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

The Saad Judgment

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Christopher Brougham QC on whether a long-standing authority should now be relegated to footnote status

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Chambers Bar Awards
Insolvency set of the year, shortlisted 2017

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

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Welcome to the Autumn version of the South Square Digest

As the new legal term begins, Chambers is already very busy. The 12-week Tchenguiz v Grant Thornton trial is underway and will continue until Christmas, the Primeo v HSBC appeal will soon see several members decamp to the Cayman Islands to face off against each other for a two-week appeal in front of the Court of Appeal. And later this month sees the “rule in Gibbs” under renewed scrutiny as the International Bank of Azerbaijan appeal in front of the Court of Appeal. In the broader legal space, our own Supreme Court and the Supreme Court of the United States have recently seen new appointments in the most markedly different circumstances: the swearing-in ceremony of Lord Kitchin and Lady Arden taking place in Westminster almost the very same day as Judge Brett M. Kavanaugh and Christine Blasey Ford gave testimony to the US Senate (and a US TV audience of nearly 30 million).

The summer saw further bad news on the high street, including the collapse of House of Fraser and providing for the distribution of the $8 billion sanctions of the scheme of arrangement by Mr Thornton. As the new legal term begins, Chambers (and former Deputy High Court Judge) Richard Sheldon QC turns litigant-in-person, and takes on (and vanquishes) the Goliath of Shell in the County Court.

Finally, we have the ever-popular South Square Challenge, which for this edition has a ghostly theme as we approach Halloween. Many thanks to all for their contributions (including Richard Fisher for his assistance with this editorial). As always, views expressed by individual authors and contributors are theirs alone.

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

William Willson

1990, another Royal wedding. And, as the Indian summer continues, cricket fans can fondly remember Alastair Cook’s heroics at the Oval test, and the best test series in England since the 2005 Ashes.

Lehman is not the only long-running saga to drag on. First, Brexit continues to dominate the headlines. “Exit day” on 29 March 2019 is now less than six months away, and still there is no consensus. The autumn party conference season saw former Foreign Secretary Boris Johnson rousing the assembled masses with his “Chuck Chequers” badge, seeking to steal the crown from “Dancing Queen” (and Prime Minister) Theresa May. A second referendum seems increasingly possible – though formulating the appropriate “question” is far from obvious. Second, the Skripal poisoning. In increasingly bizarre twists-and-turns, it claimed its first life, the aliases of the would-be GRU assassins were uncovered, and in a surreal Russian TV interview they claimed to have visited Salisbury twice (in two days) to view local tourist highlights, including the “123 metre spire” (which we have all heard of) and “Old Sarum” (which none of us have).

In the season of harvest festival, this edition sees a (record) bumper crop: almost 100 pages of articles, digests and more.

Marcus Haywood (conveniently, given it runs to over 1,000 pages) summarizes the judgment in Saad Investments Company v AlgoaBank, which saw Marcus, Michael Crystal QC and Mark Phillips QC successfully defend the largest fraud claim ever issued in the Cayman Islands. Christopher Brougham QC revisits the case of Narandas–Gidhar v Bradstock, and consigns the case of Re Plummer to the dustbin. Mark Phillips QC, in his Brexit series, follows the squabbling family on their way to Brexit as the atmosphere in the car becomes one of “increasing nervousness”. Mark Arnold QC and a team from Weil Gotshal explore the UK/US different approaches to the recharacterization of contracts. Tom Smith QC looks at the current hot topic of conflicts of interest and officeholders. And Gabriel Moss QC provides his regular update from Euroland.

For an alternative window onto the legal world, we introduce a new series – “Legal Eye” – from Madeleine Jones and Rose Lagram-Taylor, the first article of which explores Shakespeare’s involvement with the law, and the law’s involvement with him. And former member of Chambers and (former Deputy High Court Judge) Richard Sheldon QC turns litigant-in-person, and takes on (and vanquishes) the Goliath of Shell in the County Court.

SOUTH SQUARE DIGEST
www.southsquare.com
October 2018
Obituary:

Professor Ian Fletcher QC (honoris causa)
Academic Member of South Square

A Personal Appreciation
by Gabriel Moss QC

South Square was shocked and saddened to learn of the death of its academic member Ian Fletcher on 21 July 2018 at the age of 74. The funeral took place on Friday 10th August 2018 at St. Michael’s Church, Tilehurst, Reading. Our sincere and heartfelt condolences go out to his widow and fellow legal academic, Letitia Crabb, and his sons Daniel and Julian.

Some of us had been aware that Ian had health difficulties in the last few years and had undergone an operation and subsequent treatment. Ian was however a very private person and someone who never complained or wished to draw attention to himself.

I assumed that his treatment was proceeding successfully. It was thus a great shock to receive his email on 28 May 2018 to the effect that his prognosis was now short and that regrettably he was having to disengage from his various publishing commitments. At Insolvency Intelligence we resolved to bring out a special issue in his honour and emailed him to that effect.

Ian’s scholarship in insolvency law and in particular cross-frontier insolvency law was profound and internationally recognised and respected. He wrote and contributed to a vast library of respected books and articles.

Ian reached the heights of achievement and recognition in every respect that one could expect. He was a distinguished professor at UCL, one of the country’s top universities, with a very highly rated law faculty. He was a Bencher of Lincoln’s Inn and an honorary QC. Ian was also the only person I know who had a moot set up in his honour in his own lifetime. It reflects the huge regard of the international insolvency community for his erudition and scholarship.

Over all the years of achievement he remained a very modest and unassuming person.

I would list my appreciation of Ian under some key headings, which are echoed in a number of other recent obituaries.

** Brilliant.** Ian’s statements of the correct legal position were invariably accurate and revealing and his ideas for developing legal thinking proved influential in the development of the law.

** Kind.** In his quiet manner, Ian helped and encouraged students and young lawyers.

** Modest.** For someone of his worldwide stature in academia and the legal profession Ian was incredibly modest and unassuming.

** Utterly dependable.** Publishing legal texts and articles, and in particular collaborations, require trust in the diligence, thoroughness and accuracy, as well as good judgment, of authors or fellow authors. Ian was the most dependable of authors for books and articles, always faithful to his promises. He could always be relied on to produce top quality material and in good time.

** Private.** Ian was a very private person, a devoted family man.

To sum up, Ian was not only striking in his qualities and achievements, as well as the high regard that he was universally held in, but is simply irreplaceable and will be much missed by the insolvency world. The combination of high achievement with his kindness, consideration and modesty made him a truly special person whom all of us will remember with fondness.

This is an abbreviated version of Professor Fletcher’s obituary, which can be read in full on our website at www.southsquare.com

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**Re Plummer**

In March 2004 Mr Registrar (shortly to become Chief Registrar) Baister decided *Re Plummer* [2004] BPIR 767, a case concerned with a purported individual voluntary arrangement (“IVA”) made under Part VIII of the Insolvency Act 1986 (“the Act”). In those days the relevant sections of Part VIII referred to meetings of creditors but, following amendments made by the Small Business, Enterprise and Employment Act 2015, now refer to creditors deciding whether to approve the proposed IVA (the decision being made on the “decision date” and the whole procedure being called the “creditors’ decision procedure”), but the relevant law remains essentially the same.

This article considers whether *Re Plummer* has survived.
In Re Plummer, at the meeting of the debtor’s creditors summoned under $257 of the Act as then formulated, some modifications to the debtor’s proposal, adverse to the debtor, were put forward. The debtor could not be contacted with a view to obtaining her consent to them, nonetheless the chairman of the meeting reported to the court under $259 of the Act that the proposal had been approved subject to those modifications. About three weeks later the debtor gave her written consent. The debtor subsequently failed to make payments due under the IVA, so some three years after it had been approved the supervisor petitioned for the debtor’s bankruptcy under $264(1)(c) of the Act. In defending the petition the debtor relied upon $258(2).

As then formulated, ss258(1) and (2) provided that (1) “the proposal may be approved with modifications but shall not do so unless the debtor consents to each modification”. The debtor contended that consequently her purported IVA was of no effect so that the supervisor’s petition should be dismissed. The registrar concluded that the effect of $258(2) was to render the purported IVA “nullity and void” (at [28]) with the consequence that the 28-day-time limit prescribed by s.265(3) for challenging the IVA on the grounds of “some material irregularity at or in relation to the creditors’ meeting” was inapplicable. It was immaterial that the debtor may have ratified the modification after the meeting since the debtor’s consent was “a condition precedent for the approval of the proposal subject to any modifications proposed” (at [28]). “What is at issue is whether the arrangement with modifications but shall not do so unless the debtor consents to each modification”. The debtor contended that consequently her purported IVA was of no effect so that the supervisor’s petition should be dismissed. The registrar concluded that the effect of $258(2) was to render the purported IVA “nullity and void” (at [28]) with the consequence that the 28-day-time limit prescribed by s.265(3) for challenging the IVA on the grounds of “some material irregularity at or in relation to the creditors’ meeting” was inapplicable. It was immaterial that the debtor may have ratified the modification after the meeting since the debtor’s consent was “a condition precedent for the approval of the proposal subject to any modifications proposed” (at [28]). “What is at issue is whether the arrangement with modifications but shall not do so unless the debtor consents to each modification”. The debtor contended that consequently her purported IVA was of no effect so that the supervisor’s petition should be dismissed. The registrar concluded that the effect of $258(2) was to render the purported IVA “nullity and void” (at [28]) with the consequence that the 28-day-time limit prescribed by s.265(3) for challenging the IVA on the grounds of “some material irregularity at or in relation to the creditors’ meeting” was inapplicable. It was immaterial that the debtor may have ratified the modification after the meeting since the debtor’s consent was “a condition precedent for the approval of the proposal subject to any modifications proposed” (at [28]). “What is at issue is whether the arrangement with modifications but shall not do so unless the debtor consents to each modification”.

The judge readily concluded that the registrar’s conclusions were striking but nevertheless the material parts of the original clause 4.3 of P’s proposal read as follows: “The acceptance of my Individual Voluntary Arrangement is conditional upon the acceptance of the Arrangement for my wife/ husband, following acceptance the estates shall be combined for dividend purposes and treated as one. I propose that, during the term of the Arrangement the Supervisor will be paid a combined contribution for the benefit of the creditors not less than:— £250 per month for the first year — £3,000 year total £500 per month for the second year — £6,000 year total £550 per month for the third year — £6,400 year total £400 per month for the fourth year — £4,800 year total £400 per month for the fifth year — £4,800 year total Total contributions — £20,400 total”.

However, after Mrs P’s proposal had been circulated to her creditors there was an overwhelming expectation that it would not be approved with the consequence that P’s proposal would likewise be rejected. A modification to P’s proposal was therefore put forward which read as follows: “Clause 4.3 is to be substituted with “I agree to pay the Supervisor for the benefit of the creditors not less than £320 per month for the duration of the Voluntary Arrangement.”” P maintained that he had had no knowledge of this modification until he received the s.299 report from the chairman of the creditors’ meeting held on 16 December 1999, which recorded that P’s proposal had been approved subject to the modification by 75.82% in value of the votes cast. B’s case was that the modification had been put forward only after discussion with, and with the consent of, P if P also maintained that HMRC, a significant creditor voting by proxy, had not at the time of the meeting (not subsequently) approved the modification. P relied on Re Plummer, and submitted that Smith-Evans v Smailes was wrongly decided in January 2000 P had signed a document containing the modification and shortly thereafter made his first payment of £230 as stipulated in the modification. Twice thereafter (in 2001 and 2002) P’s creditors, at his request, agreed to revised schedules for payments under the IVA. In 2005 P defaulted again and B presented a supervisor’s bankruptcy petition against him upon which a bankruptcy order was made, B being appointed P’s trustee in bankruptcy. P had opposed the petition, but not on the grounds that the IVA was a nullity, in fact, in a witness statement in those proceedings, P had stated that “I entered into an IVA contract... with an understanding that I will have to pay £230 per month for 5 years.” In November 2009, after litigation contested by P, the bankruptcy court granted B an order for the possession and sale of P’s home. Then in August 2010, nearly eleven years after the meeting of creditors leading to the IVA, and nearly five years after the IVA had been terminated, P issued his claim form in the Chancery Division (not in the bankruptcy court) for a declaration that the IVA was a nullity. P also raised an issue as to the proper construction of the proposal even as modified, claiming that it was nevertheless a condition precedent for the IVA to take effect, that Mrs P’s IVA had to be approved, and that consequently the IVA was vitiated for mistake. P also asserted that it was a fundamental term of the IVA that Mrs P was required to make contributions under it, whereas P and his creditors believed she had no such obligation, again resulting in the vitiation of the IVA for mistake. However, I saw the case as principally a battle between the Plummer and Smith-Evans decisions. If the judge preferred the former, then P was likely to win the case even if the judge rejected his evidence concerning his consent to the modification, since the documentation contemporaneous with the meeting indicated that, as alleged by P, HMRC had not, at the time of the meeting, agreed to the modification.
P was challenging the validity of an IVA which, he now accepted, was based on his modified proposal, when no creditor, not even the dissenting credit, had challenged it.
FEATURE ARTICLE: HAS RE PLUMMER SURVIVED?

To the ambit of s. 262, Briggs LJ declared that “in Re Plummer was wrongly decided” (at [51]).

He dismissed P’s appeal “with some relief. This is a case where the debtor had approved and supported the modified proposal, where the modification for which HMRC had not given voting authority was IVA, by avoiding the loss of his authorisation (at [53]).

All this seemed to me ironic for two reasons. First, it was always my view that, on the facts of the Case, the ratification issue was irrelevant. If Re Plummer was correctly decided, any purported ratification by HMRC would be ineffective as the modification had not been approved by HMRC at the meeting of creditors. If the Smith-Evans case was correctly decided then HMRC’s ratification would be irrelevant since there had been no application under s. 262 of the Act challenging the IVA. Secondly, the Case was not concerned with the deletion of clauses; no clause had been deleted. There was the proposal and there was the modification. As P put it to me, “there is only one proposal”, it was not to be regarded as a draft and nothing in the Act permits an amended proposal. It seemed to me that a creditor reading the proposed modification would read, and be entitled to read, the original clause 4.3 in order to understand the modification’s effect. However, P’s case had been put in terms of the removal of provisions from a draft contract and the Court of Appeal had dealt with the submission on those terms.

It was what I read in certain textbooks concerning the material irregularity issue that surprised me most. I thought that the authors could not accept that Re Plummer, which had inhabited the pages of their books for so long without challenge, had ultimately been held to be wrongly decided. So, for example, in Sealy & Milman: Annotated Guide to Insolvency Legislation 2018, in its General Note to s. 261.5 it is stated that “In Re Plummer … it was held by Registrar Baister that for IVA modifications to become binding it must be proved that the debtor assented to them. Therefore, a report by the chairman of the creditors’ meeting held under s. 257 that an IVA had been proved (sic) inaccurate and the purported IVA was a nullity. The status of Re Plummer (above) is in some doubt at the moment in view of the comments of HHJ Purle QC in [the Smith-Evans case]. These doubts have been reinforced by the view taken of Re Plummer (above) by Briggs LJ in [the Case]. This is a major understatement of the correctness of Re Plummer, all three members of the Court of Appeal declared Re Plummer to have been “wrongly decided”. Again, in the same textbook in its General Note to s. 262: “Challenges under s. 262 are only and with any irregularity. Where the flaw (whether it be procedural or substantive) is so serious as to render the purported IVA a nullity the time limits specified in s. 262(a) become irrelevant … Re Plummer … See [the Smith-Evans case] where HHJ Purle QC cast doubt upon Re Plummer. These doubts were reinforced by the comments of Briggs LJ in [the Case].”

In Schaw Miller and Bailey: Personal Insolvency Law and Practice, 5th ed., at para 6.116 it is stated that “Not only must the debtor consent to any modification, it is essential that the debtor’s consent is obtained at the time of the decision procedure. To this end the statutory requirement is clear and mandatory. An IVA cannot be valid if the debtor has not approved the modification, for there is no formal agreement between him and his creditors. Where the meeting approved a modified voluntary arrangement in the absence of the debtor’s consent, and her consent was obtained only some weeks after the chairman had reported to the court indicating the proposal had been approved with modifications, the voluntary arrangement was held to be a nullity. Accordingly, the

It seemed that the authors of certain textbooks could not accept that Re Plummer had ultimately been held to be wrongly decided
The trial took place over 129 days before the Chief Justice in the Cayman Islands over the course of a year, ending on 27 July 2017 when judgment was reserved. The trial involved the cross-examination of over fifteen witnesses of fact and nine expert witnesses in relation to expert evidence of accountancy, handwriting and foreign law (including Saudi Arabian and Swiss law).

The trial was the largest which had ever taken place in the history of the Cayman Islands and is understood to have been the largest in the Commonwealth in 2016/2017.

The trial involved allegations made by AHAB, a Saudi Arabian partnership, that during the period from at least 2000 to 2009, Maan Al Sanea (who had married into the Algosaibi family and was once reputed to be one of Saudi Arabia’s richest men) used his alleged complete managerial control of the Money Exchange, a division of AHAB, to defraud AHAB by misappropriating over US$9 billion from the Money Exchange and funding the misappropriations by causing AHAB to be liable to third parties for, and eventually in default in respect of, over US$9.2 billion in alleged unauthorised debt. The Defendants were alleged by AHAB to have been recipients of that fraud.

The Money Exchange, the Chief Justice found, in conjunction with certain Bahraini companies owned by AHAB (the Bahraini Financial Businesses), had been used to perpetrate one of the largest Ponzi schemes in history, with later borrowing used to repay earlier borrowing, while also providing funds for the ever-increasing indebtedness of the Money Exchange.

From 2000 until the collapse of the Money Exchange in May 2009, some US$330 billion was raised by the Money Exchange (including through the Bahraini Financial Businesses) to fund the fraudulent borrowings, not only on behalf of AHAB but also on behalf of the Bahraini Financial Businesses, in early 2009.

What follows is a summary of the background to AHAB’s claim and the Chief Justice’s findings.

The Background

AHAB has its origins in a business begun by Hamad Algosaibi in the 1940s. Hamad died in 1956 and was succeeded by his three sons, Ahmad, Abdulaziz, and Suleiman. Together, they incorporated AHAB as a general partnership and subsequently chaired AHAB until Suleiman’s death in February 2009. AHAB has since been chaired by Yousef, Ahmad’s son. Yousef, Saud (Abdulaziz’s son), and Dawood (Suleiman’s son) are amongst the current AHAB Partners.

From 1980 onwards, AHAB strategically expanded into financial services and other related businesses. In 1981, AHAB’s board of directors established the Money Exchange as an unincorporated division of AHAB. Mr Al Sanea, who had married Abdulaziz’s daughter in 1980, was appointed its Managing Director. In the 1980s, AHAB incorporated Algosaibi Investment Holdings EC (“AIH”) and Algosaibi Trading Services Limited (“ATS”) in Bahrain and, in 2003, AHAB incorporated a bank in Bahrain, The International Banking Corporation (“TIBC”) (together with AIH and ATS, the Bahraini Financial Businesses).

From near the time of the establishment of the Money Exchange until its collapse in May 2009, financial statements, disseminated to in excess of one hundred lending banks, understated the extent of the borrowings and true extent of AHAB indebtedness to the banks and its status as a borrower. By presenting them to the banks, the false financial statements became the central instrumentality of a fraud.

In 2009, AHAB defaulted on more than 34 billions of Saudi Riyals of debt (US$9.2 billion). Shortly after that default AHAB commenced proceedings against Mr Al Sanea and the Defendants (companies established by Mr Al Sanea in the Cayman Islands and which are now in liquidation).

In essence, AHAB’s claims were for fraudulent breaches of fiduciary duties allegedly committed by Mr Al Sanea and restitution, damages and compensation from the Defendants, including SICL and Singularis, on the basis of their alleged conspiracy with Mr Al Sanea, their knowing assistance in his alleged fraud upon AHAB and their alleged knowing receipt of the proceeds of that fraud. AHAB also brought proprietary claims against the Defendants on the basis that their
the fraudulent accounting practices, he also knew of this and was the primary author for the purposes of defrauding the banks. He was consistently involved, not just in monitoring the financial position of the Money Exchange, but in the significant decisions taken by the Money Exchange. Saud knew of and authorised Mr Al Sanea’s activities.

As to Dawood, who was cross-examined by Mark Phillips QC for over 5 days, the Chief Justice held that his evidence struck him as a false and convenient narrative aimed at avoiding the fact that his involvement, as a partner of AHAB, fixed AHAB with his knowledge of the massive borrowing which he transacted, not only on behalf of the Money Exchange but also on behalf of the Financial Businesses, in early 2009.

The Algosaihs, the Chief Justice held, were willing to allow the massive personal borrowing of Mr Al Sanea from the Money Exchange to go unchecked because it was the quick pro quo for his willingness also to use the Money Exchange to procure fraudulent borrowing on behalf of the AHAB partners themselves. Payments to Mr Al Sanea were not “misappropriations” but loans, which were expected to be repaid. What the AHAB partners had not reckoned on, and what shocked them in May 2009 when the global financial crisis erupted, was that Al Sanea, thought to be one of the wealthiest men in the world, would be unable to repay his debts. The reality, the Chief Justice held, was that the AHAB partners had made a bad credit decision.

The Forged and Manipulated Audit Allocations
AHAB’s case pivoted around allegations that Mr Al Sanea, in his alleged fraud upon AHAB, engaged in forgery “on an industrial scale”. In this regard AHAB relied on, amongst other things, the presence of “matched” signatures recovered from among the records of the Money Exchange, AHAB’s Head Office and the Bahraini Financial Businesses.

