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

AUGUST 2013

SOUTH SQUARE DIGEST

Finally.... a blistering summer

Welcome to the summer edition of the Digest. Since the May edition some pretty amazing things have happened. After a miserable start we have been attacked by a blistering summer. What is more we have had some fantastic sporting moments. Justin Rose winning the US Open at Merion. A massive Lions victory over Australia to secure the series after two very tight games. Andy Murray winning the men's singles at Wimbledon - an amazing feat after 77 years since the last British man did so. A cracker of a first cricket test between England and Australia at Trent Bridge - full of twists and turns and a thrilling climax. Who says test cricket isn't fun? Well I guess maybe the Australian touring team don't think test cricket is much fun after they then went on to be thrashed at Lords. And finally Chris Froome becomes the second Brit in succession to win the Tour de France. We have not had a summer like this for years.

On to the last three months outside the sporting arena. We, of course, now have a new governor of the Bank of England, Mark Carney, the first non-British governor of the Bank and a man who is heralded as the most outstanding banker of his generation. Let's hope so and that the economy really gets moving. At least there seem to have been a few tentative signs in that department over the last few months with the double dip recession being "revised" away, with the construction sector performing more strongly and with there having been a steep surge in manufacturing activity.

So what else has happened? Some areas have not been good: Syria is a disaster. Egypt does not look much better. Modelzone and Dwell went into administration suggesting that the high street may still be struggling. And the Co-Operative bank needed a "bail-in". But two more events were good. First, we have a new royal baby who takes up the post of third in line to the throne. But, second, and perhaps my favourite news of the summer: Richard Saunders of Moon Beever and Ayesha Hason of Locke Lord LLP won the R3 Strictly Dancing event with a waltz at the Hilton raising a large sum of money for the Debbie Fund. Well done to them.

So what have we got for you in this edition of the Digest? Well, it is a bit of a bumper issue. We have articles by Stephen Robins on the recent Lehman/Nortel decision and by Tom Smith on Moratoriums and Schemes of Arrangement. We also have articles by Alexander Riddiford on the implementation of the Third Party (Rights Against Insurers) Act 2010, Ben Valentin on the Court of Appeal's decision in Imcopa, Robin Knowles QC on fundamental changes to the justice system and Henry Phillips on the recent trial in *Smithton v Naggar*.

In addition we have the two new regular features announced last time: Gabriel Moss QC providing the first Euroland update and the first of our offshore articles this time by Arabella di Iorio of Maples & Calder and David Allison on the BVI. In addition, of course, we have the usual case Digests as well as diary dates, news in brief and the South Square Challenge.

We hope you all enjoy this Digest. As always, if you find yourself reading someone else's copy of it and want to be added to the circulation list please just send an email to kirstendent@southsquare.com and we will try to make sure you get the next one directly. Please also send Kirsten an email if any of your contact details have changed.

Finally, all at South Square wish everyone a very good remainder of the summer.

David Alexander QC - Editor.

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SOUTH SQUARE

Provable debts and administration expenses

Stephen Robins[1] on the recent Supreme Court decision in the Lehman and Nortel pension appeals

Introduction

The Supreme Court has handed down judgment in the *Lehman* and *Nortel* pensions appeals[2], reversing the decisions of Briggs J and the Court of Appeal and, in the process, sweeping aside numerous other well-known and long-established decisions.

The Supreme Court (Lords Neuberger, Mance, Clarke, Sumption and Toulson) unanimously upheld the appeals and held that:

1. A liability imposed on a company by the Pensions Regulator by way of a financial support direction ("FSD") and a contribution notice ("CN") under the Pensions Act 2004 ("the 2004 Act") after the commencement of the company's administration will fall within Rule 13.12(1)(b) of the Insolvency Rules 1986 ("the 1986 Rules") so as to be provable in the company's administration, even if the FSD was not issued until after the commencement of the administration.

2. The liability will not be payable as an expense of the administration. Where: (i) a statutory liability is one which could have been imposed before or after the commencement of insolvency proceedings; (ii) the liability does not give rise to a provable debt; and (iii) the statute is silent as to how the liability should be treated if it is imposed after the commencement of insolvency proceedings, the liability can only be an expense if the nature of the liability is such that it must reasonably have been intended by the legislature that it should rank ahead of provable debts.

The decision is one which is bound to be welcomed by insolvency practitioners and others working in the insolvency industry.

Its legal relevance lies principally in the explanation of how to identify: (i) whether a contingent liability is provable in an administration or liquidation; and (ii) whether a statutory liability will be payable as an expense in an administration or liquidation. As to the former, the Supreme Court has sought to define the concept of "obligation" for the purposes of Rule 13.12(1)(b) of the 1986 Rules. As to the latter, the Supreme Court has sought to clarify the concept of "necessary disbursements" within Rule 2.67(1)(f) of the 1986 Rules.

Commercially, the decision is bound to be seen as promoting the rescue culture. Substantial expense claims hinder the ability of an administrator or liquidator to achieve an advantageous result for creditors.

The decision also avoids the risk of debt finance drying up more generally. According to the Court of Appeal's decision, the liability under the 2004 Act was payable as an expense and therefore in priority to the floating chargeholder. Those lending to companies against the security of a floating charge were therefore at risk of making no recovery at

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1/. Junior counsel for the appellant administrators of Lehman Brothers International (Europe) and two other companies in the Lehman group. Other members of Chambers appearing in the Supreme Court were Gabriel Moss QC, Richard Sheldon QC, Mark Phillips QC, Robin Dicker QC, William Trower QC, Barry Isaacs QC, Felicity Toube QC, David Allison, Daniel Bayfield and Tom Smith.

2/. Re Nortel GmbH, Re Lehman Brothers International (Europe); Bloom v Pensions Regulator [2013] UKSC 52.

all where the borrower was the target of liabilities under the 2004 Act after the commencement of insolvency proceedings.

However, the decision of the Supreme Court could potentially generate as much uncertainty as it has resolved. In particular it means that the position in respect of statutory liabilities (particularly in the regulatory context) must be judged on a case-by-case basis, and accordingly the decision leaves significant scope for future argument as to when and whether, for the purposes of Rule 13.12(1)(b), an obligation has been "incurred" under particular statutory provisions.

There will also be room for debate as to whether the legislature must reasonably have intended that a particular statutory liability should rank ahead of provable debts.

The facts

The Lehman group included a company which entered into service contracts with, and ran a pension scheme for the benefit of, employees who worked for other group members.

The Nortel group included a company which had a pension scheme and which was insufficiently resourced to fund that scheme. The pension scheme in each case was a final salary scheme which was in substantial deficit.

After the appointment of administrators in respect of numerous members of the Lehman Brothers group of companies and the Nortel group of companies, the Pensions Regulator initiated machinery under the 2004 Act to require certain group members to provide financial support for the relevant scheme. As stated above, the 2004 Act provides for a two-stage process involving FSDs and CNs.

The FSD/CN regime was introduced to address the risks of moral hazard, namely (i) to prevent groups of companies from taking steps to avoid their pension obligations by using company structures and business transactions, leaving such obligations to be borne by the Pension Protection Fund and (ii) to act as a deterrent against such behaviour.

Although the FSD/CN regime under the Pensions Act 2004 is of central importance, section 75 of the Pensions Act 1995 Act is also highly relevant, as it provides that, upon the happening of an "insolvency event" (which term includes administration and liquidation), an amount equivalent to any shortfall in the assets of an occupational pension scheme as against its liabilities, which exists immediately prior to the relevant event, is to be a debt (known as a "section 75 debt") due from the employer to the trustees of the scheme. The FSD/CN regime under the 2004 Act permits the Pensions Regulator to seek financial support from associates of the employer to seek to recover the section 75 debt.

STEPHEN ROBINS

The administrators of the Lehman companies and the Nortel companies applied to Court for directions as to whether any liabilities imposed by the Regulator under the 2004 Act after the date of appointment of administrators would be: (i) payable as expenses; (ii) provable pari passu with other unsecured liabilities; or (iii) neither.

LEHMAN BROTHERS WENT INTO ADMINISTRATION IN SEPTEMBER 2008

Briggs J held that the liabilities would be payable as expenses. His decision was upheld by the Court of Appeal.

The administrators of the Lehman companies and the Nortel companies appealed to the Supreme Court. As noted above, the Supreme Court upheld the appeals, concluding that the liabilities imposed by the Regulator under the 2004 Act after the appointment of administrators will be provable debts.

The statutory waterfall

In corporate insolvencies, there is a waterfall of distributive priority which consists of descending interlinked pools. The order of priority is (in simplified form):

(1) fixed-charge creditors;
(2) the expenses of the insolvency proceedings;
(3) preferential creditors;
(4) floating charge creditors;
(5) unsecured provable debts;
(6) statutory interest;
(7) non-provable liabilities; and
(8) shareholders.

There can be no guarantee that any money will be available to pay the liabilities at any particular level of priority. The money might not even be sufficient to cover all the expenses: it is for this reason that Rules 2.67(1) and 4.218(1) of the Insolvency Rules 1986 contain an order of priority for expenses inter se and the Court has a power in Rule 2.67(3) of the Insolvency Rules 1986 and section 156 of the Insolvency Act 1986 to re-order the priority of expenses in the event of a deficiency.

The question for the Supreme Court was whether liabilities imposed by the Regulator under the 2004 Act after the commencement of insolvency proceedings would fall within level (2), level (5) or level (7) in the priority waterfall set out above.

Provable debts

The current statutory provision in respect of provable debts is contained in Rule 13.12(1) of the Insolvency Rules 1986. Paragraph (a) of Rule 13.12(1) is concerned with liabilities to which the company "is subject" at the date of the commencement of insolvency proceedings. Paragraph (b) is directed to those liabilities to which it "may become subject" subsequent to that date "by reason of an obligation incurred" before that date.

The statutory test has changed over time. Originally, pursuant to section 7 of the Bankrupts Act 1705, it was necessary for the liability to be due and payable in a liquidated sum at the commencement of the insolvency proceedings. In other words, the category of provable debts

3/. See section 1 of the Bankrupts Act 1720, section 2 of the Bankrupts Act 1745, section 8 of the Bankrupts Act 1809, sections 52 to 54 of the Bankrupts Act 1824, section 178 of the Bankrupt Law Consolidation Act 1849, sections 153 and 154 of the Bankruptcy Act 1861, and section 31 of the Bankruptcy Act 1869.

was confined to what is now paragraph (a) of Rule 13.12(1) and there was nothing equivalent to paragraph (b). Over the course of three centuries, however, Parliament re-drafted the statutory test repeatedly to widen the category of provable debts in a gradual attempt to bring prospective and contingent liabilities into the category of provable debts[3]. With each reform, the class of provable debts expanded, and the category of non-provable liabilities contracted. The most significant development in the history of provable debts occurred with the enactment of the Bankruptcy Act, which introduced the "obligation incurred" wording that survives to this day in paragraph (b) of Rule 13.12(1) of the Insolvency Rules 1986.

The courts were quick to recognise the fact that the "obligation incurred" wording of the 1869 Act was wide and that it represented something of a new departure. In *Ex parte Llynvi Coal & Iron Co, In re Hide* (1871) LR 7 Ch App 28, for example, Mellish LJ said at p.33: *"The Legislature, in Bankrupt Act after Bankrupt Act, has been trying to relieve the bankrupts from both their present and future liabilities upon contracts; but up to the passing of this last Act, that had been very incompletely provided for, and by the construction which has been put on previous sections, it was found that, notwithstanding the language used by the Legislature, a bankrupt did still remain liable on a variety of contracts which he had previously entered into. It is quite plain that the object of these sections is that the bankrupt shall be absolutely relieved from any liability under any contract he has ever entered into"*[4].

However, despite the width of the "obligation incurred" wording, liabilities imposed by a decision-maker under a statutory jurisdiction after the commencement of insolvency proceedings were repeatedly held to be non-provable. In particular, costs orders imposed by the court after the commencement of the bankruptcy, in respect of litigation which had taken place before the commencement of the bankruptcy, were repeatedly held to be non-provable in the bankruptcy, on the basis that the bankrupt had incurred no obligation in respect of the costs before the commencement of his bankruptcy. See, for example, *Re Bluck, Ex parte Bluck* (1887) 57 LT 419, in which Cave J said at p.420: *"The contention was, that this was a contingent liability to which he might become subject by reason of an obligation incurred before his discharge; but it is impossible to see what the obligation is. There had been litigation, and that too commenced by the plaintiff, but where is the obligation? If a man brings an action he does not place on himself an obligation to pay costs; that obligation arises when judgment is given against him … I cannot think that before judgment there was an obligation in respect of which a debt or liability arose"*[5].

The Supreme Court has rejected this narrow interpretation of the word "obligation" in paragraph (b) of Rule 13.12(1), holding that it is not confined to contractual liabilities.

This reasoning was followed by the Court of Appeal in *Glenister v Rowe* [2000] Ch 76 and the Court of Appeal later applied the same reasoning to a statutory liability to repay overpaid benefits, which was held to be non-provable in *R (Steele) v Birmingham City Council* [2007] 1 All ER 73.

The Supreme Court has rejected this narrow interpretation of the word "obligation" in paragraph (b) of Rule 13.12(1), holding that it is not confined to contractual liabilities. Rather, according to the Supreme Court's conclusion, a company will have incurred an "obligation" if it has taken or been subjected to some step or combination of steps which (a) had some legal effect

MIDDLESEX GUILDHALL: HOME OF THE SUPREME COURT

4/. See also Ex parte Neal, In re Batey (1880) 14 Ch D 549 per Bramwell LJ at p.584.

5/. See also Re A Debtor (No 68 of 1911) [1911] 2 KB 652, in which Buckley LJ approved Cave J's analysis in Re Bluck, Ex parte Bluck (1887) 57 LT 419 and said at p.657: "I am unable to find here that the debtor was under any obligation at the date of the prior bankruptcy … An obligation may arise in any one of various ways. It may arise by contract. It will arise if a judge makes an order against him. But in the latter case until judgment there is no obligation". See also Re Pitchford [1924] 2 Ch D 260, in which Astbury J said at pp 264-265: "In my judgment this is not a debt certain or contingent and it was never incurred by reason of any obligation within the meaning of this section".

(such as putting it under some legal duty or into some legal relationship) and (b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred. If these two requirements are satisfied, it is also relevant to consider (c) whether it would be consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation under Rule 13.12(1)(b).

This conclusion was based heavily on *Winter v Inland Revenue Commissioners, Re Sutherland* [1963] AC 235, a case about tax liabilities, which the Court of Appeal had held to be irrelevant in both *Glenister and Steele*. The Supreme Court overruled *Bluck, Glenister and Steele*.

As regards the liabilities under the Pensions Act 2004, the Supreme Court held that:

(a) Prior to the date they went into administration, each of these companies had become a member of a group of companies. Membership of a group of companies is a significant relationship in terms of law: it carries with it many legal rights and obligations in revenue, company and common law.

(b) Prior to the commencement of the administration, the group concerned included either a service company with a pension scheme or an insufficiently-resourced company with a pension scheme. Accordingly, the target companies were precisely the type of entities which-o were intended to be rendered liable under the 2004 Act.

(c) The sensible and fair answer would appear to be that the potential liability of a target company under the 2004 Act after the commencement of insolvency proceedings should be treated as a provable debt, even where the FSD is not issued until after the commencement of the insolvency proceedings.

The Supreme Court also dealt expressly with the status and ranking of costs liabilities, holding that, where an order for costs is made after the company has gone into administration or liquidation in respect of litigation which occurred before the commencement of the insolvency proceedings it will be provable in the administration or liquidation. In summary, by becoming a party to legal proceedings in this jurisdiction, a person is brought within a system governed by rules of court, which carry with them the potential for being rendered legally liable for costs, subject of course to the discretion of the court. An order for costs made against a company in administration or liquidation, made in proceedings begun before it went into that process, is therefore provable as a contingent liability under Rule 13.12(1)(b), as the liability for those costs will have arisen by reason of the obligation which the company incurred when it became party to the proceedings.

NORTEL COLLAPSED IN 2009 LEAVING A PENSIONS DEFICIT THAT STANDS AT £2.1 BILLION

The decision of the Supreme Court therefore brings clarity to the law regarding the status and ranking of pensions liabilities under the 2004 Act and costs orders made after the commencement of insolvency proceedings in respect of litigation initiated prior to that date.

However, the decision of the Supreme Court will serve to generate uncertainty in

6/. See also Lord Russell in Alderman v Great Western Railway Co [1937] AC 454, 459.

respect of other statutory liabilities, particularly in the regulatory context, which must now be judged on a case-by-case basis by reference to the Supreme Court's threefold test. Accordingly the decision leaves significant scope for future argument as to when and whether, for the purposes of Rule 13.12(1)(b), an obligation has been "incurred" under particular statutory provisions.

Expenses

It had been held by Briggs J and the Court of Appeal that a liability imposed by the Regulator under the 2004 Act would be payable as an expense falling within Rule 2.67(1)(f) of the 1986 Rules as a "necessary disbursement … in the course of the administration".

The Supreme Court rejected this conclusion, holding that a liability may arise during an administration without being "in the course of" the administration. In construing this phrase, the Supreme Court found assistance in *Davidson v Robb* [1918] AC 304, in which Lord Dunedin explained at 321 that "in the course of his employment" had a more limited meaning than "during the period of his employment" and connoted "something which is part of his service" namely "work or the natural incidents connected with the class of work"[6].

The Supreme Court held that a disbursement falls within Rule 2.67(1)(f) only if it arises out of something done in the administration (normally by the administrator or on the administrator's behalf) or if it is imposed by a statute whose terms render it clear that the liability to make the disbursement falls on an administrator as part of the administration – either because of the nature of the liability or because of the terms of the statute.

The Supreme Court therefore rejected Briggs J's conclusion (which had been adopted by the Court of Appeal) that where by statute Parliament imposes a financial liability which is not a provable debt on a company in an insolvency process then, unless it constitutes an expense under any other sub-paragraph in the twin expenses regimes for liquidation and administration, it will constitute a necessary disbursement of the liquidator or administrator. The Supreme Court held that Briggs J and the Court of Appeal had misunderstood and misapplied the guidance of the House of Lords in *Re Toshoku Finance UK plc* [2002] 1 WLR 671. Unless the statute states, expressly or impliedly, how the liability is to rank, the liability can only be an expense if the nature of the liability is such that it must reasonably have been intended by the legislature that it should rank ahead of provable debts.

The Supreme court held that Briggs J and the Court of Appeal had misunderstood and misapplied the guidance of the House of Lords in Re Toshuku Finance UK plc

Applying this approach, the Supreme Court held that a potential liability under the 2004 Act does not fall within Rule 2.67(1)(f). First, there is no question of such a liability resulting from any act or decision taken by or on behalf of the administrator or any act or decision taken during the administration. The liability self-evidently arises out of events which occurred before the commencement of the insolvency proceedings. Secondly, the terms of the 2004 Act contain no suggestion that the liability would be an expense of the administration. The fact that the CN gives rise to a debt payable by the target company is not sufficient to render the payment of the debt a "necessary disbursement … in the course of the administration". The mere fact that an event occurs during the administration of a company which a statute provides give rise to a debt on the part of the company is not enough to render payment of the debt an expense of the administration. The liabilities imposed under the 2004 Act would be payable "during the period of" the administration, but they would not be "part of" the administration and would not form one of the "natural incidents connected with" the administration, to use the language of Lord Dunedin in Davidson.

Conclusion

The decision of the Supreme Court is to be welcomed.

First, it means that the claims in respect of pension liabilities under the 2004 Act are placed into level (5) of the statutory waterfall, alongside the target company's other unsecured creditors, whether the FSD is served before or after the commencement of the insolvency proceedings.

Secondly, Briggs J's misinterpretation of Toshoku has been laid to rest. There is nothing special about statutory liabilities. They will only be payable as expenses if they are genuinely one of the costs of doing the administration or liquidation.

Thirdly, the anomalies thrown up by the decisions of the lower courts have been avoided.

For example, given that the section 75 debt is merely provable and non-preferential in respect of the employer, there was no obvious reason why the secondary liability of a target under the 2004 Act should rank as an expense.

Another oddity of the Court of Appeal's decision arose from section 43(6)(a) of the 2004 Act, which makes it clear that FSDs and CNs may be issued to insolvent employers. According to the reasoning of the Court of Appeal, the Regulator was able to use section 43(6)(a) to elevate the provable and non-preferential section 75 debt into an expense of the employer's administration or liquidation payable in priority to the provable debts.

A further peculiarity of the Court of Appeal's reasoning was that the 2004 Act gave rise to the super-priority inherent in expense liabilities only where no FSD had been issued prior to the commencement of the insolvency proceedings and could therefore produce an entirely different result depending on the timing of the issue of the FSD.

However, with these anomalies laid to rest, insolvency practitioners can now continue to focus their energies on achieving the statutory purpose for which they are appointed, free from the risk of having insufficient assets available to them even to discharge the expenses of the process.

Moratoriums and Schemes of Arrangement

Tom Smith considers recent developments on the grant of stays in support of schemes of arrangement

In recent years, schemes of arrangement under the Companies Act 2006 have been an increasingly popular way of restructuring the liabilities of companies which are in a form of distress. However, one of the features of schemes of arrangement is that there is no provision in the Companies Act enabling a company which is intending to propose, or which is in the process of proposing, a scheme with its creditors to obtain a moratorium in order to be sheltered from the claims of dissentient creditors. This can be perceived to be an important drawback of schemes of arrangement when compared with other forms of restructuring process which take place from within the context of a formal insolvency.

It is certainly true that Part 26 of the Companies Act contains no mechanism enabling a company which is promulgating a scheme of arrangement to obtain the benefit of a moratorium from the claims of creditors. However, this is not the end of the story. That is because under the Civil Procedure Rules the English court has extensive powers to manage claims which are brought before it. And recent case law shows that the courts are prepared to exercise these powers to stay claims brought by dissentient creditors in circumstances where a proposed scheme of arrangement is on foot. In particular, in a recent decision of the Commercial Court in *Bluecrest Mercantile NV v Vietnam Shipbuilding Industry Group* [2013] EWHC 1146 (Comm) the court stayed proceedings brought by two borrowers of the debtor company in order to allow the company to proceed with a proposed scheme of arrangement.

The *Vietnam Shipbuilding* case concerned a Vietnamese stated-owned shipbuilding company (Vietnam Shipbuilding Industry Group or "Vinashin") which had run into financial difficulties. Part of the company's liabilities arose under a US$600 million unsecured loan facility agreement governed by English law. The company proposed a restructuring of its liabilities under the loan facility agreement to be implemented either consensually (which would require 100% lender consent) or through a scheme of arrangement under the Companies Act. The possibility of a scheme of arrangement was open given the choice of English law in the loan facility agreement[1].

