SOUTH SQUARE DIGEST

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

MAY 2014

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SOUTH SQUARE DIGEST

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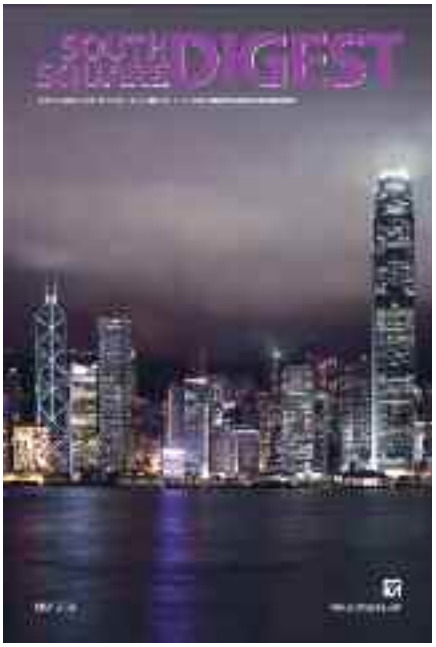

FROM THE EDITOR

DAVID ALEXANDER QC

Uncertainty abounds abroad while the UK powers on...

Welcome to the May edition of the Digest. Well the goings-on in the rest of the world have been fairly extraordinary over the three month period since the last edition. Three things stand out for me, all carrying uncertainty.

First, the Scottish independence movement has really got going with the SNP refusing to accept that any of the Westminster parties are serious when they say with one united voice that if Scotland leaves it cannot keep the Pound. But, nevertheless, the "yes" vote is still creeping up on the "no" vote and there are still more than four months to go to polling day. Maybe Alex Salmond and Nicola Sturgeon will get their way after all and Scotland will leave the UK. A result which, to the horror of the SNP, one senior Labour figure apparently described as being "cataclysmic". For those who wish the Scots to stay, maybe the time has come to stress the positive reasons why Scotland should remain with the rest of the UK rather than telling everyone how bad it will be for them if they leave.

Secondly, Russia has effectively taken over the Crimea in what one can describe as an almost bloodless coup of breath-taking audacity. The rest of the world seems to have been left powerless to do anything about it other than ban a few Russians from shopping in places like Harrods and the United States. Not a good example to set to anyone who has ambitions on their neighbour's territory. But as I am sure Mr Putin will have calculated – what else could the rest of the world really do? And now there is a crisis with East Ukraine.

Thirdly, and most peculiarly, for what seems like an astonishingly long period of time everyone was asking what had happened to the missing Malaysian Airlines plane, MH 370, with there being either no, or inaccurate, information. It seems amazing that it could take so long to find a plane with all the satellites and other equipment available to the world's powers. And that is just the beginning. Why did the plane go missing? At some stage we (and the poor families involved in this tragedy) may get concrete answers. But who knows whether the true story will ever be known.

So what has been happening with the economy in the UK over the last three months? Well it all seems to be roaring on. Insolvencies are down. Inflation is apparently down. Average earnings have edged above inflation. Predictions for growth keep rising with even the IMF sharply increasing its growth forecast for the UK economy for 2014 from 1.9 per cent to 2.4 per cent meaning that the UK is growing faster than any other major European economy. Manufacturing is looking up. Property prices

SALMOND: WILL HE GET HIS WAY?

seem to be increasing in most of the country, with prices apparently rising in London over the last year by something like 20 per cent (interestingly more than 50 per cent of properties in London above £1 million were apparently bought by foreigners). And there seems no sign of any of this "positive" news ending with interest rates remaining at the low levels that they are and with an election now only a year away.

On to the last three months at South Square. Well, it has been rather a busy time. Leaving aside the numerous cases that members of Chambers appeared in both here and abroad, a number of us went to INSOL in Hong Kong (see page 52) which is one of the reasons why we have Hong Kong on the front cover of this edition. An amazing place by day, but perhaps even more amazing by night. Next Chambers held its Spring Reception at the National Portrait Gallery on Wednesday 9 April 2014 (see page 74). Then the very next week David Allison and Tom Smith took silk (see page 76). And finally we are about to have a new website to trumpet which will be launched very shortly (see page 43)

So what other materials do we have for you in this edition of the Digest? Well, as you will see, this edition is a little larger than the last, and contains a number of interesting articles. Hilary Stonefrost writes on bank insolvency regimes, and we have an article on the recent Bernie Ecclestone trial where Tom Smith appeared for the second defendant. Hannah Thornley gives us an update on the Court of Appeal decision in Games Station, being the latest in the Goldacre series of cases. William Needham of Weil Gotshal & Manges joins South Square's Daniel Bayfield in an article on high yield restructurings. Stephen Robins writes on forum conveniens in necessary and proper party cases and we have an article by our Head of Chambers, William Trower QC, on common issues arising out of MF Global and the administration of the estate of Jimmy Savile (deceased). Simon Mortimore QC enlightens us on the Government's April 2014 proposals to enhance corporate transparency. And last, but by no means least, the latest in our series of offshore articles, this time on Hong Kong (by Roxanne Ismail SC) and Singapore (by Jamie Harrison and Adeline Chung of Addleshaw Goddard and David Chan and Tan Su Hui of Shook Lin & Bok).In addition to all of that we of course have the usual case digest section, edited in this edition by Hilary Stonefrost. And we have Gabriel Moss QC's regular Euroland piece, as well as news-in-brief, diary dates and the latest South Square Challenge.

DAVID ALLISON QC (LEFT) AND TOM SMITH QC IN FULL REGALIA ON THE DAY THEY TOOK SILK

All at South Square hope that you enjoy this latest edition of the Digest. And as I always say if you find yourself reading someone else's copy of it and wish to be added to the circulation list please just 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 additions after that. Best wishes to everyone and we hope that you have a great spring and early summer – I have heard that May is predicted to be very hot here in England!

David Alexander QC Editor

ENGLAND, THIS MONTH. IF YOU BELIEVE THE MET OFFICE.

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The bank insolvency regimes that the George Clooney[1] of finance may never need to use...

HILARY STONEFROST looks at special insolvency regimes that were introduced for banks in 2009, shortly after Alistair Darling described the state of the economy as arguably the worst for 60 years

Introduction

Special insolvency regimes for banks were introduced in early 2009, by the Banking Act 2009 (the "Act"), just months after the then Chancellor had said that the UK faced an economic crisis that was "*arguably the worst for 60 years*".[2]

The special insolvency provisions in the Act do not prevent a bank from being put into administration or liquidation under the Insolvency Act 1986 (the "IA 1986"). They do, however, enable the Bank of England, the Financial Conduct Authority (the "FCA") and the Prudential Regulation Authority ("PRA") an option as to whether to bring administration or winding-up proceedings under the IA 1986 or the Act.[3] And, if the insolvency proceedings are commenced under the Act, these authorities are able to control what is done in the early stages of those insolvency proceedings.

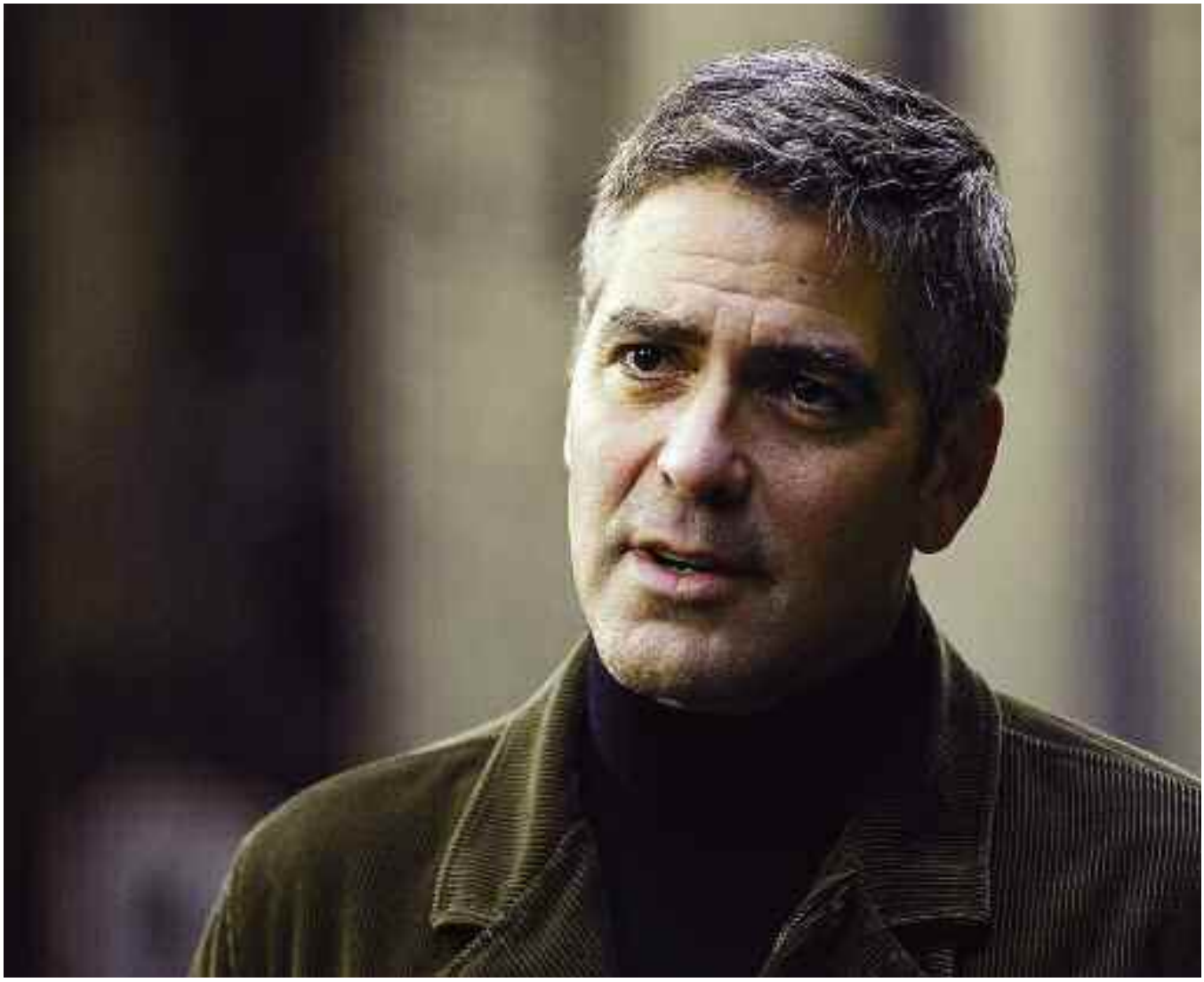
Before 2009 there was no special insolvency regime for banks. All bank insolvencies were governed by the general insolvency legislation, contained for the most part in the IA 1986 and the Insolvency Rules 1986; including the insolvencies of BCCI and Barings.[4]

The failure of Northern Rock did not, at first, prompt consideration of special insolvency procedures for banks.[5] Initially the government's focus was on what has become known as the Special Resolution Regime (SRR). The SRR was introduced by the Banking (Special Provisions) Act 2008 which had a sunset clause after 12 months. This statute was used to deal with the failures of Northern Rock, Bradford & Bingley, Kaupthing and Heritable Bank.

The statute that introduced special insolvency procedures for banks,[6] the Banking Act 2009 (the "Act"), received Royal Assent on 12 February 2009, just before the sun came down on the temporary provisions.

By this time the Bank of England had decided that normal corporate insolvency procedures were not adequate to deal with bank failures for a number of reasons. First, a loss of confidence by depositors often precedes the point where normal corporate insolvency procedures can be used. Second, these standard procedures are not well suited to ensuring continuity of key banking functions, in particular access by depositors to their funds. Third a failure of one bank may cause problems for other financial institutions.[7]

1/. When Mark Carney was appointed as Governor of the Bank of England he was described in the press as the George Clooney of finance and hailed, by some, in the media as the saviour of the UK economy. His tenure as Governor began on 1 July 2013.
2/. At the end of August 2008, Alistair Darling, in an interview in The Guardian, made headlines when he said that the economic times we were facing were "arguably the worst they've been for 60 years."
3/. In 2013 the Act was amended to reflect the reorganisation of bank regulation. The Financial Services Act 2012, which came into force on 1 April 2013, abolished the Financial Services Authority, which was independent from the Bank of England. The regulatory structure now consists of the Bank of England's Financial Policy Committee, the Prudential Regulation Authority and the Financial Conduct Authority. The PRA is part of the Bank of England and is responsible for, among other things, the prudential regulation of banks. The FCA is a separate institution which is responsible for promoting effective competition and ensuring that the markets function properly.
4/. There is a separate regime for investment banks which was covered in an article by Adam Goodison in the February 2014 edition of the digest.
5/.Paragraphs 3.17 and 3.18 of the discussion paper published in October 2007.
6/.The Banking Act 2009 defines a "bank" as a UK institution (i.e. an institution incorporated or formed under the law of any part of the UK) which has permission under Part 4 of the Financial Services and Markets Act to carry on the regulated activity of "accepting deposits". In this article the word "bank" is used to describe such an institution. For what constitutes "accepting deposits" see section 2 of the Banking Act 2009. "Bank" does not include a building society or a credit union.
7/. See, for example the speech given by Andrew Bailey, Executive Director for Banking Services and Chief Cashier, Bank of England, to the ICAEW on 26 November 2009.



CLOONEY, OR CARNEY

The main provisions of the Act came into force on 21 February 2009.[8] Part 2 of the Act introduced the "*Bank Insolvency Procedure*" for the winding up of a failed or failing bank. Part 3 introduced the "*Bank Administration Procedure*" for use where part of a failing bank's business has been transferred. These insolvency procedures have also been applied to building societies by secondary legislation.[9] Credit Unions are not covered by the Act; on 6 April 2014 a special insolvency regime was also introduced for these financial institutions.[10]

There are provisions that apply only to banks in the Act, in addition the provisions of the IA 1986 are modified in the Act for the purpose of bank administration and liquidation. There are also insolvency rules for deposit taking banks and for building societies which are a combination of new rules and modifications to the Insolvency Rules 1986.[11]

Special Resolutions Regime

The departures from and modifications to the general insolvency procedures are intended to reflect the overall objectives of SRR in Part 1 of the Act.

The purpose of the SRR is to enable the authorities to take steps to deal with a failing bank or a bank that is likely to fail before it is insolvent.[12] The idea is that the authorities can trigger the resolution of a bank before the bank reaches the point where the conditions for formal insolvency

8/. The provisions of the Banking Act 2009 that did not come into force on that date came into force during the course of the year.
9/. The Building Societies (Insolvency and Special Administration) Order 2009, SI 2009/805.
10/. A special regime was introduced by The Industrial and Provident Societies and Credit Unions (Arrangements, Reconstructions and Administration) Order 2014 (SI – 2014/299) which came into force on 6 April 2014. This statutory instrument modifies provisions of the IA 1986.
11/. The Bank Insolvency (England and Wales) Rules 2009 (SI 2009/356); The Bank Administration (England and Wales) Rules 2009 (SI 2009/357); The Building Society Special Administration (England and Wales) Rules 2010 (SI 2010/2580); The Building Society Insolvency (England and Wales) Rules 2010 (SI – 2010/2581)
12/. The relevant authorities are the Treasury, the PRA, the FCA and the Bank of England; section 4(3) of the Act.

HILARY STONEFROST

proceedings could or would be met.

The Act gives the PRA considerable discretion as to when to use its SRR powers.[13] The SRR powers can be invoked when the following conditions are satisfied:

(1) The bank is failing or is likely to fail to satisfy the threshold conditions.[14] The principal threshold conditions are, in very broad terms, that the bank must be capable of being effectively supervised, have "*appropriate resources*", be fit and proper and have a suitable business model for the activities being conducted.[15]

(2) Having regard to timing and other relevant circumstances it is not reasonably likely that (ignoring stabilisation powers) action will be taken by or in respect of the bank that will enable it to satisfy the threshold conditions.[16]

The remedies available under the SRR regime include: transfer of the bank or some or all of its business to a private sector purchaser; transfer of some or all of its business to a bridge bank; or, what amounts to, in substance, nationalisation.[17]

Bank administration under the Act

Where the SRR has been used to intervene in the bank's affairs and part of the bank's business has been transferred to a private purchaser or to a bridge bank, the part of the bank that has been left behind is likely to be insolvent (the "residual bank").[18]

An application for a bank administration order under the Act, made by the Bank of England,[19] can be made where a partial property transfer has occurred or is intended using the SRR powers. The Bank of England must also be satisfied that the residual bank is unable to pay its debts or is likely to become unable to pay its debts as a consequence of the transfer.[20]

The first objective of the administration is to ensure that the private purchaser or the bridge bank, as the case may be, is provided with the services and facilities that it needs to continue the business that has been transferred ("Objective 1).[21] The main difference between what the Act describes as "normal" administration procedure (i.e. the procedure under the IA 1986) and bank administration proceedings under the Act is that an administrator appointed under the Act has a statutory objective to support the

13/. A stabilisation power can only be exercised in respect of a bank if the PRA is satisfied that the conditions are met. The conditions are drafted in such a way as to give the PRA flexibility. Before determining whether the second condition is satisfied the PRA must consult the Bank of England, the FCA and the Treasury. Section 7 of the Act.

14/. In this context "threshold conditions" are as defined in sub-section (1) of section 55B of the Financial Services and Markets Act 2000 for which the PRA is treated as responsible under sub-section 2 of that section; see sub-section 7(4A) of the Act.

15/. The "threshold conditions" are set out in Schedule 6 to the FSMA 2000.

16/. The threshold conditions are to be treated by the PRA as met if the PRA is satisfied they are met but for financial assistance provided by the Treasury or the Bank of England (disregarding ordinary market assistance); section 7(4) of the Act.

17/. The circumstances in which the Bank of England may exercise any of the stabilisation powers under Part 1 of the Act are set out in the Act. The Bank of England has to conclude that it is necessary to do so having regard to the public interest in the stability of the financial systems of the United Kingdom; the public confidence in the UK banking system; the protection of depositors or of client assets. The Bank of England must also consult the other authorities before exercising these powers. (Section 8 of the Act) The Treasury has the power to nationalise the bank in certain circumstances. (Sections 9 and 13 of the Act)

18/. Sub-section 136(2)(c) of the Act.

19/. Sections 136(2)(b) and 142 of the Act.

20/. Section 143 of the Act. The documentation required for such an application is set out in the Bank Administration Rules.

21/. Sub-section 138(1) of the Act.

THE BANK OF ENGLAND: WHETHER OBJECTIVE 1 HAS BEEN ACHIEVED IS ENTIRELY A MATTER FOR IT TO DECIDE

transferred business with any infrastructure that has been left behind in the insolvent residual bank.

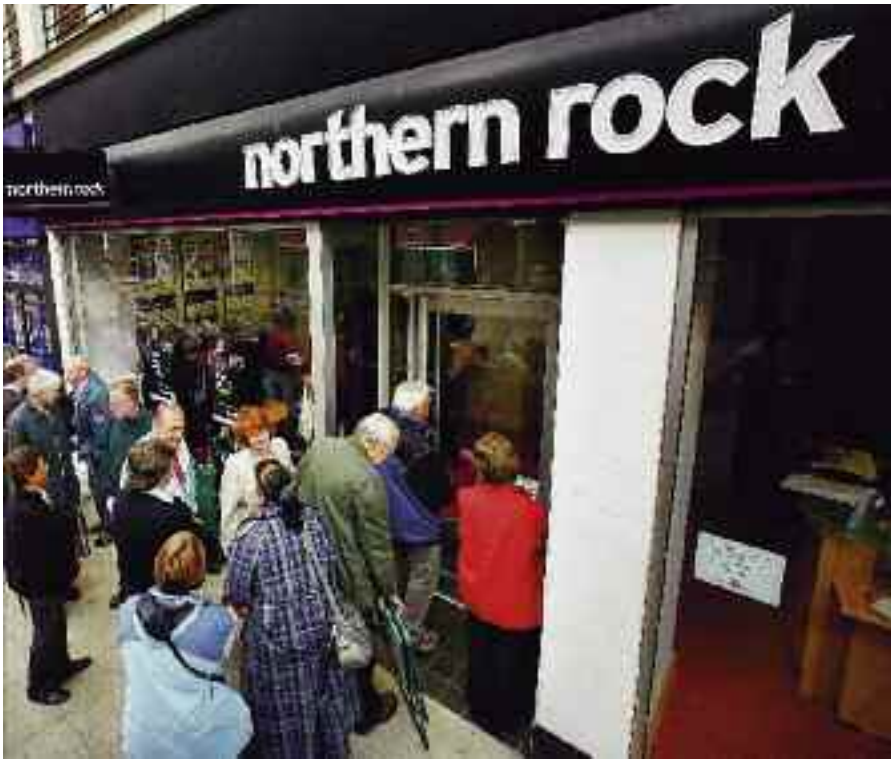
In substance the Bank of England controls this first stage of the administration process. Whether Objective 1 has been achieved is entirely a matter for the Bank of England to decide.[22] While there is a provision that enables the administrator to apply to the court for a direction concerning the achievement of Objective 1, the most the court can do on such an application is to direct that the Bank of England "*consider whether to give notice*" that Objective 1 has been achieved.[23]

Once this first objective has been achieved, the balance of power changes. The objectives became those of a "normal" administration: the rescue of the residual bank as a going concern or to achieve a better result for the residual bank's creditors than would be likely if the bank were wound up without first being in bank administration.[24] At this stage a "normal" creditors' committee can be established.[25]

The Act gives a bank administrator the power to do anything necessary or expedient to for the pursuit of the objectives. The administration provisions in Schedule B1 of the IA 1986 apply subject to the modifications set out in Table 1 of the Act.[26] Most of the modifications of substance restrict

The Banking Act 2009 gives the Bank of England has a high degree of control over the conduct of the first stage of the administration

22/. Sections 137 to 139 of the Act. See also The Bank Administration (Sharing Information) Regulations.
23/. Sub-section 139(2) of the Act.
24/. Sections 136(2)(d) and 140 of the Act; see also Table 1 and the modifications to Schedule B1 of the IA 1986.
25/. Rule 2.5 of the Insolvency Rules 1986, as modified by the Bank Administration Rules.
26/. This table appears after section 145 of the Act. Table 2 applies some other provisions of the IA 1986 to administrations under the Act; for example a distribution may only be made prior to objective 1 having been achieved with the consent of the Bank of England and only out of assets that have been designated as realisable by agreement between the Bank of England and the bank administrator.



THE FAILURE OF NORTHERN ROCK DID NOT, AT FIRST, PROMPT CONSIDERATION OF SPECIAL INSOLVENCY PROCEDURES FOR BANKS.

what a bank administrator may do in the period before the Bank of England has determined that Objective 1 has been achieved and has served an Objective 1 Achievement Notice.

The use of the bank administration process under the Act

So far the SRR in conjunction with the bank administration under the Act has only be used once.[27] Over the weekend of 28 to 29 March 2009 the Dunfermline Building Society's retail and wholesale deposits, branches, head office and originated residential mortgages were transferred to Nationwide. Following the transfer to Nationwide, on 30 March 2009, a court order was made to put Dunfermline's business into the Building Society Special Administration Procedure under the Act. The business that remained with the residual bank in administration included commercial loans, acquired residential mortgages, subordinated debts and most treasury assets.

Bank administrations and the Insolvency Act 1986

The Act does not prevent an application for an administration order or an out-of-court appointment of an administrator in respect of a bank under the IA 1986.

The appropriate regulator(s), the FCA and/or the PRA, are entitled to be heard on applications for administration orders made pursuant to Schedule B1 of the IA 1986.[28]

An administrator cannot be appointed by the company or directors pursuant to paragraph 22 of Schedule B1 of the IA 1986 without the written consent of the appropriate regulator.[29]

In addition, the FCA and/or PRA can make an administration application in respect of a bank pursuant to Schedule B1 of the IA 1986 instead of using the procedures under the Act.[30]

On an application for an administration order in respect of a bank the court may make a bank insolvency order on the application of the relevant authorities. [31]

Bank winding up orders under the Act

The Bank of England can make an application to wind up a bank under the Act if the PRA has informed the Bank of England that the PRA is satisfied that the bank is failing or has failed to satisfy the "*threshold conditions*" (described above), and the Bank of England is satisfied that the bank has eligible depositors and that either the bank is unable or is likely to become unable to pay its debts (Ground A) or the winding up of the bank would be fair (Ground C).[32] (This appears to be the same ground as the "*just and equitable*" provision in the general insolvency law.[33])

The PRA may apply for a bank insolvency order on the same grounds as the Bank of England, but only with the consent of the Bank of England.[34]

Only the Secretary of State for the Treasury can make an application to wind up a bank in the public interest (Ground B).[35]

27/. See the Bank of England website.
28/. Section 362 of the FSMA 2000 as amended by Schedule 14 of the FSMA 2012.
29/. Section 362A of the FSMA 2000 as amended by Schedule 14 of the FSMA 2012. A failure to obtain the necessary consent prior to the appointment does not invalidate the appointment, but the appointment only takes effect from the date on which the consent is filed with the court. See In the matter of Ceart Risk Services Limited [2012] EWHC 1178 (Ch) (But see also M.T.B. Motors Limited (in administration) [2010] EWHC 3751 (Ch) where the administrators accepted that the consent had to be filed with the notice of intention to appoint; the court made a retrospective appointment.)
30/. Section 359 of the FSMA 2000 as amended by Schedule 14 of the FSMA 2012. Paragraph 11 of Schedule B1 of the 1986 IA on inability to pay debts as applied to banks is amended by this provision.
31/. Section 117 of the Act.
32/. Sub-section 96(2) of the Act.
33/. See Sub-section 96(5) of the Act and sub-section 124A(1) of the IA 1986.
34/. Sub-section 96(3) of the Act.
35/. Section 96(4). The Secretary of State also has to be satisfied that the bank has eligible depositors.

The liquidator of the bank appointed under the Act has two objectives.[36] The first is to ensure that the accounts of eligible depositors are transferred to another financial institution or that the depositor receives payment from the FCSC as soon as practicable (Objective 1).37 This objective has priority. The second objective, which is pursued at the same time as the first, is to achieve the best result for the bank's creditors as a whole, in much the same way as a "normal" winding up (Objective 2).

So far as the duties and powers of a liquidator of a bank wound up under the Act are concerned, there are only limited modifications to those of a liquidator in a "normal" winding up.[38]

One key difference is that, at the commencement of the liquidation, the members of the liquidation committee are nominees of the Bank of England, the PRA, the FCA and the FSCS.[39] The liquidator is required to keep the committee, which is only quorate if all the members are present, informed of progress towards Objective 1.[40] On Objective 1 being achieved, a new committee can be formed of creditors who were not eligible depositors.[41] The FSCS becomes immediately and automatically subrogated to the rights of the depositors that have been paid from the compensation scheme and so has an option to stay on the committee after the achievement of Objective 1.

A bank liquidator may do anything necessary or expedient for the pursuit of the Objectives.[42] The liquidator has the general powers under the IA 1986 subject to modifications. The main modifications of substance are directed at the achievement of Objective 1 and role of the authorities in the achievement of that objective.[43]

In a liquidation under the Banking Act 2009, a liquidation committee must be established to ensure the liquidator properly exercises his powers

Bank winding-up orders under the Insolvency Act 1986

A petition to wind up a bank may be presented under the IA 1986.

Where a person presents a petition to wind up a bank the appropriate regulator is entitled to be heard at the hearing of the petition.[44]

In addition, the FCA or PRA may present a petition to wind up a bank under the IA 1986 and the court may make a winding up order if that person is unable to pay its debts within the meaning of section 123 IA 1986 or the court is of the opinion that it is just and equitable that the bank should be wound up.[45] On a petition for a winding up order in respect of a bank, the court may make a bank insolvency order on the application of the relevant authority. [46]

The use of the bank insolvency process under the Act

On 16 June 2011 the court made an order putting the Southsea Mortgage and Investment Company Limited into the bank insolvency procedure. The bank was found not to be meeting the regulatory requirements and was unable or likely to become unable to pay its debts. This was a small bank with about 270 customers with deposits of some £7.4 million. The FSCS compensated the eligible depositors. The other creditors were dealt with in the insolvency under the "normal" insolvency provisions.

Conclusion

The special insolvency procedures for banks has only, as yet, had to be used to deal with two relatively small bank failures, neither of which was likely to cause any or any significant contagion to other institutions. One substantial bank, the Co-operative Bank, was hit by a number of scandals in 2013, one of which was the determination by the PRA that the bank had a shortage of capital of some £1.5 billion. The Co-op Bank's financial problems were not resolved by the use of the procedures under the Act, but by way of a scheme of arrangement pursuant to section 896 the Companies Act 2006.

There is a more general point about special regimes. There are now no fewer than 17 special insolvency regimes (England and Wales) and they present potential difficulties because it is neither clear from the general insolvency legislation whether a special regime exists nor are all the relevant provisions relating to any particular special regime necessarily easily identifiable from any single statute or statutory instrument.

36/. Section 99 of the Act.
37/. Section 101 of the Act.
38/. Section 103 of the Act. In exercising powers under Schedule 4 of the Insolvency Act 1986, the liquidator is required to have regard to the first objective. The power to bring or defend proceedings expressly includes a power to go to arbitration. Section 104 of the Act.
39/. Section 100(1) and (2) of the Act.
40/. Section 100 and 101(2) of the Act.
41/. Section 100(6) of the Act.
42/. Section 103 of the Act.
43/. The table of applied provisions, with the modifications, is at section 103 of the Act.
44/. Section 371 of the FSMA 2000 as amended by Schedule 14 of the FSMA 2012.
45/. Section 367 of the FSMA 2000 as amended by Schedule 14 of the FSMA 2012.
46/. Section 117 of the Act

Constantin Medien v Ecclestone

In February, Mr Justice Newey dismissed the claims which had been brought against Bernie Ecclestone arising out of bribery allegations relating to the ownership and control of Formula One

On 20 February 2014 Mr Justice Newey handed down his judgment in the action of Constantin Medien v Ecclestone [2014] EWHC 387 (Ch). The case attracted many headlines. At its heart was the allegation that the architect of Formula One, Bernie Ecclestone, had paid a bribe of some US$44 million to a German banker in order to procure the sale of Formula One to the private equity firm, CVC.

The Sale of Formula One

The background to the case revolved around the various corporate transactions that had taken place in relation to Formula One since the late 1990s. In particular, through a series of transactions Formula One had by 2001 become owned as to 75% by the Kirch Media group, a large German media conglomerate and another German media company EM.TV and as to 25% by the Bambino Trust, a trust of whom the beneficiaries included members of Mr Ecclestone's family. In 2002 Kirch Media encountered serious financial difficulties and collapsed into insolvency. Three of its lender banks took enforcement action over Kirch Media's and EM.TV's stake in Formula One. The banks, Bayerische Landesbank ("BLB"), JP Morgan Chase and Lehman, thereby inherited a very significant stake in the Formula One business. The BLB team responsible for the Formula One stake was led by a German banker, Gerhard Gribkowsky.

The three creditor banks were not natural owners of a large stake in the Formula One business which they had acquired as a result of enforcement action. In late 2005 a deal was therefore agreed whereby the private equity firm, CVC, would acquire the stakes of BLB and Bambino in Formula One for some US$1.5 billion. CVC also subsequently acquired the stakes of JP Morgan and Lehman and thereby became the owner of the business.

The issue in the proceedings arose because it was subsequently revealed that Dr Gribkowsky had received payments of some US$44 million from certain companies associated with Bambino and Mr Ecclestone. In criminal proceedings in Germany, Dr Gribkowsky was convicted of corruption, breach of fiduciary duty and sentenced to 8½ years imprisonment. In the course of those proceedings, Dr Gribkowsky reportedly admitted that the payments which had been made to him were a bribe.

In the English proceedings, the Claimant, Constantin, claimed that it had an economic interest in the sale by BLB of its interest in Formula One because of the existence of certain "overage" rights which had been granted in favour of EM.TV in compromise of a dispute between BLB and EM.TV when BLB enforced it security. Under these rights, Constantin was entitled to a certain percentage of the proceeds of sale of BLB's stake above an agreed level. Constantin claimed that there had been a corrupt agreement between Mr Ecclestone and Dr Gribkowsky and that, but for that corrupt agreement, BLB's stake in Formula One would have been sold for a much higher price with the result that Constantin would have received a large sum pursuant to its contractual overage rights.

Applicable law: German or English?

Although Constantin commenced the proceedings against the Defendants in England, its primary claim in fact was said to arise under German law. One of the questions for the court to determine was therefore whether German law or English law applied to the claims. This is a question which is now governed by the Rome II Convention on the law governing non-contractual obligations[1]. However,

1/. Council Regulation 864/2007/EC.

THE BACKGROUND TO THE CASE CONCERNED THE OWNERSHIP OF FORMULA ONE, WHICH HAS GROWN TO BE A MULTI-BILLION DOLLAR BUSINESS

where, as in this case, the alleged wrongful acts took place before 11 January 2009 the position is governed by the Private International Law (Miscellaneous Provisions) Act 1995. Under that Act, the general rule is that the applicable law is the law of the country in which the events constituting the tort in question occur[2]. But where elements of those events occur in different countries[3], the applicable law under the general rule is to be taken as being the law of the country in which the most significant element or elements of those events occurred[4].

In this case, elements of the relevant events had taken place in both England and Germany. The relevant English law causes of action were in the torts of unlawful means conspiracy and causing loss by unlawful means. The defendants argued that the most significant of the elements constituting these alleged torts was the supposed combination or common design and that, to the extent such a combination or common design had been formed, this would have taken place in London. Constantin, on the other hand, argued that the objection of the alleged corrupt agreement was to influence Dr Gribkowsky's behaviour as an employee of a German company (BLB) and that the acts which Dr Gribkowsky undertook pursuant to that agreement would have been undertaken in Germany. Overall, the Judge considered that the significance of these latter elements outweighed the significance of the fact that the alleged combination was formed in England. As a result, German law applied.

