A REGULAR REVIEW OF RELEVANT NEWS, CASES AND ARTICLES FROM **SOUTH SQUARE BARRISTERS** MAY 2013

SOUTH SQUARE DIGEST

Full of the joys of spring...

Welcome to the May 2013 edition of the Digest. It has been quite a three months since the February edition: the Chris Huhne and Vicky Pryce trials, a new Pope, the loss of the UK's triple A credit rating, the Oscar Pistorius affair, the Grand National won by a 66-1 shot, miserable freezing weather well into April, horsemeat all over the place, very peculiar behaviour from North Korea, the death and ceremonial funeral of Baroness Thatcher and a cracking end to the US Masters at Augusta. Not to mention the dreadful events in Boston and the fact that the UK avoided a triple dip recession … just.

But perhaps the most monumental event took place in the Eurozone area. I am not talking about the horror movie that is Italian politics and which could destabilise things further. No, it was the smash and grab raid on bank accounts in Cyprus where the state effectively helped itself to up to 60per cent of credit balances in bank accounts holding more than the guaranteed EU minimum of Euros 100,000. Now accounts in Cyprus may have had a lot of bad money in them so at first blush we may not have too much sympathy for the victims. But many innocent savers too have had their money snaffled by the state in what appears to be a legal way. One also asks the question "What sort of a precedent does that set for everyone else?" How I am sure other Southern European countries would like to, for example, pay off part of their national debt by appropriating the assets of the better off. And, if it works in Cyprus and others follow suit, there seems to be no reason in principle why it could not happen here. Now that would be a way of getting rid of the debt rather faster than through the present austerity measures. Very scary indeed.

So what have we got to look forward to over the next few months? Well, in those well-known words of Donald Rumsfeld, there are known knowns: like INSOL in the Hague from 20-23 May (at which South Square will be well represented: see p34), the arrival of the Australians for the first of back-to-back Ashes series, Wimbledon (come on Andy Murray, give us something to cheer about) and the summer holidays to look forward to. But I suspect the unknowns, whether known or unknown, will continue to surprise us.

On to this edition of the Digest. This time we have four articles for you: an article by William Trower QC on the role of the security trustee and lessons from the Stabilus restructuring, an article by William Willson on statutory derivative claims and the common law, an article by Glen Davis QC on the granting of relief under the Cross-Border Insolvency Regulations and the second of Mark Arnold QC's articles on the European Commission's recent Report on the application of the Insolvency Regulation and proposals for its amendment. In addition to the articles there are, of course, the usual case Digests, news-in-brief, diary dates and the South Square Challenge. And don't miss the advert for Simon Mortimore QC's book on Company Directors which enables you to get 20 per cent off the purchase price!

I hope you all enjoy this edition of the Digest. If you wish to be added to the Digest circulation list please send an email to kirstendent@southsquare.com. Similarly if your contact details have changed please let us know so that we can ensure you get the next edition of the Digest.

David Alexander QC
Editor

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SOUTH SQUARE

The Role of the Security Trustee

William Trower QC considers some of the lessons from the Stabilus Group restructuring

In the recent decision of *Saltri III Limited v. MD Mezzanine SA Sicar & Ors* [2012] EWHC 3025 (Comm), Mr Justice Eder considered a number of issues arising out of the restructuring of a group of companies known as the Stabilus Group, a global market leader in the manufacture of gas springs and hydraulic vibration dampers. The lengthy judgment dealt with the facts in great detail, but the court also decided in a commercially robust manner some points of general significance to the position of security trustees appointed and acting under English law documentation in the leveraged finance market.

In summary, the restructuring was driven by the senior lenders without the consent of the mezzanine lenders, who were investment funds managed by AXA and European Capital. One of the steps in the restructuring involved J P Morgan Europe Limited ("JPMEL"), in its capacity as security trustee, enforcing the security and selling the trading subsidiaries to an entity connected to one of the senior lenders. It was challenged by the mezzanine lenders, a challenge which led to the commencement of proceedings by one of the senior lenders seeking declaratory relief that the restructuring was valid.

The mezzanine lenders responded to the challenge by asserting that the restructuring was unauthorised, effected for an improper purpose and therefore void. They also advanced claims for breach of duty seeking equitable compensation or damages against JPMEL. In the event the challenge by the mezzanine lenders did not succeed and, although he made some criticisms of the conduct of JPMEL, Eder J. made the declarations sought by the Claimant, Saltri III Limited.

The story begins in 2008 when the Stabilus Group was acquired by a private equity fund, Paine & Partners LLC, for €519 million, €340 million of which was advanced under a secured senior facility agreement ("SFA") and €75 million of which was advanced under a secured mezzanine facility agreement ("MFA"). JPMEL was appointed senior facility agent under the SFA and (initially) mezzanine facility agent under the MFA, as well as security trustee under both facility agreements. JPMEL's duties as senior and mezzanine facility agent were described as being solely mechanical and administrative in nature and, in those capacities, it was required to exercise its rights and discretions on the instructions of the relevant majority lenders. In the normal way, the lenders' rights inter se were partially regulated by the terms of an intercreditor agreement ("ICA"), to which JPMEL was also a party. The principal documentation was based on the then current LMA standard forms.

The liabilities under both the SFA and the MFA were guaranteed by other Stabilus companies and secured by, amongst other things, Luxembourg law pledges over group shareholdings granted in favour of JPMEL as security trustee. Both the SFA and the MFA were syndicated, and J P Morgan Plc, a company associated with JPMEL, was mandated lead arranger. One of the original lenders was another J P Morgan company, J P Morgan Chase Bank ("JPMCB").

As is commonly the case, the ICA contained a general subordination provision by which the liabilities and security were agreed to rank first as to the liabilities under the SFA and second as to the liabilities under the MFA. It also contained relatively elaborate provisions for prohibiting the making of payments to the mezzanine lenders and restricting their rights of enforcement prior to the discharge of the senior debt. The subordination of the mezzanine lenders was further reflected by the ability of the senior facility agent (but not the mezzanine facility agent or anyone else acting on behalf of the mezzanine lenders) to require the security trustee to enforce its

security and the ranking provided for by the payment waterfall. There was also an enforcement release clause (of the type considered in *Barclays Bank plc v. HHY Luxembourg SARL* [2010] EWCA Civ 1248 (*"European Directories"*)), which authorised the security trustee to release any of the secured assets from the transaction security and, where the assets were shares in an obligor, to release or transfer the liabilities of that obligor.

In addition, the ICA contained the terms of the trusts and provided that the security trustee would only have the duties expressly specified in the ICA or the relevant security documentation. Clause 14 provided that the duties owed by the security trustee to the mezzanine lenders in respect of enforcement of the transaction security were no different to, and no greater than, the duty to the obligors that would be owed by the security trustee under general law.

Less than a year after the acquisition by Paine, it had become apparent that the Stabilus Group would soon be in breach of its financial covenants and unable to meet the interest payments about to fall due. A senior coordinating committee was formed, one of the members of which was JPMCB. The senior debt was by then trading at a significant discount to its face value. There then followed what the judge described as difficult and prolonged negotiations between the mezzanine and senior lenders.

WILLIAM TROWER QC

Throughout these negotiations, the general view of all involved, including the mezzanine lenders, was that the value of the Stabilus Group was significantly below the amount of the senior debt. The negotiating position of the mezzanine lenders seems to have been predicated on the assumption that, without their consent, the senior lenders would have had to exercise their pledge over the shares with consequential risks to the survival of the business. In the light of that perceived leverage, they sought a controlling interest in the equity. The position of the senior lenders was that, in the light of the enterprise value of the group, the mezzanine debt had no more than nuisance value and they were only prepared to agree to a structure which gave the mezzanine lenders a payment at all in order to smooth the way to a consensual restructuring.

Initially, the Stabilus Group instructed Rothschilds to advise it with a mandate to assist in valuing the company and its assets and to conduct a marketing exercise. This was limited to soliciting bids from five selected investors. The level at which the bids came in were significantly less than the outstanding amount of the senior debt. Thereafter further offers were made, including at least one from the mezzanine lenders themselves, all of which were pitched at a level which ascribed no value to the mezzanine debt itself. There was no further general marketing carried out, although it was at the core of the mezzanine lenders' complaint, that this should have taken place.

At some stage JPMEL instructed separate lawyers in respect of its role as security trustee. However, the taking of separate legal advice was not matched by a separation of roles or the erection of Chinese walls internally within the J P Morgan group. Individual J P Morgan employees continued to receive and disseminate information for JPMCB as senior lender, for JPMEL as security trustee and for JPMEL as senior facility agent, without distinguishing properly between their respective roles.

Shortly thereafter, JPMEL, in its capacity as Security Trustee, took steps to obtain an independent valuation of the Stabilus Group, because it was apparent that enforcement was now likely to be required. American Appraisal ("AA") was instructed to carry out the work. The final report, more the result of a desktop than a

The judge did not consider that the ICA contemplated that all enforcement consideration had to be capable of application in accordance with the payment waterfall.

general marketing exercise, gave the Stabilus Group an enterprise value substantially less than the amount of the senior liabilities. There was considerable criticism at trial of the work carried out by AA but the judge expressed himself satisfied that AA acted in an independent and competent manner and that, therefore, the mezzanine lenders were so far out of the money that their demands for equity were unrealistic. Indeed, he found that they had never provided any evidence that their claims against the Stabilus group had any value.

The restructuring itself took place in the summer of 2010. JPMEL as senior facility agent accelerated the senior debt and took steps to enforce the pledges by issuing an enforcement notice to itself as security trustee. The enforcement of the pledges took the form of a sale by JPMEL of the relevant shareholdings to two senior lender-linked investment funds (Acquilux and KG) for a nominal consideration but subject to the existing debt burden. JPMEL also exercised its rights under the ICA to transfer the mezzanine liabilities and what was described as the non-performing senior debt to Acquilux. Those mezzanine liabilities and the non-performing debt were then released.

The overall effect of the restructuring was that Acquilux and KG acquired ownership of the Stabilus Group. Some extra cash was injected by the seniors and part of the existing senior debt was converted into equity. The mezzanine and part of the senior debt was released, while the remainder of the senior debt was converted into new super-senior, senior and mezzanine debt. Senior and mezzanine profit participating loans (in effect a form of quasi-equity) were also allocated to the senior lenders. The judge concluded that this then placed the Stabilus Group on a sustainable footing with a substantially reduced debt burden.

The first argument dealt with by the judge was the mezzanine lenders' ambitious submission that the ICA simply could not be used for the purposes of a restructuring. He rejected this on the grounds that the court's task is to construe the agreement in accordance with its terms and explained that, in any event, such a submission was inconsistent both with the Court of Appeal's decision in *European Directories*, where a very similar ICA was used for precisely that purpose, and with statements to the same effect by Mann J in *Re Bluebrook Ltd* [2010] BCLC 338.

The next issue was the mezzanine lenders' argument that the way that the waterfall provisions of the ICA were drafted meant that enforcement realisations could not be effected for nominal or non-cash consideration. The judge correctly dismissed this argument on the grounds that restrictions on any such sale or disposal would be uncommercial, particularly given the possible shortage of liquidity in a market in which pure cash bids may not be forthcoming. He also drew comfort for this conclusion from the approach adopted in *European Directories*, and pointed out that the references in the ICA to "proceeds" of enforcement and to "amounts … received or recovered" are apt to refer to non-cash consideration as well as cash. The judge did not consider that the ICA contemplated that all enforcement consideration had to be capable of application in accordance with the payment waterfall. In his view all that was required was that, if the consideration was capable of any such application, the waterfall should be applied. This part of the judgment is of interest in the light of the revised LMA wording intended to protect the junior lenders when non-cash consideration is received.

The issue which has caused most comment is the way in which the judge dealt with the nature and extent of JPMEL's duties as a fiduciary. He explained that the starting point was to identify the extent of the duties which, in this case, were defined by the ICA and which, if fiduciary in their quality, would render JPMEL a fiduciary in respect of their exercise. He held that the mezzanine lenders were fundamentally wrong to suggest that merely because JPMEL might have been a fiduciary in some respects it was a fiduciary in all. This meant that in a commercial context, (and this may seem obvious, but is worth restating) a person will not be under a fiduciary duty to subordinate his personal interest to that of his principal, if the documentation governing the relationship entitles him to act in his own interest or that of a third party in preference to the interests of his principal. He stressed that in the context of complicated financial transactional documentation it is particularly important to give full effect to the contract that the parties have agreed.

In the light of the judge's approach on this aspect of the case, it was not surprising that he reached the conclusion that, when exercising its powers of enforcement, JPMEL as security trustee did not owe fiduciary duties to act in the interests of all lenders, including the mezzanine lenders. Any such conclusion could not have stood with the subordination provisions in the ICA, the rights of the senior lenders to control the manner of enforcement and the fact that the release provisions could be exercised in a manner contrary to the interests of the mezzanine lenders. It would also cut across

He held that the mezzanine lenders were fundamentally wrong to suggest that merely because JPMEL might have been a fiduciary in some respects it was a fiduciary in all.

the fact that a mortgagor ordinarily owes no fiduciary duty to his mortgagee and, in the present case, the ICA provided that this was the extent of the security trustee's duty to the mezzanine lenders. Furthermore, where there is a conflict between beneficiaries built in by the documentation (in this case the ICA), it was not open to the mezzanine lenders to complain of what might otherwise have been the further conflict arising out of the association between JPMEL as security trustee and JPMCB as one of the senior lenders.

On this latter issue, the judge expressed the view that JPMEL had acted inappropriately by its failure to put in place Chinese walls, and by sharing certain information with the senior lenders without doing the same for the mezzanine lenders, although, in the event, this conduct made no difference because it was not causative of any loss. This is a warning for security trustees more generally to ensure that there is a proper separation of the various capacities in which members of the same group may act and that information is appropriately disseminated to those who have (or in an appropriate case may have) a legitimate interest in receiving it.

Intimately connected with this conclusion was the judge's recognition that in this, as in any case in which assets are realized on enforcement by or for the benefit of a secured creditor, the power to do so is not held on trust for the mortgagor. The mortgagee is entitled to act in his own interests both as to the timing and manner of sale (*Downsview Nominees v. First City Corpn Ltd* [1993] AC 295), although (as was common ground) JPMEL was under a duty to take reasonable care to obtain the true market value at the time of the sale.

Moving to the actual sale process itself, the judge considered the principles to be derived from *Tse Kwong Lam v. Wong Chit Sen* [1983] 1 WLR 1349. He was prepared to assume that there was a heavy burden on JPMEL to show that in all respects it had acted fairly and used its best endeavours to obtain the best price reasonably obtainable, because Acquilux was to be treated as a party associated with the secured creditors. He rejected, however, an argument also said to be derived from *Tse Kwong* that JPMEL was under an absolute duty to take (and act upon) independent expert advice as to the method of sale. He said that a duty expressed in these terms would in any event be inconsistent with the terms of the ICA and the need to assess the facts broadly in deciding whether the duty of care had been breached.

JP MORGAN: SOME GROUP COMPANIES HAD CONFLICTING ROLES IN THE RESTRUCTURING

The judgment contains a very detailed review of the grounds on which the mezzanine lenders had challenged the valuation evidence on which JPMEL relied and demonstrates the care with which the court may be inclined to examine the valuation steps which a security trustee takes before sale of transaction security. The judge was satisfied that there was no absolute duty to conduct a further sales and marketing process of the kind that the mezzanine lenders said that Rothschild had earlier advised was appropriate. It would have been impracticable by the time that AA was instructed and would in all probably have been pointless. It is apparent that the judge was fortified in his conclusion by the fact that the senior debt was trading throughout the relevant period at a very steep discount. The consequence was that he was satisfied that whatever further marketing process had been undertaken, there was no realistic prospect of a price in excess of the senior liabilities being achieved and therefore there was no relevant breach of duty by JPMEL.

The overall approach reflects the considerable difficulties for mezzanine lenders where they challenge a restructuring against the background of good evidence that they are substantially out of the money. The judgment draws together many of the legal principles which are applicable in this area, and gives security trustees a salutary warning to ensure that, even though the documentation may contemplate an intrinsic conflict of interest, they should be careful to maintain proper separation between the various capacities in which members of their group may act.

Robin Knowles CBE QC, Hilary Stonefrost and Tom Smith all appeared at the trial.

This article first appeared in the April edition of the Butterworths Journal of International Banking & Financial Law

CASE DIGESTS

Edited by HILARY STONEFROST

There are a very considerable number of reports in this edition of the Digest. They include decisions in Lehman Brothers and MF Global as well as the decision of the Supreme Court in in Administrators of Heritable Bank plc v Winding-Up board of Landsbanki Islands HF. In each of the latter two cases, South Square had no fewer than five members of Chambers involved. In addition to the above there are a couple of interesting cases under the Civil Procedure heading. In R (on the application of Prudential Plc) v Special Commissioner of Income Tax, the Supreme Court decided that legal advice privilege did not apply to legal advice given by someone other than a member of the legal profession and, accordingly, did not apply to legal advice given by an accountant. In Pavledes v Hadjisavva, David Richards J decided that there was no need for a claimant to demonstrate an imminent infringement of a legal right before the court would grant declaratory relief in respect of that right. Finally, note should be taken of the decision of Mann J in HSBC v Tambrook Jersey Limited. Many people will be aware of the practice that has grown up of obtaining an administration order in respect of a Jersey company on the back of a letter of request from the Jersey court. Mann J decided that he had no jurisdiction to make such an order under Section 426 of the Insolvency Act 1986 in circumstances where there were no insolvency proceedings in Jersey. Mann J granted permission to appeal to the Court of Appeal and the appeal will have been heard on an expedited basis by the time this edition of the Digest reaches you.

HILARY STONEFROST

BANKING AND FINANCIAL SERVICES

Digested by WILLIAM WILLSON

WILLIAM WILLSON

Highbury Pension Fund Management Co and others v Zirfin Investments Ltd and others Ch D [2013] EWHC 238 (Ch) (Norris J), 14 February 2013

Charges – Subrogation - Marshalling

The sixth defendant ("B") had lent money to the first defendant ("Z") to fund the acquisition and refurbishment of a property ("the Property"). The loan was secured by a charge over that property. Thereafter, B made loans to the second, third, fourth and fifth defendants ("the Affiliates"), with each loan being secured by a charge over a property owned by the relevant Affiliate. As additional security for the Affiliates' loans, Z gave B a guarantee, secured against the Property. Subsequently, Z borrowed £2 million from the first claimant ("H"), secured by a second charge over the Property. The second claimant ("C") lent Z just over €1 million, secured by a third charge on the Property. Thereafter there was a general default by Z and the Affiliates leading to B making a demand for the repayment of all the loans and to a demand being made under the aforementioned guarantee. The Property was sold with net proceeds of £28 million discharging Z's loan, leaving a surplus of £7 million applied in part satisfaction of Z's liability in respect of the Affiliates' loans under the guarantee. There remained a shortfall in respect of the Affiliates' loans. Had the surplus not been taken by B, it would have been available to satisfy the loans by H and C. That being the case, the Claimant's sought to invoke an exception to the so-called common debtor rule in the equitable doctrine of marshalling to achieve repayment those loans from the Affiliates' charges which B had chosen not to recover under.