The commercial terms of the restructuring involved exchanging the existing claims of the lenders under the loan facility for new fixed rate guaranteed notes due 2025 ("the Notes"). Importantly, the Notes were to have the benefit of a sovereign guarantee provided by the Vietnamese Government. Accordingly, the Notes would not mature for a number of years, lenders would benefit from a sovereign guarantee. In the usual way, creditors were invited to execute undertakings agreeing to support the restructuring and undertakings were received from over 50% of lenders by number and over 75% by value.

One of the lenders under the facility,

1/. It is well established that the court has jurisdiction to sanction a scheme of arrangement under Part 26 in respect of a foreign company provided that there is a "sufficient connection" with England. There will be such a sufficient connection where the claims of the relevant creditors are governed by English law: see Re *Drax Holdings* [2004] 1 WLR 1049 at [29] (Lawrence Collins J); Re *Rodenstock GmBH* [2012] BCC 459 at [68]-[69] (Briggs J); Re *Primacom Holding GmbH* [2011] EWHC 3746 (Ch) [63]-[64] (Hildyard J).

however, commenced proceedings in the Commercial Court claiming repayment of outstanding principal and interest due under the facility. This lender was joined by another lender and both lenders then applied for summary judgment on their claims. For its part, Vinashin applied for an order staying the proceedings in order to allow it to promulgate the proposed scheme of arrangement and to put the scheme to vote at a meeting of lenders. The lenders however argued that the court did not have jurisdiction to grant such a stay, or, alternatively, that it should not do so.

The Old Authorities

The decisions in *Booth v Waltons Manufacturing Co* [1909] 2 KB 369 and in *Bowkett v Fullers United Electric Works* [1923] 1 KB 161 (per Scrutton LJ at 165) are sometimes cited in support of the proposition that there is no jurisdiction to grant a stay of proceedings in support of a proposed scheme of arrangement. However, neither case is in fact support for this proposition. Booth is only support for the proposition that there is no power under the Companies Act itself to grant a stay. Similarly, the point made by Scrutton LJ in Bowkett was that, absent presentation of a winding-up petition, there is no power under section 140 of the Companies (Consolidation) Act 1908 (now section 126 of the Insolvency Act 1986) to stay proceedings pending a meeting of creditors to consider a proposed scheme of arrangement.

Neither of these propositions is in real doubt. But, equally, it does not follow that the court has no power under its case management powers to stay proceedings pending a proposed scheme of arrangement. Under CPR 3.1(2)(f) the court has power to *"stay the whole or part of any proceedings or judgment either generally or until a specified date or event"*. On the face of it, this would appear to confer jurisdiction on the court to stay proceedings pending a proposed scheme of arrangement.

Roberts v Kenny Petroleum

Moreover, the authorities show that the court will be prepared to stay enforcement of a judgment pending consideration by creditors of a proposed scheme of arrangement. In *Roberts Petroleum ltd v Kenny ltd* [1982] 1 WLR 301 the Court of Appeal set out the principles to be applied in determining whether a creditor should be permitted to enforce against a company which was insolvent and proposing a scheme of arrangement.

The particular issue in Roberts was whether a charging order nisi should be made absolute in circumstances where the judgment debtor was apparently insolvent. Lord Brandon of Oakbrook set out a number of principles derived from the existing authorities which included that[2]:

"The following combination of circumstances, if proved to the satisfaction of the court, will generally justify the court in exercising its discretion by refusing to make the order absolute: (i) the fact that the judgment debtor is insolvent; and (ii) the fact that a scheme of arrangement has been set on foot for the main body of creditors and has a reasonable prospect of succeeding."

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2/. See page 307E-H.

The principles in *Roberts* were set out in the context of enforcement which was sought to take place in that case by way of charging order. However, the principles apply generally to all forms of enforcement. The key point is that where a company is insolvent then the interests of creditors generally must be considered. The question is no longer simply one of fairness as between the debtor and the particular creditor who is making a claim. Rather the interests of creditors generally must be taken into account.

On the facts of *Roberts*, the Court of Appeal concluded that the charging order should have been made absolute. This was because, although the defendant was insolvent and irretrievably on the road to liquidation, there was no other significant factor present such as a scheme of arrangement which had a reasonable prospect of success[3]. The House of Lords overturned the Court of Appeal's decision holding that a resolution for voluntary winding up was, without more, sufficient cause for making absolute a charging order nisi. It is implicit in the House of Lords' decision that the prospect of a scheme of arrangement in respect of the judgment debtor which had a reasonable prospect of success would also have been sufficient cause not make absolutea charging order nisi.

Sea Assets

Following Roberts, in *Sea Assets Ltd v PT Garuda Indonesia*, 27 June 2001, Thomas J granted a stay of execution of a judgment pending a proposed scheme of arrangement. In that case, the judgment debtor was an Indonesian airline which intended to propose a scheme of arrangement with its creditors including the judgment creditor. The airline sought a stay of execution of the judgment under RSC Order 47 to allow the creditors to consider the proposed scheme. Thomas J held that the court had jurisdiction to grant the stay sought. Further, as a matter of discretion, the court granted a stay in order to allow meetings of creditors to be convened in order to consider and vote on the proposed scheme[4].

It is clear that the jurisdiction to grant a stay exists. The real question is how the jurisdiction is to be exercised on the facts of each case....

The Present Position

In the *Vietnam Shipbuilding* case, the court concluded that there is jurisdiction to stay proceedings brought against the debtor, pending the promulgation by the debtor of a scheme of arrangement. The power to grant such a stay exists under the CPR. The court also held, moreover, that neither the decision in Booth nor that in Bowker precludes the existence of such a jurisdiction. Accordingly, contrary to statements which have on occasion been made that there is no such jurisdiction, it is clear that the jurisdiction exists. The real question is how the jurisdiction is to be exercised on the facts of each case.

Granting the Stay

On the facts of the *Vietnam Shipbuilding* case, there was a powerful case for granting a stay to allow creditors to consider the proposed scheme. The company was insolvent and there was a scheme of arrangement on foot for the lenders under the loan facility which had (at the very lowest) a reasonable prospect of succeeding. In particular, binding contractual undertakings to support the proposed scheme had been received from lenders exceeding 50% by number and 75% by value of the total lenders.

Given the insolvency of the company, and thus the need to consider the interests of the class of creditors as a whole, there was a strong argument that no single scheme creditor should be permitted to obtain or execute a judgment and thereby obtain different treatment to that which all scheme creditors would receive under the proposed scheme. Conversely, if individual lenders were permitted to obtain and execute a judgment, this might cause the proposed scheme to fail before it could be considered by the lenders because the various lenders would or might consider that they were not being treated equally. The evidence also suggested that proposed scheme might well offer a better return to the lenders than the likely alternative of Vinashin going into an insolvency proceeding in Vietnam.

These considerations applied in support of the court staying execution of any judgment, but they also applied in support of staying the proceedings even before they got to judgment. The evidence was that the entry of judgments might itself disrupt the proposed scheme and destabilise the restructuring process, in particular, raising the prospect that other lenders would seek to obtain similar judgments themselves leading to a *"free for all"* amongst creditors. Equally, it could be said that the dissentient lenders would suffer no legitimate prejudice from not having judgment entered in their favour at this stage. The company had admitted liability and there was no dispute as to liability or quantum in respect of the claims. The only reason to obtain a judgment would be to enable

The courts can, and will, grant a stay of proceedings to allow a scheme to be proposed.

3/. Page 309C, 309G-H.

4/. The scheme of arrangement in that case was subsequently approved by creditors and sanctioned by the court.

VINASHIN IS ONE OF A NUMBER OF FOREIGN BORROWERS WHO ARE SEEKING TO RESTRUCTURE USING A SCHEME OF ARRANGEMENT

execution to proceed.

In these circumstances, the court granted a stay of the claims brought by the two lenders in order to allow Vinashin to proceed with the proposed scheme. There was some potential prejudice to the dissentient lenders in that, if the scheme did not become effective, they would have been delayed in the enforcement of their claims. However, this was outweighed by the interests of the lenders generally in having the opportunity to consider the scheme.

Other Cases

The Vietnam Shipbuilding case is important because it shows there is a jurisdiction to stay proceedings where a scheme of arrangement is on foot. It also shows that the court will be prepared to exercise this jurisdiction.

One important consideration will be whether there is a real prospect of the proposed scheme getting the necessary support from creditors. In the *Vietnam Shipbuilding* case, it was obviously very helpful that there were executed undertakings in support of scheme from the necessary majority of creditors. But it should be possible to obtain a stay even absent such undertakings provided the evidence shows that there is a real prospect that the scheme will be approved by the requisite majority of creditors.

A more difficult question may concern the degree of development of the scheme proposal which is required. In *Vietnam Shipbuilding*, the scheme documents had not been prepared but there was a term sheet. It seems likely that the court would want to see some kind of concrete proposal, and some evidence that the proposal is capable of attracting sufficient creditor support, before granting a stay. A debtor company which has done little or no preparation and simply expresses a desire to pursue a scheme of arrangement may not attract much sympathy from the court.

The court will also want to know the timetable for implementing the scheme. In this context, an important feature of the power to grant a stay is the ability of the court to impose conditions. In the Sea Assets case, the company was required to adhere to a tight timetable in respect of the scheme. In the *Vietnam Shipbuilding* case, the court granted a two month stay to the date of the proposed convening hearing, with the prospect of further stays being granted thereafter. Depending on the facts of individual cases, the court will be able to tailor the length of the stay granted and the degree of court supervision accordingly.

Overall, the decision in *Vietnam Shipbuilding* is a useful development to the law relating schemes of arrangement. The courts can and will grant a stay of proceedings to allow a scheme to be proposed. This means that, in practice, most, if not all, of the perceived disadvantages of the scheme of arrangement procedure in not providing for the debtor company to have the benefit of a moratorium from dissentient creditor claims fall away.

CASE DIGESTS

Edited by **LLOYD TAMLYN**

Since the last Digest, the Supreme Court has pronounced in a number of significant cases, including *Pitt v Holt* (an important decision in the field of mistake and the rule in *Hastings-Bass*, summarised below under Property and Trusts) and *BNY Corporate Services Ltd v Eurosail* (on the meaning of balance sheet insolvency, summarised under Corporate Insolvency). In *Prest v Petrodel Resources Ltd* (summarised under Property and Trusts), the Supreme Court has decided that English law applies in the Family Division, also that the metaphor of piercing the corporate veil is a doctrine of English law, probably located in the ill-mapped territory of abuse of rights, but successful application of the doctrine will be as rare as hen's teeth. Lady Hale sees through, or above, the thicket of reasoning in *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391, explaining that decision in terms of the doctrine, Lord Walker agreeing that Stone Rolls is, arguably, a rare example. The Supreme Court has recently handed down its decision in the *Lehman/Nortel* case in which eleven members of Chambers were involved (digested in Corporate Insolvency). This is an important decision on liquidation expenses and the provability of debts. Finally, we reported in the last edition of the Digest that in *HSBC v Tambrook*, Mann J had held that there was no jurisdiction to make an administration order under Section 426 of the Insolvency Act 1986 in circumstances where there were no insolvency proceedings in Jersey. The Court of Appeal did not agree with Mann J holding that Section 426 merely required the foreign court to have that insolvency jurisdiction rather than to be exercising it (see the digest in Corporate Insolvency)

Lloyd Tamlyn

LLOYD TAMLYN

BANKING AND FINANCIAL SERVICES

Digested by **WILLIAM WILLSON**

DAVID ALLISON

WILLIAM WILLSON

Harbinger Capital Partners v (1) Andrew Caldwell (2) HM Treasury [2013] EWCA Civ 492, CA (Civ Div) (Mummery LJ, Lewison LJ, Beatson LJ)

Northern Rock – Compensation - Construction

Northern Rock was nationalised on 22 February 2008. Under the Banking (Special Provisions) Act 2008 and the Northern Rock Compensation Scheme Order 2008 an independent valuer was required to value its shares on the basis of various valuation assumptions. In particular, in determining the amount of compensation payable to former shareholders, the valuer was required to assume that all financial assistance provided by the Bank of England had been withdrawn (whether by the making of a demand for repayment or otherwise) ("the Withdrawn Assumption").

On the valuer's construction, the withdrawal of financial assistance was achieved through a hypothetical repayment of the £27 billion of lender of last resort assistance received by Northern Rock between September 2007 and February 2008. The repayment required a notional fire-sale of Northern Rock's assets just before the nationalisation date. Consequently the hypothetical administration provided for in the valuation assumptions started with a large balance-sheet deficit (whereas in the real world Northern Rock had at all times been balance-sheet solvent). Harbinger challenged this "Repayment Interpretation", submitting that the Withdrawal Assumption required only a demand for repayment of the financial assistance – but not repayment itself ("the Demand Interpretation"). Applying the Demand Interpretation and modelling a hypothetical run-off of Northern Rock's mortgage book in administration, Northern Rock's preference shares should actually be valued at £322.5 million.

The majority of Court of Appeal (Mummery, Beatson LJJ) preferred the Repayment Interpretation to the Demand Interpretation. First, as a matter of ordinary language financial assistance

could not be "withdrawn" by a demand for repayment. Second, only the Repayment Interpretation fully satisfied the aim of ensuring that shareholders did not reap the benefit of taxpayer support. The minority (Lewison LJ) preferred the Demand Interpretation. First, there was no evidence that Northern Rock's balance sheet was increased as a result of the public sector support, and there was no basis for finding that the Demand Interpretation would lead to the shareholders reaping the benefits of public support. Second, what is assumed to be withdrawn is the assent of the person who provided the assistance to its continuation. Third, the Demand Interpretation was consistent with the "principle of reality".
[Mark Phillips QC; David Allison; William Willson]

Grupo Hotelero Urvasco SA v Carey Value Added SL [2013] EWHC 1039, QBD, (Comm), Blair J, 26 April 2013


TOM SMITH

Events of Default - Material Adverse Change

A borrower under a loan agreement brought a claim against the lender for a failure to advance funding to be used for the construction of a hotel. In response, the lender asserted that its failure to advance lending was justified by the fact that a number of events of default had occurred under the loan agreement, including in relation to material adverse change ("MAC") in the financial condition of the borrower and a guarantor, the commencement of negotiations with creditors for the rescheduling of indebtedness, the use of advanced tranches of borrowing and various defaults relating to the construction of the hotel. The court held that the lender had not established that any MAC in financial condition had occurred. For these purposes, a MAC in financial condition was to be assessed primarily by reference to the company's financial statements and a MAC could not arise out of matters of which the lender had been aware at the time of entry into the lending agreement. Changes in the fair value of derivative instruments would not necessarily give rise to a MAC. However, the lender had established the negotiations with creditors' default and certain of the construction-related defaults and accordingly the borrower's claim for damages failed and the lender was entitled to judgment on its counterclaim for repayment of the lending which had been advanced. **[Tom Smith]**

Morgan Stanley v Tael Partners [2013] EWCA Civ 473, CA (Civ) (Longmore, Rimer, Tomlinson LJJ)

LMA Standard Terms - Construction

The parties had entered into a trade to buy and sell a portion of a loan under the loan facility. The trade was subject to the LMA Standard Terms for Par Trade Transactions. The seller claimed that on the correct construction of the LMA Standard Terms it was entitled to a portion of the Payment Premium which had subsequently been paid by the borrower under the loan facility, such portion being calculated by reference to the period for which the seller had held the loan. The Court of Appeal allowed the appeal from the decision of the Judge below. On the correct construction of the LMA Standard Terms, the seller was only entitled to such payment as had accrued at the time of settlement of the trade and the right to receive any part of the Payment Premium from the borrower had not accrued at this time. Further, there was no separate entitlement on the part of the seller to receive this payment under any other part of the LMA Standard Terms. **[Tom Smith]**

CIVIL PROCEDURE

Digested by MARCUS HAYWOOD

Abela v Baadarani [2013] UKSC 44, Supreme Court (Lord Neuberger, Lord Clarke JSC, Lord Sumption JSC, Lord Reed JSC, Lord Carnwath JSC), 26 June 2013


MARCUS HAYWOOD

Service of Claim Form – Alternative Method – Retrospective Effect

A judge had been correct to permit service of a claim form on a defendant in Lebanon by an alternative method with retrospective effect under CPR r.6.15(2) where he had found that there was a "good reason" to make the order. In cases not involving the Hague Convention or a bilateral service treaty, the court should simply ask whether, in all the circumstances, there was good reason to make the order; it would not be appropriate to say that there would only be a good reason in exceptional circumstances. The Supreme Court so held overturning the Court of Appeal's decision.
Lord Clarke, with whom the other members of the Supreme Court agreed,

held as follows: (1) Whether there was good reason to order that delivery of documents amounted to good service was essentially a matter of fact. It was not appropriate to add a gloss to the test by saying that there would only be good reason in exceptional circumstances. The Hague Convention did not apply in the instant case, nor was there a service treaty between the United Kingdom and Lebanon. An alternative service order therefore did not risk subverting the provisions of any such convention or treaty. The mere fact that the defendant had learned of the claim form could not constitute good reason to make an order under r.6.15(2). However, the wording of the rule showed that it was a critical factor. The most important purpose of service was to ensure that the contents of the document served were communicated to the defendant. (2) The Court of Appeal had not focused on the judge's reasoning. It had wrongly held that the judge had decided that there had been valid service under Lebanese law. It had also been wrong to state that a r.6.15(2) order would make an already exorbitant power still more exorbitant. Although service out of the jurisdiction had traditionally been regarded as the exercise of an exorbitant jurisdiction, such a description was no longer necessary. The Court of Appeal had also been wrong to say that a claimant seeking retrospective validation of alternative service abroad had to show that the method used was good service under local law, save where there were adequate safeguards. That would render r.6.15(1) and (2) otiose, and it was unclear what safeguards the court had in mind.

Watson v Sadiq [2013] EWCA Civ 822, Court of Appeal (Arden LJ, Jackson LJ, McCombe LJ), 16 July 2013

Setting Aside Consent Order

It was not appropriate to set aside a consent order made in property dispute proceedings. The order was not vitiated by duress or improper pressure by the judge to settle the case, nor had the judge acted in breach of common law principles of fairness or article 6 of the European Convention on Human Rights by repeatedly encouraging the parties to settle and adjourning the four-day trial on multiple occasions to allow for settlement negotiations.

The Court of Appeal so held dismissing the appellant's appeal against a consent order. Its reasoning was as follows: (1) The terms of a schedule to an order in Tomlin form amounted to a contract between the parties. The CPR had no application to the schedule to a Tomlin order, which was not a court order at all. Accordingly, in so far as the appellant's case was that the schedule to the Judge's order should be set aside on the basis of some feature of contract law vitiating his consent, for example duress, that was a matter which would need to be tried out either in a new action or by reference to the court below to try any relevant issue. It was impossible on an appeal such as the instant one, conducted entirely on the basis of the papers and without any witness examination, for the court to interfere on ordinary contractual principles. (2) It was well within a judge's function to indicate a view that an action before him seemed to be of a nature that should sensibly be compromised, and he could enquire whether avenues for settlement had been fully explored. If it emerged that settlement might be possible, he might afford to parties time out of court at any stage of the proceedings to enable possibilities of compromise to be explored. He should, however, try to ensure, both in the interests of the parties and other litigants waiting for cases to be heard, that indulgences to the parties to try to settle did not disable him from proceeding to deal with the case and decide it expeditiously if compromise proved impossible. (3) In the instant case, the judge had not acted in breach of the common law or art.6. The case had not been well prepared by the parties. The judge identified difficulties in achieving a satisfactory resolution of the issues in the time available on the materials provided. Undoubtedly correctly, he saw that the case should be capable of sensible resolution and he afforded time on the first day for it to be explored while he read further into the documents. There could be no complaint about that. Whilst the fact that he allowed time to slip by in the way that he did might have constituted poor trial management, and in some incidences his interventions might have surpassed the desirable levels of judicial encouragement of sensible compromise, that was not the same as offending principles of fairness or art.6. What had transpired had not undermined the settlement agreement, signed by the appellant and enshrined in the order under challenge. In any event, whatever might have been the position when the order was made, it was entirely clear that the appellant had affirmed the agreement by his insistence on the performance of its terms in correspondence in the ensuing weeks. In doing so, he waived any deficiency in the proceedings about which he sought to complain.

COMMERCIAL CASES

Digested by CHARLOTTE COOKE


CHARLOTTE COOKE

ODL Securities Ltd v McGrath [2013] EWHC 1865 (Comm) (Flaux J) 5 July 2013

Commercial Court – Employee – Contract – Fiduciary duties

The claimant company (C) claimed damages and equitable compensation from the defendant employee (M) for dishonest and/or fraudulent breaches of contract and/or fiduciary duty in respect of loans in excess of $5 million to a company in severe financial difficulty which C said were not authorised and were contrary to its interests. Flaux J held that M had breached his contractual and fiduciary duties to act in C's best interests. C was therefore entitled to damages or equitable compensation in respect of M's breaches of duty.

Melli Bank Plc v Holbud Ltd [2013] EWHC 1506 (Comm) – Robin Knowles QC – 13 May 2013

Commercial Court – Facility letter – Frustration – Repudiation

The applicant Iranian bank (M) applied for summary judgment in relation to commitment fees said to be owing under a facility agreement and a pricing letter it had entered into with the respondent customer (H). The issues were whether the agreement had been frustrated or, alternatively, whether there had been a repudiatory breach as a result of the designation and asset freeze. H submitted that as a result of M's designation and asset freeze, the agreement had become illegal, or alternatively that M no longer had the funds to honour the agreement. Summary judgment was given. M's designation did not render obligations under the facility agreement and the pricing letter incapable of performance and accordingly the doctrine of frustration was not engaged. It was also held that the agreement had not been terminated by repudiation; there was no clear evidence of any intention accept any alleged repudiation.

Bate v Aviva Insurance UK Ltd [2013] EWHC 1687 (Comm) – HHJ Mackie QC – 17 June 2013

Commercial Court – Insurance – Misrepresentation – Non-disclosure

The claimant householder (B) claimed against the defendant insurers (X) for an indemnity and damages arising from an accidental fire at his property. B's previous insurers (Z) had refused to indemnify B for fire damage caused to the house by construction work to neighbouring properties on the basis that Z had excluded cover for the outbuildings and for damage caused by contractors. B disclosed that claim to X, not the facts that it referred to the current site, or that it had been repudiated. B also failed to disclose ongoing development work or business use of the property by him and by a development company that he ran. Following another fire, X claimed that it was entitled to avoid the policy for B's failure to disclose material facts, for his misrepresentation and for breach of a condition precedent. It was held that the insurer was entitled to avoid the policy. B's claim that X has breached its obligations under the Insurance Conduct of Business Sourcebook was rejected.

Re LMAA Arbitration [2013] EWHC 895 (Comm) – Hamblen J – 8 May 2013

Commercial Court – Freezing injunctions – Arrest

The claimant had obtained a worldwide freezing order over a defendant's assets and given an undertaking not to enforce it in another country without the court's permission. It was held that the claimant's arrest of a vessel abroad did not amount to a breach of the undertaking. The undertaking did not preclude the pursuit of independent rights of security that might be available abroad.

Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd [2013] EWHC 1063 (Comm) – HHJ Mackie QC – 1 May 2013

Commercial Court – Arbitration agreements – Guarantees

The applicant Chinese guarantor (J) challenged arbitration awards declaring that the relevant tribunal had jurisdiction over the dispute referred to it and granting an anti-suit injunction restraining J from continuing the proceedings it had commenced in China. J argued that the guarantees were unenforceable as a matter of English public policy on the grounds that the parties knew that it was illegal under Chinese law for a Chinese legal person to give a guarantee to a foreign entity without having obtained the prior authorisation of State Administration for Foreign Exchange, that the guarantees did not and could not have had such authorisation and that the funds needed to meet any demand on the guarantees would have to be transferred from China contravening Chinese law.

It was held that an arbitration agreement was to be treated as a distinct agreement from the contract of which it formed a part; unenforceability of the contract therefore did not of itself result in the unenforceability of the arbitration agreement.

However, an arbitration agreement could be unenforceable on grounds which related to the arbitration agreement itself; it was necessary to ask whether the policy of the rule that invalidated the main contract entailed the invalidity of the arbitration agreement. The arbitration agreements were separately enforceable.

Mauritius Commercial Bank Ltd v Hestia Holdings Ltd [2013] EWHC 1328 (Comm) – Popplewell J – 24 May 2013

Commercial Court – Contracts – Governing law

M brought a claim to recover from H (the borrower) and S (the guarantor) money due under a Restated Facility Agreement (RFA), which replaced the Original Facility Agreement (OFA) between the parties. The OFA provided that the law of Mauritius would be the governing law whereas the Restated Facility Agreement provided for that English law would be the governing law. H and S argued that the parties could not amend the governing law of their agreement.

It was held that there was no rationale or policy reason why parties to a contract should not be permitted to amend the governing law of that contract, particularly given that that the same result could be achieved by making a new agreement on amended terms rather than simply amending the terms. Moreover, there is a strong countervailing policy based party autonomy.

Concept Oil Services Ltd v En-Gin Group LLP [2013] EWHC 1897 (Comm) (Flaux J) – 5 July 2013

Commercial Court – Deceit – Conspiracy

In October 2008 the Claimant entered an agreement with EUK to buy refined oil products. The Claimant paid in advance to fund the purchase of crude oil by EUK from Kazakhstan. Before the agreement was entered into the Claimant's main shareholder (Z) received assurances from K, EUK's director, that EUK was and would remain an English registered company. In September 2009 EUK became an Anguillan company (EA). The Claimant did not know of the transfer and would not have advanced further sums to EUK if they had been aware of it. It was held that K positively misled Z and was liable for deceit. B, a director of EUK, did nothing to correct the deliberately misleading impressions which K gave Z and was jointly liable for unlawful means conspiracy.

Further, the transfer to EA was a nullity. As a matter of English law, what occurred was a purported transfer of assets and liabilities from the English company to another entity for no consideration, which was not recognised by English law. The Claimant was entitled to a declaration in those terms Finally, as the substantial purpose of the transfer of EUK to EA was to put its assets out of the reach of creditors and the Claimant was a victim of that transaction within the meaning of s.423(5) of the Insolvency Act 1986, it was entitled to relief under s.423 and s.425.

COMPANY LAW

Digested by GEORGINA PETERS


SIMON MORTIMORE QC


GEORGINA PETERS

Jackson v Dear, Griffith and others, The Royal Court of the Island of Guernsey, Lieutenant Bailiff Patrick Talbot QC, 26 March 2013

Company Law – Derivative Claims – Multiple Derivative Claim – Wrongdoer Control – Directors' Duties

In the first derivative action to be brought before the Royal Court of Guernsey, the Plaintiff ("P"), a former director and holder of non-voting shares in the Tetragon fund ("T"), sought to contend that T's directors had breached their duties and acted negligently in deciding that T should enter into a real estate joint venture transaction ("GORE"). Two issues of law arose: (a) whether the rule in Foss v Harbottle applied in Guernsey or whether it should be regarded as relaxed, as it had been in England by section 260 (3) of the Companies Act 2006 ("the 2006 Act"), so as to allow a derivative action which alleged negligence or breach of duty with no element of actual or equitable fraud; and (b) the correct test to be applied on an application to strike out a derivative action. On the first, it was held that the rule in Foss v Harbottle and its exceptions applied in Guernsey and that the Royal Court could not, as P contended, import into Guernsey only part of Part 11 of the 2006 Act relating to derivative actions. Though the Guernsey law officers consulted widely before the Companies (Guernsey) Law 2008, no provisions about such actions were included, and any change in the law of Guernsey should be by amendment to the Companies Law.

As to the correct test on a strike out, it was not enough, as P contended, to show an arguable case. P had to show a prima facie case on each of the causes of action and that each cause of action came within the exception to the rule in Foss v Harbottle (Prudential Assurance Co Ltd v Newman Industries No 2 [1982] Ch 204; Barrett v Duckett [1995] BCC 362). To satisfy the prima facie case standard, the claim had to be more than merely arguable (Renova Resources v Gilbertson [2009] CILR 268).

Applying that test to each of the breaches alleged, the Lieutenant Bailiff held in each case that the P had not established a prima facie case. Accordingly, he struck out the Cause is in its entirety.

[Simon Mortimore QC; William Willson]

05179470 Limited (formerly GPA International Limited) in liquidation (acting by its Liquidator, David Griffin) v Direct 4 All Limited, Unreported, (Nicholas Lavender QC sitting as a Judge of the Chancery Division), 5 July 2013

Breach of Duty – Breach of Trust - Dishonest Assistance

This was a claim which related to Missing Trader Intra Community ("MTIC") fraud. In the period between 16 March and 10 May 2006, GPA International Limited ("GPA") had entered into transactions with Direct 4 All Limited ("Direct 4 All"), a company owned and controlled by John Parton ("Mr Parton") and based in Stoke-on-Trent. The transactions were all in relation to mobile telephones, computers, cameras and other goods. The goods had a value of some £32.5 million. In addition, having imported the goods from the EU and accordingly not having paid VAT on them, GPA charged VAT in the sum of about £5.7 million.

Direct 4 All immediately on sold the goods with a small additional profit margin to its own customers. About a month later, those customers paid the sums due to Direct 4 All to Digecom Limited, another company owned and controlled by Mr Parton. All payments were made by those customers from their accounts at the First Curacao International Bank ("FCIB") in Curacao in the Netherlands Antilles. All payments were made to Digecom's account at FCIB. Having received payment from Direct 4 All's customers, Digecom then paid the sums due to GPA (including VAT) into the personal bank account of GPA's sole director. That account was also at FCIB.

GPA never accounted to Her Majesty's Revenue & Custsoms for any of the VAT charged by GPA on the transactions. Instead, the director disappeared with all the money that should have been paid to GPA.

The Liquidator of GPA brought a claim against Direct 4 All for dishonest assistance in a breach of duty and/or breach of trust in relation to the sum of about £38 million paid to GPA's sole director. The Judge held that the director of GPA was plainly in breach of duty and/or breach of trust in causing GPA to enter into the transactions at all and/or in causing the monies to be paid to his own personal bank account. The Judge reviewed the legal position as set out in Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378; Barlow Clowes International v Eurotrust International Ltd [2006] and Abou-Rahman v Abacha [2007] 1 All ER (Comm) 827. Referring to Fresh 'N' Clean (Wales) Ltd v Miah [2006] EWHC 903, the Judge said that what he had to be satisfied of was that (1) the facts known to Direct 4 All (i.e. Mr Parton) would have deterred an honest man from trading with GPA and/or paying money to its sole director or (2) the facts known to Direct 4

All gave Mr Parton solid grounds for suspicion concerning the transactions into which Direct 4 All were proposing to enter or had entered with GPA which Direct 4 All made a conscious decision to ignore. Having reviewed the transactions in question, the Judge found that Direct 4 All was liable for dishonest assistance. In doing so, he took into account the terms of the transactions, the payments to the director's offshore bank account, Mr Paton's knowledge of MTIC fraud in 2006, the circumstances in which the trading ceased, the fact that Mr Parton had continued to make payments to the offshore bank account of the director of GPA even after he had been told not to deal with GPA by HMRC and the fact that Mr Parton had shown himself to be dishonest when he gave evidence **[David Alexander QC]**

Smithton Limited (formerly Hobart Capital Markets Limited) v Guy Naggar (Rose J), 11 July 2013

De facto directors – Shadow directors – Contracts for difference – Companies Act 2006, section 190 – misrepresentation


MICHAEL CRYSTAL QC

The Claimant ("Hobart") brought a claim for loss suffered when two companies, Insureprofit Limited and Mariona Limited, defaulted on their obligations to pay margin calls under contracts for difference ("CfDs") entered into between Hobart and those two companies. The claim, which had three separate limbs, was not, however, brought against those companies (which are insolvent), but against the Defendant, Guy Naggar, personally. Mr Naggar was a director and chairman of Dawnay Day International Limited, itself the majority shareholder of Hobart. Mr Naggar and his family had also owned and controlled Insureprofit and Mariona. First, Hobart alleged that Mr Naggar was a de facto or shadow director of Hobart and had breached duties he owed to Hobart. However, the identification of the hat which Mr Naggar was wearing in his dealings with Hobart being crucial in determining whether he was a de facto or shadow director, Rose J held that Mr Naggar was not a de facto or shadow director; nothing she had seen went beyond the involvement one would expect to see from a person who combined the roles of the representative of major clients of Hobart and chairman of the majority shareholder. The first head of the claim was therefore dismissed. Second, it was alleged that Mr Naggar's conduct constituted a breach of section 190 of the Companies Act 2006 which prohibits arrangements under which certain persons (in this case a director of a holding company) acquire a substantial non-cash asset from the company or vice versa. Rose J held, however, that the mechanism for creating the CfD does not constitute an arrangement under which Mr Naggar acquired an asset from Hobart or under which Hobart acquired an asset from him. As to Hobart's further argument that the overall arrangement under which Hobart opened the CfDs was an arrangement under which Mr Naggar or his connected companies would ultimately acquire shares, Rose J accepted that section 190(1) requires a high degree of certainty at the time when the arrangement is entered into that the asset will be acquired, whereas the most that could be said on the facts was that the overall arrangements entered into were arrangements under which Mr Naggar or his companies might at some future point acquire shares, which was not enough. The second head of the claim was therefore dismissed.

Finally, the third head of claim, for negligent misrepresentation, was also dismissed, on the basis that no misrepresentations were made by Mr Naggar.

[Michael Crystal QC, David Alexander QC, Tom Smith, Charlotte Cooke]

CORPORATE INSOLVENCY

Digested by ADAM AL-ATTAR

Re Property Professionals + Ltd [2013] EWHC 1903 (Ch), HH Judge Purle QC (Sitting as a Judge of the High Court), 8 July 2013

Administrator – Term of Office – Extension - CVL


ADAM AL-ATTAR

The Court held that an administrator's initial term of office of one year ran from the time of appointment to just before the anniversary of the time of appointment the following year and that, a notice of a transition to CVL having been sent to and received by the Registrar of Companies within that period, the administration was impliedly extended (by statute) to the time of registration by the Registrar, even if after that period. The transition to CVL by notice under paragraph 83 of Schedule B1 to the Act was, therefore, effective.

Re SED Essex Ltd [2013] EWHC 1583 (Ch), Mr John Randall QC (sitting as a deputy High Court judge), 14 June 2013

Provisional liquidation – likelihood of winding up order

The Judge explained that, in relation to the appointment of a provisional liquidator in respect of which the applicant had established a "likelihood" of a winding up order being made, by stating a standard of a "good arguable case" on the part of the respondent in Re Rochdale Drinks Distributors Ltd [2012] 1 BCLC 748 Lord Justice Rimer had simply meant that, where the evidential burden had switched to the respondent, the respondent then has to make out a sufficiently strong case to negate such "likelihood".

Re MF Global UK Ltd [2013] EWHC 1655 (Ch), David Richards J, 14 June 2013

Special Administration - Distribution of client money – Indemnity of court order


ANTONY ZACAROLI QC

The Judge approved a procedure for the distribution of client money on the assumption that certain classes of client did not have a client money entitlement under the statutory trust, thereby enabling a distribution on footing which protected the trustee (MF Global (UK) Limited) and the special administrators (KPMG) from liability for any breach of trust for an incorrect distribution. The Judge recognised that he had no jurisdiction to sanction a scheme of arrangement in relation to beneficial interests, or to vary a beneficiary's rights; however, the inherent jurisdiction of the court to supervise and intervene in the administration of trusts permitted a trustee to distribute under the indemnity of a court order which specified the assumptions upon which that distribution was to be made. Such assumptions could extend to certain clients not having a client money entitlement under CASS 7.
[Antony Zacaroli QC, Adam Al-Attar]

HSBC Bank plc v Tambrook Jersey Ltd [2013] EWCA Civ 576 Longmore, Mcfarlane, Davis LJJ, 22 May 2013

Section 426 Insolvency Act – Administration Order - Jurisdiction to accede to letter of request from Jersey


FELICITY TOUBE QC


STEPHEN ROBINS

The Court of Appeal overturned the decision of Mann J which had held that, under section 426 of the Act, the English Court did not have jurisdiction to accede to a letter of request and make an administrator order in relation to a company incorporated under the law of Jersey. The company had been incorporated for the purpose of developing residential property in England and had a development in Margate, Kent. The centre of main interests (COMI) of the company was, however, in Jersey. Mann J had held that: "[Section 426 of the Act] requires that the foreign court be assisted in its functions as an insolvency court. That in turn presupposes that the foreign court is doing something, or perhaps planning to do something, which the English court can, and is invited to, assist. That is what the plain words seem to me to mean." On this basis, the Judge concluded that, because there were no insolvency proceedings in the Royal Court of Jersey, the English court had no jurisdiction because there was no endeavour in the Royal Court to which assistance could be provided. The Court of Appeal held that Section 426 of the Act does not require a foreign court to be exercising insolvency jurisdiction (as opposed to having that jurisdiction to exercise), and that assistance had a broad and natural meaning consonant with the principle of modified universalism. The Judge had, therefore, erred in placing too narrow a construction upon the statute.
[Felicity Toube QC, Stephen Robins]

BNY Corporate Trustee Services Limited v Eurosail-UK 2007-3BL PLC appeal [2013] UKSC 28 Lords Hope, Walker, Mance, Sumption and Carnwath

Insolvency – Section 123(2) Insolvency Act - balance sheet test


GABRIEL MOSS QC


ROBIN DICKER QC


JEREMY GOLDRING QC

The Supreme Court unanimously dismissed the appeal against the order of the Court of Appeal on an appeal concerning the meaning of Section 123(2) of the Act. The Court held: The balance sheet test within Section 123(2) of the Act requires the Court to be satisfied that, on the balance of probabilities, a company has insufficient assets to be able to meet all of its liabilities, including prospective and contingent liabilities.

The assessment of "balance-sheet" insolvency for the purpose of Section 123(2) of the Act may differ from a company's statutory balance sheet prepared in accordance with the requirements of the Companies Act 2006, in that it may need to take into account contingent assets or contingent liabilities which are not reflected in the statutory balance sheet.
Section 123(2) of the Act is not concerned with "the point of no return", and that phrase should not be used as a paraphrase for the effect of Section 123(2) of the Act.
[Gabriel Moss QC, Robin Dicker QC, Jeremy Goldring QC, David Allison, Richard Fisher]

Re Nortel GmbH, Re Lehman Brothers International (Europe); Bloom v Pensions Regulator [2013] UKSC 52 (Supreme Court; Lords Sumption, Mance, Neuberger, Clarke and Toulson), 24 July 2013


RICHARD SHELDON QC


MARK PHILLIPS QC


DANIEL BAYFIELD

Provable debts – administration expenses – necessary disbursements

The Lehman group included a company which entered into service contracts with, and ran a pension scheme for the benefit of, employees who worked for other group members. The Nortel group included a company which had a pension scheme and which was insufficiently resourced to fund that scheme. The pension scheme in each case was a final salary scheme which was in substantial deficit. After the appointment of administrators in respect of numerous members of the Lehman Brothers group of companies and the Nortel group of companies, the Pensions Regulator initiated machinery under the Pensions Act 2004 ("the 2004 Act") to require certain group members to provide financial support for the relevant scheme. The 2004 Act provides for a two-stage process involving financial support directions ("FSDs") and contribution notices ("CNs"). The administrators of the Lehman companies and the Nortel companies applied to Court for directions as to whether the liabilities imposed by the Regulator under the 2004 Act after the date of appointment of administrators would be: (i) payable as expenses; (ii) provable pari passu with other unsecured liabilities; or (iii) neither. Briggs J held that the liabilities would be payable as expenses. His decision was upheld by the Court of Appeal. The administrators of the Lehman companies and the Nortel companies appealed to the Supreme Court. The Supreme Court allowed the appeals, concluding that liabilities imposed by the Regulator under the 2004 Act after the appointment of administrators will be provable debts.
The Supreme Court held that:
(1) For a debt to be provable in an administration or liquidation, it must fall within rule 13.12(1) of the Insolvency Rules 1986. Paragraph (a) of rule 13.12(1) is concerned with liabilities to which the company "is subject" at the commencement of the insolvency proceedings, whereas paragraph (b) is directed to those liabilities to which it "may become subject" subsequent to that date. There is no overlap between these two categories.
(2) For a liability to fall within paragraph (b) of rule 13.12(1), it must arise "by reason of an obligation incurred" by the company before the commencement of the insolvency proceedings. The term "obligation" is not confined to contractual obligations but is wider in scope. In order for a company to have incurred a relevant "obligation" under rule 13.12(1)(b), it must have taken, or been subjected to, some step or combination of steps which (a) had some legal effect (such as putting it under some legal duty or into some legal relationship) and (b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred. If these two requirements are satisfied, it is also relevant to consider (c) whether it would be consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation under rule 13.12(1)(b). Re Sutherland [1963] AC 235 applied. Re Bluck, Ex p Bluck (1887) 57 LT 419, Re British Gold Fields of West Africa [1899] 2 Ch 7, Re A Debtor (No 68 of 1911) [1911] 2 KB 652, Re Pitchford [1924] 2 Ch 260, Glenister v Rowe [2000] Ch 76 and R (Steele) v Birmingham City Council [2006] 1 WLR 2380 overruled.
(3) In the context of the 2004 Act, the liabilities which could be imposed by the Regulator were provable, because they would arise from pre-administration obligations. As to the first requirement, each of these companies was a member of a group of companies in the period before they went into administration. Membership of a group of companies is a significant relationship in terms of law: it carries with it many legal rights and obligations in revenue, company and common law. As to the second requirement, by the date they went into administration, each group included either a service company with a pension scheme or an insufficiently-resourced company with a pension scheme. Accordingly, the target companies were the type of entities who were intended to be rendered liable under the 2004 Act. As to the third requirement, the sensible and fair answer would appear to be that the liabilities imposed by the Regulator under the 2004 Act should be provable debt.
(4) The liabilities were not payable as expenses. It had been held by Briggs J and the Court of Appeal that the liability would fall within rule 2.67(1)(f) as a "necessary disbursement". However, a disbursement falls within rule 2.67(1)(f)

only if it arises out of something done in the administration (normally by the administrator or on the administrator's behalf) or if it is imposed by a statute whose terms render it clear that the liability to make the disbursement falls on an administrator as part of the administration – either because of the nature of the liability or because of the terms of the statute.
(5) The Supreme Court rejected Briggs J's conclusion (which had been adopted by the Court of Appeal) that where by statute Parliament imposes a financial liability which is not a provable debt on a company in an insolvency process then, unless it constitutes an expense under any other sub-paragraph in the twin expenses regimes for liquidation and administration, it will constitute a necessary disbursement of the liquidator or administrator. The Supreme Court held that Briggs J and the Court of Appeal had misunderstood and misapplied the guidance of the House of Lords in Re Toshoku Finance UK plc [2002] 1 WLR 671. Unless the statute states, expressly or impliedly, how the liability is to rank, the liability can only be an expense if the nature of the liability is such that it must reasonably have been intended by the legislature that it should rank ahead of provable debts.
[Gabriel Moss QC, Richard Sheldon QC, Mark Phillips QC, Robin Dicker QC, William Trower QC, Barry Isaacs QC, Felicity Toube QC, David Allison, Daniel Bayfield, Tom Smith and Stephen Robins]

PERSONAL INSOLVENCY

Digested by ALEXANDER RIDDIFORD


ALEXANDER RIDDIFORD

Consolidated Finance Ltd v Collins [2013] EWCA Civ 475, Court of Appeal (Arden and Sullivan LLJ and Sir Stanley Burnton)

Annulment – restricted use agreements

Consolidated Finance Limited brought various claims seeking payment of sums alleged to be due to it by the defendant appellants and to enforce the mortgages over the defendants' homes executed by the defendants to secure payment of those sums. On appeal the defendant appellants disputed their respective liabilities to the company, contending that the agreements under which they were alleged to have incurred their liabilities to the company (i) were regulated agreements for the purposes of the Consumer Credit Act 1974 and (ii) did not comply with the requirements of the 1974 Act. The agreements in dispute all provided for the advance of a short-term loan to a bankrupt individual as part of an arrangement by which an associated company would repay the individual's creditors and obtained an annulment of her bankruptcy order. Allowing the appeal the Court of Appeal held (i) that such agreements were regulated by of the Consumer Credit Act 1974 (as a "restricted use agreement" for the purposes of section 11(1)); and (ii) that because the required default notice had not been served, the agreement was unenforceable. Moreover, it followed from the above (inter alia) that section 285 of the Insolvency Act 1986 was irrelevant, since this provision applies only to debts provable in the debtor's bankruptcy (the debt was incurred only after the bankruptcy order was made and so was not provable in the bankruptcy: see section 382 of the 1986 Act; rule 12.3 of the 1986 Rules).

McGuire v Rose [2013] EWCA Civ 429, Court of Appeal (Laws LJ and Mann J)

Transactions at an undervalue – section 304 of the Insolvency Act 1986

By way of a judgment given on 28 July 2010 Lewison J, on an appeal from a district judge, had refused a bankrupt's application for leave to pursue an application under section 304 of the Insolvency Act 1986 for an order requiring his trustee in bankruptcy to repay to him sums in respect of properties allegedly sold at an undervalue. The bankrupt applied to the Court of Appeal for permission to appeal Lewison J's decision. The Court of Appeal held that Lewison J had in fact proceeded on the basis of a wrong interpretation of the requirements of section 304(2) of the Insolvency Act 1986. In particular, Lewison J had proceeded on the false basis that section 304(2), which clearly provides for the possibility that a bankrupt may make an application under the section even if it is not apparent that there would be a surplus for him, required that there should be such a surplus. However, permission to appeal was refused since the bankrupt had no real prospect of success even if the correct test was applied.

