Hallett. Lady Hallett is no stranger to Richard III, having formed part of the High Court Panel in 2014 that decided that the remains of the King (killed at the Battle of Bosworth in 1485 and disinterred from under a car park in Leicester by a team of archaeologists in 2013) should stay in Leicester and not be returned to York.

John Kelsey-Fry QC and Sallie Bennett-Jenkins QC were the barristers for the defence, with Ian Winter QC and Jonathan Laidlaw QC acting for the prosecution. The 1000-strong audience formed the jury, led by Jury Foreman Hugh Dennis.

The prosecution argued that it was the defendant's intention that he would become King after his brother King Edward IV. To achieve this he needed to remove all those who stood in the line of succession after King Edward IV: the defendant's elder brother, Clarence, and the two sons of King Edward IV – the so-called Princes in the Tower. Witnesses called to the stand included Lady Anne, Richard's wife, and his former ally the Duke of Buckingham.

Two professional murderers also took to the stand, claiming that they had acted under a royal warrant. Although no bodies had been found, the murderers (in return for immunity from prosecution) testified that they had committed murderous acts in the name of the King. The defence team argued that there was no evidence that the King had instructed the murderers.

Richard's brother, the Duke of Clarence, who in a dramatic twist survived the alleged attempted drowning in a butt of Malmsey wine, also took the stand. ■

Man threatens to bill wife for 'exceptionally difficult' mother-in-law

In April this year the family law court in Ennis, Co. Clare, heard a case where a woman applied for a safety order against her husband who had threatened to send her a bill for accommodating her "exceptionally difficult" and "disruptive" mother in their home. The 78-year-old woman had stayed with the couple on and off for a number of years but in June of last year settled in permanently.

It was alleged by the husband that the mother-in-law rearranged his socks and shirts in the wardrobe, "ranted" about the television being on late at night and pulled up, then threw away, garden plants which she didn't like.

The man denied he had ever been violent towards his wife and blamed the breakdown of their marriage on financial issues and his "sulking" mother-in-law. The court dismissed the application for the safety order against the husband, but asked him to treat his wife "with the respect she is due". ■

"The mother-in-law rearranged his socks and shirts in the wardrobe, "ranted" about the television being on late at night and pulled up, then threw away, garden plants which she didn't like"

News in brief

Has the rug been pulled out from under Poundland and Carpetright?

In the ongoing spiral of high street decline, Poundworld has become the latest in a string of retailers considering shutting stores. The discount retailer is said to be considering a company voluntary arrangement (CVA) to close up to 110 of its 355 stores, putting 1,500 jobs at risk.

On the flooring front, on 26 April a majority of Carpetright's creditors and landlords backed the retailer's CVA to allow it to close just under a quarter of its stores and to seek rent reductions of up to 50% on a further quarter of its outlets. Chief Executive of Carpetright, Wilf Walsh said: *"Addressing our legacy property issues to reduce our fixed costs to sustainable levels is critical to securing Carpetright's recovery"*. ■

> "The discount retailer is said to be considering a company voluntary arrangement (CVA) to close up to 110 of its 355 stores"

SFO to employ robot lawyer

The Serious Fraud Office (SFO) began using a robot to sift evidence on all new casework in April. Ben Denison, chief technology officer at the SFO said; *"AI technology will help us work smarter, faster and more effectively investigate and prosecute economic crime"*.

The agency claims that the new Axcelerate system will reduce costs and achieve a lower error rate, as well as having speed benefits over the work of human lawyers. The SFO has already been using a pilot robot, able to process more than half-a-million documents a day, to scan for legal professional privilege content in its 4-year investigation into Rolls-Royce. ■

Skype a Justice

Between April and June this year the Supreme Court is running a new "Skype a Justice" scheme with school pupils being given the chance to question the most senior judges in the land over the internet. Children from six schools will be able to put questions to one of the 12 justices of the Supreme Court in sessions lasting 30 minutes.