It was held that the Affiliates' charges could be brought into account because in equity Z could have called on the Affiliates to bear the burden of the debt. However, if Z would not have been subrogated to B's rights until such time as the debt to B had been entirely repaid, the Claimants could not be entitled to any greater right.

[Charlotte Cooke]

Digital Satellite Warranty Cover Ltd v Financial Services Authority SC [2013] UKSC 7, Neuberger as President, Hale, Mance, Clarke and Sumption. 13 February 2013


LLOYD TAMLYN

Financial Services – Regulated Insurance Business – First Council Directive 73/239

Digital Satellite Warranty Cover Limited ("DSWC") and Satellite Services ("Satellite") offered extended warranty contracts, the agreements providing that, in consideration of a periodic payment, DSWC and Satellite would repair or, if necessary, replace satellite television dishes, boxes and associated equipment in the event of breakdown or malfunction. The Financial Services Authority ("FSA") petitioned to wind up DSWC and Satellite on the basis they were carrying on a regulated insurance business without authorisation, contrary to section 19 of the Financial Services and Markets Act 2000. The judge made the winding up orders, with the Court of Appeal upholding the judge's decision. The Supreme Court dismissed a further appeal, holding that even if the classes set out in the annex to the First Council Directive 73/239 (on the co-ordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance) were confined to insurance providing pecuniary benefits, there was nothing to prevent the United Kingdom from legislating to regulate insurance providing benefits in kind. Moreover, the contracts entered into by DSWC and Satellite were within the meaning of class 16 of schedule 1 to the Regulated Activities Order 2001, such that authorisation was required. There was no material distinction, when determining whether a contract fell within class 16, between a contract which provided only for repair or replacement and a contract which also provided an indemnity for costs actually incurred by the insured; in each case the risk covered was essentially the same.

[Lloyd Tamlyn; Charlotte Cooke]

Cinema Holdings 2 Ltd & Anor v Irish Bank Resolution Corp Ltd (Nicholas Strauss QC sitting as a Deputy Judge of the High Court), 19 February 2013


LUCY FRAZER QC


ANTONY ZACAROLI QC

Security - Jeopardy

The Bank lent £27 million to Cinema Holdings for the purchase of cinema sites, which was on lent to subsidiaries, including Ealing Cinema 2 Ltd ("Ealing") which provided guarantees and security in the form of their cinema properties. The facility provided that the term was repayable on demand which could be served at any time by the bank at its sole discretion. It also provided that, without prejudice to the demand nature of the facility, the loan was repayable on a number of events of default, including where any part of the security or guarantee was in jeopardy. The cinema on Ealing's property had been demolished four years previously and, following Ealing's failure to develop the site in that period, the local authority threatened compulsory purchase of the property, presenting a real risk of an adverse effect on the value of the security. The Bank made a demand under the facility, relying on the actions of the local authority as ground for terminating the facility on the basis that its security was in jeopardy. The issue for the court was whether the property was in jeopardy. The Judge held that that there could be no doubt that there was likely to be a compulsory purchase order and that it would have a significant, detrimental effect upon the security provided to Bank. As the Bank's security was facing the risk of having its value lowered, it was in jeopardy. The Bank therefore had an absolute right to call for payment. The Judge also held that the effect of the Irish Banking Resolution Corporation Act 2013 did not impose an immediate stay on these pending proceedings

[Antony Zacaroli QC; Lucy Frazer QC]

Lehman Brothers International (Europe) (in administration) v Lehman Brothers Finance SA [2013] EWCA Civ 188 CA (Civ Div) (Sir James Munby, Arden LJ, Aikens LJ), 14 March 2013

ISDA Agreements – "Material Terms" - "Value Clean" principle

The appellant administrators of LBIE appealed a decision that a side letter ("the Side Letter") was not a material term of certain intercompany transactions entered into with LBF. LBIE dealt in OTC derivatives, entering into back-to-back intercompany transactions with LBF on the terms of the Side Letter, which followed the 1992 ISDA Master Agreement, as modified to incorporate provisions of the 2002 ISDA Master Agreement. The Side Letter provided for automatic termination of an intercompany transaction if the related transaction terminated, and for LBIE to pay to LBF only the amount recovered from the client under the related transaction. Automatic early termination occurred, and compensation had to be determined by "closing out" the intercompany transactions. That involved determining gains or losses at the date of closing out and replacing or providing the economic equivalent of the "material terms" of the intercompany transactions and assuming that all conditions precedent as to payment and delivery were fulfilled. At first instance the judge

had held that the Side Letter was not a "material term" and that the Side Letter was excluded from the process of valuation. Held that the Side Letter had to be taken into account as a "material term" and the "value clean" principle had a different effect in the 2002 Master Agreement from that which it had in the 1992 Master Agreement. The decision in Lomas v JFB Firth Rixson [2012] EWCA Civ 419 did not establish the "value clean" principle for the purposes of the 2002 Master Agreement. The "value clean" principle appeared in the 2002 Master Agreement in a very different context from that in the 1992 Master Agreement and the judge's application of the "value clean" principle conflicted with business common sense. This was reinforced by section 2(a)(iii) of the 2002 Master Agreement.

CIVIL PROCEDURE

Digested by **MARCUS HAYWOOD**


MARCUS HAYWOOD

R (on the application of Prudential Plc) v Special Commissioner of Income Tax & Anor [2013] UKSC 1, Supreme Court (Lord Neuberger, Lord Hope, Lord Walker, Lord Mance, Lord Clarke, Lord Sumption, Lord Reed) 23 January 2013

Legal advice privilege - professional advisers other than lawyers

Legal advice privilege did not apply to legal advice given by someone other than a member of the legal profession, and therefore did not cover legal advice given by accountants in relation to a tax avoidance scheme. The Supreme Court so held (Lords Sumption and Clarke dissenting), dismissing an appeal by certain companies within the Prudential group ("Prudential"). The Inland Revenue had issued a notice under the Taxes Management Act 1970 s.20 requiring disclosure of documents relating to a tax avoidance scheme. Prudential refused to disclose documents containing legal advice from their accountants on the ground that they were covered by legal advice privilege. Lord Neuberger (with whom Lords Hope, Walker, Mance and Reed agreed) held that the documents were not covered by legal advice privilege. He held that: (1) Allowing the appeal would extend legal advice privilege considerably beyond what had for a long time been understood to be its limits. There was a strong argument in principle for allowing the appeal: the privilege was based on the need to ensure that a person could seek legal advice with candour, and it was conferred for the client's benefit, not for the legal profession. (2) However, the consequences of allowing the appeal were hard to assess and were likely to lead to a clear and well-understood principle becoming unclear and uncertain. The accepted state of the law was clear to advisers and relatively easy to explain to clients. The implications had been generally understood and allowed for by the rules and practice of the courts and in legislation. Extending the privilege to advice given by a member of a profession which ordinarily included giving legal advice, as had been proposed, carried an unacceptable risk of uncertainty. It was unclear whether certain occupations would be regarded as professions, and unclear how a court was to decide whether a profession was one which ordinarily included giving legal advice. The question of whether the privilege should be extended raised questions of policy which should be left to Parliament.

Pavledes v Hadjisavva [2013] EWHC 124 (Ch) Chancery Division (David Richards J) 31 January 2013

Declaratory judgments - whether imminent threat of infringement to rights necessary

There was no need for a claimant to demonstrate an imminent infringement of a legal right before the court would make a declaration concerning the relevant right. The court therefore granted a declaration concerning a claimant's right of light where the defendant had not infringed the right, but had failed to acknowledge it. The circumstances in which the court would be prepared to make a declaration were summarised in Rolls-Royce Plc v Unite the Union [2010] 1 W.L.R. 318. There was nothing in those general statements requiring an actual or an imminent infringement of a legal right before a declaration would be made. The willingness of the courts in appropriate cases to make declarations regarding rights which might arise in the future, or which were academic as between the parties, suggested that the court's jurisdiction was not so tightly constrained. The issue was whether the circumstances were such as to make it appropriate for the court to grant a declaration, and whether there was a real dispute between the parties.

COMMERCIAL CASES

Digested by CHARLOTTE COOKE


CHARLOTTE COOKE

NYK Bulkship (Atlantic) N.V. v Cargill International S.A. [2013] EWHC 30 (Comm) (Field J), 1 February 2013

Commercial Court – Arbitration – Shipping

The Commercial Court allowed the claimant owner's appeal under art 69 of the Arbitration Act 1996 against the decision of an arbitration tribunal. The court decided, inter alia, that the tribunal had erred in its decision that the arrest of the vessel in question had not fallen within the proviso to the 'off-hire clause' contained in the charterparty between the parties. In the light of the court's ruling that the proviso in that clause had applied, the question of causation was remitted to the tribunal to determine.


BEN VALENTIN

Bank of New York Mellon (London Branch) v Truvo N.V. and others [2013] EWHC 136 (Comm) (Eder J), 5 February 2013

Commercial Court – Contract – Construction

In proceedings concerning the proper construction of a senior facilities agreement (SFA) and an intercreditor agreement (ICA), the issue was the level of consent required from the lenders under the SFA to amend the terms of the SFA so as to change, as between senior lenders and second lien lenders, the application of mandatory prepayments payable by a company (Truvo), as the original borrower under the SFA. The Commercial Court held that the proposed amendment did not require the consent of all the lenders but only the consent of the majority lenders and Truvo, which had been given. Accordingly, the purported amendment was valid and effective. **[Ben Valentin]**

Cadogan Petroleum Holdings Ltd v Global Process Systems LLC [2013] EWHC 214 (Eder J), 15 February 2013

Commercial Court – Contract - Rescission

The parties signed a sale agreement by which defendant agreed to purchase gas plants from claimant. The purchase price was payable by instalments. The defendant made a payment under the sale agreement but failed to pay the balance of the purchase price. The claimant rescinded the contract. The Commercial Court held that the claimant was entitled to retain the payment and was entitled to recover further instalments owed by the defendant.

Astrazeneca Insurance Company Ltd v XL Insurance (Bermuda) Ltd and another [2013] EWHC 349 (Comm) (Flaux J) , 28 February 2013

Commercial Court - Reinsurance

The claimant was the captive insurer of a major worldwide pharmaceutical group, which had settled class actions brought in respect of a prescription drug which it manufactured. The claimant brought a claim contending that it was entitled to be indemnified by the defendant reinsurers in respect of all sums it had paid in respect of settlements and defence costs. The defendants denied any such entitlement to an indemnity. The Commercial Court held that: (i) the insured was only entitled to an indemnity under the policy where it demonstrated that it was under an actual legal liability; and (ii) the insured was only entitled to an indemnity for defence costs where it established that it was or would have been liable for the claim in question.

Al Sulaiman v Credit Suisse Securities (Europe) Ltd and another [2013] EWHC 400 (Comm) (Cooke J) – 1 March 2013

Commercial Court – Financial services – Breach of statutory duty

The claimant brought a claim against the defendants alleging breach of statutory duty under section 150 of the Financial Services and Markets Act 2000, in respect of losses suffered following her entering into a series of leveraged transactions.

In dismissing the claim, the Commercial Court held that there had been no breach of duty and that the cause of the loss had been the unforeseeable collapse of the market and decisions made by the claimant, notwithstanding that she had been properly advised as to the risks.

PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov and others [2013] EWHC 422 (Comm) (Popplewell J), 7 March 2013

Commerical Court – Freezing order

The bank brought arbitration proceedings in London against the first defendant, M, who was the President of the bank and a Russian citizen with significant business interests in the Ukraine claiming damages of US$78,269.996. Whilst the bank did not assert that it had a cause of action against the corporate defendants, against whom it obtained a freezing order, it contended that they were effectively nominees for M, who exercised substantial control over them. The corporate defendants' case was that they were not owned, controlled by, or connected with, M. They contended that they held no assets with a value exceeding US$50,000, save for a shareholding in a Ukrainian company whose largest shareholder was a Cypriot company, Carlsbad. On the corporate defendants' application to set aside the freezing order, the key question was whether there was good reason to suppose that M was the ultimate beneficial owner of Carlsbad. The Judge found that there was good reason to suppose that Carlsbad was and remained a company owned and substantially controlled by M. Accordingly, subject to questions of material non-disclosure, he considered that the freezing order should apply to the assets in the names of the corporate defendants. Moreover, he found that there had been no material non-disclosure so as to warrant setting the order aside.

Hyundai Merchant Marine Company Ltd v Americas Bulk Transport Ltd [2013] EWHC 470 (Comm) (Eder J), 8 March 2013

Commercial Court – Arbitration – Award

Arbitration proceedings were commenced by charterers, ABT, alleging that the Claimant had repudiated a contract, in respect of the alleged fixture of the vessel. The claimant challenged the tribunal's jurisdiction to hear the claim. The tribunal granted an award in favour of ABT, having found that a valid and binding contract had been concluded. The claimant applied to set aside the award. The Commercial Court, in granting the application, held that there was no valid binding contract and that the claimant was entitled to a declaration that the award had to be set aside or varied.

JSC BTA Bank v Ablyazov and others [2013] EWHC 510 (Comm) (Teare J), 19 March 2013

Commercial Court – Fraud

The Claimant bank brought 11 actions against its former chairman (A) and others, alleging that the bank had been defrauded up to US$6 billion, this judgment concerning 3 of those actions: (i) the Granton action; (ii) the Drey action and (iii) the Chrysopa action. In the Granton action the bank claimed that A had paid away nearly US$2.5 billion to offshore companies which he owned or controlled. In the Drey action, the bank contended that some US$400m had been paid away and in the Chrysopa action, the bank contended that US$120m had been paid away. The issues for consideration were: (i) in relation to the Granton and Drey actions, whether A had committed a fraud on the bank and if so, had Z, a Kazakhstanti citizen who had held office under A, known of that fraud and assisted A to commit it; and if so, whether Z was liable to the bank under Kazakh law; (ii) in respect of the Chrysopa action, whether A had committed a fraud on the bank, if so, whether K, a Russian citizen employed by the bank in Moscow, had known of the fraud and had assisted A to commit it, if so, whether K was liable to the bank under Russian law; and (iii) what liability did Usarel, a Cypriot company which had allegedly used the proceeds of a loan to purchase a port, have to deliver up the shares in the White Sea port of Vitino and/or to pay damages under Kazakh law. The court ruled that A had committed frauds against the bank. In respect of the Granton action, Z had knowingly assisted A to defraud the bank by means of the original and later loans. It followed that Z was liable under Kazakh law for the loss thereby caused. In respect of the Drey action, Z had knowingly assisted A to defraud the bank by means of the Drey transactions. Z was liable under Kazakh law for the loss thereby caused. In respect of the Chrysopa action, Usarel was liable under Kazakh law to deliver up to the bank the shares in the White Sea Group of companies which owned the Vitino port (save for shares which were purchased with other funds).

Stokors SA and others v IG Markets Ltd [2013] EWHC 631 (Comm) (Field J), 27 March 2013

Commercial Court – Fiduciary duties – Dishonest assistance

The Claimants entered into agreements with Echelon Wealth Management Ltd, pursuant to which Echelon was to enter into contracts for difference with IG Markets Ltd. Under those agreements, money paid to Echelon by the Claimants was to be held in segregated accounts and was to be used only for their trading and not for any other purpose. Echelon collapsed, having allowed one of its clients to run up a deficit of £16 million, during which time it used funds paid by the Claimants (and other clients) to finance its liabilities to IG. The Claimants brought proceedings against IG to recover losses incurred as a result to Echelon's liquidation, on the basis that three IG employees had dishonestly assisted in breaches of fiduciary duty by Echelon arising out of its failure to hold the Claimant's funds on a segregated basis and to use those funds only for the purpose of supporting their individual trading. The Judge, however, held that the Claimants failed to establish their case that IG, acting by the three employees had dishonestly assisted in Echelon's breaches of fiduciary duty.

COMPANY LAW

Digested by GEORGINA PETERS


GEORGINA PETERS

VTB Capital Plc v (1) Nutritek International Corp & Ors [2013] UKSC 5, (Lords Neuberger, Mance, Clarke, Wilson and Reed JJSC), 6 February 2013

Company Law – Conflict of Laws – Piercing Corporate Veil

V, a bank, appealed against the refusal of permission to effect service on the respondents out of the jurisdiction and to amend its particulars of claim. V had lent money to R, a Russian company, to fund R's acquisition of Russian companies from the first respondent, D1. The facility agreement provided for English law and jurisdiction. Following R's default, V alleged that it had been induced to enter into the agreement by D1's fraudulent misrepresentations, for which the other respondents were alleged to be jointly liable. The fourth respondent, D4, was an individual said to be the owner and controller of D1 and R. V's case was pleaded in deceit and unlawful means conspiracy. It applied to amend to add claims in contract on the basis that the court should pierce R's corporate veil so as to make the respondents liable as parties under the facility agreement. The High Court refused permission to amend, holding that England was not the appropriate forum. The Court of Appeal upheld that decision. The Supreme Court held (Lords Clarke and Reed JJSC dissenting regarding forum) that the High Court had erred in its interpretation of the approach in *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* [1987] AC 460 to determining the appropriate forum. However, its error had favoured V and did not affect its analysis. As to the claims in contract, V's case involved an extension to the circumstances where it had traditionally been held that the corporate veil could be pierced. It would lead to the person controlling the company being held liable, as if he had been a co-contracting party with the company to a contract. There was an overwhelming case against such an extension. V had not suggested that any of the other contracting parties was not liable. There was no unfairness since the law provided redress against the controller of a company for misrepresentation. Further, the facts V relied on to justify piercing the veil did not involve R being used as a facade concealing the true facts. If the veil was to be pierced, the person behind the company, rather than the company itself, had to be the relevant actor, *Alliance Bank JSC v Aquanta Corp* [2011] EWHC 3281 (Comm) doubted. The Supreme Court also considered that it was disproportionate for parties to incur costs and spend many days on hearings concerning forum. If a defendant chose not to identify the nature of his case when challenging jurisdiction, the court could proceed on the basis that there was no more to the proceedings than would be involved in the claimant making out its case.

(1) Weavering Capital (UK) Ltd (In Liquidation) (2) Geoffrey Bouchier & Paul Clark (Joint Liquidators of Weavering Capital (UK) Ltd) v (1) Charanpreet Dabhia (2) Edward Platt [2013] EWCA Civ 71 (Lord Dyson MR, Moore-Bick and McCombe LJJ) 15 February 2013

Company Law – Directors' Powers and Duties – Fraudulent Misrepresentation – Fraudulent Trading

D, a director, and P, an investment manager appealed against a decision that they were liable to W, the company, and L, its liquidators, for breach of fiduciary duty. D and P had been found jointly and severally liable with two other directors of W. D claimed at trial that he was not an investment manager and had relied on the other directors. He said he had not known

about fraudulent swap transactions or misrepresentations to investors. The judge found that D had acted without reasonable care and skill. P claimed that he honestly believed the swap transactions were genuine and had also relied on the other directors. The judge found P liable in negligence for breaches of duty in contract and tort. D and P submitted that W's losses were not caused by their breach of duty, and that the judge had failed to make adequate findings to that effect. D further argued that, having regard to the requirements of s 174(2) Companies Act 2006, the judge had not identified the specific knowledge, skills and experience that D had or were to be expected of him, or how the required standard had not been met. It was held by the Court of Appeal that, provided a judge recognized the law's requirements regarding a director's duties and found that the relevant duty had been broken, it was not necessary to further spell out what that duty was or the standard of care to be exercised. It was clear that the judge had fully considered the relevant law, including s 174. The judge drew the necessary conclusions of fact as to D's functions and what was to be expected of him. She had also adequately spelt out what was expected of him as a director and how he had fallen short of the required standard. The judge was entitled to conclude that if D had probed the information he was given by W's chief executive, as he should have done, he would have seen that the latter's explanations were deficient. Whilst the judge had not provided an express analysis of causation, D's argument on causation ignored the facts proved against him, that he had made false representations to investors which enabled the business to continue. It was also implicit in the judge's findings that D and P's roles in negligently enabling the business to continue had caused the loss claimed.