Dismissing AHAB’s forgery allegations, the Chief Justice held that those allegations had been shown to have been made on a random scatter-shot basis without any reasonable foundation for a finding that the questioned documents and signatures were deployed by Mr Al Sanea without the knowledge and authority of AHAB partners.

In addition to the forgery case, AHAB also ran a document manipulation case based on 16 sets of bank facility documents. Dismissing this aspect of AHAB’s case, the Chief Justice held that the bank facility documents on which AHAB’s manipulation case was based could not bear the weight of inference that AHAB wished to place upon them. Whatever the reason for the alteration of these documents might have been at the time, the one thing the documents showed was that AHAB was in fact aware of the ever-increasing facilities which it procured – that, in and of itself, was inconsistent with the evidence of AHAB’s own witnesses.

Consideration of AHAB’s forgery and manipulation allegations involved the cross-examination of two handwriting experts (Dr Audrey Colies and Michael Handy) over a number of days.

AHAB’s Proprietary Claims
AHAB’s tracing claim involved complex allegations relating to a multiplicity of transactions through accounts in numerous jurisdictions. Eight accountancy experts gave evidence over several weeks. The Chief Justice held that AHAB’s tracing claims failed both on the facts and the law. As to AHAB’s allegation of receipt by the Defendants, even if AHAB had been able to establish the antecedent breach of trust by Mr Al Sanea (which the Chief Justice held it had not), it would still have had to prove the necessary transactional links required by the case law, between its funds taken from the Money Exchange and the accounts of the Defendants. The Chief Justice held these requirements had not been satisfied by AHAB.

Recognising this problem, AHAB resorted, impermissibly the Chief Justice held, to a claim for equitable accounting based upon a reversal of the burden of proof. Rejecting this argument, the Chief Justice held that the duty of a constructive trustee to account did not arise where there was no receipt of monies in relation to which a constructive trust could arise. It followed that there was no duty on the Defendants to account unless AHAB established receipt. As AHAB had not established receipt, AHAB’s assertion that a reversed burden of proof applied to the Defendants because of their duty to account was also held to be misconceived.

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Saudi and Swiss Law

The Chief Justice’s judgment also considered a number of issues relating to the law of Saudi Arabia and Switzerland.

The Chief Justice held that the proper law governing AHAB’s equitable claims was the law of Saudi Arabia. Having accepted this principle as being applicable here, the Chief Justice found that Saudi law does not admit of a proprietary claim against intangibles (dayn). In these circumstances, AHAB could not satisfy the conflict of laws rules in respect of its receipt-based or proprietary claims for knowing receipt, dishonesty or unjust enrichment/ restitution in any event.

As to AHAB’s claim for damages for conspiracy, under Saudi law there is no hard and fast rule of joint and several liability for harm and damage at large for conspiracy (which itself is not recognised as a distinct tort). The Chief Justice accepted the submissions of the Defendants that in the circumstances of this case a Saudi judge would apportion liability between joint tortfeasors (i.e. “for what” they are liable) on an actual “receipts” basis. As a consequence of the “double actionability” rule, the liability of the Defendants under the law of the Cayman Islands was, therefore, also restricted to actual receipts (if any).

The Saudi law issues decided by the Chief Justice involved the cross-examination of three Saudi law experts (including Professor Chibli Mallat and Professor Frank Vogel) over a number of days.

As to claims made by AHAB in respect of intangible assets held by SICL in Switzerland, subject to a “mini – bankruptcy proceeding” there and governed by Swiss law (worth some US$225 million) AHAB, the Chief Justice held, could have had no proprietary right to these assets as a matter of Swiss law, irrespective of how it framed its claim.

Illegality

The Chief Justice further held that the Defendants’ ‘illegality defence’ (the legal doctrine which prevents a claimant from pursuing a claim if the claim arises in connection with some illegal act on the part of the claimant) was entitled to succeed, not only on the basis of AHAB’s continuous complicity in the fraud from beginning to end but because of AHAB’s indisputable involvement through Abdulaziz Algosaiabi until October 2000, in what had already become a massive fraud on the banks and one which AHAB must have known would be continued.

There could be no doubt as to the gravity of the fraud perpetrated by AHAB, the Chief Justice held. This was a fraud carried out, with increasing sophistication, from as early as 1981. The total sums borrowed pursuant to AHAB’s fraud numbered in the hundreds of billions of dollars. In short, this was an enormous, long-standing Ponzi scheme which defrauded more than a hundred banks. Every single dollar or riyal that ever flowed into the Money Exchange was obtained dishonestly through fraudulently obtained borrowing. The Money Exchange was, from its very inception, a criminal enterprise. It remained so throughout its existence.

In effect AHAB’s response to the illegality defence came down to the argument that AHAB was deserving of being afforded a locus penitentiae for allegedly having corrected the error of its ways after Abdulaziz’s time. The Chief Justice held that there was no possibility of AHAB establishing a locus penitentiae in the face of its conduct during Abdulaziz’s time and its admitted continuing involvement in the use of fraudulent accounts to obtain loans from the banks. There could be no suggestion of repentance because AHAB had failed to make any attempts at penitence long after the fraud took place. The effects of the fraud were entirely irreversible. The loans obtained by the Money Exchange had been paid off many times with the proceeds of other dishonestly borrowed funds.

In these circumstances, the Chief Justice held that AHAB’s claim was barred in any event, through the application of the Court’s policy that it will not enforce an illegal arrangement and/or because AHAB lacked clean hands so that it was not entitled to invoke the Court’s equitable remedies.

Conclusion

In all these circumstances, the Chief Justice held that AHAB’s claim should be dismissed. The Chief Justice also dismissed certain counterclaims advanced by SICL and Singularis against AHAB on the basis that the evidence relied upon in proof of the counterclaims was unsafe and unreliable.

Brexit: Where are we going? Chequers or “No Deal”?

BY MARK PHILLIPS QC

In the last edition of the Digest I likened the Brexit negotiations to a squabbling family who had set off on a journey without knowing where they were going.
Continuing the analogy, since then the squabbling in the back of the car has become so bad that two of the children, Boris and David, have got out and they’ve jumped into Uncle Jacob’s car declaring that they’re not playing with Michel ever again. The ever-studious Theresa has produced a new game with rules she has written out and she’s invited a new friend Dominic to come along. So three quarters of the way along the journey, Dad (Nigel) has his head down and is heading for the coast, trying to keep up with Uncle Jacob, who seems to be having all the fun. But the atmosphere in the car is one of increasing nervousness. “I think my new game will be fun” says Theresa. “Michel, if we don’t play Theresa’s game, then we’re going to take all our toys and play with someone else, and then you’ll be sorry”, says Dominic. “OK, my friends Angela and Emmanuel said you can include Ireland in the game, but you need to let us have some of the City.” And so it goes on, but it can’t go on and on. 29 March 2019 is now only 6 months away.

Having examined in the June 2018 Digest what the position would be on recognition and enforcement of insolvency proceedings and schemes during the transition period and beyond based upon the EU (Withdrawal) Act 2018 and the Draft Withdrawal Agreement, I now turn to what the position might be based upon the Chequers White Paper of July 2018 and HMU’s announcement of the impact of no-deal made on 13 September 2018.

The “Chequers” White Paper

The formal title of the Chequers’ White Paper is “The Future Relationship Between the United Kingdom and the European Union.” In her Foreword the Prime Minister says that leaving the EU “requires pragmatism and compromise from both sides.” Both she and the Secretary of State for Brexit, Dominic Raab, state that they will take the UK out of the Single Market. That is significant when it comes to insolvency procedures and schemes.

The White Paper runs to 68 pages. There are only two references to insolvency, and none to schemes. Chapter 1.7 deals with “Socio-economic cooperation”. The sub-chapter starts (paragraph 122) by stating that there are “many other areas where the UK and EU economies are closely linked”, including civil judicial cooperation. The starting point is that civil judicial cooperation, which is central to the successful operation of cross border insolvency, as well as all other forms of cross border dispute resolution, together constitute an “other area”. The Paper goes on to say that “the UK recognises that it will not be possible to replicate (the close integration in these areas) once (the UK) has left the EU.” This, it is said, is because this cooperation reflects the EU Member States’ membership of the Single Market. It is deplorable that the international cooperation in insolvency matters across Europe has been a result of the EU Single Market, or a recognition of insolvency processes is not simply embodied recognition of the processes of different jurisdictions and a number of core principles, such as the UNCITRAL Model Law. By linking insolvency to the Single Market, rather than acknowledging that our cross border insolvency regimes reflect something more international, it is arguable that the White Paper has sold our insolvency laws short.

The White Paper acknowledges that there are precedents outside the Single Market for close cooperation and says that the UK would seek to draw on these precedents in the future relationship. The most obvious precedent in an insolvency context is the UNCITRAL Model law.

Paragraph 148 sets out the UK’s proposals in relation to socio-economic cooperation, which includes air transport, road transport, maritime, rail, energy, civil nuclear, intellectual property and audit and accounting. As regards civil judicial cooperation, it refers in (g) to “seeking to join the Lugano Convention and exploring a new bilateral agreement with the EU on civil judicial cooperation, covering a coherent package of rules on jurisdiction, choice of jurisdiction, applicable law and enforcement of judgments in civil, commercial, insolvency and family matters.”

The second reference to insolvency comes in paragraph 148. This comes in sub-chapter 1.7 on civil judicial cooperation. That starts by recording that civil judicial cooperation is mutually beneficial to both the UK and the EU. “Businesses benefit from legal certainty in the event of disputes and are more confident trading across borders.” This sub-chapter sets to “protect” the advantages of cooperation. Paragraph 146 says, “The UK is therefore keen to explore a new bilateral agreement with the EU, which would cover a coherent package on jurisdiction, choice of jurisdiction, applicable law, and recognition and enforcement of judgments in civil, commercial, insolvency and family matters. This would seek to build on the principles established in the Lugano convention and subsequent developments at EU level in civil judicial cooperation between the UK and Member States. This would also reflect the long history of cooperation in this field based on mutual trust in each other’s legal systems…”

What the White Paper fails to recognise is that recognition of insolvency processes is not simply another aspect of recognition of civil judgments. Whilst an insolvency will often give rise to questions of jurisdiction and the need to enforce judgments, in an insolvency recognition is being given to an insolvency process, not to a judicial process. By focussing on the Lugano Convention and including insolvency among other aspects of cooperation, the White Paper has failed to take account of the very different nature of an insolvency process, and the different nature of the questions of recognition and enforcement that arise.

There is a further problem at the heart of this negotiation. The UK has enacted the Cross-Border Insolvency Regulations 2006 that give effect to the UNCITRAL Model Law. 23 EU member states have not yet adopted the UNCITRAL Model Law, the 4 exceptions are Greece, Poland, Romania and Slovenia. The recognition in the UK, as main proceedings, of EU insolvency proceedings taking place where the Centre of Main Interests (“COMI”) is located will continue, but under the

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1. I gratefully acknowledge the advice given by my colleagues Ian Mukai and Tilby Brown.
2. This is confirmed by the position of Denmark.
Cross-Border Insolvency Regulations 2006 (unless it is going to be suggested that proceedings in UK countries are manifestly contrary to public policy). Thus, the UK will continue to give effect to EU Based insolvency regimes unless it is going to be suggested that proceedings in UK countries are manifestly contrary to public policy. The problem for Brexit is that there will no longer be a clear mechanism for recognition of UK insolvencies and judgments in much of the EU. Once the EU Insolvency Regulation ceases to have effect in relation to the UK, the UK will need to agree recognition and enforcement of insolvency processes and orders in 27 of the 27 remaining EU member states. If the UK failed to secure such an agreement, recognition and enforcement in 27 EU member states, including Germany, France, Holland and Italy, will depend upon their domestic laws. As I analysed in my previous article, in relation to several issues, once the UK is a third party and no longer a member state, there will be no mechanism for automatic recognition. What the White Paper highlights is the UK’s need to secure EU agreement to recognition of UK insolvency processes and judgments.

Her Majesty’s Government’s (HMG’s) announcement on no deal - HMG’s announcement on the impact of a no deal Brexit on cross-border insolvency is two paragraphs long. The first paragraph says: “The...advising that UK insolvency practitioners may want to take professional advice is something of an understatement, but I question whether this is something that should be done on a case by case basis or whether more market-wide research should be done.

An incidental consequence of the Cross-Border Insolvency Regulations 2006 and their application in this context is article 8. Article 8 requires the UK courts in the interpretation of the Model law, and in the present context, of the payment of insolvency as a means of enforcing good faith.” On one view this requires UK courts to have regard to the decisions of EU courts, including UK European Court of Justice when it comes to concepts such as the COMI. Clearly to some Brexeters this would be the antithesis of a certain view of the purpose of Brexit. The second paragraph of HMG’s announcement says: “UK insolvency practitioners would need to make applications under an EU country’s domestic law in order to have UK orders recognised there. In certain circumstances, some EU countries may not recognise UK insolvency proceedings, for example if that would prevent creditors from taking action against the assets held in that country. We would, if this happens, want to ensure that our insolvency practitioners may wish to take professional advice on the prospects of successfully obtaining recognition for UK insolvency order in an EU country. EU insolvency proceedings and judgments would no longer be recognisable in the UK under the EU Insolvency Regulation, but may be recognised under the UNCITRAL Model law on Cross-Border Insolvency. The second sentence advising that the UK insolvency practitioners may want to take professional advice is something of an understatement, but I question whether this is something that should be done on a case by case basis or whether more market-wide research should be done. The second sentence recognises the sorts of problems that could arise. If creditors cannot take action against assets in EU countries, that signals a return to the days before modified universalism. As is well known, such an outcome could result in unnecessary complication and consequences.

As regards schemes, ‘no deal’ would result in the repeal of Brussels I insolvency law as it applies to UK judgments, which would straightforwardly the question whether recognition of schemes of arrangement in the EU depends upon the application of choice of law rules or upon recognition of the UK court’s order. On a ‘no deal’ Brexit, reliance cannot be placed entirely on the court order and so it will depend upon establishing that the scheme is effective by an application of the choice of law to the restructuring contracts.

A cause for concern? In the insolvency context it is very difficult to take comfort from either the Chequers White Paper or HMG’s announcement. On ‘no deal’ if the Cross-Border Insolvency Regulation is negotiated with the EU, the UK should seek continued application to UK insolvencies in EU member states of the principles found in the UNCITRAL Model Law and if possible the EU Insolvency Regulation. Absent agreement along those lines, what the UK will be left with is an asymmetric system whereby recognition and enforcement is given to EU insolvencies, but in relation to UK insolvencies the answer will be “we do not know” and we leave an insolvency system that depends upon domestic EU laws.

Yes Minister

“Minister, I have been giving some thought to what happens to insolvencies on no deal Brexit.”

“Oh, do we have to deal with insolvency, it sounds rather depressing.”

“We do Minister. What will we do is repeal the EU Insolvency Regulation and we will say we will do it in all parts of the UK.” We will say that we will abolish the rules that currently make the proceedings in the country where the Centre of Main Interest is located, the main proceedings.”

“That sounds excellent, Sir Humphrey, that will show the EU we mean business.”

“Well, the beauty of it Minister, is that in the UK we have given effect to the UNCITRAL Model Law. That means that insolvency proceedings where the Centre of Main Interest is located will be recognised in the UK as ‘foreign main proceedings’.”

“So instead of calling the EU insolvency proceedings ‘main proceedings’, we will call them ‘foreign main proceedings’. Yes, I like that, Sir Humphrey. That’s giving effect to the referendum result.”

“It’s the ideal solution, Minister. We tell the world that what we are taking big steps to repeal the EU rules, and apart from calling them ‘foreign’ we change as little as we can.”

“And what about our UK proceedings, will they call ours ‘foreign’?”

“We haven’t worked out what they will call ours, or if they will recognise them at all.”

“That’s the EU for you, Sir Humphrey, I knew we were right to withdraw.”

The ... sentence advising that UK insolvency practitioners may want to take professional advice is something of an understatement, but I question whether this is something that should be done on a case by case basis or whether more market-wide research should be done.
Form v: Function: Recharacterisation of contracts in the UK and US

Part from being divided (supposedly) by a common language, the laws of the UK and the US take a different approach to the recharacterisation of contracts. In particular, it is said that the UK takes the formal approach, while the US adopts the functional approach. Typically, the question arises when the true nature of a financing agreement fails to be determined: assuming it matters, is the transaction one which creates an absolute interest (e.g. by way of sale) or one which is less than absolute (e.g. a security interest)? But what does it mean to adopt a functional approach, as opposed to a formal, approach in this context? In this article, we propose to explore that distinction. The formal approach: recharacterisation in English law

In English law, characterisation in this context is the process whereby the court determines the legal nature of a particular transaction. Recharacterisation occurs where the parties to the transaction have purportedly characterised it as creating one kind of interest but the court characterises it, as a matter of law, as creating a different kind of interest. In such instances, recharacterisation does not actually change the legal nature of the transaction, which remains the same throughout; rather, it corrects mischaracterisation, and associated mislabelling, by the parties. Typically, the English Courts have had to embark on the process of recharacterisation in circumstances where, usually by virtue of the provisions of a statute, the transaction will be void unless registered if, for example, it is to be characterised as creating a security interest.

Such questions have arisen in the context of determining the application and effect of the provisions of the Companies Act 2006 and its predecessors, the Bills of Sale Acts 1878 and 1882 (in relation to individuals) and the Moneyminders Acts 1957 (since repealed). In addition, however, recharacterisation becomes relevant if, while not void, the rights conferred by the transaction may be less effective if, for example, it is to be characterised as a floating rather than a fixed charge. There are many ways of raising cash besides borrowing

In the financing context, English law recognises that there are many ways of raising cash besides borrowing. Merely to recognise a transaction as a financing transaction, therefore, does not assist in the task of characterising that transaction because, under English law, financing can perfectly well be effected in different ways. As Lord Devlin once said: “There are many ways of raising cash besides borrowing … if in form (the transaction) is not a loan, is it not to the point to say that its object was to raise money … or that the parties could have produced the same result more conveniently by borrowing and lending money.”

Substance over form means looking at the words used in the context of the transaction as a whole

Judges have often said, as Romer LJ did, ‘that the English Court is concerned with substance rather than form, but this must be understood in its proper context. In ascertaining the substance of a transaction, the English Court is concerned with what the parties intended the transaction to be from being divided: substance over form means looking at the words used in the context of the transaction as a whole.’

The English law approach in summary

The approach adopted under English law when recharacterising a transaction may be summarised as follows:

- The English Court will first ascertain whether the written agreement between the parties is a sham; if it is not, it may be characterised as creating a security interest.
- If the agreement is found to be a sham, the English Court will then classify, or characterise, the agreement. That is a matter of law, rather than being dependent on the intentions of the parties.
- Having determined the rights and obligations the parties have characterised and labelled the transaction to create, the Court will then classify, or characterise, the agreement. That is a matter of law, rather than being dependent on the intentions of the parties. In other words, it is concerned with the language used by the parties considered in the context of the transaction as a whole.

4. Hillsborough Borough Council v 25

BCLC 148 (CA).
8. BCLC 159 (HL).
A lease will be distinguishable from a licence if the true character of the transaction as a matter of law, is consistent with the label used by the parties, the English Court will accept the parties’ label. Indeed, it will generally be slow to reject the label when considering a bona fide mercantile document issued in the ordinary course of business.

Legal substance over economic effect

When the English Court speaks of substance in this context, it refers to the legal substance of the transaction. It is emphatically not concerned with its economic substance or commercial effect, but rather with its legal nature. 

The economic or commercial effect of a sale and lease-back arrangement is the same as a matter of English law.11

Thus, under English law, the sale and leaseback arrangement, which has the purpose of which is to raise funds. In the absence of any evidence that such an arrangement is a sham, or unless it is found that it refers to the legal substance of the transaction.

If an agreement is a true lease, then the debtor would be obliged to assume the lease (i.e. continue to perform its obligations under the lease) or reject the lease, and if an agreement is a secured financing, then the debtor would own the property and the relevant creditor (or lessor) would have a secured or unsecured claim against the debtor.

Essentially, the US Bankruptcy Code distinguishes between financial versus economic distress, effectively treating the date of bankruptcy as the creation of a new firm unburdened by its predecessor’s debts. “The new firm must cover all new expenses, while debt attributable to former operations is adjusted.”19

Leases are treated as “new” expenses while debt service is treated as an “old” expense and adjusted for financial distress.20

Considering the US policy of affording disparate treatment to leases versus security interests, courts generally found on attempts by parties to avoid the intended consequences of the Bankruptcy Code by entering a lease to cover what in economic substance is a secured financing. As one court put it, “[W]hen the parties enter into a lease to avoid a secured financing arrangement the court is particularly in bankruptcy court, the debtor-lessee could, among other things: (1) sell the asset free and clear of all liens and interests, (2) retain the asset and devise a plan of reorganization to cram down or otherwise impair the creditors’ claims, or (3) retain the asset but refine the “financing arrangement” on better terms with another lender. These strategies could essentially permit the debtor to restructure the “financing arrangement” provisions unilaterally if advantageous, in contrast to a lease which generally cannot be modified without consent of all other constituencies of the estate.

Benefits of recharacterisation

There are myriad circumstances that may result in a party seeking to recharacterise a lease as a secured financing, particularly to gain a strategic advantage by using or avoiding an aspect of the Bankruptcy Code. While this article does not purport to discuss all strategic advantages, recharacterisation could accomplish any number of goals:

- By recharacterising a lease into a security interest, the debtor-lessee is now deemed to have legal title to and ownership of the asset. Conversely, the creditor-lessor would no longer have purported ownership of the asset. Instead, the creditor-lessor is left with a secured claim, or possibly even an unsecured claim.
- By owning the asset outright, the debtor-lessee could, among other things: (1) sell the asset free and clear of all liens and interests, (2) retain the asset and devise a plan of reorganization to cram down or otherwise impair the creditors’ claims, or (3) retain the asset but refine the “financing arrangement” on better terms with another lender. These strategies could essentially permit the debtor to restructure the “financing arrangement” provisions unilaterally if advantageous, in contrast to a lease which generally cannot be modified without consent of all other constituencies of the estate.