Lady Hale said: *"School students from across the UK will have the opportunity to chat to us from their classrooms. We hope to reach out to young people far beyond our courtrooms here in London who might otherwise find it difficult to visit us."* ■

Charlotte Cooke returns to full time practice

We are delighted that Charlotte has returned to full-time practice in Chambers following her maternity leave.

To enquire about Charlotte's availability to accept instructions please contact our practice managers either on: 0207 696 9900 or by e-mail to practicemanagers@southsquare.com

"Prince of Darkness" to spearhead courts reform

Tim Parker has been appointed chair of the board of HM Courts & Tribunals Service. Mr Parker was once dubbed "the Prince of Darkness" by the GMB Union after allegedly turning up in his Porsche to sack a group of factory workers. Taking up his new post on 27 April, Parker said *"I am delighted to be joining HMCTS and look forward to spearheading its programme of reform – bringing courts and tribunals into the digital age and ensuring they are providing the best service possible for the public".*

Consultants from Accenture are to help senior judges to draw up a paper ("Judicial Ways of Working: 2022") to explain the benefits of online courts and video-link hearings to their junior colleagues.

Lord Burnett of Maldon, the lord chief justice, said; *"Judges are good at many things, but perhaps not communication of a major reform programme".*

Under those reforms courts are moving to paperless proceedings, with online pleas and hearings, and increased use of video links. The continuing court closures will pay for some of the reforms.

Andrew Walker QC, chairman of the Bar Council, has cautioned that the adoption of technology *"must not be at the expense of justice itself or of the involvement of real justices and human interaction in the determination of those disputes in which this is necessary".* ■

> Judges are good at many things, but perhaps not communication of a major reform programme

Economic storms hit seaside towns

Research by Moore Stephens has found that 7 out of the 10 towns with the largest numbers of people who have become insolvent were beside the sea. The top spot, with 47.5 insolvencies per 10,000 people, goes to Plymouth, compared with the national average of 19.9 insolvencies per 10,000 people. Jeremy Willmont, Moore Stephens head of restructuring and insolvency, said *"Personal debt in many British seaside towns shows no sign of improving … People living in these towns continue to fall into insolvency as the costal economy fails to keep up with the rest of the country".* The economies of British seaside towns have suffered from the decline of shipbuilding, fishing and other traditional industries, allied with the popularity of package holidays overseas. ■

New Small Claims Online Service goes live

In addition to appealing tax decisions and applying for divorce, claims worth up to £10,000 can now be handled online as the latest initiative to modernise the courts system came on stream in April. The new system eliminates the need to complete and post a paper form, or to use the outdated online system launched in 2002.

Justice minister Lucy Frazer, formerly a member at South Square, said: *"We know that using the civil courts has been a daunting prospect for some. This innovative, quick and easy online system will enable people and small businesses to get back the money that is rightly owed to them. This is an excellent example of the work we are doing under our £1bn plan to transform the courts system, allowing people to access justice online and around their busy lives."*

Whilst the Personal Support Unit (a charity which supports people who represent themselves in the civil and family justice system) has welcomed the initiative as being intuitive and avoiding most of the formal legal language of traditional court processes, the Bar Council has counselled caution, saying *'the pilot must be evaluated carefully, and it must not be assumed that lessons learned are necessarily applicable more widely or to more substantial or complex claims'.* ■

SOUTH SQUARE NOTICES

Youngest Crown Court Judge

Barrister Richard Archer has become the youngest crown court judge in recent history at the age of 32. Mr Archer is based at Winckley Square barristers' chambers in Preston, a set that practises mainly criminal law. As a part-time recorder Mr Archer will sit several days a month in the crown court.