Jackson v Dear and Griffith [2013] EWCA Civ 89, (Laws, Lewison and McCombe LJJ), 22 February 2013

Company Law – Contracts – Shareholder Agreement – Necessity of Implied Terms


SIMON MORTIMORE QC

The Court of Appeal considered whether a term should be implied in a shareholders' agreement to prevent two shareholders (D and G) from joining with the other directors to exercise the directors' power in the company's articles to remove the third shareholder (J) as director. J, D and G owned all the shares in a Cayman company, which in turn owned all the voting shares in Tetragon Financial Group Ltd (TFG), a Guernsey closed-ended investment fund, whose non-voting shares were traded on the Euronext Amsterdam Exchange and were held by members of the public. TFG's articles provided for a majority of the board to be independent directors in accordance with the UK Combined Code and for a director to vacate office if he is given notice to vacate by all the other directors. In order to resolve a dispute, J, D and G had entered into a shareholders' agreement, which included express terms for the Cayman company to nominate and vote for the election of J as a director of TFG and not to remove him unless certain termination events, including breach of fiduciary duty, occurred. More than two years later, after another dispute, D and G joined with the independent directors to give notice to J under TFG's articles to vacate office as a director of TFG. J contended that there was an implied term of the shareholders' agreement which prevented D and G from joining in the giving of such a notice unless there had been a termination event. There was a dispute as to whether there had been a breach of fiduciary duty amounting to a termination event. The court was asked to determine as a preliminary issue whether there was an implied term, as J contended. The Judge found that there was, but the Court of Appeal unanimously disagreed. The judgment of McCombe LJJ, with which Laws and Lewison LJJ agreed, shows the high bar for the implication of a term in this context: (i) where the agreement expressly deals with the subject matter of the suggested implied term, the court should exercise caution in going beyond it; (ii) since the agreement dealt with the exercise of shareholders' powers, but was silent about whether or not D and G could join in a directors' notice, the starting point was that nothing was to happen in that respect; (iii) the agreement was workable without the suggested implied term, in that J's rights were not rendered futile, given that all the independent directors had to join in the notice and D and G could not remove him at their whim; (iv) there were tenable reasons for different views being taken about the suggested implied term, whereas for the court to imply a term to spell out what the contract actually means, it must be satisfied that the consequences of the contract without the term would contradict what any reasonable person would understand the contract to mean; and (v) the suggested implied term would interfere with a potentially useful power available for the directors. Lewison LJ added two further points, with which Laws LJ agreed: (i) it is difficult to imply into an agreement made by parties in their capacities as shareholders, a term which fetters their powers as directors; and (ii) independent directors should be able to take the articles at face value, since they may have no knowledge of collateral matters such as a shareholders' agreement.
[Simon Mortimore QC]

In the matter of Fort Gilkicker Ltd; Universal Project Management Services Ltd v (1) Fort Gilkicker Ltd (2) Ian Pearce (3) Fort Gilkicker Properties Ltd [2013] EWHC 348 (Ch), Briggs J, 26 February 2013

Civil Procedure – Company Law – Derivative Claims – Multiple Derivative Action

U applied for permission to continue a derivative action against P, in respect of a single purpose vehicle, F. U and P were the only members in a limited liability partnership ("LLP") carrying on a property development joint venture by way of single purpose vehicles. P was one of only two directors in F. U claimed, as a member of the LLP owning all of F's shares, that P had misappropriated a valuable business opportunity for his personal benefit, in breach of his fiduciary duty to F. The judge held that, as a matter of construction, the Companies Act 2006 did not do away with the multiple derivative action. The extension of locus standi beyond immediate members of the wronged company was based upon the need to find a suitably interested claimant to pursue the claim when the company was disabled from doing so. Once that was recognized, the precise nature of the corporate body which owned the wronged company's shares was of no legal relevance, provided that it was itself in wrongdoer control and had some members interested in seeing the wrong put right. The locus standi given to the member of the intermediate entity was not an aspect of that person's rights as a member, but simply the consequence of the law's search for a suitably interested representative of the wronged company. It was irrelevant that the LLP's members had no recourse to a statutory derivative claim. Further, CPR Pt 19 para 1(a)(i) made it clear that the permission regime applied to "derivative claims, whether under Part 11 of the Act or otherwise".

Jackson v Dear, Griffith and others, The Royal Court of the Island of Guernsey, Lieutenant Bailiff Patrick Talbot QC, 6 March 2013

Company Law – Derivative Claims – Company's Participation in Proceedings

In February 2011 Mr Jackson (J), a holder of non-voting shares and a former director, commenced a derivative action on behalf of Tetragon, a Guernsey closed-ended investment fund, in which he claimed that the directors, including four independent directors, had breached their duties by causing Tetragon to enter into a property investment transaction and that they were liable to pay Tetragon damages. Tetragon and the directors applied to strike out the proceedings. In June 2011 J applied for an injunction to restrain Tetragon from actively participating in the proceedings. J's application was heard over 4 days in early October 2011, following which the Lieutenant Bailiff announced that he would not grant an injunction and would give his reasons later. On 6 March 2013 the Lieutenant Bailiff issued his judgment on the injunction application. He recognised the general rule that, in the case of private companies, company funds should not be used in disputes between shareholders, but he doubted whether the rule could easily be applied to a public company so as to prevent it from actively participating in a derivative action at the strike out stage. His reasons for refusing the injunction on balance of convenience grounds were: (i) the claim for damages was not a sufficiently strong case for derivative relief to justify limiting the involvement of Tetragon's lawyers, (ii) J had unreasonably delayed in applying for an injunction and explaining his grounds, (iii) J would not suffer harm which could not be compensated in costs and the court would be better placed to form a view about Tetragon's involvement after hearing the strike out application, and (iv) the property investment had been publically announced and the proceedings had been disclosed to shareholders.
[Simon Mortimore QC; William Willson]

Re Cavell Insurance Company and others, ChD, Sales J, 25 March 2013

Company Law – Insurance – Business Transfer Schemes – Obligation to Notify Policyholders - Waiver


BARRY ISAACS QC

The Applicants sought an order waiving the requirement in Regulation 3(2)(b) of the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001 that notice of insurance business transfer schemes be sent to policyholders whose identity could not be established from the Applicants' records (Non-Identifiable Policyholders). 24,565 of the Applicants' 37,578 policyholders were Non-Identifiable Policyholders. The Court held that it had jurisdiction to grant the waivers sought, notwithstanding that the FSA had not approved the form of the report to be prepared by the Independent Expert under section 109 of the Financial Services and Markets Act 2000. The Court granted the waivers, having regard in particular to: (i) the impossibility of notifying Non-Identifiable Policyholders individually; (ii) the low probability that Non-Identifiable Policyholders would be affected by the Transfers; (iii) the Independent Expert's view that policyholders would not be materially adversely affected by the Transfers; (iv) the proportionate steps proposed to be taken by the Applicants by way of notification and publication of the Transfers; and (v) the non-objection of the FSA. **[Barry Isaacs QC]**

CORPORATE INSOLVENCY

Digested by ADAM AL-ATTAR and HENRY PHILLIPS


HENRYPHILLIPS

Re Lemma Europe Insurance Company Limited Supreme Court of Gibraltar, 24 January 2013

winding up – discharge of provisional liquidator – disclaimer of contracts

On a petition by the Gibraltar Financial Services Commission in respect of an insurance company incorporated and regulated in Gibraltar which had been in provisional liquidation since 28 September 2012, the Gibraltar Court made a winding-up order and gave directions for the discharge and release of the provisional liquidator, appointing the same practitioner as liquidator, and permitting the liquidator to disclaim contracts of insurance and reinsurance under which the company was or might be liable. The amount for which a person injured by operation of disclaimer of a contract of insurance may prove in the winding-up would be such proportion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which that premium was paid, unless the Liquidator agrees or the Court directs that the person is entitled to prove for a different amount. **[Glen Davis QC]**


DAVID ALLISON

Re MF Global UK Ltd (Hindsight Application) [2013] EWHC 92 (Ch) (David Richards J), 29 January 2013

Client money – Application of hindsight principle to the value of claims against the statutory trust under CASS 7A

Following the explanation of the "claims basis" for the distribution of client money by the Supreme Court in Lehman, which entitled a claim to client money based upon a contractual entitlement irrespective of whether any money was held for that client, the Companies Court was asked to reconsider whether entitlements were to be quantified without regard to subsequent events relevant to the value of the underlying contractual right. The application concerned derivative contracts open as at the date of administration.

The Judge directed that each client's client money entitlement was to be valued as at the date of the administration without regard to hindsight and by reference to published pricing sources as at the date of the administrators' appointment. Claims are, accordingly, to be valued by a notional close-out at the date and not by reference to the subsequent liquidation value of the position.

[Antony Zacaroli QC, Barry Isaacs QC, Glen Davis QC, David Allison, Adam Al-Attar]


WILLIAM TROWER QC

Isis Investments Limited v Oscatello Investments Ltd and ors [2013] EWHC 75 (Ch) (Mrs Justice Asplin), 30 January 2013

Practice – Stay of proceedings – Foreign cause of action – Related proceedings subsequently beginning in Manx court – Whether stay to be granted to allow Manx proceedings to continue – Whether fourth defendant prevented by moratorium Iceland from issuing counterclaim against Kaupthing – CPR Pt 20.

The claimant (S) was a Manx investment holding company in liquidation. It was an indirect subsidiary of Kaupthing (K), an Icelandic bank subject to an insolvency process in Iceland and the third defendant. In December 2007, S entered into a Framework Agreement with K and a number of companies, including the first and fourth defendants, which were part of an offshore trust structure set up by or for the property entrepreneur Robert Tchenguiz. The Framework Agreement, which conferred exclusive jurisdiction on the English courts, required S to apply the proceeds of the sale of shares in the supermarket chain Somerfield in accordance with a payment waterfall. S commenced proceedings in this jurisdiction for, among other things, declarations that the payment waterfall was unenforceable and that it was not required to give effect to it. S also commenced proceedings in the Isle of Man against its directors for breaches of duty in approving, authorising and / or ratifying the Framework Agreement. S submitted that the English proceedings should be stayed under CPR 3.1 in favour of the proceedings in the Isle of Man on the basis that (i) the Manx courts had a legitimate interest in the issues involved which were questions of Manx Company law and the insolvency process was based in the Isle of Man; (ii) parts of the proceedings in the Isle of Man would be statute barred and could not be brought in England and (iii) in any event, it was not possible to amend the English action to include the Manx claims because K was a credit institution and the effect of Directive 2001/24, the

Credit Institutions (Reorganisation and Winding Up) Regulations 2004 ("the Regulations") reg.3 and reg. 5 and Icelandic law was to prohibit S from bringing new claims, there being no "pending lawsuit" for the purposes of the Directive. To this end, it was argued that any amendments made to the English proceedings would introduce new claims and were therefore prohibited. In addition, the fourth defendant (A) sought leave to commence a counterclaim, which K opposed on the grounds that there was no claim pending by A at the time when reorganisation measures were implemented in Iceland. It was not in dispute that the imposition of a case management stay is a matter of discretion, that the burden upon the applicant is high and the circumstances warranting the imposition of a stay are rare and compelling (Reichhold Norway ASA v Goldman Sachs International [2000] 1 WLR 173 applied) The Court held that the circumstances were not sufficiently rare and compelling to warrant a stay of the English proceedings to enable the Isle of Man Proceedings to take place first. First, the issues in the English proceedings were logically prior to the claims in the Isle of Man proceedings as the claims for damages in the Isle of Man proceedings could not be established until the validity of the Framework Agreement has been determined in England. Second, English proceedings had been on-going since 2008 and much time and money had been expended on them. Third, S chose to bring both claims and had brought the present circumstances on itself. Fourth, the Framework Agreement was governed by English law. As to the effect of the Directive and Regulations, the Court held that authorities on seizing are not relevant when determining whether there is a pending lawsuit for the purposes of the Directive. There was no dispute that Icelandic law only prevented claims which could not be brought as part of existing proceedings and it was a matter for English procedural law to determine whether amendments could be made to the English proceedings and, also, whether they should be treated as new claims. The Court held that there was little doubt that the amendments would not be regarded as new proceedings and that there was a pending action concerning assets or rights which could be amended. Accordingly, England was available forum for deciding the majority of the relevant issues and the English proceedings could be amended to join E's directors as proper parties to the proceedings. A was granted leave to bring a counterclaim against K as the relevant Icelandic law was concerned with pending lawsuits and not claims within it. As the English proceedings were pending at the time when reorganisation measures were implemented in Iceland, A was not prevented from introducing a claim into the existing action.

[William Trower QC; David Allison; Henry Phillips]

Re Coniston Hotel (Kent) LLP (in liquidation) [2013] EWHC 93 (Ch) (Norris J), 1 February 2013

Schedule B1, Paragraphs 74 and 75 – Scope and Limits of Action for Unfair Harm – Claims as a Creditor or Member Only

The claimant had invested in an LLP for the purpose of refurbishing and developing a hotel. The LLP entered administration and was wound up subsequently.

The claimants commenced an action against the former administrators of the LLP. The administrators had been discharged as administrators following the winding up of the LLP. The claimant had, therefore, to rely on paragraphs 74 and 75 of Schedule B1 to the Insolvency Act 1986.

On an application by the former administrators to strike out the claim, although declining to strike out the claim on the facts, the Judge provided guidance as to the scope and limits of an action for unfair harm. Paragraph 74 did not exist to enable individual, disgruntled creditors to pursue administrators for compensation. Its focus was "unfair harm" and that would ordinarily mean unequal or differential treatment to the disadvantage of the applicant, or applicant class, which could not be justified by reference to the interests of the creditors as a whole or to achieve the objective of the administration.

It was clear from the statutory wording that a case based on "unfair harm" was something distinct from a case centred on breach of fiduciary or other duty.

The Judge also held that it was correct that the insolvency proceedings should have been confined to the claimants' claims as creditors or members of the LLP.

Re Integeral Ltd [2013] EWHC 164 (Ch) (Mr Richard Snowden QC, Sitting as a Deputy High Court Judge), 5 February 2013

Winding-up petition – Cross application by director for administration order – Whether winding-up order should be made

The Judge described the cross application by the director as a tactical ploy to postpone or avoid the liquidation of the company and the investigation of his conduct as a director. The asserted litigation claims could be pursued in liquidation and administration, and there was no substantial evidence of such claims or of funding asserted to be available in administration only.

The statutory purpose of administration under Schedule B1, paragraph 3 could not be satisfied.

Re Lemma Europe Insurance Company Limited Chancery Division (Briggs J), 14 February 2013


GLEN DAVIS QC

Recognition of foreign winding up proceedings

On applications for recognition of Gibraltarian winding-up proceedings in respect of an insurance company, under the Cross-Border Insolvency Regulations 2006 and under section 426 of the Insolvency Act 1986 following a Letter of Request from the Supreme Court of Gibraltar, the liquidation in Gibraltar under the local Companies Act and Insurers (Reorganisation and Winding Up) Act was recognised as a foreign main proceeding and its liquidator as the company's foreign representative under the UNCITRAL Model-Law on Cross-Border Insolvency. A disclaimer of contracts of insurance and reinsurance (which had been permitted by the Gibraltar Court and effected by the liquidator before the Gibraltar Court on 24 January) has effect on the basis that insolvency law of Gibraltar applies pursuant to section 426(5) of the Insolvency Act.

[Glen Davis QC, Charlotte Cooke]

Ricoh Europe Holdings BV v Spratt [2013] EWCA Civ 92 (Mummery, Patten, Treacy LJJ), 19 February 2013

Members' voluntary liquidation – Liquidator valuing contingent claims and making final distribution – Appeal against refusal to direct liquidator to provision in full for contingent claims

The contingent claims were based upon indemnities against liability to tax, which liability was contingent upon investigations and action in Germany, Italy, France and Spain by tax auditors and revenue authorities.

The liquidators valued the contingent claims under IR 4.82 and 4.86 and declined to make provision for the maximum value of the contingent claims. The liquidators communicated their determination for the purpose of a final distribution.

The creditor applied under Section 112 of the Act for a direction that the liquidators make provision in full for the maximum contingent liability. The company was solvent and should not walk away from a liability.

At first instance, the judge held that once a contingent creditor had proved in the liquidation for its debts and they had been valued, there was no room in the statutory scheme to allow the liquidators to delay a distribution to members pending the crystallisation of the contingent liabilities. On appeal, Patten LJ explained that any challenge to the liquidators' decision to proceed to a valuation faced the objection that to succeed it must demonstrate that the exercise of discretion which took place was flawed in the sense that it was one which no reasonable liquidator in the circumstances of this case could properly have made. By contrast, a challenge to the value placed upon the claim could be considered afresh on the merits as an appeal against a reject of a proof of debt. On the basis that the creditors' challenge was a challenge of the latter kind, Patten LJ approved the statement of Hoffmann LJ in Re Forte's (Manufacturing) Ltd [1994] 1 BCLC 628:

> *"A company is certainly entitled to initiate and complete the process of winding up notwithstanding that it will thereby become unable to fulfil future or contingent obligations. Contingent creditors become entitled to prove for the value of their claims at the date of winding up, but the company cannot be required to set aside a fund against the possibility that the contingency may happen. The liquidator is entitled to distribute the assets in accordance with the rules and such distributions cannot afterwards be disturbed."*

The effect of the Insolvency Rules is, therefore, to allow the liquidator (after the disposal of any appeal against valuation) to distribute the assets of the company free from any further claims by creditors. It made no difference that the liquidation was solvent.