13. Id. at 610.
14. Id. at 610-14.
15. Id. at 612.
17. Assumption and rejection each carry material risks. Under some circumstances, assumption could lead to irreparable harm to the lessor. For example, in United Airlines, the lessor’s potential damages claims in connection with the lease, and could be vigorously contested—this is particularly true if the lessor is aware of this.
18. Assumption and rejection could result in an outsize impact on the lessor’s potential damages. Claims in connection with the lease, and could be vigorously contested—this is particularly true if the lessor is aware of this.
19. Id.
20. Id.
22. Assumption and rejection each carry material risks. Under some circumstances, assumption could lead to irreparable harm to the lessor. For example, in United Airlines, the lessor’s potential damages claims in connection with the lease, and could be vigorously contested—this is particularly true if the lessor is aware of this.
23. Alternatively, assumption could result in an outsize impact on the lessor’s potential damages. Claims in connection with the lease, and could be vigorously contested—this is particularly true if the lessor is aware of this.
The test for recharacterisation

The burden of demonstrating that a lease is a financing agreement rests with the party challenging the lease. Typically, “[w]hether an agreement is a true lease or a secured financing arrangement under the Bankruptcy Code is a question of law.”

As a security interest by considering factors such as whether the lessor assumes and discharges substantially all the risks and obligations usually associated with outright ownership and whether rental payments are essentially payments of principal and interest rather than designed to compensate for the value of the property. The issue of whether the lessor has a meaningful residual interest in the goods or property at the end of the lease term will often remain a central focus. Moreover, if state law required a formal, rather than a functional approach, it would likely not be followed in the bankruptcy context because of the federal policy in favour of treating such arrangements differently. Indeed, a number of courts have stated that if state law is inconsistent with federal law and the Bankruptcy Code, federal common law will apply.

Recharacterisation in practice

A pair of cases in the context of the United Airlines bankruptcy demonstrate how recharacterisation works in practice in the United States. In the first instance, the parties disputed whether the transactions at issue were loans or leases, and the Seventh Circuit determined that based on the substance of the particular transactions, they were appropriately characterised as secured loans and not leases.[30] The same five factors supported the court’s ruling in each case.[31] First, United’s “rent” was linked at least indirectly to the amount borrowed, making it more like a loan payment than a traditional rent payment where rent is based on the market value of the property.[32] Second, the transactions at issue both involved balloon payments.[33] The Seventh Circuit noted that “the balloon payment has no parallel in a true lease, though it is a common feature of secured credit.”[34] Third, the agreements contained “bell or high water” clauses—which stand in contrast to typical lease provisions that might provide for rent to be abated if property is uninhabitable or unusable.[35] Fourth, the arrangements provided that the lessor would terminate in the event of prepayment. Notably, “such a prepayment/termination provision would be superfluous in the context of a lease” because “[i]f the landlord would make little economic sense for a lessor to prepay its full rental obligations and thereby cause its lease to terminate and the value of its prepayment to evaporate.”[36] Finally, the court considered the fact that the lessor would not have any remaining interest in the property at the end of the transaction as further indication that the true nature of the arrangements were akin to those of a loan.[37] As the United Airlines cases demonstrate, courts will look to the facts of the case to see whether what was nominally a lease transaction appeared in substance to be a secured financing.

Conclusion

Recharacterisation under both English law and US law, therefore, requires analysis of the economic substance of the transaction and, to that extent, share a common approach. Where they differ, however, is in identifying what constitutes the substance for these purposes. While the US court will closely investigate the economic substance, its English counterpart will focus instead on legal substance to the exclusion of economic or commercial effect.
Conflicts of interest and officeholders

In two recent cases, the High Court has provided helpful guidance on these issues – and shown that the English Courts continue to adopt a strongly pragmatic approach in dealing with conflict issues in the context of insolvency proceedings.

Previous Engagements of Administrators

The decision in *Zinc Hotels [2018] EWHC 1936 (Ch)* concerned a group of companies in administration, which owned various hotels operated under the “Hilton” brand. The secured lenders to the group had appointed administrators from a firm which had previously carried out engagements for the lenders, including a “contingency planning exercise” prior to the appointments. The ultimate shareholder in the group applied for the removal of the administrators, and for relief under paragraph 74 of Schedule B1. One of the grounds relied on was that the administrators lacked the necessary independence by reason of their previous engagement with the lenders, and also that they had acted in breach of the Insolvency Practitioner Code of Ethics (“the Ethics Code”).

The high point of the argument that a previous engagement with a lender in relation to a borrower may disable members of a firm from accepting appointments as administrators of that borrower are certain Australian decisions, in particular, the judgment in *Commonwealth Bank of Australia v Fernandez* (2010) 81 ACSR 262. In that case, the court emphasised that the role of administrator gave rise to fiduciary duties and that it required an administrator to act impartially as between interested groups; moreover, questions of conflict between the banks and the unsecured creditors might well arise. The court suggested that, against this, there was much to commend a competitive tendering process being undertaken prior to the appointment of administrators, rather than practitioners nominated by the secured creditors being appointed.

However, in *Davey v Money [2018] EWHC 766 (Ch)* at (340) Snowden J rejected the idea that there could be any absolute bar upon the appointment of administrators who had had a prior business relationship with the secured creditors and had been nominated by them. That must be right. As a practical matter, it is to be expected that in most, if not all, cases a prospective administrator will undertake an investigation of the company’s affairs and financial position and form a view on the strategy for the administration prior to their appointment. Indeed, the requirement to express a view on the likelihood of the purpose of administration being achieved requires some degree of investigation to be undertaken. It is difficult to see how that could be done without some kind of pre-appointment engagement – whether with the secured creditors, company or regulator – being in place.

In addition, as Henry Carr J pointed out in the *Zinc* case, the insolvency legislation can now be said to expressly envisage that officeholders may have undertaken pre-appointment engagements, since specific provision is now made in the 2016 rules for the disclosure and recovery of pre-appointment costs.1 In *Zinc*, Henry Carr J therefore dismissed the argument made by the shareholder that the administrators’ pre-appointment engagement by the secured lenders for the purposes of contingency planning gave rise to any conflict of interest. The administrators were under no continuing duties to the lenders which conflicted with their duties as administrators, and the previous engagement was not by itself of a nature so as to give rise to a conflict. There was, therefore, no arguable case of conflict.

It is suggested that, in light of *Zinc Hotels* and *Davey v Money*, it is clear that the normal type of pre-appointment engagement undertaken by prospective administrators will not in any way disqualify them from accepting the appointment.

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Where there is a relevant previous professional engagement, the Ethics Code requires an evaluation to be undertaken of whether or not the relationship creates a threat to the fundamental principles which include the principle of objectivity.

Or by itself give rise to any arguable allegations of conflict of interest. That is not to say that other types of engagement prior to the commencement of the insolvency might not give rise to an issue – obvious examples would be where the firm had acted as auditors or was otherwise involved in advising on pre-insolvency transaction which might well need to be investigated subsequently by an off-filere. In relation to the latter, an analogy can be made with those cases where the court has removed administrators because of the need to investigate a previous transaction with which the administrators were involved – see Clydesdale Financial Services v Smalles (2009) BCLC 211 where Robert Walker J had pointed out that there might well be practical benefits to this stage, the administrators took the decision to shareholders, after discharge of the secured debt, the unsecured creditors and expenses. At this stage, the administrators took the decision from being engaged by the administrators:

“I do not think that Finkelstein J’s view concerning the appointment of solicitors on the bank’s panel can be taken to have been intended as prescribing some hard and fast legal rule as regards the appointment of agents by administrators. If, as the judge acknowledged, there is no prohibition on the appointment of administrators who have previously been engaged by the secured creditors, I fail to understand how he could have thought that such a rule could exist as regards the appointment of other professional agents.”

In fact, it is clear, as a matter of English law, that, not only does the fact that lawyers may have been previously engaged by secured creditors not prohibit their subsequent engagement by the administrators, but also that there is no absolute objectionable about a solicitor acting for both a trustee in bankruptcy or liquidator and a major creditor of the bankrupt or insolvent company”. He referred to the earlier decision in Re Schappan (No. 1) [2007] 1 BCLC 211 where Robert Walker J had pointed out that there might well be practical benefits to such an approach in terms of efficiency and cost savings, and that any conflicts of interest could be managed by practical measures put in place. Against this context, in Zinc Hotels Henry Carr J dismissed the argument that it had been inappropriate for the administrators to have engaged the same lawyers who were also advising the secured lenders. He accepted that there were good practical reasons why such an approach was likely to have been helpful to the conduct of the administration, and that appropriate measures had been put in place to deal with those aspects where there might be a conflict between the interests of the secured lenders and those of the companies, the unsecured creditors and/or shareholders.

The relevant factual circumstances in Zinc were that at the time the lawyers were engaged the evidence available to the administrators indicated that the value of the companies’ assets was likely to break within the secured debt, and thus that the interests of the secured lenders and the companies were aligned in seeking to maximise the value of the companies’ assets. As the administrators continued it, however, became apparent that there was in fact a real prospect of there being a return to shareholders, after discharge of the secured debt, the unsecured creditors and expenses. At this stage, the administrators took the decision

2 The Ethics Code makes clear that in this case it will be inappropriate for the appointment to be made if the work was carried out within the previous three years. See para 79.

3 Ethics Code para 44.

4 Ethics Code para 80.
The court, therefore, did not have to consider the

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The essential question in all cases is whether the agents to be appointed are competent and able to change legal representation, to engage lawyers who were not also acting for the secured lenders. The court, therefore, did not have to consider the question of whether it would be appropriate for administrators to engage the same lawyers as also acted for secured creditors, in circumstances where the evidence indicated that the value of the companies’ assets was likely to break in the unsecured debt or in the equity.

Engagement of Other Agents

Finally, it is relevant to touch on the position of other agents engaged by administrators to assist with the conduct of administrations. The actual issue in Davey v Money concerned the appointment by administrators of property agents to manage the sale of a property in Canary Wharf which was intended to be redeveloped. The administrators appointed agents who were proposed by the bank which, as the secured creditor, had appointed the administrators. It was argued that the agents lacked the necessary independence and that the administrators should have held a “beauty parade” before appointing agents.

This argument was rejected by Snowden J. There is “no hard and fast legal rule requiring a selection process to be held, or prohibiting the appointment by administrators of agents who have been recommended by the secured creditor”[1]. Rather, the essential question in all cases is whether the agents to be appointed are competent and able to discharge their fiduciary duties to the company. This depends upon the precise nature of the duties in question and all the circumstances of the individual case. On the facts of Davey v Money, the agents, although not as well-known as some other firms, were competent and able to discharge their duties, and so it was not inappropriate for the administrators to have appointed them, notwithstanding that they had been nominated by the appointing bank.

Conclusion

The English courts have historically taken a pragmatic approach to dealing with issues of conflict of interest in the context of insolvencies, recognising that the approach to dealing with conflicts has to be balanced with the practical requirements of conducting insolvencies in an efficient and cost effective way. Most practitioners would no doubt have found it surprising if the courts can consider that a previous engagement by secured creditors of practitioners to carry out a contingency planning exercise or similar would disable those practitioners from then being appointed as administrators, but it is helpful that this has been confirmed by the courts. The practical approach to the engagement of lawyers and other agents is also to be welcomed. Ultimately, the approach remains that the English court will not take an inflexible or dogmatic approach to conflict questions – and for the most part reliance will be placed on the relevant professionals to deal with conflicts as and when they arise in a sensible way.

[1] Tom Smith QC acted for the Bank in Dunbar v Davey, and Tom Smith QC and Hannah Thurnley acted for the Administrators in Zinc Hotels]

New Tenants at South Square

South Square is delighted to welcome Stefanie Wilkins and Lottie Pyper as new practising tenants following successful completion of their pupillages.

STEFANIE WILKINS

Stefanie was first admitted to practice as a barrister and solicitor of the Supreme Court of South Australia in 2006. She has extensive experience in complex and large-scale commercial litigation and insolvency from her practice in Australia. Stefanie was called to the bar of England and Wales in 2017.

Before joining South Square, Stefanie practised for several years as a Senior Associate at Lipman Karas, a leading firm specialising in insolvency and commercial litigation, with offices in Australia, Hong Kong and London. Stefanie also worked for two years as Associate (judicial assistant) to the Honourable Justice Sultan in the Supreme Court of South Australia, and was an intern at the International Criminal Tribunal for the Former Yugoslavia.

During her time in practice and during pupillage, Stefanie has gained experience in a range of areas of practice, including domestic and cross-border insolvencies, claims against fiduciaries, banking and company law.

Stefanie graduated from the Bachelors of Civil Law with Distinction from University College, Oxford, during which she was jointly awarded the prize for Principles of Civil Procedure. She completed the BCL as a recipient of the Sir Robert Menzies Memorial Scholarship in Law. Stefanie holds undergraduate degrees in Law and Civil Engineering, both with first class honours, from the University of Adelaide.

Stefanie has published several academic works in the field of civil procedure, and most notably is one of the joint authors of Zuckerman on Australian Civil Procedure (published in July 2010).

LOTTIE PYPER

Prior to coming to the Bar, Lottie graduated with a First Class degree in English Literature from Oxford University and a Distinction in the Graduate Diploma in Law from City, assisted by a scholarship from Gray’s Inn. Lottie then studied the Bar Course with a Postgraduate Scholarship from City and a Bedingfield Award, Gray’s Inn’s most prestigious scholarship for that year.

Having completed an internship at J.P. Morgan as a credit risk analyst, Lottie is familiar with the regulatory framework underpinning commercial finance. She also has experience of financial analysis and modelling, in particular relating to mergers, hedging arrangements and loan maintenance covenants.

As a pupil, Lottie was exposed to all of chambers’ core areas of practice, including both cross-border and domestic insolvency, restructuring, banking and finance, company law, commercial litigation, offshore and bankruptcy.

She has extensive experience in complex and large-scale commercial litigation and insolvency, with particular experience of insolvency and restructuring of Noble Group.
Michael Crystal QC receives the GRR 2018 Lifetime Achievement Award

On 26 June South Square’s Michael Crystal QC was honoured with the Global Restructuring Review 2018 Lifetime Achievement Award in recognition of his contribution to the development of cross-border restructuring and insolvency sectors.

Michael (who together with Mark Phillips QC and Marcus Haywood), successfully appeared in the AHAB v SICL & Ors trial earlier this year (see pages 14-18 of this issue), has been involved as counsel, adviser or expert witness in most of the best known international insolvencies and restructurings in the UK and overseas in the last four-and-a-half decades, including BCCI, Maxwell Group Newspapers and Parmalat.

Michael was given the award at a dinner held by Global Restructuring Review in the Banking Hall. Mark Phillips QC, who gave an introductory speech to Michael’s award said, “When Michael started practice, bankruptcy was perceived to be an unglamorous end of the legal world. Fashionable barristers and solicitors would not get involved. Michael was at the forefront of developing solutions to cross-border insolvency problems where none had existed before. For example, before BCCI, in which he acted for the liquidators, cross-border pooling had never been attempted. Michael pulled it off.”

Accepting the award, Michael reflected on his experiences over 45 years at the bar, with photographs from the course of his career as prompts (some of which we publish here). The first, seen here to the far left, is of a young Michael as a junior barrister with the late Muir Hunter QC – one of the founders of the English insolvency bar – at the 1973-4 trial of British architect John Paulson, described at the time as “the largest corruption of civil servants and politicians in the 20th century”. The net result of that trial was the imprisonment for corruption of about 20 politicians and civil servants.

“For me, it was quite an interesting start,” joked Michael.

He also recalled his time in Bermuda in the 1990s while he was working on the much-publicised family dispute between the Swiss baron Hans Heinrich Thyssen-Bornemisza and his eldest son, Georg, who had been accused of defaulting on payments from the family trust. The photo top right shows Michael and the Baron’s legal team heading off to Court in Hamilton, Bermuda.

Running through a brief history of key moments in the insolvency sphere, Michael reviewed the “raft of offshore failures” that took place in Anglo-Saxon jurisdictions during the 1980s which gave rise – albeit quietly – to the development of international judicial cooperation “so by the time we get to BCCI in 1991 there is already a background of cooperation to lean on. He also recalled the first instances of COMI-switching to the UK that took place in the early 2000s and the rise in so-called “bankruptcy tourism”, leading up to the next phase when the financial world imploded in 2008.

Closing, Michael left the audience with three things that had struck a chord with him during his career.

Firstly, Michael emphasised the critical importance of respecting other jurisdictions’ approaches to restructuring and financial failure. He noted there has been a sea-change in the recognition that different countries have different ways of doing things, and that the territorial approach has been replaced with universalism in the restructuring area, where there will inevitably be multiple jurisdictions involved in complex cases.

Secondly, “beware of Gibbs” – the 19th century precedent that remains in situ and prevents English law-governed debt being compromised outside of English proceedings – Michael warned. Michael described Gibbs as “an unexploded mine field for us all to walk into over the next few years” that would be all the more complicated because of Brexit.

Thirdly and finally, Michael predicted that lawyers and other restructuring professionals will have to start addressing what he called “the valuation of litigation futures in restructuring cases”. At the heart of this is the extraction of value in restructuring cases, he said, taking into account aspects that are not being tackled and values that are being stripped. Some of these issues were also failing to be picked up in the US, which would explain why they’re not being picked up in the UK either, Crystal noted. “For me, that’s something for the future.”

All at South Square are delighted that Michael’s contributions have again be honoured in this way.
Case Digest Editorial

Toby Brown

This edition of the Digest presents 30 summaries of a variety of English and offshore decisions, ranging from Playboy Club (pg 39) through to Everton Football Club (pg 54).

The handing down of the Saad judgment in 2018 strengthens the impression that the Cayman Islands has in recent years hosted the biggest pieces of commercial litigation taking place across the Commonwealth. We can see further evidence of South Square’s ongoing work in the Cayman Islands and the BVI in the digests of recent insolvency and fund disputes in which David Allison QC and Tom Smith QC have appeared (pp 49-52).

Moving back to England and Wales, since the last edition of the Digest we have seen a number of interesting insolvency decisions in the High Court and Court of Appeal involving a dozen members of South Square. For example, over the summer the Court of Appeal handed down a further judgment in MF Global UK Ltd, which has been in Special Administration since 2011 (pg 40). Mark Arnold QC, Daniel Bayfield QC, Marcus Haywood and Adam Al-Attar appeared in this appeal which decided that the CVA approved in 2017 (which gave unsecured creditors an option to exit the administration in return for a final cash payment) was precluded from coming into operation due to a condition precedent.

Another notable insolvency decision was handed down the following month, in July 2018, in the long running administration of Lehman Brothers International (Europe) (pg 50). Hildyard J sanctioned a scheme to compromise complex legal proceedings in order to facilitate distribution of the substantial surplus to creditors. The notable issue concerned whether the majority creditors had an adverse special interest which meant that their vote had to be disregarded or discounted as not being representative of the class. Reflecting South Square’s significant involvement in Lehman Brothers litigation, eight members of chambers were involved in this hearing (Robin Dicker QC, William Trower QC, David Allison QC, Daniel Bayfield QC, Richard Fisher, Adam Al-Attar, Henry Phillips and Ryan Perkins).

The summer also saw a number of contract law decisions from the appellate courts (pp 43-55). Of particular note is the Supreme Court’s judgment in Rock Advertising Limited v MWB Business Exchange Centre Limited concerning “no oral modification” clauses, which are commonly used to prevent an attempt to vary a contract without written agreement. The Supreme Court reversed the Court of Appeal’s decision and enforced the validity of the clause. Lord Sumption reasoned that there were legitimate reasons for such clauses, and that there was no conceptual inconsistency between the general rule allowing oral contracts and a specific rule that effect would be given to contracts requiring variations to be in writing.

Finally, the decision in August 2018 in Fundo Soberano de Angola v Jose Filomeno dos Santos is a salutary reminder of the importance of giving full and frank disclosure when applying for freezing orders (pg 43). Papelewski J discharged a $3 billion worldwide freezing order, one of the largest ever granted, because there had been a serious and substantial breach of the duty to give full and frank disclosure of all material facts.

Whilst there was no evidence that they had sought mislead the Court, it was incumbent on the claimant and its lawyers to make the fullest inquiry into the case given the size of the freezing order sought and the allegations of dishonesty.

That is but a brief digest of the digests, with many other interesting cases summarised for your reading over the following pages.
SOUTH SQUARE DIGEST

Banking and Finance

Elite Property Holdings Limited v Barclays Bank PLC [2018]
EWCA Civ 1688 (Lindblom LJ and Flaux LJ) 17 July 2018
Mis-selling of IRHPs – no contractual duty to customer in respect of review agreed with the FCA

The Court of Appeal considered, for the first time, whether a bank owed a contractual duty to a customer in relation to its conduct of a review pursuant to an agreement with the Financial Conduct Authority (“the FCA”) regarding interest hedging products (“IRHPs”). Although ultimately permission to appeal was refused, the Court gave permission for the judgment to be cited as a precedent.

The claimants had entered into three structured collars with the defendant (“the Bank”) between 2006 and 2008 in connection with loan facilities totalling c. £7.5 million. They subsequently asserted that the products had been mis-sold to them. The Bank subsequently agreed with (what is now) the FCA to conduct a review of its sale of IRHPs. In 2014, the claimants agreed the terms of a “Revised Redress Offer” with the Bank, which provided (amongst other things) that the claimants would receive, in full and final settlement of any losses. Subsequently, under oversight of an independent reviewer, the Bank rejected the claims for consequential loss.

