Digest

SOUTH SQUARE

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A guide for the rest of us

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

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SOUTH SQUARE

From the editor

WILLIAM WILLSON

Welcome to the summer 2019 edition of the South Square Digest

This edition is dedicated to our friend and colleague, Gabriel Moss QC, who we lost on 15 March. Gabriel had been my next or opposite door neighbour my entire career in Chambers. We had spoken that morning for a good 20 minutes on all manner of topics: in no particular order, tardy contributors to Rowlatt on Principal and Surety; recent appointees to the Supreme Court; Gabriel's certainty that he had won his (what turned out to be last) case before the Privy Council (he was right: see Case Digests at page 53); and his recent classical music tastes (which I shared by default, through the thinness of our party wall). As ever, he was generous-spirited, effortlessly intellectual and subversively funny. When I received the email from our Heads of Chambers to announce the terrible news, it was hard to believe. Within 48 hours the emails started arriving in my Inbox from solicitors, barristers, judges, accountants and other lay clients.

What stood out was the universal acknowledgment of Gabriel's kindness. Two were from solicitors who had first met him at very early stages in their careers. Both had 'difficult' partner supervisors, both had come to South Square to hear learned Leading Counsel. Both praised Gabriel for making them feel at ease (even when one poured him the wrong drink, not once, but twice). To commemorate Gabriel, this edition includes an obituary, as well as two shorter reflections from Felicity Toube QC and Daniel Bayfield QC, both of whose careers owe a huge amount to him.

This edition also marks the 100th anniversary of Women in the Law. In 1919 the Sex Disqualification (Removal) Act was passed, allowing women to enter the legal profession for the first time. One week later, Ada Summers became Britain's first female magistrate. In 1922 Helena Normanton became the first woman to practice as a barrister in England (going on to become the first female King's Counsel, along with Rose Heilbron, in 1949). Progress was initially slow. In 1954, women made up 3.5% of the practising Bar (fewer than in 1939). By 1970, of 24,407 solicitors holding practising certificates, only 803 were women. It was not until 1988 that Dame Elizabeth Butler-Sloss became the first woman appointed to the Court of Appeal; Lady Arden the first female Chancery Division in 1993; and Patricia Scotland the first woman Attorney General in 2007. However, in October 2018, the Supreme Court sat, for the first time ever, with a female majority, Lady Hale, Lady Arden and Lady Black outnumbering Lords Carnwath and Lloyd-Jones. In 2018 50.1% of solicitors holding practising certificates were women. To mark 100 years of women in the law, Rose Lagram-Taylor recounts the life and ground-breaking achievements of Helena Normanton in our regular "Legal Eye" feature (page 72).

As we draw to the end of the summer term, Chambers continues to be involved in diverse and high-profile litigation. A raft of challenges to retail CVAs (Arcadia and Debenhams, to name but two) promise to keep many of us busy over the vacation period. But will the Landlords Strike Back? There is a heavy commercial arbitration in Hong Kong (a reminder that South Square is not just all about insolvency/restructuring law), several large trials next Michaelmas already under preparation (such as Lehman Waterfall V and Cyrus Capital) and a raft of other contentious and advisory matters at all levels in Chambers. Toby Brown (page 28) reviews the recent Cayman Islands Court of Appeal decision in Primeo v HSBC (in which five members of Chambers appeared), and which will now be appealed to the Privy Council on reflective loss.

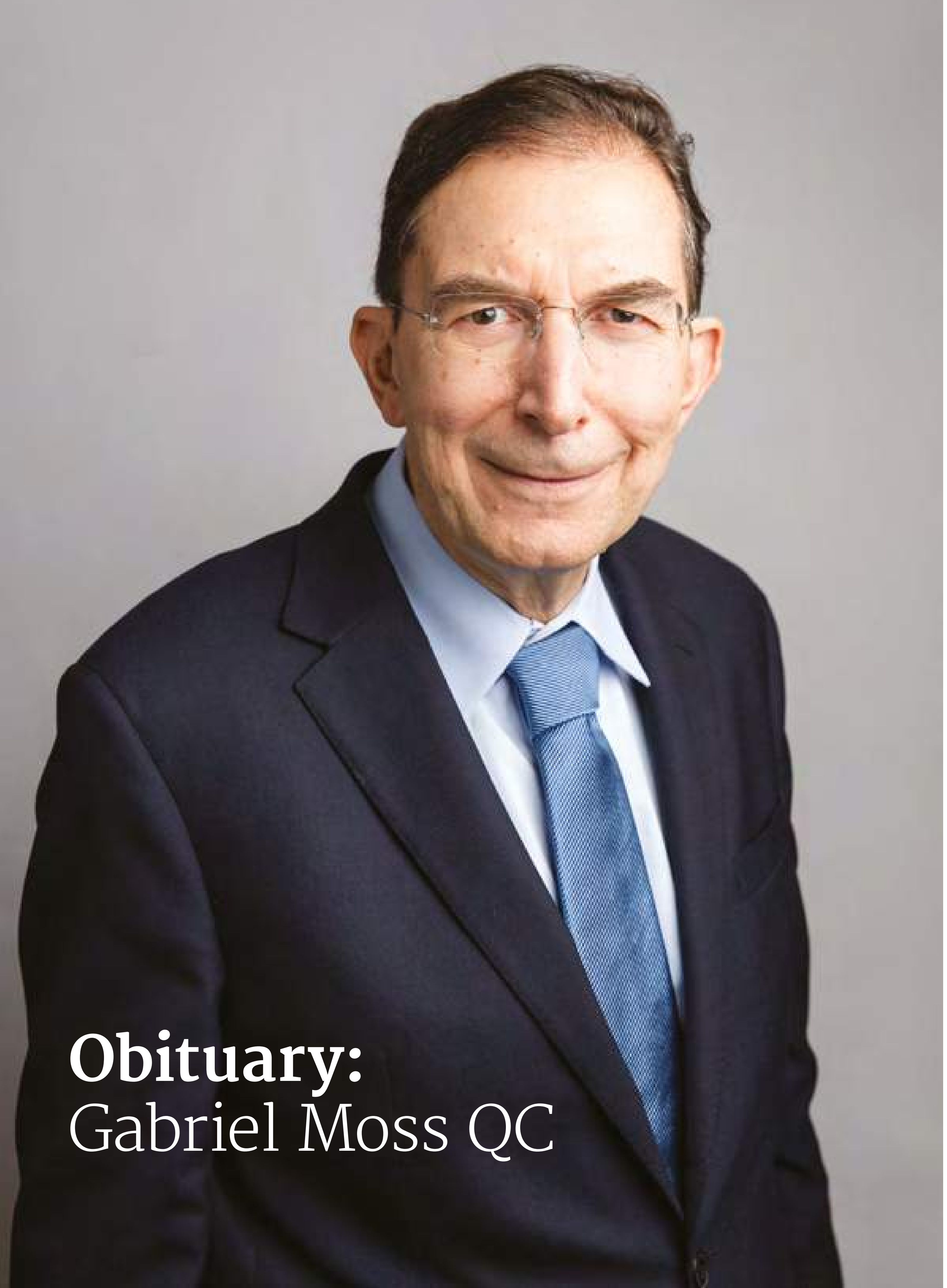
Outside Chambers, as the Digest was going to press, England had just won the cricket World Cup final, a double-tie decided on the basis of England's 26 boundaries scored to the Kiwis' meagre 17 (surely a law the draftsmen never thought would be tested). Boris Johnson was set to become Prime Minister, having won the popular vote amongst the Conservative Party's 160,000 membership. Another Boris (Becker) was about to auction off his trophy collection (see page 86), having just watched his former ward, Novak Djokovic, beat Roger Federer in the longest Wimbledon final in history.

Elsewhere in this edition, we have a thought-provoking leading article by Robert Amey, on cryptocurrency, Bitcoin and their possible effect on the future legal landscape. Mourant's Stephen Alexander and Abel Lyall negotiate the comparative insolvency regimes in the Channel Islands; Kennedy's Alex Potts QC looks back into his 2014 crystal ball to see if he is Bermuda's answer to Mystic Meg; David Alexander QC and Adam Goodison look at unfair prejudice remedies; and Simon Mortimore QC (now captain of Royal St George's Golf Club, Sandwich – see page 91) continues his history of Chambers, with the onset of WWII and the arrival of Claude Duveen. Finally, we have the South Square Challenge, set by Charlotte Cooke. Please enter: there is a magnum of champagne (and a South Square umbrella!) waiting for the lucky winner.

I hope you enjoy this edition of the Digest (and preferably that you are enjoying it somewhere nice on holiday). And if you find yourself reading someone else's copy and wish to be added to the circulation list, please send an email to williamwillson@southsquare.com or kirstendent@southsquare.com and we will do our best to make sure that you will get the next and all future editions.

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. ■

William Willson



Obituary: Gabriel Moss QC

Chambers was shocked and saddened to hear of the sudden death of our friend and colleague Gabriel Moss QC on Friday 15 March 2019. Gabriel was a leading light of the Bar and a titan of the insolvency and restructuring world.

He was born Gabriel Mosonyi in Hungary in 1949. His parents met during the Nazi occupation of Budapest in the ghetto hospital, where his father was a doctor. Having survived both Nazi and Soviet occupation, the family left after the Hungarian Uprising in 1956, initially planning to move to the United States, but eventually taking refuge in the UK.

Once in the UK, the family moved frequently in northern England, and Gabriel attended over a dozen schools during his primary/secondary education, eventually taking his A-levels in Bradford.

After finishing school, Gabriel worked at a magistrates' court before attending St Catherine's College, Oxford University, from which he graduated as an Honorary Scholar with a BA in Jurisprudence with First Class Honours in 1971, followed by a BCL in 1972. He only discovered his Jewish identity around the age of 21.

Gabriel was called to the bar in 1974, having been awarded the prestigious Eldon Scholarship on leaving Oxford University, as well as Hardwicke and Casell Scholarships from Lincoln's Inn. In 1975 he undertook his pupillage in Hare Court. Having been denied a tenancy, he briefly practised from Chambers in Mitre Court, where he appeared in magistrates' courts and the family courts. In late 1976 Gabriel came to the attention of Lord Bingham (who was then at Fountain Court) who told Edward Evans-Lombe QC (as he then was) and Muir Hunter QC, the Head of Chambers, about a clever young man who could not find anywhere from where to practice. And so it was the Gabriel joined 3 Paper Buildings, which later became South Square. Gabriel took up occupation of an underground room in the Chambers "annex" in 4 Kings Bench Walk, with David Marks, where the two enjoyed a mutual love of chess, as well as the law. This resulted in the revival, in 1981, of *Rowlatt on Principal and Surety*, which had been out of print for over 40 years. Having been in practice from 3 Paper Buildings for about a year, Gabriel changed his name to "Moss".

From the annex in 4 Kings' Bench Walk, Gabriel started to forge a strong insolvency practice, fortified by the coming into force of the 1986 Insolvency Act, and the publication of the first edition of *Lightman and Moss on Receivership* in 1986.

His insolvency practice took on an international flavour with the onset of the first cross-border insolvencies of the early 1990s. in 1991, BCCI went into liquidation, and the liquidators were faced with having to manage separate liquidations in each country in which the debtor company had assets. The shortcomings of this process laid the groundwork for the forging of an international spirit in insolvency law, manifested in the UNCITRAL Model Law and the EU Regulation, both of which Gabriel (and other leadings UK IPs/lawyers) played a part in shaping. This did not abate the short-term fury of the BCCI depositors, many of whom turned up to Court on 12 July 1991 to hear the winding up petition. As his junior at the time recalls, Gabriel was chased, after Court, down Fleet Street, by a group of angry depositors. As with his turn of phrase, Gabriel is reported to have shown an equally impressive turn of speed.

Gabriel continued to build his reputation tackling the most significant insolvency cases. He was instructed not only for his understanding of all facets of insolvency law, which was second to none, but also for his creativity and imagination. He was particularly valued by clients for his ability to come up with novel solutions to difficult problems, which led to his involvement in a great many cases before courts at the highest level, in doing so playing an important role in shaping the law as we know it. In short, Gabriel had what is the rarest combination of skills: a fierce intellectual ability, matched by a practical approach to advocacy.

However, Gabriel's practice became ever more wide-ranging, encompassing banking law, company law, financial services, commercial chancery, off-shore law, and litigation, as well as, of course, insolvency and restructuring. In the latter field, in particular, he was pre-eminent, a fact all the more impressive in light of his confession in a 2016 podcast for OUP promoting the third edition of *Moss, Fletcher and Isaacs, The EC Regulation on Insolvency Proceedings* that he had come to specialise in insolvency rather by accident and had been attracted to a career in law in part by "silly things" like the popular British TV series of the 1950s and 60s "Boyd QC".

Reflecting the international reach of his practice he was later admitted to practice in Gibraltar and before the Eastern Caribbean Supreme Court generally, and in Bermuda, the Cayman Islands, Hong Kong and the Isle of Man for specific cases.

He took Silk in 1989, sat as a deputy judge in the High Court (Chancery Division) from 2001, and was elected as a Bencher of Lincoln's Inn in 2003.

In the last few years, Gabriel acted as Leading Counsel in many major Supreme Court and Privy Council cases involving insolvency, banking and commercial chancery matters: *Heritable v Landsbanki*; *Rubin v Eurofinance*; *New Cap Reinsurance v Grant*; *BNY Corporate Trustees Services v Eurosail*; *Re Nortel*; *Re Lehman Brothers*; *Re Kaupthing Singer & Friedlander*; *Perpetual Trustee Co v BNY Corporate Trustee*; *PWC v Saad Investments Co Ltd*; *Singularis Holdings Ltd v PWC*; *LBI hf v Merrill Lynch International Ltd*; *Works Council of Nortel Networks SA v Liquidator of Networks SA and the Joint Administrators of the Nortel Group*; and *Re Olympic Airlines*.

> *The Board wishes to pay tribute to his intellect and humanity and acknowledge his unrivalled contribution to corporate insolvency law as a practitioner, author and university teacher*
>
> Lord Hodge on behalf of the Privy Council

Recently Gabriel had been acting as Leading Counsel to funds managed by Franklin Templeton, trying to prevent the International Bank of Azerbaijan (IBA) from obtaining a permanent moratorium in the English courts that would prevent the funds pursuing claims based on their English law governed debt. In December, he successfully persuaded the Court of Appeal that relief offered under the UNCITRAL Model Law in the Cross-Border Insolvency Regulations should only extend for as long as the relevant foreign proceeding continued. The matter, which has seen the challenge to the century-old 'rule in *Gibbs*' that debt can only be compromised in the jurisdiction of the law it is governed by, is currently subject to an application for permission to the Supreme Court.

He also retained his busy offshore practice, having appeared in the Grand Court of the Cayman Islands in *Re Abraaj Holdings* in late 2018, as well as appearing in the Privy Council in *UBS AG New York (& Ors) v Kenneth Krys & Ors* in February 2019 (on appeal from the Court of Appeal of the British Virgin Islands).

The latter was his final case, heard only a matter of weeks before his death, and playing perfectly to his appellate advocacy strengths and cross-border expertise. Praised in the judgment for his "powerful submissions", his respondent client was successful, and the appeal dismissed. In a rare tribute at the end of the judgment, Lord Hodge (on behalf of the Board) said that: "While this judgment was being prepared the Board received the very sad news of the untimely death of Gabriel Moss, who so skilfully presented the case for the liquidators. The Board wishes to pay tribute to his intellect and humanity and acknowledge his unrivalled contribution to corporate insolvency law as a practitioner, author and university teacher".

These words have been echoed by other members of the bench who have written to South Square to share their condolences (and their fond memory of his propensity to rely on and refer to his own cases in submissions).

As his ongoing cases continue, opposing Counsel continue to acknowledge him as somebody "who is not appearing today [...] but had a profound influence on several of those appearing [...] today [...] a profound influence on the law [...] whose passing has left the legal professional greatly diminished".

Gabriel was a true European. He had a holiday home on the coast of Southern France and frequently travelled to other European destinations. In the book-shelf in front of his desk in Chambers, there was an array of European dictionaries: French, Italian, German, Spanish (not to forget a Latin dictionary, reflecting his great interest in Roman law, which he was not shy to refer to and cite in his cases). He also continued to speak fluent Hungarian, and was proud of his European roots.

In this vein, Gabriel was and continued to be involved in many of the major cross-border insolvency cases across the EU. He was counsel to the Italian special administrator of Parmalat subsidiary Eurofood before the CJEU in the mid-2000s, which led to a controversial CJEU precedent in 2006 that an Irish court had jurisdiction to commence main insolvency proceedings for an Irish Eurofood entity, rather than an Italian court where its parent's insolvency was pending. Other notable EU insolvency cases of Gabriel's include: *Elektrim* (UK/Poland); *Enron Directo* (UK/Spain); *Daisytek* (UK/France/Germany); *Eurodis* (UK/Netherlands); *Stojevic* (UK/Austria); *Quinn* (UK/Ireland) *O'Donnell* (UK/Ireland) and *McNamara* (UK/Ireland). He also provided expert evidence for cases in jurisdictions including France, Germany, Australia, Denmark, Greece, the Netherlands, Italy, Iceland, Poland, Portugal, and Switzerland. He was both saddened and puzzled by Brexit, but determined to forge creative legal solutions to deal with its consequences.

As a Deputy High Court Judge, Gabriel gave judgments in a range of cases, extending well beyond the insolvency sphere, including *Internet Broadcasting Corp (t/a Nettv) v Marr LLC* (exclusion clause and fundamental breach) *Enviroco v Farstad Supply A/S* (meaning of "affiliate" and "subsidiary"); *The Governors of the Peabody Trust v Reeve* (right of unilateral contract variation, unfair contract terms); *Tamares v Fairpoint* (right to light and

Gabriel Moss QC, drawn by staff member Ewa Podgorska

damages in lieu of injunction); *Nexus Communications v Lambert* (doctrine of election); *Macepark v Sargeant* (rights of way); *Shepherd v Legal Services Commission* (bankruptcy); *Parker v C.S. Structured Credit Fund Ltd* (disclosure and freezing injunctions); *Official Receiver v Zwirn* (disqualification of directors) and *Blight v Brewster* (execution against pension).

Gabriel's expertise also led to a number of advisory appointments, which in the aforementioned podcast he described as a way to give back to an industry that had given him so much. The Treasury, the FSA and the FSCS all sought Gabriel's advice, as did financial regulators in Gibraltar, Guernsey, Hong Kong and Bermuda. Between 2007 and 2013 he was a member of the Financial Markets Law Committee of the Bank of England and involved in the Working Groups on Property Interests in Investment Securities, on Building Society and Incorporated Friendly Society Set-Off, and on Financial Collateral. He was also appointed as a specialist legal advisor to the Work and Pensions and Business Innovation and Skills House of Commons Select Committees relating to the BHS inquiry and the Carillion inquiry (regarding both of which he acted pro bono), as well as the FA Disciplinary Panel (for insolvency matters).