Re Ovenden Colbert Printers Ltd [2013] EWHC 311 (Ch) (Peter Smith J), 22 February 2013


STEPHEN ROBINS

Transaction at undervalue – Challenge to payments but not challenge to underlying fee agreements – Meaning of transaction – Adequacy of pleading

Section 238 of the Act required there to be a transaction at an undervalue. Absent a challenge to the fee agreement pursuant to which a payment was made, it was not possible to assert that a dealing on an account from which monies had been paid was a transaction within the meaning of that section.
An application to set aside a transaction at undervalue had to be properly pleaded. In response to a strike out based on the inadequacy of an application as pleaded, it was insufficient simply to assert that matters required investigation.
[Stephen Robins]

Administrators of Heritable Bank plc v Winding-Up Board of Landsbanki Islands HF [2013] UKSC 13 (Lord Hope DP, Lord Walker, Lord Kerr, Lord Reed and Lord Carnwath SCJJ), 27 February 2013


GABRIEL MOSS QC


MARTIN PASCOE QC

Credit Institutions (Reorganisation and Winding Up) Regulations 2004 – Cross-claims by two credit institutions in two different EEA states – Insolvency set-off

Landsbanki, a bank incorporated in Iceland, and Heritable, its Scottish subsidiary, were credit institutions within the European Economic Area (the EEA) for the purposes of Directive (EC) 2001/24 on the Reorganisation and Winding up of Credit Institutions (the Directive) made by European Parliament and Council and applicable in the EEA. In 2008 the Icelandic banking system failed and Landsbanki and Heritable became insolvent. A winding-up board was appointed for Landsbanki by the District Court of Reykjavik and administrators of Heritable were appointed by the Court of Session. Landsbanki and Heritable submitted claims in each other's insolvency proceedings, Heritable submitting four claims for approximately £905m in the winding up of Landsbanki, and Landsbanki submitting three claims in the Heritable administration including a claim for £86m relating to a revolving credit facility. The Landsbanki winding-up board rejected Heritable's claims except for a relatively small amount of some £7m. Heritable's administrators rejected Landsbanki's revolving credit claim on the ground that Heritable's own claims could be set off against the Landsbanki claim under the Scots principle of balancing of accounts in bankruptcy. Heritable's administrators subsequently withdrew their claims in Landsbanki's winding up in Iceland but Landsbanki appealed to the Court of Session against the rejection of its claim by Heritable's administrators, contending that Heritable's claims could not be set off against its claim because those claims had been rejected or extinguished under Icelandic insolvency law, which was binding in the United Kingdom under regulation 5(1) of the Credit Institutions (Reorganisation and Winding up) Regulations 2004, which provided that an EEA insolvency measure (such as Landsbanki's winding up) had effect in the United Kingdom in relation to any branch of an EEA credit institution or its property or other assets or debt or liability "as if it were part of the general law of insolvency of the United Kingdom". The Supreme Court, dismissing the appeal of Landsbanki from the Inner House, held that the provisions of regulation 5 were concerned only with the effect in the United Kingdom of an EEA insolvency measure in relation to a credit institution located in another EEA state and were designed to give effect to the mandatory choice of the insolvency law of the EEA state in which the foreign credit institution was located, so that the entire process of winding up could be conducted in that state. Since Landsbanki was located in Iceland the provisions of regulation 5 applied to the winding up of Landsbanki and therefore the extinction of Heritable's claims in the winding up of Landsbanki in Iceland could not be questioned in the administration of Heritable in Scotland. However, it did not follow that Heritable's administrators were obliged to treat Heritable's claims as extinguished for the purposes of the winding up in Scotland or that Heritable's claims could not be set off against Landsbanki's claims in that winding up. Instead, since Heritable was a United Kingdom credit institution its winding up was subject to the rules set out in Pts 3 and 4 of the 2004 regulations, which included, in regulation 22, the conditions under which set-off could be invoked in accordance with United Kingdom insolvency law and the common law of Scotland.
[Gabriel Moss QC, Martin Pascoe QC, David Alexander QC, Stephen Robins, Georgina Peters]

Somers Dublin Ltd and Ors v Monarch Pointe Fund Limited British Virgin Islands Court of Appeal (The Hon. Mde. Pereira, the Hon Mde. Blenman, the Hon. Mr. Mitchell), 1 March 2013

Mutual Fund – Redeemed members of fund in liquidation claiming redemption proceeds in priority to claims of continuing members – Whether judge right to order liquidator to distribute pro rata between continuing members and redeemed members

Monarch Pointe Fund Limited (M) carried on business as a mutual fund incorporated in the British Virgin Islands (BVI). In August 2007 M suspended redemptions and in 2008 the High Court in the BVI appointed a liquidator.

At the time of the appointment of the liquidator, seven members had submitted redemption requests and were owed some $18 million in redemption proceeds. After payment of all of M's external creditors, the company had $3.5 million to satisfy M's liabilities to its continuing and redeemed members. The liquidator applied to court for directions as to whether he should distribute M's remaining assets pro rata without distinguishing between continuing and redeemed members or whether he should pay the redeemed members in priority to the continuing members or vice-versa. At first instance, the Judge held that section 207 of the BVI Insolvency Act 2003 (the Act) required the liquidator to satisfy the outstanding claims of members, past and present, in their capacity as such and that there was no need or justification for a third class of creditor (the redeemed members) floating between the continuing members and external creditors. He directed that M's remaining assets should be distributed pro rata between redeemed and continuing members. The issues before the Court of Appeal were (i) whether the redeemed members were "creditors" of M in respect of their claims for their redemption proceeds and (ii) if so, whether they were to be paid in priority to the claims of existing members. The Court of Appeal reversed the first instance decision and held that redeemed members should be paid in priority to continuing members.

The Court of Appeal held, following dicta in Westford Special Solution Fund v Barfield Nominees and Kenneth M Krys et al v Stichting Shell Pensioenfonds, that a redeemed member is a creditor in respect of his redemption payment and that this conclusion was unaffected by section 197 of the Act, the purpose of which is merely to subordinate former a member's claim as creditor to that of the ordinary unsecured creditors.

The Court went on to hold that the question of priority as between continuing and redeemed members can be determined purely on the construction of the words of the Memorandum, Articles and Act. Section 207(3) of the Act provides for the distribution of "surplus" assets to members. M's articles of association defined "surplus" as the excess of the total assets over the aggregate of its total liabilities plus its share capital. That is, the "surplus" is what is left after all liabilities have been taken into account. As the sums due to redeemed members were "liabilities" of the company, they had to be paid first before the "surplus assets" could be distributed to continuing members under section 207(3) of the Act. Accordingly, redeemed members were entitled to be paid in advance of continuing members.

[Gabriel Moss QC; Barry Isaacs QC]

Lehman Brothers International (Europe) (in administration) v Lehman Brothers Finance SA [2013] EWCA Civ 188 (Munby, Arden and Aikens LJJ), 14 March 2013

ISDA 1992 form as modified to incorporate 2002 form provisions regarding consequences of termination – Meaning of replacement contract – Whether or not to include side letter as material term

LBIE laid off risks arising from its derivative trading with clients over a number of years by (a) entering into back-to-back transactions with LBF; and (b) signing a side letter. The back-to-back transactions were carried out on the terms of an ISDA master agreement 1992 form issued as modified to incorporate certain provisions of the 2002 form dealing with the consequences of termination. The side letter provided: (1) for automatic termination of a back-to-back inter-company transaction if the related transaction terminated; and (2) for LBIE to pay to LBF under any inter-company transaction only the amount recovered from the client under the related client transaction. In the events which happened, LBF defaulted and an automatic termination of the inter-company transactions occurred. As a consequence, under the master agreement, there had to be a determination of compensation by closing out the inter-company transactions in accordance with the master agreement. This involved determining gains or losses at the date of the closing out in replacing or providing the economic equivalent of the "material terms" of the inter-company transactions and assuming that all conditions precedent as to payment and delivery were fulfilled (a "replacement contract").

The Judge held that the side letter was not a material term of the inter-company transaction, and that it should be left out of the ascertainment of the

economic equivalent of the material terms, alternatively that, if it was a material term, that term had no value. The Court of Appeal overturned the Judge and held that the Side Letter should be taken into account for the purposes of determining the value of a replacement contract under the 2002 master agreement close-out provisions.

Re FuturesOne Diversified Fund SPC Limited High Court of Justice, British Virgin Islands (Bannister J), 20 March 2013

Solvent liquidation - Appointment of liquidators

The case concerned four hedge funds incorporated in the BVI, the voting shares in which were all held by corporate holding companies incorporated in Cayman. The holding companies were, or were thought to be, in the sole ultimate ownership of an individual who had acted as the funds' investment adviser. That individual resolved to place each of the funds into voluntary liquidation, but apparently without the authority of the holding companies. Proceedings had been commenced in the US against the individual by the CFTC and SEC alleging fraud, and a receiver had been appointed over all of the individual's assets, directly or indirectly held. The US receiver challenged the validity of the appointment of the liquidators. The Judge held that the liquidators had all been properly appointed, applying the dictum of Lord Hoffmann in *Meridian Global Funds Management Asia Ltd* [1995] AC 500, at 506 C-E, derived from *Multinational Gas* [1983] Ch 258, that the unanimous decision of the shareholders in a solvent company about anything the company has power to do under its memorandum of association shall be the decision of the company. He also held that the US receiver had no standing under Part XIX of the BVI Insolvency Act, 2003.
[Lloyd Tamlyn]

HSBC Bank v Tambrook Jersey Ltd [2013] EWHC 866 (Ch) (Mr Justice Mann), 12 April 2013

Letters of Request – section 426(4) IA 1986 - Jurisdiction – Debtor based in Jersey – Application to appoint administrators in England – Application refused

The Judge refused an application by HSBC (the Bank) to appoint administrators over Tambrook Jersey Ltd (T) pursuant to a letter of request issued by the Royal Court of Jersey.
T was a company incorporated under the laws of Jersey. Its main business activity and only assets were in the United Kingdom. Following a failed business venture concerning the development of certain properties in Margate, the Bank and T acknowledged that it would be desirable to place the company into administration in England to effect a sale of T's assets in England without commencing insolvency proceedings in Jersey. On 28 February 2013, the Royal Court of Jersey issued a letter of request asking "that the English High Court, pursuant to the provisions of section 426 of the IA 1986 or otherwise, assist and act in aid of and be auxiliary to this court by: [appointing administrators and performing certain other ancillary acts]". Section 426 IA 1986 provides for cooperation between courts exercising jurisdiction in relation to insolvency. Section 426(4) IA 1986 provides that the courts having jurisdiction in relation to insolvency law in any part of the UK shall assist the courts having the corresponding jurisdiction in any other part of the UK or any relevant country or territory. Section 426(5) IA 1986 provides that a request made to a court in any part of the UK for assistance is authority for the court to apply the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. Notwithstanding the letter of request issued by the Royal Court of Jersey, the Judge declined to make an administration order. He held the jurisdiction under section 426 IA 1986 was to provide "assistance" to a foreign court exercising insolvency jurisdiction and that this, in turn, presupposes that the foreign court is doing something or (perhaps) planning to do something in the exercise of its insolvency jurisdiction which the English court can and is invited to assist. Referring to Rubins v Eurofinance [2013] 1 AC 236, the Judge held it was consistent with the principle of modified universalism that assistance is to be provided in the context of some sort of insolvency procedure in the requesting state. The Judge accepted that the Royal Court of Jersey was an "insolvency court". However, as there was no Jersey insolvency proceeding currently on foot and as there was apparently no intention to start one he held that the Jersey letter of request was not asking the English court for "assistance" within the meaning of section 426 IA 1986. The Judge considered that "without some form of existing or future intended activity by the foreign insolvency court, I do not see how that court is "assisted"". Accordingly he held that the request did not fall within the statute and there was no jurisdiction to make an administration order. **[Stephen Robins]**

PERSONAL INSOLVENCY

Digested by ALEXANDER RIDDIFORD

Singh v Singh (Proudman J), 8 February 2013


ALEXANDER RIDDIFORD

Personal Insolvency – Sections 252, 255 and 256 Insolvency Act 1986 – whether an IVA proposal is serious and viable

A District Judge had declared a debtor bankrupt. The debtor's second largest creditor ("R") had challenged the validity of charges held by the debtor's largest creditor ("H"). Although it was clear that R's return would be greatly reduced if this challenge were unsuccessful, nonetheless the District Judge was persuaded at the hearing of the bankruptcy petition that R would have a greater than 25 per cent share of the votes at a creditors' meeting through which he could defeat a proposed IVA. The debtor had applied for an interim order under section 252(1) of the Insolvency Act 1986 in light of the proposed IVA, but the District Judge impliedly dismissed this application in declaring the debtor bankrupt. The Judge allowed the debtor's appeal against the order declaring him bankrupt and made an interim order under section 252 of the Insolvency Act 1986. The District Judge had failed to consider whether the IVA had no reasonable prospect of being approved and implemented under section 256(1)(a) of the Insolvency Act 1986. The closer R's share of the vote came to 25 per cent, the less clear it became that the 75 per cent majority required for the IVA approval would be achieved. There were many variables that could have affected figures that were borderline to the calculation of the percentage of debt attributable to R which would have impacted on his voting share. Accordingly, the Court's discretion under section 255(2) of the Insolvency Act 1986 had been engaged and it had to be satisfied that the IVA was serious and viable (Davidson v Stanley [2005] B.P.I.R. 279 applied). The Judge held that the proposed IVA was serious and viable for the purposes of the debtor's application for an interim order, noting (a) that the District Judge had been wrongly persuaded that the IVA proposal was doomed to fail in that he had failed to consider whether the IVA proposal was serious (having addressed his mind only to viability), and (b) that if R wished to have H's charges investigated then R could vote against the proposed IVA (Knowles v Coutts & Co [1998] B.P.I.R. 96 applied).

Davis v Price [2013] EWHC 323 (Ch) (David Richards J), 21 February 2013


ADAM AL-ATTAR

Personal Insolvency – Section 262 Insolvency Act 1986 – suspension of approval of individual voluntary arrangements

The Judge dismissed appeals by appellant creditors against orders by which two statutory demands had been set aside. The respondent debtors had proposed IVAs which were approved at a creditors' meeting in June 2010, with the appellant creditors' proof of debt being treated as a contingent liability and valued at £1. On the appellant creditors' application under section 262 of the Insolvency Act 1986 challenging this valuation, the Court suspended (rather than revoked) this approval and ordered the debtors to pay the creditors' costs of £7,010.52. At further creditors' meetings held in January 2012 IVAs were approved under which the appellant creditors' proofs of debt were valued at approximately £35,000. The appellant creditors issued statutory demands to recover the sum of £7,010.52 owing pursuant to the costs order. These statutory demands were set aside. The issue on appeal was whether the debt created by the costs order was subject to the terms of the IVAs approved at the later creditors' meetings held in January 2012. The appellant creditors submitted that, since the IVA approval of June 2010 had only been suspended under section 262(4)(a) of the Insolvency Act 1986, the IVAs as finally approved in January 2012 did not encompass claims which had arisen after June 2010. The creditors' appeal was dismissed. An IVA bound every creditor who was entitled to vote at the meeting at which the IVA was approved. Neither the Insolvency Act 1986 nor the Insolvency Rules 1986: (a) distinguished between the original meeting at which an IVA was considered and any subsequent meeting held pursuant to a direction of the Court made under section 262(4); (b) provided that a revised proposal put to a further meeting of creditors was restricted in its effect to those who were creditors at the date of the original meeting; or (c) provided that notice of the further meeting was only to be given to those who were entitled to vote at the first meeting. Further, the distinction between the suspension and revocation of an IVA's approval under section 262(4)(a) of the Insolvency Act 1986 did not have the effect of determining which creditors were to be bound by the IVA which fell to be considered at the further meeting. The Judge suggested that there might have been more force in the appellant creditors' submissions if Section 262(4) empowered the Court to give a direction for a further meeting only where approval had been suspended rather than revoked, but noted that Section 262(4) granted the Court this power whether approval had been suspended or revoked. Accordingly, the appeals were dismissed. **[Adam Al-Attar]**

Kasumi v Arrow Global Guernsey Ltd, (Asplin J), 27 February 2013

Personal Insolvency – Rule 6.26 Insolvency Rules 1986 – permission to issue bankruptcy petition

The appellant debtor ("K") appealed against a District Judge's order that the respondent petitioning creditor ("G") should apply on notice for permission to present a second bankruptcy petition and to file and serve the second petition within 21 days. As the District Judge was aware, the first bankruptcy petition had been dismissed for non-attendance and G had already presented a second petition. K argued that the second petition was an abuse of process and that the District Judge had erred in granting the permission required by Rule 6.26 of the Insolvency Rules 1986 to present a second petition. The Judge dismissed K's appeal. The District Judge had not granted permission to present a second petition. Rather, he must have intended that G should apply for permission and that, if this permission were granted, the petition would then be heard at the same hearing. The real issue was whether permission under Rule 6.26 of the Insolvency Rules 1986 could be granted retrospectively. Rule 6.26 could not be read in such a way as to force the Court to dismiss the second petition, for example on the basis that it was a nullity, and so permission could be granted retrospectively. Nor was the presentation of a second petition an abuse of process. Only one hearing had been missed and there was a reason for the failure to attend on which the Court could hear evidence at the permission hearing.

Darbyshire v Turpin (Arnold J), 1 March 2013

Personal Insolvency – Rule 6.5(6) Insolvency Rules 1986 – procedural defect in bankruptcy petition; adjournment to allow time to pay

The appellant debtor ("D") appealed against the bankruptcy order made against him. D's application to set aside a statutory demand had been dismissed. However, the Court had not specified at that hearing the date on which the respondent petitioning creditor ("P") could present the bankruptcy petition. P presented the bankruptcy petition the day after the hearing. The District Judge, at a subsequent hearing at which D was not present, adjudged D bankrupt. D appealed against the order of the District Judge adjudging D bankrupt. D submitted (a) that here was a procedural defect in the bankruptcy petition; (b) that the District Judge had been wrong to proceed to the determination of the petition at that hearing without first making a finding of fact on the cross-claims which D asserted he had against P; and (c) D should have been granted an adjournment to allow him to pay the debt.The Judge allowed D's appeal. As to Rule 6.5(6) of the Insolvency Rules 1986, the purpose of this provision was to allow a debtor to request time to pay the debt before the bankruptcy petition was presented. D had not shown any way he could have paid the debt and so the District Judge was correct to reject D's request for an adjournment. However, the Court had to consider whether D's attempt to establish that he had cross-claims against P had any prospect of success, a matter which required a finding of fact on the basis of evidence. The District Judge, in deciding that there was no such prospect of success, was influenced by the immaterial consideration that D had not attended the hearing and that he had not signed a statement of truth (which he was not obliged to do). Accordingly, D's appeal was allowed and the Judge ordered that the matter was to be remitted to the County Court where directions were to be made for the filing of evidence.

PROPERTY AND TRUSTS

Digested by STEPHEN ROBINS AND HENRY PHILLIPS

In the matter of an Application for Information about a Trust, Supreme Court of Bermuda (Kawaley CJ), 12 March 2013

Information Control Mechanism – Supervisory Jurisdiction

DAVID ALEXANDER QC

P sought disclosure of information about a Bermudian trust of which he was a beneficiary. The Trust Deed provided that disclosure to anyone could only be made by the Trustees with the consent of the Protector. The Protector had declined to consent to the disclosure of any information about the Trust (save for the Trust Deed itself and its supplemental documents) to P. The case raised the novel question of the impact of an information control clause or mechanism on the Court's supervisory jurisdiction. That depended on the answer to two questions. Firstly, was the information control mechanism valid on its face or were its terms incompatible with the irreducible core obligations inherent in a valid trust? Secondly, if the clause was valid, what principle delineated the scope of the court's jurisdiction to grant relief in circumstances which arguably entailed a departure from the strict terms of the governing instrument? The Chief Justice of Bermuda held that the relevant clause was valid and not incompatible with the irreducible core obligations.

