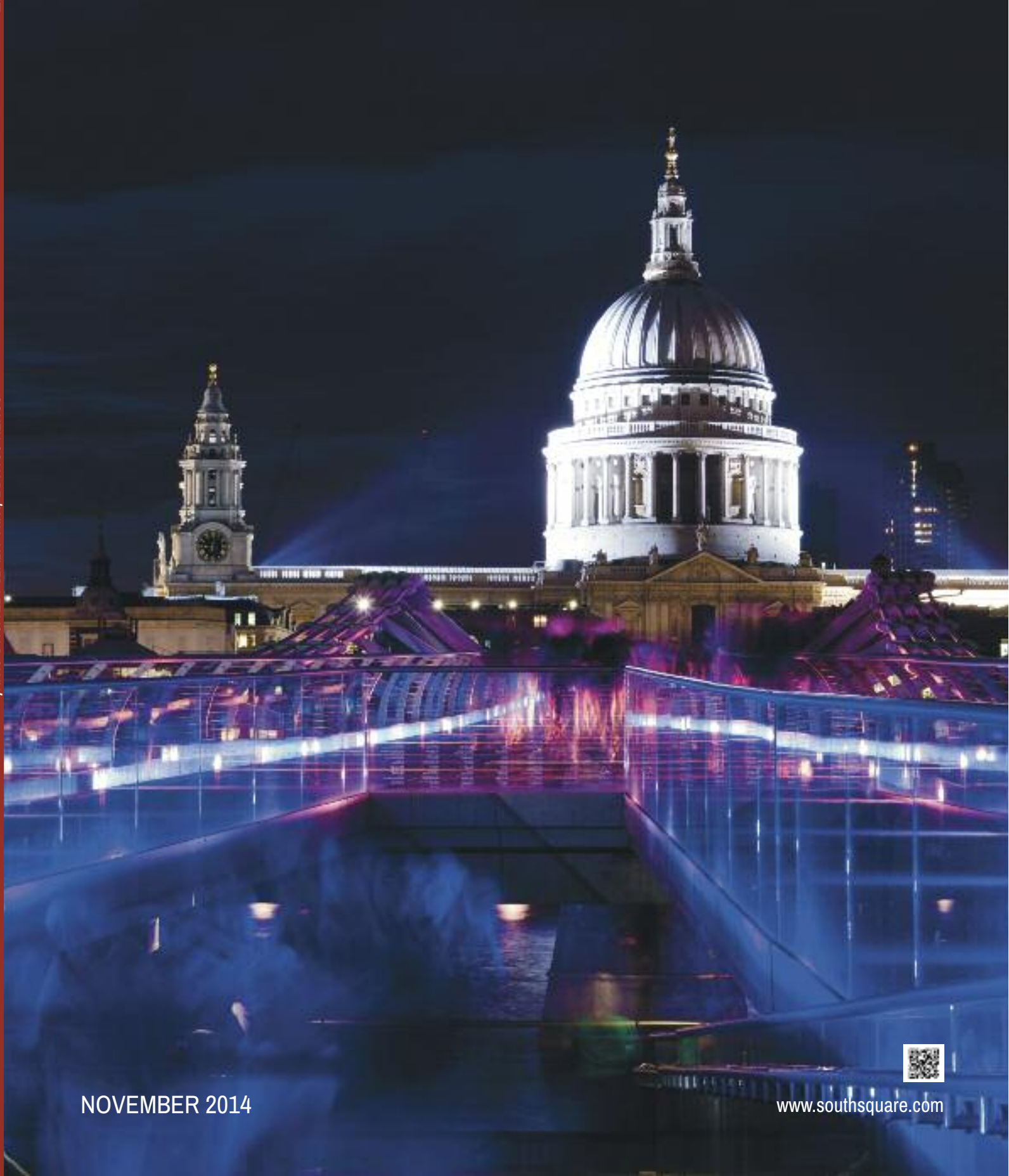
SOUTH SQUARE DIGEST

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



NOVEMBER 2014

www.southsquare.com

SOUTH SQUARE DIGEST

SOUTH SQUARE 'WILL NEVER LET YOU DOWN'

South Square Awards

Insolvency/Corporate Restructuring Set of the Year

Insolvency Set of the Year

In this issue

NOVEMBER 2014

FEATURE ARTICLES

FOCUS - BRITISH VIRGIN ISLANDS

FOCUS - JERSEY

CASE DIGESTS

COVER STORY

ST. PAUL'S AND THE CITY OF LONDON FROM ACROSS THE THAMES

REGULARS

FROM THE EDITOR

DAVID ALEXANDER QC

An eventful year...

Welcome to the November 2014 issue of the Digest, the last edition of another year. Quite an eventful year it has been too. What with the annexation of Crimea, pro-Russian unrest in Ukraine, chaos in Syria, the rise of ISIS, the loss of two Malaysia Airlines planes and serious outbreaks of Ebola in Africa which threaten to spread to the wider world. Not to mention the Pistorius trial that gripped many. But there were some good things too. The world cup was a thrilling spectacle, probably the best ever. There was a European Ryder cup victory at Gleneagles. Perhaps most importantly though the Scottish referendum, which everyone began to think was far too close to call, was in the event won by the "No" camp with the result meaning that the United Kingdom of Great Britain and Northern Ireland remains intact. A disappointment for Alex Salmond of course. But from where I sit, thank you Scotland. We are all better off together.

So now what have we got to look forward to? Well Christmas is coming, at least if you believe what is on sale in the shops. But beyond that we also have the next UK election upon us pretty soon after that. And the parties seem to have started that already. What will the UK's Parliament look like come May next year? A Labour Government (although David Miliband's speech at his party conference seems to have rather holed his polling numbers)? A return for David Cameron as Prime Minister? Will the Liberal Democrats get enough seats to remain in Government? Or will

PISTORIUS: FIVE YEAR SENTENCE. BUT COULD JAIL TERM LAST ONLY SLIGHTLY LONGER THAN THE TRIAL?

the balance of power go to Nigel Farage and UKIP? I am not sure that anyone really knows what will happen. As a result this is probably going to be the most interesting election since John Major narrowly obtained an overall majority in 1992.

So what has this year been like for South Square? Busy and good would be my verdict. As you can see from the inside front cover, we were delighted to be named as Insolvency/Corporate Restructuring Set of the Year at the Chambers Bar Awards 2014. We were just as delighted to be named as Insolvency Set of the Year in the inaugural Legal 500 UK 2014 Bar Awards as you can see from the inside back cover. In relation to both awards thank you to all our loyal supporters who helped us to achieve this. We really do appreciate your support. As does Adam Al-Attar who was awarded junior of the year at Chambers Bar Awards (beating an all South Square shortlist which also comprised Richard Fisher and Stephen Robins).

In addition South Square is delighted to have joined INSOL International's Group of Thirty-Six (G36) with effect from 1 November 2014. We are also pleased to say that Robin Knowles CBE QC has become Mr Justice Knowles having been elevated to the High Court Bench. We here are all delighted for Robin. We thank him for all his past contributions to Chambers and wish him the very best for his new life as a judge in the Queen's Bench Division. What is more we congratulate him on being the first member of Chambers to be appointed as a full-time High Court judge since Cyril Salmon (later Lord Salmon of Sandwich) in what I think was 1957.

So what have we got for you in this edition of the Digest? Well we have lots more articles. Mark Phillips QC has provided us with his (typically forthright) views on the UNCITRAL Model Law asking whether we embrace it or go back to Victorian rules on conflict of laws. Simon Mortimore QC examines the sharp difference of judicial opinion in the Eclairs case, one of the important company law cases to come before the English courts in recent years. We also have Toby Brown on the Privy Council's decision in Fairfield Sentry and Joanna Perkins on the reform of financial benchmarks and their evolution as reference rates for standard form contracts. Then there is a Jersey double-header. First, Alexander Riddiford on the Jersey law of dishonest assistance following the Royal Court's decision in Nolan v Minerva Trust Company Limited. And then Robert Amey on the origins and future of Jersey's unique contract law. Last but by no means least in the articles stakes, we have a BVI insolvency focus this time contributed by Phillip Kite and Vicky Lord of Harneys which is enchantingly entitled "From Tortola to the Thames".

INTERESTING TIMES: COME THE ELECTION, COULD FARAGE AND UKIP HOLD THE BALANCE OF POWER?

But articles are, of course, not the only thing in this issue. Obviously we have the usual case Digests, this time edited by Hilary Stonefrost. There are also pieces on the South Square and Mourant Ozannes Litigation Forum 2014 and on the career of the new Mr Justice Knowles. Back by popular acclaim is Gabriel Moss QC with his latest Euroland update. In addition there is a review of what the 2015 Legal 500 had to say about South Square and its members, as well as news in brief, diary dates and the infamous South Square challenge.

I hope that you enjoy this edition of the Digest. If you find yourself reading someone else's copy of it, please do get in touch with kirstendent@southsquare.com and let us know that you would like to be added to the list. Similarly if your contact details have changed. All at South Square wish you well for the remainder of this year and hope that 2015 starts well. The next edition of the Digest will be the February edition.

SOUTH SQUARE DIGEST IS PUBLISHED BY SOUTH SQUARE BARRISTERS, AT 3-4 SOUTH SQUARE GRAY'S INN, LONDON WC1R 5HP. TEL 020 7696 9900.
PUBLICATION, PRINT AND PRODUCTION BY WENDOVER PUBLISHING LTD. TEL 01428 658697.

International insolvency at a crossroads...

Mark Phillips QC asks: Do we embrace the Model Law or go back to Victorian rules on conflict of laws?

The liquidation of BCCI in July 1991 was a pivotal moment in the development of international insolvency. In 1991 the only way to deal with large international companies like BCCI SA and BCCI Overseas was for there to be individual liquidations in all of the countries in which BCCI operated. Not only did this result in expense, but it resulted in conflicts between the different jurisdictions over issues concerning the collection of assets, proof and ranking of debts and distributions. Faced with the prospect of complex and costly parallel insolvency proceedings in several different jurisdictions, in a packed courtroom on the day he ordered that BCCI SA be wound up, Sir Nicholas Browne-Wilkinson VC said[1]:

"It is a matter of profound regret to me that there is no international convention regulating international insolvency. This case, I hope, if it does nothing else may concentrate people's minds on the necessity for such a convention. What we do have are some rather dated rules of private international law which will regulate the disposal of the assets in the event that no rescue scheme is possible. It will require the most difficult and complicated attempts at co-operation between the different national jurisdictions which I hope will be forthcoming."

In 1991 the Maxwell group collapsed. Maxwell Communications Corporation had significant operations in both the US and in England. It went into Chapter 11 in the US and into administration in England. The Judge in England was Hoffmann J. The Judge in the Southern District of New York was Tina Brosman. They were both forward thinking. Faced with many of the issues facing the courts in international insolvencies they engaged in one of the first significant court to court communications and they oversaw a protocol that helped the English administrators and the US company co-ordinate their management of the estate.

Sir Nicholas Browne-Wilkinson VC's comments did help to concentrate people's minds and, in the mid 1990s, the United Nations Commission on International Trade Law ("UNCITRAL") established a working group on cross-border insolvency to identify an appropriate solution to the problem of cross-border insolvencies. The result of the working group's efforts was the UNCITRAL Model Law on cross-border insolvency ("the Model Law"). The Model Law is not an ordinary piece of domestic legislation. Rather, it is an international endeavour to provide a framework for cross-border insolvencies, which has also been enacted in numerous other countries.

The Model Law seeks to give effect to the doctrine of Modified Universalism, which provides a 'third way' between Territorialism and Universalism[2]. Territorialism is the old-fashioned view that insolvency proceedings in one jurisdiction should not be recognised or given effect outside that jurisdiction. It was the cornerstone of the out-dated rules that Sir Nicholas Browne-Wilkinson VC referred to. The

1/. Re: Bank of Credit and Commerce International SA [1992] BCC 83.
2/. See Fletcher, Insolvency in Private International Law (2nd ed., 2005), para 1.12: "Until relatively recent times, doctrinal argument concerning the correct basis of approach to be applied to questions of international insolvency could be broadly divided into two polarized camps of opinion – Universalists and Territorialists [This] pairing of antithetical propositions addresses the issue of the effects of insolvency proceedings opened under the law of a given State, and places the principle of universality of bankruptcy in opposition to that of Territoriality".

SIR NICHOLAS BROWNE-WILKINSON VC ADDRESSING A PACKED COURT ON THE WINDING UP OF BCCI SA IN 1991. "THIS CASE IF IT DOES NOTHING ELSE MAY CONCENTRATE PEOPLE'S MINDS ON THE NECESSITY FOR [AN INTERNATIONAL CONVENTION]."

principle of Territoriality therefore "*argues that the effects of insolvency proceedings are confined to such property as is located within the territorial jurisdiction of the country in which the proceedings are opened and carries no consequences with respect to foreign assets of the debtor*".[3] The principle of Territorialism "*begins with the rule that the effects of an insolvency proceeding do not reach further than the sovereignty of the State where the insolvency proceeding is opened. The effects are limited to the territory of that State*".[4] To an old fashioned conflicts lawyer this must seem comfortably familiar. Assets found in England will be governed by English law as will questions how those assets should be distributed to creditors. Unless English law interferes with the validity of a contract or the proper law of the contract provides otherwise, the foreign insolvency will have no effect on the contracts. Contracts governed by English law would be unaffected by the insolvency of one of the parties, even if under the local insolvency law, there would be effects on such contracts. Only English anti-avoidance actions will be relevant, only English rules of set off will apply. It was the need to have a separate insolvency process in England that led to the practice of having ancillary liquidations here.

Universalism is the view that insolvency proceedings should be recognised automatically and given effect in other jurisdictions. The principle of Universalism "*advances the claim that such proceedings enjoy worldwide – hence, 'universal' – effect over all property and interests of the debtor, wheresoever these may be found*".[5] According to Universalism, "*[an] insolvency proceeding commenced in one country will have full effect in other countries*".[6] As Lord Hoffmann explained in *Re HIH Casualty & General Insurance Ltd* [2008] 1 WLR

3/. Fletcher, Insolvency in Private International Law (2nd ed., 2005), para 1.13.
4/. Berends, "The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" (1998) 6 Tul J Int'l & Comp L 309, 314. A prime example of the Territorialist approach may be found in the decision of the Court of Appeal in Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) 25 QBD 399. In that case the defendant agreed to buy copper to be delivered in England by the plaintiff. The defendant refused to accept the copper. As a result, the defendant was liable in damages to the plaintiff. The defendant was placed in judicial liquidation in France. As a matter of French insolvency law, the defendant was discharged from its liability in damages. The defendant contended that the position under French insolvency law should be recognised and given effect in England. Lord Esher MR held at p.406 that French insolvency law was irrelevant because it was "not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound".
5/. Fletcher, Insolvency in Private International Law (2nd ed., 2005), para 1.12.
6/. Berends, "The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview" (1998) 6 Tul J Int'l & Comp L 309, 313.

852 at para 6, Universalism requires that "*[there] should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets*". "*Universality … would provide a single forum applying a single legal regime to all aspects of a debtor's affairs on a worldwide basis*".[7] To an old fashioned conflicts lawyer this must sound a note of terror. There would be no applicable conflict rules as such, the questions arising would automatically be determined by the country of the debtor's insolvency.

As Universalism proved to be politically unacceptable, Modified Universalism evolved to provide a 'third way' between the polar opposites of Territorialism and Universalism. "*Modified Universalism … accepts the central premise of Universalism, that assets should be collected and distributed on a worldwide basis, but reserves to local courts discretion to evaluate the fairness of the home-country procedures and to protect the interests of local creditors*".[8] Modified Universalism therefore "*eschews the unattainable dogma associated with the traditional notions of universality, which argue for extraterritorial effects to take place on a de jure basis. In place of this, the pragmatic approach aspires to work via the rules and processes of private international law and cross-border cooperation*".[9]

The UNCITRAL working group, which formulated the Model Law,

The UNCITRAL working group considered a number of potential templates, including section 304 of the US Bankruptcy Code

considered a number of potential templates, which they took into account[10]. Amongst the more significant, they considered section 304 of the US Bankruptcy Code, which came into force in the United States in 1978. Section 304 was one of the best-known examples of Modified Universalism.[11] It worked by granting a wide power to the US courts to grant any "*appropriate relief*" in cross-border insolvency cases. As a result of the width of the statutory wording, which empowered US courts to grant any appropriate relief, US courts held that section 304 empowered them "*to broadly mould appropriate relief in near blank check fashion*".[12] The court's ability to grant any appropriate relief was therefore a "*very broad power*".[13] However, section 304 did not require the US courts to grant relief, hence the modification of universalism. The draftsmen of the Model Law also considered the European Commission's draft bankruptcy conventions of 1982 and 1995, which were both very strongly Universalist in nature. In particular, Article 4(2) of the 1995 convention provided: "*The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular … (e) the effects of insolvency on current contracts to which the debtor is party*". Article 17 provided: "*The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Contracting State as under the law of the State of the opening of proceedings*".[14]

The basic structure of the Model Law is straightforward. The starting point is that it enables the office-holder in the foreign insolvency proceedings (the Foreign Representitive) to apply for recognition and relief in other States. This will result in a level of relief in every case (Article 21) but also, the recognising court has jurisdiction to grant "any appropriate relief" including under the identified heads in article 22. These deliberately wide words confer a very flexible power to grant such relief as may be appropriate to give effect to the foreign insolvency proceedings in the recognising State. However, whilst this language gives the court scope to ensure that the main proceeding is effective in England as it is in the COMI, the discretion to grant such relief is not at large. Rather, it must be exercised in accordance with the criteria identified in the Model Law,

7/. Westbrook, "Choice of Avoidance Law in Global Insolvencies" (1991) 17 Brook. J. Int'l L. 499.
8/. Ibid.
9/. Fletcher, Insolvency in Private International Law (2nd ed., 2005), para 1.17.
10/. See, for example, UNCITRAL, "Possible future work: Cross-border insolvency" (A/CN.9/378/Add.4), 23 June 1993, pages 8 to 10.
11/. In re Maxwell Communication Corp., 170 BR 800, 816 (Bankr SDNY 1994).
12/. In re Culmer, 25 BR 621, 624 (Bankr. SD NY, 1982), cited in In re Axona International Credit & Commerce Ltd, 88 BR 597, 606 (Bankr. SD NY, 1988) and In re Davis, 191 BR 577, 583 (Bankr. SD NY 1996).
13/. In re Gee, 53 BR 891, 896 (Bankr. SD NY, 1985).
14/. The 1995 draft convention was ultimately recycled to become Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings ("the EC Insolvency Regulation"). In turn, the EC Insolvency Regulation was used as the template for Directives on the restructuring and winding-up of credit institutions and insurance companies, which were even more strongly Universalist, in that there was no scope whatsoever for any secondary proceedings. The Directive on the restructuring and winding-up of credit institutions was described by Gloster J in Lornamead Acquisitions Limited v Kaupthing Bank hf [2011] EWHC 2611 (Comm) at para 65 as "a purer form of unity and universalism, in which there can only be a single insolvency proceeding within the EEA, based in the credit institution's home Member State, which has automatic effect, and extends to all branches, throughout all states within it".

having regard to the purpose of the Model Law itself. First, the recognising court is entitled to decline to grant relief where it would be manifestly contrary to the public policy of the recognising State (Article 6). Secondly, the recognising court should grant relief if it is necessary for protecting the debtor's assets or the interests of the debtor's creditors (Article 21). Thirdly, the recognising court should ensure that the interests of all affected persons are adequately protected (Article 22). It is those conditions, in particular the public policy exception, that modifies the application of Universalism. Where these requirements are satisfied, relief should be granted to give effect to the position in the foreign insolvency proceedings.

Article 6 provides: *"Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of Great Britain or any part of it"*. This is a very high threshold, and deliberately so. The only policy that matters is public policy. And it is not enough for the position in the main proceedings to be contrary to public policy. Article 6 will only be engaged if it is manifestly contrary to public policy, i.e. so clearly contrary to the public policy of the recognising State that there is no room for debate. This is the main brake on the automatic application of the system of the foreign main proceeding and it demonstrates that the modification of universalism is quite limited. The UNCITRAL Guide to Enactment explains in para 20: *"The Model Law preserves the possibility of excluding or limiting any action in favour of the foreign proceeding, including recognition of the proceeding, on the basis of overriding public policy considerations, although it is expected that the public policy exception will be rarely used"*. It continues in para 89: *"The purpose of the expression 'manifestly' … is to emphasize that public policy exceptions should be interpreted restrictively and that Article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State"*.


MARK PHILLIPS QC

There are then two conditions that have to be satisfied on a case by case basis. Article 21(1) provides: *"Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief"*. This provides an important guide to the exercise of the court's discretion under Article 21. The court must be satisfied that the relief is necessary to protect the assets of the debtor or that it is otherwise in the interests of creditors. It is conceivable in this context that the court could conclude that a particular provision of the insolvency law of the foreign main proceeding should not be given effect because it is not "necessary to protect the assets of the debtor or the interests of the creditors". Different jurisdictions take subtly different views of what is required to protect the assets of the debtor. For example, in the U.S, Canada and, amongst others, Korea, they take the view that it is necessary

It is a matter of some regret that the English Courts have failed to embrace the Model Law

to protect the contracts of the debtor by preventing the enforcement of clauses terminating on insolvency. Otherwise, on an insolvency, the debtors' contracts are lost to the estate. In England, we don't take that approach (with the exception of contracts with utilities that must be maintained for a different reason). Which view of what is necessary should be applied? The law in the court of the foreign main proceeding or England? Is it enough for the counterparty to say that we don't have the same provision in England so the English court can't consider it necessary? Such an approach ignores the fundamental concept at the heart of the Model Law, namely, that effect is given to the insolvency regime in the foreign main proceeding. In that context, what is necessary should be guided by the law of the foreign main proceeding unless the policy behind it is manifestly contrary to public policy in England. The second condition is found in Article 22(1) which provides: "In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article or paragraph 6 of article 20, the court must be satisfied that the interests of the creditors (including any secured creditors or parties to hire-purchase agreements) and other interested persons, including if appropriate the debtor, are adequately protected". In this regard, para 162 of the UNCITRAL Guide to Enactment explains: *"The reference to the interests of creditors, the debtor and other interested parties in article 22, paragraph 1, provides useful elements to guide the court in exercising its powers under article 19 or 21"*. Article 22(1) is therefore another important guide to the exercise of the discretion under Article 21(1)[15].

Article 23 is of some significance in the context of *Rubin v Eurofinance*[16] because it is concerned with actions to avoid "Acts Detrimental to Creditors". It provides that: *"upon recognition of a foreign proceeding, the foreign representative has standing to make an application to the court for an order under or in connection with sections 238, 239, 243, 244, 245, 339 340, 342A, 343 of the Insolvency Act 1986…"* Anti avoidance actions can be brought by a Foreign Representative under the law of the recognising court. At the heart of this is a policy decision that transactions with a third party that are vulnerable are to be vulnerable under the system of law in the country where that person is subject to the jurisdiction. The Guide to the Model Law explains Article 23 (para 165):

"Under many national laws both individual creditors and insolvency administrators have a right to bring actions to avoid or otherwise render ineffective acts detrimental to creditors. …The procedural standing conferred by article 23 extends only to actions that are available to the local insolvency administrator in the context of an insolvency proceeding…"

Article 23 gives the Foreign Representative procedural standing to bring proceedings under the local anti avoidance provisions. In para 166, the Guide continues: *"The Model Law expressly provides that a foreign representative has "standing" … to initiate actions to avoid or otherwise render ineffective legal acts detrimental to creditors. The provision is drafted narrowly in that it does not create any substantive right regarding such actions and also does not provide any solution involving conflict of laws."* If a Foreign Representative can assert jurisdiction over someone in England, then he can bring proceedings against them under English anti avoidance provisions. What is apparent is that the Model Law was not framed on the basis that anti avoidance proceedings in the foreign main proceeding would be enforced in England. That is relevant to the decision in *Rubin*.

The draftsmen of the Model Law recognised that the international nature of the Model Law gives rise to a need for global consistency in interpretation. It would obviously be undesirable for the same provisions to mean different things in different jurisdictions. Article 8 of the Model Law (which has been replicated as Article 8 of Schedule 1 to the CBIR) therefore provides: "*In the interpretation of this Law, regard is to be had to its international origin and to* the need to promote uniformity *in its application*". This is a mandatory requirement to have regard to the interpretation of the Model Law elsewhere. Cases decided on provisions in the Model Law elsewhere in the world are at the least persuasive. Foreign courts, especially in the US, have been quick to recognise the importance of Article 8. In *O'Sullivan v Loy (In re Loy)*, 432 BR 551, 560 (ED Va 2010): "*if a textual provision of Chapter 15 is unclear or ambiguous, the court may then consider the Model Law and foreign interpretations of it as part of its interpretive task … In doing so, the court may consider how foreign jurisdictions have interpreted language in the Model Law that is similar to that of Chapter 15*". In *In re JSC BTA Bank,*

15/. See, for example, Re Atlas Bulk Shipping A/S; Larsen v Navios International Inc [2012] Bus LR 1124 at para 26.
16/. SA [2013] 1 AC 236

434 BR 334, 340 (Bankr SDNY 2010): "*The international origins of Chapter 15 is a dominant and consistent theme that underlies the various specific provisions of this chapter and that distinguishes Chapter 15 from all other chapters within the Bankruptcy Code. This is the one chapter of the Bankruptcy Code predicated on the concept of international coordination and cooperation and that encourages bankruptcy courts to look beyond the shores of the United States for interpretative guidance*".

Against that history and the enactment by Parliament of the Model Law through the Cross-border Insolvency Regulations 2006 it is a matter of some regret, not only that the English courts have failed to embrace the Model Law, but that some of the language used in declining to give effect to it as intended has been negative and backward looking. In *Rubin* Lord Collins preferred to look back to the "rather dated rules of private international law". In *Pan Ocean* Morgan J made a decision that would been recognised in Victorian England. If the approach in these decisions is to become settled, the treatment of cross-border insolvencies has advanced little from the state it was in when Sir Nicholas Browne-Wilkinson VC said that there had to be a better way. On one view there has been a triumph of Victorian rules of conflict of laws over the purpose and content of the Model Law. This approach has been met with "bewilderment" by some senior practitioners across the world and one senior insolvency judge described a recent decision on the Model Law as "just wrong". These are sentiments I share.

RETURN TO VICTORIAN VALUES?

Rubin

The decision in Rubin is well known. For the purposes of this article I focus only on the case of Eurofinance, who were not held to have submitted to the jurisdiction of the US court, and to the discussion of CBIR, although it isn't possible to understand Lord Collins' approach without considering his remarks about Lord Hoffman's speech in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508. In New York the equivalent of undervalue proceedings were brought against Eurofinance who were not present in New York and who did not defend the proceedings. Default and summary judgments having been entered, the Foreign Representative sought enforcement of the judgments in England under, amongst other things, the CBIR. It was held that the US Chapter 11 proceedings fell within the Model Law but that the Model Law did not extend to enforcing the US judgment. Two points are worth noting at the outset. First, there was no in personam jurisdiction over Eurofinance. Second, there was jurisdiction in England and, on the face of it, the Foreign Representative could have come to England and brought proceedings under Article 23 of the Model Law for relief under section 238 Insolvency Act 1986 on the basis that the transaction was a transaction at an undervalue. The existence of that remedy strongly suggested that under the structure of the Model Law, Eurofinance, not being subject to the in personam jurisdiction of the US court, should be sued in England and not in New York. On that basis the decision in the *Eurofinance* case was correct. What is disappointing is that in reaching that decision Lord Collins' analysis and remarks, some of which were relied upon by Morgan J in *Pan Ocean* were backward looking and dismissive of the Model Law. In his opening comments Lord Collins started by commenting that *"it is not only in recent times that there have been large insolvency proceedings with significant cross-border implications … but there is no doubt that today international co-operation in cross-border insolvencies has become a pressing need"*. (para 14).

However, he went on to say that *"there is no international unanimity or significant harmonisation on the details of insolvency law, because to a large extent insolvency law reflects national public policy.."*(para 15). *"…there has been a trend, but only a trend, to what is called universalism, that is the "administration of multinational insolvencies by a leading court applying a single bankruptcy law…What has emerged is what is called by specialists "modified universalism".* Lord Collins then went back to what Story meant by universalism in 1834 and what Professor Cheshire meant by "universality" in 1935. However, this is an English centric view of what is an international concept. What English academics and Judges might have thought of universalism or universality prior to the Model Law isn't in point. It is what UNCITRAL intended that has been enacted into English law and it is, with respect to Lord Collins, simply wrong to say that what we now have is part of a "trend, but only a trend". CBIR has enacted the Model Law in England. The approach to international insolvencies is found in the Model Law, the Guide to the Model Law and, under Article 8, the numerous cases from around the world on the meaning of the Model Law. The writings of Story, Professor Cheshire and the way in which the Russian banks were dealt with are of great interest and worthy of great respect, but they are no more than footnotes.