Gabriel wrote extensively, with his books invariably leading the field, including the seminal text on the EC Insolvency Regulation – *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings.*

Gabriel was a natural and generous-spirited teacher who was as much loved by his students as he was by those whom he taught more informally in Chambers. Over the years he was appointed as a part-time lecturer and tutor at St Edmund Hall, a lecturer in law at the University of Connecticut Law School and, most recently, a Visiting Fellow at St Catherine's College, Oxford. In 2011 he was appointed Visiting Professor in Corporate Insolvency Law at Oxford University, an appointment which enabled him, through his witty and generous teaching style, to share with students his unparalleled knowledge of substantive law, and to debate with them questions of policy, no doubt shaping the next generation of insolvency lawyers. His support for young lawyers was also reflected in his support for scholarships, thesis examinations and advising on course structure. In 2016 he was awarded the Distinguished Friend of Oxford Award, which recognises individuals who have acted as exceptional volunteers for the benefit of the university.

He also gave guest lectures around the world, including the Universities of Florence, Milan, Vienna, Leiden, Cologne and Leipzig, Brooklyn Law School at the University of Bologna, the Max Planck Institute, Luxembourg and NYU. He also gave a number of lectures to French, Belgian and other EU insolvency judges. He was a regular face at international legal conferences and developed many international friends and colleagues over the years as a result of his work.

Gabriel was as prized for his friendship as for his intellect. He was supremely approachable and humble, kind and thoughtful (as well as having a dry, and occasionally subversive sense of humour). No matter how busy he may have been, he always stopped working, listened to your problem and came up with suggestions that you hoped you understood. Over the years a steady stream of South Square tenants negotiated the precipitous piles of books and papers stacked across his room to "borrow his brain" and ask if they could "run a quick point past you".

Gabriel's interests included tennis, theatre, cinema and travel. He especially enjoyed spending time in his and Judith's home in the South of France.

He also greatly enjoyed opera and concerts, regularly playing (amongst others) Mozart, Schubert and Dvorak in his room in Chambers.

He leaves a wonderful legacy, but we will miss him immensely. ■

Written by William Willson and Charlotte Cooke

Reflections on **Gabriel Moss QC**

FELICITY TOUBE QC

> *It is impossible to conceive of a world without Gabriel*

On 15 March 2019, I got a call from the clerks. Did I have the mobile phone number for Judith Moss, Gabriel's wife? Gabriel had suffered a bit of a turn, and they were trying to reach her. Within two hours we had lost him. The shock waves reverberated around Chambers. The grief was extraordinary. We were all devastated, and we were desperately sad for Gabriel's family. Every member of Chambers who was in the country and not in court was at his funeral. There was a palpable sense that someone great had passed. We knew that we were all the poorer for his loss.

Gabriel Moss QC was my mentor and my friend. He was in almost every way responsible for my career, bringing me in on cases as his junior from the first time I arrived in Chambers (as he had always done, and continued to do for every junior in Chambers). He got me involved in publication after publication, particularly when he discovered my inability to say no to him. Even after I took Silk, he continued recommending me to clients for cases when he was unavailable. Quite a lot of what we achieve as barristers comes from the luck of being in the right place at the right time, and Gabriel made it possible for me – and for so many other people in Chambers – to be situated in the best place to make our own luck.

There is no doubt that Gabriel had a particularly fine legal mind. He could find the loopholes and the analogies – and if he couldn't find them, he created them so that they existed for all time. His words were so measured that you couldn't help agreeing with them, even when some little alarm was going off in your mind that suggested they might (just might) not be right. Judges and opponents came under his sway; following him like he was the Pied Piper (although without the rodent/child association).

Gabriel was the person who practically invented COMI shifting to the UK and he was a true European at heart. He was very troubled by Brexit, and could not quite believe that we were going to divorce ourselves from such a rich tradition, and such a brilliant source of work for lawyers in this country. Mostly, of course, he was irritated by the lack of planning and thought, but he was starting to look for the loopholes and angles if it was really going to happen.

He was always busy at work; always in demand. And yet he had time for everyone. If you had a particularly knotty problem, you could always pop to his room, as I did on many occasions, in order to ask him to "borrow his brain for a moment". Of course, you always had to stand, because the only chair was herded into a corner where it could survive for a few days amongst the piles and piles of books, papers, files. If you had an odd moment, you could engage in a mild archaeological dig, where the striations of time passing would be marked by the files of authorities that lined his shelves.

Those sanity checks kept us all sane – or as near as is possible in the world in which we operate. He never said no. Not to his fellow members of Chambers, to employees, to clients, to anyone who wanted his help. The only hesitation came if you wanted him to travel abroad to speak or to represent a client in court. In those cases, the first step was for him to check at home: "I need to ask Judy". That was as it should be. His wife and daughter were paramount to him. As I told them when I spoke to them after Gabriel's untimely passing, it might have felt that Gabriel worked a lot, and that he was away from home for so many hours, but his family was always with him, in his thoughts and in his heart.

> "The insolvency world has lost one of its really great figures, and we have all lost a good friend and colleague. He worked tirelessly to advance the cause of international restructuring law and practice and was truly a towering intellect, but unfailingly courteous and kind to those around him."
>
> **MR JUSTICE SNOWDEN**

> "We have always known Gabriel as an unfailingly courteous man and an immensely clever lawyer. Respected by all and feared by opponents for his sharp intellect and creative ideas, whether on his feet or on paper. In the realm of international insolvency and recognition issues he in particular was the man you wanted on your team first … there can be no greater compliment to a professional in his field of expertise."
>
> **KEN BAIRD,**
> *on behalf of the Partners and Restructuring Team at Freshfields*

> "A true great of our profession – fiercely intelligent and yet so approachable and kind."
>
> **MARK FENNESSY,**
> *Proskauer Rose (UK) LLP*

Gabriel was the calmest man I knew. He was never stressed by work. He was never bothered by intense questioning from the Court. He was never cowed by attacks. He had an equanimity that we would all like to emulate – and the skin of a rhino. If he was asked a tricky question, he took his time to make a note – in his spidery writing and usually in green or red ink – and then he would answer it. And the answer was always right. Or even if it wasn't, it just sounded right.

Although being a barrister was never "just a job", it was also not something that defined his life. He was an avid tennis player, until his initial heart problems made him give it up a few years ago. My favourite little known fact about him was that he and Judy then took up Israeli dancing.

He continued to exercise even after he had to give up playing tennis, including the afternoon constitutional walks to local coffee shops. If the phone rang at about 4pm and it was Gabriel, I knew that it was time for a walk. I often joined him on his perambulations, chatting about work and family. He knew that I didn't drink tea or coffee and was trying to avoid the tempting cakes in the shops, but he offered to buy me them anyhow, every time. He was always a little bemused when I said that I was really just coming with him to enjoy his company. My greatest regret is that the last time he asked me, I declined because I was trying to finish an advice for a client. If I had known, if I had only known, that it was the last opportunity to walk with him, I would have delayed my work for those twenty minutes and spent them with him.

The overwhelming comment we heard on Gabriel's death was that he was a gentleman. He was courteous and honourable. He was kind and thoughtful. He was always interested in those around him, and in current events and cultural happenings. He was interested and interesting. And no matter how junior you were, in Chambers or at the client, he was unfailingly gentle. You got the wrong end of the stick? No problem, he would guide you in the right direction with no judgment. You had no idea what you were talking about? No problem, he would help you to understand. The only thing he had no time for was a lack of loyalty. If you let him down, he would (in an understated way) never let you find yourself in a position where that could happen again. But if you were there for him, he was always (and I mean always) there for you.

It is impossible to conceive of a world without Gabriel. When my phone rings at 4pm, I still for a moment think that it is him. When I need wise counsel, I have to stop my steps from going towards his room on autopilot. He was a kind, generous, brilliant man. We will all miss him. ■

Reflections on **Gabriel Moss QC**

DANIEL BAYFIELD QC

> *It was in March 2002 that I bumped into Gabriel... clutching the then newly released Legally Blonde DVD*

It was in March 2002 that I bumped into Gabriel, the doyen of the insolvency and restructuring bar, wandering back to Chambers from the Holborn Circus branch of WHSmith, clutching the then newly released Legally Blonde DVD. He had seen the film in the cinema with his wife, Judith, and daughter, Debbie, and wanted to watch it with them again. Other members of Chambers might have dismissed the film as drivel (surely not?) or delegated the task of buying it to a junior clerk – to avoid wasting precious, billable time – but it would not have occurred to Gabriel to ask someone else to go to Smith's for him and the DVD was, after all, primarily a gift for Debbie, or so he told me.

This memory, so mundane and yet for me so unforgettable, captures the essence of Gabriel. Despite his ferocious intellect, he was utterly down to earth and his long and glittering career did not alter him. Wherever he was, whoever he was with, whatever he was doing, Gabriel was the same warm, humble and thoroughly decent man. He addressed the Supreme Court in the same relaxed and affable manner in which he spoke to colleagues and friends. No act was put on and there were no sides to Gabriel. However busy, Gabriel would take time to get to know mini-pupils and new members of staff. He put people at ease, had time for everyone and enjoyed company and the opportunity to discuss work and other matters, particularly work.

Gabriel and I spent a lot of time together over the years. I was his junior in many cases. We were often triumphant, amongst other things, successfully defending the "Football Creditors Rule", bringing down a CVA which sought to strip away parental guarantees for no value and creating a quasi-bar date mechanism for administration expense claims. But one cannot win every time – sometimes the judges get things wrong, as Gabriel would put it – and we worked together on a case which rather deflated (okay, killed-off) the solvent insurance schemes market. Almost 15 years later, I am still smarting from that defeat but, as with everything, Gabriel took it in his stride.

Whether or not we were working together or, latterly, against one another, Gabriel and I would regularly meet for a mid afternoon coffee or, since 2014, a mid afternoon "healthy drink". I know that it was 2014 when the change occurred, although I can't recall what prompted it, because I typed "healthy drink" into the search function in Outlook and it returned pages of emails from Gabriel with "healthy drink?" as the subject, the oldest being from July 2014. I would collect him from his room and, at the merest hint of sunshine, Gabriel would insist on donning his "shades" before we set off on the short walk to one of the numerous coffee shops which came and went over the course of this near 20 year long ritual. It took me the first 10 or so years to stop Gabriel from talking about his cases the second we set off. It was meant to be a break from work. Thereafter, our topics of conversation ranged from Chambers gossip – which is usually thin on the ground – through the congestion charge exemption for electric and hybrid cars (a personal favourite of Gabriel's since the acquisition of his prized Tesla), to my, still uncompleted, odyssey of a property search and whatever else was on our minds. I would often leave him amused and somewhat bemused, Gabriel putting down much of what I said to "a young man's humour".

Notwithstanding the mountain of work Gabriel invariably had to get through, he was never in a rush, never panicked and never refused a plea for help. And so it was that, for the first 10 years or so of my career – it may well have been substantially longer but clients will be reading this – it would be Gabriel that I went to for a sense-check or because I had no idea where to start to find the answer to something. Gabriel always had an answer – often found in a book he had written or in a case in which he had appeared – and whether or not it ended up being *the* answer, it was always immensely valuable.

Gabriel's humility was never false and it didn't prevent him from taking great pride in his work. Quiet and softly spoken he undoubtedly was but Gabriel took immense pleasure, inside and outside of the courtroom, from relying on judgments in cases he had argued and from getting the better of opponents and judges. He was not, unlike many of us, beset by intellectual self-doubt. On the contrary, Gabriel's intellectual self-belief was the source of his unrivalled creativity in approaching problems and legal or other obstacles. If one argument was rejected, there would always be countless more where that came from.

No matter the importance of the case or the difficulty of the arguments he was making, we would amble down to court with Gabriel as relaxed as if we were popping to Catalyst for a "traffic light drink". I will never forget those occasions on which Gabriel made the courtroom feel more like a lecture theatre. On issues of law, his authority, expertise and knowledge often led to his submissions coming across as a masterclass. Gabriel was the lecturer and the rest of the courtroom, the judge or judges included, his body of keen students. On complicated issues of insolvency law, particularly those with an EU angle, there was no-one better. His ability to explain away inconsistent or unhelpful authorities was remarkable. Gabriel would identify a common thread and make it good, turning numerous confusing judgments into a body of law underpinning the central argument he was advancing. It is no overstatement to refer to Gabriel as having been, for decades, a titan of the profession. He was a lawyer and advocate of the very highest order.

As a mentor, Gabriel taught me so much. I could never dream of matching his intellectual prowess, the depth of his knowledge of insolvency law or his love for it. And it will be a long and, I fear, ultimately fruitless battle for me, like Gabriel, to meet Kipling's challenge of treating the imposters of triumph and disaster just the same. But what I shall strive hardest of all to follow is his quiet example of treating everyone I have dealings with just the same.

Gabriel did not want to retire. He looked at me as if I was mad when I questioned whether he intended still to practise in 2025 when TFL's "Cleaner Vehicle Discount" is due to be removed – Gabriel had filed a written objection to that proposal. He died far too soon but doing what he loved. Being a full-time barrister and a part-time teacher, academic and legal commentator was his calling.

At South Square, Gabriel will always be remembered as a brilliant lawyer but he will also be remembered as a liberal, non-judgmental, kind and gentle soul, whose easy companionship and generosity of time and spirit will be sorely missed. ■

"If I may, I should like to add an anecdote as a measure of the esteem in which Gabriel was held. During W/P negotiations with the other side some years ago, I mentioned that we had been instructed by the client to brief the best cross-border personal insolvency barrister in England. My opponent asked, somewhat laconically, whether that meant we had briefed Gabriel Moss. I was delighted to confirm that we had. I then mentioned that Gabriel had read the evidence made by my opponent's client, the trustee, and Gabriel had asked me to mention that he was very much looking forward to cross-examiningthe witness. We settled, that afternoon, to my client's advantage."

SIMEON GILCHRIST,
EdwinCoe LLP

"He was never without charm or wit. I would think he was the most influential insolvency barrister of his time, and his enthusiasm for insolvency (practice and academic) was infectious. We were lucky to know him."

CHIEF ICC JUDGE BRIGGS

Cryptocurrency:
a guide for the rest of us

ROBERT AMEY

Articles about Bitcoin and other cryptocurrencies tend to fall at one end or other of a spectrum. At one extreme are the articles so heavy with the technical jargon of 'consensus algorithms', 'blockchain' and 'unspent transaction output', that anyone lacking a PhD in computer science will struggle to understand them. At the other extreme are the descriptions given in the mainstream press, which talk in loose language about 'electronic money' and 'digital currency' without attempting to explain what these concepts actually involve.

This creates obvious difficulties for the lawyer who wants to know what legal rights and obligations attach to a bitcoin,[1] or for the liquidator who wants to know what to do with cryptocurrency that falls within the estate. The problem is compounded by the fact that the whole concept of cryptocurrency is in its infancy compared to other types of asset which lawyers and IPs typically come across. The first bitcoin transaction, for example, occurred just over 10 years ago. A further source of confusion is the fact that different cryptocurrencies might rely on wildly different underlying technology, such that the analysis applicable to one will not necessarily be applicable to the other. This article focusses on Bitcoin, the best-known cryptocurrency, but the analysis in relation to other cryptocurrencies may well be very different.

What is a bitcoin?

It is impossible to discuss the legal incidents of Bitcoin without some explanation of what it actually is. It is perhaps easiest to explain what a bitcoin is by describing (avoiding jargon without, as far as possible, sacrificing technical accuracy) how they are held and transferred. To receive a bitcoin, one must first create a 'wallet'.[2] This is easily done by appropriate software, which will generate two 'keys', which are simply strings of letters and numbers. One of these keys is intended to be public, and is a sort of 'address' to which others can send bitcoins. The other should be kept private, and is the secret key which the wallet 'owner' uses to transfer bitcoins out of the wallet and into the wallets of others.

The language of wallets, however, is apt to mislead. Nothing is actually stored in the 'wallet'. The 'wallet' simply consists of the two 'keys'. These keys can be stored on a computer, or they can be printed on a physical piece of paper.[3] The 'keys' enable users to add entries to a ledger, which records the transfer of bitcoins. This ledger is not stored in any central location. Instead, multiple copies are distributed across the network (making unauthorised interference practically impossible), and a new entry can only be made by using the private key of the most recent recipient, the bitcoin 'owner', and the public key of the new 'owner'.

If the 'owner' of a wallet loses the keys, for example if he loses the computer hard drive or piece of paper on which the keys are stored, then he loses the ability to add an entry to the ledger, making it impossible for him to transfer his bitcoins. A headline in the Guardian newspaper in 2013 referred to a bitcoin owner who had accidentally thrown away a *"hard drive containing bitcoins worth £4m"*.[4] This is not entirely accurate. The hard drive did not actually contain bitcoins, rather, it contained the keys which would enable the 'owner' to make a new entry on the ledger, and sell his bitcoins to others.

What does the 'owner' of a bitcoin actually 'own'?

If a person owns a physical banknote for, say, £10, she has a property right which the courts will enforce. A thief who steals that banknote will be liable both to a criminal sanction and to civil action at the suit of the victim. If the owner of the banknote stores her banknote in a safe deposit box at the local bank, and the bank subsequently enters an insolvency process, the owner of the banknote is nonetheless entitled to get her banknote back.

If, on the other hand, a person deposits a £10 banknote into a cash account at a bank, then he typically acquires a *chose in action* against the bank – a legally enforceable debt payable by the bank to the depositor. Unlike the person who has a physical banknote in her hand, or the person who has stored her physical banknote in a safe deposit box which she alone controls, the bank accountholder does not have a property right. If the bank becomes insolvent, the accountholder has no right to enter the bank and take back the £10 note he previously handed over. He nonetheless has a claim against the bank which the law will recognise.