Furthermore, he held that, notwithstanding the existence of the clause, this did not limit the circumstances in which a beneficiary can invoke the Court's supervisory jurisdiction provided that he could make out a prima facie case that the Court's intervention was required to meet the minimum requirements for trustee accountability in objective terms. The Chief Justice then held that, on balance, disclosure should be given of historical basic financial information about the Trust assets (as set out in a Confidential Appendix to the judgment) subject to appropriate safeguards to meet concerns about the use to what that information could be put. **[David Alexander QC]**

UK Housing Alliance (North West) Limited v Bowyer and others Adjudicator to HM Land Registry (Michael Mark), 18 March 2013

Unpaid vendor's lien – Constructive Trust – Proprietary Estoppel – Set Off - Registration of Notice at HM Land Registry

The applicant ("the Company") carried on business in the 'equity release' market, operating on the basis of a 'sale and lease-back' model. In summary, the Company would purchase residential properties from the owners of those properties in return for 70per cent of the purchase price, lease the properties back to the owners for 10 year terms, and promise to pay the remaining balance of 30per cent of the purchase price at the end of the 10 year term. The Company went into administration, without having paid the final payments of 30per cent. The administrators of the Company found that a large number of former owners of properties purchased by the Company had registered unilateral notices at HM Land Registry, to protect the final payments of 30per cent. The administrators applied to HM Land Registry for the notices to be cancelled, contending that the former owners of the properties were unsecured contingent creditors of the Company in respect of the final payments of 30per cent and that they did not have any interest in land capable of binding a purchaser with notice. The Adjudicator to HM Land Registry held: (1) Where a vendor is to be paid part of the purchase price on completion and the balance at a later date, no unpaid vendor's lien arises. (2) Even where an unpaid vendor's lien would otherwise arise by implication, it could be excluded by express provision to that effect in the sale contract (as it had been in the present case). (3) The provisions excluding an unpaid vendor's lien were not contrary to the Unfair Terms in Consumer Contracts Regulations 1999. (4) On the facts, none of the former owners could establish any constructive trust or proprietary estoppel. (5) In any event, it is not possible to have a remedial constructive trust or equity by way of estoppel when a company's property has become subject to the statutory scheme for administration pursuant to the Insolvency Act 1986. (6) There could be no right of set-off whether against the Company (which had charged its right to receive rent and thereby destroyed the requisite mutuality) or a purchaser to whom a property had been sold. (7) The contingent right to receive the balance of the purchase price did not affect a registered estate or charge within the meaning of section 32 of the Land Registration Act 2002. (8) Accordingly, no notice in respect of that right could be registered, and the notices which had been registered against the properties would be cancelled.
[Stephen Robins]

In the Matter of the A and B Trusts [2012] JRC 169A, Royal Court of Jersey

The applicants comprised the majority of the adult beneficiaries of two discretionary trusts, which both appointed the same protector. After the death of the settlor the relationship between the beneficiaries and the protector broke down and a majority of the beneficiaries sought his removal on a number of grounds, principally that he mistakenly believed that as protector his role was to act the guardian if the deceased settlors' wishes such that he was indifferent or actively hostile to the beneficiaries. They also alleged that he had failed properly to supervise the actions of the trustees or ensure that the interests of the beneficiaries were paramount.
The Royal Court held that the Protector had misunderstood his duties to the beneficiaries and was wrong to insist on the trustees following the settlors' wishes as he understood them, irrespective of the wishes and interests of the majority of the trustees. A protector's duty is no higher than to see that trustees have "*due regard*" to the settlor's wishes and he should not play an overactive part in the management of the trust.
The court referred to the decision of Lord Blackburn in *Letterstedt v Broers* and held that the appropriate test for removal of a protector was whether his continued role would be "*detrimental to the execution of the trusts*". This is not confined to exceptional circumstances and where mutual hostility and distrust had led to a breakdown in relations between protector and beneficiaries, this could suffice for removal in the absence of any other solution.
The court ordered the removal of the protector and appointed a replacement protector.

For this relief, much thanks[1] - but what relief?

Glen Davis QC considers further orders available following recognition of a foreign insolvency

When the English court[2] has recognised a foreign insolvency proceeding under the UNCITRAL Model Law, it has a discretion to grant "any appropriate relief". But when will it recognise foreign proceedings, and when it has done so, how far will (and how far should) it go in granting further relief?

The Cross-Border Insolvency Regulations 2006[3] ("CBIR") implement for Great Britain[4] the UNCITRAL Model Law on cross-border insolvency[5] in the form set out in Schedule 1 CBIR, and provide a convenient route to recognition for foreign insolvency proceedings where the effect of a foreign insolvency is not automatic under the EC Insolvency Regulation[6] ("ECIR") or one of the regimes applicable to institutions excluded from the ECIR[7]. Reg 2 CBIR permits the court when interpreting the Model Law to have regard to the original UNCITRAL Model Law, to UNCITRAL's preparatory documents and to the *Guide to Enactment*.

A *foreign representative* can apply to the English court as of right under Art 15(1) Model Law for recognition of the *foreign proceeding*[8] in which they have been appointed, and can rely on a statement in the decision or "certificate" (usually, a copy of the order by which they have been appointed) that the proceeding is within Art 2(i) of the Model Law and the foreign representative is a person within Art 2(j)[9] to raise the presumption under Art 16(1) Model Law. Applications for recognition are almost always without notice to any other party, and rarely opposed; the court rarely has need to look any further.

Art 17(1) Model Law provides that the 'foreign proceeding' *shall be recognised* if it is a proceeding within Art 2(i) of the Model Law and the foreign representative is a person within Art 2(j), and the other procedural conditions are met, and Art 17(2) provides that it *shall be recognised* as a 'foreign main proceeding' if it is taking place in *the State where the debtor has the centre of its main interests*[10], and as a 'foreign non-main proceeding' if the debtor has a *establishment*[11] in that foreign state. In some jurisidictions, the use of 'shall' is regarded as imperative, and there have been comments to that effect in unopposed first instance decisions in England[12] but the better view is that the duty is imposed on a court which always has a discretion as to whether or not it is appropriate, in all the circumstances of the case, to grant the recognition requested[13].

As the Supreme Court observed in *Rubin v Eurofinance*[14], the Model Law shares with the ECIR the approach (ultimately derived from the civil law concept of a trader's domicile) that the

1/. *Hamlet, Act 1, sc 1*
2/. *Jurisdiction is allocated to the Chancery Division of the High Court as regards England and Wales by Art 4(1) Model Law*
3/. *SI 2006/1030*
4/. *"Great Britain" refers to England, Wales, and Scotland (the term is derived from section 1 of the Union with Scotland Act 1706)*
5/. *The UNCITRAL Model Law on cross-border insolvency was adopted by the United Nations Commission on International Trade Law on 30 May 1997. References in this article to the Model Law are to the form in which it appears in Schedule 1 CBIR unless otherwise specified.*
6/. *Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings; where the Model Law conflicts with an obligation under the ECIR, Art 3 Model Law provides that the requirements of the ECIR prevail.*
7/. *The Insurers (Reorganisation and Winding Up) Regulations 2004, SI 2004/353 ("the Insurers Regulations"); The Credit Institutions (Reorganisation and Winding Up) Regulations 2004, SI 2004/1045 ("the Credit institutions Regulations"); entities to which these regimes would apply, and companies which are subject to certain "Special Administration" regimes in the UK, are excluded from the operation of the Model Law as implemented in Great Britain by para 2 of Schedule 1 CBIR.*
8/. *By Art 2(i), a "foreign proceeding" for the purpose of the Model Law means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation*
9/. *equating to Arts 2(a) and (d) of the original text of the Model Law*
10/. *There is no definition of this expression in the Model Law, as the Court of Appeal noted in In Re Stanford International Bank Ltd [2010] EWCA Civ 137, [2011] Ch 33*
11/. *defined in Art 2(e): any place of operations where the debtor carries out a non-transitory economic activity with human means and assets or services*
12/. *eg per Morgan J in Re Samsun Logix Corporation, Samsun Logix Corporation v DEF [EWHC] 576 (Ch), [2009] BPIR 1502 at [5]*
13/. *cf Hughes v Hannover Ruckversicherungs-Aktiengesellschaft [1997] BCC 921 CA*
14/. *[2012] UKSC 46, [2013] 1 AC 236 per Lord Collins at [13]*

jurisdiction which is treated as having international competence in respect of an insolvency is that of the country of the debtor's centre of main interests ("COMI"). This choice was deliberate, looking to harmonise the emerging concept of a main proceeding[15]. As the Supreme Court also observed in *Rubin*, the expression *centre of main interests* is "an expression not without its own difficulties". But before an English Court, at least, the approach to COMI under the ECIR and the Model Law will be the same[16]; it is where a company regularly conducts the management of its interests in such manner as to be objectively ascertainable by third parties[17].

In practice, the foreign court can also certify that the debtor has its COMI in the state where proceedings are opened, and the English court is likely to defer to such a finding by the court first seised, or at the very least (and even in cases where it has not been necessary for the original court to consider the question of COMI) rely on the presumption in Art 16(3) Model Law that, in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the debtor's COMI[18].

There is power to grant provisional relief from the time of filing an application for recognition[19]. When the English makes an order recognising a foreign proceeding, that order then has effect throughout Great Britain[20].

GLEN DAVIS QC

The first and most obvious relief which would be sought on recognition is a protective stay on proceedings, both to prevent administration of the estate being distracted by the costs of defending multiple proceedings, and to prevent local actions proceeding to judgment. Where the proceeding recognised is a foreign main proceeding, there is an automatic stay under Art 20(1) of the Model Law, which for a corporate debtor is the equivalent of the stay which would apply on domestic winding-up[21]. That is to say:

no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose[22]

This form of stay enables the court to impose a condition that, for example, an arbitration or action may proceed to judgment which is only to be enforced by proof in the foreign liquidation. It does not prevent enforcement of security[23] or repossession of property under a hire-purchase or retention of title agreement[24].

The purpose of this automatic and mandatory stay is explained in the Guide

15/. *see the UNCITRAL Guide to Enactment at [31], and In Re Stanford International (fn 10 supra) at [37]*
16/. *decision of the Court of Appeal in Re Stanford International (fn 10 supra)*
17/. *Case C-341/04 Eurofood IFSC [2006] ECR I-3813; Case C-396/09 Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*
18/. *eg Re Bud-Bank Leasing SP zo.o [2010] BCC 255*
19/. *Art 19*
20/. *Reg 7 CBIR;*
21/. *Art 20(2)*
22/. *section 130(2) of the Insolvency Act 1986*
23/. *Art 20(3)(a)*
24/. *Art 20(3)(b); the Article refers to a 'hire-purchase agreement' but this term is defined in Art 2(k) to include: a conditional sale agreement, a chattel leasing agreement and a retention of title agreement*

to Enactment:

The stay of actions or of enforcement proceedings is necessary to provide breathing space until appropriate measures are taken for reorganization or fair liquidation of the assets of the debtor.

Upon recognition of foreign insolvency proceedings – whether main or non-main – Art 21(1) of the Model Law gives the court discretionary jurisdiction to grant in addition *any appropriate relief* at the request of the foreign representative *where necessary to protect the assets of the debtor or the interests of the creditors*. There are examples in sub-Articles (a) to (g), but are introduced by the word "including" so these are clearly intended to be a non-exclusive list. The examples are:

(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1(a) of article 20;

(b) staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1(b) of article 20;

(c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of article 20;

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court;

(f) extending relief granted under paragraph 1 of article 19; and

(g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986.

English judges readily act to extend the stay…

In practice, the English judges readily act under this power to extend the stay on recognition into the form of moratorium which is available in England where a company is in administration[25]. This prevents enforcement of security, repossession of property under a hire-purchase or retention of title agreement, or re-entry by a landlord without the consent of administrators or the permission of the court, and there are now numerous examples (many of them unreported) of them doing so[26]. Courts in other jurisdictions take a similar approach[27].

Under Art 20(2), the court has a discretion to entrust the distribution of all or part of the debtor's assets located in Great Britain to the foreign representative or another person, provided it is satisfied that the interests of creditors in Great Britain are *adequately protected*. It is not surprising that the English court will exercise its powers under Art 21(2) to direct liquidators in a non-main proceeding to remit assets to be distributed in the foreign main proceeding, as it did in *Re Swissair*[28]. The English court (and the courts of other common law jurisdictions) have since at least the late 19th century[29] considered that they had jurisdiction to direct the liquidator in an ancillary English liquidation to remit assets to a foreign liquidator to be distributed in accordance with the law applicable to that foreign liquidation, at least where there would be a pari passu distribution among unsecured creditors[30], and more recently even where the foreign proceeding gives priority to a particular class of creditor[31] (as European jurisdictions now do in the case of insurance insolvency).

Similarly, it would be surprising if the court was not prepared to grant relief under Art 21(1)(d) in most cases, enabling the foreign representative to take evidence concerning assets and liabilities of the debtor, and making orders in support of the foreign proceedings where necessary to facilitate the taking of such evidence.

The real question, to which we do not yet know the answer, is how much further the court will (and should) be prepared to go.

The Guide to Enactment anticipates that there will be very wide powers available to the court to grant discretionary relief under Art 21; it refers to *any other relief* that may be available under the laws of the enacting State.

The scope of Art 21 was recognised by Lindgren J in the Federal Court of Australia in *Tucker, In the Matter of Aero Inventory (UK) Limited (No 2)*[32]: *It will be recalled that Article 21(1) empowers the Court to "grant any appropriate relief" – a power not confined to the forms of relief described in the lettered paragraphs (a) to (g) of Article 21(1)*. In that case, the Judge granted the applicant foreign representatives the same protections with respect to charges, liens and pledges and leased property as he said the voluntary

26/. under paragraph 43 of Schedule B1 of the Insolvency Act 1986

27/. eg Re Samsun Logix (fn 12 supra); Re Pan Oceanic Maritime Inc [2010] EWHC 1734 (Ch) ; Re Transfield ER Cape Limited [2010] EWHC 2851 (Ch);

28/. eg Hur v Samsun Logix [2009] FCA 372, in which Jacobson J in the Federal Court of Australia granted the foreign representative of Samsun Logix an extended form of stay

29/. Re Swissair Schweizerische Luftverkehr-Aktiensgesellschaft [2009] EWHC 2099 (Ch), [2010] BCC 667

30/. Re Matheson Bros Ltd (1884) LR 27 Ch D 225

31/. Re BCCI (No 10) [1997] Ch 213

32/. [2009] FCA 1481

administrator of an Australian company would enjoy as a matter of course, saying that this approach promotes consistency and gives effect to the objectives set out in the preamble to the Model Law.

One boundary is now charted by the decision of the Supreme Court in *Rubin*; the Model Law does not permit enforcement of an in personam judgment against a person who has not submitted to jurisdiction in the state of the foreign main proceeding. But what about other boundaries?

To keep this article within manageable bounds, I would like to take just one example, but one with potentially profound consequences; the effect of a foreign main proceeding on a contract governed by English law.

As a starting point, it is a familiar proposition of common law that a contract can be, and can only be, discharged under its proper law[33] (although submitting to a foreign insolvency proceeding and accepting a benefit in that proceeding may give rise to what is in effect an estoppel).

APPLYING AUSTRALIAN LAW THROUGH THE PRISM OF SECTION 426

It has long been recognised that it may be necessary to suspend or affect contract rights in order to achieve a reorganisation or a cost-effective liquidation. One example is the power given to a liquidator under the English Insolvency Act[34] to disclaim contracts as a species of onerous property, converting executory obligations on the part of the debtor company into a provable damages claim on the part of the counterparty. An Australian liquidator has similar powers under Australian insolvency legislation.

Let us suppose that there is an Australian company in liquidation, some of whose contracts are subject to English law, and it is "necessary in the interests of the creditors" (the test under Art 21) for the liquidator to disclaim them. Australia is a designated territory for the purposes of section 426 of the Insolvency Act, and so there is the possibility that the Australian liquidator can apply for recognition under that section, and under section 426(5) of the Insolvency Act the English court can apply either English or Australian law. The English Court can by either route give effect to the necessary disclaimer – either by applying Australian law through the prism of section 426(5) or by applying English insolvency law to the English law contracts[35].

Similarly, although disclaimer as such may not be available within the insolvency regimes of other EU Member States, the automatic effect of the ECIR when the COMI of a company is in another Member State is that it is the law of the State where the main proceedings are opened which governs effects of those proceedings on a current contract to which the debtor is a party[36].

So the position as a matter of English law is that a European insolvency will have automatic effect on a contract governed by English law[37], and an insolvency in a State designated for the purposes of section 426 of the Insolvency Act *can* have effect on such a contract, but we are still in the very early days of exploring just how wide a jurisdiction the Model Law confers on the English courts to make appropriate orders in support of a foreign insolvency.

Art 6 of the Model Law provides that nothing in the Model Law prevents the court from refusing to take an action governed by the Model Law if the action would be "*manifestly contrary*" to the public policy of Great Britain or any part of it. While this "public policy" Exception may be invoked in an extreme case, if is difficult to see how it could be contrary to public policy for the court to grant as relief under the Model Law provision which would automatically apply by operation of the ECIR.

33/. *Anthony Gibbs & Sons v La Société Industrielle et Comercielle des Métaux (1890) 25 QBD 359 CA; Wight v Eckhardt Marine GmbH [2004] 1 AC 147; Joint Administrators of heritable Bank plc v Winding Up Board of Landsbanki Islands HF [2013] UKSC 13, [2013] 1 WLR 725*

34/. *section 178*

35/. *This is not an entirely hypothetical example – the English High Court recently applied Gibraltar law through section 426(5) of the Insolvency Act to give a liquidator's disclaimer under Gibraltar law effect on contracts of insurance and reinsurance governed by English law: Re Lemma Europe Insurance Company Limited, unreported 14 February 2013*

36/. *Reg 4(2)(e)*

37/. *where the ECIR applies, or where the Insurers Regulations or the Credit Institutions Regulations have implemented the relevant Directives which include provisions to the same effect*

The Insolvency Regulation: a Service or an Overhaul?

In the second of two articles, **Mark Arnold QC** considers the European Commission's recent Report on the application of the Insolvency Regulation and proposals for its amendment.

Introduction

As I noted in the first article, which appeared in the last edition of the Digest, the European Commission presented its report on the application of the Insolvency Regulation (No 1436/2000), together with a proposal for its amendment, on 12 December 2012. The Commission's view overall is that the Regulation in general functions in a "sound and satisfactory" manner; nevertheless areas have been identified where it is thought amendment is needed.

I previously addressed certain aspects of the changes suggested in the wake of the Commission's consideration of the provisions of the Regulation relating to its scope, the jurisdiction for opening insolvency proceedings (including the further definition of COMI) and the scope of the general rule relating to the applicable law (Articles 4-15). In this article, I propose to address certain changes which the Commission has proposed in relation to (i) the co-ordination of main and secondary proceedings and (ii) groups of companies.

Co-ordination of main and secondary proceedings

The Regulation distinguishes between main and secondary proceedings. Main proceedings are those opened in the Member State in which the debtor has its COMI, and it is by reference to the law of that Member State that matters relating to the insolvency generally fall to be determined (Article 4), subject to various exceptions (Articles 5-15). Save to the extent that secondary proceedings are opened, main proceedings have universal effect throughout the EU and aim to encompass all the debtor's assets (Recital (12)). Secondary proceedings are those opened in a Member State where the debtor has an establishment. Their effects are confined to the assets located in that State (Recital (12)), and they are limited to winding-up proceedings of a type listed in Annex B (Article 27), albeit this latter restriction is alleviated to some extent by the fact that secondary proceedings may be closed without liquidation by a rescue plan, a composition or a comparable measure where the applicable law so permits (Article 34(1)).