Lord Collins' approach is exemplified by para 27 of his judgment where he says that *"The CBIR supplement the common law, but do not supercede it."* Again, this is the wrong way around. Whilst we endorse the idea that the common law might, in an appropriate case, supplement the CBIR, it is the CBIR and the EU Regulation that provide us with the core of our applicable rules. Lord Collins' backward looking approach led Lord Collins to say, obiter, that *Cambridge Gas* was wrongly decided. *Cambridge Gas* was not a decision on the Model Law but Lord Collins' dictum that *"This would not be an incremental development of existing principles, but a radical departure from substantially settled law"* reveals that Lord Collins' view is that English law was fixed in the late 19th and early 20th centuries and he does not accept that the common law has moved on. Lord Mance reserved his opinion on this point (para 178) and Lord Clarke did not agree (para 192). I hope that it will not be long before the Privy Council or the Supreme Court decide that Lord Hoffmann was right and that the common law has developed along the path of modified universalism.

Pan Ocean

Pan Ocean was a Korean company in rehabilitation proceedings in the Republic of Korea. On 25 June 2013, the Korean rehabilitation proceedings in respect of Pan Ocean were recognised in England as the 'foreign main proceeding' under Article 17 of Schedule 1 to the CBIR. The Administrator was the 'foreign representative'. Before the commencement of the Korean rehabilitation proceedings, Pan Ocean entered into a contract with a Brazilian wood pulp provider, Fibria. Pursuant to the contract, Pan Ocean was required to provide five ships to carry cargoes for Fibria for twenty-five years. The contract was very profitable from the Pan Ocean's perspective, as the freight payable by Fibria under the contract was significantly higher than the market rate.

Under Korean law, the Administrator of a company in a rehabilitation proceeding was entitled to choose whether or not to perform an executory contract[17]. If he so chose, the other party cannot rely on a termination provision because to do so would cut across the election. Sums payable by the company are payable as an expense in the rehabilitation. The Administrator resolved that Pan Ocean should perform the contract and the Korean court authorised performance, as the profit that to Pan Ocean was important to the success of the restructuring. The counterparty, Fibria, said it wanted to rely on the Insolvency Termination Clause and relied on an English choice of law clause in the contract. In effect, Fibria argued that it could choose by contract to avoid the consequences of the insolvency in the COMI of Pan Ocean.

The Administrator issued an application seeking an Order under Article 21(1) to restrain Fibria from relying on the Insolvency Termination Clause in England and Wales. Under Article 21(1) of Schedule 1 to the CBIR, the English court has jurisdiction to grant "*any appropriate relief*". This gave rise to two main issues. The scope of relief available under Article 21(1) of Schedule 1 to the CBIR, and the basis on which the discretion to grant such relief should be exercised. In his judgment dated 30 June 2014 Morgan J dismissed the application. He refused to give any effect to the Korean reconstruction notwithstanding that Korea was Pan Ocean's COMI. Morgan J held that the "*any appropriate relief*" wording in Article 21(1) of Schedule 1 to the CBIR should be construed narrowly. The court's power under Article 21(1) is limited to granting such relief as would be available in a hypothetical English administration or liquidation of the Company. In a hypothetical English administration or liquidation of the Company, the Insolvency Termination Clause would be valid and it would not be possible for an English administrator or

17/. Article 119 of the Debtor Rehabilitation and Bankruptcy Act of Korea. There was a question raised as to whether or not this was the effect of Korean law and Morgan J declined to rule on it. For present purposes this question is immaterial.

liquidator to obtain any relief. Consequently, the English court has no jurisdiction under Article 21(1) of Schedule 1 to the CBIR to grant relief that goes beyond the relief available to an English administrator or liquidator. The effect of this decision is that recognition under the CBIR has the same effect in England as an ancillary winding up. Precisely the position before the Model Law. Alternatively, Morgan J held that it would be wrong for the English court to grant relief in the exercise of its discretion. The parties agreed that the contract would be governed by English law and the court should not seek to override their bargain. However, he went onto say that the English court should prefer the policy of English insolvency law (namely, that the Insolvency Termination Clause would be valid in an English administration or liquation) to the very different policy of Korean insolvency law. Again, the effect of this is to apply rules and policies of an English insolvency to the insolvency in the COMI. Morgan J's decision can be criticised on every point.

The starting point on the scope of the relief available is that the draftsmen of the Model Law ultimately decided to adopt the Section 304 type approach. Article 21(1) of the Model Law therefore enables the recognising court to grant "*any appropriate relief*" and what follows in the list is no more than relief included in the general rubric. That's why the word following the words *"any other relief"* is "*including*". This wording is deliberately very broad. The court has a wide discretion to grant any relief that is appropriate to give effect to the position in the foreign main proceeding. In England, Article 21 of the Model Law has become Article 21 of Schedule 1 to the CBIR. English authority favours giving

The effect of Morgan J's decision in Pan Ocean was to apply the rules and policies of an English insolvency to the insolvency in the COMI

these words a broad meaning. Lord Collins held in *Rubin* at para 129 that Article 21(1) of Schedule 1 to the CBIR "*should be given a purposive interpretation and should be widely construed in the light of the objects of the Model Law*". Similarly, Norris J held *Re Atlas Bulk Shipping A/S; Larsen v Navios International Inc*[18] that "*there is every reason to give Article 21 a broad scope*".

In the US, Article 21 of the Model Law has become Section 1521 of the US Bankruptcy Code. US authority also favours giving these words a broad meaning. See, for example, *In re Atlas Shipping A/S*, 404 BR 726, 739 (Bankr SD NY, 2009): "*The discretion that is granted is exceedingly broad*". US textbook writers take the same approach. Hon. Leif M. Clark, "Ancillary and Other Cross-Border Insolvency Cases under Chapter 15 of the Bankruptcy Code" (Lexis Nexis, 2008), p.70 says "*Section 1521 is a broad reservoir of equitable power, providing as it does the authorization for the court to grant 'any appropriate relief' … That is an exceedingly broad grant of discretion, and affords the judge considerable flexibility*". US courts have recognised that the "*appropriate relief*" wording of Article 21 of the Model Law derives from the "*appropriate relief*" wording of section 304 of the US Bankruptcy Code. See, in particular, *In re Atlas Shipping A/S*, 404 BR 726, 738-9 (Bankr SD NY, 2009) where it was said "*Many of the principles underlying section 304 remain in effect under Chapter 15 … In short, while Chapter 15 replaced section 304 and provided a more structured framework for recognizing foreign proceedings, Congress specifically granted courts discretion to fashion appropriate post-recognition relief, consistent with the principles underlying section 304*".[19]

Since the purpose of the Model Law is to provide a mechanism for giving effect to the foreign main proceeding, it has been recognised in the U.S that the relief available under Article 21(1) is not limited to the relief that would be available in a hypothetical domestic insolvency proceeding: see *In re Condor Insurance Ltd*, 601 F.3d 319 (5th Cir. 2010); *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685 (Bankr.S.D.N.Y.2010) and *In re Sino–Forest Corporation*, 501 B.R. 655 (Bankr. S.D.N.Y., 2013).

In the case of Pan Ocean, the US authorities go further that the general principles. In many cases, the US courts have granted relief to a foreign representative under Section 1521 of the US Bankruptcy Code to stay the termination of executory contracts. In particular, in cases where Canadian courts have made orders staying counterparties from terminating executory contracts, US courts have made orders under Chapter 15 to prevent or restrain the termination of any executory contracts governed by US law. See Glenn et al, "Comity and its

18/. [2012] Bus LR 1124 at para 23
19/. See also Leif M Clark and Karen Goldstein, "Sacred Cows: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies" (2011) 64 Tex Int'l LJ 513, 524: "Not surprisingly, the case law under former section 304 is still relevant to the interpretation of Chapter 15, especially as it concerns the remedies available to a foreign representative once recognition as been granted".

Limits: Trends in Cross-Border Insolvencies" (American Bankruptcy Institute, 2013), p.50: "*Both provisional and final relief under Chapter 15 have been used to aid CCAA proceedings by … providing a Debtor with protection against ipso facto termination of its US executory contracts*". In one such case, *In re Gandi Innovations Holdings, LLC*, 2009 Bankr LEXIS 2751 (Bankr. W.D. Texas June 5, 2009), the Canadian court granted an initial order restraining the termination of executory contracts. The Canadian monitor applied to the US court for recognition of the CCAA proceeding under Chapter 15. Hon. Leif M. Clark, US Bankruptcy Judge, granted recognition and made an order under Section 1521 of the US Bankruptcy Code expressly prohibiting the termination of executory contracts. The US court's order under Section 1521 of the US Bankruptcy Code provided: "*Any party wishing to terminate, modify, alter or interfere with any executory contract … for any reason must bring an action or proceeding for such relief in the CCAA proceeding prior to taking any action with respect to such contracts*". Similarly, in *In re W.C. Wood Corp., Ltd.*, Case No. 09-11893 (KG) (Bankr. D. Del. June 1, 2009), the Canadian court commenced a proceeding in respect of the company under the CCAA. The Canadian monitor applied to the US court for recognition of the CCAA proceeding. Hon. Kevin Gross, US Bankruptcy Judge, granted recognition and made an order under Section 1521 of the US Bankruptcy Code expressly prohibiting the termination of executory contracts. The US court's order provided: "*No person shall discontinue, fail to honor, alter, interfere with, suspend, withdraw, accelerate, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, license or permit in favour of or held by the Applicants or in connection with any of the Property or the Business, except with the written consent of the Applicants and the Monitor, or the leave of the Ontario court or unless such contract, agreement or license expired by its own terms without acceleration or declaration of a default*". This is precisely the same relief as that sought in the same circumstances in Pan Ocean.

Canadian courts have adopted materially the same approach to the Canadian version of the Model Law. For example, in *Re Lightsquared LP* (2012) CBR (5th) 321, the company went into Chapter 11 proceedings in the United States. The debtor-in-possession applied to the Canadian court for recognition and relief under section 49(1) of the CCAA in the form of an order "*restraining the right of any person or entity to, among other things, discontinue or terminate any supply of products or services to the Chapter 11 Debtors*". The Canadian court held that such an order was "*appropriate in the circumstances*" (para 38) and granted an order in those terms (para 39).

Morgan J's reasoning in rejecting the application: wide words are too wide

In rejecting the application Morgan J first held that these words "*any appropriate relief*" did not provide the court with jurisdiction to grant relief to give effect to the position in the foreign main proceeding. He held that the court's power under Article 21(1) is limited to making orders that have the effect of replicating the position that would exist in a hypothetical English liquidation or administration. Whilst recognising that the words "*any appropriate relief*" are "*wide words*" (para 79) which are "*capable of being given a wide literal meaning*" (para 105), Morgan J held that the width of the words proved too much. In para 79 he said:

"*Although the argument in the present case focussed on the appropriateness of the English court granting the sort of relief which a Korean court would grant, applying Korean insolvency law, it is only right to acknowledge that if the administrator is right in his approach to article 21, then the English court has power to grant any relief which it thinks fit, whether that relief would be available under the law of the State of the foreign proceedings or under English law or, indeed, under some other system of law. On this basis, the English court would have power to reflect the fact that Fibria is a Brazilian company and to apply Brazilian law, if the English court thought that relief under Brazilian law was appropriate. Indeed, the English court could express approval for the insolvency laws which apply in some entirely different jurisdiction and persuade itself that it was appropriate that such laws should be applied in the case before it. Further, if the court has power to do what it thinks is appropriate, it may not be necessary to find that the relief which is sought is relief which is available under any current system of law anywhere. If there were a pending proposal, for example from the Law Commission, to reform English insolvency law, then on the administrator's approach, the English court would have power to anticipate that reform and to hold that granting relief in accordance with the proposed reform would be 'appropriate'. Whilst some of these examples are more fanciful than others, they do indicate that the administrator's submissions result in the English court having the widest possible power to do whatever it thinks fit, whether its order is in accordance with the law of the foreign insolvency proceedings or not*" (emphasis added).

This reasoning was essentially that a wide construction would be too wide. Morgan J's suggestion that this could result in the granting of relief in accordance with (say) Brazilian law or some other law or perhaps even no law at all was plainly wrong. The words "*any appropriate relief*" are to be construed in the context of Modified Universalism. The

recognising court should take appropriate steps to give effect to the position in the foreign main proceeding. There is only one foreign main proceeding and only one system of law that governs that foreign main proceeding. There is no basis whatsoever for thinking that the English court might grant relief to replicate the position under any other system of law.

Article 21 has been enacted differently in the US and Canada

Morgan J then declined to follow the US authorities on the meaning of "*any appropriate relief*" in Section 1521 of the US Bankruptcy Code, essentially on the basis that Section 1521 of the US Bankruptcy Code was based on the former section 304 of the US Bankruptcy Code, whereas Article 21 of Schedule 1 to the CBIR was not. He said in para 106:

"*[The US courts'] reasoning relied on the position which pertained under section 304 of the former US Bankruptcy Code before the implementation of the Model Law. I can see that if the position under section 304 of the former Code was that the US court could grant 'any appropriate relief' and that it had been established that those words allowed the US court to apply the law of the foreign proceedings, then the same words should have the same effect in section 1521 of the Bankruptcy Code, which implemented the Model Law. However, there is no comparable legislative history in Great Britain and it is open to me to conclude that the United States have implemented the Model Law in a way which is not identical to the way in which it has been implemented in Great Britain*"

Morgan J relied on a finding that Section 1521 of the US Bankruptcy Code was based on the old Section 304 and that there was "*no comparable legislative history in Great Britain*". The difficulty here is that there is a shared legislative history. Article 21 of

US and Canadian courts can restrain counterparties from relying on contractual termination clauses

Schedule 1 to the CBIR has the same origins as Section 1521 of the US Bankruptcy Code: they both replicate Article 21 of the Model Law. It is therefore impossible to explain away the US cases by the fact that Section 1521 of the US Bankruptcy Code is based on Section 304, whereas Article 21 of the Schedule 1 to the CBIR is not. The reality is that both the US Article 1521 and the English Article 21 come from Article 21 of the Model Law, which in turn is based on the wording of Section 304 of the US Bankruptcy Code in this important respect. As the US courts have recognised, the "*appropriate relief*" wording in Section 304 of the US Bankruptcy Code was copied in Article 21 of the Model Law. There is therefore a "*comparable legislative history*" in Great Britain, because the relevant wording of Article 21 of the English version of the Model Law derives from Section 304 as well.

Morgan J also declined to follow the Canadian authorities. The Judge's approach to both the US and the Canadian cases fails to comply with the requirements of Article 8 of Schedule 1 to the CBIR, which requires the courts of different countries to interpret the Model Law uniformly throughout the world. Morgan J's conclusion means that the English meaning of Article 21 of the Model Law will be radically different from the US and Canadian meaning of Article 21 of the Model Law. This is contrary to the intention of Article 8. He should have held that Article 8 required him to apply the US and Canadian authorities in the interests of global consistency of interpretation.

Furthermore, US and Canadian courts have recognised that their equivalents of the CBIR (which, like the CBIR, reflect the Model Law) enable them to make Orders to restrain counterparties from relying on contractual termination clauses. In circumstances where there is an emerging global consensus that the power in Article 21 enables the recognising court to give effect to the position in the foreign main proceeding, and specifically that the recognising court will give effect to a provision in the main proceeding preventing enforcement of ipso facto clauses, that is what Morgan J should have done.

The public policy exception doesn't apply

Morgan J held that Article 6 of the Model Law, the public policy exception, was not relevant to interpreting the scope of Article 21. The obvious answer to this is that Article 6 is unnecessary if Article 21(1) were limited to the relief available in an English liquidation or administration, because relief available in an English liquidation or administration would never be manifestly contrary to the public policy of Great Britain. Morgan J rejected this argument in paragraph 104:

"*This argument as to the significance of article 6 ignores the fact that article 6 is not restricted to dealing with cases which might involve the grant of 'appropriate relief' within article 21(1). Article 6 deals with all of the provisions of the CBIR, which include many specific provisions. It may therefore be the case that an application is made to the court to take action under such a specific provision,*

where the court may have to consider whether the action in question would be contrary to public policy in English law".

The existence of Article 6 shows that the CBIR enables the court to grant relief to replicate the position in the foreign main proceeding, subject to the 'public policy' exception in Article 6. That, in essence, is how the Model Law is intended to work. Article 6 is the key modification to the doctrine of Universalism, in that it enables the recognising court to refuse to give effect to the position in the foreign main proceeding where to do so would be manifestly contrary to the public policy of the recognising court. Morgan J's reasoning in para 104 of his judgment fails to address this argument. It is true to say that "*Article 6 deals with all of the provisions of the CBIR*", but that must include Article 21 because Article 21 is the provision under which the recognising court grants relief. If Article 6 isn't relevant to Article 21 is raises a question what Article 6 is there for.

The case of *In Re Toft*, 453 B.R. 186 (Bankr. S.D.N.Y. 2011), which Morgan J mentioned in para 104 of the Judgment, fails to support his analysis. The German bankruptcy trustee in that case was asking the US court to make Orders to give effect to the position in the German bankruptcy proceeding, in accordance with the doctrine of Modified Universalism. Specifically, the German bankruptcy law permitted the interception of the bankrupt's mail. The US court refused to make orders giving effect to the position in the German bankruptcy proceeding, on the basis that the interception of mail was manifestly contrary to US public policy.

The existence of Article 6 does therefore show that relief under the Model Law is not limited to the relief available under the laws of the recognising court. If relief under the Model Law were limited to the relief available under the laws of the recognising court, the public policy exception in Article 6 would be unnecessary.

The Traveux Preparatoires were misinterpreted in the US

Finally, Morgan J held that comments in the *travaux préparatoires* in respect of the drafting history of the Model Law required a limited meaning to be given to the words "*any appropriate relief*". He said in para 87: "*My reaction to the discussions of the working group is that it seems improbable that the working group, having deleted (from what is now Article 21(1)(g)) a power for the recognising court to apply the law of the foreign proceeding, intended to bring back in such a power under the general wording which refers to 'any appropriate relief'*." He returned to this point in para 106, in which he dealt with the reasoning of the United States Court of Appeals for the Fifth Circuit in *In re Condor Insurance Ltd*, 601 F.3d 319 (5th Cir. 2010) by making the surprising statement: "*I do not think their description of the various reports of the working group on the Model Law was accurate*". He concluded in para 107: "*On my reading of the reports of the working group, it was not intended that 'any appropriate relief' would allow the recognising court to go beyond the relief it would grant in relation to a domestic insolvency*".

If the *travaux préparatoires* are open to such widely differing interpretations, it is probably unwise to place much reliance on them. However, since Morgan J mentioned aspects of the *travaux préparatoires*, his analysis is worth considering. It is essential in this regard to distinguish between (i) the type of relief in question (e.g. declaration, injunction, money judgment) and (ii) the entirely separate question of whether that particular type of relief would be available in precisely the same factual circumstances in an English administration or liquidation. It seems that the parts of the *travaux préparatoires* identified by Morgan J were dealing merely with the type of relief. The working group concluded that it would be unrealistic to permit relief of a type unknown to the law of the recognising court. The relief sought must be of a type which is "*cognizable*" under the law of the recognising court, to quote the language in *Toft* ("*the relief requested must not only be cognizable under US law but not manifestly contrary to US public policy*"). This qualification poses no problem iwhere the Foreign Representative seeks injunctive relief. This is a type of relief that is known to English law. It is not necessary to go on to show that exactly the same relief would be granted on the same facts in a local administration or liquidation. If that was a requirement, then we have progressed no further than the days of ancillary liquidations.

Turning to how the Model Law should have been applied in the circumstances of Pan Ocean, the starting point is to address the jurisdictional requirements of Articles 21 and 22. Applying Article 21, an Order restraining Fibria from relying on the Insolvency Termination Clause in England and Wales was necessary to protect the Pan Ocean's assets, namely its contract and the interests of the Company's creditors in the performance of that contract going forward. The contract in question was highly profitable and termination would have adversely affected the reconstruction that had been approved by the Korean court. Applying Article 22, Fibria's interests were adequately protected because Pan Ocean was performing the contract and any sums due under the contract were payable as an expense. It followed that prima facie, relief should be given to the Foreign Representative to give effect to the provisions of Korean insolvency law that prevented Fibria terminating the contract on the ground that Pan

Ocean had gone into an insolvency procedure.

That leaves Article 6, the public policy exception. Article 6 was not engaged. An order restraining the termination of an executory contract – which might pejoratively be described as an 'interference' with contractual rights – is not "*manifestly contrary to public policy*". It is common for insolvency law to 'interfere' with pre-insolvency contractual rights. As Field J stated at first instance in *AWB Geneva SA v North America Steamships Ltd* [2007] 1 CLC 749 at paragraph 31, "*it is a common feature of insolvency regimes that contractual rights can be overridden*". Field J cited, amongst other things, the disclaimer of unprofitable contracts, the mandatory insolvency set-off and compromises and arrangement under Part I of the Insolvency Act 1986 and schemes of arrangement under what was then section 425 of the Companies Act 1985. It is common for contractual rights governed by English law to be overridden by foreign insolvency law. Indeed, that is precisely the effect of the EC Insolvency Regulation. As the eighth recital of the EC Insolvency Regulation states: "*In order to achieve the aim of improving the efficiency and effectiveness of insolvency having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States*". As a result, Article 4(2) of the EC Insolvency Regulation provides that the law of the State of the opening of proceedings shall determine the conditions for the opening of these proceedings, their conduct and their closure. Article 4(2)(e) and Article 4(2)(k) provide that such law governs "*the effects of insolvency proceedings on current contracts to which the debtor is a party*" and "*creditors' rights after the closure of insolvency proceedings*". Simply because in an English Administration we don't override ipso facto clauses doesn't mean that it is manifestly contrary to public policy to give effect to an insolvency regime that does. In any event such a result is not unexpected or unfair. It is entirely predictable and typical for insolvency law to supervene when one party to a contract enters into insolvency proceedings. As Norris J held in *Re Atlas Bulk Shipping A/S; Larsen v Navios International Inc* [2012] Bus LR 1124 (a case on the CBIR) at para 26: "*Navios contracted with a Danish entity. The Danish bankruptcy law recognises the principle of equal distribution and strikes a balance between the interests of the person having a claim capable of amounting to a set-off and the interests of the general body of creditors. Those who contract with a Danish entity might expect that balance to govern their relationships inter se when insolvency supervenes*". Similarly, in *AWB Geneva SA v North America Steamships Ltd* [2007] 1 CLC 749, Field J held in para 31: "*Both AWB and Pioneer knew or had the means of knowing that NASL carried on business and was incorporated in Canada. Accordingly, it was entirely predictable that if NASL were to become insolvent during the currency of the 2007 FFAs, the insolvency would fall to be dealt with under the applicable Canadian legislation and it is a common feature of insolvency regimes that contractual rights can be overridden*". In *Firswood Ltd v Petra Bank* [1996] CLC 608, Schiemann LJ (with whom Waite and Russell LJJ agreed) held at p.618: "*The assignee can have no higher claim to priority than the creditor; the creditor has chosen to contract with a company whose domicile is Jordan and therefore has to take Jordanian law as governing the priorities in the distribution of the company's assets*".

Where parties contract with another, they should look at the effect of insolvency proceedings in the COMI of the other party

When parties contract with another, they should look at the effect of insolvency proceedings in the COMI of the other party. That is the system of law that governs what happens when the other party goes into an insolvency regime. You can't contract out of that any more than you can contract out of the effect of an English insolvency. By choice of law you can't choose the applicable insolvency regime, but that is the effect of Morgan J's decision.

The future

The decision in *Pan Ocean* is a first instance decision and Lord Collins' more trenchant remarks in *Rubin* were obiter. We now stand at a crossroads. The rest of the the Model Law world appears to be embracing it and approaching international insolvencies from a perspective of modified universalism as was intended. England appears to be rowing back from the Model Law. There will either be a string of cases that explain, as Morgan J did in *Pan Ocean* why in England we've enacted the Model Law differently to other jurisdictions, and we will return to the territorialist approach of the Victorian era, or the more trenchant statements in *Rubin* and *Pan Ocean* will be explained away. It is only the latter path that will answer Sir Nicholas Browne-Wilkinson VCs call for a "better way" in 1991 and I hope that the courts decide that the time has come to take it.

The Eclairs case and the 'proper purpose' duty head to the Supreme Court

SIMON MORTIMORE QC examines the sharp difference of judicial opinion in the Eclairs case and suggests why the proper purpose doctrine should not restrict an express power to interfere with rights and powers of shareholders

The Ukrainian and Russian oil and gas fields are a fertile source of conflict, but few might have expected that a battle for control of a company with interests in those fields would give rise to one of the most important company law cases to come before the English courts in recent years. Reduced to its essence, the issue in the case is whether directors used their corporate power to restrict voting rights to enforce transparency and disclosure about interests in shares for the improper purpose of enabling the members to pass special resolutions to protect the company from corporate raiders while the restrictions were in place. This issue has exposed a sharp difference opinion among the judges in the Chancery Division and the Court of Appeal.[1] In view of the importance of the issue, the Court of Appeal gave permission to appeal to the Supreme Court.

The proper purpose doctrine in company law derives from equity cases about fraud on a power or, in modern language, "*an improper use of power for a collateral purpose*".[2] In company law the doctrine operates in two ways. If a director exercises a power otherwise than for the purposes for which it was conferred, he breaches the general fiduciary duty now stated in s 171(b) of the Companies Act 2006. Also, since the exercise of the power is regarded as if it had been in excess of power, the consequent transaction is invalid,[3] unless it is protected by the provisions in Part 4 of the 2006 Act or the "indoor management" principle.[4] This case is concerned with the latter operation only, because it was alleged that restrictions on the voting rights of the holders of two blocks of shares, imposed by the board under powers in the company's articles, were invalid.

Facts

JKX Oil & Gas PLC ("JKX") is an English public company whose ordinary shares are quoted on the London Stock Exchange. It is engaged, mainly through a Ukrainian subsidiary, in the development and exploitation of oil and gas reserves in the Ukraine and Russia.

Through nominees, Eclairs Group Ltd ("Eclairs") and Glengarry Overseas Ltd ("Glengarry") hold and at all relevant times held 27.55% and 11.45% respectively of the company's ordinary shares. Eclairs and Glengarry are said to be controlled by Ukrainian oligarchs and their associates.

The board of JKX became concerned that Eclairs and Glengarry were about to embark on a corporate raid on the company, which was likely to involve destabilising it by replacing senior management and blocking necessary fundraising processes with a view to

1/. The judgment of Mann J at first instance is reported at [2013] EWHC 2631 (Ch), [2014] 1 BCLC 202. The Court of Appeal judgment, where Longmore LJ and Sir Robin Jacob reversed Mann J on this issue, with Briggs LJ dissenting, is reported at [2014] EWCA Civ 640, [2014] 2 BCLC 164.
2/. Hillsdown Holdings plc v Pension Ombudsman [1997] 1 All ER 862, 883, per Knox J.
3/. Regentcrest plc v Cohen [2001] 2 BCLC 80 at [123].
4/. Royal British Bank v Turquand (1856) 6 E&B 327.

JKX OIL DEVELOP OIL AND GAS IN UKRAINE

acquiring the company for less than its proper value.[5]

The board served notices under s 793 of the 2006 Act on Eclairs, Glengarry and others seeking disclosure of interests in the shares beneficially held by them and of arrangements between them. The board considered that the responses were false or materially incorrect and so, under powers conferred by Article 42, it issued restriction notices, which prevented the transfer or exercise of voting rights in respect of the shares beneficially owned by Eclairs and Glengarry (the "Restricted Shares"). As a result, votes could not be cast in respect of the Restricted Shares at the AGM at which special and ordinary resolutions would be proposed to protect the company from corporate raiders.

The proceedings

Eclairs and Glengarry brought proceedings to challenge the restrictions and for injunctions to prevent the resolutions from being voted on. There was an expedited trial before Mann J. The facts and legal arguments explored during the 6-day trial were complex and his judgment runs to 262 paragraphs. He decided that (i) the beneficial owners had standing to bring the claim,[6] (ii) the disclosure notices were valid and the challenges to their form and content failed,[7] and (iii) the directors had reasonable cause for believing the answers were false or materially incorrect, with the result that, under Article 42, they were entitled to treat the information requested as not having been provided. However, he held that the restrictions were invalid as having been imposed for an improper purpose. This was because he found that the main purpose of the directors in imposing the restrictions was, while they were in force, to secure the passage of the special and ordinary resolutions at the AGM, which Eclairs and Glengarry would have been able to block, in the case of the special resolutions, and might have been able to block, in the case of the ordinary resolutions, if their nominees were able to vote on them.[8] He found that obtaining information about the Restricted Shares was at most a subsidiary purpose.[9]

As an interim measure, the parties agreed that the AGM would take place and that the Restricted Shares could be voted, subject to the votes being invalid if the restrictions were found to be valid. The consequence of Mann

5/. That remains the board's position; see its letter to shareholders dated 14 May 2014 on the JKX website.
6/. The nominee shareholders were parties to the proceedings, but took no part in them.
7/. Eclairs and Glengarry never argued that the s 793 disclosure notices were invalid as having been issued for improper purposes; their only complaint was as to the content of those notices.
8/. At [189], [200] and [213].
9/. At [189] and [213].

ECLAIR'S UKRAINIAN OWNER, IGOR KOLOMOISKY

J's judgment, subject to appeal, was that the votes of Eclairs and Glengarry were valid and sufficient in number to block the special resolutions, but not the ordinary resolutions.