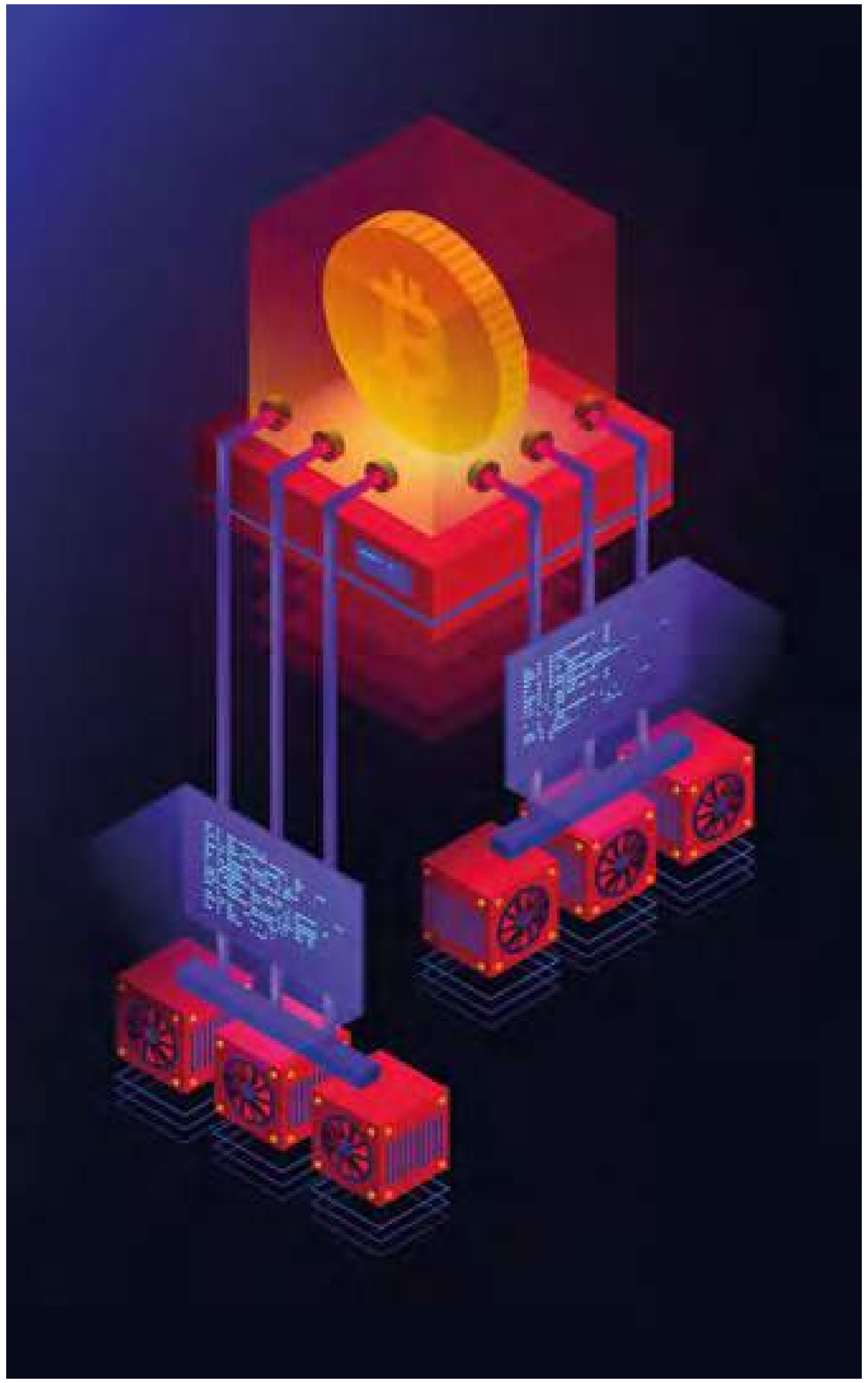
So what does the owner of a bitcoin have? As noted above, bitcoins are transferred by making entries on a ledger. In the modern world, all sorts of valuable assets are traded simply by making entries on electronic ledgers. To take a simple example, a person who wishes to invest in gold might choose to invest through an account at a brokerage. The physical gold itself might be held in storage somewhere many miles away, and the investor might never see it. Instead, the investor's holding will simply be recorded on a ledger held by the broker. If the investor wishes to sell her gold to another, she will instruct the broker to make the necessary entries in the ledger. The physical gold stays exactly where it is. If the investor is asked exactly what it is that she is buying and selling, she will respond that she has the right to demand a delivery of physical gold from her broker, and this right has value, even though she might have no intention of ever exercising it.

1. Bitcoin is usually capitalised when referring to the technology generally, while the individual unit is not capitalised.

2. This assumes that the bitcoin is being held directly. Many investors do not have a wallet of their own, and instead invest indirectly through bitcoins held in the wallet of a bitcoin exchange.

3. Although this may sound old-fashioned, it is reportedly the method used by the Winklevoss twins to avoid their bitcoins falling into the hands of hackers: https://www.independent.co.uk/life-style/gadgets-and-tech/news/bitcoin-cameron-tyler-winklevoss-cryptocurrency-shared-investment-key-cut-a8120301.html

4. https://www.theguardian.com/technology/2013/nov/27/hard-drive-bitcoin-landfill-site. There are numerous similar stories of early Bitcoin users losing bitcoins which, at today's prices, would be worth an eye-watering sum.



The owner of a bitcoin, however, does not have the right to demand anything from anyone. He has the ability (through knowledge of the relevant 'key') to make an entry on the ledger. But unlike the depositor at the bank, who has the right to demand cash from the bank, or the investor with the gold brokerage, who has the right to demand delivery of gold, the owner of a bitcoin does not have any right at all.

EU Carbon Emissions Allowances

Within the European Union, operators of carbon dioxide-emitting installations above a certain size are given an annual credit of EU Allowances (EUAs), with each EUA permitting the emission of one metric tonne of carbon dioxide. Operators who have adopted greener technology can sell their EUAs at a profit to other operators, who have insufficient EUAs for their activities. The idea is to provide an economic incentive for the introduction of green technology.

EUAs do not exist in physical form, and exist solely as an entry on a register. In *Armstrong GmbH v Winnington Networks Ltd* [2013] Ch 156, the claimant's EUAs had been 'stolen', and ultimately sold through the defendant EUA trader to an innocent third-party purchaser. The High Court held that the defendant was liable in knowing receipt.

To some legally trained bitcoin enthusiasts, the decision is evidence of English law's willingness to protect novel forms of intangible property. At paragraphs 60-61 of his judgment, the deputy judge remarked that an EUA was not a *chose in action* (because it did not confer on its 'owner' any right which a court would enforce), but nonetheless held that it should be recognised as "*intangible property*". If intangible property, which exists only in the form of an entry on an electronic ledger, is capable of protection, then so too (some argue) is Bitcoin.

The reality is less clear. The decision in *Armstrong* relies on novel and unorthodox reasoning which is difficult to reconcile with the established authorities on constructive trusts and knowing receipt. It remains to be seen whether this first instance decision will be followed in other cases. But even if the result is correct in the context of misappropriated EUAs, to apply the same reasoning to misappropriated bitcoins would be a considerable leap.

Although both EUAs and bitcoins both exist only in virtual form, the similarities end there. An EUA has legal consequences in the real world, in that it permits an operator to do something which would otherwise be unlawful. This is what the court in *Armstrong* recognised as intangible property. There is nothing particularly novel about this part of the analysis. English law has long recognised that a licence to do something which would otherwise be prohibited might not fall within the traditional definition of a *chose in action*, but is nonetheless a form of intangible property, see for example the analysis of export licences in *Attorney-General of Hong Kong v Daniel Chan Nai-Keung* [1987] 1 W.L.R. 1339.

The owner of a bitcoin has no 'real-world' legal rights – he simply has a key which enables him to modify the ledger. The decision in *Armstrong* to recognise EUAs as intangible property therefore does not necessarily mean that the same analysis will apply to Bitcoin.

Knowledge and confidential information

In *Oxford v Moss* (1978) 68 Cr.App.R. 183, a crafty university student pinched an advance copy of an exam paper, copied it, and then replaced the original. Having replaced the original, he could not be charged with theft of the physical paper. But the Theft Act, as then in force, also prohibited the misappropriation of "*intangible property*". The student was prosecuted for theft on the basis that he had stolen the university's confidential information. The prosecution failed: confidential information is not intangible property.

The civil law takes an even more restrictive view of property than the criminal law. While the criminal law recognises that intangible property (albeit not information) can be stolen, the civil law tort of conversion only applies to physical property: *OBG v Allan* [2008] AC 1.

Nowadays, the misappropriation of bitcoins would likely be caught by the offences created by the Computer Misuse Act 1990 and the Fraud Act 2006. But what consequences does the civil law provide for the misuse of confidential information, such as a private key? Rather than seeking to extend the law concerning property rights to bitcoins, a more fruitful exercise would be to apply by extension the existing law concerning breach of confidence.

In 1987, a disaffected MI5 intelligence officer, Peter Wright, published an autobiography entitled '*Spycatcher: The Candid Autobiography of a Senior Intelligence Officer*'. Unsurprisingly, the British Government sought to block its release in the UK. The attempt ultimately failed because, by the time the case reached the House of Lords, the book had been published overseas and was readily available to anyone who wanted to read it. However, the judgments in *Attorney General v Observer Ltd* [1990] 1 A.C. 109 make clear that a person who comes into possession of confidential information, however inadvertently, is under an obligation not to misuse it. An injunction will be available to restrain misuse, and the recipient may be liable to account for any profit he makes as a result of the misuse. There is no obvious reason why these principles should not apply to a person who obtains the private key to another's Bitcoin 'wallet'.

Insolvency

The 'owner' of bitcoins has, in the eyes of the law, no more than a right to prevent others misusing his private key. What happens to this right when the owner becomes bankrupt?

It has been held that a bankrupt's personal correspondence does not form part of the estate,[5] and nor does a right to legal professional privilege.[6] On this footing, a private Bitcoin key should not fall within the estate.

On the other hand, it has been said that the word 'property' used in the Insolvency Act:

> "*is not a term of art but takes its meaning from its context … that in bankruptcy the entire property of the bankrupt, of whatever kind or nature it may be, whether alienable or inalienable, subject to be taken in execution, legal or equitable, or not so subject, shall, with the exception of some compassionate allowances for his maintenance, be appropriated and made available for the payment of his creditors … It is apparent from the terms of section 436 of the Insolvency Act 1986 that the definition is to some extent circular but is not exhaustive. Further … it is hard to think of a wider definition of 'property'.*"[7]

On this analysis, the fact that Bitcoin does not fit easily into our existing definitions of 'property' should not matter. It is obviously consistent with the scheme of the insolvency legislation that an insolvency officeholder should be able to realise bitcoins in the insolvent estate, regardless of whether they can be brought within some previously recognised category of 'property'.

It appears that the criminal courts are already taking this pragmatic approach. In *R v Teresko* [2018] Crim LR 81, a drug dealer's house had been searched, revealing a piece of paper containing a private Bitcoin key. The Crown applied under the Proceeds of Crime Act 2002 s.47 (which applies to 'realisable property') for an order permitting the police to convert the bitcoins (around £975,000 worth) into sterling. The order was granted.

Conclusion

A debate rages between Bitcoin enthusiasts, who are convinced that cryptocurrencies will revolutionise the international economy, and ceptics, who are convinced that the whole thing is a massive bubble, if not a downright scam.

Regardless of who is right, cases involving the tax treatment of Bitcoin trading[8] and the regulatory implications[9] have already made their way before the court. It is surely only a matter of time before disputes concerning the 'ownership' of cryptoassets, and the impact of insolvency, come before the courts. ■

5. *Haig v Aitken* [2001] Ch. 110.

6. *Shlosberg v Avonwick Holdings Ltd* [2017] Ch. 210

7. *In re Celtic Extraction Ltd* [2001] Ch 475, 486

8. *Skatteverket v Hedqvist* (C-264/14) [2016] S.T.C. 372

9. See, for example, *United States v Murgio* No. 15-CR-769 (AJN) (SDNY April 21, 2016), *Securities Exchange Commission v Shavers* 4:13-CV-416, United States District Court, Eastern District of Texas, Sherman Division (6 August 2013), *United States v Ulbricht* No. 15-1815, US Court of Appeals for the Second Circuit (31 May 2017).

BTI 2014 LLC v Sequana SA [2019] EWCA Civ 112: *the Twilight Zone*

RICHARD FISHER

In February this year, the Court of Appeal dismissed an appeal and cross-appeal against the decision of Mrs Justice Rose in *BTI 2014 LLC v Sequana SA*. In doing so, the Court of Appeal provided welcome guidance on the approach to directors' duties in the twilight zone before insolvency, and the circumstances in which the payment of dividends might constitute a transaction susceptible to challenge under Section 423 of the Insolvency Act 1986.

As I observed in a previous Digest article relating to the first instance decision, the existence of long-tail contingent liabilities is an unfortunately common feature of modern corporate groups. Actual and contingent asbestos liabilities drove the T&N group into insolvency. Other entities face liabilities for historical acts that they committed themselves, or as a consequence of successor liability, which, despite the purchase of insurance, continue to grow beyond anticipated levels and existing cover, and require ever more demanding provisions in their accounts.

Two principal issues came before the Court of Appeal in *Sequana*: (i) whether section 423 is capable of applying to the payment of dividends that are otherwise lawful (i.e. declared in accordance with the provisions of the Companies Act 2006); and (ii) when and in what circumstances does the duty of directors to have regard to the interests of creditors arise, and can it ever arise if the directors are considering the payment of an otherwise lawful dividend.

Those issues are very important in the existing business environment. If the current business is being conducted profitably, and the accounts demonstrate sufficient distributable profits, is it open to directors of a company to pay dividends to shareholders if they have made a reasonable estimate of the potential liabilities faced by the relevant entity? Or is something more required? Should prudence prevail, and the monies be retained in order to cater for the possibility that the contingencies will vest and liabilities exceed those estimates?

In *Sequana*, the issues arose in a scenario which can be simplified as follows. Company A faced potentially huge liabilities to indemnify a third party, B, for liabilities arising under the United States Comprehensive Environmental Response, Compensation and Liability Act 1980 ("CERCLA"). It had ceased to trade and had only these liabilities to deal with. Its assets consisted of a capped investment contract, certain historic insurance policies and an inter-company debt due to it from S. Based on matters of judgment by its directors, A's accounts made a provision for these contingent liabilities in the amount of circa £50 million (which was considerably below the value of its assets).

The provision was at a level that enabled A's directors to form the view that A was solvent, such that it was able to effect a reduction of capital and had sufficient distributable reserves in its accounts so as to enable it to declare dividends in two successive years to its parent company, S.

S, shortly after receipt of the second dividend, sold A on terms which sought to ensure that it could have no possible liability for any CERCLA indemnity. However, in due course, the creditors of A alleged that the provision in A's accounts for the indemnity liability was manifestly inadequate.

What remedies, if any, are open to the creditors of Company A to challenge the payment of the dividends to S?

On appeal, there was no challenge to the Judge's findings at first instance that the two dividends paid were lawful (in the sense of having been paid in accordance with the provisions of the Companies Act 2006). However, in relation to the second dividend paid, there was a challenge to the Judge's conclusion that (i) the dividend was not paid in breach of duty; but (ii) did amount to a transaction falling within Section 423 (i.e. to defraud creditors). The appeal and cross-appeal were both dismissed. David Richards LJ has treated us to a comprehensive analysis of the principles in play in this area.

Section 423

Section 423 is a wide-ranging provision designed to protect actual and potential creditors where a debtor takes steps falling within the section for the purpose of putting assets beyond their reach or otherwise prejudicing their interests. The notion of transactions extends to gifts and transactions on terms that provide for the payee to receive no consideration (Section 436). The appellants challenged whether a payment of a dividend could amount to a "*gift*", a "*transaction*" or "*on terms that provide for the payee to receive no consideration*".

The Court accepted the submission of S that a dividend cannot amount to a gift because rights are conferred on shareholders regards dividends by the terms of issue of the shares or by the articles, and it is pursuant to those rights that shareholders receive dividends (at [41]). However, it rejected the argument based on the analysis of dividends in the tax case of *Inland Revenue Commissioners v Laird Group plc* [2003] 1 WLR 2476 that the transaction pursuant to which a dividend is paid is not the resolution of the directors or declaration of the dividend but rather the antecedent contracts between the company and its members (i.e. that in paying a dividend, the company is simply paying members what is already theirs as a matter of right, so that it is necessarily on terms that provide for the payee to receive no consideration). The correct analysis was said to focus on whether or not the company was parting with any property of funds beneficially owned by it in favour of its shareholders: if it was, and received nothing in return, the dividend was on terms that provide for the payee to receive no consideration in the required sense.

> "The appellants challenged whether a payment of a dividend could amount to a "*gift*", a "*transaction*" or "*on terms that provide for the payee to receive no consideration*""

That was not, however, conclusive as to whether or a not a dividend amounted to a "*transaction*" in the required sense. Absent mutual dealing, or some form of active engagement between the company and recipient, could a dividend be a "*transaction*" The Court of Appeal concluded that it could. The definition of "*transaction*" was inclusive and not exhaustive, and although a transaction is normally used to denote some bilateral activity it can be used to denote an activity in which a single person is engaged i.e. a gift (at [58], applying obiter comments from *Greenberg v IRC* [1972] AC 106 at 136).There was no good policy reason for restricting the scope of Section 423 to exclude the payment of a dividend or any other unilateral act (albeit David Richards LJ also questioned at [61] whether a payment of a dividend really was a unilateral act in light of the pre-existing rights involved).

So far, so good and unsurprising. It would seem very strange if a decision to dividend out a large sum of money could not, in principle, be reviewed under Section 423 IA 86 albeit whether the required statutory purpose existed would be a question of fact in each case.

In this regard, the Court reiterated that the purpose of a person in entering into a transaction is a matter of the subjective intention of that person: what did he aim to achieve? Applying the test from *IRC v Hashmi* [2002] BCLC 489 at [23], it suffices if it "*can properly be described as a purpose and not merely as a consequence, rather than something which was indeed positively intended*".

The line between something being "*a purpose*" even if not "*positively intended*", but not a mere consequence, is rather difficult to draw, and in my view a rather unhelpful distinction. I am not convinced that the distinction is really anything more than whether *a* purpose (even if not *the* purpose, or the *main or predominant* purpose) of the person entering into the transaction was to put assets beyond the reason of a creditor or otherwise prejudice their interests. There must be some evidence of subjective purpose in this sense (rather than prejudice being a mere consequence of the transaction). Be that as it may, that is the test that we are to apply as a matter of fact in each case. The Court of Appeal concluded that there was no basis to disturb the judge's finding of fact in this regard. What is clear, however, is that the application of the correct test is very sensitive to the correct identification of the transaction in issue and whether the transaction that deprives the company of value can be said to be one where there is evidence that the statutory purpose is satisfied. In many cases, particularly of complex transactions entered into with professional advice, that test will be very difficult to satisfy.

Finally, the Court reviewed the Judge's approach to remedies. The Judge had concluded at [39] of her separate judgment that, where significant time had passed between the transaction and a successful challenge, and the relationships between the parties had changed, the Court was not limited to making an order that went no further than restoring the value of what was lost by the company at the time of the transaction (which the judgment of Sales J in *4Eng Ltd v Harper* [2009] EWHC 2633 (Ch) at [9] had suggested). She concluded that if fairness to the victim required a wider order to be made, the Court could carefully tailor the relief granted to the facts so as to minimize the prejudice of what had occurred. The Court of Appeal upheld her decision in this regard, taking particular account of the fact that a subsequent settlement agreement had been necessary in no small part because the dividend had rendered A insolvent. Although the Court could not have a trial of the hypothetical issues of what had happened, it should strive to grant relief which, insofar as possible, restored the victim now to the position that it would have been likely to be in (see at [88]).

