Digest

SOUTH SQUARE

Artificial Intelligence in English Law

Professor John Armour and Robin Dicker QC outline an ambitious programme of research into the potential application of AI to English law

Brexit: Deal or no Deal?
The third instalment by Mark Phillips QC on the ongoing Brexit saga

India's Revised Insolvency Framework: Too fast from too slow?
An update on the current insolvency regime in India, and changes brought about by the Insolvency and Bankruptcy Code 2016

www.southsquare.com

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

In this issue

Designed and produced by Creative Interpartners, London

SOUTH SQUARE

From the Editors

William Willson and Marcus Haywood

Welcome to first edition of the South Square Digest for 2019

The four months since the last edition of the Digest was published in October 2018 have seen the handing down of judgments in a number of important cases in which members of chambers have been involved, including *Re OJSC International Bank of Azerbaijan* (where the long standing rule in *Gibbs* and its interrelationship with the Cross Border Insolvency Regulations 2006 was considered by the Court of Appeal), *Re Noble Group Limited* (concerning a highly complicated restructuring, involving an English scheme of arrangement of one of the world's biggest commodity traders), *Lehman Brothers Australia v Lomas* (where Hildyard J considered the scope of the rule in *ex parte James*) and *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* (where the Court of Appeal gave guidance on the interplay between construction adjudication and insolvency regimes).

In wider news, Brexit continues to dominate the headlines. As at the time of writing, "exit day" remains 29 March 2019. However, there remains no consensus. On 15 January 2019, an overwhelming and decisive majority of MPs rejected the Withdrawal Agreement negotiated between the EU and the UK government. Then, on 29 January 2019, with just 59 days to go until "exit day", MPs narrowly passed a government-backed amendment, tabled by Graham Brady MP, proposing the replacement of the Irish border "backstop" with unspecified "alternative arrangements". Theresa May now remains engaged in attempts to re-open talks with the EU to get changes to the "backstop". It remains impossible to predict what the future of Brexit will be.

In equally unsettling news, the post-Christmas period saw a number of further high street insolvencies including the appointment of administrators in relation to HMV, Oddbins and Patisserie Valerie, together with the announcement that the UK economy had expanded at its slowest annual rate in six years in 2018.

Against this background of uncertainty, this edition of the Digest contains a number of topical articles. Professor John Armour of the University of Oxford and Robin Dicker QC consider the topic of artificial intelligence (AI) in English law. AI, once a notion confined to science fiction novels, movies and research papers, is now making a tremendous impact on society. Whether we are aware of it or not, AI already pervades much of our world, from its use in banking and finance to electronic disclosure in large scale litigation. The application of AI to English law raises many interesting questions, a number of which will be explored by a programme of research being undertaken by an interdisciplinary team of academics at Oxford, as John and Robin explain.

Ever topical, Mark Phillips QC continues his Brexit series with an article which discusses the possible frameworks for cross-border insolvencies and schemes of arrangement following the UK's exit from the EU.

Meanwhile, Cyril Shroff and Dhananjay Kumar of Cyril Amarchand Mangaldas together with Mark Arnold QC and Matthew Abraham consider India's recently revised insolvency framework and the changes that have been brought about in India by the Insolvency and Bankruptcy Code 2016, a landmark event for the Indian insolvency regime.

Following its recovery from Hurricane Irma, Brian Child and Matthew Freeman of Campbells, review some recent developments in the British Virgin Islands' legal market.

Closer to home, in the first of a series of articles by Simon Mortimore QC tracing the history of South Square from its origins to the present day, Simon provides a lively and fascinating account of the early career of Cyril Salmon KC and the beginnings of chambers.

In his regular "Euroland" piece, Gabriel Moss QC reflects on the judgment of Snowden J in *Re M2 Property Invest Limited* which considered the interrelationship between creditor protection and the EU Directive on cross-border mergers. David Alexander QC and Adam Goodison consider the unfair prejudice legislation and recent case law on shareholder disputes. And Jeremy Goldring QC considers the Court of Appeal's judgment in *Re OJSC International Bank of Azerbaijan.*

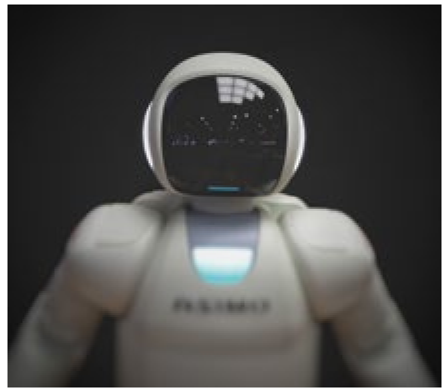
For an alternative window onto the legal world, Madeline Jones' "Legal Eye" turns to the topic of anthropology and the law and asks *"Are you a rainmaker?"* Finally, we have the ever-popular South Square Challenge, which for this edition challenges you to match the judge with the correct hobby...

It goes without saying that if you have any feedback to give us in relation to the Digest – positive or negative – we would be delighted to hear from you.

Many thanks to all for their contributions. As always, views expressed by individual authors and contributors are theirs alone.

We hope you enjoy this edition of the Digest. 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.

Marcus Haywood **and** William Willson



CherryX per Wikimedia Commons

© International Bank Azerbaijan

Artificial Intelligence in English Law: A Research Agenda

Artificial intelligence (AI) is attracting an enormous amount of attention in the media and public discourse. Well-publicised recent successes for AI have included self-driving cars and self-teaching board game champions.

Economists see AI as a nascent general purpose technology, capable of transforming working patterns in professional sectors, including law, in a way that some liken to the impact of the industrial revolution on manual labour.[1] This disruption can bring great efficiencies, but also displace many human employees.[2]

PROFESSOR JOHN ARMOUR, OXFORD UNIVERSITY

ROBIN DICKER QC

Legal services are a major contributor to the UK economy, accounting in 2016 for 1.5% of domestic GVA and generating a trade surplus of £4bn.[3] If implemented effectively, AI offers opportunities to improve legal services both for commercial parties and individuals. We are collaborating, along with an interdisciplinary team of academics at Oxford and a range of other private sector partners, on an ambitious programme of research into the potential application and limitations of AI to English law. The project, entitled Unlocking the Potential of AI for English Law,[4] is funded by an award from UK Research and Innovation as part of its Next Generation Services investment programme.[5] This in turn is one of a number of Industrial Strategy Challenge Funds, established to stimulate research partnerships between academia and the private sector in areas of importance to the UK economy.

The research project will investigate several of the (many) important questions raised for law and lawyers by the advent of AI. How is AI being used in legal services, and how does organisational structure and governance affect its implementation? What are the possibilities for the adoption of AI in dispute resolution?

Will lower costs facilitate access to justice? Will there be an impact on quality of provision that means the "justice" thereby provided is lacking in one or more important respects? What trade off, if any, should be adopted between cost and quality? What constitutional and other constraints are there on the use of AI in legal proceedings? Are there technological advances in the pipeline that may further push back the boundary between humans and machines in the future? How is AI adoption affecting job descriptions? What implications are there for the boundaries of professional knowledge, business models in legal services, and the education and training of lawyers and relevant technical specialists? In this article, we provide some background to these research questions along with some very preliminary insights from our work.

What is AI?

AI is not a new concept, the first usage generally being attributed to computer scientists John McCarthy and Myron Minsky in the mid-50s.[6] The convention is to use the term in a functional sense, meaning that an artificial system functions as well as, or better, than a human. Clearly, machines can perform many tasks better than humans that do not involve intelligence, as opposed to strength or endurance. The "intelligence" qualifier therefore can usefully be understood as restricting the comparison to activities for which a human would use their brain – most obviously, processing and analysing information.

The classic assessment of whether a system functions as well as a human is the so-called "Turing test", in which a human is asked to engage in conversation with messages sent through a mechanism that does not reveal whether the party on the other side is human or not.[7] If a human participant cannot distinguish the communications of an artificial system from a human, then the test is passed by that system. To pass a Turing test without any constraints around the type of conversation that could be had, the machine would need to exhibit artificial general intelligence (AGI); that is, as good as human in every dimension of intelligence. Modern AI systems do not come anywhere near AGI. This is—according to experts—anywhere between a decade and two centuries away.[8] Rather, the AI deployed today only has (super) human-level capability in respect of narrowly-defined functions, such as image recognition, driving vehicles in straightforward surroundings, or the classification of documents.

> "We are collaborating, along with an interdisciplinary team of academics at Oxford and a range of other private sector partners, on an ambitious programme of research into the potential application and limitations of AI to English law"

1. See e.g. E Brynjolfsson, D Rock, and C Syverson, 'Artificial Intelligence and the Modern Productivity Paradox: A Clash of Expectations and Statistics' and M Trajtenberg, 'AI as the Next GPT: A Political-Economy Perspective', in AK Agrawal, J Gans and A Goldfarb (eds.), *The Economics of Artificial Intelligence: An Agenda* (Chicago: University of Chicago Press, forthcoming 2019).
2. See e.g. J Furman and R Seamans, 'AI and the Economy' in J Lerner and S Stern, *Innovation Policy and the Economy 2018, Vol 19* (Chicago: University of Chicago Press, forthcoming 2019).
3. TheCityUK, UK Legal Services 2017: *Legal Excellence, Internationally Renowned* (London: TheCityUK, 2017).
4. See https://www.law.ox.ac.uk/research-and-subject-groups/unlocking-potential-artificial-intelligence-english-law/work-packages.
5. https://www.ukri.org/innovation/industrial-strategy-challenge-fund/next-generation-services/.
6. J McCarthy, ML Minsky, N Rochester and CE Shannon, *A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence* (1955) (proposing a "2 month, 10 man study of artificial intelligence", organised around "the conjecture that every aspect of learning or any other feature of intelligence can in principle be so precisely described that a machine can be made to simulate it.").
7. AM Turing, 'Computing Machinery and Intelligence' (1950) 49 Mind 433, 434. A test so formulated "has the advantage of drawing a fairly sharp line between the physical and the intellectual capacities of a man." (ibid).
8. Martin Ford, Architects of Intelligence (Birmingham: Pakt Publishing, 2018), 528-9.

FEATURE ARTICLE: ARTIFICIAL INTELLIGENCE IN ENGLISH LAW

> There have been at least three distinct technical approaches to AI since the birth of the field[9]

Defining AI in this functional way means that no particular restrictions are put on the nature of the computing system used. Indeed, there have been at least three distinct technical approaches to AI since the birth of the field.[9] The first, popular in the 1960s, involved logical rules: the idea was to develop a general-purpose system capable of deriving answers to problems through formal logical reasoning.[10] This approach fell afoul of the problem that deterministic calculation of outcomes becomes exceedingly complex for even moderately challenging real-world problems.

A different tack was taken in the 1980s and 90s, with the advent of so-called "expert systems".[11] These were designed to give human users the benefit of expert answers to problems in an area of practice. The problems and answers – what computer scientists call "domain knowledge" – were characterised with the help of relevant human experts. These were then coded into a system designed to answer questions related to that particular body of knowledge. Expert systems in turn proved quite brittle, however. If the question asked by a user fell outside the system's expertise, it could not give an answer. And moreover, the framing of questions had to be done in terms of the specific syntax of the system. If the user was unable to express themselves in terms the system could understand, then again it would fail. These created roadblocks to the roll-out of such systems.

Recent advances in AI rely primarily on machine learning (ML). This is an approach to computing in which the solution to an optimisation problem is not coded in advance, but is derived inductively by reference to data. The technique relies on applying computing power to very large amounts of data, the availability of which has blossomed in recent years.[12] Progress since 2012 has largely been in a particular type of ML known as deep learning, which involves running multiple layers of representation of the data in series.[13]

The greatest practical successes with ML to date have been in the use of supervised learning techniques.[14] This refers to a process that begins with a dataset that is classified or labelled by humans according to the dimension of interest, known as the training data. The system analyses this dataset and determines the best way to predict the relevant outcome variable (classified by the experts) by reference to the other available features of the data. The nature of the features, and the relationships between them, relevant for predicting the outcomes can be exceedingly complex: the power of ML lies in identifying the optimal mix of input variables. The trained model—that is, the algorithm with the set of parameters that optimised performance on the training dataset—is then put to work on a new test dataset, to see how effective it is at predicting outside the original training sample. These results must now be checked by human experts.

3. Applying AI to Law: Established Applications

One of our research questions is to understand the way in which AI is currently being applied in legal services. The foregoing account reveals two key constraints on the application of ML-based AI to legal contexts. First, the need for a large and relevantly labelled dataset for training the model. And second, the need for consistency between the training dataset and the data on which the trained model is to be used for predictive purposes.

Supervised learning techniques have been enormously effective in image recognition and language translation contexts, where vast quantities of pre-labelled data are available on the internet, and there is high consistency in the format of data. In many legal contexts, however, these conditions may prove more restrictive. Labelling a sufficiently large dataset of legal documents is costly, and the more varied the document types in question, the more difficult it may be to get good results. This means supervised learning techniques have fixed costs to implement, and their generalisability is constrained. They are consequently most useful in contexts where there is a very high volume of very similar material.

3.1 Technology-assisted review

The contexts in which ML-based techniques are now being actively applied in legal services are to identify relevant documents from amongst very large bodies of materials. In contentious matters, this is known as "technology-assisted review" (TAR). The growth of electronically stored information (ESI) means that there are enormous volumes of potentially relevant information for discovery/disclosure in a typical contentious matter. A large contentious matter can easily require review of hundreds of gigabytes of ESI per party.[15] This has triggered a rapid rise in the costs of pretrial discovery relative to overall litigation costs, of which, in the US, over 70 per cent is estimated to be the costs of document review.[16] This in turn has spurred uptake of ML applications in TAR (also referred to as "predictive coding"), which are able to deliver better results than human reviewers.[17] TAR is also increasingly being used in large scale litigation in the UK.

To minimise the costs of training, practice has evolved whereby an iterative training process is deployed: an initial training set is used, the results of the test set are then checked and continuous review of outputs is performed to assist in improving the process as it develops.[18] For TAR in relation to contentious matters, there is no scope for cross-matter application of a trained model, because the relevant identifying criteria are always highly idiosyncratic to the matter.

The use of TAR has been approved in various jurisdictions, including in particular the US; for example by Judge Peck in *Monique Da Silva Moore* v. *Publicis Groupe & MSL Groupe*,[19] and in *Rio Tinto* v *Vale*.[20] In the High Court in England, TAR was identified as a possible approach to the provision of e-disclosure in *Goodale* v *The Ministry of Justice*,[21] but was first specifically approved as a means of providing disclosure only in *Pyrrho Investments Ltd v MWB Property Ltd*.[22] The use of TAR for large scale commercial litigation in the UK is, however, now well established. The pilot of a new disclosure regime in the Business and Property Courts that started on 1 January 2019 contains a sharper focus on the use of new technology. The Disclosure Review Document (DRD) requires parties to consider the use of TAR and states that, where parties have decided against it, particularly if the review universe is greater than 50,000 documents, they must set out reasoning as to why TAR should not be used.[23] There remain issues as to the application of TAR, including the selection of software and the appropriate method of selecting the test datasets and their checking.[24] But such issues are small in comparison to the cost and considerable risk of human error when lawyers are tasked with reviewing vast quantities of electronically stored information.

3.2 AI in due diligence

Similarly, vast reams of documents must also be navigated in the context of transactional due diligence, again making it economic to apply supervised learning techniques. There may be greater scope for cross-matter application of a trained model as respects non-contentious matters, insofar as practitioners are looking for similar things amongst corporate documents in different transactions. The potential for cross-matter application is greatest where the documents are most standardised. Early successes have been in contexts like real estate transactions. However, the applicability to other types of transactions is improving rapidly.

Practitioners using these tools rapidly come to learn that optimising performance involves a trade-off between various metrics.[25] Perhaps the most intuitive is "precision": the proportion of the documents selected by the trained model that are actually relevant to the matter in question. Low precision means that expensive human time must be spent reviewing documents that are not actually relevant – so-called "false positives". However, simply designing a system to maximise precision is not the answer. Another relevant metric is "recall": to what extent does the system capture relevant documents *from the corpus as*

9. See S Russell and P Norvig, *Artificial Intelligence: A Modern Approach*, 3rd ed. (Upper Saddle River, NJ: Pearson, 2010), 16–28.

10 See generally, J Minker, 'Introduction to Logic-Based Artificial Intelligence', in J Minker (ed.), *Logic-Based Artificial Intelligence* (Dordrecht: Kluwer, 2000), 3.

11 See e.g., P Harmon and D King, *Expert Systems: Artificial Intelligence in Business* (New York: Wiley, 1985). For a classic account of their application to law, see R Susskind, *Expert Systems in Law: A Jurisprudential Enquiry* (Oxford: Clarendon Press, 1987).

12 See A Halevy, P Norvig and F Pereira, 'The Unreasonable Effectiveness of Data' (2009) *IEEE Intelligent Systems 8*.

13 See e.g., F Chollet, *Deep Learning with Python* (Shelter Island, NY: Manning, 2018), 8–11.

14 See Ford,*supra* n 8, 186.

15. NM Pace and L Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* (Santa Monica, CA: RAND Corp, 2012), 29–31.

16. Ibid, 42.

17. M Grossman and GV Cormack, 'Technology-Assisted Review in e-Discovery can be More Effective and More Efficient than Exhaustive Manual Review' (2011) 17 *Richmond Journal of Law & Technology* 11; Pace and Zakaras, *supra* n 15, 65–66.

18. See GV Cormack and MR Grossman, 'Evaluation of Machine-Learning Protocols for Technology-Assisted Review in Electronic Discovery' (2014) Proceedings of the 37th international ACM SIGIR conference on Research & development in information retrieval 153.

19. 868 F.Supp.2d 137 (SDNY, 2012).

20. 306 F.R.D. 125 (SDNY, 2015).

21. [2009] EWHC 3834 (QB).

22. [2016] EWHC 256 (Ch).

23. Practice Direction 51U – Disclosure Pilot for the Business and Property Courts, Appendix 2: Disclosure Review Document, 20.

24. See e.g., *Rio Tinto, supra* n 20, at 128; see also SH Kitzer, 'Garbage In, Garbage Out: Is Seed Set Disclosure a Necessary Check on Technology-Assisted Review and Should Courts Require Disclosure?' [2018] *University of Illinois Journal of Law, Technology and Policy 197.*

25. See e.g. Pace and Zakaras, supra n 15, 117–9; *Rio Tinto, supra* n 20, at 130.

FEATURE ARTICLE: ARTIFICIAL INTELLIGENCE IN ENGLISH LAW

"A fast-growing application, and one that may be of particular concern to lawyers worried about being replaced by robots, is the use of technology to predict case outcomes"

a whole. Low recall rates mean that the system generates a high number of "false negatives"—that is, it treats documents as not relevant when they actually are. Focusing simply on maximising precision can often result in a system that appears to be delivering good results ("it only sends me relevant stuff") but in fact is missing out large amounts of relevant material in the process. Determining recall rates requires review not just of the documents selected by the system, but of samples of the underlying dataset.

As the breadth of applicability of supervised learning solutions depends on consistency between documents, there are clearly opportunities for increasing their utilisation by increasing consistency in particular types of contract.

4. Emerging Applications

A fast-growing application, and one that may be of particular concern to lawyers worried about being replaced by robots, is the use of technology to predict case outcomes. Already available are tools that mine and aggregate data from prior disputes to give parties information about the prior record of particular judges and lawyers. These data can then be fed into a supervised learning model to predict outcomes. Early work has produced results achieving in excess of 70 per cent accuracy in predicting success in relation to disputes in the ECHR and US Supreme Court, respectively.[26] However, the very heterogeneous nature of disputes means that there is considerable variation by matter type, and early commercially-available versions of this type of technology are focusing on particular dispute types to achieve better accuracy—e.g. patent, antitrust, etc.[27]

The publicly-available record often only contains the outcome of fact-determination exercises; that is, it does not contain all the evidence submitted by the parties but just the findings of fact made by the decision-maker or statements of agreed facts. This means that early progress is likely to be made in predicting outcomes *given particular facts*. This is a parallel process to the one in which a lawyer might assess the likely outcome by applying the law to the facts. With a supervised learning approach, the AI is not in fact applying the law. Rather, it is modelling statistical relationships between the language in prior disputes to determine the likely outcome in this matter, given the nature of the facts. However, from the standpoint of commercial parties, predicting the likely outcome with a sufficient level of accuracy is often likely to be enough. A prediction permits parties to determine an appropriate settlement value, and avoid the costs of litigation. Of course, the heterogeneity of dispute types mean that there will be likely to be much variation in predictions based even on the application of supervised learning to prior disputes; that variation will impede its utility for settlement purposes.

The application of supervised learning models to precedent data raises a host of important questions, both practical and normative. From a practical standpoint, could commercial parties, rather than simply using supervised learning for estimating outcomes, embed an appropriately-trained model within an arbitral or other dispute resolution mechanism? Such a mechanism would provide a cheap means of resolving disputes that could offer tolerable congruity with the outcomes of human decision-making, particularly for parties frequently involved in disputes, across which individual errors could average out. Moreover, lowering costs automation can also facilitate equality of arms between the parties. The level of accuracy needed to be "tolerable" for commercial parties, interested only in financial consequences of disputes, is likely to be lower than for individuals concerned with issues touching on fundamental rights. This raises challenging questions concerning the mechanisms by which consent may be given to channel a dispute to an automated resolution procedure, and the circumstances under which such a process might be subject to (human) judicial review.[29] And under what circumstances—if any—could the output of such analytics have normative significance in a dispute before a human adjudicator?

A significant limitation in the use of ML-based AI in legal advice is the lack of transparency concerning factors relevant to the prediction. ML can give an expected outcome—and perhaps even a quantum—but generally cannot provide any sort of readily-interpretable explanation behind this. This in turn poses further questions, well-put by Richard Susskind: to what extent do parties actually need legal advice? [30] A "front end" for a system based on ML could be framed in terms of lay questions, to which the user could provide answers, and an outcome is automated. Simple matters such as conveyancing, lease agreements and wills can readily be automated; personal injury could be turned into a liability estimation mechanism, and so forth.

A risk inherent in the application of ML to existing datasets of human practice is that the data may reflect some element of bias in prior decisions against persons in respect of (now) protected characteristics.[31] Given changing attitudes—and law—over time, it seems plausible that such bias is more likely to be present for older decisions. ML applications coded on such data may simply replicate this bias. Because ML cannot explain how results are achieved, it is not possible simply to examine the process of reasoning.[32] Instead, it is necessary to explore other mechanisms for ensuring that the decision is free from discrimination.[33]

A further step, still, would be the application of such technology to the determination of disputes which, at present, are resolved by a judge in court. Could this provide a possible solution to issues raised by the shortage of legal aid or by the inability of SMEs to fund litigation? Attempting to apply existing technology in this way would, however, quickly run into obvious and potentially fundamental obstacles, including where there is a requirement for public hearings or for reasons to be given for any decision. In *Flannery v Halifax Estate Agencies Ltd*,[34] Henry LJ said that the duty of a judge to give reasons is a function of due process, and therefore of justice.[35] Its rationale has two principal aspects. The first is that fairness requires that the parties, and especially the losing party, should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not. However, one may question how far this rationale extends if both parties have agreed to a judgment being given without reasons.

For the moment, at least, it looks unlikely that AI is going to be able to fulfil requirements such as these. A more difficult question may, however, be how one deals with a situation in which, if AI is not to be permitted to be used to adjudicate disputes, the individual will be unable to litigate and thus unable, in any event, to enjoy the benefit of a public hearing and a decision, reasoned or otherwise, on his or her claim. Perhaps a technological solution may emerge. In the future, emerging *semantic systems* approaches in AI research, which seek to combining the structured reasoning of the expert systems approach with the inductive engagement with data of ML, may offer a way to move beyond the "black box" character of current applications. This is an exciting avenue for future research at the intersection of computer science and law.[36]

Conclusion

The application of AI to law raises many interesting and challenging questions, a number of which our research project will explore over the course of the next two years. While the hyperbole associated with AI has surely engendered unrealistic expectations, only a fraction of these need to be met for the changes to be profound. ■

26. N Aletras, D Tsarapatsanis, D Preotiuc-Pietro and V Lampos, 'Predicting Judicial Decisions of the European Court of Human Rights: a Natural Language Processing Perspective' (2016) PeerJ Computer Science 2:e93; DM Katz, MJ Bommarito II and J Blackman, 'A General Approach for Predicting the Behavior of the Supreme Court of the United States' (2017) PLoS ONE 12(4): e0174698.

27. See e.g., https://lexmachina.com/legal-analytics/.

28. Indeed, simple algorithms are already used to resolve most disputes between parties on eBay: see C Rule, 'Designing a Global Online Dispute Resolution System: Lessons Learned from eBay' (2017) 13 *University of St Thomas Law Journal* 354.

29. Conceptually similar questions are raised if AI is used in administrative decision-making: see R Williams, 'Rethinking Deference for Algorithmic Decision-Making', working paper, Oxford University Faculty of Law (2018).

30. See R Susskind, The End of Lawyers? *Rethinking the Nature of Legal Services* (Oxford: OUP, 2010); R Susskind, 'AI, Work and "Outcome-Thinking"', *British Academy Review*, Autumn 2018, 30.

31. Equality Act 2010, s 4.

32. See e.g. TB Gillis and J Spiess, 'Big Data and Discrimination', forthcoming (2019) University of Chicago Law Review.

33. A promising candidate is to use a simulation to test whether the decision would be any different for an individual without the protected characteristic in question: see MJ Kusner, JR Loftus, C Russel and R Silva, 'Counterfactual Fairness' (2017) arXiv.org > stat > arXiv:1703.06856.

34. [2000] 1 WLR 377.

35. *Ibid* at 381–2.

36. see e.g. P Hohenecker and T Lukasiewicz, 'Ontology Reasoning with Deep Neural Networks' (2018) arXiv.org > cs > arXiv:1808.07980. One of the strands of our research project explores their application to legal sources.

Brexit: Deal or no deal?

MARK PHILLIPS QC[1]

It is impossible to predict what the future of Brexit holds, or even whether there will be a Brexit. However, we have two possible frameworks for insolvencies and schemes in the UK and EU. They are incomplete and many would argue unsatisfactory, but on 30 March 2019 one of them may be the basis for UK/EU cross border insolvency and on that basis we should know what they provide.

The first scenario is the adoption of a Withdrawal Agreement that includes the provisions in the Government's draft Withdrawal Agreement in so far as it relates to insolvencies. Despite the Government's historic defeat in relation to the draft Withdrawal Agreement as a whole, unsurprisingly, it's effect on cross border insolvencies did not feature large in the debates. It is a reasonable assumption that, if there is a Withdrawal Agreement, the terms of the draft will be unaffected in so far as it applies to insolvencies. The second scenario is that on 29 March 2019 the UK leaves the EU without an agreement, a so called 'hard Brexit'. I will consider what we know about each possibility.

1. The UK leaves the EU on similar terms to the EU Withdrawal Agreement

There are two new sources to consider if the UK leaves the EU on terms similar to the EU Withdrawal Agreement. First, the Withdrawal Agreement and secondly the Political Declaration on the future relationship between the UK and the EU.

A) The Withdrawal Agreemet

The full title of the Withdrawal Agreement is the "Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018." It is 585 pages long and it was rejected in its current form by Parliament by an historic 230 vote majority. At the time of writing the debate is ongoing. The first impression from reading all 585 pages of the Withdrawal Agreement is the sheer complexity of managing the UK's exit from the EU. What is also clear, and is sometimes overlooked, is that this is a transitional agreement. It is as far as the UK and the EU have got in preparation for a Brexit on 29 March 2019. Amongst the purposes of the Withdrawal Agreement, the preambles record "that the objective of this Agreement is to ensure an orderly withdrawal of the United Kingdom from the Union." The preambles also record that that it is "resolved to ensure an orderly withdrawal through various separation provisions aiming to prevent disruption and to provide legal certainty to citizens and economic operators as well as to judicial and administrative authorities in the Union and in the United Kingdom, while not excluding the possibility of relevant separation provisions being superseded by the agreement(s) on the future relationship."

Whilst there is agreement about some aspects of the UK and EU's future relationship, in the majority of areas there isn't. The Withdrawal Agreement might be categorised as an agreement to agree in good faith. It is difficult to discern quite what the future trading relationship might be, or how the cross border relationship on services might work. In the context of insolvency those questions will make a big difference, but at present we cannot know what the future might hold. What would follow is intense negotiations and discussions to resolve the future relationship. Amongst the areas where there is no substantive agreement at present is insolvency and also the related field of Judicial cooperation in Civil and Commercial matters.

"Ongoing Judicial cooperation in Civil and Commercial matters"

In the Withdrawal Agreement there are a handful of provisions directly relevant to insolvency and insolvency related fields.[2] Under the Withdrawal Agreement the status quo continues until at least 31 December 2020, although it might continue until 31 December 2022.[3] Title VI is concerned with Ongoing Judicial cooperation in Civil and Commercial matters.

The EU Insolvency Regulation

Article 67 is concerned with Jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities. In insolvency the most significant provision is article 67(3)(c), which provides that the EU Insolvency Regulation[4] shall apply to insolvency proceedings, and any action which derives directly from the insolvency proceedings and is closely linked with them[5], such as avoidance actions, provided that the main proceedings were opened before the end of the Transition Period.[6] The effect of article 67(3)(c) is that cross border insolvency in the EU will continue to operate unchanged until new arrangements are agreed.

Rome 1

Article 66 is concerned with applicable law in contractual and non-contractual matters. Article 66(a) provides that Regulation (EC) No 593/2008 (Rome I) shall apply in respect of contracts concluded before the end of the Transition Period.[7] This affects the application of Rome I in the UK rather than the EU because Rome I will continue to apply in the EU to UK choice of law contracts after Brexit as its application is not dependent upon the UK being a Member State.

The Brussels Regulation

Article 67(1)(a) provides that the provisions regarding jurisdiction of the Brussels Regulation[8] shall apply in the UK, as well as in Member States in situations involving the UK, in respect of legal

1. I gratefully acknowledge the assistance and advice given by my colleague Riz Mokal.

2. There will be provisions that come up in an insolvency when the company or individual's business or affairs relate to an area in which the Withdrawal Agreement is prescriptive.

3. See the discussion of article 132 below.

4. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ L 141, 5.6.2015, p. 19).

5. Article 6(1) of the EU Insolvency Regulation.

6. See articles 126 and 132 considered below.

7. The Transition period may be extended under article 132, see below.

8. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1).

FEATURE ARTICLE: BREXIT: DEAL OR NO DEAL?

proceedings instituted before the end of the transition period[9]. Article 67(2)(a) provides that the provisions regarding the recognition and enforcement of judgments of the Brussels Regulation[10] given in legal proceedings instituted before the end of the transition period shall apply in the Member states in situations involving the UK to the recognition and enforcements of judgments given in legal proceedings instituted before the end of the transition period[11].

Extension of the Transition Period

Article 126 provides that the transition or implementation period, "shall start on the date of entry into force of this Agreement and end on 31 December 2020." Article 132 provides that notwithstanding Article 126, the Joint Committee may, before 1 July 2020, adopt a single decision extending the transition period for up to one or two years. This would extend the application of Rome 1, Brussels and the EU Insolvency Regulation. It is therefore possible that these important regulations could continue to apply until 31 December 2022.

The extension of the Transition Period would mean that any new EU Directives or Regulations passed before the end of the Transition Period would apply in the UK.[12] So, for example, if the proposal for the Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures (the proposed EU restructuring Directive) became effective prior to the end of the Transition Period, the UK would be obliged to give effect to it. It is unclear whether or not the EU would consider that the current UK proposals for restructuring[13] adequately gives effect to the proposed EU restructuring directive.

The ECJ

As regards the ongoing jurisdiction of the ECJ, the preambles record that "in order to guarantee the correct interpretation and application of this Agreement and compliance with the obligations under this Agreement, it is essential to establish provisions ensuring overall governance, in particular binding dispute-settlement and enforcement rules that fully respect the autonomy of the respective legal orders of the EU and of the UK as well as the UK's status as a third country." Article 86(2) provides that the ECJ shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the UK made before the end of the Transition Period. Requests for preliminary rulings are made at the moment at which the document initiating the proceedings has been registered.[14] Not only would EU law continue to apply, but requests for preliminary rulings made before the end of the Transition Period, which could be 31 December 2022, would be heard by the ECJ and binding in the UK.

B) The Political Declaration

The Political Declaration on the future relationship between the UK and the EU was endorsed by leaders at a special meeting of the European Council on 25 November 2018. The declaration does not refer to insolvency proceedings or practitioners, but amongst the aspirations set out in the Political Declaration are arrangements creating a free trade area combining deep regulatory and customs cooperation; a level playing field for open and fair competition; arrangements on trade in services and investment; market access ensuring that services providers and investors are treated in a non-discriminatory manner, including with regard to establishment arrangements on professional qualifications; free movement of capital and payments related to transactions liberalised under the economic partnership; and cooperation on regulatory and supervisory matters. Whilst these are general declarations of political intent, they provide some guidance as to how relationships are hoped to operate in insolvency related areas.

2. The UK leaves the EU without a full withdrawal agreement

Whilst the Withdrawal Agreement is transitional, a 'hard' Brexit would, by necessity, also be transitional. The difference would be the extent of what has been agreed beforehand. Thus, for example, the EU has made it clear that it would enter into short term agreements with the UK to permit flights across Europe, transport across Europe, and residents from the UK in Europe and EU countries in the UK to continue to reside where they are on Brexit day. There is no indication however, that the EU and the UK contemplate that, in the event of a 'hard' Brexit on 29 March 2019, any reciprocal agreements would be in place in relation to insolvency matters. In the insolvency field, provision has been made for the arrangements that will no longer apply. That is highly unsatisfactory because there will continue to be new insolvencies across the EU and the many insolvencies presently subject to the EU Insolvency Regulation will need to be completed.

The European Union (Withdrawal) Act 2018

The starting point is the European Union (Withdrawal) Act 2018, which is now in force. Section 3(1) provides that Direct EU legislation[15], so far as operative immediately before exit day, forms part of domestic law on and after exit day. Section 5(1) provides that the principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day. Thus in a 'hard' Brexit, from 11pm on 29 March 2019 EU Regulations would continue as part of UK law, but EU law would no longer have supremacy over UK law. The principle of the supremacy of EU law would only apply so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.[16] If the UK amends an EU regulation, questions of interpretation of EU law would be altered by those amendments.

> "A 'hard' Brexit would, by necessity, also be transitional"

9. The Transition Period may be extended under article 132, see below. This also applies in respect of proceedings or actions that are related to such legal proceedings pursuant to Articles 29, 30 and 31 of the Brussels Regulation, which are concerned with stays of proceedings in courts other than the first seised and the court of the jurisdiction chosen in the contract.

10. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1

11. It also applies to authentic instruments formally drawn up or registered and court settlements.

12. Because they are "Union Law" or "Union Acts". Article 6(1) provides that references to "Union Law" shall be understood as references to Union law, including as amended or replaced, as applicable on the last day of the Transition Period. Article 6(2) provides that references to "Union Acts", are to Union law or provisions thereof that, although replaced or superseded by the act referred to, continue to apply in accordance with that act.

13. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_24_Aug_clean_version__with_Minister_s_photo_and_signature__AC.pdf

14. This can be either in the registry of the Court of Justice or the General Court.

15. This includes EU Regulations.

16. Section 5(2) of the European Union (Withdrawal) Act 2018.

17. Section 6(1) of the European Union (Withdrawal) Act 2018.

18. Section 6(2) of the European Union (Withdrawal) Act 2018.

19. Sections 6(3) and 6(6) of the European Union (Withdrawal) Act 2018.

20. This provision was originally section 7 in the draft Withdrawal Act, but after debate a new section 7 was introduced giving Parliament extensive powers over amendments to EU legislation.

21. Regulation (EU) 2015/848.

22. The application of the EU Insolvency Regulation to proceedings commenced before 29 March 2019 would be unaffected.

As to questions of interpretation, UK courts and tribunals would not be bound by any principles laid down, or any decisions made, on or after exit day by the ECJ, and would no longer be able to refer any matter to the ECJ.[17] However a court or tribunal may have regard to anything done on or after exit day by the ECJ, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.[18] Different provisions apply to the interpretation of unmodified and modified provisions of EU law that become UK law on exit day.[19]

Section 8(1) of the European Union (Withdrawal) Act 2018 provides that a Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU. Section 8(2)(c) provides that deficiencies include where the Minister considers that retained EU law makes provision for, or in connection with, reciprocal arrangements between the United Kingdom or any part of it or a public authority in the United Kingdom, and the EU, an EU entity, a member State or a public authority in amember State, which no longer exist or are no longer appropriate.[20]

The Insolvency (Amendment) (EU Exit) Regulations 2018

In reliance upon section 8 of the European Union (Withdrawal) Act 2018, the Government has published the draft Insolvency (Amendment) (EU Exit) Regulations 2018. These regulations would amend the EU Insolvency Regulation and related legislation[21] on and after exit day.[22] For reasons explained in more detail below, it might be argued that some of the amendments should be considered by Parliament under section 7 of the EU (Withdrawal) Act 2018 because they fall outside section 8.

The amendments to the Insolvency Regulation, in so far as they relate to proceedings in England, are contained in paragraphs 1 to 15. These

FEATURE ARTICLE: BREXIT: DEAL OR NO DEAL?

> The draft Insolvency (Amendment) (EU Exit) Regulations 2018 take a wrecking ball to the system of jurisdiction and recognition that was put together in the EU Insolvency Regulation

amendments would only apply in the UK after Brexit and cannot affect the EU Insolvency Regulation as it applies in the EU27. One oddity is that no amendments have been made to the recitals. The status of the recitals after Brexit is accordingly unclear. They appear to become UK law on 29 March 2019 in their current form and should continue to be a source for interpretation of concepts found in the EU Insolvency Regulation, particularly where those concepts have not been modified. The UK courts would continue to have regard to the rulings of the ECJ and other courts on provisions that remain unaltered. One obvious example is the meaning of the COMI. That is unaltered and so UK courts ought to look at rulings of the ECJ and other European courts in determining its meaning and application. Thus, if a German court and the ECJ determines that the COMI of a debtor is in Germany, the UK courts are likely to reach the same decision.

However, aside from leaving the recitals and the possibility of consistent rulings in relation to common concepts such as the location of the COMI, the draft Insolvency (Amendment) (EU Exit) Regulations 2018 take a wrecking ball to the system of jurisdiction and recognition that was put together in the EU Insolvency Regulation. All the provisions on recognition of insolvency proceedings would be repealed, including the provisions dealing with court to court communication and communication between insolvency practitioners.[23] The provisions relating to the provision of information for creditors and the lodgement of creditor claims would be repealed, as would the provisions relating to groups.[24]

By the Regulations the UK would take an additional ground of jurisdiction over a debtor where either the debtor's COMI is in the UK, or where the COMI is in a Member State and there is an establishment in the UK. Article 1, which presently deals with "scope", would be replaced by a new provision that is stated to deal with "Application and jurisdiction". The new Article 1 provides, with my emphasis added:

23. Paragraph 7.
24. Paragraph 7.
25. Paragraph 3.
26. Paragraphs 16 to 44 and 45
27. Paragraphs 46 to 107.
28. Paragraphs 112 to 132.
29. See the amendments to the Administration of Insolvent Estates of Deceased Persons Order 1986, paragraph 108, the Land Registration Rules 2003, paragraph 109, the Civil Proceedings Fees Order 2008, paragraph 110, and the Pension Protection Fund (entry Rules Regulations) 2005, paragraphs 111.

" **1.** *The grounds for jurisdiction to open insolvency proceedings set out in paragraph 1B are **in addition** to any grounds for jurisdiction to open such proceedings which apply in the laws of any part of the United Kingdom.*

1A. *There is jurisdiction to open insolvency proceedings listed in paragraph 1B where the proceedings are opened for the purposes of rescue, adjustment of debt, reorganisation or liquidation and—*

a) *the centre of the debtor's main interests is in the United Kingdom; or*

b) *the centre of the debtor's main interests is in a Member State and there is an establishment in the United Kingdom.*

1B. *The proceedings referred to in paragraph 1 are—*

a) *winding up by or subject to the supervision of the court;*

b) *creditors' voluntary winding up with confirmation by the court;*

c) *administration, including appointments made by filing prescribed documents with the court;*

d) *voluntary arrangements under insolvency legislation; and*

e) *bankruptcy or sequestration."*

The list of insolvency proceedings that was in Annex A would be replaced so that the 'insolvency proceedings' to which the Regulation would relate would be limited to the five UK procedures in Article 1(1B), including interim proceedings.[25]

There are also ancillary amendments to the Insolvency Act 1986,[26] the Insolvency Rules 2016,[27] the Cross Border Insolvency Regulations[28] and other rules and regulations.[29] The amendments to the Cross Border Insolvency Regulations amend the UNCITRAL Model Law to include a new article 16(2A) that provides that where the EU Insolvency Regulation (as amended) applies, the COMI is to be determined by that Regulation. That is curious because the final sentence of the first paragraph of Article 3(1) of the EU Insolvency Regulation would not be amended, so that the core COMI test in the amended EU Insolvency Regulation, that would apply to the UNCITRAL Model Law, would remain "the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties." From this it would seem that, where the proceedings were in the UK under the amended EU Insolvency Regulations, the Cross Border Insolvency Regulations would be amended to apply the COMI test found in those amended Regulations. Since that test would not be modified from the EU Insolvency Regulation UK courts would have regard to rulings by the ECJ and other European Courts. Under Article 8 of the UNCITRAL Model law, in applying the Model law, "regard is to be had to its intended international origin and to the need to promote uniformity in its application and the observance of good faith". What the UK would do by these amendments is give more prominence to decisions of the ECJ and European courts where the COMI is in the UK or a Member State.

The repeal of provisions that would be reciprocal on the grounds of no reciprocity

The power relied upon is contained in section 8(1) of the EU (Withdrawal) Act 2018, and that gives a Minister power to make provision to remedy or mitigate a deficiency in retained EU law. In the present instance, the deficiency would be in reciprocal arrangements between the UK and the EU or if they were "no longer appropriate". The draft amendment regulations would repeal all of the reciprocal arrangements between the EU and the UK in relation to insolvency proceedings.

FEATURE ARTICLE: **BREXIT: DEAL OR NO DEAL?**

> "It is difficult to understand how communications between courts and insolvency practitioners can make the EU Insolvency Regulation deficient"

However, no distinction has been drawn between provisions that would continue to be reciprocal under the EU Insolvency Regulation after Brexit, and provisions that would not. The draft amendment regulations take no account of the distinction in the EU Insolvency Regulation between Member States and third countries. Whilst the UK would cease to be a Member State, it would become a third country. The provisions that apply to Member States can properly be characterised as reciprocal arrangements between the UK and the EU that would be deficient, because the EU would no longer be giving reciprocal recognition to the UK. However, the provisions that apply to third countries cannot be so characterised. EU Member States would continue to recognise the application of UK law in those areas.

There are provisions in the EU Insolvency Regulation that apply the law of a third country. For example, Article 9 provides that set-off is available where "a set-off is permitted by the law applicable to the to the insolvent debtor's claim." If set off applies in England to an English law claim[30], that would be recognised by the EU Member States. However, the draft amendment regulations would mean that under the amended EU Insolvency Regulation, English courts would no longer recognise a set off permitted by the applicable law of a Member State. Article 17 gives protection to third party purchasers[31] in relation to acts concluded after the opening of insolvency proceedings where a debtor disposes of an immovable asset, a ship, an aircraft or securities. The validity of the disposition is governed by the law of the State within the territory where the immovable asset is or where the register is kept. This is not restricted to Member States and so would continue to apply to assets in the UK or registered in the UK. Notably it would apply to securities registered in the UK. However, the draft amendment regulations would mean that the UK would no longer apply the law of the EU Member state where the immovable asset or the register is kept. Far from the UK repealing provisions of the EU Insolvency Regulation on the ground that reciprocity has been lost, the UK would be repealing provisions in circumstances where Member States would continue to reciprocate. In such circumstances there is an argument that the draft amendment regulations go beyond section 8, at least to the extent that it repeals provisions that would continue to apply in the EU to UK laws.

There are other areas where reciprocity would be lost on the UK ceasing to be a Member State. So, for example, article 8 applies to rights *in rem* in respect of assets situated within the territory of a Member State; article 10 provides that insolvency proceedings shall not affect sellers' ROT rights where at the time of the opening of proceedings the asset is in a Member State; and article 11 concerns the effects of insolvency proceedings on a contract conferring the right to acquire or make use of immovable property. The EU Insolvency Regulation provides that the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market[32]. Paris and Frankfurt will continue to recognise each other's payment and settlement systems. It is hoped that similar reciprocal arrangements would be put in place for the London market. Another area of concern is the effects of an insolvency on contracts of employment. Article 13 provides that the effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment. These provisions would be recognised across the EU27 but no longer in the UK. If this were not dealt with conflicts between the EU27 and the UK on these issues are inevitable.

A further oddity is the repeal of the provisions relating to court to court communication and communication between insolvency practitioners. It is difficult to understand how communications between courts and insolvency practitioners can make the EU Insolvency Regulation deficient. It might be argued that articles 42 and 43 of the EU Insolvency Regulation arise in a particular context that would no longer arise, namely, "the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor", but that is a very narrow view of the utility of such communication. This is an example of where a provision of the EU Insolvency Regulation would be repealed simply because ordinarily they would only arise where the UK was a Member State. A better solution would be to amend the provisions so that such communications between the UK courts and practitioners and EU courts and practitioners continue.

Jurisdiction and recognition of EU Insolvencies in the UK after Brexit

Recognition of EU insolvency proceedings in the UK would no longer be under the EU Insolvency Regulation. Instead they would be recognized under the Cross Border Insolvency Regulations. There are two differences, aside from the nomenclature of "main proceedings" in the EU Insolvency Regulation and "foreign main proceedings" in the Cross Border Insolvency Regulations. The first is that a line of English authorities has held that recognition under the Cross Border Insolvency Regulations is procedural rather than substantive.[33] The second is that recognition under the Cross Border Insolvency Regulations follows an application and is not automatic. In the immediate aftermath of a 'hard' Brexit, the UK would recognise insolvency proceedings brought in the EU27 by applying analogous procedures available in UK insolvencies. That would be the case whether the EU proceedings are in the country of the COMI or where there is an establishment. The test for the COMI would be the same after Brexit as it is now across all EU Member States and the UK. In the longer term it is likely that this restriction will be remedied when the UK adopts the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgements, but that will not be in force before 30th March 2019[34]. Until then, the substantive rules presently applied through the EU Insolvency Regulation between Member States would not be applicable in the UK.

30. Rome I would continue to apply to determining the law of the contract because Rome I is not limited to Member States. It cannot be argued that Rome I should be amended because the UK's status as a Member State or Third Country does not affect its application.

31. Rome I will continue to apply to determining the law of the purchase contract.

32. Article 12 of the EU Insolvency Regulation.

33. Rubin and another v Eurofinance SA and others [2012] UKSC 46.. Re: Pan Ocean Ltd [2014] EWHC 2124 (Ch). Bakhshiyeva (Representative of the OJSC International Bank of Azerbaijan) v Sberbank of Russia & Ors [2018] EWHC 59 (Ch); [2018] 4 All E.R. 964; [2018] Bus. L.R. 1270; [2018] 1 WLUK 212; [2018] B.C.C. 267; [2018] 2 B.C.L.C. 396; [2018] B.P.I.R. 287; Bakhshiyeva (Foreign Representative of the Ojsc International Bank of Azerbaijan) v Sberbank of Russia & Ors [2018] EWCA Civ 2802 (18 December 2018) ([2018] EWCA Civ 2802, [2018] FCA 153, [2018] WLR(D) 784, [2018] 12 WLUK 286. This has arisen in particular in the context of the rule in Gibbs, *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) LR 25 QBD 399.

34. Contained in the Decision of the United Nations Commission on International Trade Law (UNCITRAL) made on 2nd July 2018.

> "The suggestion that the EU27 will recognise UK proceedings simply by turning back the clock to apply the law in each EU country that applied before the EU Insolvency Regulation is wrong. It fails to recognise that the EU Insolvency Regulation is now part of the domestic laws of each EU country"

A view on the UK's proposed 'hard' Brexit amendments

It is difficult to categorise the UK's amendments by reference to a coherent legal theory. What the UK wants to do is make unilateral modifications to concepts of modified universalism that resulted from multilateral international arrangements adopted after years of debate. On a political level there is some irony in the fact that the debate was, in a significant part, contributed to by judges, academics and lawyers from the UK. In the international context, being restrictive in our approach to recognising insolvency processes abroad does the UK few favours when overseas courts consider questions of comity.

Recognition post Brexit of UK proceedings into the EU

I have heard it suggested that the question whether the EU27 will recognise UK proceedings is simply a question of turning the clock back and applying the law in each EU27 country that applied before the EU Insolvency Regulation. That is wrong. What it fails to recognise is that the EU Insolvency Regulation is now a part of the domestic laws of each EU country and that the Regulation applies to aspects of all insolvencies both in Member States and in third countries. The domestic law applicable to the recognition of UK insolvencies and to the impact of insolvencies upon certain rights to property located in the UK, or contracts arising out of the UK, was altered in all EU member states by the EU Insolvency Regulation. After 29th March 2019, the provisions of the EU Insolvency Regulation relating to Member States would cease to apply to the UK. The automatic precedence given to main proceedings where the COMI is in the UK would be lost. EU Member States would not recognise a secondary insolvency proceeding opened in the UK on the ground of an establishment in a UK country. The provisions relating to third countries identified above would continue to apply, and the EU27 would continue to recognise applicable UK laws in those areas.

In addition, there are 4 EU member states that have adopted the UNCITRAL Model law, although they do not include Germany, France or Italy. Greece, Poland, Romania and Slovenia have implemented the UNCITRAL Model Law. UK insolvency proceedings may be recognised and enforced in those countries by an application made to their courts under the local laws giving effect to the UNCITRAL Model Law.

Recognition under the domestic laws of the EU27.

That would leave recognition of UK proceedings under the domestic laws of the EU27. As regards the recognition and enforcement across the EU27 the EU Insolvency Regulation would determine how Member States deal with insolvencies falling within the Regulation. The EU27 would not recognise UK insolvency proceedings or determinations that are inconsistent with the determination of how a debtor's insolvency proceedings fall to be dealt with under the EU Insolvency Regulation. So for example, if an EU country or the ECJ determines that the COMI is in a Member State, it would be a matter of indifference to all EU27 countries if a UK court determined that the COMI is in the UK. If a question arose that was determined under the EU Insolvency Regulation in relation to a third country, the EU27 would apply that determination in relation to the UK. It is only after the application of the EU Insolvency Regulation across all EU27 members, that questions would be determined by a Member State's domestic law. ■

India's Revised Insolvency Framework

Too Fast From Too Slow?

The English Courts have, over the years, been host to a number of disputes involving Indian companies; however, in the last year or so there has been a significant increase in these disputes arising from the insolvency of major Indian companies. For example, there have been numerous cases involving companies in the Essar Steel group, following the decision by the Reserve Bank of India ("RBI") to proceed with insolvency proceedings against Essar Steel India Limited.

As a result of the crackdown on non-performing assets held by Indian banks, the English Court and the English practitioner has had to grapple with the new legislation and insolvency regime that came into force in India in December 2016. Following a very successful and thought-provoking thought leadership conference in Delhi last September, South Square has liaised with Cyril Amarchand Mangaldas to provide an update on the current position in India and the changes that have been brought about by the Insolvency and Bankruptcy Code, 2016 ("IBC").

Cyril Shroff
Cyril Amarchand Mangaldas

Dhananjay Kumar
Cyril Amarchand Mangaldas

Mark Arnold QC

Matthew Abraham[1]

1. Authors acknowledge the assistance provided by Gautam Sundaresh and Mehul Kumar.

FEATURE ARTICLE: INDIA'S REVISED INSOLVENCY FRAMEWORK — TOO FAST FROM TOO SLOW?

Above:
Supreme Court of India

The Problems with the Former Regime for Corporate Rescue and Liquidation

The passing of the IBC by the Indian Parliament in May 2016 was a landmark event for the Indian insolvency regime. The IBC seeks to address the many shortcomings of the previous insolvency regime, and to consolidate and streamline the framework governing insolvency and liquidation in India. Prior to its promulgation, the insolvency regime in India was highly fragmented. In addition to the two primary pieces of legislation dealing with corporate insolvency, which were the Companies Act, 1956 (and later the Companies Act, 2013, both of which provided only for liquidation) and the Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA"), there existed several other avenues for debt recovery. In particular, proceedings for the recovery of debt by Indian lenders could be initiated under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, whilst security could be enforced under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002.

The fragmented nature of the previous framework often resulted in a conflict of proceedings and resulting delays, which would be in addition to the otherwise chronic delays in Indian courts. Particularly, proceedings under the SICA were often misused by debtors to obtain a protective shield from creditor actions. The absence of strict timelines for completion of a rescue under the SICA combined with the ineffectiveness of the quasi-judicial body constituted to deal with cases under the SICA, meant that the existing management could continue business as usual, without dealing with pestering creditors.

As a consequence of the ineffectiveness of the previous regime, the Indian economy developed a formidable problem of stressed/ non-performing assets ("NPLs"). The data disclosed by the RBI demonstrated that the aggregate gross NPLs on the books of Government-owned banks had increased from INR 279,016 crore (approximately USD 39 billion) as on March 31, 2015, to approximately INR 895,601 crore (approximately USD 123 billion) as on March 31, 2018.[2] Similarly, according to data published by the World Bank in 2016, lenders saw an average recovery rate of only 26 cents to the dollar in respect of their exposure to Indian borrower companies. In addition, the time taken for resolution under the former regime was an average of 4.3 years.

Consequently, banks preferred to restructure their debt under out-of-court schemes specified by the RBI,[3] rather than opting for recovery or formal insolvency. However, due to the inordinate delays in courts and the weak insolvency regime outlined above, such schemes also saw very limited success.

The Lead-up to the IBC

Efforts at insolvency law reform began in late 2014, when the Government of India constituted the Bankruptcy Law Reforms Committee under the chairmanship of Dr. T.K. Viswanathan. The Committee submitted its report to the Ministry of Finance on November 04, 2015. The Committee's report also contained the draft Insolvency and Bankruptcy Bill, which was introduced in the Indian Parliament in December, 2015 with a few amendments. This bill was subsequently referred to a Joint Parliamentary Committee, which submitted a detailed report along with a revised draft of the bill. It was this version of the bill that was eventually passed and enacted as the IBC on May 28, 2016. The provisions relating to corporate insolvency resolution in the IBC were brought into force on December 01, 2016.

Corporate Insolvency Resolution under the IBC – A Summary

The consolidation of the framework

The IBC seeks to bring all insolvency proceedings in India under one umbrella, and provides the insolvency framework applicable to companies and limited liability partnerships (together "Corporate Debtor(s)"), individuals and partnership firms.[4] Part II of the IBC along with the Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016 (the "CIRP Regulations") govern the conduct of the insolvency resolution process of Corporate Debtors.

The IBC framework is supported by four 'key pillars', being: (i) the National Company Law Tribunal ("NCLT"), which is the designated judicial authority under the IBC; (ii) the Insolvency and Bankruptcy Board of India ("IBBI"), being the regulatory body with rule-making and supervisory powers; (iii) insolvency professionals ("IPs"), a new body of professionals registered with the IBBI, who play a central role in the insolvency process under the IBC; and (iv) information utilities, who store all financial information in relation to Corporate Debtors, thereby ensuring symmetry of information under the new insolvency regime.

Categorization of debt

The IBC categorizes creditors into 'financial' and 'operational', depending on the nature of the debt. The IBC defines financial debt as that which has been disbursed against the consideration of time value of money (along with interest, if any); while operational debt is defined as a claim in respect of the provision of goods and services, and includes employee claims and statutory/ Government dues.

Initiation of proceedings

A corporate insolvency resolution process ("CIRP") under the IBC for a Corporate Debtor can be initiated upon the occurrence of a default by the Corporate Debtor of a minimum of INR 1,00,000 to any creditor. Upon such default, the relevant creditor or the Corporate Debtor itself (after obtaining a special resolution passed by its shareholders or a resolution passed by at least three-quarters of its partners, as the case may be) can make an application to the NCLT for initiation of the CIRP. Prior to making the application, operational creditors are obligated

2. According to some estimates, if stressed loans across the economy are to be aggregated, this number can be as high as USD 250 billion.

3. Between 2002 and 2016, the RBI allowed restructuring of debt of Indian lenders under many schemes such as the corporate debt restructuring, Strategic Debt Restructuring, Change in Ownership of Borrowing Entities (Outside Strategic Debt Restructuring Scheme) and Scheme for Sustainable Structuring of Stressed Assets, to name a few. All these provided for restructuring of the debt of the Indian lenders with provisioning and asset classification benefits for the banks.

4. The parts relating to individuals and partnership firms have not yet been made effective, and this article focuses only on insolvency resolution of Corporate Debtors.

FEATURE ARTICLE: INDIA'S REVISED INSOLVENCY FRAMEWORK — TOO FAST FROM TOO SLOW?

to deliver a demand notice to the Corporate Debtor for repayment, and are entitled to initiate proceedings only if repayment of defaulted debt is not forthcoming within a period of ten days therefrom, or if the Corporate Debtor does not point out an existing dispute in relation to the defaulted debt. Financial creditors are not required to give any such notice. Further, the financial creditors are required to name an IP in their application, who will be appointed as the interim resolution professional ("IRP") should the application be admitted. Operational creditors are not required to name an IP in their application.

After the filing of an application, the NCLT is statutorily obligated to admit or reject such application within a period of 14 days of its presentation; however, this time-limit has been held to be directory by the Supreme Court of India in the *Kamalpat Jute Mills*[5] case (wherein it was also clarified that the 14 day time period was to be calculated from the date the application is listed before the NCLT for admission). Further, the Supreme Court of India has also held that if the NCLT is satisfied of the existence of debt and default, it should admit the application.[6]

Institution of a moratorium

Upon the admission of the CIRP application, the NCLT will order the institution of a moratorium from the date of admission of the application, up until the conclusion of the CIRP. The moratorium extends to the initiation or continuation of any proceedings against the Corporate Debtor, the transfer by the Corporate Debtor of any of its assets, any action by any creditor to enforce any security interest over the assets of the Corporate Debtor, and recovery of any property by lessors. Further, during the CIRP, supply of certain 'essential goods and services' (*viz.* electricity, water, telecommunication services and information technology services) cannot be terminated. Notably, the moratorium does not apply to proceedings against a guarantor.

The interim resolution professional

Upon the admission of an application for the initiation of a CIRP, the IRP is appointed by the NCLT, who takes over the management and functions of the Corporate Debtor until the appointment of a full-time resolution professional, as discussed below. From the date of appointment of the IRP, the powers of the board of directors of the Corporate Debtor are suspended and such powers are vested in and exercised by the IRP.

In addition to running the Corporate Debtor as a going concern and preserving and protecting its assets, the IRP also collects and verifies claims of creditors pursuant to a public announcement issued by him, constitutes the committee of creditors ("CoC"), and takes control of the assets and bank accounts of the Corporate Debtor.

The committee of creditors

After verifying the claims of the creditors, the IRP constitutes the CoC, comprising of all the unaffiliated financial creditors of the Corporate Debtor.[7] The CoC is required to vote on and take several decisions for the Corporate Debtor during the CIRP. The vote share of each financial creditor is determined on the basis of the financial debt held by such creditor. Members of the suspended board of directors and operational creditors with aggregate dues exceeding ten percent of the total debt of the Corporate Debtor are also permitted to attend meetings of the CoC (but do not have a right to vote at such meetings). Other than for certain specified matters (including *inter alia* voting on resolution plans, raising interim finance, undertaking related party transactions, creating security interests over the assets of the corporate debtor and changing the capital structure of the corporate debtor) for which a minimum vote of sixty-six percent of total vote share is required, all other decisions of the CoC can be taken with a vote of fifty-one percent of the total vote share.

The "full-time" resolution professional

In the first meeting of the CoC, which is held within 7 days of its constitution, the CoC decides, by majority vote of not less than 66%, to either re-appoint the IRP as the resolution professional ("RP"), or replace the IRP and appoint another IP as the RP. The CoC is required to notify the NCLT of such resolution, and the NCLT then passes an order to confirm the appointment of the RP.

In addition to the powers of the IRP, which are also available to the RP, the RP has additional powers and duties, including the filing applications for the reversal of avoidable transactions, preparing the information memorandum in respect of the Corporate Debtor, and the appointment of registered valuers for conducting valuation of the assets of the Corporate Debtor. One of the more significant duties carried out by the RP is the invitation of resolution plans. The invitation sets out any eligibility criteria for the applicants of a resolution plan, as is decided by the CoC. The RP provides all information required by the resolution applicants to prepare the resolution plan, subject to the applicants furnishing a confidentiality undertaking.

Approval of resolution plan

Once resolution plans are received for the Corporate Debtor, the RP examines[8] the plans and prepares a due diligence report setting out his prima facie view on whether the plans are compliant with the requirements of the IBC.[9] The IBC does not restrict the manner in which the resolution of the Corporate Debtor may be effected, and only provides for an illustrative list of measures that may be considered, which include sale of assets, substantial acquisition of shares / merger / consolidation, extension of maturity date or change in interest rate or other terms of debts due from the Corporate Debtor, and reduction in dues payable to creditors.

If compliant with the IBC, the selected resolution plan is placed by the RP for voting before the CoC, which may approve or reject the plan by a majority decision of sixty-six percent by vote share. A resolution plan approved by the CoC is then presented to the NCLT for approval. At this stage, the NCLT examines compliance of the resolution plan and assesses whether it provides steps for the effective implementation of the plan. If approved by the NCLT, the resolution plan is binding on the Corporate Debtor and its employees, members, creditors (including dissenting creditors), guarantors and other stakeholders involved in the resolution plan.

Liquidation

In situations where the NCLT does not receive a resolution plan for its approval before the expiry of the CIRP period, or where the resolution plans received by the CoC are rejected by it, the NCLT is statutorily mandated to pass an order for the liquidation of the Corporate Debtor. Liquidation may also be commenced upon the receipt of an application from the RP notifying the NCLT of the decision of the CoC to liquidate the Corporate Debtor, and also on an application by a person aggrieved by the contravention of the resolution plan by the Corporate Debtor (post approval of the resolution plan).

The liquidation process has also been professionalised under the IBC, and either the RP previously appointed for the CIRP is re-appointed as the liquidator (with his/her consent), or is replaced by the NCLT (by issuing a direction to the IBBI to propose the name of another IP to act as the liquidator).

Major Changes

Shift from debtor-in-possession regime

The most significant change brought about by the IBC is the shift from a debtor-in-possession regime to one that is essentially creditor-run. This was done primarily for the purpose of ensuring that the former management of the Corporate Debtor does not deal with the assets of the Corporate Debtor during the rescue process. This has contributed immensely to the success of the IBC, as the loss of control over the business is gravely prejudicial to mostly family-run enterprises in India.

Focus on revival

Unlike the previous regime which focused on liquidation, the IBC places primary importance on the revival of the Corporate Debtor. In a recent case,[10] the National Company Law Appellate Tribunal[11] set out the objectives of the IBC in the following order of priority: (i) resolution, (ii) maximization of value of assets of the Corporate Debtor, and (iii) promoting entrepreneurship and availability of credit, and balancing the interests of stakeholders. In *ArcelorMittal*, the Supreme Court of India also observed that if resolution is possible, every effort must be made to try and see that this is made possible.

Professionalization of the rescue and liquidation regimes

The IBC has also resulted in the professionalization of the rescue and liquidation regimes in India, as can be seen from the role played by IPs in the CIRP and liquidation proceedings. Today, there are over 1900 IPs registered with the IBBI. Prospective IPs are required to pass an examination that is conducted by the IBBI, and also to become members of an 'insolvency professional agency'. The IBBI and the insolvency professional agencies ensure that the IPs are well trained and follow their code of conduct.

Time-bound procedure

Strict timelines are the hallmark of the IBC. There is an outer timeline to completion of the CIRP (180 days from the date of the admission order, which can be extended by the NCLT only once, to a maximum of 270 days). Further, the CIRP Regulations provide detailed timelines for each of the steps of the CIRP. Again, in ArcelorMittal, the Supreme Court of India observed that the only reasonable construction of the IBC is the balance to be maintained between timely completion of the CIRP and the Corporate Debtor being put into liquidation.

Changes in priorities among creditors

The IBC has made a few radical changes to the waterfall hitherto applicable during the liquidation of companies. The highest priority is given to the insolvency resolution process costs and liquidation costs. Following them, wages to the blue collar workers (for the twenty four months preceding the commencement of liquidation) and secured creditors rank together at par. Finally, unsecured financial creditors and unsecured operational creditors rank at the bottom of the

> "Unlike the previous regime which focused on liquidation, the IBC places primary importance on the revival of the Corporate Debtor"

5. *Surendra Trading Company* v. *Juggilal Kamlapat Jute Mills Company Limited*, Judgement dated September 19, 2017 in C.A. No. 8400 of 2017 and C.A. Nos. 15091-15091 of 2017.

6. *Innoventive Industries Limited* v. *ICICI Bank and Another*, (2018) 1 SCC 407.

7. If there are no financial creditors, the CoC comprises of the 18 largest operational creditors of the Corporate Debtor.

8. The Supreme Court of India in *ArcelorMittal India Private Limited* v. *Satish Kumar Gupta & Ors.* (Civil Appeal Nos. 9402-9405 of 2018, judgment dated October 04, 2018), decided that the RP is only to examine and not decide in relation to compliance with the resolution plans received. The decision in respect of compliance will be taken by the CoC.

9. A resolution plan is required to mandatorily provide for: (i) payment of insolvency resolution process costs in a manner specified in the CIRP Regulations and in priority to all other debts of the Corporate Debtor; (ii) payment of the debts of the operational creditors which shall not be less than the amounts to be paid to the operational creditors in the event of liquidation of the Corporate Debtor; (iii) the management of affairs of the Corporate Debtor after approval of the resolution plan; (iv) the implementation and supervision of the resolution plan; (v) compliance with all applicable laws (including requirements pertaining to the eligibility of the resolution applicants); and (vi) a representation that the plan conforms to all other requirements provided in the CIRP Regulations. In addition, a resolution plan is required to provide for the insolvency resolution of the Corporate Debtor as a going concern, and is expected to resolve the cause of default that resulted in the insolvency of the corporate debtor, in the first place.

10. *Rajuptana Properties Private Limited v. Binani Industries Ltd and Ors*, order dated November 14, 2018 in Company Appeals (AT) (Insolvency) Nos. 82, 123, 188, 216 & 234 of 2018.

11. The judicial body before which appeals from the orders of the NCLT lie.

FEATURE ARTICLE: INDIA'S REVISED INSOLVENCY FRAMEWORK — TOO FAST FROM TOO SLOW?

waterfall with the unsecured financial creditors enjoying preference over the unsecured operational creditors. It is also important to note that dues of the Government including taxes are junior to the financial creditors (secured and unsecured) and rank above unsecured operational creditors.

While unsecured operational creditors are junior to financial creditors as noted above, in a resolution, they are entitled to receive at least the liquidation value of their debt in priority to other debts of the Corporate Debtor. In this context, the National Company Law Appellate Tribunal has, in the *Sirpur Mills*[12] and *Binani Cements* cases, held that operational creditors will also have to be treated in the same manner as financial creditors while deciding the distribution of proceeds under a resolution plan.

Recalcitrant Promoters/ Management

The initial days of the IBC witnessed 'phoenixing' from the promoters/ management of insolvent companies, whereby they were able to regain control of the company while the creditors were suffering haircuts. To address this issue, in November 2017, Section 29A was included in the IBC. Section 29A provides extensive disqualifications for resolution applicants on various grounds, including that the resolution applicant (or its controlling shareholders, directors and their relatives[13]) has (anywhere in the world) been classified as a chronic / wilful defaulter by lenders/ banks; or has been prohibited from participating in/ accessing the securities market, or been convicted of certain specified offences; or controls or manages a company whose loans have been non-performing in the books of its lenders for more than one year. In the *ArcelorMittal* judgement, interpreting this section, the Supreme Court of India held that this section requires piercing of the corporate veil to assess eligibility of the "true owners" of the resolution applicants. The expanse of the section can cover multiple persons and jurisdictions, making it practically difficult to have a definitive view on eligibility.

Overhaul of the Out-of-Court Restructuring Regime

In addition to overhauling the formal insolvency regime in India, the Government of India has also revised the out-of-court restructuring regime. In February 2018, the RBI revoked all of its earlier restructuring schemes and gave complete flexibility to Indian banks to restructure their exposure in whatever manner they deemed fit. However, the RBI also prescribed a timeline for such restructuring for larger cases. For exposures above INR 20 billion, the clock starts ticking from the day of default, and if the lenders cannot implement a resolution plan to restructure the debtor within 6 months of the default, the lenders are required to mandatorily apply for the initiation of a CIRP under the IBC.[14]

Post the enactment of the IBC, the Banking Regulation Act, 1949 (which governs most commercial banks in India) was amended to enable the RBI to issue directions to Indian banks to initiate a CIRP against any Corporate Debtor upon the occurrence of a default in repayment of debt. It was pursuant to this amendment that, in June 2017, the RBI issued a direction to certain banks to initiate insolvency proceedings against 12 identified Corporate Debtors, having debt value in excess of INR 50 billion (approximately USD 720 million) each; commonly referred to as the 'dirty dozen'. The total debt of these 12 debtors comprised more than 25% of the gross NPLs of the Indian banking system. The 'dirty dozen' were the first high-profile cases under the new insolvency regime under the IBC. Following the referral of these cases to the insolvency resolution process under the IBC, the RBI issued further directions to banks to initiate IBC proceedings against another set of 28 borrowers, in respect of whom out-of-court resolution had not been possible up until that point (i.e. December 13, 2017).

Conclusion

The urgency shown in dealing with the high NPL levels of the Indian banking system has resulted in a huge number of cases coming under the IBC process. As per one source, by December 2018, 1322 cases were admitted into CIRP (in addition to 4452 cases which were decided pre-admission), and out of which 66 were resolved and 260 resulted in liquidation. This has not only helped the resolution of NPLs under the formal IBC process, but has also encouraged out of court settlement of dues by debtors.