It was originally intended that secondary proceedings should "protect the diversity of interests" (Recital (12)). This was primarily a reference to local interests, referred to in Recital (19), which goes on to state that, at the request of the liquidator in main proceedings, they might also serve to promote the efficient administration of the estate in cases where the estate is too complex to administer as a unit, or where difficulties might arise because of the differences in the legal systems concerned.

The need for mandatory rules of co-ordination is recognised (Recital (12)), and provision is made (albeit in rather vague terms) in Article 31 for (i) a duty to communicate, subject to rules restricting the communication of information and (ii) a duty to co-operate, subject to "the rules applicable to each of the proceedings".

In England and Wales, various problems have arisen in the context of secondary proceedings, but they have largely been solved by the Courts. Of most concern has been the potential proliferation of secondary proceedings in a manner unhelpful to the administration of the estate in main proceedings and against the interest of creditors generally. The English Courts have sought to combat that possibility by avoiding secondary proceedings altogether where possible. They have sought to do this in two ways. First, they have adopted the stance that secondary proceedings will not be opened unless it can be shown that they

are necessary and will not adversely affect creditors' interests, ie that they will serve some demonstrable purpose. In this respect, the English Courts have taken their cue from their counterparts in France.[1] Secondly, the English Courts have expressly recognised the ability of officeholders to undertake to treat creditors in another Member State in a manner consistent with the preferential rights such creditors would have if secondary proceedings were to be opened in that Member State, even if they would enjoy no such priority under English law. Such undertakings have been used to good effect, having been recognised in the relatively early days of the Regulation, in *Re MG Rover Espana*[2] *SA, Re Collins & Aikman*[3] and *Nortel Networks*.

Another potential problem, which arises out of the fairly narrow terms of Article 31, is that no express duty is imposed on courts to communicate and co-operate with each other, and there is no similar duty between liquidators and courts. As to the first of these, the English Courts have expressly recognised that there is such a duty, as have those in other Member States: see *Re Nortel Networks SA*[4].

The Commission has noted that it is only relatively infrequently that the liquidator in main proceedings has applied for the opening of secondary proceedings. More often, secondary proceedings have been "used (and abused) as a tool for the protection of local interests and as an instrument in jurisdictional conflicts". The Commission refers to the following particular problems, almost all of which it proposes should be addressed by amending the Regulation:

- The fact that secondary proceedings must be winding-up proceedings is an impediment to flexible and effective restructuring measures
- The absence of specific rules on the procedure for opening secondary proceedings is problematic, primarily because of the absence of any provision (i) allowing the competent court to refuse to open proceedings where to do so would not be in the interests of local creditors or (ii) requiring the main liquidator to be heard before opening the proceedings
- The fact that it is unclear whether main liquidators in all Member States can give undertakings effectively guaranteeing that creditors who might otherwise apply for secondary proceedings in their own Member States will have such preferential rights as they would enjoy in secondary proceedings respected, so as to avoid the need to open such proceedings
- The duties to co-operate and communicate information under Article 31 are vague, and do not provide for co-operation between courts and between liquidators and courts
- Problems have also arisen as a result of the provisions enabling a stay of secondary proceedings to be granted, or terminated, under Article 33, in relation to which different standards apply.


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1/. See Re Nortel Networks SA [2009] BCC 343, citing the decision of the Court of Appeal of Versailles in Public Prosecutor v Segard (Administrator of Rover France SAS) [2006] ILPr 32
2/. [2006] BCC 599
3/. [2006] BCC 861
4/. [2009] BCC 343, where Patten J referred also to the decision of the Vienna Higher Regional Court in Re Stojevic (November 9, 2004, 28 R 225/04w)

Proceedings other than winding-up proceedings

The Commission proposes that Article 27 should be amended by simplifying the language and omitting the sentence which requires secondary proceedings to be among those listed in Annex B. In addition, the proposed Article 29a(3) expressly states that it is for the court opening secondary proceedings to decide which type of proceedings under its national law would be the most appropriate taking into account the interests of local creditors, irrespective of whether any condition relating to the debtor's insolvency are fulfilled.

Procedure for opening secondary proceedings

It is proposed that more specific rules be introduced relating to the procedure for opening of secondary proceedings. These are set out in a new Article 29a, the essential elements which are as follows:

- The court seised of a request to open secondary proceedings must immediately notify the liquidator in the main proceedings and give him an opportunity to be heard: Article 29a(1).
- At the main liquidator's request, the court may postpone the decision to open secondary proceedings or refuse to do so altogether if opening them is not necessary to protect the interests of local creditors. Whether the main liquidator has given an undertaking of the kind referred to in Article 18 (see below) will be of particular importance to the court's decision in this respect: Article 29a(2)
- Provision is made for the main liquidator to be notified of the decision to open secondary proceedings and he is to have a right to challenge that decision: Article 29a(4).

Article 18 Undertakings

The reference to an undertaking of the kind referred to in Article 18 is to a proposed amendment to Article 18(1). The Commission has recognised the usefulness of the approach adopted by the English courts to undertakings given by officeholders with a view to protecting the priority interests of local creditors so as to avoid secondary proceedings, and propose that such a substantive power be conferred on liquidators in all Member States to give such an undertaking. The proposed amendment reads as follows:

"[The liquidator in main proceedings] may also give the undertaking that the distribution and priority rights which local creditors would have had if secondary proceedings had been opened will be respected in the main proceedings. Such an undertaking shall be subject to the form requirements, if any, of the state of the opening of the main proceedings and shall be enforceable and binding on the estate."

Co-operation and Co-ordination between liquidators

As regards co-operation and communication between liquidators in main and secondary proceedings, the Commission proposes that Article 31 be amended so as to provide for a duty to co-operate to the extent such co-operation is not incompatible with the rules applicable to each of the proceedings. In particular, it is proposed that liquidators be subject to express duties:

- to explore the possibility of restructuring the debtor and to co-ordinate the elaboration and implementation of such a restructuring plan; and
- to co-ordinate the administration of the realisation or use of the debtor's assets and affairs.

In addition, new Articles 31a and 31b are proposed, which respectively make provision for co-operation and communication between courts and between liquidators and courts.

Co-operation and Co-ordination between courts

Article 31a proposes that courts be under an obligation to co-operate "to the extent such co-operation is not incompatible with the rules applicable" to each of the proceedings. Communication may be direct provided it is free of charge and the procedural rights of the parties and the confidentiality of information are respected. Co-operation may be implemented by any appropriate means, and a non-exhaustive list of specific forms of co-operation is provided. This approach appears to be based in large part on the provisions of Articles 25 and 27 of the UNCITRAL Model Law, albeit expressed in slightly different terms. The main point of distinction, at least as a matter of drafting, appears to be that Article 31a provides for the courts to be obliged to co-operate, whereas Article 25 of the UNCITRAL Model Law provides in terms that the English Court "may cooperate to the maximum extent possible" and "is entitled" to communicate with foreign courts. Whether, assuming the proposed amendment is adopted, this will give rise to any real difference in approach remains to be seen, but it seems unlikely: the English Courts have always attached great importance to such co-operation.

Co-operation and Co-ordination between liquidators and courts

The proposed new Article 31b makes provision for liquidators in main and secondary proceedings respectively to be obliged to co-operate and communicate with any court before which a request to open secondary or main proceedings is pending or which

"Secondary proceedings have been used (and abused) as a tool for their protection of local interests and as a instrument in jurisdictional conflicts".

has opened secondary or main proceedings. Co-operation is to be implemented by any appropriate means including those set out in Article 31a(3), "to the extent not incompatible" with the rules applicable to each of the proceedings. Once again, the approach is broadly similar to that adopted in Articles 25-27 of the UNCITRAL Model Law, save that the Model Law only imposes an obligation on foreign officeholders to co-operate with the English Court to the extent provided for in Article 18, which is limited to a duty to inform the court promptly of any substantial change in the status of the recognised foreign proceeding or in the status of his appointment, and of any other relevant proceeding regarding the debtor that becomes known to the foreign officeholder.

Articles 31-31b are to be read with new Recital (20), which includes the following exhortation:

"In their cooperation, liquidators and courts should take into account best practices for cooperation in cross-border insolvency cases as set out in principles and guidelines on communications and cooperation adopted by European and international associations active in the area of insolvency law."

This stems from one of the recommendations made by the Impact Assessment Report, which made particular mention of the Global Principles for Cooperation in international insolvency cases from the American Law Institute and the International Insolvency Institute, as elaborated by Professor Ian Fletcher QC and Professor Bob Wessels (2012).

Stay of secondary proceedings

Minor changes are suggested to the language of Article 33. Curiously, however, having identified as a problem the fact that the tests governing the grant and termination of a stay of secondary proceedings (as provided for in Article 33(1) and (2)) differ, it is not proposed that anything be done about it. Changes that might be made so as to address this problem are suggested below.

The absence of a framework for group insolvency is "an obstacle to the effcient administration of the insolvency of members of a group of companies".

Closure of main or secondary insolvency proceedings

Article 34 of the Regulation currently makes provision for the liquidator in main proceedings to be involved in the closure of secondary proceedings, as well as the manner of such closure: as stated above, this may be according to a rescue plan, a composition or comparable measure, rather than liquidation, if permitted by the law applicable to the secondary proceedings. It also provides that any restriction of creditors' rights arising from such a measure may not have effect in respect of the debtor's assets not subject to the secondary proceedings without the consent of all the creditors having an interest. Finally, it provides that, while secondary proceedings are stayed under Article 33, only the liquidator in the main proceedings or the debtor (with the liquidator's consent) may propose measures to close the secondary proceedings.

Under the amendments proposed by the Commission, Article 34 in its current form is to be deleted, presumably on the basis that, by reason of the changes proposed elsewhere, it is no longer required. Instead, provision is to be made making clear that closure of main proceedings will not prevent continuation of secondary proceedings, while closure of secondary proceedings involving the dissolution of the legal person (debtor) will not prevent the continuation of main proceedings opened in another Member State.

Groups of companies

The Regulation contains no framework for group insolvency. The Commission regards this deficiency, at least in certain cases, as "an obstacle to the efficient administration of the insolvency of members of a group of companies".

Status quo

As the Commission recognises, it is fair to say that the absence of such a framework has not proved an obstacle in all cases. Where, for example, it is possible to establish that the COMI of each relevant group company is in the same Member State, so as to displace (where necessary) the presumption that the location of its registered office means that it is elsewhere, it is possible for the Court of that Member State to open main proceedings in relation to each of the companies concerned. That is the approach which has been adopted in this country in relation to the group insolvencies of MG Rover and Nortel, to name but two. There are numerous others.

The Commission specifically recognises the utility of this approach and considers that it should continue in those cases where it is appropriate. This is made clear in the new proposed Recital (20b), which provides as follows:

"The introduction of rules on the insolvency of groups of companies should not limit the possibility of a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of those companies is located in a single Member State. In such situations, the court should also be able to appoint, if appropriate, the same liquidator in all proceedings concerned."

Where such an approach is not appropriate because the COMI of each company is located in a different Member State, the Commission considers that there should be close co-operation and communication between those involved

in the insolvency proceedings so as to ensure their efficient administration: proposed Recital (20a). It provides a suggested framework for such cases in draft Articles 42a-42d.

Cooperation and communication between liquidators

Where insolvency proceedings relate to two or more members of a group of companies, draft Article 42a provides that the liquidators in each are to cooperate with each other "to the extent such cooperation is appropriate to facilitate the effective administration of the proceedings, is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interests". In addition, provision is made for the liquidators in the respective proceedings to be subject to the following specific obligations, namely:

- immediately to communicate to each other information which may be relevant to the other proceedings, provided appropriate arrangements are made to protect confidential information
- to explore the possibilities for restructuring the group and to coordinate with respect to the proposal and negotiation of a coordinated restructuring plan
- to coordinate the administration and supervision of the affairs of the group members subject to insolvency proceedings.

The suggested approach broadly reflects the duties to cooperate and communicate which are to apply to liquidators in main and secondary proceedings, as provided for in the proposed Article 31, as amended (see above).

In addition, however, provision is made which permits the liquidators to agree to grant additional powers to the liquidator appointed in one of the proceedings, where such an agreement is permitted by the rules applicable to each of the proceedings. It is not entirely clear what the Commission has in mind in this regard, or in what circumstances such a power might be exercised.

Additional powers are conferred on liquidators by the proposed Article 42d: see below.

Communication and cooperation between courts

The Commission proposes that the courts overseeing the opening or conduct of insolvency proceedings relating to companies in the same group should be obliged to communicate and cooperate with each other to the extent that this is appropriate to facilitate the effective administration of the proceedings: proposed Article 42b. Despite various drafting differences, the rationale for which is unclear as the differences are of form rather than substance, the approach reflects the position as between courts overseeing main and secondary proceedings relating to the same corporate entity (draft Article 31a: see above), which itself largely reflects the position adopted in the UNCITRAL Model Law.

Cooperation and communication between liquidators and courts

Draft Article 42c imposes on liquidators duties to cooperate and communicate with any court before which a request to open proceedings in relation to another member of the same group of companies is pending, or which has opened such proceedings, in terms similar to those which impose such a duty on liquidators appointed in main or secondary proceedings relating to the same corporate entity (draft Article 31b). In addition, however, draft Article 42c provides that liquidators may request information from that court concerning the proceedings regarding the other member of the group or request assistance concerning the proceedings in which he has been appointed. In this respect, it differs from draft Article 31b, which confers no such power and, to that extent, appears one-sided.

Powers of liquidators

In addition to the power to request information and assistance conferred by draft Article 42c, it is proposed that liquidators appointed in insolvency proceedings opened in relation to a member of a group shall have the following rights, which are set out in draft Article 42d:

- to be heard and to participate (including by attending creditors' meetings) in any of the proceedings opened in respect of any other member of the group
- to propose a rescue plan, a composition or a comparable measure for all or some members of the group for which insolvency proceedings have been opened, and to introduce it into any of the proceedings opened in relation to another member of the same group in accordance with the law applicable to those proceedings
- to request any additional procedural measures under the law applicable to the relevant proceedings which may be necessary to promote rescue (including the conversion of proceedings).

Stay of proceedings

Draft Article 42d also confers on a liquidator appointed in insolvency proceedings opened in relation to a member of a group of companies the right to request a stay of the proceedings opened in relation to any other member of the same group: Art 42d(1)(b). The proceedings will be stayed in whole or in part if it is proven that such a stay would be to the benefit of the creditors in "these" proceedings, ie

Endorsement of practices already familiar to UK practitioners and their extension throughout the EU is to be welcomed.

the proceedings which are to be stayed. Such a stay may be ordered for up to three months, but may be continued or renewed for the same period. As an additional protection for the creditors in the proceedings to be stayed and – perhaps – to discourage applications save in cases where it is clearly appropriate, the court granting the stay may require the liquidator to take any suitable measure to guarantee the interests of those creditors. The reference to liquidator is not specific but in context must be a reference to the liquidator making the application for the stay.

The power to apply for a stay is similar to that granted by Article 33 in respect of secondary proceedings to a liquidator appointed in main proceedings. In particular, the permissible duration of such a stay is the same, as is the court's ability to require the liquidator to guarantee the interests of the creditors affected.

It differs, however, in important respects:

- the tests to be satisfied are different: the stay of secondary proceedings at the request of the liquidator in main proceedings may be refused only if it is manifestly currently of no interest to the creditors in the main proceedings, whereas it is proposed that the stay of proceedings relating to a different member of the same group can only be granted if shown to be for the benefit of the creditors in those proceedings
- although Article 33 currently makes provision for the stay of secondary proceedings to be terminated either at the request of the liquidator in the main proceedings or by the court of its own motion or at the request of a creditor or the liquidator in the secondary proceedings if the stay no longer appears justified by (in particular) the interests of the creditors in the main or the secondary proceedings, draft Article 42d makes no similar (or any) provision for termination of the stay.

The rationale for these apparent differences of approach is not clear. The lack of uniformity is to be regretted to the extent that it may give rise to a lack of clarity and lead to confusion. Starting with a blank canvas, it is suggested that the test suggested in Article 42d is to be preferred, so that the decision to grant a stay is determined by reference to the benefit of the creditors in the proceedings to be stayed. Despite the absence to an express power to terminate in draft article 42d, it must nevertheless be the case that any court having power to grant a stay has power to terminate it as well. Such a power should be exercised where it can be shown that the stay is no longer to the benefit to the creditors in the proceedings stayed.

Amending both the draft Article 42d and also the existing Article 33 along these lines would have the advantage of rendering the approaches consistent. As a bonus, it would also remove the existing inconsistency in Article 33, which the Commission has identified as a problem (see above) but has so far done nothing about.

(4) Conclusion

There is much in the proposed amendments that will already be familiar to UK practitioners, and which reflects current practice in the UK. Endorsement of such practices and their proposed extension throughout the EU is to be welcomed.

The suggested amendments relating to secondary proceedings appear to be sensible and timely. Whether they will lead to the greater use of secondary proceedings is doubtful, but that is not their aim: the concern, rightly, is to limit the cases in which it is appropriate to resort to such proceedings to those where it is absolutely necessary, but otherwise to avoid them. Where they cannot be avoided, the obligations placed on those in charge, both liquidators and courts, should serve at least to reduce the scope for potentially value-destructive strife.

It is true that there remains a lack of clarity in the provisions relating to the test applicable to the grant and termination of a stay of secondary proceedings, a problem identified but so far not addressed. As explained above, it would be a straightforward matter to mend this shortcoming by reference to the test proposed for the stay of insolvency proceedings relating to a company in the same group of companies, although it would seem sensible to extend even those provisions so as to confer an express power to terminate such a stay.

The introduction of a framework for group insolvency is likely to be of the highest importance. The proposals are sensible and appear workable. The only cause for regret is that they have not been introduced earlier.

The Commission's ultimate stated objective is to create a more business-friendly environment, to facilitate the survival of businesses and present a second chance for entrepreneurs as part of the new European approach to business failure and insolvency. Modernising the Regulation is but one step towards achieving the Commission's objective. The other is harmonising insolvency processes across EU Member States, in a bid to improve the prospects of reorganisation by encouraging more creditors to support restructuring plans, or to increase the return to creditors if a decision is take to liquidate.[5] The aim will not quickly be achieved. Even according to the draft amending Regulation (Article 2), it is not anticipated that it will apply until two years after it comes into force (the timing of which itself obviously depends on the approval of the European Parliament which is unlikely to consider the proposal before December 2013).

For the moment, therefore, and looking at the Regulation itself, this is a service with some modifications and a few new parts. It is not an overhaul - although it may well become such if plans for harmonisation of substantive provisions of national insolvency law reach fruition.

5/. Communication from the Commission to the European Parliament, the Council and the European Economic and social Committee, COM (2012) 742 (12th December 2012)

Statutory derivative claims and the common law

Five years on from the introduction of the statutory derivative claim, **William Willson** explains why the common law derivative action remains relevant to practitioners.