German law claims

Accordingly, the court was in the position of applying German law (on the basis of expert evidence of German law) to determine the claims made by Constantin. Constantin sought to rely on a provision in section 826 of the German Civil Code which simply provides that "*A person who wilfully causes damage to another in a manner*

2/. Section 11(1).
3/. And where the claim is not for personal injury or damage to property.
4/. Section 11(2)(c).

TOM SMITH QC

A relevant intention to injure will exist if a person desires to cause loss to a particular person or desire to make a profit for himself but knows that in so doing this will inevitably cause loss

which violates good morals is bound to compensate the other for thus caused damage". On the facts, the difficulties which Constantin faced in establishing its claims included that there was no evidence that the defendants were aware at the time of Constantin, or of its overage rights, and thus it was difficult to say that anything which the defendants did could have been done with the intention of harming Constantin.

In order to address this, Constantin sought to argue that under German law it was not necessary for the defendants to have been aware of the existence of the overage rights; rather it was said to be sufficient for the purposes of liability under section 826 that the defendants were aware that damage might result from their actions and Constantin was within the scope of the direction of that damage. The Judge, however, rejected this contention. He considered that under German law there could be no claim under section 826 unless the defendants had known of the overage rights. Absent this, a German court would have decided that the defendants lacked the necessary intention and/or had not acted contrary to good morals vis-à-vis Constantin.

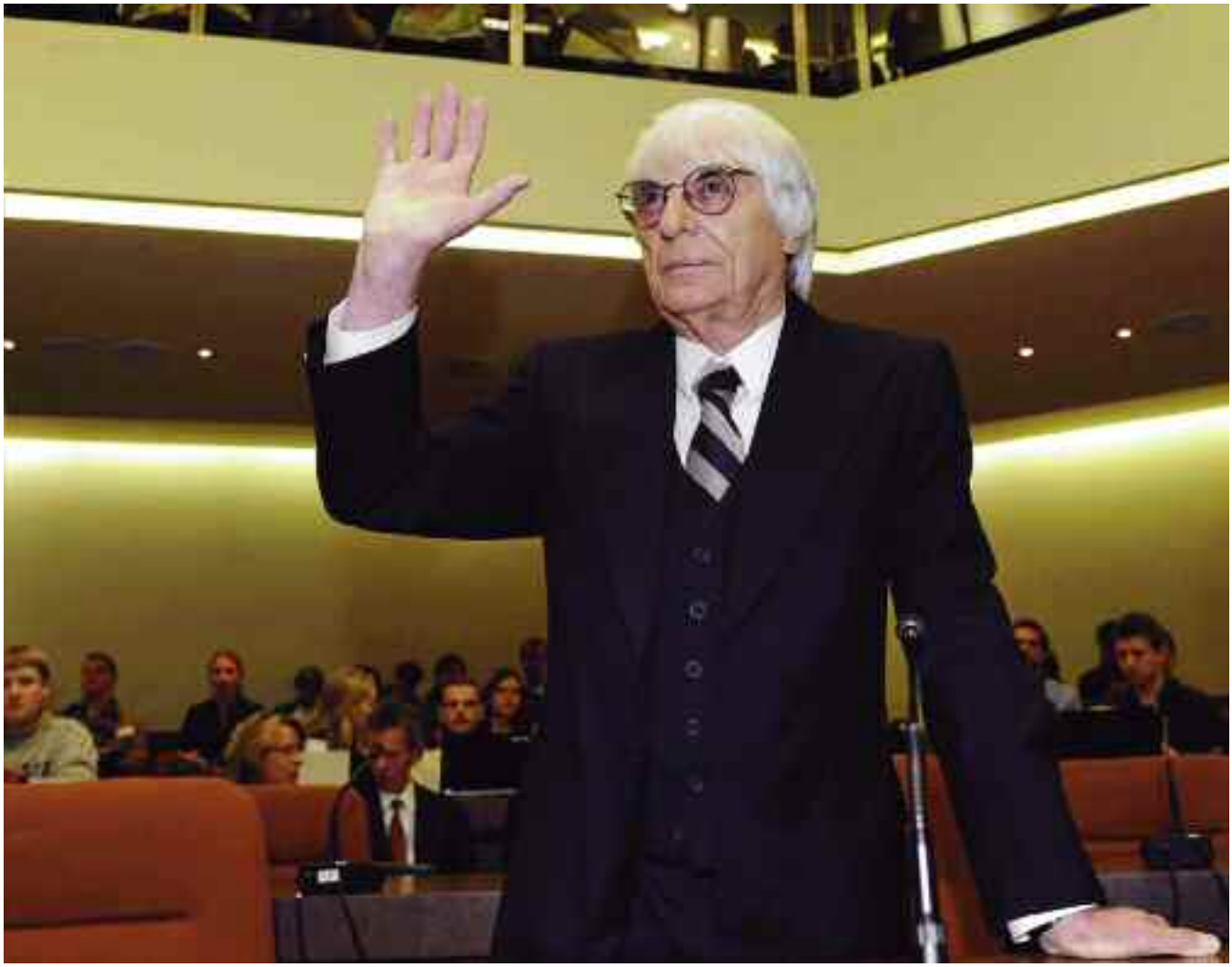
But, apart from this, the claim also failed for a further reason. Constantin's contractual overage rights were rights as against BLB. BLB in turn, in theory, would have had its own claim against the defendants under German law. In these circumstances, any loss suffered by Constantin was reflective of loss which had been suffered by BLB and, if both BLB and Constantin were to have claims, there would be overlap and potential double recovery. The German court would not in these circumstances have permitted Constantin a claim in any event.

English law?

Although Constantin pursued English law claims in the alternative, the Judge found that it was impossible for those claims to succeed on the facts. As noted above, the causes of actions relied on by Constantin were the torts of unlawful means conspiracy and causing loss by unlawful means. Following the House of Lords decision in *OBG Ltd v Allan* [2008] 1 AC 1 and the subsequent authorities[5], both torts require proof of an intention on the part of the defendant to injure the claimant.

For these purposes, a relevant intention to injure will exist if a person desires to cause loss to a particular person or desires a result that he knows will cause that person loss. So, if a defendant desires to make a profit for himself but knows that in so doing this will inevitably cause loss to the claimant then this will be sufficient.

5/. The most recent of which is the decision of the Court of Appeal in WH Newson Holding Ltd v IMI plc [2013] EWCA Civ 1377.



BERNIE ECCLESTONE GAVE EVIDENCE FOR OVER 3 DAYS, AND THE CLAIM AGAINST HIM WAS DISMISSED, ALTHOUGH HE STILL FACES A BRIBERY TRIAL IN GERMANY WHICH STARTED ON 24 APRIL 2014

However, it is not enough for a claimant to show that loss to him was reasonably foreseeable or even that the defendant realised that there was a chance that such loss would be caused. It is also not enough that the defendant must have appreciated that *someone* (whether or not the claimant or members of a specific class including the claimant) would suffer loss.

Since, on the facts there was no evidence that the defendants knew of Constantin or its overage rights, it was impossible to say that they had any intention to injure Constantin, and accordingly the English law claims failed for this reason.

The Court therefore did not need to consider the further point which would have arisen, namely, whether there can be any liability in the unlawful means tort or for unlawful means conspiracy where the third party is not prevented from performing its contractual obligations owed to the claimant, and the only effect is that such performance is rendered less valuable to the claimant.

What would have happened absent the alleged bribe?

Finally, Constantin's case also failed on causation. The Judge found on the evidence that it was more likely than not that BLB would have accepted CVC's offer even if the alleged corrupt arrangement had not been made. In other words, the payments made to Dr Gribkowsky had no causal effect because BLB would have accepted CVC's offer in any event. On this point, the internal BLB documents showed that the view within BLB, including of the members of its Administrative and Supervisory Boards, was unanimously to the effect that CVC's offer was a good one and undoubtedly sought to be accepted. Moreover, Constantin also failed to show that, even if BLB had decided to look for another offer, there would have been another buyer who would have been willing to pay more than CVC.

Tom Smith QC appeared for the successful Second Defendant in the proceedings

MF Global meets Jimmy Savile

William Trower QC examines an unlikely pairing between the MF Global special administration and the administration of the estate of Jimmy Savile (deceased)

The ultimate objective of every procedure for the terminal administration of a fund is the realisation and distribution of the assets amongst those entitled. In the case of an insolvency, those primarily entitled will be the creditors and the distribution will be undertaken by the insolvency office holder. Where a deceased estate or trust fund is being administered, those primarily entitled will be the beneficiaries and the distribution will be undertaken by the personal representatives or the trustees. But that is not always the full picture; insolvency office holders sometimes have to deal with difficult trust claims to assets held by or in the name of the insolvent debtor, while personal representatives and trustees sometimes have to deal with difficult creditor claims payable out of the trust assets ahead of the beneficiaries.

An unlikely pairing of an investment bank special administration and the administration of the estate of Jimmy Savile (deceased) has helped to illuminate the distribution principles to be applied in such circumstances. That illumination is to be found in the judgments of David Richards J in In re MF Global UK Limited [2013] EWHC 1655 (Ch) and Sales J in National Westminster Bank Plc v. Lucas [2014] EWHC 653 (Ch), which show that there are common themes. The judgments demonstrate the flexibility and adaptability of the court's jurisdiction to supervise and, where appropriate, intervene in the administration of a trust; a jurisdiction which can prove particularly useful in juxtaposition with the administration of an insolvent estate. In Scotland, Lord Hodge reached a similar result in Joint Liquidators of Direct Sharedeal Limited, Petitioners [2013] CSOH 45, but by a rather different route.

MF Global

MF Global UK Limited ("MFGUK") was an investment bank and held client money as part of its business. That client money was held on the trusts established by the FSA's CASS rules. On 31 October 2011, special administrators of MFGUK were appointed under the Investment Bank Special Administration Regulations 2011 ("the Regulations"). This caused a primary pooling event to occur for the purposes of the client money distribution regime contained in CASS 7A. The effect of this event was that all client money held by MFGUK was treated as pooled, and MFGUK was required to distribute that pool so that each client received a rateable proportion of its client money entitlement calculated in accordance with CASS 7A.

Unfortunately, however, the CASS rules make no specific provision for the adjudication of disputed claims or the imposition of a bar date after which claims cannot be made (or after which late claimants cannot disturb distributions already made). Furthermore, although the bar date and court-approved scheme provisions introduced by regulation 11 of the Regulations and implemented by Part 5 of the Investment Bank Special Administration (England and Wales) Rules 2011 had been successfully used to obtain the court's approval to a distribution plan in respect of client assets other than client money, that procedure was not available for client money.

The evidence before David Richards J was that there was a very substantial shortfall in the client money pool. At the time he gave judgment in June 2013, the client money claims made in MFGUK's administration exceeded US$2.2 billion, while there was only c.US$950 million of client money available for distribution. In these circumstances, the omissions from the client money rules described above meant that there was a real risk that, without the court's assistance, the pool could not be properly administered. Since the hearing the position has changed in the sense that there has been a significant reduction in the shortfall (the latest report shows that, after a small reduction in the amount available for distribution and a much larger reduction in the estimated figure for total client money claims, the claimants will have received in excess of 75c in the $). However, a procedure is still required to enable the administrators to distribute without having to make provision for all possible eventualities. If such a procedure were not to have been developed, the obligations to distribute client monies in accordance with the provisions of CASS 7A could not have been achieved, because the administrators would have been at risk of distributing in breach of trust if clients were to make subsequent claims which were no longer capable of being satisfied in the amounts to which they were entitled.

Jimmy Savile

On 29 October 2011, two days before the

appointment of special administrators to MFGUK, Jimmy Savile died. The executor of his will is National Westminster Bank Plc ("NatWest"). The will named a number of individual beneficiaries, but the residue of his estate was left to the Jimmy Savile Charitable Trust ("the Charitable Trust"). Initially NatWest proceeded to administer his estate in the normal way, placing an advertisement for claims under section 27 of the Trustee Act 1925, which would have enabled it to effect a distribution to beneficiaries on the expiry of the relevant notice period (13 March 2012), having regard only to claims of which it then had notice.

At the beginning of October 2012, and before NatWest had made any distribution, ITV broadcast a documentary called Exposure: the Other Side of Jimmy Savile, accusing him of being a serial child abuser and sex offender. Since then, and as is now notorious, a large number of people have made claims that they were subjected to abuse by Savile. As at 11 March 2014, 139 people had intimated to NatWest that they had personal injury claims against him and his estate. The nature and evidence relating to those claims satisfied Sales J that "there is no serious dispute that some, perhaps many, of the claims may be well-founded and meritorious". In addition many of the claimants asserted claims against third party entities such as the BBC, certain NHS trusts, Barnado's and Mind all of which were said to be vicariously liable for personal injury torts committed by Savile. In the event that such claims are established, it is likely that those third parties will have indemnity claims against the Savile estate.

The total value of the Savile estate exceeds £3 million. It is clear, however, that the personal injury claims are such that there is a serious possibility that they will exhaust the estate, and that there will be a shortfall. It also seems that the Charitable Trust does not accept that this will inevitably be the case, or that many of the claims will be made out. It has expressed concern that the personal injury claims will not be defended by NatWest with a sufficient degree of robustness. Indeed, this was such an issue for the Charitable Trust that one of the matters dealt with by Sales J, (indeed the matter with which the major part of his judgment is concerned), was an application by the Charitable Trust to remove and replace NatWest as Savile's personal representative. In the event, the removal application failed, but the court had to proceed on the assumption that, while it is quite likely that the estate is insolvent, it is not clear that it is.

The ability of the person in control of the fund to distribute the assets was seriously compromised by uncertainties as to the identity of those entitled to share in any distribution

The probable insolvency also means that there is some prospect that an insolvency administration order will be made in due course. No such order has yet been made, although Sales J did make a prospective validation order in relation to certain categories of cost and expense under section 284 of the Insolvency Act 1986. It also followed that the circumstance with which NatWest had to grapple was one in which it was on notice of a large number of claims (and so could no longer distribute under the protection of section 27), but those claims were inherently uncertain as to number and amount. Furthermore, the possibility of a deficiency as regards claimants meant that not only the beneficiaries under the will, but also the other claimants had an interest in ensuring that there was a proper system for scrutinising each claim against the estate before any distributions were made.

The Problem of Uncertainty

The problems which came before David Richards J and Sales J were therefore very different, but they had this important factor in common. In both instances the ability of the person in control of the fund to distribute the assets was seriously compromised by uncertainties as to the identity of those entitled to share in any distribution, and the size of their pro rata shares. The effect of

SAVILE'S ESTATE WOULD BE QUICKLY EXHAUSTED BY THE VOLUME OF CLAIMS

These cases are two very different modern examples of the court's well-established jurisdiction to supervise and intervene in the administration of a trust

these uncertainties was exacerbated by the lack of any statutory provisions designed to facilitate distributions on completion of any form of proving or claims administration process.

In a conventional insolvency process, these kinds of uncertainty are dealt with by rules which include provision for the proving of claims, the admission or rejection of proofs in whole or in part, an estimation of the value of uncertain or contingent claims, the declaration and payment of dividends and the principle that late-proving creditors are not entitled to disturb dividends already paid but will normally be able to catch up if and when further dividends are declared. The policy which underpins these rules, whether applicable in winding up, administration or bankruptcy, is to strike an appropriate balance between the desirability of ensuring that claimants to a fund are given an adequate opportunity to assert their entitlements, but that distributions to others interested in that fund are not delayed for longer than is necessary. These rules are, of course, part of the statutory scheme under which the creditors are entitled to participate in a distribution of the assets of an insolvent debtor. Their rights are limited to those given by the statutory scheme itself, which include the possibility that a late proof will not be satisfied because all of the assets will have been distributed to those proving in time.

Where a claimant's rights are not limited to its entitlement under the statutory insolvency scheme, but are proprietary claims to the return of specific assets or, as in the case of MF Global, a proprietary right to share in an identified pooled fund, the position is different. There is no mechanism for estimating contingent or future liabilities and paying a dividend on the estimated amount. It follows that the special administrator cannot ensure his own release from liability to comply with the duty to distribute by following a defined statutory process, but nor can he easily fulfill his positive duty to distribute to those whose claims have been established with the expedition that the client money rules appear to contemplate. Likewise, where a deceased estate is subject to uncertain or contingent creditor claims, such as the personal injury claims asserted against the Savile estate or the insurance claims asserted against the estate of a deceased Lloyds name considered in Re Yorke (deceased); Stone v. Chataway [1997] 4 All ER 907, the personal representatives can be faced with very difficult decisions. (In the latter instance the uncertainty arose from a concern that the reinsurance provided by Equitas may not have been adequate to protect the Yorke estate from late-claiming long tail liabilities.) How are they to ensure that their duty to distribute to beneficiaries as soon as practicable is complied with, without subjecting themselves to the risk of a devastavit if unpaid creditor claims against the estate are subsequently established? Section 27 will only assist where the claims are not just unascertained, but also unknown at the time the distribution is made.

There was a time when the solution in the context of distributing a deceased estate was either to make a reserve for the unascertained claims of contingent or future creditors, or to require the beneficiary to provide security against the personal representative's right to an indemnity for the consequences of what might later prove to be a wrongful distribution. Many of the cases in which the principles were established arose out of the administration of the estates of deceased lessees, which, at the date of death, were subject to highly uncertain contingent liabilities accruing only in the event of the failure of the tenant for the time being. In either instance an application to court was required, but where such an application was made, and the executors retained sufficient reserves or obtained adequate security, they would gain complete protection against the emergence of future claims.

This form of solution gives sufficient comfort to the personal representatives, but one of its unsatisfactory aspects is that finality is not achieved. The very nature of a reserve means that undistributed assets remain in the hands of the personal representative, while the very nature of security is that the assets which would otherwise be within the free disposition of the beneficiaries remain encumbered by the obligation to indemnify. This problem was particularly acute in the type of case exemplified by Re Yorke, where the claims were highly contingent, and many decades may well pass before it can be seen with clarity that no claim will ever emerge.

The position of the client money claimants in the case of MFGUK was slightly different to the position of the contingent creditors of a deceased estate. The decision of the Supreme Court in Lehman Brothers International (Europe) v. CRC Credit Fund Limited [2012] UKSC 6 established that the pooled fund constituted by the CASS rules did not just create identifiable trust property, it also gave rise to identifiable beneficial interests. It follows that, unlike the creditors of a deceased estate whose principal right is a personal claim against the executors in respect of an unpaid liability where assets out of which the liability might have been paid have passed through the executors' hands, the client money claimants have proprietary claims to their proportionate share of the client money pool. The end result is, however, very similar. If the assets have been distributed without taking account of all client money claims, MFGUK and its special administrators are exposed to claims for breach of duty.

The Solution Adopted

The approach adopted by both the MFGUK special administrators and the Savile personal representatives was to present a procedural scheme to the court and to seek the court's direction that they proceed to implement that scheme as part of the administration of the estate over which they had been appointed. By adopting this approach, the special administrators and

personal representatives respectively aimed to ensure that the funds which they had been appointed to administer were distributed as expeditiously as practicable, (or in the case of Savile to at least start that process), while ensuring that they themselves were protected from claims for breach of duty. In both cases, interested claimants (in so far as their identities were known) were notified of the applications, but formal representation orders do not seem to have been made.

In the case of MFGUK, the relief sought could not vary the beneficial interest of any client who subsequently established a claim to the client money pool. The court was, however, able to give directions for distribution as part of its general jurisdiction to supervise and administer trusts. It is well established by cases such as In Re Benjamin [1902] 1 Ch 723 (unascertained residuary beneficiary) and In Re Gess [1942] Ch 37 (untraceable creditors) that those directions will protect the trustees against late claims made by clients of which they are not aware at the time of distribution. David Richards J also sanctioned the introduction of further refinements to the principle and agreed to give directions set out in a lengthy procedural order which amounted to a judicially-sanctioned mechanism for agreeing and admitting proofs, concluding with a liberty to distribute once those procedural hoops had been gone through. Not surprisingly, perhaps, many of the stages in the process bore a close resemblance to the proving and distribution procedures commonly used in a more conventional formal insolvency. In particular, they included provision preventing any late-claiming client from disturbing distributions already made, thereby protecting not just MFGUK and its special administrators, but also the clients who had already received the distributions out of the client money pool, even though, with the benefit of hindsight, it might transpire that they will have received more than the amount to which they were entitled.

The analysis adopted by Lord Hodge in the much smaller Scottish case of Joint Liquidators of Direct Sharedeal Limited, Petitioners [2013] CSOH 45 was slightly different. Direct Sharedeal Limited ("DSL") carried on investment business and happened to hold client money in respect of its CFD business with MF Global Holdings Ltd. After DSL went into liquidation, it became apparent that there was a significant shortfall in the client money pool. This led to its liquidators making an application to the Court of Session for similar protective relief to that sought by the special administrators of MFGUK. However, rather than relying on the court's general jurisdiction to supervise and administer trusts, Lord Hodge simply implied into CASS 7 itself what he described as "a judicial power to give directions to achieve a means of identifying the clients of DSL and to give finality to the process of their ascertainment". He preferred this approach to the invocation of the power of the court to supervise a Scottish private trust on the basis that the authorities which established that power were "somewhat removed from the circumstances of this case". In the event though, the outcome of both cases was very similar, although it seems that the order made in England was rather more elaborate than that made in Scotland.

The procedural scheme sanctioned by Sales J in the Savile case will not enable distributions to be made without more. It provides for a proving and dispute resolution procedure, designed to promote settlement of personal injury claims against the estate and was described by the judge as similar to those which operate in relation to RTA, employment and public liability claims under their respective CPR protocols. Its purpose is to introduce a procedure for the agreement of personal injury claims against the estate intended to achieve as much clarity as possible as quickly as possible and at the least possible cost. It was intended that NatWest and the third parties (such as the BBC) would accede to the scheme by agreement, but it was accepted that no personal injury claimants could be required to participate. It was hoped, however, that many would and that this would have the beneficial effect of

WILLIAM TROWER QC

speeding up the process by which the correct distribution of the estate could be fully worked out. In other words, the relief granted by Sales J was interim in form. It gave NatWest sufficient comfort to go ahead with the proposal, and to incur costs in doing so, and set the scene for an application to sanction a distribution in due course. The time at which NatWest can proceed to the next stage will presumably depend on the progress that is made in persuading the claimants to settle under the auspices of the scheme.

These cases are two very different modern examples of the court's well-established jurisdiction to supervise and intervene in the administration of a trust and to give guidance to personal representatives on the distribution of a deceased estate. The court does not vary proprietary rights but, short of that, can give wide ranging directions to ensure that funds which might be subject to unknown or unascertained claims are safely distributed to those entitled as soon as practicable. It seems that, in an appropriate case, directions can be given without introducing the full panoply of representation orders in relation to each category of affected person, but whether that will be possible will be heavily dependent on the facts of each case.

Case Digests

Since the beginning of February 2014 there have been a number of important decisions. In particular, I have in mind the decision in the Lehman Waterfall case where Mr Justice David Richards addressed a number of issues arising from the likelihood of a surplus in the estate of Lehman Brothers International (Europe) after payment of all proved debts. There is also the decision of the Court of Appeal in *Jervis v Pillar Denton* which has solved the problem caused by the decisions in *Goldacre (Offices) Ltd v Nortel Networks UK Ltd* and *Leisure (Norwich) II Ltd v Luminar Lava Ignite Ltd* by overruling those cases. The Court has now decided that, where an administrator or liquidator makes use of leasehold property for the purposes of the administration or the winding up, then the reserved rent is payable as an expense of the administration for the period during which the property is used and will be treated as accruing from day to day for that purpose (i.e. the date on which a quarter's rent becomes payable is irrelevant). In addition, the Cayman Islands Court of Appeal in *Irving Picard v Primeo Fund (in Official Liquidation)* decided the trustee cannot rely on US insolvency law to reverse preferences but can rely on Cayman insolvency law to do so. See Hannah Thornley's review of these decisions at page 48 of this edition of the Digest.

The schemes of arrangement cases include a case, *Apcoa Parking,* of the Court sanctioning a scheme where the governing law and jurisdiction had been changed to English law for the purpose of allowing the companies to propose schemes of arrangement.

The Court's approach to relief from sanctions for breaching orders of the Court since the Court of Appeal's decision in *Mitchell* has not, or at least not yet, reached the point of *"one strike you're out":* see the Civil Procedure section on p24. And, for those of you who think "sport and physical education" includes contract bridge, see the English Bridge Union Ltd case in the Sport section on p41.

Finally, we need to make a correction to one of the Digests which appeared in the last issue. As has been on our website for a while, it has been drawn to our attention that the editorial on page 14 of the February 2014 issue of the Digest and the Case Digests on page 19 both refer to a case called *BAT Industries v Windward* in a way which suggests that a Receiver was in fact appointed by the Court. In fact, as Hamblen J envisaged might be the case in paragraphs 55 and 58 of his Judgment, the matter was dealt with by way of the giving of undertakings obviating the need for the appointment of a Receiver.

HILARY STONEFROST

Hilary Stonefrost

BANKING AND FINANCIAL SERVICES

Digested by WILLIAM WILLSON


WILLIAM WILLSON

Citibank N.A. v Geodesic Ltd [2014] EWHC 306 (Comm) QBD (Com) (Walker J), 7 February 2014

Bond – construction – summary judgment

C (a trustee of a bond issue) sought summary judgment against G (a company registered in India) for around US$157 million following the maturity of bonds issued by G. G sought to oppose the application for summary judgment based on an allegation that a valid direction had not been given by the bondholders to C to enforce against G as (i) a number of bondholders did not hold their bonds at the time of the direction; and/or (ii) a number of bondholders had acquired their interest in the bonds after the redemption date. The judge found that this defence had no prospect of success as: (i) the evidence filed by C demonstrated that the bondholders did hold their bonds at the time of the direction; (ii) a bondholder was defined as a person "*who is, for the time being, shown in the records of Euroclear or Clearstream, Luxembourg and is the holder*" of a particular principal amount of the bond. There would be no commercial purpose in restricting the natural and ordinary meaning of the defined term so as to include only those bondholders who held bonds prior to the redemption date; (ii) in any event, C had a discretion pursuant to the Trust Deed to act without there having been a written direction by the bondholders.

[David Allison QC]


DAVID ALLISON QC

Citicorp International Ltd v Shiv-Vani Oil & Gas Exploration Services Ltd [2014] EWHC 245 (Comm) QB (Andrew Smith J), 11 February 2014

Bond – construction – summary judgment – concurrent proceedings

C (a trustee of a bond issue) sought summary judgment against S (a company registered in India) for around US$85m on the acceleration of the sums due under the bonds following the failure by S to make a payment of interest in the sum of US$2m. C also issued a winding-up petition against S in India based upon the failure to discharge the sums due in respect of the bonds. S challenged C's entitlement to summary judgment based on an alleged express or implied term that S would not be required to make payment of any sums in circumstances where the Reserve Bank of India had not consented to the payment as this would otherwise be unlawful under the Indian Foreign Exchange Management Act applicable to S. S also contended that it was oppressive for C to have commenced two sets of proceedings against it and applied for an order that C should be made to elect between the two sets of proceedings and that the Court should dismiss or grant a stay of the UK proceedings unless C withdrew the winding-up petition in India. The judge dismissed S's application on reasons including the following: (i) the UK proceedings raised a narrow question on the meaning and effect of the Bond Conditions and the Trust Deed; (ii) the Bond Conditions and the Trust Deed were governed by English law with an exclusive jurisdiction clause in favour of the English court; (iii) the issue could properly be decided summarily against S; (iv) efficient case management called for the issue to be determined by the English court. The judge then proceeded to grant summary judgment to C as: (i) there was no real prospect of S establishing the alleged express or implied term so as to excuse non-payment in the absence of the consent of the Reserve Bank of India; and (ii) there could be no defence based on illegality or public policy as any alleged illegality as a matter of Indian law was irrelevant in circumstances where the payment obligation was to be performed in England or New York.

[David Allison QC]

HSH Nordbank AG v Intesa Sanpaolo SPA (2014) [2014] EWHC 142 (Comm) QBD (Burton J), 31 January 2014

Swap – mistake – restitution

The claimant ("H") sought restitution from the defendant ("S") in respect of swap entered into with an Italian local authority ("B"). S entered a swap with B in 2005, restructured in 2006, and H replaced S by novation in 2007. H and B entered into an ISDA master agreement, under which H paid S a novation payment of €8,972,000. The Italian Ministry of Economy & Finance ("MEF") issued decree 389, setting out the rules under which local authorities could use derivatives. The regional Court of Auditors found that the 2007 swap infringed the decree (though the 2005/2006 swaps were valid). H brought proceedings against S on the basis that the 2006 swap, and therefore the 2006 novated swap, were void for non-compliance with decree 389.H submitted that it had entered into the novation agreement under the mistaken belief that the 2006 swap transaction was valid, and that there had been a total failure of consideration. The judge held that H had failed to show that the 2006 swap was void. However, if wrong in that conclusion, the court would consider H's case for restitution on the assumption that the 2006 swap was void. H's case based on mistaken belief had to fail. H had taken the risk that the 2007 swap would not comply with decree 389 and there was no mistaken belief (*Pitt v Holt* [2013] UKSC 26 applied). There was no total failure of consideration for the novation in any event. The 2006 swap was effectively novated to H. Considering the relevant clauses of the novation agreement, H had understood and accepted the risks of its invalidity and S had not assumed any responsibility in respect of the swap's legality, validity or enforceability (*Standard Chartered Bank v Ceylon Petroleum Corp*[2011] EWHC 1785 (Comm)applied). H had obtained what it bargained for, namely the elimination of S from the equation and its route to the 2007 swap.

Barclays Bank Plc v Unicredit Bank AG[2014] EWCA Civ 302 CA (Civ Div) (Longmore, Patten, Clarke, LLJ), 20 March 2014


ROBIN KNOWLES CBE QC

Early termination of guarantee – consent – commercial reasonableness

The appellant banks ("A") appealed against a decision that the withholding of consent by the respondent bank ("R") to the early termination of guarantees in respect of loan portfolios had been commercially reasonable. Under the guarantees, A had transferred the credit risk in certain of their assets to R, which made quarterly payments to A in respect of relevant portfolio losses and in return A paid quarterly premiums to R. The lifetimes of the guarantees were 11 years and 19 years, but the guarantees provided that in certain circumstances A were entitled to end them after a period roughly equal to the average life of the loans, which was expected to be five years. In the event of "regulatory change", early termination required R's consent, such consent to be determined by R in a commercially reasonable manner. A regulatory change occurred and A sought to terminate after two years. R refused consent unless A paid it the balance of its premiums for a five-year period. Their Lordships held that the critical factor was that the person who had to act in a commercially reasonable manner in determining whether consent was to be given was the guarantor, namely R. It was the manner of determination which had to be commercially reasonable; it did not follow that the outcome had to be commercially reasonable. R could take account of its own interest in preference to that of A. Any commercial man whose consent to a course of action was required but to whom the determination of whether to give consent was entrusted would think it commercially reasonable to have primary regard to his own commercial interests. It was impossible to see how a requirement for R to have regard to A's interests could work in practice. A neutral third party could have been given the task of determining whether consent should be given, but that was not what the clause said. The requirement that consent be determined in a commercially reasonable manner was intended as a control exercise of some kind. It was not easy to express a test for commercial reasonableness in the instant contract, but it could be tentatively expressed by saying that the party which had to make the relevant determination would not be acting in a commercially reasonable manner if it demanded a price which was way above what it could reasonably anticipate would have been a reasonable return from the contract. **[Robin Knowles QC]**

Napier Park v Harbourmaster CLO 2 B.V. & Ors [2014] EWHC 1083 (Ch) ChD (The Chancellor), 9 April 2014

Notes – Construction – ordinary and natural meaning

Napier Park ("NP"), a junior noteholder in a CLO structure, contended that a substantial sum of money representing Unscheduled Principal Proceeds was available for reinvestment under the CLO structure for the benefit of the junior noteholders. T, the trustee, and CA, the collateral administrator, contended that the monies were not available for reinvestment, but should be used to redeem the most senior class of notes. The dispute turned on whether the provision in the Reinvestment Criteria in Schedule 2 to the Collateral Management Agreement that "*the ratings of the Class A1 Notes have not been downgraded below their Initial Ratings*" was unsatisfied in circumstances where the Class A1 Notes had been downgraded by S&P in 2010 from their Initial Rating of AAA to a rating of AA, even though they were then upgraded back to an AAA rating by S&P in 2012. The Chancellor considered the principles applicable to the construction of the CLO documentation, noting that in circumstances where it was contemplated that the rights and obligations under the contract may pass to persons other than the original contracting parties (as in the case of tradable financial instruments), the Court should be particularly cautious about departing from the ordinary and natural meaning of the words. The Chancellor found that the words were clear and unambiguous and that the Reinvestment Criteria were not capable of being satisfied in circumstances where the Class A1 Notes had at any time been downgraded below their Initial Ratings, even if they had subsequently been upgraded to their Initial Ratings. The Chancellor also noted that a great deal of the evidence relied upon by the parties was inadmissible as it represented the market's view on the meaning of the provision and that it was impossible for the Court, in the absence of expert evidence and cross-examination, to take a view on a number of the points on commercial purpose made by NP.
[David Allison QC]

U.S Bank Trustees Limited v Titan Europe 2007-1 (NHP) Limited and Ors [2014] EWHC 1189 (Ch) (Richard Snowden QC), 16 April 2014


HENRY PHILLIPS

Securitisation – Servicing Agreements – Removal of Special Servicer – Need for Rating Agency Confirmation – Identity of the Controlling Party

The Note Trustee of a series of notes sought directions from the Court concerning the interpretation and effect of financial documentation of which the notes formed a part. Under the terms of a Servicing Agreement the "Controlling Party" was granted the right to remove the Servicer or Special Servicer appointed in respect of a £1.1bn loan facility, subject to the satisfaction of certain condition precedents. Those condition precedents included confirmation from the rating agencies rating the notes that the removal and replacement of the Servicer or Special Servicer would not lead to a downgrade in the then-current rating of the notes (a "Rating Agency Confirmation").