Walden v Atkins [2013] EWHC 1387 (Ch), Chancery Division District Registry (Birmingham) (HHJ Simon Barker QC)

Real property – beneficial interests

The claimant claimed a beneficial interest in real property which was disputed by the defendant executor of the estate of the claimant's deceased uncle. It had been agreed in writing in 1975 that the claimant's uncles would provide in their will for their joint title in a property to pass to the claimant. The claimant was adjudged bankrupt in 1992. His first uncle died in 1981 but the second lived until 2010. The case of the defendant executor of the will of the claimant's second uncle was that the claimant had had, prior to 1992, an equitable interest that fell within the definition of property under the Insolvency Act 1986 s.436, and that this interest became vested in his trustee in bankruptcy (thus divesting the claimant of it). By contrast, the claimant argued that his interest in the property was based on equitable estoppel, alternatively a constructive trust, and that it did not fall within the scope of Insolvency Act 1986 s.436; that the agreement with his uncle had created only a negative obligation on his part and no proprietary interest on the claimant's part.

The claimant's argument was flawed in that the claimant's equitable interest (if any) must have arisen prior to his bankruptcy since, even on his own case, he had acted to his detriment in reliance on his uncle's assurances in the late 1970s and early 1980s. Accordingly, the claimant's ex hypothesi equitable interest arose at this time, which was some years prior to his bankruptcy in 1992. Therefore, what had been promised to the claimant under the 1975 agreement was property for the purposes of Insolvency Act 1986 s.436 and had vested in the claimant's trustee in bankruptcy.

McNally v Dymond [2013] EWHC 1685 (Ch), Chancery Division (Judge Purle QC)

Individual Voluntary Arrangements – creditors' meetings

This was an appeal from decisions of a District Judge (i) refusing to set aside the decision of Mr Dymond as chairman of the creditors' committee to admit the Bank to vote in the sum of £2,938,211.67 and, as a consequence, (ii) adjudging Mr McNally bankrupt. The result of the District Judge's refusal to set aside this decision of Mr Dymond was that the IVA proposal was defeated and that the Appellant was adjudged bankrupt, whereas the Appellant argued that the Bank ought to have been admitted for a much smaller amount (which might have meant the IVA proposal could have succeeded). Accordingly, the appeal turned on whether the District Judge was wrong summarily to refuse to set aside Mr Dymond's decision to admit the Bank's claim at the value claimed by the Bank. As to this, Judge Purle QC noted that the test on appeal against a voting decision is whether the challenged indebtedness is, on balance, owed. The legal burden is on the creditor to establish the claimed indebtedness, but the evidential burden shifts to the debtor in circumstances where the creditor has made, as the Bank had in this case, a bona fide assessment of the unsecured element of a debt based on a respectable professional valuation. The Appellant had argued before the District Judge that the value of the property on which the Bank's debt was secured was higher (and that accordingly the value of the unsecured part of the debt was lower) than the Bank had estimated. Mr Dymond had marked the unsecured part of the Bank's claim as "objected to" but allowed the votes to be cast in the amount claimed by the Bank, as provided by IR 1986 r.522(4). Judge Purle QC had no doubt that this was an appropriate procedure for Mr Dymond to adopt, since he was in no position to value the security himself. Before the District Judge the Appellant had not put in any valuation evidence himself, restricting his case to commenting on the Bank's valuation, and the Court held that these comments were not sufficient to show that there was a real issue to be tried. Accordingly, Judge Purle QC held that the Bank had been entitled to rely on its valuation and that the real practical onus was on the Appellant to "disturb that valuation by proper evidence". Since the Appellant had failed to adduce such evidence, the District Judge had been correct summarily to refuse the Appellant's application to set aside Mr Dymond's decision.

Kemsley v Barclays Bank Plc [2013] EWHC 1274 (Ch), Chancery Division (Roth J)

Anti-suit injunctions – foreign proceedings – COMI


RICHARD FISHER

The Court dismissed an application by Mr Kemsley, a previously wealthy businessman who had successfully petitioned for his own bankruptcy in England on 26 March 2012, to restrain two sets of proceedings brought by Barclays in the United States. On 1 March 2012 Barclays had commenced proceedings against Mr Kemsley in New York and on 26 November 2012 Barclays commenced proceedings against him in Florida, with both proceedings relating to a loan agreement between Barclays and Mr Kemsley. However, since the New York proceedings concerned post-discharge assets whereas the Florida proceedings did not, Mr Kemsley's complaint focused on the New York proceedings. Roth J, noting that Mr Kemsley's COMI was for the purposes of the UNCITRAL Model Law on Cross-Border Insolvency either in the US or in England (there being no third state which could qualify), observed that the US Courts would do one of two things: (i) if the US Courts recognized the English bankruptcy as foreign main proceedings on the basis that England was Mr Kemsley's COMI, then the US proceedings would be stayed; alternatively (ii) if the US Courts determined that his COMI was in the US, then an anti-suit injunction would be wholly inappropriate.

In particular, the Learned Judge attached significance to the possibility of Mr Kemsley being found to have his COMI in the US. Mr Kemsley's statutory discharge from his debts under the Insolvency Act 1986 was the main defence he had filed in the New York proceedings, but on the assumption that Mr Kemsley's COMI was found to be in the US there would be no oppression or unfairness in Barclays being permitted to maintain its New York proceedings, and in these circumstances it would not be for the English Court to intervene by preventing Barclays from pursuing its case there. Further, the mere fact that the New York Court might not apply the approach of the British insolvency statute (no evidence was adduced either way) did not mean that its approach would be so contrary to some fundamental English public policy (particularly if the UK was found not to be Mr Kemsley's COMI) that the English Court should take the exceptional step of preventing creditors from invoking the New York Court's jurisdiction.

[Simon Mortimore QC; Robin Dicker QC; Richard Fisher]

1st Credit (Finance) Ltd v Carr, Chancery Division, 14 March 2013, unreported, Chancery Division (Roth J)

Annulment – evidence

Roth J held, refusing an appeal against a decision of a district judge annulling a bankruptcy order which had been made against the respondent that (i) an annulment of a bankruptcy order would be affirmed in light of very late evidence adduced by the respondent, but (ii) the debtor was to pay the costs in light of the lateness of that evidence.

The making of the bankruptcy order, in light of the evidence on which it had been made, could not be faulted. Moreover, the annulment of that bankruptcy order was affirmed by Roth J on grounds other than those on which the district judge had annulled it, in particular in light of evidence produced by the respondent for the first time during the hearing before the Learned Judge which indicated that the respondent had had sufficient funds in place to discharge the entire petition debt at the relevant time. Accordingly, the justice of the case required that the annulment be affirmed, but it was also appropriate that the respondent should pay the costs of the trustee in bankruptcy and official receiver.

Governor and Co of the Bank of Ireland v Gill, Chancery Division, 24 May 2013, Chancery Division (Asplin J)

Bankruptcy proceedings – statutory demands – setting aside

The Bank had served a statutory demand on the respondent and the latter's application to set it aside was refused. However, an order was subsequently made which provided that the statutory demand was stayed pending the respondent's appeal against the refusal to set the statutory demand aside, and that either party could apply to set aside the stay within seven days of the date of its service. The Bank applied to set aside this order staying the execution of a statutory demand. The issues before the Court were twofold, namely (i) whether the Bank's application had been made in time; and (ii) if so, whether the Court should set aside the stay.

The Court held, on the evidence, that the Bank had made its application to set aside the stay in time. Further, the Court held that, taking the respondent's application to set aside the statutory demand at its highest, the merits were relatively weak; and that, in light of this and of the fact that the insolvency regime was intended to protect creditors, it was appropriate to set aside the stay.

Mawer v Bland, Chancery Division, 12 June 2013, unreported, Chancery Division (Rose J)

Personal insolvency – bankrupt's estate – discharge from bankruptcy

The appellant bankrupt appealed against a registrar's decision, on the application of the respondent trustee in bankruptcy, to continue the suspension of the discharge of the bankruptcy. The trustee in bankruptcy had applied for an order suspending discharge on the basis that the bankrupt had been uncooperative. The registrar held that the bankrupt had been uncooperative, but held that there was a further and independent ground for suspending discharge in the bankrupt's attempted disposal, after he had been adjudged bankrupt, of certain shares to his wife. Accordingly the registrar made the order continuing the suspension of discharge. On appeal the bankrupt submitted, inter alia, that the registrar had failed to have sufficient regard to his more cooperative acts; and that the agreement to transfer the shares took place at such a time and in such a way that the beneficial interest in the shares had passed to the bankrupt's wife prior to the bankruptcy and that the transfer of the legal title after the bankruptcy order was made was merely the perfecting of that transaction. However, Rose J dismissed the appeal on the basis (inter alia) that the registrar's findings in relation to the shares had not been undermined; and that the registrar had paid due regard to such evidence as there was that the bankrupt had cooperated with the trustee in bankruptcy.

PROPERTY AND TRUSTS

Digested by **STEPHEN ROBINS**

DAVID ALEXANDER QC

In the matter of an Application for Information about a Trust, Bermuda Court of Appeal, (The President, Lord Justice of Appeal Lord Justice Auld and Lord Justice of Appeal Bell), 19 June 2013

Information Control Mechanism – Supervisory Jurisdiction - Disclosure of Documents – Stay of Execution pending Appeal

The Chief Justice of Bermuda ordered the disclosure by the Trustee of various documents by way of a judgment dated 12 March 2013. The Protector filed an appeal to the Bermuda Court of Appeal against that decision. An application was made to the Chief Justice for a stay of execution of the order pending the appeal. The Chief Justice granted the application in part but not in whole. The Protector made an application to a single Lord Justice of Appeal for a stay of execution of the whole of the order. The single Lord Justice of Appeal refused that application. The Protector made an application to the single Lord Justice of Appeal for an interim stay of execution pending a hearing by the full Bermuda Court of Appeal in June 2013 of an application for a stay of execution of the whole of the Chief Justice's original order for disclosure. The single Lord Justice of Appeal granted the interim stay. On 19 June 2013 the full Court of Appeal heard the application for a stay of execution pending the hearing of the appeal against the original decision of the Chief Justice. The Court of Appeal decided that having carried out the balancing exercise required by the authorities (see Polini v Gray (1879) 12 Ch D; Wilson v Church (No 2) (1879) 12 Ch D 454; Leicester Circuits Limited v Coates Bros [2002] EWCA Civ 474; R (Van Hoogstraten) v The Governor of Belmarsh Prison [2002] EWHC 2015; Hammond Suddards v Agrichem International Holdings [2001] EWCA 2065) the grant of a stay would not cause significant injustice to the person in whose favour the order for disclosure of documents had been made but that there was a risk of serious injustice to the Protector if the stay was not granted of rendering the appeal nugatory if that appeal was successful. In the circumstances, the Court of Appeal granted the stay pending the outcome of the substantive appeal.
[David Alexander QC]

Pitt v Holt; Futter v Futter; Futter v The Commissioners for Her Majesty's Revenue and Customs; Pitt v The Commissioners for Her Majesty's Revenue and Customs) [2013] UKSC 26 , (Lord Neuberger (President), Lord Walker, Lady Hale, Lord Mance, Lord Clarke, Lord Sumption, Lord Carnwath)

Rule in Hastings Bass – Mistake – Rescission

These appeals raised issues about the rule in Hastings-Bass, which is concerned with trustees who make decisions without having given proper consideration to relevant matters which they ought to have taken into account. In addition, the appeal in Pitt raises issues as to the court's jurisdiction to set aside a voluntary disposition on the ground of mistake.
As to the facts in Futter: In 1985, Mr Futter made two settlements. Initially, both settlements had non-resident trustees, until, in 2004, he and Mr Cutbill, both resident in the United Kingdom, were appointed. In 2008, on the advice of solicitors, Mr Futter and Mr Cutbill, in exercise of a power of

enlargement, distributed the whole capital of the first settlement to Mr Futter, and, in exercise of a power of advancement, distributed £36,000 from the second settlement to Mr Futter's three children in equal shares. In so doing, they overlooked the effect of section 2(4) of the Taxation of Chargeable Gains Act 1992 ("TCGA"), which resulted in a large capital gains tax liability for Mr Futter, and a modest one for his children. Mr Futter and Mr Cutbill, as trustees of the two settlements, applied to have the deed of enlargement and the deeds of advancement declared void, which Norris J held them to be on the basis of the rule in Hastings-Bass.

As to the facts in Pitt: In 1990, Mr Derek Pitt suffered very serious head injuries in a road traffic accident, resulting in his mental incapacity. Mr Pitt's claim for damages for his injuries was compromised by a court-approved settlement in the sum of £1.2m. Mr Pitt's solicitors sought advice from Frankel Topping, a firm of financial advisers. They advised that the damages should be settled in a discretionary settlement. This was done in 1994 by the establishment of the Derek Pitt Special Needs Trust ("the SNT"). The SNT could have been established without any immediate inheritance tax liability, but it was not. The report from Frankel Topping made no reference whatsoever to inheritance tax. In 2007, Mr Pitt died. His personal representatives, who were also two of the trustees of the SNT, commenced proceedings to have the SNT set aside, which the deputy judge ordered on the basis of the rule in Hastings-Bass. However, in so doing, he indicated that, even if there had been a mistake of any sort, it was only a mistake as to the consequences of the transaction, rather than its effect, and so he would not have granted rescission of the SNT. The Revenue's appeals against these decisions were heard together in the Court of Appeal. Lloyd LJ (with whom Longmore and Mummery LJJ agreed) (i) allowed the appeals, principally on the ground that the rule in Hastings-Bass was not applicable, because the respective trustees acted reasonably in reliance on what they supposed to be competent professional advice, (ii) dismissed Mrs Pitt's appeal based on mistake, on the basis that rescission for mistake could only be granted if there was a serious mistake as to nature of a transaction, rather than its consequences, and a mistake as to tax consequences was not a sufficient mistake for the purposes of rescission. The Supreme Court unanimously (i) dismissed the appeal in Futter, and the appeal in Pitt, so far as they turn on the rule in Hastings-Bass, (ii) allowed the appeal in Pitt on the ground of mistake, and set aside the SNT.

As to the rule in Hastings-Bass, the Supreme Court held that the rule, properly understood, depends on breach of duty in the performance of something that is within the scope of the trustees' powers, not in the trustees doing something that they had no power to do at all. The rule is centred on the failure of trustees to perform their decision-making function. It is that which founds the court's jurisdiction to intervene if it thinks fit to do so. As a matter of principle there must be a high degree of flexibility in the range of the court's possible responses. To lay down a rigid rule would inhibit the court in seeking the best practical solution in the application of the rule in Hastings-Bass in a variety of different factual situations. For the rule in Hastings-Bass to apply, the inadequate deliberation on the part of the trustees must be sufficiently serious as to amount to a breach of fiduciary duty. It is generally only a breach of duty on the part of the trustees that entitles the court to intervene. It is not enough to show that the trustees' deliberations have fallen short of the highest possible standards, or that the court would, on a surrender of discretion by the trustees, have acted in a different way. Apart from exceptional circumstances (such as an impasse reached by honest and reasonable trustees) only breach of fiduciary duty justifies judicial intervention. However, where trustees have been in breach of duty by exercising a discretion with inadequate deliberation, setting aside their decision may not be the only course open to the court.

As to rescission, the Supreme Court held that the true requirement for rescission on the ground of mistake is simply for there to be a causative mistake of sufficient gravity. The test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction. Consequences (including tax consequences) are relevant to the gravity of a mistake. A mistake must be distinguished from mere ignorance, inadvertence, and mis-prediction. Forgetfulness, inadvertence or ignorance is not, as such, a mistake, but it can lead to a false belief or assumption which the law will recognise as a mistake. Mere ignorance, even if causative, is insufficient. However, the distinctions may not be clear on the facts of a particular case. In order to satisfy the test for setting aside a voluntary disposition on the ground of mistake, the gravity of the mistake must be assessed by a close examination of the facts. The injustice of leaving a mistaken disposition uncorrected must be evaluated objectively, but with an intense focus on the facts of the particular case. The court must make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected, and form a judgment about the justice of the case. Mrs Pitt had an incorrect conscious belief, or made an incorrect tacit assumption, that the proposed SNT had no adverse tax effects. The SNT could have complied with statutory requirements without any artificiality or abuse of statutory relief.

Prest v Petrodel Resources Limited & Others, [2013] UKSC 34, (Lord Neuberger (President), Lord Walker, Lady Hale, Lord Mance, Lord Clarke, Lord Wilson, Lord Sumption)

Divorce – financial remedies – property owned by companies – Piercing the corporate veil – beneficial ownership by husband

This appeal arose from proceedings for financial remedies following a divorce between Michael and Yasmin Prest. The appeal concerned the position of a number of companies belonging to the Petrodel Group which were wholly owned and controlled by Michael Prest. One of the companies was the legal owner of five residential properties in the UK and another was the legal owner of two more. The question was whether the court has power to order the transfer of these seven properties to the wife given that they legally belong not to the husband but to his companies. Under Section 24(1)(a) of the Matrimonial Causes Act 1973 ("the 1973 Act"), the court may order that "a party to the marriage shall transfer to the other party … such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion". In the High Court, Moylan J concluded that there was no general principle that entitled him to reach the companies' assets by piercing the corporate veil. He nevertheless concluded that a wider jurisdiction to pierce the corporate veil was available under section 24 of the 1973 Act. In the Court of Appeal, three of the companies challenged the decision on the ground that there was no jurisdiction to order their property to be conveyed to the wife. The majority in the Court of Appeal agreed and criticised the practice of the Family Division of treating assets of companies substantially owed by one party to a marriage as available for distribution under section 24 of the 1973 Act. The Supreme Court allowed the appeal by Yasmin Prest, and, whilst agreeing with the Court of Appeal that it was not an appropriate case to pierce the corporate veil, declared that the seven disputed properties vested in the companies were held on trust for the husband on the ground (which was not considered by the courts below) that, in the particular circumstances of the case, the properties were held by the husband's companies on a resulting trust for the husband, and were accordingly "property to which the [husband] is entitled, either in possession or reversion". The Supreme Court held:

(1) There is a principle of English law which enables a court in very limited circumstances to pierce the corporate veil. It applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil but only for the purpose of depriving the company or its controller of the advantage which they would otherwise have obtained by the company's separate legal personality. In most cases the facts necessary to establish this will disclose a legal relationship between the company and its controller giving rise to legal or equitable rights of the controller over the company's property, thus making it unnecessary to pierce the veil. In these cases, there is no public policy imperative justifying piercing the corporate veil. But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is consistent with authority and long-standing principles of legal policy.

(2) The same principles are applicable in matrimonial proceedings by virtue of section 24(1)(a) of the 1973 Act. The section invokes concepts of the law of property with an established legal meaning which cannot be suspended or taken to mean something different in matrimonial proceedings. Nothing in the statutory history or wording of the 1973 Act suggests otherwise. General words in a statute are not to be read in a manner inconsistent with fundamental principles of law unless this result is required by express words or necessary implication.

(3) The principle of 'piercing the corporate' veil was not applicable on the facts of the case because Mr Prest's actions did not evade or frustrate any legal obligation to his wife, nor was he concealing or evading the law in relation to the distribution of assets of the marriage upon its dissolution.

(4) The only basis on which the companies could be ordered to convey properties to the wife is that they belong beneficially to the husband, by virtue of the particular circumstances in which the properties came to be vested in them. On the facts, the Supreme Court held that the most plausible inference from the known facts was that each of the properties was held on resulting trust by the companies for the husband. The trial judge found that the husband had deliberately sought to conceal the fact in his evidence and failed to comply with court orders with particular regard to disclosing evidence. Adverse inferences could therefore be drawn against him. The Court inferred that the reason for the companies' failure to co-operate was to protect the properties, which suggested that proper disclosure would reveal them to beneficially owned by the husband. It followed that there was no reliable evidence to rebut the most plausible inference from the facts.

OTHER CASES

Digested by **HENRY PHILLIPS**


HENRY PHILLIPS

Anderson v University Hospital of North Staffordshire NHS Trust, QBD, HHJ Yelton QC

Clinical Negligence – Preliminary Issue - Abuse of Process

The Claimant ("C"), an unrestrained driver, suffered serious hip/pelvis injuries in an RTA and received complex surgery at the Defendant ("D") on 8 October 2008. C was subsequently made bankrupt in September 2009 on his own petition. In a phone interview in October 2009 the OR explained that C would need to inform them if he intended to issue proceedings against D. In late September 2011 C issued protective proceedings in clinical negligence against D, claiming he had suffered a residual nerve injury during surgery and seeking both general and special damages. Despite instructing three firms of solicitors before issue, C did not inform the OR that he was issuing the Claim (though he subsequently informed the OR in early 2012 and the Claim was assigned to him). On the trial of a preliminary issue, D argued that the Claim was an abuse of process, as C knew that the Claim was a 'hybrid' claim and was therefore not vested in him at the time of issue (Ord v Upton [2000] Ch 532; Pickthall v Hill Dickinson & Or [2009] EWCA Civ 543); alternatively C ought to have known that the Claim was not vested in him. Having heard evidence the Court concluded that C neither knew nor ought to have known that he did not have locus standi to issue the Claim unless and until it had been assigned to him by the OR. The contemporaneous medical evidence showed that C was unlikely to have processed or remembered the advice given to him by the OR. Furthermore, it was not clear on the balance of probabilities that the OR had followed his usual procedure of explaining the consequences of a 'hybrid' action or that he had expressly advised C about his continuing lack of locus standi post-discharge. The Claim would therefore be allowed to proceed to trial.

[William Willson]


BEN VALENTIN

Sonera Holding B.V. v Cukurova Holding A.S. (Eastern Caribbean Court of Appeal, 9 May 2013 and 11 July 2013)

Offshore – Arbitration – enforcement of awards – jurisdiction

On 9 May 2013, the Eastern Caribbean Court of Appeal dismissed an appeal against a decision of the Commercial Division of the British Virgin Islands, declining to set aside a judgment enforcing an ICC arbitral award in Sonera's favour. The judgment required Cukurova, a Turkish conglomerate, to pay Sonera, a major Scandinavian telecommunications group, US$932 million (plus interest and costs). The Court's judgment endorses the pro-enforcement approach taken in the British Virgin Islands when considering set aside applications under the New York Convention on the Enforcement of Arbitral Awards and rejected challenges to enforcement on grounds of lack of jurisdiction, breach of natural justice and public policy. Cukurova has filed a further appeal against this decision to the Privy Council.

In a second judgment, dated 11 July 2013, the Court re-imposed an injunction preventing Cukurova from taking any steps to dispose of its interest in shares in a valuable BVI company where the shares had been validly appropriated by a third-party lender, but the Privy Council had recently granted Cukurova the right to redeem its interest in the shares as relief from forfeiture. The Court held that Sonera was entitled to an injunction, to take effect immediately upon redemption of the shares, to protect Sonera's interest as a judgment creditor where there was no evidence that Cukurova intended to pay the outstanding judgment debt. The Court declined to grant a charging order and a further injunction which would have had the effect of preventing redemption of the shares, but held that the Privy Council's decision to grant Cukurova relief from forfeiture meant that Cukurova had a beneficial interest in the shares, sufficient to confer jurisdiction to grant a charging order.