The claimants then issued proceedings against the Bank. The judge dismissed the claims by way of strike out and/or summary judgment. The judge also refused the claimants permission to amend their claim to assert that, through their acceptance of the Revised Redress Offer, the Bank owed them a contractual duty to investigate their consequential loss claims.

Flaux LJ (with whom Lindblom LJ agreed) rejected the claimants’ appeal. First, Flaux LJ observed that at the time that the Bank made the Revised Redress Offer, it was already under an obligation to the FCA to undertake a review. The Bank was always going to conduct the review, and was not assuming any fresh liability or even a duty of care in carrying out the review, so it followed that there was no consideration for any suggested contractual promise concerning the review. Secondly, Flaux LJ relied on the earlier decision of the Court of Appeal in CGM Group Ltd v Royal Bank of Scotland Plc [2018] 1 WLR 235), in which Beatson LJ had explained that there was no duty of care in tort owed by a bank to a customer when conducting a review of that customer’s products and that the “overall regulatory regime” indicated that the FCA alone had power to compel a bank to comply with the terms on which it was obliged to conduct reviews. Flaux LJ considered that this analysis was “inconsistent with there being any basis for a claim in contract”, and that absent some clear contractual term to the contrary, which was absent here. Accordingly, the Bank’s only contract in relation to the review was with the FCA.

The National Guild of Removers & Storers Ltd v Bee Moved Ltd & Ors [2018]
EWCA Civ 1302 (Kitchin LJ, Asplin LJ) 12 June 2018

The appellant trade association appealed against a decision that the respondent removals company and its directors were not responsible for a misrepresentation on a website which was relied upon for the purposes of its passing off claim.

One of the issues for the Court of Appeal was whether the trial judge had erred in accepting evidence from one of the defendant’s witness in relation to his knowledge of, and his ability to change, the webpage in question. As part of the appeal, the trade association sought to rely on fresh evidence which was said to undermine one of the respondent director’s credibility.

On the issue of adding fresh evidence, it was held that it was not appropriate to admit the fresh evidence, in accordance with the principles in Ladd v Marshall [1954] 1 WLR 1449. The finality of the litigation outweighed the relevance and necessity of the evidence in question. It was also considered that the fresh evidence did not only become relevant at the trial itself, and was in fact of relevance before the trial began, and that it could not be said that the claimants did not have the knowledge of which the evidence related to.

Hertel v Saunders [2018]
EWCA Civ 1831 (Lewison LJ, David Richards LJ, Coulson LJ) 31 July 2018
Part 36 Offers – costs orders – permission to amend
This case concerned an offer of settlement, and whether it could be construced as a Part 36 Offer or not under CPR r. 36.6(1)(b). The claimants had initiated amendments proceedings for a declaration that there was a partnership or joint venture between the parties. The claimant then applied for permission to amend, but prior to the amendment being made, the solicitor for the defendant wrote a letter offering settlement of the claim that was made in Part 36. The offer stated that the claim, as pleaded, would be bound to fail against the claimant, but the offer also stated that it was made on the basis of the proposed amendments. The claimant accepted the offer.

The master held that the costs outcome for the case was governed by CPR r. 36.10(3) on the grounds that the offer related to part of the claim and the claimants had abandoned the balance of the claim. On appeal to the judge, the defendant argued that the offer was never a Part 36 offer, as such an offer could not extend to a case that had not yet been pleaded or formulated in an existing action. The judge accepted this, and the order that the defendant pay the claimant’s costs was largely overturned. This was because the claim in the proposed amendment proceedings which the settlement related was not “a claim or part of the claim or an issue which arose in the claim” under CPR r. 36.6(3)(b).

On appeal to the Court of Appeal, the claimants submitted that under CPR r. 36.6(1)(a) Part 36 offer could be made before the commencement of proceedings when the word “claim” could not be defined by reference to any pleadings, meaning a Part 36 offer generally could not be defined by reference to the pleadings after commencement either. The appeal was dismissed. It was held that the position before the proceedings commenced was different to that after commencement as there were pleadings with procedural rules that regulated them, meaning it would be wrong to ignore the clarity which pleadings provided.

Société Générale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS & Ors [2018]
EWCA Civ 1093 (Longmore LJ, Macuer LJ, Simon LJ) 15 May 2018
Service – legal advice – freezing injunctions
The appellant bank appealed against a decision refusing to order deemed service of proceedings upon the defendants and the dismissal of its claims and the discharge of certain freezing injunctions. The proceedings had originally been commenced following the failure of the defendant companies to pay for gold bullion supplied to them. Worldwide freezing orders were also obtained on the provision of an undertaking that proceedings would be served “as soon as practicable”.

Following ineffective service on the defendants (three of whom were based in Turkey, and one in Dubai), the defendants applied for the claims to be struck out and for the freezing orders to be discharged. The bank made a cross application for an alternative method with retrospective effect pursuant to CPR r. 6.15, or in the alternative for service to be dispensed with under CPR r. 6.16, primarily on the basis that erroneous legal advice had been provided from a Turkish law firm which asserted service had been effected in Turkey, when it had not. This application was dismissed at first instance, and the claim was accordingly struck out and the freezing orders lifted. Popplewell J held that reliance upon negligent legal advice could never constitute a good reason for alternative service, and further that exceptional circumstances were required to justify alternative service under CPR r. 6.15 where an order might (i) deprive the defendants of an accrued limitation defence, or (ii) sanction a method of service not permitted by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965.

The Court of Appeal dismissed the appeal. In relation to erroneous legal advice, the court held that negligent or incompetent advice was always a bad reason for granting an extension of time, and that it was always “a bad reason” and instead whether there was “a good reason” depended on the facts of the case, in line with the decision in Barton v Wright Hassall LLP [2018] UKSC 18, 2018 (2018) 1 All ER (Comm) 1107 (June 2018 edition of the Digest). On the requirements for exceptionality, the court held that a limitation defence had to be highly relevant to the exercise of the court’s discretion, and CPR r. 6.15 required an inquiry into the reason for not achieving proper service before the expiry of a limitation period. As to the Hague Convention, service by an alternative method was to be permitted only “in special circumstances”. Whilst the court considered that Popplewell J had made a limited error of principle in saying that negligence or incompetence must always be a bad reason for ordering alternative service, this was only a minor error and did not vitiate the judge’s evaluation of the other factors in the case.
for the dominant purpose of resisting contemplated
demonstrated that litigation was a real likelihood if the self-
been contemplated when the SFO wrote to ENCR about
it was held that the judge at first instance had failed to take account that the category 1 documents had been brought into existence for the dominant purpose of resisting or avoiding proceedings. The same, it was held, could be said for categories 2 and 4. Accordingly, the category 1, 2 and 4 documents, with the exception of two emails, were covered by litigation privilege, contrary to the first judge's decision. Thirdly, whether with respect to legal advice privilege, ENCR asserted legal professional privilege over
these documents, leading to the SFO issuing proceedings
had to be brought into the zone where the dominant
threat of a criminal investigation, whistle-blower allegations
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**First Tower Trustees Ltd v CDS (Superstores International) Ltd [2018]**

**Court of Appeal**

The Court of Appeal considered the appeal of a landlord (“First Tower”) against a decision that it was liable to a tenant (“CDS”) for misrepresentation. CDS had entered a tenancy agreement with First Tower. The agreement contained a clause that it had not entered into the lease in reliance on any representation made by First Tower – a non-reliance clause (“NRC”). In pre-contractual discussions, First Tower had represented that it was unaware of any environmental problems relating to the property to be leased. This was untrue – it was aware of asbestos contamination. CDS had to lease alternative premises while remedial work was carried out. In circumstances where CDS had entered into the contract on the basis of a misrepresentation, and that the NRC was an attempt to exclude liability for misrepresentation which was invalid as it failed to satisfy the test of reasonableness under the Unfair Contract Terms Act 1977 (the “1977 Act”).

The Court of Appeal dismissed First Tower’s appeal. Section 1 of the Misrepresentation Act 1967 (the “1967 Act”) provides that a contract that restricts or excludes liability for a pre-contractual misrepresentation is valid only insofar as it satisfies the reasonable test in s.1(1) of the 1977 Act. Where the clause does satisfy this test, the parties are bound to accept a particular state of affairs as true even if they knew it not to be. The NRC in the tenancy agreement was an attempt to exclude liability for misrepresentation and therefore subject to s.3 of the 1967 Act. It did not satisfy the reasonableness test in the 1977 Act and was therefore invalid. There might be circumstances where a clause precluding reliance on enquiries made before a contract was entered into would satisfy the reasonableness test, but it was hard to imagine what those circumstances would be.

**Maurice MacNeill Iona Ltd (t/a Century 21 UK) v C21 London Estates Ltd [2018]**

**Contracts – incorporation of terms**

The Court of Appeal considered whether the terms of a side letter between members of a franchise agency brand and a franchisee had been incorporated into a franchise agreement. Lord Justice Lewis, giving the judgment of the Court, found that it had not been.

At the convening hearing, Registrar Derrett had ordered a meeting of a single class of shareholders. At that meeting, shareholders representing 80.33% in number voted in favour of the scheme, representing 75.79% in terms of value. V&B opposed the scheme at the sanction hearing on three principal grounds: (i) the consideration for the shares in Nisa was split into three elements, the split was irrational and its purpose could only be to manipulate the voting of the shareholders to achieve a favourable result; (ii) Nisa had sought to maximise the vote in favour of the scheme while taking no action in relation to the votes that might be cast, but which were not cast, against the scheme; and (iii) after the meeting, the Groceries Code Adjudicator had made public that she was investigating a senior company in the same group as the company acquiring Nisa. It was said that the investigation would have been a great concern to Nisa’s shareholders, such that if the vote were taken again the outcome would likely have been different.

As to the first ground, the consideration for the shares in Nisa was split into three components: (i) the consideration was split into a fixed sum payable to each member, deferred payments of up to £1,654 per share, and an additional 1% rebate payable for four years based on and determined by the volume of continued trading by the member with Nisa post-scheme (the “V&N”); (ii) the V&N was not in terms challenging the decision to convene a single class of shareholders, Mr Justice Morgan rejected the submission that the split consideration was irrational and, accordingly, rejected the analysis that the split must have been an attempt to manipulate the vote: each element of the split consideration could be rationally justified. As to the second ground, the Judge held that Nisa was not obliged to take any steps to get in the vote such that it was not appropriate to speculate what might have happened had more active steps been taken with regard to the no votes. However, as regards the steps taken in respect of the “yes” vote, the Judge noted that prior to the meeting Nisa had contacted a number of persons identified as potential “yes” voters who had not yet voted. Of those, ten provided valid proxies supporting the scheme. Morgan J noted that even discounting these voters, there would still have been a statutory majority in excess of 75%.

Accordingly, even if what had happened should not have happened (and Mr Justice Morgan declined to decide the point) the company’s actions in this regard were immaterial and did not cause him to take a different view.

As to the third ground, the objector’s argument relied on authorities concerning the failure to disclose a material fact to the court meeting. However, there was no evidence to suggest Nisa was aware of any relevant fact in connection with the Groceries Code Adjudicator which it had failed to disclose to the court meeting. The Judge noted that he had nothing like adequate material to form the view that the matter raised by V&K should require the voting process to be re-run. Accordingly, he proceeded to sanction the scheme.

**CASE DIGESTS**

**Commercial Litigation**

they make it easier for parties to police their own internal rules, restricting the authority to agree variations. Those were all legitimate commercial reasons for NOM clauses. Contract law did not normally override such legitimate reasons. There was no conceptual inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect would be given to contracts requiring writing for a variation. It did not follow that parties who agreed an oral variation in spite of a NOM clause must have intended to dispense with the clause. Parties to such a clause agreed not that oral variations were forbidden, but that they were invalid. The safeguard against injustice lay in the various doctrines of estoppel. That had not been made out in the current case.

**Re Nisa Retail Limited [2018]**

**Contracts – non-reliance clauses – misrepresentation**

The Court of Appeal considered the appeal of a landlord (“First Tower”) against a decision that it was liable to a tenant (“V&B”) at the hearing. A side letter between the master franchisor of an estate and an additional 1% rebate payable for four years based on and determined by the volume of continued trading by the member with Nisa post-scheme (the “V&N”); (ii) the V&N was not in terms challenging the decision to convene a single class of shareholders, Mr Justice Morgan rejected the submission that the split consideration was irrational and, accordingly, rejected the analysis that the split must have been an attempt to manipulate the vote: each element of the split consideration could be rationally justified. As to the second ground, the Judge held that Nisa was not obliged to take any steps to get in the vote such that it was not appropriate to speculate what might have happened had more active steps been taken with regard to the no votes. However, as regards the steps taken in respect of the “yes” vote, the Judge noted that prior to the meeting Nisa had contacted a number of persons identified as potential “yes” voters who had not yet voted. Of those, ten provided valid proxies supporting the scheme. Morgan J noted that even discounting these voters, there would still have been a statutory majority in excess of 75%.

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**Boy-Simon v BGC Brokers LP [2018]**

**Contracts – implied terms**

The Court of Appeal considered a loan agreement between a broker (Mr Bou-Simon) and his employer (“BGC”). Mr Bou-Simon borrowed £336,000 from BGC under an agreement between a broker (Mr Bou-Simon) and his employer (“BGC”). Mr Bou-Simon alleged that the loan was repayable if Mr Bou-Simon did not serve a further four years at BGC. Mr Bou-Simon resigned within four years, and BGC relied on an implied term in the loan agreement that the full amount of the loan would be repaid unless four years had been completed. Mr Bou-Simon appealed an order that the debt was repayable on the basis of this implied term. The Court of Appeal allowed the appeal. The correct starting point for determining whether term is to be implied is for the court to determine what the parties have expressly agreed. The trial judge erred by starting by constructing the agreement in order to fit the proposed implied term, rather than starting with the express terms themselves. The proposed implied term was not so obvious that it went without saying or to be necessary for business efficacy in the sense that the agreement would lack commercial or practical coherence without it. If the implied term had been included, the express terms would have had to be redrafted: this was an indicator that the implied term was not included.

**Re Nisa Retail Limited [2018]**

**Contracts – incorporation of terms**

The Court of Appeal considered whether the terms of a side letter between members of a franchise agency brand and a franchisee had been incorporated into a franchise agreement. Lord Justice Lewis, giving the judgment of the Court, found that it had not been.
Interactive Technology Corporation Limited v Jonathan Ferster [2018]

EWCA Civ 1954 (David Richards LJ, Newey LJ, S J May 2018)

Equitable compensation – directors – remedies

The appeal concerned the meaning and effect of an order for the assessment of equitable compensation. The appeal followed a trial which was accompanied by an extension of time to amend the order for the assessment of equitable compensation.

Mr Jonathan Ferster was a former director of ITC who had been removed without authority by a trustee in bankruptcy. The underlying claim was made by the appellant company (“ITC”) against Mr Ferster, who was a former director of ITC.

Following the trial, Morgan J accepted that Mr Ferster had caused ITC to pay substantial unauthorised remuneration to him in excess of the salary of £120,000 per annum to which he was entitled. The exact amount of the unauthorised remuneration had yet to be established but Mr Ferster had accepted that it was not less than £4.48 million. A second hearing before Morgan J had established, and Mr Ferster had accepted, that ITC’s skeleton argument made clear that it was entitled both to substitutive and reparative compensation. In light of the dispute that had arisen, Morgan J made a number of declarations, which interpreted the provision of the order regarding equitable compensation. The declarations stated: (i) that the order “provides for ITC to recover compensation for losses resulting from the payment to Jonathan Ferster of unauthorised remuneration”, and (ii) that “ITC had a right to elect between inconsistent remedies, namely (i) an order against Jonathan Ferster that he repay unauthorised remuneration received by him and (ii) an order against Jonathan Ferster that he pay equitable compensation for ITC’s losses resulting from the payment by ITC of unauthorised remuneration. By no later than the point in time on 19 December 2016 when the Court pronounced the order, ITC made a binding election for (ii)”.

On appeal, ITC submitted that equitable compensation, both as a general proposition and in the context of the order, was not confined to compensation for losses (sometimes referred to as “reparation claims”) but included the recovery of compensation for money or assets disbursed without authority (sometimes called “substitutive claims”). Richards LJ, with whom Newey LJ agreed, held that the Judge’s approach involved a narrower reading of “equitable compensation” which was not in accordance with authority. In short, equitable compensation was apt to include a payment made to restore to a claimant the value of assets or funds removed without authority by a trustee or other fiduciary, such as a director. It could also include reparation for losses suffered by the claimant, such as in this case losses resulting from the payment of the unauthorised remuneration. But, equitable compensation was not restricted to reparation for losses, as the case law showed.

In summary, the appeal was allowed and the two declarations were deleted and replaced with a declaration by ITC, which made clear that it was entitled both to substitutive and reparative compensation.

CASE DIGESTS

Corporate Insolvency

Granada UK Rental & Retail Ltd v The Pensions Regulator [2018]

UKUT 0164 (TCC) Pose J, Judge Herrington, Mr Abrams 15 July 2018

Employer’s pension scheme insufficiently resourced – Financial Support Direction – whether parent entities “connected with” or “associates of” employer – whether pension legislation could be applied in relation to events occurring before legislation came into force

In 1999-2000, the five applicant companies (“the Targets”) entered into a joint venture with a rival group (“Thorn”) and set up the “Box Clever” set of entities (“Box Clever”). The Targets and Thorn sold their respective TV retail businesses to Box Clever for £860m, which Box Clever funded in significant part by a £860m loan secured on its assets. In 2001, Box Clever set up an employee pension scheme (“the Scheme”) and accepted liability for funding it. Box Clever thereafter became insolvent and entered administrative receivership in late 2003. The pension scheme was in deficit at that time which had since grown to £250m. In September 2011, the Pensions Regulator (“the Regulator”) determined to issue a Financial Support Direction (“FSD”) pursuant to section 43 of the Pensions Act 2004 upon the Targets to address the deficit. The Regulator contended that the Targets were “connected with” or “associates of” Box Clever for this purpose as of the “look-back” date of 13 December 2009, and that they had set up Box Clever in such a way as to bear the costs associated with the rental businesses without the right to share in future profits. The Targets denied that they were “connected with” or “associates of” Box Clever, and also contended that the Pensions Act was not retroactive and could not be applied in relation to events occurring before it came into force.

The Tribunal found in favour of the Regulator. (i) The issue of connection and/or association turned, pursuant to section 43(3)(b) of the Insolvency Act 1986 on whether the Targets had control at the relevant date of Box Clever by virtue of being entitled to control at least a third of the voting power at any general meeting. The Tribunal found that voting rights had indeed remained vested in the Targets at the relevant time. (ii) The Tribunal reasoned that the application of new legislation to existing circumstances involves a degree of retroactivity, which creates the risk of unfairness or hardship. The answer to the question whether Parliament intended new legislation to have retrospective effect is a matter of degree, and the greater the likely unfairness of retrospective application, the less likely it is to have been intended by Parliament. Section 43 of the Pensions Act does alter existing rights and duties but not retroactively, such as would be the case if it sought to alter or recharacterise the terms of already concluded transactions. Rather, the section is intended to provide a solution to an ongoing problem, viz, the underfunding of a pension scheme, and this intention would be frustrated if the Regulator were precluded from considering events occurring prior to the legislation’s having come into force.

The effect of the issuance of an FSD is analogous to that of the imposition of a new tax affecting assets held by the taxpayer at the time that the tax is imposed.

Digested by Riz Mokal
**Re MF Global UK Ltd (In Special Administration) [2018]**

**EWHC Civ 1327 (McFarlane LJ, Asplin LJ and Sir Colin Rimer), 11 June 2018**

Company voluntary arrangements – interpretation

MF Global UK Limited (MFGUK) went into administration on 31 October 2011. By January 2014, 99.9% of client assets had been distributed and, following a distribution out of the administration estate in August 2016, almost all creditors had received 90p/£ on their claims. On 12 December 2017, a CVA was approved by creditors. The purpose of the CVA was to give unsecured creditors the option to exit the administration in exchange for a certain final cash payment shortly upon implementation of the CVA. Under the CVA, unsecured creditors could elect to be an “Exiting Creditors”, a “Stay-in Creditor” or a “Participating Creditor”. Upon implementation of the CVA, the Participating Creditors would fund a cash payment to the Exiting Creditors in exchange for a pro rata beneficial interest in the claims of the Exiting Creditors. Stay-in Creditors would retain their claim against the estate until the office holders made the Final Stay-in Creditors’ Distribution.

Paragraph 3.1 of the CVA proposal imposed fixed conditions precedent to the coming into effect of the CVA. Of these, the condition set out in paragraph 3.1(b) remained to be met. That condition provided that “[i]f there are any Disputed Claims after the Challenge Period has ended, the Administrators have confirmed that this should not preclude the CVA from becoming effective”. The terms “Dispute Claims” and “Challenge Period” were separately defined. After approval of the CVA, and three days before the end of the Challenge Period, Deutsche Bank (DB) filed a contingent claim—the DB Claim—for an indemnity in the amount of EUR 126m in respect of a liability that DB had agreed to assume from MFGUK’s liabilities. Accordingly, the Court of Appeal directed that, in light of the emergence of the DB Claim, the Administrators should confirm that the CVA was precluded from becoming effective.