The Offering Circular issued in respect of the notes unequivocally stated that in the circumstances which pertained before the court, the "Controlling Party" would be the representative of the E Noteholders who, at that stage, were entirely out of the money. By contrast, the Servicing Agreement provided that, in those circumstances, the "Controlling Party" would be the representative of the "A-Loan", being tranche of the loan facility in respect of which the notes had been issued. The representative of the E Noteholders sought to exercise its rights as Controlling Party to remove the Special Servicer. By that time Fitch, one of the rating agencies rating the notes, had stated that as a matter of policy it would not issue a Rating Agency Confirmation in respect of European commercial backed securities, including the notes. The issues before the Court included (i) whether the representative of the E Noteholders was, in fact, "Controlling Party" under the terms of the contractual documentation and (ii) whether Rating Agency Confirmation was in fact required from Fitch in circumstances where Fitch had notified the market that, as a matter of policy, it would not issue such a confirmation.

The Court held that while the Offering Circular clearly indicated that the Issuer thought the Controlling Party would be the E Noteholders and while it formed an important part of the relevant matrix against which the Servicing Agreement ought to be construed, a proper construction of the Servicing Agreement meant that the Issuer was the Controlling Party.

As to the need to obtain a Rating Agency Confirmation from Fitch, the Court held that it would not have made any commercial sense for the parties to

have agreed that just because Fitch no longer gave rating confirmations as a matter of policy, the Servicer or Special Servicer's appointment could never be terminated (not even voluntarily). Accordingly, as a matter of construction it was wrong to attribute to the parties the intention that if one of the Rating Agencies simply stopped issuing rating confirmations as a matter of policy there could never be a termination of the Servicer or Special Servicer. **[William Trower QC, Barry Isaacs QC, Tom Smith QC, Henry Phillips and Charlotte Cooke]**

CIVIL PROCEDURE

Digested by ALEXANDER RIDDIFORD


ALEXANDER RIDDIFORD

Lakatamia Shipping Co Ltd v Nobu Su & Ors [2014] EWHC 275 (Comm), Hamblen J, 13 February 2014

Disclosure – non-compliance – relief – time limits

A company which failed to comply with an unless order, by serving its disclosure list 46 minutes late, was granted relief from sanction under CPR r.3.9, on the basis that the non-compliance was trivial and there were good reasons why the default had occurred. In particular, it could be said that the company "narrowly missed the deadline", a circumstance which the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 expressly contemplated as being *de minimis* and usually deserving of relief from sanctions. Further and in particular, the triviality of the non-compliance was demonstrated by its effect, that is by the fact that it had caused no prejudice to the other side and no such prejudice had been suggested. The fact that the company had a history of default in relation to such matters had no bearing on this analysis or "metamorphose" a trivial default into a serious one.

Williams v Central Bank of Nigeria [2014] UKSC 10, Supreme Court (Lords Neuberger, Mance, Clarke, Sumption and Hughes). 19 February 2014

Dishonest assistance – limitation periods – constructive trusts – fraud

The Supreme Court upheld the Bank's appeal against the Court of Appeal's decision ([2012] EWCA Civ 415) than an action brought against it by Williams as a beneficiary under a trust was not time-barred under s.21(3) of the Limitation Act 1980 (the "1980 Act"). Williams had brought an action against the Bank requiring it to account for and to trace monies that he had been fraudulently induced to pay to an individual (the latter having undertaken to hold these monies on trust for Williams, whereas in the event he paid the money in fraudulent breach of trust into an account held with the Bank). The basis for Williams' claim against the Bank was that it had been a party to the principal fraudster's fraud or had knowingly received the trust funds.

It was agreed that, to the extent that Williams' claims were subject to statutory limitation, then the limitation period had expired. The issue in dispute was therefore whether s.21(1)(a) of the 1980 Act disapplied the limitation period that would otherwise be applicable under s.21(3). This question turned firstly on whether a stranger to a trust who was liable in dishonest assistance or knowing receipt was a trustee for the purposes of s.21(1)(a). If he was not a trustee for these purposes, then the second question was whether the words "any action in respect of any fraud or fraudulent breach of trust to which the trustee was a party of privy" in s.21(1)(a) included an action against a party who was not a trustee.

The Supreme Court allowed the Bank's appeal (Lord Mance JSC dissenting), holding that Williams' claims were time-barred. In particular, the majority of the Supreme Court considered that s.21(1)(a) of the 1980 Act was concerned only with actions against trustees, and that the Bank was not a trustee in the relevant sense, since a constructive trust of the type alleged against the Bank was not a true trust. The phrase "constructive trustee" has two distinct meanings: (1) *de facto* trustees, who have lawfully assumed fiduciary obligations in relation to trust property but without a formal appointment, and who are true trustees; and (2) those who have accrued liabilities relating to a trust, having exposed themselves to equitable remedies by virtue of their participation in the unlawful misapplication of trust assets, but who have not assumed and never intended to assume the status of a true trustee. In its second meaning a constructive trustee was not a trust trustee for the purposes of s.21(1)(a), and this is so whether the cause of action in question was either dishonest assistance or knowing receipt

Rawlinson and Hunter Trustees and ors v (1) Stephen John Akers (2) Mark MacDonald [2014] EWCA Civ 136 (Court of Appeal) (Moore-Bick LJ, Tomlinson LJ, Ryder LJ), 20 February 2014


WILLIAM TROWER QC

Third Party Disclosure – Liquidators' Reports – Litigation Privilege – Dominant

The Appellants are the joint liquidators of the Oscatello Group of companies, which operated under the umbrella of a trust in favour of Robert Tchenguiz and his children and remoter issue. The Oscatello Group of companies held positions in valuable assets by way of direct equity/debt investments and participated in large-scale derivatives and futures trading. Their investment activities were largely funded by Kaupthing hf. The Serious Fraud Office ("SFO") launched an investigation into the involvement of Robert and Victor Tchenguiz in Kaupthing's collapse. During the course of the SFO's investigations, the Appellants gave the SFO permission to read (but not take copies of) a number of reports which had been produced at the Appellants' request (the "Reports"). The Tchenguiz brothers subsequently commenced proceedings against the Director of the Serious Fraud Office, alleging that the SFO's investigation had caused extensive financial losses and reputational harm. The basis of those claims is that the SFO did not have reasonable grounds to suspect the Tchenguiz brothers of having committed a crime. During the course of the proceedings brought against the SFO, the Tchenguiz brothers made an application seeking third party disclosure of the Reports from the Appellants under CPR rule 31.17(3). At first instance, the Appellants opposed the application on three main grounds i.e. (i) necessity/relevance (ii) the Reports had been commissioned by the Respondents for the dominant purpose of aiding actual or contemplated litigation and were therefore protected by litigation privilege; and (iii) discretion. Mr Justice Eder held that the evidence failed to establish that the Reports had been created for the dominant purpose of aiding actual or contemplated litigation. In particular, he held among other things that the dominant purpose for the production of the Reports was to enable the Appellants to understand the financial position of the Oscatello Group of companies in accordance with their duties as liquidators. The Appellants appealed on the basis that, among other things, the Judge had mischaracterised the proper approach in that an exercise to establish the financial position of a company need not necessarily be independent of the possible need to take recovery proceedings and that the approach of the Judge wrongly suggested where a report commissioned for or on behalf of an officeholder contains information which the officeholder may otherwise be bound to obtain then the "dominant purpose" test cannot not be satisfied in respect of such report.The appeal was dismissed. The Court of Appeal held that, while certain aspects of the evidence had been overlooked by the Judge, the Judge had not lost sight of the need to identify the dominant purpose for which the Reports had, in fact, been produced. The Court held that the evidence before the Court was not sufficient to make out a claim for litigation privilege

[William Trower QC, David Allison QC, Henry Phillips]

OJSC VTB Bank v Parline Ltd & Ors, [2014] EWHC 1045 (Comm), (Walker J) 21 February 2014


DAVID ALEXANDER QC

Preliminary issues – expert evidence – foreign law

The defendants (Ds) applied for an order directing a preliminary issue as to Russian law. Ds submitted that, if their expert evidence of Russian law were right, then, taken at their highest, the claimants' allegations would not found a cause of action under Russian law. The Judge held that the relevant question was as follows: what is the most efficient, orderly and just way of determining the procedure which the court should adopt for deciding the issues which arise? Applying the factors in *Steele v Steele* [2001] CP Rep 106, the Judge stated that he would bear in mind the 'stern warnings' that have been given by appellate courts about the danger of identifying what may seem to be an easy shortcut. Further, it would not be appropriate to accept Ds' invitation to approach the matter as if it were an English law strike-out application. In the English courts, Russian law is a question of fact, which cannot be divorced from other factual issues arising in the fact. The issues of Russian law raised by Ds were fact-sensitive. The orderly and efficient way of proceeding would therefore be to proceed to a trial of the action as a whole, at which all facts, including issues of Russian law, could be examined together by the trial

judge. The proposed issues of Russian law did not disclose a sufficiently succinct 'knock out point' of the type envisaged by Lord Hope in *Boyle v SCA Packaging Limited* [2009] UKHL 37. Further, the preliminary issue would not necessarily achieve a substantial saving in costs. Accordingly, Ds' application was dismissed and the Judge gave directions for the trial of the whole action. **[David Alexander QC; Stephen Robins]**

McTear v Englehard [2014] EWHC 722 (Ch), (Richard Spearman QC), 14 March 2014

Extensions of time – judgments and orders – non-compliance

The Defendants were in breach of a Master's orders relating to the service of witness statements and further disclosure. They had also sought to adduce expert evidence without the leave of the Court. Notwithstanding the above it was held, on the Defendants' application (inter alia) for relief from sanctions under CPR r.3.9 (and on the Claimants' application for the amended Defence to be struck out pursuant to CPR r.3.4(2)(c) for non-compliance with the Master's orders), that it would be a disproportionate response for the Court to strike out the Defendants' pleaded case which had been placed on the record before that non-compliance with Court orders and the CPR had taken place. The Court decided that (i) where non-compliance with an order was trivial, it would be appropriate to grant a prompt application for relief from sanction, but otherwise the applicant would need to show a good reason for non-compliance (*Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 applied); but (ii) where non-compliance, taken by itself, might be said to be trivial, it might become more significant when seen against the background of other matters (*Durrant v Chief Constable of Avon and Somerset* [2013] EWCA Civ 1624 applied).

Porter Capital Corporation v Masters, unreported, (Nicholas Strauss QC), 20 March 2014

Case management – order for interim payment – CPR rule 3.9

The Claimant issued an application for an interim payment, pending the taking of an account, after a contested hearing. It also sought an order that, in the event of a default in payment, it should be permitted to enter judgment for the whole amount claimed or, alternatively, the Defendant should be barred from defending the proceedings The Court granted the Claimant an interim payment but refused to make a peremptory order. The Learned Judge observed that, following the Court of Appeal's decision in *Mitchell v News Group Newspapers Ltd* and the more stringent regime for obtaining relief from sanctions imposed by the amended provisions of CPR r.3.9, it was appropriate that the Court should adopt a cautious approach to the making of orders with sanctions attached, unless the sanction is built into the rule, as in the case of the requirement for a costs budget which was in issue in the Mitchell case.

Further, the Judge observed that, since the sanctioned party may find it difficult to obtain relief from anything other than a trivial breach, the Court should consider in advance whether the sanction will be a proportionate response to a breach of the order in all foreseeable circumstances. In particular, where the order requires the payment of money, as opposed to compliance with a procedural direction, a breach may not be deliberate or in any sense blameworthy, but due just to a lack of funds[HS2] . Whilst the Court now adopts a more rigorous approach to compliance with orders than formerly, this is still some distance from the "one strike and you're out" regime implied by the order sought in this case, which even in its milder form would be inconsistent with access to justice principles and probably with Article 6 of the ECHR.

Baho& Ors v Meerza, CA (Treacy LJ, Underhill LJ), 10 April 2014

Delay – non-compliance – extensions of time for appealing

In this case a notice of appeal was filed 7 days out of time. This was considered to be a significant delay. There was also a failure promptly to give reasons for the delay. Although there was arguably no prejudice and no waste of court resources, the decision in *Mitchell v News Group Newspapers Ltd* required parties to act promptly, efficiently and give a good explanation. Extension of time for appealing was refused.

In the matter of Guidezone Ltd [2014] EWHC 1165 (Nugee J), 15 April 2014

Application for extension of time"in-time"

The respondents to an unfair prejudice petition applied for an application for an extension of time to serve their defences before the date on which the defences were required to be served. The petitioner's argument that the decision in *Mitchell v News Group Newspapers Ltd* applied to "in-time" applications was rejected. Such applications should not be treated as an application for relief from sanctions; they should be decided by reference to the overriding objective.

COMMERCIAL LITIGATION & ARBITRATION

Digested by CHARLOTTE COOKE

Otkritie International Investment Management Ltd v Urumov [2014] EWHC 191 (Comm) (Eder J), 10 February 2014


CHARLOTTE COOKE

Fraud – Deceit – Conspiracy – Fiduciary duties – Knowing receipt – Dishonest assistance

The Claimants were members of a Russian banking group. They sought damages from the Defendants in relation to two frauds. The First Defendant (U) was a trader recruited by the Claimant from another company, together with his team of four other traders. A signing on fee of $25 million was paid to U. The Claimant claimed that sum was paid on the basis of representations that each of the five traders had a guaranteed income of $5 million per year at their previous employer and that the fee would be shared equally between U and the four other traders. It was claimed those representations were false and made fraudulently. It was further claimed that the Claimant had been induced to buy some Argentinean warrants for $150 million more than they were worth by false representations as to their value and as to their having been acquired from a reputable counterparty. The Claimants succeeded in their claims in deceit, conspiracy, breach of fiduciary duty knowing receipt, dishonest assistance. The Claimants were entitled to damages and certain proprietary remedies.

Leni Gas & Oil v Malta Oil Group [2014] EWHC 893 (Comm)(Males J), 27 March 2014


ADAM GOODISON

(Alleged fraudulent implied representations; "but for" test.)

Leni Gas & Oil ("LGO", the Claimant) alleged Malta Oil Group ("MOG", the Defendant) had made an implied fraudulent misrepresentation during a telephone call, which purportedly induced LGO to sell LGO's 10% interest in a Malta oil concession to MOG for $1 when allegedly the 10% interest was worth in excess of $10m. MOG denied that any implied representation was made as alleged, denied any fraud or dishonesty, and denied that LGO would have behaved any differently even if no such alleged representation had been made. LGO's claim failed on each point and was dismissed in its entirety. The judge decided that MOG were honest, and had no intention to make any implied statement as alleged. The judge held moreover that no such implied representation was made, as a reasonable man would not have understood any such purported implied representation to have been made and LGO did not in fact understand at the time that any such purported implied representation had been made. The judge also held, on the facts, that LGO would not have behaved any differently and would still have sold their interest on the same terms, applying the "but for" test. *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 applied. **[Antony Zacaroli QC and Adam Goodison]**

San Evans Maritime Inc v Aligaion Insurance Co SA [2014] EWHC 163 (Comm) (Teare J), 4 February 2014

Insurance – Contract – Shipping

The Court was required to determine issues relating to the proper construction of a follow clause in an insurance agreement. First, whether, on a proper construction, the follow clause in the policy: (i) required the Defendant to follow any settlement made by C and B under the policy; or (ii) merely authorised C and B to act on

the Defendant's behalf in negotiating and/or agreeing the settlement of disputed claims with the claimants. Secondly, if on a proper construction of the follow clause it required the Defendant to follow any settlement made by C and B under the policy, whether the follow clause was triggered by the settlement agreement. Thirdly, whether the Claimants had agreed by Clause 7 of the settlement agreement that the settlement agreement would not be binding on the Defendant and, if so, whether the Defendant was entitled to rely on s 1(b) of the Contract (Rights of Third Parties) Act 1999 to enforce that term. It was held that on a true construction of the policy, the follow clause was reasonably to be understood as meaning that the Defendant had agreed with the Claimants to follow any settlement made by C and B in respect of an insurance claim arising from a casualty affecting the vessel. The follow clause was triggered by the settlement agreement. As to Clause 7 of the settlement agreement, that clause would be understood by a reasonable person as meaning that the parties were not intending to bind any other insurer, though it was equally not a promise not to rely on the follow clause. The Defendant could not rely on s 1(b) because Clause 7 did not confer a benefit of the Defendant.

Constantin Medien AG v Ecclestone [2014] EWHC 387 (Ch) (Newey J), 29 February 2014


TOM SMITH QC

Fraud – conspiracy to use unlawful means – causing loss by unlawful means

The Court dismissed claims which had been brought against Bernie Ecclestone and two other defendants arising out of the sale of Formula One to CVC in 2007. The interest in the Formula One was held by, *inter alia*, a German bank, Bayerische Landesbank (BLB) and the Claimant claimed that it had the benefit of overage rights which entitled it to a portion of the sales proceeds received by BLB above a certain level. The Claimant further alleged that a bribe had been paid to an official of BLB in order to procure the sale and that as a result the Claimant had suffered loss as BLB's stake had been sold at a lower price than the price it would otherwise have been sold at. The Claimant asserted claims in German law, alternatively in English law in conspiracy to use unlawful means and causing loss by unlawful means. The Court dismissed the claim. Although a bribe had been paid to the BLB official, it was not part of the Defendants' purpose to procure a sale of BLB's stake an undervalue. The Defendants also had no knowledge of the Claimant's overage rights and did not intend to cause loss to the Claimant. Apart from this, the Claimant had not proved that it had suffered any loss. The evidence suggested that, even if the bribe had not been paid, BLB would in any case have accepted CVC's offer. Further, there was nothing to suggest that even if BLB had not accepted CVC's offer it would have obtained a better offer from either CVC or any other party. On balance, the applicable law governing the claims was German law, but the claims failed under both German and English law.
[Tom Smith QC]

COMPANY LAW

Digested by **GEORGINA PETERS**


GEORGINA PETERS

Waleed Abouraya v (1) Anja Sigmund (2) Triangle Metals & Minerals Trading Ltd (A company incorporated in Hong Kong) (3) Triangle Metals & Minerals Trading Ltd [2014] EWHC 277 (Ch) (Richards J), 13 February 2014

Company Law – Derivative Claims – Companies Act 2006, s. 260

The Claimant's application for permission to continue an action against the First Defendant (D1) as a derivative claim on behalf of the Second and Third Defendant companies (D2 and D3) was refused, in circumstances where C was held to be using the derivative action procedure to enable him to use his status as a shareholder in a parent company in order to advance his interests as a creditor of a wholly-owned subsidiary. C and D1 were shareholders in the company D2, being a holding company with two wholly-owned subsidiaries: D3 and Triangle Switzerland (TS). D1 was the sole director of both subsidiaries. C had provided the working capital for, and claimed to be a creditor of, D3, in relation to which proceedings were pending for recovery of sums allegedly due to C. In the proposed derivative action, C claimed that D1 had procured (i) the misappropriation of funds belonging to D3 for the benefit of TS, and (ii) the diversion of a business opportunity from D3 to TS. C accepted

that there was no loss either to D2 or to himself in his capacity as a shareholder of D2. His concern was that D3 would not have the funds to satisfy any judgment he may ultimately obtain against D3, unless D1 was compelled to restore to D3 the sums diverted. The Judge held, first, that C's claim was not a derivative claim for the purposes of the Companies Act 2006, s. 260, but the Court had jurisdiction at common law to entertain it. Second, in order to be permitted to continue his action as a derivative claim, C first had to demonstrate a *prima facie* case that D3 was entitled to the relief sought, which C had established on the evidence. Third, C had to establish a *prima facie* case that the proposed action fell within the exception to the rule in *Foss v Harbottle* 67 E.R. 189, which he could not do given that he had not suffered any loss as a shareholder in D2 as a result of the alleged wrongdoing. Fourth, in any event, there were other reasons for refusing the application, given C's real purpose of using his shareholding in D2 to advance his interests as a creditor of D3. This would provide him with a means of enforcement unavailable to other creditors, which was not a proper use of the derivative action procedure.

Graham v Every & Ors [2014] EWCA Civ 191 (Arden LJ, McCombe LJ, Vos LJ), 27 February 2014

Company Law – Directors' Duties – Unfair Prejudice – Pre-Emption Agreement – Companies Act 2006, s. 994

The Court of Appeal allowed an appeal against the partial strike-out of the appellant's (G) petition for relief from unfair prejudice under the Companies Act 2006, s. 994. G's petition, presented after his removal as a director of the company, contained allegations that: (i) the company had been formed on the basis of a common understanding between the parties, being its shareholders, recorded in part in written heads of agreement; and (ii) one of the respondent shareholders had bought the shareholdings of two of the others in breach of a pre-emption term in the heads of agreement.
The Court held, first, that the judge was wrong to strike out parts of the allegation that there had been a common understanding between the shareholders recorded in the heads of agreement. The court could not, on a strike-out application, determine that the only way that G could have accepted the heads of agreement was by notifying the respondents that the document had been executed, and the question whether G had communicated his acceptance of the agreement was an arguable issue. Second, the judge had erred in striking out the allegation concerning the non-compliant share purchase on the basis that it did not constitute unfair prejudice. If the allegation was properly particularized, it could involve the unfairly prejudicial conduct of the company's affairs within the meaning of s. 994(1). If, contrary to the heads of agreement, G had been denied an opportunity to buy shares, then he had lost an opportunity that might have been of value to him, being that of obtaining a potentially valuable strategic position as a 27 per cent shareholder. There was an arguable case that the share purchase in breach of the pre-emption provision was an act within the conduct of the company's affairs. Mere breach of a pre-emption agreement would not in itself constitute the conduct of the affairs of a company, *Re Coroin Ltd* [2014] BCC 14 considered, but diluting the shareholding of a company member could amount to conducting a company's affairs in a manner that was unfairly prejudicial. The parties had agreed that the company's directors were to be remunerated by way of dividend rather than salary, and such a policy was within the conduct of the company's affairs. By denying G's pre-emption right while he was still a director, the respondents had arguably interfered with the way in which the company remunerated its directors, *Gross v Rackind* [2005] 1 WLR 3505 applied.

(1) Pavel Sukhoruchkin (2) Hurley Investment Holdings Ltd (3) Pavel Novoselov (4) Vickgram Holdings Ltd v Marc Giebels van Bekestein & Ors[2014] EWCA Civ 399 (Sir Terence Etherton (Chancellor), Macur LJ, Sir Timothy Lloyd), 27 February 2014

Company Law – Reflective Loss – Freezing Injunctions

The Court of Appeal allowed an appeal against a refusal to continue a worldwide freezing injunction and a proprietary injunction in relation to the assets of the respondents, holding that the appellants did have a good arguable case that there had been breaches of fiduciary duties owed by co-joint venturers in the payment of funds to third parties under two agreements. The joint venture formed between the parties involved the establishment of a fund company and investment advisory company, both incorporated in the Cayman Islands. It was agreed that the co-joint venturers would share equally in the benefits of the funds business. The appellants alleged that a distribution agreement, under which two-thirds of the sums that would have been paid to the investment advisory

company in relation to a particular investment were instead paid to a third party, was entered into without their knowledge or consent. Further, that the third party had received secret payments pursuant to a written distribution agreement, known as the Rio agreement, with another company within the same structure. The Court, in considering whether the appellants had a good arguable case in relation to their claims for breach of fiduciary duties, held that the judge had not been entitled to find that their case was no more than borderline. The judge's rejection of a good arguable case was based on the no reflective loss principle, yet the respondents had not identified the precise causes of action which the investment advisory company might have if the appellants were successful in their claims for breach of fiduciary duty in connection with the distribution and Rio agreements. The judge had considered two claims that the company might pursue against the respondents, making findings of shadow directorship of that company which (i) did not take into account any differences in the law of the Cayman Islands as compared with English law, and (ii) were impossible to resolve at an interlocutory stage. Given that the application of the no reflective loss principle was highly fact dependent, and given the current state of the disputed evidence, the appellants were held to have a good arguable case that their claims for relief for breach of fiduciary duty would not be barred at trial by that principle.

CORPORATE INSOLVENCY

Digested by **ADAM AL-ATTAR**

Re Lehman Brothers International Europe (in administration) [2014] EWHC 704 (Ch), (David Richards J), 21 February 2014

Lehman Brothers Waterfall Application


MARK ARNOLD QC


ADAM AL-ATTAR

The issues for consideration arose as between the shareholders of LBIE on the one hand and creditors of LBIE's insolvent estate on the other. In particular, the application considered whether the subordinated debt held by LB Holdings Intermediate 2 Limited was subordinated to the claims of creditors of LBIE to be paid post-administration statutory interest. It also considered whether creditors of LBIE with a contractual entitlement to be paid in a currency other than sterling had a claim against LBIE for any shortfall suffered by them as a result of being paid dividends on their proved debt in sterling, and whether the subordinated debt of LB Holdings Intermediate 2 Limited was subordinated also to such foreign currency conversion claims. The application further considered, in light of the fact that LBIE is an unlimited liability company, the extent of the obligation of LBIE's shareholders to contribute to the assets of LBIE in its administration or in liquidation, and addressed issues of set-off as between the shareholders' contingent liability to contribute in LBIE's liquidation and the subordinated and unsubordinated debt claims of the shareholders in LBIE's insolvency.

The Judge stated his conclusions as follows:

"1. Conclusions on issues which are not connected with the status of Lehman Brothers International Europe (LBIE) as an unlimited company:

(i) The claims of LB Holdings Intermediate 2 Limited (LBHI2) under its subordinated loan agreements with LBIE are subordinated not only to provable debts but also to statutory interest and un-provable liabilities.

(ii) Creditors of LBIE whose contractual or other claims are denominated in a foreign currency are entitled to claim against LBIE for any currency losses suffered by them as a result of a decline in the value of sterling as against the currency of the claim between the date of the commencement of the administration of LBIE and the date or dates of payment or payments of distributions to them in respect of their claims. Such currency conversion claims rank as un-provable liabilities, payable only after the payment in full of all proved debts and statutory interest on those debts.

(iii) If the administration of LBIE is immediately followed by a liquidation, any interest in respect of the period of the administration which has not been paid before the commencement of the liquidation will not be provable as a debt in the liquidation nor will it be payable as statutory interest under either rule 2.88 of the Insolvency Rules 1986 or section 189 of the Insolvency Act 1986.

(iv) Those creditors of LBIE with debts which carry interest by reason of contract, judgment or other reasons unconnected with the administration or liquidation of LBIE will be entitled to claim in a liquidation of LBIE, which immediately follows the administration, for interest which accrued due during the period of the administration, as an un-provable claim against LBIE, payable after the payment in full of all proved debts and statutory interest on such debts.

2. Conclusions on those issues which arise from the status of LBIE as an unlimited company:

(i) The obligation of members to contribute under section 74(1) of the Insolvency Act 1986 extends not only to provide for proved debts but also for statutory interest on those debts and

un-provable liabilities.
(ii) The contributory rule (that is, the rule that a contributory of a company in liquidation cannot recover anything in respect of any claims he may have as a creditor until he has fully discharged his obligations as a contributory) applies only in a liquidation. It does not apply in an administration, including the administration of LBIE. The equitable rule in *Cherry v Boultbee* also does not apply.
(iii) LBIE, acting by its administrators, will be entitled to lodge a proof in a distributing administration or a liquidation of either Lehman Brothers Limited (LBL) or LBHI2 in respect of those companies' contingent liabilities under section 74(1) of the Insolvency Act 1986 which may arise if LBIE were to go into liquidation. The valuation of such claims would be a matter of estimation under the provisions of the Insolvency Rules.
(iv) In a distributing administration or liquidation of LBL or LBHI2, the claims of those companies respectively as creditors of LBIE would be the subject of mandatory set-off against the claims of LBIE in respect of those companies' contingent liabilities as contributories. I have reached the conclusion that the decision in In *re Auriferous Properties Limited* (No I) 1898 1 Ch 691 was wrong and should not be followed.
(v) In the administration of LBIE the contingent liabilities of LBL and LBHI2 as contributories will be the subject of mandatory set-off against the admitted proofs of debt of those companies as creditors of LBIE."
[William Trower QC, Antony Zacaroli QC, Barry Isaacs QC Mark Arnold QC, David Allison QC and Daniel Bayfield]

Jervis v Pillar Denton re: Games Station [2014] EWCA Civ 180 (Patten LJ, Lewison LJ and Sharpe LJ), 24 February 2014


DANIEL BAYFIELD


HANNAH THORNLEY

Administration/Liquidation – payment of rent as an expense

The Game group went into administration on 26 March 2012, the day after the March quarter day. Various companies in the group owned leasehold interests in a number of stores. Rent was payable in advance under all of the relevant leases. The rent falling due in advance on the March quarter day was not paid. The administrators refrained from paying any part of it, notwithstanding that the stores were used for the benefit of the administration throughout the remainder of the quarter, in reliance on the decisions in *Goldacre (Offices) Ltd v Nortel Networks UK Ltd* [2011] Ch 455 and *Leisure (Norwich) II Ltd v Luminar Lava Ignite Ltd* [2013] 3 WLR 1132. The Court of Appeal in this case overruled both Goldacre and Luminar. It held that where an administrator or liquidator makes use of leasehold property for the purpose of the administration or the winding up, then the reserved rent is payable as an expense for the period during which the property is so used, and will be treated as accruing from day to day for that purpose. This is true whether the rent was payable in advance or in arrears. The date upon which a quarter's rent becomes payable, and whether that is before, during or after the period during which the property is used for the purposes of the administration or liquidation, is irrelevant. The Apportionment Act 1870 had no part to play in determining the amount of rent payable as an expense under the salvage principle **[Antony Zacaroli QC, Daniel Bayfield and Hannah Thornley]**

Akers and Others v. Samba Financial Group [2014] EWHC 540 (Ch) (The Chancellor), 28 February 2014


FELICITY TOUBE QC

Cross Border Insolvency Regulations – Section 127 – stay of proceedings

Saad Investments Company Limited (in Official Liquidation) ("SICL") and its JOLs brought proceedings ("the Claim") against a bank, Samba, for relief under the Cross Border Insolvency Regulations and section 127 Insolvency Act 1986. The JOLs contended that certain shares (the "Disputed Shares") were owned by SICL under trusts ("the Trusts") that were governed by the law of the Cayman Islands, and that the Disputed Shares had been transferred to Samba after the presentation of the winding-up petition against SICL and that therefore that transfer was void (unless validated by the Court). Samba applied under CPR Part 11 for an order staying the proceedings on the grounds that the English court should not exercise jurisdiction over the claim made by the JOLs and SICL against Samba, because there exists another forum which is clearly and distinctly more appropriate, namely the courts of the Kingdom of Saudi Arabia. The JOLs resisted the Stay Application on the basis that (1) Samba could not demonstrate that another available forum (having competent jurisdiction) is clearly and distinctly the more appropriate forum for the trial of the Claim and (2) even if Samba could demonstrate that Saudi Arabia were clearly the more appropriate forum for the Claim, there were circumstances which dictated that the

Claim should nevertheless be tried in England. In particular, on SICL and the JOLs' case Cayman Islands law applies to the Trusts, but it was common ground between the parties' experts that Saudi Arabian courts will not apply or even consider the law of the Cayman Islands (or any other foreign law), but only the law of Saudi Arabia. The Chancellor stayed the Claim. He held that it could only succeed if, at the relevant date, SICL had a proprietary interest in the Disputed Shares and he further concluded that (1) The Trusts were governed by the law of Saudi Arabia and (2) the Claimants did not acquire a proprietary interest in the Disputed Shares by virtue of the Trusts. If the Judge had not reached this conclusion (on the Hague Trusts Convention and as a matter of common law), he made it clear that he would not have stayed the Claim. **[Felicity Toube QC]**

Hockin v Marsden [2014] EWHC 763 (Ch) (Nicholas Le Poidevin, QC), 19 March 2014


LLOYD TAMLYN

Assignment of claims in administration

The applicant applied under paragraph 74 of Schedule B1 to compel the administrators to assign claims of the company the administrator did not wish to pursue. The Judge directed the administrators to assign the claims. He said of the claims that the limitation period will soon begin to operate and that, since it is proposed that an assignment should be on terms that the administrators would receive a percentage of any recoveries, any success if the Applicants pursued the claims would be a benefit to the creditors. Conversely, if the claims failed, the creditors would have suffered no prejudice. The consideration, in terms of the percentage if successfully pursued, was not derisory and, in the circumstances, was sufficient consideration. **[Lloyd Tamlyn]**

Re ARM Asset Backed Securities (No 2) [2014] EWHC 1097 (Ch) (Nugee J), 28 March 2013

Provisional liquidation – s.130(2) stay

The company went into provisional liquidation in England as 'main proceedings' under Art.3(1) of the EC Insolvency Regulation, pursuant to the Order of David Richards J, who held that the company's COMI was in the UK: see Re ARM Asset Backed Securities [2013] EWHC 3351 (Ch). Subsequently, Le Procureur d'Etat de Luxembourg ("the Public Prosecutor") applied in Luxembourg for the liquidation of the company in Luxembourg under Article 39 of the Luxembourg law of 22 March 2004 on securitisation (as amended) ("the Securitisation Law"). The English provisional liquidators opposed the Public Prosecutor's application, contending that the automatic statutory stay under s.130(2) IA 86 applied throughout the European Union, pursuant to Art.17(1) of the EC Insolvency Regulation. The Luxembourg Commission de Surveillance du Secteur Financier ("the CSSF"), which had asked the Public Prosecutor to apply to the Luxembourg court for the liquidation of the company, contended that a liquidation in Luxembourg under the Securitisation Law would not amount to 'insolvency proceedings' for the purposes of the EC Insolvency Regulation and that the requirement for an 'establishment' as a pre-condition to the commencement of secondary proceedings within Art.3(2) of the EC Insolvency Regulation would not apply. On this basis, the CSSF contended that the absence of an 'establishment' in Luxembourg would not prevent the Luxembourg court from commencing a liquidation under the Securitisation Law in Luxembourg. In these circumstances, the English provisional liquidators applied to the English court for a declaration that the Public Prosecutor's application in Luxembourg was subject to the stay in s.130(2) IA 86. The Judge held: (1) the English provisional liquidation amounted to 'main proceedings' for the purposes of the EC Insolvency Regulation (Re Eurofood IFSC Ltd, C-341/04 [2006] Ch 508 applied); (2) as a result of Art.17(1) of the EC Insolvency Regulation, the effect under English law of the appointment of the provisional liquidators was applicable with no further formalities in all States to which the Insolvency Regulation applies, including Luxembourg; (3) pursuant to s.130(2) IA 86, no "actions or proceedings" could be commenced against the company without the permission of the English court; (4) the term "action or proceeding" has a wide meaning, including criminal and quasi-criminal proceedings, and it was clear that the Public Prosecutor's application was an action or a proceeding against the company falling within s.130(2) of the 1986 Act, which was automatically stayed; (5) although, outside the context of the EC Insolvency Regulation, the stay under s.130(2) IA 86 has no effect outside the UK, the effect of Art.17(1) of the EC Insolvency Regulation is to apply that stay to the whole territory of the European Union (excluding Denmark) (Kaupthing HF v Kaupthing Singer & Friedlander [2012] EWHC 2235 applied). For these reasons, the provisional

liquidators were entitled to a declaration that the Public Prosecutor's application in Luxembourg was stayed by operation of s.130(2), which applied in Luxembourg by virtue of Art.17(1).
[Felicity Toube QC, Stephen Robins]

Carman (liquidator of Casa Estates (UK) Ltd) v Bucci [2014] EWCA Civ 383 (Sullivan, McFarlane, Lewison LJJ), 3 April 2014

Inability to pay debts – when can CA substitute its own evaluation of facts

The Court of Appeal considered two questions in this case. First, when is a company deemed to be unable to pay its debts, with the result that it is insolvent? Secondly, whether the intermediate appeal court was entitled to substitute its own evaluation of the facts upon which the answer to the legal question depends? The context was a transaction at undervalue claim. The questions arose because Warren J had gone behind HH Judge Purle QC's conclusion that company was cash-flow solvent up to December 2008 and found that the company was using new deposits to pay old debts. The case did not involve a Ponzi scheme but the case was examined through the lens of the following example:
"In the early stages of a Ponzi scheme money flows in from investors promised high returns. Money from new investors is used to pay the promised returns to existing investors. On the face of it therefore the company is managing to pay its debts as they fall due. But the underlying reality is that, sooner or later, the whole house of cards will collapse. The accumulating liabilities to new investors cannot hope to be matched by any real investments: they are dependent on the continued inflow of new money. When that dries up, the game is up. In any commercial sense the company is insolvent from the beginning. What a commercial approach requires the court to do is not to stop automatically at the answer to the question: is the company for the time being paying its debts as they fall due? In an appropriate case it must go on to inquire: how is it managing to do so?"