A time of fundamental change

Legal aid, the Jackson reforms, the National Pro Bono Centre, the Rolls Building and more. **Robin Knowles CBE, QC** takes a brief moment to stand back and assess the full picture.

As the summer takes centre stage, there is the opportunity to pause for breath. In our legal system, our law, our judiciary and our legal profession, we have recently seen the introduction of many changes of a fundamental, or potentially fundamental nature. It may be worth collecting at least some of them together. Not, in this brief article, to do that in too heavy a fashion, but simply so that we can remind ourselves of the overall scale and implications. Perhaps stand back a little so as to see the wood for the trees. And keeping in mind that we have a legal system, law and legal profession that many other parts of the world use, look to and draw from.

In April, the civil legal aid landscape changed. Legal aid was taken away from major parts of the areas of law that most affect the poorest and most disadvantaged in society. As a collateral result, Law Centres, advice agencies and other front-line agencies, including small high street firms, also found they faced the perfect storm of materially increased need for their services but materially reduced funding. The changes may not stop there: alongside the most major changes imaginable in criminal legal aid, the Government has recently consulted on a 12 months' residence requirement before civil legal aid is available, and on altering the footings for public funding in the public law area.

It is early days but the Bar Pro Bono Unit has experienced a 30% increase in applications for pro bono assistance already, barely 4 months on from April. To encourage preparation for what was coming, at the end of 2011 the Civil Justice Council prepared a report on access to justice for litigants in person or "self-represented persons". The latter term has not been adopted but in many other areas the report has successfully encouraged an approach that is essential for these times. A range of no-cost or affordable activity has been embarked upon, in which everyone can play their part, and with the sum of those parts being greater than the total of the parts taken individually.

Eight guides or series of guides for LIPs have since been published. Personal Support Units are being established in other court centres. The judiciary has demonstrated its readiness to play a leadership role with the recent publication of recommendations under the aegis of the Judges' Council, and support and encouragement for a pilot duty pro bono advocate scheme. The Low Commission will in due course report in a detailed and fundamental way on the

ROBIN KNOWLES CBE, QC

social welfare law dimensions that we now face. The Attorney General's pro bono envoy has chaired coordinating work on public legal education. These are but examples. All this recognises that LIPs (whether in receipt of pro bono assistance or not) are, now more than ever, users of our legal system. The ordinary citizen, rather than the colourful eccentric we sometimes come across, will be the typical LIP in a legal system in which the ordinary citizen will rarely get legal aid and cannot afford a lawyer.

Thus in the name of, and to the ends of, access to justice, has come the programme for the introduction of the Jackson reforms on costs. These have already seen the birth of the Association of Litigation Funders, and the introduction of a code of self-regulation. Damages based agreements (DBAs), as a form of contingency fee arrangement, have been permitted across the system although the way in which the regulations have been cast is perhaps responsible for a modest start so far.

The powerful argument that, in current times, these changes may, as part of a range of approaches, increase access to justice has been the argument that has won. But like the advent of alternative business structures (ABS) and other new platforms for the practice of law, the changes require vigilance in relation to ethics - ethics here, as elsewhere, meaning more than what can be achieved by regulation or sanction alone. A short while ago the first lecture by a President of the Supreme Court at an event convened by a major litigation funder rightly examined both access to justice and ethics. And rightly did so constructively and by reference to where we in fact are today.

Against this background it has never been more important that we are a profession and professional, whether in private practice or in-house or serving in any other capacity.

The recent recognition that legal executives are a vital part of that profession by the award of a Royal Charter to their branch of the profession is welcome and richly deserved. Indeed it was the Chartered Institute of Legal Executives that 12 months ago became the first, ever, to appoint the same person as head of profession and as the head of the profession's pro bono effort. In similar spirit, this year has also seen the Law Society's immediate past President, incoming President and Chief Executive, all become trustees of LawWorks (the Solicitors Pro Bono Group). And the immediate past Chairman of the Bar has become a trustee of the Bar Pro Bono Unit. In making the connection between professionalism and pro bono work, and keeping ethics at the heart of the profession, a part will also now be played by the recent established and significantly resourced Legal Education Foundation, alongside the vital contribution already made by our existing institutions.

The Rolls Building is the world's largest business and property dispute resolution centre. The National Pro Bono Centre is visited by delegations from around the world. Both are about more than a building; both are about making the most of our legal system.

Of course it is an oversimplification, but perhaps some part of the future is illustrated by two buildings.

The Rolls Building is the world's largest business and property dispute resolution centre. It has now settled into its stride and it is something to be proud of. This is not just about a building and modern facilities (though let us never forget St Dunstan's House!). It is about arrangements for the Commercial Court, the Chancery Division and the TCC that enable their individual strengths to shine, at the same time as their collective strength is developed. It is about offering more scope for positive change through a review such as the forthcoming Chancery Modernisation Review. It is about creating a physical platform for the IT of the future. It is about ensuring the development of the law of England and Wales so that it remains the global law of choice, and keeps relevant to the rapidly changing business environment in the UK. It is about making the most of our legal system, our law, our judiciary and our legal profession.

The National Pro Bono Centre on Chancery Lane is a world first, visited by delegations from around the world. Again this is not just about a building. It is about the next chapter in the history of essential coordination and collaboration in the pro bono effort of the legal profession, and (especially internationally) of our serving and retired judiciary. It is about the larger firms and chambers increasing their contribution to the collective effort by sponsoring the Centre as a whole as well as the individual pro bono organisations within it and outside it. It is about an efficient home for the Access to Justice Foundation, connected to the network of Legal Support Trusts, as well as for the major national pro bono clearing houses, and facilities for many more organisations than are in full time occupation. It is about making the most of our legal system, our law, our judiciary and our legal profession.

There are many conclusions one might draw. For me these would include the following:

(1) Whatever one's view of some of the changes, we have to and we can make them work.

(2) We have to and we can make the most of the opportunity we have to keep the law and forum and legal services of England & Wales as the global law and forum and legal services of choice.

(3) We have to and we can help all lawyers see a personal pro bono contribution as part of being a lawyer.

(4) We have to and we can keep ethics at the centre of the profession.

Robin is a member of the Civil Justice Council, the Chairman of the Bar Pro Bono Unit and a former Chairman of COMBAR (the Commercial Bar Association).

Litigating in an Island Paradise

Arabella di Iorio, Managing Partner of Maples and Calder in the British Virgin Islands (BVI) and **David Allison** of South Square review the key recent decisions in the BVI

The battle for Turkcell

One of the juiciest prizes in the telecoms market has for years been the Turkish Cukurova Group's interest in Turkcell, and one of the longest running battles in the BVI Courts has been between Cukurova and the Alfa Group of Russia. On the off chance that the background story has escaped any of our readers, here it is. In 2005 Cukurova borrowed US$1.35 billion from Alfa on the terms of a facility agreement, and secured by English law governed equitable mortgages over shares in two BVI companies which indirectly held Cukurova's interest in Turkcell. The mortgages entitled Alfa to exercise the remedy of appropriation under the Financial Collateral Arrangements (No 2) Regulations 2003. Alfa got wind that Cukurova was looking to refinance the loan and in April 2007 alleged that Cukurova was in breach of the facility agreement, demanded immediate repayment, and commenced legal proceedings for recovery of the loan and registration as legal owner of the mortgaged shares. Some ten days later, Alfa stated that it had appropriated the shares. In May 2007 Cukurova tendered the full amount of the loan, together with penalty interest, but Alfa refused to accept the money. Cukurova then kept the tender monies in a separate escrow account for three years, but on Alfa's repeated assurance that it would never accept the monies and only wanted the shares, Cukurova had paid the monies out before trial.

Appropriation was, at the time, a novel remedy. Neither the Regulations, nor the relevant EU Directive which the Regulations were implementing, gave any guidance as to how to exercise it. The Regulations did, however, state that upon appropriation the collateral was to be valued in accordance with the terms of the contract between the parties, and in any event in a "commercially reasonable" manner. If the value of the security exceeded the debt, then the collateral-taker had to account for the excess, and the collateral provider would remain liable for any balance if the debt exceeded the value of the security.

This fairly common (save for the appropriation element) factual scenario, has led to four important Privy Council decisions. Before turning to the most recent decision, handed down by the Board this month, it is worth reminding oneself of the earlier three. The first decision, in May 2009, determined that in order validly to appropriate collateral, the collateral-taker did not first need to acquire legal title to it. In this case Alfa had not been entered on the share register as holder of the legal title to the shares, and Cukurova had argued that the appropriation was of no effect on that basis. The Board confirmed that appropriation was intended to be a speedy, self-help remedy, in effect a sale by the collateral-taker to himself, at a price determined by an agreed valuation

A dispute between lender and borrower leads to four important Privy Council decisions

BVI ROCKS

process. The main trial then took place in order to determine whether Cukurova had been in breach of the facility agreement, so as to entitle Alfa to call in the loan in the first place. Cukurova denied any default, but in the event that it was found to be in breach, sought relief from forfeiture.

Cukurova won at trial but lost on appeal. Pending its final appeal to the Privy Council, Cukurova sought a stay of the Court of Appeal's decision. The Court of Appeal granted a stay, but on condition that Cukurova pay the tender monies into Court. The Privy Council set aside the condition in its second decision, delivered in May 2012, noting that the effect of the condition was to require Cukurova to put up security for a sum which would only become payable if Cukurova was successful on its appeal.

The Privy Council's third decision was delivered on 30 January 2013. The Board concluded that Cukurova had committed one event of default under the facility agreement, and that accordingly Alfa had been entitled to appropriate the shares. The Court of Appeal had refused to grant relief from forfeiture on the basis that Cukurova had been unable to establish that any improper purpose or bad faith on the part of Alfa. The Privy Council disagreed with this analysis, holding that relief from forfeiture should be considered on its own terms as a freestanding remedy. The Board emphasized that a paradigm case for the grant of relief was where the primary object of the bargain between the parties could still be achieved at the time

THE BRITISH VIRGIN ISLANDS - SOUTH SQUARE

Members of Chambers called to the BVI Bar

Michael Crystal QC
Gabriel Moss QC
Simon Mortimore QC
Richard Hacker QC
Mark Phillips QC
Robin Dicker QC
Martin Pascoe QC
Antony Zacaroli QC
Barry Isaacs QC
Felicity Toube QC
Jeremy Goldring QC
Lloyd Tamlyn
Ben Valentin
David Allison
Richard Fisher
Adam Al Attar

the matter came before the court: here the primary object of the share mortgages was to secure the repayment of the loan, and that could still be done.

Also of interest is the Board's position on the Regulations themselves. One might have thought, and indeed Alfa pressed the point, that a "speedy, self-help remedy" such as appropriation would not readily lend itself to the grant of relief, which would introduce judicial intervention to a process that was designed to be court-free. Although the Board accepted that the need for certainty in the financial markets was a very important consideration, it concluded that it should nevertheless grant relief, and that the particular features of this case meant the situation before it was highly unlikely to arise again. Those features were:

The fact that the method of valuation contractually agreed would not oblige Alfa to pay anything for acquiring control of Turkcell, and that even the application of the "commercially reasonable" test would be unlikely to override the contract and allow a control premium to be factored into the valuation;

Alfa's aim and expectation from the outset was that Cukurova would default on the loan, allowing Alfa to seize the shares. Conversely the transaction had been structured from the outset so as to preserve Cukurova's control of Turkcell;

Although Alfa had acted within its rights, such that it could not be accused of improper purpose or bad faith, its conduct demonstrated that it saw the shares not as security for the loan, but as ultimately enabling it to acquire control of Turkcell;

Cukurova had not willfully breached the facility agreement, and the event of default it had committed did not prejudice Alfa, because at all material times the value of the shares exceeded the amount of the loan; Cukurova had tendered the full amount of the loan, but Alfa had rejected it; and although Cukurova had not originally pleaded a claim for relief, that did not matter because the shares had in effect been frozen since the commencement of the proceedings, and the question of relief would inevitably have ultimately come before the Privy Council.

Having determined that Cukurova was entitled to relief, the Board invited further submissions as to the terms on which that relief should be granted. On 9 July 2013, the fourth Privy Council decision was delivered.

DAVID ALLISON

THE BRITISH VIRGIN ISLANDS - SOUTH SQUARE

Members of Chambers who have acted in relation to BVI cases in the past five years

Michael Crystal QC	David Alexander QC	David Allison
Gabriel Moss QC	Antony Zacaroli QC	Daniel Bayfield
Simon Mortimore QC	Glen Davis QC	Tom Smith
Richard Sheldon QC	Barry Isaacs QC	Richard Fisher
Richard Hacker QC	Mark Arnold QC	Stephen Robins
Robin Knowles QC	Jeremy Goldring QC	Marcus Haywood
Mark Phillips QC	Lucy Frazer QC	William Willson
Robin Dicker QC	John Briggs	Georgina Peters
William Trower QC	Adam Goodison	Adam Al-Attar
Martin Pascoe QC	Lloyd Tamlyn	Henry Phillips
Fidelis Oditah QC	Ben Valentin	Charlotte Cooke

Cukurova submitted that it was for the Board to determine, in the exercise of its discretion, the conditions which Cukurova should meet in order to secure its shares. Whilst Cukurova accepted in principle that it would have to pay the outstanding loan, together with interest and costs, it invited the Board to consider two particular factors: first, that Cukurova had been about to refinance and pay off the loan in its entirety, and secondly that it had tendered the full amount in May 2007, but its tender had been rejected. Alfa's position was that the Board's discretion was more limited. It could simply grant Cukurova an extension of time by which the terms of the facility agreement had to be performed in full, and could impose additional conditions which Cukurova must satisfy. In all other respects, the debt should be treated as having remained outstanding, or as having retrospectively revived, as though nothing had happened in the meantime. The whole period since appropriation should therefore be viewed as one of "unremitting default" on the part of Cukurova. Accordingly, interest should accrue at the default rate (11.5% above LIBOR), and not the contractual rate.

The Board concluded that its discretion was not as limited as Alfa suggested and that the circumstances of the refinancing, the tender, and the issue of the control premium, were factors which were capable of affecting the conditions which equity should impose on the grant of relief. It would be particularly inequitable to treat the loan as if it had been outstanding throughout, without having any regard to intervening events. The Board held that interest should not run at all during the three years when the tender funds had been kept on escrow, and that for the remainder of the period contractual interest and not default interest should accrue.

Priorities in liquidations of BVI companies

There has been something of an uneasy truce between the provisions of the BVI Business Companies Act 2004 and those of the Insolvency Act 2003 insofar as they relate to the standing of redeemed but unpaid investors in hedge funds to petition for the winding up of the company and as to their priority on a liquidation of the fund. Creative judicial attempts have been made to interpret the relevant sections, but at the end of 2012 the outlook for unpaid redeemers was bleak: they could neither petition for a winding-up nor would they rank ahead of unredeemed shareholders on a liquidation. Assignees of redemption proceeds were in the same situation. The Court of Appeal's 2011 decision in *Westford Special Situations Fund Limited v Barfield Nominees* Limited had determined that an unpaid redeemed shareholder was not a creditor for the purposes of bringing insolvency proceedings against the fund, and its July 2012 decision in *Spectrum Galaxy Fund Ltd v Xena Investments Ltd* held that an assignee of the redemption proceeds was in no better a position.

A small ray of hope shone in September 2012 when in *Krys v Stichting Shell Pensioenfonds* the Court of Appeal clarified that although they could not seek a winding up of the fund, unpaid redeemed members were nevertheless creditors of the company (although it is questionable whether anyone was in any doubt about this given the provisions of the BVI Business Companies Act).

But the final blow came in November 2012 when the Commercial Court in *Somers Dublin Ltd v Monarch Pointe Fund Limited* held that whilst redeemed members could claim their redemption

ARABELLA DI IORIO, MANAGING PARTNER OF MAPLES AND CALDER IN THE BVI

THE BRITISH VIRGIN ISLANDS - SOUTH SQUARE

Members of Chambers who have appeared in the BVI in the past two years

Michael Crystal QC	Antony Zacaroli QC	Ben Valentin
Gabriel Moss QC	Barry Isaacs QC	David Allison
Mark Phillips QC	Lloyd Tamlyn	Adam Al Attar

The scores on the doors are currently redeemers 2: liquidator 0 on the good consideration defence and redeemers: 0 liquidator: 2 on the NAV defence

proceeds, and continuing shareholders could claim their capital contribution, both ranked pari passu and were to be discharged from surplus assets after all other claims in the winding-up had been fully discharged. Bannister J found that there was neither need nor justification for "postulating a third class of creditor floating uneasily between external creditors and continuing members".

In March 2013 the Court of Appeal handed down its decision in Monarch Pointe and the order of priorities expected by the industry was restored. It held that the purpose of section 197 of the Insolvency Act 2003 was merely to subordinate redeemed members' claims to those of ordinary unsecured (and usually external) creditors, and not to bar their claims as deferred creditors as part of the final adjustment of rights. It was therefore wrong to rank redeemed members alongside continuing members: they were deferred creditors and ranked ahead.

The waterfall provisions on the liquidation of a BVI company therefore work in the following order of priorities:

1/. The costs and expenses of the liquidation;

2/. Preferential claims admitted by the liquidator;

3/. All other claims admitted by the liquidator, to be paid in the following order:

a) Sums due to unsecured (outside) creditors;

b). Sums due to members in their character as members, including redemption proceeds;

4/. Any interest payable under the Insolvency Act; and

5/. Any surplus remaining after the payments at 1-4 to be distributed among continuing members in accordance with their rights and interests in the company.

The Insolvency Act is soon to be amended to make this position clear on the face of the statute; it is likely that the decision in Westford will also be addressed.- see [BOX].

Clawback Claims by liquidators of Madoff-exposed fund

Can a liquidator claw back redemption proceeds paid to redeeming shareholders when, possibly years later, it is discovered that the fund was exposed to a fraud and its NAV may, with the benefit of hindsight, have been incorrectly calculated? Yes, says the liquidator of the Madoff-exposed Fairfield funds (Fairfield Sentry, Fairfield Sigma and Fairfield Lambda). No, say the redeemed shareholders in question. Readers may recall that in an effort to staunch the time and cost implications of a litigation juggernaut involving hundreds of clawback claims, two preliminary issues were identified as being capable of putting an end to the claims in the event that the court found for the redeemers on either one.

The two preliminary issues in question are (1) whether certificates of NAV were given by or on behalf of the funds which, in accordance with the terms of the funds' Memoranda and Articles of Association, are final and binding and (2) whether the redeemers gave good consideration for the payment of their redemption proceeds by surrendering their shares in the funds and relinquishing their rights as shareholders. The scores on the doors are currently redeemers 2: liquidator 0 on the good consideration defence and redeemers: 0 liquidator: 2 on the NAV defence - the redeemers and the liquidator each having succeeded both at first instance and on appeal on one issue. Both sides obtained leave to appeal to the Privy Council and a listing of 19-20 March 2014 has been given. Should the liquidator succeed, there will need to be a full trial of every clawback claim: one of the principal defences, that of change of position, will be fact specific for every clawback defendant. Not only are there a myriad of claims in the BVI, there are even more in the US and elsewhere. A sobering thought, though one that is unlikely to deter the Privy Council from a thorough review of the law of restitution should it feel so inclined.

Anti-suit Injunctions – universalism versus territoriality

Awaiting final leave to appeal to the Privy Council is the Court of Appeal's decision in Stichting Shell Pensioenfonds v Krys & Lau (as Joint liquidators of Fairfield Sentry Limited). At the heart of the case are two questions. First, the question of what elections, if any, are made by a person who seeks to prove as a creditor in a liquidation. Do those elections include an election to take no other proceedings anywhere in the world, including proceedings commenced before the liquidation, particularly in circumstances where the proof has not been adjudicated, and might be rejected? Secondly, what is the position of a foreigner in these circumstances? Does that foreigner eschew such rights as he may be able to pursue in his home jurisdiction or elsewhere simply by asking to be treated as a creditor in a BVI liquidation? A number of other interesting questions are raised by this case, which is seen by some as the battle between universalism and territoriality. The hearing for final leave is in September 2013.

THE BRITISH VIRGIN ISLANDS - RECENT KEY CASES

Turkcell
Westford Special Situations v Barfield
Spectrum Galaxy Fund v Xena
Krys v Stichting Shell
Somers Dublin v Monarch Pointe
Chemtrade Ltd v Fuchs Oil

Unfair Prejudice – the Fuchs Oil trial

In December 2012 (after the longest running trial ever held in the BVI Commercial Court) the decision in Chemtrade Limited v Fuchs Oil Middle East Limited and Fuchs Petrolub AG was handed down. Chemtrade and Fuchs Petrolub were equal shareholders in Fuchs Oil, they each had the right to appoint two directors to the board, which would not be quorate unless at least one director from each class was present, the chairman having the casting vote. Chemtrade alleged oppression and unfair prejudice by Fuchs Petrolub, and sought an order that Fuchs Petrolub buy its shares. Fuchs Petrolub denied the allegations and sought the appointment of a liquidator over Fuchs Oil on the just and equitable basis.

At the time of the trial, Fuchs Oil had been without a functioning board for almost three years, because the Fuchs Petrolub directors had not been attending board meetings for that length of time. One of the reasons for their absence was threats that if they did attend, supplies to Fuchs Oil would be suspended, although the evidence was that they had simply given in to those threats without demur. A number of other complaints of unfair prejudice and oppression were made. The defence was simple: the actions were neither oppressive nor prejudicial but in the best interests of the company.

The Commercial Court judge concluded that the allegation of unfair prejudice had been made out. Fuchs Petrolub had substituted its own opinion of what was in the best interests of the company for that of the company's board. Whilst it had not acted out of spite or a wish to promote its own interests, proof of malice or an unwarranted advantage was not required: it was unfair to prevent a shareholder with the right to do so from participating, through its appointees, in the board level management of the company, however pure one's motives for doing so.

The Court did not, however, consider that either an order requiring Fuchs Petrolub to purchase Chemtrade's shares, nor the appointment of liquidators was warranted. Matters could be easily resolved by amending the Articles of Association of the company to provide that the quorum for a board meeting should be any two directors, the casting vote remaining with the chairman. As far as liquidation was concerned, the Judge did not accept either the submission that the company operated in reality as a joint venture, nor the submission that there had been a breakdown in trust and confidence between the parties. He said he had no intention of killing off a company which had been successful in the past and was perfectly capable of being successful in the future, simply because a publicly listed multinational company advanced the improbable claim of a breakdown in trust and confidence.

The decision has been appealed, and judgment is awaited.

THE BRITISH VIRGIN ISLANDS - FUTURE STATUTORY CHANGES

A new Arbitration Act
Amendments to the Insolvency Act
A Legal Profession Act
New Non-Contentious Probate Rules

Appeals to the Privy Council

A number of useful points can be drawn from recent decisions:

Time limits

The Virgin Islands (Appeals to Privy Council) Order 1967 provides that applications to the Court of Appeal for leave to appeal must be made within twenty one days of the date of the decision to be appealed from, and the applicant must give all parties concerned notice of his intended application. The Court of Appeal has confirmed that these time limits are strict, and that it has no jurisdiction to extend them, however meritorious the circumstances. It has also held that actual service of the application for leave within the twenty one day period is not required.