[Mark Arnold QC, David Allison QC, Daniel Dayfield QC, Marcus Haywood, Adam Al-Attar]

The administrators applied for directions as to whether, and if so how, to proceed to implementation of the CVA in the light of the DB Claim. At first instance ([2018] EWHC 1772 (Ch) (Hildyard J) held that the condition precedent in para 3.1(b) should be construed as referring to circumstances which would preclude the CVA from coming into effect at all, rather than a circumstance which affected the economic balance or commercial objectives of the CVA.

Allowing the appeal in respect of that decision the Court of Appeal held that the function of the relevant condition precedent was to enable the administrators to assess whether the state of the Disputed Claims in existence following the Challenge Period could be regarded as changing the basis on which creditors had voted in favour of the CVA. That meant that the administrators had to exercise a value judgment as to whether, in light of changed circumstances in the state of Disputed Claims, it would be fair for the CVA to come into effect. The emergence of the DB Claim had substantially falsified the commercial assumptions as to MFGUK’s liabilities. Accordingly, the Court of Appeal directed that, in light of the emergence of the DB Claim, the Administrators should confirm that the CVA was precluded from becoming effective.

**Stanford v Akers**

**BVI Court of Appeal, 12 July 2018**

**Liquidators – challenge to powers of compromise**

The BVI Court of Appeal addressed standing in the context of applications under section 273 of the Insolvency Act 2003, the jurisdictional gateway whereby an aggrieved person can ask the court to reverse or vary a liquidator’s decision. Prior to its entry into liquidation, Chesterfield had purchased a series of complicated financial instruments from Deutsche Bank. The purchase of these instruments was ultimately funded by Kaupthing.

Chesterfield and Kaupthing both brought claims against Deutsche arising from the sale of the financial instruments. Chesterfield brought claims in England. Kaupthing brought claims in England and Iceland.

In 2016, the Joint Liquidators caused Chesterfield to enter into global settlement package involving linked settlements between (a) Chesterfield and Deutsche Bank; and (b) Chesterfield and Kaupthing. In addition, Kaupthing and Deutsche also entered into a linked settlement.

After learning of the settlement, Mr Stanford (who was neither a creditor nor a member of Chesterfield, and was at most a shareholder of one of the shareholders of Chesterfield) applied pursuant to section 273 of the Insolvency Act 2003 to reverse the decision by the Joint Liquidators to enter into one element of the global settlement package, namely the settlement of claims between Kaupthing and Chesterfield. Mr Stanford contended that the Joint Liquidators ought to have settled with Deutsche Bank directly, without admitting Kaupthing’s claim. In this event, it was said that Chesterfield would have retained the full benefit of the payment from Deutsche Bank (from which Mr Sanford would have benefited as an ultimate beneficiary of Chesterfield).

Wallbank dismissed the application on all grounds, finding that Mr Stanford did not have standing to bring the application (since he was neither a creditor nor a member of Chesterfield) and that there was no proper factual basis to challenge the Joint Liquidators’ exercise of discretion in entering into the settlement.

Stanford appealed and sought to obtain disclosure on the appeal and simultaneously adduce it as fresh evidence under Ladd v Marshall principles. The Court of Appeal dismissed the application for disclosure as (i) having failed in his application at trial to obtain documents sealed on the court file, Mr Stanford should not be permitted disclosure on appeal; when he had not appealed that case management decision of the judge; (ii) certain categories of documents sought were irrelevant to the substantive issues; and (iii) certain documents should not be subject to an order for disclosure as they were privileged; (iv) in any event, the application for disclosure was bound to fail as the documents’ existence was known by Mr Stanford at the time of the trial, when he did not seek to utilise them, thus offending Ladd v Marshall principles.

The Court of Appeal also dismissed the appeal agreeing with the trial judge on both grounds (i) as a shareholder of a Chesterfield, Mr Stanford was an outsider to the liquidation with no legitimate interest entitling him to standing under section 273; and (ii) there was no proper factual basis to challenge the Joint Liquidators’ exercise of discretion in entering into the settlement. In this regard, the Court of Appeal found that the failure of Mr Stanford to appeal the judge’s findings of fact was fatal to his appeal.

[David Allison QC]

**Re Zinc Hotels (Holdings) Limited [2018]**

**EWHC 1936 (Ch) (Henry Carr J) 20 July 2018**

**Administration – appointment out of court by qualifying floating charge holder – whether power to appoint “interim administrator” – power to appoint additional administrator by way of interim relief – whether previous work for appointor a bar to appointment – grounds for challenge to administrators’ choice of statutory objective**

Administrators had been appointed over members of a corporate group which owned several hotels leased to the Hilton group, and which undertook a sales and marketing process for the sale of the hotels. The ultimate shareholder in the group applied for the removal of the administrators and for relief under para. 3/4 of Schedule B3 to the Insolvency Act 1986, and for interim relief including the appointment of an “interim administrator”.

The shareholder contended that the administrators lacked independence due to their previous engagement by the secured creditors. The application was dismissed.

(1) The Court has no power to appoint a “provisional administrator” pending the appointment of a final administrator, but where an administration has been commenced it does have power to appointment a further additional administrator including by way of interim relief. (2) However, where administrators were appointed by a floating charge-holder, then an additional administrator can only be appointed by the floating charge-hold or by the court on the application of the existing administrators. The shareholder therefore lacked any standing to make the application. In any case, additional administrators can only be appointed with the consent of the existing administrators, and no such consent had been provided. (3) The prior engagement of the administrators’ firm by the secured creditors did not bar the administrator from taking the appointment, nor was it contrary to the Insolvency Practitioner Code of Ethics. (4) The engagement by the
administrators of the same solicitors who acted for the secured creditors until such time as it appeared that there was a real prospect of a return to shareholders was not inappropriate. (5) There was no serious issue to be tried in relation to the allegation that the administrators had wrongly failed to pursue the first objective of administrator (rescue as a going concern). The decision of administrators as to which objective to pursue would only be capable of challenge on grounds of lack of good faith or irrationality. (6) There was no serious issue to be tried in relation to the allegations that the administrators had wrongly failed to assess and pursue certain alleged valuable claims belonging to the companies in administration. (7) There was no basis for an injunction restraining payment of the sales proceeds since there was no serious issue to be tried, and no cross-undertaking had been offered.

(Tom Smith QC, Hannah Thornley)

The existence of the adverse special interest. Two important and inter-linked considerations are whether other creditors not affected by the adverse special interest have reasonably approved the scheme, and whether there is more to unite than to divide the adversely interested creditors with others in its class, taking account of the situation in the absence of the scheme. Applying these tests, the Court held that Wentworth's vote need not be disregarded or discounted.

(Robin Dicker QC, William Trower QC, David Allison QC, Daniel Bayfield QC, Richard Fisher, Adam Al-Attar, Henry Phillips, Ryan Perkins)

Re Lehman Brothers International (Europe) (in administration) [2018]

EWHC 1980 (Ch) (Hildyard J) 27 July 2018

Scheme of arrangement – majority creditor had adverse special interest – test for disregarding or discounting vote

The Court sanctioned a scheme whose purpose was to compromise certain complex legal proceedings in order to facilitate distribution of the substantial surplus in the company's estate. A key issue was whether the special interest arising from the relationship between majority creditors ("Wentworth") and certain subordinated creditors was so close as to the interest in which Wentworth were placed that their votes ought to be disregarded or discounted as not being representative of the class. The Court held that for this to be justified, there must be a strong and direct causative link between the adverse special interest and the creditor's decision to support the scheme. The existence of this link may be helpful, but is not necessarily, tested by asking whether the creditor would have supported the scheme but for the contentions of BOC that there had to be a formulated restructuring plan for the Court to appoint "light touch" provisional liquidators, and rejecting the contention of BOC that the company's chosen officeholders were not independent. The Grand Court dismissed BOC's application, finding that it had failed to discharge the heavy burden faced by a creditor of providing clear or strong evidence to prove that provisional liquidators were necessary to prevent the dissipation or misuse of assets and misstatement by the directors.

(David Allison QC)

In re Videolimited Limited [2018]

EWHC 2186 (Ch) (Snowden J) 16 August 2018


The company was the English subsidiary of a US parent, who was licensed by the parent to use intellectual property critical to its business, and was the vehicle by which the corporate group of which it was part undertook business in the UK, Europe, the Middle East and Africa. The company together with the parent and others in the group voluntarily entered Chapter 11 proceedings to obtain protection against creditor claims while the group's financing was restructured and a coordinated sale of its business undertaken. At that time, the company had significant trade and tax liabilities in the UK and secured liabilities to lenders acting through a US-based agent. Entities in the group, including the company, had also obtained debtor-in-possession finance in the US. The parent applied for and was granted recognition in England of its Chapter 11 proceedings together with the equivalent of the moratorium applicable in English administration proceedings but including a restriction on the making of an administration order. In relation to the company, the Court had recognised the Chapter 11 proceedings as foreign proceedings and, in view of the US proceedings, then underway in England against the company, ordered a moratorium by way of interim relief of essentially the same form as for the parent. The Court held, however, that the presumption that the location of the company's registered office coincided with its centre of main interests ("COMI") was not applicable. The Court further held that estoppel by representation remains a distinct defence and one in principle available in response to section 127 claims. Payment of money on the basis of which an estoppel might arise is not available in response to section 127 claims. Payment of money on the basis of which an estoppel might arise is not available in response to section 127 claims. Payment of money was not, however, itself amount to a representation that the money was owed, and the facts, there was no representation on the basis of which an estoppel might arise.

(Robert Amey)

Case Digests

Corporate Insolvency

Officever Technologies Ltd v Annabel’s Ltd [2018]

EWHC 2186 (Ch) (HJ Paul Matthews sitting as a High Court Judge) 15 August 2018

Post-petition dispositions – relevance of good faith and of absence of knowledge of petition – change of position defence – estoppel by representation

Payments in excess of £1.7m were made by a company between the date of presentation of a petition to wind it up and the making of the order. Of these, nearly £260,000 were made to the respondents to an application under section 127 of the Insolvency Act 1986 by the joint liquidators. No validation application was made, and there was no proper engagement on the respondents’ behalf with the litigation. The Court characterised the liquidators’ claim as in principle one for restitution for unjust enrichment, albeit that, by virtue of arising under the statutory insolvency regime, it need not possess all the characteristics of a comparable claim under the general law. In particular, the defence of receipt of money in good faith and for valuable consideration is not available. The defence of change of position is available, but on the facts, was not applicable. The Court further held that estoppel by representation remains a distinct defence and one in principle available in response to section 127 claims. Payment of money does not, however, itself amount to a representation that the money is owed, and on the facts, there was no representation on the basis of which an estoppel might arise.

The head office of the company was in England and the group's financing was restructured and, in view of several proceedings as foreign proceedings and, in view of the US proceedings, then underway in England against the company, ordered a moratorium by way of interim relief of essentially the same form as for the parent. The Court held, however, that the presumption that the location of the company's registered office coincided with its centre of main interests ("COMI") was not applicable. The Court further held that estoppel by representation remains a distinct defence and one in principle available in response to section 127 claims. Payment of money on the basis of which an estoppel might arise is not available in response to section 127 claims. Payment of money on the basis of which an estoppel might arise is not available in response to section 127 claims. Payment of money on the basis of which an estoppel might arise is not available in response to section 127 claims. Payment of money was not, however, itself amount to a representation that the money was owed, and the facts, there was no representation on the basis of which an estoppel might arise.

Re GW Group Holdings

Grand Court of the Cayman Islands (The Hon Justice Raj Parker) 7 August 2018

Cayman Islands – soft-touch provisional liquidators

The Grand Court considered competing applications for the appointment of provisional liquidators over the Cayman holding company of a group which provides one-stop precision engineering solutions. The company is listed on the Hong Kong Stock Exchange and the operation of the group are headquartered in Singapore.

The first application was filed by Bank of China ("BOC") under s10(1) Companies Law for the appointment of members of Kalo in Cayman and RSM in Hong Kong on the grounds that the company intended to present a compromise or arrangement to its creditors. It was supported by a minority of the creditors of the company.

It was common ground that the company was unable to pay its debts within 99) Companies Law.

The Grand Court appointed provisional liquidators on the application of the company, finding that a company’s directors may apply for "light touch" provisional liquidators without a shareholders’ resolution, rejecting the contention of BOC that there had to be a formulated restructuring plan for the Court to appoint “light touch" provisional liquidators, and rejecting the contention of BOC that the company’s chosen officeholders were not independent. The Grand Court dismissed BOC’s application, finding that it had failed to discharge the heavy burden faced by a creditor of providing clear or strong evidence to prove that provisional liquidators were necessary to prevent the dissipation or misuse of assets and misstatement by the directors. 

(David Allison QC)

The court’s bank account. The UK remained the location of the company’s trading premises and staff, was the place where its customer and creditor relationship were established, where its day-to-day dealings with trade creditors occurred, and where its receivables and cash at bank (its main assets) were based. These factors were also readily ascertainable by customers and particularly trade creditors, and there had been no general communication to the contrary with the creditors. These factors outweighed the pro forma and somewhat confused evidence from the company's US-based secured creditors. The Court therefore characterised the US proceedings as non-main on the basis that it had an establishment at the corporate group headquarter. It did, however, continue the extended moratorium and a representative to do so was in the interests of the company’s creditors as a whole, including those based in the UK.

(Robert Amey)
argued that it was not necessary for the feeder fund to have
proceeds was therefore rejected. On appeal, the feeder fund's proof of debt claiming the allegedly unpaid redemption
notice had been served there had been no valid redemption. Accordingly, it had been necessary for the feeder fund to serve a second
redemption notice on the master fund and since no such notice had been served there had been no valid redemption. ■

Re Ardon Maroon Asia Master Fund, unreported
Grand Court of the Cayman Islands (McMillan J) 27 August 2018
Feeder fund – whether redemption of shares effective without notice

The Ardon investment funds operated under a master-feeder fund structure, under which investors invested in a feeder fund which in turn invested in a master fund. Prior to the master fund and the feeder fund going into liquidation, an investor had redeemed its shares in the feeder fund. The liquidators of the master fund however contended that the feeder fund had not in turn effectively redeemed its shares in the master fund, as the feeder fund had not served a separate redemption notice on the master fund. The feeder fund's proof of debt claiming the allegedly unpaid redemption proceeds was therefore rejected. On appeal, the feeder fund argued that it was not necessary for the feeder fund to have

served a second redemption notice on the master fund, in addition to the redemption notice served by the investor on the feeder fund. The appeal was however rejected. On their proper construction, the articles of association of the master fund did not empower the directors of the master fund to issue shares on terms that they could be redeemed without service of a written redemption notice. Further, on the facts, there had been no relevant determination by the directors of the master fund issuing the shares on this basis. Accordingly, it had been necessary for the feeder fund to serve a second redemption notice on the master fund and since no such notice had been served there had been no valid redemption. ■ [Tom Smith QC]

Re Herald Fund SPC, unreported,
Grand Court of the Cayman Islands (Kawaley J) 27 August 2018
‘Feeder fund’ – provable subordinated claims – whether statutory interest payable

Herald Fund was a Cayman incorporated investment fund, which had acted as a “feeder fund” to the Madoff investment business, and which had gone into liquidation following the uncovering of the Madoff fraud. Certain investors in Herald had redeemed their shares in the fund prior to the suspension of redemptions and the placing of Herald into liquidation. The Privy Council had previously held, placing of Herald into liquidation. The

petitioner asserted that the cross-claim was an abuse of opportunities to alter, vary or add to the words of sub rule (2), the Insolvency Rules Committee had had many

permission is not an appeal and as such no appeal is waiting to be heard. The Chief Registrar noted that in respect of a cross-claim, the Insolvency Rules Committee had had many

process, and an application for permission to appeal was

given in circumstances where there is no limitation period for an application for an annulment of a bankruptcy order, and that that was a sufficient answer to the concern that a bankruptcy order could be annulled very many years after it had been made. Therefore the judge granted the application. ■

Deutsche Apotheker- und Arztebank EG v Leitzbach (2018)
EWHC 1544 (Ch) (HHJ Hodge QC) 30 May 2018
Annulment – centre of main interests – discretion under section 282 of the Insolvency Act 1986

The Court faced with a creditor’s application to annul a bankruptcy order made on the debtor’s petition presented by the debtor at a time when he claimed to have been residing in England. The Court, in determining whether to annul the bankruptcy order, considered the issue of whether it had a discretion to annul in circumstances where it has found, as a matter of fact, that the debtor did not have its COMI in England and Wales.

The Court followed the decision of Naglee v Riffenohl Landeskonsortium Argen, Oberösterreich 4G v Meyden (2016) EWHC 414 (Ch) and held that if a bankruptcy order is made without jurisdiction, then it should be set aside, without consideration of discretionary matters. In response to a challenge that this approach would give rise to unjust results in circumstances where there is no limitation period for an application for an annulment of a bankruptcy order, the Court held that a person who was a creditor at the time the bankruptcy order was made, but whose debt has since become statute-barred, would not have the necessary standing to apply for an annulment of the bankruptcy order, and that that was a sufficient answer to the concern that a bankruptcy order could be annulled very many years after it had been made. Therefore the judge granted the application. ■

Barker v Baxendale-Walker (2018)
EWHC 1681 (Ch) (ICC Judge Briggs) 10 July 2018
Bankruptcy Petitions – pending appeals – r. 10.24 of the Insolvency Rules 2016

The debtor was a solicitor who had provided tax advice to the petitioner concerning an employee benefit trust. The

petitioner asserted that he had suffered substantial financial losses as a result of the debtor’s negligent advice. At first

instance his negligence claim was rejected, but the Court of

Appeal overturned that decision, finding that the debtor was
guilty of negligence and ordering him to pay in excess of £600,000. The Court of Appeal refused permission to appeal
the debarred to the Supreme Court for permission. That application was still outstanding at the time of the

instant hearing. Further, the Court of Appeal had not granted a stay of execution. HMRC was also a creditor to the sum of

£669,000 and supported the petition.

The debtor opposed the petition on the grounds that he had a genuine and substantial cross-claim that equalled the judgment debt, and the judgment debt was subject to an outstanding application for permission to appeal. The

petitioner asserted that the cross-claim was an abuse of process, and an application for permission to appeal was not the same as a “pending appeal” under r. 10.24(2) of the

Insolvency Rules 2016.

Having reviewed the relevant case law, the Chief Registrar held that the language of rule 10.24(2) was focused on providing the court with a discretion to stay an appeal if an appeal is pending, an ordinary reading of the language favours the meaning “to await”, awaiting an appeal not awaiting permission to appeal, the language used in rule 10.24(2) refers to the existence of an appeal, and an application for permission is not an appeal and as such no appeal is waiting to be heard. The Chief Registrar noted that in respect of sub rule (2), the Insolvency Rules Committee had had many

opportunities to alter, vary or add to the words of sub rule (2) since 1986 and have not done so. As a result, he inferred from this that the word “pending” reflects public policy and is deliberately limited to its meaning. The petition was therefore granted. ■

Personal Insolvency

Digested by Matthew Abraham and Leslie Pyeot

CASE DIGESTS

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October 2018

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Re Maud [2018]

Withdrawal of the petitioning creditors’ right to present the petition

The petitioning creditors, Aabar Block S.à r.l. ("Aabar") and Edgeworth Capital (Luxembourg) S.à r.l. ("Edgeworth") were joint creditors in respect of a personal loan originally made to the Debtor by RBS. The debtor was a shareholder of the parent company of a group of Spanish and Dutch companies known as the Marme Group. The personal loan was one of a number of loans made by RBS for the purpose of enabling the Marme Group to purchase a valuable Spanish real estate asset (the “Santander Asset”). In November 2010 the petitioning creditors had purchased the RBS Loans with a view to acquiring the Santander Asset. In February 2014 the companies in the Marme Group entered insolvency proceedings in Spain (the “Spanish Insolvency Proceedings”).

The petitioning creditors presented a bankruptcy petition against the Debtor in June 2015 ("the Petition").

The Petition was repeatedly adjourned and then stayed until the instant hearing before Snowden J in November 2016. By this time Aabar no longer supported the making of a bankruptcy order and instead sought an adjournment so that the debtor could maintain his involvement in the Spanish Insolvency Proceedings as a shareholder. Two other creditors also appeared to oppose the making of a bankruptcy order. Edgeworth maintained that a bankruptcy order should be made. The debtor submitted that the Petition was an abuse of process since the petitioning creditors’ real aim was to acquire the Santander Asset. Snowden J rejected this submission, holding that a petition was not an abuse of process if the purposes of the Petitioning Creditors included recovering money owed to them.

The Court then considered whether it was possible to make a bankruptcy order on the basis of a petition where one of the co-petitioners was now seeking an adjournment. Since there was no relevant authority on this point in the bankruptcy context, Snowden J approached the matter from first principles. Where two creditors jointly own a debt, they are joint trustees in respect of that interest. Joint trustees are required to exercise their powers unanimously. Obtaining a bankruptcy order is part of the bundle of class rights attaching to a debt and could no more be separately asserted than the debt could be pursued in an action of one joint creditor. Accordingly the Court could not simply accept Edgeworth’s submissions unless Aabar’s stance was irrational or a breach of its duty as a joint trustee. Snowden J was not satisfied that this was the case. As a result there was in fact no creditor before the Court entitled to ask for immediate bankruptcy.

The Petition was adjourned. It was exceptional for a bankruptcy petition to have been pending for so long, but this was a wholly exceptional case. (Antony Zacaroli QC (as he then was); David Allison QC; Ryan Perkins)

Mercato Sports (UK) Ltd v Everton Football Club Co Ltd [2018]

Football agent allegedly introducing player to football club — agent commencing litigation to recover its fee from club — whether FA Rule K applicable

In 2017, a professional footballer (“AB”) entered into a contract with Everton FC. The claimant agents claimed a fee from Everton FC for introducing AB to them, and when Everton FC refused to pay, the claimants commenced litigation in the High Court. Everton FC sought a stay of the proceedings pursuant to Section 9 of the Arbitration Act 1996, arguing that Rule K of the Rules of the Football Association Ltd 2017 – 2018 operated as an arbitration agreement between the parties. Mercato Sports (UK) Ltd denied that it was bound by Rule K.