Lewison LJ derived the following proposition from Eurosail:

(1) The tests of insolvency in s 123(1)(e) and 123 (2) were not intended to make a significant change in the law as it existed before the Insolvency Act 1986.
(2) The cash-flow test looks to the future as well as to the present. The future in question is the reasonably near future; and what is the reasonably near future will depend on all the circumstances, especially the nature of the company's business. The test is flexible and fact-sensitive.
(3) The cash-flow test and the balance sheet test stand side by side. The balance sheet test, especially when applied to contingent and prospective liabilities is not a mechanical test. The express reference to assets and liabilities is a practical recognition that once the court has to move beyond the reasonably near future any attempt to apply a cash-flow test will become completely speculative and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test.
(4) But it is very far from an exact test. Whether the balance sheet test is satisfied depends on the available evidence as to the circumstances of the particular case: para 38. It requires the court to make a judgment whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities. If so, it will be deemed insolvent even though it is currently able to pay its debts as they fall due.
(5) Cash-flow solvency or insolvency is not to be ascertained by a blinkered focus on debts due at the relevant date. Such an approach will in some cases fail to see that a momentary inability to pay is only the result of temporary illiquidity. In other cases it will fail to see that an endemic shortage of working capital means that a company is on any commercial view insolvent, even though it may continue to pay its debts for the next few days, weeks, or even months.
(6) Even if a company is not cash-flow insolvent, the alternative balance-sheet test will afford a petitioner for winding up a convenient alternative means of proof of a deemed insolvency.

On the basis of these propositions, the Court of Appeal refused to interfere with the decision of Warren J. Lewison LJ remarked that:
"It certainly seems counter-intuitive (to me at least) that a company that manages to stave off cash-flow insolvency by going deeper and deeper into long-term debt is not insolvent. It may be able to trade its way out of insolvency, and thus avoid going into insolvent liquidation, but that is a different matter. Equally if (as Warren J held) Casa UK was only able to continue to pay its debts as they fell due by taking new deposits, and using them to pay off old debts, in any commercial sense the company was insolvent, whether on a cash flow basis or a balance sheet basis."

Re Stemcor [2014] EWHC 1096 (Ch) (Birss J), 10 April 2014


ANTONY ZACAROLI QC

Scheme of Arrangement

The Court sanctioned the scheme of arrangement to restructure the debt of Stemcor. The key holdings as regard the objections to sanction were two-fold. First, the fact that the scheme conferred an additional benefit on two lenders with more limited guarantees was not unreasonable or unfair in the circumstances where all scheme creditors benefited from the company having in place a single restructured loan facility with an extended maturity date since it will thereby give it time to repay its indebtedness owed to all. Additionally, the remaining scheme creditors voted firmly in favour of the scheme. Secondly, it was reasonable to give priority in the future to those prepared to fund trade finance and borrowing base facility, which would be made available to the group creditors.

[Antony Zacaroli QC, David Allison QC, Tom Smith QC]

Christophorus 3 Limited [2014] EWHC 1162(Ch) (Henderson J), 15 April 2014

Administrations - pre-packs - release of liabilities under inter-creditor agreement

The Court was concerned with an application for (1) an administration order in respect of the company pursuant to paragraph 12(1)(b) of Schedule B1 to the Insolvency Act 1986; and (2) an order granting the proposed administrators liberty to enter into an immediate "pre-pack" agreement for the sale and purchase of all the company's assets ("the SPA").

The relief sought formed part of a scheme for the restructuring and refinancing of the predominantly German-based Auto-Teile-Unger ("ATU") group. The scheme had been devised as the only practicable means of saving the ATU group from compulsory insolvency, and a number of steps had already been taken towards its implementation. The making of an administration order in this jurisdiction, and the entry by the proposed administrators into the SPA, were essential to the success of the scheme. A crucial requirement of the scheme was that the assets to be sold under the SPA (which included, through an intermediate holding structure, the shares in the operating companies of the ATU group) should be sold "clean", released from all the existing indebtedness of the group secured on them. Achievement of this objective depended, among other things, on the granting of effective releases from the relevant existing liabilities by the Security Agent under and in accordance with the terms of an Intercreditor Agreement dated 15 October 2010 ("the ICA") which was governed by English law.

The exercise of the releases under clause 14.2 were dependent on two matters: (1) there being a disposal of "all of the shares (which are held by an Obligor) in the capital of an Obligor owing Liabilities or Liabilities of the Issuer under the Notes and Notes Indenture or any holding company of that Obligor…"; and (2) the sale being "implemented under any court approved process". As to the first issue, the definition of "Obligor" in the ICA required any new Obligor to be a subsidiary of the main operating entity in the group ("Handels") at the time when it becomes a party to the ICA by execution and delivery to the Security Agent of an Obligor Accession Deed. It was clear that this condition was satisfied when the company executed the necessary deed on 15 January 2014, but the question was whether it ceased to be satisfied when, later the same day, the company was moved up the group structure to become an intermediate holding company. The Court was satisfied that the company remained an "Obligor" within the meaning of clause 14.2 of ICA at all material times and notwithstanding its move up the corporate chain on 15 January 2014. The ICA contained no express requirement that an "Obligor" should serve any particular commercial purpose, or that it should have been trading for any particular length of time. What mattered was the contractual obligations undertaken by an Obligor. It therefore made no difference if, as in the present case, the company was incorporated with the main (or even the sole) object of becoming an Obligor, of being moved up the corporate structure once it had achieved that status, and of then being used as the vehicle for a sale of the group's assets. Although pre-planned and in some senses artificial, these steps served the very real commercial purpose of maximising recovery for the group and facilitating a refinancing. The court was satisfied that a purpose of this nature fell fairly and squarely within the purview of clause 14.2.

As to the second issue, the Court was also satisfied that the proposed sale would be "implemented under any court approved process". This was because (a) the proposed sale was to be effected by administrators appointed by the court, the administration itself being the process approved by the court for the purposes of clause 14.2; (b) the administrators were officers of the court; and (c) the court was, in any event, being asked to authorise them to

enter into the sale.
In these circumstances, the Court was satisfied that it would be appropriate to grant the relief sought, and that the Security Agent had power under clause 14.2 of the ICA to grant the necessary releases.
[William Trower QC; David Allison QC; Marcus Haywood]

Re Apcoa Parking Holdings GmbH and others [2014] EWHC 997 (Ch) (Hildyard J), 26 March 2014


BARRY ISAACS QC

Scheme of Arrangement – convening hearing – foreign law opinions

Several related companies, including companies incorporated in Germany, Austria, Denmark, Norway and Belgium, proposed schemes of arrangement with their creditors pursuant to Part 26 of the Companies Act 2006. The relationship between the companies and their creditors was governed by a Facilities Agreement, pursuant to which, at the date of execution, the governing law was German law, and the courts of Frankfurt/Main had exclusive jurisdiction. The governing law and jurisdiction were subsequently changed to English law and jurisdiction by a majority vote of creditors, pursuant to the terms of the Facilities Agreement. The companies adduced opinions of foreign law that the changes were valid under German law, and that the courts in the countries in which the companies were incorporated would, if otherwise satisfied as to the process, give effect to any scheme sanctioned by the English Court. The Court accepted that, for the purpose of convening meetings of creditors to consider and, if thought fit, approve the schemes, there was a sufficient connection with the jurisdiction, and convened those meetings accordingly.
[Simon Mortimore QC, Barry Isaacs QC]

Re Apcoa Parking Holdings GmbH and others (Hildyard J), 14 April 2014


SIMON MORTIMORE QC

Scheme of Arrangement – sanction hearing – recent change of governing law and jurisdiction

Nine companies in the Apcoa Parking group applied for the sanction of schemes of arrangement. Most of the companies' indebtedness was governed by a Facilities Agreement, which was originally subject to German law and the exclusive jurisdiction of the Courts of Frankfurt/Main. The governing law and jurisdiction were recently changed to English law and jurisdiction by a majority vote, in accordance with the amendment provisions in the Facilities Agreement. The purpose of the change was to allow the companies to propose schemes of arrangement. The principal term of the schemes extended the repayment date of the Companies' indebtedness under the Facilities Agreement. A number of the companies were incorporated in countries outside the UK (namely Germany, Austria, Belgium, Norway and Denmark); and they had no assets or operations in the UK. The Court received expert evidence of foreign law, to the effect that the change of governing law and jurisdiction, and the Schemes themselves, would be likely to be recognised in the countries in which those Companies were incorporated. The Court determined that a sufficient connection with this jurisdiction existed for the invocation of the scheme jurisdiction. The Court also exercised its discretion, having regard to the facts, in favour of sanctioning the Schemes.
[Simon Mortimore QC, Barry Isaacs QC, Adam Goodison]

Irving Picard v Primeo Fund (In Official Liquidation), Cayman Islands Court of Appeal (Chadwick P, Mottley JA, Campbell JA), 16 April 2014


MICHAEL CRYSTAL QC


GABRIEL MOSS QC

Cayman Islands law cross-border insolvency – governing law of claims

The U.S. trustee of the liquidation of Bernard L Madoff Investment Securities LLC ("BLMIS") commenced proceedings against Primeo Fund in the Cayman Islands. Jones J directed the trial of a number of preliminary issues of law, including: (i) whether the trustee could rely on U.S. insolvency law to reverse preferences, pursuant to ss 241-2 of the Cayman Companies Law; (ii) whether the trustee could rely on Cayman insolvency law to reverse preferences, pursuant to ss 241-2 of the Cayman Companies Law; and (iii) whether the trustee could rely on Cayman insolvency law to reverse preferences, pursuant to the Court's

power at common law to grant judicial assistance in cross-border insolvency cases. The provisions of ss 241-2 of the Cayman Companies Law derive ultimately from s.304 of the U.S. Bankruptcy Code.

In a series of decisions, U.S. courts held that s.304 enabled them to apply the foreign insolvency law of the foreign insolvency proceedings to reverse preferences.

The trustee contended that ss 241-2 of the Cayman Companies Law should be interpreted in the same way, so as to enable the Cayman courts to apply foreign insolvency laws. Since BLMIS is in liquidation in the United States, the trustee's argument, if upheld, would have permitted the Cayman courts to apply U.S. insolvency law to reverse preferences. Jones J held that ss 241-2 of the Cayman Companies Law drew on s.304, but did not copy it. Accordingly, he declined to interpret ss 241-2 on the basis of U.S. case law. Jones J further held that ss 241-2 did not confer any power on the Court in respect of the reversal of preferences. The trustee appealed.

The Court of Appeal, delivering judgment on issues (i) and (ii) above (issue (iii) above having been adjourned for further oral argument in due course), disagreed with Jones J's conclusion. First, Chadwick P held that the reference in s.242(1)(c) to "*the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate*" was a clear indication that s.241 was intended to enable the Court to assist foreign liquidators by avoiding preferences. Secondly, Chadwick P held that the reference to "*turnover … of any property belonging to a debtor*" in s.241(1)(e) was sufficient to cover the reversal of preferences, as the reversal of a preference would restore property belonging to the debtor, so that it could be turned over to the foreign liquidator. Thirdly, Chadwick P held that the application of foreign insolvency law would represent so radical a departure from the common law that it could not be achieved without clear words. In the absence of such clear words in ss 241-2, the law applicable to the reversal of preferences must be Cayman insolvency law.

Mottley and Campbell JJA agreed. On this basis, the Court of Appeal ruled that: (i) the trustee cannot rely on U.S. insolvency law to reverse preferences, pursuant to ss 241-2 of the Cayman Companies Law; and (ii) the trustee can rely on Cayman insolvency law to reverse preferences, pursuant to ss 241-2.

[Michael Crystal QC, Gabriel Moss QC, Tom Smith QC, Stephen Robins, Adam Al-Attar]

PERSONAL INSOLVENCY

Digested by MATTHEW ABRAHAM


MATTHEW ABRAHAM

Price v Davis [2014] EWCA Civ 26, Court of Appeal (Arden, Sullivan and Davis LJ), 21 January 2014

Binding of creditors following a suspension of an IVA

D had obtained interim orders under s.252 of the Insolvency Act 1986 (the "Act") and individual voluntary arrangements (the "Original IVAs") had been approved. P however, successfully challenged the valuation of their claims under s.262 of the Act and the District Judge hearing the matter discharged the interim orders, suspended the creditors' approval of the Original IVA and, under s.262(4)(b) of the Act, directed the nominee to summon further creditors' meetings. The suspension came to an end after further creditor meetings approved varied forms of the Original IVAs (the "Varied IVAs"). Pursuant to s.260 of the Act the Varied IVAs were binding on those creditors who were entitled to vote. As a consequence of their challenge to the valuation of their claims in the Original IVAs, P had become creditors of D in respect of their costs incurred as a result of the challenge. P opposed the Varied IVAs and served statutory demands on D for the unpaid costs on the basis that they were not bound by the approvals under the Varied IVAs in respect of those costs. D successfully applied to set aside the statutory demands and P's initial appeal was dismissed. The Judge held that r.5.21(2) of the Insolvency Rules 1986 (The "Rules") applied, and that P were bound by the creditors' approvals given at the further meetings. On appeal to the Court of Appeal, P contended that the Judge had wrongly conflated suspension and revocation and the Original IVAs would come into effect on the lifting of the suspension, meaning that P would not be bound by the Original IVAs. D argued that, once suspended, the original approvals had no legal existence and could not restrict the class of creditors bound by a subsequent approval. The Court of Appeal dismissed P's appeal. The Court held that if the IVAs were varied and approved by the creditors, those were the IVAs to come into force, not the Original IVAs which, in reality, would cease to have any legal existence. It followed that the fact that the court had suspended the original creditors' approvals rather than revoke them did not mean that only the creditors bound by the Original IVAs could be bound by the Varied IVAs. The Court

accepted that in the instant case, the literal meaning of s.260 was that it applied only to the original meeting and that a further meeting summoned by a nominee under s.262 had none of the consequences which the Act attached to the original meeting summoned. However, the Court held that the effect of a literal interpretation was to create significant anomalies which Parliament could not have intended and as a result the Court sought an interpretation which avoided those anomalies. Based on this the Court held that the reference to a "further meeting" in s.262(4)(b) of the Act, in relation to a nominee, was to be interpreted as a reference to a "further meeting under s.257". On that basis, the statutory binding applied in the instant case and P were bound by D's varied IVAs in respect of their costs.

Helman v John Lyon Free Grammar School [2014] EWCA Civ 17 (Arden LJ, Rimer LJ, Sir David Keene), 22 January 2014

Bankruptcy and the Leasehold Reform Act 1967

This case dealt with the question of whether a notice claiming to exercise the right of enfranchisement, set out in s.1 of the Leasehold Reform Act 1967 ("the 1967 Act"), in respect of a house falling within the 1967 Act was valid in circumstances where the tenant was adjudicated bankrupt and a trustee in bankruptcy was appointed. S.1 of the 1967 Act provides that the right to acquire, on fair terms, the freehold or an extended lease in relation to a property is only available to a tenant that has: (a) a long tenancy at low rent and (b) has been a tenant for two years prior to the issue of the relevant notice to the landlords. The landlords of a house (the "House") granted a 99-year lease of the House which was assigned to ("J"). J charged the House to Excel Securities PLC ("Excel") which in turn granted a registered sub-charge to Bank Leumi (UK) Plc (the "Bank"). As a result of the terms of the charge document as well as the application of s.53 of the Land Registration Act 2002, both Excel and the Bank were entitled to appoint one or more receivers in relation to the House. The receivers had various powers including the power of sale. J became bankrupt and a trustee in bankruptcy ("T") was appointed. As a result of this the Bank appointed receivers over the House. After appointment the trustee in bankruptcy filed a notice under s.315 of the Insolvency Act 1986 ("the 1986 Act") disclaiming his interest in the House. Following the disclaimer the receivers entered into an agreement with Mr Helman ("H") for the sale of the House. At the request of H the receivers served the landlords with a notice claiming the freehold in relation to the House pursuant to the 1967 Act. The notice was stated to be given on behalf of J and asserted that he was the tenant of the House. After service of the notice, the receivers transferred the lease and sought to assign the benefit of the notice to acquire the freehold to H. The landlords accepted that, in due course, H would fall within the provisions of s.1 of the 1967 Act but they argued that until then he was not eligible to the right to acquire the freehold. The landlords also accepted that, prior to J's bankruptcy, J had been a tenant for seven years and at that stage would have qualified under the 1967 Act to give a notice claiming the freehold. They argued that J's bankruptcy had the effect of vesting the tenancy in T with the result that J no longer had the right under s.1 of the 1967 Act and so no right could be assigned. It was argued by H that the property rights of J that vested in T were subject to the prior rights granted to Excel and the Bank and that those rights included the right on the part of the appointed receivers to give notice under s.1 of the 1967 Act. The Judge at first instance concluded that the property vesting in T did not include the right to give a notice, under the 1967 Act, on his behalf and that T was not entitled to disclaim the tenancy insofar as it affected the giving of notice by the receivers to acquire the freehold. The Court of Appeal held that if the registered proprietor of a property becomes bankrupt his entire interest in a property will be vested in his trustee in bankruptcy. The effect of this was that T was the new tenant and any notice pursuant to s.1 of the 1967 Act had to be in relation to T. As T had not been a tenant for two years no notice could be given. As a result the Court of Appeal found that whilst the charge and sub-charge conferred the widest powers upon the Bank and the receivers to take steps in relation to the lease of the House, including to sell it, nothing in such powers could or did enable the receivers to exercise rights in relation to the House that were not available in law to be exercised when they purported to exercise them.

Re Salliss [2014] EWHC 229 (Ch), (Etherton C), 10 February 2014

Bankruptcy annulment and Trustee's remuneration

Barclays Bank plc ("Barclays") petitioned for the bankruptcy of Mr Salliss ("S") based on a debt of more than £2m. S was made bankrupt on 20 December 1993. Following the bankruptcy order Barclays did not submit a proof of debt. Aside from Barclays, there were claims from four other unsecured creditors that each submitted a proof of debt. At the meeting of creditors it was agreed that the trustee's fee was fixed on the basis of a percentage of the assets realised and distributed.

S was automatically discharged from bankruptcy in December 1996. The only assets available to meet the claims of the creditors were S's pension plans. When S reached the requisite age to drawdown on the pension plans he paid the four creditors that had submitted proof of debts. He did not pay Barclays. In 2011, S's trustee in bankruptcy ("T") contacted Barclays stating that they had not submitted a proof of debt. Barclays wrote back stating that due to time that had passed since the debt was due they would no longer be making a claim in the bankruptcy estate.

On 3 December 2011, S issued an application for the annulment of his bankruptcy under s.282(1)(b) of the Insolvency Act 1986 on the basis that all the bankruptcy debts and the expenses of the bankruptcy had either been paid or secured. T filed a report with the court, as required by r.6.207 where an annulment is made under s.282(1)(b), which stated that he considered it appropriate that his fees ought to be based on time costs for the purposes of annulment. The reason given by T for the change in the basis for determining his remuneration was that that since there had been no realisations to date it was not appropriate to determine his fees on the percentage basis as agreed to before. The Deputy Registrar hearing the application for annulment held that the fact that Barclays appeared to be owed more than £2m weighed against the exercise of any discretion to annul. The Deputy Registrar relied on the case of *Gill v Quinn* [2004] EWHC 883 (Ch) as authority for the proposition that, when determining whether to make an annulment, the Court ought to take into account debts which are provable but have not been proved. As for the T's change of basis for determining his remuneration the Deputy Registrar held that a time costs basis was the only appropriate basis as there would be no realisations. The Chancellor of the High Court, Etherton J, held that the Deputy Registrar had erred in principle when determining the annulment application. In relation to the treatment of Barclays' debt, the Chancellor held that the decision in *Gill v Quinn* was clearly distinguishable. The reason for this was that the evidence showed that Barclays, unlike the creditors in *Gill v Quinn*, had made it clear that they would not be pursuing their debt against S. As a result the Chancellor held that there was no reason in principle why the court should take any account of any debt due to Barclays when considering whether or not to grant an annulment. In relation to the change in the basis for determining T's fees, Etherton J held that the Deputy Registrar failed to take into account the *Practice Statement: The Fixing and Approval of the Remuneration of Appointees (2004)* as referred to by David Richards J in *Brook v Reed, Practice Note* [2011] EWCA Civ 331. The Chancellor said that there is no doubt that the Practice Statement applied to an application to change the basis of the remuneration of a bankrupt trustee and that it will be important for the Court to bear in mind the principles set out in paragraph 20.2.3. He held that the Deputy Registrar failed to apply the principles in the Practice Statement and as a result remitted the issue. As the issue of remuneration was remitted the Chancellor also remitted the annulment application on the basis that it could only be determined after the issue relating to remuneration.

JSC Bank of Moscow and ZAO Sberbank Leasing v Vladimir Abramovich Kekhman ChD (Bankruptcy), (Chief Registrar Baister), 9 April 2014

Debtor's petition – Personal Presence – Application to annul bankruptcy order

Two Russian banks ("As") applied to annul and/or rescind a bankruptcy order made on a debtor's petition presented by the respondent Russian businessman ("R"). R had invoked the jurisdiction of the bankruptcy court on the basis that he was personally present in England on the date of presentation, relying on Section 265 (1)(b) of the Insolvency Act 1986 ("IA86"). In his petition R, who had over £300 million of debts, said that he would bring £200,000 cash into the jurisdiction, that he had substantial property assets in Russia and that any bankruptcy order would be recognised in Russia. The As issued applications to annul the bankruptcy on the basis that, having regard to the facts as they existed at the date of the order, the order ought not to have been made, and that it ought to be annulled on the basis of material non-disclosure. R contended that the Court had exercised its discretion properly

when making the bankruptcy order and that there was utility in the bankruptcy. After hearing oral evidence from both R, expert witnesses of Russian law and R's trustee, the Chief Registrar dismissed the applications. He accepted the As's contentions that the bankruptcy order would not in fact be recognised in Russia and that the £200,000 and the assets in Russia had been subject to an 'arrest' at the time of bankruptcy (and therefore would not have been available for the estate). However, he concluded that there was utility in the bankruptcy on the basis that the trustees would be able to conduct investigations of R's affairs and there had been limited realisations of assets (and could be further realisations). The authorities demonstrated that the English courts are prepared to countenance what is in reality forum-shopping, and the bankruptcy order filled in a lacuna under Russian law (where an individual cannot be made bankrupt). Any non-disclosure by R was not sufficiently serious or material to warrant annulment or rescission.
[Felicity Toube QC; William Willson]

PROPERTY & TRUSTS

Digested by STEPHEN ROBINS

Day v Tiuta International Ltd & Ors [2014] EWHC 4583 (Ch)
Chancery Division (Sales J), 6 September 2013

Real Property – Mortgage – Equitable Set-off – Subrogation


STEPHEN ROBINS

The claimant (D) had borrowed substantial sums from the first defendant (T), which were secured by a mortgage in favour of T over D's property. The loan became due for repayment and D failed to repay. D contended that T had acted in breach of contract, giving rise to a substantial claim for damages. D contended that he could set this damages claim off against the mortgage debt by way of equitable set-off, so as to release the property from the mortgage, and that T's appointment of LPA receivers had therefore been invalid. T counterclaimed for (inter alia) a declaration that the appointment of the LPA receivers had been valid. T applied to strike out D's attempt to rely on equitable set-off and sought summary judgment on its own counterclaim. In response, D contended that the mortgage in favour of T had been induced by fraudulent misrepresentation and that he had rescinded it. D contended that the appointment of the LPA receivers could be challenged on this basis. In addition, D sought to rely on Article 1 of the First Protocol to the European Convention on Human Rights (A1P1). Sales J granted relief in the terms sought by T, holding that:

(1) In the absence of clear and express terms to the contrary, a mortgagor has no right to rely on cross-claims or equitable set-off in answer to a mortgagee's reliance on a legal charge (*Samuel Keller (Holdings) Ltd v Martins Bank Ltd* [1971] 1 WLR 43 and *National Westminster Bank plc v Skelton* [1993] 1 All ER 242 applied);

(2) If the mortgage in favour of T had been rescinded prior to the appointment of the LPA receivers, T would have been subrogated in equity to the rights of the prior mortgagee, Standard Chartered (SC), whose mortgage had been discharged using money from T. Accordingly, there were only two possibilities: either D's claim to rescission would fail, in which case it would follow that the LPA receivers had been appointed validly under the mortgage in favour of T; or it would succeed, in which case T would be subrogated to the mortgage in favour of SC and the appointment of the receivers could be justified by reference to the mortgage in favour of SC (*Burston Finance Limited v Speirway Limited* [1974] 1 WLR 1648 applied);

(3) There was no interference with D's possessions within A1P1, as those possessions were subject to security rights in favour of T and/or SC, to which D had freely agreed.

D's appeal to the Court of Appeal on point (2) above (with the permission of Warren LJ) was heard recently by Vos, Gloster and Moses LJJ and the decision of the Court of Appeal is awaited.
[Stephen Robins]

Pullan v Wilson [2014] EWHC 126 (Ch)
Chancery Division (HHJ Hodge QC), 28 January 2014

Trusts – reasonableness of remuneration – acquiescence by beneficiaries

The beneficiary of a discretionary settlement challenged the reasonableness of the remuneration charged by a former trustee to the trusts. The claimant was one of the beneficiaries of ten family trusts, eight of which had interests in a number of family companies. In circumstances where there had no agreement as to hourly rates charged by the trustee, it was appropriate to assess the reasonableness of the hourly rate which had been charged including by reference to the work which had actually been done by the trustee. Accordingly, a professional trustee is not necessarily entitled to charge by reference to his normal or standard

charging rates (or those of his assistants), at least unless these have been specifically identified and approved before the relevant work is undertaken. However, in relation to those hourly rates had been communicated to the beneficiary who was challenging the remuneration and agreed by him then he would be precluded from challenging the reasonableness of remuneration to that extent, notwithstanding that other beneficiaries might be able to maintain such a challenge.

[Tom Smith QC]

In the Matter of an Application for Information About a Trust [2013] CA (BDA) Civ 8
Court of Appeal for Bermuda (Zacca P, Evans JA and Ward JA), 5 February 2014

Trusts – Disclosure of Information by Trustee

This case concerned the impact of a disclosure information mechanism in a Bermuda trust on the question of whether the Court should order disclosure of trust information. The disclosure mechanism provided that information should not be disclosed without the consent of the protector. The protector was the principal beneficiary of the trust. The protector was also the mother of the other adult beneficiary. The protector was concerned about the use to which the other adult beneficiary might put the information disclosed and therefore decided not to provide consent to disclosure. The other adult beneficiary brought the matter before the Bermuda Court to seek an order that the trustee provide such information. Subject to certain safeguards, the Chief Justice granted such order in relation to a number of trust documents, so the protector appealed to the Court of Appeal for Bermuda. The Court of Appeal dismissed the appeal for three reasons. First, the disclosure mechanism should be read as intended to permit the Court to be able to order disclosure even where a decision not to disclosure had been taken in accordance with the mechanism. Secondly, in any case the Court retained a broad supervisory jurisdiction over trusts which allowed it to order disclosure. Thirdly, the Court stated that if necessary it would hold that the protector had not complied with the limits of the mechanism.

[David Alexander QC]

Boyd v Rozel Channel Islands Limited & Ors [2014] JRC056
Royal Court of Jersey (Samedi Division) (W. J. Bailhache, Q.C., Deputy Bailiff, and Jurats Fisher and Nicolle), 4 March 2014

Trusts – mistake – invalidity

B was resident and domiciled in England until March 1997 and thereafter became resident and domiciled in the Isle of Man. Shortly afterwards, he sold his commercial business and sought appropriate advice as to how to deal with the shares in a Jersey company that held the proceeds of sale so as to satisfy his wishes and to ensure the arrangement was tax efficient. In October 1997, and relying upon professional advice, B, as settlor, settled the shares of the Jersey company into a discretionary trust. It had Jersey trustees and was subject to Jersey law. B and his wife were beneficiaries with long stop trusts in favour of charities generally. The trust continued for more than 10 years until it became apparent to the UK accountants that the effect of the 'deemed domicile' rule had been overlooked. The result was that under UK tax law: (1) the initial or subsequent transfer to the trust gave rise to a tax charge of 20% of the capital value; (2) 10 year charges, amounting to about 6% of the capital value, were levied on each 10th anniversary; (3) There would be an exit charge when the trust was wound up; (4) The settled property would be treated as part of B's estate on his death and subject to inheritance tax; and (5) There would be interest and penalties to pay. The ultimate financial result would be that approximately one quarter of the £4 million value of the trust would be subject to tax which otherwise would not have arisen had the trust never been created. B applied under Article 11 of the Trusts (Jersey) Law 1984 dealing with invalidity of a trust for equitable mistake, alternatively under the Trusts (Amendment No. 6) (Jersey) Law 2013, which sets out a statutory test for Hastings Bass and equitable mistake applications. The Court held that Article 11 of the Trusts (Jersey) Law 1984, together with the earlier common law position on mistake, could be applied to the facts of the case. This resulted in a finding that the three requirements had been met, namely: (1) There had been a mistake on the part of B, in his capacity as the settlor; (2) B would not have entered into the transaction 'but for' the mistake; and (3) The mistake was of so serious a character as to render it unjust to allow the trust to stand. Accordingly the Court declared that the trust should be set aside on the grounds of mistake and to have been invalid under Article 11. The trustees, who had supported the application, were permitted to retain their remuneration and expenses and to charge their reasonable and proper costs incurred in dealing with B's application.

Crociani v Crociani [2014] JCA 089 Jersey Court of Appeal (Beloff, Nutting and Martin JJA), 7 April 2014

Trusts – exclusive jurisdiction – exceptional circumstances

The Jersey proceedings involved breach of trust claims to recover funds and assets believed to be worth in excess of US$100 million removed from a trust created in 1987 called the Grand Trust. The impugned transactions principally took place between 2007 and 2011 while the Grand Trust was governed by Jersey law and administered by the first to third appellants. By a deed dated 10 February 2012, the first to third appellants purported to retire as trustees of the Grand Trust in favour of the fourth appellant and to change the proper law of the trust to that of Mauritius (the 2012 Retirement). The validity of the 2012 Retirement was challenged in these proceedings. The appellants commenced proceedings in Mauritius and applied to stay the Jersey proceedings on forum conveniens grounds. Their application was dismissed. The appellants' appeal was dismissed by the Jersey Court of Appeal, which held: (1) A clause by which Mauritius had become the "forum for the administration" of the trust did not amount to an exclusive jurisdiction clause in favour of Mauritius. It did not make the courts of Mauritius the only forum for the resolution of disputes in respect of the trust; it simply provided for the trust to be administered in Mauritius. The forum of administration of a trust and the forum for resolution of disputes in respect of it need not be the same. Koonmen v Bender [2002] JCA 218 overruled. (2) Alternatively, there were exceptional circumstances justifying a refusal to stay the Jersey proceedings on forum conveniens grounds.