While the jurisprudence under the IBC is still evolving, the break-neck pace of cases in the first 2 years of the IBC is a breath of fresh air in comparison to the otherwise sleepy pace of insolvency cases in India. With the proposed adoption of the UNCITRAL Model Law on Cross-Border Insolvency and the coming into effect of the provisions relating to insolvency resolution of individuals and partnership firms, India promises to be at the forefront of restructuring and insolvency action.

The CIRP and the other initiatives introduced by the IBC also bring both the insolvency regime in India and the UK closer. The insolvency process in India was already similar to the English process due to their common Company law heritage, but the CIRP now brings into play a rescue culture similar to that under the administration regime in the UK. While there are notable differences between the regimes, for instance the requirement of court approval of a resolution plan, it will be interesting to see what both regimes can learn from one another.

It will also be interesting to see whether the Indian regime will develop its use of non-insolvency processes such as schemes of arrangements (available in India under section 230 of the Companies Act, 2013) to assist with the restructuring and rescue of financially distressed companies.

This is clearly an area which is developing fast and practitioners in India and the UK will need to keep a close eye on matters to ensure that they do not miss out on the potential for cross-fertilization between the two restructuring and insolvency regimes. ■

12. ***Central Bank of India*** v. ***Resolution Professional of the Sirpur Paper Mills Ltd. and Ors.***, Company Appeal (AT) (Insolvency) No. 526 of 2018.

13. The definition of 'relatives' is very broad and goes into three generations. However, in a recent Supreme Court decision in *Swiss Ribbons Pvt. Ltd.* v. *Union of India & Ors.* (W.P. (Civil) No. 99 of 2018) dated January 25, 2019, it was clarified that, to be hit by the disqualification under Section 29A, the 'relative' or 'connected person' will need to have a connection with the business activity of the resolution applicant.

14. Circular issued by RBI on February 12, 2018.

Sirpur Paper Mills was established in 1938 by the Nizam of Hyderabad, Mir OsmanAli Khan. In 1937 the Nizan was on the cover of Time Magazine, labelled as the richest man in the world.

Painting of the last Nawab of Hyderabad, Mir Osman Ali Khan

BVI Strengthening…

Following a turbulent end to 2017 after the hurricanes and mud slides of that year, the legal market in BVI remains highly competitive with a strong roster of leading firms operating within the territory.

After the disasters, many professionals were forced to leave and set up remote practices all over the world but many activated emergency plans and stayed in place. The BVI Courts, including the Commercial Court, briefly relocated to Saint Lucia but resumed business as usual in Tortola by the end of 2017.

Hurricane Irma over the Virgin Islands at peak intensity on September 6, 2017 as the second most intense Atlantic hurricane on record in terms of sustained winds. *MODIS image captured by NASA's Aqua satellite*

BRIAN CHILD
Campbells, BVI

MATTHEW FREEMAN
Campbells, BVI

BVI has shown remarkable resilience and, by virtue of a combined effort of government and industry, professional services continued with minimal disruption – in vast contrast to the extraordinary physical destruction experienced on Tortola. Business continues to return to normal – key *indicia* being the rehabilitation and re-opening of restaurants and bars.

Electronic Court Filing

In 2018, the Eastern Caribbean Supreme Court commenced implementation of an e-litigation portal for all Courts in its jurisdiction, including BVI. BVI was included in the first phase of the implementation process (together with the Court of Appeal in St Lucia) and this is a significant initiative which will have a widespread impact upon the case management of disputes in BVI (the BVI Commercial Court in particular). The integrated e-filing and case management web application was launched at the end of 2018 and although existing cases will not be governed by the new regime, all new cases will be managed via this system. The launch was eagerly anticipated by practitioners and marks an important milestone in the continuing development and modernisation of dispute resolution in BVI, which ensures that the jurisdiction continues to offer industry-leading dispute resolution services to practitioners and clients alike.

Significant Decision – Fairfield

It has been a busy time in BVI, with a large number of significant decisions being published recently. One of particular note is a further decision concerning the Fairfield group of liquidations arising out of the Bernie Madoff Ponzi scheme (see *ABN AMRO Fund Services (Isle of Man) 24 Nominees Limited & Ors v Krys & Caulfield (as Joint Liquidators of Fairfield Sentry Limited* BVIHCMAP 11-16 and 23-28 2016). It addressed the BVI Court's interaction with other courts and jurisdictions around the world.

The decision concerned an attempt to have a 'second bite' at former shareholders who had received redemptions from Fairfield. Despite claims having been dismissed in BVI, Fairfield's liquidators commenced fresh proceedings in the US. The former shareholders sought the BVI Court's assistance to restrain the US claims. They were unsuccessful at first instance and appealed. The Court of Appeal dismissed their appeal and addressed two important points of principle.

First, the Court of Appeal clarified the scope of the statutory right of 'persons aggrieved' by an insolvency office holder's actions to apply to the Court. It held that the words 'persons aggrieved' must take their meaning and colour from the context of the particular statute in which the words appear. It held that the shareholders did not fall within the definition contained within the BVI *Insolvency Act, 2003* because (as a result of being former shareholders of a number of funds in liquidation who were being sued by the liquidators) they did not have sufficient interest in the outcome of the act, omission or decision of the liquidator. Merely because a person may have technical capacity, which would otherwise entitle it to standing, that is not enough 'if the circumstances demonstrate that the relief is sought not in that capacity but in some other'. The Court of Appeal held that the shareholders were strangers to the liquidation as they would not be concerned or affected by the ultimate distribution of the estate. Secondly, the Court considered whether the avoidance provisions in the BVI Insolvency Act, 2003 were powers specific to the BVI Court and that accordingly could not be exercised by a foreign court. It found that the powers were not restricted to the BVI Court. In arriving at its decision the Court paid full regard to the importance of cross-border cooperation. It saw no good reason to prohibit the US Bankruptcy Court from rendering assistance to the liquidator appointed in the BVI main insolvency proceedings. On a related issue, in response to submissions on issue estoppel and abuse of process, the Court found that the effect of the previous dismissal of claims in BVI was also a matter that could be determined and adjudicated upon by the US Bankruptcy Court. Leave to appeal this interesting decision to the Privy Council was granted and the appeal is due to be heard as this edition goes to print (and will include Gabriel Moss QC, Tom Smith QC and Henry Phillips of South Square). It justifies watching to see what approach the Privy Council ultimately takes.

> "Around 90 small islands, islets, cays, and rocks comprise the British Virgin Islands. On first sighting the archipelago in 1493 these allegedly reminded Columbus of the story of St. Ursula (who features on the BVI coat of arms above) and the 11,000 virgins, which how the islands gained their name"

Significant Decision – Eurochem

On 18 September 2018 the Court of Appeal of the Eastern Caribbean Supreme Court handed down judgment in the matter of *Livingston Properties Equities Inc and Ors v JSC MCC EuroChem and Ors.* The case is important because it addresses the criteria to be applied when considering whether a proceeding involving issues of foreign law, foreign defendants and foreign transactions should properly be brought in BVI (where some of the corporate defendants were incorporated) or in some other jurisdiction. Campbells has intimate

BVI STRENGTHENING

knowledge of the case having acted for one of the defendants (a Singapore company) challenging the BVI Court's jurisdiction.

The judgment at first instance found that BVI was an appropriate forum in which to hear the case, but on appeals taken from that decision the Court of Appeal granted the appeals and ordered that:

1. the BVI proceedings be stayed;
2. the service out orders granted in the proceedings in relation to the foreign defendants be set aside;
3. the worldwide freezing orders that had been made in the proceedings (not against Campbells' client) be set aside; and
4. the claimants pay the appellants' costs of the appeal and costs in the court below.

The claimants, a Russian company and a Swiss company, carry on business as one of Russia's largest mineral fertiliser traders.

Two of the defendants (Russian nationals) were employed by the claimants in senior positions in Russia. It was the claimants' case that these individuals set up companies (including some registered in BVI) and also in Panama, Cyprus and other jurisdictions for the sole purpose of receiving, concealing and laundering the proceeds of over $45 million in secret commission payments made by the claimants' customers and their affiliates.

The alleged payers of the bribes included individuals living in Turkey and Switzerland as well as companies registered in Singapore, Switzerland and BVI.

The claimants made various allegations to include breaches of fiduciary duties, dishonest assistance and knowing receipt of secret commissions and unlawful means conspiracy.

The appeal was brought to overturn orders made by the BVI Commercial Court granting permission to serve the claim on the defendants out of the BVI. It also sought a stay of the proceedings on the basis that BVI was not the appropriate forum to hear the claim. Worldwide freezing injunctions (abandoned against Campbells' client) had been granted by the Commercial Court.

At first instance, it was held that BVI was the most appropriate forum to determine the claim. In coming to his decision the judge at first instance placed significant weight on the fact that a number of the defendant companies were registered in BVI and that the claimants had chosen to issue a claim within BVI. The judge also found that, in the absence of satisfactory evidence of foreign law, the court will apply BVI law to the claim.

The Court of Appeal overturned the Commercial Court's decision and found that Russia was the more convenient jurisdiction for the claims to be heard. The proceedings were stayed and the orders for service out of the jurisdiction and worldwide freezing injunctions set aside. Specifically, the Court of Appeal found that:

- There was sufficient evidence to allow the judge at first instance to determine what the applicable governing law was. The Court of Appeal also found that the judge at first instance should have examined the evidence to determine the law with which the action has its closest connection. Had he done so, he would have found that the claims have their closest connection with Russian law and therefore the governing law of the claims is Russian law.
- The judge at first instance also attached too much weight to the use of companies incorporated in the BVI and to the fact that the claimants chose to sue in the BVI. Webster JA found that these are neutral considerations in a forum application and that other considerations such as the availability of a more appropriate forum to hear the claim, the jurisdiction having the closest connection to the claim, where the alleged tort took place, location of witnesses, language of the witnesses should have been given more weight.

The Court of Appeal's approach reflects that mere incorporation of a company in BVI and commencement of proceedings in BVI as a result of the claimant having selected BVI as its preferred jurisdiction are insufficient for the BVI court to be determined as the appropriate forum for trial of a claim. Instead, a thorough examination of the other factors referred to above should be taken into account and given appropriate weight to determine which forum is most appropriate in which a claim should be tried.

The judgment also reiterated the longstanding legal principle that a claimant must take a foreign forum as he finds it, even if it is in some respects less advantageous to him than the BVI forum. In this instance, the remedies available to the claimants in the BVI were perhaps broader in scope than those available in the Russian courts.

Nevertheless, the court found that Russia was the appropriate forum and that in light of all the other appropriate considerations the limitation of remedies was not sufficient to refuse a stay on the ground that the claimants would not receive justice.

The case highlights how important it is for claimants and defendants alike to take complete legal advice before commencing or defending proceedings in BVI. It also reaffirms the considerations to be taken into account in determining whether BVI or some other jurisdiction is the more appropriate forum in which a claim should be heard. Leave to appeal to the Privy has been granted, and so this is another case to keep an eye on for the "final" word on the factors to be taken into account when commencing proceedings in BVI which deal with issues of foreign law and transactions. ■

The Virgin Islands Supreme Court

> "The Court of Appeal decision in *Eurochem* highlights how important it is for claimants of defendants alike to take complete legal advice before commencing or defending proceedings in BVI"

Professor Christoph G. Paulus

South Square is delighted that on 1 December 2018, Professor Christoph G. Paulus became an Associate Member of Chambers.

Christoph is well-known and highly respected in the world of restructuring and insolvency. He is certainly no stranger to South Square, having variously given expert evidence in relation to the enforceability of certain schemes, shared platforms with us at numerous international conferences and contributed to the Digest in relation to the implications of Brexit.

Until recently he was a professor of law at the Law School of the Humboldt Universität zu Berlin, Germany, a position he held since 1994. From April 2008 through March 2010, he has served as the Dean of the Law School. He earned an LLM from the University of California at Berkeley in 1984 and was a Feodor Lynen Fellow of the Alexander v. Humboldt-Stiftung at UC Berkeley in 1989 and 1990. From 1998 onwards he has served several times as a Consultant to the International Monetary Fund ("IMF") in Washington, D.C., where he prepared a brochure on *"Orderly & Effective Insolvency Procedures"*.

Christoph is member of the International Insolvency Institute, of the American College of Bankruptcy, of the International Academy of Commercial and Consumer Law, of the International Association of Procedural Law and – as an extraordinary member – of the Instituto Iberoamericano de Derecho Concursal. He has held guest professorships at Brooklyn School of Law (USA), in Cape Town (South Africa), in Fukuoka (Japan), at Tongji University in Shanghai (China), at the Université Pantheon-Assas in Paris (France), at the Lomonosow-University in Moscow (Russia), and at the University of Sydney (Australia). Moreover, he has been appointed as a Consultant of The World Bank in Washington, D.C. regarding, among other things, insolvency laws and legislation in 2006. From November 2006 to spring 2010, he has served as Adviser of the German delegation for the United Nations Commission on International Trade Law (UNCITRAL) deliberations on group insolvency law.

For more than twenty years, Christoph has taught courses on the German Code of Civil Procedure (*ZPO*), the German Civil Code (*BGB*), on German and international insolvency law and on legal history and Roman law. He has published approximately 450 articles on topics that include civil procedure, German, and international and comparative insolvency law, contract law, secured transactions, and legal history. For more than fifteen years, he has worked on issues of sovereign default.

Further details of Professor's Paulus career and an exhaustive list of his publications are available at: https://www.rewi.hu-berlin.de/de/lf/ls/pls/cp/pub.

Any inquiries about Paul's availability to accept instructions in any particular case may be directed to practicemanagers@southsquare.com

Case Digest Editorial

Henry Phillips

This edition on the Digest presents thirty-one case summaries involving seventeen members of South Square

The subject matter ranges from the mis-selling of interest-rate hedging products (*Holmcroft Properties Limited v KPMG LLP* (pg 34) to the consequences of failing to beat CPR Part 36 offers (*JLE Warrington and Halton Hospitals NHS Foundation Trust* (pg 37) and *Finnegan v Spiers* (pg 36).

Autumn saw a number of schemes of arrangement before the courts. Of these, *Re Noble Group Limited* (William Trower QC, David Allison QC, Stephen Robins, Henry Phillips, Lottie Pyper (pg 49)) and Re *Stronghold Insurance Co Ltd* (William Trower QC, Adam Goodison, Hilary Stonefrost (pg 42)) deserve special mention.

Noble Group Limited concerned a highly-complicated restructuring of one of the world's biggest commodity traders by volume. The restructuring compromised around US$4 billion of debt and involved moving an SGX-listed company's COMI from Hong Kong to the United Kingdom, offering enhanced consideration for participants in new trade finance facilities and using a claims adjudication process to determine the entitlements of non-finance creditors under the scheme. Snowden J's thorough and careful judgments are important reading for anyone involved in this area of the law and contain a clear reminder of the need to give the Court adequate time properly to consider what decision to make and to prepare a judgment, even in the case of urgent restructurings.

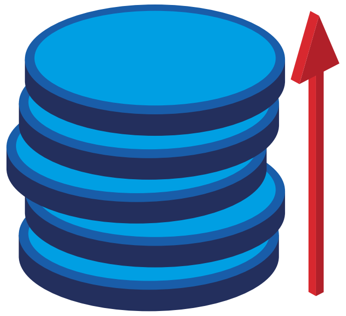
Hildyard J's refusal to convene a single meeting of creditors in *Stronghold Insurance Co Ltd* demonstrates the challenges of using schemes of arrangement to compromise long-tail insurance claims. Following a request from its regulators to end a 33-year solvent run-off, the company promulgated a scheme of arrangement to settle or compromise all outstanding obligations. The main question before the Court was whether persons with outstanding notified claims should be in the same class as persons holding policies in relation to which relevant events had occurred but which had not been reported to the policyholder (so-called IBNR claims). The Court decided that the most likely alternative to the approval of the proposed scheme was the continuation of the solvent run-off and, following the approach taken in *Re British Aviation Insurance Co Ltd* [2006] 1 BCLC 665 and *Re Sovereign Marine & General insurance* [2006] BCC 774, refused to convene a single meeting of creditors. The case highlights the significance of an insolvency comparator where a scheme seeks to compromise outstanding notified insurance claims alongside IBNR claims. It also emphasises once again the importance of clear and cogent evidence showing that liquidation is sufficiently imminent and likely to warrant it as the best comparator.

The scope of the rule in *Ex Parte James* received further clarification in *Lehman Brothers Australia v Lomas* (Daniel Bayfield QC and Ryan Perkins (pg 48)). Notably, Hildyard J departed from the decision of David Richards J (as he then was) in *Re Lehman Brothers International (Europe)* [2015] EWHC 2270 (Ch)), holding that the test for applying the rule in *Ex Parte James* was not whether an office-holder's exercise of or reliance on a legal right would be seen as unfair (as David Richards J had held) but whether it would be seen to be "obviously unjust by all right-minded men". That test is likely to narrow considerably the rule's application. Another long-standing principle received an outing in *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802 (Gabriel Moss QC, Daniel Bayfield QC, Richard Fisher, Ryan Perkins (pg 48)). The Court of Appeal held that it could not grant relief to a foreign representative of foreign insolvency proceedings under the Cross-Border Insolvency Regulations 2006 in such a way as to undermine the long-standing rule in *Antony Gibbs & Sons v Societe Industrielle et Commerciale de Metaux* (1890) 25 QBD 399, which states a debt governed by English law cannot be discharged by foreign insolvency proceedings. *Re OJSC International Bank of Azerbaijan* is on its way to the Supreme Court, where the fate of the rule in Gibbs will be determined.

Finally, the doctrine of vicarious liability has received further attention following the Supreme Court's restatement of principles in *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56 and *Cox v Ministry of Justice* [2016] UKSC 10. Both *Anderson v Sense Network* (pg 39) and *Winter v Hockley Mint* (pg 41) highlight that the liability of a principal in respect of reliance-based torts such as deceit or misrepresentation committed by an agent are likely to be governed by a distinct set of principles as described by the House of Lords in *Armagas v Mundogas* [1984] 1 AC 717 and not by the so-called "unitary modern law of vicarious liability" described by the Supreme Court in the *Catholic Child Welfare Society* case. The relationship between agency principles and the doctrine of vicarious liability will be considered further by the Supreme Court later this month, when the appeal in WUKSC 2018/0067 is due to be heard.

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

Case Digests



Banking and Finance

Digested by Toby Brown

R (o/a Holmcroft Properties Ltd) v KPMG LLP

[2018] EWCA Civ 2093 (Arden LJ, Newey LJ, Coulson LJ) 28 September 2018

Bank redress scheme – independent reviewer – judicial review

The appellant, Holmcroft, had been mis-sold interest rate hedging products ("IRHPs") by Barclays Bank. Barclays agreed with the then Financial Services Authority ("FSA") that it would provide fair compensation to such customers, and to appoint a "skilled person" to whom s.166 of the Financial Services and Markets Act 2000 ("FSMA"), as then in force, would apply. Barclays appointed the respondent firm of accountants, KPMG, for this purpose. The FSA exercised its statutory powers under s. 166 to approve the appointment and to require the skilled person to report to it. Barclays also undertook to engage the skilled person to opine on whether an offer of compensation was in each case appropriate, fair and reasonable ("AFR assessment").

Barclays offered Holmcroft compensation, but not for certain consequential loss which Holmcroft considered it was entitled to. KPMG as Independent Reviewer made an AFR assessment approving the offer. Holmcroft sought to judicially review KPMG's decision on the basis it failed to discharge its public law duty of fairness. The Divisional Court dismissed the proceedings, holding that KPMG's decision was not amenable to judicial review, and that the decision was in any event lawful.

Arden LJ gave the judgment of the Court of Appeal. Although she agreed with the decision of the Divisional Court, she considered that the wider regulatory and factual context should have been taken into account.

The fact that the decision emanates from contractual arrangements does not mean that public law principles are inapplicable. Arden LJ reviewed the authorities, including the leading case of Datafin [1987] QB 815, where the fact that the legal source of power of the Panel on Takeovers and Mergers was merely contractual, and its functions were partly private and partly public, did not prevent it from being amenable to judicial review.

Arden LJ emphasised, following Dyson LJ's decision in the *Beer* case [2004] 1 WLR 233, that all the circumstances relating to the nature and function of the power are relevant. The Divisional Court had focussed on the source of KPMG's power as Independent Reviewer, but Arden LJ analysed the position of the skilled person as part of the wider regulatory context. The so-called voluntary settlement involved an investigation by the FSA into IRHPs, and it obtained a commitment of the banks to provide compensation, which it policed by a review conducted by the skilled person reporting to the FSA. To say that AFR assessments were outside the scheme of statutory regulation was, in Arden LJ's opinion, too narrow a view of the FSA's statutory functions.

Arden LJ also considered that the factual context had to be viewed more widely. There were similarities with other industry-wide redress schemes but differences here because the FSA imposed an obligation on banks to grant redress and required a skilled person to opine on compensation offers. However, those features did not alter that the nature of the scheme was essentially the pursuit of private rights. Thus, the customers' legal rights are unaffected by the AFR assessment.

Moreover, the compensation was to be negotiated on private law principles. It would be enforceable through the courts; the FSA imposed no system for this, nor did it aim to remove the role of the courts.

In conclusion, Arden LJ held that Holmcroft's complaint against KPMG was ancillary to pursuing a private law claim. The FSA's requirements merely overlaid or sat alongside what was fundamentally a private law dispute. Arden LJ acknowledged that her conclusion exposed a gap in the protection which the FSA secured for customers of Barclays, but considered that this did not undermine her conclusion. The FSA did not confer a guarantee that every customer would receive an offer that was appropriate, fair and reasonable, but rather that the institution of the redress arrangements made it likely that customers would do so, and to restore confidence in the banking system.

The decision of the Divisional Court was therefore upheld and the appeal dismissed. ■

General Mediterranean Holding SA SPF v Qucomhaps Holdings Ltd

[2018] EWCA Civ 2416 (Lewison, Newey LLJ, Henry Carr J) 31 October 2018

Secured loan – tunnelling fraud – extent of creditor's equitable duty to protect security

The respondent ("GMH") made loans totalling USD 6 million to the first appellant ("Qucomhaps"), which the second appellant ("Mr Harkin") personally guaranteed. The loan was secured by a pledge of shares in a wholly owned subsidiary of Qucomhaps ("SRO"), and by Qucomhaps procuring that SRO provided a charge over its assets.

Subsequently SRO was alleged to have fallen victim to a "tunnelling fraud". The appellants alleged this involved an ex-manager fraudulently obtaining security of SRO's assets, seeking to enforce the security with a view to forcing the company into insolvency in the Czech Republic, and then buying SRO's assets at a fraction of their value.

GMH brought proceedings in the High Court to recover the loan. The appellants pleaded in their defence that they had no liability to GMH because GMH failed to take steps to protect the security it had been granted. The appellants pleaded that the creditor's committee in the Czech administration proceedings became controlled by the "tunnellers" because of GMH's failure to maintain its rights in respect of the security, and as a result the security was rendered worthless.

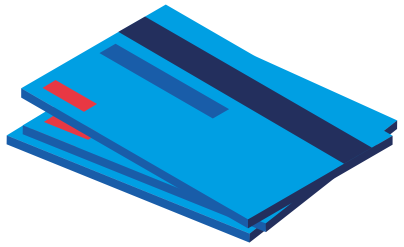
GMH successfully applied to a Master to strike-out the appellants' defence and counterclaim and for summary judgment to be entered. An appeal to the High Court was dismissed. The question for the Court of Appeal, whose judgment was given by Newey LJ, was whether the appellants should be permitted to defend the claims on the basis that GMH breached duties it owed in equity. The appellants submitted that GMH had an equitable obligation to Mr Harkin, as surety, to take reasonable steps to protect its security over SRO's assets, and that it was at least arguable that it breached that duty, and an equivalent duty was owed to Qucomhaps.

GMH relied on *Wulff v Jay* (1872) LR 7 QB 756 where debtors who had assigned their premises and the contents to creditors by way of security were adjudged bankrupt. A surety was held to have been partially discharged as a result of the plaintiff's failure to take steps either to protect the bill of sale by registration or to enter and take possession of the effects. In that case, Cockburn CJ had referred to the "well-known proposition" that "where a debt is secured by a surety, it is the business of the creditor, where he has security available for the payment and satisfaction of the debt, to do whatever is necessary to make that security properly available".

Notwithstanding this *dicta*, Newey LJ stated that he did not think that any duty of a creditor to preserve or maintain security can be an onerous one. There can be no question of a creditor having an absolute duty to ensure that a surety can have recourse to security. More than that, Newey LJ did not consider that a creditor can be obliged to incur any sizeable expenditure or to run any significant risk to preserve or maintain a security. Moreover, he doubted whether a creditor can ever have an equitable duty to the principal debtor (as opposed to a surety) to take steps to preserve or maintain a security granted by a third party.

Against this analysis of the law, Newey LJ considered that the appellants did not have a real prospect of successfully defending GMH's claims. In particular, the defence contained no real explanation of what steps GMH ought to have taken, or why, nor how its failure to do so could have resulted in the security being worthless. The evidence served by the appellants made the basis of their case less clear and contained no evidence from anyone with personal knowledge of the relevant events. Finally, the suggestion that GMH could have any liability to the principal debtor (Qucomhaps) for failing to preserve security given by a third party (albeit a subsidiary of Qucomhaps) was still less plausible. Newey LJ concluded by stating that Qucomhaps had no right to throw liability onto SRO, which only had secondary liability; to the contrary, SRO would have been entitled to an indemnity from Qucomhaps had its assets been used to pay GMH.

The appeal was therefore dismissed. ■



Civil Procedure

Digested by Rose Lagram-Taylor

Finnegan v Spiers

[2018] EWHC 3064 (Ch) (Birss J)
27 June 2018

Costs – Part 36 offers – payments on account

In a judgment handed down in November 2018, Mr Justice Birss held that the court had no power to order the payment of costs on account after a Part 36 offer had been accepted, Part 36 being a complete code.

Briefly, the claimant had brought a claim against the defendant for damages arising from professional negligence. Following the claimant's acceptance of a Part 36 offer a settlement agreement was executed. This provided that the defendant would pay the claimant's reasonable costs on a standard basis to be assessed if not agreed up to 24 March 2017. The claimant later sought an interim payment on account of costs despite the settlement agreement making no such reference to an interim payment.

The court therefore had to decide whether it had the power to order a payment on account of costs where the Part 36 offer had already been accepted. Whilst the defendant and respondent asserted Part 36 was a complete code and the source of the entitlement to costs, the claimant and appellant argued that CPR r.44 was relevant, such that r.44.2(8) allowing for payment on account applied. It was submitted that the court had to determine the effect of a deemed costs order under CPR r.44.9 and its interaction with CPR r.44.2(8).

One such scenario when a costs order was deemed to have been made under CPR 44.9 was where a Part 36 offer had been accepted.

Whilst Birss J accepted that the existence of CPR r.44.9 meant that it could be said that Part 36 is not an entirely comprehensive code, he nevertheless preferred the defendant's analysis that Part 36 was a complete code which dealt with the consequences of accepting an offer, as well as the incidence of costs and the basis of assessment. It was held that the purpose of CPR r.44.9 as it relates to Part 36 was simply to deem a costs order to be made so that the detailed assessment provisions could be triggered. This did not bring into play other parts of CPR r.44, including CPR r.44.2(8).

As Birss J explained, CPR r.44.2(8) applies when a court has ordered a party to pay costs. However, that is not what happens when a Part 36 offer is accepted under CPR r.36.13(1) or (2). In considering whether a payment on account can be made, the court therefore has to look to the provisions of Part 36 itself. Notably, the ability to order payment on account is absent from there. There was no reason, it was held, to read CPR r.44.2(8) in such a way as to make it applicable when a Part 36 offer is accepted.

Accordingly, when considering the cost consequences of accepting a Part 36 offer, Part 36 was the relevant place to look, including for the availability of payments on account. ■

Bates v Post Office Ltd

[2018] EWHC 2698 (QBD) (Fraser J) 17 October 2018

Overriding Objective – litigation tactics – group litigation

The court refused an application by the defendant in group litigation to strike out large parts of the evidence relied upon by the lead claimants as it could not be said that the challenged evidence was irrelevant to the common issues to be tried. Fraser J also admonished the parties for using *"extremely aggressive litigation tactics"* that belonged to an earlier era.

The court had previously ordered a 'common issues' trial in relation to 23 issues of contractual construction concerning around 600 claimants. However, the defendant argued that the witness statements that had been produced in support of the claim were largely irrelevant to those issues.

It was held that there was a heavy burden on the defendant, and that there were good arguments that it should be harder to strike out evidence in group litigation, rather than easier. This was because the common issues were selected at an early stage in the group litigation and the relevance of those issues had to be considered against the litigation as a whole. It was pointed out that given the large number of issues, evidence may only be relevant to one of those issues. For the evidence to be struck out, it had to be quite plain that, no matter how the proceedings might look at trial, the evidence would never appear to be relevant or, if relevant, would never be sufficiently helpful to any of the common issues. Fraser J concluded that the defendant had not discharged the burden of proof, and had merely been attempting to hollow out the lead claimants' case to its barest of bones and to keep evidence with which it did not agree with from being aired at all.

As to the parties' conduct of the litigation, the claimants had accused the defendant of taking an aggressive and dismissive approach towards them. The judge did not consider it appropriate to make a finding on this at this stage.

However, he did express his view that both sides were using extremely aggressive litigation tactics and were regularly appearing to take turns to *"outdo their opponents in terms of lack of cooperation."* It was noted that *"behaviour from an earlier era, before the overriding objective emerged to govern all civil litigation…appeared to become almost the norm"*. Accordingly, Fraser J stated that the behaviour of both parties was not cost-effective and was not in accordance with the overriding objective warning that a failure to change behaviour would result in draconian costs orders. ■

Berhad v Frazer-Nash Research Ltd

[2018] EWHC 2970 (Pepperall J)
6 November 2018

Late service of evidence – interlocutory hearings – Denton

Within a judgment largely dealing with the respondents' application to set aside the registration of certain foreign judgments made in favour of the applicant, Pepperall J gave a useful reminder that the *Denton* principles do not apply in relation to the late service of evidence before an interlocutory hearing, CPR r.3.9 simply not being engaged in the circumstances.

The applicant had argued that the respondents should not be allowed to rely on evidence filed and served less than two clear days before the hearing in breach of Practice Direction 23A, paragraphs 6.11 and 6.13, and that the respondents needed to seek relief from sanctions pursuant to CPR r.3.9. However, it was held that as the late service of evidence in interlocutory proceedings was not subject to specific sanctions, Practice Direction 23A not imposing a sanction for non-compliance with paragraphs 6.11 and 6.13, the *Denton* principles did not need to be considered.

Pepperall J also noted that in this instance, this was not a case where the respondents had filed very late evidence in order to deal with developments that had happened some weeks or months ago. Instead, the purpose of the evidence was to provide the most recent update to the court concerning matters that had only just happened. There had been no suggestion that the applicant could not deal with the late evidence. ■

JLE v Warrington and Halton Hospitals NHS Foundation Trust

[2018] 12 WLUK 450 (Master McCloud)
20 December 2018

Costs – Part 36 offers

Master McCloud held that the consequences of beating a Part 36 offer are severable and that each should be assessed against the test of whether it would be unjust to award them. In this case, it was held that it would be disproportionate to award the usual 10% uplift penalty under CPR r.36.17(4)(d) in circumstances where the penalty amount was far greater than the margin by which the Part 36 offer was beaten.

Initially, the claimant had sought £651,751 in costs after winning the substantive action. Her Part 36 offer to the defendant was for £425,000 inclusive of interest. Following detailed assessment, the defendant was ordered to pay £421,089 plus interest of £10,723. As the difference between this amount and the Part 36 offer was only £7,000 the defendant argued that it would be unjust to award the 10% uplift which would give the claimant an additional £43,000.

The claimant argued that the court did not have the power to order some but not all of the penalties in CPR r.36.17(4)(d), along with the fact that Part 36 penalties were there to incentivise settlement. However, whilst there was no authority directly on the point, Master McCloud found that the penalties were severable and had to be judged on whether they would be unjust to impose.

Overall, Master McCloud was influenced by three significant factors when reaching her judgment: (i) the very small margin by which the offer was beaten, (ii) the fact that the overall 'bill' had been reduced on detailed assessment, and (iii) the size of the 10% uplift comparted to the margin by which the offer was beaten. ■

CASE DIGESTS

Civil Procedure

Raffeisen Bank International AG v Asia Coal Energy Venture Ltd

[2019] EWHC 3 (Comm) (Moulder J)
15 January 2019

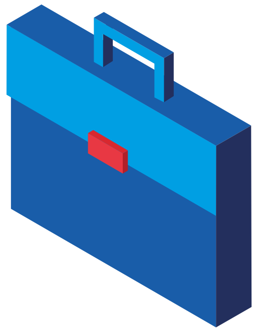
Request for further information – specific disclosure – confidentiality – legal advice privilege

This case concerned the claimant's application for the second defendant (Ashurst) to answer the claimant's requests for further information and to give specific disclosure of certain classes of documents. Ashurst asserted that it was not entitled to disclose or offer inspection of those documents as they contained the underlying instructions that had been received by their client, the funder to a transaction which was the subject of the substantive claim, and so they were protected by legal advice privilege and or confidentiality principles. However, the claimant argued that neither legal advice privilege or confidentiality applied to those documents, in circumstances where Ashurst's client had authorised them to enter into a legal relationship with the claimant, where Ashurst had already confirmed the nature of its instructions to it, and where the nature of the instructions were not confidential.

It was accepted by the claimant that legal professional privilege where it applies is absolute, following *Three Rivers DC v Bank of England (No 6)* [2005] 1 AC 610. It was also common ground that legal advice privilege arises out of a relationship of confidence between lawyer and client, and that unless the communication or document for which privilege is sought is a confidential one, there could be no question of legal advice privilege arsing. The question for the court was therefore whether the instructions correctly attracted legal professional privilege, and/or were of a confidential nature.

As to confidentiality, the claimant relied on the Court of Appeal's decision in *Conlon v Conlons* [1952] 2 All ER 462 as authority for the proposition that legal professional privilege did not extend to a communication which the client instructed the solicitor to repeat. In response, Ashurst asserted that the case could be distinguished as the information sought in that case was narrow in scope, and the case could more readily be explained as a case of implied waiver. Moulder J agreed with Ashurst that the claimant's application was broader in scope than *Conlon*, especially as the documents sought containing the instructions could also contain legal advice. On a proper analysis, it was held that the purpose of the instructions was not to merely pass on the instructions given, but to enable Ashurst to be in a position to provide independent and legally binding representations on its own behalf to the claimant irrespective of the position between Ashurst and their client. The instructions were therefore said to be confidential on the basis that (i) Ashurst were not acting as agent of their client, (ii) unlike in *Conlon* there was no issue with the authority of the solicitors or any implied form of waiver, and (iii) instructions do not cease to be confidential merely because a client authorises his solicitor to divulge information which has passed in the course of confidential communications.