News in brief

Some of South Square's team with fellow walkers: Toby Brown, Anna Barlow, Rt Hon Dominic Grieve QC MP, Georgina Peters, Rose Lagram-Taylor and Mr Justice Robin Knowles CBE

London Legal Walk

Members and staff were proud to take part in the London Legal Walk in support of the London Legal Support Trust on Monday 21 May 2018. This is an annual event where thousands of judges, barristers, solicitors, legal staff and students cover one of two 10km routes around London, raising much-needed funds through sponsorship to support free legal advice centres. The money raised enables the centres to offer help to the homeless, housebound, elderly, victims of domestic violence, people trafficking and many more. In 2017 over £800,000 was raised by over 12,000 walkers. Donations for this year are still being counted and can be made through the following website:

www.londonlegalsupporttrust.org.uk

Correction

In the March 2018 issue of the Digest in Simon Mortimore QC's article "The Carlyle Case – The Duty of Loyalty Revisited" the presiding judge in the Carlyle case was incorrectly referred to as Lt-Bailiff, Her Honour Hazel Williamson QC instead of Her Hon, Lt-Bailiff Hazel Marshall QC.
We apologise for the confusion.

Solicitor bankrupts wife over parking ticket

Immigration solicitor Tiki Emezie, who refused to pay a Camden Council parking fine eight years ago, has put his wife on the 'verge of bankruptcy', the Court of Appeal has said, throwing out an attempt to dismiss an eight-year case which has left Diana Loson, wife of Emezie, with a legal bill of over £8000. In *Loson v Stack & Anor*, Lord Justice Patten said he had 'considerable sympathy' for Diana Loson whose predicament he said was 'largely, if not entirely' down to the failure of her husband to pay a parking fine for which he was responsible.

Emezie's failure to pay the fine after an unsuccessful challenge caused Loson's car to be clamped, after which Loson took legal action against the bailiffs responsible and a debt recovery specialist. Loson sought an order stopping them from selling the car and also sought damages but her case was thrown out by District Judge Jackson in the Central London County Court in 2013, ruling that the delay in recovering the vehicle was 'entirely due to the unjustified refusal by Emezie to pay the parking fine.'

Jackson ordered Loson to pay the costs of both defendants as well as the sum of £5,000 on account of those costs by 31 October 2013. Loson unsuccessfully appealed the order but filed a new appeal seeking permission to pay the £8,000 in instalments of £50 per month. The defendants said that even without taking interest into account, it would require 160 months for the debt to be paid at the rate of £50 per month.

Dismissing the appeal, Lord Justice Patten said Loson had rightly been refused permission to pay by instalments. As a result of Emezie's failed attempts to resist payment, he said, 'Ms Loson finds herself on the verge of bankruptcy. But she has no ability to pay nor, on the evidence, any realistic prospect of discharging in the reasonably near future.'

News in brief

Gibson go out of tune

Gibson Brands have filed for bankruptcy protection. The 116-year-old company has provided guitars to legends including Jimmy Page, BB King, Bob Marley and Slash. Chuck Berry was even buried with his treasured Gibson guitar bolted to the inside of his coffin lid. Gibson was founded in 1902 by Orville Gibson who sold mandolins from a workshop in Kalamazoo, Michigan. In 1935 it launched its first electric guitar. After running into financial troubles in 1984, it was forced to shut down its Kalamazoo plant, and Nashville became Gibson's headquarters.

In a Chapter 11 filing in the US Bankruptcy Court in Delaware Gibson Brands estimated its liabilities to be in the range of $100m to $500m, but has lined up $135m of debtor-in-possession financing via a "restructuring support agreement" between its largest shareholders to provide it with enough liquidity to keep operating during the bankruptcy proceedings.

The company said its domestic and international musical instrument business were performing strongly and generating positive cash flow. It has, however, suffered from a costly attempt to diversify into headphones and hi-fi markets through its Gibson Innovations unit, which is being wound down as part of its reorganisation. Regulations implemented in 2017 under the Convention of International Trade in Endangered Species have also slowed the trade in rosewood, a material prized by guitar aficionados. ■

"Gibson Brands estimated its liabilities to be in the range of $100m to $500m"

Stuart Frith becomes new R3 President

Stuart Frith, a partner in Stephenson Harwood's restructuring and insolvency practice, has become the latest President of R3, the Association of Business Recovery Professionals.

In addition to his appointment as a deputy judge in the Insolvency and Companies Court, Stuart is a past president and honorary member of the Insolvency Lawyers Association, and is a member of the general technical committee of R3.