The Court of Appeal, after a 3-day hearing, unanimously agreed with Mann J that Eclairs and Glengarry had standing, the disclosure notices were valid and the directors had reasonable cause for believing the answers were false or materially incorrect. Longmore LJ and Sir Robin Jacob (the "Majority") held that the restrictions had not been imposed for an improper purpose and were valid with the consequence that the votes in respect of the Restricted Shares at the AGM were invalid and so all the resolutions were duly passed. Briggs LJ dissented and agreed with Mann J on this issue.

The circumstances of the case before the Supreme Court will be a good deal simpler than they were before Mann J and the Court of Appeal. There is no longer an issue about standing, so that Eclairs and Glengarry can be treated as if they are the registered shareholders. Also, there are no longer issues about the validity of the s 793 disclosure notices or the insufficiency of the responses so that Eclairs and Glengarry are in the same position as they would have been in if they had failed entirely to respond to the notices. Moreover there would be no reason for the Supreme Court to treat the restrictions as providing "*a short-term window of opportunity*"[10] during which the special and ordinary resolutions could be passed, since there seems to be no question of further answers being provided in response to the notices which might prevent the directors from continuing to have reasonable cause to believe that the answers were false or materially incorrect. The only issue before the Supreme Court is whether the directors' purpose in imposing the restrictions was improper.

In order to appreciate the reasoning of the judgments and the issue as it now stands before the Supreme Court, it is necessary to say something about the provisions of Part 22 of the 2006 Act and Article 42 of JKX's Articles.

Part 22 of the 2006 Act

These provisions give a public company power, by giving a notice under s 793, to obtain from a person who is or was interested in shares in the company information about interests in the company's shares, including information about

10/. Briggs LJ at [121].

agreements and arrangements about the exercise of voting and other rights.[11] If the person on whom the notice is served fails to give the information required by the notice within the time specified in it, the company may apply to the court for a restriction order, which makes void any transfer of the shares and prevents the exercise of voting rights and the payment of dividends.[12] A person who fails to provide information required by a notice under s 793 or who attempts to evade a restriction order commits a criminal offence.[13] The restrictions may be relaxed if they unfairly affect the rights of third parties[14] and they may also be removed if the relevant facts have been disclosed and no unfair advantage has accrued to any person or if the shares are to be sold.[15] Ten percent of the members may require the company to exercise its powers under s 793.[16] The company must maintain a register of interests disclosed pursuant to a requirement under s 793, which is open to inspection by any person.[17] The provisions of Part 22 are an important aid to transparency for the benefit of the board, shareholders and anyone considering buying shares or otherwise interested in dealing with the company. The Small Business, Enterprise and Employment Bill, now before Parliament, will, when enacted, extend them to private companies.[18]

The company has "the unqualified right to insist that contests of hearts and minds of shareholders are conducted with cards on the table"

Part 22 derives, largely without change, from provisions in Part VI of the Companies Act 1985, which restated provisions in the Companies Act 1981. Between 1984 and 1989 these provisions generated a significant body of case law, usually where a company had become concerned about a concealed accumulation of shares, perhaps with a view to a corporate raid or takeover bid.[19] After 1989, there were no further reported cases concerning these provisions until the *Eclairs* case in 2013. Some of these earlier cases are discussed in the judgments of Mann J and the Court of Appeal, because they identify the legal framework within which the imposition of a restriction under a company's articles operates.

Hoffmann J summarised the legal position under the predecessors of Part 22 in *Re TR Technology Investment plc*:[20]

"From Re Geers Gross plc[21] I derive the proposition that prima facie the company has an unqualified right to know who is the real owner of its shares. If it appears on the hearing of the originating summons[22] that sufficient information has not been provided, the company will prima facie be entitled to a restriction order.[23] There will be no need to show that damages are not an adequate remedy or that the company will suffer loss if the information is not provided. Nor will it matter that the main reason why the board of the company want the information to be provided is that they hope it will enable them to ward off a predator and stay in office. The company, through its existing board, is given the unqualified right to insist that contests of hearts and minds of shareholders are conducted with cards on the table."

If a person fails to answer a s 793 notice or provides an incorrect or incomplete answer, he has only himself to blame if legal proceedings are brought for a restriction order. On the other hand the court was alive to the misuse of without notice applications for restriction orders. In *Re Ricardo Group plc*[24] Millett J said:

11/. Sections 820-825 Companies Act 2006.
12/. Sections 794 and 797 Companies Act 2006. The court has no power to select the restrictions that may apply: Re Lonrho plc (No 4) [1990] BCLC 151.
13/. Sections 795 and 798 Companies Act 2006.
14/. Section 799 Companies Act 2006.
15/. Section 800 Companies Act 2006.
16/. Sections 803-807 Companies Act 2006.
17/. Sections 808-819 Companies Act 2006.
18/. See my article, A New Spotlight on Company Controllers, South Square Digest, May 2014, at pages 62-67 for the origin of this legislation.
19/. Many of the cases involved participation by members of South Square (Michael Crystal QC, the author, Richard Adkins QC and Mark Phillips QC), although in those days we were at 3 Paper Buildings, Temple.
20/. [1988] BCLC 256, 275, 276. This passage is not cited in the judgments in the Eclairs case.
21/. 1987] 1 WLR 837, 1649, 1653, 1654, CA. Also see Re FH Lloyd Holdings plc [1985] BCLC 293, 300, 301.
22/. Now proceedings for a restriction order under Part 22 of the 2006 Act are begun by Part 8 claim form: CPR 49 (specialist proceedings) and Practice Direction 49A. The common feature of claims assigned to Part 8 is that they are unlikely to involve a substantial dispute of fact.
23/. Millett J took the same view in Re The Bestwood plc (1989) 5 BCC 620, 623. At an interim hearing the court may accept an undertaking not to dispose of the shares, pending the hearing of the originating summons (now Part 8 claim) for a restriction order: Re TR Technology Investment Trust plc [1988] BCLC 256; Re Lonrho plc (No 3) [1989] BCLC 480. In Re Ricardo Group plc (No 3) [1989] BCLC 771 the court discharged a restriction order so that, pursuant to an undertaking given before the restriction order was made, a shareholder could vote on a bid.
24/. [1989] BCLC 566, 577. Overhasty resort to court for an ex parte order will be penalised in costs: Re Lonrho plc (No 2) [1989] BCLC 309.

The Majority held that the misuse of power doctrine does not have a significant place in the operation of Article 42 or Part 22 of the 2006 Act

"these restriction orders are not to be used as weapons to gain a temporary advantage over an opponent in a contested takeover bid. Their only legitimate purpose is to coerce a recalcitrant respondent into providing the requisite information. The company ought not to rush off to court without prior warning and seek ex parte relief, unless it has reason to believe (a) that the respondent is deliberately withholding information, and (b) that if prior warning were given the respondent would dispose of his shares and thus evade the imposition of restrictions without which the information would be unlikely to be forthcoming."

Those considerations apply to without notice applications. If by the time of the hearing of the Part 8 claim the respondent has still not provided a proper answer to the s 793 notice, the court would make a restriction order, since the company is prime facie entitled to it. If that had the effect of furnishing the company with a weapon in the corporate battle, so be it. If the court considered that proper information had been provided, a restriction order would, of course, not be made.[25] This is because restriction orders "*are granted as a sanction to compel the provision of information to which the company is entitled*" and no sanction is needed or appropriate where the information has been provided.[26]

Article 42

Where JKX has not received the information about specified shares required by a disclosure notice issued on its behalf pursuant to s 793, Article 42(2)[27] enables the board, without having to apply to court, to issue a restriction notice which applies to the member holding the specified shares. Article 42(3) gives the board power to determine that one or more of the following restrictions should apply in respect of the specified shares: (i) the member may not attend meetings or exercise voting rights, (ii) no transfer shall be effective, and (iii) no dividends shall be paid.[28] In this case the board determined that restrictions (i) and (ii), but not (iii) should apply to the Restricted Shares.

By analogy with the cases on the statutory provisions, the directors might abuse their power to impose restrictions if they did not give the shareholder or other person to whom the disclosure notice was directed a reasonable time to answer it or to correct any errors or omissions in his answers. But if, after being given that time, the shareholder or other person remained in default, there would be no reason for the board not to impose restrictions. That is what the court would do if the matter were before it. The only alternative would be for board to do nothing, but that might invite complaints from other shareholders.

Article 42(4) provides that the restrictions shall cease to apply (i) if the board so determines, (ii) 7 days after receipt of the required information, or (iii) on receipt of an executed transfer instrument to an unconnected party following a sale on an exchange or takeover.

The judgment of the Majority

The joint judgment of the Majority on the improper purpose point is brief and trenchant.[29] There were three broad reasons why they concluded that the restrictions were validly imposed.

First,[30] the ability of the board to impose restrictions was conditional on the choice of the respondent to the s 793 notice. It is only if he chooses not to give a proper answer that the board is able to exercise its power to impose restrictions. The improper purpose cases relied on by Eclairs and Glengarry[31] could be distinguished as being cases about the exercise by directors of a unilateral power, not a conditional power whose exercise depends on the conduct of the other party. Accordingly the misuse of power doctrine does not have a significant place in the operation of Article 42 or Part 22 of the 2006 Act.

Second,[32] the reason why the directors have the power to restrict voting rights is to prevent the shareholder from being able to vote at a general meeting where there has been a failure to provide the requested information. The restriction should remain in place so long as the default continues. *Re Ricardo Group*

25/. Re Ricardo Group plc [1989] BCLC 566, 572; Re Ricardo Group plc (No 2) [1989] BCLC 766.
26/. Re Ricardo Group plc [1989] BCLC 566, 572.
27/. Article 42 is set out in Mann J's judgment at [85].
28/. As Briggs LJ noted at [3], the articles of many public companies include such a provision.
29/. At [130]-[144].
30/. [135]-[138].
31/. Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821, PC and Hogg v Cramphorn Ltd [1967] Ch 254.
32/. [139]-[140].

plc is not contrary to this view, because Millett J's observations were made in a case where full information had been provided.

Third,[33] if restrictions could only be imposed if the dominant purpose is to obtain information and not to take advantage of a failure to provide it, Article 42 and the statutory provisions would be emasculated and deceitful conduct would be encouraged.

The judgments of Mann J and Briggs LJ

These judges viewed the matter in a completely different way. Mann J saw this as a case where the directors used "*a power given for a limited purpose, related to a failure to give proper information in response to a s 793 notice, and then to apply it for another, namely to stop shareholders voting so that the rights of shareholders could be successfully changed*".[34] That impermissible purpose was "*a substantial, if not principal, purpose of their exercising the power*". He refused to consider whether the directors would have made the same decision to impose restrictions even if they had not had the improper purpose.[35]

Briggs LJ agreed that "*the Restrictions were vitiated because of the improper predominant purpose for which JKX's directors imposed them*".[36] His reasoning proceeded as follows. *First*, he identified the correct general approach to the identification of the purposes for which directors' powers are conferred.[37] He followed Lord Wilberforce's advice to the Privy Council in *Howard Smith v Ampol*,[38] by drawing a distinction between the exercise of powers in matters of management, where the court will respect the directors' skill and judgment, and powers which are capable of affecting the company's constitution at shareholder level and which are exercised in a way that causes unconstitutional interference with shareholders' rights. In the latter case it is irrelevant that the directors were acting in good faith and in what they believed to be in the best interests of the company. Briggs LJ also followed Buckley J in *Hogg v Cramphorn*[39] who had held that an issue of shares was liable to be set aside where the directors had exercised their fiduciary power to issue shares "*for an improper motive*", namely to manipulate the voting position among shareholders.

GLANGARRY'S ALEXANDER ZHUKOV (LEFT) WITH RUSSIAN PRIME MINISTER DMITRY MEDVEDEV

Second, Briggs LJ turned to the purpose of the power in Article 42, which he found was substantially the same as the purposes of the restrictions in Part 22.[40] He considered that case law on the predecessors of Part 22 showed that the statutory power to seek restrictions had two purposes: (i) to compel "*the provision of the relevant information from persons unwilling to provide it*",[41] and (ii) "*not merely to deprive persons who are tight-fisted with relevant*

33/. [141]-[143].
34/. At [227].
35/. At [228]-[233].
36/. At [93].
37/. [94]-[102].
38/. [1974] AC 821, 834-838.
39/. [1967] Ch 254, 267-269.
40/. [110].
41/. [103].

SIMON MORTIMORE QC

information from obtaining relevant advantages, but also to protect the company and its shareholders from the consequences of being kept in the dark" about the relevant interests, agreements or arrangements.[42]

Third, he held that the predominant purpose of the directors (to take advantage of the restrictions to push through special resolutions)[43] was not within the scope of the purposes that he had identified.[44]

Fourth, he considered whether the directors' subsidiary purpose (to protect the company pending the provision of information)[45] saved the restrictions from invalidity and concluded that "*where a fiduciary power is exercised predominantly for an improper purpose, it is not, without more, saved from invalidity by the existence, at the same time, of a subordinate proper purpose*".[46] Briggs LJ explained that his phrase "*without more*" covered the case where it is obvious that the power would have been exercised even if the directors had not had the improper purpose, but, because of the way the case had developed at trial, that was not a point that could be run by JKX.

Briggs LJ recognised that this was a hard case,[47] but felt compelled to conclude that the restrictions were invalidated by rigorous, but necessary, application of the improper purpose principle. It looks as though Briggs LJ and Mann J found that they were forced to this conclusion by the way the evidence emerged at trial: JKX did not lead evidence about the directors' purposes, the inference from the documentary evidence was that the directors hoped that the requested information would not be provided so that they could impose restrictions which would enable the desired resolutions to be passed, and under cross-examination it emerged that imposing voting restrictions was the primary purpose and obtaining information only a subsidiary purpose.[48]

Observations on the judgments

The Majority judgment is consistent with the cases on the predecessors of Part 22, discussed above. It addresses the position that had emerged once the court had found that the disclosure notices were valid and that the board had reasonable grounds to believe that the answers were false or materially incorrect. If JKX had applied to the court for a restriction order, it would have been prime facie entitled to the order, regardless of what might be done while the restrictions are in place. If Eclairs and Glengarry wanted to

42/. [108].
43/. Mann J's judgment at [189] and [213].
44/. [112]-[114].
45/. Mann J's judgment at [189].
46/. [118].47/. [123].
48/. Mann J's judgment at [183]-[189].

avoid those consequences, they could provide the requested information. The majority judgment concludes that the same position should apply where the board exercise the power in the Articles to impose restrictions and the shareholder applies to the court to lift them.

It is worth noting that in none of the cases on the predecessors of Part 22 was an improper purpose defence raised in relation to the disclosure notice. The passage from Hoffmann J's judgment in the *TR Technology* case, quoted above, indicates that such a defence would have received short shrift. Why should the company be in a weaker position because its board exercise a self-help power in the company's articles, rather than applying to court for a restriction order, to which the company would, on the facts of this case, be prima facie entitled?

Turning to the judgments of Briggs LJ and Mann J, it is surprising to find that application of the proper purpose doctrine, which is a principle of equity, should give Eclairs and Glengarry immunity from sanction for breach of their disclosure and transparency obligations just because the board had worked out what could be done in the best interests of JKX if Eclairs and Glengarry remained in breach after sanctions had been imposed.

I would suggest that someone who knows no more about the case than can be gleaned from the judgments would be likely to think that the Majority had reached the right conclusion, since it produced a just result on the facts of the case. Although Briggs LJ explained why he disagreed with them, the Majority did not return the compliment. With some trepidation, since the issue will be decided by the Supreme Court, I will try to indicate where Briggs LJ's application of the proper purpose doctrine to the facts of the case may have taken a wrong turn.

The proper purpose doctrine and its application

The directors' powers to issue a disclosure notice pursuant to s 793 or a restriction notice under Article 42 are fiduciary powers to be exercised only for the purposes for which they were conferred; i.e. their proper purposes.[49] The leading authority on the proper purpose doctrine in the company law field is the advice given by Lord Wilberforce to the Privy Council on an appeal from the Supreme Court of New South Wales in *Howard Smith v Ampol*.[50] Lord Wilberforce's analysis proceeded in three stages (sections 1-3 below). Sections 4 and 5 below address two other issues with which Lord Wilberforce did not have to deal.

(1) The scope of the power

Lord Wilberforce said that the starting point is a consideration of the power whose exercise is in question to ascertain, on a fair view, its nature and any limits within which it may be exercised.[51] The nature of the power in Article 42 (2) and (3) is to impose restrictions on rights attaching to shares. The limits of the power are that it can only be exercised when information required by a s 793 disclosure notice has not been received. The restrictions remain in place until one of the events in Article 42(4) occurs, which includes receipt of the required information or transfer to a third party following sale on an exchange or takeover. As a matter of interpretation, it seems quite clear that the purpose of Article 42 is to enable the board to deprive the member of all or some of the benefits of holding the restricted shares for so long as the requested information is withheld and he does not dispose of the shares in one of the ways mentioned in Article 42(4). Thus the second ground in the Majority judgment appears to be correct.

There is a good argument that Briggs LJ adopted an unduly restrictive interpretation of the scope of Article 42, relying on dicta of Millett J which were given in the different context of resort to court process. Since Article 42 gives the directors express power to affect the rights and powers of shareholders by restricting voting rights where requested information has not been provided, such restrictions are therefore plainly within the scope of the power which should not be restricted by considerations of "need to know" or effectiveness of the sanction. In his classic judgment in *Vatcher v Paull* Lord Parker said that fraud on a power "*merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power*".[52]

Since the company, its shareholders and the public have an unqualified right to the information, it is not clear why the court should inquire into the board's "need to know" in relation to a restriction notice issued where the information which had been properly requested has not been provided.

If the company properly sought the information about interests in shares when the disclosure notice was issued, it ought to be proper for sanctions to be imposed if the information is not provided, regardless of whether or not

49/. Sections 171(b) and 178(2) Companies Act 2006.
50/. This case concerned an allegedly abusive allotment of shares to facilitate, rather than block, a take-over. The trial judge rejected the directors' evidence that their purpose in issuing the new shares was to raise capital, which the company had needed for some time. Instead, he found that their primary purpose was to assist the takeover; see [1974] AC at 833E-H.
51/. [1974] AC at 835F.
52/. [1915] AC 372, 378.

Hoffmann J's approach prevents the public policy in favour of disclosure and transparency from being undermined by time-consuming litigation tactics

the sanctions may have a coercive effect and lead to production of the information that had been sought. The person on whom the disclose notice had been served may be implacably opposed to providing the information so that it is obvious that the restriction notice will have no coercive effect. Those considerations would apply to an application to the court for restriction order and would not be a reason for denying the company its prima facie right to an order.[53]

(2) Substantial purpose of the exercise of the power

Lord Wilberforce went on to say that if a particular exercise of the power is challenged, it is then necessary to examine the substantial purpose for which it was exercised, which may involve a wide investigation into the directors' intentions, involving consideration of their motives and the surrounding circumstances.[54] The reason for the investigation of directors' motives and the surrounding circumstances is to identify the directors' substantial purpose.

In the context of a restriction notice, there is a good case for saying that the investigation into the directors' substantial purpose should be no more than cursory. Hoffmann J's observations about applications for restriction orders, quoted above, should apply equally to challenges to restriction notices issued under powers in a company's constitution. Hoffmann J's approach prevents the public policy in favour of disclosure and transparency from being undermined by time-consuming litigation tactics. Thus there is support for the first and third grounds of the Majority's judgment. If that approach had been taken at the beginning, the burden of the trial on the court and the parties would have been greatly reduced.

If, however, there is to be an investigation it is important to bear in mind two established distinctions: (i) between the purpose for which a thing is done and the motives which led to that purpose,[55] and (ii) between the substantial purpose for which something is done and something which is merely the bi-product of the transaction under consideration or the result of it.[56]

It looks as though Briggs did not consider the distinction between purpose and motive, because he referred uncritically to Buckley J's reference in *Hogg v Cramphorn* to "*improper motive*".[57] Identifying an improper motive is not enough. The purpose may be proper even though there may be a bad motive or reason for pursuing it. Thus in this case it may be argued that the directors had a legitimate purpose in imposing restrictions on the voting or transfer of the Restricted Shares since the disclosure notices had not been complied with even though their main reason for issuing the restriction notices was that they hoped that while the restrictions were in place the members might pass special resolutions that they believed would benefit the company. Thus they needed to achieve the purpose of imposing restrictions if the special resolutions were to be passed. Viewed in this way, procuring the approval of the special resolutions was not an improper collateral purpose, but a motive or at most a contingent purpose whose achievement depended on whether or not Eclairs and Glengarry provided the information that had been requested.

It is also arguable that the ability of the members of JKX to pass the special resolutions would be no more than the consequence or result of the restrictions being imposed and remaining in place. Whether that result would follow would depend on the whether Eclairs and Glengarry provided the requested information.

(3) Whether the substantial purpose is a proper one

Lord Wilberforce said that the court should then reach a conclusion whether the substantial purpose that it has identified is a proper one. In this connection, Lord Wilberforce drew a distinction between (i) matters of management, where the court should respect the judgment of the directors and give them more latitude than it would give a normal trustee,[58] and (ii) the exercise of a power which does not involve any considerations of management within the proper sphere of the directors, but instead the exercise is for the purpose of interfering in the rights and powers of

53/. Consider the case of Mr Withers in Re Westminster Property Group plc [1985] 1 WLR 676, CA.
54/. [1974] AC at 835G and 834H-835C.
55/. Hillsdown Holdings plc v Pensions Ombudsman [1997] 1 All ER 862, 881, 882; citing Topham v Duke of Portland (1863) 1 De GJ & S 517, 571.
56/. Inland Revenue Commissioners v Hashmi [2002] EWCA Civ 981, [2002] 2 BCLC 489, CA, at [25] per Arden LJ. This was a case under s 423 Insolvency Act 1986, where the purpose of defrauding creditors must be a substantial purpose, even though it is not the only one.
57/. See Briggs LJ at [101] and Buckley J at [1967] Ch at 269. In Extrasure Travel Insurances Ltd v Scattergood [2003] 1 BCLC 598 at [93] Jonathan Crow QC seems to have made the same error see Snell's Equity (32nd ed) at [10-020], fn 83).
58/. [1974] AC at 835H-836A.

shareholders. In the latter case its exercise is unconstitutional and invalid and the good faith of the directors is irrelevant.[59] The company law cases show that the dividing line between the two types of case is not at all clear or precise. However, where transactions undertaken by directors have been invalidated under the proper purpose doctrine, the power was either exercised ostensibly for management but in an abusive way, or, as in *Howard Smith v Ampol*, for the purpose of interfering with the rights and powers of shareholders.[60]

There is a crucial distinction between the JKX case and *Howard Smith v Ampol* and *Hogg v Cramphorn* (and the other company cases concerning the application of the proper purpose doctrine), because Article 42 gives the directors the express power to interfere in the rights and powers of shareholders by imposing restrictions. Since the directors in good faith exercised their power precisely in accordance with Article 42, there is a good argument that they should be given the latitude that Lord Wilberforce said they should be given.

(4) Multiple purposes

In his judgment Briggs LJ addressed the novel question of whether a power is exercised for an improper purpose where there are multiple purposes; one of which may be identified as the substantial or dominant purpose and the others which are subsidiary include a proper purpose. This was not an issue that had to be addressed in *Howard Smith v Ampol* since the judge had found as a fact that the directors had not issued the new shares to raise capital.[61] Similarly in all the other company law cases in this context the court had found that the directors had only one purpose, which was an improper one. Briggs LJ concluded that, where the power is exercised predominantly for an improper purpose, the transaction is not saved from invalidity by the presence of subsidiary proper purposes. He applied Lord Wilberforce's substantial purpose test,[62] which derives from the Australian case *Mills v Mills*,[63] where Dixon J explained that the effect of such a test was that a transaction would be invalid "*if, except for some ulterior and illegitimate object, the power would not have been exercised … notwithstanding that the directors may incidentally bring about a result which is within the purpose of the power and which they consider desirable*". This is a "*but for*" test, so that the transaction may be saved if the court is satisfied that the directors would have exercised the power even if they had not had the illegitimate purpose.

If the purpose of the power to issue a restriction notice is as I have described it above, then it would be obvious that the directors would have issued it anyway. That would still be the case even if the directors had an additional purpose (to affect voting rights).[65]

(5) Ratification

A familiar answer to an allegation that a transaction is invalid because the directors had breached their duty to exercise their powers only for proper purposes is that the transaction can be made valid by being approved or ratified by resolution of the members.[66] No such argument has been raised in this case even though the members appear to support the board and Eclairs and Glengarry have been unable to block ordinary resolutions.

Concluding observations

It is tempting to see the division of judicial opinion as reflecting a clash between a commercial approach and a Chancery approach, but that would be wrong. Both approaches require the court to interpret Article 42 in the context of Part 22 of the 2006 Act and to apply the guidance on the operation of the proper purpose doctrine in the company sphere given by Lord Wilberforce in *Howard Smith v Ampol*. As I have suggested, Briggs LJ may have given the doctrine an excessive potency when he applied it to the *Eclairs* case.

It will be interesting to see how the Supreme Court dispose of the appeal, but it is to be hoped that the decision does not lead to challenges to the directors' purposes and motives becoming the standard response to the issue of disclosure and restriction notices.

59/. [1974] AC 837C-838B.

60/. In Re Cameron's Coalbrook Steam Coal, Bennett's Case (1854) 5 De GM&G 284, 298, 300 directors abused their power to withhold consent to transfers of shares for the purpose of effecting the retirement of certain shareholders in order to obtain the discharge of their personal liability to the company. Other cases have involved abuse of the power to forfeit shares in order to release a shareholder from liability to contribute to company's debts, so adding to the burden on other shareholders: Re The Athenaeum Life Assurance Society (1858) 4 K&J 305); Re Agriculturist Cattle Insurance Co, Stanhope's Case (1866) 1 Ch App 161, 169, per Lord Cranworth LC; Spackman v Evans (1868) 3 LR HL 171, 186 and 189 per Lord Cranworth, 231 per Lord Chelmsford. There have been several cases like Howard Smith v Ampol where the directors abused the power to issue new shares in order to manipulate voting power at general meetings and not for the purpose of raising capital: Fraser v Whalley (1864) 2 H&M 10, 27-29; Punt v Symons & Co [1903] 2 Ch 506, 515; Piercy v S Mills & Co Ltd [1919] 1 Ch 77.

61/. The attempt in Howard Smith v Ampol to raise an alternative or additional proper purpose was rejected by the judge as a matter of fact; see p 833.

62/. Page 835G. Compare IRC v Hashmi [2002] 2 BCLC 489 at [23]-[25], [33] and [36]-[39] (a case on s 423 Insolvency Act 1986).

63/. (1938) 60 CLR 150, 185, 186.

64/. Whitehouse v Carlton House Pty Ltd (1987) 162 CLR 285. Briggs LJ accepted the "but for" test at [118] when he explained what he meant by "without more".

65/. Consider Mann J's judgment at [232] and [239].

66/. Hogg v Cramphorn and Bamford v Bamford [1970] Ch 212, CA.

Case Digests

Two urgent applications were made to court in relation to Phones 4u Limited. At the hearing of the application for administration orders the court recognised that there are cases where the urgency of making an administration order justifies waiver of notice. This was such a case. A few days later the administrators successfully applied for an order that they could sell property of the company that was subject to a fixed charge as if it were not subject to that charge. The application was unopposed and the court made the order so a substantial number of shops could be sold to EE and Vodafone. See the Corporate Insolvency section.

The court's approach to remuneration has recently been considered by the court. The court was asked to fix the remuneration of the former administrators and expressed the view that when fixing remuneration it should take into account whether the work was for the purpose of the objective, whether it was within other parameters of the administrators' proposals or otherwise formed part of the administrators' responsibilities and duties. If not, then the court should consider refusing remuneration for that work. Where subsequently appointed liquidators request the assistance of the former administrators, the issue of remuneration for that work is a matter to be determined between them. See *Re Brilliant Independent Media Specialists Ltd* in the Corporate Insolvency Section.

On class issues in schemes of arrangement, the court held that lenders who had been paid a fee in consideration of their forebearance in respect of principal that had fallen due for payment did not form a separate class because the benefit was de minimis and ought not to have influenced their decision to approve the scheme. See *Re PHS Group plc* in the Company law section.

The risks of refusing to mediate are apparent from the decision in a case involving BAE. The court held that although BAE had reasonably formed the view that their case was strong and turned out to be correct in that assessment, BAE had been unreasonable to refuse to mediate. The court, however, took into account a without prejudice offer that had been made by BAE and did not reduce BAE's recoverable costs. The BAE case is digested in the Civil Procedure section.

HILARY STONEFROST

In mid-2013 Coventry City FC fell out with the landlords of their home stadium over arrears of rent. Last season Coventry FC played their home games at Northampton Town's ground. Shortly before Coventry City FC returned to play at home in August 2014, the owners of the club, members of the SISU Capital group of companies, challenged the legality of a loan made by Coventry Council to the leaseholder of the football ground as state aid. The challenge failed on the grounds that a rational private economic operator may have been prepared to make the loan on the same terms as the local authority. See the Sports section.