There was no suggestion that Mercato Sports (UK) Ltd and Everton FC had ever entered into a contract with each other directly that would apply the FA Rules (and in particular Rule K). Rather, it was argued that, since both parties had contracted with the FA to comply with the FA Rules, there was an implied contractual relationship between them (following Clarke v Dunmore (The Satiniall (1897) AC 59). Mercato Sports (UK) Ltd denied that it had such a contract with the FA, and argued that in any event, there was no basis for implying a contract between it and Everton FC.

The court held that Mercato Sports (UK) Ltd had a ‘vertical’ contract with the FA by virtue of having acceded to the FA Rules, as did Everton FC, and that in the circumstances, it was right to imply a ‘horizontal’ contract between Mercato Sports (UK) Ltd and Everton FC. The invoice rendered by Mercato Sports (UK) Ltd and Everton FC bore the former’s registration number as an FA-registered intermediary: a strong indication that the relationship was intended to be governed by the FA Rules. Accordingly, the substantive dispute was subject to the FA Rules, and must be determined in a Rule K arbitration.
The Corporate Insolvency Framework Review: A New UK Rescue Culture?

Introduction

In 1981 the Cork Report drew attention to the recently enacted Chapter 11 of the US Bankruptcy Code 1978 as a paradigm example of a flexible rescue procedure. As is now well known, Chapter 11 proceedings can be initiated without the involvement of the Court and enable the debtor to retain possession of the Company. The company can have the benefit of debtor-in-possession financing and in a Chapter 11 plan, it is possible to cram-down dissenting classes of creditor. Almost forty years on from the introduction of Chapter 11 in the US, the UK government has announced plans to reform the UK’s insolvency and restructuring framework.

It appears that the Government’s intention is to create a more debtor-friendly environment. It is not possible to examine every proposal in one article, but we examine the potential the Government’s proposals have to effect a shift in the dynamic of the UK rescue culture. On one view, the latest plans mark the end of a journey to a rescue culture that started with the Cork Report and took the UK through the Acts of 1986 and 2002. On another view, we have gone back to the future of 1986.

The proposals are set out in Section 5 of “Insolvency and Corporate Governance: Government Response” published on 26 August 2018. They arise from a consultation titled “A Review of the Corporate Insolvency Framework (2016).” The proposed reforms are to be introduced as soon as Parliamentarily time allows, and include the following:

1. A moratorium to enable distressed but viable companies to consider their options (which for convenience we will call the ‘restructuring moratorium’).
2. A new restructuring plan that, amongst other things, will enable cross-class cram downs;
3. Legislation preventing suppliers from relying on ‘ipso facto’ clauses when a company enters moratorium.

We anticipate that these reforms, in particular the restructuring moratorium and the new restructuring plan, will ultimately mark a turning point for the UK rescue culture. However, the teething problems that followed the introduction of the CVA and administration procedures in the Insolvency Act 1986 should not be forgotten. It is important that Parliament is alive not just to the present statutory possibilities in the UK insolvency and restructuring framework, but also to the history, particularly of what were purposes (b) and (c) of the administration procedure between 1986 and 2002.

The restructuring moratorium

The purpose of introducing a restructuring moratorium is to give financially distressed but viable companies time to consider their options, including restructuring existing debt or seeking new investment. This represents a significant shift in power in a restructuring. The company is able to discuss and negotiate the terms without the fear that one creditor could hold out for a better deal under the threat that if that creditor does not get what it wants it will enforce its debt and bring the whole deal crashing down. It should enable companies to achieve structures that give the company a better chance of surviving.

The automatic moratorium has always been an integral aspect of the administration procedure. A stay, albeit not a moratorium, has been used to support schemes of arrangement. In Bluecrest Mercantile NV v Vietnam Shipbuilding Industry Group the Court exercised its discretion to stay proceedings of dissenting creditors, thereby effectively imposing a moratorium in circumstances where a scheme of arrangement had a “reasonable prospect of going ahead.”

However, the moratoriums currently available in the UK have different, but significant limitations: the moratorium in Schedule A1 is limited to small and medium sized companies, the administration moratorium can only be obtained by the directors relinquishing control to an insolvency practitioner, the court moratorium can only be obtained following an application to the court if there are relatively advanced proposals for a scheme of arrangement and will only apply to specific creditors.

The restructuring moratorium will allow companies of all sizes to obtain a moratorium quickly and cheaply. The directors do not need to relinquish control to an insolvency practitioner and no court application will be necessary. The Report also emphasises that the restructuring moratorium is intended to be a stand-alone tool and not a necessary pre-requisite seeking creditors’ consent to a restructuring plan. This might be a mistake. If a moratorium was a required step it would not be open to companies to take even more elaborate and expensive steps to avoid going into a moratorium in order to keep creditors on side, and there is a risk we end up back where we are now. It would also avoid the protection to all creditors that will result from the restructuring moratorium supervisor (known as the ‘Monitor’), which is discussed in more detail below. The restructuring moratorium will be modelled on the administration moratorium. Certain companies will be excluded from being able to benefit from the restructuring moratorium. As a result of the
restructuring moratorium the moratorium in Schedule A1 Insolvency Act 1986 will be repealed. There will also be no need to have a separate moratorium available only to small and medium sized companies.

Entering into the restructuring moratorium

The restructuring moratorium will be triggered by filing the necessary papers at court. This will be similar to the procedure for an out-of-court appointment of an administrator. This should be a cheap and efficient process. The Monitor will be required to file their consent to act and confirm that they are satisfied that the eligibility tests and qualifying conditions are met. They will also be required to file their consent to act and confirm that they are satisfied that the eligibility tests and qualifying conditions are met. They will also be required to file their consent to act and confirm that they are satisfied that the eligibility tests and qualifying conditions are met. They will also be required to file their consent to act and confirm that they are satisfied that the eligibility tests and qualifying conditions are met. They will also be required to file their consent to act and confirm that they are satisfied that the eligibility tests and qualifying conditions are met.

The role of and qualification requirements for Monitors

The Monitor must be satisfied, on a balance of probabilities, that the restructuring moratorium is triggered, the prospect of rescue is more likely than not. At first blush this appears to be different to that required by paragraph 12(f) of Schedule B1 Insolvency Act 1986, which is that an administration order must be “reasonably likely to achieve the purpose of administration”. However, this test resulted from excessive caselaw that considered the test “is likely to achieve” which is similar to the language used in the consultation. The Courts have interpreted the current provision to mean that the test is a “real prospect” of achieving the purpose of administration, rather than it being likely. Hammonds (A Firm) v Pre-Fit USA Ltd. The Monitor must also be satisfied that the company has sufficient funds to carry on its business and meet its obligations as they fall due during the duration of the moratorium. In practice this is likely to be an important question, which we consider below.

Sanctions will be introduced to deter abuse of the restructuring moratorium by directors. The Government has stated that it is considering whether similar sanctions to those in the existing moratorium are available to small and medium sized businesses for the purpose of entering into CVAs that will be required for the restructuring moratorium.

Length of the Restructuring Moratorium

The initial period of a restructuring moratorium will be 28 days. This can be extended by up to 28 days by the company—a result of the consultation. Sanctions will be introduced to deter abuse of the restructuring moratorium by directors. The Government has stated that it is considering whether similar sanctions to those in the existing moratorium are available to small and medium sized businesses for the purpose of entering into CVAs that will be required for the restructuring moratorium.

The Corporate Insolvency Framework Review

In order to be eligible for the restructuring moratorium, the company must not have entered into another restructuring moratorium, a CVA or administration within the previous 12 months, or be the subject of a winding-up order or petition. If a winding-up petition is pending, a company will be precluded from triggering a restructuring moratorium by filing papers at court. However, it may be able to obtain a restructuring moratorium if the court grants permission. This is very similar to the position in an administration. Since the 1980s, this has led to some creditors presenting protective petitions (and in earlier times to taking qualifying floating charges) in order to give themselves a platform to be heard on the application for a moratorium. The difficulty with such a strategy is that the conditions will almost always be fulfilled, and unfair prejudice to the particular creditor is difficult to show. Consequently, while the petitioning creditor will be heard, there might not be much that he can say.

The company must be in a state of “prospective insolvency” such that it will become insolvent if action is not taken. If a company is already insolvent it is not eligible for the restructuring moratorium. It is not clear from the Report what the test for “prospective insolvency” will be in the new legislation, and in particular whether or not it will mirror the requirement that “the company is or is likely to become unable to pay its debts” in order for the Court to make an administration order. However, there is no need for a different test, and it is difficult to conceive of a test that would better fit the concept of “prospective insolvency” than the current test.

The Monitor must be satisfied, on a balance of probabilities, that if the restructuring moratorium is triggered, the prospect of rescue is more likely than not. At first blush this appears to be different to that required by paragraph 12(f) of Schedule B1 Insolvency Act 1986, which is that an administration order must be “reasonably likely to achieve the purpose of administration”. However, this test resulted from excessive caselaw that considered the test “is likely to achieve” which is similar to the language used in the consultation. The Courts have interpreted the current provision to mean that the test is a “real prospect” of achieving the purpose of administration, rather than it being likely. Hammonds (A Firm) v Pre-Fit USA Ltd. The Monitor must also be satisfied that the company has sufficient funds to carry on its business and meet its obligations as they fall due during the duration of the moratorium. In practice this is likely to be an important question, which we consider below.

Sanctions will be introduced to deter abuse of the restructuring moratorium by directors. The Government has stated that it is considering whether similar sanctions to those in the existing moratorium are available to small and medium sized businesses for the purpose of entering into CVAs that will be required for the restructuring moratorium.
The starting point is that for cross-class cram down a junior class of creditors cannot receive any distribution until the dissenting class of creditors has been satisfied in full. To that extent creditors being crammed down retain an element of control in that, whilst they can be forced to take a ‘hair cut’ for the benefit of creditors junior to them. However, the Government says that it also wants the court to be able to confirm a restructuring plan even if it does not comply with the rule that more junior creditors cannot receive a benefit unless more senior creditors are satisfied in full. The court will be able to confirm a restructuring if it is satisfied that it is necessary to achieve the aims of the restructuring, and it is just and equitable in the circumstances to sanction the cram down. This is intended to be a high threshold. For the first time, the court will be able to sanction a scheme (or in this case confirm a restructuring) if, amongst other things, it is necessary to achieve the aims of the restructuring and it is just and equitable to do so. This represents a significant alteration in the balance of power between companies and the holders of ‘fulcrum’ debt. A creditor will not be able to hold out for a better deal safe in the knowledge that if he does not agree there can be no scheme. We expect there to be quite significant litigation about the circumstances in which a scheme that includes a cram down can be approved, particularly if there is a benefit to more junior creditors. It is likely to become an area of significant court development. The Report gives some guidance by drawing comparisons between a cram down and the US ‘Absolute Priority Rule’. This is doubtless because the cram down procedure was designed with Chapter 11 in mind. When a company that has filed for Chapter 11 protection wishes to exit those proceedings, it must obtain confirmation of its exit plan with the court. The US court may only confirm the plan if, amongst other things, it conforms to the Absolute Priority Rule.

The introduction of cram down into schemes of arrangement is a significant development. Whilst companies will want to achieve agreement across all classes where possible, where it is not possible, cram down can cut through it. It will, in some circumstances, be possible to cram down a more senior class and leave some benefit to a more junior class. The availability of cram down will make it easier to achieve agreement because the creditor can no longer simply hold out for the deal he wants in all circumstances. The dissenting creditor will know that if the company is able to show that it is necessary to achieve the restructuring and just and equitable, he can be
There is scope for these proposals to overhaul the UK rescue culture. Suppliers under contracts for the supply of goods and services will be precluded from relying on so-called ‘ipso facto’ clauses. These clauses typically enable a creditor to terminate the contract when the company enters formal insolvency proceedings. Suppliers will still be able to terminate the contract on any other contractual ground. There will also be a carve-out enabling a supplier to apply to the court for permission to terminate the contract on the grounds of ‘undue financial hardship.’ In this case it will be for the court to decide whether, if the supplier were compelled to continue to fulfil the contract, it would be more likely than not to enter an insolvency procedure as a consequence. The court will also consider if it would be reasonable to forgive the supplier from its obligation to fulfil the contract, having regard to the effect of non-supply on the debtor company and its prospects of rescue. There are numerous decisions in jurisdictions that already prohibit ipso facto clauses that demonstrate the utility of precluding their operation, particularly in a rescue context. If a supplier is required to continue supplying the company, the quid pro quo is that the suppliers prevented from relying on ipso facto clauses will be afforded first priority in administration or liquidation. This may incentivise the inclusion of ipso facto clauses in supply contracts, because the supplier will either be entitled to terminate or will receive priority payment for his supplies. For the company it is paying for continued supply.

Ipsa facto clauses

The Report evinces an intention to enact proposals designed to create flexibility for distressed companies. The moratorium for companies seeking to put in place a restructuring agreement goes back to what was intended in 1980. The absence of the requirement that the directors hand over control, balanced with the role of the Monitor is a positive one. The time for the moratorium is too short and should be lengthened to avoid companies continuing to rely on pre-packs. The introduction of the cram down is long overdue. In the context of Brexit, it is noteworthy that the reforms are in line with the terms of the draft EU directive on Insolvency and Restructuring published in 2016, which contains proposals for a restructuring moratorium and cross-class cram downs. The EU Directive is anticipated to be enacted in May 2019, and the UK needs to remain competitive.

There is scope for these proposals to overhaul the UK rescue culture. We anticipate a shift away from convoluted restructurings and pre-packs, often aimed, at least in part, at overcoming the current restrictions and difficulties in the legislation towards a simpler, cheaper and more overtly debtor-friendly environment. However, that will depend upon practitioners embracing the terms and spirit of what could become a new rescue culture. Whether in the long term this will be regarded as a brave new world or another false dawn, only time will tell.
What do retired barristers get up to?

As former member of Chambers Richard Sheldon QC tells us, amid the bassoon and contra-bassoon, concerts and operas, mountain walking and trekking, skiing, cycling, swimming, football and cricket, reading and crosswords, baking etc. there are some habits which die hard...

What do retired barristers get up to?

“...”That’s me!” I said to the usher pointing to my name under “Richard Michael Sheldon v Shell UK Ltd” on the court list. “Are you represented?” she asked.

“No!” I replied. “Fishing on the big fish then, are you? Good luck!”

Three years into retirement I was a world away from my former stomping ground in the Rolls Building and RCI Clerkenwell and Shoreditch County Court may not quite have the same cachet but a part of me was quite looking forward to the trial.

It had all started one Sunday last June when I filled up my car with diesel at the Shell Service Station in Upper Street, Islington with a view to going to Garsington Opera to hear Pelleas and Melisande later that day. Having picked up my elderly parents en route, the car suddenly lost power on the M40 about a mile before the Stokenchurch junction. I was able to crawl along the motorway and down the drive to the Wormsley Estate. The AA identified a faulty fuel injector and the car had to be towed back home. The AA were very accommodating, ordering a taxi to take my parents home and arranging for the car (and me and my wife) to be towed back after the opera had finished. As the AA mechanic pointed out, every cloud has a silver lining and I was able to enjoy rather more nicely matured Chateau La Mission Haut Brion than I had anticipated.

The following morning I took the car to my local garage. After a week the garage, having replaced the faulty fuel injector as identified by the car’s computer, were unable to discover why the engine would not start. With much embarrassment they said they would have to refer the car to Renault West to see if they could identify the problem. Renault West worked on the car for the best part of a week before they reported that the problem was contaminated fuel. The fuel tank had to be drained and all the fuel injectors replaced. I asked for a sample of the fuel to be retained. After 1 week I got the car back and a hefty bill of some £6000. That’s when the fun and games began.

I went to Shell Upper Street armed with a sample of what had been identified as contaminated fuel. The first visit was abortive as nobody was around to deal with the problem. On the second visit I was given a telephone number to call and told to register a complaint that I duly rang the number which was clearly inappropriate (it was aimed at Shell retailers) and ended up talking to someone in Poland with little connection with Shell. I went onto the Shell website and obtained a number for the helpline. I spoke to a woman who assured me that I had come through the right number to deal with my type of complaint and then was asked a series of standard questions. I offered to send the invoices which identified the fuel as contaminated and showed the work carried out and I also offered the sample. I was told that was unnecessary – Shell would carry out its own “detailed” investigations and would report back in 2-4 weeks.

Needless to say, I had not heard anything after 4 weeks and had to send a chaser. A series of emails ensued in which Shell, having come up with the usual flannel about how seriously they take customer complaints, said that they had sold 5600 litres of diesel that day, no other customer had complained and that the sensors indicated that there had been no water contamination. All liability was denied. I repeatedly offered to supply them with the sample of contaminated fuel – no interest was shown. I despatched a letter before action with accompanying documents. I had decided to bring proceedings because I thought that I had more than a 50/50 chance of winning. The cost of issuing proceedings was £405 – and there would be a trial fee of £370 to pay. Pretty good odds against a claim for £1700 (i.e. the garage bills plus the cost of the fuel and of towing the car from the local garage to Renault West). As the proceedings would fall under the small claims jurisdiction there was no risk of my having to pay Shell’s costs unless I acted unreasonably, something I was not worried about. I was also genuinely interested in seeing how the system worked from the user’s point of view. Issuing the claim online was relatively straightforward even to a computer illiterate like myself – no more difficult than buying a pair of trousers. The online claim form required me to summarise my claim in 120 words which in the circumstances was not difficult. The most problematic part was working out the daily rate of interest – to make the calculation easier I upped my claim to £2000 (£7), the balance being a claim for damages for inconvenience.

Solicitors appeared on the scene for Shell. They filed a page defence to my 120 word claim. The first 2 paragraphs give the flavour. I quote:

1. The claimant has failed to prove the wrong defendant. The claim against the named defendant must fail. In light of this, the defendant contends that the claim should be struck out...

2. The claimant has failed to particularise his claim at all. In addition, the claimant has failed to particularise any allegations of negligence or breach of duty against the defendant. The defendant contends that the claim should be struck out as having no prospect of success.

I burst out laughing when I read these paragraphs. As to the first, in my letter before action, I had asked in the concluding paragraph whether the Shell entity with which I had been dealing was the correct entity to sue: correspondence continued with that entity (and with the solicitors representing them who had given no inkling that the entity was not correct). So I knew that would not be a problem. As to the second, in my 120 word summary of my online claim form I had specifically referred to my detailed letter before action (with relevant documents enclosed): so that was water off a duck’s back too. More seriously, this smacked to me of intimidatory tactics: a litigant in person without relevant experience could well have been put off by these pleas. And the general tenor of the defence struck me as more appropriate for the complex fraud claims with which I had dealt in the Chancery Division rather than the small claims court. In the defence nothing was admitted and I was put to proof of everything.
The directions included those for service of the statement. I also had a bit of fun – Shell had ticked the box for mediation; Shell declined. The letter from Shell’s solicitors offering to “settle” was served, so was a “without prejudice” statement – after quite a lot of soul searching as to whether I should. As it turned out at trial, it was in retrospect clearly the right thing to do because the deputy district judge became more and more irate at Shell’s inability to identify the relevant figure. It was then my turn to cross-examine the manager. I was completely unprepared but I had with me a print out which I had picked up from the internet which gave details of the causes of diesel contamination. I had provided Shell’s counsel with a copy in case I wanted to rely on it in court but I was aware that it was in some respects double edged. Cross examination gave me the perfect opportunity to introduce (with reference to the print out itself) the matters on which I intended to rely – thereby preventing Shell’s counsel from relying on the print out. I was well aware that such a line of cross examination was not technically permissible – but we were in the informal process of the small claims court. The cross examination of the manager was not without its funny side. Do you agree that the diesel which is sold in pumps across the UK is required by EU law to contain a minimum of 7% biodiesel? I don’t know. Do you have any reason to disagree? Do you have any reason to disagree with the statement that contamination of biodiesel can occur not just by water but also by solid particulates – which can be one-off occurrences? Do you have any reason to disagree with the statement that contamination of biodiesel can occur not just by water but also by solid particulates – which can be one-off occurrences?

Do you have any reason to disagree with the statement that contamination of biodiesel can occur not just by water but also by solid particulates – which can be one-off occurrences?

I have no reason to disagree. I don’t know – I just sell the stuff.

The judge turned to me and said that his finding that Shell had acted unreasonably opened up the opportunity for me to claim costs over and above the court fees. He was obviously mad at Shell’s behaviour. I decided to lay it on a little by referring to Shell’s litigation tactics, including the “offer” of settlement. By the time I had finished, the deputy district judge had become positively incandescent. “So, what costs would you like to claim?” he asked. “If I don’t have any”, I replied, “I’ve retired so there is no loss of earnings.” “What about travel expenses?” he asked. “I don’t have any – I walked to court this morning”. The judge raised his eyebrows and looked to the ceiling. “Well, how much time did it take you to prepare the case?” I replied. “No more than a day, plus the half day in court for trial.” “I’m going to compensate you for that time at the rate of £50 per day – a total of £750.”

In the proceedings, I claimed £2,000. Judgment was awarded in my favour for £2,756 (which included court fees). I am somewhat ashamed to confess that I don’t think that I ever achieved for a client a judgment for 50% or above and the amount claimed. I have split the £750 between the Personal Support Unit and Amnesty International – the latter specifically to support the victims of the Shell oil spill in the Nigerian delta.

Afternote: my garage later told me that they had quite often had to repair cars allegedly damaged by contaminated fuel but that this was the first time that they were aware of a successful claim having been brought.