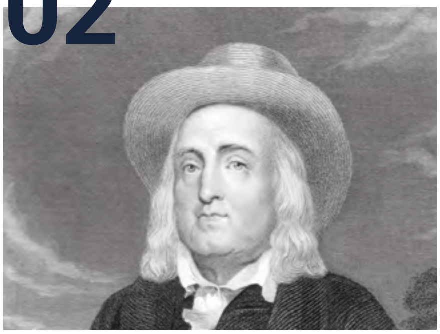
Stuart has extensive experience in both corporate and individual insolvency, advising all types of stakeholders in the insolvency process. During his career, he has been involved in a number of important cases, including, in recent years, Rangers Football Club and Lehman Brothers. ■

SOUTH SQUARE CHALLENGE

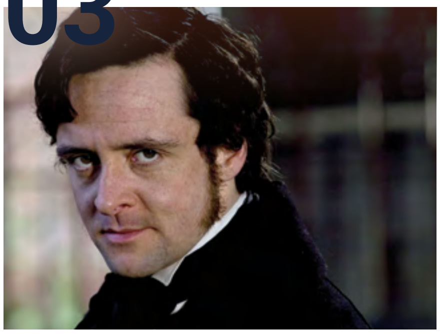
SET BY
Martin Pascoe QC

01

02



03

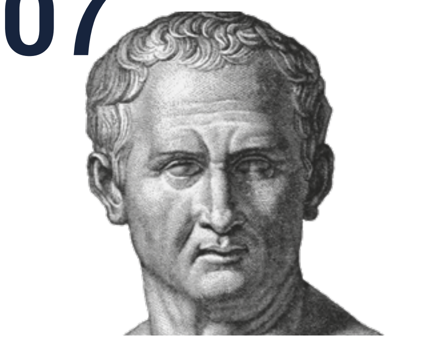


04

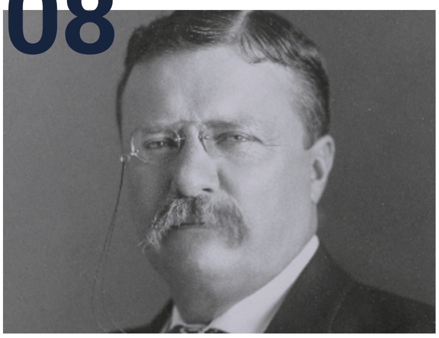
05

06

07

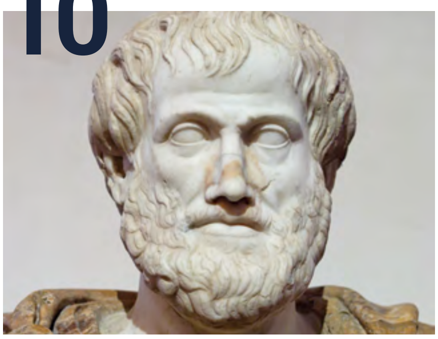


08



09

10



11

Enter the June 2018 South Square Challenge and you could win a magnum of champagne!

Welcome to the June 2018 South Square Challenge. With our March Challenge involving Patron Saints related to the law being our most popular to date, this time around your task is to identify the people (fictitious or otherwise) in the images, and pair them with the correct legal quote. 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.

ENTRY DETAILS

Please send our answers by e-mail to kirstendent@southsquare.com, or by post to Kirsten at the address on the back page. Entries to be in by 27 July 2018 please. Best of luck!

A

"But the mere truth won't do. You must have a lawyer."

B

"Law is the embodiment of the moral sentiment of the people."

C

"A lawyer is a person who writes a 10,000-word document and calls it a 'brief'."

D

"The law is reason free from passion."

E

"Argument weak; speak loudly!"

F

"Laws are the sovereigns of sovereigns."

G

"When you have no basis for an argument, abuse the plaintiff."

H

"The study of law is sublime, and its practice vulgar."

I

"If the laws could speak for themselves, they would complain of the lawyers in the first place."

J

"Where law ends, tyranny begins."

K

"The power of the lawyer is in the uncertainty of the law."