As to whether privilege attached to the documents sought, Moulder J held that the matter had to be viewed in the context of the transaction as a whole. It had to be inferred that Ashurst's client had engaged Ashurst to provide legal advice to protect its interests as the party providing the finance to the transaction. The communications containing the instructions were therefore inextricably bound up with the legal advice of Ashurst to protect the interests of its client. Even if the instructions relating to Ashurst holding the relevant funds for the transaction did not contain advice on matter of law, in Moulder J's view, they would be part of the continuum of communication such that they had to be viewed in the context of the provision of legal advice. Moulder J therefore concluded that privilege did attach to the documents sought by the claimant and as such it was not entitled to them. ■



CASE DIGESTS

Commercial Litigation

Digested by Madeleine Jones

Aircraft Purchase Fleet Ltd v Compagnia Area Italiana SpA

[2018] EWHC 3315 (Comm) (Phillips J)
30 November 2018

Contracts – frustration – renunciation

The Court considered the question of damages following the defendant's alleged renunciation of an aircraft lease framework agreement. The claimant and defendant entered into the framework agreement, under whose terms the claimant was to supply a number of A320 planes to the defendant. Over the course of the contract, the defendant requested that the claimant supply A319 planes instead, which the claimant did, for two years. After this, the company from which the claimant itself was leasing planes, Airbus, terminated its arrangement with the claimant, due to breaches by the claimant. The claimant was thereafter unable to supply further planes to the defendant. The claimant claimed the defendant had renounced the framework agreement by insisting on leasing A319s instead of A320s and claimed damages on the basis that this had caused the claimant's breaches under its contract with Airbus. The defendant claimed that Airbus' termination had frustrated the framework agreement by making it impossible for either party to perform its obligations, and counterclaimed for liabilities under a tax settlement.

The parties agreed that the Defendant would have a defence to the Claimant's claim for damages if the Claimant had independently rendered itself incapable of performing its obligation of the framework agreement. Mr Justice Philips held this would not arise because of the doctrine of frustration, since frustration of contract can only arise where responsibility for the matters which give rise to the impossibility of performance is not allocated in the contract, either expressly or implicitly, and here the Claimant's obligation not to act so as to bring its contract with Airbus to an end was an implied term of the framework agreement, necessary to give business efficacy to it.

However, the fact that the non-repudiating party was not ready and willing to perform the contract was a complete defence to a renunciation claim. On the facts, the Claimant would not have been able to perform, so the Defendant benefitted from this defence. There was also no evidence that Airbus' termination of its contract with the Claimant was influenced by the Defendant's actions, so the action for damages against the Defendant failed. The Claimant had put itself in a position where it was unable to perform its obligations to the Defendant. The Defendant's counterclaim under the tax settlement was allowed in part. ■

Dalamd Ltd v Butterworth Spengler Commercial Ltd

[2018] EWHC 2558 (Comm) (Butcher J)
05 October 2018

Insurance – negligence – agency

The claimant was the assignee of the causes of action of three related entities, who were claimants under an insurance policy. The entities were a recycling company ("D"), a partnership ("W") whose partners were D's owners' parents and JLS, a company formed after D's insolvency, to which D's owners transferred D's goodwill and assets. JLS renewed D's insurance policy with A. Fire destroyed JLS's premises. A refused to pay out on the grounds that previous fires and D's insolvency had not been disclosed to it, and because a condition relating to safe storage of materials had been breached.

The claimant sued D's and JLS's insurance broker ("BSCL") for negligence in its advice to the insured and disclosure to A.

The court found that BSCL had disclosed D's insolvency to A's broker. However, A's broker was a placing broker and was therefore an agent of the insured not the insurer, so this did not constitute disclosure to A. BSCL had explained business interruption cover (which might have mitigated JLS's loss) to D and did not need to re-explain it to JLS. BSCL had adequately explained the insured party's obligations relating to storage.

However, BSCL had failed to ensure disclosure of the build-up of waste and had not indicated to the insured what matters should be disclosed or made adequate enquiries to elicit material information from them. This was a breach of the broker's duties relating to disclosure which were summarized by David Steel J in Jones v Environcom [2010] Lloyd's Rep. I.R. 676 at [54] to [56].

To recover for these breaches, the insured had to show that the claim would have failed as a result of them. Nothing less than the policy being voidable was enough; this was to be determined as a question of law, or on the balance of probability if factual matters were engaged. ■

Anderson v Sense Network Ltd

[2018] EWHC 2834 (Comm) (Jacobs J) 26 October 2018

Fraud – agency – financial regulation

This case concerned a financial advisory company ("D") which had made investments on behalf of a number of customers. D was regulated by the FCA. However, one of D's appointed representatives, Midas, was operating a fraudulent Ponzi scheme in which a number of D's customers ("Cs") lost money. The Cs only learned of it after a whistleblower from within Midas brought their attention to it.

The Cs argued that the Ponzi scheme was a collective investment scheme ("CIS") within the meaning of s. 235 of the Financial Services and Markets Act 2000 ("FSMA") for which D had accepted responsibility under s. 39 of FSMA, that Midas had actual or apparent authority to advise on the scheme, that the whistleblower's knowledge could be attributed to D so that D should have acted sooner to stop the scheme, that D was vicariously liable for the conduct of Midas in operating the scheme and that D had failed adequately to monitor Midas, in breach of its supervisory duties.

Mr Justice Jacobs found in favour of the D.

Whether the Ponzi scheme fell under s. 235 of FSMA was irrelevant, although had it been necessary to determine the question the court would have found it was a CIS. However, D only had responsibility under s 39 for "business of a prescribed description." It was necessary to scrutinize the terms of the authorized representative agreement and the agreement between D and Cs to see if this business fell under it. Even if the authorised representative had acted with apparent authority, D would have no responsibility for business which was not set out in the contracts. On a true construction of the relevant agreements, the Ponzi scheme did not meet any description of business for which D had accepted responsibility.

In any event, Midas had not acted with D's apparent authority as the D had never represented at Midas was entitled to take deposits or advise in relation to the scheme.

CASE DIGESTS

Commercial Litigation

In any case, Cs had not relied on any representations from D in relation to the scheme.

The whistleblower's knowledge could not be attributed to D. D's performance of its regulatory obligations to have oversight of Midas was to be judged against the standard of reasonable care. This was not breached by an individual employed by Midas and working in Midas' office having knowledge of wrongdoing; there was no reason for the individual's knowledge to be attributed by D.

D was not vicariously liable for Midas' defective advice to Cs. Vicarious liability arises if harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question. In giving advice, Midas was not carrying out D's business but a separate business of its own.

D had not failed properly to supervise Midas, even though it relied on an employee of Midas (the whistleblower) to perform the supervisory role. This is not automatically a breach of the regulatory obligation to supervise, and on the facts the risks associated with delegating the duty in this way had been properly managed by supervision of the supervisor himself. In any case, the Cs had not established a causal link between any failure to supervise the supervisor and the losses caused.

If liability had been established, there would have been no reduction for contributory negligence. Cs had been entitled to reply on Midas' advice. ■

Winter v Hockley Mint Ltd

[2018] EWCA Civ 2480 (Sir Terence Etherton MR, Flaux LJ, Carr J) 15 November 2018

Fraudulent misrepresentation – vicarious liability

The appellant ("W"), a supplier of postal equipment, appealed a ruling that he had been vicariously liable for the fraudulent misrepresentations of his agent. The agent had told the respondent ("H") that it could save money by leasing postal equipment from a third party and claiming 'postal credits' back from Royal Mail which would exceed the cost of the leases. In reliance on the representations H leased equipment supplied by W to the third party, from the third party under a tripartite agreement. Royal Mail does not give 'postal credits'. The agreement obliged W to provide H with rebates (which H took to be the postal credits) for some but not all of the life of the lease. Thus, H was obliged to continue making payments under the lease after the rebates were no longer paid.

The trial judge held that the test for determining a principal's liability for his agent's intentional torts was whether there was a sufficiently close connection between the agent's wrongdoing and the class of acts which he was employed to perform. In the circumstances, the test was met.

Allowing the appeal, the Court held that this was not the correct test. An agent's deceit is to be attributed to a principal only where the agent's deceitful conduct was within the principal's actual or ostensible authority. *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] AC 717, [1986] 5 WLUK 208 sets out the test for vicarious liability. The judge had erred by not considering whether W had held out the agent so as to give him ostensible authority, and whether H had acted in reliance on such holding out. There is no rule that a principal will always be liable for the dishonesty of an agent who had acted with the intention of benefiting him.

As the judge had not applied the correct test nor addressed some relevant issued, the question of vicarious liability was remitted for rehearing. ■

Assetco Plc v Grant Thornton UK LLP

[2019] EWHC 150 (Comm) (Bryan J) 31 January 2019

Negligence - pure economic loss – causation - quantum

The claimant, "A" is a public company listed on the Alternative Investment Market; its business is providing fire and rescue services to a branch of the UAE Armed Force and it had previously operated as the holding company for a group whose business was the manufacture of various industrial products as well as the provision of fire and rescue services to various other entities. The defendant, "GT", was engaged to audit A's financial statements for two financial years. Over the relevant financial years, A's senior management team behaved in a fundamentally dishonest manner, both in providing deliberately misleading information to GT and, outside the audit, in operating the company in a fraudulent manner. GT failed to detect this dishonesty, and accepted that it was negligent for not doing so. The trial concerned issues of causation and loss relating to this negligence.

Mr Justice Bryan gave a very long judgment in which he considered various aspects of the law of negligence.

A pleaded its case on loss by positing counterfactual scenarios: what would have happened but for GT's negligence. GT defended itself on a number of bases: that positing counterfactuals did not establish factual causation of A's alleged losses, that in any event the losses claimed were not recoverable as a matter of law, that the quantum of any recoverable losses was to be reduced or extinguished by the doctrine of contributory negligence or that of circuity of action, and that it ought to be relieved under s. 1157 of the Companies Act 2006.

Causation and counter-factual scenarios

The Court first had to consider what the correct approach to causation was in a case where auditors had failed to uncover fraud by a company's own management: whether causation of loss was to be established on the balance of probabilities, or whether the loss of chance analysis was appropriate.

Mr Justice Bryan noted that there are two well-established scenarios in which the Court will award damages for loss of a chance: where the claimant has lost a "hypothetical speculative benefit", such as the chance of winning a beauty contest, and where the defendant's wrongful act has caused the claimant to lose a benefit which is also dependent upon the hypothetical action of a third party. GT submitted that A's claim was of the second sort. In *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 the Court of Appeal had required a claimant to establish it had a real or substantial chance, as opposed to a speculative one, to establish causation of loss, and then applied a discount on the quantum of damages reflecting the size of the chance lost. GT submitted this approach was mandatory; A submitted that it was one available option, but that a court might award a claimant all its losses if it established on the balance of probabilities that the defendant's breach caused it to suffer loss, even where the claim depended on the hypothetical act of a third party.

After a detailed review of the authorities, Bryan J held that although *Allied Maples* allows a claimant to succeed on causation in a loss of a chance case where he would have failed on causation had he been required (which he is not in such cases) to establish causation on balance of probabilities, it does *not* allow parties to opt to prove causation on the balance of probabilities where the loss of chance analysis applies. In a loss of chance case, the claimant must prove on the balance of probabilities what he would have done but need only show that it had a real or substantial chance of the third party acting in such a way as to benefit it to satisfy the requirement of causation, the evaluation of the chance being part of the assessment of the quantum of the damage.

Bryan J also considered how loss of chance principles apply where the claimant's loss depends on the hypothetical action of a number of third parties. Again, after a detailed assessment of the case law, he concluded that where there are two or more *independent* contingencies the Court should assess the chance of each occurring independently: the product of the chances of each of these contingencies occurring reflects the recoverable loss. However, where there are two or more contingencies which are *not independent* – because they overlap or are affected by the same considerations - this approach is not appropriate. Rather than adopting an entirely mathematical approach, in that case the Court should look at the contingencies in the round and reach a global view on the chance which has been lost.

When deciding what approach to quantification of loss it should take, the Court must look closely at whether an entity is truly a third party or whether it is for practical purposes a unity with the claimant or so closely connected with the claimant as to justify the third party's hypothetical conduct being judged on the balance of probabilities analysis, rather than the loss of chance analysis.

Bryan J also considered whether the loss of chance approach to third parties' conduct continues to be appropriate where the Court has heard witness evidence from those third parties. He considered that the loss of chance analysis remains appropriate in this case. However, he noted that with the benefit of live evidence from witnesses, it may be that the Court is more confident in ascribing a chance to an outcome, so that, for example, it may happen that a Court is able to assess a chance at 100% where after having heard from the witness it is sure that witness would have acted in a certain way. Nonetheless, the Court is still taking the loss of chance approach in this case.

After having determined the legal principles determining what approach should be applied in what scenario, Bryan J considered A's submission that its loss did not depend at all on its own actions. If this was correct, then the balance of probabilities approach would have been appropriate – as all that the Court would have to consider was whether GT's actions caused it loss. If it was incorrect, the loss of chance analysis was appropriate. Bryan J had little difficulty in finding that A's actions (that is, the actions of its senior management, as attributed to the company) had contributed to the causation of loss, so that when looking at the case what the Court had to decide what chance of the true state of A's affairs being discovered had been lost through GT's negligence.

Applying the principles set out above, Bryan J determined that A had established on the balance of probabilities that it would have taken the steps necessary to its posited counterfactual situations, under which loss would have been minimized by A entering a scheme of arrangement in 2009 or 2010, rather than in 2011, as actually occurred. He also found that no discount on the quantum recoverable stood to be made by applying loss of chance principles.

Issues relating to Quantum

The next step was to assess quantum of loss. GT put forward its second main defence at this stage, arguing that A had suffered no recoverable loss, because any loss that was or might have been suffered was avoided or mitigated by the scheme of arrangement entered into in 2011.

Mitigation

The parties agreed that the purpose of damages for negligence was to put the injured party in the same position he would have been in if he had not sustained the wrong, and that where a loss has been avoided, damages may not be recovered for it. Additional benefits received as a result of mitigation are to be taken into account in calculating damages. A claimant must take all reasonable steps to mitigate his loss, and cannot recover for reasonably avoidable loss, but can recover for loss

CASE DIGESTS

Commercial Litigation

incurred in reasonable attempts to avoid loss. After such mitigation, only loss that has not been avoided is recoverable.

GT submitted that loss was to be calculated by comparing A's actual situation with the situation it would have been in if GT had not been negligent – the counterfactual scenarios. A submitted that it was entitled to recover for its actual rather than hypothetical loss – money that would not have been spent but for GT's negligence. A submitted that these losses were not the same as unsatisfied liabilities in the 2011 scheme of arrangement – the losses claimed were liabilities which were satisfied prior to the scheme of arrangement.

The Judge largely rejected GT's submissions on loss. It is not possible to undertake a "before and after" analysis – GT can only claim the benefit of mitigation that would have occurred in the counterfactual scenarios if this was mitigation which would have reduced A's *recoverable* loss rather than its actual loss. GT had to prove that mitigation that occurred in the counterfactual scenarios would have mitigated the losses caused by GT's negligence in particular. In practice this meant showing that hypothetical earlier schemes of arrangement would not have taken place but for GT's negligence and that GT's negligence would have been the legal cause of the schemes. GT had not demonstrated these points.

The 2011 scheme (which A did in fact enter into) was not a step taken in mitigation of A's losses caused by GT's negligence, and it did not enter into it to recover or reduce any wasted expenditure caused by GT's negligence or spent to mitigate this. GT's negligence was not the but for cause of A's entering into the 2011 scheme, as the judge had found that it would have entered into a scheme in 2009 or 2010 in any event. Even if A would not have entered a scheme in 2009 or 2010, all A had to prove was that it would not have suffered the losses claimed but for GT's negligence. The 2011 scheme mitigated losses which were not caused by GT's negligence – but mitigated other losses, largely group and third party debts. The 2011 scheme was not entered into on the basis of GT's audits, so that there is no proven connection between GT's negligence and the scheme. Even if GT's negligence was the 'but for'' cause of the 2011 Scheme, it was not the legal cause, in that it was not the most proximate cause, nor was it part of a 'continuous transaction' from GT's negligent audit.

Thus, the Judge found that GT did not mitigate or avoid its losses by entering the 2011 scheme.

Causation in law

GT further argued that A's losses, which comprised trading losses, a fraudulent related party transaction which occurred after the FY09 and FY10 audits, claims arising out of a preference share agreement and dividends paid by the board, did not fall within the scope of GT's duty and that they were not legally caused by GT's breach of duty.

A submitted that all these losses resulted from GT's failure to detect fraud or irregularity and from A's continuing to trade in reliance on GT's negligent audits and that there was no break in the chain of causation because these losses were precisely what an audit is supposed to protect against.

Bryan J found that an auditor owes a duty to shareholders to report accurately on the state of a company's finances, to enable those shareholders to question past management and influence future decisions. The shareholders' interest in proper management is indistinguishable from the company's own interest. GT's negligence deprived the decision-makers within AssetCo of the opportunity to "call the directors to book", influence future policy and management and ensure errors were corrected. For this reason, A's trading losses were within the scope of GT's duty. The same went for losses incurred through A's entry into the preference share agreement.

The dividends paid were within the scope of GT's duty as GT's negligence hid the fact that there were no distributable reserves available. But for causation was established as if GT had advised non-negligently, a distribution would not have occurred. However, although the decision by the directors to declare the dividend was a foreseeable consequence of GT's failure to detect management's fraudulent inflation of income, it was nonetheless a novus actus interveniens, which meant that the loss was not recoverable.

The judge agreed that A had to show that it had incurred the losses in reliance on GT's audit, but found this was easily shown.

On intervening acts, the judge found that A was wrong to say that GT could not rely on an intervening act where the loss was "the very thing" against which GT should have been guarding. The "very thing" is the occurrence that GT was supposed to prevent, not its consequences.

The fraudulent related party transaction was within the scope of GT's duty in that it occurred through A's trading dishonestly in reliance on the negligent audit, where if GT had not been negligent, the dishonesty would have been uncovered and the payment not made. There was no intervening act.

GT also submitted that A had to give credit for benefits which it obtained as a result of GT's negligence. Bryan J found that in order to give credit, it was necessary for the court to find that GT's negligence was the legal not simply the "but for" cause of the benefit. GT failed to prove this and therefore was unable to get credit for the benefits identified.

Contributory Fault

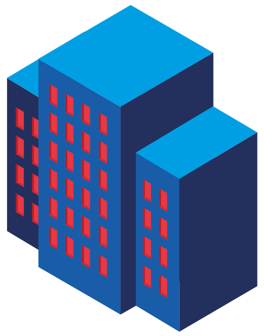
GT also argued that A's recovery should be reduced on the basis of A's own contributory fault. GT's negligence was negligence of the highest order, short of recklessness, and as assessed in relation to its duties as a member firm and individual member of the Institute of Chartered Accountants of England and Wales ("ICAEW"). However, the "very thing" principle did not assist A: the dishonesty of management is attributed to the company for the purpose of contributory fault. The Court's task is to assess the relative blameworthiness of the parties and the causative potency of their acts – which involves a consideration of both a company's management responsibilities and the scope of the auditor's duty. Weighing up both the serious dishonesty of A's management and the serious negligence of GT in its audit, the Judge gave a 25% discount to GT's liability for A's wasted expenditure caused by GT's negligence, a 35% for the money lost through A's management's decision to enter the preference share agreement and 100% in respect of the dividends (as an alternative to the finding that the claim in respect of these failed due to the doctrine of novus actus interveniens).

Circuity of Action

GT also submitted it had a counterclaim in deceit which resulted in A's claim failing for circuity of action. However, GT was negligent in not identifying the misrepresentations, and therefore could not rely on those as a basis of a claim in deceit. Misrepresentations which could potentially have been relied on (the misreporting of tax liabilities to HMRC) were not properly pleaded as so as to support a claim in receipt. Further, GT had not established reliance on these misrepresentations.

Discretionary Relief from Liability

Finally GT sought relief under s. 1157 of the Companies Act 2006, which gives the Court a discretionary power to relieve an auditor of liability where he acted honestly and reasonably and having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused. However, although GT had acted honestly, it had not acted reasonably, and it was not the case that having regard to the circumstances of the case it ought not to be excused. Its negligence was of the most serious nature and went to the heart of the auditor's duties. The application for relief under s. 1157 was therefore dismissed. ■



CASE DIGESTS

Company Law

Digested by Edoardo Lupi

Global Corporate Limited v Dirk Stefan Hale

[2018] EWCA Civ 2618 (Patten, Asplin, Coulson LJJ) 27 November 2018

Unlawful dividends – leading questions

The appeal concerned the dismissal by HHJ Paul Matthews (sitting as a judge of the High Court) of a claim to recover £23,511 as unlawful dividends from a company director paid over a period of time. Not long after the final payment in question, the company entered a creditors' voluntary liquidation. The joint liquidators had assigned their claims to the appellant, Global.

At first instance, the Judge had accepted that because the Company had no profits available for distribution within the provisions of s. 830(2) of the Companies Act 2006, the payments to the director by way of dividends were *prima facie* unlawful. However, he had rejected the claim on two alternative grounds: (i) that the decision to make the disputed payments as dividends was no more than a decision in principle subject to confirmation by the Company's accountant at the end of the financial year, once the accountant had ascertained whether there were sufficient distributable reserves; and (ii) that there had been no valid decision at all to pay the monies as dividends at the time when the monies were paid, so that s. 830 and s. 847 CA 2006 had no application at all.

The appeal turned on the trial judge's concentration on the intention or state of mind of the directors when authorising the disputed payments as dividends rather than on the payments themselves, as well as on a line of leading questions the Judge had asked the defendant (who was a litigant in person) at the end of cross-examination.

Patten LJ (with whom Asplin and Coulson LJJ agreed) began by noting that on the evidence at trial, it was apparent that the director's position was that the payments had been received as a dividend. Patten LJ noted how at the end of cross-examination the Judge had asked a number of *"highly leading"* questions *"designed to examine the basis on which the dividends had been declared having regard to the possibility that after the year end the accountants might take steps to "reverse" that process"*.

His Lordship observed that whilst the Judge was perfectly entitled to clarify answers given during the director's

CASE DIGESTS

Company Law

evidence, it had not been part of the director's case that the decision to pay dividends was provisional or so conditional as not to be a decision at all, and no such suggestion had been made by the director. Accordingly, the Judge's ultimate finding was based upon a new line of cross-examination introduced by the Judge himself for which there was no existing evidence. Patten LJ concluded that the Judge's approach had not been satisfactory but, in any event, the evidence he had elicited was also irrelevant.

First, on the evidence, Patten LJ rejected the conclusion that the dividends had not been, as the Judge put it, declared *"definitively"*: they had been expressly declared as interim dividends and, therefore, had real legal consequences. No steps had been taken by the directors or accountants to adjust the arrangements retrospectively before the Company went into liquidation. Second, the payments were clearly distributions within the meaning of s. 830 CA 2006 when they were made and that was the time when their legality had to be tested. Patten LJ noted that s.830 is directed to distributions as and when they are made. It was immaterial that a subsequent realisation that the distributions should not have been made would prompt their being treated as remuneration. That could not cure the illegality of the original payment. The most it could do was allow the monies to be notionally repaid and then re-applied in a way that does not contravene the provisions of s. 830 and is otherwise a lawful application of the assets of the company. Accordingly, the appeal was allowed.

Hopkinson v Towergate Financial (Group) Ltd

[2018] EWCA Civ 2744 (David Richards, Underhill and Elias LJJ) 6 December 2018

Indemnity clauses – interpretation – sale of shares

The appeal concerned a point of construction of indemnity provisions in a share sale agreement. The purchaser and other group companies had made claims under the relevant indemnity. The defendants, who were the indemnifying parties, contended that prior notice of claim was required under that indemnity and had not been given in advance of the relevant cut-off date. The defendants applied for summary judgment dismissing the proceedings on that basis.

Under the relevant indemnity, the defendants agreed to indemnify the claimants for, among other things, losses and liabilities the 'Group' or 'Purchaser Group' might suffer in connection with claims against the 'Group', specifically including claims arising from mis-selling and pensions transfers.

The defendants' liability both under the indemnity in question and in respect of other defined 'Claims' was subject to a notification clause. The clause in question made the defendants' liability conditional on: (i) being given notice in writing of the relevant matter or thing. Words in brackets in the body of the clause required the purchaser to specify the details and circumstances giving rise to the 'Claim' or 'Claims' and a good faith estimate of the total amount of such 'Claim' or 'Claims'; and (ii) notice of the indemnity 'claim' (lower case) being given as soon as possible and in any event prior to the seventh anniversary of the share sale agreement.

Following entry into the agreement, reviews by the FCA had led to the payment by the Group of very significant amounts of compensation for mis-selling. A few days prior to the seventh anniversary of the date of the agreement, the claimants wrote a letter to the defendants. The parties disputed whether that letter complied with the notification requirements applicable to the indemnity. The issue of construction was whether the bracketed words applied to 'claims' under the indemnity, or just to 'Claims' as defined under the agreement (which did not include indemnity claims). If the bracketed words applied to the latter, then the letter to the defendants fell foul of the notification requirement because it did not provide the requisite detail.

At first instance, the defendants submitted that the bracketed words applied to any notice given under the relevant provision, whereas the claimants contended that the bracketed words only applied to 'Claims' as defined, and not to 'claims' under the indemnity. Leggatt J held that the bracketed words should be construed to apply only when the relevant matter or thing is a 'Claim', and dismissed the defendants' application.

In the Court of Appeal, David Richards LJ's starting point was that the relevant provisions could not be said to have been well drafted nor to fit in with related provisions elsewhere in the agreement. His Lordship accepted the submission that the term 'Claim' was not being used strictly in accordance with its definition in one sub-clause of the relevant notification provision, such that it was not appropriate to approach the issue on the basis that the clause was carefully drafted (departing from the usual assumption: Wood v Capita Insurance Services Ltd [2017] UKSC 36 at [13]).

Despite the one apparently mistaken use of the term 'Claim' in the sub-clause, there was still internal consistency in the use of that term in the rest of the clause. In any event, the mistake in the sub-clause could be corrected by way of interpretation applying the established approach in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38. Further, it was *"most important"* that the construction with commercial common sense. Circumstances that created the real possibility or probability of successful mis-selling or similar claims leading to a claim under the indemnity could well occur at a stage when it would be impossible to provide the information required by the bracketed words. Accordingly, the appeal was dismissed.

Ideal Standard International SA v Herbert

[2018] EWHC 3326 (Comm) (Sir Ross Cranston, sitting as a Judge of the High Court) 22 November 2018

Interim injunctions – shareholders agreement – non-compete clauses

The case concerned an application for an interim injunction to restrain breach of a non-compete clause in a shareholders' agreement.

The respondent had worked for the applicant, Ideal Standard, for about twenty years. As a senior employee and shareholder in a group company, the respondent became party to a shareholders' agreement. That agreement contained a non-compete clause, which applied for 18 months from the respondent's cessation date. The shareholders' agreement also provided for arbitration in London, with the arbitration clause also preserving the right to seek injunctive relief from the court pending commencement of an arbitration. The agreement was signed by a Mr Turling for and on behalf of an Ideal Standard entity.

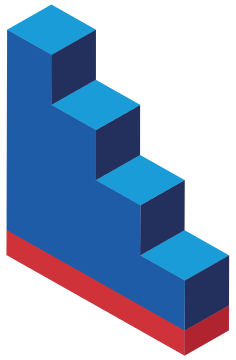
The respondent was dismissed and, subsequent to his dismissal, he and an entity in the Ideal Standard group entered into a settlement agreement relating to the termination of his employment. The settlement agreement was subject to Belgian law. None of the parties sought to rely on Belgian law, such that the English Court proceeded as if English law applied. The settlement agreement contained a clause which provided that, with the exception of what was provided in the settlement agreement, none of the parties would have any obligations vis-à-vis the others. A further clause extended the waiver of rights to other companies and entities within the Ideal Standard group.

Ideal Standard's CEO discovered that the respondent had been engaged by a competitor around five months after his dismissal. Accordingly, Ideal Standard sought an interim injunction until the position was determined in arbitration.

The respondent argued that the effect of the settlement agreement was to discharge him from the shareholders' agreement, including the non-compete clause thereunder. Sir Ross Cranston (sitting as a Judge of the High Court) held that whilst the agreement was not an easy document to construe, it did not have the effect for which the respondent contended. The Judge took into account that: (i) the signature of Mr Turling was on behalf of a specified entity and not anyone else in the Ideal Standard group; and (ii) there was no reference to the shareholders' agreement in the settlement agreement, and anything making it clear that the applicants had waived their rights under the shareholders' agreement.

As to the non-compete clause itself, the Judge rejected the further submission that, in general, a non-compete clause was more strictly enforced in shareholders' agreements than in the ordinary employee context. Applying ordinary American Cyanamid principles, the Judge held that there was a serious issue to be decided in the arbitration as to the legitimate interests of the Ideal Standard group in relation to the non-compete clause, and that the scope of the clause was no more extensive than required to provide adequate protection: an 18-month period was not unreasonable to protect Ideal Standard's legitimate business interests.

As to the balance of convenience, this was in favour of the interim injunction. Damages were unlikely to be an adequate remedy given the respondent's knowledge of confidential information, whereas it would likely be an adequate remedy for the respondent. Accordingly, the interim injunction was granted.



CASE DIGESTS

Corporate Insolvency

Digested by Ryan Perkins and Riz Mokal

Re GP Cars (Herts) Ltd

[2018] EWHC 2639 (Ch) (Edwin Johnson QC, sitting as a Deputy Judge of the High Court) 11 October 2018

Compulsory power to require production of documents and information under section 236 of Insolvency Act 1986 – principles governing allocation of costs of application and of compliance with order

This appeal from a decision of Chief Registrar Briggs concerned two categories of costs: the costs of making an application under section 236 of the Insolvency Act 1986 to compel production of documents and information ('application costs') and the costs of complying with an order under that provision ('compliance costs'). The Chief Registrar had ordered a firm of solicitors to produce certain documents and had subsequently awarded the liquidators their application costs on the basis that the solicitors had in effect invited the liquidators to make the application. He had also refused the solicitors' application that the liquidators be required to pay the solicitors' compliance costs.

CASE DIGESTS

Corporate Insolvency

In relation to application costs, the Court held that the Chief Registrar has discretion the result of whose exercise would be overturned only if no other registrar properly directed would have thus exercised it. Notwithstanding this wide discretion, the Court overturned the Chief Registrar's decision on the basis that he had misconstrued the solicitors' position, who had not invited the making of the application but instead had taken the position that they were not at liberty simply to hand over documents that might be subject to the duty of confidentiality or to legal professional privilege but instead would require the protection of a court order. In taking this position, the solicitors had acted reasonably and there was no basis for burdening them with the liquidators' application costs. There would be no order as to application costs. As to compliance costs, the Chief Registrar's decision was not outwith the proper exercise of his discretion and would not be overturned. ■

[Robert Amey]

Re Platinum Partners Value Arbitrage Fund Ltd LP

Grand Court of the Cayman Islands (Segal J) 23 October 2018

Litigation funding agreement – security interest over proceeds of claims the subject of the funding agreement – secured creditor objection to agreement – whether court has jurisdiction to approve agreement

The official liquidators of the Fund applied for sanction to enter a litigation funding agreement. The application was opposed by one of a number of creditors who claimed a security interest over the proceeds of all claims which were to be subject to the Funding Agreement. The creditor challenged the jurisdiction of the Court to approve the Funding Agreement in so far as it sought to impose liabilities which would be charged on and payable in priority to its own secured claims out of the claims over which it asserted a security interest.

The court sanctioned the Funding Agreement. It applied the principle set out by the High Court of Australia in *Re Universal Distributing Co Ltd* (1933) 48 CLR 171, namely that a secured creditor may not have the benefit of a fund created by a liquidator's efforts in the winding up without the liquidator's costs and expenses, including remuneration, of creating that fund being first met. To that end, equity will create a charge over the fund in priority to that of the secured creditor. The principle will apply where there is an insolvent company in liquidation; the liquidator has incurred expenses and rendered services in the realisation of an asset; the resulting fund is insufficient to meet both the liquidator's costs and expenses of realisation and the debt due to a secured creditor; and the creditor claims the fund. The principle in *Universal Distributing Co* was applied, although the present case was different from the authorities establishing the principle in that (i) the liquidators sought an order in advance of incurring the relevant expenses; and (ii) the Funding Agreement involved intangible assets (namely, claims) and imposed obligations of a different kind and extent from those ordinarily associated with the preservation and sale of tangible property. The court was also satisfied that it should sanction the exercise of the liquidators' powers, having regard to (i) the principles set out in Re DD Growth [2013 CILR (2) 361], and (ii) the fact that the Funding Agreement was not unlawful by reason of champerty and maintenance. ■

[Barry Isaacs QC]

Re Stronghold Insurance Co Ltd

[2018] EWHC 2909 (Ch) (Hildyard J) 31 October 2018

Insurance company – protracted runoff – solvent scheme – whether continuation of runoff or liquidation was comparator – whether IBNR and other claimants may be placed in same class

The Company had been in run-off for 33 years and continued to have long-tail business relating to asbestos and similar liabilities. Compromise settlements and commutations had been achieved with certain policy holders but some 245 potential claims remained to be resolved. The Company proposed a 'cut-off and estimation' scheme to settle or compromise all outstanding obligations. It proposed a single class meeting, and the main question before the Court was whether IBNR claimants (i.e. those holding policies in relation to which relevant events had occurred but which had not been reported to the policy holder) should be classified separately from other creditors.

The Court decided that the most likely alternative to the approval of the proposed scheme was the continuation of the solvent run-off. However, in assessing whether the policyholders might be expected to discuss the proposals together as to their common interest, account had to be taken of possible, presently unspecified regulatory intervention, and of supervening insolvency. If the Court could be persuaded on the facts that insolvency was imminent, insolvent liquidation was the correct comparator, the same insolvency valuation rules would apply to all claimants, and IBNR claimants may be placed in the same class as claimants with notified claims. If insolvency was not imminent, however, then in order to permit a single meeting, the Court would need persuading on the facts either that any uncertainties in estimating IBNR claims were not material, or that IBNR and other claimants could realistically be expected to consult together notwithstanding such inherent uncertainties and resulting qualitative differences between their rights. On the facts of this case, the Court refused to permit the Company to convene a single meeting. ■

[William Trower QC; Adam Goodison; Hilary Stonefrost]

Re Stripes US Holdings Inc

[2018] EWHC 3098 (Ch) (Marcus Smith J) 12 November 2018

Scheme of arrangement – EU-domiciled creditors – whether Art 8 of Recast Judgment Regulation applied

The company, a Delaware corporation with a UK-registered establishment, applied for the sanctioning of a scheme of arrangement. The corporation was part of a US group whose business was the manufacture, sourcing,and retailing of household goods around the world. The company's only significant assets were shares in another group member which was the leading mattress retailer in the US. The scheme concerned a US$200m revolving credit facility governed by English law guaranteed by other group entities, which was in default. The scheme envisaged the scheme creditors transferring their rights under the facility to the company's parent in return for longer-term debt issued by the parent and guaranteed by another group member. The scheme was part of a wider group restructuring being undertaken via Chapter 11 proceedings in the US, which also involved a fresh injection into the group of US$400m. The company's position was that, absent the scheme, it would be in a precarious position and its assets – the shares in the subsidiary – would be rendered valueless, leaving the scheme creditors with claims of uncertain value against the guarantors. At the convening hearing, Zacaroli J had found that the proposed scheme offered real benefits to scheme creditors.