Applications for conditional leave

An application for conditional leave must be made, even where an appeal lies as of right. The Court of Appeal has recently heard such an application on paper, in circumstances where the respondent indicated that it accepted that the appeal was as of right. The Court's practice to date has been to hear these applications at a formal sitting of the full Court, and the introduction of a quicker and more efficient process is welcomed.

What is a final decision and how is value to be assessed

The liquidator of a BVI company issued an application, in the liquidation, seeking an anti-suit injunction against a Dutch pension fund which had submitted a claim in the liquidation. The pension fund sought leave to appeal, as of right, from the Court of Appeal's grant of the injunction. The question arose whether the decision was final. The liquidator submitted that it was not, because the lis between the parties was as to the pension fund's rights in the liquidation, and those would not be finally determined until the liquidation was concluded. The pension fund argued that the lis was simply the question whether it should be permitted to pursue the litigation which it was currently injuncted from doing. The fact that there was a liquidation did not mean that the order should be treated as interlocutory in circumstances where there was nothing further to be done.

A further area of dispute was in relation to value. The liquidator argued that the anti-suit injunction had no value, the fund was merely being prevented from pursuing a claim in the foreign proceedings. The fund's position was that the proceedings in question involved an alleged debt of $45 million, which satisfied the value requirements.

The Court of Appeal agreed with the pension fund and granted conditional leave to appeal to Her Majesty in Council on the basis that the fund had an appeal as of right.

The judgments are worth reading in full for many reasons, not least the differing views of the majority and minority on the development of the relevant equitable principles, and the comprehensive review of the nature and operation of the remedy of relief from forfeiture.

Legislate in haste, repent at leisure...

Alexander Riddiford discusses the long-awaited implementation of the Third Parties (Rights Against Insurers) Act 2010.

Nobody could accuse either the Labour or the Coalition Governments of acting with undue haste in reforming the Third Parties (Rights Against Insurers) Act 1930 ("the 1930 Act"). The reform of the 1930 Act has proceeded at a glacial pace: it took Parliament some 9 years to get around to passing the reforming Bill suggested by the Law Commission in 2001, and the resulting Third Parties (Rights Against Insurers) Act 2010 ("the 2010 Act") has still not been brought into force. However these delays have allowed, albeit serendipitously, various wrinkles in the new 2010 Act to come to light prior to its implementation. A Ministry of Justice Report of 22 January 2013 [HC 908] stated that implementation of the 2010 Act, which has been on the statute books since 25 March 2010, would be unlikely to occur before 2014.

However, there is no good reason why implementation should take any longer than this, particularly now that the Government has announced its intention to make the amendments to the 2010 Act which are a prerequisite for its implementation[1]. Accordingly, for those who like to be ahead of the game, this article explains why the Government's dilatory approach to reform has been in some ways an unintentional blessing and sets out the most salient repercussions that the new 2010 Act (as it shall be amended) will have for lawyers and insurers upon its implementation.

The object of the new 2010 Act is substantially the same as that of the 1930 Act, namely to transfer to a third party claimant the liability insurance policy rights of an insolvent insured as against its insurer. The public policy rationale of both Acts is that a claimant should not have to prove in an insolvent insured's winding-up (or other insolvency proceedings); that the proceeds of the insolvent insured's insurance policy should not form part of the insolvent insured's estate but should be ring-fenced for the third party claimant.

The 1930 Act, a very slight piece of legislation running to only 5 sections, belongs to a very different era from our own. The main perceived injustice targeted by Parliament with the 1930 Act was the growing number of victims of automobile crashes who had no recourse against an insolvent insured motorist.[2] However, over the intervening decades the applications and scope of liability insurance have grown exponentially and the insurance markets have diversified greatly. A statute introduced to remedy quite a specific range of perceived injustices – in particular those afflicting the "working man" (the 1930 Act borrowed some of its wording from the Workmen's Compensation Acts) – has been made to work much harder and in a

1/. See the Written Ministerial Statement of Helen Grant, on 25 April 2013 [HC, 25 April 2013, c71WS].

2/. Hansard (HC) 29 October 1929 vol 231, col 128 and 130; see also McCormick v National Motor and Accident Insurance Union Ltd (1934) 49 Ll L Rep 361, at p.363, per Scrutton LJ.

3/. Jonathan Goodliffe, 'What is Left of the Third Party (Rights against Insurers) Act 1930?', [1993] JBL 590.

4/. Sir Jonathan Mance, 'Insolvency at Sea' [1995] LMCLQ 34.

much wider range of commercial contexts than its draftsmen could have contemplated.

The need for legislative reform was forcefully articulated in the early to mid-nineties, in particular by Phillips J (as he then was) in *Banque Bruxelles Lambert v Eagle Star*, unreported, 26 February 1993, and in articles by Jonathan Goodliffe[3] and Sir Jonathan Mance (as he then was)[4]. The call for reform has focused in particular on the practical consequences for the third party claimant of the way sections 1 and 2 of the 1930 Act have been interpreted and applied by the Courts. One such consequence is that a third party claimant might successfully sue an insolvent insured, incurring the expense that such litigation involves, but only subsequently (once the insolvent insured's duty to give information under section 2(1) of the 1930 Act has arisen) find that the insurer is not liable under the contract of insurance.[5]

The Law Commission and Scottish Law Commission addressed the shortcomings of the 1930 Act in their Joint Discussion Paper (Consultation Paper No 152) published on 6 November 1997 ("the 1997 Discussion Paper"). The 1997 Discussion Paper presented a thoroughgoing analysis of the need for legislative reform which, following a consultation with relevant stakeholders, resulted in a Joint Report in July 2001 (Report No 272) ("the 2001 Report") recommending a new statute to replace the 1930 Act and including (at Appendix A) a draft Third Parties (Rights Against Insurers) Bill ("the TP(RAI) Bill").

In 2002 the Labour Government accepted in principle the Law Commission's recommendation for reform. The Law Commission's prompt response to the need to reform the 1930 Act was not matched by a prompt legislative response from Parliament. However Parliament's delay appears, in retrospect, to have been a narrow escape. In particular, when finally a revised version of the TP (RAI) Bill was passed by Parliament on 25 March 2010, it was not noticed that the 2010 Act did not sit well with the Enterprise Act 2002, a statute which amended the Insolvency Act 1986 so as (inter alia) to allow companies to enter administration without the making of a Court order. This effect of the Enterprise Act 2002 was problematic from the point of view of the definition in section 6 of the 2010 Act of the phrase "*relevant person*" (a phrase used, for example, in section 1 to circumscribe the category of persons whose rights can pass to a third party claimant). Section 6 of the 2010 Act defines the phrase "*relevant person*" with reference to various different types of insolvency proceedings to which a corporate body may become subject, but it does so in such a way that, for example, companies that have entered into administration otherwise than by an order of court would not be a "*relevant person*". The Ministry of Justice noted in a January 2013 Report to Parliament [HC 908] that the 2010 Act needs to be amended prior to implementation in order to cover all forms of administration (see paragraphs 8

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5/. This consequence is, according to the interlocutory decision of Phillips J (as he then was) in Banque Bruxelles Lambert v Eagle Star, unreported, 26 February 1993, entailed by the House of Lords' decision in Bradley v Eagle Star Insurance Co Ltd [1989] AC 957.

THE OBJECT IS TO TRANSFER TO A THIRD PARTY CLAIMANT THE LIABILITY INSURANCE POLICY RIGHTS OF AN INSOLVENT INSURED AS AGAINST ITS INSURER

and 9); and Government Minister Helen Grant gave a Written

Ministerial Statement on 25 April 2013 [HC Deb, 25 April 2013, c71WS] noting further that: (i) the definition of "*relevant person*" also needs to be amended to include certain subject specific administration orders, such as air traffic administration orders and energy administration orders; (ii) the Government proposes to amend the 2010 Act so as to include a power for the Secretary of State to add further insolvency situations to the 2010 Act by order should the need arise; and (iii) the aim is to bring the 2010 Act into force as soon as reasonably possible after such amendments have been made.

A narrow escape this may have been, but there are obvious downsides to the 2010 Act's stop-start progress towards implementation. In particular, so long as cases continue to be decided under the 1930 Act, it means that some third party claimants will continue to have to go to the expense of applying to have companies restored to the register instead of using 2010 Act procedures which allow third party claimants to sue the insurer directly; it may also mean that some third party claimants may not be able to recover at all whereas they could recover under the 2010 Act, for example where the insolvent insured has been dissolved and cannot provide information such that, depending on the terms of the policy, the insurer may have a valid defence (an oddity remedied by section 9(3) of the 2010 Act)[6]. That said, the Courts have stepped in to remedy one of the more egregious injustices of the 1930 Act. In *Re OT Computers (in administration*) [2004] Ch. 317 the Court of Appeal, overruling an earlier first instance decision, held that a third party claimant's entitlement to information under section 2 of the 1930 Act arose as soon as the insolvent insured became insolvent (i.e. even before its liability has been established), thereby anticipating the effect of section 11 and schedule 1, paragraph 1 of the new 2010 Act.

The 1930 Act has been made to work much harder than its draftsmen could have contemplated.

What, then, will be the changes that the new 2010 Act will introduce once it

6/. See Alison Padfield, 'Whatever happened to the Third Parties (Rights Against Insurers) Act 2010?', 24, Personal Injury Law Journal, October 2012.

7/. Tim Bullimore, 'The Third Parties (Rights Against Insurers) Act 2010: unanswered questions and rights of set-off', LMCLQ 2002 3(Aug), 382-392, at p.385.

8/. See 2001 Report, paragraph 5.22 and n.36; see also Tim Bullimore, 'The Third Parties (Rights Against Insurers) Act 2010: unanswered questions and rights of set-off', LMCLQ 2002 3(Aug), 382-392, at p.388.

has been implemented? The salient changes will be as follows:

• Most critically, various hurdles to a third party's claim against an insurer are lifted. In particular, the third party claimant can sue the insurer directly, and can establish the liability of the insolvent insured in such proceedings (section 1(2) and (3)). Section 9(5) overrides, in most cases, policy terms requiring the insured to pay the third party claimant's claim before the insurer's obligation to indemnify arises. As noted above, section 9(3) prevents the insurer from relying on a breach of condition that requires the insured to provide information/ assistance in circumstances where that condition cannot be fulfilled on account of the insured's death or dissolution. Finally, section 9(4) provides that the third party claimant can notify the claim to the insurer, even if the terms of the policy require the insured to do this itself.

• The third party claimant's right to obtain information is enhanced in various respects. In particular, section 11 and schedule 1 permits a third party claimant to send to an insurer a "written notice" if it "reasonably believes" that the insured has incurred a liability to it. As Tim Bullimore has argued, this could mean that the schedule 1 letter becomes quite an "*important and contentious document*", particularly if insurers take points on the reasonableness of a claimant's belief in the insurer's liability (the Courts would do well to keep the "reasonable belief" threshold at a low level if the purpose of these provisions is not to be stifled)[7]. Further, a broader category of persons is subject to the obligation to provide information to the third party claimant (including former officers of dissolved companies); and paragraphs 2(1) of schedule 1 provides a time limit of 28 days for the provision of information upon receipt of a "written notice" from a third party claimant.

Section 10 of the 2010 Act marks an important shift of emphasis from the 1930 Act.

• Finally, whereas the 1930 Act is silent on the question of the insurer's right of set-off against the third party claimant, section 10 of the 2010 Act addresses this issue expressly. Under section 10 the insurer is entitled to set off, as against the third party claimant, any amounts which the insured would have been liable to pay the insurer "*under the contract* [of insurance]" (section 10(1)(b)), if the insured's rights had not been transferred to the third party. Strangely, whereas the Law Commission's 2001 Report referred only to the desirability of an insurer being able to set off amounts owing by way of unpaid premium against its liability to indemnify the insured, the language of section 10 does not expressly limit its application to unpaid premium (though it is limited to liabilities arising under the specific contract of insurance relevant to the third party claim)[8]. In theory, therefore, the insurer may be permitted to set off, as against the third party claimant, any amounts owing by the insured in respect of a breach of condition under the policy of insurance against the amounts owing by the insurer to indemnify the insured. In any event, the broad effect of section 10 of the 2010 Act is to remedy an injustice suffered by insurers under the 1930 Act, namely that the insurer cannot set off premium owed by the insured against the third party claim (see *Murray v Legal & General Assurance Soc Ltd* [1970] 2 QB 495), which is surely to be welcomed as an improvement on the status quo. The change effected by section 10 of the 2010 Act marks an important shift of emphasis from the 1930 Act: whereas the 1930 Act sought only to enhance the position of the third party claimant (the "working man", as often as not), by contrast the 2010 Act seeks to level the playing field so that the third party claimant does not, at the expense of the insurer, receive a windfall that the insured itself would not have received.

Accordingly, once the 2010 Act has been implemented, the third party claimant's position will be enhanced in various respects, and various obvious injustices will be remedied. However it is important to stress that, whilst the third party claimant's position will be significantly enhanced under the 2010 Act, a third party claim is still subject to various potential sticking points. In particular, any policy excess or aggregate limit under the insurance policy will continue to apply to a third party claim, such that a third party claimant may find that its claim is not large enough (or has come too late) to enable any or any significant recovery from an insurer. These potential sticking-points will make it all the more important for any request for information sought under section 11/ schedule 1 of the 2010 Act to be calibrated correctly and in sufficient detail[9].

There are, however, at least three reasons not to expunge the 1930 Act, and the case law decided under it, from your memory. First, the 2010 Act will not have retrospective effect, with the 1930 Act continuing to apply to cases where before the commencement day of the 2010 Act (i) the insured incurs liability and (ii) the insured becomes insolvent (see Schedule 3 of the 2010 Act). Secondly, various offshore jurisdictions continue to have local versions of the 1930 Act and are unlikely to upgrade to versions of the 2010 Act until the latter is stress-tested by the English Court (see for example the Third Parties (Rights Against Insurers) (Jersey) Law 1948, or Guernsey's equivalent 1936 Law). Finally, and by no means least importantly, who's to say whether the Government will ever get around to implementing the 2010 Act in any event?

9/. See also Alison Padfield, 'Three's company, Third party claims against insurers – a new era, or more of the same?', NLJ, June 2010, 840.

Persuading noteholders to vote Yes - Consent payments in debt restructuring

Ben Valentin discusses the Court of Appeal's recent rejection of a bondholder challenge in the landmark *Imcopa* case

Introduction

In the aftermath of the 2008 financial crisis, the issuance of debt finance in the form of non-financial corporate bonds, sharply increased in Europe, as in other parts of the world. This occurred for a number of reasons. First, the marked reduction in bank lending following the crisis has meant that corporate borrowers have increasingly turned to the debt capital markets to meet their need for finance. Secondly, investors seeking a better return in the era of historically low interest rates, and low government bond yields, have turned to corporate debt as a significant alternative. Thirdly, following the banking crisis, appetite for financial bonds has reduced, and appetite for non-financial corporate bonds has increased, for obvious reasons.

One of the other significant consequences of the 2008 financial crisis, and its aftermath, has been the increased need to restructure existing corporate debt (as well as sovereign and other public debt), as a means of avoiding covenant default or, in the worst case, insolvency. There are various methods by which issuers may seek to restructure the terms of their debt securities outside the context of insolvency. These methods include: (i) exchange offers, whereby newly issued debt or equity securities are offered to bondholders in full or partial exchange for their existing debt claims, (ii) cash tender offers, whereby issuers seek to repurchase some or all of their outstanding bonds, usually at below par value, and (iii) consent solicitations, which involve soliciting the agreement of bondholders to adopt amendments to the debt instrument (usually a trust deed), often in exchange for the payment by the issuer of a "consent payment" or other form of consideration to consenting bondholders.

Corporate debt securities are issued in large volumes in the London market, and are governed by English law. Whenever the restructuring of such securities becomes necessary, English law governs the process.

Since 2008, the need to restructure corporate debt has increased so as to avoid default and insolvency.

Against this background, it is perhaps surprising that there are so few English cases in which bondholders have sought to challenge the validity or legitimacy of the restructuring of the instruments they hold. No doubt one reason for this is that the techniques used are well established, even routine in nature, so the scope for legal challenge is limited. Another reason is that the London legal market has a high concentration of experienced transactional lawyers (and market participants) specialising in both debt finance and debt restructuring, so the standard of advice to corporate issuers is generally high.

Over the last year, the English court has for the first time had to decide a claim with the potential to declare unlawful one of the key elements of consent solicitations – the consent payment. The decision of the Court of Appeal in *Azevedo v Imcopa Importacao, Exportacao E Industria de Oleos LTDA, and others* [2013] EWCA Civ 364 (the "Imcopa case") considers in detail the rationale behind consent payments, and confirms that they may be used, subject to certain conditions, as a central element in this form of debt restructuring.

Background

The background to the Imcopa case was in many ways a classic example of corporate debt restructuring in the aftermath of the financial crisis.

In 2006, the Imcopa Group, a major South American soya bean processor, issued US$100 million of guaranteed

notes (the "Notes"). The Notes were issued by a company incorporated in Uruguay (Imcopa U), later replaced by a Cayman company (Imcopa C), and were guaranteed by its parent company, incorporated in Brazil (Imcopa B). The Notes were governed by a trust deed originally made between Imcopa U, Imcopa B and the Bank of New York Mellon (as trustee). The trust deed was governed by English law, and contained an exclusive jurisdiction clause in favour of the English courts. The Claimants, two Brazilian individuals, invested US$1.2 million in the Notes.

In late 2008, Imcopa initiated a restructuring plan to address serious financial difficulties resulting from the financial crisis. This led to four resolutions being put to noteholders, each of which was ultimately approved by the necessary majority following a consent solicitation, with the necessary quorum. In May 2011, the Brazilian court confirmed the reorganisation plan.

The first resolution, in May 2009, did not involve any modification of the Issuer's obligations, and did not require any special quorum (of 75% of all noteholders) for its adoption. In the event, just under 65% of votes were cast, of which 95% were cast in favour of approval of the resolution.

By contrast, the second resolution, in November 2009, involved more fundamental amendments: postponement of the maturity date of the Notes and the cancellation of an interest payment due later that month. These were amendments to which the special quorum provision in the trust deed applied. Since a quorum of 75% was required for the resolution to pass, the issuer offered a consent payment to all those voting in favour of the resolution. On this occasion, 90% of all eligible noteholders voted, with over 99% voting in favour.

A similar result was achieved on the third and fourth resolutions, adopted in May 2010 and November 2010. Consent payments were also offered on each of these occasions.

As is usual with such consent solicitations, the consent payments had the following features: (i) they were paid only to those voting in favour, and were not paid to those who voted against, or did not vote at all, (ii) they were calculated by reference to the amount of interest that would have accrued on the relevant principal of the Notes, and (iii) they were openly disclosed in advance to all noteholders.

BEN VALENTIN

The bondholders' challenge

The Claimants had voted in favour of the first three resolutions, and had therefore received consent payments paid in respect of the second and third resolutions. However, they did not vote in favour of the fourth resolution, and accordingly were not entitled to the consent payment paid to other noteholders.

They issued proceedings challenging the legality of the various resolutions where consent payments were offered on the grounds that: (i) the offer and payment of consent payments only to those who voted in favour of the resolution contravened the contractual requirement that all payments were made to noteholders *pari passu*, and (ii) more fundamentally, the consent payments were in the nature of a bribe, which rendered unlawful each scheme subject to the relevant resolution.

No challenge was made on grounds of oppression, unfairness or bad faith on the part of Imcopa in relation to the

solicitation of votes, or any other part of the restructuring process.

The Claimants claimed damages for breach of contract, as well as various forms of declaratory relief. Both the Claimants and the Imcopa defendants applied for summary judgment.

The decision of the Commercial Court

The applications for summary judgment were determined in the Commercial Court by Hamblen J [2012] EWHC 1849 (Comm). The Judge dismissed the Claimants' application, and granted summary judgment in favour of the Imcopa defendants. The Claimants appealed.

The Court of Appeal's decision – first principles

The Court of Appeal (Lloyd LJ, with whom Aikens LJ and Beatson LJ agreed) began with an analysis of the market factors relevant to the challenge. The Court noted that they were unaware of any previous judicial decision on the point in England, and had to decide the issue, on a summary basis, regardless of whether the practice of consent solicitation had been used extensively, rarely, or not at all in the English market.

The Court therefore approached its task by applying first principles. The Court first noted that bondholders faced with a proposal to restructure their bonds faced the equivalent of the "Prisoner's Dilemma", namely the situation where two prisoners are interrogated separately, neither knowing what the other will say or has said, with each unable to tell how the other's conduct will affect his own position, and therefore what conduct will be in his best interests. In a similar way, the members of a class of bond or noteholders will not know who the other members of the class are, and will not be able to take an informed decision as to what would be in their best interests.

BONDHOLDERS FACED THE EQUIVALENT OF THE "PRISONER'S DILEMMA"

Secondly, it followed that, while those who purchased such instruments could be assumed to be sophisticated and experienced investors, they were on their own in deciding how to vote on a proposal such as those put forward by the Imcopa group.

Thirdly, the Court held that it was sensible and practical for there to be provisions by which terms could be varied, so long as a proper process was followed. However, it noted that it was not enough to guarantee adoption of a resolution, that it was beneficial to the class as a whole. That might not be sufficient to persuade enough holders to vote in favour to satisfy the requirement for an extraordinary resolution passed with a special quorum, which was intended to make it possible, but not too easy for the issuer, to amend the terms of a bond issue. The special quorum requirement provided the issuer with the reason to offer members of the class an incentive to vote on the resolution, and preferably to do so in favour of its adoption. This explained why consent payments were used to solicit votes in this case, and in other cases.

Consent payments ensure that noteholders vote in sufficient numbers to approve the bond restructuring.

No breach of the *pari passu* requirement

In relation to the first of the two grounds of challenge, the Court observed that the rule requiring *pari passu* treatment of all members of a class is a basic principle of English insolvency law. However, in the present case, insolvency was not in issue, so the principle was only relevant to the extent that it was reflected in the contractual documents.

On an interpretation of the main contractual document, the trust deed, the Court held that the obligation to apply money received by the trustee in payment of amounts owing in respect of the Notes *pari passu* and rateably,

applied only to funds held by the trustee, and not to consent payments which were paid by the issuer directly, not via the trustee.

This part of the decision therefore emphasised the importance of ensuring that consent payments are paid *outside* the usual payment mechanisms contained in the trust deed, and do not involve the trustee, so as to avoid any conflict with the *pari passu* principle.

Consent payments are lawful in English law

The Court then went on to consider the more fundamental objection to consent payments: that they are akin to illegal bribes, or the unlawful purchasing of votes.

Having considered two older cases in which similar issues had arisen (*Goodfellow v Nelson Line (Liverpool) Ltd* [1912] 2 Ch 324; *British American Nickel v MJ O'Brien* [1927] AC 369), the Court concluded that it was inappropriate to speak of bribery where, as here, all of the details of the scheme were fully disclosed to all members of the class.