Directors' Duties

The second, and perhaps most interesting, topic dealt with in the judgment is the approach to directors' duties. We have long been aware that, as a company moves closer to insolvency, there is a point at which the interests of the members may have to give way to the interests of the creditors, being those with the principal economic stake in the business. The question is when, and whether any duty in that regard really extends beyond the statutory relief that may be granted where a director has engaged in wrongful, or even fraudulent, trading.

The argument of the creditor was that the directors owe a duty to consider the interests of creditors in any case where a there is a real, as opposed to remote, risk of insolvency. Such a duty was said to arise under Section 172(3) of the Companies Act 2006 and that, even where a dividend was technically lawful, could have been breached because of the company's financial position.

The argument had an obvious superficial attraction: remember that A had ceased to carry on business. Its only function was to run off its indemnity liability and the dividend in question reduced its assets by some EUR 135 million. Even if the estimate of the provision needed for the contingent liability was made in accordance with the directors' statutory duties and in compliance with the applicable accounting standards, it was clear (and common ground) that it might well be wrong (and probably would be wrong).

Much of what was recorded in the first instance judgment had been common ground, including that (i) the content of the duty does not vary according to the degree of risk of insolvency that has arisen, and (ii) that, if the court decides that the duty to take into account creditors' interests has arisen but the directors did not in fact take the interests of creditors into account, that is not of itself a breach of fiduciary duty invalidating everything done automatically (applying *Colin Gwyer v London Wharf (Limehouse) Ltd* [202] EWHC 2748 (Ch)). If the directors could have reasonably concluded that the proposal in question should be approved even if creditors' interest were taken into account, it may be that no breach occurs (see at [119]).

The key battleground was when the duty actually arose. The two alternative camps were, on the one hand, *"a real as opposed to remote risk of insolvency"* or, on the other, "*insolvency, or very close to insolvency*".

Upholding the Judge, David Richards LJ confirmed that, as a matter of law, there were no English authorities which established the proposition that the creditors' interests duty is triggered by anything short of actual insolvency, and that that was for good reason. Any other approach would hinder appropriate risk taking by directors and the economic benefits of conducting business through companies. Where Parliament had intended that there is a restriction on directors' conduct where a company is anything other than insolvent or near to insolvency, it had done so through legislation (see at [202]-[213]). Having identified four potential points at which the creditors' interests duty could arise (see at [213]), he concluded that the most appropriate formulation was that the creditors' interests duty would arise when the directors know or should know that the company is or is likely to become insolvent (at [220]).

On this basis, the Court of Appeal accepted that, in theory, a decision to pay dividends might on the right facts amount to a breach of duty (see at [224]). However, there was no breach of duty on the facts of the case at hand, because A, the company, was not insolvent or likely to become insolvent at the point when the dividend was paid.

Interestingly, although left over for determination on another day, David Richards LJ indicated that, in his view, it was hard to see that creditors' interest could be anything other than paramount once the directors knew or ought to have known that the company was presently and actually insolvent (at [222]).

In so concluding, the Court of Appeal reminded us that, at their heart, companies are vehicles for risk taking (see [125] and [127]). It is for creditors to look after their own interests, albeit there has been some statutory intervention so as to ensure that certain transactions and conduct are regulated and potentially subject to review in any ensuing insolvency. Any recognition at common law of a duty to take into account the interests of creditors was very recent, as a masterful review of the authorities in this area demonstrated. David Richards LJ emphasized that a real, as opposed to a remote, risk of insolvency can arise even though the company is not insolvent and may very well never become insolvent, and that it is a much less demanding test than whether the company is likely to become insolvent.

The test promulgated by the Court of Appeal is getting close to the Section 214 threshold. Quite how likely it is that a breach of duty of the type considered will occur absent circumstances that will also amount to wrongful trading is difficult to predict, and something that is likely to be tested in further disputes in this area.

The Court of Appeal decision (and that of Rose J) provides a large degree of comfort to those advising directors that a commercial approach will be adopted. David Richards LJ's reminder that companies are vehicles for risk taking, and that creditors cannot expect too much outside the statutory scheme, is good news. However, caution is required: there is an inherent conservatism that suggests to most practicing in this area that a dividend paid by a company that has ceased to trade, and faces large potential contingent claims, is inherently risky. The finding that Section 423 IA was applicable to the dividend payment notwithstanding that it was legal under Part 23 of the Companies Act 2006 may have surprised many. It will be necessary to test on the facts of a given case the true motivation for declaring a dividend. But *Sequana* is a lesson that, in the twilight zone, anything can happen. ■

Corporate Insolvency in the Channel Islands: *what you need to know*

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The important global economic function of the Channel Islands and other offshore centres are well known. Investment structures in these jurisdictions are (and have been) vitally important in raising aggregate investment by mitigating instances of double and triple taxation, thereby often facilitating complex international transactions and enabling investment in both established and emerging markets. Corporate insolvency laws and procedures play an important part in the efficient functioning of such jurisdictions. The Jersey and Guernsey insolvency legal frameworks provide adaptable and commercially focussed regimes, whose heart is the concept of the protection of creditors' interests, and the promotion of a "creditor friendly" approach.[1]

Guernsey and Jersey are not members of the EU and do not have legislation giving effect to the UNCITRAL Model Law on Cross-Border Insolvency. They do however have modern domestic insolvency laws as well as well recognised procedures for assisting foreign officeholders.

Many of those procedures are broadly similar to, or are derived from, English law principles and reflect the processes available in the UK and many other Commonwealth jurisdictions. Yet the insolvency procedures of each Island have distinct features and some significant differences. This article will explore some of the features of the insolvency regimes of each Island and how they are applied in both domestic and foreign insolvencies.

Formal corporate insolvency and restructuring procedures

Voluntary Winding Up

Both Jersey and Guernsey permit the winding up of a company on the passing of a special resolution by members.

In Jersey, a solvent voluntary winding up requires the directors to confirm by way of a declaration of solvency that the company has no assets or liabilities, has assets but no liabilities or will be able to discharge all liabilities within six months of the commencement of the winding up.[2] Where the company is insolvent a "creditors' winding up" will occur.[3] The winding up process is broadly similar to a creditors' voluntary winding up under the UK Insolvency Act 1986. Guernsey law does not distinguish between a "solvent" and "insolvent" voluntary winding up, and the same process is followed irrespective of the solvency position.[4]

On passing the winding up resolution, members may also appoint a liquidator to undertake the winding up of the company. There is no qualification or licensing requirement to act as liquidator in Guernsey. In Jersey, the liquidator must be a member of a number of prescribed professional accountancy bodies, although the liquidator does not need to be resident in Jersey or to be a qualified insolvency practitioner. In common with other jurisdictions the liquidator is required to realise the company's assets and discharge its liabilities, before distributing any surplus to members.

In addition to their statutory powers liquidators may seek directions from the Court.[5] The Courts in both Jersey and Guernsey have shown a real willingness to assist liquidators on such directions applications, taking a similar approach to the assistance they give trustees.

Compulsory Winding Up

Similar to provisions available under the UK Insolvency Act 1986, an application for the compulsory winding up of a Guernsey company may be made by the company, any director, member or creditor on a number of grounds including where the company is 'unable to pay its debts' or where it is 'just and equitable' that the company be wound up. One notable departure is that such applications may also be made by any 'interested party',[6] which the court has interpreted as requiring assessment as to whether a person has a "connection or association" with the company that warrants the person taking steps to bring about its dissolution.[7]

The company must be given notice of an application for winding up before it will be heard by the Court, but there is no requirement for prior advertisement.

There is no equivalent to the official receiver in Guernsey, and normally the party making the application for a compulsory winding up order will nominate the proposed liquidator. As with voluntary liquidations, there is no formal qualification for appointment, though the Court is often more cautious to ensure liquidators have appropriate experience. The Court previously has looked to have at least one office-holder located within Guernsey, though this requirement appears to have been relaxed in recent times.[8]

The ability of a creditor to apply for the compulsory winding up of a company in Jersey is more limited. The only available option for a creditor is the *désastre*. The *désastre* process arose out of the customary law of Jersey and is unique to the Island. Notwithstanding the different historical roots, *désastres* are, in substance, similar to compulsory liquidations in England and Wales or other Commonwealth jurisdictions.

1. See, for example, the Guernsey Commerce and Employment Committee, Discussion Paper "Options for Reforming Guernsey's Insolvency Regime" (December 2014).

2. Part 21, Companies (Jersey) Law 1991.

3. Ibid.

4. Part XXII, Companies (Guernsey) Law, 2008.

5. See section 426 Companies (Guernsey) Law, 2008. For the application of the directions power in Guernsey see Re Huelin-Renouf Shipping Limited [Royal Court 46/2015] and Re DM Property Holdings (Guernsey) Limited [Royal Court 1/2017]. In Jersey, see for example, Re Malabry Investments Ltd 1982 JJ 117 and Hotel Beau Rivage Company Ltd v Careves Investments Ltd 1985-86 JLR 70.

6. Section 408(1) of the Companies (Guernsey) Law, 2008. In addition, the Guernsey Financial Services Commission may apply to wind up any company on the grounds that doing so would be for the protection of the public or the reputation of the Bailiwick of Guernsey, see section 410.

7. See Re Synergy Capital Limited (Guernsey Royal Court, 20 July 2012), para 80 – in that case an indirect beneficial owner of shares in Synergy was found to have a sufficient interest.

8. As was the case in recent high profile court appointments in relation to Joannou & Paraskevaides (Overseas) Limited (18 October 2018) and Elli Investments Limited (1 May 2019).

Saint Peter Port, Guernsey

> *Guernsey applies a dual "cash flow" and "balance sheet" solvency test*
>
> *Insolvency in Jersey is determined on a "cash flow" basis*

In granting a *désastre*, the Court must be satisfied that the applicant creditor has a claim for a liquidated sum in excess of £3,000.[9] If the debt claimed in the demand is disputed by the company in good faith and on substantial grounds then it cannot form the basis of a winding up petition. If, however, the debt claimed is a judgment debt, the company cannot legitimately dispute it, unless execution of the judgment has been stayed by the court.

Upon declaration of a *désastre*, an automatic stay of proceedings is effected.[10] This means that no creditor of the debtor has any remedy (other than a right to prove his claim) in respect of any debt that is provable in the *désastre* against the property of the debt, nor may a creditor commence any legal action or proceeding to recover the amount of the provable debt nor, except with the consent of the Viscount (who is the Executive Officer of the Royal Court of Jersey with responsibility for administering désastres) or the Royal Court, can a creditor continue any action or proceedings to recover the debt.

In a *désastre* all property and rights and powers of the debtor over its affairs (along with the capacity to take proceedings for exercising such powers) vest in the Viscount. In effect, the Viscount "steps into the shoes" of the debtor and takes over the powers of the directors of the debtor. The powers and duties of the Viscount in a *désastre* are principally to investigate, get in and, ultimately, liquidate the estate for the benefit of the creditors who prove their claims.[11] *Désastre* proceedings will last as long as necessary to ensure that the Viscount's duties have been discharged. When the Viscount has realised all of the debtor's property he must pay whatever final dividend is due and supply all creditors with a report and accounts relating to the *désastre*.

Administration Orders

In Guernsey, the Court may make an administration order where the company is unable or is likely to become unable to satisfy the solvency test, and the making of the order would achieve one of the two statutory purposes – either the survival of the company as a going concern or the 'more advantageous realisation' of the company's assets than on a winding up. As in a UK administration, the administrator assumes broad powers to operate the business of the company. However unlike in the UK there is no "out of court" appointment process for administration.

Administration has become a popular alternative to compulsory winding up, with its potential to be used as a rescue procedure and its lesser negative perception thought to be helpful with asset realisations. Administration in Guernsey has also been used in conjunction with "pre-packaged" sales, with the court adopting as best practice the protections laid out in the ICAEW Statement of Insolvency Practice 16.[12]

At present there is no equivalent regime in Jersey. Instead, Jersey relies upon the Court's wide jurisdiction, under the just and equitable winding up regime, to supervise companies in liquidation which have been permitted to continue to trade out contracts or sell stock to maximise creditor returns.[13]

The same flexible jurisdiction has also enabled in recent years the pre-packed sale of a distressed company's business.

Schemes of Arrangement

Schemes of arrangement are available for use in both Jersey and Guernsey.[15] The legislation is substantially the same as that under the UK Companies Act, and courts in both islands regularly adopt and apply English case law to issues under consideration.[16]

Schemes of arrangement can also be used in conjunction with other insolvency procedures. For example, the Court in Guernsey has approved schemes of arrangement proposed by a company in administration.[17]

Moratoriums in formal insolvency proceedings

In Jersey, as noted earlier, an automatic moratorium is imposed upon declaration of a désastre. There is no such automatic moratorium in voluntary or compulsory winding up in Guernsey. The making of an administration order in Guernsey does give rise to an automatic moratorium, but this is limited, specifically excluding right of set off and the claims of secured creditors.[18]

As in England, in neither Jersey nor Guernsey does the commencement of a creditors' scheme of arrangement have the effect of staying creditor claims.

Solvency test

Guernsey applies a dual "cash flow" and "balance sheet" solvency test.[19] A company will fail the solvency test under section 527 of the Companies Law where the company is either unable to pay its debts as they fall due or the value of its liabilities is greater than the value of its assets.[20] For the purposes of a compulsory winding up, a statutory demands process may be used by serving a demand for a debt greater than £750 on the registered office of the company by Her Majesty's Sergeant, an official of the Court. There is no need to obtain a judgment debt or to register a foreign judgment in Guernsey before serving a statutory demand.

Where a company fails to pay the amount demanded or otherwise reach agreement with the creditor within 21 days, it is 'deemed' to be unable to pay its debts.

Insolvency in Jersey is determined on a "cash flow" basis.[21] The "cash flow" test turns on the ability of the debtor to pay its debts as they fall due. Debts are liquidated sums to which there is no reasonably arguable defence.

Transaction avoidance claims

Office holders in Channel Islands have a variety of statutory and common law claims at their disposal, for the purposes of recovering assets of the company for the benefit of creditors.

Both Guernsey and Jersey have provisions to deal with wrongful and fraudulent trading[22] and unlawful preferences.[23] A liquidator may also bring a claim for misfeasance, though recent authority held that such claims in Guernsey are limited to breaches of fiduciary duty or other misapplication of assets, rather than negligence.[24] It remains open to the liquidator or administrator to pursue directors for breach of their common law duties owed to the company.

Jersey has statutory provisions to deal with transactions at an undervalue[25] while Guernsey does not at present have such provisions. Creditors do however have available to them in both Islands what is known as the Pauline action, by which they can seek to set aside a transaction which was undertaken for the substantial purpose of defrauding creditors at a time when the company was insolvent.[26]

9. Bankruptcy (Désastre) (Jersey) Order 2006.

10. Bankruptcy (Désastre) (Jersey) (Law) 1990, Article 10.

11. Bankruptcy(Désastre) (Jersey) (Law) 1990, Part 6.

12. Re Esquire Realty Limited (Guernsey Royal Court, 17 April 2014).

13. Re OT Computers Ltd (31st January 2002) JU 29, 2002 JLR N10.

14. In re Collections Group [2013] (2) JLR N [2].

15. Part VIII of the Companies (Guernsey) Law, 2008 and Part 18A of the Companies (Jersey) Law 1991.

16. The most authoritative treatment of Schemes of Arrangement in Guernsey is in the Court of Appeal's decision in Re Puma Brandenberg Limited [2017] GLR 127, in which the court of appeal upheld the Bailiffs decision to deny sanction to the proposed scheme.

17. See Re Montenegro Investments Limited (in Administration) [2013] GRC 23, in which the Guernsey court sanctioned a members' scheme of arrangement proposed in administration.

18. Section 376(1)(b) Companies (Guernsey) Law, 2008.

19. Section 527,Companies (Guernsey) Law.

20. Regulated entities will also need to meet any capital requirements that apply.

21. Bankruptcy (Désastre) (Jersey) (Law) 1990, Article 1(1).

22. See sections 433 and 434, Companies (Guernsey) Law, 2008.

23. See section 424 Companies (Guernsey) Law, 2008.

24. See Carlyle Capital Corporation Limited & Ors v Conway & Ors (Guernsey Court of Appeal, 12 April 2019).

25. Bankruptcy (Désastre) (Jersey) (Law) 1990, Article 17 and the Companies (Jersey) Law 1991, Article 176.

26. Re Esteem and the No.52 Trust [2002] JLR 53; Re Flightlease Holdings (Guernsey) Limited [2005–6] GLR Note 11.


Corbiere Lighthouse, Jersey

In addition, officeholders in both Islands may bring disqualification proceedings against directors and other officers of the company[27] (and indeed may be obliged to do so where criminal conduct pertaining to the company is identified).[28] Disqualification may be ordered if the Court is satisfied that the person's conduct makes him unfit to be concerned in the management of a company and it is expedient to do so in the public interest. A disqualification order shall be for such period not exceeding fifteen years, as the Court thinks fit.[29]

Proof of debts and priority on winding up

There is currently no formal 'proof of debt' procedure in Guernsey. In practice liquidators will make contact with known creditors and advertise for claims in relevant newspapers. Creditors will be asked to submit claims in the form of 'proofs of debt', but liquidators do not have the role of adjudicating such claims.

There is generally no time period within which creditors must lodge their claims. Ultimately it will be for a Commissioner appointed by the Court (in a compulsory winding up) to approve distributions to creditors. Where there are disputes over creditor claims these are referred to the Court for determination.

In Jersey, the position is more codified. In a *désastre* every creditor is required to file their claim within a time fixed by the Viscount and notified in the Jersey Gazette. The date fixed for the filing of claims must not be less than forty nor more than sixty days from the date of the declaration.[30] In a creditors' winding up, statute provides no express period, and the matter is left to the liquidator to determine the procedure. The liquidator may well choose to follow the procedure in a *désastre* as a guide to good practice. The content and supporting evidence of such proofs is a matter to be assessed by the Viscount or liquidator.

The general principle of *pari passu* will apply in a Guernsey or Jersey insolvency and creditors of the company share in the distributable assets of the company in proportion to the size of their claims in the insolvency. This is subject to the interests of secured creditors and payments to preferred creditors. In general, the order of priority after payment to secured creditors will be:

1. **Costs and expenses of the winding up:** including the remuneration of the liquidator, other reasonable costs, expenses and charges that are incurred during the liquidation.
2. **Preferred debts**: under the Preferred Debts (Guernsey) Law, 1983 and the Bankruptcy (Désastre) (Jersey) Law 1990 priority is granted to various types of creditors including amounts owed to landlords, salaries and holiday pay owed to employees, unpaid tax and social security contributions.
3. **General unsecured creditors.** Importantly for secured creditors, there is no equivalent in Guernsey or Jersey to the 'prescribed part' under the UK Insolvency Act, whereby a part of the assets that would otherwise fall to the secured creditor is held in the estate for distribution to unsecured creditors. Assets held as security do not form part of the assets of the company available for distribution to the general body of creditors.