Do you have any reason to disagree with the statement that contamination of biodiesel can occur not just by water but also by solid particulates – which can be one-off occurrences?
The setting off of mutual debts is an ancient feature of the law. The Digest of Justinian (compiled in the sixth century AD from earlier Roman legal sources) contains the following definition, which still serves:

“Set-off is a contribution made between a debt and a credit.”

(Dig. 16.1.1. Translation by S.P. Scott, The Civil Law, IV, Cincinnati, 1912.)

Set-off is available under statute (currently s. 42(2) of the Senior Courts Act 1981 and CPR r. 16.6), in equity and under contract, special rules govern banks’ right to combine accounts. These species of solvent set-off are cousins of insolvency set-off, but should not be confused with it. Insolvency set-off raises a distinct set of issues.

Insolvency set-off was first enshrined in English statute in the Bankruptcy Act 1705 (3 Anne, c.17), although it was already present in the common law before this date: Anonymous (1670) 1 Modern 215, 86 E.R. 837, Chapman v Denby (1869) 2 Vernons Cases in Chancery 177. The doctrine has survived in each of the succeeding revisions of English insolvency statute law (except that there was no such provision under the original administration regime: see further Boulton Contracts Ltd v ABB Building Technologies Ltd (2002) 1 BCLC 390). Its current place is as follows: for administrations, s. 14.24 of the Insolvency Rules 2016 (the “2016 Rules”), for windings up, r. 14.25 of the 2016 Rules, and for bankruptcies, s. 323 of the Insolvency Act 1986 (the “1986 Act”).

**Insolvency set-off**

In Stein v Blake (1996) 1 AC 243 at 251, Lord Hoffmann described bankruptcy set-off (the doctrine operates in the same way in all compulsory insolvency proceedings) as follows:

“Bankruptcy set-off – affects the substantive rights of the parties by enabling the bankrupt’s creditor to use his indebtedness to the bankrupt as a form of security. Instead of having to prove with other creditors for the whole of his debt in the bankruptcy, he can set off pound for pound what he owes the bankrupt and prove for at pay only the balance. So in Forster v Wilson (1843) 12 M. & W. 101, 204, Parke B. said that the purpose of insolvency set-off was "to do substantial justice between the parties." Although it is often said that the justice of the rule is obvious, it is worth noticing that it is by no means universal.”

As to the “substantial justice” done by insolvency set-off, it has been said that:

“Where one party has no prospect of paying his debts, it would usually run counter to common notions of good sense and justice to require the other party to pay, as opposed to set off, its debt.”

(Anonymous and Customs Commissioners v Room Systems Ltd (2018) EWHC 2945 (Ch) at [38], David Richards J.)

Under English law, insolvency set-off has the following features (see MS Fashions Ltd v Bank of Credit and Commerce International SA [1993] Ch 425 at 432-3, Stein v Blake at 254-5):

a. It is mandatory, so that its operation cannot be excluded by prior agreement nor by judicial discretion. Stein v Blake at 254, Halesowen Presswork & Assemblies Ltd v National Westminster Bank Ltd (1972) AC 785.

b. It is automatic, so that it occurs at the moment of liquidation with no further procedural step needing to be taken for set-off to take place: Stein v Blake, at 254.

c. It extinguishes the prior causes of action, which it replaces with a net balance taken as at the date of the winding up order: Stein v Blake at 255, MS Fashions at 432.

d. In taking the account the court has regard to events which have occurred since the date of the winding up. MS Fashions at 432.

The creditor who benefits from insolvency set-off bypasses the pari passu principle: she receives 100p in the £1 in respect of the amount of her debt that may be set-off, and need only prove for the balance.

**Availability of Insolvency Set-Off**

Set-off is expressly stated in the relevant provisions of the 1986 Act and the 2016 Rules to apply to **mutual** dealings. It has also been said that the claim against the company or bankrupt must be **provable**. The question of whether **secured** liabilities may be set off has been unsettled in English law for some time. The questions of both mutuality and provability impact on whether set-off is available in respect of such debts.

**Prob provability**

In Re Norman Holding Co Ltd [1991] 1 WLR 30 at 45-6, Mervyn Davies J found that a secured debt was not susceptible to set-off, on the basis that the secured debt had not been brought within the liquidation by means of a proof.

“ harassed creditor he does not (unless he so elects) prove or claim to prove for his debt in the liquidation. He relies on and realises his security. But as an unsecured creditor he must be proved therein. The position is that a creditor with two debts, one secured and the other unsecured, is obliged to submit to set-off in respect of his unsecured debt but is not obliged so to submit as to his second debt, because for that purpose he is not proving in the liquidation.”

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“As a secured creditor he does not (unless he so elects) prove or claim to prove for his debt in the liquidation. He relies on and realises his security. But as an unsecured creditor he proves in the liquidation and so is caught by set-off as to the unsecured debt. I read Rule 4.90 (the predecessor to r. 14.25) as affecting debts proved in the liquidation and not as affecting debts that are elected not to be proved therein. The position is that a creditor with two debts, one secured and the other unsecured, is obliged to submit to set-off in respect of his unsecured debt but is not obliged so to submit as to his second debt, because for that purpose he is not proving in the liquidation.”

“Having regard to the considerations set out above I take the view, with some hesitation, that while rule 4.90 set-off applies to an unsecured creditor who proves in the liquidation, that creditor is not obliged to bring into account any secured debt owing...”
FEATURE ARTICLE: INSOLVENCY SET-OFF AND SECURED DEBTS

to him by the insolvent company if the secured debt is not proved in the liquidation. As I have said, rule 4.90 affects debts proved in the liquidation but does not affect debts that are elected not to be proved.

It is not controversial that a secured creditor may elect to abandon her security and prove as an unsecured creditor, in which case set-off would certainly operate. Mervyn Davies J deals with the situation where the creditor does not so elect. On this view, by choosing to rely on her security, the secured creditor in effect takes her debt outside the insolvency proceedings, which is concerned with the division of distributable assets among creditors in accordance with their provable liabilities.

This analysis was given support by Rose LJ in an obiter comment in Bank of Credit and Commerce International SA v Stewart (in Liquidation) (No.8) [1996] Ch 245, at 256:

"It has been said many times that the right of set-off in bankruptcy is a rule as to debts and liabilities provable. It was on this basis that section 39 of the Bankruptcy Act 1869 and its successors were made applicable in companies winding up: see Mersey Steel and Iron Co. Ltd. v Naylor, Benson & Co. (1884) v App.Cal. 414, 417-418. In In re Charge Card Services Ltd. [1987] Ch 628-629 that there was “nothing at all” to do with the personal rights of the creditor or the proprietary rights of the insolvent company, which is only the latter that are obiter). He continued (\[185\]-\[186\]):

"The reason, it seems to me, why In re Charge Card Services Ltd. v Blake [1996] AC 243, 252–255. Gye v Mcintyre (1991) 17 CLR 609, as follows:

"I can see no good reason why a debt owing by the creditor to the company which is or would be non-provable in the creditor’s insolvency should thereby be disqualified from being set off under rules 4.90 to 4.95. The finding was unsurprising, and fair dealing which underlie” the set-off provisions “require that a set-off be allowed in such circumstances.

As it is now clear that non-provable debts are capable of being set-off, the reasoning in Re Norman Holdings on the inapplicability of set-off to secured debts is no longer to the point.

Mutuality

A recent decision of Tottle J, sitting in the Supreme Court of Western Australia, Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (In Liquidation) [2017] WASC 152, affirmed the non-application of set-off to secured debts in an insolvency for a different reason, namely that an attached security interest is a proprietary right, and the proprietary nature of this right, as against the unsecured debt of the insolvent company, a merely personal right and a claim under a personal right and a claim against a man’s money shall not be applied to pay another man’s debt.

However, here Sir James Wigram was not referring to a claim under a personal right and a claim under a personal right and a claim against a man’s money shall not be applied to pay another man’s debt.

As it is now clear that non-provable debts are capable of being set-off, the reasoning in Re Norman Holdings on the inapplicability of set-off to secured debts is no longer to the point.

Proof is a voluntary procedure... set-off operates automatically

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It is not controversial that a secured creditor may elect to abandon her security and prove as an unsecured creditor, in which case set-off would certainly operate. Mervyn Davies J deals with the situation where the creditor does not so elect. On this view, by choosing to rely on her security, the secured creditor in effect takes her debt outside the insolvency proceedings, which is concerned with the division of distributable assets among creditors in accordance with their provable liabilities.

This analysis was given support by Rose LJ in an obiter comment in Bank of Credit and Commerce International SA v Stewart (in Liquidation) (No.8) [1996] Ch 245, at 256:

"It has been said many times that the right of set-off in bankruptcy is a rule as to debts and liabilities provable. It was on this basis that section 39 of the Bankruptcy Act 1869 and its successors were made applicable in companies winding up: see Mersey Steel and Iron Co. Ltd. v Naylor, Benson & Co. (1884) v App.Cal. 414, 417-418. In In re Charge Card Services Ltd. [1987] Ch 628-629 that there was “nothing at all” to do with the personal rights of the creditor or the proprietary rights of the insolvent company, which is only the latter that are obiter). He continued (\[185\]-\[186\]):

"The reason, it seems to me, why In re Charge Card Services Ltd. v Blake [1996] AC 243, 252–255. Gye v Mcintyre (1991) 17 CLR 609, as follows:

"I can see no good reason why a debt owing by the creditor to the company which is or would be non-provable in the creditor’s insolvency should thereby be disqualified from being set off under rules 4.90 to 4.95. The finding was unsurprising, and fair dealing which underlie” the set-off provisions “require that a set-off be allowed in such circumstances.

As it is now clear that non-provable debts are capable of being set-off, the reasoning in Re Norman Holdings on the inapplicability of set-off to secured debts is no longer to the point.

Mutuality

A recent decision of Tottle J, sitting in the Supreme Court of Western Australia, Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (In Liquidation) [2017] WASC 152, affirmed the non-application of set-off to secured debts in an insolvency for a different reason, namely that an attached security interest is a proprietary right, and the proprietary nature of this right, as against the unsecured debt of the insolvent company, a merely personal right and a claim under a personal right and a claim against a man’s money shall not be applied to pay another man’s debt.

However, here Sir James Wigram was not referring to a claim under a personal right and a claim under a personal right and a claim against a man’s money shall not be applied to pay another man’s debt.

As it is now clear that non-provable debts are capable of being set-off, the reasoning in Re Norman Holdings on the inapplicability of set-off to secured debts is no longer to the point.
pattern involving the passing of an estate through death and then the bankruptcy of the administrator, the claim involved cross-debts (what is remarkable about the case is that the judge found the right to set-off in equity rather than in statute, raising the issue – beyond the scope of this article and of primarily academic interest – of whether there exists a non-statutory doctrine of insolvency set-off).

With respect to the learned Australian judge, the argument that the security destroys mutuality does not overcome the objection of the editors of Totty, Moss & Segal: Insolvency (Sweet and Maxwell, 2018), H6-04.1 to the idea that security stands outside a liquidation: “[T]he fact that secured assets stand outside the scheme of insolvency distribution is neither here nor there because the set-off is not against any secured assets, but against the debt secured. A secured debt is a debt all the same.”

A secured debt is a debt which gives rise to a property right, but it does not for this reason lose its character of debt. It is well established that mutuality is destroyed where the beneficial interest of a cross-claim is held by someone other than the creditor: “My view is this, that, the account standing in the names of the brother and sister, the case could not have been brought within the rules of equitable set-off or mutual credit, unless the brother was so much the person solely beneficially interested that a Court of Equity, without any terms or any further inquiry, would have obliged the sister to transfer the account into her brother’s name alone.”

[Re Willis, Percival & Co, ex parte Morier (1870) 12 ChD 431 at 432 per Bevan J] This decision was not overruled by Stavin v Blake: Bank of Credit and Commerce International SA [in liq.] v Prince Fahd bin Salman Abdul Aziz Al-Saud [1997] B.C.C. 69 at 70. However, Be Morier deals with cross claims between a debtor and a creditor where C held the benefit of the claim on trust for A. It does not dispose of a situation where there is a cross-claim with a secured debt, that is, where C’s claim against D is the assertion of a real right in D’s property.

Conclusion

With respect to the learned Australian Judge, it is therefore submitted that the better view (and the one which, following the judgment of Lord Neuberger in Lehman (No 4), should prevail in English law) is that of Dillon LJ in MS Fashions at 446:

“It is common ground that where there are such mutual credits, mutual debts or other mutual dealings the set-off is mandatory and cannot be excluded by any contract between the parties: see Halesowen Presswork & Assemblies Ltd. v National Westminster Bank Ltd. [1972] A.C. 785. If there are indeed mutual credits or mutual debts or mutual dealings between a company, or a bankrupt, and a creditor, then the set-off applies notwithstanding that one or other of the debts or credits may be secured. See, for instance, the judgment of Lord Selborne L.C. in Ex parte Barnett; In re Deveze (1874) L.R. 9 Ch. App. 293 and the judgment of Dixon J. in Hiley v. Peoples Prudential Assurance Co. Ltd. [1938] 60 C.L.R. 468, 498. Dixon J. added: “To the extent that the secured debt is answered by set-off the security is freed.”

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FEATURE ARTICLE: EUROLAND: EUROPEAN UNION (WITHDRAWAL) ACT 2018

The Act has some key provisions affecting insolvency and restructuring law which are due to take effect on and after “exit day”, defined in Section 20 of the Act as “29 March 2019 at 11.00 p.m.”. As expected, Section 1 repeals the European Communities Act 1972 “on exit day”. Section 2 preserves, subject to what follows below, “EU-derived domestic legislation”, defined so as to include the UK implementation of reorganisation and winding-up Directives relating to banks and direct insurers.

Section 3 of the Act preserves as part of domestic law on and after exit day “direct EU legislation” including “any EU Regulation”. Accordingly the Recast Regulation on Insolvency Proceedings 2015/848 of 20 May 2015 will remain in force, subject to what follows below.

In the case of direct EU legislation such as the Recast Regulation, it is only the English language version that is to be brought into English domestic law. Section 4(4). But other language versions can be used for the purposes of interpreting the Regulation. This is an oddity, since under EU law all language versions are equally authoritative and to that extent EU law is not being preserved by Section 3.

The principle of the supremacy of EU law over domestic law continues to apply after exit day in relation to EU law as it stands prior to exit day, but the principle of supremacy of EU law does not apply to any enactment or rule of law passed on or after exit day. Section 5, save that pursuant to Section 9(3) the supremacy of EU law is preserved in relation to a modification made after exit day of an enactment or rule of law passed or made before exit day “… if the application of the principle is consistent with the intention of the modification”.

The Act preserves EU law as at exit day, so that if there were a Regulation amending the Recast Insolvency Regulation, that would have no effect in English law unless the change is also made by UK legislation: see Section 7.

In interpreting retained EU law, UK courts will not be bound by any principles laid down or any decisions made on or after exit day by the Court of Justice of the European Union (CJEU). Section 6(1). Moreover, references to the CJEU are cut off on or after exit day. Section 6(3). One oddity in relation to Sections 5 and 6 is the use of the expression “on or after exit day”. Since “exit day” is defined in Section 20 not merely as a “day” but as “29 March 2019 at 11.00 p.m.” it is not entirely clear what “on” exit day means in relation to 29 March 2019. Thus if the EU passes some legislation modifying the Recast Insolvency Regulation on 29 March 2019 itself, but prior to 11.00 p.m. UK time (midnight in Brussels), it is not at all clear whether such a modification or decision is made “on” exit day. It would actually be more logical to read the phrase “on or after exit day” as being at or after 11.00 p.m. on 29 March 2019.

Recast Regulation 2015/848 on Insolvency Proceedings, as well as the UK implementation of the banking and insurance reorganisation and winding up directives, will continue to have effect after 11 p.m. on 29 March 2019, subject to what follows below.

The interpretation of, for example, the Recast Regulation and the implementation of the Directives is to be decided “in accordance with any retained case law and any retained general principles of EU law”. Section 6(1) of the Act. However, pursuant to Section 6(4) the Supreme Court is not bound by any retained EU case law, although in deciding whether to depart from it, the Supreme Court must apply the same test as it would in deciding whether to depart from its own case law. To that extent again the principle of retaining EU law in the same state as before the exit from the EU has been breached. Incidentally, “retained EU case law” is defined in Section 6 sub-section (3) as referring to “any principles laid down by, and any decisions of, the CJEU … as they effect in EU law immediately before the exit day …” Likewise, by Section 6(7) “retain general principles of EU law” refers to general principles of EU law as they had effect “… immediately before exit day …”.

The above is however only a prima facie situation as at the time of leaving the EU. The real position will be decided, not by Parliament but by Ministers in the light of the outcome of the negotiations both for the so-called “implementation period” (the transition phase to the end of 2020) and what the Act in Section 13 refers to as the “negotiated withdrawal agreement” and the “framework for the future relationship”.

Thus for example in a “no deal” scenario where no agreement has been reached, there would be a breach of reciprocity at the time of exit. The recast Regulation on Insolvency Proceedings and the Banking and Insurance Reorganisation and Winding-up Directives would apply to the UK but not the EU. The UK would be bound for example to recognise and give effect to a German main insolvency proceeding pursuant to the Recast Regulation but German courts would not have any obligation under the Regulation to recognise, for example, a secondary proceeding in respect of the same debtor in the UK. As a result of this lack of reciprocity, under Section 8 of the Act the relevant Minister can simply change the legal position in the UK in relation to the Regulation or the Directives by using the notorious “Henry VIII powers”, described in this context, oddly, as being to “… prevent, remedy or mitigate … any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU”. The so-called “deficiency” is defined as including a situation where reciprocal arrangements have ceased to exist, apart from during the proposed implementation period to the end of 2020. Thus, it seems likely that either immediately upon exit (in a “no deal” scenario) or subsequently at the end of the implementation/transitional period the Recast Regulation and/or the UK implementation of the Directives will cease to be part of English law.
The aim of the UK government is to do some kind of deal, both in relation to the implementation/transitional phase to the end of 2020 and thereafter. Thus, in the worst-case scenario where there is no deal, even as to an implementation period, we need to be ready for a potential situation where reciprocity is lost on 20 March 2019 at 11.00 p.m. which, at a minimum, would mean that unless the EU 27 made transitional arrangements the UK would cease to be able to rely on the Recast Regulation or the Directives in EU 27 countries and may well lose the Recast Regulation and/or implementation of the Directives by the Government using its Henry VIII powers. Of course, the aim of the UK Government is to do some kind of a deal both in relation to the implementation/transitional phase to the end of 2020 and thereafter, and it is confident of achieving this. Even in that event, it is currently unclear whether and to what extent the Recast Regulation or the UK implementation of the Directives will survive beyond the implementation/transition stage. Since “nothing is agreed until everything is agreed”, the fundamental uncertainty continues and the only certainty is what would happen in a “no-deal” scenario, which cannot be wholly discounted. To sum up, if we were to ask the question: “What will happen on exit day?”, the answer remains “we don’t know.” This will remain the case while the status of the negotiations is that nothing is agreed (since not everything is agreed) and therefore nothing is known for certain. The effect of the Withdrawal Act 2018, despite its quirks and oddities, is to leave things mainly as they are, but entirely subject to change, depending on the outcome of the negotiations. We are hurting towards a date, only a few months away, when either the EU law relating to insolvency will continue as before or not, entirely depending on the wholly unknown and unforeseeable outcome of the present negotiations. This brings us back to Parliament trying to have a “meaningful say” in these matters, for which alleged purpose there are now specific provisions in the Act. If there is no deal and the Prime Minister makes a statement before the end of 21 January 2019 that no agreement in principle can be reached on the arrangements for withdrawal and the framework for a future relationship, a Minister must make a statement as to how the Government proposes to proceed and put a motion in neutral terms before the House of Commons as well as a motion for the House of Lords to take note of the statement. If no such Prime Ministerial statement is made but at the end of 21 January 2019 there is in fact no agreement in principle a Minister must make a statement setting out how the Government proposes to proceed and make arrangements for a motion in neutral terms for the Commons and a motion for the Lords to take note of the statement. It is not at all clear what would happen next. If a deal is reached on the negotiated withdrawal agreement and the framework for a future relationship, then prior to ratification they must be approved by a resolution of the House of Commons and there must be a motion for the House of Lords to take note of the agreement and framework for which the Lords can have up to five sitting days. An Act of Parliament will have to be passed which contains provision for the implementation of the withdrawal agreement. It is not at all clear from the Act what would happen if the Commons or Parliament as a whole rejected the agreement reached by the Government and/or refused to pass the necessary Act of Parliament. As far as the Withdrawal Act 2018 is concerned, we are definitely exiting the EU on 29 March 2019 at 11.00 p.m. UK time, i.e. midnight in Brussels. This seems to be intended as “red meat” for Brexiteers. However, even that date is in reality uncertain. If need be, it can be amended by a subsequent (and perhaps very short) Act of Parliament for which there is likely to be a majority in both Houses if the exit under Article 50 is delayed with the agreement of the EU 27. The implementation period has the provisional end date of the end of December 2020, that can also be moved by agreement with the EU 27. Truly it can be said that nothing will be clear until everything is clear.