SPORT

Digested by MARCUS HAYWOOD


MARCUS HAYWOOD

English Bridge Union Ltd v Revenue and Customs Commissioners [2014] UKFTT 181 (TC) First Tier Tribunal Tax Chamber (Judge Charles Hellier, Sheila Cheesman), 12 February 2014 12/02/2014

Sport - VAT

"Sport or physical education" in Directive 2006/112 art.132(1)(m) did not include contract bridge. The normal English meaning of sport required an athletic element and whilst bridge involved some physical activity, physical skill, as opposed to mental skill, was not particularly important to the outcome of participation. The supply of services made by the English Bridge Union in relation to bridge competition fees were therefore not exempt for VAT purposes.

British Telecommunications Plc v Office of Communications & Ors [2014] EWCA Civ 133 Court of Appeal (Civ Div) (Arden LJ, Aikens LJ, Vos LJ), 17 February 2014 17/02/2014

Sport – competition law

OFCOM had jurisdiction under the Communications Act 2003 s.316 to impose conditions in broadcasting licences of BSkyB if, as it had found, its practices relating to Pay TV made it appropriate to impose them to ensure fair and effective competition. At the relevant time, BSkyB held the right to broadcast the content of major sporting events, such as Premier League football, and it did so on core premium sports channels (CPSCs). In its "Pay TV statement" of 2010, OFCOM concluded that BSkyB had a practice of refusing to negotiate wholesale deals for the supply of CPSCs to retailers in order to maintain its two strategic objectives, identified as being the protection of its retail business on its own satellite platform and reducing the risk of stronger competition from rival retailers to be able to bid for content rights. OFCOM found that that practice was prejudicial to "fair and effective" competition in the Pay TV market. As a result, OFCOM declared that pursuant to the Communications Act 2003 s.316, it would exercise its statutory right to impose a term in the licences of BSkyB that it must offer to wholesale its CPSCs to retailers at a price fixed by OFCOM. BSkyB challenged that decision. The Court of Appeal held that OFCOM had jurisdiction to make the conditions that it did. Given that it was OFCOM's statutory duty to promote the interests of consumers in relevant markets and that one of those relevant markets must be Pay TV, then it had to follow that s316 was to be widely construed. However, the Competition Appeal Tribunal had erred in law in the way it disposed of some of the issues that were before it on the appeal. Those issues would be remitted to the tribunal for further consideration.

Dato Worawi Makudi v Baron Triesman [2014] EWCA Civ 179
Court of Appeal (Civ Div) (Laws LJ, Tomlinson LJ, Rafferty LJ), 26 February 2014

Football - parliamentary privilege

The protection afforded by the Bill of Rights 1689 art.9 to statements made in the Houses of Parliament could extend to speech outside Parliament where (a) there was a public interest in the repetition of the statement, which the speaker ought reasonably to serve; and (b) it was reasonably foreseeable at the time of the first speech that the speaker would be obliged to repeat his statement, and his purpose in speaking on both occasions was the same or very closely related. The appellant appealed against a decision striking out his claim against the respondent for defamation and malicious falsehood. The respondent was the chairman of the English Football Association ("the FA") and the English 2018 Football World Cup bid. After the failure of the English bid, an inquiry into domestic football governance was set up by the Culture, Media and Sports Committee ("the CMSC") of the House of Commons. The respondent gave evidence before the CMSC concerning allegations that members of the FIFA Executive had taken bribes in exchange for votes on the World Cup bids. He referred to a conversation between him and the appellant concerning a proposed match between the Thai and English football teams, and allocation of certain lucrative TV rights, which he believed was linked to a promise to vote for the English bid. He also gave an undertaking to take his concerns to the FA. The FA subsequently set up its own inquiry. The respondent's evidence before the CMSC was protected by absolute privilege but was repeated: (i) in oral evidence before the FA inquiry; (ii) in a witness statement for the FA inquiry; (iii) by the Chair of the FA inquiry to FIFA and the FA; (iv) on the FIFA website. The issue was whether those subsequent references attracted immunity under the Bill of Rights 1689 art.9.

The Court of Appeal, dismissing the appeal, held that:

(1) Absolute privilege was a common law rule affording a defence in some defamation cases. Its scope was strictly defined by reference to the setting in which the words complained of were uttered: Parliament and the Queen's courts. Once publication in the prescribed setting was established, the privilege attached. However, the reach of art.9 was not as clear-cut. It stated that "the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place outside Parliament". But the meaning of "impeached or questioned" was not clear.

(2) Members and witnesses speaking in the House or before the Committee were not to be vexed by the fear of litigation, for if they were, the functions of Parliament itself would be inhibited. It was clear in this regard that the protection afforded by art.9 was not given for the sake of the individual members, but for the integrity of the legislature's democratic process.

(3) Accordingly, a member who, for his own purposes, chose to repeat outside Parliament what he had said within its walls had no claim to the protection of art.9. However, not all such repetitions were the gratuitous choice of the speaker. There would be occasions when it would be in the public interest that he should repeat or refer to his earlier utterance in Parliament, and it might be a public interest which he ought reasonably to serve, because of his knowledge or expertise as a Parliamentarian, or an expectation or promise arising from what he said in Parliament. Generally, cases where the protection of art.9 extended to extra-Parliamentary speech would possess two characteristics: (a) a public interest in repetition of the Parliamentary utterance which the speaker ought reasonably to serve, and (b) so close a nexus between the occasions of his speaking, in and out of Parliament, that the prospect of his obligation to speak on the second occasion (or the expectation or promise that he would do so) was reasonably foreseeable at the time of the first, and his purpose in speaking on both occasions was the same or very closely related. Courts would look for a very strong case if art.9 was to apply. They would be concerned to see that the protection of art.9 was not extended to speech outside Parliament more than was strictly necessary.

(4) On the facts, the protection of art. 9 applied. The respondent's participation in the FA inquiry flowed directly from the undertaking he gave to the CMSC and the invitation he received from the FA very shortly after he had given his evidence. There was plainly a public interest in the FA inquiry, which would be served by the respondent's contribution. Art 9 therefore prohibited an examination of the respondent's evidence in the FA inquiry.

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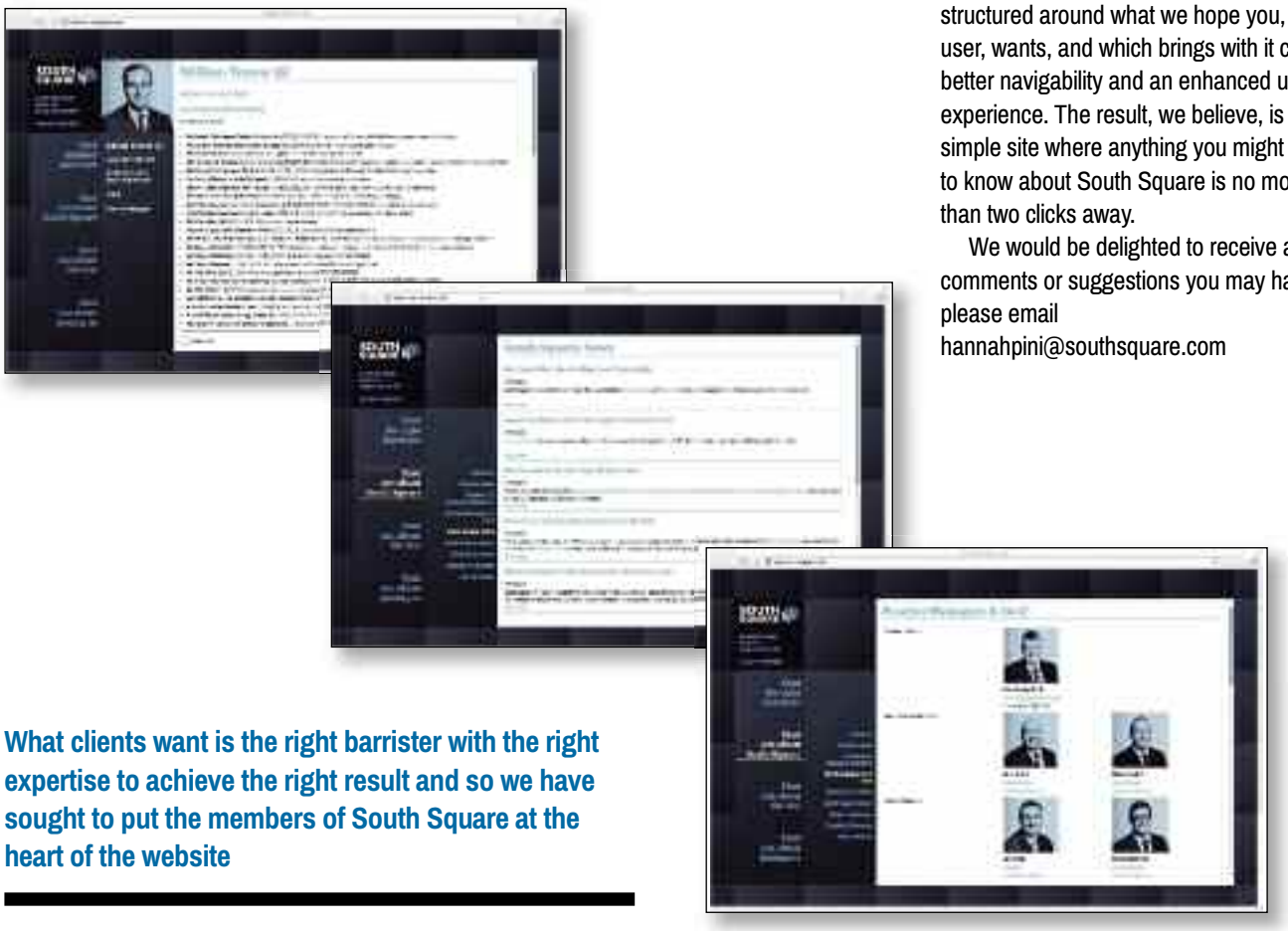

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What clients want is the right barrister with the right expertise to achieve the right result and so we have sought to put the members of South Square at the heart of the website

Forum conveniens in 'necessary or proper party' cases

Stephen Robins examines a trilogy of recent cases in the Commercial Court which show that the doctrine of forum conveniens can lose its potency.

Introduction

Three recent decisions in the Commercial Court – *Erste Group Bank AG v JSC 'VMZ Red October'* [2013] EWHC 2926 (Comm) (Flaux J), *OJSC VTB Bank v Parline Ltd & Ors* [2013] EWHC 3538 (Comm) (Leggatt J) and *BAT Industries plc v Windward Prospects Ltd* [2013] EWHC 4087 (Comm) (Field J) – make clear that the ordinarily potent doctrine of *forum conveniens* will be weakened to the point of irrelevance where the foreign defendant is a necessary or proper party to a claim against defendants sued in England as of right.

The Three-Part Test

The three-part test applicable in non-EU cases when seeking to bring a foreign defendant into proceedings in England was recently restated authoritatively by the Privy Council in *Altimo Holdings & Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at para 71.

First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law or both ("the first requirement"). This is the same test as for summary judgment, namely whether there is a real prospect of success[1].

Secondly, the claimant must satisfy the court that there is a good arguable case that the claim falls within one of the jurisdictional gateways set out in paragraph 3.1 of Practice Direction 6B ("the second requirement")[2].

Thirdly, the claimant must satisfy the court that England is the appropriate forum for the trial of the dispute and that the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction ("the third requirement").

The third requirement is ordinarily regarded as an important free-standing point: parties often seek to provide the Judge with long lists of factors that are said to connect the claim to one particular forum or another. However, in cases where the jurisdictional gateway to satisfy the second requirement is the 'necessary or proper party' test in paragraph 3.1(3) of Practice Direction 6B, it is increasingly clear that the second requirement and the third requirement are inseparably related. If a claimant in such a case satisfies the Court that the foreign defendant is a necessary or proper party to a claim against defendants who can be sued as of right in England, it will ordinarily follow inexorably that England is the appropriate forum for the claim against the foreign defendant as well.

The Second Requirement

Paragraph 3.1(3) of Practice Direction 6B states that the Court will have jurisdiction if: "(3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and – (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim". This test was first introduced in 1883. It has subsequently been the subject of numerous decisions of the Courts. Although there are textual differences between paragraph 3.1(3) of Practice Direction 6B and the former provisions of RSC Ord.11, "the differences are not intended to reflect any change in the underlying principles": see *MRG v Engelhard Metals Japan* [2004] 1 Lloyd's Rep 731 per Toulson J at p.732[3].

The 'necessary or property party' test has two limbs. First, the Court must be satisfied that there is a "real issue" between the claimant and the 'anchor' defendant. In substance this is the same as the test for summary judgment under Part 24: see *Altimo* at para 82 ("There is no practical difference between the two tests"). In *Ellinger v*

1/. See also De Molestina v Ponton [2002] 1 Lloyd's Rep 271 per Colman J at p.281; MRG v Engelhard Metals Japan [2004] 1 Lloyd's Rep 731 per Toulson J at p.732; and Carvill America Incorporated v Camberdown UK Ltd [2005] 2 Lloyd's Rep 457 per Clarke LJ at para 24.
2/. See also Seaconsar Far East Ltd v Bank Markazi Jomhouri Islam Iran [1994] 1 AC 438 per Lord Goff at p.453D-G; MRG v Engelhard Metals Japan [2004] 1 Lloyd's Rep 731 per Toulson J at p.732; Carvill America Incorporated v Camberdown UK Ltd [2005] 2 Lloyd's Rep 457 per Clarke LJ at para 45.
3/. See also United Film Distribution Ltd v Chhabria [2001] 2 All ER (Comm) 865 (CA).

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Guinness, Mahon & Co [1939] 4 All ER 16, Morton J said at p.22 (in a passage cited with approval by the Privy Council in *Altimo* at para 65): "I do not think it is part of the function of the court, in considering whether an action is 'properly brought' against a party within the jurisdiction, to arrive at a conclusion as to whether the plaintiff will or will not succeed against that party. It is enough if the court is satisfied that there is a real issue between the plaintiff and that party which the plaintiff may reasonably ask the court to try".

Secondly, the Court must be satisfied (to the 'good arguable case' standard) that the foreign defendant is a "necessary or proper party" to the claimant's claim against the anchor defendant. The meaning of "necessary or proper party" was authoritatively explained by Lord Esher MR in *Massey v Heynes & Co* (1888) 21 QDB 330 at p. 338: "The question, whether a person out of the jurisdiction is a 'proper party' to an action against a person who has been served within the jurisdiction, must depend on this – supposing both parties had been within the jurisdiction, would they have been proper parties to the action? If they would, and only one of them is in this country, then the rule says that the other may be served, just as if he had been within the jurisdiction"[4].

It is accordingly necessary to consider the rules for joinder in CPR 19.2(2): "(2) The court may order a person to be added as a new party if – (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue". A person who could be joined as a new party within CPR 19.2(2) will be a proper party for the purposes of paragraph 3.1(3) of Practice Direction 6B: see *United Film Distribution Ltd v Chhabria* [2001] EWCA Civ 416 at paras 36 to 38[5].

For this reason, it has been said that a foreign defendant will be a 'necessary or proper party' to a claim against a defendant within the jurisdiction "when the liability of several persons depends on one investigation" (*Massey v Heynes & Co* (1888) 21 QDB 330 per Lindley LJ at p.338; *Petroleo Brasiliero SA v Mellitus Shipping Inc (The Baltic Flame)* [2001] 2 Lloyd's Rep 203 per Potter LJ at para 33); or when the claims "give rise to common questions of fact" (*United Film Distribution Ltd v Chhabria* [2001] 2 All ER (Comm) 865 (CA) per Blackburne J at para 40); or when the claim against the foreign defendant is "closely bound up" with the claim against the defendant within the jurisdiction (*Carvill America Incorporated v Camberdown UK Ltd* [2005] 2 Lloyd's Rep 457 per Clarke LJ at para 46).

The Third Requirement

The third requirement raises the issue of *forum conveniens*. The Court is required to consider where the claim may be tried "suitably for the interests of all the parties and for the ends of justice": see *Spiliada Maritime Corporation v Cansulex* [1987] AC 460 per Lord Goff at p.482, citing *Sim v Robinow* [1892] 19 R 665 per Lord Kinnear at p.668. However, in cases where the jurisdictional

4/. This test has been applied repeatedly. See, for example, Qatar Petroleum Producing Authority v Shell Internationale [1983] 1 Lloyd's Rep 35 per Ackner LJ at p. 41 and Barings plc v Coopers & Lybrand [1997] I L PR 12 per Chadwick J at paras 14 and 15.

5/. See also Barings plc v Coopers & Lybrand [1997] I L PR 12 per Chadwick J at para 18 and 889457 Alberta Inc v Katanga Mining Ltd [2008] EWHC 2679 (Comm) per Tomlinson J at para 26.

gateway for the second requirement is the 'necessary or proper party' test in paragraph 3.1(3) of Practice Direction 6B, it is clear from the authorities that the second requirement and the third requirement will be inseparably related. If a claimant satisfies the Court that the foreign defendant is a necessary or proper party to a claim in England, it will ordinarily follow that England is the appropriate forum for that claim.

Earlier Authorities

A number of older decisions make this point. First, in *Golden Ocean Assurance Ltd v Martin (The Goldean Mariner)* [1989] 2 Lloyd's Rep 390, [1990] 2 Lloyd's Rep 215, Phillips J held that there was "one consideration which … outweighed all others in making London the obvious forum for the trial of the plaintiffs' claims against all the defendants": "Where … the validity of a claim has to be determined by litigation, this should occur in a single hearing binding on all concerned … To suggest in such circumstances that the ends of justice required the plaintiffs to proceed against some of the defendants in England and some in New York would have been patently absurd". The foreign defendants sought to challenge this decision. However, the Court of Appeal dismissed the appeal.

Secondly, in *Societe Commerciale de Reassurance v Eras International Ltd (The ERAS EIL Actions)* [1992] 1 Lloyd's Rep 570, Waller J held that "necessary or proper party cases will often be just those type of cases … when leave will normally be given once a judge is satisfied … that a person is a proper party. Since the forum is already chosen, it will normally be a case when the discretion is exercised in favour of service". The appellants sought to persuade the Court of Appeal that Waller J had approach the matter on an inappropriate basis. They contended that he had imposed "an unjustified fetter on the free exercise of the Court's discretion" (p.591, col.2). The Court of Appeal rejected the appellants' contentions and upheld Waller J's decision. Mustill LJ (delivering the decision of the Court of Appeal) explained at p.591 that "the factors which make the party served a necessary or proper party … will also weigh heavily in favour of granting leave to make the foreigner a party".

Thirdly, in *Barings plc v Coopers & Lybrand* [1997] I L PR 12, Chadwick J was required to consider the issue of *forum conveniens*. He set out the relevant principles in paras 53 and 54 by reference to *Spiliada* before concluding in para 55: "The factors which lead the court to conclude that the foreign defendant is a proper party to the proceedings commenced in England are bound to point, although not to the exclusion of other factors, to the conclusion that England is the appropriate forum". Christopher Clarke J adopted a similar approach in *JSC BTA Bank v Granton Trade Ltd* [2011] 2 All ER (Comm) 542.

Risk of Inconsistent Judgments

One of the main factors in the reasoning in such cases relates to the importance of avoiding a risk of inconsistent judgments, which courts have always regarded as a "potential disaster from a legal point of view" (see *Aratra Potato Co Ltd v Egyptian Navigation Co* [1981] 2 Lloyd's Rep 119 per Brandon LJ at p.128)[6].

Such a risk would be created if the court were to require a claimant to pursue the same underlying claim simultaneously in two different jurisdictions but eliminated if the court were to permit the foreign defendant to be sued in the same forum as the domestic defendants.

Consequently, in circumstances where (i) a claimant is already suing an English defendant as of right in England and (ii) a foreign defendant is a necessary or proper party to that litigation, it is clear that the appropriate forum for the claimant's claim against the foreign defendant will ordinarily be England. In such a case the relevant question is ***not*** "What is the appropriate forum for the litigation as a whole?" Rather, the relevant question is "In circumstances where this claim is to be pursued in England against the English defendant, what is the appropriate forum for the pursuit of the same claim against the foreign defendant?"

Three Recent Commercial Court Cases

As stated above, three recent decisions in the Commercial Court underscore this reasoning.

First, in *Erste Group Bank AG v JSC 'VMZ Red October'* [2013] EWHC 2926 (Comm), the claimant was entitled to sue certain defendants in England, pursuant to an exclusive jurisdiction clause. The defendant sought to join other foreign defendants to the claim. Those foreign defendants sought to challenge the jurisdiction of the English court on *forum conveniens* grounds by contending that Russia was the most appropriate forum for any claims against them. Flaux J rejected the jurisdiction challenge. He held in para 156 that the claimant had a fully arguable case against the borrower and the guarantor in conspiracy, which it was entitled to pursue in England, and that the other foreign defendants were necessary or proper parties to that claim, on the basis that they were at the relevant time in the same group (and parties to the same conspiracy) as the borrower and the guarantor. Flaux J held: "In my judgement, it would be verging on the perverse for [the claimant] to have to litigate the conspiracy and other tort claims against companies arguably in the same group as the borrower and the guarantor in Russia … involving as that would litigating the same complex issues of fact twice with all the attendant waste of cost and risk of inconsistent findings in the two jurisdictions".

In *OJSC VTB Bank v Parline Ltd & Ors* [2013] EWHC 3538 (Comm), the claimant was entitled to sue the first defendant (an English company) and the third defendant (an English domiciled individual) in England

[6] See also Aiglon Ltd v Gau Shan Co Ltd [1993] 2 Lloyd's Rep 164 per Hirst J at p.172 ("the Court would inevitably have regard to the fact that the claims against Ltd and SA respectively were inextricably interlinked and that in the interests of justice they would be heard together, so as to save costs and avoid inconsistent results"); Citi-March Ltd v Neptune Orient Lines Ltd [1996] 1 WLR 1367 per Colman J at p.1375F-G ("there is a risk, if actions in respect of the same loss must be brought in different jurisdictions, that there will be inconsistent decisions on the facts"); Barings plc v Coopers & Lybrand [1997] I L PR 12 per Chadwick J at para 55 ("The potential for different decisions by different courts on the same underlying facts ought to be avoided if possible"); 889457 Alberta Inc v Katanga Mining Ltd [2008] EWHC 2679 (Comm) per Tomlinson J at para 25 (referring to "the desirability of concentrating proceedings in one jurisdiction so as to avoid the possibility of inconsistent decisions"); and JSC BTA Bank v Granton Trade Ltd [2011] 2 All ER (Comm) 542 per Christopher Clarke J at para 17 ("If the proceedings ... against the applicants are heard in Kazakhstan there is an obvious risk of inconsistent judgments and of waste and duplication of costs. That is a powerful factor in favour of having the applicants as parties to this litigation").

as of right, pursuant to the Brussels Regulations. The claimant also sued the second defendant (a Russian domiciled individual) in England, contending that she had been party to a conspiracy with the first and third defendants. The second defendant challenged jurisdiction on *forum conveniens* grounds, contending that Russia was the most appropriate forum for any claim against her. Leggatt J rejected the jurisdiction challenge. He held in para 4 that "the fact that the second defendant is a necessary or proper party is a relevant and indeed weighty factor to take into account, albeit that it is not conclusive and does not in any way exclude consideration of other factors". He explained: "The reason why it is a weighty factor is, in essence, that it is generally desirable that claims arising out of the same facts and requiring a single factual investigation should be decided in one proceeding in the same place. The reasons which make that so are, first, the desirability of avoiding duplication and waste of time and costs and, second, the undesirability of inconsistent judgments. Those are the policy considerations which underlie the jurisdiction of the court over a defendant who is a necessary or proper party to those proceedings, and those same policy factors are clearly important factors to take into account in deciding which is the most appropriate and convenient forum for the trial".

In response to the contention (which Leggatt J accepted) that the case against the second defendant was overwhelmingly connected with Russia, Leggatt J held that those connecting factors lost all their potency in circumstances where the claim against the second defendant was not a freestanding claim: "I accept that, if the claim against the second defendant were a freestanding claim, all those factors would point overwhelmingly to Russia being the appropriate forum for the claim. However, the context is that the claim against the second defendant is not a freestanding claim, and it has to be considered in circumstances where the claimant has chosen to bring, and is entitled to bring, claims against the first and third defendants in England, which it wishes to pursue, regardless of whether the second defendant is brought into these proceedings or not". Leggatt J explained: "What therefore has to be considered … is not whether England or Russia is the more suitable forum for the claim against the second defendant, other things being equal, but whether it is appropriate to have proceedings against the second defendant in Russia in circumstances where proceedings involving identical or virtually identical facts, all the same transactions, witnesses and documents, will anyway be taking place in England". As Leggatt J put it in para 5: "The real question, in other words, is whether the factors which connect the claim against the second defendant with Russia carry weight in circumstances where to require the claim to be pursued in Russia would result in duplication of costs and the risk of inconsistent judgments – the same factors which make the second defendant a necessary or proper party".

These decisions potentially make it easier for a claimant to sue a foreign defendant in England

Field J adopted the same approach in *BAT Industries plc v Windward Prospects Ltd* [2013] EWHC 4087 (Comm). The claimant was suing an English company as of right in England. The second defendant was a company incorporated in the United States which sought to challenge jurisdiction on *forum conveniens* grounds. Field J concluded in para 81: "I conclude that looking only at the connecting factors and ignoring for the moment the issue of bifurcation of proceedings, there is a clear preponderance in favour of New York over London". Field J proceeded to ask in para 82: "Does the prospect of [the claimant] having to bring substantially identical actions in two jurisdictions, in London against [the first defendant] and in New York against [the second defendant] with the risk of inconsistent decisions, decisively tip the scales in favour of London being the appropriate forum? In my judgment it does". Field J explained: "The claims … involve very heavy and very expensive litigation and the risk of inconsistent decisions is pregnant with disaster".

Conclusion

These decisions potentially make it easier for a claimant to sue a foreign defendant in England, by finding some other defendant against whom proceedings may credibly be brought in England as of right, so that the foreign defendant can be joined as a necessary or proper party, robbing the ordinary *forum conveniens* arguments of their normal potency in the process. However it will always be important in such a case for the English anchor defendant to be a real party and not simply a token defendant sued for the purpose of founding jurisdiction against the 'real' defendant, who could not otherwise be sued in England. As Leggatt J put it in para 7 of the *VTB* decision: "It seems to me that if the situation were one in which claims against the defendants domiciled in England would not be brought except for the fact that it was sought to use those claims as a hook on which to bring another defendant into the jurisdiction, then that would be a strong reason for discounting the arguments in favour of England being the most appropriate jurisdiction". In other words, if the claim against the 'English' defendants is an artifice designed to bring foreign defendants within the jurisdictional reach of the English courts, the doctrine of *forum conveniens* will retain its usual potency. If however the English defendants are real parties to the claim, who can be sued as of right in England, the foreign defendant who protests that the claim has far stronger connections with a foreign jurisdiction will find those complaints falling on deaf ears.

Stephen Robins was junior counsel for the claimant in OJSC VTB Bank v Parline Ltd & Ors [2013] EWHC 3538 (Comm), led by David Alexander QC.

Pay As You Go for administrators

Hannah Thornley reviews the Games Station judgment, including the overruling of Goldacre and Luminar by the Court of Appeal and the treatment of rent payable under a lease held by a corporate tenant that enters administration or liquidation. When is rent no more than a provable debt; and when does it rank as an expense of the administration?

Introduction

On 24 February 2014 the Court of Appeal handed down judgment in *Jervis v Pillar Denton; re Games Station*. I will look at the facts, the decision and the key points arising from the decision.

Facts

The Game group of companies went into administration on 26 March 2012, the day after the March quarter day. Various companies in the group owned leasehold interests in a large number of stores. Rent was payable in advance under all of the relevant leases. The rent falling due in advance on the March quarter day was not paid. Some stores were closed down immediately but trading continued in other stores which were included in a swift sale of the business and assets of the group to Game Retail Ltd. The administrators did not pay any part of the rent falling due, despite the fact that the stores were used for the benefit of the administration throughout the remainder of that quarter, in reliance on the decisions in *Goldacre* and *Luminar*. At the heart of the appeal was the question of whether part of an instalment of rent payable in advance can be treated as an expense in the context of insolvency.

Goldacre and Luminar

In *Goldacre (Offices) Ltd* v *UK Nortel Networks Ltd* [2011] Ch 455, HH Judge Purle QC decided that if a quarter's rent (payable in advance) fell due during a period in which administrators were retaining the property for the purposes of the administration, the whole of the quarter's rent was payable as an administration expense even if the administrators were to give up occupation later in the same quarter.

In *Leisure (Norwich) II Ltd v Luminar Lava Ignite Ltd* [2013] 3 WLR 1132, HHJ Pelling QC decided that where a quarter's rent payable in advance fell due before entry into administration none of it was payable as an administration expense even if administrators retained possession for the purposes of the administration for the rest of that quarter. The rent was held to simply be a provable debt in the administration.

Decision

Lord Justice Lewison gave the only reasoned judgment of the Court of Appeal in Games Station. He noted that it was common ground between the parties that: (i) at common law rent is not apportionable in respect of time and that rent payable in advance is not apportionable under the Apportionment Act 1870; (ii) whether rent is payable as an administration expense is not a question of an exercise of the court's discretion. Either it counts as an expense, or it does not. If rent falls within the salvage or "Lundy Granite" principle it is an administration expense. If not, not; (iii) the salvage principle and the right to prove for a debt are not mutually exclusive. Thus the mere fact that a

SOME STORES WERE CLOSED DOWN IMMEDIATELY WHILST OTHERS REMAINED TRADING

debt is a provable debt does not mean that the salvage principle cannot apply.

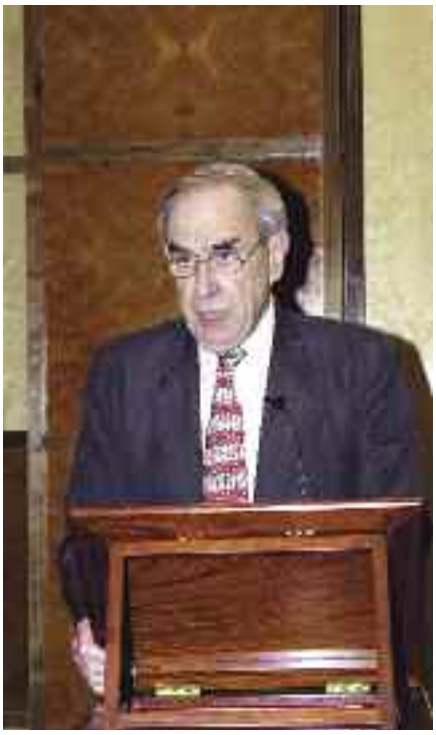
The argument of the landlords was that whether rent payable in advance is apportionable at common law or under the Apportionment Act 1870 is irrelevant. The salvage or "Lundy Granite" principle should be applied and that principle relies on the rules of equity rather than the common law. The opposing argument of Game Retail Ltd was that rent payable in advance cannot be apportioned.

The origins and development of the salvage or "Lundy Granite" principle were explained by Lord Hoffmann in *Re Toshoku Finance Ltd* [2002] UKHL 6. They can be traced back to *Re Exhall Coal Mining Co Ltd* (1864) 4 De GJ & S 377. In *Exhall* the landlord had put in a distress for rent on the same day as but after the presentation of the petition. The Court of Appeal allowed the distress to proceed. Of *Exhall*, Lord Hoffmann observed: "*thus was created a discretion to allow a creditor to use a process of execution to recover in full a debt for which he would otherwise have had to prove in the liquidation. In subsequent years a body of precedent on the exercise of the discretion developed*". It is clear that Lord Hoffmann did not regard the existence of a provable debt as incompatible with the salvage principle.

In *Re Lundy Granite exp Heavan* (1870-71) LR 6 Ch App 462, the landlord was permitted to distrain for rent which had accrued due after the winding up. The principle underlying the decision was formulated by James LJ as follows: "*But in some cases between the landlord and the company, if the company for its own purposes, and with a view to the realization of the property to better advantage, remains in possession of the estate, which the lessor is therefore not able to obtain possession of, common sense and ordinary justice require the Court to see that the landlord receives the full value of the property. He must have the same rights as any other creditor, and if the company choose to keep the estates for their own purposes, they ought to pay*

The Lundy Granite principle relies on the rules of equity rather than the common law

GOLDACRE V NORTEL HAS BEEN OVERRULED. BELOW: LORD HOFFMAN



the full value to the landlord, as they ought to pay any other person for anything else, and the Court ought to take care that he receives it".

The Lundy Granite principle was approved as founded on equitable grounds in *Toshoku*: *"The principle…is thus one which permits, on equitable grounds, the concept of a liability incurred as an expense of the liquidation to be expanded to include liabilities incurred before the liquidation in respect of property afterwards retained by the liquidator for the benefit of the insolvent estate. Although it was originally based upon a statutory discretion to allow a distress or execution against the company's assets, the courts quickly recognised that its effect could be to promote a creditor from merely having a claim in the liquidation to having a prior right to payment in full. As in the case of other equitable doctrines, the discretion hardened into principle. By the end of the nineteenth century, the scope of the Lundy Granite Co principle was well settled."* per Lord Hoffmann at para. 29.

Lord Hoffman did not regard the existence of a provable debt as incompatible with the salvage principle in Toshoku

Lewison LJ then went through the earlier distress and salvage cases to show that the state of the law at the end of the nineteenth century was that the salvage principle was applied both to rent payable in arrear and in advance. The modern cases referred to by Lord Hoffmann in *Toshoku* then show that the law continued to be applied in this way for the next century.

Game Retail Ltd relied upon certain rating cases in order to demonstrate that the rent could not be apportioned. Lewison LJ analysed the rating cases, but did not find them helpful as liability for rates accrues from day to day in modern law.