Any surplus on winding up will be distributed to shareholders in accordance with their rights and interests under the articles of association of the company.

Assistance to foreign office-holders

While the Islands sit outside the framework of the European Insolvency Regulation, the Courts of Jersey and Guernsey both regularly extend recognition and assistance to foreign office holders. The principles of comity and assistance are at the heart of the approach of the Court in both islands to multi-jurisdictional insolvencies and restructurings.

For an English office holder, the most common approach would be to use the statutory mechanisms available on each Island. In this regard each Island has adopted a slightly different approach.

Guernsey has had extended to it (with necessary amendments) section 426 of the Insolvency Act 1986 by means of the Insolvency Act 1986 (Guernsey) Order, 1989 (the '1989 Order'). Accordingly, Guernsey will extend recognition and assistance to an English office holder[31] on the issue of a letter of request from the English court. The Guernsey Court has a duty to grant the assistance unless the request is oppressive or contrary to public policy. Importantly, in providing assistance the Guernsey Court can apply the insolvency law of either Guernsey or England. This can be particularly useful where, for example, a foreign office holder wishes to use Insolvency Act statutory powers, such as the power to conduct private examinations of officers of the company that may otherwise not be available.[32]

Jersey has included a foreign assistance provision in its Bankruptcy (Désastre) (Jersey) Law 1990.[33] It is less prescriptive than section 426, providing that the Jersey courts may, at the request of a foreign court (from a relevant territory[34]), grant assistance to insolvency officers of that court where they wish to take steps in Jersey or the relevant foreign jurisdiction in relation to insolvency matters. This assistance may be afforded even where there are concurrent bankruptcy proceedings in Jersey. If the Jersey court grants assistance, it might typically do so by sanctioning and registering the appointment of the foreign office holder. Such assistance is usually effected by way of a letter of request from the foreign court to the Jersey court.

Central to the Jersey courts' discretion when considering all applications for assistance are the welfare of the creditors, the extent to which the request is consistent with, and not abhorrent to, Jersey domestic law and policy and is reflective of the underlying principles of comity.[35]

For requests from countries not covered by the statutes, both Jersey and Guernsey will generally extend assistance under common law principles. While recognition of an appointment is normally uncontroversial, the full extent of powers for courts to assist foreign office holders under common law is subject to many of the same uncertainties as it is in other jurisdictions. In *Singularis*[36] , a majority held, *inter alia*, that there is a common law power to require persons subject to the court's jurisdiction to provide information to overseas officeholders, as long as similar orders can be made in the officeholders' home forum. This has proved controversial in Guernsey, at least in the context of personal insolvency, with the Royal Court declining to follow the majority in *Singularis*, finding instead that the foreign trustee in bankruptcy of a foreign debtor could not use information collecting powers in Guernsey.[37] The decision is yet to be considered in Jersey.

Proposals for law reform

Both Islands are working on reforms to further improve their insolvency regimes.

The Guernsey legislature has proposed a series of reforms that are expected to be introduced later in 2019. These reforms cover a wide area and include the establishment of a rules committee to prepare insolvency rules to cover issues such of proof of debt procedure, the introduction of a power to wind up foreign companies, along with the extension of liquidator powers including the ability to challenge undervalue and extortionate credit transaction as well as statutory investigative powers to examine directors and officers of a company.[38]

The principle insolvency reform on the immediate horizon in Jersey is the widening of the creditors' winding up regime under the Companies (Jersey) Law 1991 to enable creditors to initiate those proceedings, as an alternative to the désastre process. Following consultation within the industry, the amendment is expected to come into force within the next 12 months. ■

27. See section 427 Companies (Guernsey) Law, 2008. In Jersey, disqualification proceedings are brought by the Chief Minister, the Jersey Financial Services Commission or the Attorney General (Article 78 of the Companies (Jersey) Law 1991 and may follow reporting of misconduct from the Viscount (Article 43 of the Bankruptcy (Désastre) (Jersey) (Law) 1990).

28. Companies (Jersey) Law 1991, Article 184.

29. Section 429, Companies (Guernsey) Law, 2008 and Companies (Jersey) Law 1991, Article 78.

30. Bankruptcy (Désastre) Rules 2006, Article 3.

31. As well as other UK office holders, along with those in Jersey or the Isle of Man.

32. See for example Batty v Bourse [2017] GLR 54 where an order was obtained applying English law on undervalue transactions.

33. Article 49.

34. Being UK, Guernsey, Jersey, Isle of Man, Finland and Australia.

35. Re Royco Investment Company Ltd [1994] JLR 236.

36. Singularis Holdings Limited v Pricewaterhouse Coopers [2014] UKPC 36.

37. Brittain (Trustee in Bankruptcy of X) v GTC (Guernsey) Limited [2015] GLR 248. Though in this case it is not clear why the English Trustee in Bankruptcy sought to pursue an application under the common law when it could have been brought under the 1989 Order.

38. Insolvency Review – Amendments to the Companies Law, States of Guernsey Committee for Economic Development, 19 February 2017.

Primeo v HSBC: Cayman Islands Court of Appeal dismisses appeal in Madoff feeder fund claim

TOBY BROWN

Toby Brown reports on the decision of the Cayman Islands Court of Appeal to uphold the dismissal of the claims in Primeo Fund (in Official Liquidation) v. Bank of Bermuda (Cayman) Ltd and HSBC Securities Services (Luxembourg) SA. Tom Smith QC, Richard Fisher, William Willson, Toby Brown and Robert Amey appeared at first instance and on appeal.

On 13 June 2019, the Cayman Islands Court of Appeal ("**CICA**") handed down a 184-page judgment following what was then reportedly the longest appeal heard in Cayman (recently surpassed by *Saad Investments v AHAB*). In a combined judgment, Beatson, Birt and Field JJA held that Primeo's claims were completely barred by the rule against recovery of reflective loss. The CICA ruled (albeit *obiter*) on various other matters ranging from breach of contract to contributory negligence.

Background

More detailed background may be found in the September 2017 South Square Digest. In brief, Primeo was a Cayman fund established in 1993 which invested through Bernard L Madoff Investment Securities LLC ("BLMIS"). From 2003, Primeo also invested indirectly with BLMIS via shareholdings in other Madoff feeder funds, "Alpha" and "Herald". In May 2007, Primeo switched all of its direct investments in BLMIS for a shareholding in Herald ("Herald Transfer"), thereafter only investing through Herald and Alpha.

Bank of Bermuda (Cayman) Ltd ("BBCL") and HSBC Securities Services (Luxembourg) SA ("HSSL") were appointed as Primeo's administrator and custodian respectively under an Administration Agreement and a Custodian Agreement. BBCL's administration duties were delegated to HSSL, who was also sub-administrator and sub-custodian to Alpha and administrator and custodian to Herald.

In December 2008, Bernard Madoff confessed to orchestrating a massive Ponzi scheme through BLMIS, defrauding billions of dollars from thousands of investment clients over decades.

In 2013, Primeo issued a claim in the Grand Court of the Cayman Islands seeking c. US $2 billion, alleging in particular that (a) BBCL failed to properly determine Primeo's Net Asset Value per share and (b) HSSL breached its duties regarding the appointment and supervision of BLMIS as sub-custodian and was also strictly liable for BLMIS' wilful default. Herald and Alpha also had ongoing claims in Luxembourg against HSSL for losses allegedly suffered from investing with BLMIS, totalling US$2 billion and $346 million respectively, with supplementary proceedings later served seeking $5.6 billion and $1.2 billion respectively.

Following a lengthy trial, Jones J handed down judgment on 23 August 2017 dismissing the claims. Whilst he found that the defendants had breached certain of their contractual duties, he held that: (a) the claims were barred by the rule against recovery of reflective loss ("RL Rule"), (b) Primeo failed to establish causation, (c) Primeo suffered no loss for which HSSL was strictly liable, (d) any causes of actions accruing six years after the claim was issued were statute barred, (e) even if a claim had been made out against BBCL (but not HSSL) damages would be reduced by 75% for contributory negligence.

Primeo appealed against the dismissal of its claims, and in response the defendants issued a Respondents' Notice which sought to affirm the judgment on additional grounds.

Reflective loss

The CICA's judgment includes a detailed analysis of the English authorities on the RL Rule, which is derived from the decision of the English Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries (No 2)* [1982] Ch 204, which was confirmed by the House of Lords in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1. In short, a shareholder may not recover loss which is merely reflective of loss suffered by the company i.e. loss which would be made good if the company enforced its rights against the defendant.

The Rule has been broadly applied by the English courts. For example, the English Court of Appeal in *Carlos Sevilleja Garcia v Marex Financial Ltd* [2018] EWCA Civ 1468 ("Marex") confirmed that the RL Rule applied to claims by unsecured creditors who are not shareholders, though an appeal was heard by the Supreme Court on 8 May 2019, with judgment reserved.

The CICA proceeded to analyse the policies which justify the RL Rule:

- **First**, the need to avoid double recovery by the shareholder and the company from the defendant. The CICA considered this is important but not the primary concern, and the RL Rule may apply even where there is no prospect of double recovery, for example because the company has declined to bring a claim.
- **Second**, causation, in the sense that if the company chooses not to claim against the wrongdoer or to settle a claim for less than it might have done, the claimant's loss is caused by the company's decision not by the defendant's wrongdoing. The CICA noted that this consideration has been criticised and there was more to the matter than causation.
- **Third**, the public policy of avoiding conflicts of interest, particularly if the claimant had a separate right to claim it would discourage the company or the wrongdoer from making settlements. As Chadwick LJ noted in *Giles v Rhind* [2002] EWCA Civ 1428, there is a *"need to avoid a situation in which the [defendant] wrongdoer cannot safely compromise the company's claim without fear that he may be met with a further claim by the shareholder in respect of the company's loss".*

- **Fourth**, the need to preserve company autonomy and avoid prejudice to minority shareholders and other creditors. In *Johnson v Gore Wood*, Lord Bingham considered that "*the court must respect the principle of company autonomy, ensure that the company's creditors are not prejudiced by the action of individual shareholders and ensure that a party does not recover compensation for a loss which another party has suffered*". The CICA added that where the company is in or near insolvency, the prejudice that would result if unsecured creditors could sue directly would be a breach of both the principle of collective insolvency and the pari passu rule. The CICA considered that this fourth factor was the primary justification for the RL Rule.

Against this useful exposition, the CICA considered a number of issues by which Primeo sought to argue its claims were not barred by the RL Rule. Five main issues are addressed below, the first three of which relate to the Herald Transfer.

First, the CICA considered whether for the RL Rule to apply, the plaintiff must in substance be claiming in its capacity as a shareholder (or a creditor) for a diminution in the value of its shares in (or claim against) the company.

Although the CICA acknowledged there were some references in Johnson v Gore Wood to a shareholder "suing in that capacity", this was merely a description of the typical scenario in which the RL Rule applies rather than a condition. It is clear that the RL Rule extends beyond diminution in share value to all payments which a shareholder might have obtained from the company, including qua employee.

Second, the CICA rejected the argument that the RL Rule could not apply because Primeo's causes of actions accrued before it was a shareholder. Lords Bingham and Millett's speeches in *Johnson v Gore Wood* focused on the loss claimed and whether the plaintiff would be "made whole" or "*made good*" if the company had enforced its rights against the defendant wrongdoer. This being the object, the position had to be assessed at the time the plaintiff's claim is made.

Third, related to this, the CICA accepted that the nature of the loss sustained which is separate and distinct cannot change and become reflective just because the plaintiff later becomes a shareholder. However, it follows from the authorities (which focus on whether the loss would be made good) that whether the loss is reflective must be determined in light of the circumstances when the claim is made. Moreover, the very nature of the Herald Transfer provides an additional explanation for why the loss before May 2007 ceases to become separate and distinct. This conclusion was supported by the third and fourth policy justifications set out above, given the possibility of Primeo "*scooping the pool*" before Alpha/Herald's claims, thereby prejudicing other shareholders and creditors and impacting on the Respondents' ability to settle those claims.

Fourth, the CICA rejected the suggestion that the administration claim against BBCL could not be reflective because Herald has no claim against BBCL. Under the delegation agreement, HSSL would be liable to BBCL for performing its delegated duties negligently, and so Primeo's claim against BBCL would in substance be passed through to HSSL, competing with Herald's claim by potentially "*scooping the pool*" at the expense of other shareholders and creditors. The CICA also referred to the effect of delegation by Alpha's custodian and administrator to HSSL, which would have the same effect of passing liability onto HSSL.

Fifth, the CICA held that for the RL Rule to be engaged, the company's claim must have a realistic prospect of success, rather than be "*likely to succeed*". The latter test would lead to a number of significant practical difficulties. The merits would have to be determined in a trial within a trial to which the company is not generally a party, which would be particularly difficult where (as here given Alpha and Herald's ongoing claims), the shareholder's claim comes before the court before the company's claim is particularised and evidenced.

A further practical difficulty is that the court may have little assistance because the parties will have no incentive to argue the company's claim is likely to succeed because (a) the claimant shareholder will not do so because it would bar its claim and (b) the defendant will not do so because it would amount to admitting liability of the company's claim.

Accordingly, the CICA upheld the Judge's conclusion that Primeo's claims were barred by the RL Rule. The appeal was therefore dismissed. The CICA also expressed their conclusions on the following other grounds since they had been argued by Primeo and the Respondents.

Custody claim

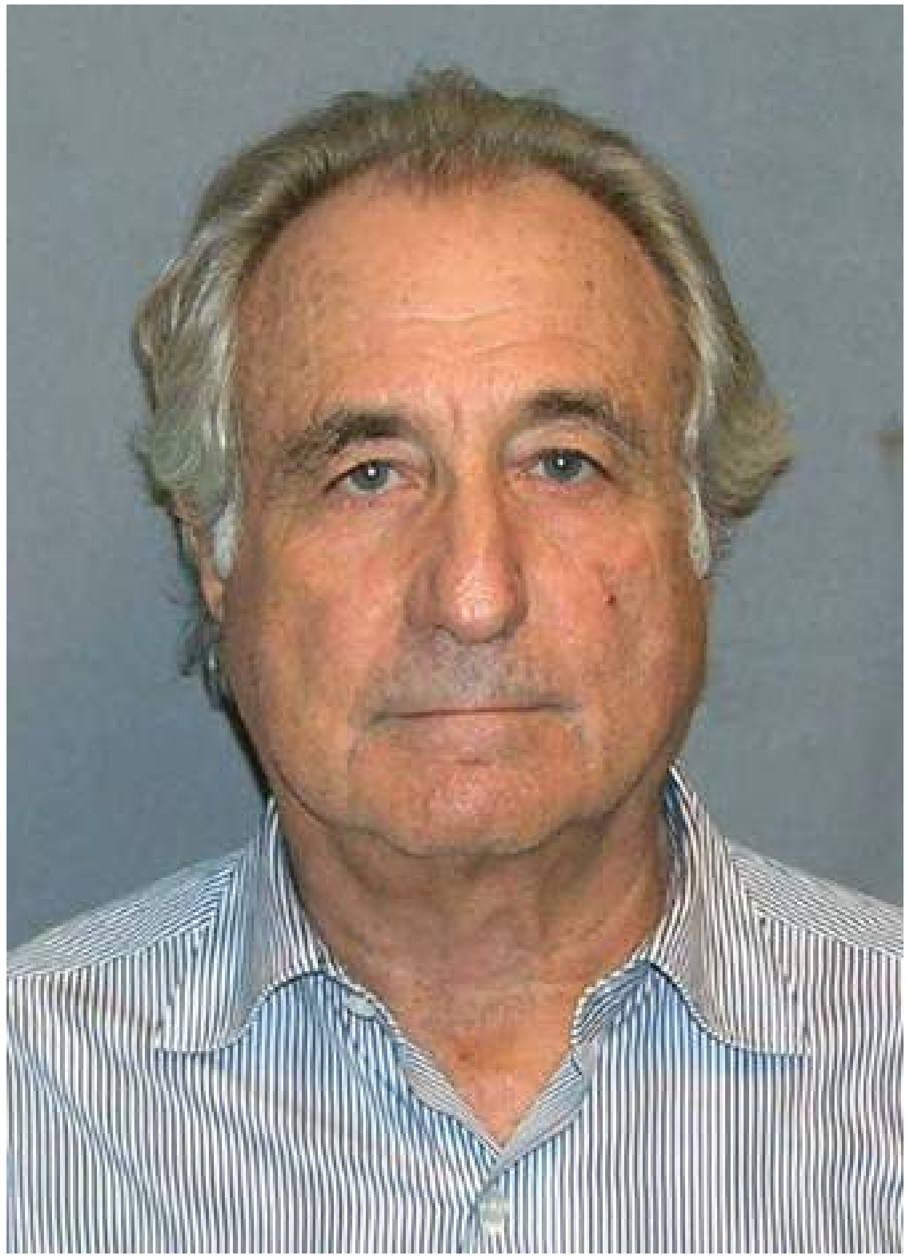
The CICA found that the Judge was entitled to conclude on the evidence that Primeo (not HSSL) had appointed BLMIS as its custodian for the period 1993 to 2002, but that from 2002 to 2007, the Sub-Custody Agreements were effective to constitute BLMIS as sub-custodian, for whom HSSL was strictly liable under the Custodian Agreement. The CICA held that the loss suffered by Primeo was the relevant loss for which HSSL was liable, finding per *Nykredit Mortgage Bank Plc* [1997] 1 WLR 1627 that loss was suffered each time it transferred cash to BLMIS.

However, the CICA did not determine that Primeo was entitled to any damages on the strict liability claim, directing the issue be remitted in the event that the reflective loss finding is overturned by the Privy Council. On the negligence claim, the CICA concluded that the Judge's evaluation of the position was reasonably open to him, concluding that the custodian was negligent given that BLMIS' uniquely risky model of combining investment management, brokerage and custody was not addressed by normal procedures.

Administration claim

First, the CICA upheld the Judge's rejection of the claim that BBCL was grossly negligent from 2002 to 2005. The CICA commented that Mance J's dicta in *Red Sea Tankers* [1997] 2 Lloyd's Rep 547 regarding serious disregard or indifference to the obvious risk "*are of assistance [but] should not be treated as ifin a statute*", and gross negligence "*means simply 'very great,' 'extreme' or 'flagrant' negligence*".

Second, the CICA also upheld the Judge's finding that the administrator was grossly negligent from 2005 to 2008 in the determination of Primeo's NAV by relying on a single source of information, in circumstances where, from 2005, Primeo's auditors EY were relying on custody confirmations given by HSSL, rather than on audit procedures supposedly conducted by BLMIS' auditor, Friehling & Horowitz.