Introduction

The statutory derivative claim created by Part 11 of the Companies Act 2006 (**"the 2006 Act"**) recently celebrated its fifth birthday. Before its introduction the common law recognised the 'fraud on the minority' exception to the rule in *Foss v Harbottle*, and English procedural rules had been implemented over time by first the RSC and later the CPR in order to deal with common law derivative claims.

The switch-over from the *"complicated and unwieldy"*[1] common law derivative claim to a successor statutory mechanism has largely been a success (though practical issues, particularly in relation to costs, mean that such claims are still relatively rare).

However, three recent decisions, one in England and two from the Channel Islands, underline why the old common law claim remains relevant to English practitioners and that the rule in *Foss v Harbottle* continues to be important.

The Statutory Background

A derivative claim or derivative action is an action commenced by a shareholder seeking relief on behalf of the company in respect of a wrong done to the company.

Under Section 260 of the 2006 Act:

(1) This Chapter applies to proceedings in England and Wales or Northern Ireland by a member of a company –
(a) in respect of a cause of action vested in the company; and
(b) seeking relief on behalf of the company.
This is referred to in this Chapter as a "derivative claim".

(2) A derivative claim may only be brought –
(a) under this Chapter, or
(b) in pursuance of an order of the court in proceedings under section 994 (proceedings for protection of members against unfair prejudice).

(3) A derivative claim under this Chapter may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.

(4) …….
(5) …….
(c) references to a member of a company include a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.

The remaining sections in Chapter 1 of Part 11 deal with the application for permission. In particular, Section 263 sets out the two mandatory bars and the six discretionary factors that the court hearing the application for permission must consider.

The Position at Common Law

The two basic requirements at common law for a derivative action had historically been:

1/. That the alleged wrong or breach of duty was by a director and incapable of being ratified by a simple majority of the members (e.g. a fraudulent breach by a director or the deliberate misappropriation of monies) ("equitable fraud"); and

2/. That the alleged wrongdoers are in control of the company so that the company, which is the proper plaintiff, cannot claim relief by itself ("wrongdoer control").

The explanation for this exception to the rule in *Foss v Harbottle* was set out by the Court of Appeal in the landmark case of *Prudential Assurance Co Ltd v Newman Industries & Ors (No 2)* [1982] Ch 204:

"[The exception arises where] what has been done amounts to fraud and the

1/. See the findings of the Law Commission (Law Com No 246) and the Company Law Review Group in this respect.

wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue".

In their report on *Shareholders' Remedies* the Law Commission firmly recommended (at 6.50-6.55) that the statutory derivative claim procedure should replace the common law action entirely (even if that meant that certain kinds of common law derivative claim would not survive).

Clarity Lost - Multiple Derivative Claims

One debate that has remained live amongst academics, commentators and practitioners since the introduction of the new statutory mechanism on 1 October 2007 has been the fate of the common law "multiple derivative" action.

A multiple derivative claim is either a claim by a shareholder in a parent company on behalf of a subsidiary whose shares are held by the parent company (a "double derivative claim") or a claim by a shareholder in the parent company on behalf of subsidiaries of the subsidiary ("a triple derivative claim"). In *Waddington v Thomas* [2009] 2 BCLC 82 the Hong Kong Final Court of Appeal found that a shareholder could maintain a multiple derivative action at common law on behalf of a subsidiary of a company of which they were a member. Lord Millett characterised the question as simply being one of *locus standi* (at [100]-[105]).

Though the Law Commission appeared to have taken the view that the new derivative claim should do away with the common law in its entirety, they also thought (at 6.109-6.110) that multiple derivative claims might remain a possibility outside of Chapter 1 and that, rather than dealing with them expressly within the new provisions, the question of multiple derivative claims would be

WILLIAM WILLSON

"best left to the courts to resolve, if necessary using the power [under unfair prejudice provisions] to bring a derivative action".

In the last 5 years the debate as to whether the common law multiple derivative claim has survived the 2006 Act has continued to divide company lawyers.

There are now a dozen or so reported cases under Part 11, many of which have confirmed that Chapter 1 replaces the common law in its entirety: see *Mission Capital v Sinclair* [2008] EWHC 1339 (Ch), [35]; *Iesini v Westrip Holdings Ltd* [2009] EWHC 2526 (Ch); [73] ff.; *Stainer v Lee* [2010] EWHC 1539 (Ch), [24]; *Cinematic Finance Ltd v Ryder* [2010] EWHC 2387 (Ch), [11].

Most notably, Lord Millett himself, speaking extra-judicially in his 2010 article "Multiple Derivative Actions", lamented that:

"Had the facts alleged in Waddington come before an English Court the case must have been dismissed in limine, and for the first time in more than 150 years an alleged injustice would be without redress. The moral for would-be fraudsters is

COMPUTER GENERATED IMAGE OF THE PROPOSED FORT GILKICKER DEVELOPMENT

simple; choose an English company and be careful to defraud its subsidiary and not the company itself".

Clarity Regained – Re Fort Gilkicker Ltd [2013] EWHC 348 (Ch)

The continued availability of common law multiple derivative claims was considered by Mr Justice Briggs in the recent case of *Universal Project Management Services Ltd v Fort Gilkicker & Ors* [2013] EWHC 348 (Ch).

The application was for permission to bring a derivative claim. The applicant was not a member in the company (which was a special purpose vehicle set up to develop a former Victorian coastal battery): rather, the applicant was a member of a limited liability partnership which owned all of the shares in the company.

The two primary questions for the consideration of the court were:

1/. Whether the multiple derivative claim was known to English common law before the 2006 Act came into force; and

2/. If so, whether the multiple derivative claim had survived the enactment of the 2006 Act.

Having considered the juridical roots of the common law action, the judge acknowledged that there were a number of reported cases in which the English courts had appeared to recognise the conferral of *locus standi* to pursue the company's cause of action not upon the members, but upon one or more members of its holding company, where the holding company was itself subject to the same wrongdoer control as the company: *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849; *Halle v Trax BW Ltd* [2000] BCC 1020; *Truman Investment Group v Societe General SA* [2003] EWHC 1316 (Ch); and *Airey v Cordell* [2006] EWHC 2728 (Ch).

The question of what effect the 2006 Act has had upon the common law procedural device of the derivative action was ultimately a question of construction. In particular, the judge recognised that statute will be construed as taking away common law rights only if it does so expressly or by necessary implication: see the approach of Lord Dyson in *Islington Borough Council v Uckac* [2006] 1 WLR 1303 (at [28]).

The judge concluded that the 2006 Act did not do away with the multiple derivative claim. His reasoning was as follows:

1/. There was before 2006 a common law procedural device called the derivative action which could be brought by a minority of the company's members though also, where the company was a wholly owned subsidiary of another company, by a minority of the holding company's members. These were not separate derivative actions but simply examples of the efficient application of the procedural device designed to avoid injustice to different factual circumstances.

2/. In the 2006 Act Parliament identified the main version of that device, namely where *locus standi* is accorded to the wronged company's members and labelled it a "derivative claim" and enacted a comprehensive statutory code in relation to it. As a matter of language, Section 260 applied Chapter 1 of Part 11 only to that part of the old common law device thus labelled, leaving other instances of its application unaffected.

3/. Applying the well-established relevant principle of construction, Parliament did not expressly abolish the whole of the common law derivative action in relation to companies, even though by implication from the comprehensiveness of the statutory code it did so in relation to derivative claims by members of the wronged company.

4/. Indeed, Section 260 could easily have been phrased to achieve that result (but was not). Alternatively it could have abolished the whole of the common law derivative action c.f.

Section 236 (3) of the Australian Corporations Act 2001 (but did not).

Having reached this conclusion, the judge went on to decide that the case did satisfy the exception to the rule in *Foss v Harbottle*, and he granted permission for the claim to continue.

The common law multiple derivative claim therefore appears to have survived the 2006 Act (subject to any contrary decision of a higher court). The extension of *locus standi* beyond the members of the wronged company reflects the need for a suitably interested claimant to pursue the company's claim when it is disabled from doing so. The decision avoids both the injustice identified by Lord Millett as well as an inconsistency of approach across different common law systems (including Hong Kong, Singapore, Canada, Australia and New Zealand).

However, it remains to be seen whether other parts of the common law derivative claim will also be found to have survived the 2006 Act: the most obvious example of this being a members' derivative claim based on causes of action vested in foreign companies, as was the case in *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269 ([43]-[44]).

A View from the Channel Islands

Though the statutory derivative action is now well-established in England, the common law procedure remains alive and well in several offshore jurisdictions.

Two notable examples are Guernsey and Jersey, each home to a myriad of investment and other structured vehicles, many of whose offices, assets, directors and shareholders are based on the UK mainland. Consequently the exception to the rule in *Foss v Harbottle* continues to be relevant to both English and Channel Islands practitioners alike.

The survival of the rule in *Foss v Harbottle* has recently been confirmed by the Royal Court of Guernsey in *Andrew Jackson v (1) Patrick Dear (2) Reade Griffith & Ors*.

This was the first derivative action ever to be brought in Guernsey. The claimant, Mr Jackson, a holder of non-voting shares and a former director, commenced derivative proceedings on behalf of Tetragon, a Guernsey-based closed-ended investment fund, in which he claimed that the two executive directors and four independent directors had breached their duties by causing Tetragon to enter into a high value property transaction with a third party in which the two executive directors were personally interested.

The common law multiple derivative claim therefore appears to have survived the 2006 Act (subject to any contrary decision of a higher court).

Tetragon and the directors applied to strike out the claim on the grounds that the Cause showed no reasonable grounds for bringing an action and that it failed to satisfy the proper test for bringing a derivative claim.

The claimant submitted that the full rigour of the rule in *Foss v Harbottle* should be relaxed in Guernsey as it had been in England under Section 260 (3) of the 2006 Act so as to allow a derivative action where the alleged cause of action of the company was negligence or breach of duty and where there was no element of actual or equitable fraud. He also submitted that the correct test on the strike out application was that he needed to show a case that was merely arguable.

On the first of these legal issues, the Royal Court held that it could not import into Guernsey the substantive changes only in Section 260 (3) of the 2006 Act (without the procedural changes in Section 261 and Section 263). A limited inclusion could not be justified. The Guernsey legislature had consulted widely before the enactment of the Companies (Guernsey) Law 2008 (**"the Companies Law"**) and would have been aware of the English reforms: any change in the law of Guernsey should be by way of amendment to the Companies Law.

On the second issue, the Royal Court held that the correct test was that set out in *Prudential Assurance Co Ltd v Newman Industries (No 2)* [1982] Ch 204, namely that on an application to strike out a derivative action the claimant needed to show a *prima facie* case in relation to each element of the cause of action and that each cause of action came within the exception to the rule in *Foss v Harbottle*. In order to establish a *prima facie* case, the claim had to be more than merely arguable: see the Cayman Islands case of *Renova Resources v Gilbertson* [2009] CILR 268.

Accordingly, the Royal Court struck out the entirety of the claim (as well as refusing the claimant's application for an injunction to restrain the company from actively participating in the proceedings).

This decision shows that the common law derivative action and the procedure adopted by the English courts some 30 years ago remain applicable in Guernsey today.

Similarly, the Royal Court of Jersey has recently confirmed in *Prestigic (Wisley) Nominees Ltd v JTC Management Limited & Ors* [2012] JRC 097 that in order to bring a derivative action the applicant needs to establish that the claim falls within the 'fraud on the minority' exception (following *Khan v Leisure Enterprises* [1997] JLR 313).

Conclusions

Taken together these recent decisions conclusively show that the 'fraud on the minority' exception is the applicable law of derivative claims in the Channel Islands (as well as other common law jurisdictions that have not enacted a statutory procedure) and that, as with the recently established survival of the common law multiple derivative claim, practitioners are well advised not to throw out their old company law text books and loose-leafs just yet.

As complicated and unwieldy as it may be, the nineteenth century rule in *Foss v Harbottle* continues to play a major role in twenty-first century corporate law.

William Willson acted (with Simon Mortimore QC) for Tetragon in the proceedings before the Royal Court in Guernsey and advises on, and has appeared in, other derivative claims, unfair prejudice petitions and a range of other company law disputes. He is contributor to Company Directors (OUP, 2013) and gives talks on company law topics.

South Square at INSOL 2013

South Square will be making its presence felt at this year's INSOL 2013 Quadrennial Conference in The Hague.

Members attending will be William Trower QC, Antony Zacaroli QC, Glen Davis QC (who is also going to the Insurance Insolvency ancillary meeting on Sunday 19 May), Felicity Toube QC (who will be participating in the plenary panel session on Monday 20 May on Criminal Elements of Restructuring) and John Briggs. One of Chambers' Academic Members, Prof. Ian Fletcher QC (Hon) will also be attending.

South Square will be sponsoring breakfast in the World Forum Foyer on Monday 20 May, and hosting a stand throughout the proceedings.

Chambers has a long and happy tradition of supporting the work of INSOL and its member organisations, as Head of Chambers William Trower QC explains, "Much of our daily practice is spent thinking about and appearing in cutting-edge international insolvency cases. It is good to have the opportunity to stand back in the company of experts from so many jurisdictions around the world and consider in relative tranquillity where we have got to and where we ought to be going".

The members of Chambers attending INSOL will be supported by a number of members of staff who will man the South Square stand. Chambers Director Ron Barclay-Smith is particularly looking forward to his first INSOL Congress. "A lot of our international work nowadays involves instructions which arrive as a pdf attached to an email, and we sometimes miss out on the personal aspects. I regard INSOL as a great opportunity for me and some of our practice managers to meet clients face-to-face". Senior Practice Managers Michael Killick and Dylan Playfoot will also be present for at least part of the time.

So if you are going to INSOL, come and have breakfast, stop by the stand to say hello, or find us in the conference hall! We are looking forward to renewing old friendships and making new ones.

VERMEER'S GIRL WITH A PEARL EARRING

INSOL WILL BE AT THE WORLD FORUM IN THE HAGUE

South Square attendees

WILLIAM TROWER QC

William Trower QC took Silk in 2001 and has been called to the Bars of Bermuda, the Cayman Islands and Hong Kong for specific cases. He specialises in corporate insolvency (particularly banking and insurance-related work). William is currently acting for the administrators of Lehman Brothers and Nortel and has acted in many other high-profile insolvencies and restructurings, such as BCCI, Polly Peck, Maxwell, Bermuda Fire & Marine, Barings, TXU, HIH, T&N, Stanford, EMLICO, SPhinX, Metronet, Wind Hellas, Travelodge, Landsbanki, Kaupthing and European Directories. William has published and contributed to several books ("Corporate Administrations and Rescue Procedures" (LexisNexis), "Transaction Avoidance in Insolvencies" (OUP) and "Schemes of Arrangement" (OUP)) and many articles. He was a member of the Insolvency Rules Committee between 2000 and 2011 and sits part time as a Deputy High Court Judge in the Chancery Division.

Chambers and Partners 2013:

William is ""the go-to man" for top law firms. His courtroom style is confident and effective, and he is described as, "without a doubt the best team player in the market…""

Antony Zacaroli QC was appointed Queen's Counsel in 2006 and was called to the Bar of the BVI in 2004 - he is also called to the Bar for specific cases in Cayman Islands and Bahamas. Antony has been instructed in connection with many of the major insolvencies and reconstructions of the last two decades, both domestic and international, including MF Global UK, Deutsche Annington, Irish Bank Resolution Corporation, Lehman Brothers, Icelandic Banks, Cyprus Banks, Comet, Arcapita Bank, Stanford International Bank, Wind Hellas, European Directories, TXU, Enron, British Energy, Railtrack, Metronet, Global Crossing, Marconi, Federal Mogul (T&N), Schefenacker, Barings, Polly Peck and BCCI. Antony has written a number of books and articles and most recently was author of a chapter for the second edition of "Company Directors: Duties, Liabilities, and Remedies" (OUP: 2013).

Chambers and Partners 2013:

Antony "is a first-rate silk, who is highly intelligent and yet able to explain complex matters simply".

ANTONY ZACAROLI QC

Glen Davis QC took Silk in 2011. He specialises in cases involving commercial law complicated by insolvency, often with an international or cross-border dimension, including banking, insurance, financial services, fraud and asset-tracing. He chairs the Africa Committee of COMBAR and has experience of the laws of numerous common-law jurisdictions (including being consulted on law reform). He has been called to the Bar of Gibraltar for specific cases, and is presently acting for the liquidators in two substantial Gibraltar insurance insolvencies. Other recent experience includes cases under the EC Insolvency Regulation and the UNCITRAL Model Law, particularly involving major shipping insolvencies, and acting for the Financial Services Authority in MF Global. He established the Sovereign Debt Restructuring group on LinkedIn, contributes to "Company Directors: Duties, Liabilities and Remedies" (OUP: 2013), and edits the Butterworths Insolvency Law Handbook (15th ed, 2013).

Chambers and Partners 2013:

Glen is "sought out for his particular specialism" in banking and finance insolvency matters. He is described as "technically excellent and always a delight for clients to work with.""

GLEN DAVIS QC

Felicity Toube QC has been a member of South Square since 1996. She took Silk in 2011. She regularly advises on domestic and international insolvency and restructuring issues, as well as fraud, company, banking, and general commercial cases. She has a particular specialism in cross-border and international asset tracing. Felicity regularly advises on cases originating in parts of the Caribbean (including Cayman, Bermuda, Antigua, and Turks and Caicos) and acts in Cayman and BVI (as advocate) and in continental Europe and the United States (as an expert). Felicity has acted in relation to most of the recent major corporate restructurings or insolvencies and related litigation. Felicity is speaking at the Congress about the 'Criminal elements of restructuring' at the plenary session at 4pm on Monday 20th May.

Chambers and Partners 2013:

Felicity "is tipped for greatness…….[she] possesses a "brilliantly communicative manner," and is "very difficult to put under any serious pressure - she is completely unflappable and calm." She "shows great dignity in court and is a brilliant communicator.""

FELICITY TOUBE QC

John Briggs was called to the Bar in London in 1973 and is a Deputy Registrar of the High Court in Companies and Bankruptcy. John was called to the N Ireland Bar in 2011. John specialises in corporate and personal insolvency, both domestic, cross-border and international (e.g. instructions from Jersey and Cyprus). John has been instructed in many "high -profile" personal insolvencies, most notably, Kevin Maxwell, Asil Nadir, Darius Guppy, Jonathan Aitken, Marc Golberg (Crystal Palace FC), Seifert Sedley (partnership IVA), Terry Ramsden (securities), Jan Bonde Nielsen (well-known Danish debtor), Jack Dunnett (ex Labour MP and former Chairman of Football League), Leo Kastner (US producer of "Where Eagles Dare" and other films), David Irving (holocaust-denying historian), Nicolas Levene, Kerry Katona (celebrity) and Sean Quinn (Irish tycoon). He is a contributor to many publications, including "Muir Hunter on Personal Insolvency" and "Sheldon: Cross Border Insolvency".

Chambers and Partners 2013:

John is "pre-eminent in terms of personal insolvency, and is quite excellent in what he does."

JOHN BRIGGS

Professor Ian Fletcher QC has been a Professor of International Commercial Law at University College London (UCL), since January 2001. Since September 2009 the Chair has been held on an Emeritus basis, in conjunction with the position of Senior Research Associate. His principal research activity lies in the field of Insolvency Law, including its domestic, international (cross-border) and comparative aspects and his interests extend across both personal and corporate insolvency law. Ian also teaches on the Global Insolvency Practice Course and has been a member of the core committee which oversees the running of the programme since its inception in 2007. He also holds a number of prestigious positions - he is Chairman of the INSOL International Academics' Group and has been Editor (since 1992) of the INSOL International Insolvency Review.