The Court also firmly rejected the argument that it was unlawful to put to all members of a class a proposal offering benefits open to all who vote in favour, but not to others. This was principally because no member of the class was excluded from participation in the offered benefits, except by his own choice as to whether, and if so how, to vote.

As Lloyd LJ put it: "*I see nothing wrong in principle with the idea that a company, which has taken the view that a particular course of action is in its best interests and in those of its creditors and shareholders, but which requires favourable votes from one or more classes, should take part in the process which leads to the relevant resolution being put to the necessary vote. It seems to me that it would be extraordinary to suggest that the company cannot take part in the process. Indeed, in practical terms, it must do so. The only issue is whether it is allowed to strengthen its urging and encouragement in favour of a vote by offering an incentive. For my part I fund no objection to that in principle in English law, so long as it is open and above board.*"

The Court therefore concluded that it

Consent payments are not "bribes" when fully disclosed to all members of the voting class

was not inconsistent with English company law for the issuer to offer a consent payment to noteholders who vote in favour of a resolution proposed for their consideration as a class, where the payment is available to all members of the class, and provided that the basis of the payment is made clear in the documents relating to the resolution, the meeting and the vote.

Although this represented the first time the issue had arisen in England, the Court's conclusions were consistent with the established position in the United States, and in particular in the State of Delaware, where similar issues arose in a series of cases in the 1980s: *Schreiber v Carney* (1982) 447 A.2d 17, *Katz v Oak Industries Inc.* (1986) 508 A.2d 873, *Kass v Eastern Airlines Inc.* (1986) WL 13008.

Other debt restructuring issues

The Court of Appeal's decision makes clear that consent payments will be lawful, provided they are disclosed in advance to all voting Noteholders. This was the case in the Imcopa case, but had not been the case in, for example, British American Nickel.

Another distinctive feature of the consent solicitations involved in the Imcopa case was that they were regarded as beneficial to noteholders as a class: in other words, without the amendments proposed, there was a real risk that Imcopa would default on its obligations to its creditors, and that noteholders would receive little or nothing if insolvency ensued. It was for this reason that it could not have been suggested that the proposals involved oppression or unfairness to noteholders.

In other cases, the benefits to bondholders will be less clear. In *Assenagon Asset Management SA v Irish Bank Resolution Committee* [2012] EWHC 2090 (Ch), bondholders were asked to vote for a proposal which involved the exchange of their bonds for the issue of new bonds: a so-called "exchange offer", involving the offer of an "exit consent". Those who did not vote in favour of the proposal had their bonds cancelled for a nominal consideration. Briggs J distinguished this situation from the one in the Imcopa case (which Hamblen J had decided shortly beforehand), and held that the exit consent was "a coercive threat which the issuer invites the majority to levy against the minority, nothing more or less. Its only function is the intimidation of a potential minority, based upon the fear of any individual member of the class that, by rejecting the exchange and voting against the resolution, he (or it) will be left out in the cold." The Judge therefore held that exit consent process was an abuse of the power of the majority noteholders to bind the minority.

The company had lodged an appeal against this decision, which was due to be heard at the same time as the appeal in the Imcopa case. However, the issuer went into special liquidation in Ireland shortly before the appeal was due to be heard and the special liquidators decided not to pursue the appeal. As Lloyd LJ noted: "the issues raised in this case, which has attracted a good deal of academic and professional interest, remain open to be tested at appellate level."

Conclusion

The Imcopa decision provides welcome confirmation of the validity of a widely used practice of considerable importance in debt restructuring under English law. However, it is likely that there will be other cases to test the inevitable competition between the rights of bondholders and the need for issuers to restructure their debt to escape default or insolvency.

[Ben Valentin was Counsel for the Imcopa companies, before Hamblen J and the Court of Appeal, instructed by Shearman & Sterling LLP.]

Not just tulips...

Glen Davis QC reflects on South Square's presence at this year's 2013 INSOL Quadrennial Conference in The Hague

Perhaps it was inevitable that an INSOL conference in the Netherlands would begin with tulips and tulipmania (tulpenmanie), the crazy commodity bubble of 1636-37 when the price of tulip bulbs skyrocketed, fortunes were made and at the peak a single bulb cost more than a fine Amsterdam house. Until, overnight, it didn't, and fortunes were lost. As Congress Co-Chair Rob Abendroth pointed out in his opening remarks, one of the things the entrepreneurial Dutch have invented is the financial crisis, an observation almost trumped by Paul Tucker, Deputy Governor of the Bank of England, who reminded us that the Netherlands also first came up with the idea of central banking.

So Holland was a fitting setting for this year's Quadrennial, even if the iconic image for the conference, Vermeer's instantly-recognisable Girl with a Pearl Earring, isn't actually to be found in The Hague at the moment; it is on loan to the de Young Museum in San Francisco while its usual home, the Mauritshuis museum (which is in the Hague), is closed for refurbishment.

Every INSOL Quadrennial is a remarkable feat of organisation and programming by Claire Broughton and the INSOL team, and this year's was no exception. For me personally it started early on the Sunday, being driven down from Amsterdam at the break of dawn for the Insurance Insolvency ancillary meeting, and ended late on Wednesday with a slightly blurred search for a taxi outside the Steigenberger Kurhaus Hotel after what I am sure was a memorable Gala Dinner (even if I can't quite now recall the details - I do remember at one point being asked by a senior but bemused Chinese lawyer the difference between insolvency and restructuring).

We have long had close relationships with INSOL, both individually and as a Chambers, and many of us have participated in aspects of INSOL's work and spoken on INSOL panels. We were main sponsors of the Quadrennial in London in 2001, and this year we decided it was time to offer financial support again, so South Square was the proud sponsor of breakfast on the Monday morning. We also provided a stand highlighting the extent of our international practices. Actually, it was only when we were putting together the materials that we realised just how many jurisdictions members of South Square have appeared in, advised in connection with, or helped with the law reform of. There are actually very few parts of the world where we don't between us have some connection or experience.

That meant that there was an opportunity for Ron, our Chambers Director, and Niti, our Marketing Manager, to see just how many USB drives they could give away during coffee breaks, and for our Senior Practice Managers Mike Killick and Dylan Playfoot to renew old acquaintances and make new friends.

A number of members were also able to take time out from practice to reflect in the company of peers from around the world, always a valuable and often a humbling experience. Professor Ian Fletcher QC has long been a doyen of INSOL, and played his usual major role chairing the Academics' Colloquium. William Trower QC and Antony Zacaroli QC were there, as were Felicity Toube QC, John Briggs and his wife. As is so often the case, for the most part we barely saw each other in the crowds.


GLEN DAVIS QC

The actual proceedings at INSOL are supposed to be conducted under Chatham House rules (or, I suppose, their equivalent in other jurisdictions). That means we can refer in general terms to what was said but not to who said it, which I suppose does encourage freer debate. But no-one seems to have told Paul Tucker, who not only took the opportunity of the INSOL platform to offer some pertinent and timely comments about bank resolution and put a case for some presently-uninsured deposits to have preferential status in a bank insolvency (apparently

SOUTH SQUARE'S FELICITY TOUBE QC SPEAKING AT THE PLENARY SESSION ON CRIMINAL ELEMENTS OF RESTRUCTURING *© Glen Davis QC, 2013.*

differing from the Chancellor of the Exchequer on this point), but also arranged for his speech to be press released by the Bank of England with the result that it was quickly picked up by online media.

Plenary sessions in the somewhat-cavernous auditorium at the World Forum were of a uniformly high standard. Topics ranged from recent developments in sovereign borrowing to the criminal aspects of restructuring. Felicity Toube QC was part of the latter panel, demonstrating previously-unsuspected acting skills as one of a purportedly hastily-assembled international team of advisers on a conference call to identify the immediate challenges of an appointment no sensible insolvency practitioner would want to take on.

PROF. IAN FLETCHER QC (HONS) RECEIVES A SCROLL OF HONOUR FROM GORDON STEWART, PRESIDENT OF INSOL INTERNATIONAL.

Among the keynote speeches, Prof Hans-Werner Sinn of the Ifo Institute delivered a remarkably concise and distilled exposition of the causes and prognosis for the present financial crisis, particularly in Europe, analysed particularly from the perspective of capital flows and trade deficits. You could almost hear the lightbulbs going on round the theatre.

If I have one criticism, it is a slight sense that too many of the main INSOL panels are still rooted in the Transatlantic and Eurocentric axis from which INSOL has grown and still derives much of its support. Of course there is a value in debating the

comparative advantages and disadvantages of Chapter 11 and English administration as restructuring tools, but I would like to have seen more of a platform offered to practitioners and judges facing the challenges of insolvency and restructuring in emerging markets and very different local economic conditions. So I was particularly interested in a remarkable breakout session chaired by David Kidd which looked at China and Africa and included a judge from the Xiamen Intermediate People's Court.

To take another example, I have for some time had a nagging sense that those of us involved in finance in London will need to understand more about the principles of Islamic finance, but it was one of those issues which hovers just on the periphery of your practice vision. A focused and clear panel chaired by Mark Hyde which looked at Islamic Finance in a restructuring and insolvency context with expert input from Islamic scholars Abdul Wahab Al Halabi of KPMG and Sheikh Bilal Khan of Linklaters means that I do now have an overall appreciation of how different forms of financing and bonds function in the Islamic world. It is difficult to think of where other than INSOL you could find that combination of academic expertise and practical experience.

Back in the plenary hall on the last day, a brilliantly conceived and realised series of film dramatisations - and the bridging participation of familiar TV presenter Nick Ross - took us into the boardroom of a multinational coming under pressure as an energised and energising backdrop to a series of panel discussions bringing out issues of corporate governance and directors' duties. Who would have thought that Ken Baird, the mastermind behind the film, had missed quite so spectacular a vocation?

But a conference like INSOL is about so much more than the formal programme. At breakfast, over coffee, at lunch, there were so many opportunities to connect and reconnect. I approached one group to introduce myself and quickly found I was in conversation with the legendary Honourable Justice Geofrey Kiryabwire, the senior judge of the Ugandan Commercial Court and someone I had previously known only by reputation.

On the "free" evenings, there were almost too many invitations to cocktails and dinners. KPMG's beach club dinner was delicious and only slightly dampened by the torrential rain; Norton Rose offered wine and canapes in the elegant surroundings of the Escher Museum. I know my South Square colleagues were entertained royally by Deloittes, Ernst & Young, Grant Thornton, Hogan Lovells LLP, Freshfields, and Carey Olsen. We hope we will have an opportunity to return the hospitality at future events.

And to cap it all, on the last night, at the Gala Dinner, Prof. Ian Fletcher QC was justly awarded the INSOL lifetime award, the Scroll of Honour, being only the eighth recipient since the foundation of INSOL in 1982 (the first name on the list being that of Sir Kenneth Cork in 1989).

As a Chambers, we are looking forward to developing our relationship with INSOL. So much so, in fact, that we have already signed up to sponsor both the Cayman seminar in November and the 2014 annual conference in Hong Kong. So if you are going to INSOL, we will hope to see you there!

GALA DINNER WAS AT THE HAGUE'S STEIGENBERGER KURHAUS HOTEL

SOUTH SQUARE STAND - READY FOR THE THRONG

EU/EEA LAW UPDATE

We welcome readers to this new feature of the Digest, focussing on recent developments in EU and EEA law relating to restructuring and insolvency, looking at cases both in the UK and elsewhere in the EU and EEA.

Gabriel Moss QC

GABRIEL MOSS QC

Olympic - permission to appeal to Supreme Court applied for

On 4 July 2013 the Trustees of the Olympic Airlines SA Pension Fund filed an application for permission to appeal to the Supreme Court. The case raises issues concerning jurisdiction to open secondary proceedings within the EU, and in particular whether a local office in London, which was taking part in the winding up of the debtor company in the main proceedings in Greece, was an "establishment" for the purposes of Article 2(h) of the Insolvency Regulation (1346/2000).

The Chancellor had held at first instance that there was jurisdiction to open a winding up proceeding in England on the basis of the activities of the London office, but this was reversed by the Court of Appeal. The Court of Appeal did not seem to regard winding up activities as being sufficient to constitute the London office a "place of operations" within the definition of "establishment" in Article 2(h). The Pension Fund Trustees are represented on the application by Gabriel Moss QC and Marcus Haywood.

AG opines on meaning of 'reorganisation measures' and 'winding up proceedings'

On 30 May 2013, Advocate-General Villalon of the European Court of Justice presented his opinion concerning the meaning of "reorganisation measures" and "winding up proceedings" within Article 2 of Directive 2001/24/EC on the reorganisation and winding up of credit institutions in the case of *Landsbanki Islands HF v Kepler Capital Markets SA* (C-85/12).

This was as a result of a reference by the French Cour de Cassation, on an appeal from the finding of the Court of Appeal to the effect that the entry of Lansbanki into winding up proceedings in April 2009 in Iceland by means of a legislative provision (as opposed to a court of administrative ruling) meant that the winding up did not fall within the definition of "winding up proceedings" within the Directive. The definition in Article 2 requires winding up proceedings to be opened by the "administrative or judicial authorities" of the Member State. Article 9(1) refers to the "administrative or judicial authorities" "alone" being empowered to decide on the opening of winding up proceedings.

This in turn meant that the Landsbanki winding up need not be recognised in other EEA Member States and the Icelandic stay on execution could not apply so as to prevent execution in France on assets of Landsbanki. The Court of Appeal had considered that the rationale for the requirement in the wording of the Directive for a judicial or administrative decision was to enable individuals affected to have recourse to the courts in respect of such decision, which they would not have in respect of legislation.

The Court of Appeal decision in France was followed in England by Burton J. in *Rawlinson & Hunter Trustees SA v Kaupthing Bank HF* [2011] EWHC 566 (Comm), which in turn was followed by Gloster J. (as she then was) in *Lornamead Acquisitions Ltd* [2011] EWHC 2611 (Comm).

AG Villalon considered that the fact that a winding up proceeding was opened by legislative act should not prevent it falling within the Directive, as long as there was a right of individual recourse to the courts. It seems that some EEA Member States have such rights in respect of legislation, while others do not.

The AG's opinion is available in a number of languages, but currently not in English.

Commission proposals on reforming EC Regulation gather momentum

The Commission's proposals for reforming the EC Regulation has been considered by the Council Working Group and well received. The text of the proposals is being revised in the light of comments from Member States. It is thought that the proposals as amended may be passed by the end of 2013. They are not likely to come into immediate effect: there is usually an 18-24 month period to enable stakeholders to adjust to the changes.

Harmonisation

On 5 July 2013, the European Commission launched a web-based consultation "A new European approach to business failure and insolvency". This seeks views from stakeholders on areas where the harmonisation of national law could bring benefits.

The consultation runs until 11 October 2013 and can be accessed at: http://ec.europa.eu/justice/newsroom/civil/opinion/130624 en.htm.

What hat are you wearing?

Henry Phillips reports on the recent trial and judgment in Smithton Limited v Naggar, where the Court had to consider de facto and shadow directorship and Section 190 of the Companies Act 2006


HENRY PHILLIPS

Introduction

Dawnay Day was founded in 1928 by two army officers, Major Julian Day and General Guy Dawnay. By the mid-1980s it had been acquired by Guy Naggar. He was joined there by Peter Klimt in the early 1990s. Together they built a vast empire made up of property and financial interests. At its height, the Dawnay Day Group was said by the press to be worth over £1 billion. Mr Naggar ran the financial side. Mr Klimt ran the property side.

With hindsight we all know that by mid-2007 the world was not in a good economic place. The first sign of real trouble in the United Kingdom was probably Northern Rock. It hit problems in the credit crisis in the summer of 2007. There were queues round the block with depositors trying to get their money out. 2008 was not a good year for banks either and in September that year Lehman Brothers went bust. Lehman was quickly followed in October 2008 by the problems with the Icelandic Banks, Kaupthing, Landsbanki and Glitnir. Terror gripped the markets. The second half of 2008 was bad.

In the middle of all of this, the Dawnay Day group also collapsed. It was effectively brought down by margin calls on contracts for difference ("CfDs") which had been entered into in relation to shares in Foreign & Colonial Management Plc ("F&C"). Many of those contracts for difference had been entered into with Dawnay Day Capital Markets Limited ("DDCM"), a joint venture company which had been founded by Mr Naggar and Barry Townsley ("Mr Townsley"). The business had originally been set up as a division of Dawnay Day Brokers Limited ("DDB") following Mr Townsley's departure from Insinger de Beaufort. Mr Naggar and Mr Townsley were old friends. Mr Naggar invited Mr Townsley to come and join him at Dawnay Day when Mr Townsley left Insinger de Beaufort. Then together Mr Townsley and Mr Naggar set about building a broking business designed to effect contracts for difference and share acquisitions for clients under the umbrella of the Dawnay Day group.

When the Dawnay Day group collapsed Mr Townsley wanted to buy DDCM. He acquired it for £1.00 and became its major shareholder. He changed its name to Hobart Capital Markets Limited ("Hobart") and re-capitalised it.

Hobart's Claims

Having been acquired by Mr Townsley, Hobart never brought proceedings against its counterparties to the CfDs in relation to F&C. For present purposes, the counterparties were Insureprofit Limited ("Insureprofit") and Mariona Limited ("Mariona"). They were both companies owned and controlled by Mr Naggar and his family and it had been Mr Naggar who had agreed on behalf of those companies to enter into the relevant CfDs with Hobart. However, both Insureprofit


GUY NAGGAR

and Mariona went into insolvency proceedings in July 2008.

Instead of bringing proceedings against its counterparties, in January 2011 Hobart started proceedings against Mr Naggar personally. Hobart originally alleged that Mr Naggar had been a *de factor* or shadow director of DDCM, that he had been in breach of his duties to DDCM in causing DDCM to enter into the relevant contracts for difference and that he was therefore responsible for DDCM (by then Hobart)'s losses. Hobart claimed some £4.7 million from Mr Naggar together with interest and costs.

Hobart also made an alternative claim from the outset. A claim under Section 190 of the Companies Act 2006 ("the 2006 Act"), formerly Section 320 of the Companies Act 1985

Section 190 of the Companies Act prohibits a company from entering into an arrangement with a director of the company or of its holding company, or a person connected with such a director, whereby the director "acquires or is to acquire" from the company (directly or indirectly) a substantial non-cash asset unless the arrangement has been approved by a resolution of the members of the company or is conditional on such approval being obtained. It also prohibits such an arrangement where the company "acquires or is to acquire" a substantial non-cash asset from such a director or connected person unless the arrangement is approved by a members' resolution or is conditional on such approval being obtained. For these purposes, an asset is "substantial" if its value (1) exceeds 10 per cent of the company's asset value and is more than £5,000 or (2) exceeds £100,000: Section 191(2) of the 2006 Act.

Hobart alleged that the entering into the contracts for difference was a breach of Section 190 of the 2006 Act for which Mr Naggar was said to be liable to compensate Hobart under Section 195 of the 2006 Act. On this basis Hobart also claimed about £4.7 million from Mr Naggar together with interest and costs.

In 2013 Hobart added a third cause of action: alleged misrepresentation and/or negligent misstatement. This was said to be based on the financial position of the Dawnay Day Group in 2008 and the fact that Hobart had not been told about it.

Mr Naggar's Defences

Mr Naggar denied that he had ever been a *de facto* or shadow director of Hobart and said that even if he had been he had not been in breach of duty. He denied that he had ever acquired or was ever to acquire any interest in the shares in F&C to which the CfDs had been referenced. He denied that there had been any misrepresentations.

The Trial

The trial of the proceedings commenced on 15 May 2013 before Mrs Justice Vivian Rose in the Chancery Division by which time Hobart had changed its name again , this time to Smithton Limited. The trial took place in the Rolls Building. Given the Whitsun vacation, it lasted until 7 June 2013. Hobart was represented by Philip Marshall QC and Jonathan Adkin QC of Serle Court instructed by Decherts. Mr Naggar was represented by Michael Crystal QC, David Alexander QC, Tom Smith and Charlotte Cooke instructed by Isadore Goldman (the lead partner was the indomitable Danny Schaffer).


BARRY TOWNSLEY

The trial started with an opening by Mr Marshall QC. Then a short opening from Mr Crystal QC in which he described the three limbs of the claim as rotten. Then it moved to the witnesses. First, was Mr Townsley. Then his CEO, Colin Thomas. They were followed by the rest of the Hobart witnesses. When it came to the Defence, the first witness was Barry Pincus, a former officer at Dawnay Day and director of DDCM. Then David Gelber, a former non-executive director of Dawnay Day International. Other witnesses were Robert Keane, a former director of DDCM, and Martin Gilbert, the CEO of Aberdeen Asset Management. There were also experts to help with the CREST system, the transfer of title to shares and in relation to CfDs and how they worked. The experts included Dr Timothy May, formerly the Chief Administrative Officer at Euroclear. The trial then ended on Friday 7 June 2013.

The Judgment

On 11 July 2013, Mrs Justice Rose handed down judgment [2013] EWHC 1961 (Ch). She concluded that "all three limbs of Hobart's claim against Mr Naggar fail and

The trial started with an opening by Mr Marshall QC. Then a short opening from Mr Crystal QC in which he described the three limbs of the claim as rotten...


MICHAEL CRYSTAL QC

the claim is dismissed". However in giving her judgment she said a number of things which are worth noting.

Contracts for Difference

The Judge explained contracts for difference and how they worked in some detail:

> "Under a contract for difference the client, usually referred to as the CfD holder, enters into a contract with the CfD provider referencing a particular volume of shares at a particular price. If the CfD is long, the provider promises to pay the holder a sum equal to the difference between the total value of that number shares at the date that the contract is entered into and the value at the date that the contract is closed, if that later value is higher. If the value of the shares is lower when the contract is closed, then the holder has to pay the provider the difference. All the CfDs concerned in this case were open-ended, that is to say there was no fixed date at which the difference is crystallised – the holder can choose to close out the contact at any time.
> Most CfD providers will want to hedge their risk under the CfD. There are a number of ways they can do this. The way that is most relevant for this case is where the provider will itself buy the shares which are referenced by the CfD in a one-to-one hedge. Although Hobart entered into CfDs with its clients, its business was in fact as an intermediary because it always entered into a back to back CfD itself with its own CfD provider referencing exactly the same volume and value of shares as it wrote for its own clients.
> Once the CfD is written, the provider requires the holder to give some security to ensure that the provider will get paid if the CfD is closed at a point when the holder's obligation to pay the provider is triggered. This security is referred to as the margin and the requirement to pay margin is referred to as a margin call. The initial margin is usually calculated as a percentage of the value of the shares referenced. The size of that percentage depends on various factors such as the liquidity of the stock. For example, shares which are in the FTSE 100 generally require a lower percentage margin than FTSE 250 shares or more 'exotic' shares because it will be easier for the provider to sell any shares acquired as a hedge when the contract is closed out. The margin percentage may also depend on the provider's assessment of the creditworthiness of the holder.
> After the CfD has been written, if the share price starts to move against the holder, a further margin call will be made by the provider, increasing the security that the provider holds. This in a long CfD, if the price of the referenced share starts to fall, it becomes more likely that the holder will be liable to pay the difference to the provider rather than vice versa and the margin required to guarantee the payment of that difference is increased. If the holder defaults on the payment of a margin call then the holder may close the contract forthwith, sell any referenced shares it holds as a hedge and demand payment of the difference."