BANKING AND FINANCIAL SERVICES

Digested by WILLIAM WILLSON


WILLIAM WILLSON

Patel v Mirza [2014] EWCA Civ 1047 CA (Civ Div) (Rimer LJ, Gloster LJ, Vos LJ), 29 July 2014

Spread-Betting – Unjust Enrichment – Illegality

A appealed against the dismissal of his claim for recovery of funds from R on the basis of unjust enrichment. R offered A and their mutual friend ("G") an opportunity to use his spread-betting account to bet on the movement of RBS shares. A had paid R more than £600,000 on hearing that R had contacts who could supply advance information about a statement by the Chancellor about the Government's investment in RBS. R would use A's money, along with his own, to bet on the quoted share price. A's case was that R did not place the bets because the Government statement never materialised. The money was mistakenly paid to G instead. A was unable to recover it from G and maintained that it was recoverable from R as money paid for a consideration that had wholly failed. The judge held that A's claim was barred by illegality, but stated that the position would have been different if A had withdrawn from the agreement before its implementation became frustrated. Held on appeal, it was clear that A was positively relying on the illegal agreement in order to make good his claim. His claim ran straight into the principle of public policy that the courts would not lend their aid to claimants whose case was stated to be reliant on illegality. If, before A had learnt that the venture could not be carried out because the insider information was not forthcoming, he had repudiated and withdrawn from the agreement, he would have been entitled to sue for and recover his money. However, it made no difference that A's withdrawal from the illegal agreement was not because he had changed his mind and no longer wished to participate. A distinction between cases where the withdrawal was from an illegal agreement that (a) was no longer needed for the purpose for which it was designed and (b) could not be or was not going to be performed, was unattractive. Such a distinction would depend on holding that genuine repentance was required, which it was not. If voluntary withdrawal from an illegal agreement when it had ceased to be needed was sufficient to entitle a claimant to recover, it would be an odd distinction if a claimant was not entitled to recover by relying on an illegal agreement that was not, and could not be, performed. An order for repayment of £620,000 to A was made.

Ashwood Enterprises Ltd & Ors v The Governor & Company of Bank of Ireland & Ors [2014] EWHC 2624 (Ch) Ch D (Asplin J), 29 July 2014

Preliminary issues collateral warranty – Estoppel by convention – Comfort letter

The court was required to determine preliminary issues concerning the claimants' liability under a third party legal charge ("TPLC"). The first claimant company ("X") had been established to develop a property held by the second and third claimant property developers ("M") on trust for X. For tax reasons, it was decided that X would not develop the property, and M's company ("Y") was brought in as the developer. The first defendant bank extended a £27m loan facility to Y. Y's liabilities were secured by a TPLC over the property given by M with X's consent. A further facility of £10m was extended to Y in June 2008, and another £6m extended in December 2008. The bank also made an overdraft facility available to Y in August 2010 to enable the development's completion. The preliminary issues were concerned with whether the TPLC was restricted to the £27m facility. Held, the TPLC had been expressed in unambiguous terms to be an all monies charge. A reasonable person, who had all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time that the TPLC was executed, would have understood the parties to have intended it to extend to all the liabilities. The December 2008 email did not amount to a collateral warranty to the effect that the TPLC secured only the £27m facility as there was no unambiguous, common intention that it would have contractual effect. Nor was the

email's content sufficient to give rise to an estoppel by convention. The comfort letter could not be construed effectively so as to carve-out the £10m facility from the scope of the TPLC. The reasonable reader, taking account of the relevant background and reading the comfort letter as a whole, would not have understood the parties to have intended it to refer to the TPLC. Since there was no outward expression of accord that the comfort letter had the effect contended for by X and M, their claim for rectification failed. X and M were estopped from denying that the TPLC was security for the £10m facility.

CIVIL PROCEDURE

Digested by ALEXANDER RIDDIFORD


STEPHEN ROBINS


ALEXANDER RIDDIFORD

Smails v McNally [2014] EWCA Civ 1296, Court of Appeal, 30 July 2014

Non-compliance – Disclosure – Unless orders

Liquidators had alleged that the appellant company were liable for fraudulent trading and trading while insolvent, bringing a claim on this basis in relation to alleged underpayment of tax amounting to around £45m. The court had made an unless order against the liquidators, following what it described as a "lamentable history" of disclosure, requiring them (inter alia) to serve a list of documents in compliance with CPR rule 31.10 by a certain date. The liquidators served a list by the relevant date but the appellant company noted that certain documents were not included which ought to have been, in particular certain "scripts", weekly reports of amounts paid to individuals setting out gross pay. The court below had ruled that, notwithstanding the absence from the list of these scripts, the liquidators had complied with the unless order on the basis that, in light of the "very extensive" documents search that had been carried out by the liquidators, it was clear that the search was reasonable and in good faith. The Court of Appeal allowed the appellant company's appeal on the basis (1) that the solicitor responsible for disclosure was aware that the scripts were vitally important for the dispute between the parties, given (inter alia) that the liquidators had relied heavily upon these very documents in support of a freezing order application at an earlier stage in the proceedings; and (2) the appellant company's solicitor's had been assured that the scripts would be included in the list. The liquidators' solicitor had failed to check that the scripts had been delivered to the third party who conducted the disclosure search on the liquidators' behalf. This omission amounted to a failure to comply with the unless order. The Judge below had erred (inter alia) in failing to consider the various factors listed in CPR rule 31.7(2).

[Stephen Robins]

Yeo v Times Newspapers Ltd [2014] EWHC 2853 (QB) (Warby J) 20 August 2014

Relief from sanctions

In a defamation action brought by an MP against a newspaper in relation to a front page article titled "Top Tory in new Lobbygate row", an issue arose as to whether the claimant should be granted relief from sanctions for a failure, due to a solicitor's mistake, to effect timely service on the defendant of the claimant's funding arrangement within the meaning of CPR rule 43.2(1)(k). The Court stated that relief from sanctions should not be granted lightly, but that the breach in this case had not resulted from a deliberate decision but from an error by a solicitor which was promptly rectified. There was negligible impact on the efficient and proportionate conduct of the litigation. Accordingly, it was appropriate to grant relief from sanctions in this case.

Kellie & Anor v. Wheatley & Anor [2014] EWHC 2886 (TCC) (HHJ Keyser QC) 27 August 2014

Costs – Indemnity basis – Costs between the parties

The court determined the issue of costs in a professional negligence claim brought by the claimants against the defendant architects. It had been held that the claimants had not established that the defendant had breached its duty of care (and that, in any event, they had failed to prove loss). The Learned Judge reserved three issues for determination at this hearing: (i) whether the claimants should pay more than 90 per cent of the defendant's assessed costs; (ii) whether the assessment of the defendant's costs should be on the indemnity basis; and (iii) whether, in the light of the decision on the first two issues, the claimants should pay any further amount by way of interim payment. The claimants contended that the defendants should recover only 90 per cent of their costs on the ground that it raised, pursued to trial and lost on two discrete issues, i.e. the no-loss defence and the limitation defence. The defendants contended that their costs should be paid on the indemnity basis since the claim was weak and had only been pursued in the hope of pressurising it and its insurers to avoid the time and cost involved in prolonged proceedings. The court held that the defendants should recover 100% of their costs (to be assessed on the standard basis, since although the claim was weak it was not so weak as to be especially remarkable), given that the evidence showed that the no-loss defence and the limitation defence were not discrete issues and made no difference to the costs incurred by either party. An interim payment on account of the costs was ordered.

Northrop Grumman Mission Systems Europe Limited v BAE Systems (AL Diriyah C4I) Limited [2014] EWHC 3148 (TCC) (Ramsey J) 3 October 2014

Costs – CPR rule 44.2 – Refusal to mediate

Following Ramsey J's judgment in Part 8 proceedings in favour of BAE Systems, NGM accepted that BAE was entitled to its costs to be assessed on a standard basis if not agreed, but contended that those costs should be reduced by 50% by reason of BAE's unreasonable refusal to mediate the dispute. BAE challenged this basis for reducing its costs. Ramsey J noted that, when the court comes to consider costs and to exercise its discretion under CPR rule 44.2, it has regard to all the circumstances, including the conduct of the parties before as well as during the proceedings: see CPR rule 44.2(4) and (5). This conduct includes by which a party refuses to agree to alternative dispute resolution: see *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 and *PGF II SA v OMFS Company 1 Limited* [2013] EWCA Civ 1288. The Learned Judge, referring in particular to *Halsey*, at paragraph [18], and *Daniels v Commissioner of Police for the Metropolis* [2005] EWCA Civ 1312, noted that the Court of Appeal have indicated that when a party faces an unfounded claim and wishes to contest that claim rather than make a payment to buy it off, the court should be slow to characterise that conduct as unreasonable. The fact that a party reasonably believes that it has a watertight case may well be sufficient justification for a refusal to mediate. However, Ramsey J agreed with the authors of the Jackson ADR Handbook that this line of cases ignores positive effect that mediation can have in resolving disputes even if the claims have no merit. Accordingly, BAE's reasonable (and correct) view that it had a strong case was a factor which provided some but limited justification for not mediating. Moreover, in light of the parties' commercial relationship, the Learned Judge considered this to be a "*classic case*" where a mediator could have brought the parties together and where there was a reasonable prospect of a successful outcome from mediation. Accordingly, despite BAE's reasonable view that it had a strong case, it was still unreasonable for BAE to refuse to mediate, given the prospects of a successful outcome from mediation. However, the Learned Judge set BAE's unreasonable refusal to mediate against BAE's without prejudice settlement offer (the latter being an additional relevant factor pursuant to CPR rule 44.2(4)(c)), coming to the conclusion that, on balance, he should make no reduction of BAE's costs.

Regione Piemonte v Dexia Crediop SpA [2014] EWCA Civ 1298 (Court of Appeal) 9 October 2014

Setting aside default judgment – Delay – Applicability of Mitchell principles

The Court of Appeal refused an appeal against Eder J's refusal to set aside, under CPR 13, a default judgment that had been entered against the Appellant by Cooke J in July 2012. Clarke LJ, with whom Lewison and Jackson LJJ agreed, affirmed Eder J's characterization of the test applicable under CPR 13, including the requirement under CPR 13.3(2) that the defendant show that it has acted "*promptly*" (in the sense of with alacrity or with all reasonable celerity in the circumstances). The Court of Appeal considered that CPR 13 makes clear (i) that the power to set aside is discretionary; (ii) that the conditions specified in CPR 13(1)(a) or (b) are necessary, but not necessarily sufficient, conditions for the exercise of the discretion; and (iii) that the question as to whether the application has been made promptly is a mandatory and obviously, therefore, an important consideration. Clarke LJ held that it follows that a court may be entitled to refuse to set a judgment aside even if the defendant shows a real prospect that he may succeed in his defence at trial. To this extent the Court of Appeal concurred with Eder J in the Court below. However, it added the qualification that the merits of any defence are never "*irrelevant*" if by that Eder J meant that the court will not even consider them. Further the Court of Appeal considered that the principles in *Mitchell* / *Denton* are applicable to an application to set aside default judgment. Accordingly, *Denton* made clear that any application for relief against sanctions involves considering (i) the seriousness and significance of the default (ii) the reason for it and (iii) all the circumstances of the case. At the third stage factors (a) and (b) in CPR 3.9 (i.e. the need "*for litigation to be conducted efficiently and at proportionate cost*" and the need "*to enforce compliance with rules, practice directions and orders*", respectively) are of particular, but not paramount, importance. Accordingly, it was appropriate to refuse (as Eder J had done) an application to set aside default judgment on the basis of a "*serious*" delay (in the sense, for example, that the delay resulted from a decision not to engage in the litigation) even if that delay did not itself disrupt future hearing dates.

LBI HF v Kevin Gerald Stanford, 14 October 2014 (Mrs Justice Asplin)


DAVID ALEXANDER QC


DAVID ALLISON QC

Witness statement – Application to admit at trial - Relief from sanction

In 2007 the Defendant, Kevin Gerald Stanford (one of the founders of Karen Millen and the former Chief Executive of All Saints), had borrowed £13.5 million from Landsbanki Luxembourg SA ("LLux") to acquire a property in Ennismore Gardens, London SW7. He had also borrowed €4.5 million from LLux in relation to a ski chalet in Courchevel 1850, France.

In 2011 proceedings were commenced against the Defendant for a monetary judgment and possession of the Ennismore Gardens property. In response, the Defendant alleged that there had been oral agreements made with a Mr Olafsson and a Mr Thoroddsen of LLux to the effect that he would repay the loans from the profits of a joint venture with LLux in India. That joint venture had collapsed. There would therefore be no profits. Accordingly the Defendant contended that he did not have to repay the loans or interest on them. In the alternative, the Defendant contended that he had a counterclaim against LLux exceeding the amount owed. That counterclaim was also said to be based on an oral agreement reached at a meeting or meetings in March 2007 at which Mr Olafsson was present. In the further alternative, the Defendant claimed that there had been a misrepresentation made in relation to a bond issued by LBI HF ("LBI")t. In 2012 LLux assigned its claims against the Defendant to LBI.

Witness statements were originally due to be exchanged by 17 January 2014. That was extended by agreement to 28 February 2014. On 4 March 2014 Mann J made an unless order against the Defendant in relation to service of his witness statements. On 21 March 2014 the Defendant served three witness

statements. They did not include a witness statement by Mr Olafsson.

The trial, which was listed for 17 days and was selected for the Chancery Division's pilot fixed trial scheme, commenced in October 2014. On Day 6 of the trial, after all the witnesses for LBI and LLux had given evidence and after the Defendant had himself given evidence, the Defendant applied for permission to serve a witness statement from Mr Olafsson and for relief from sanction.

On that application, the Judge recorded that the evidence of Mr Olafsson was agreed by all to be of significance and importance. However, she said that Mr Olafsson had left the employ of LLux in 2012. Since then Mr Olafsson had assisted the Defendant. He had been interviewed by the Defendants' former solicitors in March 2014 but had been reluctant to make a witness statement at that stage. The Judge recorded that it was said that he had only become willing to make a witness statement on 7 October 2014. Having reviewed the background to the proceedings and recorded the stage of the trial which had been reached the Judge then applied the criteria from *Denton v TH White* [2014] EWCA Civ 906. She concluded that the breach was serious and significant. Evidence about the alleged oral agreements had always been central to the Defendants' defence. There had been serious delay in producing the evidence of Mr Olafsson. She then concluded that there was no good reason for that delay given the closeness between Mr Olafsson and the Defendant.

Finally she considered all the circumstances of the case, including the need for litigation to be conducted efficiently and at proportionate costs and the need to enforce compliance with rules, practice directions and orders. She said that (1) there had been plenty of opportunity to obtain evidence from Mr Olafsson (2) the events in question had always been known to be central to the Defendant's defence (3) these proceedings could not now be conducted efficiently and at proportionate cost if Mr Olafsson's witness statement was allowed in at this stage (4) such a course would cause a great deal of disruption and prejudice to LBI and LLux (witnesses would have to be recalled, further cross examination would have to be prepared, and this might extend the trial affecting the parties to this and other litigation) and (5) it was much too late and would cause much too much disruption for Mr Olafsson's statement to be admitted.

The Judge refused permission to appeal. The Defendant immediately asked the Court of Appeal for permission to appeal. Jackson LJ refused permission. In doing so he said "This case is a classic example of what the new rule 3.9 is intended to prevent. Litigants and those who are assisting them … cannot ride roughshod over the litigation timetable. There is no prospect of the Court of Appeal interfering with the judge's trial management discretion".

[David Alexander QC, David Allison QC, Stephen Robins]

COMMERCIAL LITIGATION & ARBITRATION

Digested by CHARLOTTE COOKE

Credit Suisse AG v Up Energy Group [2014] EWHC 2352 (Comm) (Males J), 12 August 2014


CHARLOTTE COOKE

Conflict of laws – Anti-suit injunctions

A dispute had arisen in relation to the exercise of a put option in a deed of undertaking that contained an English exclusive jurisdiction clause. In accordance with that exclusive jurisdiction clause proceedings were commencing in England seeking payment of the amount due on the exercise of the put option, as well as under a guarantee of that obligation (which contained a non-exclusive English jurisdiction clause). The Defendants instructed solicitors and filed a defence and then successfully opposed a summary judgment application by the Claimant, as well as complying with directions for a trial due to take place in April 2015. In April 2014 the Defendants' solicitors came off the record and the Defendants then commenced proceedings in California against the Claimant and others. The Claimant sought an anti-suit injunction restraining the taking of any further steps in litigation in California on the grounds that the dispute came within the scope of an English exclusive jurisdiction clause and that the Respondents had already submitted to the jurisdiction of the English Court in proceedings that were advanced. The anti-suit injunction was granted.

Global Draw Ltd v IGT-UK Group Ltd [2014] EWHC 2973 (Comm) (Blair J), 10 September 2014

Contract – Indemnity – Summary judgment

The Claimant purchased shares in Barcrest Ltd (B) from the first Defendant. B operated in Italy and has a contract for the provision of gaming machines with an Italian company (S). At the time of the share purchase, S was alleging breaches of a supply agreement by B and a claim was brought in the Italian Courts in which it was alleged a ticket for approximately €13m had been wrongly issued by a vending machine playing a game provided by S by B. The Claimant sought declarations as to the indemnity provisions in the share purchase agreement, making an application for summary judgment. It was held that the application was not suitable for summary judgment, save in one regard. Potentially relevant factual issues needed to be resolved and a dispute as to the proper construction of the indemnity's terms could only be resolved at trial. However, insofar as the claim concerned the costs and expenses of the Italian proceedings, there was no real prospect of the claim being successfully defended and the Claimant was therefore entitled to the declaration sought in that regard.

Eurokey Recycling Ltd v Giles Insurance Brokers Ltd [2014] EWHC 2989 (Comm) (Blair J), 12 September 2014

Professional negligence – Insurance

Following a fire an insured company turned out to be grossly underinsured. The insured company brought a claim against an insurance broker, alleging breach of contract and negligence, alleging that it was underinsured because the broker had given negligent advice and failed to arrange adequate cover. It was held that the nature and scope of a broker's obligation to assess a client's business interruption insurance depends on the particular circumstances. If a client appeared to be well-informed about his business provided a broker with information, the broker was not expected to verify that information, unless he had reason to believe that it was not accurate. On the particular facts, the broker had adequately explained the business interruption cover and had no reason to believe that the figures provided by the client for the estimated turnover, stock and machinery were inadequate when giving advice regarding levels of cover and so was not liable either in contract or negligence.

Starlight Shipping Co v Allianz Marine and Aviation Versicherungs AG [2014] EWHC 3068 (Comm) (Flaux J), 26 September 2014

Shipping – Insurance

The Applicants challenged the bringing of proceedings in Greece by a shipowner whose ship had sunk. The challenge was brought on the ground that the Greek proceedings were brought in breach of a settlement agreement entered into by the shipowner and its insurer. The shipowner had accepted a sum in full and final settlement of its claims against "the Underwriters" in respect of certain insurance policies. It was held that the Greek proceedings had been brought in breach of that settlement agreement as the reference to "the Underwriters" in the settlement agreement had to be read as including the servants and agents of the underwriters. An alternative reading defied business common sense; unless the settlement agreement was read in that way, the insurers would have remained exposed as their agents and servants, in the event a claim against them succeeded, would claim an indemnity against the insurer.

Titan Europe 2006-3 plc v Colliers International UK plc (in liquidation) [2014] EWHC 3106 (Comm) (Blair J), 30 September 2014

Professional negligence – Mortgage – Valuation

The defendant valued a commercial property for the claimant which was security for a loan. The tenant of the property became insolvent and the property was in the process of being sold for a price far below the valuation. The claimant brought a claim for professional negligence against the defendant company which went into liquidation in 2012. It sought judgment for €58.4m, being the difference between the valuation of the property at €135m and what the claimant contended was the true market value at €76.6m. The Commercial Court concluded that the true value of the property as at December 2005 was €103m and that the defendant had therefore 'negligently' overvalued the property by €32m.

COMPANY LAW

Digested by GEORGINA PETERS


ADAM GOODISON


GEORGINA PETERS

Re Zodiac Pool Solutions SAS [2014] EWHC 2855 (Ch) (Morgan J), 31 July 2014

Scheme of arrangement – Companies Act 2006, section 889 – Judgments

Zodiac Pool Solutions SAS and five other Zodiac group companies (incorporated in France, Finland and Delaware) sought and obtained an order under section 899 of the Companies Act 2006 sanctioning six schemes of arrangement with the companies' creditors. In broad terms, the schemes provided for the maturity dates of the companies' liabilities to be extended and for other restructuring amendments to be made. The fact that the relevant claims were governed by English law was considered to be a "sufficient connection" to the English jurisdiction for the purposes of the court exercising its jurisdiction in relation to the schemes. In considering whether the schemes were likely to have a useful effect, the court had regard to expert evidence that the schemes would be recognized and enforced in, as applicable, France, the United States and Finland.

[Gabriel Moss QC, Adam Goodison]

Secretary of State for Business, Innovation & Skills v (1) Roger Lionel Dymond (2) Michael William Dymond [2014] EWHC 2844 (Ch) (William Trower QC, sitting as a Deputy Judge of the High Court), 15 August 2014

Director's disqualification – Company Directors Disqualification Act 1986, section 6 – Director's duties

The Secretary of State sought and obtained orders under the Company Directors Disqualification Act 1986, section 6 that a managing director and a second director be disqualified from acting as, *inter alia,* company directors. The conduct impugned arose in connection with breaches of an invoice discounting agreement (IDA), entered into with a bank at a time of financial distress for the company and thus a critical facility. It consisted of the re-aging of invoices to prevent them from falling outside the lending criteria prescribed by the IDA, unreasonably delaying the issue of credit notes, assigning invoices before delivery of goods and failing to notify the bank promptly of a rebate due to a customer. In rejecting the directors' case that the company's finance manager had been responsible for the breaches in accounting practice, the court had regard to the managing director's hands-on approach to running the accounts department, his authorization of the procedures giving rise to the IDA breaches and the absence of any personal benefit accruing to, and thus motive of, the finance manager. As to the managing director's conduct, the court held on the facts that he had caused the company to commit the breaches, even if he had known only that he was pushing the limits of what was permissible under the IDA (but had not considered that such actions constituted a breach). This conclusion was reinforced by his lack of enquiry and absence of internal controls, particularly in view of the criticism of

certain practices in reports commissioned by the bank. The failure to investigate such criticism and regularly review the operation of the IDA, as well as to engage with the actions of the finance director, was a culpable breach of his duties as a director. His conduct fell at the lower end of the middle bracket of seriousness, resulting in a disqualification of six years. As to the second director's conduct, this was held to fall at the lower end of the minimum bracket, resulting in a disqualification of three years. The court had regard to the fact that he had been the second largest shareholder and a signatory to the company accounts, and had known of the bank's concerns. His failure to take any steps to investigate the position constituted a failure of his duty to keep himself fully apprised of the company's financial position.

Secretary of State for Business, Innovation & Skills v (1) Brandon Weston (2) David Christopher Williams [2014] EWHC 2933 (Ch) (Judge David Cooke), 5 September 2014

Director's disqualification – Company Directors Disqualification Act 1986, sections 2, 4 and 6 – Abuse of process – Fraud by false representation – Jurisdiction

On an application by the Secretary of State for director disqualification orders against two company directors under the Company Directors Disqualification Act, section 2, after the Crown Court had declined to make such orders, the court found the application to represent an attempt to obtain a different decision from the civil court than had been given on identical issues by the criminal court. This was unfair and an abuse of process. The directors, having been convicted of fraud and making false representations in relation to residential tenants' deposits, had been interviewed by the Insolvency Service prior to the criminal trial with a view to their being disqualified under the Act, section 6. The criminal proceedings, having been initiated under the Act, section 2, supervened. In the event, the criminal court was not asked to make disqualification orders due to an omission on the part of counsel. On a further hearing under the slip rule, the criminal court declined to make such orders on the ground that the directors had suffered significantly and should be permitted to rehabilitate themselves. The court held that the jurisdiction of the civil court expressly given by the Act, section 2 necessarily arose after a criminal conviction and thus after a criminal court had had the opportunity to make a disqualification order under section 2. Whether a subsequent application to a civil court for such an order amounted to an abuse of process depended on whether it would be manifestly unfair to a party or would otherwise bring the administration of justice into disrepute among right-thinking people, *Hunter v Chief Constable of the West Midlands* [1982] AC 529 followed. Where, as in the instant case, there was a complete overlap of facts and issues between the two proceedings and the court was being asked to exercise the same jurisdiction on the same principles, it would not be fair to expose a defendant to the same claim in a second court. The court gave guidance that in future cases, the Secretary of State could initiate and then stay proceedings under the Act, section 6 until the outcome of a criminal trial, or apply for such relief after the criminal trial under the Act, section 4, on a basis sufficiently different from the facts of any conviction.

Re PHS Group Plc (Newey J), 14 October 2014


GABRIEL MOSS QC

Scheme of arrangement – Companies Act 2006, section 899 – Class constitution– Effectiveness

A company sought and obtained an order under section 899 of the Companies Act 2006 sanctioning a scheme of arrangement with its lenders whose claims arose under a €955 million facilities agreement governed by English law. In broad terms, the scheme provided for the six facilities to be replaced, reduced and for their maturity dates to be extended, following the restructuring of the group's capital and the issue of new loan facilities and equity. In relation to whether the creditors had been placed in appropriate classes, the Court found that a fee paid to a group of lenders, in consideration of their forbearance in respect of principal that had already fallen due for payment, conferred a *de minimis* benefit which ought not to have had an impact on their decision to approve the scheme, *Re DX Holdings Ltd* [2010] EWHC 1513 (Ch), *Re Primacom Holding Gmbh* [2011] EWHC

3746 (Ch) and *Re Seat Pagine Gialle SpA* [2012] EWHC 3686 (Ch) considered. It thus did not give rise to a class issue. Further, in respect of certain facilities denominated in Euro, the court accepted that the allocation of a scheme creditor's entitlement to the scheme consideration using a prescribed currency conversion mechanism (based on the facility agent's spot Euro/Sterling exchange rate on a date falling two business days prior to the scheme meetings), also did not give rise to a class issue, *Re Telewest Communications Plc* [2004] BCC 342 considered. In considering whether the scheme was likely to have a useful effect, there was an argument that the issue of the scheme consideration could require compliance with certain registration requirements prescribed by the United States Securities Act of 1933. The court had regard to evidence that the Company would, upon the sanction of the scheme, be entitled to rely on an exemption to that requirement under Section 3(a)(10) of the Securities Act and that the issue of scheme consideration would be effective in that jurisdiction as a matter of United States law.

[Gabriel Moss QC, Georgina Peters]

CORPORATE INSOLVENCY

Digested by ADAM AL-ATTAR

Laverty v British Gas Trading Ltd [2014] EWHC 2721 (Ch) (Etherton C), 31 July 2014


WILLIAM TROWER QC


ADAM AL-ATTAR

Priority of charges for gas and electricity - Expenses of administration or provable debts

The respondent company was owed charges for gas and electricity supplied to retail company premises owned by the Peacock Group plc after the relevant companies in that group (which were subsequently liquidated) had entered administration and vacated the premises. The applicant liquidators submitted that the charges constituted provable debts. The respondent contended that the charges ranked as expenses of the administration. The charges arose under the Gas Act 1986 and the Electricity Act 1989. The Gas Code provided:

"Where a gas supplier supplies gas to a consumer otherwise than in pursuance of a contract, the supplier shall be deemed to have contracted with the consumer for the supply of gas as from the time . . . when he began so to supply gas to the consumer".

That code was supplemented by the Gas Scheme, which provided:

"2.3 Subject to the provisions of paragraph 3 below each [deemed contract] will continue to apply in respect of the supply of gas to the property, without prejudice to any Terms and Conditions expressed to have effect thereafter, until whichever of the following first occurs; namely, the time when:

(a) the circumstances referred to in sub-paragraphs 8(1) . . . of the Gas Code cease to apply; or

(b) it is terminated in accordance with its terms; or

(c) another contract for the supply of gas to the property takes effect (whether with the Company or another licensed supplier)."

The relevant parts of the Electricity Code and the Electricity Scheme were in material the same terms as the Gas Code and the Gas Scheme.

The Chancellor considered that it was improbable that Parliament, under the Gas Code or the Electricity Code, would have conferred on a supplier of gas or electricity the power unilaterally to achieve priority over unsecured creditors in respect of liability under a deemed contract, both the terms of which and the timing of which lie in the hands of the supplier. By contrast, Section 233 of the Insolvency Act provided a specific guarantee mechanism by which priority might be obtained. He accordingly held that the charges were provable, applying the analysis of provable debts articulated by Lord Neuberger in *Nortel*.

[William Trower QC, Antony Zacaroli QC, Adam Goodison, Stephen Robins]

Re Phones 4u Limited, Unreported (Mr Justice Birss), 16 September 2014

Administration

This was an administration application in relation to 10 companies in the Phones 4u Group (the Companies). It was made under paragraph 12(1) of Schedule B1 to the Insolvency Act 1986. The Group was a major independent retailer of mobile phones. It had 560 stores, which were held on leases, 160 concession stores, 5,600 staff and, at the year-end 2013, it had a turnover of £1.1 billion. The Group was financed by a revolving credit facility, senior secured notes and toggle notes. The Group had recently

lost several significant contracts and now it was important that the group companies were placed into administration in order to preserve value for the creditors without delay. The companies were balance sheet insolvent. It was also reasonably likely that the purpose in paragraph 3(c) of Schedule B1 would be achieved. The security trustee did not oppose the application but did direct the Court to *Re Cavco Floors Ltd* [1990] BCLC 940 and *Cornhill Insurance plc v Cornhill Financial Services Limited and Others* [1992] BCC 818 on the issue of short notice. However, such judgments were made at a time when this type of order was new and there is now a body of case law recognising that there are times when this order should be made urgently with waivered notice. The principle is that the court should look critically at the evidence. In doing this, the court must balance the risks and effects for and against administration. There was a compelling argument for making the administration orders without delay.