Lewison LJ concluded that the extent of the salvage principle is that the office holder must make payments at the rate of the reserved rent for the duration of any period during which he retains possession of the property for the benefit of the winding up or administration. Rent will be treated as accruing from day to day. Such payments will be payable as expenses of the winding up or administration. The duration of the period is a question of fact and is not determined merely be reference to which rent days occur before, during or after that period.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Conclusion

The key points arising from the decision in *Games Station* are as follows:

- *Goldacre* and *Luminar* are both overruled;
- Where an administrator or liquidator makes use of leasehold property for the purposes of the administration or winding up, then the reserved rent is payable as an expense for the period during which the property is so used, and will be treated as accruing from day to day for that purpose;
- The rent will be treated as an expense and accrue daily whether or not it is payable in arrears or in advance;
- The date upon which a quarter's rent becomes payable, and whether that is before, during or after the period during which the property is used for the purposes of the administration or liquidation, is irrelevant;
- The Apportionment Act 1870 is not relevant to the calculation of rent payable as an expense under the salvage or "Lundy Granite" principle;
- The Court should apply the salvage principle in the same way in an administration as it was applied in liquidation, in the light of the similarity in the respective rules relating to expenses (this was common ground between the parties);
- It will no longer be necessary for administrations to commence on the day after a quarter day in order to minimise the expenses claims of landlords, as administrators now need to pay as they go.

Hannah Thornley was junior counsel for the Landlords in Games Station. She was led by Antony Zacaroli QC. Game Retail Ltd has applied for Permission to Appeal to the Supreme Court.

INSOL Hong Kong 2014

William Willson reports on South Square's attendance at INSOL's regional conference in Kowloon, Hong Kong

After a very successful visit last November to the INSOL Caribbean conference, South Square again deployed in number to March's regional conference in Hong Kong. 9 members – Michael Crystal QC, Fidelis Otitah QC, David Alexander QC, Antony Zacaroli QC, Glen Davis QC, Tom Smith, Marcus Haywood, William Willson and Matthew Abraham attended (as well as 2 academic/ associate members, Professor Ian Fletcher QC and Roxanne Ismail SC) – took the total Chambers turnout to nearly 25%. This underlines the substantial amount of instructions received by South Square in recent years with an Asia Pacific dimension, and our continued forging of professional relationships in this ever-growing marketplace.

This year's conference saw a capacity crowd, with all tickets sold out months in advance. There were 650 delegates in total, with significant attendance from the hedge fund and financial services industry, emphasising Hong Kong's position as a global business hub. It was a pleasure to see so many of our friends and colleagues from jurisdictions all over the world (the Caribbean, the Channel Islands, the US, Australasia, the Middle East and Hong Kong/Singapore). Particular praise must go, however, to the contingent from the British Virgin Islands who, in most cases, had travelled nearly 40 hours to be there. As a bonus, the end of the conference neatly coincided with the biggest event in Hong Kong's social and sporting calendar – the rugby 7s. Hong Kong was at its best and busiest.

The conference kicked off on the Saturday evening with some social events, including a Walkers dinner at the stylish China Club and a private dinner hosted by Borrelli Walsh.

On the Sunday 200 or so of us gathered for an "Offshore Ancillary Meeting" sponsored by South Square – an opportunity to consider hot topics in offshore jurisdictions that affect

(TOP) THE SOUTH SQUARE BREAKFAST (ABOVE) GLEN DAVIS QC CHAIRS THE JUDGES PANEL

practitioners all over the world. The meeting was sponsored by South Square, and chaired by Walkers' Fraser Hern.

The speaking programme started with "Driving the Exit: A comparative analysis of "offshore" legal issues facing private equity investors", with informative (as well as amusing) contributions from Bermuda, the Cayman Islands and the BVI which underlined the finely-balanced competitiveness and camaraderie of practitioners in those jurisdictions.

In the afternoon Glen Davis QC chaired a "Judicial Question Time" involving five judges from the Caribbean and Asia: Chief Judge Kawaley (Bermuda), Justice Bannister (BVI), Justice Foster (Cayman Islands), Justice Coomarasmawy (Singapore), Justice Harris (Hong Kong) and Judge Fu Wang (China) (the first ever judge from the people's Republic of China to speak at such an event).

This panel followed the familiar model of UK's "Question Time", with questions from the floor posed to each of the panellists. Though held under Chatham House rule, the questions dealt with the panellists' views on the decision in *Rubin*, the preferential treatment of local creditors, as well as more lighted hearted topics such as the strangest submission their Lordships' had ever had put to them.

The conference proper began on Monday morning with a keynote address from Michael Smith, the Chief Executive Officer of Australia and New Zealand Banking Group Limited (ANZ) and Ali Moore, the international TV broadcast journalist. This was entitled "The global financial crisis, the Asian Century and the transformation of finance", and provided a fascinating insight into lessons learnt in the last decade – and the shape of the 21st century in the financial industry.

This was followed by various "break-out" sessions. Notable examples included "Hedge Funds and Distressed Debt Investing: the past, the present and future", a fascinating, hands-on panel looking into the changing investment profile of hedge funds and the distressed debt market, ably chaired by Jesse Hibbard, of Fulcrum Capital, as well as "It's not all about the USA: issues in emerging and developing countries", chaired by South Square's Fidelis Oditah QC.

Later in the day we were treated to "A bridge over troubled waters: the current climates in maritime and shipping insolvencies", chaired by Curtis Mallet's Lynn Harrison, with a valuable insight into the respective views from the US, the UK and Germany from Alix Partners' Lisa Donehue, Stephenson Harwood's Stuart Frith and Taylor Wessing's Dr Oliver Rossbach. If the writer had one comment on this particular panel, it would echo the words of at least two Hong Kong shipping lawyers I spoke to immediately after it: why nothing on the Pacific Asia angle given that it is Korea, China, Japan and Singapore that have generated such a large percentage of these cases in the last 5 years?

On Monday evening we were again treated to a social whirl at a range of glamorous locations: thanks to KPMG, Deloitte and Ernst & Young for their respective drinks parties, as well as to the team at Hogan Lovells for their waterfront reception on the Hong Kong harbour. The final place on the dance card was saved for Clifford Chance, Walkers and FTI, who invited delegates to a bracing evening in the Central nightclub aptly known as "Insomnia".

The Tuesday again featured a range of break-out sessions. The highlight of these was "Fifty shades of greed: cross-border asset recovery in the wake of the global financial crisis", entertainingly chaired by Walkers' Collette Wilkins and Martin Kenney. Introducing itself as a panel that was *not* going to tell us what we already knew about *Mareva* injunctions, we were instead treated to a psychodynamic analysis of the mind of a fraudster by Dr Alexander Stein, through the medium of clips from

WILLIAM WILLSON

popular films of the last decade such as *American Hustle*, *The Wolf of Wall Street* and *Catch me if you Can*.

The conference ended, as it had begun, with a Gala Dinner in The Grand Ballroom hosted by our friends at Alix Partners LLP. For those who had stayed in Hong Kong for either business or pleasure, thanks must also go to Harneys, for their post-conference drinks on the Wednesday evening on the impressive rooftop balcony on one of Hong Kong's coolest nightspots, Sevva.

As ever, thanks must go to INSOL's Penny Robertson for her sterling organisational work in bringing together a programme that operated seamlessly.

And thanks also to the conference's main sponsors: bmcgroup, Borelli Walsh, FTI consulting and PPB advisory.

To our ever-growing global readership, it was brilliant to catch up with so many of you in Hong Kong, to renew old acquaintances and make new friendships.

We look forward to seeing you all again soon - and we will be attending the INSOL Channel Islands conference in June.

Hong Kong roundup

ROXANNE ISMAIL SC reports on some of the recent developments in Hong Kong

Notable recent developments in Hong Kong include:

1. The coming into force of the new Companies Ordinance (Cap. 622) on 3 March 2014.

2. The reform proposals for corporate insolvency law.

3. The clarification of when a Hong Kong court will take jurisdiction to wind up a foreign-incorporated company.

The new Companies Ordinance ("CO")

The new CO is divided into 21 parts. It attempts to modernize and clarify company law, including clarification in respect of the use of electronic forms and communications. However, this article will focus on substantive changes.

1. Part 1 streamlines the type of companies which may be formed: unlimited companies without a share capital are abolished; guarantee companies without a share capital will be treated similarly to public companies; public companies are defined as companies other than private and guarantee companies. The consequence is 5 type of companies rather than 8: private and public companies limited by shares, private and public unlimited companies with a share capital, and companies limited by guarantee without a share capital.

2. Part 3 addresses the abolition of the memorandum of association and new requirements for the articles of association. It adds statutory

protection for persons dealing with the company (to complement the common law indoor management rule protection).

3. Part 4 includes the adoption of a mandatory system of no-par for all companies with a share capital.

4. Part 5 addresses reduction of share capital and financial assistance. A uniform solvency test is adopted to apply as a basis for the following different types of transaction: an alternative court-free procedure for reduction of capital; allowing companies to purchase their own shares out of capital; allowing companies to provide financial assistance for acquisitions of shares.

5. Part 8 revises the system for registration of charges.

6. Part 9 introduces simplified accounting and reporting requirements for SMEs.

7. Part 10 codifies directors' duties to incorporate a mixed objective and subjective test. It requires ratification of directors' conduct to be by way of approval of disinterested members. It also clarifies the permissible indemnification which may be given by a company to its directors.

8. Part 11 expands the prohibitions on loans and similar transactions to cover a wider category of person connected with a director, and expands prohibitions on payments for loss of office. It requires disinterested members' approval for certain prohibited transactions, and requires members' approval for directors' employment to exceed 3 years. It also requires increased disclosure in line with UK law. Sanctions become civil instead of criminal.

9. Part 12 addresses company administration and procedure and introduces changes to enhance shareholder engagement (e.g. reducing the threshold requirement for members to demand a poll from 10% to 5% of voting rights) and making comprehensive provision for passing written resolutions.

Part 10 of the new Companies Ordinance codifies directors' duties to incorporate a mixed objective and subjective test...

HONG KONG: THERE ARE COMPANY INSOLVENCY LAW REFORMS BUT CONSPICUOUSLY ABSENT FROM THE REFORM AGENDA IS THE ADOPTION OF THE UNCITRAL MODEL LAW

10. Part 13 addresses schemes and amalgamations. The provisions are largely unchanged save that the "headcount test" for approving a scheme is changed for a scheme involving a takeover offer or general offer to buy back shares, so that dissenting votes do not exceed 10% of disinterested shares.

11. The shareholder remedy provisions are consolidated and refined but not substantially altered (there having been substantial revision in 2004 and 2010 e.g. the introduction of statutory derivative actions and multiple derivative actions).

12. Part 15 streamlines procedures for striking off and restoring companies.

Effectively, save for provisions on prospectuses, all of the pure company parts of the old CO (Cap. 32) have been repealed, subject to transitional provisions. The remaining prospectus provisions and corporate insolvency provisions in Cap. 32 are retitled as "Companies (Winding up and Miscellaneous) Provisions Ordinance".

Company insolvency law reform

In 2013, the Government conducted a consultation on limited proposals for reform. These proposals concern the commencement of winding-up, the appointment and powers of provisional liquidators and liquidators, the conduct of winding-up, voidable transactions, and investigations during winding-up, offences before or during winding-up

THE FORMER LEGISLATIVE COUNCIL BUILDING, SOON TO BE OCCUPIED BY THE COURT OF FINAL APPEAL

On the reform agenda is the long overdue introduction of a corporate rescue procedure...

and powers of the court. It is intended that a draft bill will be proposed in the 2014/2015 term.

Largely, the proposed changes are simply "tightening up" rather than any major change. However, there is a proposal to introduce transaction at an undervalue provisions (already present in the Bankruptcy Ordinance), provisions for invalidating pre-commencement floating charges, and provisions for clawback of redemptions and buy-backs of shares out of capital, all modeled on UK law. Further, there is a proposal to codify the inter-relationship between private examinations and the privilege against self-incrimination; and a proposal to widen the scope of public examination.

Also on the reform agenda is the long overdue introduction of a corporate rescue procedure and the introduction of insolvent trading provisions. Whilst the administration originally intended that such provisions also be proposed in the 2014/2015 term, the reform proposals have not yet been put before the Advisory Group which would precede public consultation.

Conspicuously absent from the reform agenda is the adoption of the UNCITRAL Model Law.

Jurisdiction over foreign-incorporated companies

As a result of a number of recent cases, it has been confirmed that for the Hong Kong court to exercise its jurisdiction to wind up a foreign-incorporated company, it will apply the orthodox test of the three core requirements (using the language of the English case *Re Real Estate Development Ltd* [1991] BCLC 210), namely: (1) sufficient connection with Hong Kong (which does not need to consist of assets in Hong Kong); (2) a reasonable possibility that the order would benefit those applying for it; and (3) the court must be able to exercise jurisdiction over one or more persons in the distribution of the

company's assets. See *Re Yung Kee Holdings Ltd* [2012] 6 HKC 246, upheld on appeal on 6 March 2014 (as yet unreported). The courts in *Yung Kee* emphasized that it would be harder for shareholders to establish that the court should wind up a company in a place other than the place of its incorporation as they must have voluntarily approved the law of the place of incorporations as governing the company's legal status.

The *Yung Kee* case is of particular interest in the context of offshore companies which indirectly hold (through other subsidiaries) assets of value in Hong Kong. Without a place of business in Hong Kong, or the conduct of management in Hong Kong, or any directly-owned assets in Hong Kong, there was held to be insufficient connection for the Hong Kong court to wind up the offshore holding company.

The core requirements have been held to go to discretion rather than jurisdiction: *Re China Medical Technologies Inc* (unrep.) 9 April 2014, Harris J. It may be in certain circumstances that the connection with Hong Kong is so strong that one of the other core requirements need not be established: *Re Pioneer Iron and Steel Group Company Ltd*, (unrep.) HCCW 322/2010, 6 March 2013, Harris J.

Re China Medical concerned a Cayman Islands company, listed on NASDAQ, with BVI operating subsidiaries which held operating companies in the PRC mainland. There were business activities in Hong Kong such as a small office and some employees although these were not regarded as significant in the context of business activities in the US or the mainland. However, the Cayman-appointed liquidator sought an ancillary liquidation in Hong Kong predominantly because of suspicious transactions involving Hong Kong companies and/or Hong Kong bank accounts. *China Medical* examines in some detail the significance of the third core requirement and how it may be satisfied. Simple presentation of the petition within the jurisdiction is not enough. Something more is required such as the petitioner being employed or resident in the jurisdiction, or having obtained judgment within the jurisdiction, or being registered under the local Companies Ordinance and having a place of business within the jurisdiction. There may be cases, it was held, although they will be rare, in which the third core requirement is satisfied by the presence of a person within the jurisdiction who has an indirect but substantial economic interest in the liquidation e.g. the owner of a foreign company, which is a major creditor of the relevant company. However, it was not sufficient that the fund manager of overseas funds (which were creditors) was located in Hong Kong.


ROXANNE ISMAIL SC

Roxanne Ismail S.C. practised from 3-4 South Square from 1994 to 2001, when she relocated to Hong Kong. She has practised from Temple Chambers, Hong Kong to date, and specializes in the areas of commercial, company and insolvency law. She took silk in 2013. She is a member of Hong Kong's Standing Committee for Company Law Reform, and a member of the Advisory Group on corporate insolvency law

Recent developments in the Singapore legal landscape

Jamie Harrison and **Adeline Chung** of Addleshaw Goddard on recent developments in the Singapore Legal Landscape

Arbitration In Singapore

Along with Hong Kong, Singapore is now widely recognized as a leading arbitration centre in Asia, and is also the preferred base for international law firms and corporate counsel of MNCs within Southeast Asia and in the 10 ASEAN (Association of South East Asia Nations) jurisdictions. Singapore is the third most preferred seat of arbitration in the world, behind London and Geneva and on par with Tokyo and Paris, with the Singapore International Arbitration Centre ("SIAC") as the fourth most preferred arbitral institution (after the ICC, LCIA and the International Centre for Dispute Resolution).[1] The active caseload of SIAC as of 31 December 2013 was 619 cases.[2]

The Singapore courts adopt a pro-arbitration stance, and have generally been slow to set aside or refuse enforcement of international arbitration awards. Having said that, in 2013, there were two notable Court of Appeal decisions involving recourse against international arbitration awards.

(i) *PT First Media TBK v Astro*

1/. See Report of the Singapore International Commercial Court Committee (November 2013) at http://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf
2/. See http://www.siac.org.sg/why-siac/facts-figures/statistics

Nusantara International BV and others [2013] SGCA 57

The Court of Appeal considered the key issue of whether an arbitrating party may oppose enforcement of an arbitral award on the ground that the arbitral tribunal lacked jurisdiction, notwithstanding that such a challenge had not been raised previously. To determine this question, the court had to interpret the relevant provisions of Singapore's International Arbitration Act ("IAA") and the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") which together govern the enforcement of international arbitral awards made in Singapore.

The Court of Appeal held that Section 19 of the IAA, when construed alongside with the underlying philosophy of the Model Law, permits an award debtor to have a "*choice of remedies*". The award debtor may apply to resist enforcement of a domestic international award (i.e. an international commercial arbitral award made in the same territory as the forum in which recognition and enforcement is sought) under Section 19 of the IAA even if he has not actively challenged the award at an earlier opportunity under Article 16(3) or Article 34 of the Model Law. The same grounds for resisting enforcement under Article 36 of the Model Law would be available to a party resisting enforcement under Section 19 of the IAA.

Having established that the court has the power under Section 19 of the IAA to refuse enforcement of domestic international awards if one of the grounds under Article 36 of the Model Law is established, the Court of Appeal went on to consider the specific objection on jurisdiction, being the tribunal's decision to join the additional parties to the arbitration.

In this regard, the Court of Appeal held that Rule 24(b) of the 2007 SIAC Rules does not confer on the Tribunal the power to join third parties who are not party to the arbitration agreement. It merely permits other parties to the arbitration agreement who are not yet party to the arbitration proceedings to be joined in as parties. Accordingly, the parts of the award relating to the joined parties were unenforceable.

The effect of the Court of Appeal's decision is that parties do not need to challenge a tribunal's jurisdiction in the Singapore Courts while arbitration proceedings are ongoing. Parties may conserve their resources and challenge an unfavourable award at the point of enforcement. The decision also highlights that care needs to be taken when considering extending the jurisdiction of an arbitration to non-parties to the arbitration agreement. The latest version of the SIAC rules (released in April 2013) makes it clear that third parties may be joined to the arbitration, provided that they are a party to the arbitration agreement and they provide written consent (see SIAC Rule 24.1(b)).

(ii) *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] SGCA 55

This was an appeal by International Research Corp PLC ("IRCP") challenging the ruling of the arbitral tribunal that it had jurisdiction over arbitration proceedings commenced by Lufthansa Systems Asia Pacific Pte Ltd ("Lufthansa").

In summary, the facts are as follows – Lufthansa entered into a cooperation agreement with Datamat Public Company Ltd ("Datamat"). Subsequently, Lufthansa, Datamat and IRCP entered into 2 supplemental agreements. The cooperation agreement has a multi-tiered dispute resolution clause. The 2 supplemental agreements were specifically expressed as being "*annexed to and made a part of*" the cooperation agreement. Lufthansa commenced arbitration against IRCP pursuant to the arbitration clause in the cooperation agreement.


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The Court of Appeal held that as Singapore's legislative framework gives effect to the 1985 UNCITRAL Model Law on International Commercial Arbitration,[3] it is time to "*put the English authorities aside*".[4] As the supplemental agreements did contain a clear reference to the cooperation agreement, the court had to determine whether as a matter of construction, the parties intended to incorporate the arbitration agreement into the supplemental agreements. The Court then went on to apply the contextual approach to contractual interpretation and found that the supplemental agreements gave rise to obligations distinct from those under the cooperation agreement – IRCP's only substantive obligation under the supplemental agreements was to act as a payment agent and it assumed no obligations under the cooperation agreement. Therefore, the Court held that the arbitration agreement in the cooperation agreement had not been intended to also be incorporated into the supplemental agreements.

The Court of Appeal also confirmed the enforceability of multi-tiered

3/. Article 7(2) of the Model Law does not require express reference to the arbitration agreement, it only requires a reference to the document containing it
4/. The strict rule from English law that clear and express reference to an arbitration clause was required for it to be incorporated into another contract was followed by Singapore in Star-Trans Far East Pte Ltd v Norske-Tech and others [1996] 2 SLR(R) 196

dispute resolution clauses. In this regard, the court held that where parties had clearly contracted for a specific set of dispute resolution procedures as preconditions for arbitration, these preconditions must be complied with.

This case is significant for the Court of Appeal's clarification of when an arbitration agreement may be incorporated by reference and the Court's approach with respect to compliance with multi-tiered dispute resolution clauses.

Singapore's plans to set up an International Commercial Court & Mediation Centre

In view of the growth of trade and investment in Asia and the significant rise in commercial transactions in the region, the number and complexity of cross-border disputes is expected to increase. To enhance Singapore's position as the destination of choice for resolving commercial disputes in Asia, the Ministry of Law announced in December 2013 its plans to set up the Singapore International Commercial Court ("SICC") and Singapore International Mediation Centre ("SIMC").

The SICC

A committee has been set up to study the viability of developing a framework for the establishment of the SICC ("SICC Committee"). The key recommendations of the SICC Committee in its November 2013 report are as follows:

(i) Establishment of SICC as a division of the High Court, to hear international commercial disputes. It will offer litigants the option to have their disputes heard by specialist commercial judges in Singapore;

(ii) The constitution of an SICC panel of judges which could include eminent international jurists;

(iii) The SICC will hear cases governed by Singapore law and by foreign law, with the court taking judicial notice of the foreign law;

(iv) The SICC will hear cases where parties have consented to use the SICC or where cases are transferred to the SICC from the Singapore High Court by the Chief Justice;

(v) Decisions of the SICC will be appealable to the Court of Appeal;

(vi) Foreign counsel may appear in proceedings in certain circumstances (where the case has no substantial connection to Singapore – for example, where Singapore law is not the governing law or the choice of Singapore law is the sole connection to Singapore); and

(vii) The creation of a set of rules and practice directions to govern proceedings in the SICC, which should be sensitive to the commercial needs of SICC's users and follow international best practices for commercial dispute resolution.[5]

The Law Minister, Mr K Shanmugam, announced in March 2014 that the Ministry of Law is preparing legislative changes to Singapore's Constitution, the Supreme Court of Judicature Act, the Evidence Act and the Legal Profession Act to pave the way for the setting up of the SICC. The SICC aims to handle disputes with little or no connection to Singapore and public consultations will soon be held on the proposed legislative changes. Mr Shanmugam also said that the SICC will be constituted as a division of the High Court of Singapore and its judgments will be treated and enforced as High Court judgments. SICC judgments may therefore be enforced by registration in countries listed in the Reciprocal Enforcement of Commonwealth

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Judgments Act and the Reciprocal Enforcement of Foreign Judgments Act. The Ministry of Law is exploring ways to strengthen the enforceability of SICC judgments, including studying the feasibility of Singapore signing the Hague Convention on Choice of Court Agreements.[6]

The SIMC

The SIMC is expected to be launched later this year.[7] It is aimed at assisting feuding business partners work out their differences through a process of discussion using qualified mediators so as to avoid the more costly arbitration or court process. The working group tasked with assessing and making recommendations on how to develop Singapore into a centre for international commercial mediation has recommended, among others, establishing a professional body to set standards and provide accreditation for mediators and enacting of a Mediation Act to help strengthen the framework for mediation in Singapore.[8]

5/. See "Government Welcomes Recommendations to Establish Singapore International Commercial Court" at http://www.mlaw.gov.sg/news/press-releases/government-welcomes-recommendation-to-establish-SICC.html
6/. See "S'pore paving way to be dispute resolution centre" by Selina Lum, Straits Times, 6 March 2014
7/. See "S'pore paving way to be dispute resolution centre" by Selina Lum, Straits Times, 6 March 2014
8/. See Recommendations of the Working Group to develop Singapore into a centre for international commercial mediation at http://www.mlaw.gov.sg/content/dam/minlaw/corp/News/FINAL%20ICMWG%20Press%20Release%20-%20Annex%20A.pdf

David Chan and **Tan Su Hui** at Shook Lin & Bok report on recent insolvency/restructuring cases in Singapore


DAVID CHAN

Insolvency practice in Singapore has been greatly shaped by Singapore's position as an international and regional business hub. Singapore's Court of Appeal continues to extensively shape the insolvency landscape in Singapore and the role of the Singapore Courts in cross-border insolvencies, striking a delicate balance between the statutory protections afforded by the various insolvency regimes and wider considerations of international trade. Three examples are highlighted below.

Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another [2014] SGCA 14

Singapore liquidators of a chartering company which was principally under liquidation in Germany were directed to remit the company's assets to the German Liquidator. The Court of Appeal held that the company's creditors in Singapore were not entitled to satisfaction of the debts incurred by the company in priority to the company's global creditors. The Court of Appeal reversed a High Court decision to apply a "ring-fencing provision" under s 377(3)(c) of the Companies Act (Cap. 50) which preserves assets in Singapore for the purpose of meeting claims in Singapore on the basis that the company did not have a place of business in Singapore nor did it carry on business in Singapore. The Court of Appeal referred with approval to *RBG Resources plc (in liquidation)* v. *Credit Lyonnais* [2006] 1 SLR(R) 240 in which the High Court found if a foreign company was not registered under the Companies Act at the time it went into liquidation, then the ring-fencing provisions would not apply to it.

Turning to the nature of the relationship between a Singapore liquidator of a company and its foreign liquidator, the Court of Appeal was satisfied that the ancillary liquidation doctrine was entrenched in Singapore law. Given that the Singapore creditors of the company were unsecured creditors and did not enjoy any other priority under Singapore law, the Court of Appeal stated that the application of the ancillary liquidation doctrine required that the company's Singapore assets be transferred to the German liquidators. Although the issue of the treatment of the Singapore creditors under the German liquidation was not raised, the Court of Appeal opined that the mere fact that the foreign insolvency scheme differs from the local insolvency scheme would not suffice to constitute such injustice that would warrant a ring-fencing of the Singapore assets for the Singapore creditors.

Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)

The liquidators of Petroprod commenced proceedings against Larsen, with whom it had entered a management agreement. The proceedings, which were to avoid a number of payments made by Petroprod and its subsidiaries to Larsen under the management agreement on the basis that the payments were undervalue or made with the intent to defraud it as a creditor of the subsidiaries. Larsen's application for a stay of proceedings in favour of arbitration failed in the High Court and the Court of Appeal on the basis that the claims brought by Petroprod were non-arbitrable.

The Court of Appeal considered that allowing the pre-insolvency management of a company to limit the avenues by which the company's creditors could enforce the very statutory remedies which were meant to protect them against the company's management would be wrong. As such, the pronouncement by the Court of Appeal drew a distinction for the first time between disputes involving an insolvent company that stem from its pre-insolvency rights and those that stem from its status as a company in liquidation.

DBS Bank Ltd v Tam Chee Chong and another (judicial managers of Jurong Hi-Tech Industries Pte Ltd (under judicial management)) [2011] 4 SLR 948

Judicial Managers of a company applied successfully to the High Court to set aside a charge given by the company on the basis that it constituted an unfair preference under s 227T of the Companies Act (Cap.50). The Court of Appeal, in dismissing the appeal, cited with approval the test in *Re MC Bacon Ltd* [1990] BCLC 324.

The Court of Appeal noted *obiter* that if the charge was found not to be unfair, the existence of negative pledges and *pari passu* clauses which the company and its parent company had entered into with other creditors had the effect of creating among the contracting parties a "cessation of payments". The Singapore Court of Appeal opined that there was no reason why a court would not enforce such an arrangement in an appropriate case, and in the present case, the chargee, if it had been successful in the appeal, may have been found liable in tort for interfering with the aforesaid contractual rights of the other creditors.

A new spotlight on company controllers

Simon Mortimore QC reports on the Government's April 2014 proposals to enhance corporate transparency

For most people the June 2013 G8 Summit at Lough Erne was memorable for the sight of President Putin, sitting stern-faced by a placid Northern Irish lake in an open-neck shirt and resisting all attempts at conviviality. Against that unpromising background, it is perhaps surprising that there were any positive developments from the Summit. But there was at least one: the "*G8 Action Plan Principles to prevent the misuse of companies and legal arrangements*". On 18 June the Department for Business Innovation and Skills ("BIS") announced its Action Plan to give effect to the G8 Principles to improve the transparency of the ownership and control of UK companies, which includes:[1]

- amending the Companies Act 2006 so that companies are required to maintain records of beneficial ownership of their shares, to make that information available to the authorities through a central registry maintained by Companies House and consulting on whether that information should be publicly accessible;
- reviewing corporate transparency, including bearer shares and nominee directors; and
- supporting transparency action plans for Overseas Territories and Crown Dependencies.

In July 2013 BIS published a Discussion Paper: "*Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business*" (the "BIS Discussion Paper") which outlined the Government's thinking on those matters, including four key proposals for enhancing transparency of UK company ownership: (i) a central registry of UK company ownership, (ii) abolition of bearer shares, (iii) increased transparency about nominee directors, and (iv) prohibition of corporate directors. Responses were required by 16 September 2013. The Law Society, the Bar Council and several firms and other bodies submitted papers.

On 31 October 2013 BIS announced that the register of beneficial ownership of UK companies would be publicly accessible. This announcement received the enthusiastic support of Prime Minister David Cameron and World Bank Group Vice-President Sanjay Pradham. BIS also announced that further details of the register would be revealed in a formal response to the BIS Discussion Paper to be published in early 2014.

On 16 April 2014 BIS published its response (the "BIS Response"), which includes mandatory disclosure of beneficial ownership of most UK companies, a public register of those interests, no more bearer shares, restrictions on corporate directors and steps to inform directors of the risks of acting as a "front" for another person.

Before looking in more detail at the BIS proposals for reform, it is worth asking what has brought about this urgent need for reform of company law so soon after the Companies Act 2006.

The reforms in the 2006 Act followed the most extensive review of company law by the Law Commission, which produced reports on *Shareholder Remedies* (1997) and *Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties* (1999), the Company Law Review Steering Committee, which produced four reports under the general heading *Modern Company Law for a Competitive Economy* (1999-2001) and by the Government itself. The transparency issues that now concern BIS were not regarded as serious problems at the end of the Twentieth Century and are either not mentioned or barely discussed in the reports that provided the foundation for the 2006 Act. Since then the scale, speed, and internationalization of business activity and investment has expanded to a degree that could not have been contemplated a dozen or so years ago.

1/. This article only focuses on the company law aspects of the BIS announcements, discussion paper and response. There are also proposals to improve the disqualification regime and for compensating creditors for directors' misconduct.

PRESIDENT PUTIN ADDRESSES THE PRESS AT THE SUMMIT WHICH PROPOSED AN ACTION PLAN TO PREVENT MISUSE OF COMPANIES.

Corporate structures have grown ever more complex and there has been far more use of offshore companies. While much this is legitimate and beneficial, it must be recognised that opaque structures involving a maze of offshore companies are too often abused. As Business Secretary Vince Cable said in his Foreword to the BIS Response, "*a lack of transparency with respect to those who really own and control companies can allow tax evasion, money laundering and terrorist financing to flourish*". It is therefore not surprising that the G8 governments wanted greater transparency. The reasons for the BIS proposals for reform are therefore readily understandable.

A central registry for company beneficial ownership information

For over 150 years, since the Companies Act 1862, there have been two core features of UK company law, which need to be borne in mind when considering the BIS proposals. The first is that a company should keep a register of its members, which is open for inspection and that information about its members should be publicly available at the Companies Registry.[2] The company and its directors need to have a record of members for obvious governance reasons, but the reason why the public should have the right to information about a company's members is less obvious and has a historical origin. In the Nineteenth Century it was common for shares to be issued not fully paid up. The companies register would enable a shareholder to know with whom he shared responsibility for the company's liabilities and the public register would enable intending creditors to "*reach a view as to the credit-worthiness of the concern and the sufficiency of the contributors*".[3] Those reasons for a public register are seldom relevant today. Instead they have been replaced by a need to prevent the abuse of companies to conceal illegitimate activities.

The other core feature is that a company is not required to take notice of any trusts affecting shares.[4] This facilitates the proper conduct of company meetings and distributing dividends. As the *Davey Committee* put it in 1895:

"*Any provision which would render it incumbent upon the directors and managers of joint stock companies, in order to keep themselves within the law, to inquire into and take notice of trusts affecting shares would impose an intolerable burden upon the officers of a company, and would be a departure from the policy hitherto adopted as shown by statutory enactment and judicial decision.*"[5]

2/. Now 2006 Act, ss 113-121, 856-856B. See also the 1862 Act, ss 25-27.
3/. Cohen Report (1945) at [77].
4/. 2006 Act, s 126. See 1862 Act, s 30. These provisions are usually supported by the company's articles; see 1985 Act Table A, reg 5; 2006 Act Model Articles for private and public companies, articles 23 and 45 respectively.
5/. See [18].

Since 1980 there have been two significant inroads into this principle affecting public and quoted companies. First, in 1981 the provisions now found in Part 22 of the 2006 Act were introduced to enable a public company to obtain information about who is interested in its shares. If the appropriate disclosure was not given, the court could make an order imposing restrictions on the shares. These provisions gave public companies valuable protection from attempts at takeover by stealth and were widely used in the 1980s.[6] Second, Part 9 of the 2006 Act reflects the fact that investors in shares invariably make their investments through nominee companies and gives (i) a member power to nominate another person to exercise members' rights, if the articles so provide, and (ii) persons interested in shares in a quoted company which are held by a nominee the right to enjoy information and other rights against the company.

The BIS announcement of 31 October 2013 included Business Secretary Vince Cable's explanation of the need for a public registry giving information about beneficial ownership of companies:

"*We believe a public register, listing those who really own companies makes Britain a better place to invest and do business. People have a right to know who controls UK companies and greater openness will help tackle tax evasion, money laundering and other crimes.*"

This statement makes it clear that BIS's purpose in proposing a public register of beneficial ownership of companies is to deter and obstruct tax evasion, money laundering and other crimes and to facilitate investigation by the authorities. Improving corporate governance would be a bi-product. In other respects, Mr Cable's statement is open to debate. Will a public register of beneficial owners of companies (public and private) boost investment and business in the UK? Does the public really have right to know who owns UK companies, private as well as quoted?