The Court sanctioned the scheme, which had been approved by an overwhelming majority of creditors and not opposed by any. In relation to whether the Court had jurisdiction over certain scheme creditors incorporated in EU states other than the UK, the company had submitted that the case fell within Article 8 of the Recast Judgment Regulation, which provides that where there are multiple defendants domiciled in different member states, they may be sued in the courts of the state in which any of them is domiciled, provided that the claims against them are so closely related that it would be expedient to try them together in order to avoid the risk of irreconcilable judgments. The Court agreed, without resolving the question whether it was sufficient that one or more scheme creditors was domiciled in the UK or whether a sufficient number had to be so domiciled. ■

[Mark Arnold QC; Adam Al-Attar]

Re Ixoyc Anesis Ltd

[2018] EWHC 3190 (Ch) (Richard Spearman QC sitting as a Deputy Judge of the High Court) 23 November 2018

Director disqualification – discrimination amongst creditors – trade and employee creditors paid at the expense of HMRC – whether director's honesty and conduct provided extenuation

The director of a company with a beauty salon business had caused it to pay only those creditors whose ongoing cooperation was required in order to keep the company in operation. VAT payments were not made and only a few payments were made in right of PAYE. The company went into voluntary liquidation and the Secretary of State applied for a disqualification order. Confirming that disqualification does not require dishonesty and may result from serious incompetence or negligence or from unfair discrimination between creditors, the Court made a disqualification order. It was relevant that this conduct continued over 17 months, which amounted to virtually the entire lifetime of the company. The facts that the director put money into the company and did not carry on trading in circumstances where he thought the company would never be able to meet its liabilities to HMRC were not sufficient to relieve him of liability to disqualification. ■

CASE DIGESTS

Corporate Insolvency

Re Spaces London Bridge Ltd

[2018] EWHC 3099 (Ch) (Nugee J) 18 October 2018

Appointment of administrators - validity of appointment - notice of appointment

The administrators of the company applied for a declaration that they had been validly appointed. The issue turned on the requirement under rule 3.24(1)(j) of the IR2016 to specify the "date and time of the appointment" on the face of the notice of appointment. Nugee J held that this requirement meant that the notice should specify the time when the appointment took effect, being the time at which the notice was filed at court. In the present case, the notice of appointment failed to comply with this requirement. However, Nugee J granted a declaration that the appointment was nevertheless valid (on the basis that the procedural defect did not invalidate the appointment). ■

Lehman Brothers Australia Ltd v Lomas

[2018] EWHC 2783 (Ch) (Hildyard J) 24 October 2018

Rule in Ex parte James - unfair harm

Lehman Brothers Australia (LBA) entered into a Claims Determination Deed (CDD) with Lehman Brothers International Europe (LBIE), pursuant to which LBA and LBIE agreed that LBA's claim would be admitted to proof in the administration of LBIE in the sum of c. £23m. Some years later, LBA discovered that the agreed amount had been calculated on the basis of a model which contained an error. Had the model been created in the correct way, the claim would have been calculated in the sum of c. £25m. LBA (acting through its liquidators) applied for a direction that the administrators of LBIE be required to admit LBA's claim in the sum of £25m notwithstanding the terms and contractual effect of the CDD. The application was made on the basis of the rule in *Ex parte James* and/or para 74 of Schedule B1 to the IA1986 (unfair harm). Hildyard J dismissed the application, and held as follows: (i) The test for applying the rule in *Ex parte James* was whether the office-holder's exercise of or reliance on a legal right would be pronounced to be obviously unjust by all right-minded men (see *Re Wigzell, Ex parte Hart* [1921] 2 KB 835). The occasions when the test would apply were likely to be few and far between. In *Re Lehman Brothers International (Europe)* [2015] EWHC 2270 (Ch), David Richards J adopted a different test based on the concept of "unfairness". This test was inconsistent with Court of Appeal authority and should not be followed. (ii) As a matter of principle, there was no reason for refusing to give effect to contractual obligations freely entered into. The case was "rectification or bust": if there was no basis for rectifying the contract, then the application was flawed. LBA accepted that the CDD could not be rectified under the usual contractual principles. (iii) Even if, contrary to Hildyard J's view, the rule in *Ex parte James* or para 74 of Schedule B1 empowered the court to override a contractual commitment or impose equitable constraints on the exercise of a contractual right derived from a freely entered bargain simply on the ground of "unfairness", it would not be right to exercise such jurisdiction here. The CDD was entered into in order to define the admitted claim with certainty and finality. It was drafted in a way and with terms specifically designed to prevent the admitted claim from being reopened. It expressly released further claims. It provided for the ability to transfer the admitted claim to a third party in the agreed amount on that basis. It was one of some 2,300 Claims Determination Deeds drafted with the same objectives. The claim had been admitted to proof and paid in full in 2014. The account was agreed and settled. Assuming that the contract could not be rectified, there was no unfairness in enforcing it in accordance with its terms. LBA has applied to the Court of Appeal for permission to appeal. ■

[Daniel Bayfield QC, Ryan Perkins]


Re OJSC International Bank of Azerbaijan

[2018] EWCA Civ 2802 (Lewison, Henderson, Baker LLJ) 18 December 2018

Cross Border Insolvency Regulations - Permanent Moratorium - the Gibbs rule

The International Bank of Azerbaijan (IBA) entered into a restructuring proceeding in Azerbaijan, which was recognised as a foreign main proceeding under the Cross Border Insolvency Regulations 2006 (CBIR). A restructuring plan was approved by the Azeri court which purported to discharge the claims of IBA's financial creditors (in return for a number of "entitlements" such as new debt securities). Some of the claims were governed by English law. Two creditors (Sberbank and Franklin Templeton) sought to enforce their claims against IBA contrary to the terms of the Azeri restructuring plan. They relied on the rule in *Antony Gibbs & Sons v Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399, which states a debt governed by English law cannot be discharged by foreign insolvency proceedings. It was common ground that neither Sberbank nor Franklin Templeton had submitted to the jurisdiction of the Azeri court. The foreign representative of IBA applied under Articles 21(1)(a) and (b) of Schedule 1 to the CBIR for a permanent moratorium so as to prevent the enforcement of the claims held by Sberbank and Franklin Templeton. At first instance, Hildyard J dismissed the foreign representative's application. He held that the Court did not have jurisdiction to grant relief under the CBIR which would undermine the effect of the *Gibbs* rule. The Court of Appeal upheld the judgment of Hildyard J, holding that: (i) the English court does not have and/or should not exercise the power to grant any relief under the CBIR which would undermine the substantive English law rights of Sberbank and Franklin Templeton; and (ii) in any event, the relief under the CBIR must terminate upon the termination of the relevant foreign proceeding (which would prevent the grant of a permanent moratorium). The foreign representative has applied to the Supreme Court for permission to appeal, including to argue that *Gibbs* is no longer good law. ■

[Gabriel Moss QC, Daniel Bayfield QC, Richard Fisher, Ryan Perkins]




Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd; Cannon Corporate Ltd v Primus Build Ltd

[2019] EWCA Civ 27 (Sir Andrew McFarlane PFD, King LJ, Coulson LJ) 24 January 2019

Construction adjudication – liquidation – Company Voluntary Arrangements – set-off

In two appeals, heard together, the Court of Appeal gave guidance on the interplay between the construction adjudication and insolvency regimes.

In one appeal Bresco sought to set aside an injunction preventing the continuation of an adjudication which had been obtained on the basis that the adjudicator did not have jurisdiction to deal with a company in insolvent liquidation facing a cross-claim as the application of insolvency set-off meant that the only remaining claim was to the net balance.

In the other appeal Cannon appealed against the summary judgment in favour of Primus, granted notwithstanding that Primus was subject to a company voluntary arrangement that incorporating the rules of set-off applicable in a liquidation, and, in the alternative, against the refusal to grant a stay of execution.

Shortly after the hearing, *Cannon v Primus* settled, but given the close links between the issues raised in the appeals, a judgment covering both was handed down.

Coulson LJ (with whom McFarlane PFD and King LJ agreed) held that the insolvency set-off regime did not preclude an adjudicator having jurisdiction to consider a dispute involving a party in liquidation facing a cross-claim. However, he considered that, even though an adjudicator might technically have jurisdiction, any decision would be incapable of enforcement and therefore futile. The Judge had therefore been right to grant an injunction. Bresco's appeal was therefore dismissed.

Coulson LJ considered that the jurisdiction argument (had there been anything in it) would not have been open to Cannon as it had not been the subject of any specific reservation before the adjudicator. Cannon's general reservation did not cover it and was subsumed by the specific objections to the adjudicator's jurisdiction in any event. In any event, he considered that the position relating to a company voluntary arrangement differs from a situation where a company is in liquidation, the former being designed to allow a company to trade out of its difficulties. On the facts the Judge had therefore been right to grant summary judgment and to refuse a stay of execution. ■

[Charlotte Cooke]

Re Noble Group Ltd

[2018] EWHC 2911 (Ch); [2018] EWHC 3092 (Ch) (Snowden J) 2 November 2018 and 14 November 2018

Schemes of arrangement – backstop fees – class composition

This was a substantial scheme of arrangement proposed by the company, which had moved its centre of main interests to the UK in March 2018. The convening hearing took place on 2 November 2018 and the sanction hearing took place on 14 November 2018. The scheme was part of a restructuring whereby the company's business and assets were to be transferred to two subsidiaries of a newly incorporated company as part of a debt-for-equity swap. The convening judgment, in particular, is likely to become the leading case on the impact of consent and backstop fees in the context of class composition.

At the convening hearing, Snowden J dealt with the question of class composition. The company had paid a variety of different fees to certain members of an ad hoc group, comprising some of the company's creditors involved in substantive discussions with the company concerning the restructuring. Snowden J held that payments made by a

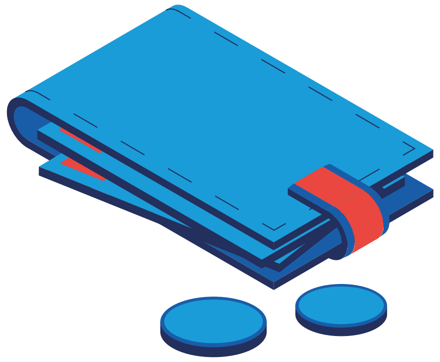
CASE DIGESTS

Corporate Insolvency

company to some creditors independently of a proposed scheme and its associated restructuring agreements, which were not dependent upon the scheme taking effect, ought not to be considered for class purposes. However, certain fees (known as "backstop fees") formed part of the restructuring and were dependent upon the scheme being sanctioned. They were not offered to all scheme creditors and were to be paid in differing amounts depending upon whether the scheme creditor was an initial lender. Snowden J held that, in a case in which any form of fees are offered to some but not all scheme creditors contingently on the scheme being sanctioned, the Court will inevitably have to form a view about the materiality of the fees when judging whether the rights of the creditors who will not be paid the fees are sufficiently dissimilar that they cannot consult together with a view to their common interest with those who will be paid the fees. Put simply, if the fees are immaterial to the decision, then the creditors can consult together: if they are material, then they probably cannot. In making that evaluation, the Court will have regard to the level of the fees in question, but it is not appropriate simply to look at the percentage which the fee bears to the face value of the debt held by the potential recipients. More relevant is the size of the fee when compared to the predicted returns offered to all creditors under the scheme and the returns that creditors are predicted to make in a liquidation. Moreover, in a case in which the fees are offered in return for the provision of financial support or other financial accommodation or risk, as opposed to simply being offered in exchange for an agreement to support the restructuring, evidence as to whether the fee is in line with market rates will also be relevant. The court can then make a judgment as to whether the value of the extra fees is likely to make a real difference to the decision faced by the creditors who will receive them and those who will not. On the evidence, Snowden J was satisfied that it was not impossible for scheme creditors who did not stand to receive backstop fees to consult with those who did. *Obiter,* Snowden J affirmed the usual rule that those who attend a convening meeting to raise legitimate points in a constructive manner could expect to receive their reasonable costs irrespective of the outcome.

At the sanction hearing, Snowden J sanctioned the scheme. The scheme had been overwhelmingly approved at the creditors' meetings, and no one appeared to object to the sanction of the scheme. In those circumstances, despite the misgivings that Snowden J expressed in his convening judgment about certain aspects of the scheme (particularly the high levels of fees), the Court was prepared to sanction the scheme (applying the usual *Buckley* test). ■

[William Trower QC; David Allison QC; Stephen Robins; Henry Phillips; Lottie Pyper]



CASE DIGESTS

Personal Insolvency

Digested by Lottie Pyper

Gertner v CFL Finance Ltd

[2018] EWCA Civ 1781 (Patten, Floyd, Coulson LJJ) 30 July 2018

Conflict of interest – creditors' meetings – creditors' powers and duties – good faith – individual voluntary arrangements – material irregularity – non-disclosure settlement – voting rights

The debtor, Mr Gertner, appealed against the revocation of an individual voluntary arrangement approved by his creditors. The question was whether there had been a material irregularity where one creditor, Kaupthing Bank ('Kaupthing') had failed to disclose an agreement with a related company to the other creditors, pursuant to which it stood to gain a substantial sum if the IVA was approved (the 'agreement').

The Court of Appeal considered whether the agreement gave rise to a material irregularity in the IVA under section 262 of the Insolvency Act 1986, either because (i) as a result of the settlement agreement, Kaupthing's debt had been compromised or become contingent and/or unliquidated, or (ii) the agreement breached Kaupthing's duty of good faith towards the other creditors.

It was held that the agreement did not automatically result in Kaupthing's debt being compromised or becoming contingent and/or unliquidated, as there was no reason why a debt could not be preserved despite a creditor's agreement not to enforce it ([53]). Kaupthing's debt therefore fell to be calculated by reference to the debt owed as at the date of the IVA meeting, in accordance with rule 5.21(2)(b) of the Insolvency Rules 1986 ([61]).

However, the existence and non-disclosure of the agreement to the other creditors did amount to a breach of Kaupthing's duty of good faith ([71]). Although preferential treatment of certain creditors did not *ipso facto* give rise to a material irregularity, it did so in this case ([79]). The practical effect of the agreement was to confer a collateral advantage of $6 million onto Kaupthing if the IVA was approved, and therefore Kaupthing was incentivised to vote in favour on that basis. This collateral advantage was adverse to the interests of the other creditors, and therefore Kaupthing's vote should not have been admitted, or have been admitted but at a nominal value only. Without Kaupthing's vote the statutory majority for approving the IVA would not have been reached. The appeal was dismissed and the IVA revoked ([82]). ■

[Gabriel Moss QC]

Boulton v Queen Margaret's School, York Ltd

[2018] 10 WLUK 490 (Arnold J) 31 October 2018

Bankruptcy orders – offers – reasonableness – refusal

The appellant had been made bankrupt as a result of a statutory demand comprising (i) unpaid school fees and (ii) debt recovery costs in respect of those fees. She appealed against the bankruptcy order, arguing that the respondent school had unreasonably refused an offer to pay the portion of the petition debt relating to school fees in instalments together with 3% interest, and therefore that the court should have exercised its discretion to dismiss the petition under s271(3) of the Insolvency Act 1986. Since the remainder of the petition debt, relating to debt recovery costs, was *bona fide* disputed, it did not fall within s271(1) of the Insolvency Act 1986 and so could not form the basis for a bankruptcy order. The Court accepted these submissions, holding that a reasonable hypothetical creditor would have accepted the appellant's offer, and therefore the school had been unreasonable in not accepting it. Accordingly, the bankruptcy order was set aside and the petition dismissed. ■

[Edoardo Lupi]

Azuonye v Kent

[2018] EWHC 2766 (Ch); [2018] 4 WLR 157 (Falk J) 2 October 2018

Income payments order – subsequent bankruptcy – discharge

The question in this case was whether an obligation to make future payments under an income payments order ("IPO") made pursuant to section 310 of the Insolvency Act 1986 ("IA 1986") survives a second bankruptcy order where the first bankruptcy has been discharged.

Falk J held that the IPO did not form part of the 'bankruptcy debts' and therefore was not released upon the appellant's discharge from the first bankruptcy (s281 IA 1986, [16]). The position was the same at common law, since future payments under an IPO are inherently uncertain due to the court's power to vary them ([26]).

Since the IPO was also not a debt provable in the second bankruptcy, the trustee was not precluded from enforcing the IPO as a result of section 285(3) IA 1986. Although section 335 IA 1986 only applies where a bankruptcy order was made in respect of an undischargd bankruptcy, and therefore had no direct application where a bankruptcy order was made in respect of a undischarged bankrupt, there was an assumption in s335(2) that sums payable under an IPO continued to be payable under a second bankruptcy order. The fact that the Insolvency Act 1986 was silent on the impact of a second bankruptcy order on a discharged bankrupt subject to an IPO did not mean that the IPO ceased to operate in those circumstances. Falk J observed that it would be a strange result if a discharged bankrupt, but not an undischarged bankrupt, could avoid an IPO by making himself bankrupt for a second time ([25]). The appropriate manner in which to address the relationship between the first and second bankruptcies lay in the trustee in the second bankruptcy's power to seek variation of the IPO and/or to seek a further IPO in the second bankruptcy. ■

[Charlotte Cooke]

CASE DIGESTS

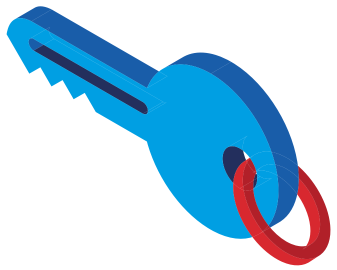
Personal Insolvency

Re Singh (In Bankruptcy)

[2018] EWHC 3277 (Ch) (Nugee J) 29 Novemer 2018

Costs – expenses – remuneration – surplus – trustees in bankruptcy

A bankrupt sought permission to challenge the remuneration and expenses of his trustee in bankruptcy under rule 18.35 of the Insolvency Rules 1986. Upholding the decision at first instance, the Court held that prospect of the bankrupt benefitting was relevant to both the threshold and discretionary limbs of the test in rule 18.35. The threshold question, under rule 18.35(4), was whether absent the trustee's costs, there was or was likely to be a surplus of assets to which the bankrupt was entitled. Although this threshold test was satisfied in this case, the Court was nevertheless entitled to refuse permission to bring the application as an exercise of its discretion under rule 18.35(5). The fact that a surplus was possible was not necessarily sufficient, and it was appropriate for the Court to further consider whether there was in fact a real likelihood of the application resulting in an overall surplus for the bankrupt. Since the required reduction in remuneration and expenses was not realistically likely to be achieved in this case, the application for permission was refused. ■



CASE DIGESTS

Property and Trusts

Digested by Andrew Shaw

Antoine v Barclays Bank UK Plc & Ors

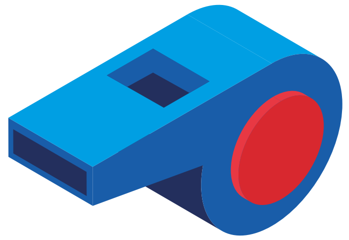
[2018] EWCA Civ 2846 (Longmore, Peter Jackson and Asplin LJJ) 20 December 2018

Registration – mistake – rectification

The appellant was the personal representative of his father's estate. Following earlier legal proceedings, an order had been made that a Mr Taylor was entitled to be registered as the proprietor of a property previously owned by the appellant's father (the "Property") (the "2007 Order"). On the basis of the 2007 Order, Mr Taylor was registered as the legal proprietor of the Property, which he mortgaged to Barclays Bank ("Barclays"). It subsequently transpired that the 2007 Order had been obtained on the basis of forged documents and the appellant brought proceedings against Barclays and the Chief Land Registrar to have the land register altered on the basis that the registration of Mr Taylor as proprietor of the Property was a mistake.

At first instance the Judge refused the relief sought by the appellant. She held that the disposition of the Property to Mr Taylor had been effected by the 2007 Order, which was at that time valid and effective, notwithstanding that it had been procured by forgery. The registration was not therefore a mistake for the purposes of Schedule 4 to the Land Registration Act 2002 ("LRA 2002") and so the register could not be rectified.

The Court of Appeal upheld the Judge's conclusions. Asplin LJ held that the terms void and voidable were part of the English law of contract but were not applicable to orders made by a court of unlimited jurisdiction, which were either irregular or irregular. While an irregular order may be set aside on application, unless and until this occurs, such an order must be complied with. Such an order is thus analogous to a voidable contract, rather than one which is void *ab initio*. At the time at which Mr Taylor was registered as proprietor of the Property, the 2007 Order was therefore valid and so its registration was not a mistake for the purposes of Schedule 4 of LRA 2002. ■



CASE DIGESTS

Sport

Digested by Robert Amey

AGBPhoto

Fleetwood Wanderers Ltd (t/a Fleetwood Town Football Club) v AFC Fylde Ltd

[2018] EWHC 3318 (Comm) (Teare J) 30 November 2018

FA Rule K arbitration – serious irregularity

In 2014 and again in 2015, AFC Fylde entered into employment contracts with Dion Charles. The second contract was not registered with the Football Association or the National League. Subsequently, during the course of the second contract, Mr Charles joined Fleetwood Wanderers.

AFC Fylde commenced a Rule K arbitration against Fleetwood Wanderers, alleging that the latter had unlawfully procured a breach by Mr Charles of his contractual obligations, and that AFC Fylde was entitled to compensation under Article 17 of the Regulations on the Status and Transfer of Players ("RSTP") issued by FIFA.

An issue arose whether the RSTP had been incorporated by the FA Rules, and the arbitrator heard submissions. Subsequently, the arbitrator issued his award, holding that the common law claim for procuring a breach of contract failed, but that the RSTP claim succeeded.

Fleetwood Wanderers subsequently discovered that before the award was issued, the arbitrator had conducted his own research to determine whether the RSTP had been incorporated by the FA Rules, and had emailed contacts at the FA to make enquiries, as well as doing further research on the internet. The parties had been unaware of this prior to the award being handed down.

Fleetwood Wanderers challenged the award under section 68(2)(a) of the Arbitration Act 1996, alleging that the arbitrator's communications with the FA without notifying the parties or giving them the opportunity to make representations, amounted to a serious irregularity.

The High Court noted that to comply with its duty under section 33(1) of the Arbitration Act 1996 to act fairly, the tribunal should give the parties an opportunity to deal with any issue that may be relied upon by it as the basis of its findings. Parties are entitled to assume that the tribunal will base its decision solely on the evidence and argument presented by them prior to the making of the award and if the tribunal is minded to decide the dispute on some other point, the tribunal must give notice of it to the parties to enable them to address the point.

Contrary to these principles, the arbitrator had conducted research and made enquiries without sharing the information with the parties and giving them an opportunity to make representations. This was a breach of his duties under section 33 of the 1996 Act, amounting to an irregularity within the meaning of section 68(2).

Moreover, the breach had caused substantial injustice. Had the arbitrator informed the parties of the results of his research, it is likely that they both would have made further submissions, and there was a real prospect that the outcome would have been different. On this basis, the award was remitted to the arbitrator for him to reconsider the RSTP aspect of the claim. ■

Shareholder Disputes: Unfair Prejudice

David Alexander QC and Adam Goodison review unfair prejudice legislation in the context of shareholder disputes

DAVID ALEXANDER QC ADAM GOODISON

Section 75 of the Companies Act 1980 introduced the concept of "unfair prejudice" into the context of shareholder disputes in England and Wales (the previous concept being one of "oppressive" conduct as set out in Section 210 (1) of the Companies Act 1948). Via Section 459 of the Companies Act 1985 unfair prejudice has since been carried through into Section 994 of the Companies Act 2006. Similar provisions appear in some offshore jurisdictions such as the BVI. Others still, like Bermuda, remain with provisions based on Section 210 of the Companies Act 1948.

Unfair Prejudice in England and Wales: The Statutory Provision

Section 994(1) of the 2006 Act provides as follows:

> A member of a company may apply to the court by petition for an order under this Part on the ground-
>
> (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
>
> (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be prejudicial.

Who can complain?

On its face Section 994 of the 2006 Act allows any member (defined in Section 112 of the 2006 Act) of a company to present an unfair prejudice petition. However in practical terms, a member with a majority interest may not successfully petition unless the minority are in control of the company because the court will not grant a remedy to a member who can avoid any prejudice by exercise of his own majority rights as a shareholder: *Re Baltic Real Estate Ltd (No 2)* [1992] BCC 629; *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171.

In addition to a person who is a member (as defined), Section 994(3) of the 2006 Act permits the following to present an unfair prejudice petition: (1) a person who is not a member of a company but to whom the shares in the company have been transferred (i.e. those in whose favour, in relation to the share or shares in question, a proper instrument of transfer has been executed and delivered to the transferee or the company: *Re a Company* [1986] *BCLC 391*; see also *Re Quickdome Ltd* [1988] BCLC 370 where an agreement to transfer was held to be insufficient and (2) a person who is not a member but to whom the shares have been transmitted by operation of law e.g. a trustee in bankruptcy: *Murray's Judicial Factor v Thomas Murray & Sons (Ice Merchants) Ltd* [1992] BCC 596, or a personal representative following death: *Royal Trust Co v Norrie and Cartwright* [1951] 3 DLR 561 BC,SC affirmed at [1951] 3 WWR (NS) 503, BC,CA but not someone who merely has an equitable interest: *Re a Company (No 7828 of 1985)* (1986) 2 BCC 98,951 at 98,954 (*"The courts, in the Companies Act are not concerned for a moment with trusts. Companies are required not to pay attention to trusts. The nature of the title to shares in companies with which the company is concerned is at all times that of the registered holder, who has a legal estate"* per Harman J)

A former member may not present a petition: *Re a Company No 00330 of 1991* [1991] BCLC 597. But, provided that a petitioner falls within Section 994(3) of the 2006 Act, the petitioner can rely on events which happened before he became a member in support of his petition: *Lloyd v Casey* [2002] 1 BCLC 454 and even if he joined the company knowing that its affairs were being conducted in the manner of which complaint is made: *Bermuda Cablevision Ltd v Colica Trust Ltd* [1998] AC 198.

What are the "company's affairs"?

A complaint can only relate to the company's affairs. However the concept of the company's affairs is wide in the sense that anything that the company does (or fails to) do can be relied on: *Re Unisoft Group Ltd (No 3)* [1994] 1 BCLC 609. The words should be construed liberally: *Re Neath Rugby Ltd (No 2)* [2009] 2 BCLC 427. A court will not adopt a technical or legalistic approach to what amounts to the company's affairs. Instead it will look at the business realities: *Re Coroin Ltd* [2013] 2 BCLC 583 at [628]. The affairs of a company can include the affairs of a subsidiary: *Rackind v Gross* [2005] 1 WLR 3505. The conduct of a parent company's affairs can also be conduct of a subsidiary's affairs: *Nicholas v Soundcraft Electronics Ltd* [1993] BCLC 360. However a member cannot complain about the acts of a shareholder carried out in a personal or private capacity which happen to affect the company: *Re a Company (No 1761 of*

"A complaint can only relate to the company's affairs. However, the concept of the company's affairs is wide"

SHAREHOLDER DISPUTES: UNFAIR PREJUDICE

1986) [1987] BCLC 141; *Re Leeds United Holdings plc* [1996] 2 BCLC 545; *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171. Similarly conduct by a member of his own affairs is not relevant: *Apex Global Management Ltd v F1 Call Ltd* [2015] EWHC 3356 (Ch).

What are the "interests of members"?

The Court takes a broad view of what are and are not in the interests of a member of a company. Thus the interests of members which it is said have been unfairly prejudiced do not strictly speaking need to be interests in their capacity as members. It is enough if they are sufficiently connected with membership: *Gamlestaden Fastighter AB v Baltic Partners Ltd* [2007] UKPC 26.

Unfair and Prejudicial

Unfair prejudice requires that two elements be shown.

The conduct in question must be prejudicial i.e. it must cause prejudice or harm to the interest of the members or some part of them. But again the Court does not take too narrow a view of this: *O'Neill v Phillips* [1999] 1 WLR 1092 (*"the requirement that prejudice must be suffered should not be too narrowly or technically construed"* per Lord Hoffmann; *Re Tobian Properties Ltd, Maidment v Attwood* [2013] BCC 98). Prejudice often includes damage to a member's financial interests. However it does not need to be damage of a financial nature: *Cool Seas (Seafoods) Ltd v Interfish Ltd* [2018] EWHC 2038 (Ch). Other conduct, such as a breach of a shareholders' agreement, a breach of the articles or a breach of duty can amount to prejudice even if there is no damage to a member's financial interests. Even the disregard of a member's rights without any financial consequences may amount to prejudice: *Re Coroin Ltd* [2013] 2 BCLC 583. However the conduct must also be unfair. It is not enough simply to demonstrate one or other of the elements: *Re Saul D Harrison and Sons Plc* [1995] 1 BCLC 14 at 30-31 per Neill LJ *"conduct may be unfair without being prejudicial or prejudicial without being unfair, and it is not suf*ficient if the conduct satisfies only one of these tests". However the test is objective and it is not necessary to show that the offending party acted in bad faith or with a view to causing prejudice. But, even where the respondent does not resist a finding of unfair prejudice, a court must still satisfy itself that unfair prejudice has occurred before moving on to grant a remedy: *Re Bankside Hotels Ltd, Re Pedersen (Thameside) Ltd, Re G&G Properties Ltd* [2018] EWHC 1035 (Ch) per Warren J *"unless the court is so satisfied, it has no power to grant a remedy in respect of the conduct complained of"*.

As to what amounts to unfairly prejudicial, the leading authorities are the Court of Appeal's decision in *Re Saul D. Harrison Plc* [1995] 1 BCLC 14 and the House of Lords' decision in *O'Neill v Phillips* [1999] 1 WLR 1092.

In *Saul D. Harrison*, among other things, Hoffmann LJ (as he then was) said (at 17d-18a):

> "'Unfairly prejudicial' is deliberately imprecise language which was chosen by Parliament because its earlier attempt in s.210 of the Companies Act 1948 to provide a similar remedy had been too restrictively construed. The earlier section had used the word 'oppressive', which the House of Lords in *Scottish Co-op Wholesale Society Ltd v Meyer* [1959] A.C. 324 said meant "burdensome, harsh and wrongful'. This gave rise to some uncertainty as to whether 'wrongful' required actual illegality or invasion of legal rights. The Jenkins Committee on Company Law, which reported in 1962, thought it should not. To make this clear, it recommended the use of the term 'unfairly prejudicial', which Parliament somewhat tardily adopted in s.75 of the Companies Act 1980. This section is reproduced (with minor amendment) in the [present s.994 of the 2006 Act]
>
> *"[Counsel] who appeared for the petitioner … said that the only test of unfairness was whether a reasonable bystander would think that the conduct in question was unfair. This is correct, so far as it goes, and has some support in the cases. Its merit is to emphasise that the court is applying an objective standard of fairness. But I do not think that it is the most illuminating way of putting the matter. For one thing, the standard of fairness must necessarily be laid down by the court. In explaining how the court sets about deciding what is fair in the context of company management, I do not think that it helps a great deal to add the reasonable company watcher to the already substantial cast of imaginary characters which the law uses to personify its standards of justice in different situations. An appeal to the views of an imaginary third party makes the concept seem more vague than it really is. It is more useful to examine the factors which the law actually takes into account in setting the standard.*
>
> *"In deciding what is fair or unfair for the purposes of s.459, it is important to have in mind that fairness is being used in the context of a commercial relationship. The articles of association are just what their name implies: the contractual terms which govern the relationships of the shareholders with the company and each other. They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case under s.459 will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association…"*

In *O'Neill v Phillips*, among other things, Lord Hoffmann, with whom the other members of the House of Lords agreed, said (at 1098D-1099A):

> *"In section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in Saul D. Harrison & Sons Plc [1995] 1 B.C.L.C. 14, 17-20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based on rationale principles …*
>
> *"Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others (it's not cricket) it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.*
>
> *"In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it was considered that this would be contrary to good faith. Those principles have, with appropriate modification, been carried over into company law.*
>
> *"The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the terms of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith."*

SHAREHOLDER DISPUTES: UNFAIR PREJUDICE

At the risk of oversimplification, unfairness for the purposes of s.994 (para [118]) may therefore be established where:

1 There has been some breach of the terms on which it was agreed that the affairs of the company should be conducted, for example, a breach of the articles or of a collateral agreement; or

2 Equitable considerations arising at the time of the commencement of the relationship, or subsequently, make it unfair for those conducting the affairs of the company to rely on their strict legal powers under the company's constitution. The unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.

Illustrations

Whilst the words *"unfairly prejudicial"* are general words to be applied flexibly and *"the categories of unfair prejudice are not closed"* (per Arden J in *BSB Holdings Ltd (No 2)* [1996] 1 BCLC 155 at 243e–f), the following are some (inevitably overlapping) illustrations of where, a court has indicated that unfair prejudice did or may exist on the facts of the particular case:

1. Breaches of the Articles of Association and/or any Shareholders' Agreement: *Re Saul D Harrison* [1995] 1 BCLC 14 and *O'Neill v Phillips* [1999] 1 WLR 1092
2. Breach of an unwritten oral agreement in circumstances where the company is a quasi-partnership. For a recent consideration of what as a matter of law amounts to a quasi-partnership see the decision of Fancourt J in *Estera Trust Ltd (formerly known as Appleby Trust (Jersey) Ltd) v Singh* [2018] EWHC 1715 (Ch) at [123]ff.
3. Exclusion from management in circumstances where there is a legitimate expectation of participation i.e. a quasi-partnership: *Re a Company (No 00477 of 1986)* [1986] BCLC 376; *Re Ghyll Beck Driving Range Ltd* [1993] BCLC 1126; *Re Saul D Harrison & Sons Ltd* [1995] 1 BCLC 14; *Brownlow v GH Marshall Ltd* [2000] 2 BCLC 655
4. Justifiable loss of confidence by the petitioner in a quasi-partner leading to the breakdown of a relationship of trust and confidence: *Re Baumler (UK) Ltd* [2005] 1 BCLC 92.
5. Serious mismanagement of a company's business: *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354; *Re Elgindata Ltd* [1991] BCLC 959; *Cool Seas (Seafoods) Ltd v Interfish Ltd* [2018] EWHC 2038 (Ch).
6. Breach of fiduciary duty by directors: *Re a Company (No 005287 of 1985)* [1986] 1 WLR 281; *Re a Company (No 008699 of 1985)* (1986) 2 BCC 99,024; *O'Neill v Phillips* [1999] 1 WLR1092; *Re Tobian Properties* [2013] 2 BCLC 567 at [22]; *Estera Trust Ltd (formerly known as Appleby Trust (Jersey) Ltd) v Singh* [2018] EWHC 1715
7. Misappropriation of company assets: *Re London School of Electronics Ltd* [1986] Ch 211; *Re Cumana Ltd* [1986] BCLC 430; *Wilkinson v West Coast Capital* [2005] EWHC 3009.
8. Using company assets for the personal benefit of a director and his family and friends: *Re Elgindata* [1991] BCLC 959.
9. Oppressive conduct: *Re Bovey Hotel Ventures Ltd* (ChD 31 July 1981, unreported).
10. Conducting a company's affairs in a criminal manner: *Bermuda Cablevision Ltd v Colica Trust Co Ltd* [1998] AC 198.
11. Improper allotment of shares: *Re a Company (No 005134) of 1986) ex p Harries* [1989] BCLC 383.
12. Rights issues: *Re a Company* [1985] BCLC 80; *Re a Company (No 007623 of 1984)* [1986] BCLC 362; *Re Cumana Ltd* [1986] BCLC 430; *Re Regional Airports Ltd* [1999] 2 BCLC 30.
13. Removal of auditors: Section 994(1A) of the 2006 Act.
14. The diversion of business away from the company to another company in which the majority shareholder is interested or to the majority shareholder personally: *Re London School of Electronics Ltd* [1986] Ch 211; *Re Cumana Ltd* [1986] BCLC 430; *Re Little Olympian Each-Ways Ltd* [1995] 1 BCLC 636.
15. The granting by the majority shareholder of excessive financial benefits to himself: *Re Cumana Ltd* [1986] BCLC 430; *Re a Company (No 004415 of 1996)* [1997] 1 BCLC 479; In *re Sam Weller & Sons Ltd* [1990] Ch 682. For example, directors paying themselves excessive bonuses, or excessive remuneration and/or providing themselves with excessive perks, e.g. luxury cars, a yacht etc: *Re CF Booth Re CF Booth Ltd* [2017] EWHC 457 (Ch).
16. The suppression of profits to prevent dividends being paid: *Sikorski v Sikorski* [2012] EWHC 1613 (Ch).
17. The failure to declare dividends: *Re a Company (No 00370 of 1987) ex p Glossop* [1988] 1 WLR 1068; *Re McCarthy Surfacing Ltd* [2009] 1 BCLC 622; *Re CF Booth Ltd* [2017] EWHC 457 (Ch).
18. Failure to provide members with accounts: *Re Tobian Properties Ltd* [2013] BCC 98.
19. Withholding of information as to the company's affairs: *Re RA Noble & Sons (Clothing) Ltd* [1983] BCLC 273.