[Antony Zacaroli QC; Hannah Thornley]

Re Phones 4u Limited, Unreported (Mr Justice Morgan), 22 September 2014


ANTONY ZACAROLI QC


HANNAH THORNLEY

Administration – Sale of property subject to a fixed charge

This was an application for the disposal of property subject to a fixed charge, which in the circumstances required court permission under paragraph 71 of Schedule B1 to the Insolvency Act 1986. The administrators had negotiated two sales of certain assets of the Company. Some of these assets were subject to fixed charges. Under paragraph 71(1), the court may enable the administrator of a company to dispose of property which is subject to a security (other than a floating charge) as if it were not subject to the security. Morgan J heard detailed evidence of the Company, the nature of the administration and evidence of the negotiations between the Administrators and potential purchasers. In this application, the secured creditors were the only party who the court had to consider. Even so, Morgan J heard from counsel to the security trustee, and also from a solicitor acting for the senior note trustee. Neither of these persons opposed the application, but neither were they in a position to consent to the application either. It was therefore in the court's discretion to make the paragraph 71 order. In this regard, Morgan J explained that the court heard no substantive comments in relation to the order from either of the two representatives. Given the information in front of him, and having considered the interests of the secured creditors, Morgan J then made the order under paragraph 71(1).

[Antony Zacaroli QC; Hannah Thornley]

Re Brilliant Independent Media Specialists Ltd [2014] Lexis Citation 201 (Mr Registrar Jones), 23 September 2014

Former joint administrators' remuneration – Entitlement to remuneration for certain periods – Justification for remuneration claimed

The Registrars judgment at [28] provides a useful summary of the current approach of the Companies Court to remuneration applications. It is useful to highlight the following aspects:

"*I should when fixing the remuneration consider and, if appropriate, take into account whether the work was for the purposes of the Objective and within the other parameters of the Proposals or otherwise formed part of the Administrators' duties and responsibilities. If not, I should consider refusing to fix remuneration for such work.*

[I]t is also relevant to consider and, if appropriate, take account of the jurisdiction that exists to vary the proposals. Plainly it will be relevant if work otherwise falling outside the Proposals could have been authorised."

These principles did not, however, permit remuneration to be fixed for work during the period after termination of the administrators' appointment following which the company was placed into creditors' voluntary liquidation and the liquidators requested the former administrators' services. The issue of remuneration for that period was a matter between the former administrators and the liquidators.

[Stephen Robins]

Re Buccament Bay Resort Ltd [2014] EWHC 3130 (Ch) (Nicolas Straus QC, sitting as a deputy judge of the High Court), 3 October 2014

Winding-up – Foreign companies – Jurisdiction

The petitioners' application to have a winding up petition heard in the UK in respect of the respondent's foreign companies was dismissed.

The companies were part of a group that developed and operated luxury Caribbean resorts. The court held that, notwithstanding that a reasonably substantial connection with England had been satisfied, the English court had no jurisdiction for a winding up order in circumstances where, among other things, most of the companies' assets were mainly in a foreign jurisdiction, and where the order sought would prove ineffective.

Re Parkwell Investments Ltd [2014] EWHC 3381 (Ch) (Sir William Blackburne), 16 October 2014

Jurisdiction to appoint provisional liquidator – VAT dispute pending before FTT

In *HMRC v Rochdale Drinks Distributors Ltd* [2011] STC 186, as regards the power to appoint a provisional liquidator on a creditor's application, the Court of Appeal had said that "*[i]f…the dispute [as to the debt] is shown to be one of those whose resolution will require the sort of investigation that is normally within the province of a conventional trial, the settled practice is for the petition to be struck out or dismissed so that the parties can contest their differences before whichever other forum may be appropriate*." The Company accepted that "*notwithstanding any appeal to the FTT the debt arising from an assessment remains due and payable by the person assessed.*" The Company nevertheless submitted that the FTT was seised and was the proper venue for any dispute regarding the tax debt; and, further, the applicant creditor should apply for a freezing order, or other step short of a provisional liquidator, if concerned about the Company's conduct or management prior to the resolution of the disputed tax debt.

Sir William Blackburne said:

"There is to my mind something highly artificial in the notion that this court has jurisdiction to entertain a winding-up petition brought by HMRC against a company founded on the non-payment of a VAT assessment (and, it must be assumed, grant interim relief in the process, for example, the appointment of a provisional liquidator) for so long as the company has taken no steps to appeal the assessment to the FTT (and, of course, the company may decide not to do so) only to find that that jurisdiction is lost the moment the company files its notice of appeal to the tribunal or, if not lost, is no longer exercisable, irrespective of the merits of the appeal."

He therefore continued the appointment of the provisional liquidator.

PERSONAL INSOLVENCY

Digested by MATTHEW ABRAHAM

MATTHEW ABRAHAM

Oraki and another v Bramston and another [2014] EWHC 2982 (Ch)

Nature of the duty owed by a trustee in bankruptcy to the bankrupt

This case was an appeal against the decision of Deputy Master Julia Clark on 6th December 2013 on applications by the appellants to strike-out the particulars of claim (the "Particulars of Claim") and by the respondents to amend it. The nature of the respondents' claim, set out in the Particulars of Claim, was that the appellants, who were the trustees in bankruptcy of both respondents, negligently caused the respondents financial loss by the way in which they conducted the affairs of their estates. The Deputy Master refused to strike out the Particulars of Claim and did not allow all of the amendments sought by the respondents. There were two issues of law that had to be determined by the Court in relation to the appellants' appeal which are worth noting: (1) whether a trustee in bankruptcy owes any common law duties to the bankrupt outside section 304 of the Insolvency Act 1986 (the "Act"); and (2) whether, if the bankrupt is in a position to apply under section 303 of the Act for the directions of the court in relation to a

particular matter but does not do so, the trustee is absolved from any possible liability in relation to the matter. In relation to the first issue the appellants argued that a trustee in bankruptcy could not owe a common law duty to the bankrupt outside section 304 of the Act which provides a discretion to the court to order a trustee to repay, restore or account for money or other property where (inter alia) property has been misapplied or the bankrupt's estate has suffered any loss in consequence of misfeasance or breach of a fiduciary or other duty owed by a trustee of the estate in the carrying out of his function. The court confirmed the Deputy Master's decision that in circumstances in which it is clear throughout that the assets of the estate far exceed the sums required to pay all creditors in full and the expenses of the bankruptcy, *"it is at least arguable that the existence of the surplus gives rise to a duty on the trustee's part to the bankrupt as the person who will be entitled to that surplus."* As for the second issue it was argued by the appellants that the trustee in bankruptcy could not be in breach of duty if the bankrupt failed to apply to the court under section 303 of the Act. Section 303(1) of the Act states: *"If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of a trustee of the bankrupt's estate, he may apply to the court; and on such an application the court may confirm, reverse or modify any act or decision of the trustee, may give him directions or may make such other order as it thinks fit."* In relation to this the court agreed with the decision of the Deputy Master and held that the argument raised by the appellants was not persuasive as *"it is at least arguable that the effect of a bankrupt's failure to seek the directions of the court on what would otherwise be negligence on the part of the trustee must depend on the particular facts of the case"*.

SPORT

Digested by MARCUS HAYWOOD


MARCUS HAYWOOD

R (on the application of Coventry City Football Club (Holdings Ltd) & Ors v Coventry City Council & Ors [2014] EWHC 2089 (Admin QBD (Admin) (Hickinbottom J) 30 June 2014

Football - European Union Law

A loan advanced by a local authority to a company in which it held a 50 per cent interest was not classed as state aid where the local authority had been concerned to protect its commercial interest in the company from the risk of a hostile takeover attempt by a third party and where a rational private economic operator might have made the loan on the same terms. The court so held on the application of the Claimant for an order quashing a decision by the defendant local authority to advance a loan to the leaseholder of ground of City Football Club. The Claimants are all members of the SISU group of companies. Between them, they own Coventry City Football Club, which, from 2005 to 2013, played its home games at the Ricoh Arena in Coventry ("the Arena") under a sublease and licence from the First Interested Party ("ACL"), the leaseholder of the ground. The Defendant City Council owns the freehold of the Arena, and is the ultimate owner of 50 per cent of ACL. On 15 January 2013, the Council resolved to lend £14.4m to ACL. The Claimants sought to challenge the legality of that decision, on the grounds that (i) contrary to European Union ("EU") law, the loan amounted to State aid which was not notified to the European Commission, and (ii) contrary to domestic law, the Council failed to take into account several material considerations and, in any event, the decision was irrational in the sense that no authority could reasonably have come to it. The court held that whether action by the state amounted to state aid was a global question which had to be considered in the round. On that approach, a rational private economic operator might have made the loan to ACL on the terms on which the loan was made by the local authority. The factors in support of that conclusion included: (a) the failure to pay rent had put the local authority in an invidious commercial position; (b) restructuring the bank loan was not a viable option; (c) a private investor would have concluded that winding up ACL would have been detrimental to its investment, whereas refinancing it gave rise to a realistic prospect of future profits; (d) a private investor would have been alive to the mismanagement of the club. Although the local authority had had to make difficult decisions over the commercial enterprise, given the wide margin of discretion allowed it could not be said that the loan it had extended would not have been entered into on the terms agreed by a private operator in the circumstances. The transaction therefore fell within the wide ambit extended to public authorities and did not amount to state aid. Furthermore, the local authority had not failed to have regard to material considerations.

From Tortola to the Thames...

Phillip Kite and **Vicky Lord** of Harneys discuss the last 12 months of insolvency cases in the British Virgin Islands

The last 12 months have seen a steady stream of cases running though the British Virgin Islands Courts and as ever insolvency claims have played their part in building BVI law. Putting BVI insolvency into focus, we look at the cases which over the last year have been of interest to practitioners and office-holders alike.

Fairfield Sentry – Did London end the litigation?

Readers may recall that the liquidators of the Madoff-exposed Fairfield funds were determined to show that they could claw back redemption proceeds paid to redeeming shareholders, in circumstances where the calculation of the NAV was made on data later found to be fictitious. The Privy Council disagreed.

In order to try to reduce the cost and expense of a full trial, the redeemed shareholders identified preliminary issues, which were argued in the BVI Commercial Court, Court of Appeal, and in March of this year, in the Privy Council. These were (1) whether the redeemers gave good consideration for the payment of their redemption monies by surrendering their shares in the funds and their rights as shareholders – the Good Consideration Defence; and (2) whether certificates of NAV were given by or on behalf of the fund which, in accordance with the terms of the Memorandum and Articles of Association, were final and binding – the Article 11 Defence.

Article 11 turned on Sentry's Articles of Association. These provided that a director's certificate made in good faith as to the NAV per share, subscription or redemption price was "*binding on all parties*". Therefore, it was said, it was not open to revisit the NAV when the Madoff fraud came to light. Good Consideration was a defence to the liquidators' claim in unjust enrichment: as a valid contractual obligation to pay out the redemption monies was owed to the redeeming shareholders, any alleged mistake as to Sentry's NAV could not lead to recovery unless the mistake avoided the contract as a whole.

The Privy Council considered both issues together. After a review of the terms of Sentry's Articles which set out the process for subscription and redemption and calculation of NAV, the court found that the basic principles on Good Consideration were

BVI ADVICE IS NOW CLOSER THAN A PHONE CALL AWAY

not in dispute. A payee of money "*cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him*": *Kleinwort Benson Ltd v Lincoln City Council*[1]. In general, enrichment will not be unjust if the benefit was owed to the defendant by the claimant under a valid contractual obligation[2]. Therefore, to the extent that a payment made under a mistake discharges a contractual debt of the payee, it cannot be recovered, unless (which was not suggested) the mistake was such as to avoid the contract: *Barclays Bank Ltd v W.J. Simms Son & Cooke (Southern) Ltd*[3] applied. Whether the liquidators were able to recover the redemption payments depended on whether Sentry was bound by the redemption terms to make the payments which it did make. That was bound up in the question of whether the NAV was the NAV determined by Sentry at the time of the redemption or the true NAV post-discovery of the fraud.

The Privy Council found that the operation of the scheme was dependent on the NAV being definitively ascertained. If the liquidators were correct in their submissions that the NAV had to be re-calculated to take into account the fraud and that no certificate had been issued, then it was open to the directors to vary the NAV even long after payment out had been made. Given that the sole purpose of the certification process was to provide finality, it could not be that no certificate had been issued. The Court considered that, where certification was provided for in the Articles as part of the mechanics of subscription and redemption, the references to certificates in the Articles must be read as referring to the ordinary transaction documents recording the NAV per share or the subscription or redemption price which would be generated and communicated to the redeeming shareholder at the relevant time, and not to some special document issued at the discretion of the directors. The only formal requirements for a certificate were: (a) a statement in writing conveying

1/. [1999] 2 AC 349 at 408B (Lord Hope)
2/. Professor Burrows - Restatement of the English Law of Unjust Enrichment (2012) at §3(6),
3/. [1980] QB 677, 695

information; (b) issued by an authoritative source; (c) communicated to those intending to rely on it, in a form or context which demonstrated that it was intended to be definitive. No further formal requirements were necessary, unless the legal context or the certificate's purpose necessitated it. The monthly statements of account, emails and contract notes issued by the administrator under the authority of Sentry's directors, were, the Privy Council determined, certificates for the purposes of Sentry's articles and accordingly the liquidators were unable to claw back.

The Privy Council's determination clearly brings into question the viability of the many actions in the brought by the liquidators in the United States, in which more than US$6 billion is claimed. What impact this will have on the actions in the United States remains to be seen.

Recognition – the door is ajar

Following on from another Madoff-related case, *Picard v BLMIS*[4], in which an application by Mr Picard, the US court appointed SIPA Trustee, for recognition in the BVI, was refused, Bannister J went on to revisit that decision in part, seemingly leaving the door ajar to certain foreign office holders to obtain recognition in *Re: C (a bankrupt)*. Trustees of the estate of a judgment debtor appointed in Hong Kong bankruptcy proceedings sought recognition before the BVI Court and assistance under Part XIX of the Insolvency Act, 2003 (as amended) by way of conferral of powers that the Trustees would have had, had they been BVI Court-appointed Trustees. Part XIX of the Insolvency Act provides for the BVI Court to make orders for assistance to foreign office holders of designated countries[5]. Part XVIII of the Insolvency Act, which deals with the UNCITRAL model law, is not as yet in force in the BVI. It was argued that, subsisting in parallel to Part XIX, the BVI Court had power to recognise a foreign office holder at common law, as if he or she had been a locally appointed Insolvency Practitioner. That submission was roundly rejected.

Whilst a foreign office holder who satisfied the relevant criteria was perfectly entitled to apply for assistance under Part XIX, the Court held that it had no jurisdiction to confer powers upon a stranger which were otherwise only conferred by way of a local appointment. However, Bannister J did concede that section 467 of the Insolvency Act did provide for recognition of foreign representatives (as defined) and for the provision of assistance[6] whether or not the relevant foreign office holder had applied under the Act. The Judge revisited his judgment in *Picard* to that extent, concluding that there had been power to grant the SIPA Trustee some form of relief. *Obiter*, Bannister J further concluded that the common law approach to recognition and assistance had not survived the bringing into force of Part XIX of the Act, and so, unless a foreign office holder meets the relevant criteria such that assistance may be ordered, a local appointment by the BVI Court will still need to be made.

Winding up and exclusive jurisdiction clauses

On various occasions the BVI Court has considered the ability of parties to refer winding up proceedings and other corporate disputes to arbitration, and now, in the first recorded judgment of the BVI Court in

PHILLIP KITE

Kea Investments Limited v Novatrust Limited[7], the BVI Court has determined that an exclusive jurisdiction clause in a shareholders' agreement would not catch winding up proceedings relating to BVI companies brought on just and equitable grounds, unless the clause expressly prevented the shareholders from relying on their statutory right to apply to wind the company up.

A petition to wind up a BVI joint venture company on just and equitable grounds was brought on by Kea, following deadlock at board level. The shareholders' agreement regulated the parties' rights and responsibilities in respect to the joint venture and contained an exclusive jurisdiction clause in favour of the courts in England. Novatrust filed suit in England to enforce that agreement a matter of days before the first hearing of the winding up petition was due to be heard, and subsequently applied to the BVI Court for Kea's petition to be stayed on jurisdictional grounds. Novatrust submitted that *Fiona Trust v Privalov*[8] applied and therefore, just as exclusive arbitration clauses were to be widely interpreted to include any conceivable disputes, including liquidation proceedings, that rationale equally applied to exclusive jurisdiction clauses. Therefore, it was said, the English Court was the only

4/. BVIHCV 2010/00140
5/. Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, United Kingdom and United States of America.
6/. Of the sort as discussed by Lord Collins in Rubin v Eurofinance: [2013] 1 AC 236
7/. BVIHC (COM) 2014/46
8/. [2007] 4 All ER 951

The Court of Appeal reversed the first instance judgment, holding that it was not for the Court to re-write the contract struck

court with jurisdiction to wind the company up on Kea's application. Kea argued otherwise, in particular asserting the fact that the exclusive jurisdiction clause properly construed, was never intended to apply to the liquidation proceedings it had brought.

Finding that the right to petition for the winding up of the company derived from Kea's status *qua* member of the company, a right it acquired as soon as it obtained the shares, Bannister J dismissed Novatrust's application finding that it would be extraordinary if Kea could have been deprived of that right by contractual arrangements subsequently entered into, unless they expressly precluded Kea from relying on its rights under the Insolvency Act. On the question of whether England was an available forum, whilst Bannister J found that the English Court had jurisdiction in the strict sense to wind up the company, and although he was prepared to assume that there was a sufficient connection between the company and England, he did not consider the requirement of benefit arising from the making of a winding up order to persons subject to its jurisdiction, to have been met, applying *Stocznia Gdanska SA v Latreefers Inc*[9]. He stated that:

"*no conceivable benefit would be obtained if the Company was wound up in England in addition to or instead of in the BVI. The Company is more than solvent. Its non-cash assets (shares in BVI companies) are situated within the BVI. Its cash, as I understand it, is in Jersey. No one suggests that resort should be made to provisions of the UK Insolvency Act in an effort to maximize returns to its shareholders. In my judgment, the critical condition for the English Court to exercise its winding up jurisdiction over an unregistered foreign company is simply not met. The English High Court, if a petition was presented in England to wind the Company up on just and equitable grounds, would, in my judgment and having regard to the relevant principles, properly decline jurisdiction. At the very least, [Novatrust] fails to persuade me that the English Courts are an available forum for determination of Kea's application to wind up the Company*."

Bannister J's decision mirrors an increasing reluctance in the global arena for foreign courts to exercise their jurisdiction to wind up unregistered foreign companies. For example, in *Yung Kee Holdings Limited* the Hong Kong Court of Appeal upheld Harris J's refusal to wind up a BVI Company. It noted that the jurisdiction to wind up a foreign non-registered company was "exorbitant", particularly in cases concerning shareholder disputes as opposed to creditor claims, and needed to be supported by facts and reasons that would render it just and expedient to so exercise that jurisdiction. In that case, a foreign unregistered company had to have a sufficient connection to Hong Kong in order for the court to justify a winding up order; the fact that its subsidiary might have a sufficient connection would not suffice.

More construction

The joint liquidators of Value Discovery Partners LP ("VDP") brought a claim in the Commercial Court before Bannister J to ascertain the meaning of certain words used in VDP's Articles of Partnership. This was as a result of the fact that the construction of the Partnership's Articles would be determinative of whether two of the Partners, KBC Partners LP ("KBC") and SCI Partners LP ("SCI"), would be entitled to receive a particular percentage of the net gains and profits of the Partnership, known as Carried Interest. If the construction which the General Partner, New World Value Fund ("NWVF"), contended for was correct then KBC and SCI would not be entitled to the Carried Interest, and NWVF's share of the Partnership's assets would be greater. The opposite construction would result in KBC and SCI receiving the Carried Interest, reducing NWVF's share of the assets accordingly. Faced with a dispute between the Partners, the joint liquidators turned to the court to ascertain which position was correct.

At first instance KBC and SCI argued that they were entitled to the Carried Interest, on the basis that both conditions precedent were fulfilled, one of which was the sale of all of VDP's investments by 1 July 2012. This turned on whether the word 'sale' was broader than a sale to a third party and included a realisation of an asset in specie. NWVF argued that the word ought to be given its plain, ordinary meaning so that it refers to a sale in the trader's sense, whilst the remaining Partners submitted that it included the realisation of an asset in specie during liquidation, after the end of the term of the partnership. Bannister J, finding in favour of KBC and SCI, preferred the broader meaning, holding that this approach was the more commercially sensible

9/. *[2001] BCC 174 at 194A-B*

of the two. NWVF appealed.

The Court of Appeal reversed the first instance judgment, holding that the term 'sale' should bear its natural meaning, that the term was unambiguous and it was not for the Court to re-write the contract struck, applying *Rainy Sky SA v Kookmin Bank*[10]. It considered adhering to the plain meaning of the word sale did not on the facts lead to a ridiculous or absurd result, even if KBC and SCI were unable to obtain their Carried Interest. Whether the Privy Council will take the same view, remains to be seen.

Remuneration

Recent decisions concerning liquidator's remuneration in the BVI suggest that, provided liquidators stay within their statutory remit, they are unlikely to come unstuck. In *Ip v Griffin Industries Limited* (in Liquidation)[11] the joint voluntary liquidators appealed the decision of Bannister J, following their application for remuneration to be fixed by the Court, as a result of disagreement with the creditors' committee as to an appropriate level of remuneration.

The voluntary liquidators were required to send a notice to the Official Receiver under section 209 of the Business Companies Act 2004, advising of the company's insolvency, once they had determined the same. Thereafter they were only entitled to remuneration in carrying out their limited functions under section 182, namely taking custody and control of the company's assets, disposing of perishable goods, and doing all things necessary to protect the company's assets. Having failed to send the requisite notice for a very considerable period of time, Bannister J found that once they were fixed with knowledge of the company's insolvency they could only be remunerated for tasks falling within section 182, on the basis that to award otherwise would be to flout the intention of the legislature that a voluntary liquidation should effectively be frozen once the opinion was reached that the company was insolvent. The Court of Appeal upheld that decision, noting that the appeal was predominantly against the Judge's findings of fact and underlining that an appeal court would be very slow to interfere with findings of fact made by the judge at first instance.

On the other side of the coin lies the Court's robust approach to unwarranted challenges to liquidator's remuneration. In an application for remuneration in *Re: Titan Group Investment Limited*[12] the fees claimed were challenged by a minority shareholder, TOSIL. The appointments were set against a backdrop of a shareholder battle for control of the company. The Group's financial position at the time was characterised as precarious, with estimated outcomes ranging from zero to thirteen cents on the dollar. The facilities were located in the PRC, management were described as not cooperating and there were both safety and environmental concerns on the ground. The liquidators had managed to achieve a sale of the assets, meeting creditor liabilities in full and leaving a small surplus to the members. The Court noted that the liquidators had applied a significant discount to their fees in advance of the hearing.

Challenging the amount of remuneration, complaint was made by TOSIL that (1) hourly rates charged by the Hong Kong joint appointee were too high, particularly as the rates were higher than those charged by BVI Insolvency Practitioners; (2) time entries were compendious and were imprecise; and (3) time spent by

VICKY LORD

lawyers should be written down as if they had been taxed. Bannister J, save for two very minor exceptions, allowed the remuneration claimed in full. He considered that, given the differential in overheads between BVI and Hong Kong, the higher rates charged by the Hong Kong based joint appointee were reasonable in the circumstances. Whilst best practice was to record specific tasks, the records as they stood were sufficiently detailed and that one had to assume that the liquidators and their staff were honest and that they would not seek to charge for unnecessary or pointless work. As for the lawyers' fees, provided the charges were properly incurred and not manifestly excessive, these were recoverable from the estate.

Phillip Kite and Vicky Lord

Phillip Kite is Global Head of Litigation and Insolvency at Harneys, specialising in large scale commercial litigation and contentious insolvency matters. He is one of the most experienced BVI litigation and insolvency practitioners and has worked on many of the jurisdiction's largest and most complex cases. He recently relocated to the UK to launch Harneys' London-based litigation practice, offering real-time BVI and Cayman Islands advice. He is joined there by Vicky Lord, Senior Associate in the BVI insolvency and litigation team, based in London.

10/. [2011] 1 WLR 2900
11/. Unreported at first instance - BVIHCMAP 2013/0006 (Court of Appeal)
12/. BVIHC(COM) 2012/0056

Privy Council decision in *Fairfield Sentry*: A blow to Hedge Fund clawback claims?

Toby Brown, who recently returned from secondment at Campbells in the Cayman Islands, writes about the leading Privy Council judgment, together with Ross McDonough and Guy Manning of Campbells

Earlier this year the Privy Council gave its awaited judgment in *Fairfield Sentry Limited (in Liquidation) v Alfredo Migani and others* [2014] UKPC 9, holding that certain documents issued by the fund's administrator were binding certificates of the net asset value ("NAV") per share and redemption price, and that the fund's claims to recover redemption payments on the ground of unjust enrichment failed since the redeeming shareholders received the amounts due under the governing documents.

Background

The case concerned a BVI company, Fairfield Sentry Limited (the "Fund"), which was the largest feeder fund to have invested in Bernard L. Madoff Investment Securities LLC ("BLMIS"). The Fund's liquidators brought claims in the BVI High Court against a number of investors which had redeemed their shares in the Fund prior to the discovery of the Madoff fraud. More than 300 similar actions in the USA were stayed pending the Privy Council's decision.

Bannister J heard the claims in the BVI and determined two preliminary issues. Firstly, whether transaction documents issued to shareholders recording the NAV per share or Redemption Price were "certificates" within the meaning of Article 11 of the Fund's Articles, and if so whether these were binding so as to preclude recovery since the certified amounts exceeded the true redemption price. Secondly, whether by surrendering its shares a member gave good consideration for the redemption proceeds which it received, thereby also precluding recovery. Bannister J found that none of the documents constituted a certificate but that good consideration had been given. His decisions on both issues were affirmed by the Eastern Caribbean Court of Appeal, albeit with different reasoning.

Privy Council

The decisions of the Eastern Caribbean Court of Appeal were appealed to the Privy Council, at which stage the Fund accepted that if the certificates were binding under Article 11, its claims would fail. Lord Sumption gave the unanimous advice of the Privy Council. He referred to the well settled principle of the English law of restitution that a payee of money cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him, and that to the extent that a payment made under a mistake

It is inherent in a Ponzi scheme that those who withdraw their funds before the scheme collapses escape without loss

TOBY BROWN

discharges a contractual debt of the payee, it cannot be recovered unless (which was not suggested) the mistake is such as to avoid the contract.

As a result, the Fund's claim depended on whether it was bound to make the payments. This turned on whether the Fund was obliged upon redemption to pay the true NAV per share as ascertained in light of Madoff's fraud (as argued by the Fund) or to pay the NAV per share determined by the directors at the time (as argued by the redeemed shareholders). If the latter, the shares had been surrendered in exchange for the amount properly due under the Articles, and such amounts could not be recovered under a claim for restitution.

The starting point was the Articles which determined the Subscription and Redemption Prices (based on the NAV per share under Article 11) and the timing of determination and payment.

Lord Sumption commented that "*the whole of this scheme depends upon the price being definitively ascertained by the Dealing Day and known to the parties shortly thereafter. It is unworkable on any other basis.*" The Fund argued that the directors' determination was not definitive unless they chose to issue a certificate under Article 11 which provided that "Any certificate… shall be binding on all parties." This construction was rejected by Lord Sumption for reasons of certainty:

"*If it were correct, an essential term of both the subscription for shares and their redemption, namely the price, would not be definitively ascertained at the time when the transaction took effect, nor at the time when the price fell to be paid…This would not only expose Members who had redeemed their shares to an open-ended liability to repay part of the price received if it subsequently appeared that the assets were worth less than was thought at the time. It would confer on them an open-ended right to recover more (at the expense of other Members) if it later appeared that they were worth more. Corresponding problems would arise out of the retrospective variation of the Subscription Price long after the shares had been allotted.*"

Since under the Articles the Subscription and Redemption Prices were to be definitively ascertained at the time, the NAV per share had to be the one determined by the directors at the time whether or not carried out in accordance with Article 11. This meant that either the determination must (i) be treated as conclusive whether or not there was a certificate; or (ii) the reference in Article 11 to a certificate must refer to the ordinary transaction documents communicated to members at the time. The Privy Council considered that, where such a certification provision was included, the correct approach was the second one, on the basis that:

"*…the word "certificate" has no standard meaning and … the question what constitutes a certificate is dependent on the commercial or legal context in which the certification clause appears… As a matter of language, a "certificate" ordinarily means (i) a statement in writing, (ii) issued by an authoritative source, which (iii) is communicated by whatever method to a recipient or class of recipients intended to rely on it, and (iv) conveys information, (v) in a form or context which shows that it is intended to be definitive. There is no reason to think that a document must satisfy any further formal requirements, unless its purpose or legal context plainly requires them. There is nothing in the context of these Articles which does.*"

The Privy Council considered that the monthly emails and statements of account sent to members, and the contract notes sent to a redeeming member, were "certificates" since they communicated information in documentary form to Members. It was held these were issued by an authoritative source being sent by the Fund's Administrator pursuant to the functions delegated to it by the directors under the administration agreement. In addition, in the context the documents were intended to be definitive. The Privy Council, however, declined to express an opinion on whether statements on the Administrator's website constituted "certificates" since this depended on considerations upon which evidence had not been adduced.