PROF IAN FLETCHER QC

South Square is delighted to say that on 27th March 2013 four members of Chambers took up their appointment as silks. Professor Ian Fletcher became an honoury silk. Mark Arnold, Jeremy Goldring and Lucy Fraser have been appointed as practising silks. Biographies of all four of them appear below and opposite.

Professor Ian Fletcher QC (Hon.)

PROFESSOR IAN FLETCHER QC (HON.) (CENTRE) WITH SENIOR PRACTICE MANAGERS DYLAN PLAYFOOT (LEFT) AND MICHAEL KILLIK (RIGHT)

Ian Fletcher was educated at Cambridge University, and subsequently gained a Graduate Fellowship to study in the USA for a Master's Degree in Civil Law at Tulane University in New Orleans.

His academic career commenced with an appointment in 1967 in the Law School of the University of Wales, Aberystwyth, initially to teach Roman Law and Conflict of Laws. His interests expanded to embrace Comparative Law, European Community Law, Human Rights Law and, increasingly, Commercial and Insolvency Law.

He was awarded a Personal Chair by the University of Wales in 1986, and served as Head of the Aberystwyth Law School between 1985 and 1988. He then accepted the Chair of Commercial Law in the Centre for Commercial Law Studies (CCLS) at Queen Mary, University of London, and established an Insolvency Law Unit to serve as a focus for advanced study of the subject.

He was Director of CCLS from 1994 until 2000, when he moved to his current academic home at UCL to take up a newly established Chair in International Commercial Law. He was awarded the degrees of PhD and LLD by Cambridge University in 1979 and 1993 respectively. Having been called to the Bar by Lincoln's Inn in 1971, he became a Bencher of the Inn in 2003.

Ian is the author of numerous books, beginning with The Law of Bankruptcy (1978), which subsequently became the nucleus of a comprehensive treatise, first published in 1990, covering both personal and corporate insolvency. The Law of Insolvency is currently in its fourth edition (2009, with Supplement 2011), and a fifth edition is due to appear in 2014.

Ian is also the author of a treatise on Insolvency in Private International Law (1999, 2nd edition 2005, with Supplement 2007), and has contributed to the writing and editing of several other established works including Moss, Fletcher and Isaacs: The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (2002, 2nd edition 2009); Lightman & Moss, The Law of Administrators and Administrative Receivers (4th and 5th editions); and (since 1985) Palmer's Company Law. He has also been the Editor of the INSOL International Insolvency Review since 1992.

Over the past two decades Ian has regularly given advice to the UK Insolvency Service on various aspects of insolvency law and policy, and also served as a consultant to the World Bank for its international insolvency programme. More recently, from 2006 onwards he served as Joint Reporter for a project commissioned by the American Law Institute and the International Insolvency Institute to develop global principles of co-operation in international insolvency cases. The final report of the project, of which he was the co-author, was accepted by both organisations in 2012.

Ian joined South Square as an Academic Member in 1999 and continues to practice on a part-time basis, concentrating mainly on matters with an international aspect including those involving potential application of the EU Insolvency Regulation.

(LEFT TO RIGHT) JEREMY GOLDRING QC, LUCY FRAZER QC AND MARK ARNOLD QC

Mark Arnold QC

Mark Arnold is a graduate of Cambridge University, and was called to the Bar in 1988. He specialises in company, commercial and insolvency law and has a particular interest in cross-border insolvency.

Mark has been involved in various aspects of many important domestic and international insolvencies and restructurings in recent years, including TXU, Boo.com, Schefenacker, Dana, Eurotunnel, Nortel, Woolworths, Hellas, European Directories, Kaupthing, Eircom and Lehman. His inability to distinguish between a contingent liability and a risk of liability in Glenister v Rowe remains a source of consternation for him and amusement for others. He is currently engaged in the Lehman litigation concerned with (amongst other things) the relative priorities of subordinated debt and post-administration interest, and cases relating to a request for assistance by Cayman Islands liquidators under the Cross Border Insolvency Regulations and the solvent dissolution of a BVI limited partnership.

Mark is a contributor to the chapters on directors' duties in Company Directors: Duties, Liabilities and Remedies ed. Simon Mortimore QC (OUP, 2nd edition 2013). He also wrote the chapter on the EU Insolvency Regulation in Cross Border Insolvency ed Richard Sheldon QC (Bloomsbury Professional, 3rd edition 2012). Together with Peter Arden QC of Erskine Chambers, he was principal author of the joint response of the Bar Council and the Chancery Bar Association to the European Commission's consultation on the future of the EU Insolvency Regulation in 2012. Mark spoke on directors' duties at the R3 course in Solihull in March and will do so again at its course in London in May. He will also be speaking at the European and International Restructuring 2013 Conference in London in July.

Jeremy Goldring QC

Jeremy Goldring read history at Pembroke College, Oxford and at Yale University, where he was a Henry Fellow, before qualifying as a barrister. He has been at South Square since 1996, where his practice has developed three main strands.

A broad range of restructuring and corporate insolvency work has formed a substantial part of his practice from the outset, and he has appeared in some of the leading cases, including Spectrum Plus and HIH in the House of Lords and Eurosail in the Supreme Court. In recent years, he has also developed a significant banking practice, with a particular emphasis on derivatives, for example acting for ISDA in Lomas v. Firth Rixson. He has considerable commercial trial experience, including National Westminster Bank v. Rabobank, Royal Bank of Scotland v. Raiffeissen Zentralbank, the Bank Charges litigation and Standard Chartered Bank v. Ceylon Petroleum Corporation.

Thirdly, Jeremy has considerable offshore experience, having spent several months in both the Cayman Islands and the British Virgin Islands. He has specialist expertise in funds litigation.

Lucy Frazer QC

Lucy Frazer is a graduate of Cambridge University where she was President of the Cambridge Union. Lucy's practice comprises insolvency and restructuring, banking and commercial litigation. She has developed a particular specialism in international and cross-border insolvency work.

Lucy has recently acted in a number of cross border insolvencies involving foreign banks including Kaupthing, JSC BTA Bank and Roskilde. She has been involved in most domestic and international insolvencies over recent years from Lehman Brothers, Woolworths Plc, Nortel, to TXU, Railtrack, British Energy and BCCI.

As a member of the Attorney-General's A Panel (the most senior panel which provides advice and representation to the Government in the most complex Government cases in all kinds of courts and tribunals) she has advised and represented the Government in a number of high profile insolvencies and acted for HMRC and the Serious Organised Crime Agency in a number of complex tax fraud cases. She is a contributor to Rowlatt on Principal and Surety, 3rd ed. and to Tolley's Insolvency law. She was elected to the Bar Council, having been endorsed by the Chancery Bar Association, and served on the Equality and Diversity Committee and Public Affairs Committees.

NEWS in brief

Recent Supreme Court cases

There have been a number of important and topical cases in the Supreme Court in recent months.

There was considerable representation from South Square in the case between the Joint Administrators of Heritable Bank plc (respondent) and The Winding-Up Board of Landsbanki Islands hf (appellant). Members of Chambers involved included David Alexander QC and Stephen Robins for the appellant and Gabriel Moss QC, Martin Pascoe QC and Georgina Peters for the respondent. A summary of the decision appears in the Case Digests section of this edition. To read the judgment itself, which was given on 27 February 2013, go to the "Decided Cases" section of the Supreme Court website.

Chambers was also well represented in the case of BNY Corporate Trustee Services Ltd v Eurosail which took place in February 2013 and where judgment is awaited. The case concerned the proper interpretation of Section 123(2) of the Insolvency Act 1986 and in particular when a company is to be deemed to be unable to pay its debts. Gabriel Moss QC and Richard Fisher appeared against them for the appellant. Robin Dicker QC and Jeremy Goldring (now Jeremy Goldring QC) appeared.

There are two other important cases which have been argued and where judgment is awaited from the Supreme Court. Firstly, Petrodel Resources v Prest where the question for the Court is whether it is open to it in ancillary relief proceedings to treat the assets of a company of which one spouse is the sole controller as being assets to which that spouse is "entitled". Secondly, Pitt v Holt where the Court has to consider the circumstances in which it can interfere with the exercise by trustees of their powers and discretion, and specifically whether the court can declare void or voidable decisions of trustees for failing to take into account a relevant matter or taking into account a relevant matter when the trustees act on the basis of professional advice (the so called "Rule in Hastings-Bass" issue).


ROBIN DICKER QC


JEREMY GOLDRING QC


RICHARD FISHER

Higher levels of compliance for Pre-packs

In February, the Business, Innovation and Skills Select Committee concluded that the process for handling pre-pack administrations is still insufficiently transparent and requires higher levels of compliance.

As a result it has been recommended that the Insolvency Service do more to monitor compliance with SIP 16. In addition, it has been recommended that the Insolvency Service amends its monitoring process to include feedback to insolvency practitioners and their regulatory bodies where SIP 16 Reports have been judged non-compliant. In a further move, it was announced in March in Parliament that an independent review of the process of pre-pack administrations will be conducted by the government in late spring following a number of concerns from creditors. The review is intended to enable further evidence to be assembled on how pre-packs are working and whether further steps are needed.

Arbitration at South Square

19 April saw a notable first for the new South Square conference facilities. The procedural hearing for an LCIA Arbitration took place in the new facilities in relation to an arbitration where Glen Davis QC is a member of the Tribunal. The new conference facilities stood up admirably and they can of course be made available for any arbitration in which a member of Chambers is involved either as an arbitrator or in any other capacity.

New features for the Digest

Given the volume of offshore work done by members of Chambers, starting with the next edition of the Digest, Chambers is going to start running a series of offshore updates. Each edition will focus on a different offshore jurisdiction or jurisdictions. Each article will be co-written by a member of Chambers and a lawyer based in the relevant offshore jurisdiction. The first jurisdiction to be covered will be the British Virgin Islands. The article will be written by David Allison and Arabella Di Iorio of Maples and Calder in the BVI. The other jurisdictions which it is presently intended to cover in future editions include Bermuda, the Cayman Islands, Guernsey and Jersey, Hong Kong and Singapore.

In addition to the new offshore feature, as from the next edition of the Digest we will be providing you with a regular Euroland insolvency update intended to focus on what is coming out of Europe as well as decisions in other European countries that may be of relevance here. The updates will be produced under the guidance of our own leading Euro insolvency lawyer, Gabriel Moss QC.

GABRIEL MOSS QC

New Supreme Court Justices

In February, three new Supreme Court Justices were announced to replace Lords Dyson, Walker and Hope. Lord Dyson, who became Master of the Rolls in October 2012, has been succeeded by Lord Justice Hughes, a member of the Court of Appeal since 2006 and who was Vice-President of its Criminal Division.

Lord Justice Toulson has succeeded Lord Walker, who retired on 17 March 2013. Lord Justice Toulson was a member of the Court of Appeal from 2007 and Chairman of the Law Commission of England and Wales between 2002 and 2006. Lord Hodge will succeed Lord Hope, one of the two Scottish Justices, who retires on 27 June 2013.

Lord Hodge was appointed as a Senator of the College of Justice in 2005 and sits in both the Court of Session and the High Court of Justiciary. Lord Hodge will take up his new role in the Supreme Court at the beginning of the new legal year in October 2013.

All three new appointments were made by Her Majesty the Queen on the recommendation of the Prime Minister and the Lord Chancellor following the recommendation of an independent selection commission. Lord Hope's forthcoming retirement also means that there will be a new Deputy President.

LORD JUSTICE HUGHES

LORD JUSTICE TOULSON

DIARY DATES

15-17 May 2013.
Brussels, Belgium.
Second European Insolvency and Restructuring Congress.

16 May 2013.
London.
Insolvency Practitioners Association Annual Conference.

16 May 2013.
New York, USA.
Fifteenth ABI Conference.

19-22 May 2013.
The Hague, Netherlands.
INSOL 2013 Ninth World International Quadrennial Congress.

6-7 June 2013.
London.
Seventh TMA Europe Conference,

13 June 2013.
Sao Paolo, Brazil.
INSOL International Latin American Seminar.

17-18 June 2013.
New York, USA.
III Thirteenth International Insolvency Conference.

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

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

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

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

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

12 November 2013.
Cayman Islands.
INSOL International Offshore Seminar.

14 November 2013.
London.
TMA UK Annual Conference.

New First Instance Judges

Mark George Turner, QC was appointed as a Justice of the High Court with effect from 28 January 2013 on the elevation of Mr Justice Beatson to the Court of Appeal. He will be assigned to the Queen's Bench Division. His Honour Judge Jeremy Russell Baker, QC has been appointed as a High Court Judge with effect from 25 March 2013 on the retirement of Mr Justice Eady. He will also be assigned to the Queen's Bench Division.

Unanswered Calls and Letters

20 million calls went unanswered at HMRC in 2011-2012. The unanswered calls cost callers £136 million whilst they waited to speak to an HMRC adviser. HMRC also only managed to respond to 66 per cent of letters it received within a 15 day period.

Farewell FSA - Hello FCA and PRA

The Financial Services Authority ceased to be the regulator for the providers of financial services on 1 April 2013. It has been replaced by two new regulatory bodies. The Financial Conduct Authority, or FCA, and the Prudential Regulation Authority, or PRA. The two new regulatory authorities will work alongside one another. The FCA, which is a company limited by guarantee, regulates financial firms providing services to consumers and maintains the integrity of the UK's financial markets. It is to focus on the regulation of conduct by both retail and wholesale financial firms. The PRA, which is a limited company and a wholly-owned subsidiary of the Bank of England, carries out the prudential regulation and supervision of financial firms, including banks, investment banks, building societies and insurance companies.

New Court of Appeal judges

2013 has been a very busy time for the appointment of Court of Appeal judges. The Queen has approved the appointment of Mr Justice Lloyd Jones, Mr Justice McCombe, Mr Justice Treacy and Mr Justice Beatson.

The Queen has also approved the appointment of the following Lord and Lady Justices of Appeal whose appointments will be taken up as and when vacancies in the Court of Appeal arise over 201:-

Mr Justice Briggs
Mr Justice Christopher Clarke
Mr Justice Floyd
Mr Justice Fulford
Mrs Justice Gloster
Mr Justice Macur
Mr Justice Ryder
Mrs Justice Sharp
Mr Justice Underhill
Mr Justice Vos

These appointments were made in the light of the elevation of Sir Terence Etherton (to Chancellor), Sir Roger Toulson (to the Supreme Court) and Sir Anthony Hughes (to the Supreme Court), the retirements of Sir Alan Ward and Sir Malcolm Pill and the forthcoming retirements of Lord Judge, Sir Bernard Rix, Sir Matthew Thorpe, Sir John Mummery and Sir Timothy Lloyd.


MICHAEL BRIGGS


ELIZABETH GLOSTER


GEOFFREY VOS

Celebrities in bankruptcies

There have been a number of high profile personal insolvencies over recent months. Martine McCutcheon, who starred in Eastenders and as the love interest of Hugh Grant in Love Actually as well as in the stage version of My Fair Lady as Eliza Doolittle, was made bankrupt in the Kingston-Upon-Thames County Court on her own petition. The ITV 2 "I'm a celebrity" presenter and former King of the Jungle, Joe Swash, who co-incidentally has also been an Eastenders star (as Mickey Miller), was recently made bankrupt in the Central London County Court. It was his second bankruptcy at the instigation of HMRC in five years. Finally, *Walk on By* singer Dionne Warwick, cousin of the late Whitney Houston and who has sold more than 100 million records since the 1960s and won five Grammy awards, recently filed for bankruptcy in the United States after amassing debts of nearly US $10 million in taxes since the early 1990s.


MARTINE MCCUTCHEON


JOE SWASH


DIONNE WARWICK

Silk in VAT fraud conviction

A barrister, Rohan Pershad QC, formerly of 39 Essex Street and 2 Crown Office Row, has been found guilty of cheating the public purse after not paying a total of £600,000 in VAT he had charged his clients over a period of 12 years.

Pershad was at 2 Crown Office Row until 1999 when he moved to 39 Essex Street. At the time of his move he disappeared off the VAT radar. Pershad, who apparently practiced in the area of financial disputes, professional negligence and professional liability, said that he believed that his new Chambers – 39 Essex Street – paid his VAT bills for him and that he was under the impression that his higher members fee at his new Chambers meant that it would take care of the payments. Pershad, described as "financially astute" by the prosecution, told the jury that he was "extremely poor at paperwork" and was naïve about why his new set charged between 22 and 26 per cent of his fees. Prosecutor Andrew Marshall QC described this as an absurd explanation. He said "He was paying a higher contribution no doubt thinking he would get better work. They do not charge 22 per cent of a barrister's net fees and then pay 17.5 per cent to HMRC. That would leave them with a single figure and make them the cheapest place around. We'd all be trying to get in there". The jury took almost 10 hours to convict Pershad on a majority verdict of 11-1. Pershad has been sentenced to three and a half years in prison.

ROHAN PERSHAD QC: SENTENCED TO THREE AND A HALF YEARS

A change in fortune at HMV

HMV: BACK TO HEALTH

It appeared to be all doom and gloom for the iconic entertainment retailer HMV and for those who like to shop there. HMV crashed into administration earlier in the year and things were not looking good.

However, the business and certain HMV assets have now been acquired from the administrators by Hilco, the owner of the HMV Canada business, with the intention of restoring HMV to health.

The return of Nick Leeson

Nick Leeson, the man who caused the collapse of the 223 year old investment bank Barings after losing hundreds of millions through unauthorised trading in 1995, who was sentenced to a lengthy period in jail in Singapore and about whom the film Rogue Trader starring Ewan McGregor was made, has a new job.

Not only that but it is in the insolvency world. Leeson is reported to have a new role as an insolvency practitioner in Ireland with GDP Partnership where he will mediate on behalf of distressed borrowers with debts of more than a million Euros.

Leeson is reported to be delighted with his new job and to have said "Banks in Ireland were part of the problem by lending recklessly and now they have to be part of the solution"

NICK LEESON

South Square Challenge

Welcome to the May 2013 Insolvency Challenge. As usual, all you have to do is look at the pictures and work out what they represent and what the connection is. Good luck. And for the winner (drawn from the wig tin if there is more than one correct entry) a magnum of champagne. Please send your answers by e-mail to kirstendent@southsquare.com or to Kirsten at the address on the back page. Entries by 1st July 2013 please. *David Alexander QC*.

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9 And the connection is?

February 2013 South Square Challenge

The correct answers to the February 2013 South Square Challenge were: ***1. Jack Straw; 2. Alexander Irvine; 3. Charles Falconer; 4. Quentin Hogg; 5. Chris Grayling; 6. Kenneth Clarke; 7. James Mackay; 8. Michael Havers.*** *The link is, of course, that they have all held the office of Lord Chancellor. The February Challenge saw more entries, and correct answers, then ever before. The winner, drawn from a packed wig-tin, is Richard Saunders of Moon Beever Solicitors to whom we send many congratulations and a Magnum of Champagne.*

SOUTH SQUARE
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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