"There is no limitation period for unfair prejudice petitions. However the courts will not allow stale claims"

Who is the complaint brought against?

An unfair prejudice petition should be brought against (1) any shareholder or director who has been guilty of the alleged unfair conduct; (2) any other member of the company whose interests have been affected by that behaviour (3) any other person (including a third party) who may be affected by any order that the court might make and (4) the company itself.

Limitation

There is no limitation period for unfair prejudice petitions. However the courts will not allow stale claims: *Re CF Booth Ltd* [2017] EWHC 457 (Ch).

Remedies: The Statutory Provisions

If the Court is satisfied that there has been unfair prejudice, the relief which it may grant under Section 996(1) and (2) of the 2006 Act is very wide.

For Section 996(1) provides that *"if the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of"*.

Section 996(2) goes on to provide that without prejudice to the generality of section 996(1) the court may:

a) Regulate the conduct of the company's affairs in the future;

b) Require the company –

   i) To refrain from doing or continuing to do an act complained of, or

   ii) To do an act that the petitioner has complained it has omitted to do;

c) Authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;

d) Require the company not to make any, or any specified, alterations to its articles without the leave of the court;

e) Provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

SHAREHOLDER DISPUTES: UNFAIR PREJUDICE

Whilst the relief that can be granted may be very wide, the statutory provisions in relation to the grant of a remedy do not provide any entitlement to relief even where unfair prejudice is shown to the satisfaction of the court. Such relief, if any, as is granted by the court is entirely within the discretion of the court: *Re Bankside Hotels Ltd, Re Pedersen (Thameside) Ltd, Re G&G Properties Ltd* [2018] EWHC 1035 (Ch), Sir Nicholas Warren and the court may grant no relief: *VB Football Assets v Blackpool Football Club* [2017] EWHC 2767 (Ch).

The Court is not limited in the remedy it grants by the relief sought by the petitioner: *VB Football Assets v Blackpool Football Club* [2017] EWHC 2767 (Ch).

The Court is required to consider matters as at the time of the hearing: *Re Hailey Group Ltd* [1993] BCLC 459 at 472.

The Court can make orders against people who were not members of the company nor participants in the conduct complained of. However they have to be parties to the proceedings before the court will do so: *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420.

The most common order that a court will make when unfair prejudice has been found is that one party buy out the other party. This enables the petitioner to leave but with fair value for his shares in the company. The majority shareholder is usually ordered to buy out the minority shareholder, although occasionally it can be the other way round: *Re Brenfield Squash Racquets Co Ltd* [1996] 2 BCLC 184.

Where one shareholder is ordered to buy out another, the question arises as to how value should be determined. The Court has a very wide discretion as to how the valuation is to be brought about. Each case depends on its facts. But the valuation should be fair on the facts of the particular case: *Annacott Holdings Ltd* [2013] 2 BCLC 46. In quasi-partnership cases, this means a pro rata share of the value of the company as a whole without any discount on account of a minority shareholding (on the basis that the majority can only exclude the minority if they offer to pay a fair price for the minority's shareholding): *Re Bird Precision Bellows Ltd* [1986] Ch 658; *CVC/Opportunity Equity Partners Ltd v Demarco Almeida* [2002] 2 BCLC 108. But where there is no quasi-partnership then a fair price may include a discount because the minority shareholder's shareholding is a minority interest in the company: *Strahan v Wilcock* [2006] 2 BCLC 555.For other cases on how the purchase price should be determined see: *Profinance Trust v Gladstone* [2002] 1 WLR 1024; *O'Neill v Phillips* [1999] 1 WLR 1092; *Irvine v Irvine (No 2)* [2007] 1 BCLC 445; *Re Sunrise Radio Ltd* [2010] 1 BCLC 367; *Re Blue Index Ltd* [2014] EWHC 2680. For even more recent cases, see *Wann v Birkinshaw* [2017] EWCA Civ 84; *Estera Trust Ltd (formerly known as Appleby Trust (Jersey) Ltd) v Singh* [2018] EWHC 1715 (Ch)at[637]ff.

Cost, Time and Result

As will be readily apparent, unfair prejudice petitions are highly fact specific. As such, even with active case management, they can have a habit of containing detailed allegations of fact spanning lengthy periods of time leading to the disclosure of large quantities of documents, requiring the cross-examination of many witnesses, both factual and expert, and leading to lengthy judgments (unfair prejudice petitions have in the past been likened to corporate divorces). And that is not to mention all the lawyers involved. Accordingly unfair prejudice petitions can be expensive and the parties have to bear the costs themselves. For it is amisuse of company monies for any of the costs of the proceedings to be paid by the company (with the exception of the necessarily modest costs of the company itself). Unfair prejudice petitions also take a considerable time to cometo trial and save in the most blatant or obvious cases, theresult is not always that easy to predict given the uncertainties of litigation.

Estera (Re Edwardian Group)

As an illustration of these points in relation to cost and time one only has to consider the recent case of *Estera Trust Ltd (formerly known as Appleby Trust (Jersey) Ltd) v Singh* [2018] EWHC 1715 (Ch). The case related to the affairs of the Edwardian Group Limited, a family owned hotel group. The unfair prejudice petition was presented in November 2015. Allegations dated back six years. The trial took place in January, February and March 2017 over a period of some 7 weeks. Three firms of solicitors were involved as well as eight barristers, including three silks. There were four main witnesses of fact and two experts. Judgment was given by Mr Justice Fancourt on 5 July 2018, so more than 18 months after the proceedings had started. The judgment ran to 655 paragraphs over about 150 pages. These facts alone make it obvious that the proceedings, even just at first instance never mind any appeal, cost a very considerable amount of money and time to pursue. One should also take note of what the Judge said about witness statements:

> *"The witness statements prepared for the main witnesses (HS, JS, Mr Machan and Mr Christensen) were very long. They traversed and commented upon a range of events – in the case of HS and JS, their family lives from an early stage and the history of the Company from 1977. It is clear to me that they were products of careful reconstruction of events and states of mind, based on a meticulous examination of all the documents in the case by the large teams of lawyers involved. The true voices of the witnesses, and the extent of their real recollection, which became apparent when they were cross-examined over a number of days each, are notably lacking from the witness statements. As was demonstrated repeatedly in cross-examination, the statements mostly present considered argument and assertion in the guise of factual evidence and often with a slant that favours the case of the witness. In many instances it emerged that this was without any real recollection on the part of the witness of the events or circumstances being described, but with a belief that the witness "would have" done or said something for superficially plausible reasons that are now advanced with the benefit of hindsight.*
>
> *"That is not to be taken as suggesting that, as part of this process, the witnesses have been deliberately dishonest about parts of their evidence. Rather it seems to me that the process of creating the written statements has infected or distorted the true evidence that the witness was capable of giving. The witness statement then, in turn, affects the witness's memory of events when he or she comes to court to give oral evidence, having studied carefully his or her written statement in the days before doing so. It took skilful and painstaking work by counsel to remove the varnish that had been applied and identify what the witness could fairly recall and that of which he or she had no real memory at all.*
>
> *"The result is that, in my judgment, these principal witness statements are not of much greater value as evidence of the matters in dispute than detailed statements of case (largely duplicating the already lengthy and detailed statements of case that were previously prepared). In other words, an inordinate amount of time and costs have been expended in preparing statements that are of limited value in resolving the factual disputes in this case. While I take account of the contents of all the statements, and draw on particular passages where material, I am cautious about relying on factual assertions in the statements not supported by contemporaneous documents, or confirmed by the account that the witness gave of the matter when cross-examined or by the credible evidence of other witnesses."*

David Alexander QC, instructed by Maples and Calder, recently appeared at trial for two of the successful defendants in relation to an unfair prejudice claim in the BVI High Court (sitting in St Lucia because of Hurricane Irma) in *Re: Successful Trend Investment Corporation, Kathryn Ma Wai Fong V Wong Kie Yik and Others* (BVIHC (COM) 52 of 2015). He also appeared on the appeal in BVI in October 2018. At the time of writing, judgment on the appeal was awaited. ■

Dead-end: permanent stay under the Model law barred by *Gibbs*

JEREMY GOLDRING QC

Jeremy Goldring QC considers the Court of Appeal's decision in *Re: OJSC International Bank of Azerbaijan*

Since the UNCITRAL Model Law on Cross-border Insolvency was implemented in the UK by the Cross-Border Insolvency Regulations 2006 ("CBIR"), those involved in restructuring the debts of foreign companies have debated whether it provides debtors with a means of protecting English assets, whether by discharging English law debts or (perhaps) staying English proceedings against the debtor indefinitely.

In *OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802 ("**IBA**"), handed down on 18 December 2018, the Court of Appeal (upholding Hildyard J) provided a clear answer, Henderson LJ giving the substantive judgment. In short, recognition of a foreign proceeding under the Model Law provides no assistance to a foreign debtor seeking to modify its English law obligations or indefinitely stay proceedings based on those obligations brought against it in England.[1]

The issue

The historic scale of the London capital markets has meant that numerous foreign-incorporated borrowers owe debts under loan and note documentation governed by English law. Many will also have assets in England. Invariably a portion become financially distressed and seek to restructure both their foreign debts and their English law debts. Some will enter restructuring processes in their home jurisdictions that would have the effect, as a matter of local law, of discharging or varying the borrower's debts, including those arising under English law.

IBA was an example of such a foreign borrower. An Azeri bank, with its centre of main interests in Azerbaijan and assets in England, IBA sought to modify its obligations to creditors using an Azeri statutory restructuring process similar in some ways to an English scheme of arrangement or company voluntary arrangement. The modification under the local process extended to debts owed under contracts governed by English law. Following the restructuring, the bank would continue to trade.

For a foreign borrower with English assets, such as IBA, a crucial question has long been whether lenders with English law debts can proceed in the English courts notwithstanding the foreign process and so put those assets, and potentially the restructuring as a whole, at risk. In IBA's case, the risk was obvious. There was a rump of dissenting creditors with English law debts who ignored the Azeri process entirely.[2] The dissenters' obvious hope was to obtain a better return for themselves than that offered in the Azeri collective process. The means was pursuing their own proceedings in England.

This gives rise to questions of principle. Will the discharge or variation of English debts under a restructuring process under the law of the borrower's home state have any effect in England? Can such a discharge or variation be recognised under the CBIR? If not, can the English Court nonetheless grant a stay on proceedings against the debtor, permanently restraining the English law creditor from proceeding in this jurisdiction?

The current position at common law – the rule in *Gibbs*

At common law the position is long established and clear, though controversial: a discharge of debts effected by a foreign insolvency proceeding provides no defence to an English action on an English debt.[3] This derives from an equally ancient rule of the private international law of obligations that while a discharge good by the proper law of a contract is effective wherever the question may be litigated, a discharge other than by its proper law, will not be effective in any other country.

This is often referred to as the rule in *Gibbs*, after *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399, a decision of the Court of Appeal in which it was applied. But *Gibbs* was only applying established law. For example, in *Smith v. Buchanan* (1800) 1 East 6, a debtor sought, in English proceedings, to rely on a discharge arising under the bankruptcy law of the state of Maryland, arguing that the English courts should *"give it effect by adoption and the curtesy of nations"*. The argument, perhaps unsurprisingly given the recent war of independence, was rejected in robust terms by Lord Kenyon CJ: *"It is impossible to say that a contract made in one country is to be governed by the laws of another. It might as well be contended that if the state of Maryland had enacted that no debts due from its own subjects to the subjects of England should be paid, the plaintiff would have been bound by it".* [4]

Given the rule in *Gibbs*, what is a foreign debtor which seeks to rely in England on a discharge under its home insolvency process to do? Two main routes have been explored by foreign debtors.[5]

Potential alteration of the common law rule

The first avenue has involved a questioning of the rule in *Gibbs*, which has been subject to criticism by some academics and practicing insolvency lawyers, and some judges. In England, the rule in *Gibbs* has so far withstood these criticisms, not because they have been rejected as a matter of principle but as a matter of precedent.[6] In other jurisdictions they have been more successful: see, for example the Singapore High Court's decision in *Pacific Andes Resources Development*.[7]

The arguments are out in detail, for example, in Riz Mokal's article in this publication for March 2017.[8]

Boiled down, the contention is that the rule in *Gibbs* does not reflect the principle of modified universalism which underpins English cross-border insolvency but instead undermines the collective benefit that modified universalism brings to creditors generally. As Lord Hoffman said in *Re HIH Casualty & General Insurance* [2008] 1 WLR 852:

1. It is understood that the bank has applied to the Supreme Court for permission to appeal. At the time of writing, it is not known whether permission will be granted.

2. The English law procedural principle of submission to the jurisdiction applies to a foreign insolvency proceeding; if a creditor submits to a foreign insolvency proceeding, it will generally be bound by a discharge or variation of debts arising out of those foreign proceedings: see *Rubin v. Eurofinance SA* [2013] 1 AC 236; *Stichting Shell Pensioenfonds v. Krys* [2014] UKPC 41; *Erste Group Bank AG v. JSC "VMZ Red October"* [2015] EWCA 379.

3. The rule was well established by the end of the eighteenth century. The history is described in, amongst other texts, Sheldon, *Cross-Border Insolvency* (4th ed), pp 491 to 498 (in a chapter by the present author); Mokal, Shopping and Scheming the rule in Gibbs, South Square Digest, March 2017.

4. Nor do the authorities suggest that the English court has a judge-made power to disapply *Gibbs* because of the existence of a foreign insolvency process. Contrast, for example, the power developed by the English Court to order remission to the home state when the English Court was conducting an ancillary winding up: see Re BCCI (No 10).

5. Foreign debtors might alternatively seek to rely on an English law process, such as a scheme of arrangement.

6. Sheldon, *Cross-Border Insolvency*, pp 494 to 495.

7. [2016] SGHC 210

8. See Mokal, Shopping and Scheming the rule in Gibbs, South Square Digest, March 2017.

FEATURE ARTICLE:
DEAD-END:PERMANENT STAY UNDER THE MODEL LAW BARRED BY *GIBBS*

"6. Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives world-wide recognition and it should apply universally to all the bankrupt's assets."

The English Court, the argument goes, should, to give effect to the private international law principle of modified universalism, incrementally develop its recognition of the effect of a foreign process. It already recognises various aspects of a foreign insolvency process (e.g. the status of the foreign office-holder). It already recognises the discharging effect of the foreign process on debts not governed by English law. In that context, the argument is that recognition of the discharging effect of a foreign process on English law debts is a small step which is more than justified by principle and fairness; why should the fact that debts are governed by English law rather than a foreign law have any impact on the effect of a foreign insolvency process?

In *IBA*, the Court of Appeal was not required to consider arguments of this sort because the bank (rightly) accepted that the Court of Appeal was bound by the rule in *Gibbs*. The issue would potentially be alive for debate in an appeal to the Supreme Court.

Attempted reliance on the CBIR

The second avenue for a foreign debtor seeking to rely on a discharge under its local collective insolvency process has been a reliance on recognition of that process by the English court under the CBIR. That was the route pursued by the debtor in *IBA*. The debtor sought a permanent stay under Article 21 of the CBIR, to prevent the dissenting creditors from proceeding in England. As such, the stay sought was to continue after the Azeri proceedings had come to an end.

The Court of Appeal rejected the application for a permanent stay under the CBIR. It would be wrong in principle, it held, for the English Court to grant a stay which (a) would prevent the English creditors from enforcing their English law rights in accordance with *Gibbs* and (b) would continue after the Azeri process had come to an end.

There were two important premises for the Court of Appeal's reasoning. First, the rule in *Gibbs* was

"Given the rule in *Gibbs*, what is a foreign debtor which seeks to rely in England on a discharge under its home insolvency process to do?"

binding, as noted above. As a matter of common law, therefore, because the dissenters' debts were governed by English law, they were not discharged or varied by the Azeri process. The second premise (applying the Supreme Court's decision in *Rubin v. Eurofinance SA*[9]) was that the Model Law, being concerned with procedural matters, did not give the English Court a power to apply the law of the relevant foreign proceeding (in this case, Azeri law) to the discharge of English law debts.

The starting point for the Court of Appeal, therefore, was that the dissenting creditors had unvaried and undischarged substantive contractual rights under English law. The English Court had no power to recognise the discharge by the Azeri Court under the Model Law. The debtor could not, therefore, obtain what it wanted through the front door. The question became: was it proper for it to be granted a stay which allowed the debtor to obtain equivalent benefits through the back door? The likely answer to a question framed in that way seems obvious: as Henderson LJ said, *"I can find nothing in article 21 to suggest that the procedural power to grant a stay could properly be used to circumvent the Gibbs rule"*.

The UNCITRAL Model Law on Recognition and Enforcement of Insolvency Related Judgments

A third avenue for a foreign debtor may well open-up. As Henderson LJ pointed out, UNCITRAL is currently working on a new model law about the recognition and enforcement of insolvency-related judgments ("the Insolvency Judgments Model Law"), which may deal with the issues arising out of *Gibbs*. Matters have progressed to the stage where the Insolvency Judgments Model

9. [2013] 1 AC 236. See also *Fibria Celulose S/A v Pan Ocean Co Ltd [2014] EWHC 2124 (Ch).*

FEATURE ARTICLE:
DEAD-END:PERMANENT STAY UNDER THE MODEL LAW BARRED BY *GIBBS*

Law was adopted by a decision of UNCITRAL on 2 July 2018, and it will now be disseminated to governments and other interested bodies with a recommendation that all States give favourable consideration to its implementation.

The accompanying Guide to Enactment includes in its non-exhaustive list of the types of judgment that might be considered insolvency-related judgments, at paragraph 59(e):

> *"A judgment (i) confirming or varying a plan of reorganisation or liquidation, (ii) granting a discharge of the debtor or of a debt, or (iii) approving a voluntary or out-of-court restructuring agreement."*

It remains to be seen if, and when, the UK implements the new model law, presumably by way of amendment to the CBIR. When it does so, it may well render the long-running *Gibbs* debate irrelevant, no doubt to the relief of many. But until the new model law is enacted, the decision in IBA remains significant.

Conclusions

This outcome in *IBA* comes as no surprise. The debate over recognition of a discharge by a foreign insolvency process has evolved since 2006, as the tides of modified universalism first flowed and more recently ebbed in the House of Lords and the Supreme Court. A recognition by English courts of a discharge of English debts by a foreign restructuring process, whether through a common law modification of the rule in *Gibbs*, or through the Model Law, may well have seemed possible in the heady days for universalists after the speeches of Lord Hoffmann in *Cambridge Gas* (in 2006), *HIH* (in 2008) and the judgment in *Rubin* in the Court of Appeal.

But the decision of the Supreme Court in *Rubin*, reversing the Court of Appeal and disapproving *Cambridge Gas*, changed the landscape. Lord Hoffmann had focused on the English courts' imaginative use of modified universalism and the power of the concept as a way of developing the fairness and effectiveness of cross-border insolvency processes. The Supreme Court in *Rubin* had a different perspective: it focused on the importance of maintaining other established common law conflicts of law principles in the insolvency context, with the benefit of certainty. It also took a narrow approach to the effect of recognition under the Model Law as procedural. The Court of Appeal's decision in *IBA* reflects an application of the *Rubin* approach to the issue with which it is concerned. It remains to be seen whether, in *IBA* or a subsequent case, the Supreme Court turns the tide of English cross-border insolvency law again. ■

> "The decision of the Supreme Court in *Rubin*, reversing the Court of Appeal and disapproving *Cambridge Gas*, changed the landscape"

EUROLAND: Creditors "Blasted with The East Wind …"?[1]

The Mergers Directive And Creditor Protection

GABRIEL MOSS QC

A Polish company called Vendor Wind Service Sp zoo wished to merge into its parent M2 Property Invest Limited, an English-registered company. Such a merger could in principle take place pursuant to Directive 2005/56/EC on cross-border mergers and limited liability companies as implemented in England by the Companies (Cross-Border Mergers) Regulations 2007.

1. Genesis 41:23

FEATURE ARTICLE: EUROLAND: CREDITORS "BLASTED WITH THE EAST WIND…"? THE MERGERS DIRECTIVE AND CREDITOR PROTECTION

Re M2 Property Invest Limited

(Snowden J November/December 2017)

Vendor Wind was a Polish company carrying on business providing building services in Poland. Its parent, M2, an English company, was to be the transferee company: the assets and creditors of Vendor Wind were to become the assets and creditors of M2. However, Vendor Wind was solvent and M2 was insolvent on a balance sheet basis, which seemed hard on the creditors of Vendor Wind. After some twists and turns in the evidence, Snowden J finally concluded that although Vendor Wind was merging with a company which was marginally insolvent on the balance sheet basis, there was evidence from the two current creditors of Vendor Wind in Poland making it clear that they had been notified of the merger and of its terms and they expressly indicated that they did not object to it (paragraph [67]).

Although the particular question of creditor protection was solved on the special facts of the M2 case, Snowden J considered some significant legal aspects of the EU law merger process.

The scheme of the Directive is that there are two stages of scrutiny of a cross-border merger. The first stage involves the designated national authority in each EU Member State checking the company's compliance with the relevant procedure under national laws. The second stage of scrutiny is performed only by the designated national authority of the company which results from the merger and relates to the legality of the completion of the cross-border merger. (Paragraph [7]).

In the case of the Polish company, Vendor Wind, it obtained a certificate headed "Decision" from the Gdansk – North District Court which certified compliance by Vendor Wind with the procedure for cross-border mergers under Polish law. The required certificate for M2, an English company, was obtained from Registrar Jones of the Companies Court. That completed stage one. However, by the time the matter came before Snowden J for the second stage, it was clear that material facts placed before the Polish and English courts were no longer accurate. The question arose therefore whether the certificates were binding.

There were two arguments suggesting that the Polish certificate was binding, even if the facts on which it was based were no longer capable of being correct.

The first argument was based on the recast Jurisdiction and Judgments Regulation and for this purpose the question was whether the Polish certificate was a "Judgment". Snowden J, relying on *Solo Kleinmotoren GmbH v Boch* (Case C-414/92) considered that the pre-merger certificate issued by the Polish court lacked the essential elements of a Judgment (paragraph [47]). That was because the merger was a contractual arrangement and there was no decision on any point in dispute. Nor was there any investigation or resolution of issues concerning creditors. The certificate simply verified that the pre-merger process under Polish law had been completed.

The alternative argument was that the certificate was conclusive under Article 10(2) of the Directive. Article 10(2) of the Directive provides:-

> *"In each Member State concerned the authority referred to in paragraph 1 shall issue, without delay to each merging company subject to that State's national law, a certificate* ***conclusively attesting*** *to the proper completion of the pre-merger acts and formalities."* [emphasis added]

Although giving no final ruling on this point, Snowden J's "inclination" was that "conclusively attesting" ought to be given its ordinary wide meaning so that the court hearing the application for approval of the second stage would be bound to accept and give effect to the pre-merger certificate, even if aware of facts that might suggest that the certificate had been issued in error, or on the basis of erroneous information. (Paragraph [50]).

The question however that Snowden J did have to decide was whether he should exercise his discretion at the second stage of the process to approve the merger. This gave rise to a further matter of dispute, which was whether the court at this stage should concern itself with the interests of the creditors of the foreign company being merged, namely Vendor Wind. (The creditors of M2 would obviously be better off after the merger since Vendor Wind was solvent and M2 was not (paragraph [58])).

Snowden J considered three possible approaches:

i. An English court should consider the interests of all creditors of both companies;

ii. An English court should only concern itself with the creditors of the English transferee company and

iii. An English court should not concern itself with the interests of the creditors of either company, because it is for the domestic laws of each merging company to protect the interests of the respective creditors of those companies *at the pre-merger stage.*

Snowden J's "initial inclination" was to go for option (i), which was supported by a decision of Sales J in *Re Diamond Resorts (Europe) Limited* [2013] BCC 275, although his approach had been doubted by Morgan J in *Re Livanova PLC and Sorin* SpA [2015] BCC 915. On the other hand, Snowden J felt as a result of the hearings in the M2 case that there was much to be said for option (iii) (Paragraph [61]).

Snowden J considered (at paragraph [60]) that option (ii) was the least likely to have been intended by the framers of the Directive, because it was an insular approach which would not promote uniform treatment of creditors of both companies in any cross-border merger.

In looking at options (i) and (iii), Snowden J considered that the structure of the Directive appeared to be that it was for the national laws of each respective merging company to implement appropriate protection for the creditors of their own company at the first, pre-merger stage, so that by the time the matter reached the second stage, the court should be entitled to rely upon the pre-merger certificates and assume that the correct procedures had been followed. This would mean that the creditors had been given the opportunity to avail themselves of whatever measures for creditor protection existed under the relevant national law.

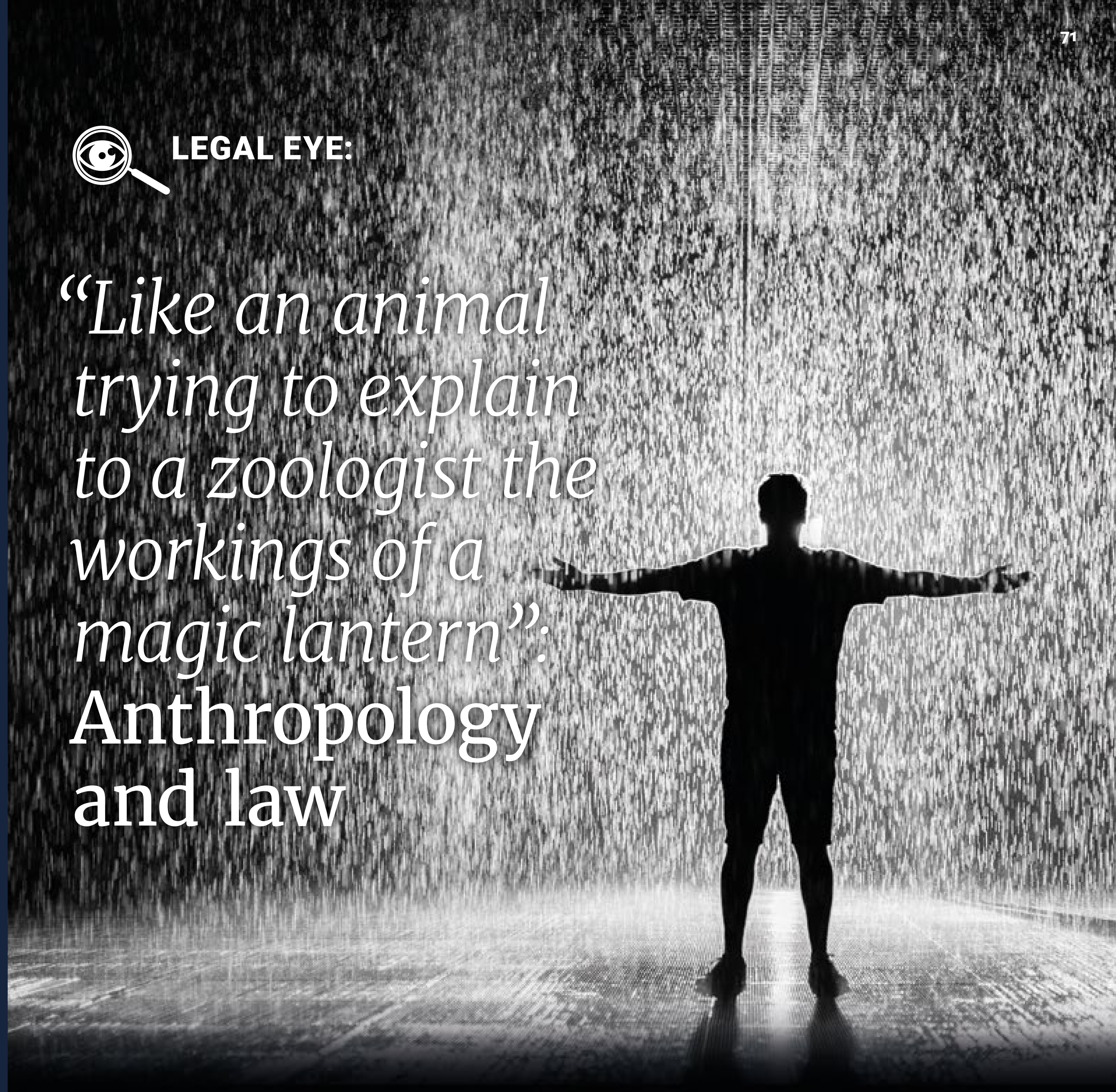
With regard to the approach in (i), the court would, at the second stage, if that approach were adopted, have to enquire into the measures which existed under the relevant foreign law and ask what steps had already been taken for the protection of creditors in the other relevant jurisdiction before exercising its discretion. This would involve receiving evidence of foreign law and then expressing a view as to the adequacy of the creditor protection provisions of the law of another EU Member State (Paragraph [65]). The alternative approach of the English court simply applying its own view of creditor protection was not supported by the terms of the Directive and would introduce an undesirable lack of consistency of approach between Member States. It would also risk a conflict where for example creditors of a transferor company had unsuccessfully objected at national level and then were given another opportunity to object under a different law before a different national authority or court at the second stage (Paragraph [66]).

> "The result in M2 Property leaves the protection of creditors of proposed merger companies rather unclear"

Since on the facts as they finally appeared to Snowden J the approach in option (i) would have been satisfied on the evidence, Snowden J did not have to choose between options (i) and (iii).

The result leaves the protection of creditors of proposed merger companies rather unclear. In particular it is not clear whether creditors of the foreign company sought to be merged, if they feel that the foreign court has not protected them adequately, or if (as in the M2 case) the facts appear to have changed by the time of the second stage hearing, can rely on the discretion of the English court to protect them.

There may be a fourth possible approach which might avoid the difficulties of the three set out by Snowden J It seems plainly wrong for the English court routinely to be able to second-guess the position relating to protection of creditors under the foreign law and therefore option (i) seems to be wrong in principle. As Snowden J points out, option (ii) is unsatisfactory because it approaches matters in an insular way under which only the creditors of the English entity are considered. On the other hand, option (iii) leaves a major potential loophole in a case where the facts have changed since the foreign certificate was obtained. In that type of case, or in other exceptional cases, it might be more suitable to follow a fourth option, namely to consider whether the basis of the granting of either of the national law certificates has been undermined by further facts or disclosures and then to consider the protection of creditors as part of the court's discretion. Such protection may only extend to the protection given by each national law. ■



LEGAL EYE:

“Like an animal trying to explain to a zoologist the workings of a magic lantern”: Anthropology and law

MADELEINE JONES

Are you a rainmaker?

Francis Ford Coppola’s late 90s melodrama, The Rainmaker, deals with a plucky law graduate (played by Matt Damon) fighting a David and Goliath style legal battle to force an insurer to pay out for life-saving cancer treatment. Matt wins at trial thanks to his dramatic cross-examination of the insurer’s CEO, but the film ends with the company declaring bankruptcy to get out of paying damages, making it one of the few movies by a great director of the last century crying out for a sequel exploring the distribution of assets to creditors in an insolvency.

LEGAL EYE

The phrase, 'rainmaker', doesn't usually evoke images of the underdog, though. Instead, it calls to mind expensively-suited men with slicked back hair shouting into brick-sized cell phones on their way to eat small portions of hard to pronounce foods in hard to pronounce restaurants. In other words, the expression calls to mind the corporate culture of the 90s, or at least one stereotype of that culture.

Interestingly, the term rainmaker itself seems to relate to another corporate trend (or, at least, a micro-trend) dating from the time before the financial crisis, namely the practice of large businesses to hire "corporate anthropologists." These were people with academic anthropology qualifications who, rather than trekking out to remote Amazonian villages, documented and analysed a company's working culture, with a view to helping the business improve its internal practices. The use of the term rainmaker in business probably pre-dates the corporate anthropology craze, but is certainly a borrowing from academic anthropology: it refers to a kind of political leader, found in some Nilotic communities in Southern Sudan, whose power derives from his supposed ability to control rainfall.

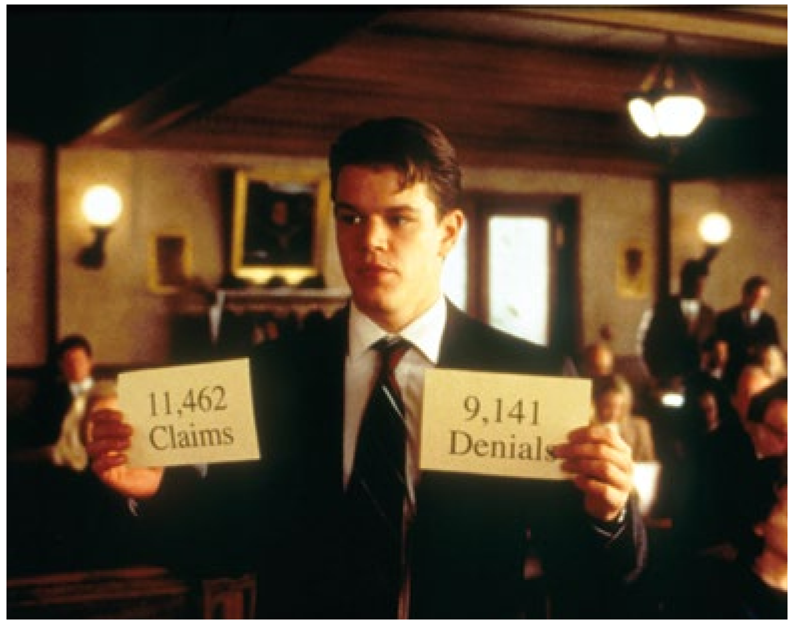
At first glance the rainmakers of South Sudan seem to have as enviable a lifestyle as the most prosperous partner at any white shoe law firm in Midtown Manhattan. Leveraging their apparent preternatural ability to communicate with the forces responsible for bringing rain, these men frequently grow into powerful leaders, bolstering their reputations through the good times of clement weather, and graciously accepting gifts offered by those grateful for an abundant harvest. Naturally, problems arise when the weather is less favourable. When drought strikes, the gifts increase, at first, as citizens cajole the sacred king to work his magic. But when he finds himself unable to oblige, tensions mount; the formerly beloved leader is now seen as selfish and spiteful. Eventually, the rainmaker must flee in the night, or face quasi-ritual slaughter by his aggrieved subjects.[1]

Talk of rainmakers seems to be less fashionable in the modern corporate climate; since the crash overt celebrations of moneymaking are out in favour of more nuanced articulations of corporate values, though I think the practice of making money is as much appreciated as ever. Perhaps it was never the best label to identify with anyway; no one wants to think that their professional or business successes can be attributed to some impressive-looking but in truth ineffectual hand-waving and the good weather of a booming economy.