Accordingly, the Privy Council allowed the appeal on the issue of certificates (save as to the website information) and dismissed the appeal on the question of good consideration.

Comment

It is clear that the judgment was heavily influenced by the need for certainty and finality in the subscription and redemption of shares in hedge funds. The Privy Council did not favour "open-ended" liability to repay redemption prices based on an overvalued NAV. Lord Sumption may have been influenced by the reality he accepted that it "*is inherent in a Ponzi scheme that those who withdraw their funds before the scheme collapses escape without loss, and quite possibly with substantial fictitious profits… The loss will in principle be borne entirely by those who were still Members of the Fund at that date.*"

The judgment was heavily influenced by the need for certainty and finality in the subscription and redemption of shares in hedge funds

L TO R: JEREMY DURSTON, HON. JUSTICE QUIN AND TOBY BROWN IN THE CAYMAN ISLANDS GRAND COURT

The breadth of the judgment's application is not yet certain, since the focus was the interpretation of specific articles of association and in particular their provision for certificates, which will not be shared by all investment funds. Whilst the guidance on what will constitute a certificate is welcome, in each case this will be fact specific. In addition, although the Privy Council dismissed the appeal regarding good consideration, Lord Sumption did not directly address it as a defence. Instead he decided it alongside the interpretation of the Articles, on the basis that a redemption could not be unjust where the fund was obliged to pay the amount determined by its directors, and therefore an essential requirement for unjust enrichment would not be present.

It should also be noted that the Fund's claims were based exclusively on common law. Depending on the jurisdiction, a liquidator may be able to bring claims based on company law legislation to recover an unauthorised return of capital or unlawful share redemption, or under insolvency avoidance provisions. There is also potential for claims to be based on knowing receipt by shareholders where the directors breached their duties in determining and paying redemptions and where the shareholder's knowledge was such as to make it unconscionable for them to retain the payment.

This article first appeared as a Client Advisory on the Campbells website (campbells.com.ky) and is reprinted here with their kind permission.

Changes ahead for financial benchmarks

Joanna Perkins discusses the reform of financial benchmarks and their evolution as reference rates for standard form contracts

In 2012, Barclays was fined £290m ($454m) by British and US regulators for manipulation of the London Interbank Offered Rate (Libor) and the Euro Interbank Offered Rate (Euribor) between 2005 and 2009.[1] This was the first blow in a scandal with far-reaching implications for the financial markets which still reverberates today. Many of the world's largest banks were found to have colluded on price-fixing in order to boost the profits of traders. During their investigations into the abuse of Libor and Euribor, regulators identified anti-competitive practices on the part of banks and brokers setting foreign exchange and commodities prices. This prompted a wholesale review of benchmarks by national and international regulators, including the regulator's Fair and Effective Markets Review[2] and the European Commission's Proposal for a Regulation on Indices Used as Benchmarks.[3]

Against this background, in February 2013, the G20 asked the Financial Stability Board in Basel (FSB) to undertake a fundamental review of major interest rate benchmarks and to develop plans for their reform. The review was carried out by a high-level Official Sector Steering Group (OSSG) of regulators and central banks.[4]

The OSSG assessed the feasibility and viability of a variety of proposals for reform and alternative benchmark rates, taking account of the market structure, institutions, and the legal and regulatory framework within different currency areas (US dollar, Sterling, Japanese yen, Euro and Swiss franc). It

1/. The Financial Services Authority issued a fine of £59.5 million against Barclays as set out in its final notice: http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf.
The U.S. Commodity Futures Trading Commission fined Barclays $200 million and issued the following order: http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfbarclaysorder062712.pdf
The U.S. Department of Justice issued a fine of $160 million and the following statement: http://www.justice.gov/iso/opa/resources/337201271017335469822.pdf.
2/. The Fair and Effective Markets Review is a joint review by HM Treasury, the Bank of England and the Financial Conduct Authority. It was published on 12 June 2014. The terms of can be accessed here: https://www.gov.uk/government/publications/fair-and-effective-markets-review-terms-of-reference/fair-and-effective-financial-markets-review-terms-of-reference.
As part of this review, a consultation on whether additional major financial benchmarks should be brought into the regulatory framework originally implemented for LIBOR has was published on 25 September 2014. The consultation and recommendations can be accessed here: https://www.gov.uk/government/consultations/fair-and-effective-market-reviews-benchmarks-to-bring-into-uk-regulatory-scope.
3/. The European Commission's proposal was published in 2013 and can be accessed here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0641:FIN:EN:PDF.
4/. See Financial Stability Board press release: http://www.financialstabilityboard.org/publications/r_140722.htm.

BARCLAYS: FINED £290M IN 2012 OVER LIBOR RIGGING

published a final report on 22 July 2014.[5]

The main conclusions of the review were:

- existing IBORs (Libor, Euribor etc) and other potential reference rates based on unsecured bank funding costs should be strengthened by underpinning them, to the greatest extent possible, with transaction data;[6]
- an alternative, nearly risk-free rate should be developed and participants in the derivative markets should be encouraged to use these rates in place of the IBORs.[7]

To achieve these objectives, the OSSG recommended significant changes to the IBORs and to the markets that rely on them. In the case of Libor, proposed structural changes include a broad expansion of the types of transactions from which the benchmark is calculated beyond the universe of interbank unsecured lending in London. The OSSG also recommended expanding the administrator's definition of the benchmark to reflect these changes.[8] Necessarily the proposals call into question whether the very name "Libor" or the common understanding of the underlying interest will remain applicable and appropriate in the years to come.

The OSSG also recommended moving markets in certain financial instruments, particularly derivatives, away from their customary reliance on the IBOR benchmarks and towards incorporation of "risk-free" rates set by central banks. An example of such a rate is the Bank of England's Base Rate set by the

5/. The final report is entitled "Reforming Major Interest Rate Benchmarks" and was published on 22 July 2014. It can be accessed here: http://www.financialstabilityboard.org/publications/r_140722.pdf.
6/. Ibid. See page 21 and onwards for analysis and page 59 of final report for summary of specific recommendations for currency subgroups.
7/. Ibid. See page 22 of final report for analysis of risk free or near risk free rate.
8/. Ibid. See pages 12-16 for analysis of these issues in final report.

The OSSG recognised that transitions of the sort contemplated could raise serious questions for existing financial contracts

Monetary Policy Committee each month.[9] And the OSSG suggested that regulators consider whether markets reliant on other unsecured rates, such as the Sterling Overnight Index Average (SONIA), should also be moved across to risk free rates.[10] One element of the OSSG's recommendations for new benchmarks is the introduction of a "cut-off" date from which the original benchmark would cease to be published.[11]

In making these recommendations, the OSSG recognised that transitions of the sort contemplated could raise serious questions for existing financial contracts ("legacy contracts"). The final report acknowledged the risks involved:

In pursuing the objective of moving to transactions-based rates, transition risks and costs should be minimised as much as possible. These risks and costs can include legal risks arising from litigation and contract frustration….

The OSSG did not, however, think that legal risks should be of sufficient concern to derail the reform programme:

However, whilst risks and costs arising from legacy contracts should not be ignored, they should not be used to prevent changes regarded as necessary from a systemic perspective (emphasis added).[12]

Was the OSSG right to remain untroubled by the legal risks involved in the fundamental alteration, or even the withdrawal, of major financial benchmarks during the term of outstanding financial contracts worth hundreds of trillions of dollars?[13] A lawyer's instinct is almost certainly that it was not, but history suggests that the risks, in practice, should not be over-estimated.

The general nature of the legal risk involved in benchmark transition is the kind which arises when it can be said that a contract does not expressly cater for a change in the circumstances upon which certain of its terms are premised. In this case the term in question is the contract's definition of the applicable interest rate and the putative change in circumstances is the implementation of the proposed reforms. Whether or not any contractual uncertainty arises will depend, first, on whether the reforms take the benchmark outside the contractual definition of the applicable interest rate and, second, whether, if they do, the contract makes provision for this outcome, either expressly or impliedly. A further consideration is whether the interest rate reference in the contract is, or is not, a core term—i.e. one identifying the "subject matter"—of the contract. If it is not, then the possibility of frustration, referred to by the OSSG above, should be ruled out.

The common law doctrine of frustration operates to discharge a contract where, after the formation of the contract, something occurs which i) renders performance of contractual obligations impossible; ii) destroys the subject-matter of the contract; or iii) renders either performance or the subject-matter radically different from that which was in the contemplation of the parties at the time of entry into the contract.[14] If the doctrine is applied, the contract will automatically be

9/. Ibid. See page 28 of final report for further details on the Financial Conduct Authority and Bank of England's recommendations in this regard.
10/. Ibid. See page 29 of final report.
11/. Ibid. See page 54 of final report.
12/. Ibid. See pages 12 - 13 of final report.
13/. Outstanding interest rate swap contracts referring to LIBOR alone had an estimated value of $400 trillion, on a notional underlying basis as reported in June 2012: http://www.bis.org/statistics/otcder/dt1920a.pdf.
14/. Where a contract is found to be frustrated under English law, both parties are released from their obligations under the contract and neither party may sue for breach. For further detail, see cases regarding the conditions (impossibility, illegality, and frustration of purpose) which must be satisfied for the doctrine of frustration to apply: i) impossibility and/or destruction of the subject-matter: Taylor v. Caldwell (1863) 3 B & 826, ii) illegality: Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 and iii) frustration of purpose: Krell v Henry [1903] 2 KB 740

THE BANK OF ENGLAND WAS ACCUSED OF REFUSING TO LEAD LIBOR REFORM

brought to an end, irrespective of the wishes of the parties, and both parties will be released from their obligations to perform the contract.[15] Demonstrating a concern for commercial certainty, the courts have traditionally adopted a restrictive approach to the operation of this doctrine, outside certain very narrow circumstances.[16] There is no reason to believe that this strict approach would be relaxed in a situation in which a finding of frustration would bring to a disorderly end not only the contract being litigated but, owing to the standardised nature of the terms on which market contracts are concluded, almost certainly throw into doubt financial instruments worth hundreds of trillions of dollars.

To cater for the unexpected withdrawal of key benchmarks, market standard terms, such as the Master Agreement for derivatives produced by the International Swaps and Derivatives Association (ISDA) and terms for syndicated loan agreements produced by the Loan Market Association (LMA), usually incorporate fall-back clauses which make provision for what will happen in the event that the reference rate for the contract becomes unavailable. The incorporation of these provisions into financial contracts is the strongest possible indicator that the parties intended to allocate, at the outset of the contract, all the commercial risks which might

A finding of frustration would… almost certainly throw into doubt financial instruments worth hundreds of trillions of dollars

15/. The allocation of loss is then determined under the Law Reform (Frustrated Contracts) Act 1943 which provides: Section 1(2): All money payable under the contract ceases to be payable and any money already paid may be recovered. Where expenses have been incurred this may be deducted from the amounts payable or paid. This is at the discretion of the court and is subject to what is just and equitable in the circumstances of the case. There is no provision allowing expenses to be recovered which exceed the amounts paid or payable.
Section 1(3): Where a valuable benefit has been conferred this must be paid for
16/. See Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema [1982] AC 724 at 752, [1981] 2 All ER 1030 at 1046, HL, per Lord Roskill: "[the doctrine is] not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains".

arise and to exclude the possibility of frustration.

Nevertheless, the fall-back provisions incorporated in financial instruments, which generally refer to a complicated bespoke mechanism for identifying an alternative rate, are not well-designed to guarantee the continual provision of daily rates over an extended period, certainly not for the lifespan of, say, a 30-year interest rate swap. And there is another problem, too: reliance on fall-backs is not the transition pathway outlined by the OSSG. The integrity, transparency and robustness of the derivatives and loan markets would not be improved by a market-wide reliance on bespoke reference rates in financial contracts. The plan is, rather, to identify risk-free and transaction-anchored successor rates and to integrate them seamlessly into existing contracts and thereby into the financial markets.

So how can a successor reference rate be integrated seamlessly into an existing contract which refers to a different benchmark? One way in which contractual continuity could be preserved in the event of benchmark withdrawal would be by the courts implying a term into the contract to the effect that in this event the nearest substitute benchmark (probably, a successor rate identified by the OSSG) should apply to the parties' agreement. If the English courts are very reluctant indeed to accept that a commercial agreement has been frustrated, the doctrine of implied terms is one route by which they may avoid having to do so.

A significant volume of litigation over the continuity of contracts concluded on market standard terms, however, would—no matter how satisfactorily resolved—result in a undesirable period of market uncertainty. So, just how likely is such an outcome in the circumstances anticipated by the FSB?

History suggests that it is not very likely; that market participants are reluctant to litigate over benchmark transition when it comes to financial contracts on market standard terms. Three examples of interest rate transition, in particular, should give regulators and market participants alike cause for comfort.

1. In 1981, the Minimum Lending Rate (MLR)—the minimum interest rate at which the Bank of England announced that it would make short-term money available to the market—ceased to be published. A market-wide transition to the prevailing clearing rate (i.e. the base rate published by members of The Committee of London Clearing Bankers) occurred seamlessly and apparently without the need for revisions to contracts on standard terms.

WAS THE OSSG RIGHT TO REMAIN UNTROUBLED BY THE LEGAL RISKS?

JOANNA PERKINS

2. In 1998, the British Bankers Association, which was the administrator of LIBOR at the time, took a decision to calculate LIBOR, not as a "prime bank" reference rate but rather as a rate reflecting panel banks' "own cost of funds". It therefore significantly amended the published question which identifies the benchmark's underlying interest. Today the question reads:

At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11.00 am?

This change occurred without legal incident.

3. On 31 January 2014, the British Bankers Association ceased to act as the administrator for LIBOR and the benchmark was transferred to its current administrator: ICE Benchmark Administration Ltd. This handover occurred without incident for financial instruments, notwithstanding contractual references to "BBA LIBOR" or "the British Bankers Interest Settlement Rate" were still common in standard form contracts at the time.

It is not hard to identify reasons for the prevailing tendency towards the preservation of contractual continuity in benchmark transition. First, there is the obvious point that frustration is an unpredictable and disorderly—and therefore undesirable—outcome for nearly all concerned. A related point is that where a party is a significant participant in the markets it may have literally thousands of outstanding contracts tied to a benchmark like LIBOR. Litigation which brings an abrupt end to one of those contracts may create a precedent for all the others and it may, quite frankly, be difficult to model the overall economic outcome for the institution concerned. Indeed, even in the case of a single contract, parties probably cannot know or demonstrate with certainty whether the transition will have a net positive or a net negative position on their economic interests under the contract and will be aware that trying to bring the contract to an end could be a self-defeating move. A lesser consideration may be that few institutions want the reputational taint associated with creating widespread market uncertainty, as litigation over the continuity of contracts on market standard terms would be likely to yield. Pragmatically, too, most parties will be advised, if not already aware, that the chances of making a successful case that a commercial contract has been frustrated are very slim indeed, particularly when the contract incorporates fall-back provisions to cover exactly the eventuality now realised, i.e. the unavailability of the reference rate.

For these reasons as well, no doubt, as others there is every reason to be optimistic that benchmark reform will occur seamlessly in the next few years as it has on the occasions discussed above. While this may be disappointing news for lawyers, it is very good news indeed for the markets.

The Jersey law of dishonest assistance in breach of trust

Alexander Riddiford examines the Jersey law of dishonest assistance in breach of trust following the Royal Court's decision in Nolan & Ors v Minerva Trust Company Limited & Ors

Earlier this year the Royal Court of Jersey, when it handed down its judgment in *Nolan & Ors v Minerva Trust Company Limited & Ors* [2014] JRC 078A, a lengthy decision running to some 519 paragraphs, developed the Jersey law of dishonest assistance in breach of trust in various important respects.

The Plaintiffs' dishonest assistance claim concerned the alleged misapplication of various sums of money that the Plaintiffs had transferred to certain companies (the "Buchanan Companies") administered by Professional Trust Company Limited ("PTCL"), a trust company which later merged with the Defendant trust company (which, following that merger, inherited the former's historical liabilities). The Plaintiffs alleged (and the Court found) that the monies received by the Buchanan Companies were impressed with a *Quistclose* trust and/or a *Halley* constructive trust[1]; that the Buchanan Companies breached these trusts when they paid the trust monies away; and that PTCL (through its trust officers) had dishonestly assisted the Buchanan Companies in these breaches of trust. The nub of the Plaintiffs' case in relation to PTCL's alleged dishonesty was the contention that PTCL's trust officers acted in accordance with the instructions of a certain Mr Walsh (the settlor of the Arkaga Settlement which in turn owned the Buchanan Companies), whom the Court found to have been at all material times a fraudster[2]. The Defendants, by contrast, contended that there were no trusts; further or alternatively no breaches; further or alternatively no dishonesty in any assistance in breach of trust; and in any event that the Plaintiffs' claim was time barred.

The decision in *Nolan v Minerva* has developed the Jersey law of dishonest assistance in various ways. It has, for example, helpfully clarified that, as a matter of Jersey law, the limitation period for an action in dishonest assistance is three years (for reasons which are consistent with the basis for the six-year limitation period for an English dishonest assistance claim[3]). However,

1/. A Quistclose trust was found to have arisen in relation to all but one of the sums received by the Buchanan Companies; a Halley constructive trust was held to have arisen in relation to two of the sums received by the Buchanan Companies (in one case as an alternative to a Quistclose trust).
2/. Nolan v Minerva, paragraph [13].
3/. As recently confirmed by the Supreme Court in Williams v Central Bank of Nigeria [2014] UKSC 10, a decision relied upon by the Court in reaching its own conclusion on the analogous point of Jersey law: see Nolan v Minerva, paragraph [498].

THE ROYAL COURT OF JERSEY WILL OFTEN LOOK TO ENGLISH TRUST LAW WHEN JERSEY TRUST STATUTES AND CASE LAW ARE SILENT

in other respects the Court may be said to have caused the Jersey law of dishonest assistance to depart surprisingly (and without obvious justification) from the English legal principles that underpin[4] that Jersey cause of action. In particular the Court, by characterizing the dishonesty test in a dishonest assistance action with reference to inquiries that an "*honest trust officer*" would have made in given circumstances (and to what an "*honest trust officer*" would have learnt if he had made such inquiries), may be said to have imported into the dishonesty test concepts of negligence and constructive knowledge which English law does not recognize in this context.

Limitation: a helpful clarification

The Plaintiffs had issued proceedings against the Defendants in January 2011. The claims in dishonest assistance in breach of trust related to transactions which were all concluded by late 2007. One of the Defendants' defences was that the Plaintiffs' action was prescribed on the basis that the limitation period in dishonest assistance is, as a matter of Jersey law, three years. The Plaintiffs contended that the limitation period was either ten years (on the basis of Jersey customary law) or, alternatively, that there was no applicable limitation period (on the basis of Article 57(1) of the Trusts (Jersey) Law 1984 (the "1984 Law")).

The Court held: (1) that Article 57(1) of the 1984 Law does not apply to a dishonest assistance action; and (2) that the limitation period for a dishonest assistance action is three years (although it also held that, on the particular facts of the case, the action would not in fact have been prescribed until 2013[5]).

As to point (1), the Court considered whether Article 57(1) of the 1984 Law applied to a dishonest assistance action. This Jersey statutory provision, closely modeled on

4/. The Court correctly accepted the Defendants' submission that the trust law of Jersey was derived from that of England: see Nolan v Minerva, paragraph 150(ii).

5/. The Court considered that, as a matter of fact, it would have been a "practical impossibility" for the Plaintiffs to have brought the action before 2010 when they received documents pursuant to a Jersey injunction and so, by the doctrine of empêchement de fait, the limitation period only began to run in 2010.

FOLLOWING THE ROYAL COURT'S JUDGMENT IN NOLAN V MINERVA, SERVICE PROVIDERS IN JERSEY SHOULD BEAR IN MIND THAT THE TEST FOR DISHONESTY IS NOW CLOSER TO THE NEGLIGENCE TEST THAN IT USED TO BE

section 21(1) of the English Limitation Act 1980 (the "1980 Act"), provides:

"No period of limitation or prescription shall apply to an action brought against a trustee –

(a) is in respect of any fraud to which the trustee was a party or to which the trustee was privy; or

(b) to recover from the trustee trust property -

(i) in the trustee's possession,

(ii) under the trustee's control, or

(iii) previously received by the trustee and converted to the trustee's use."

The issue was whether Article 57(1) applied only to those trustees whose trusteeship has arisen through the lawful assumption of fiduciary obligations in relation to trust property (category 1 trustees), or whether it also applied to trustees whose trusteeship has arisen solely as a remedy for the misapplication of assets (category 2 trustees).

This question had previously been addressed by the Royal Court in *Bagus Investments Limited v Kastening* [2010] JLR 355, although since this was an application for leave to re-amend a pleading to include a claim for knowing receipt the decision was not (even accepting that what is true for knowing receipt must be true for dishonest assistance) a final determination of the issue. In *Bagus* the Bailiff accepted that it was arguable (without deciding the point) that Article 57(1) of the 1984 Law did not apply to a knowing receipt claim because (inter alia): (a)

The Court in *Nolan v Minerva* confirmed that the Bailiff's reasoning in *Bagus* was correct and that Article 57(1) does not apply to actions in dishonest assistance or knowing receipt

The Court's characterization and application of the test for dishonesty sets the bar for establishing liability materially lower in Jersey than it is in England

the Jersey law of constructive trusts is similar to English law; (b) the wording of Article 57(1) of the 1984 Law is similar to and based on that of section 21(1) of the 1980 Act; and (c) the English authorities (along with Lord Hoffmann NPJ's powerful decision in the Hong Kong Final Court of Appeal in *Peconic Industrial Development Ltd v Lau Kwok Fai & Ors* [2009] WTLR 999) indicated, albeit not quite unanimously, that constructive 2 trustees were not trustees for the purposes of section 21(1) of the 1980 Act (and, in Hong Kong, section 20 of the Limitation Ordinance, whose wording is materially identical).

The Court in *Nolan v Minerva* confirmed that the Bailiff's reasoning in *Bagus* was correct and that Article 57(1) does not apply to actions in dishonest assistance or knowing receipt. In particular the Court approved the reasoning of Lord Hoffmann in *Peconic* (which had informed the Bailiff's decision in *Bagus*), as well as that of Mr Sheldon Q.C. in the English decision in *Cattley v Pollard* [2007] Ch 353 (a decision consistent with *Peconic*), as representing the correct approach towards the treatment of category 1 and category 2 trustees, a view which was reinforced by the decision of the Supreme Court in *Nigeria v Williams* [2014] UKSC 10 (a decision published shortly after the draft judgment in *Nolan v Minerva* was distributed to the parties, which gave the Court the opportunity to amend its draft judgment so as to take the Supreme Court's views into account).

Having established that Article 57(1) of the 1984 Law did not apply to a dishonest assistance action, meaning that there is no statutory disapplication of what would otherwise be the applicable limitation period, the next question for the Court was what the applicable limitation period was.

The starting position, as a matter of Jersey customary law, is that a 10-year limitation period is applicable to "*all personal actions and all actions concerning movables, save to the extent that they have already been held to be subject to a different period, e.g. tort, actions concerning estates etc., or that some other period is, by analogy, clearly more applicable*" (*In the matter of the Esteem Settlement* [2002] JLR 53, at paragraph 257). Whilst the Plaintiffs contended that the 10-year limitation period should apply, the Court held that an action for dishonest assistance was analogous to an economic tort, so that the prescriptive period was three years pursuant to Article 2(1) of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960. In this regard the Court relied in particular on the analogy identified in the English case law between the causes of action in dishonest assistance and the economic tort of knowingly procuring a breach of contract (as to which see in particular *Cattley*, p.376A), considering this to be relevant to the application of the *Esteem Settlement* test as to whether "*some other period is, by analogy, clearly more applicable*".

Dishonesty: a surprising departure from English law

Whereas on the question of the applicable limitation period the Court's decision in *Nolan v Minerva* has clarified Jersey law in light of and consistently with the rationale of English and other common law decisions, other aspects of the Court's approach to the Jersey dishonest assistance action may be said to depart (without obvious justification) from the English law position.

In particular the Court's characterization and application of the test for dishonesty sets the bar for establishing liability materially lower in Jersey than it is in England.

It is settled law at the highest judicial level in various jurisdictions (see *Royal Brunei v Tan* [1995] 2 AC 378; *Twinsectra Ltd v Yardley* [2002] 2 AC 164; *Barlow Clowes Ltd v Eurotrust Ltd* [2006] 1 WLR 1476) that the test for dishonesty in a dishonest assistance claim involves both a subjective and objective element, the subjective element requiring the Court to consider what the Defendant actually

knew or understood or believed or suspected at the time of his assistance, the objective element requiring the Court to determine whether the assister's state of mind (applying an objective standard) was dishonest (the point being that an assister cannot rely on his own low moral standards as a defence). Moreover, the Jersey Court has previously accepted that this is the correct test for dishonesty in a dishonest assistance claim (see in particular *Cunningham v Cunningham* [2009] JLR 227).

As regards the test for dishonesty the Court in *Nolan v Minerva* affirmed various uncontroversial principles which align Jersey law with English law: that honesty is not an optional scale with higher and lower standards according to the moral standards of each individual (*Royal Brunei v Tan* [1995] 2 AC 378, 389); an honest person should not act recklessly (ibid., 390-391); an honest person has regard to the circumstances known to him, including the nature and purpose of the proposed transaction (*Twinsectra Ltd v Yardley* [2002] 2 AC 164, paragraph [121]). However, in its application of the dishonesty test, the Royal Court applied the novel concept of "*an honest trust officer*" and determined whether the assisters had acted dishonestly on the basis of an assessment as to what "*an honest trust officer*" would or would not have done in any given circumstances or discovered if he had made proper inquiries. Further, and importantly given that this was a case concerning a series of impugned transactions conducted over a period of months, the Court held that in later transactions the assister would be fixed with the knowledge he would have gained in earlier transactions if he had made those inquiries which "*an honest trust officer*" would have made at that time. Accordingly, the Court held that "*the knowledge of an honest trust officer was cumulative*" (paragraph [265]).

The effect of the Court's characterization of the dishonesty test in *Nolan v Minerva* is to move Jersey law away, in at least two ways, from the law of other jurisdictions which have an English-style action in dishonest assistance.

First, the concept of "*an honest trust officer*" (a concept not clearly defined by the Court[6], although it appears to include or relate to the duty of a trust officer to comply with industry regulations[7]) imports a negligence or quasi-negligence standard into the dishonesty test. What the test amounts to is in fact a "*diligent trust officer*" test, with a failure to make proper inquiries being sufficient to found liability regardless whether or not the reason the assister failed to make inquiries was so as not to learn what he subjectively suspected to be true.

Secondly, the *Nolan v Minerva* test for dishonesty, in treating the assister as having the knowledge which they would or might have gained if they had made certain inquiries, is predicated on constructive knowledge in a way which is impermissible in other jurisdictions. At paragraph [266] of its judgment the Court stated: "*The suggestion that one should wipe the slate clean at the start of each transaction and ignore the information that an honest trust officer would have acquired from an earlier transaction is, in our view, both logically indefensible and legally incorrect. Although we accept the broad proposition that constructive knowledge will not suffice for a dishonest assistance claim, that proposition must be kept within bounds. We do not regard the information which an honest trust officer would have acquired if he had made the necessary enquiries as constituting such constructive knowledge.*" However, it is respectfully suggested that the Court's attempt

6/. It is not clear, for example, whether the test relates to what "any" or what "every" trust officer would do in given circumstances; nor is it clear on what basis (given the absence of expert evidence on the issue) the Court determined what such an "honest trust officer" would have done in the circumstances of the case.

7/. Such as the duty to safeguard, properly segregate and identify trust assets (Article 21 of the Financial Services (Jersey) Law 1998); the duty to keep adequate records of customer money (paragraph 2(1) of the Financial Services (Trust Company Business (Assets – Company Money) (Jersey) Order 2000); and the duty to avoid any transfer of customer money where the trustee should suspect that it represents the proceeds of crime (Articles 32 and 33 of the Proceeds of Crime (Jersey) 1999).

to keep "*within bounds*" the proposition that constructive knowledge will not suffice for a dishonest assistance claim in fact amounts to the wholesale acceptance that constructive knowledge is sufficient to found liability. This is most clearly seen in the context of later transactions where, by virtue of the "*cumulative*" approach to a trust officer's knowledge, the trust officer is fixed with: (1) knowledge which he would have obtained in the context of an earlier transaction if he had asked the questions which an honest trust officer would have asked ("T1 Knowledge"); and (2) knowledge which he would have obtained in the context of a later transaction if he had asked the questions which an honest trust officer with T1 Knowledge would have asked ("T2 Knowledge"). It is difficult to see how the Court's acceptance of T1 Knowledge and (a fortiori) T2 Knowledge as sufficient to satisfy the dishonesty test amounts to keeping "*within bounds*" the proposition that constructive knowledge will not suffice for a dishonest assistance claim. Certainly, it is not obvious how the Court's approach can be reconciled with, for example, Lord Nicholls' statement of principle in *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 389D, that the dishonesty test has a "*strong subjective element in that it is a description of the type of conduct assessed in the light of what a person* ***actually knew at the time****, as distinct from what a reasonable person would have known or appreciated*" (emphasis added).