Bernard Madoff

Causation

First, the CICA considered the Judge's rejection of the causation case in relation to 2002, holding the finding was reasonably open to him, including because there was equivalence of knowledge between the parties of the consequences of the BLMIS model, and Primeo had not tendered evidence from any of the decision makers.

Second, in respect of causation as at 2005 and 2007, the CICA considered that the Judge through no fault of his own had erred in applying the balance of probabilities standard to the hypothetical actions of Madoff and EY. Rather, applying *Allied Maples* [1995] 1 WLR 1602, the hypothetical actions of a third party ought to have been addressed on a loss of a chance basis. In addition, the CICA overruled the Judge's finding that Primeo would have reinvested monies withdrawn from BLMIS into another feeder fund.

The CICA did not, however, quantify the loss of chance, but directed that this would need to be remitted to the Grand Court in the event that reflective loss was overturned. Further, causation would be subject to determination of the defence that Primeo would have been unable to withdraw its assets because BLMIS would have collapsed.

Limitation

First, the CICA rejected the suggestion that the strict liability claim was an action based upon fraud under s. 37(1)(a) of the Limitation Law, given authorities such as *Beaman v ARTS Ltd* [1949] 1 KB 550 that an action is only "based on fraud" where fraud is an essential element of the cause of action.

Second, the CICA, following *Applegate v Moss* [1971] 1 QB 406, held that the concept of an "agent" extends to an independent contractor and therefore BLMIS' concealment extended time in respect of the strict liability claim under s. 37(1)(b) of the Limitation Law.

Third, the CICA held that the Judge was correct to conclude that a *reckless* breach of duty does not constitute deliberate commission of breach of duty under s. 37(2) of the Limitation Law, as supported by *Cave v Robinson Jarvis & Rolf* [2002] UKHL 18. Accordingly, the limitation defence was applicable to the negligence claims. In any event, the finding of gross negligence against BBCL did not equate to recklessness.

Contributory negligence

Finally, the CICA rejected the assertion that the defence of contributory negligence was not available where a professional is engaged to carry out skilled activities. Conversely, the CICA accepted that the defence should be available to HSSL, on the basis that its contractual duties were co-extensive in tort and thus fell within "category 3" according to *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852.

As to the appropriate apportionment, applying *Jackson v Murray* [2015] UKSC 5, the court has regard to both the blameworthiness of each party and the relative importance of each party's act in causing the damage. The CICA considered that since BBCL was performing a professional service, but bearing in mind Primeo's "*keenness to invest wholly in BLMIS*", BBCL's conduct was equally blameworthy as that of Primeo, and thus assessed contributory negligence at 50%.

Conclusion

As summarised above, the Court of Appeal dismissed Primeo's appeal. Shortly before the Digest went to press, Primeo was granted leave to appeal as of right to the Privy Council. ■

Case Digest Editorial

Adam Goodison

At a Chancery Bar Conference Workshop analysing the decision of Rose J in *BTI v Sequana*, the Workshop was playfully entitled *"How to defraud your creditors without being in breach of duty"*.

In summary, Rose J's judgment had decided that dividends had been lawfully declared, despite a large potential pollution liability, but nevertheless one of the dividends was held to be a transaction made under s 423 of the Insolvency Act 1986 and thus was to be set aside. The Court of Appeal has now determined that Rose J was broadly correct in her analysis and judgment, with the Court of Appeal (David Richards LJ, Henderson LJ and Longmore LJ) upholding her judgment. The Court of Appeal decision is digested within this edition's work at page 45 by Edoardo Lupi of South Square, and is both of great importance in the determination of when the "creditors interest duty" triggers, (as well as of interest in the determination of when a company can pay dividends), and Edoardo's summary saves the long read through 59 pages of the Court of Appeal decision (for summer reading, the decision is on the BAILII website).

Also in this edition's case digests, at page 41, Madeleine Jones summarises the important decision of the Supreme Court regarding implied terms in contracts of *Wells v Devani* [2019] UKSC 4. Lewison LJ in the Court of Appeal had held that there should be no implied term in the relevant estate agency agreement. When the Court of Appeal decision was issued, it carried considerable weight because of Lewison LJ's distinction in contract law (his seminal work is "*The Interpretation of Contracts*"). Nevertheless, on appeal to the Supreme Court, the SC Justices decided that the majority in the Court of Appeal had been wrong, and overturned the Court of Appeal judgment. The Supreme Court held (in summary) that even though the important terms were not expressly spelt out, they had nevertheless been agreed by words and conduct. In case anyone ever suggests that Supreme Court Justices do not live in the real world, a short read of the judgment of Lord Briggs in this case will give a flavour of the everyday occurrences that occur in the life of a Supreme Court Justice. He held at 59 – 61:

"59. Lawyers frequently speak of the interpretation of contracts (as a preliminary to the implication of terms) as if it is concerned exclusively with the words used expressly, either orally or in writing, by the parties. And so, very often, it is. But there are occasions, particularly in relation to contracts of a simple, frequently used type, such as contracts of sale, where the context in which the words are used, and the conduct of the parties at the time when the contract is made, tells you as much, or even more, about the essential terms of the bargain than do the words themselves. Take for example, the simple case of the door to door seller of (say) brooms. He rings the doorbell, proffers one of his brooms to the householder, and says "one pound 50". The householder takes the broom, nods and reaches for his wallet. Plainly the parties have concluded a contract for the sale of the proffered broom, at a price of £1·50, immediately payable. But the subject matter of the sale, and the date of time at which payment is to be made, are not subject to terms expressed in words. All the essential terms other than price have been agreed by conduct, in the context of the encounter between the parties at the householder's front door."

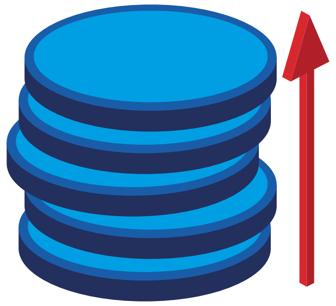
"60. So it is with the contract in issue in the present case. All that was proved was that there was a short telephone call initiated by Mr Devani, who introduced himself as an estate agent, and Mr Wells, who Mr Devani knew wanted to sell the outstanding flats. Mr Devani offered his services at an expressly stated commission of 2% plus VAT. It was known to both of them that Mr Wells was looking for a buyer or buyers so that he could sell the flats, and it was plain from the context, and from the conduct of the parties towards each other, that Mr Devani was offering to find one or more buyers for those flats. The express reference by Mr Devani to the 2% commission was, in the context, clearly referable to the price receivable by Mr Wells upon any sale or sales of those flats achieved to a person or persons introduced by Mr Devani. Furthermore it was evident from the fact that nothing further was said before the conversation ended that there was an agreement, intended to create legal relations between them, for which purpose nothing further needed to be negotiated."

"61. The judge decided the case by reference to implied terms. But it follows from what I have set out above that I would, like Lord Kitchin JSC, have been prepared to find that a sufficiently certain and complete contract had been concluded between them, as a matter of construction of their words and conduct in their context rather than just by the implication of terms, such that, by introducing a purchaser who did in fact complete and pay the purchase price, Mr Devani had earned his agreed commission."

Regarding the other digests that follow, readers will see that members of South Square have been busy litigating both in the core areas of South Square, and wider specialisations, including shareholder disputes in the British Virgin Islands (see David Alexander QC's case regarding alleged unfair prejudice in *Wai Fong v Wong Kie Yik* on page 47), further fall out from the Madoff frauds (*UBS AG v Fairfield Sentry Ltd* in the Supreme Court on page 53 where the late Gabriel Moss QC, Tom Smith QC and Henry Phillips acted), the Court of Appeal judgment in *Box Clever* at page 54 (with Mark Arnold QC having acted), the decision of ICC Judge Burton on *Toisa Ltd* regarding the time when COMI requirements are required to be established for recognition purposes at page 51, disciplinary proceedings in South Square's sports practice in respect of Birmingham City FC at page 57 (where Daniel Bayfield QC acted), and British Steel Ltd with Snowden J making a winding up order, and an urgent *Carillion* type special managers order just before 10am on 22 May 2019, and issuing his judgment in writing a few hours later, the same day, to assist the Official Receiver in carrying forward the liquidation of one of the last steel plants in the UK (where Lloyd Tamlyn acted for the company, and I acted for the Official Receiver and the proposed special managers).

The various case Digests this month have been compiled by South Square members Stefanie Wilkins, Rose Lagram-Taylor, Madeleine Jones, Edoardo Lupi, Ryan Perkins, Lottie Piper, Andrew Shaw and Robert Amey. ■

Case Digests



Banking and Finance

Digested by Stefanie Wilkins

Winterbrook Global Opportunities Fund v NB Finance Limited & Others

[2019] EWHC 737 (Ch) (Marcus Smith J) 1 April 2019

Application under CPR 3.4 and/or 24.2 – whether there was an Event of Default by the Guarantor – recognition of foreign legal determination

Winterbrook, the claimant, was the beneficial owner of certain notes ("the Notes"). It had sought a declaration that an Event of Default had occurred under the terms of the Notes, enlivening its power to request the trustee to take steps to accelerate and enforce the Notes. The asserted Event of Default was a failure by Espirito Santo, which was the original Guarantor of the Notes, to perform obligations under an (otherwise unrelated) agreement referred to as "the Oak Loan". The Notes provided relevantly that such a default by the Guarantor would be an Event of Default.

NB Finance (the Issuer) and Novo Banco (the current Guarantor), who were the first and second defendants, applied to have the claim form and particulars struck out on the basis that it had no prospect of success. The question for Marcus Smith J was whether Espirito Santo's default was by, or attributable to, the Guarantor.

In short, Espirito Santo had encountered financial difficulties in mid-2014, and on 3 August 2014 the Banco de Portugal – the designated Resolution Authority for the purpose of the European Bank Recovery and Resolution Directive – published a Deliberation which transferred Espirito Santo's assets and liabilities to Novo Banco. This served to transfer to Novo Banco the obligations of Espirito Santo under the guarantee and, it was thought, the Oak Loan.

But subsequent investigations revealed that the Oak Loan was not eligible to be transferred as a matter of Portuguese law, and the Banco de Portugal confirmed in a December 2014 Decision that it had not, in fact, been transferred. The Supreme Court had, in unrelated proceedings, already held that as a matter of Portuguese law, the Oak Loan never transferred to Novo Banco, and that this point was settled unless and until a Portuguese Court annulled the December 2014 decision.

Marcus Smith J observed that, as a result, on and after 3 August 2014, Espirito Santo had held the liability under the Oak Loan, but the liability under the Guarantee had transferred to Novo Banco. His Lordship therefore concluded that any default by Espirito Santo in respect of the Oak Loan was not an Event of Default, because it was not a default by the Guarantor (which was now Novo Banco). The claim, therefore, had no prospects of success, and was struck out.

Finally, his Lordship accepted that if the December 2014 Decision were overturned in Portugal, the position might alter. But that was irrelevant for the present application, because the consequences of any decision were uncertain, and a matter for the Portuguese court, and it was undesirable for the English court to speculate about their effect. ■

[Tom Smith QC, Daniel Bayfield QC and Ryan Perkins]

Netherlands v Deutsche Bank AG

[2019] EWCA Civ 771 (Sir Geoffrey Vos C, Longmore and Asplin LJJ) 2 May 2019

Interpretation of CSA to ISDA Master Agreement – whether negative interest accrued on cash collateral

The judgment concerned the construction of the Credit Support Annex ("CSA") to the ISDA Master Agreement. The State of Netherlands ("the State") and Deutsche Bank ("the Bank") had executed the CSA in its 1995 form (with a 2010 amendment) as part of its contractual arrangements for the State's derivative trading.

The question for the Court was whether negative interest accrued on cash collateral posted under the terms of the CSA.

Although the standard CSA provided for collateral to be posted by either party, the State and the Bank had agreed to a bespoke term, which provided that the Bank was the sole Transferor and the State was the sole Transferee. Under the CSA, interest was payable by the Transferee on the collateral, with the interest rate being the Euro Over-Night Interest Average ("EONIA") minus 0.04%. From 2014, the interest rate calculated in this manner fell below zero. The State accordingly sought a declaration that negative interest could accrue in its favour. Paragraph 5(c)(ii) – the critical provision – provided only for the payment of interest by the Transferee to the Transferor.

The Court of Appeal considered that the proffered interpretations of both the State and the Bank were available. But following the conventional approach to contractual interpretation set out in Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173, several factors pointed to the conclusion that negative interest would not accrue. First, the background materials indicated that ISDA did not contemplate that negative interest would be payable. Secondly, paragraph 5(c)(ii) contained no reference to negative interest, although that paragraph would have been the most obvious source of such an obligation. Thirdly, if the State's proposed construction were accepted, there would be various inconsistencies in the remainder of the document. Finally – and more generally – the CSA as a whole did not indicate that negative interest was contemplated. The appeal was therefore dismissed, in the Bank's favour. ■

Chudley v Clydesdale Bank Plc (t/a Yorkshire Bank)

[2019] EWCA Civ 344 (Longmore, Flaux and Moylan LJJ) 6 March 2019

Interpretation of Contracts (Rights of Third Parties) Act 1999

The claimants (the appellants before the Court of Appeal) had invested money in Arck LLP, which was to develop a resort. Arck had, in turn, provided a signed letter of instruction ("LOI") to the defendant bank to open a segregated client account with investment monies. The principal questions on the appeal were whether there was a binding contract in terms of the LOI, and whether the claimants' loss was caused by the bank's breach of that contract. Notably, in resolving these questions, the Court of Appeal provided important clarification on the interpretation of s 1 of the Interpretation of Contracts (Rights of Third Parties) Act 1999.

Section 1(1) of that Act provides relevantly that a third party to a contract may nevertheless enforce a term for his own benefit if "(a) the contract expressly provides that he may"; or "(b)… the term purports to confer a benefit on him" (subject to an exception which was irrelevant on the facts). It was s 1(1)(b) which was said to be engaged in the case at bar. Section 1(3) goes on to provide that "The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description".

The question arose whether the requirements of s 1(1)(b) and s 1(3) could be satisfied by the same term of the contract. On this point, the current edition of Chitty on Contracts states (uncontroversially) that the requirements are cumulative, but goes on to argue that "reasoning which satisfies the first of these requirements cannot, of itself, satisfy the second".

The Court of Appeal explained that, on the contrary, the very same term of a contract could satisfy both the requirements of s 1(1)(b) and s 1(3). Flaux LJ (with whom Moylan LJ agreed) explained that when the LOI was interpreted as a whole, the instruction to open "a client account" was such a term – it identified both the class (i.e. clients of Arck), and conferred a benefit on them, in that the LOI was primarily intended to protect investors. Longmore LJ also agreed, and explained in greater detail that the name of the account in itself indicated for whose benefit the account was opened, and the class of beneficiaries was expressly identified.

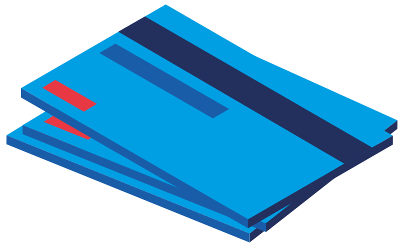
The appeal was allowed, although the trial judge's reasoning on this point was upheld. ■

Libyan Investment Authority v JP Morgan Markets Ltd & Ors

[2019] EWHC 1452 (Comm) (Bryan J) 10 June 2019

Fraud – service out

D3 and D4 to a claim for fraud and money had and received applied for service out to be set aside. The LIA ("C") claimed D3, allegedly an associate of the Gaddafi regime, had fraudulently helped arrange a US $200 million derivative transaction, and had allegedly agreed to accept $6 million commission, which had been routed via D4. C said that it had become aware of the facts giving rise to the allegations during proceedings the "SocGen Proceedings" (which had settled in 2017). C issued this claim in April 2018 and, at an ex parte hearing, obtained permission to serve out on D3 and D4. Held that, C had to demonstrate that it had a real prospect of obtaining an extension under Section 32 of the Limitation Act 1980 to the usual six-year limitation period by showing that it could not with reasonable diligence have discovered the alleged concealed fraud more than six years before issuing its claim, namely before April 2012. The evidence showed that C had either known or could have discovered the facts necessary to plead its claims before then. Further, the Commercial Court Guide Appendix 9 required C to draw attention to any features which might weigh against making the order and otherwise comply with the duty of full and frank disclosure. C had known when applying for service that the Ds would raise a limitation defence and that it would need to rely on section 32. That was a matter which indisputably might reasonably be thought to weigh against the making of the order. The claimant had also failed to highlight the evidence relevant to limitation which demonstrated that relevant information had been available to it before April 2012. The failure to give full and frank disclosure in relation to limitation was an egregious breach of duty and required permission to serve out to be set aside. Had service not been set aside, C could have claimed for the sum of the bribes, but if it wished to claim for further sums then any loss had to be pleaded and proved. Its claims for more than the amount of the bribes did not have any real prospect of success. Service would also have been set aside for that reason. ■



Civil Procedure

Digested by Rose Lagram-Taylor

Takhar v Gracefield Developments Ltd & ors

[2019] UKSC 13 (Kerr, Sumption, Hodge, Lloyd-Jones, Briggs, Arden, Kitchin JJSC) 20 March 2019

Res judicata – setting aside a judgment – fraud

The Supreme Court was required to determine whether an action to set aside an earlier judgment on the basis of fraud should be allowed to proceed.

The dispute had arisen about the terms on which the appellant had transferred properties to the first respondent. Proceedings were issued on the basis that those properties had been transferred as a result of undue influence or other unconscionable conduct. The claim was rejected. A significant item of evidence in the hearing had been a written profit share agreement which provided for the claimant to receive £300,000 as deferred consideration for the properties, as well as 50% of the profits of the sale of each property. However, the claimant denied signing the agreement and claimed she had not seen it until the dispute arose. Although the claimant had made an application to obtain a report on a handwriting expert, disputing the validity of her signature on the agreement, this had been refused because it had not been made until the trial was imminent. During the trial, the claimant gave evidence that she could not say the signature on the agreement was not hers, but she was unable to explain how it had got there. Following the trial, the claimant obtained a report from a handwriting expert. The expert concluded that the claimant's signature had been transposed onto the agreement from another document. The claimant therefore issued proceedings to have the judgment set aside on the basis of fraud. The defendant asserted that this would be an abuse of process. This was tried as a preliminary issue. At first instance, the court concluded that the second action was not an abuse of process and should be allowed to proceed. However, the Court of Appeal concluded that the claimant had to establish that the evidence of fraud was not available at the time of the first trial, and could not have been discovered with reasonable diligence, finding in favour of the defendants.

In reaching their judgment, the Court of Appeal had relied on Henderson v Henderson (1843) 3 Hare 100 which was authority for the principle that parties must normally advance their total case on the first bout of litigation. It was not open to them, save in exceptional circumstances, to raise a point which should have been raised and which could, with reasonable diligence, have been discovered and canvassed at the first trial. However, Lord Kerr, in giving the leading judgment in the Supreme Court, determined that Henderson v Henderson did not speak to two subjects which were critical in the present case: (i) whether the rule applies where the new point was not in issue between the parties in the first trial, and if it had been and evidence had been obtained, a different outcome might have ensued, and (ii) whether the rule requires modification or disapplication where the new issues raised an allegation of fraud, by which, it is claimed, the original judgment was obtained.