MARCH CHALLENGE

The answers to the March 2018 challenge were:

1. Thomas More (Patron saint of court clerks, judges and lawyers)
2. Saint Ivo of Kermartin (Patron saint of lawyers)
3. Saint Mark (Patron saint of notaries and lawyers)
4. Saint Juan de Capistrano (Patron saint of jurists)
5. Saint Genesius (Patron saint of lawyers, barristers and also clowns)
6. Saint Catherine of Alexandria (Patron saint of jurists, lawyers, argument and rhetoric)
7. Saint Raymond of Penyafort (Patron saint of canon lawyers)
8. Saint Jude (Patron saint of lost and desperate cases)
9. Saint John Chrysostom (Patron saint of oratory)

The connection being that they are all saints to whom lawyers might appeal. The winner, drawn from the wig tin, is Hannah Brown of Herbert Smith Freehills LLP to whom goes our congratulations, a magnum of champagne and a South Square umbrella!

Diary dates

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

12 June 2018

GRR Live Offshore - Cayman

Cayman Islands

3 July 2018

INSOL International Channel Islands One Day Seminar

Radisson Blu Waterfront Hotel, St Helier, Jersey

20 September 2018

South Square/Mourant Ozannes Litigation Conference

London

23-25 September 2018

International Insolvency Institute 18th Annual Conference

New York

7-12 October 2018

International Bar Association Annual Conference 2018

Roma Convention Centre La Nuvola, Rome

4 October 2018

INSOL Europe Annual Congress

Athens

7 November 2018

INSOL International Hong Kong One Day Seminar

Hong Kong

19 November 2018

RISA Conference 2018 in association with South Square

Ritz Carlton, Grand Cayman

South Square also runs a programme of in-house talks and seminars – both in Chambers and on-site 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

SOUTH SQUARE

Commercial barristers

'The set is highly regarded internationally, with barristers regularly appearing in courts around the world.'

CHAMBERS UK

Company/Insolvency set of the year, winner 2017

CHAMBERS BAR AWARDS

Insolvency set of the year, shortlisted 2017

LEGAL 500 BAR AWARDS

Practice areas

Insolvency & Restructuring

Banking & Finance Litigation

Offshore

Commercial Litigation & Arbitration

Company Law

Civil Fraud

Sport

Insurance

Trusts & Property

Mediation
Members of Chambers have frequent experience of mediation and other forms of alternative dispute resolution, and a number have been trained as mediators and accept appointments.

Sectors

- Financial Services
- Banking
- Energy
- Government/ Regulation
- Insurance
- Manufacturing
- Professional Services
- Retail
- Shipping
- Sport
- Aviation
- Technology & Communication

+44 (0)20 7696 9900 | practicemanagers@southsquare.com | www.southsquare.com

"South Square has endless expertise and there is pretty much nothing the barristers there haven't been involved in." **CHAMBERS AND PARTNERS**

Michael Crystal QC
Gabriel Moss QC
Richard Hacker QC
Mark Phillips QC
Robin Dicker QC
William Trower QC
Martin Pascoe QC
Fidelis Oditah QC
David Alexander QC
Glen Davis QC
Barry Isaacs QC
Felicity Toube QC
Mark Arnold QC
Jeremy Goldring QC

David Allison QC
Tom Smith QC
Daniel Bayfield QC
John Briggs
Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn
Richard Fisher
Stephen Robins
Marcus Haywood
Hannah Thornley
William Willson
Georgina Peters
Adam Al-Attar

Henry Phillips
Charlotte Cooke
Alexander Riddiford
Matthew Abraham
Toby Brown
Robert Amey
Andrew Shaw
Ryan Perkins
Riz Mokal
Madeleine Jones
Edoardo Lupi
Rose Lagram-Taylor

3-4 South Square | Gray's Inn | London WC1R 5HP | UK

Tel. +44(0)20 7696 9900.
Fax. +44(0)20 7696 9911. LDE 338 Chancery Lane.
Email. practicemanagers@southsquare.com

www.southsquare.com