Vince Cable: "People have a right to know who controls UK companies..."

The proposals about beneficial ownership raise several significant issues. The first point to note is that BIS proposes public disclosure of beneficial ownership of the company not of individual shares in the company.[7] Hence BIS suggested adopting the definition of "beneficial owner" in the Money Laundering Regulations 2007:[8]

"*In the case of a body corporate, "beneficial owner" means any individual who –*

(a) as respects any body other than a company whose shares are listed on a regulated market, ultimately owns or controls (whether through direct ownership or control, including through bearer share holdings) more than 25% of the shares or voting rights in the body; or

(b) as respects any body corporate, otherwise exercises control over the management of the body."

By this definition a person is a beneficial owner of a company if he is able to block a special resolution or if he exercises control over management. The Money Laundering Regulations provide that banks, lawyers, accountants and other professional bodies are required, as part of their "know your customer" due diligence, to identify the beneficial owners of a corporate client.[9] As such, information about beneficial ownership should emerge from an investigation. The BIS proposal would make the information generally available without the relevant criminal or regulatory authority having to go to trouble and expense of an investigation to obtain it. As such the proposed reform would support the new standard of the Financial Action Task Force ("FATF") to combat money laundering and the financing of terrorism under which:

"*Competent authorities should be able to obtain, or have access in a timely fashion to adequate, accurate and current information on the beneficial ownership and control of companies and other legal persons.*"

This standard has also been adopted in the European Commission's proposal for a Fourth Money Laundering Directive, so a strong international case is building up for privacy of corporate ownership to yield to public disclosure as a matter of both principle and expediency. After considering responses to the BIS Discussion Paper, BIS has decided to adopt the anti-money laundering definition, but to give clarity as to the meaning of "*otherwise exercises control*".

The second point to note concerns the companies to which the requirement of disclosure of beneficial ownership should apply. BIS proposed that there should be an exemption for companies whose shares are quoted on the Main Market of the London Stock Exchange, since an individual who holds 3% or more of the voting rights in such a company must disclose that fact to the market and the regulator. Following representations from the Law Society and others, BIS will exempt companies who comply with the FCA's Disclosure and Transparency Rules or who have securities listed on a regulated subject to equivalent disclosure requirements. The main application of the proposals is

6/. Since 1989 the only reported case on these provisions is Eclairs Group Ltd v JKX Oil and Gas plc [2014] 1 BCLC 202.
7/. BIS Discussion Paper at [2.1]-[2.3]. Therefore the definition of an interest in shares in the 2006 Act, s 820 would not be helpful.
8/. No 2157/2007, reg 6(1). The FATF International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation define a beneficial owner as "the natural person(s) who ultimately owns or controls a customer and/or natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement".
9/. No 2157/2007, regs 3 and 4.

therefore in the field of private companies. BIS has also decided to extend disclosure of beneficial ownership to LLPs.

The third point concerns how the information should be obtained for the public register. BIS proposed that the company should have a statutory obligation to obtain the information and that Part 22 of the 2006 Act could be adapted to give it the necessary powers. Alternatively or additionally the beneficial owners could be obliged to make disclosure to the company. While there was general agreement among respondents to the BIS Discussion Paper that Part 22 could be adapted to provide the company with necessary powers, there was real disagreement as to whether the company should be under an obligation to obtain the information or whether the beneficial owner should be obliged to provide it.[10] The problem with leaving it to the beneficial owner to disclose is that the disclosure rules would become toothless. Directors and beneficial owners could ignore them. In any case BIS supported FATF Recommendation 24 and would be obliged by Article 29 of the draft Fourth Money Laundering Directive to ensure that "*corporate or legal entities established within their territory obtain and hold adequate, accurate and current information on their beneficial ownership*". BIS has therefore decided that in principle the company should be obliged to obtain the information, through provisions adapted from Part 22 and that beneficial owners should be liable to self-declare as well. It recognised that drafting the new legislation will not be straightforward. The disclosure and filing obligations would be enforced by criminal sanctions.

For Insolvency practitioners and others interested in good governance of UK companies, the imposition of an obligation on the company and its directors to obtain information about beneficial ownership would be a positive development since it would help to identify actual or potential shadow directors. This is because a beneficial owner who exercises control over management is at risk of being a shadow director unless his control is only exercised through the powers conferred on members under the company's constitution. Potential liability for breach of duty as a shadow director is a significant consideration, albeit that the extent to which fiduciary and other duties may in particular circumstances apply to a shadow director is not settled.[11]


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Fourthly, BIS proposed that the information would be kept at the Companies Registry and would be generally available, but that there could be exceptions where public disclosure might be harmful. Again this was controversial with respondents to the BIS Discussion Paper, but on 31 October 2013 BIS announced that the information would be publicly available. The BIS Response describes the detailed nature of the disclosure that will be required in order to make the register as effective as possible for law enforcement and tax authorities.[12] The Registrar would be

10/. Objectors to the company being obliged to obtain the information included Capita Asset Services and the Law Society, which pointed out that listed and AIM companies were not subject to such an obligation and that placing a company under an obligation to identify its beneficial owners might conflict with s 126 of the 2006 Act under which the company is not concerned with trusts of its shares.
11/. Vivendi SA v Richards [2013] EWHC 3006 (Ch), [2013] BCC 771; R v R [2013] EWHC 4244 (Fam); Sukhoruchkin v van Bekestein [2014] EWCA Civ 399.
12/. The public register will not be as extensive as the company's register since it will reveal the month and year of birth, but not the day, and will not reveal residential addresses.

given power to exempt from disclosure in exceptional circumstances; e.g. serious risk of violence or intimidation.

There are several problems with the BIS proposed reforms. First, as the Law Society pointed out, people who want to conceal their ownership of assets through companies will simply use offshore rather than English companies. Much will depend on whether the UK Government presses for improvements in transparency in Overseas Territories and Crown Dependencies. Second, it is easy for beneficial ownership to change without the management of a company becoming aware. Third, there is little that can be done about a stonewalling answer. This can be illustrated by the facts of a case under what is now Part 22 of the 2006 Act. In 1989 the Ricardo Group, which was the subject of a takeover bid, served a notice on a nominee company to disclose who was interested in the shares registered in its name. The response was that the sole beneficial owner was a Lichtenstein anstalt. However unlikely it might have been that such an entity should have acquired the interest in the shares for its own benefit, the court had to accept the evidence and release the nominee's shares from restrictions.[13]

Bearer shares

BIS also put forward a proposal for the abolition of bearer shares. They are an ideal tool for concealing economic ownership of a company and so facilitating tax evasion and money laundering, but they have never been popular with English companies.[14] The BIS Discussion Paper records that only about 0.05% of UK companies have issued bearer shares, but of those that had issued them, a high proportion were entirely owned by bearer shareholders, whose identities were therefore concealed.[15]

It is possible for the Secretary of State to use powers under Section 442 Companies Act 1985 to investigate ownership of bearer shares and obtain an order freezing the shares if disclosure is not provided. This is a costly procedure which also has the disadvantage of revealing the fact of the investigation. Furthermore a freeze on the bearer shares may not be effective and the identity of the owner may never be discovered.

BIS favoured abolition of bearer shares in preference to a system of controls, but would give holders a period to convert to registered shares. Responses to the BIS Discussion Paper revealed little or no support for bearer shares.[16] The BIS Response proposes to prohibit the further issue of bearer shares and to provide for a nine month surrender period. Company law will be simpler without bearer shares and nothing worthwhile would be lost. They have become archaic survivors from Nineteenth Century, which have no place in a world of electronic communications and paperless records.

Transparency about nominee directors

UK companies have always been required to maintain records of directors and a public record is kept at the Companies Registry.[17] Through these records, a person dealing with the company may know who has authority to transact business on its behalf. In general it does not matter to third parties if directors take their instructions from the members.[18]

The BIS *Discussion Paper* shows that greater transparency about nominee directors is required to deal with two types of arrangement. One is where a person is appointed a director of the company in accordance with its constitution but in fact acts on the instructions or according to the wishes of another person ("X"). The director is of course subject to all the duties of a director.[19] X is could well be a shadow director and may well expose himself to liability to the company for the directions that he gives to the *de jure* director.

The other situation is where the director abdicates management of the company to X, for whom he is merely a nominee or front. The director might give X a power of attorney or he may simply leave management of the company in the hands of X. Again the director is subject to all the duties of a director and, through his abdication, he is at serious risk of breaching them. X is likely to owe the same duties either as a *de facto* director or as an agent under a power of attorney.

A good example of the abuse of nominee directors of the second kind is Stones & Rolls Ltd,[20] an English company, which was ostensibly trading in commodities but was in fact used as a vehicle for defrauding European banks. The only director was a resident of Sark and all the shares were held by an Isle of Man company as trustee for a family trust set up by Mr Stojevic, the controller of the company. Quite clearly the Sark director could not and did not discharge his duties. Mr Stojevic was liable in tort for the victims' losses, but there was no effective remedy against him.[21]

The BIS Discussion Paper included

13/. Re Ricardo Group plc (No 2) [1989] BCLC 766.
14/. Cohen Report at [77], [83] noted that bearer shares were more popular on the Continent. The Company Law Review Steering Group favoured their retention: Developing the Framework at [4.145, 4.146]. Provision for bearer shares is made in the 2006 Act, ss 122, 779.
15/. About 900 non-dormant UK had issued bearer shares. Of a sample of 81 of these, 80% were entirely owned by bearer shareholders.
16/. Law Society and Bar Council Responses to Question 27 noted that bearer shares were sometimes used in schemes of arrangement.
17/. 2006 Act, s 162, 167, 855, 855A. See 1862 Act, ss 45, 46.
18/. Articles invariably give members power by special resolution to give directions to directors; see 1985 Act Table A, reg 70; article 4 of the Model Articles for private and public companies.
19/. Re Neath Rugby Ltd (No 2) [2009] 2 BCLC 427, CA, at [32], [33].
20/. Stones & Rolls Ltd v Moore Stephens [2009] AC 1391.
21/. Bankruptcy proceedings in England were rescinded on the basis that his COMI was in Austria: Stojevic v Komercni Bank AS [2006] EWHC 3447 (Ch). He was disqualified for 11 years: Official Receiver v Stojevic [2007] EWHC 1417 (Ch).

proposals seek to deter these arrangements through transparency. More would be done to bring home to directors the duties to which they are subject and there would be an obligation to make public the name of the nominator. The proposals also suggest that there should be a specific offence for a director to divest himself of the power to direct the company.[22]

All the responses sympathised with the BIS proposals, but several difficulties were identified. In its Response BIS took heed of these comments. Now it proposes that the Registrar will remind all newly appointed directors of their responsibilities. It will explore ways of extending "shadow directorship" to persons who control an individual director and will amend the disqualification regime to deal explicitly with directors who act as a "front".

Corporate directors

It has long been recognised that a company could be appointed a corporate director.[23] In its *White Paper: Modernising Company Law* (2002) the Government proposed that corporate directors should be prohibited,[24] but was persuaded to permit them in the 2006 Act, provided that the company has at least one director who is a natural person.[25]

The BIS Discussion Paper reported that only a tiny fraction of companies had corporate directors.[26] Although there may be legitimate reasons for using a corporate director, BIS was concerned that corporate directors are used to conceal beneficial ownership or control of the company and to frustrate investigation, because of difficulties in obtaining documents and tracing the individuals who run the corporate director. To BIS the main advantages of prohibiting corporate directors are limiting the scope for money laundering and other criminal activity and saving costs of investigations.

The test for the Government is whether it will give effective and active support for transparency action plans for Overseas Territories and Crown Dependencies

The BIS concern about the misuse of corporate directors surely misses the central point, which is that they may enable the individual behind a corporate director to avoid responsibility for his direction of the management of the company itself. This can be illustrated by the *Paycheck* case,[27] where the events occurred before the coming into force of the provision in the 2006 Act, which requires a company to have at least one director who is a natural person. Mr Holland successfully used corporate directors to protect himself from the risk of personal liability if dividends declared in furtherance of an aggressive tax saving scheme were unlawful, as turned out to be the case. Even after the 2006 Act the same risk of misuse exists, because the real power could be exercised through the corporate director, while the natural person might be a man of straw or might disappear.

Several respondents pointed out that corporate directors performed useful functions in the pension scheme, structured finance and mutual fund contexts.[28] The BIS Response took account of those views and concluded that corporate directors would be prohibited, subject to exemptions in sectors where they are of value, subject to regulatory oversight and there is a low risk of financial crime. Companies will have one year to become compliant. Prohibition should promote accountability by removing an artificial corporate wall between the individual who takes the decisions or gives directions to management of a company and that individual's responsibility and potential personal liability for those decisions and directions.

Conclusions

The Government intends to introduce legislation to implement its reforms to give effect to the G8 Principles as soon as Parliamentary time allows. Bearer shares and corporate directors (except in exempt areas) will be consigned to historical footnotes. The position of people who run companies as fronts for owners and controllers who hide in the background will become distinctly uncomfortable. These steps to improve transparency of UK companies can only go so far. The interesting question is whether equivalent transparency rules will apply to offshore companies. Thus the test for the Government is whether it will give effective and active support for transparency action plans for Overseas Territories and Crown Dependencies, as BIS promised in its 18 June 2013 announcement.

22/. In paragraph 33 of the Executive Summary to the BIS Discussion Paper it was suggested that there should be an "offence for directors to divest themselves of their duties as director". It is of course impossible for a director to divest himself of his duties and paragraph 4.16 is more accurate when talks of divestment of powers.
23/. Re Bulawayo Market and Offices Co Ltd [1907] 2 Ch 58.
24/. See [3.32]-[3.35]. At that time few countries apart from the Netherlands and some offshore jurisdictions permitted corporate directors. Significantly they are prohibited in Australia, New Zealand, Canada, Singapore and most US States, including Delaware.
25/. 2006 Act, s 155.
26/. BIS research reveals that there are about 13,000 corporate directors out of 2.9 million company directors (about 0.4%) and that they are used by about 11,600 companies (about 0.5% of active companies).
27/. Revenue and Customs Comrs v Holland [2010] 1 WLR 2793, SC.
28/. Law Society response to question 35. The Bar Council was agnostic on this question.

A tide of high yield restructurings

William Needham of Weil, Gotshal & Manges and **Daniel Bayfield** of South Square consider the growing trend amongst European corporates to look to English law restructuring processes to compromise their foreign law high yield debt obligations

Introduction

In 2008, the year in which Lehman Brothers collapsed, the European high yield bond market was at a 10 year low. There were fewer than 40 issuances that year, with a total value of only €32 billion. Fast-forward five years, and 2013 saw over 255 issuances, with an aggregate value of over €117 billion.[1]

During that period, the European high yield bond market has been buoyant. This, coupled with global creditors' growing familiarity with English restructuring procedures, means that there has been and, we think, will continue to be, a surge in European corporates with New York law financing documents running balance sheet restructurings through London.

Historically, high yield constituted a smaller component of the overall financing package and was typically unsecured and subordinated to the other debt. In recent years, most high yield issuances have been senior secured. In addition, high yield has become a much larger part of the financing, and is often used to fund entire transactions.

In deals where high yield is the only term debt in the structure (an "all bond" structure), a super senior revolving credit facility ("**ssRCF**") is typically put in place for liquidity purposes. In these deals, the ssRCF ranks equally with the bonds in all respects, except that the ssRCF is paid in priority to the bonds from the proceeds of collateral enforcement. Other structures include term and revolving credit facilities that sit alongside senior secured bonds (a "pari" structure). In pari structures, the loan facility and the bonds rank equally in all respects.

In all of these structures, high yield bonds are typically governed by New York law, while the loan facilities and the intercreditor agreement are typically governed by English law. The reason we see a difference in governing law is because the high yield bond was developed in the US in the 1980s and, as a result, there is extensive New York case law interpreting covenants and other contractual provisions, providing greater certainty to issuers and investors

Intercreditor arrangements

The intercreditor arrangements between the loan and the bond play a key role in successful restructurings, as they govern which creditors are entitled to give instructions to a common security agent to enforce collateral.

In the all bond structure, the security agent will initially act on the instructions of the bondholders. If after a period of time, no action has been taken or the ssRCF has not been repaid in full, the security agent will thereafter follow the instructions of the ssRCF lenders.

Intercreditor arrangements used in pari structures are more varied. Financings from 2009 to 2011 provide that the lenders under the loan facilities will have full control over enforcement until the loans represent a smaller part of the capital structure (e.g. 25-30%). Today, most "pari" deals provide that the lenders and the

1/. Source of this and bar chart data: Thomson One. Other sources put 2008 to 2009 figures even lower.

bondholders have an equal vote ("pound-for-pound") when instructing the security agent to take an enforcement action.

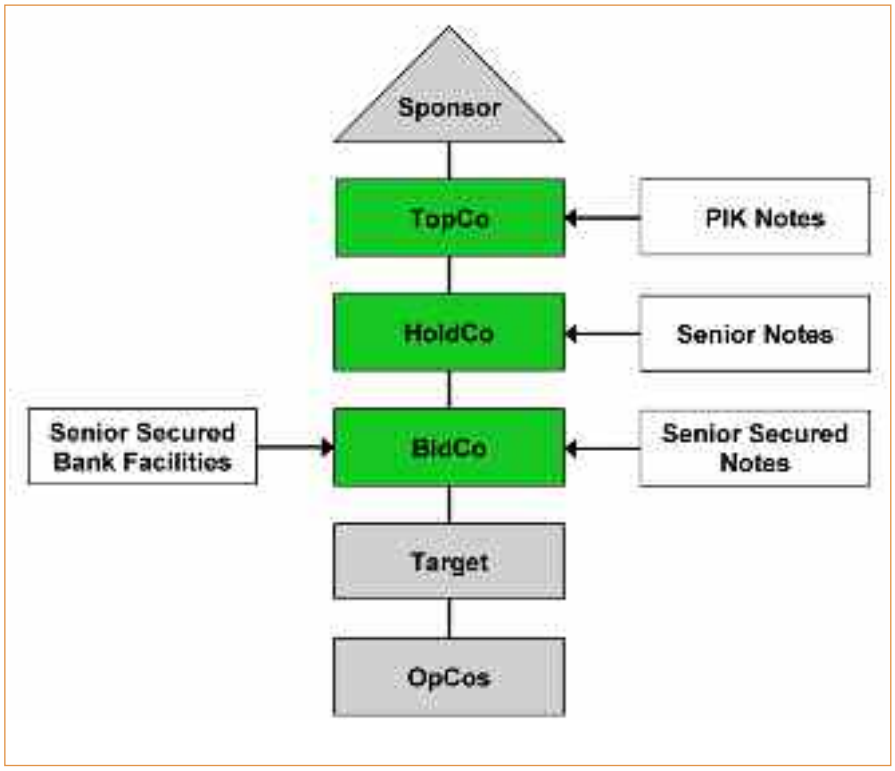
In addition, structures that include subordinated bonds have payment blockage provisions and enforcement standstills, which are usually permanent in the case of a payment default on the senior secured debt and 179-days for any other default.

Covenants

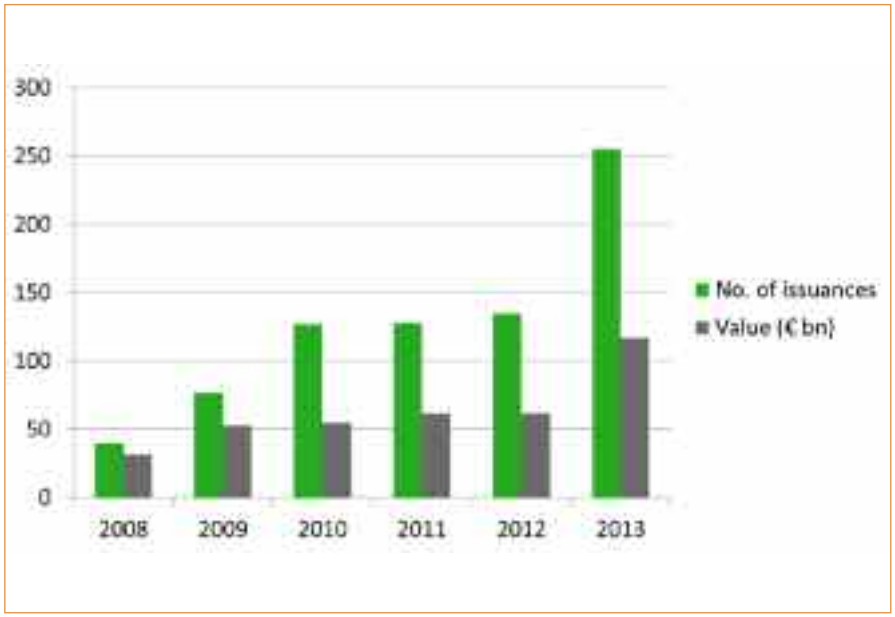
Whilst the loan facilities typically have financial maintenance covenants (DSCR/EBITDA) ratios etc.), the bonds will have "incurrence-based" covenants: the difference being that a decline in financial performance will not lead to a breach of covenants under the bonds, but will do so under the loans. This gives lenders an initial advantage over the bondholders as they will be able to accelerate the facility when the bondholders cannot accelerate the bonds (although doing so will usually amount to a cross-default giving rise to a right to accelerate the bonds).

Bond restructuring techniques

Bond restructurings can take various guises. For example, there may be an exchange offer, such as that recently made by Ideal Standard International S.A.: on 20 March 2014, the company gave holders of its €275m 11.75% senior secured bonds due 2018 the option to exchange their bonds for new ones or convert them into equity. The offer was launched with the support of 60% of the bondholders in connection with a restructuring aimed at improving the company's liquidity. Alternatively, there may be cash tender offers, redemptions or consent solicitations to waive or amend covenants under the indenture. These techniques are used to incentivise participation in exchange/tender offers by stripping the covenants of the bonds that are not tendered. However, where



TYPICAL FINANCING STRUCTURE WHERE BOTH BANK FACILITIES AND HIGH YIELD BONDS ARE PRESENT



THOMSON ONE: EUROPEAN HIGH YIELD BOND ISSUANCES BETWEEN 2008 AND 2013

the financial difficulties of the company are such that, to ease pressure on cash flow and shore up liquidity, all bondholders need to consent, a formal restructuring tool or insolvency process may be required.

The latter path was recently taken in the case of *Re Magyar Telecom B.V.*[2] Magyar was a company incorporated and registered in the Netherlands, and a member of a group operating telecommunication services in Hungary. In 2009, Magyar issued €345 million 9.5% Senior Secured Notes, due

2/. *[2013] EWHC 3800 (Ch)*

WILLIAM NEEDHAM OF WEIL, GOTSHAL & MANGES

in 2016, which were governed by the laws, and subject to the non-exclusive jurisdiction, of the state of New York. The group was over-leveraged, and restructuring negotiations took place in order that commercial terms acceptable to the various stakeholders could be agreed.

A restructuring agreement was signed by approximately 70% (by value) of bondholders. Magyar had first considered local restructuring procedures, but neither Dutch nor Hungarian processes were flexible enough to accommodate the deal. It is not uncommon for local procedures to be unworkable. In *Zlomrex International Finance S.A.* (a broadly similar restructuring to that proposed by Magyar) for example, local proceedings would have triggered events of default and cross-defaults which would have hampered creditor recoveries.[3]

The solution? An English law scheme of arrangement. Whilst it might seem odd to use the scheme jurisdiction to vary New York law governed rights owed by a European corporate, as is explained below, it can be the most cost-effective and certain way of implementing a restructuring which cannot be done wholly consensually or through an exchange offer.

Whilst it may seem odd to use the scheme jurisdiction to vary New York law governed rights owed by a European corporate, it can be the most cost-effective and certain way to implement a restructuring

Using the scheme jurisdiction

Whilst effective, using a scheme of arrangement to effect a restructuring of this type is not altogether straightforward. It requires meticulous planning.

Before a scheme can be sanctioned, the Court must be satisfied of a number of matters including (but not limited to) the following:

1. the company proposing the scheme is a "company" for the purposes of Part 26 of the Companies Act 2006 (the "**CA06**");
2. the company has a sufficient connection with this jurisdiction; and
3. the scheme will be effective, in the sense that it will be recognised and given effect to in the courts of other jurisdictions where it is essential to the commercial success of the scheme that the scheme "works", most notably jurisdictions in which the company has assets.

The *"liable to be wound up"* test

In order to be sanctioned by the English court under Part 26 of the CA06, a scheme must be proposed by a company liable to be wound up under the Insolvency Act 1986.[4] It is now well established law, as Mr Justice Richards reiterated in *Magyar*, that "*a foreign incorporated company is so liable, even if its circumstances at the time of the application to the court are such that the English court would not at that time exercise its jurisdiction to wind up the company*".[5]

The test could not be set much lower and, in *Magyar*, the company satisfied the requirement.

The court recognised, however, that where a company is not registered in this jurisdiction and, more importantly, where the finance documents are not governed by English law, there will be serious questions as to whether it will be appropriate for the court to exercise its discretion to sanction the scheme.[6]

Sufficient connection

In *Re Drax Holdings Ltd* Mr Justice Collins stated that the fact that a foreign company would not be wound up by the English court is not itself a bar to the court sanctioning the scheme, provided that there is sufficient connection with this jurisdiction: "*that the companies fall within the definition of companies for the purpose of section 425 of the Companies Act 1985, now section 899 of the Companies Act 2006 does not, of course, mean that there are no limitations to the exercise of jurisdiction under section 425. The court should not, and will not, exercise its jurisdiction unless a sufficient connection with England is shown*".[7]

Mr Justice Richards explains that demonstrating a "sufficient connection" with England is, as it is in the context of a

3/. [2013] EWHC 3866 (Ch)
4/. S 895(2), CA06
5/. [11], [2013] EWHC 3800 (Ch). Applying Re Drax Holdings Ltd [2003] EWHC 2743 (Ch), [2004] 1 WLR 1049; Re DAP Holding NV [2005] EWHC 2092 (Ch), [2006] BCC 48; and Re Rodenstock [2011] EWHC 1104 (Ch), [2011] Bus LR 1245
6/. [13], [2013] EWHC 3800 (Ch)
7/. [29], [2003] EWHC 2743 (Ch), [2004] 1 WLR 1049

winding up petition, imposed as a discretionary requirement because it is necessary for the scheme, or the winding up, to have a practical effect.[8] As Mr Justice Richards then explains, "*the presence of assets within the jurisdiction is but the most obvious example of a connection which will give practical effect to a winding up order*".[9]

In a number of cases, the sufficient connection has been satisfied by virtue of the governing law of the finance documents being English law and the English courts having exclusive or non-exclusive jurisdiction in respect of disputes (see, for example, *Re Rodenstock GmbH*, *Re Primacom Holdings GmbH* and *Re Vietnam Shipbuilding Industry Group)*. As the Judge made clear at paragraph 16, the sufficient connection test and the issue of international effectiveness (discussed below) are closely related to one another: "*the court will not generally make any order which has no substantial effect and, before the court will sanction a scheme, it will need to be satisfied that the scheme will achieve its purpose*".[10]

The generally adopted conflicts of law approach is that the variation or discharge of contractual rights in accordance with the governing law of the contract will be given effect to in other jurisdictions.[11] That is why Mr Justice Briggs was correct, in *Re Rodenstock GmbH*, to hold that where the rights being varied by a scheme are governed by English law, the sufficient connection requirement is satisfied.

In *Magyar*, as is often the case where high yield bonds are issued by mainland European registered companies, the bonds were not governed by English law. In such circumstances, the sufficient connection test will need to be satisfied with reference to other factors. Magyar sought to satisfy the sufficient connection requirement by migrating its centre of main interests ("**COMI**") to the UK. Whilst a dramatic step to take,

DANIEL BAYFIELD

and one which is usually impractical in the case of an operating company (as opposed to a finance (or holding) company), the COMI migration has the additional consequence of making recognition of the scheme as a foreign main proceeding possible in the US under Chapter 15 of the US Bankruptcy Code. Given that the bonds were governed by New York law, this was considered important in ensuring that the scheme would be effective.

The migration of Magyar's COMI to the UK satisfied the sufficient connection requirement because it led to a situation in which, if Magyar were to go into formal insolvency proceedings, they would take place in this jurisdiction.

Mr Justice Richards was at pains to make clear that "*the significance of moving the COMI… lies not so much in the establishment in the abstract of a connection between the company and England but on the basis that any insolvency process for the company would be undertaken under English law in England*".[12]

8/. Re Compania Merabello San Nicholas SA [1973] (Ch) 75
9/. [21], [2013] EWHC 3800 (Ch)
10/. [16], [2013] EWHC 3800 (Ch). Applied Sompo Japan Insurance Inc v Transfercom Ltd [2007] EWHC 146 (Ch); [73 – 77] Re Rodenstock [2011] EWHC 1104 (Ch), [2011] Bus LR 1245
11/. Rome Convention; Council Regulation (EC) 593/2008 (the Rome 1 Regulation)
12/. [23], [2013] EWHC 3800 (Ch)

The EC Regulation sets out the presumption that the COMI of a company lies where such company is incorporated, and that is where it must file for the opening of main insolvency proceedings.[13] The presumption can be rebutted, but "*in order to rebut the presumption there must be clear, objective and ascertainable facts which rebut it*".[14] Mr Justice Lewison in *Hellas Telecommunications* reiterated that "*it is possible for an entity… to change its COMI from its original or presumed location*".

COMI migration

Where it is done in the interests of the creditors generally, using insolvency procedures in other countries is not generally considered to be abusive but "*merely the optimisation of procedural possibilities*".[15] As a result, many foreign companies have moved their COMI to this jurisdiction to take advantage of our administration procedure or to promote schemes of arrangement.

In terms of identifying a company's COMI, the decisions of the European Court of Justice in *Re Eurofood IFSC Ltd*[16] and *Interedil Srl (In Liquidation) v Fallimento Interedil Srl*[17] establish that:

1. where the bodies responsible for a company's management and supervision are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the COMI presumption is wholly applicable;
2. that presumption may be rebutted where, from the viewpoint of third parties, the place in which a company's central administration is located is not the same as that of its registered office;
3. in that event, the simple presumption laid down by the European legislature in favour of the registered office of that company can be rebutted if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect; and
4. those factors must be assessed in a comprehensive manner, account being taken of the individual circumstances of each particular case.

Precisely what is required successfully to shift the COMI of a company will depend on the facts of any given case but, as a general guide, the following steps are involved:

1. moving the head office functions and the principal operating address to England;
2. notifying all creditors, relevant parties and bodies (including any relevant stock exchange) of the move to the UK;
3. issuing a press release which announces that the company's activities are shifting to the UK;
4. opening a bank account in the UK and making all payments through that account;
5. registering with Companies House; and
6. holding all negotiations with creditors in the UK.[18]

In *Zlomrex*, as well as taking the steps suggested above, the company:

7. took on English phone lines;
8. received all correspondence in England;
9. appointed directors to the board of directors who were resident in the UK;
10. took steps to acquire a Certificate of Tax Residency in England from HMRC;
11. entered into a contract with an English company for corporate management functions; and
12. held all key meetings and board meetings in England.[19]

Although there is no minimum time period in which a company must have had its COMI in the new member state, COMI shifts have been achieved over relatively short periods of time. In *Magyar*, the convening hearing for the scheme took place some eight to ten weeks after steps were first initiated to shift the company's COMI, with the sanction hearing taking place four weeks later. The fact that the COMI migration is recent does not alter the analysis. The identification of a company's COMI is an exercise to be undertaken at the time of the request to open proceedings and, so long as the COMI migration has the hallmark of permanence, the test is satisfied.[20]

Where a COMI shift to the UK has been completed and the only practical alternative to the restructuring proposed under a scheme is a formal insolvency process, it follows that any such insolvency process would be opened by the English court.

International effectiveness

It is well established that the English court will not act in vain. Accordingly, the court will need to be satisfied that the scheme will have substantial effect, i.e. that it will "work" as a matter of commercial reality, and that disgruntled creditors will not be able to go behind the scheme and rely upon their pre-scheme rights in a way which will undermine the effectiveness of the scheme.

Where it is done in the interests of creditors, using insolvency procedures in other countries is not generally considered to be abusive

13/. Article 3, Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings
14/. [3], Hellas Telecommunications (Luxembourg) II SCA [2009] EWHC 3199 (Ch); Re Eurofood IFSC Ltd (C-341/04) [2006] All ER (EC) 1078
15/. [71 - 73] Re Staubitz-Schreiber (Area of Freedom, Security and Justice) (Case C-1/04) [2006] ECR I-701
16/. [2006] (Ch) 508
17/. [47 - 53] [2012] BCC 851
18/. [2009] EWHC 3199 (Ch)
19/. [5], [2013] EWHC 3866 (Ch)
20/. Shierson v Vlieland-Boddy [2006] 2 BCLC 9

The governing law of European high yield bonds is typically New York law, and so the English court will need to be satisfied that the US courts, under Chapter 15 of the US Bankruptcy Code, which gives effect to the UNCITRAL Model Law on Cross-Border Insolvency, would recognise and give effect to the scheme. This is not necessarily straightforward: our US counterparts are not known for permitting the alteration or replacement of rights governed by New York law. However, unless recognition can be obtained, the scheme will not achieve its purpose because, looked at through the eyes of New York law, the contractual rights will not have been varied and the bondholders will be entitled to enforce them as if the scheme had not become effective.

In order to be recognised by the US courts under Chapter 15, there must first be a "foreign proceeding". To satisfy this test: (a) the proceedings must be brought under a law relating to insolvency or the adjustment of debt; (b) the assets and affairs of the debtor must be under the control or supervision of a foreign court; and (c) the proceedings must be for the purpose of reorganisation or liquidation.[21] The US courts have accepted that schemes of arrangement qualify as foreign proceedings on many occasions (and the Magyar scheme, following its sanction by the English court, was recognised by the US Bankruptcy Court on 11 December 2013 under Chapter 15).[22]

Provided that the existence of a foreign proceeding has been established, the US courts will grant it recognition if it is a main or non-main proceeding. A proceeding will be a main proceeding if pending in the country where the debtor has its COMI, and non-main if pending in a country where the debtor has an establishment.