Lord Kerr pointed to the basic principle that the law does not expect people to arrange their affairs on the basis that others may commit fraud. The judgments of Owens Bank Ltd v Etoile Commerciale SA [1995] 1 WLR 44 and Owens Bank Ltd v Bracco [1992] 2 AC 443, as relied on by the Court of Appeal were not followed, the Supreme Court holding that these judgments were not authority for the proposition that, in cases where it was alleged that a judgment was obtained by fraud, it could only be set aside where the applicant could demonstrate that the fraud could not have been uncovered with reasonable diligence in advance of the judgment (and that if those judgments had that effect, they should not be followed).

Instead, Royal Bank of Scotland Plc v Highland Financial Partners LP [2013] EWCA Civ 328 as relied on at first instance, correctly summarised the principles governing applications to set aside for fraud: (i) first there had to be conscious and deliberate dishonesty in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned, (ii) second, the relevant evidence, action, statement or concealment must be material (material meaning that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision), and (iii) the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision. Applying these principles to the current matter, the appeal was accordingly allowed.

Whilst the judgment of Lord Kerr was agreed with, certain disagreement was voiced between Lord Sumption and Lord Briggs on the best approach going forwards for other similar fraud-based claims. Per Lord Briggs, the appeal turned on the outcome of a "bare-knuckle fight" between two long-established principles of public principle, first that fraud unravelled all, and second, that there had to come an end to litigation. Whilst on the facts of the instant case the fraud principle prevailed, Lord Briggs was of the opinion that there should not be a "bright-line boundary" between the types of case where one principle should prevail. Instead, a more flexible basis was preferred where the court could apply a fact-intensive evaluative approach to whether lack of diligence in pursuing a case in fraud in the first proceedings ought to render a claim to set aside an abuse of process. Lord Sumption, however, expressed his opinion that such a flexible approach would introduce an unacceptable element of discretion into the enforcement of a substantive right, meaning whilst the standard of proof for fraud was high, once it is satisfied, there are no degrees of fraud which can affect the right to have the judgment set aside. ■

BNP Paribas SA v Trattamento Rifiuti Metropolitano SpA

[2019] EWCA Civ 768 (Hamblen, Flaux, Asplin LJJ) 7 May 2019

Conflict of laws – jurisdiction clauses – foreign experts – declaratory judgments – ISDA

The issue on appeal was whether the judge at first instance was correct to conclude that claims for declaratory relief fell within the exclusive English jurisdiction clause contained in a swap transaction between the parties, and not within an Italian jurisdiction clause contained in a financing agreement.

At first instance, the judge recognised that the dispute on jurisdiction turned on the application of Article 25 of Regulation (EU) 1215/2012 (the "Regulation"), which provided: "If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction". It was accepted that the relevant test to determine if the court did have jurisdiction was which party had "much the better of the argument". In determining that it was the Bank who had the better argument, the judge considered that the two jurisdiction clauses did not in fact conflict, as each applied to a different part of the parties' relationship. The claim brought by the Bank involved the relationship between the parties as to the swap transaction, and not the financing agreement, and so the English jurisdiction clause was the relevant one for the purposes of the claim. The judge was particularly influenced by the fact that the parties had used ISDA documentation for their swap transaction which "signaled the parties' interest in achieving consistency and certainty in this area of financial transacting." The judge expressed, where commercial parties use ISDA documentation, "they are even less likely to intend that provisions have one meaning in one context and another meaning in another context."

In upholding the decision at first instance, the Court of Appeal gave the following guidance, summarising the established principles on the approach a court should take when determining the scope of competing jurisdiction clauses; (i) where the parties' overall contractual arrangements contain two competing jurisdiction clauses, the starting point is that a jurisdiction clause in one contract was probably not intended to capture disputes more naturally seen as arising under a related contract (Trust Risk Group SPA v Amtrust Europe Ltd [2015] EWCA Civ 437), (ii) a broad, purposive and commercially-minded approach is to be followed (Sebastian Holdings Inc v Deutsche Bank [2011] 1 Lloyd's Rep 106), (iii) where the jurisdiction clauses are part of a series of agreements they should be interpreted in the light of the transaction as a whole, taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme (UBS AG v HSH Nordbank [2009] EWCA Civ 1740), (iv) it is recognised that sensible business people are unlikely to intend that similar claims should be the subject of inconsistent jurisdiction clauses (Deutsche Bank AG v Savona [2018] EWCA Civ 1740), (v) the starting presumption will therefore be that competing jurisdiction clauses are to be interpreted on the basis that each deals exclusively with its own subject matter and they are not overlapping, provided the language and surrounding circumstances so allow (Deutsche Bank AG v Savona [2018] EWCA Civ 1740), and (vi) the language and surrounding circumstances may, however, make it clear that a dispute falls within the ambit of both clauses. In that event the result may be that either clause can apply rather than one clause to the exclusion of the other (Deutsche Bank AG v Savona [2018] EWCA Civ 1740).

Given the use of foreign experts in the case, the Court of Appeal also confirmed that the role of such experts in relation to contractual interpretation is a limited one and is confined to identifying what the rules of interpretation are. The Court categorically stated that it was not the role of an expert to express opinions on what a contract means, that task being the task of the English court. As the Company's expert did express views on how the Italian court would interpret the relevant jurisdiction clauses, the Court of Appeal found this evidence to be irrelevant and inadmissible. ■

Civil Procedure

Calonne Construction Ltd v Dawnus Southern Ltd

[2019] EWCA Civ 754 (Hamblen, Flaux, Asplin LJJ) 3 May 2019

Part 36 offers – costs

The Court of Appeal has confirmed that a defendant's Part 36 offer would not be rendered invalid simply by reason that it was made in respect of both the claim against it and a proposed counterclaim that had yet to be pleaded. A Part 36 offer would also not be rendered invalid in circumstances where a provision for interest to accrue at a particular rate was included in the offer.

The underlying claim concerned a dispute over certain building works carried out by the respondent. The parties fell into dispute following delays to and defects with the work and a claim was issued by the claimant seeking declarations as to the sums due under the contract. Before serving a defence and counterclaim, the defendant had made a Part 36 offer to settle both the claim and its anticipated counterclaim. The offer stated that it was inclusive of interest until the expiry of the 21 day "relevant period" under CPR r.36.3(g), and that thereafter interest would be added at 8% per annum. The offer was not accepted and so the respondent served its defence and counterclaim, the claim proceeding to trial.

At first instance, the judge rejected the two main submissions of the claimant which it was said rendered the offer invalid for the purposes of Part 36. First, the judge rejected the argument that the inclusion of the offer in the counterclaim which had yet to pleaded rendered the offer invalid. Second, the judge rejected the argument that the addition of a provision relating to the rate of interest to be charged after the end of the relevant period rendered the offer invalid.

The Court of Appeal, in dismissing the appeal, considered the two questions of (i) whether the offer was invalidated by the inclusion of the counterclaim which had yet to be pleaded, and (ii) whether the inclusion of a term of interest after the end of the relevant period rendered the offer invalid.

On the first question, Asplin LJ in giving the leading judgment considered that it did not matter that the counterclaim had not been "formulated or pleaded" because of the application of CPR r.36.7, and r.20.2 and r.20.3, which as the defendant had argued meant that the counterclaim was to be treated as a separate claim. Pursuant to r.36.7, a Part 36 offer can be made at any time, including before the commencement of proceedings. The Court was persuaded by the judgment of AF v BG [2009] EWCA Civ 757 in which the Court of Appeal had decided obiter that an offer was a valid Part 36 offer relating to both the original claim and a proposed counterclaim. The Court was not minded to follow the decision in Hertel & Anr v Saunders [2018] EWCA Civ 1831; [2018] 1 WLR 5832 (handed down after the decision of first instance) where it was held that the inclusion of a counterclaim which had yet to be pleaded was fatal to the validity of a Part 36 offer because that decision had not made reference to AF v BG and was deemed to be primarily concerned with CPR r.36.10(2) (a provision which has now been reversed). Asplin LJ also expressed that she was fortified in her decision because it could not be correct that a defendant must go to expense of pleading a counterclaim, and if necessary obtaining permission in relation to it, or alternatively having to issue separate proceedings in order to make a Part 36 offer. Such a consequence would be contrary to the policy behind both Part 36 and Part 20 of the CPR.

On the second question, Asplin LJ gave five reasons for upholding the decision that the inclusion of an interest term after the end of the relevant period does not render a Part 36 offer invalid; (i) there is nothing in Part 36, and specifically CPR r.36.5 which precludes the inclusion of terms as to interest in a Part 36 offer which are intended to apply after the relevant period has expired, (ii) there is nothing which expressly precludes the inclusion of terms in addition to the requirements in CPR 36.5(2), and CPR 36.2(2) expressly preserves the ability to make an offer to settle in whatever way the party chooses. If, however, r.36.5 is not complied with the offer will not have the costs consequences set out in that section, (iii) if a party could not provide for interest to run after the end of the relevant period, it would not be compensated with interest for any delay between the end of that period and a subsequent acceptance, (iv) there are at least two ways to prevent the effect of offers containing unreasonable rates of interest under such terms, e.g. 25% or 200%. First, an offeror might find that the judgment was not more advantageous than the offer containing the exorbitant interest rate, and accordingly, the costs consequences of Part 36 would not apply. Secondly, as interest after the end of the relevant period is ignored for the purposes of the CPR 36.17 assessment, it should also be ignored for the purposes of determining whether the Part 36 offer is valid, and (v) if the offeree found the particular clause unpalatable, it could make its own Part 36 offer in the same terms but without the offending provision. ■

Khandanpour v Chambers

[2019] EWCA Civ 570 (Males LJ, Sir Timothy Lloyd) 4 April 2019

Appropriation – default costs certificate – late payments – relief from sanctions

This judgment concerns an appeal from an order by which it was held that the appellant had failed to make a payment which was required to be made as a condition for setting aside a defaults costs certificate, and in which relief from sanctions was refused. The appellant accepted that the payment was not made on time but appealed against the refusal from relief from sanctions.

By way of background, the respondent had obtained a judgment debt and costs order against the appellant. As the appellant failed to pay the judgment debt, the respondent took steps to enforce it and also to have his costs assessed. As the appellant had failed to engage with the process, a default costs certificate was given to the respondent. On applying to have the certificate set aside, the appellant was successful on the condition that he pay to the respondent £10,000 on account of costs by 4pm on 15 June 2017 as well as file points of dispute on the bill of costs. The appellant filed the points of dispute on time, but struggled to raise the requisite money himself, arranging for two others to pay the sum on his behalf. Whilst the two people gave instruction to their bank for payment to be made, only one payment was received before the deadline. The second payment was received the following morning. The solicitors for the respondent accepted that the first payment was received in compliance with the set-aside order, but apportioned the second payment towards the judgment debt by reason that the set-aside order had not been complied with. At first instance, the judge declared that the appellant had failed to make the required payment in compliance with the order on time, and refused relief from sanctions, determining that the respondent's solicitors were entitled to appropriate the second payment towards the judgment debt because the appellant had not given sufficient indication of his intention that the second payment should be treated as part of the sum required by the set-aside order.

The appeal was allowed. On appropriation the Court of Appeal relied on Parker v Guinness (1910) 27 TLR 129 which held that a debtor's intention to appropriate a payment to a particular debt could be inferred from the circumstances known to both parties. As per Leeson v Leeson [1936] 2 KB 156, what matters is that in the light of all the circumstances, and viewing the matter objectively, there should be no doubt about the debtor's intention. The Court of Appeal were satisfied that in the present case, it was obvious from the circumstances known to both parties that the second payment was intended to be a part payment of the sum required to be paid as a condition of setting aside the default costs certificate: the time of receipt was such that instructions must have been given the previous day, the total amount paid was the full amount required, if the second payment was not intended to represent the balance there would have been no point in making the first payment on time the previous day, and serving the points of dispute on time only made sense if the appellant had intended to fulfil the payment condition. In seeking to appropriate the second payment as they did, the respondent's solicitors were taking advantage of what they regarded as a slip by the appellant, and whilst they may have been frustrated by the appellant's failure to pay the full balance on time, they knew that their purported appropriation was contrary to the appellant's obvious intention.

As to relief from sanctions, by reference to the Denton principles, the seriousness of the breach was minor given the delay was short and had no effect on the conduct of the litigation. The appellant's previous conduct did not make the breach more serious. Although conduct had been taken into account in British Gas Trading Ltd v Oak Cash and Carry Ltd [2016] EWCA Civ 153, that case concerned the breach of an unless order, whilst the instant appellant had not been in breach of any previous order as to costs. It would have been disproportionate and unjust to deprive the appellant of an opportunity of challenging the default costs certificate. Accordingly, relief from sanctions were allowed. ■

SPI North Ltd v Swiss Post International (UK) Ltd & Anor

[2019] EWCA Civ 7 (Lewison, Henderson LJJ) 17 January 2019

Defences – admissions – strike out applications – Civil Procedure Rules

This appeal concerned a refusal of an application for an order striking out the defendant's defence, unless it was amended to comply with CPR r.16.5(1)(b). That rule specified that a defendant must state in his defence "which allegations he is unable to admit or deny, but which he requires the claimant to prove". The question for the court was whether r.16.5(1)(b), properly construed, required a defendant to make reasonable enquiries of third parties before it could be said that he was "unable" to admit or deny a particular allegation.

At first instance, the judge answered this question in favour of the defendants, determining that as a matter of principle, a defendant is not required, before being able to make a non-admission, to have made reasonable inquiries, and is able to properly make a non-admission based on his own knowledge. In the case of a corporate defendant, the non-admissions are based on corporate knowledge. Permission to appeal was granted, the judge at first instance observing that there is no authoritative decision on the issue, and whilst, in construing r.16.5, a court is required to have regard to the overriding objective on CPR r.1.2, the Court of Appeal may weigh the various elements of the overriding objective differently from the way the court of first instance had weighed them.

Civil Procedure

The issues before the Court of Appeal were accordingly; (i) whether a defendant was obliged to make reasonable enquiries of third parties before pleading that it was unable to admit or deny an allegation under r.16.5(1)(b), and (ii) the meaning of "unable" in that context.

In arguing for a positive answer to the defendant's obligations, the claimant emphasised the structure and language of r.16.5(1) and asserted that the purpose of statements of case was to narrow the scope of factual disputes to enable the issues to be identified which would save time and costs and promote the overriding objective. The clear implication of this, it was submitted, was that parties must make reasonable enquiries before they can say that their personal or corporate knowledge does not permit them to admit or deny an allegation.

However, the Court of Appeal was not convinced of this argument. Instead, it was held that a number of factors pointed towards the conclusion that a defendant is "unable to admit or deny" an allegation where the truth or falsity of the allegation is neither within his actual knowledge, nor capable of rapid ascertainment from document or other sources at his ready disposal. There was no general obligation to make reasonable enquiries of third parties at this early stage of litigation. Instead, the purpose of the defence was to define and narrow the issues between the parties in general terms, on the basis of knowledge and information which the defendant had readily available to him during the short period afforded by the rules for the filing of the defence. Further, if an admission or denial was based on information obtained from a third party, this could create difficulties for verifying, in the statement of truth, that the contents of the defence were based on the defendant's own knowledge. Accordingly, the appeal was dismissed, with the Court of Appeal confirming that the wording of r.16.5(1)(b) does not import a duty to make reasonable enquiries of third parties before putting the claimant to proof of an allegation which the defendant is "unable to admit or deny". ■

Cathay Pacific Airlines Limited v Lufthansa Technik AG

[2019] EWHC 715 (Ch) (John Kimbell QC) 25 March 2019

Costs orders – foreign currencies – overriding objective

The High Court held that it has jurisdiction under section 51 of the Senior Courts Act 1981 and CPR r.44.2 to make a costs order in a foreign currency. The judgment provides confirmation that in appropriate circumstances, a party domiciled outside the jurisdiction will be able to seek its costs in the foreign currency in which it has incurred and paid legal costs in connection with proceedings in England.

The case arose in circumstances where the defendant had prevailed at a summary judgment hearing and sought its costs. The defendant's solicitors had accounted for their time and generated their invoices in euros. The defendant accordingly sought its costs in euros.

In the absence of any binding authority or guidance from specialist practitioner texts on the matter, the judge asserted that the overriding objective, contained in CPR r.1.2, was a necessary point of reference. This requires the court to give effect to the overriding objective whenever it exercises any power under the CPR or interprets any rule. The judge considered that in circumstances where a receiving party domiciled outside the jurisdiction had incurred substantial costs in a foreign currency in connection with proceedings in England, an order providing for those costs to be paid in the foreign currency was consistent with the overriding objective in three respects; (i) it was consistent with ensuring the parties are on equal footing under CPR r.1.1(2)(a) because foreign parties would be able to claim costs in the same way that domestic parties have always done, (ii) it was expeditious within the meaning of CPR r.1.1(2)(d) and saved costs as per CPR r.1.1(2)(b) because making a costs award directly in the currency in which they have been incurred avoids the need for any currency conversion calculation to be carried out or approved by the court, and (iii) it appeared to be fair under CPR r.1.1(2)d) for the risk of any currency fluctuation in the period between the making of a costs order and the date of actual payment to be borne by the paying party rather than the receiving party as the paying party had the power to eliminate the risk by paying the costs awarded quickly.

In the absence of anything to the contrary it was therefore concluded that the overriding objective supported an interpretation of the word "amount" in CPR r.44.2(1)(b) and r.44.2(6)(b) as including a sum expressed in a foreign currency. Although, the court must ultimately determine which currency truly reflects the claimant's loss and therefore the currency in which it is most appropriate to compensate the receiving party for the costs which it has incurred.

The judge also gave guidance to parties seeking costs awards in a foreign currency. Paragraph 9.1 of Practice Direction 16, which sets out various requirements where a claim is for a sum of money expressed in a foreign currency, does not expressly apply when a party to an existing set of proceedings seeks a costs award. However, a party seeking a summary assessment of costs in a foreign currency ought to provide information on (i) the claim being for payment in a specified foreign currency, and (ii) why payment is being claimed in that currency, as part of the ordinary course of persuading the court to exercise its discretion. There is no need to be prescriptive about the form in which the information ought to be provided, but in most cases it will be by a combination of the form N620, submissions in writing and, in appropriate cases, a witness statement. A sterling equivalent of the sum claimed would also be useful to provide to allow the court to assess the reasonableness of the sums claimed. ■

Davey v Money

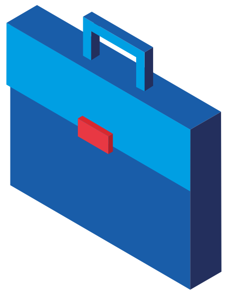
[2019] EWHC 997 (Ch) (Snowden J)
17 April 2019

Costs – litigation funding – non-party costs orders

This judgment principally concerned the application of the so-called "Arkin cap", derived from Arkin v Bochard Lines Ltd (Costs Order) [2005] EWCA Cov 655, which operates to limit the liability of commercial funders for adverse costs.