Some companies do still hire anthropologists (Microsoft is reputed to be the second-largest employer of anthropologists in the world, although presumably there are not many massive workforces comprised of ethnographers to compete with it). However, the heyday of corporate anthropologists, like that of self-defined rainmakers strutting down Wall Street, is past: it seems to have taken place just before the dotcom bubble burst. In any case, law firms never really got in on the anthropology act, client confidentiality alone likely being an insurmountable obstacle to this kind of consultancy.

Do lawyers have anything to learn from anthropologists? Not being an anthropologist myself, I hesitate to point to a particular ethnography that might help us in our practice, though surely some exist. My own impression of anthropology as a discipline is limited to the contrast between anthropological writings and the approach of other academic disciplines, including law.

More than any other humanities discipline, anthropology is alive to the fact that the identity of the scholar has as much impact upon a piece of research as the field being studied, and as a consequence academic texts can combine academic formality with an unexpectedly personal, even confessional, tone. The classic example is Claude Lévi-Strauss' beautiful 1955 work *Tristes Tropiques*, a memoir which recalls his personal growth through travel and summarises his approach as an academic anthropologist to the communities he stayed with along the way.



Scene from 'The Rainmaker', © Paramount Pictures

1. The most comprehensive academic account of this phenomenon (by an author who was in the region when such a regicide occurred, and who draws also on the historical record of such killings) is Simon Simonse's *Kings of Disaster: Dualism, Centralism and the Scapegoat King in Southeastern Sudan*, rev. ed. (Kampala, Uganda: Fountain Publishers, 2017; also as an e-book from Michigan State University Press).

Lévi-Strauss started out as a law student, incidentally. He was not complimentary about the discipline as he found it in Paris in the late 1920s:

> *"A curious fatality hangs over the teaching of law. Sandwiched between theology, with which it had certain intellectual affinities at that time, and journalism, towards which recent reforms have sent it swerving, it seems unable to find firm and objective ground on which to take its stand. The firmer it is, the less objective: and vice versa. Himself a subject for serious study, the jurist is, to me, like an animal trying to explain to a zoologist the workings of a magic lantern. At that time, as luck would have it, law examinations could be got up in a fortnight, if one learnt certain aides- memoire by heart. And if law study was sterile, the law student was himself a repulsive creature. Whether the distinction is still valid, I can't say, but in 1928 or thereabouts first-year students could be divided into two species – two races, I might almost say – law and medicine on the one hand, letters and natural sciences on the other."* [2]

At the heart of the criticism here is an unease with lawyers' perceived failure to scrutinize themselves and their own approach. Legal precepts seem to be handed down from on high (like theology) or else legalwriting is (like journalism) simply a description of how things are, without any concern as to why they are like that or whether they should be. Worst of all, the "repulsive" law student tries to explain the very rules that govern society – rules that are so complicated that their outward appearance might be completely different from their true underpinnings, like a magic lantern- without first of all examining himself, as if he were an animal.

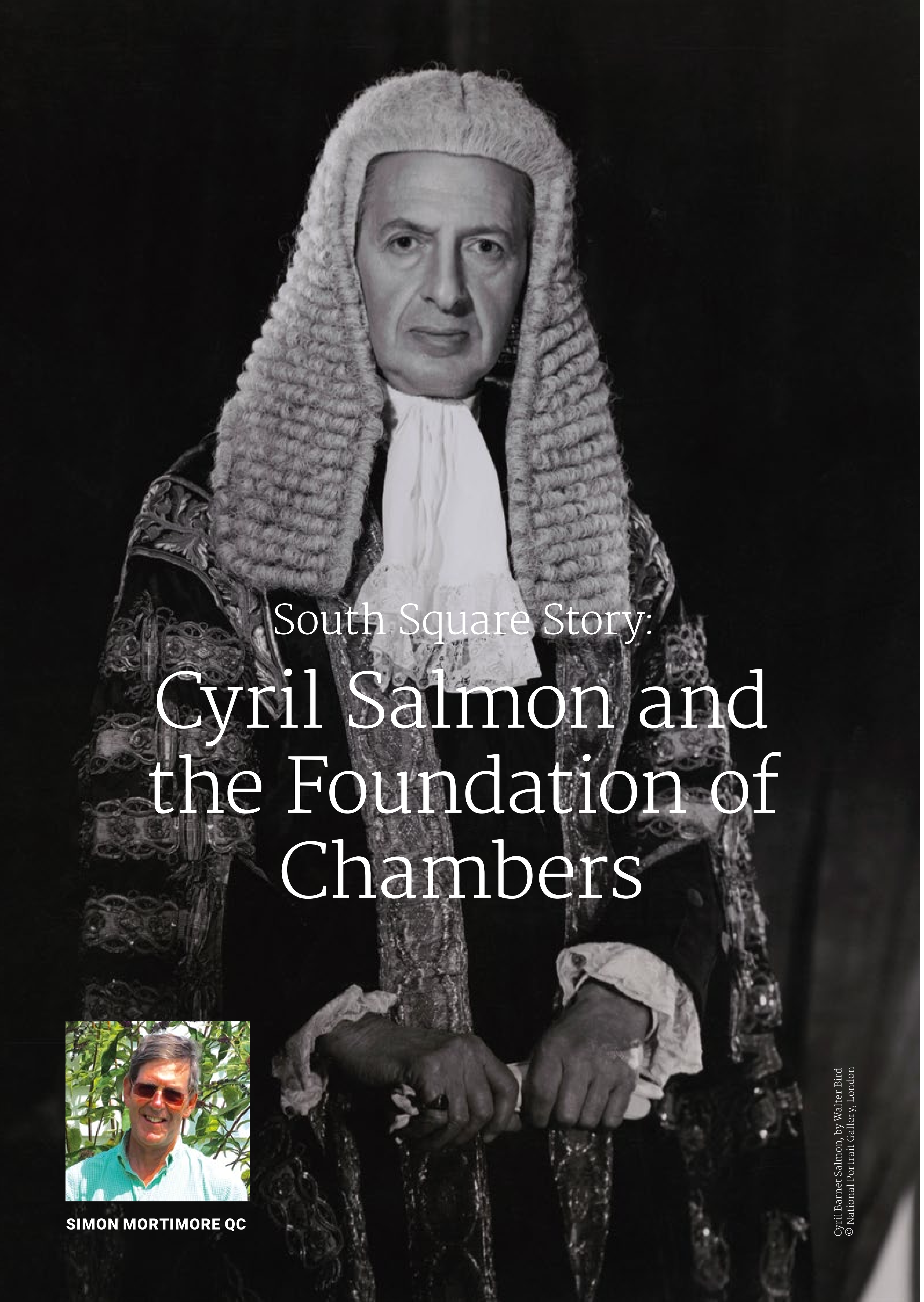
Such a personal tone as in the memoir would clearly be inappropriate in legal writing, not least because the law must be applied impartially, and even though judgments and statutes are framed by imperfect humans, once they have passed into law they are no longer one person's idea about how things ought to work, but a definitive account of how things are. Still, judgments are written in the first person, and once we have read enough from the same judge, we do build up a picture of his or her approach; we might even feel we have a glimpse of his or her personality.

The message from Lévi-Strauss, then, is that lawyers should not try to exclude their own attitudes and even their biases from their approach, but should scrutinize them fully and reach their conclusions in full consciousness of how they have done so. The little human connection we feel when we read a judgment and feel we can hear the judge's voice handing it down is not a side effect of the process, but a crucial part of it. We must (Lévi-Strauss might suggest) understand the judge, empathise with him or her, and notice how we are changed by doing this. ■

2. *Tristes Tropiques*, tr John Russell (New York: Atheneum, 1961) p 57.

Claude Levi-Strauss (1908-2009)

> "Himself a subject for serious study, the jurist is, to me, like an animal trying to explain to a zoologist the workings of a magic lantern"
>
> **LEVIS-STRAUSS**



Cyril Barnet Salmon, by Walter Bird
© National Portrait Gallery, London

South Square Story:

Cyril Salmon and the Foundation of Chambers

SIMON MORTIMORE QC

This is the first of a series of articles tracing the history of South Square from its origins to the present day.

When I joined the chambers in the early 1970s, I understood that they had been started by Cyril Salmon KC just after the end of the Second World War at 3 Paper Buildings in the Inner Temple and that the other early members included Claude Duveen and Muir Hunter. By then Salmon was a distinguished law lord, Duveen was a notorious Berkshire county court judge and Muir Hunter QC had achieved national fame for his work on the Poulson bankruptcy case. My understanding was in several respects incorrect. The origins of the chambers can be traced back further than I had understood to Lady Day 1933, when they were established by Cyril Salmon, then a 29-year-old junior barrister, at 6 Crown Office Row in the Inner Temple. Claude Duveen joined Salmon's chambers in 1945, when they had moved to 3 Paper Buildings, but Muir Hunter did not join until 1954.

This article explores Salmon's background, his career as a junior barrister and the foundation of his chambers at 6 Crown Office. It ends in 1940 when the Salmon and his colleague Douglas Potter enlisted for war service.

Cyril Salmon's arrival at the Bar

Cyril Salmon was born on 28 December 1903 at 232 Finchley Road, Hampstead, the son of Montague Salmon and Marion Nina Trevor (née Abrahams). He was born into a wealthy Jewish family and the financial security that he enjoyed from that no doubt enabled him to embark on the risky career of a barrister and, when the moment came, to strike out on his own.

In 1873 his grandfather, Barnett Salmon, and Samuel Gluckstein had founded the tobacco merchant's business, Salmon & Gluckstein, which was owned by their families and which grew to become the largest tobacco retailer in Great Britain, if not the world. In 1902, after the death of Barnett Salmon in 1897, the business was sold to Imperial Tobacco. Meanwhile, in 1894, Barnett Salmon and Samuel Gluckstein had founded a new catering business, which began its life with a teashop in Piccadilly. The Salmons and Glucksteins considered it beneath their dignity to use their own names for the new business and so it was called J Lyons & Co after the manager, Joseph Lyons, who was a distant relative. The catering business prospered. In 1896 it acquired the Trocadero near Piccadilly Circus, a grand restaurant in the baroque style. In 1909, J Lyons launched the Lyons Corner Shop chain of teashops and later moved into the hotel business (the Strand Palace, Regent Palace and Cumberland Hotels) and food and teas manufacturing. The J Lyons & Co businesses remained in the co-ownership of the Salmon family until the 1960s when they were sold.

The Salmon and Gluckstein families established a family trust, accepted by the Inland Revenue, under which all income from the family businesses and other sources, including professional earnings, was pooled and distributed equally among family members. This worked to Cyril Salmon's advantage in his early years at the Bar, but, when he became a successful silk, he was dismayed to discover that he put more into the family pool than he took out. It was perhaps easier for him to accept the loss of earnings on taking a judicial appointment than it has been for other successful silks, because he would again become a net beneficiary from the family pool.

After school at Mill Hill, a public school on the north-west edge of London, Cyril Salmon went to Pembroke College, Cambridge, where he read law. He was admitted to the Middle Temple on 4 October 1922 and was called to the Bar on 17 November 1925. His call papers show his address as the Metropole Hotel, London WC1, which was then a fashionable and luxurious hotel.

2 Harcourt Buildings

Shortly after being called to the Bar, Salmon became the pupil of Walter Monckton, who practised from chambers on the ground floor of 2 Harcourt Buildings, Inner Temple. Monckton was then one of the most successful common law juniors and it is testimony to Salmon's evident promise as a barrister that Monckton chose him as one of his pupils. Indeed, several of the most distinguished barristers and judges of Salmon's generations were Monckton's pupils and devils,[1] including three other Law Lords – Colin Pearson, Reginald Manningham-Buller (Viscount Dilhorne, also a Lord Chancellor) and Gerald Upjohn –and two High Court judges – Richard Elwes and Brian McKenna.

When Salmon arrived as a pupil at 2 Harcourt Buildings, the chambers had one King's Counsel, about seven junior barristers, a senior clerk, one or two junior clerks and a distinctly mixed reputation. The head of chambers was Frederick Barrington-Ward KC, a brilliant lawyer and former fellow of All Souls and a Vinerian Law Scholar. He had not served in the First World War and instead accumulated a substantial junior practice. For this he was subjected to the mocking taunt: *"The Navy*

1. *"Devilling"* is a long-established practice by which a barrister may obtain the assistance of another barrister (the devil) to help him discharge his instructions in return for remuneration for which the first barrister is responsible. The devil is usually more junior than the first barrister and is often, but not necessarily in the same chambers.

SOUTH SQUARE STORY:
CYRIL SALMON AND THE FOUNDATION OF CHAMBERS

kept Watch, and the Bar kept Ward."

In 1919, Barrington-Ward was appointed a King's Counsel. In 1924 he became head of chambers and all should have been set for a stellar career as a silk and later as a judge. But things went badly wrong. Apparently encouraged by his clerk to emulate his contemporary, Sir Patrick Hastings KC, Barrington-Ward pursued an extravagant lifestyle, flaunting wealth he did not have, including buying a house in Mayfair, while failing to provide for his taxes. This led to enforcement proceedings by the Inland Revenue. In July 1930 Barrington-Ward had to give up practice and become a Metropolitan Magistrate.

The two bright stars in the chambers were Herbert du Parcq and Walter Monckton. Du Parcq was a fine pleader and eloquent advocate. He took silk in 1926, around the time Salmon was a pupil, and would go on to have a distinguished judicial career, becoming a Law Lord in 1946. After serving in the First World War and being awarded the Military Cross, in 1919 Monckton was called to the Bar and joined the chambers. By about the time Salmon became his pupil, some six years later, Monckton had been appointed junior counsel to HM Commissioner of Works and had so much work that he had to introduce a minimum fee so that he could concentrate on better-quality cases. The other junior barristers were Terence O'Connor, Harry Strauss (who both combined their careers at the Bar with being MPs), Tom Goff (whose passion was making harpsichords), Cyril Harvey and Walker Kelly Carter.

A legal education with Walter Monckton

Salmon would have learnt much from the way Monckton conducted his practice. Monckton regarded work as a duty and worked prodigiously hard by the standards of the time, using pupils and devils to help him prepare his opinions, pleadings and advocacy (including undertaking research which he never did himself). He enjoyed the challenge of litigation, saying: *"I enjoyed the art of advocacy in all its stages – not only in presenting a case but the preparation... of the argument."*[2] His contemporaries recognised that, although Monckton was not a great academic lawyer, he had exceptional skills in absorbing information, selecting the points to pursue and marshalling a persuasive argument, which he would present with clarity and in an almost conversational tone. Monckton never forgot that the object of advocacy was to persuade the judge, saying:[3]

"Don't forget your job at the Bar is to persuade that old man sitting up there that you are right. Be flexible. Don't be tied to your note. But watch him like a lynx. Try to get inside his head and follow his train of thought. Deal with the points that are troubling him."

"Don't be tied to your note. But watch him like a lynx. Try to get inside his head and follow his train of thought. Deal with the points that are troubling him"

His advocacy style was in strong contrast to the more florid, emotional or aggressive manner of advocates of the traditional school, like Sir Edward Marshall Hall and Sir Patrick Hastings. Many years later, Salmon said that Monckton was *"full of immensely persuasive charm. All the Judges liked listening to him, and he was essentially a 'lawyers' or Judges' advocate'"*. Of his cross-examination style, Salmon said: *"He was quiet and courteous, but deadly, and the victim would emerge discredited without knowing it, or realising that he had been destroyed."*[4]

Soon after he began his career, Monckton was briefed on behalf of the self-governing dominion of Newfoundland in its dispute with Canada about the location of the boundary of Labrador, which turned on the meaning of "the coast of Labrador" in the Commission to the Governor of Newfoundland of 1763. At the hearing in the Privy Council in November 1926, Monckton and his former pupil, Colin Pearson, were led by Sir John Simon KC, Barrington-Ward KC and the Attorney-General for Newfoundland. The judgment of the Privy Council vindicated Newfoundland's claim that the coast of Labrador was part of Newfoundland and extended some 500 miles inland to the crests of the watersheds of the rivers flowing into the sea on the coast.[5] Monckton spent a week or two in August 1926 at Simon's house in Oxfordshire helping him prepare Newfoundland's argument for the Privy Council. This gave Monckton the opportunity to learn the art of preparing the presentation of an argument in a complex case, which he would have passed on to his pupils and devils, including Cyril Salmon. Monckton later recorded what he had learnt from Sir John Simon:[6]

> *"I learnt how important it is to do well the mechanical job of managing and handling your books and papers. He liked to start with a large empty table and a notebook which became not only a guide to the argument but also a key to the documents. I have tried to emulate his example in heavy cases and have kept a notebook which gradually contains a child's guide to the case, invaluable through the many interruptions in the long preparation of heavy litigation, and one feels more inclined to return to the papers and browse over another bundle of them if there is in one's notebook a summary of one's own slowly acquired information."*

The value of making a written note when preparing a case may seem obvious now, but in the early twentieth century, there was another school of advocacy which deplored the written note. Horace Avory KC's firm advice to Patrick Hastings was: *"No one but a fool ever makes a note on his own briefs"*. Hastings followed that advice and never made a note himself or allowed any of his pupils to do so either. Instead, the facts of the case would be committed to memory and, as soon as the case was over, dismissed from the mind.[7] This practice might lead to greater spontaneity in oral argument, but would be impractical for handling the volume of documents in most modern litigation.

"Regrettably, Salmon's first appearance in court to attract attention was one where he was in the dock...The magistrate said that Salmon's type of driving was one of the greatest dangers to people going about London"

Salmon's practice at 2 Harcourt Buildings

Salmon became a member of 2 Harcourt Buildings in 1926, when he finished his pupillage. As a general common law barrister, Salmon had to join a circuit. Following Monckton, who lived in Kent, Salmon chose the South-Eastern Circuit and the Kent Sessions. Salmon's choice of circuit would turn out to be prescient as he would come to have a deep affection for East Kent and would take the title Lord Salmon of Sandwich.

Regrettably, Salmon's first appearance in court to attract attention was one where he was in the dock. In October 1926, Cyril Salmon of the Hotel Metropole was convicted in Marylebone Magistrates Court of negligently driving his sports car at what the magistrate described as the outrageous speed of 40 mph near Lord's Cricket Ground and colliding with another vehicle.[8] The magistrate said that Salmon's type of driving was one of the greatest dangers to people going about London. In fining Salmon £50, disqualifying him from driving for 12 months and ordering him to pay 5 guineas costs, the magistrate told him he was fortunate not to be sent to prison.

As a junior at 2 Harcourt Buildings, Salmon appeared in a variety of cases in the High Court, county courts and magistrates' courts covering the full range of common law practice, including crime. Salmon's family connections

2. Montgomery Hyde, *Walter Monckton*, Sinclair-Stevenson, 1991, p 2.

3. Lord Birkenhead, *Walter Monckton, The Life of Lord Monckton of Brenchley*, Weidenfeld & Nicolson, 1969, p 74, recording that, if Monckton had twelve points to choose, he had the judgment and daring to select and press one point, while abandoning the others.

4. Birkenhead, *Walter Monckton*, pp 73, 74.

5. (1927) 137 LT 187, 43 TLR 289.

6. Montgomery Hyde, *Walter Monckton*, p 21; Birkenhead, *Walter Monckton*, p 78.

7. Montgomery Hyde, *Sir Patrick Hastings, His Life and Cases*, Heinemann, 1960, pp 28, 29.

8. Presumably, contrary to s 1 of the Motor Car Act 1903, which made it an offence to drive a motor car on a public highway *"recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the highway."*

SOUTH SQUARE STORY: CYRIL SALMON AND THE FOUNDATION OF CHAMBERS

helped to launch his career. The firm of Bartlett and Gluckstein instructed Salmon in two High Court cases that were reported in the Times. In May 1927 he was led by Du Parcq KC in successfully defending an allegation of fraud in a company's thrift scheme.[9] Two years later he was led by Malcolm Hilbery KC for Regal Cinema Ltd, defending a nuisance claim.[10] The plaintiff, who owned a flat above the defendant's cinema at the corner of Marble Arch and Edgware Road, complained that an army of cockroaches, having multiplied and nourished themselves among the refuse on the defendant's property, had invaded the plaintiffs flat. The trial lasted four days and included expert evidence about the propensity of the invading cockroaches. The jury found for the plaintiff, who was awarded damages of £481 and costs.

In the spring of 1930, Salmon had a noting brief for the brother of one of the defendants in the trial of *Lever Brothers v Bell* before Mr Justice Wright and a special jury, which lasted 21 days.[11] After the jury had made their findings of fact, Salmon rose to inform the judge that his client was not involved in the impugned transactions. The judge's response, that the matters raised by Salmon had nothing to do with the action that had been tried, may have been of comfort to Salmon's client, but it is possible to detect a note of irritation in the judge's response. He was about to hear complex submissions of law on which he would give a judgment, which would ultimately be reversed by the House of Lords in what became the leading case in the law of common mistake.[12]

In March 1931 Bartlett & Gluckstein instructed Salmon to act as junior for J Lyons & Co on its appeal to the Court of Appeal against its conviction by the Swindon justices for selling cream filled Swiss rolls and vanilla cream sandwiches in contravention of the Artificial Cream Act 1929.[13] The justices fined J Lyons £2 with £8 costs, but the conviction was of the utmost concern to its recently established food manufacturing business, since it imperilled the sale of two of its best-selling products. For this reason, Salmon was led by two illustrious leaders, Sir John Simon KC and Roland Oliver KC. The appeal succeeded, with the Court of Appeal accepting J Lyons' argument that the Artificial Cream Act only applied to the sale of cream or artificial cream as a separate article of food and had no application to composite products such as Swiss rolls or vanilla cream sandwiches. While this successful appeal may not have opened the door for Salmon to appear in a string of cases under the Artificial Cream Act before it was repealed in 1938, the experience was undoubtedly worthwhile. It gave Salmon the opportunity to see how to present a compelling argument on statutory interpretation to an appeal court; a skill Salmon would master over his career at the Bar.

Bartlett & Gluckstein also instructed Salmon in what may have been his last case before leaving 2 Harcourt Buildings.[14] This was a libel action, in which Salmon, led by John Singleton KC, acted for the plaintiffs who were proprietors of Thames Riviera, a pleasure resort on Taggs Island, near Hampton Court. Walter Monckton KC was leading counsel for the defendants, the printer and proprietor of Reynolds Illustrated News. Salmon's clients complained that passages in an article in Reynolds Illustrated News, which described "midnight champagne bathing parties from motor cars" by "gay mixed parties of men and girls to the more secluded reaches of the Thames" meant that Thames Riviera was a place frequented by immoral persons where scandalous bathing and dancing scenes took place.[15] The jury agreed and awarded the plaintiff company damages of £1,000. The judge rejected Monckton's argument that the plaintiff company was not entitled to recover the damages, because the operation of a pleasure resort was beyond its powers as set out in its constitution.

Salmon's decision to leave 2 Harcourt Buildings

By early 1933, Salmon, who was then only 29, decided it was time to move on from 2 Harcourt Buildings. At first sight, this may appear a surprising decision. After all, 2 Harcourt Buildings was then a well-regarded set. Since the departure of Barrington-Ward in 1930, the chambers' reputation had greatly improved under leadership of Du Parcq KC and, from 1932, Monckton KC.

When Walter Monckton took silk in 1930, Salmon may have hoped that he would have benefited from some of Monckton's junior practice being passed down to him, but that may not have happened. It is more likely that Colin Pearson was the main beneficiary. In 1929 Terence O'Connor had taken silk and moved with Cyril Harvey to 1 Temple Gardens, leaving spaces for Pearson to return from 3 Elm Court and for Douglas Potter to join the chambers. In 1930 Pearson succeeded Monckton as junior counsel to HM Commissioner of Works and made his first appearance in the law reports since the Labrador boundary case. Over the next four years Pearson appeared as junior in twelve reported cases, five of which were in the House of Lords. Although Salmon was only junior to Pearson by one year, his practice in those years came nowhere to matching Pearson's.

An exceptionally successful barrister like Walter Monckton KC casts a large shadow, from which an aspiring barrister may need to emerge if he is to succeed in establishing his own reputation. Perhaps, Salmon had come to realise this and that he would do better to move and find a good room of his own and a clerk dedicated to his own practice. Fortunately for him, Salmon had the financial resources to contemplate setting up chambers on his own.

6 Crown Office Row

Salmon found empty chambers on the east side of the ground floor of 6 Crown Office Row of which he became the tenant

Walter Monkton KC,
© National Portrait Gallery, London

"An exceptionally successful barrister like Walter Monckton KC casts a large shadow, from which an aspiring barrister may need to emerge if he is to succeed in establishing his own reputation"

9. *Sellar and McGiven v Anderson* (Times 17 May 1927).

10. *D'Arcy v Regal Cinema Ltd* (Times 15, 16, 19 and 20 March 1929).

11. [1931] 1 KB 557.

12. *Bell v Lever Brothers Ltd* [1932] 2 AC 161, HL.

13. *J Lyons & Co Ltd v Keating* [1931] 2 KB 535.

14. *United Kingdom Advertising Co Ltd v Sullivan*, Times 4 and 8 March 1933.

15. Times, 3 March 1933.

SOUTH SQUARE STORY:
CYRIL SALMON AND THE FOUNDATION OF CHAMBERS

In his first case at 6 Crown Office Row Salmon defended one of the most difficult clients he would ever encounter; Baroness Elizabeth Florence Strabolgi

from 25 March 1933. 4-6 Crown Office Row was a yellowish Victorian building in the Italianate style, which stood to the west of 1-3 Crown Office Row, which had been built in 1737. Salmon's rooms were therefore at the Middle Temple Lane end of Crown Office Row, with views across the road to the Inner Temple gardens.

Douglas Potter, another member of 2 Harcourt Buildings, moved with Salmon to 6 Crown Office Row. They were joined by Geoffrey Barratt who had been called to the Bar in 1931 and was a member of the Midlands Circuit, where he seems to have conducted most of his practice.[15] In 1939 Colin Sleeman, who was one of Salmon's pupils, joined them. Their clerk must have given good service at 6 Crown Office Row, since Salmon regretted that he did not return after the war. In those days it was common for a chambers to have only three of four members.

By the time Salmon left the Bar for military service in 1940, he had become one of the three top common law juniors;[16] the others being two more senior barristers: Valentine Holmes, the junior counsel to the Treasury (common law), and Gilbert Paull, who took silk in 1939. Crime formed a large part of Salmon's practice, but he covered the full range of common law litigation, including breach of contract, defamation and personal injury claims.

Baroness de Strabolgi

The first case in Salmon's practice at 6 Crown Office Row to attract the attention of the national press was a fraud trial at the Old Bailey in January 1934, where Salmon defended one of the most difficult clients he would ever encounter; Baroness Elizabeth Florence Strabolgi, the 71-year-old wife of the Ninth Baron. She had married the Ninth Baron, who was about ten years older than her, in 1884, when he was plain Cuthbert Matthias Kenworthy, the son of a Yorkshire vicar. He claimed to be heir to the ancient Barony of Strabolgi, which had been in abeyance since 1602, and petitioned the House of Lords Committee of Privileges to call the title out of abeyance, so that he could sit in the House of Lords. The petition was successful and in April 1916 Kenworthy was summoned to the Upper House of Parliament. The Kenworthys were ill-prepared for their elevation to the ranks of the nobility. They lived in Leinster Gardens, Paddington, had little in the way of property and no knowledge of the workings of the Upper House. On 17 May 1916, the Ninth Baron took his seat in the House of Lords and the Lord Chancellor (Buckmaster) was astonished to find that he was greeting *"a little man, clad in a grey lounge suit"*, rather than morning dress, as was the normal attire for the noble lords.[17] A few days later, the Ninth Baron arrived early at the House and took a seat on the opposition front bench, from where, to the astonishment of the noble lords, he clapped a speech by Lord Selborne and greeted other speeches with nods of approval.

The de Strabolgis soon took to their elevated status. They moved to smarter addresses in Kensington and Mayfair and became actively involved in the Liberal party. In 1919, their elder son, Commander Joseph Kenworthy, became Liberal party MP for Hull Central.[18] The apogee of their social success came with the unexpected, but short-lived, Liberal revival in the December 1923 General Election. In January 1924, the Baroness moved into a grand mansion in Grosvenor Square, had herself photographed in tiara and mink by Bassano and made a notable appearance at the State Opening of Parliament wearing a black and pink velvet wrap, bordered with chinchilla.

This lifestyle required financing, but the Baron's means were limited; he was well over 70 and would soon retire to the country. To supplement her income, the Baroness became a dealer in London property and the partner of Robert Henri Marie Muller who had schemes for exploiting oil and timber concessions in Honduras. The oil concession was disposed of in the early 1920s, but Muller claimed to have concessions to work vast timber plantations, full of pine trees for extracting turpentine and mahogany for logging, from which untold

Baroness Elizabeth Florence Strabolgi, captured by the Victorian high society photographer Alexander Bassano, © National Portrait Gallery, London

15. Little is known about Barratt. His Inner Temple admission papers show that he was the only son of John Bernard Steinton Barratt of Brampton Rectory, Northampton. He appeared in only one reported case; *Hanscombe v Bedfordshire CC* [1938] Ch 944.

16. According to Sir Anthony Evans' article on Salmon in the Oxford Dictionary of National Biography.

17. Western Daily Press, 17 May 1916.

18. He became a commander in the Royal Navy and had been the Royal Navy's heavy weight boxing champion; a feat that seems to have owed more to his mother's genes than his father's. He was MP for Hull Central from 1919-31; changing to Labour in 1926.

SOUTH SQUARE STORY:
CYRIL SALMON AND THE FOUNDATION OF CHAMBERS

wealth could be extracted. Those concessions would only become effective if they were confirmed by the Honduras Congress, which never happened. It is not clear whether the Baroness and Muller ever obtained any financial benefit from their Honduras ventures, but by the end of the 1920s they were both in financial difficulties.

The Baroness was reduced to living in rooms in a house in Rutland Gate, Knightsbridge, which belonged to Mrs Rosa Hanner, a widow. The two ladies argued over the Baroness's decision to replace the gas fires in her rooms with coal ones. When Mrs Hanner entered the Baroness's rooms to try to stop her from changing the locks, a violent and an undignified scuffle ensued between Mrs Hanner and her daughter on one side and the Baroness and Muller on the other. All claimed to have been grievously injured. Mrs Hanner and her daughter sued the Baroness and Muller for damages for assault and battery. The Baroness counterclaimed for damages for trespass and both defendants counterclaimed for damages for assault. In May 1929, the dispute was tried by Mr Justice McCardie and a special jury. Mr Hilbery KC, counsel for the plaintiffs told the court that Lady Strabolgi was an elderly lady *"though extremely active and violent at times"*. He said that Muller had grabbed Mrs Hanner and threw her to the ground, whereupon the Baroness had started kicking her. On the other hand, the Baroness said that she had acted in self-defence, that Mrs Hanner had pulled her hair and insulted her by calling her *"a mean old cat"* and *"a glutton"*. The Baroness told the court that the gluttony insult was unfair, as she tried to keep thin by eating as little as possible. Looking at the Baroness in the witness box, Mr Justice McCardie could not resist observing: *"unrewarded abstinence"*. In the end, the jury found that all the claims for assault and battery failed, but the Baroness achieved a victory of sorts, because she was awarded damages of one shilling for trespass.[19]

In 1928 Muller and the Baroness had persuaded the solicitors Smith, Piper and Padfield to lend £5,000 for them to invest in the Honduras timber venture on the security of a mortgage executed by Muller over his lease of 1 Princes Gate, Knightsbridge. To give Muller's lease some value as security for Muller's covenant to pay back the £5,000, the Baroness agreed to take a sub-lease of the premises for 14 years at an annual rent of £850. The loan was not repaid and so the lender appointed a receiver to collect the rent from the Baroness. She defaulted and was sued. Sir Patrick Hastings KC appeared for the receiver and John Singleton KC and Cyril Salmon appeared for the Baroness. Her defence was that she only agreed to take the sub-lease from Muller if she could develop the property as flats and that the mortgagees were aware of that condition. Since that condition was not satisfied, she claimed not to bound by the sub-lease. Mr Justice Swift robustly rejected that defence:[20]

> *"I do not believe one word about the alleged agreement between Lady Strabolgi and Mr Muller. I am convinced that she took this lease to enable Mr Muller and herself to get £5,000 out of the lenders... Not until afterwards, when she sought to get out of her liability, was the idea of a suggested licence to convert into flats either thought of or discussed. I therefore give judgment for the plaintiff for the amount claimed with costs."*

"At the next meeting between Muller, the Baroness and de Moleyns in a flat in Cornwall Gardens, Kensington, two policemen were hiding behind the curtains"

By now Muller's and the Baroness's financial position was desperate. In 1930 he was adjudicated bankrupt and lived in squalor in an unlit room in 1 Princes Gate. She struggled to pay the rent and rates on her properties, which were heavily mortgaged, and in 1932 she was made bankrupt with assets of only £27 to her name and unsecured debts of less than £1,000.

In October 1933, Muller and the Baroness approached the Honourable Francis de Moleyns, the son of an Irish peer, to persuade him to invest in the Honduras venture against promises of huge profits. He was suspicious and went to the police. At the next meeting between Muller, the Baroness and de Moleyns in a flat in Cornwall Gardens, Kensington, two policemen were hiding behind the curtains. After Muller and the Baroness had explained that an investment of £6,000 in their supposed Honduras venture would produce a profit of £1 million and de Moleyns had given them a cheque for £6,000, the policemen emerged from behind the curtains and arrested the Baroness and Muller. She was outraged: *"I am a peeress of England. My son is Commander Kenworthy. You shall hear something about this."*[21] Police enquiries revealed that Muller and the Baroness had tried to extract investments from other people and so, by the time the case was committed for trial at the Old Bailey, they had been charged with conspiracy to defraud and Muller was also charged with attempting to obtain money by false pretences. In fact, as prosecuting counsel would make clear, all attempts to obtain investment money had failed, so no one had suffered loss. Moreover, de Moleyns was not a man of means and it was unlikely that his cheque for £6,000 would have been honoured. He had been an unsuccessful breeder of Wessex Saddleback pigs and was now engaged in promoting an eye balm company.