Amendment to Annexes A and B of the Recast Insolvency Regulation

On 6 July 2018, EU Regulation 2018/946 of the European Parliament and of the European Council was published in the Official Journal. This replaces Annexes A and B to EU Regulation (EU) 2015/848 on insolvency proceedings (“the Recast Regulation”). The amended Annexes A and B address recent changes in insolvency laws/procedures in Croatia, Bulgaria, Latvia, Portugal and Belgium. Of note, the amended Annex A includes, in relation to the Republic of Croatia, the “Act on the Extraordinary Administration Proceeding in Companies of Systemic Importance for the Republic of Croatia” (also known as “the Extraordinary Administration Law”). This will now become an “insolvency proceeding” for the purposes of Article 2(a), and will be subject to automatic recognition. The Extraordinary Administration Law has recently been the subject of a contested recognition application in the High Court, where a dissenting creditor, Sberbank, sought to argue (unsuccessfully) that the Extraordinary Administration of Croatia’s largest privately owned company, Agrokor, was not a “foreign main proceeding” for the purposes of the CBIR 2006. With the amendments to Annex A, that dispute (in relation to which permission to the Court of Appeal had been granted) is now academic. William Willson of South Square assisted the Government of the Republic of Croatia with their submission to the European Council.
The title quote is perhaps a strange sentiment for this first article of the new Legal Eye column. But, as with most things in law, things are not necessarily as straightforward as they seem.

One might suppose by the malicious message in this rallying cry, that Shakespeare was not such a fan of us lawyer types. You would not be wrong to take this stance. However, according to a 1950 New York Times article, this line has been misinterpreted as the literal message it seems to be. Instead, the article suggests, this command (delivered by Dick the Butcher in Henry VI, Part II, Act IV, Scene II) should in fact be taken as a compliment to the attorneys and judges of the world who instil a sense of justice in society. A stretch? Maybe. But the reasoning behind this view focuses on who Dick the Butcher actually was - a follower of the rebel leader Jack Cade, who thought that if he disturbed law and order, he could become King. So, killing all the lawyers was seen to be the only way in which society and the monarchy could be brought down.

What was Shakespeare’s relationship with the law? For those avid theatre-goers out there, you may already know that several of Shakespeare’s plays feature a legal theme. Let us not forget Shylock’s demand for a pound of flesh in the trial scene of a Merchant of Venice. Shylock did in fact have a penal bond with conditional defeasance, granting him a pound of Antonio’s flesh upon non-payment by a date which had passed. As Shylock himself submits when putting forward his case:

“The pound of flesh which I demand of him/Is dearly bought, its mine and I will have it./If you deny me, fie upon your Law!”

And in Measure for Measure, each character faces judgment and his own punishment in the true sense (from which the play takes its name). See Matthew 7: 1-2 (Geneva Bible):

“Judge that ye be not judged. For with what judgment ye judge, ye shall be judged, and with that measure ye mete, it shall be measured unto you again.”

In this new regular feature of the Digest, Madeleine Jones and Rose Lagram-Taylor cast their Legal Eye over matters of legal interest, both ancient and modern.

In this edition of the column, Rose explores Shakespeare’s involvement with the law, and the law’s involvement with him.

Even in Henry VI, Part I, a play not typically remembered as having a legal theme, Shakespeare uses the Temple Gardens (which, tucked off Fleet Street in London, can still be enjoyed today) as a setting for one of the most pivotal scenes. Richard Plantagenet picks a white rose from a bush growing in the gardens, coaxing his followers to do the same, whilst Somerset counters by plucking a red rose and calls his supporters to follow. Warwick, in choosing a white rose laments in Act II, Scene IV.

“And here I prophesy: this brawl to-day/ Grown to this faction in the Temple-garden/ Shall send, between the red rose and the white A thousand souls to death and deadly night.”

Even in Henry VI, Part I, a play not typically remembered as having a legal theme, Shakespeare certainly had his own run-ins with the law, and may have narrowly escaped its clutches when he failed to pay his taxes in Bishopsgate in 1595, perhaps explaining why he moved to Southwark the following year. Shakespeare also used the justice of the law to his own advantage, bringing law suits against pirate publishers. However, it is as a witness in a trial at the Court of Requests in 1612 where we see a true glimpse of the real Shakespeare. The case itself involved the family with whom the Bard lodged. They wanted their apprentice to marry their daughter, Mary, which duly took place in 1604. But, in 1612, the then-former apprentice took out an action testifying that he had not been paid Mary’s promised dowry. Shakespeare was called to testify as to his involvement in the saga in which he assisted Mary’s mother in bringing about the match. In the only record of Shakespeare’s own words, he affirmed:

“The said defendant’s wife did solicit and entreat this deponent to move and persuade the said Complainant to effect the said Marriage, and accordingly this deponent did move and persuade the complainant thereunto.”
October 2018

Events round up

On 20 September we held our annual joint litigation forum with Mourant, at Landing Forty Two of the Leadenhall Building.

South Square’s David Allison QC and Peter Hayders, Partner, of Mourant were co–chairs of the well–attended event, with speakers from South Square, Mourant, Allen & Overy, Clifford Chance, Deutsche Bank, Freshfields, Lipman Karas and Macfarlanes LLP.

The afternoon was rounded off by an entertaining keynote address from Lord Daniel Finkelstein OBE, columnist and Associate Editor of the Times, followed by networking drinks. The next edition of the Digest will carry a full summary of the forum.

Past Events

South Square & Mourant Litigation Forum 2018

Did you know?

All beached whales and sturgeons must be offered to the Reigning Monarch pursuant to the Prerogativa Regis 1322 as initiated by Edward II. This was tested in 2004 when Robert Davies, a Welsh fisherman, caught a sturgeon off the coast of Wales and offered it to the Queen. He received a notice back saying the Queen was happy for him to dispose of the sturgeon as he saw fit.

However, this then led to a criminal investigation into the fisherman on the basis that sturgeons are a protected species meaning it is an offence to deliberately catch or kill them. The case was dropped and the sturgeon, named Stanley, now resides in the Natural History Museum in London.

Sources:

“Kill the Lawyers”;
A line misinterpreted,

Why lawyers love Shakespeare,
The Economist,
8 January 2016

Shakespeare and the legal world,
Counsel, June 2016

INTERNATIONAL INSOLVENCY INSTITUTE
18th Annual Conference,
New York

Members of the International Insolvency Institute (“III”) convened at New York University School of Law over 23 – 25 September 2018 for a packed schedule of talks and events. Michael Crystal QC, Mark Phillips QC and Georgina Peters of South Square all attended, with Michael also acting as a panelist on the session on Legal Civilizations. Other sessions included a judicial panel (including former Member of Chambers the Hon. Justice Antony Zacaroli) on recent cross–border cases, and a discussion entitled “Will it be different: are we prepared for the next financial crisis?” A full write-up will be included in the next edition of the Digest.

LEGAL EYE: NEW SERIES

The continuing fascination of Shakespeare and the law has not gone amiss. Numerous books on the topic exist, ranging from 19th century tomes such as J Campbell’s Shakespeare’s Legal Acquirements considered (1859) to the more modern–day studies like R Strier’s Shakespeare and the Law (2012). In fact, interested undergraduates can now take modules on this subject at the likes of King’s College London, Warwick University, and even Harvard. We lawyers are still in awe of the majesty of Shakespeare’s word, the eloquence of which we can only hope to achieve. In 2015, Scott and Ami Dodson published a study which found that Shakespeare was the most quoted of all writers by the then–current Justices of the US Supreme Court, with Antonin Scalia coming out on top as the “most prolific citer and the widest read”. In fact, as pointed out in Robert Peterson’s The Bard and the Bench all 37 of Shakespeare’s plays have been quoted at least once in over 800 judicial opinions in the American courts.

However, the reach of Shakespeare in the law today extends beyond the boundaries of just America. When Oscar Pistorius was convicted of murder, the presiding judge described the case as a “human tragedy of Shakespearean proportion”. Closer to home, during the “Twitter Joke Trial” of Paul Chambers v DPP in 2011, the Lord Chief Justice quoted King Lear in asserting that “social media users are “free to speak not what they ought to say, but what they feel.” And, in the boundary dispute of Strachey v Ramage [2008] EWCA Civ 384, Lord Justice Sedley recited Hamlet’s “little patch of ground that hath no profit in it but the name” when describing the source of contention.

And so whether or not Shakespeare would be happy to see all lawyers dead, this certainly won’t kill our reverence for him.

Sources:

“A line misinterpreted,

Why lawyers love Shakespeare,
The Economist,
8 January 2016

Shakespeare and the legal world,
Counsel, June 2016

The Bard and the Bench

“Human tragedy of Shakespearean proportion”

A 2015 study found that Shakespeare was the most quoted writer by the then–current justices of the US Supreme Court.

The Bard and the Bench

“Human tragedy of Shakespearean proportion”

A 2015 study found that Shakespeare was the most quoted writer by the then–current justices of the US Supreme Court.

The Bard and the Bench

“Human tragedy of Shakespearean proportion”
News In Brief – October 2018

South Square: the magic circle’s chambers of choice

We were delighted to be crowned ‘the magic circle’s barristers chambers of choice’ by The Lawyer this August, based on the number of instructions we received over the last 3 years. The statistic comes from The Lawyer Litigation Tracker which, if you haven’t seen it, provides some interesting insights about which sets work for which firms in which practice areas. The data is drawn from publicly available sources only, predominantly BAILII and firms’ submissions, and while it doesn’t present a complete picture, it does reveal that 64 matters, 28% of the 228 recorded cases which came to South Square, came from the magic circle firms.

It is, of course, wonderful to see our name in lights on an occasion such as this but we were equally pleased, and reassured, to see that a significant element of our work continues to come from a very broad range of clients. Long may that remain so.

Judicial Appointments

South Square is delighted that former Member of Chambers, the Hon Mr Justice Zacaroli, was appointed President of the Upper Tribunal (Tax and Chancery Chamber), with effect from July 2018. He succeeds the Hon Mrs Justice Rose.

The Hon Mr Justice Zacaroli has been appointed President of the Upper Tribunal (Tax and Chancery Chamber)

appeals against certain decisions made by the Financial Conduct Authority, Prudential Regulation Authority, Pensions Regulator, Bank of England, HM Treasury and Ofgem.

Carillion update

On 6 August 2018 agreements were completed to transition the last of the 278 contracts previously provided by the Carillion group to new service providers. This signalled the end of the trading phase of the liquidation, which commenced on 15 January, and which ensured the continued provision of essential public-sector services across hospitals, schools, transport and other key infrastructure with minimal service disruption.

The Official Receiver continues to investigate the causes of failure of the company. However, at the TUC Congress in Manchester in September Unite, Britain’s biggest labour union, called for a criminal investigation into key individuals involved in the collapse, with Gail Cartmail, Unite’s assistant general secretary, stating that “If no laws were broken, then we need better, stronger laws.” Unite did not name which individuals it

Dark Days for Debenhams

Hot on the heels of the August collapse of House of Fraser (eventually bought by Mike Ashley’s Sports Direct) come reports that Debenhams is considering restructuring options with experts at KPMG. These reports follow a long-term slide in Debenhams’ share prices, with its stock falling almost two thirds to below £1, and with hedge-fund short-selling making it the most heavily shorted stock on the London stock market (according to the Financial Conduct Authority).

On 11 September, however, Chairman Sir Ian Cheshire told BBC Radio 4’s Today programme that news that the retail chain may be looking into a restructuring was “simply not true”. Debenhams was founded as a drapers and bonnets and gloves at 44 Wigmore Street in 1778 by William Clark, who opened the first store selling quality fabrics, amounted to a massive £2.6bn. But the single year of losses in 2017/18, with a £655m loss, was the start of the end. Debenhams is owned by the private equity firm Arcadia, which also owns House of Fraser, and the share price has collapsed, from £1.50 to below 13p, and with hedge-fund short-selling making it the most heavily shorted stock on the London stock market (according to the Financial Conduct Authority).

Debenhams

Former payday lender Wonga collapsed into administration on 30 August. Founded in 2005 and offering loans to consumers for 30 days without the need for a formal, lengthy application process the company was one of the first to offer an instant lending application on Apple mobile phones. Wonga claimed to be offering a debt solution that was speedy and convenient for what they declared were tech-savvy consumers who acted in their own best interests. However, the catch was the astronomical, and now infamous, annual interest rates of up to 5,853%, which could in some cases increase the cost of even a small loan taken out for a few days.

Wonga began to attract criticism in 2012 after running adverts that encouraged students with jobs to borrow money for activities such as overseas holidays and festival tickets. However, the reversal of its fortunes began in earnest in 2014 when the Financial Conduct Authority (FCA) upheld or not. In early August, Wonga made a claim but has not received a payout - due to the nature of the business, there is no protection offered to consumers under the Financial Services Compensation Scheme. Anyone who made a claim but has not received compensation is now unlikely to receive a payout - due to the nature of the business, there is no protection offered to consumers under the Financial Services Compensation Scheme.

In a statement delivered at the end of August, Wonga said its board had assessed “all options” and concluded that administration was the only option, with accountantory Grant Thornton called in as administrators.

Wonga no Longer - What went wrong?

Former payday lender Wonga collapsed into administration on 30 August. Founded in 2005 and offering loans to consumers for 30 days without the need for a formal, lengthy application process the company was one of the first to offer an instant lending application on Apple mobile phones. Wonga claimed to be offering a debt solution that was speedy and convenient for what they declared were tech-savvy consumers who acted in their own best interests. However, the catch was the astronomical, and now infamous, annual interest rates of up to 5,853%, which could in some cases increase the cost of even a small loan taken out for a few days.

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(amount he owed fell below £5,000.
The petition raised against him in 2017, however, was dropped when the
assets to £2. This is not the first time that Yorke has faced bankruptcy.
adjourned until October 15 following the dwindling of his company’s
her companies.

Katie Hopkins enters an IVA
Katie Hopkins, the self-styled “most
counteressional columnist” in Britain
has agreed an individual voluntary
arrangement (IVA) with her creditors
in a bid to avoid bankruptcy.
In 2017, Hopkins lost a libel case against
food blogger and poverty campaigner
Jack Monroe after sending two tweets
in which she implied that Monroe
supported the defacement of a war
memorial. Hopkins had confused
Monroe with the columnist Laurie
Penny, and Monroe originally asked
Hopkins to apologise and donate
£5,000 to a migrants’ charity. Hopkins,
however, refused to back down. The
High Court found Hopkins’ tweets
were defamatory and ordered her to
pay £24,000 in damages and £307,000
in legal costs within 28 days.
Hopkins’ Daily Mail column and
LBC show both ended this year
by “mutual consent” and she put
her Devon home on the market in
February this year, selling it for
£950,000 within three weeks.
Ms Hopkins has not commented
publicly on the IVA. She had previously
tweeted “The only thing people in
debt have in common other than bad
money management, is an ability to
blame anyone but themselves.”

Trial of ‘Basil the ghost’
adjoined
In what may be a legal first, the trial of Michael Seed – allegedly ‘Basil the
ghost’ behind the 2015 Hatton Garden heist – has been
adjourned to allow his defence more time to construct their arguments
because of problems that may arise from the recent release of British crime
film “King of Thieves”. The other 5 of the gang of 6 have already been jailed
for a combined 34 years.

Lawcatz
A new TV chat show is to be piloted
on Sky this month: LawCatz. The
aim of the show, apparently, is to
demystify the legal profession by

Primera Air Collapses
Danish leisure airline Primera Air filed for bankruptcy on
Monday 1 October.
The airline specialised in ultra-cheap flights, such as the £69
starting price for tickets on its route from London Stansted
to Boston launched in March this year. On 18 September
Primera invited passengers to fly in “our most spacious
Premium Economy seats” in the brand new Airbus A321neo.
However, less than two weeks later Primera’s Twitter account
tweeted a brief note to say that the airline’s operations had
been suspended. Stranded passengers predictably responded
with surprise and not-a-little outrage.
Primera claims that aeroplane maker Airbus is partly to
blame for its collapse for failing to deliver the new Airbus
A321 on time this summer, ready for flights to the US.
The company then had to lease other, older, planes from
National Airlines at the last minute, a move that cost it
£17.78 million. These older aircraft were unable to make
the journey non-stop as advertised but had to stop in
Iceland to refuel. Some of the leased planes also had to be
grounded because of engine trouble.

Airlines are risky business. Last year, out of 79 new
airlines, 25 failed. And even long-established companies
like Monarch in the UK are not immune, the company
went into administration in 2017, leaving nearly 100,000
passengers stranded.

‘Lord Harley of Counsel’
bankrupt
The career of solicitor-advocate Alan
Blacker, the self-styled ‘Lord Harley of
Counsel’ who first came to public
attention in 2014 when criticised by a
judge for looking like “something out of
Harry Potter” and for wearing medals and
memorial ribbons on his gown, has concluded with his personal
bankruptcy.
Struck from the roll of solicitors by
the Solicitors Disciplinary Tribunal
(SDLT) in 2016 for, among other things,
a variety of inaccurate and misleading
statements regarding his professional
memberships and academic qualifications, the Solicitors Regulation
Authority filed a petition to bankrupt
Blacker at Manchester County Court in
March 2018.
Blacker had been ordered to pay
an initial £65,000 costs by the SDLT
and, following an
unsuccessful bid
for a fresh hearing
into the case, he
was also ordered
to pay a further £1,500
to cover further
regulatory costs.

Former partners, Dwight and Katie,
face bankruptcy
Former football Dwight Yorke, and his erstwhile partner, TV personality
Katie Price, are both at risk of bankruptcy.

News in brief
ENTER THE OCTOBER 2018 SOUTH SQUARE CHALLENGE AND YOU COULD WIN A MAGNUM OF CHAMPAGNE!

Welcome to the October 2018 South Square Challenge. Your task for this seasonal challenge is to identify the subjects in the pairs of images and what unites them, and the common theme which unites all eight pairs! As ever, the prize for the winner (drawn from the wig tin if we have more than one correct entry) is a magnum of champagne and a much-coveted South Square umbrella.

1. I – George Savile, 1st Marquess of Halifax
2. K – Jeremy Bentham
3. A – Dr Allan Woodcourt in Bleak House (played by Richard Harrington)
4. J – William Pitt (although the quote was originally attributed to John Locke)
5. F – Louis XIV
7. G – Cicero
8. E – Theodore Roosevelt
9. C – Franz Kafka
10. D – Aristotle
11. H – Oscar Wilde

The winner, drawn this time from a bulging wig tin, is Leah Alpren-Waterman of Watson Farley & Williams LLP, to whom we send our congratulations, a magnum of champagne and a South Square umbrella.

MARCH CHALLENGE

The answers to the March 2018 challenge were:

1. 1 – George Savile, 1st Marquess of Halifax
2. 2 – Jeremy Bentham
3. A – Dr Allan Woodcourt in Bleak House (played by Richard Harrington)
4. J – William Pitt (although the quote was originally attributed to John Locke)
5. F – Louis XIV
7. G – Cicero
8. E – Theodore Roosevelt
9. C – Franz Kafka
10. D – Aristotle
11. H – Oscar Wilde

The winner, drawn this time from a bulging wig tin, is Leah Alpren-Waterman of Watson Farley & Williams LLP, to whom we send our congratulations, a magnum of champagne and a South Square umbrella.
Diary dates

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

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>25 October 2018</td>
<td>Chambers Bar Awards</td>
<td>Hilton Park Lane, London</td>
</tr>
<tr>
<td>7 November 2018</td>
<td>INSOL International Hong Kong One Day Seminar</td>
<td>Four Seasons, Hong Kong</td>
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<tr>
<td>19 November 2018</td>
<td>RISA Conference 2018 in association with South Square</td>
<td>Ritz Carlton, Grand Cayman</td>
</tr>
<tr>
<td>2-4 April 2019</td>
<td>INSOL Singapore</td>
<td>Sands Expo and Convention Centre, Singapore</td>
</tr>
</tbody>
</table>

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

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

‘An unrivalled collection of the best talents currently at the Bar.’

LEGAL 500

Your future in commercial law

Pupils are drawn to South Square for our reputation as a top commercial set and the opportunity to learn from leading lights at the Bar. Our barristers advise on a wide range of commercial disputes and have acted in many of the most high-profile insolvency, restructuring, banking, company and fraud-related cases of recent times.

‘The pupil supervisors have been brilliant; very friendly and supportive throughout the year, always willing to answer any questions I had or to discuss a point of law.’

ROSE LAGRAM TAYLOR, PUPIL (2017)

We are looking to meet exceptionally talented and ambitious candidates for our various pupillage programmes.

VISIT US AT THE CITY LAW FAIR TO FIND OUT MORE
‘The set is highly regarded internationally, with barristers regularly appearing in courts around the world.’

Company/Insolvency set of the year, winner 2017
CHAMBERS BAR AWARDS

Insolvency set of the year, shortlisted 2017
LEGAL 500 BAR AWARDS

Practice areas

- Insolvency & Restructuring
- Commercial Litigation & Arbitration
- Banking & Finance Litigation
- Company Law
- Mediation
- Sport
- Insurance
- Offshore
- Civil Fraud
- Trusts & Property

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

Sectors

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

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

Michael Crystal QC  
Christopher Brougham QC  
Gabriel Moss QC  
Richard Hacker QC  
Mark Phillips QC  
Robin Dicker QC  
William Trower QC  
Martin Pascoe QC  
Fidelis Oditah QC  
David Alexander QC  
Glen Davis QC  
Barry Isaacs QC  
Felicity Toube QC  
Mark Arnold QC  
Jeremy Goldring QC  
David Allison QC  
Tom Smith QC  
Daniel Bayfield QC  
John Briggs  
Adam Goodison  
Hilary Stonefrost  
Lloyd Tamlyn  
Richard Fisher  
Stephen Robins  
Marcus Haywood  
Hannah Thornley  
William Willson  
Georgina Peters  
Adam Al-Attar  
Henry Phillips  
Charlotte Cooke  
Alexander Riddiford  
Matthew Abraham  
Toby Brown  
Robert Arney  
Andrew Shaw  
Ryan Perkins  
Riz Mokal  
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Stefanie Wilkins  
Lottie Pyper