Practical implications of the Court's decision

The Royal Court's decision in *Nolan v Minerva* has developed the law of Jersey in various ways beyond the scope of this article, for example in relation to attribution/ imputation of knowledge, some of which should be carefully considered before being followed in future cases. However, the greatest points of practical impact arising from the decision relate to the Court's helpful determination of the limitation period for an action in dishonest assistance (in respect of which the Court's reasoning was clearly correct) and to the Court's approach towards the test for dishonesty for the purposes of a dishonest assistance action (in respect of which the Court may be said to have taken a somewhat unorthodox view). As to the dishonesty test applied in *Nolan v Minerva*, those advising clients in Jersey (particularly in the trust company business) should note that this decision materially heightens the standards to which those who deal with trust monies or are responsible for companies or entities under administration in Jersey are now held[8].

Tom Smith QC and Alexander Riddiford acted for the defendants in Nolan v Minerva.

ALEXANDER RIDDIFORD

8/. In this regard note the case comment by Nick Williams (Ogier, Trusts Advisory Group, Jersey), Nolan v. Minerva: Trustees and Dishonest Assistance (2 September 2014).

Reflections on contract law in Jersey

Robert Amey looks at the origins and the future of Jersey's unique law of contract

It is a common misconception, even among residents of the island, that Jersey law derives from English law.

It is certainly the case that the law of British Overseas Territories derives from English law. In Bermuda, for example, the Supreme Court Act 1905 provides that subject to any local amendments: *"the common law, the doctrines of equity, and the Acts of the Parliament of England of general application which were in force in England at the date when these Islands were settled [11 July 1612] shall be, and are hereby declared to be, in force within Bermuda."*

However, Jersey is not a British Overseas Territory. Long before it was under the rule of the English Crown, it formed part of the ancient Duchy of Normandy. So, just as the law of Bermuda is based on the law of England in 1612, the law of Jersey is based upon the customary law of the ancient Duchy of Normandy in 1204 (the year when the King John of England lost continental Normandy to Phillip II of France). This foundation on Norman customary law explains many of the idiosyncrasies of Jersey law.

Of course, the law has not stood still in Jersey or in Bermuda, but there has been a crucial difference between the ways in which the law on both islands has developed. Bermudan common law has developed broadly in line with English common law. This is unsurprising, since practitioners and judges in Bermuda will have been trained in the common law tradition, and it will be entirely natural to look to Commonwealth authority on points where Bermudan authority is lacking. In contrast, until relatively recently, Jersey lawyers received their legal education in France. It was therefore quite natural for the Jersey lawyer, especially in matters of contract law, to cite French authority.

One of the most popular authorities for use in the Jersey courts in contract cases is Pothier's *Traité des Obligations*, published in 1761. Although there are legal treatises on Norman and Jersey customary law dating back to 1200, Pothier is easily the best-known and most authoritative author on pre-revolutionary French law, which would have borne close resemblance to the law of Jersey. A study by John Kelleher estimated that Pothier had been cited in almost half the contract cases before the Royal Court from 1950-1999.[1]

The Norman influence runs deep through the Jersey law of contract. While English law follows the objective theory of contract (whereby the existence and interpretation of a contract are considered from the point of view of the objective bystander), Jersey law

1/. The Sources of Jersey Contract Law, (1999) Jersey Law Review 1.

THE ROYAL COURT STATES BUILDING ST HELIER, JERSEY

follows the subjective theory, focussing, like French law, on the parties' actual intentions.[2] When a Jersey lawyer speaks of a "*clause pénale*" in a contract, he is not talking about a penalty clause in the English sense but a liquidated damages provision. Similarly, while English law contracts must be supported by valuable consideration, there is no such requirement in Jersey law[3] (since Jersey law does not have the concept of a deed, there would be no way of making gratuitous promises enforceable if consideration were required). Instead, Jersey law, like French law, has the doctrines of "*cause*" and "*objet*", which perform a similar, though not identical role.

Recently, however, Jersey law has become more anglicised. The vast majority of Jersey lawyers now receive their legal training in England, and since October 2006, conveyancing contracts have been written in English rather than in French. We need only look to a 2008 decision of the Royal Court to see the extent of the modern English influence in Jersey.

In *Toothill* v *HSBC Bank plc*[4], the bank brought proceedings against Mr and Mrs Toothill for repayment of a loan. Mrs Toothill alleged that she had acted under the undue influence of her husband. According to Pothier, to avoid liability on this ground, the wife would have to show "*violence*" capable of making an impression on a person of courage. Reverential fear felt towards a head of household would not, without more, qualify. However, instead of relying on Pothier, the Royal Court relied upon the English decision of *RBS* v *Etridge (No.2)*[5] on the basis that: *"The majority of banks who lend money on the security of immovable property in the Island are UK-owned. Their guidelines and procedures have been established in*

2/. O'Brien v Marrett [2008] JCA 178 at [55].
3/. Wightman v Cathcard Properties Ltd (1970) JJ 1433, 1441.
4/. 2008 JLR 77.
5/. [2002] 2 AC 773.

There has been some judicial resistance to the use of English case law in the Royal Court

accordance with the clear judicial guidance offered in Etridge *and their personnel will have been trained accordingly."*

This was by no means the first mention of a doctrine of undue influence in Jersey law, but the decision is notable for the way in which the Royal Court so closely followed the English law on constructive notice and the steps which lenders ought to take in order to ensure that a party was contracting freely. The Jersey law of "*vices de consentement*" (defects in a contracting party's consent) had historically been one of the most distinctive (and most obviously continental) features of the Jersey law of contract. *Toothill* has now introduced conspicuously English concepts into this area of law.

There has been some judicial resistance to use of English authority case law in the Royal Court. In one case judgment, the court criticised an advocate who had relied upon English authority rather than "*mine the rich lodes of our ancient French law*"[6]. This criticism is perhaps a little unfair. The practice of looking to English law where Jersey law is silent is well-established.[7] The body of case law in Jersey is understandably much smaller than that in England, and cannot be supplemented simply by drawing on modern French authority. As the Court of Appeal noted in *Public Services Committee* v *Maynard*,[8] the law of Jersey is perhaps closer to the law of France than to the law of England, but differs in material respects from both. The best-known academic treatises on Jersey contract law are now hundreds of years old. Although Pothier has been described as a "*surer guide*"[9] to the law of Jersey than any English authority, he was writing about the law of Orléans in the 18th century, which did not perfectly reflect the law of Jersey at the time and certainly does not now. There are the works of the 17th century Jersey lawyers Le Geyt and Poingdestre which highlight the differences between the law of Jersey and the law of Normandy, but these are even older than Pothier and do not carry quite the same weight.

The Jersey Law Commission has lamented the "*cherry-picking*" approach of the Royal Court, sometimes following English authority and sometimes French authority without any proper justification.[10] In *Incat Equatorial Guinee Ltd* v *Luba Freeport Ltd*,[11] Deputy Bailiff William Bailhache complained that: "*The Defendant submitted that it was useful to look at Chitty on Contracts … There seems little doubt that if one were seeking to ascertain the English Law of Contract, Chitty would be a good place to start … Nonetheless, it is clearly a textbook which is to be approached with some caution insofar as the law of Jersey is concerned, as the basic principles of our law do not have the same provenance*."

The irony of this criticism is that Chitty borrowed heavily from Pothier and other continental jurists, although Pothier was far and away the most influential.[12] It was not until after the translation of Pothier into English in 1806 that common lawyers started to think of contract in terms of offer and acceptance, a distinctly French notion. A search for Pothier on an English legal database today reveals several hundred citations, many coming from the 19th century when English lawyers first tried to rationalise English case law in the style of the continental authors (Chitty was first published in 1826).

In the well-known English case of *Taylor* v *Caldwell*, Blackburn J expressly relied upon

6/. La Motte Garages Ltd v Morgan 1989 JLR 312, 316.
7/. 1996 JLR 343, 350.
8/. Selby v Romeril 1996 JLR 210, 218.
9/. The Jersey Law of Contract, Consultation Paper No.5, October 2002.
10/. [2010] JRC 0834 [24]
11/. AWB Simpson: Legal Theory and Legal History: Essays on the Common Law p.180.
12/. (1863) 3 B&S 826

ROBERT AMEY

Pothier when formulating the doctrine of frustration.[13] In *Cox* v *Troy*, the full Court of the King's Bench (Abbott CJ with Bayley, Holroyd and Best JJ) relied upon Pothier when formulating the rules for acceptance in contract. All of the judges apart from Bayley J (who gave a short concurring judgment) cited Pothier, Best J describing the authority of his work as "*high as can be had, next to the decision of a Court of Justice in this country*".[14] Even where Pothier was not expressly cited, the influence of French law on the English law of contract is plain to see. In *Hadley* v *Baxendale*, the court cited the French Civil Code, and decided that the English rules for remoteness in damages should be modelled on the French rules.[15] *Smith* v *Hughes*[16] makes no express mention of French law, but it is widely believed that Cockburn CJ and Blackburn J (who had relied upon Pothier in *Taylor* v *Caldwell*) were once again inspired by it when formulating the English law of mistake.[17]

Since much of the English and Jersey law of contract can be traced to the same source, it is unsurprising that on more than one occasion the Royal Court has found that the two legal systems have "*much in common*",[18] and has happily relied on both English and French authorities. However, Jersey law has never reached a satisfactory answer on which system of law should be favoured where they conflict. The Jersey Law Commission has proposed the incorporation of English law by statute, as was done in India by the Indian Contract Act 1872. This would have the attraction of providing legal certainty, but would result in the loss of part of Jersey's historic identity. An alternative would be to codify the existing Jersey law of contract. This too would provide legal certainty, although one would first have to decide what the Jersey law of contract is before it could be codified, and there would probably be disagreement on key areas. Whatever policymakers decide, they should bear in mind the words of Hoffmann JA sitting in the Court of Appeal in *Re Barker*[19]: "*I am conscious of the pride which the legal profession in this Island takes in its unique legal system but such pride can only be justified if the legal institutions are sufficiently adaptable to enable the Court to do justice according to the notions of our own time. The Court should not be left with the uneasy feeling that in following the old authorities, it might have perpetrated an injustice upon one of the litigants*".

13/. (1822) 5 B&Ald 474.
14/. (1854) 9 Ex 341
15/. (1870-71) LR 6 QB 597
16/. JH Baker: An Introduction to English Legal History p.353
17/. See for example Kwanza Hotels Ltd v Sogeo Co Ltd (1981) JJ 59, a misrepresentation case. Ironically, this is one area where English law and French law are normally thought to be quite different.
18/. 1985-86 JLR 186 at 195
19/. 1985-86 JLR 186 at 195

2014 Legal 500 Guide

We are absolutely delighted that our clients have helped us win Legal 500's Set of the Year for Insolvency. Thank you. Last month also saw South Square awarded the Chambers & Partners Insolvency/Corporate Restructuring Set of the Year, with Adam Al-Attar named Insolvency/Corporate Restructuring Junior of the Year. In the recently published Legal 500 Guide to the UK Bar, our commercial work is highlighted as a particular strength. In addition, the diversity of Members' practices, including sport and civil fraud, is also highlighted. Some of the main features from the guide are below.


MARTIN PASCOE QC


DAVID ALLISON QC


TOM SMITH QC


JEREMY GOLDRING QC


RICHARD ADKINS QC


BARRY ISAACS QC

Banking and finance

South Square contains 'some of the most brilliant barristers at the Bar for highly complex financial disputes'. In addition to advising banks, hedge funds and private equity groups, members also advise bodies such as the Bank of England, the FCA and PRA and HM Treasury. Recent cases in which members of South Square have been involved include *MF Global, Lehman Brothers, Barclays Bank v Graiseley Properties* and *Saltri v MD Mezzanine Sicar*. The following Members are individually ranked as leading practitioners:

Gabriel Moss QC
Mark Phillips QC
Robin Dicker QC
William Trower QC
Antony Zacaroli QC
Barry Isaacs QC
Jeremy Goldring QC
Daniel Bayfield
Richard Fisher
Stephen Robins
Joanna Perkins
David Allison QC and Tom Smith QC are ranked as leading new Silks

Commercial litigation

South Square is ranked as a leading set for commercial litigation, both where that litigation arises out of an insolvency and in a wider commercial context. Our barristers regularly appear in the Commercial Court, the Chancery Division and in other English and overseas courts, with members frequently appearing in the Bahamas, Bermuda, the British Virgin Islands, Brunei Darussalam, the Cayman Islands, Dubai, Gibraltar, Hong Kong and the Isle of Man. The following Members are individually ranked in the list of leading practitioners:

Gabriel Moss QC
Robin Dicker QC
David Alexander QC
Antony Zacaroli QC
Daniel Bayfield
Stephen Robins
David Allison QC and Tom Smith QC are ranked as leading new Silks

Company

The guide notes that our members have '…a deep understanding of company law' which has been '…essential for several high profile contentious matters such as the Lehman Brothers waterfall application'. Members advise on a wide range of matters including schemes of arrangement, reductions of capital, shareholders' agreements, joint venture agreements, directors' duties and technical issues of statutory interpretation arising under the Companies Act 2006. Members from South Square who are noted as leading practitioners are:

Gabriel Moss QC
Robin Dicker QC
William Trower QC
Martin Pascoe QC
Antony Zacaroli QC
Glen Davis QC
Barry Isaacs QC
Daniel Bayfield
David Allison QC and Tom Smith QC are ranked as leading new Silks


LLOYD TAMLYN

Fraud:Civil

South Square's pre-eminence in the fields of both insolvency and banking inevitably leads to a significant number of instructions in cases involving civil fraud issues, with much of the work having an international dimension. Current and recent instructions include substantial fraud-related litigation in various jurisdictions concerning Bernard Madoff, the Stanford fraud, the Saad Group fraud, as well as asset recovery issues relating to HRH Prince Jefri Bolkia.

Mark Phillips QC
Antony Zacaroli QC
Lloyd Tamlyn
Stephen Robins
Tom Smith QC is noted as a leading new Silk in this field


JOHN BRIGGS


FELICITY TOUBE QC

Insolvency

'The go-to chambers for academically challenging insolvency work'.
We are delighted that our clients are enthusiastic about the work we undertake both at silk and junior level in this field. The guide notes that we have 'real strength in depth, so you know you will always get someone good'. Our Members continue to be involved in almost every major insolvency, including *Administrators of Heritable Bank plc v Winding-up Board of Landsbanki Islands HF*, *BNY Corporate Trustee v Eurosail*, and *Re Nortel GmbH*, all in the Supreme Court.
The following Members are individually ranked as leading practitioners:


GLEN DAVIS QC


RICHARD FISHER

Michael Crystal QC
Gabriel Moss QC
Simon Mortimore QC
Richard Adkins QC
Richard Sheldon QC
Richard Hacker QC
Mark Phillips QC
Robin Dicker QC
William Trower QC
Martin Pascoe QC
David Alexander QC
Antony Zacaroli QC
Glen Davis QC
Barry Isaacs QC
Felicity Toube QC
John Briggs
Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn
Daniel Bayfield
Richard Fisher
Stephen Robins
Georgina Peters
David Allison QC and Tom Smith QC are ranked as leading new Silks


RICHARD HACKER QC

Insurance and reinsurance

The complex commercial cases regularly handled by our barristers often include elements of insurance, reinsurance and professional negligence, and the guide notes South Square is a leading set in this field. **Glen Davis QC**, who has been called to the Gibraltar Bar, is recommended as a leading silk, and remains a leading authority on Gibraltar insurance and reinsurance law.


DANIEL BAYFIELD


GEORGINA PETERS

Sport

Once again recommended as a leading Silk is **Mark Phillips QC**, who handles high-profile Formula 1 cases (advising and representing Formula 1 teams and drivers in connection with competition law issues), and heavyweight football disputes. He regularly leads recommended junior **Daniel Bayfield**, who acts for the FA Premier League and the Football League.

South Square and Mourant Ozannes Litigation Forum 2014

Reviewed by Robert Amey

South Square once again joined forces with specialist offshore law firm Mourant Ozannes for a half-day Litigation Forum in September. This year's event - entitled *Lehman Brothers 6 years on - where are we now?* - with keynote speaker the Hon. James Peck, comprised three panel sessions covering key aspects of international insolvency law.

The Mourant Ozannes and South Square panellists were joined by guest speakers from Allen & Overy, BakerHostetler, Clifford Chance and Morrison & Foerster.

After a welcome from co-chairs Michael Crystal QC of South Square and Robert Shepherd of Mourant Ozannes, the Forum kicked-off with an informative and entertaining keynote session with a difference - a "cross-examination" of the Hon. James Peck by Michael Crystal QC. This session was held under the Chatham House Rule.

The first panel session, entitled "Getting the Money Back - Clawback Claims", was chaired by Peter Hayden from Mourant Ozannes, Cayman with co-panellists Robin Dicker QC, Gonzalo Zeballos of BakerHostetler, New York and Howard Morris of Morrison & Foerster, London.

One of the important issues at the moment in cross-border insolvency concerns the extent to which a court can assist a foreign office-holder advance clawback claims, either by applying the foreign law applicable to the clawback claim or by applying any comparable provision under domestic law. Robin Dicker QC considered the effect of the decision in *Rubin v Eurofinance* both in the context of the Cross-Border Insolvency Regulations and also at common law, the latter being particularly important in commonwealth jurisdictions that have not yet adopted the Model Law or enacted their own domestic equivalent.

THE HON. JUDGE JAMES PECK AND MICHAEL CRYSTAL QC GAVE THE KEYNOTE SESSION

An interesting contribution came from Gonzalo Zeballos, from BakerHostetler's New York office. Coming initially from a commercial litigation background, Gonzalo Zeballos had, like Lord Collins in *Rubin*, initially thought that the rules applicable to enforcement of foreign insolvency judgments should be no different to those applicable to commercial judgments. However, after acting as lead attorney to the SIPA trustee of Bernard L Madoff Investment Securities LLC, Gonazalo Zeballos had come to sympathise more with the approach of Lord Hoffmann in *Cambridge Gas*.

As for the application of foreign law in domestic proceedings, the approach in England and the USA varies. In England, the High Court has held in *Re Pan Ocean* Co Ltd [2014] that the UNCITRAL Model Law does not enable the application of foreign law (the decision is currently under appeal). The contrary result was reached by the US Court of Appeals for the 5th Circuit in *Re Condor Insurance Co Ltd* (2010), although Gonzalo Zeballos noted that the decision was considered "not uncontroversial" by US lawyers. The view was expressed that since transaction avoidance actions are simply part of the process of gathering in the assets and distributing them, it makes no sense for avoidance and distribution to be governed by

LEFT TO RIGHT: ROBIN DICKER QC WITH JEREMY WESSELS AND PETER HAYDEN OF MOURANT OZANNES

ABOVE: HOWARD MORRIS OF MORRISON & FOERSTER AND ROBERT SHEPHERD OF MOURANT OZANNES

different systems of law. As Robin Dicker QC noted, the English court is quite happy to apply foreign law for contract and tort actions, and there is no obvious policy reason why the same should not be done for insolvency actions. Ultimately, the solution may lie in legislative reform.

Finally, Mourant Ozannes' Peter Hayden explained the recent Cayman authorities on international cooperation, in particular, *Picard v Primeo*. Cayman law, like English law, does not allow foreign law clawback claims, but does allow foreign officeholders to bring Cayman law clawback claims under the Cayman Companies Law (it is an open question whether there is jurisdiction at common law). Peter Hayden noted that Cayman was "one of the most progressive jurisdictions in the world" when it came to cross-border insolvency, but that there were still "unfair and outdated negative perceptions of offshore jurisdictions". This had manifested itself in recent years in decisions of the US District Court for the Southern District of New York, notably *Sphinx, Bear Sterns* and *Basis Yield*, where the US court appeared to show a lack of comity.

The second session, "Insolvency of International Banks", discussed three issues arising out of the collapse of Lehman: client money, derivatives and potential mis-selling. Delegates were treated to the acting talents of the panel, as a hapless client (Bruce Lincoln of Mourant Ozannes) approached three lawyers (South Square's Jeremy Goldring QC and Antony Zacaroli QC, and Helen Carty of Clifford Chance) with his legal problems in the days after the collapse. Each gave advice with the benefit of the hindsight allowed by looking at cases from the subsequent six years. Antony Zacaroli QC explained the "spectacular failure" of the client money rules in the Lehman administration, Lehman having failed to comply with the rules. Jeremy Goldring QC then spoke about the options of a LBIE counterparty under the ISDA Master Agreement, and discussed the consequences of either designating an early termination date, or allowing the swap to continue. Finally, Helen Carty addressed the difficulties faced by clients trying to establish a mis-selling claim against a bank in relation to financial products.

The final session, "Trends in Offshore Liquidation" - chaired by Shaun Folpp from Mourant Ozannes, BVI with co-panellists Jeremy Wessels from Mourant Ozannes, Guernsey, Marc Florent of Allen & Overy and South Square's Tom Smith QC - focussed on the large number of frauds which have been discovered in the wake of the financial crisis. Seemingly simple frauds have given rise to sophisticated technical problems.

One of the issues in relation to clawback actions brought by officeholders arising out of fraud was the question of submission. Tom Smith QC noted in *Rubin v Eurofinance*, the Supreme Court had seemingly intended to align the rules on enforcement of insolvency judgments with those governing enforcement of commercial judgments generally, but there was doubt as to whether that had actually been achieved. Although in both cases, there is now a requirement that the defendant submitted to the foreign jurisdiction, what amounts to submission seems to vary in insolvency cases. Special rules relating to submission may therefore apply in insolvency. Marc Florent discussed the problems which officeholders may face in obtaining information and documents needed in order bring claims. This was the issue in the *Saad v PwC* case heard by the Privy Council in April 2014 and which may revisit the tension between *Cambridge Gas* and *Rubin*. Finally, Jeremy Wessels talked of some of the issues raised by asset tracing claims in the Channel Islands.

The Forum was extremely well received by the 250 plus delegates who had the opportunity to network and exchange views on issues raised during the sessions over drinks at the end of the day.

If you would like a copy of the slides, or are interested in attending future South Square events, please email events@southsquare.com.

Robin Knowles elevated to the QBD

On 3 October 2014 a full Lord Chief Justice's court experienced the pomp and ceremony expected of the swearing-in of one of Her Majesty's High Court Judges. It was with real pride that South Square saw Robin Knowles CBE QC elevated to the bench, albeit with sadness that chambers would be losing one of its long-standing colleagues.

Robin commenced his career at the Bar in 1984 when the set was at 3 Paper Buildings and his practice quickly developed. Just 15 years later he took silk. He undoubtedly had "a distinguished career at the commercial and chancery Bars" to quote the tribute given by the Lord Chief Justice. Robin was widely instructed including by most of the City firms and institutions such as Lloyd's. Notable recent cases showing the breadth of his practice include *Rubin/New Cap Re* before the Supreme Court on cross-border enforcement of insolvency judgments, the *Sky Gardens* litigation in the DIFC Courts arising out of Dubai's property crash in 2008, and earlier this year *Barclays v Unicredit* before the Court of Appeal regarding contractual determination. Robin's name accordingly appears many times in the Law Reports and not just as an advocate but also as a deputy High Court Judge, a position he held since 2006.

But that is only part of the story. As the Chairman of the Bar stated in his address at the ceremony, Robin has worked tirelessly for the good of the profession and the public. He did not just sit on the Bar Council, the Civil Justice Council and previously chair COMBAR, but he spearheaded many initiatives to support the Bar and our legal system, each time in his modest, inclusive but determined manner. For example, with Sir William Blair he led the work on reinstating and reforming the QC system in England and Wales, which otherwise looked likely to be consigned to history. With others he led work on the establishment of the Rolls Building, now rightly seen as a world-class business court complex and where members of chambers routinely appear. On the international stage, Robin assisted in the creation of the Qatar International Court and Dispute Resolution Centre, and in 2012 chaired the committee that organised the Qatar Law Forum that brought leaders in law together in Doha to discuss the rule of law.

Yet still that does not encompass Robin's contributions to date. He has long been deeply committed to the cause of pro bono and access to justice, together with wider charitable causes. Characteristic of his role in leading and encouraging the profession's pro bono efforts, Robin has chaired the Bar Pro Bono Unit since 2006, and is also chair or trustee of a number of pro bono initiatives such as Pro Bono in the London Muslim Centre, the solicitors pro bono group LawWorks and the National Pro Bono Centre. His work with the Civil Justice Council on increasing access to justice for litigants in person will this November see the third annual forum take place in Westminster to discuss strategy now so critical in light of the changes to legal aid. Beyond law, Robin chairs both Richard House, the first children's hospice to be established in London, and the UK's umbrella charity for children's palliative care and hospices, Together for Short Lives. He also leads the board of the SS Robin which is restoring in Royal Victoria Dock the world's oldest surviving steam-coaster by the same name. Robin was rightly decorated for his services to pro bono when he was made a Commander of the Order of the British Empire in 2006.

As the Lord Chief Justice stated before swearing in his newest colleague, Robin will bring these interests and activities, for which we are all grateful, to his new role on the bench. We have no doubt that Mr Justice Knowles will be a Judge of the highest calibre and we wish him well.

MR JUSTICE KNOWLES CBE

EU/EEA LAW UPDATE

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

INSOL Europe - Istanbul 2014

Update of European Insolvency Regulation

There is now an important document from the Council setting out proposals for reform as they currently stand in the light of both the Commission and European Parliament proposals. The key points were discussed by a panel (including Gabriel Moss QC) at the Insol Europe conference in Istanbul on 9 October 2014. Here are two of the key areas of proposed reform.

Scope

As is well known, the text of the Regulation is almost identical to the text of the draft Convention, which failed on 23 May 1996. The text of the Convention itself had been negotiated for over 20 years previously and reflected a very different era. The text of the Regulation is thus a very old one which assumes that the relevant proceedings are insolvency proceedings such as bankruptcy and liquidation.

Nevertheless, Annex A to the Regulation has listed rescue/reorganisation and pre-insolvency proceedings from the start (such as administrations and voluntary arrangements in England, which do not require proof of current insolvency), and increasingly so since the Regulation came into force. There are now even proceedings such as the French *sauvegard* procedure, which is not available if the debtor is already insolvent in the French law sense.

The ECJ has taken a pragmatic approach in order to fit pre-insolvency proceedings into the Regulation and in the *Bank Handlowy* Case (C-116/11) held that the *sauvegard* procedure was within the Regulation, because it was listed in Annex A, even if it did not fulfil the criteria set out in Article 1, which currently expressly refers to "insolvency" proceedings.

In terms of the proposal for reform, the plan is to make express provision for rescue, reorganisation and pre-insolvency proceedings.

The current position of the European Council in its document of 3rd June 2014 proposes a much wider definition of the scope of the Regulation, to include proceedings "for the purpose of rescue, adjustment of debt, reorganisation or liquidation". This is however subject to the condition that the proceedings should be public, collective and based on a law relating to insolvency. There is also a further condition that the proceeding has to be of one of three kinds. Either (a) the debtor must be totally or partially divested of his assets and an "insolvency practitioner" (the new phrase instead of liquidator) has to be appointed, or (b) the assets and affairs of the debtor are subject to control or supervision by a court, or (c) there is a temporary stay of individual enforcement proceedings granted by a court or by operation of law in order to allow negotiations between the debtor and his creditors, subject to such proceedings providing for suitable measures to protect the general body of creditors and are preliminary to (a) or (b) proceeding if no agreement with creditors is reached.

Moreover, where the proceedings may be commenced in situations where there is only a *likelihood* of insolvency, their purpose must be to avoid the debtor's insolvency or the cessation of his business activities.

This proviso could arguably cause problems for a common form of administration proceeding in England, which has as its sole effective purpose the realisation of property to pay one or more secured creditors (Insolvency Act 1986, schedule B1, paragraph 3(1), objective (c)). There could also be difficulties with an administration whose sole practical purpose is to obtain a better result for creditors as a whole (objective (b)). However, the statute requires an administrator primarily to have the objective of rescuing the company (objective (a)) and it is only if it is not "reasonably practical" to achieve objective (a) that he may pursue objective (b) or (c). Since it is often not possible to tell at the moment of appointment which purposes are "reasonably practical", administration orders as a concept should fall within the proposed proviso as a proceeding having the purpose of avoiding the debtor's

insolvency or the cessation of his business activities on the basis that the primary purpose of administration is in all cases objective (a).

The greatest concern and interest in the UK has been in relation to the question as to whether Schemes of Arrangement under the UK Companies Act 2006 are to be included. On the face of it, such Schemes of Arrangement, even if they are used in a situation of insolvency, appear to be excluded by the proposed requirement that the proceedings be "based on a law relating to insolvency". This seems very clear from footnote 6 to the proposal which states that a recital should be added "clarifying that proceedings are not based on a law relating to insolvency when they are based on general company law not designed exclusively for insolvency situations". That is precisely the position of Schemes of Arrangement under the Companies Act 2006. They fall under company law and are available to completely solvent entities not subject to any financial problems.

It is also difficult to fit all corporate voluntary arrangements (CVAs) into the proposed definition. These are currently included in Annex A. However, there may not be a divestment of assets under the terms of the CVA, the assets and affairs will not normally be subject to control or supervision by a court and there is no statutory provision for a temporary stay for negotiations, although the court has a discretion under general (not insolvency) law to stay individual proceedings to protect a proposed CVA.