The trial began on 16 January 1934, with Salmon defending the Baroness and Geoffrey Barratt defending Muller. When the case was called on, the Baroness and Muller were not in court. Eventually they appeared, with the Baroness making an impressive entrance, wearing a black hat, trimmed with ostrich feathers, and a black velvet coat with fur collar and carrying a muff to match. She graciously apologised to the Recorder, Sir Ernest Wild KC, and blamed the traffic in the Strand. The prosecution opened the case, explaining to the jury that anyone was entitled to make wild proposals to friends or the public, provided that the facts are made perfectly clear and the truth is told, and that there is a line between honesty and dishonesty which the accused had crossed.

After the prosecution witnesses had given their evidence and defence counsel had made their speeches opening the defences, Muller limped towards the witness box, collapsed and cried *"my back is red hot"*. The Recorder asked him if he was able to give evidence. Muller said he was *"quite incapable"*.[22] This was not a wise answer, because the Recorder adjourned the proceedings until the following morning and revoked Muller's bail, so that he could be assessed in custody by a prison doctor. The next day, the prison doctor reported that he could see no reason why Muller should not give evidence. Muller tried to explain that he never told people that he owned a concession; he only said that he had a right to a concession which would be completed by some further authorisation of the Honduras authorities. He also tried to rely on a judgment in the Honduras Court of Appeal, but, unfortunately for him, closer inspection revealed that it was a dissenting judgment and the majority decision did not support his case.

Now it was the Baroness's turn. For her, Salmon had three lines of defence: she believed what Muller said about the Honduras concessions; anyway, she merely supported him; and the de Moleyns case was a false one and a publicity stunt. The final line of defence was unconvincing, since it was impossible to see how the eye balm company which de Moleyns was promoting could benefit from the publicity. In advancing the other defences, Salmon was not assisted by his client's performance in the witness box. She did not answer the tiresome questions put to her by prosecuting counsel, made no attempt to disguise her irritation with them and was rebuked by the Recorder on several occasions. She explained her relationship with Muller in this way: *"I was giving him moral support and encouraging him; the same as Queen Isabella helped Christopher Columbus"*.[23]

The Baroness did not convince the jury. After going out for one hour, they returned guilty verdicts against both defendants, but recommended leniency for the Baroness on account of her age. Salmon also urged leniency, saying that arrangements had been made for her to be taken away from *"all influence of the present kind"*. She could live with her younger son, a vicar, in his

19. Times 2-4 May 1929; Scotsman 3 May 1929.

20. Times 28 May 1930.

21. Times 17 October 1933.

22. Daily Herald, Leeds Mercury 18 January 1934.

23. Leeds Mercury 20 January 1934.

24. Times 23 January 1934.

SOUTH SQUARE STORY: CYRIL SALMON AND THE FOUNDATION OF CHAMBERS

Norfolk vicarage and her elder son had offered financial support. The Recorder described the jury's verdict as *"a righteous verdict"*[24] and sentenced Muller to twelve months in prison in the second division and the Baroness to three months in prison in the second division, which he considered was the most lenient sentence he could impose. She looked surprised as she left the court to serve her sentence in Holloway prison.

Within two weeks of the Baroness's conviction, the Ninth Baron died. The Dowager Lady de Strabolgi served her sentence and lived for another seventeen years, dying at the age of 88 in 1951.

The Charity Card Party Case

In January 1936 Salmon was led by Sir Patrick Hastings KC for John Trevor,[25] a charity appeal-fund organiser, who was the defendant in a trial before Mr Justice Finlay and a special jury in what became known as the *"Charity Card Party Case"*. This was a claim for damages for misrepresentation brought by Keith Hugh Williams, a financier, who claimed that the defendant had invited him to a card party at Sunderland House, Curzon Street to raise funds for two reputable medical charities, by giving the charities a percentage of the house winnings from games of chance, such as baccarat and chemin de fer. Mr Williams alleged that Mr Trevor had represented that the party would be perfectly organised, that everyone helping would be known to him or the organising committee and that in breach of those representations, Mr Trevor admitted to the party crooks and cardsharpers, that the games were not conducted properly and that he had lost £10,000. Mr Trevor denied that he owed any duty to Mr Williams or that there had been any breach of warranty or negligence. At the end of the plaintiff's case, Sir Patrick Hastings submitted that there was no evidence of breach of warranty or breach of any duty for Mr Trevor to answer. Mr Justice Finlay agreed and dismissed the claim with costs but expressed the hope that in future no reputable charity would resort to card parties to raise money. The trial gave Salmon the opportunity to watch Sir Patrick Hastings' style of cross-examination – short direct questions, fired in quick succession – which demolished the plaintiff's case.

Cyril Salmon's reported cases as a junior at 6 Crown Office Row

In the four years 1936 to spring 1940, Cyril Salmon featured in a remarkable 26 cases reported in the official law reports, many in the Court of Appeal and more than half of which concerned bankruptcy, guarantees and moneylending, with the remainder covering contract, landlord and tenant, personal injuries, Sunday trading offences and even an issue about the constitution of Malta.

Salmon excelled at finding technical defences to complaints of breach of ancient or modern Sunday trading legislation. In 1936, in *Green v Berliner*,[26] he persuaded Mr Justice Du Parcq that he could not be satisfied to a criminal standard that his client, a printer, was in breach of the Sunday Observance Act 1780 just because the printer's name appeared at the

> In 1939, with Sir William Jowitt KC as his leader, Salmon defended two Chelsea shopkeepers who were charged with infringing the Shops (Sunday Trading Restriction) Act 1936 by selling confectionaries, including arctic rolls, and veal and ham pies on a Sunday afternoon for consumption off the premises

bottom of a handbill announcing a boxing match due to take place on a Sunday, but he could not save a newspaper from liability, where it had announced the boxing match as a news item. In 1939, with Sir William Jowitt KC as his leader, Salmon defended two Chelsea shopkeepers who were charged with infringing the Shops (Sunday Trading Restriction) Act 1936 by selling confectionaries, including arctic rolls, and veal and ham pies on a Sunday afternoon for consumption off the premises. The magistrate had dismissed the complaints and the Court of Appeal could not be satisfied he was wrong. Salmon and his leader had no difficulty in pointing out the many infelicities and confusions in the 1936 Act, whose sections and schedules contained a multitude of prohibitions to which there were an array of partial exemptions, special provisions and extensions.[27] Lord Hewart, Lord Chief Justice, concluded that the 1936 Act had been passed for the bewilderment of small shopkeepers, but he did not go so far as to accept Sir William Jowitt KC's submission that it was unintelligible.

Salmon's practice in bankruptcy, guarantees and moneylending law is the aspect of his practice that is of greatest significance to the development of chambers, since it was one of the sources of the expertise that members of chambers later acquired in those areas of law. These seem to have been areas of practice that Salmon developed for himself, since there is no evidence of Walter Monckton having been engaged in them. Salmon's bankruptcy work concerned debt recovery and disputes about bankruptcy notices and petitions, rather than issues about the administration of the bankruptcy estate, the recovery of property or discharge from bankruptcy. For these cases, Salmon forged relationships with solicitors who became regular suppliers of work to chambers.[28]

Salmon was adept at arguing technical points, as was necessary under the Bankruptcy Act 1914 and the Moneylenders Acts 1900 and 1927, even though he did not always win. In one 1936 bankruptcy case, where he lost, Lord Wright, Master of the Rolls, said that Salmon had *"put all his arguments before us with great force" and Lord Justice Romer referred to his "excellent argument"*.[29]

Salmon's last case before departing the Bar for active service in World War II was an appropriate one for its time. In *RA Kohnstamm Ltd v Ludwig Kremin (London) Ltd*,[30] decided by Mr Justice Macnaghten on 21 May 1940, Salmon represented the defendant, an English company which had guaranteed the obligations of a German company to the plaintiff, another English company. Given the onset of war, the defendant had no prospect of recovering any money from the German company, if it paid under the guarantee. Salmon tried to protect his client by arguing that the defendant could not pay without breaching the Trading with the Enemy Act 1939. His argument failed, because the judge held that payment would not absolutely discharge the German company's obligations, as required for an infringement of the 1939 Act, but would merely transfer them from the plaintiff to the defendant. Salmon's argument was a bold one, because, as the judge pointed out, there would have been no breach of the Act if the plaintiff had received payment from the German company.

Douglas Potter, the first chambers' author

Douglas Potter, the son of a Putney solicitor, had been born on 17 December 1903 and so was a few days older than Cyril Salmon. He was educated at Radley College and Trinity College, Oxford, where he was a keen sportsman. He was a member of the crew that won the Ladies' Plate at the Henley Regatta in 1923. In 1925 he won a half-blue for athletics, running in the 3 miles race.

Potter was called to the Bar (Inner Temple) in 1928 and in the following year became a member of 2 Harcourt Buildings, where he joined Cyril Salmon. He became a member of the South Eastern Circuit and the Hertfordshire and Essex Sessions. In 1933 he moved with Salmon to 6 Crown Office Row.

Potter's practice before the Second World War seems to have been heavily based on criminal work. He appeared in four reported cases, none of any lasting significance, covering crime, divorce, bankruptcy and moneylending. Potter seems to have been an able barrister and he certainly enjoyed Salmon's support and friendship, but a comparison between their careers reveals just how successful Salmon was in the years before the Second World War. With an eye to becoming an expert in a new area of law, Potter wrote *The Law relating to Garages and Carparks*, which was published in 1939. The timing of publication could not have been worse for a book on that subject. Later that year, Britain was at war and in the following years the German bombing campaign destroyed many of the city centres where carparks might

25. Salmon had acted for Trevor before. On 19 May 1928 he was led by Sir Henry Curtis-Bennett KC for Mr Trevor who pleaded guilty in the Marlborough Street Magistrates Court to three offences: causing an unnecessary obstruction with his motor vehicle, which he left outside the Eccentric Club in Ryder Street, not having the rear number plate of his car illuminated and corruptly giving a police constable £1 to induce him not to pursue the motoring charges, contrary to the Prevention of Corruption Act 1906. The magistrate sentenced Trevor to one month in prison in the second division for *"this most disgraceful attempt to bribe"* and fined Trevor £2 for obstruction and 10s for lack of lights. Trevor appealed against the prison sentence and was granted bail pending appeal. On 8 June the Quarter Sessions reduced the sentence to a £25 fine and ordered Trevor to pay the costs of the appeal.

26. [1936] 2 KB 477.

27. [1939] 1 All ER 191.

28. H Davis; Isadore Goldman & Co; Kenneth Brown, Baker, Baker; MA Jacobs; Pothercary & Barratt; Samuel Tonkin Booth & Co; Trower, Still & Keeling; and Woolfe & Woolfe.

29. Re a Debtor *(No 836 of 1935)* [1936] Ch 622, CA.

30. [1940] 3 All ER 84.

31. Perhaps the most legally significant cases about carparks are *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, CA (a "ticket case") and *Re APCOA Carparks GmbH* [2015] Bus LR 374 (a case about the restructuring of a pan European carpark operator, in which several members of Chambers appeared), while the most interesting case to emerge from a carpark is *R (ex p Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3 All ER 261, concerning the disposal of the remains of Richard III, which had been found under a municipal carpark in Leicester.

SOUTH SQUARE STORY:
CYRIL SALMON AND THE FOUNDATION OF CHAMBERS

have been located. It would be many years before car parks would become established features of urban landscapes, but even then, there has been no demand for a legal text book dedicated to the subjects of car parks and garages.[31]

World War II and Postscript

Sometime after April 1940, the chambers at 6 Crown Office closed as Cyril Salmon and Douglas Potter enlisted for active service. As I will explain in the next article, when the War ended Salmon took silk and they returned to practice from chambers on the ground floor at 3 Paper Buildings. There, they would find that Sir Walter Monckton and some of his colleagues from 2 Harcourt Buildings had moved into chambers on the second floor. The chambers established there by Monckton moved to Gray's Inn in 1964 and since 1996 have been called Monckton Chambers in honour of their illustrious founder. Salmon's chambers remained at 3 Paper Buildings until 1989, when they also moved to Gray's Inn. It is pleasing to discover that the chambers at 2 Harcourt Buildings, headed by Walter Monckton in the 1930s, is the source of two sets of chambers, both based after World War II in 3 Paper Buildings and later moving to Gray's Inn, which are now acknowledged leaders in their fields: Monckton Chambers for competition and European law and South Square for insolvency and restructuring law. ■

© Simon Mortimore

Acknowledgements

Celia Pilkington, Archivist at the Inner Temple, and Ben Taylor, Archive Assistant, for making available the Inn's tenancy record books and tenancy agreements and for providing information about the Inn's buildings and Geoffrey Barratt.

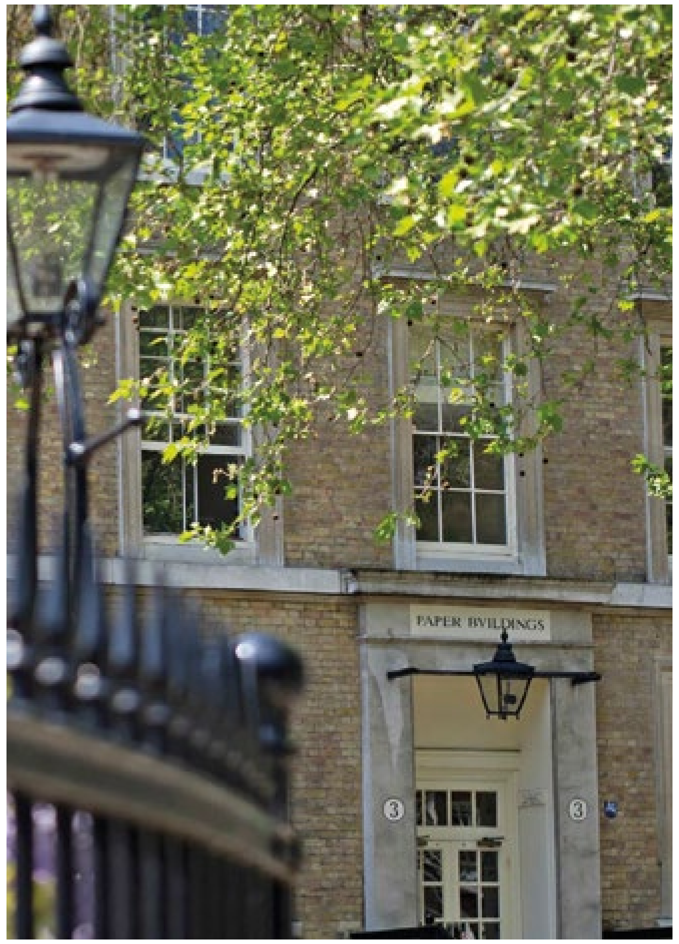
Barnaby Bryan, Assistant Archivist at the Middle Temple, for providing information about Lord Salmon.

Jennifer Skilbeck, historian of Monckton Chambers for providing information about the chambers at 2 Harcourt Buildings and to Meredith Pickford QC for introducing her to me.

For information about Lord Salmon and his family: Lord Brown of Eaton-under-Heywood and Sir Anthony Evans' article on Lord Salmon in the Oxford Dictionary of National Biography.

For background information about the people and cases discussed, I have referred to the books noted in the footnotes, the British Newspaper Archive, The Times Archive, Who Was Who and Wikipedia.

For reading, commenting on and correcting an earlier draft of this article: David Alexander QC, Mark Arnold QC, Michael Crystal QC,



This image is reproduced with kind permission of 3 Paper Buildings: www.3PB.co.uk

In the next issue of the Digest we will follow Salmon and Potter as they return from active service to form chambers at 3 Paper Buildings.

News In Brief – March 2019

As a G36 member, South Square is delighted to be sponsoring breakfast on the first day of the INSOL International Annual Regional Conference to be held in Singapore between 2 – 4 April 2019 at the Marina Bay Sands Expo and Convention Centre.

INSOL have once again drawn together experts and leaders in their fields for an exceptional programme, with the theme being "Looking to the future: what to expect and how to prepare". At a time when technology appears to be surging ahead of the law, the conference will focus on the importance of the law and practice of insolvency anticipating the challenges of a rapidly evolving global economy. Breakout sessions will cover topics such as blockchain and cryptocurrency, disruptive technology and the challenges and opportunities that disruption – whether economic, regulatory, political, technological or otherwise – will create across sectors and geographies, and the ever-popular 'Hot Topics' session where an international panel will attempt to anticipate the business impacts of an evolving world.

David Alexander QC, Mark Arnold QC, Fidelis Oditah QC, Tom Smith QC and Matthew Abraham are currently scheduled to attend, with other members hoping to join as commitments permit.

We look forward to renewing old friendships and making new ones in Singapore, and hope to see you there.

To register for the conference and for further information, please visit https://www.insol.org/events ■

Riz Mokal becomes an International Fellow of the American College of Bankruptcy

South Square is delighted to announce that Riz Mokal has been made an International Fellow of the American College of Bankruptcy. This is a rare honour, and Riz will be the seventh ever British Fellow.

Fellowship is conferred by the College's Board of Regents at the nomination of a special committee. It recognises "exceptional bankruptcy professionals for their work, their contributions to the administration of justice, their public service and their integrity".

Riz is not the first member of Chambers to be made a Fellow. Michael Crystal QC was conferred with Fellowship in 2006, and Associate Member Paul Heath QC in 2000. ■

Hardy Amies goes bust – again

For the second time in its 73-year history couturiers Hardy Amies have gone into administration, seeking buyers for their UK brands and intellectual property rights. The group, founded by the eponymous former dressmaker to the Queen, was previously rescued in 2008.

Sir Hardy Amies was a former wartime intelligence officer and founded the firm initially as a men's shop in 1946 at 14 Savile Row, which is still the group's base. After one of his creations was immortalised in the Queen's Silver Jubilee portrait, Hardy Amies went on to design outfits for a number of high-profile clients including the 1966 England World Cup team and the 1972 British Olympic squad. He also designed the costumes for Stanley Kubrik's 1968 sci-fi epic 2001: A Space Odyssey.

The brand's operations outside of Britain are trading successfully and are not affected by the administration. ■

News in brief

Bar Pro Bono Awards 2018: **Toby Brown**

South Square's Toby Brown was Highly Commended in the Junior Pro Bono Barrister of the Year category of the Bar Pro Bono Awards 2018. Bar Pro Bono is now called Advocate. Toby received his award from Chair Lord Peter Goldsmith QC at the awards ceremony held at the end of October 2018.

The Awards celebrate the very best of barristers giving back, and this award highlights both Toby's commitment to and outstanding work for Advocate.

Toby has been very active in the pro bono sector for many years with a particular dedication to the African Prison Project (APP). He identified that he could help turn a student project into a charity by incorporating it and registering it as a charity and then took five years out from the start of his career at the Bar to work on pro bono and charity projects with Sir Robin Knowles CBE. Having returned to practice in 2013, Toby's work with the APP continues today alongside a myriad of other organisations he supports including a national Muslim charity, a charitable trust that owns school playing fields and the usual court-related work such as CLIPS and COIN.

He does a great deal of work behind the scenes supporting and helping lead the profession's pro bono efforts, whether as a trustee to the Access to Justice Foundation (for example helping with pro bono costs),or this year taking on the role as Chair of the Pro Bono Week organising committee, on behalf of the profession and the access to justice sector.

Rebecca Wilkinson, Deputy CEO of LawWorks (the solicitors' pro bono group) said: *"Through his input to Pro Bono Week Toby has broadened the reach of the pro bono services the Bar makes and has raised the profile of his colleagues contribution to the public interest. Throughout each Pro Bono Week Toby has participated in pro bono debates and education, particularly to raise awareness to the vital pro bono costs orders, and whilst this may not be traditional pro bono work, which I know he also undertakes, the value added and range of reach has really made a difference."*

All at South Square are proud and delighted that Toby's dedication has been acknowledged in this way. ■

P.R.I.M.E. Finance Annual Conference 2019

On 4 and 5 February 2019, South Square's Robin Dicker QC joined the P.R.I.M.E. Finance Annual Conference at the Peace Palace in the Hague. Over 300 delegates were drawn from distinguished practitioners, academics, judges, regulators and experts who influence the day-to-day workings of the international financial markets.

As always, the conference programme covered a wide range of pertinent topics over the two days. Robin Dicker QC chaired the first session which considered the vexed question of Brexit's implications for financial markets. In these still-uncertain times the panel tried to anticipate its effects on financial contracts, courts and markets generally. Will the day after be business as usual, or will it be something far less certain?

Associate Member of Chambers Joanna Perkins formed part of the panel entitled "Benchmark No More: The Case of the Disappearing IBORs," which considered the issues involved in the likely disappearance of benchmarks such as LIBOR and other IBORs. Whilst trade associations and market participants are committed to facilitating this transition, the panel discussed how could this be achieved and how market participants can agree how to modify the economics of their trades to reflect the shift to a new standard. ■

Valentine's Day Rescue for Patisserie Valerie

After failing to secure a financial lifeline from its banks, café chain Patisserie Valerie fell into administration at the end of January. Patisserie Holdings, the parent company which also owns Baker & Spice, Flour Power City, Druckers Vienna Patisserie and Philpotts, has been in serious trouble since October 2018 when "significant, potentially fraudulent" accounting irregularities amounting to £40 million were revealed. The company's banking facilities were frozen (which protected it from action to recover debts) after a winding-up petition was issued by HM Revenue & Customs against one of its trading subsidiaries.

A rescue plan was passed by shareholders in November 2018, resulting in the issue of £15m worth of new shares. Since then, however, the scale of the fraud has been reported as more widespread than believed, involving "thousands of false entries" in its ledgers.

The standstill on banking facilities expired on 10 January 2019. The failure of talks with main lenders HSBC and Barclays to secure further funding forced administrators KPMG to close 71 of the group's cafes immediately, with the loss of around 900 jobs. The remaining stores continued trading and, on 14 February, the group was bought out of administration by Irish private equity firm Causeway Capital Partners.

The first Patisserie Valerie was opened on Frith Street, in London's Soho district in 1926 by Belgian-born Esther and Theo Vermeirsch. It remained there until bombing during World War II resultedin a move to nearby Old Compton Street. In 1987 the Scalzo family took over thestore and it remained a family business until 2006. In 2014 Patisserie Valerie was floated on the Alternative Investment Market. ■

Retail Apocalypse Continues

At the end of December 2018 HMV began administration proceedings for the second time in its history, citing weak Christmas footfall and the ongoing decline in the CD and DVD market for its demise. Administrators from KPMG were called in to seek a buyer for the business as a going concern. KPMG reported that it had received a number of offers ahead of the 15 January deadline to join the bidding process. On 5 Febuary the chain was bought out of administration by Doug Putman, owner of Canadian chain Sunrise Records.

Elsewhere on the high street Marks & Spencer (M&S), Debenhams, Mothercare and Halfords all had a tough Christmas. In the case of M&S, the retailer announced in January 2019 the closure of a further 17 stores as part of a drastic transformation plan. As part of an accelerated store closure programme, M&S is on track to close over 100 stores by 2020. ■

Netherlands Commercial Court Opens

Amsterdam joined the likes of London, Dubai and Singapore when the new Netherlands Commercial Court opened its doors on 1 January 2019, less than a month after the Dutch Senate approved a bill for the new international trade chamber.

The court is intended to specialise in hearing complex international commercial cases, offering parties to business and trade disputes a forum where they can litigate in English or Dutch, with evidence being tendered in either of French, German, English or Dutch which, the court claims, will save both time and translation costs. ■

News in brief

Truffle Shuffle

In October 2018 the High Court in London wound up 5 companies which it found had carried out investment scams promising high-value truffles for commercial sales.

The companies involved manipulated costs and created complex contractual structures in order to secure high-value investments, and targeted people that had access to their pension savings. Investors were told their savings were funding oak and hazel tree saplings pre-inoculated with truffle spores and planted on a commercial scale in managed, dedicated plantations worldwide. Investors were charged anywhere between £750 and £995 per sapling: investigators from the Insolvency Service found that similarly inoculated saplings were available publicly for £7.95 to £9.95 each at the same time. They also found that no cultivation or harvesting had ever taken place at any of the plantations despite the scheme first being sold to the public back in 2012.

Investors were also mis-sold the investment opportunities through unsubstantiated claims, such as having the option to trade out at any time of their contract and one investor was told they could expect a 200% return over a ten year period. However, in reality, investors had little or no remedy in relation to their investments and had no contractual relationship with the plantation companies responsible for maintaining the truffle trees for the contracted 15 years.

The Insolvency Service has said that more than 100 investors were cheated out of their savings, totalling close to £9 million and potentially rising. ■

GSI to be phased out

The Government Secure Intranet (GSI) is being phased out.Most pertinent to readers of the Digest to note is that both HMRC and The Insolvency Service will remove '.gsi' from e-mail addresses before the deadline of 31 March 2019. ■

Abu Dhabi Global Arbitration Centre

On 17 October 2018 the Abu Dhabi Global Market (ADGM), the international financial centre in Abu Dhabi, opened a state-of-the-art-arbitration hearing facility located in the financial free zone of Abu Dhabi. It is open to local and global parties "regardless of the arbitral institution administering the dispute", ADGM said. It hopes to compete with other regional centres as a preferred dispute resolution location for commercial and civil cases, with decisions issued by the zone's courts are enforceable under the New York Convention and its regulations are modelled on the UNCITRAL Model Law.

By Wadiia - Own work, CC BY-SA 4.0, https://commons.wikimedia.org/w/index.php?curid=37137962

ADGM is positioning itself as a fintech hub to rival the likes of Dubai and Bahrain with the zone launching a new framework to regulate spot crypto asset activities in June of last year. ■

Flexible Sitting in Court

As part of the £1 billion that HMCTS is investing in modernising the court service, the civil and family courts in both Manchester and Brentford are to pilot early and late sittings for six months from this spring. The aim is to test whether civil and family buildings can be used more effectively, the benefits of making it possible for members of the public to attend court outside the traditional 10am-4pm sitting day, and what this increased flexibility would mean for staff and legal professionals.

Former member of Chambers Lucy Frazer QC MP, Parliamentary Under-Secretary at the Ministry of Justice, announced that ministers had listened to the profession's concerns and will not pilot the scheme in criminal courts. ■

Judges 'deserve' 32% pay rise, but only get 2%

A review into the salaries of High Court Judges by the Senior Salaries Review Body (SSRB), leaked to the Daily Mail in early October last year, concluded that to counter low morale, long hours and changes to their pension schemes the annual pay of Britain's most senior judges should rise to £240,000, backdated to April of 2018. However, by the end of the month a statement by The Rt Hon David Gauke MP, the Lord Chancellor, revealed a 2% rise. ■

Ghostly Judge halts redevelopment plans

According to a report in Australian tabloid The Advertiser, former Supreme Court Chief Justice of Australia, Sir George Murray, has expressed his concern with plans to redevelop the Adelaide Supreme and District Court buildings — despite dying almost 80 years ago.

Construction firm Hansen Yuncken, who have the contract to carry out the planned upgrade, apparently hired an unnamed psychic medium following a spate of spooky incidents, including a fire extinguisher and chairs being moved around in the courtrooms. Having consulted the 'spirit' the medium informed Hansen Yuncken that Sir George was unhappy that the layout of his courtroom, number 11, was being changed and in particular the position of the bench.

While no changes to the AUS$31million redevelopment have been approved as yet, the building firm is allegedly in talks as to whether they should rearrange the floor plan of the courtrooms to 'appease the ghost'.

Having completed a degree in English literature at the University of Adelaide, George Murray moved to the UK to study law at the University of Cambridge. He returned to his homeland shortly after being called to the Inner Temple in 1888 and sat as a judge on South Australia's Supreme Court bench from April 1913 until his death in 1942, aged 78. ■

Insolvencies rise in 2018

New figures from the Insolvency Service for the 2018 year show a 20% increase in personal insolvencies in England and Wales on the previous year, driven by a record jump in IBAs. Companies going under also reached a 5-year high in 2018, with the total of 17,439 insolvencies driven by the collapse of retailers and builders.

Stuart Frith, president of R3, said "The pressure point for businesses most often cited by our members is weak consumer demand. People just don't have much spare cash at the moment". ■

@nicksarebi, Flickr

Bankrupt Bent

Former premier league striker Marcus Bent (who played for seven Premier League clubs including Everton, Birmingham City and Wolverhampton Wanderers during his 17-year career) has been declared bankrupt despite once having earned a salary of almost £1 million-a-year at his peak. He allegedly had debts running into seven figures, due to involvement in a number of failed tax avoidance schemes.

The latest news comes four years after the former footballer was involved in a cocaine-fuelled stand-off with police. Having called for police assistance, believing there to be an intruder on the premises, he charged topless at two officers with a meat cleaver and a kitchen knife. ■

Taking AIM

London's Alternative Investment Market (AIM) is now home to three litigation funders, with both specialist insolvency funders Manolete Partners and Australian funders Litigation Capital Management Limited joining Burford Capital last month. Vannin Capital is also thought to be planning a launch on AIM at some point, although it withdrew from listing last October citing concerns over 'volatility' in the equity market.

This news follows a report by City firm Reynold Porter Chamberlain in February of 2018 which analysed the volume of finance available in the funding market. It estimated that during the 2016/2017 year, assets held by the largest 20 litigation funders in the UK totalled £1.03 billion, a rise year-on-year of 42%.

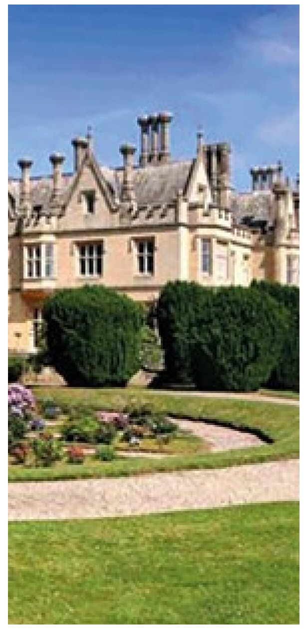
The rise comes as private equity firms and hedge funds continue to invest in this increasingly popular alternative asset class. A key attraction for investors is that returns are uncorrelated to mainstream assets, such as equities or bonds, helping to properly diversify portfolio returns. Litigation funders pay the costs of legal claims brought by businesses or individuals, in exchange for a share of any damages awarded.■

Celebrity Wedding Venue boss disqualified for New Year

With effect from 1 January 2019, Richard Fuller, the director of Mamhead House and Castle Limited (MHAC) was banned for 9 years from either directly or indirectly becoming involved, without the court's permission, in the promotion, formation or management of a company.

Liquidators appointed to wind-up MHAC when it entered into a creditors voluntary liquidation in November 2016 found that it had continued to accept deposits from customers after the point it knew it was in financial trouble. 21 couples who had booked the venue for weddings were left thousands of pounds out of pocket.

The Grade 1-listed Georgian mansion in Devon first hit the headlines in 2015 when it served as the backdrop to the wedding of former pop star Peter Andre and Emily MacDonagh. ■



SOUTH SQUARE CHALLENGE

SET BY
Ryan Perkins

Enter the March 2019 South Square Challenge and you could win a magnum of champagne!

Welcome to the first South Square Challenge for 2019. With the New Year often comes new resolutions, including new hobbies and interests. Your task on this occasion is to correctly identify each member of the judiciary shown below and match them to the correct hobby. 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 an ever so useful South Square umbrella.

ENTRY DETAILS

Please send your answers by e-mail to kirstendent@southsquare.com, or by post to Kirsten at the address on the back cover. Entries to be in by the end of May 2019 please. Best of luck!

01


02


03


04


05


06


07


08


09


A


B


Image: Peter Trimming

C

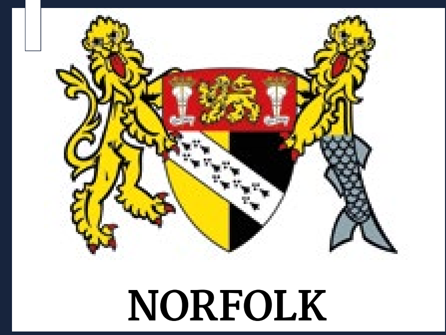

D


E


F


G


H


I


OCTOBER 2018 CHALLENGE

The answers to the Halloween October 2018 Challenge, which were all images to do with ghosts and the law were:

1. The Ackley House and the Ghostbusters: the case of Stambovsky v. Ackley, also called the ghostbusters ruling.
2. Lowes Cottage, Upper Mayfield and Derby Court: the cottage was declared 'not haunted' by Judge Peter Stratton in 1999.
3. "Old Hunch" (Sir Edmund Reeve, called to the bar in 1611) who haunts the town of Long Stratton.
4. Pond Square, Highgate and a frozen chicken: the ghost of the chicken stuffed with snow by Sir Francis Bacon – who then died of a chill – is said to haunt the square.
5. Judge Yvette M. Palazuelos and Michael Jackson: Palazuelos allowed testimony from Jackson's 'ghost' to stand in a wrongful death suit against a concert promoter.
6. Edgar Allen Poe and South Square's William Willson: In Poe`s short story 'William Wilson' the second-self haunts the protagonist
7. Brett J. Tally, one-time nominee for Federal Judge and ghost hunter, and his book on ghost hunting.
8. The ghost of Clytemnestre, and the trial of Orestes: arguably the 'first' trial by jury.

We had only one correct entry for this very difficult, seasonal challenge: **Sara Crystal of Moon Beever,** 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

Spring 2019 onwards

Thursday 21 March 2019
Ogier & South Square Conference
The Law Society, London

21 March 2019
R3 Annual dinner
8 Northumberland Avenue, London

29 – 30 March 2019
ILA Academic Forum and Conference
Allen & Overy LLP, London

2-4 April 2019
INSOL Singapore Annual Regional Conference
Marina Bay Sands, Singapore

7-10 May 2019
London International Disputes Week
London

10 May 2019
Chancery Bar Association Inaugural Bermuda Conference
Hamilton Princess Hotel, Bermuda

22- 24 May 2019
29th R3 Annual Conference
Slaley Hall, Northumberland

6 June 2019
South Square/RISA BVI One Day Conference
BVI International Arbitration Centre

June 17 – 18 2019
19th Annual III Conference in Barcelona
The Imperial, Barcelona

20 June 2019
INSOL International Channel Islands
Radisson Blu Waterfront Hotel, Jersey

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

Practice areas

Insolvency & Restructuring

Banking & Finance Litigation

Offshore

Commercial Litigation & Arbitration

Company Law

Civil Fraud

Sport

Insurance

Trusts & Property

Mediation
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
- Shipping
- Sport
- Aviation
- Technology & Communication

+44 (0)20 7696 9900 | practicemanagers@southsquare.com | **www.southsquare.com**

SOUTH SQUARE

"Widely considered to be the foremost restructuring and insolvency set by virtue of its unparalleled strength and depth at both silk and junior levels"

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 Amey
Andrew Shaw
Ryan Perkins
Riz Mokal
Madeleine Jones
Edoardo Lupi
Rose Lagram-Taylor
Stefanie Wilkins
Lottie Pyper

3-4 South Square | Gray's Inn | London WC1R 5HP | UK

Tel. +44(0)20 7696 9900.
Fax. +44(0)20 7696 9911. LDE 338 Chancery Lane.
Email. practicemanagers@southsquare.com

www.southsquare.com

WINNER Chambers BAR Awards 2018