Under a contract for difference the client … enters into a contract with the CfD provider referencing a particular volume of shares at a particular price


DAVID ALEXANDER QC

Breach of Director's Duties

In order for Hobart to succeed on its claim under this head, it was clearly crucial for Hobart to establish that Mr Naggar was a *de facto* or shadow director of DDCM. For if he was not none of the duties which Hobart alleged that Mr Naggar owed could have arisen.

Mrs Justice Rose reviewed the case law on *de facto* directors, referring to the familiar cases of *HMRC v Holland* [2010] UKSC 51, *Secretary of State for Trade and Industry v Tjolle* [1998] 1 BCLC, *In re Lo-Line Electric Motors* [1998] Ch 477, *In the Matter of Mumtaz Properties Ltd* [2011] EWCA Civ 610 and *Re Hydrodam (Corby) Limited* [1994] 2 BCLC 180. She also reviewed the case law on shadow directors, referring to more familiar cases, namely: *Secretary of State for Trade v Deverell* [2001] Ch 340, *Hydrodam* and *McKillen v Misland*

(Cyprus) Investments Limited [2012] EWHC 521 (Ch).

Mrs Justice Rose then went on to refer to the fact that Mr Naggar wore a number of hats in his dealings with Hobart in 2007 and 2008. Firstly, in the period when the business was run as a division of DDB, Mr Naggar was a *de jure* director because he was a *de jure* director of DDB. Secondly, through his private companies, Mr Naggar was a major client of Hobart. Thirdly, Mr Naggar was the Chairman of DDI, the holder of a majority stake in Hobart. She then went on to say that (1) the case law indicates that the identification of the hat which the individual was wearing in his dealings with and for a company is crucial in determining whether he is a *de facto* or shadow director (with the *Holland* case being a striking example of this) and (2) hat identification was therefore an important legal qualification to the general principle that one must look at what the putative director actually does rather than how he is described when deciding whether to impose fiduciary duties upon that director.

The Judge then went on to analyse the myriad of allegations made by Hobart in support of its contention that Mr Naggar was a *de facto* or shadow director of Hobart. She said that those matters which had taken place whilst the business had been part of DDB should be accorded considerably less weight than incidents occurring after. Then in substance she explained that the other acts were of no consequence or explicable on the basis of one or other of the alternative hats that Mr Naggar was wearing. In conclusion in relation to *de facto* directorship allegations, she said that the evidence put forward by Hobart fell "far short of showing that Mr Naggar was involved in the management of Hobart after it became a separate company". She said that there was nothing that she had seen that went beyond the involvement that one would expect to see from a person who combined the roles of major client and chairman of the majority shareholder. In relation to shadow directorship, she concluded that there was "no evidence" that the majority of the board were

TOM SMITH

accustomed to act in accordance with Mr Naggar's instructions. She therefore held that Mr Naggar was neither a *de facto* nor a shadow director and that it was not therefore necessary to consider what she described as "the difficult legal and factual issues that would arise" if her decision had been different.

Section 190

Hobart's case under Section 190 was put in two ways. First, it was put in what was described as the "narrow basis". Hobart alleged that the mechanism by which the CfDs were created over the course of the trading day involved the transfer of property rights or interests in shares between Hobart and either Mr Naggar or one of his companies and then later on the same trade day the transfer of those rights or interest back to Hobart. Secondly, it was put on what was described as the "wider basis". Hobart alleged that the overall arrangement under which Hobart opened the CfDs in F&C shares for Mr Naggar's companies was an arrangement under which Mr Naggar or those companies would ultimately acquire the F&C shares themselves.

CHARLOTTE COOKE

In relation to the "narrow basis", Mrs Justice Rose decided that the mechanism used to create the CfDs did not involve the creation of a proprietary interest on the part of Mr Naggar or his companies. The mechanism did not, therefore, constitute and arrangement under which Mr Naggar acquired an asset from Hobart or Hobart acquired an asset from him.

In relation to the "wider basis", the Judge decided that the arrangement was one under which Mr Naggar did not have a settled intention to acquire the shares either himself or through a company as part of a bid for F&C and/or as part of a consortium bidding for F&C. She went on to say that Section 190 of the 2006 requires a high degree of certainty at the time when the arrangement is entered into that the asset will be acquired. In this case she said that the most that could be said was that the overall arrangements entered into were arrangements under which Mr Naggar or his companies "might at some future point" acquire the shares in F&C. She held that that possibility was not enough to bring the arrangements within the wording of Section 190 because they were not arrangements under which Mr Naggar acquired or was to acquire shares.

Postscript

The case is now going to the Court of Appeal on the *de facto* and shadow director claims and the Section 190 claim. The Digest will of course keep you informed of the outcome.

Michael Crystal QC, David Alexander QC, Tom Smith and Charlotte Cooke appeared at the trial on behalf of Mr Naggar

NEWS in brief

High Court Judge appointments

In the last edition of the Digest we reported on the appointment of many new Court of Appeal Judges.

This time it is the turn of the High Court Judges to have many new faces added to their ranks. By the time this issue reaches you, the following will have been appointed since the May issue of the Digest was published:

- **His Honour Judge Stephen Paul Stewart QC (Queen's Bench Division)**
- **His Honour Judge Colin Birss QC (Chancery Division)**
- **Vivian Rose (Chancery Division)**
- **Joseph Keehan QC (Family Division)**
- **Robert Jay QC (Queen's Bench Division)**
- **James Dingemans QC (Queen's Bench Division)**
- **Clive Lewis QC (Queen's Bench Division)**
- **Sue Carr QC (Queen's Bench Division**
- **His Honour Judge Andrew Gilbart QC (Queen's Bench Division)**
- **Anthony Hayden QC (Family Division)**

In addition it has been announced that Frances Patterson QC will be appointed as a High Court Judge with effect from 1 October 2013. The Lord Chief Justice will assign Miss Patterson to the Queen's Bench Division.

ROBERT JAY QC

JAMES DINGEMANS QC

Transparency and Trust Discussion Paper

On 15 July 2013, Vince Cable, Secretary of State for Business, Innovation and Skills, announced the launch of the Transparency & Trust discussion paper.

This sets out a number of proposals aimed at addressing opaque ownership structures and improving the accountability of company directors. The proposed reforms include proposals that the registry should hold information on the beneficial owners of all UK companies.

It also considers options to enhance transparency around the use of nominee directors; and whether companies should be prohibited from being appointed company directors. In the insolvency sphere, proposed reforms include granting liquidators the statutory right to sell or assign fraudulent and wrongful trading actions and extending the power to bring such action to administrators as well as liquidators. The paper also explores the possibility of giving the court a new power to make a compensatory award at the time it makes a disqualification order. The paper is available on the Department for Business, Innovation and Skill website. The consultation in relation to the paper closes on 16 September 2013.

VINCE CABLE MP

South Square hosts Insolvency Forum

South Square is hosting an Insolvency Forum on Thursday 19 September 2013 (in partnership with Mourant Ozannes) which will discuss developments in Cross-Border Litigation, Insolvency and Restructuring.

The event will be co-chaired by Michael Crystal QC and speakers include Robin Dicker QC, Antony Zacaroli QC, Jeremy Goldring QC and Tom Smith.

The topics to be covered include Common Law recognition, cross-border cooperation and comity and offshore restructuring. The forum is being held at Dexter House, 2 Royal Mint Court, London, EC3N 4LP from 1pm and will be followed by a drinks reception and an opportunity to network. If you would like to register for your free place, please contact South Square's Marketing Manager, Niti Sidpra, on 020 7696 9900 or by email at nitisidpra@southsquare.com.


ANTONY ZACAROLI QC


ROBIN DICKER QC

Senior Judicial Appointments

Baroness Hale of Richmond has been appointed as Deputy President of the Supreme Court in place of the retiring Lord Hope of Craighead.

Lady Hale assumed the responsibilities of Deputy President on 28 June 2013 following Lord Hope's retirement the day before. Baroness Hale was called to the Bar in 1969 and became a Recorder and Queen's Counsel in 1989. In 1994 she became a judge of the Family Division. Five years later she was appointed to the Court of Appeal. On 12 January 2004 Lady Hale was appointed as the first female Lord of Appeal in Ordinary and was created a life peer as Baroness Hale of Richmond.

It has been announced that the President of the Queen's Bench Division, Sir John Thomas, will be appointed as Lord Chief Justice of England and Wales following the retirement of Lord Judge on 30 September 2013. Sir John Thomas will be sworn in on 1 October 2013.


BARONESS HALE AND SIR JOHN THOMAS (BELOW)

DIARY DATES

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19 September 2013.
London.
TMA Europe Distressed Investing Conference.

25-28 September 2013.
Paris, France.
INSOL Europe Annual Conference.

18 October 2013.
Berlin, Germany.
ABI International Insolvency Symposium.

30 October-2 November 2013.
Atlanta, Georgia, USA.
NCBJ Annual Conference.

6 November 2013.
London, Natural History Museum.
Insolvency Lawyers Association Annual Dinner.

7 November 2013.
Cayman Islands.
INSOL International Offshore Seminar.
(Sponsored by South Square)

14 November 2013.
London.
TMA UK Annual Conference. 2014

14-16 May 2014
Tivoli Marina, Vilamoura, Portugal.
R3 Annual Conference.

Wiltshire solicitor shot

A solicitor has been shot at work in the Wiltshire town of Devizes. The partner, James Ward, suffered a single gunshot wound to the head. Michael Chudley, thought to be a former client, has been arrested and charged with attempted murder, and a trial is listed for September.

Corporate and personal insolvency round up

In the corporate insolvency world: Blueworld (UK) LLP, the management company of pop act Blue, and which manages the band's website and fan club, has gone into administration halfway through the group's comeback tour. Modelzone has also been placed into administration. So has furniture chain, Dwell. And the football club, Heart of Midlothian. AIM listed security company, Eruma, and its subsidiary, Security Blinds Limited have also been placed into administration. The payday lender Speed-E Loans has also gone into administration as well. As has luxury fashion retailer Nichole Farhi.

In the personal insolvency world: Former Manchester United goalkeeper Roy Carroll has been declared bankrupt whilst playing for his current club Olympikos. Andy Abraham, a former X Factor finalist and who finished joint last as Britain's entry in the 2008 Eurovision song contest, has also been made bankrupt.

The same fate has also happened to Matt King, the actor best known for his role as "Super Hans" in Channel 4's Peep Show. Former Atomic Kitten and reality TV star Kerry Kantona has also been declared bankrupt. It is her second bankruptcy in five years.

NICOLE FARHI WENT INTO ADMINISTRATION

Bankrupt jailed for avoiding creditors

A bankrupt has been sentenced to six months' imprisonment for avoiding payments to creditors. James Ferguson transferred £29,920 to his partner in order to put funds out of reach of two creditors. Less than two weeks later he declared himself bankrupt in an effort to dispose of the creditors' claims against him. Ferguson was convicted at Bradford Crown Court of one charge of fraudulently disposing of an asset.One of the investigation officers said "By choosing to remove funds from his estate, Mr Ferguson not only placed his property outside the reach of his creditors and his trustee in bankruptcy, he also sought to undermine the bankruptcy regime by circumventing an order of the court. By imposing this jail term, the Court has sent a message that it treats seriously those who seek to undermine the proper administration of justice

David Marks QC retires

David Marks QC has retired from practice at the English Bar. David was called to the Bar in 1975 and was appointed as Queen's Counsel in 2009. David has been a member of Chambers for more than three decades.

He acted in connection with all of the major insolvencies over the last 20 years or so. David has also been a member of the Illinois and US Federal Bars since 1973.

He was a Deputy Bankruptcy Registrar, Deputy Chairman, Data Protection and Information Rights, a Judge of the Upper Tribunal Administrative Appeals Panel and a Judge of the National Security Appeals Panel.

He also wrote extensively, being a major contributor to Rowlatt on Principal and Surety, the general editor of Tolley's Insolvency Law and a contributor to Lightman & Moss and Totty & Moss as well as other publications.

All in Chambers wish David a very happy retirement and thank him for the immense contribution that he made both in and outside Chambers for the many years he was here.

DAVID MARKS QC

UK Insolvency judgment recognised in Ukraine

By an assignment purportedly dated 6 April 2011, a Northern Irish company ("Demesne", pronounced "Domain") ultimately financed by Anglo-Irish Bank and controlled by Irish billionaire Sean Quinn (now Ireland's biggest bankrupt) disposed of a claim for about USD 45m for no consideration. The claim was against a Ukrainian company which owned a shopping centre in Kiev and which had been controlled by Quinn, but over which the Bank has a mortgage. The disposal of the claim was to a Northern Irish company owned by a relative of Quinn and the disponee assigned on to a BVI company. The BVI company obtained judgment against the Ukrainian company in the Ukrainian courts. The Bank (now "Irish Bank Resolution Corporation") brought proceedings under the NI equivalent of s.423 of the Insolvency Act 1986, joining

GABRIEL MOSS QC

Demesne (in receivership) as an additional claimant and the Ukrainian company as an additional Defendant. On 3 May 2012, after a trial at which the Bank was represented by Gabriel Moss QC, McCloskey J. set aside the transfers. On 3 April 2013, the Ukrainian courts recognised the NI judgment and on 11 June 2013 the Kiev Appellate Court confirmed the recognition. On 22 July 2013 the Kiev Commercial Court set aside the USD 45m judgment against the Ukrainian company. Further details and copies of the judgments in the Ukraine can be obtained from the Bank's Ukrainian lawyers', Egorov Puginsky Afanasiev and Partners in Kiev – contact Dmytro Marchukov (d.marchukov@epap.ua).

One in five shops could close

The Centre for Retail Research has warned that one in five UK high street shops could close in the next five years with further administrations and job losses.

The Retail Futures Report 2018, produced by Professor Joshua Bamfield, forecasts that total UK store numbers will fall by 22% from 281,930 to 220,000 by 2018 with some 316,000 possible job losses.

Online retail is identified as the main threat to the high street shops. Even as matters stand today, empty shops in UK high streets and shopping centres now account for 11.9% of all sites, that figure being the highest since records began. The Report estimates that this figure will continue to rise, with pharmacies and health and beauty stores being the first to suffer from falling sales followed by retailers specialising in music, books, cards, stationery and gifts. The Report predicts that there will be a further 164 major or medium sized companies going into administration. Many of these are predicted to survive but at the cost of closing more than half their stores.

CLOSED SHOPS - MORE TO COME

Rise in female insolvencies

The Debt Advice Foundation has said that women accounted for 49% of personal insolvencies in 2011. That was an increase of 30% from a decade previously. In the 18 to 24 age group, 66% of personal insolvencies were female. In the 25 to 34 age group the figure fell to 54%. In the 35 to 44 age group the figure fell further to 47%. The Debt Advice Agency said that analysis of the trends in Insolvency Service data revealed that the rate of female insolvencies would be broadly equal in 2012 but with women projected to outstrip their male counterparts in 2013.

FEMALE INSOLVENCIES PROJECTED TO OUTSTRIP MALE

NEWS in brief

Cayman Seminar

Richard Sheldon QC, Mark Phillips QC and Henry Phillips recently took part in a seminar on the meaning of insolvency and the Lehman/Nortel case.


RICHARD SHELDON QC


MARK PHILLIPS QC

EU Regulation Reform

On 17 June 2013, Gabriel Moss QC took part in a panel discussion, followed by a break-out discussion, on the proposed reforms to the EC Regulation on insolvency proceedings at the International Insolvency Institute conference held in New York at Columbia University.

John Briggs

John Briggs wrote an article in the July 2013 edition of Insolvency Intelligence entitled "Payment protection insurance claims and insolvency". John is also due to chair a break-out session at Insol Europe in Istanbul in October 2014 on the mis-selling of financial products.


JOHN BRIGGS

COMBAR

Glen Davis QC has been elected to the Executive Committee of COMBAR, the Commercial Bar Association. Glen will also continue to chair COMBAR's Africa Committee, which has a remit to promote fraternal relations between the English Commercial Bar and counterpart commercial lawyers in and interested in Africa.

African Insolvency Reform

Glen Davis QC has been invited to participate in this year's Africa Round Table on Insolvency Reform which will take place in Lusaka, Zambia in October.

The Africa Round Table is an initiative of Insol International in partnership with The World Bank Group, which is working closely with many governments in Africa to strengthen their insolvency and restructuring regimes.

It takes the form of a private meeting with a limited number of invited participants who include judges, practitioners, regulators and government representatives from across the region. The theme this year is "Building Africa's Credit Environment for Growth: How insolvency regimes can improve the cost and availability of credit". Fidelis Oditah QC, SAN, who practices both as a member of South Square and in Lagos, Nigeria, has also been invited to attend.


FIDELIS OTIDAH QC

The Hottest Barristers...

A site called *Your Barrister Boyfriend* on micro-blogging site, Tumblr, has just produced its views on the hottest 21 male barristers in London in 2013 by looking at photos on the websites of various sets of Chambers.

The site caused sensation, and consternation, receiving substantial coverage in the national and trade press.

The enterprise of two American women living in the capital, the *Your Barrister Boyfriend* list amazingly includes two members of Chambers in its top 12 "barrister hotties".

William Willson is described as "tall(?) dark and handsome" and someone they knew the second they laid their eyes on him would be one of their front-runners. William came in at number 6 in the list.

Adam Al-Attar was described as having a "soulful, elegant quality that reminds us of a young Marcel Proust before he took to his bed to write Swann's Way which was said to make up for his boring case history: "corporate insolvency, banking, trusts blah blah".

Adam came in at number 12 in the list. Such has been the media response, we suspect this is not the last we have heard from *Your Barrister Boyfriend...*


WILLIAM WILLSON


ADAM AL-ATTAR

Honouring Sir Roy Goode

The UK Foundation for International Uniform Law is to raise funds for its scholarship programme with a dinner honouring Professor Sir Roy Goode CBE, QC, FBA and Emeritus Professor of Law at Oxford University, for his extraordinary contribution to the field of international uniform law.

Since creating the Foundation in 2005, Sir Roy has raised funds for 20 scholarships for postgraduate law students - 11 at UNIDROIT in Italy, three at the University of Oxford and six at the University of Cambridge. The event will take place at The Berkeley Hotel in Knightsbridge on Thursday, October 17. Its patrons include three eminent members of the judiciary: The Right Honourable Baroness Hale of Richmond, DBE, the Supreme Court of the United Kingdom; The Right Honourable Lord Mance, the Supreme Court of the United Kingdom; and The Right Honourable Lady Justice Arden, DBE, Justice of the Court of Appeal.

Money raised by the foundation has already had a life-changing impact on the students granted scholarships. One of the recipients is 32-year-old Jarrod Hepburn, who is currently pursuing his doctorate of philosophy in law. Mr Hepburn said: "The Foundation's assistance has greatly

SIR ROY GOODE

enhanced my prospects both in research and in teaching. My students have greatly appreciated my international outlook on a core subject of domestic law, and I credit that totally to the Foundation's support."

Sir Roy Goode said: "When we launched the Foundation eight years ago, the vision was to provide funding to equip young legal scholars with the knowledge and training to help them develop as future leaders in the field of international uniform law.

"To date, the Foundation has supported 20 postgraduate lawyers in furthering their uniform law education, and I'm certain with Ron at the helm that the Foundation's sterling work in supporting the next generation of lawyers coming through will continue."

Ronald DeKoven said: "I am honoured to be asked to serve on the Foundation's board. Sir Roy has done an outstanding job in creating and nurturing the Foundation. The new board faces a significant challenge. We will certainly do our best to meet that challenge."

Those wishing to attend the event should contact Plamena Metodieva at plamena@dekovenchambers.com or call 020 7831 9521.

Lending and debt information to become more accessible

In two related developments, the government has announced that UK lenders will publish the lending data for 10,000 postcodes by the end of the year, while debt management specialist, Payplan, has created an interactive map detailing levels of secured and non-secured personal debt in different areas of the UK.

Chief secretary to the Treasury, Danny Alexander has revealed that seven of the UK's banks and building societies, which account for 80 per cent of the current stock of lending, have agreed to release the data to identify areas where action is required to boost access to finance.

The data will be published by the British Bankers' Association (BBA) and the Council of Mortgage Lenders on a quarterly basis.

Conversely, Payplan's interactive map reveals the extent of debt levels in given locales. Users are invited to input postcodes to reveal the number of individuals approaching the organisation for debt advice and details levels of secured and non-secured personal debt in different areas of the UK.

Payplan's map has revealed a surprisingly high level of those declaring bankruptcy coming from relatively well-to-do areas.

Legal fees outstripped by bankers earnings

Legal fees on UK public M&A are dwarfed by those paid to investment bankers on the same deals, with lawyers billing up to 70 per cent less on takeovers during the first half of 2013, according to research by The Lawyer. Legal fees from 18 public offers from January to the end of June were £26.1m compared with £46.1m going to financial advisers and brokers and a total of £99.3m spent on all fees and expenses.

Kier Group's takeover of May Gurney Integrated Services yielded the poorest legal fees to bankers' fees ratio for lawyers, with £2.74m going to firms including Eversheds and Linklaters compared to £9.2m won by bankers at Canaccord Genuity, Peel Hunt and Rothschild - a 70 per cent drop.

South Square Challenge

Welcome to the August 2013 South Square Challenge - hopefully one for you to work out on a sun lounger someone in southern Europe or somewhere else hot. This time the same old format is there - each of eight pairs of two pictures should lead you to an answer. All you need in the first instance is the eight correct answers. A little clue this time. I asked members of South Square to tell me what they thought were the eight most important cases of all time. So perhaps the list does not comprise what everyone would think of as being the most important cases of all time, but the ones represented by the pictures are all up there. And for the ninth question you have to say what you think is the most important case ever decided and which is not one of the eight answers (and for what it is worth there is one that is to my mind so obviously missing from the eight answers!). For the winner, if necessary drawn from the wig tin, there is a magnum of champagne… oh and a South Square umbrella! Answers by 15 October 2013 to kirstendent@southsquare.com or the address on the back page. Good luck.

David Alexander QC

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9 The most important missing case is?

May 2013 South Square Challenge

The correct answers to the May 2013 South Square Challenge were (1) Richard Scott (2) Andrew Morritt (3) Jonathan Parker (4) William Blackburne (5) Timothy Lloyd (6) Nicholas Patten (7) David Richards and (8) Michael Briggs. And the connection is that they are the last eight people to have held the office of Vice-Chanecllor of the County Palatine. The winner is Chris Chapman of Quayside Chambers, Wellington, NZ to whom we send many congratulations and a Magnum of Champagne.

SOUTH SQUARE

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