The governing law of European high yield bonds is typically New York law, and so the English court will need to be satisfied that the US courts will recognise and give effect to the scheme

In *Magyar*, Mr Justice Richards expressed the view that: "*where the practical alternative to the scheme is an insolvency process in… England, there is an obvious logic in treating a scheme approved under English law as effective to alter the rights of creditors, even though those rights are governed by the law of a different country*".[23] The court was satisfied that it was reasonably likely (on the basis of expert evidence) that the US courts would recognise the scheme and give effect to it. The subsequent decision of the US Bankruptcy Court vindicated that view.

The Judge also gave guidance to the effect that: (i) expert evidence of foreign law should be given be experts unconnected with the law firms professionally engaged in the scheme[24]; and (ii) expert evidence should be given (as it was in *Magyar*) in relation to the jurisdictions in which there are guarantors and/or assets.

It is, of course, critical that creditors will not be able to ignore the scheme and enforce against assets in other jurisdictions. In the case of *Magyar*, it was critical to satisfy the court that the Hungarian courts were likely to recognise and give effect to the scheme, Magyar's operating subsidiary (and main asset) operating in Hungary.

There appears to be a growing view in Europe that, subject to public policy exceptions, orders sanctioning English schemes of arrangement should be recognised as "judgments" within the meaning of articles 32 and 33 of Council Regulation (EC) No 44/2001 (the Judgments Regulation).

It will not be necessary, in every case where the contractual obligations are governed by a foreign law, to satisfy the sufficient connection test by moving the company's COMI to the UK. For example, the presence in England of assets belonging to a company proposing a scheme might provide the requisite connection. The question will be whether that connection is sufficient in terms of leading to the conclusion that the scheme, if sanctioned, would achieve the practical effect of preventing the creditors from relying upon their pre-scheme rights.

Conclusion

It is likely that Mr Justice Richards' judgment in *Magyar* will encourage other foreign companies to look to English restructuring processes to compromise their foreign law debt obligations.

A scheme of arrangement is not the only way of restructuring high yield bonds, but it appears to be *en vogue* as a result of recent successes and the English court's ability and preparedness to be inventive and practical in the interests of creditors.

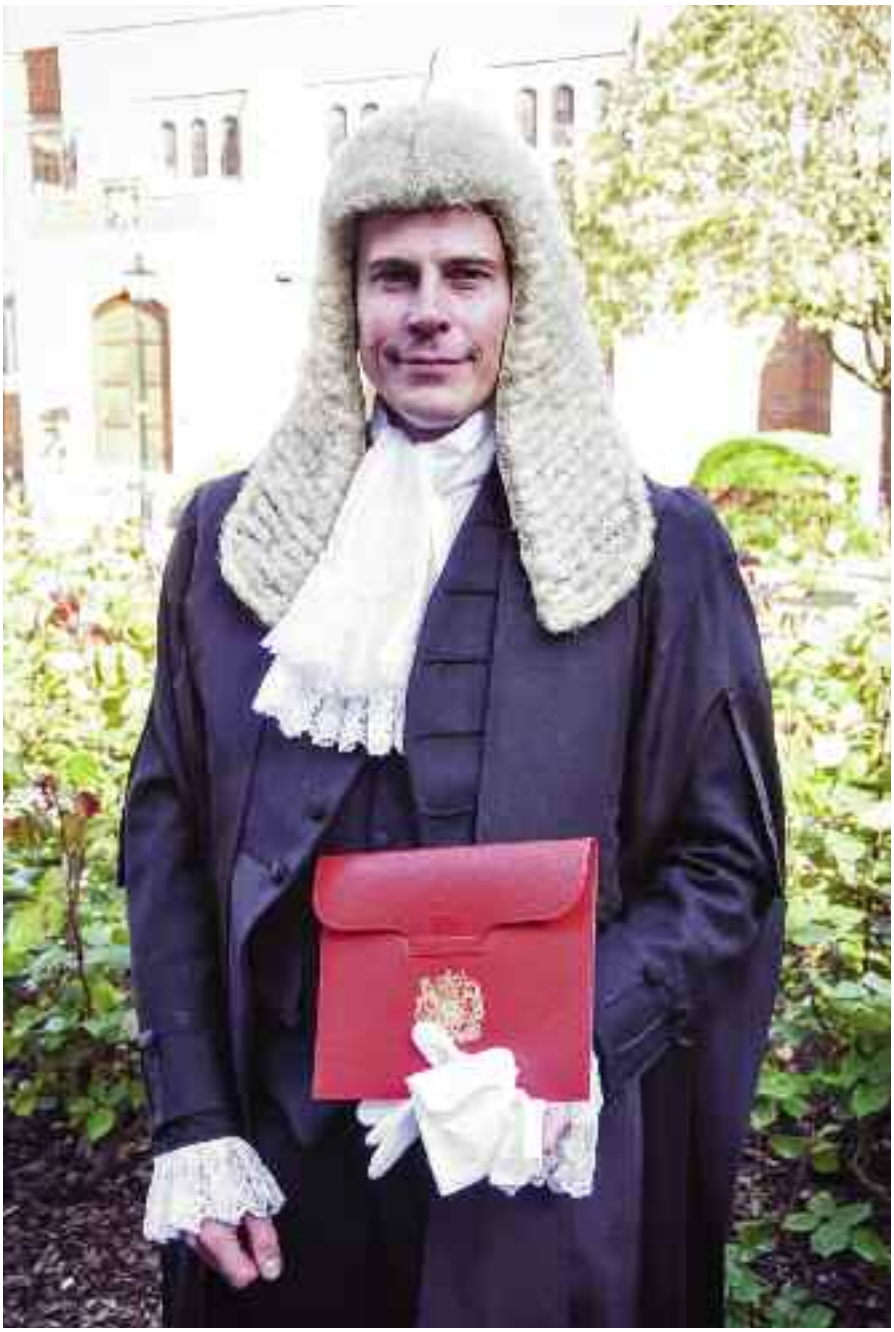
William Needham advises on restructurings and distressed investing. He advised creditor-side on Hellas and is advising on current high yield restructurings. Daniel Bayfield has for many years advised on a wide range of restructurings and acted for the scheme companies in Magyar and Zlomrex.

21/. § 101(23), US Bankruptcy Code
22/. As matters stand, following a decision of United States Court of Appeals for the Second Circuit in Drawbridge Special Opportunities Fund LP v Barnet (In re Barnet), 737 F.3d 238 (2d Cir. 2013) where it held that the debtor eligibility requirements contained in section 109 of the Bankruptcy Code apply to Chapter 15 debtors, before petitioning for Chapter 15 relief the foreign debtor will need to ensure that it has a place of business or property in the United States.
23/. [19], [2013] EWHC 3800 (Ch)
24/. [27], [2013] EWHC 3800 (Ch)

South Square and friends... and David Bailey

The South Square annual reception this year took place on Wednesday 9 April when Members and staff welcomed some 300 clients and friends of Chambers to the National Portrait Gallery. The reception, held in the impressive Victorian Galleries, included a private viewing of the high profile Bailey's Stardust Exhibition - the largest retrospective of Bailey's work spanning his 50+ year career with over 250 images. Guests have fed back how much they enjoyed the evening of socialising with contacts old and new, and viewing exhibits at their leisure.

DAVID **ALLISON** QC



David Allison read law at Downing College, Cambridge University. He graduated with First Class Honours and was called to the Bar in 1998.

David has developed a broad commercial practice. He specialises in business, commercial and financial law, with a particular emphasis on corporate restructuring (both domestic and cross-border), sovereign debt restructuring, banking and financial services, structured finance, commercial litigation and company matters. He has an extensive overseas practice which includes Dubai, Cayman, BVI, Jersey and Guernsey.

David's recent cases include Lehman (including Lehman Client Money, Lehman Pensions, Lehman Waterfall Application), Eurosail, ATU, Airwave, Stemcor, MF Global, Nortel, Bank of Ireland, European Directories, Stanford International Bank, Madoff, Landsbanki, Glitnir, Kaupthing, Woolworths, Almatis, Arcapita, Metronet, Northern Rock, Dewey & LeBoeuf, Deutsche Annington, PrimaCom, Nef Telecom, Biffa, Fitness First, NCP, Monier, Tele Columbus and Cattles.

David is ranked as a leading barrister in six practice areas by the legal directories: Banking & Finance; Insolvency & Restructuring; Company; Commercial Dispute Resolution; Chancery: Commercial; and Financial Services.

David is ranked in the Chambers UK 100. He has been recognised in the annual awards of Chambers and Partners as the winner of the Insolvency/Restructuring Award and as a nominee for the Banking & Finance Award.

TOM **SMITH** QC

Tom Smith is a graduate of Clare College, Cambridge University where he obtained first class degrees in law (MA and LLM). He was called to the Bar in 1999 and has been at South Square since then.

Tom specialises in commercial litigation and arbitration, banking and finance and corporate insolvency and restructuring. He also practices extensively in the fields of company law, civil fraud and asset recovery, professional negligence and trusts. He acted for the Bank of England in the Three Rivers litigation and since then has developed a significant commercial litigation practice ranging from major commercial trials such as the recent Formula One/Bernie Ecclestone dispute to various arbitrations. These have included a number of banking litigation matters such as Saltri v MD Mezzanine, Grupo Urvasco, Assénagon v Anglo Irish, and Morgan Stanley v Tael (due to be heard in the Supreme Court in 2014).

Tom has also been involved most of the major domestic and international insolvencies of recent years. His other notable work includes many of the recent restructurings and schemes of arrangement. He also has a particular interest in cross-border insolvency, having acted in HIH in the House of Lords, Rubin v Eurofinance in the Supreme Court and in the ongoing Primeo v Picard proceedings in the Cayman Islands.

Tom is recognised as leading barrister in five areas in the legal directories: Banking and Finance, Restructuring/Insolvency (star individual), Chancery: Commercial, Commercial Dispute Resolution and Company and has previously been a winner of Restructuring/Insolvency Junior of the Year at the Chambers Bar Awards.

EU/EEA LAW UPDATE

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

EU Insolvency courts have universal jurisdiction

Schmid v Hertel (ECJ, 16th January 2014
The issue here was whether the EU Regulation on insolvency proceedings gave the German courts domestic law jurisdiction to hear an avoidance action against a defendant resident in Switzerland, in relation to a claim brought by the liquidator in a German insolvency proceeding.

Prior to this case, it had generally been assumed that the Regulation's rules as to jurisdiction, and in particular Article 3(1) (jurisdiction to open main proceedings), dealt with the allocation of jurisdiction within the EU between Member States and not with jurisdiction under domestic law. However, the ECJ in this case, on the basis of the objectives of improving the efficiency and effectiveness of EU insolvency proceedings, where they have cross-border effects, interpreted Article 3(1) as creating domestic law jurisdiction in EU Member States to hear and determine "actions which derive directly" from the insolvency proceedings opened in Member States "and which are closely connected with them".

This interpretation was said to promote foreseeability and legal certainty. The fact that the third country, in this case, Switzerland, might not be under any obligation to recognise or enforce a judgment delivered by a court exercising this type of jurisdiction within the EU could not prevail against this interpretation. The ECJ held that even if such a judgment is not recognised and enforced on the basis of a bilateral convention, it may be recognised and enforced by other Member States within the EU pursuant to Article 25 of the Regulation, "in particular if part of the defendant's assets are in the territory of one of those States". (Paragraph 38).

The practical effect is that whenever there is an insolvency proceeding in an EU Member State, there is jurisdiction to launch an insolvency law avoidance action in the courts of the Member State, not only against EU defendants, but also against Defendants worldwide, regardless of any more restrictive jurisdiction rules in that particular member State. Of course, as the ECJ points out, recognition and enforcement in the Defendant's country, if outside the EU, may be problematic, but at least any assets within the EU will be available for enforcement purposes.

Reform of Insolvency Regulation

The three-cornered discussions and decision-making between the Commission, Parliament and the Council continue, interrupted however by the forthcoming European elections. The suggestions of an arbitrary period required for COMI changes to become effective and the threat of forcing schemes of arrangement into the Regulation (both suggestions from the Parliament) are the major areas of concern for the UK.

Changes to French Restructuring Law

In January 2014, the French legislature passed Law No. 2014-1 "authorising the Government to simply and secure corporate life" ("habilitant le Gouvernement à simplifier et sécuriser la vie des entreprises"), Art.2 of which authorises the government to adopt secondary legislation to promote a rescue culture for insolvent companies. Press reports suggest that the package of reforms under consideration include making it easier for creditors to propose reorganisation plans and to circumvent dissenting shareholders.

Spanish insolvency reforms

On 7 March 2014, Spain enacted Royal Decree Law 4/2014 ("the Decree") adopting urgent measures on corporate debt refinancing and restructuring (*Real Decreto-ley 4/2014, de 7 de marzo, por el que se adoptan medidas urgentes en material de refinanciación y reestructuración de deuda empresarial*). The Decree amends certain provisions of the Spanish Insolvency Act (*Ley 22/2003, de 9 de julio, Concursal*). The most important reforms are as follows.

1/. Art.5bis of the Spanish Insolvency Act is amended so that once a debtor has notified a court that it is in negotiations for restructuring under the Act, enforcement proceedings (*ejecuciones judiciales*) over assets that are necessary for the debtor's business (*bienes que resulten necesarios para la continuidad de la actividad profesional o empresarial del deudor*) are suspended. The opening of negotiations must be supported by at least 51% by value of financial creditors, and cannot last more than three months.

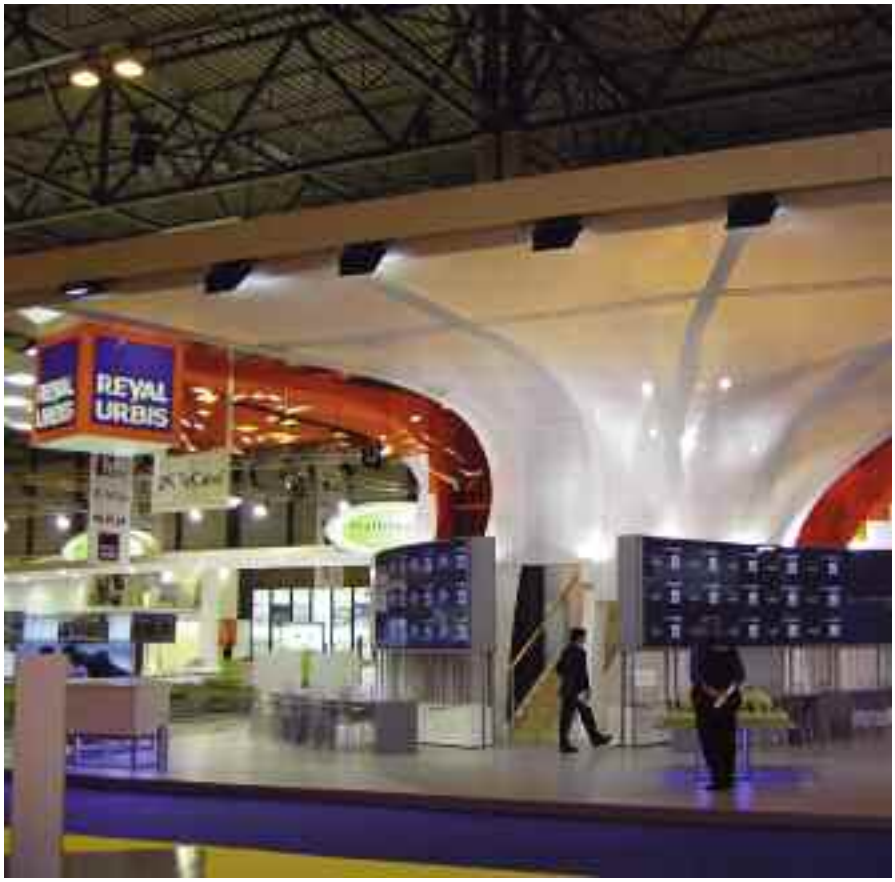
2/. Art.71bis of the Spanish Insolvency Act is amended to encourage refinancing agreements (*los acuerdos de refinanciacion*). The requirement for a report in support of the refinancing issued by an independent expert has been replaced by a requirement for creditors representing 60% of the value of the liability to vote in support. Other requirements of Art.71bis are that the assets of the debtor be increased to a greater level than the liabilities, that the value of security created in favour of creditors not exceed 90% of the outstanding debt due to those creditors and that the interest rate applicable to the debt arising from the refinancing not exceed the interest on the previous debt by more than one third. Refinancing agreements that comply with Art.71bis will not be impeached by a court. In addition, for the first two years following the entry into force of the Decree, cash injected under a refinancing agreement will be protected in the event of future insolvency (the default position is that only 50% of such cash is protected).

3/. The fourth additional provision (*Disposicion adicional cuarta*) of the Decree introduces new rules for approval of compositions, in particular where it is sought to cram down dissenting creditors. Refinancing agreements may be approved by 51% by value of creditors, excluding trade creditors and public authorities (*los acreedores por operaciones comerciales y los acreedores de pasivos de derecho público*). (For syndicated loans (*préstamos sindicados*) to be taken into account, lenders representing at least 75% of the liability must vote in favour, unless the syndication agreement provides for a smaller majority.)

Where creditors representing 60% of an unsecured liability or 65% of a secured liability have voted in favour, a composition may postpone payment obligations for up to five years, or convert debt into equity loans (*préstamos participativos*).

Where creditors representing at least 75% of an unsecured liability or 80% of a secured liability have voted in favour, the composition may provide for:

- payment obligations to be postponed for 5-10 years;
- the reduction of debts (*las quitas*);
- the transfer of assets to creditors in payment of debt (*La cesión de bienes o derechos a los acreedores en pago de la totalidad o parte de la deuda*);
- a debt-for-equity swap (*La conversión de deuda en acciones o participaciones de la sociedad deudora*); and
- the conversion of debt into:
  - equity loans (*préstamos participativos*) for a term of 5-10 years,
  - convertible bonds (*obligaciones convertibles*),
  - subordinated loans (*préstamos subordinados*),
  - capitalised interest loans (*préstamos con intereses capitalizables*), and
  - any other instrument with ranking, maturity or characteristics that differ from the original debt (*cualquier otro instrumento financiero de rango, vencimiento o características distintas de la deuda original*).



PROPERTY FIRM, REYAL URBIS, FILED FOR INSOLVENCY LAST YEAR, THE SECOND LARGEST IN SPANISH HISTORY

NEWS in brief

Oversight Committee of IBA

Joanna Perkins has been appointed to the Board of the Intercontinental Exchange Group (ICE) Benchmark Administration (IBA) Oversight Committee. Following the recommendations of the Wheatley Review and a rigorous selection process conducted by the Hogg Tendering Committee, IBA took charge as the new independent administrator of the London Interbank Offered Rate (LIBOR) in February. Operating as an autonomous entity within ICE, IBA's oversight committee will administer LIBOR's code of conduct. Joanna specialises in structured finance, derivatives and financial regulation and is also Chief Executive of the Financial Markets Law Committee. In 2012, she was voted one of the 100 most influential women in European finance by Financial News.

JOANNA PERKINS

Second walk-out over legal aid cuts

Barristers and solicitors across England and Wales staged a second walk-out of courts on 7 March in protest over the government's legal aid cuts. The decision to take action followed a meeting between Bar Council Chairman Nicholas Lavender QC and the Ministry of Justice, from which Chairman of the Criminal Bar Association (CBA), Nigel Lithman QC, said "nothing fresh" had emerged.

Following subsequent concessions agreed by Justice Secretary Chris Grayling, including the deferment of cuts in the Advocate Graduated Fee Scheme (AGFS) for at least one year, criminal barristers halted plans for further strike action at the end of March.

Reacting to the postponement of the fee scheme, Nigel Lithman said: "We are glad that we have persuaded the government to recognise that further cuts to the junior bar are unnecessary and would jeopardise the existence of the profession". Nicholas Lavender QC said the move "points to a better future from the one which many have feared".

Conservative Candidate for South East Cambridgeshire

Lucy Frazer QC has been confirmed as the prospective parliamentary candidate for the Conservative Party in South East Cambridgeshire. Lucy will be standing for the Conservatives at the next general election in place of MP Sir James Paice, who is retiring. Meanwhile, Lucy maintains her busy practice at South Square.

LUCY FRAZER QC

Secondments

Toby Brown is currently on a three month secondment in the Cayman Islands with Campbells. Matthew Abraham has recently returned to South Square after a secondment at the London office of Stephenson Harwood.

TOBY BROWN

MATTHEW ABRAHAM

Barrister permanently disbarred for falsified CV

Many will recall the temporary suspension of Dennis O'Riordan from practising as a barrister last year after it emerged he had falsified academic qualifications listed on his CV.

Mr. O'Riordan, who had worked as an in-house counsel for City institutions and law firms, made a number of bogus claims, including two first class degrees and a DPhil from Oxford University, and a Master's in Law from Harvard. He was exposed in November 2012 when applying to join a set of chambers.

At the original disciplinary tribunal in September 2013, the disgraced barrister received a three-year suspension from practice. Following a successful appeal by the Bar Standards Board (BSB) to the Visitors to the Inns of Court, Mr. O'Riordan was permanently disbarred in January.

Fixed Trials: Pilot Scheme

The Chancellor has announced a pilot scheme in the Chancery Division for fixed-end trials. The Chancery Modernisation Review report drew attention to the fact that trials in the Chancery Division regularly overran. As Lord Justice Briggs noted, statistics for trials in 2013 showed that nearly 50% had exceeded their time estimates, on average by almost 50%. Lord Justice Briggs recommended that, in the first instance, there should be a pilot of fixed-end trials.

The Chancellor has decided that this pilot runs from 1 May 2014. The announcement of the scheme requires all parties to cases listed for trial in the Chancery Division on or after that date to check their time estimates as a matter of urgency and, should they now be thought to be too short, inform the Court at once. And from 1 May 2014 any trial may be selected to be part of the pilot. If it is selected, it will have to be completed within its time estimate. Cases may be chosen to be part of the pilot from as late as the day before the trial begins. The parties to all cases must therefore prepare for trial in the knowledge that their cases may not be allowed to overrun.

Time estimates must make a realistic allowance for pre-reading. If the period for pre-reading is inadequate, the time available in court will be shortened accordingly.

Furthermore, where it is thought to be appropriate to have an interval between the close of evidence and final submissions, the time estimate should factor this in as well. It is, therefore, clearly going to be necessary for parties to consider carefully how long each element of the case is likely to take. Likewise, parties should agree a timetable at as early a stage as possible and review it if circumstances change.

New Cayman laws

On Friday 11 April the Cayman Islands Government approved a significant modernisation of the Exempted Limited Partnership Law ("the ELP") and also introduced The Contracts (Rights of Third Parties) Law, allowing contracting parties to give contractually enforceable rights to third parties.

The principal changes to the ELP include enhanced liability protection for limited partners, greater structural flexibility increased certainty of interpretation and a simplified dissolution regime. The new law in relation to third parties will be particularly useful in relation to indemnity and exculpation clauses.

Together the changes are regarded as a response to the evolving requirements of the international financial service

Pre-trial reviews

The Chancery Division is to experiment with holding pre-trial reviews in all cases estimated to last five days or more.

From the beginning of next term, whenever a case with an estimate of at least five days is fixed to come on for final hearing on or after 1 March 2015, a pre-trial review before a judge will be arranged at the same time, to take place about four weeks before the trial.

Among other things, the judge hearing the pre-trial review will be concerned to check that the time estimate is realistic and that the parties have taken appropriate steps to agree a timetable for the trial.

Conference round up

BARRY ISAACS QC DEBATES RISK ISSUES ARISING FROM THE INSOLVENCY PROCESS WITH EY'S ALAN BLOOM

This has been a busy quarter for South Square members on the conference circuit. Gabriel Moss QC joined the panel at the BrooklynJournal of Corporate, Financial & Commercial Law Annual Symposium on 7 March in New York. He also chaired the Sweet & Maxwell Insolvency Law Conference 2014 held on 25 March in London and will be speaking at the R3 and INSOL Europe International Restructuring Conference on 1 May also in London. Barry Isaacs QC was invited to join the panel debating 'Risk issues arising from the insolvency process' at the Credit Summit: Insolvency & Restructuring Conference which took place on 2 April at the QE11 Centre in London.

Felicity Toube QC spoke at the ILA Academic Forum in Oxford the day before the ILA Annual Conference on 22 March, where she was also a speaker together with William Trower QC, Mark Phillips QC and Barry Isaacs QC.

The same weekend, another South Square contingent were out in force in another part of the globe with 10 Members attending the INSOL Annual Regional Conference 23-25 March in Hong Kong.

South Square were sponsors and Glen Davis QC and Professor Ian F Fletcher QC (Academic Member of South Square) facilitated sessions and spoke at the well-attended conference.

These external events are in addition to the in-house events and numerous bespoke talks South Square Members gave for clients at their premises.

FELICITY TOUBE QC

PROF IAN FLETCHER QC

MARK PHILLIPS QC

Company liquidations

Statistics released by the Insolvency Service revealed there were 3,552 company liquidations in England and Wales in the fourth quarter of 2013, a decrease of 7.4 per cent on the previous quarter and 7.1 per cent less than the same quarter in 2012. This comprised 692 compulsory liquidations, down 26.7 per cent on the previous quarter and down 25.8 per cent on the same period in 2012, in addition to 2,860 creditors' voluntary liquidations, which fell by 1 per cent on both the previous quarter and the corresponding quarter of the previous year.

Delaware secret court hearings

Judges in Delaware have urged the Supreme Court to reinstate a law allowing sitting judges to arbitrate corporate litigation disputes in private. A contentious state law passed in 2009 offered litigants with at least $1 million at stake the opportunity to resolve business disputes in secret hearings before Delaware's Chancery Court judges in courtrooms for so-called "arbitrations" that produced enforceable legal judgments.

For these proceedings, the courtroom would be closed to the public and the outcome would be secret.

The Delaware Supreme Court could however review judgments but it is not clear whether appeals would also be confidential.

The system gained little notice until 2011, when a merger dispute involving Skyworks Solutions and Advanced Analogic Technologies prompted a group called the Coalition for Open Government to accuse the court of "secret justice for wealthy companies".

A federal judge conceded the legislation violated the public's right of access to civil proceedings under the First Amendment. A divided appellate court concurred the law was unconstitutional. New calls to reinstate the practice, outlawed in 2012, have prompted objections from campaigners and major US news organisations. The New York Times observed the situation in Delaware points to a broader problem: the increasing privatisation of judging and closing of access to courts.

'So much damage' after stenographer misconduct

A Manhattan court stenographer went rogue during a high-profile criminal trial repeatedly typing, "I hate my job, I hate my job, I hate my job" instead of the trial dialogue, the New York Post reported in April. Daniel Kochanski, who has since been fired for misconduct, wreaked havoc on some 30 cases. A high-profile source told the newspaper his "gibberish" typing may have jeopardised multiple convictions, prompting judges to hold 'reconstruction hearings'. "I never had a situation where a single court reporter was responsible for so much damage," Claudia Trupp from the Centre for Appellate Litigation said.

RECONSTRUCTION HEARINGS NOW NEEDED IN NYC

Insolvency consultation

The Insolvency Service conducted an Insolvency Practitioner regulation and fee structure consultation which closed on 28 March and feedback is currently being analysed.

The consultation set out ways to strengthen the regulation of IPs, by introducing regulatory objectives and giving the oversight regulator additional powers to deal with failure to comply with the objectives.

It also included proposals to change the ways an IP can charge fees to ensure that money is available to pay creditors.

Sir Richard Ground QC OBE

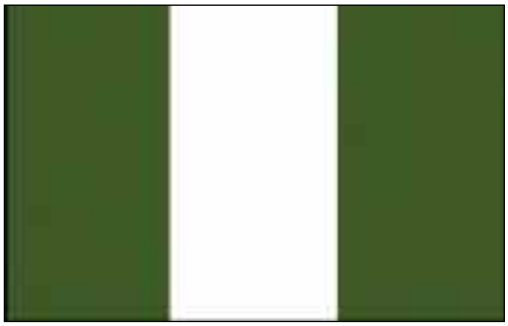
Chambers is sad to report the death of Sir Richard Ground QC OBE, Bermuda's former Chief Justice, who passed away in February at the age of 64. Sir Richard had a long and distinguished career in the judiciary of the Overseas Territories.

He sat on Bermuda's Supreme Court bench as a Puisne Judge for six years. Then he was Chief Justice in the Turks and Caicos Islands for a further six years between 1998 and 2004. Next from 2004 to 2012 he was Chief Justice of Bermuda.

Following retirement in March 2012, he received a knighthood in the Queen's Birthday honours in recognition of his achievements during an eight-year tenure as Bermuda's Chief Justice. His successor, Hon Mr Justice Ian Kawaley, described Sir Richard as a model modern judge who "set exceptionally high standards of fairness and clarity of reasoning".

SOUTH SQUARE CHALLENGE

Welcome to the May 2014 South Square Challenge. This is similar but not quite the same as previous challenges. In this international age, Members of Chambers have obviously appeared in the courts of or advised in or about matters in numerous countries and territories outside England and Wales. Obvious ones include Cayman, Bermuda, the Bahamas, BVI, Hong Kong, Singapore, Jersey, Guernsey, Scotland, Ireland and the like. So this challenge is called Maps and Flags. Each pair of images represents the map and flag of a country or territory (not any of the ones mentioned above!) where one or more members has had an involvement. Of course they are some of the more obscure ones. All you have to do is work out which country each of the eight pairs of images represents. As always for the winner (if necessary drawn from the wig tin), a magnum of champagne. And the much coveted South Square umbrella. Please send your answers to Kirstendent@southsquare.com or by post to Kirsten at the address on the back page. Entries by Friday 20 June 2014 please. Good luck. ***David Alexander QC***



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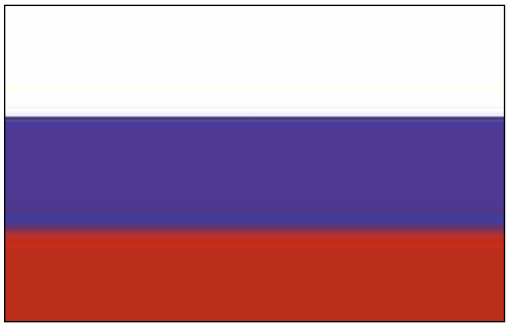

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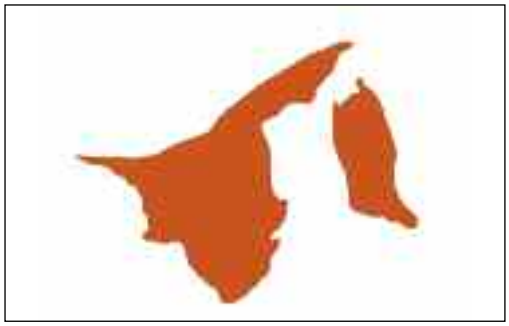

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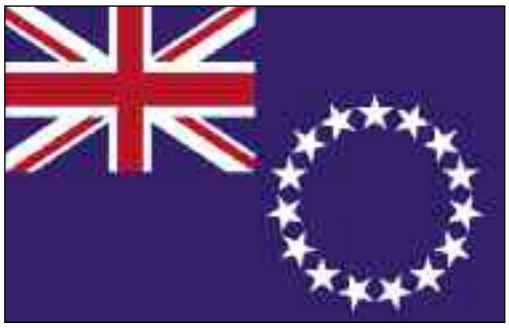

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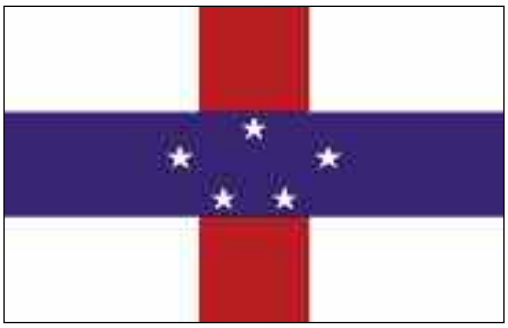

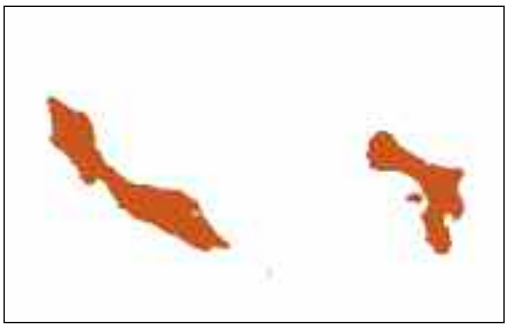

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FEBRUARY CHALLENGE

The correct answers to the February 2014 South Square Challenge were (1) The White Book (2) Gore-Browne on Companies (3) Chitty on Contracts (4) Bowstead & Reynolds on Agency (5) Clark & Lindsell on Torts (6) Sealy and Milman: Annotated Guide to the Insolvency Legislation (7) Dicey and Morris on Conflict of Laws and (8) Mortimore on Company Directors. The connection was that they are, of course, all legal books. As for the winner, it is a joint entry from Jane Cary and Danny Schaffer at Isadore Goldman to whom go our congratulations, a magnum of champagne and an ever-useful South Square umbrella.

Diary Dates

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

We look forward to seeing you at one or more of them.

R3 and INSOL Europe International Restructuring Conference
1 May - Hilton Tower Bridge, London

R3 Annual Conference
14-16 May - Vilamoura, Portugal

III 14th Annual International Insolvency Conference
9-10 June - Mexico City

INSOL International Channel Islands One Day Seminar
12 June - Jersey

INSOL Europe Annual Congress
9-12 October - Istanbul, Turkey

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


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