The existing cross-reference to Annex A is however to be preserved by the proposal. On the basis of the *Bank Handlowy* case therefore it would seem that CVAs will continue to be within the Regulation, even if outside the proposed definition.

Virtual Secondaries

As a practical matter, it is often best to avoid secondary proceedings being opened. As we point out in **Moss Fletcher & Isaacs: The EC Regulation on Insolvency Proceedings** (Second Edition 2009) at paragraph 8.151:

"Secondary proceedings can disrupt the beneficial rescue or realisation of the business. Particularly in the case of a group which had traded prior to insolvency as one organisation, it makes practical sense for the rescue, reconstruction or insolvency proceedings to be run as a unity. In some situations, local creditors can be persuaded to abstain from starting secondary proceedings in the interests of a better realisation by promising to respect local law priorities in the eventual distribution."

There is then a citation of the *Collins & Aikman* Case [2007] 1 BCLC 182, which was subsequently followed by the *Nortel* Case [2009] BCC 343. In both those cases, a promise was made by the UK main administrator to respect local priorities in respect of distributions from assets which would have fallen into a secondary proceeding, *if* no request was made by local creditors to open a secondary proceeding. In *Collins & Aikman* the undertaking was given first and the court approved of this technique subsequently and held it to be legally effective. In *Nortel* the judge gave advanced permission and equally regarded the process as effective.

Subsequently in *Nortel* the judge agreed to reinforce the position by sending out letters of request to potential secondary jurisdictions to ask them to ensure that the main administrators were given notice of any request to open a secondary. An express provision requiring such notice to be given is now proposed as Article 29a.

There was however a concern that the insolvency laws of some Member States were not flexible enough to overcome the apparent obstacle of Article 4, which requires distributions in the main proceeding to be carried out under the law of the main proceeding. English insolvency law is flexible enough to provide that in some cases, even applying English law pursuant to Article 4, the normal priorities can be departed from, including situations where an undertaking had been given to local creditors to respect their local priorities, in the interests of better realisations for creditors generally, provided that local creditors did not request the opening of local insolvency proceedings.

The current proposal includes a new provision for the creation of such "virtual secondaries". A proposed new Article 28a creates a right on the part of the insolvency practitioner in the main proceeding to give an undertaking in order to avoid secondary proceedings. There are a series of detailed rules laid down and of course the provision would have self-executing, mandatory effect throughout the EU.

The proposed new Article 28a empowers an insolvency practitioner to give a written "unilateral" undertaking to comply with local law priorities that would apply in a secondary in relation to assets which are located in the local jurisdiction (Article 28a.1). The relevant time for looking at the assets is at the time the undertaking is given (Article 28a.1a). I assume the word "unilateral" is used to emphasize that the undertaking is not a matter of contract.

The article then makes the local law applicable to the distribution of local assets, thereby avoiding any problem with Article 4.

The proposal (at Article 28a.3a) states that the undertaking "shall be approved by the known local creditors." This reads rather oddly in English, as if the known local creditors were being ordered to approve the

undertaking. However, there is then a statement about the voting rules that are to be applied, namely those applicable for the adoption of restructuring plans in the local jurisdiction. This seems to imply that the proposal is making the undertaking *subject* to approval by "the known local creditors". This accords with the text of proposed Article 28a.4, which states that an undertaking given *and approved* under Article 28a "shall be binding on the estate."

Enforcement of the undertaking is to take place, under the proposal, in the main proceedings (article 28a.6), but provisional or protective measures can also be sought in the secondary jurisdiction (Article 28a.6a). Rather worryingly for the insolvency practitioner in the main proceeding, he is to be made personally liable for not complying with the requirements of Article 28a (Article 28a.7)

There does not seem to be any scope for the insolvency practitioner to make his undertaking conditional upon the local creditors not requesting the opening of local proceedings. However, a proposed new provision, Article 29a.2, requires a court facing such a request to turn it down if an undertaking "in accordance with Article 28a" has been given "…if it is satisfied that the undertaking adequately protects the general interests of local creditors." Presumably the words "in accordance with Article 28a" import the need for local creditor approval under Article 28a.3a, so that it is only undertakings given *and approved by local creditors* and therefore binding on the estate under Article 28a.4 that can block the opening of a secondary.

Even if secondary proceedings are in fact opened, if an undertaking has been given and approved, it remains binding on the estate and the insolvency practitioner in the main proceeding is required to return to the secondary proceeding any assets (or

THE INSOL EUROPE CONFERENCE WAS HELD ON THE EUROPEAN SIDE OF THE BOSPHOROUS, MOMENTS FROM THE BLUE MOSQUE

their proceeds) which he has removed since the undertaking was given (Article 28a.4).

The proposed major innovation in the "virtual secondary" process, the requirement of approval by local creditors (Article 28a.3a), may give rise to some paradoxical results. In some countries it may well be against the interests of the majority of local creditors for local priorities to apply, because of the priority awarded to governmental preferential creditors. In such cases it would make sense for the local creditors to vote down the approval of the undertaking and rely on the priorities in the main proceeding, if that is likely to give them a better result.

The proposal expressly gives the insolvency practitioner in the main proceeding standing to apply to challenge a decision opening a secondary proceeding (Article 29b) on the grounds that the court did not comply with the conditions and requirements of Article 29a. This seems to cover for example a case where the local court opens a secondary despite the giving and acceptance by local creditors of an Article 28a undertaking which adequately protects the general interests of local creditors. Since proposed Article 29a.1 requires notice to be given of a request to open a secondary, the insolvency practitioner in the main proceeding should be able simply to oppose the opening rather than have to challenge it subsequently. However, if no notice has been given, that would seem to be an obvious case for a subsequent challenge.

The heading of the proposed Article 29b, giving standing as mentioned, reads rather oddly in English because it refers to "judicial review" of the decision to open secondary proceedings. As a matter of legal English, "judicial review" is only used for court challenges against administrative (or delegated legislative) decisions or regulations and not court decisions. Legal English would refer to an application to "set aside" the opening, but I think the true meaning of "judicial review" is clear here from the context.

EU/EEA CASE DIGESTS

Re X

A recent judgment of the French *Cour de cassation* (*Re X,* 27 May 2014) highlights an important difference between the operation of the Judgments Regulation (44/2001) and the Insolvency Regulation (1346/2000).

Mr X filed for bankruptcy in France in July 2007, claiming that his centre of main interests (COMI) was in France. Before his case came before the French court, the German revenue authorities opened bankruptcy proceedings in Germany.

Had the two sets of proceedings been unrelated to insolvency (and therefore governed by the Judgments Regulation) the German court would have been obliged to stay its proceedings under article 27 of the Judgments Regulation, which provides that "*Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established*". Under article 30 of the Judgments Regulation a court is deemed to be seised "*at the time when the document instituting the proceedings or an equivalent document is lodged with the court*". However, the Insolvency Regulation contains no equivalent provision, simply stating at article 16 that "*Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings*".

Although the French court was the court first seised, it had not yet delivered a judgment. The District Court of Cologne was therefore free to proceed without taking any notice of the French proceedings, and gave a judgment in November 2008 opening main insolvency proceedings under article 3(1) of the Insolvency Regulation, finding that the debtor's COMI was in Germany.

That judgment was then entitled to recognition under article 16 of the Insolvency Regulation. Accordingly, when Mr X's case came before the French court, that court held that it was bound by the finding of the German court. Mr X appealed.

Mr X's first argument relied upon art.15 of the Insolvency Regulation, which provides that "*The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending*". Mr X argued that his French bankruptcy proceedings amounted to a pending lawsuit, and that under French law, the French court had to determine independently where COMI lay and accordingly whether it had jurisdiction. The court rejected this argument. Unlike the Judgments Regulation, the Insolvency Regulation confers jurisdiction on the court which first gives judgment opening main proceedings, not the court in which the proceedings are first commenced.

Mr X's second argument was that the German proceedings had been opened following inappropriate pressure from the German tax authorities, and that this, coupled with the non-adversarial nature of German bankruptcy proceedings, violated his rights under art.6 of the European Convention on Human Rights. Mr X therefore sought to rely upon art.26 of the Insolvency Regulation which provides that "*Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual*". This argument also failed.

Nickel & Goeldner Spedition GmbH v "Kintra" UAB: C-157/13

Another recent case, this time in the ECJ, deals with the interplay between the Judgments Regulation and the Insolvency Regulation. In this case, the Lithuanian liquidator made a claim against a German company in respect of non-performance of a contract for carriage of goods. The liability had arisen before the insolvency. The Lithuanian liquidator sought to proceed against the German company in the Lithuanian court. The German defendant argued that Germany was the proper forum.

There were three relevant sources of law. Under the Insolvency Regulation, matters "*closely connected*" with the insolvency proceedings are within the jurisdiction of the court where main proceedings are opened. The Judgments Regulation provides different rules for "*civil and commercial matters*" (but not insolvency proceedings), the default rule being that defendants should be sued in their home state. Finally, the Convention on the Contract for the International Carriage of Goods

by Road (CMR) has its own jurisdiction provisions.

The ECJ restated the orthodox position that the Insolvency Regulation and the Judgments Regulation are intended to dovetail with each other, so matters which fall within the insolvency exception to the Judgments Regulation should fall within the Insolvency Regulation, and those falling outside the scope of the Insolvency Regulation fall within the Judgments Regulation. Only actions which derive directly from insolvency proceedings and are closely connected with them fall within the Insolvency Regulation. For example, transaction avoidance rules will fall under the Insolvency Regulation. An action under a reservation of title clause against an insolvent entity will, however, not fall under the Insolvency Regulation, since the action is independent of the opening of insolvency proceedings. In each case, the court must consider "*whether the action at issue derived from insolvency law or from other rules*" (para.26), and the "*decisive criterion*" is "*not the procedural context of which that action is a part, but the legal basis thereof*" (para.27). On that analysis, "*it must be determined whether the right or obligation which respects the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings*" (para.27).

In the present case, the ECJ notes that the action could have been brought entirely independently of insolvency proceedings. That the action had been taken by an insolvency administrator did not alter the situation. The action therefore fell outside the Insolvency Regulation and within the Judgments Regulation.

The court further held that where the Judgments Regulation and the CMR are both applicable, the court "may" apply the rules in the CMR, although often there will be no difference between the outcome under the Judgments Regulation and that under the CMR.

C-327/13 Burgo Group SpA v Illochroma SA (in liquidation)

Illochroma SA had its registered office in Belgium, where it owned a building, employed staff and traded in goods. Its centre of main interests, however, was in France, where main proceedings were opened April 2008. On 4 November 2008, Burgo Group (an Italian company) presented the administrator with a claim for €359,778·48, which was rejected for being out of time.

Presumably considering that it could circumvent any time bar by opening fresh insolvency proceedings, on 15 January 2009, Burgo Group applied to the Belgian court to open secondary proceedings. The French liquidator of Illochroma SA argued that it would not make sense to open secondary proceedings in the jurisdiction where the debtor has its registered office. Secondary proceedings can only be opened where there is an 'establishment'. An 'establishment', it was argued, could not have legal personality. Furthermore, it was alleged that under Belgian domestic law, secondary proceedings could only be opened by a creditor residing or having its registered office in Belgium. It was argued that secondary proceedings exist for the benefit of local creditors, and an Italian creditor therefore ought not to be allowed to commence secondary proceedings in Belgium.

Unsurprisingly, the ECJ held that the fact that Illochroma had its registered office in Belgium was no bar to the opening of secondary proceedings there. It was noted that prior to the opening of main proceedings, recital 17 of the preamble to the Insolvency Regulation limits the right to request the opening of 'territorial' proceedings to 'local creditors and creditors of the local establishment or to cases where main proceedings cannot be opened'. However, recital 18 provides that once main proceedings have been opened elsewhere, 'the right to request the opening of insolvency proceedings in a Member State where the debtor has an establishment is not restricted by this Regulation'. Article 2(h) defines establishment as 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods'. There is nothing in the Insolvency Regulation that prevents a company having an 'establishment' in the member state where it has its registered office.

The ECJ then considered whether the court considering whether to open secondary proceedings is entitled to discriminate against residents of other EU member states. This is a more difficult question, since Article 29 entitles the liquidator in the main proceedings and "*any other person or authority empowered to request the opening of insolvency proceedings*" under the law of the jurisdiction where secondary proceedings are sought to request the opening of such proceedings. What if the law of that member state restricts standing to creditors resident in that member state? That, according to the ECJ, would amount to indirect discrimination on the basis of nationality (since non-residents are more likely to come from other member states) and is therefore prohibited by community law. The member state where secondary proceedings are sought can exercise whatever discretion it has under national law, but may not discriminate indirectly against the citizens of other Member States.

Awards success for South Square

South Square was named Insolvency / Corporate Restructuring Set of the Year at the Chambers Bar Awards 2014.

The award recognises South Square's continued strength in this field, with Chambers & Partners commenting that "South Square dominates the insolvency and restructuring sector – its world-class reputation is reflected by the headline cases it attracts."

More than 600 guests attended this year's ceremony at the London Hilton on Park Lane on 2 October.

South Square's Adam Al-Attar, Richard Fisher and Stephen Robins were shortlisted for the Insolvency / Corporate Restructuring Junior of the Year award. Adam received the accolade on the night, having impressed the judging panel with his "sharp intellect and excellent reputation amongst peers and clients".

More recently, in a further success, South Square was crowned Insolvency Set of the Year in the inaugural Legal 500 UK 2014 Bar Awards. A winners' dinner will be held in London on 26 November.

CHAMBERS BAR AWARDS 2014 HOSTED BY GYLES BRANDRETH (RIGHT)

Head of Chambers, William Trower QC, said: "We are delighted to have received these awards, which recognise the expertise and hard work of our members and staff. These awards are very important to us as they are voted for by our clients – we thank you for your support."

Attempt to abolish SFO revived

Home Secretary Theresa May will revive plans to abolish the UK's main anti-fraud and corruption agency, drawing it into a new FBI-style national crime force, the Financial Times reported in October.

Plans to roll the Serious Fraud Office (SFO) into the larger National Crime Agency were halted three years ago following resistance from Conservative cabinet colleagues, including former attorney-general Dominic Grieve and then justice secretary Ken Clarke. Both have since been ousted in this summer's cabinet reshuffle, paving the way for May's reforms.

Since 2012, the SFO has tried to re-model itself as a tough prosecutor of economic crime and persuaded the Treasury to top-up its emptying coffers, enabling investigations of cases such as the rigging of the London interbank offered rate (Libor).

Pensioner gang masterminded pyramid scheme

A gang of female pensioners which masterminded a £21m pyramid scheme was convicted for unfair trading in September, having duped more than 10,000 "investors".

Eleven women – including a grandmother and the vice-president of a local Rotary Club in Burnham-on-Sea who had been friends since their Catholic convent schooldays – became the first to be prosecuted for such a scheme under new legislation in the Consumer Protection from Unfair Trading Act 2008.

Participants of the Give and Take ("G&T") scheme were required to hand over £3,000 and sign-up eight new recruits, and were assured a cash prize in return. But while the women behind the scam pocketed up to £92,000 each, 90 per cent of their investors lost out.

The victims, predominantly female, were enticed by champagne-fuelled pamper parties and glitzy promotional material showing women reclining in cash-filled bath tubs and strewn across beds scattered with banknotes. They were seduced by the promise they would receive £24,000 when they reached the top of their pyramid, with a guarantee they "could not lose".

Hundreds of women regularly attended G&T parties, at which they would witness the "financial crowning" of the scheme's "Brides" – those recipients who had reached the top of their pyramid cell.

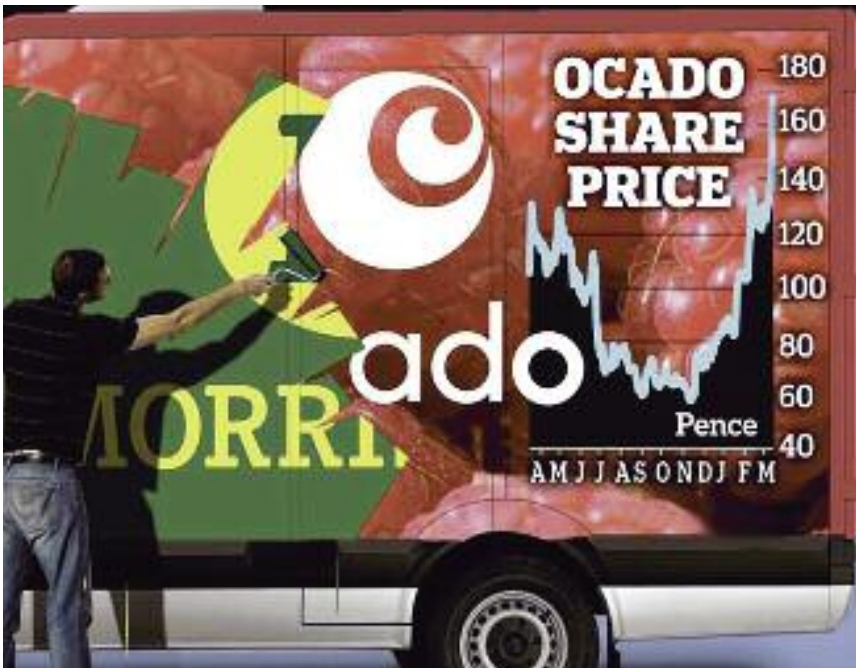
Handing down his verdict at Bristol Crown Court, Judge Mark Horton said of the scheme: "If it looks too good to be true, that's because it is."

Morrisons' former tax chief charged with insider dealing

In a further scandal to hit one of the "big four" supermarkets, the former treasurer and head of tax at Wm Morrison was charged with insider dealing by the Financial Conduct Authority (FCA) in September.

Paul Coyle was charged with two offences over trading in Ocado Group plc shares between February and May 2013, shortly ahead of a transformational £216m tie-up between the two retailers.

The value of Ocado rocketed following the announcement of the planned merger to create a new online service for the Bradford-based retailer.



COYLE IS CHARGED WITH INSIDER TRADING RELATING TO THE MORRISON AND OCADO MERGER

Sheldon: Cross-Border Insolvency - Update

Cross-Border Insolvency 4th Edition is due to be published in January 2015. This fully revised book, edited by Richard Sheldon QC with contributions from Mark Arnold QC, Jeremy Goldring QC, Tom Smith QC, John Briggs, Lloyd Tamlyn, Richard Fisher and Adam Al-Attar, provides a comprehensive update of cross-border insolvency law and practice. South Square is delighted to offer Digest subscribers a 25% discount on the normal price of £195 - quote TOCB125 to receive your discount. For more information and to order your copy visit www.bloomsbury.com/crossborder

RICHARD SHELDON QC

Spring of personal insolvencies

Despite an overall decline in personal insolvencies following the recession, government figures present a sharp rise between April and June, during which 27,029 people in England and Wales became insolvent. This marks a 5.1 per cent increase on the same period in 2013. The Insolvency Service reported the increase was driven by a 20 per cent rise in the number of Individual Voluntary Arrangements (IVAs).

Financing terror

William Willson gave a live TV interview in September for World News Media on The Islamic State, financing terrorism and money laundering.

Conference round-up

Gabriel Moss QC and John Briggs spoke at the INSOL Europe Academic Forum 8-9 October and the Annual Congress 9-12 October in Istanbul. William Willson gave the Personal Insolvency Update at the R3 SPG Regional Conference in Birmingham on 17 October. Glen Davis QC and Fidelis Oditah QC moderated sessions at the INSOL Africa Round Table on 17-18 October in Kampala. Joanna Perkins spoke at the IBC Annual Financial Institutions Litigation Conference in London on 21 October

Lawyer convicted of fraud

A solicitor has been found guilty of stealing almost £1m of tax in a stamp duty fraud. Shameer Sacranie was sentenced to 10 years in jail after an investigation by HMRC revealed he had fraudulently altered legal property documents to reduce the amount of stamp duty due on 139 properties bought by his clients. He then charged clients the full stamp duty amount and kept the difference. Due to appear at Nottingham Crown Court on 8 September Sacranie absconded and was sentenced to 10 years in his absence.

South Square barristers 'hot'

The new South Square website, launched in May, has received numerous plaudits, none more effusive than that from the 'experts' at *Your Barrister Boyfriend*.

Launched last year by a pair of enterprising American ladies on the hunt for eligible partner material (more fool them), *Your Barrister Boyfriend* included chambers' Adam Al-Attar and William Willson among its initial, er, subject matter.

These ladies recently sung the praises of South Square's new website and improved photography of members therein. Furthermore, through the power of social media, fans of South Square barristers vouched for the apparent charms of members on twitter. Praise indeed, and never forget, *Your Barrister Boyfriend* is where the world at large first heard of the new Mrs Clooney. Watch this space...

YOUR BARRISTER BOYFRIEND: IMPECCABLE TASTE

Lost tax revenue due to insolvencies over £4bn

HM Revenue & Customs (HMRC) lost up to £4.4bn in 2012-13 because of business and taxpayer insolvencies, according to the revenue's latest Tax Gap Estimate report. Insolvency practitioners have also warned that this figure could grow from April 2015 thanks to the implementation of the 2012 Legal Aid, Sentencing and Punishment of Offenders Act.

Insolvency trade body R3 believes HMRC could reduce this figure by becoming more involved in the insolvency process. Giles Frampton, president of R3, said: "HMRC is often the biggest creditor in an insolvency but they don't always engage with the insolvency process.

"Input from experienced creditors can really help insolvency practitioners and Official Receivers bring back more money, not just for the taxpayer, but for all creditors."

Frampton said: "More concerning is the fact that, from next year, even more money will be lost by the taxpayer because of the government's refusal to make insolvency litigation permanently exempt from the 'Jackson' legal reforms."

UK among worst in Europe for employing female judges

UK judicial systems rank among the lowest in Europe for female representation, figures from the Council of Europe (CoE) revealed in October.

Only Armenia and Azerbaijan have a smaller proportion of female professional judges than England and Wales, Scotland, and Northern Ireland.

The CoE's annual report on the efficiency and quality of justice in Europe said 25.2 per cent of judges in England and Wales in 2012 were women. This compares to 60 per cent in France.

The study also revealed British judges are the most highly paid in the European Union, second only to Switzerland.

WOMEN MAKE UP ONLY 25% OF JUDGES IN ENGLAND AND WALES

New arbitration rules to increase efficiency

With arbitration being increasingly used to settle high level disputes, particularly where they are of a cross-border or sensitive nature, the London Court of International Arbitration (LCIA) has recently brought into effect a new set of rules which aim to make the LCIA arbitration process more efficient and less costly. One innovative change brought about by these new rules is the power for the tribunal to sanction legal representatives for poor conduct. " In the event of a complaint by another party or on its own initiative, the tribunal may decide – after consulting the parties and granting that legal representative a reasonable opportunity to answer the complaint – to determine that a legal representative has violated these general guidelines and to impose sanctions accordingly," said Paula Hodges QC, the Head of the Herbert Smith Freehills Global Arbitration Practice. These sanctions may include a written reprimand; a written caution as to future conduct in the arbitration; or indeed, "Any other measure necessary to maintain the general duties of the arbitral tribunal."

Banker convicted for Libor rigging

In October, a senior banker from a leading British bank pleaded guilty to conspiracy to defraud in connection with manipulating Libor, marking the first conviction of an individual over the rigging scandal. The Serious Fraud Office (SFO) has charged 11 others currently awaiting trial, while further individuals remain under police investigation. Barclays settled a £290m payout in 2012. This was followed by Lloyds, which paid £218m, and a record £930m settlement from UBS.

Red Bull's clipped wings

Drinks giant Red Bull GmbH settled a $13m lawsuit in October after an American consumer sued the company for false advertising, claiming he had neither wings, nor enhanced athletic or intellectual performance, having regularly consumed the drink for 10 years. The Austria-based firm pledged to refund $10 to any US customer who had bought the drink since 2002 and agreed to amend future advertising.

Court of Appeal appointments

A new Lady Justice of Appeal and three new Lord Justices of Appeal joined the Court of Appeal in the autumn. Her Majesty the Queen approved the appointments of Mr Justice Bean, Mr Justice Burnett, Mrs Justice King, and Mr Justice Sales.

New judges appointed

On 1 October 2014, five new judges were appointed to the Queen's Bench Division of the High Court. They were Andrew Edis QC, Maura McGowan QC, HHJ James Goss QC, Robin Knowles CBE QC and Ian Dove QC.

SOUTH SQUARE CHALLENGE

Welcome to the South Square Challenge for the November 2014 edition. All you have to do is name the eight people in the pictures and then say what the connection is. Please send answers by email to kirstendent@southsquare.com or by post to Kirsten at the address on the back page. Entries by Monday 5 January 2015 please. To the winner, if necessary drawn from the wig tin, will go a Magnum of Champagne and an ever so useful South Square umbrella. Good luck.

David Alexander QC

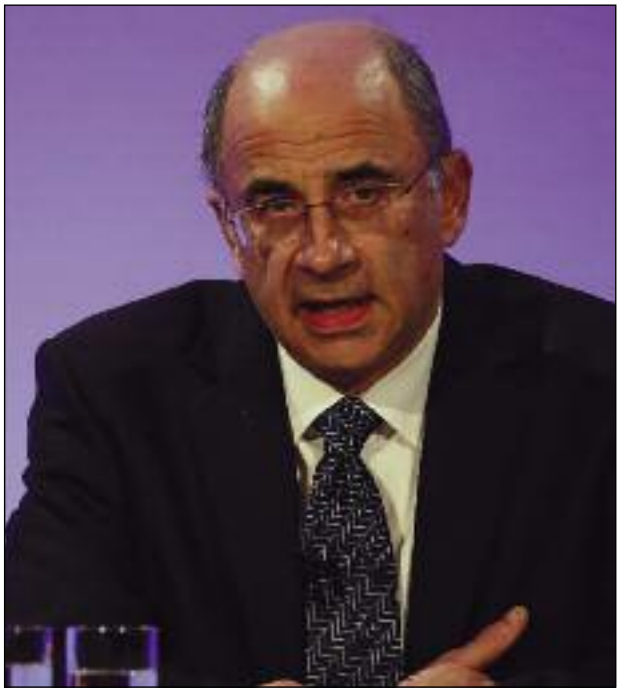
1

2

3

4

5



6

7

8

And the connection is?

AUGUST CHALLENGE

The correct answers to the August 2014 South Square Challenge were: 1. The Bahamas, 2. Bermuda, 3. Gibraltar, 4. Cayman Islands, 5. Hong Kong, 6. Isle of Man, 7. Strasbourg, France, 8. British Virgin Islands.

Congratulations to Richard Baird, Senior Associate at Forbes Hare LLP to whom goes a magnum of champagne and an ever so useful South Square umbrella.

Diary Dates

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

R3 Ladies Lunch
7 November 2014 - Park Plaza, Westminster Bridge, London

Campbells' Fund Focus Conference
14 November 2014 - Cayman

ILA Annual Dinner
27 November 2014 - Natural History Museum, London

R3 Advanced Restructuring
4 December 2014 - Holiday Inn Bloomsbury, London

IBC Global Conference: Trust Jurisdiction & Conflict of Laws Issues
10 December 2014 - Kensington Close Hotel, London

INSOL International Academic Group
21-22 March 2015 - San Francisco

INSOL Annual Regional Conference
22-24 March 2015 - San Francisco

ILA Annual Conference and Academic Forum
24-25 April 2015 - Lincoln's Inn, London

R3 Annual Conference
20-22 May 2015 - Grand Hyatt, Berlin

INSOL Europe Annual Conference
1-4 October 2015 - Berlin

INSOL Dubai
24-26 January 2016

INSOL 2017 Tenth World International Quadrennial Congress
19-22 March 2017 - Sydney

South Square also runs a programme of in-house seminars and talks - both in Chambers and onsite at our client premises - covering important recent decisions in our specialist areas of practice as well as topics specifically requested by clients.

For more information, contact events@southsquare.com, or visit our website www.southsquare.com.

We are delighted to be winners of the Chambers Bar Awards and Legal 500 UK Awards

Thank you for your support

SOUTH SQUARE

SOUTH SQUARE: 'WILL NEVER LET YOU DOWN'

Legal 500 2014

Michael Crystal QC
Christopher Brougham QC
Gabriel Moss QC
Simon Mortimore QC
Richard Adkins QC
Richard Sheldon QC
Richard Hacker QC
Mark Phillips QC
Robin Dicker QC
William Trower QC
Martin Pascoe QC
Fidelis Oditah QC
David Alexander QC
Antony Zacaroli QC

Glen Davis QC
Barry Isaacs QC
Felicity Toube QC
Mark Arnold QC
Jeremy Goldring QC
Lucy Frazer QC
David Allison QC
Tom Smith QC
John Briggs
Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn
Daniel Bayfield
Richard Fisher

Stephen Robins
Joanna Perkins
Marcus Haywood
Hannah Thornley
William Willson
Georgina Peters
Adam Al-Attar
Henry Phillips
Charlotte Cooke
Alexander Riddiford
Matthew Abraham
Toby Brown
Andrew Shaw
Robert Amey

3-4 South Square | Gray's Inn | London WC1R 5HP | UK
Tel. +44 (0)20 7696 9900. Fax +44 (0)20 7696 9911. LDE 338 Chancery Lane. Email practicemanagers@southsquare.com.
www.southsquare.com