The application itself arose following the success of the defendants in an action involving serious allegations of breach of duty and improper conduct tantamount to dishonesty. As a result, the claimant was ordered to pay each of the defendants' costs to be assessed on the indemnity basis amounting to a combined amount of £3.9 million. At the same time as the costs orders, the defendants sought a non-party costs order under section 52 of the Senior Courts Act 1981 against the claimant's commercial funder. Whilst the funder accepted that a non-party costs order should be made against it on the same indemnity basis as the costs order made against the claimant (following the decision in Excalibur Ventures LLC v Texas Keystone Inc (No.2) [2017] 1 WLR 2221), it contended that its total liability should be limited to the overall maximum of the funding that it provided to the claimant, namely £1,275,166.34 because of the application of the "Arkin cap" which, it was contended, was a principle meaning that the total liability of a funder should be limited to the overall maximum of the funding it had provided.

In reaching judgment, Snowden J made reference to the Privy Council decision in Dymocks Franchise System (NSW) Pty v Todd [2004] 1 WLR 2807 which was relied on by the court when reaching a decision in Arkin. In Dymocks, Lord Brown first established that the imposition of a third party costs order was ultimately a matter of discretion to be exercised on the basis of what is just in all the circumstances of the case. He explained that there was generally a distinction in approach between (i) cases in which the funder does not take a stake in the outcome of the litigation, and (ii) cases in which the funder does have a financial interest in the outcome of the litigation. In the case of the former, priority is ordinarily given to the public interest in enabling a party who would not otherwise be able to afford to litigate getting access to justice by arranging funding from an outside source. In the case of the latter, the priority is ordinarily that a successful unfunded party should be able to recover his costs and not have to bear the expense of vindicating his rights. Snowden J therefore held that neither Dymock, nor Arkin which followed this, should be taken as having prescribed a rule to be followed in every subsequent case. As Snowden J explained, the Court of Appeal in Arkin merely indicated that this was an approach that could be commended to other judges when exercising their discretion in the future. As Lord Brown had pointed out in Dymock, the ultimate question for the court to answer was what was just in all the circumstances of a particular case. Accordingly, Snowden J concluded that the "Arkin cap" was not a rule or guidance to be applied mechanistically in every case involving commercial funders. It was merely an approach which the court had envisaged might commend itself to other judges exercising their discretion in a similar case. The instant case was an example of when it would be inappropriate to apply the "Arkin cap", and so the application for an uncapped third-party costs order was granted. ■



Commercial Litigation

Digested by Madeleine Jones

Wells (Respondent) v Devani (Appellant)

[2019] UKSC 4 (Wilson, Sumption, Carnwath, Briggs, Kitchin JJSC)
13 Feb 2019

Contracts – certainty – implied terms – estate agents

The Supreme Court considered whether a commission was due to an estate agent upon the sale of several flats. The estate agent, Mr Devani, contacted Mr Wells about the flats which Mr Wells was selling. Mr Devani introduced himself to Mr Wells by telephone and the trial judge found as a fact that he made clear he was acting as an estate agent and for a 2% commission. Subsequently Mr Devani found a buyer for the flats. He then sent Mr Wells his written terms, which contained reference to a 2% commission. The transaction completed, but Mr Wells refused to pay any commission.

Had there been a sufficiently certain agency agreement under which the commission was due?

At first instance, the judge found there had been: although the term regarding commission had only been communicated after the sale had been agreed, and although it did not make clear the event which triggered the payment of commission, it was necessary to imply a term that commission was due upon a sale completing into the agreement reached during the telephone conversation.

On appeal, the Court of Appeal, Arden LJ dissenting, found there had been no binding agreement. Lewison LJ

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held that implication of terms was not a tool for creating a contract where there would not otherwise be one. Identification of a trigger event for the payment of commission was essential for the creation of legal relations. Without such an identification there was therefore no contract, as it is wrong in principle to turn an incomplete bargain into a legally binding contract by adding expressly agreed terms and implied terms together.

In the Supreme Court, Lord Kitchen, with whom Lord Wilson, Lord Sumption and Lord Carnwath agreed, overturned the Court of Appeal's judgment. The law on whether a binding agreement has come into being is set out in RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH [2010] UKSC 14 para 45 per Lord Clarke. It depends upon whether on an objective assessment the parties "intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations." Courts are reluctant to find an agreement is too vague or uncertain to be enforced where it is found that the parties had the intention of being contractually bound and have acted on their agreement.

Lord Kitchen, with whom Lord Wilson, Lord Sumpton, Lord Carnwath and Lord Briggs agreed, found "It is true that, as the judge found, there was no discussion of the precise event which would give rise to the payment of that commission but, absent a provision to the contrary, I have no doubt it would naturally be understood that payment would become due on completion and made from the proceeds of sale" (para 19). This was supported by authority on the commissions of estate agents. The fact that there are no special rules governing the interpretation of estate agency contracts does not change this outcome. There was no need to imply a term as the circumstances made clear what condition was intended and the contract was therefore sufficiently certain and complete. Had it been necessary, Lord Kitchen would have held the term Mr Devani argued for was to be implied for commercial efficacy.

Lewison LJ in the Court of Appeal had been wrong to consider there was a general rule that it is in general impossible to imply terms into a unilateral contract, on the ground that this would impose a contractual obligation before the contract had in fact come into existence by acceptance. Where parties intend to create legal relations and act on that basis, a term may be implied into a unilateral contract where it is necessary to do so to give the agreement business efficacy or the term would be so obvious that "it goes without saying", and where, without that term, the agreement would be regarded as incomplete or too uncertain to be enforceable.

The Supreme Court therefore overturned the judgment of the Court of Appeal but upheld the trial judge's ruling that Mr Devani's entitlement should be reduced by one third as he had provided his written terms after entering into the agency agreement, contrary to s. 18 of the Estate Agents Act 1979. ■

Netherlands v Deutsche Bank

[2019] EWCA Civ 771 (Sir Geoffrey Vos, C, Longmore, Asplin LLJ) 2 May 2019

ISDA Credit Support Annex – construction

The Court of Appeal considered the interpretation of an ISDA Credit Support Annex. The Dutch State Treasury Agency entered into a number of derivatives transactions with Deutsche Bank under an English law ISDA Master Agreement and CSA. Under the CSA DB had to provide cash collateral to cover any credit risk to which the DSTA was exposed. The derivatives were in the money for DSTA and so DB was holding a large amount of cash as collateral. Under the CSA, DSTA had to pay interest on this cash collateral at the rate of EONIA less four basis points. This rate was negative. The Court of Appeal considered whether DSTA could become entitled under the CSA to "negative interest" accruing in its favour.

Hildyard J in Re Lehman Brothers (No 8) [2016] EWHC 2417 (Ch) at [48] had given guidance on the interpretation of ISDA Master Agreements, which the Court followed. Giving the judgment of the Court the Chancellor held that on a proper construction of the CSA, DSTA was not entitled to negative interest, for five reasons.

Firstly, the Chancellor noted that the User's Guide published in 1999 and available to both parties when they entered the transactions makes no reference to negative interest being provided for. Best Practice Guidance published in 2011, 2013 and 2014 suggested that the parties should reach express agreement about the handling of negative interest rates. Although these Best Practice guides were published after the transactions were entered into, the Court had some regard to them.

Secondly, the place in the CSA where one would most expect to find reference to negative interest if it were intended (paragraph 5(c)(ii)) referred only to positive interest.

Thirdly, Interest Amounts were excluded from both the Minimum Payment Amount of €1 million to be paid into the Delivery Account, whereas the interest provision at paragraph 5(c)(ii) required all amounts to be paid. Furthermore, the rounding provisions apply to all amounts in the CSA except Interest Amounts. These provisions would create an inexplicable disparity between the way in which positive and negative interest would be accounted for.

Fourthly, one would have expected, if the parties had negative interest in mind, that paragraph 11(f)(iv), which imposed a penalty on DB for transferring to the wrong account, to provide for the reduction of interest to the lower of zero or a negative rate. It was no answer to say that default interest might be payable, because the provision must have a free-standing effect.

Finally, there was nothing in the CSA read as a whole that gives the impression that negative interest was contemplated or intended. There was no unfairness in excluding negative rates: this is just a function of what was actually agreed and not agreed. ■

Astra Asset Management (UK) Ltd v Co-Operative Bank plc

[2019] All ER (D) 62 (Apr) (Andrew Henshaw QC, sitting as a Deputy High Court judge) 10 April 2019

Contractual relations

The Co-Operative Bank plc (the "Bank") sought a buyer for certain rights (the "Rights"), including a debt secured on a property in Leeds (the "Property"). Astra Asset Management (UK) Ltd ("Astra") came forward as a potential purchaser. The parties entered into preliminary negotiations and agreements as follows: (1) an exclusivity agreement and non-disclosure agreement in January 2017; (2) a telephone conversation in January 2017 in which Astra sought an extension to the exclusivity period; (3) telephone conversations in February 2017 in which the parties discussed issues arising from Standard Life's interest in the property; (4) a second exclusivity agreement in February 2017 extending the exclusivity period to 17 March. The Bank increased the asking price for the Rights and Astra terminated the second exclusivity agreement. The Bank sold the Rights to a third party.

Astra sued the Bank for breaching an alleged contract for sale of the rights to it by selling them to the third party, breach of an alleged express or implied agreement to negotiate in good faith to conclude such a transaction, restitution in unjust enrichment, for services Astra claimed to have provided to the Bank.

The Bank applied for strike out of and/or summary judgment on Astra's claim.

The exclusivity agreements contained the words "subject to contract"; in the absence of any waiver or evidence of contrary intention, these words were decisive and negative contractual intention. The agreements also contained reference to due diligence, prohibitions with engagement with rival potential purchasers in the exclusivity period and consequences of the transaction not being completed. These were inconsistent with a deal having already been completed. The words "subject to contract" also governed the basis of the telephone conversations in February 2017 and in these it was agreed that Astra would provide a written offer to be approved by the Bank's Strategic Asset Review committee. Correspondence following the calls made clear that nothing was agreed until the formal documentation was completed. The February calls therefore also did not create contractual relations. No binding agreement had come into effect.

The Judge also found that no obligation to negotiate in good faith could be spelled out from a recital stating that, "The Buyer and the Seller are entering into this agreement in good faith and are relying on its terms…" and that any obligation to negotiate in good faith was inconsistent with the subject to contract nature of the agreement. There was no arguable ground for implying such a term. There had therefore been no breach of any obligation to negotiate in good faith.

Astra worked to resolve and did resolve difficulties with Standard Life, with the result that the value of the rights rose. The judge found that there was on the evidence an arguable case that the Bank did encourage and facilitate this work. He noted that the law on unjust enrichment is in a state of uncertainty, lacking a clear general principle. He further observed that there may well be a significant difference between cases where the defendant has received a clear benefit, and cases where the claim is merely for costs or losses incurred by the claimant, it is possible that a claim will lie where the defendant has received an incontrovertible benefit even without having actually requested or freely accepted it and it might be sufficient that the defendant has encouraged or facilitated the claimant's performance of the work that produced the benefit. Relevant factors may include the circumstances in which the anticipated contract did not materialise, including whether they include 'fault' on the defendant's part (or – perhaps more relevantly – something outside the scope of the risk undertaken by the claimant at the outset), and whether a defendant who has received a benefit has behaved unconscionably in declining to pay for it.

On this basis, the application for strike out and/or summary judgment failed in respect of the unjust enrichment claim. ■

Ang v Reliantco Investments Ltd

[2019] EWHC 879 (Comm) (Andrew Baker J) 12 April 2019

Jurisdiction – operating as a consumer

Ms Ang made leveraged investments in Bitcoin futures through an online trading platform operated by Reliantco Investmens Ltd, a company incorporated in Cyprus ("Reliantco"). Reliantco terminated her account, and Ms Ang sued for wrongful termination, loss of profit on her open Bitcoin positions or restitution of funds invested. Reliantco challenged the English Court's jurisdiction. Reliantco's standard terms and conditions provided that the courts of Cyprus were to have exclusive jurisdiction over "all disputes and controversies arising out of or in connection with" her customer agreement, and Reliantco therefore relied on Art. 25 of EU Regulation 1215/2012 on jurisdiction, under which a contractual stipulation as to

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jurisdiction is determinative. Ms Ang relied on Art. 18(1), which holds as an exception to Art. 25 that, "A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled."

The Court considered whether Ms Ang, a private individual committing capital to speculative currency transactions in the hope of making investment gains, was a consumer for the purpose of the Regulation. It found that, "the investment by a private individual of her personal surplus wealth (i.e. surplus to her immediate needs), in the hope of generating good returns (whether in the form of income on capital, capital growth, or a mix of the two), is not a business activity, generally speaking. It is a private consumption need, … to invest such wealth with such an aim, i.e. that is an 'end user' purpose for a private individual and is not exclusively a business activity. That means… that it will be a fact-specific issue in any given case whether a particular individual was indeed contracting as a private individual to satisfy that need, i.e. as a consumer, or was doing so for the purpose of an investment business of hers (existing or planned)" [63]. On the facts, Ms Ang was not operating any investment business and was operating as a consumer. Reliantco's challenge to jurisdiction was dismissed. Had Reliantco's challenge succeeded, the English Court would still have had jurisdiction in respect of claim for breach of the General Data Protection Regulation 2016/679, thanks to the provision on jurisdiction in Art. 79. The Court was not impressed with an attempt to argue Ms Ang was not bound by the standard terms because they were not available for her to read: they had been so available. ■

Deutsche Bank AG and others v Unitech Global Ltd and another company; Deutsche Bank AG v Unitech Ltd

[2019] All ER (D) 43 (May) (Knowles J) 15 April 2019

Misrepresentation – standard of proof – reliance

Deutsche Bank ("DB") and other claimants lent funds to the first defendant, Unitech Global Limited ("UGL"), pursuant to a credit agreement and entered into an interest rate swap with it. The second defendant, Unitech Limited ("UL"), UGL's owner and one of India's largest real estate investment and development companies, guaranteed UGL's obligations under the credit agreement and the swap. The claimants sought judgment against UL under its guarantee and indemnity for the amounts outstanding on the loan and swap.

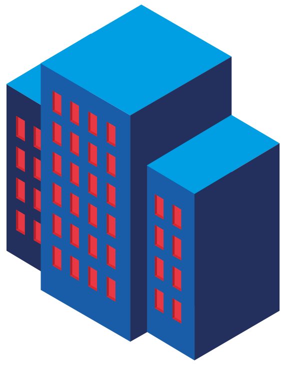
UL claimed it had relied on express and/or implied misrepresentations made by DB before entering into the relevant agreements, claiming that DB had expressly or impliedly represented that the swap and the credit agreement, which hedged the swap, were suitable for UL. However, it alleged, the swap was not a suitable product for UL for a number of reasons, including an alleged mismatch with the credit agreement and an alleged downward trend in 6M USD LIBOR at the time of the trade. Furthermore, DB was said to have made a number of implied misrepresentations about LIBOR and DB's role in setting LIBOR.

However, UL advanced no evidence in support of these defences. The burden was on UL to establish the defences. There was no evidence to support the express representations alleged. Nor was there any evidence that any representation, express or implied, was actually understood or appreciated by UL at the time and hence relied on. In the absence of any evidence of reliance, there was no point considering whether the evidence supported any implied representations. The defences therefore failed. The judge also critised UL for advancing allegations of fraud and then simply leaving, as opposed to withdrawing, them where it did not intend to attend trial to attempt to substantiate them.

Whether the claim succeeded. Unitech first claimed that DB had made various express and/or implied misrepresentations that the swap had been suitable for UGL as a hedge of its liabilities under the credit agreement. Second, Unitech contended that DB had made various implied misrepresentations about LIBOR, and about DB's involvement in the LIBOR setting process, upon which Unitech had relied when entering into the credit agreement and the guarantee and indemnity.

The burden lay squarely on Unitech to establish its misrepresentation defence. It had not done so. There was no evidence, for example, to support Unitech's allegation that any express representation had been made. That would still leave an analysis of whether representations were to be implied. However, there was no value in embarking on that analysis, because the misrepresentation claim had to fail on the grounds of lack of reliance: there was no evidence that any of the alleged representations had been actually understood or appreciated by Unitech at the time (see [41], [42] of the judgment).

Even assuming that the misrepresentation defence had not failed at an earlier stage of the analysis, Unitech had adduced no evidence that anyone at Unitech had been aware; that they actually had understood that DB had been making the alleged suitability recommendation or the alleged representations about LIBOR. As to the latter, it was of note that the communications with DB had not concerned the LIBOR process. In the absence of such evidence, Unitech's claim had to fail. Moreover, to the extent that it was possible to draw inferences from the surrounding circumstances, those circumstances did not help Unitech (see [44], [45] of the judgment). ■



Company Law

Digested by Edoardo Lupi

BTI 2014 LLC v Sequana SA

[2019] EWCA Civ 112 – Court of Appeal (David Richards, Henderson, Longmore LJJ) 6 February 2019

Breach of fiduciary duty – dividends – transaction defrauding creditors

In its judgment in *BTI v Sequana*, the Court of Appeal has provided important guidance as to the point at which the fiduciary duty of company directors to have regard to the interests of creditors in proximity to insolvency arises. David Richards LJ reviewed the authorities on this issue comprehensively. The is now the leading authority on the vexed question of the trigger point for the creditor duty. Further, the Court of Appeal also considered certain requirements of s. 423 of the Insolvency Act 1986 in some detail.

The directors of AWA ("D2") resolved to pay two interim dividends in the sum of €443 million and €135 million to its parent company, Sequana, respectively in December 2008 and May 2009 (the "Dividends"). Prior to the payment of the Dividends, AWA effected a reduction of capital by special resolution supported by a solvency statement in order to free up distributable reserves. The claimant was liable for a series of expenses referable to the clean-up operation of the Lower Fox River in Wisconsin USA. AWA in turn was liable to indemnify the Claimant for the monies it had paid out for these purposes. AWA's accounts made provision for the company's liability to the Claimant during the relevant period.

At first instance, Rose J held that the Dividends were (i) not paid in contravention of Part 23 of the Companies Act 2006; (ii) the decision to pay the Dividends was not a breach by the directors of their fiduciary duties to AWA, in particular the duty to act in the best interest of creditors, because the duty had not arisen at the relevant time; and (iii) the May Dividends contravened s. 423 of the IA 1986 as a transaction defrauding creditors. Sequana appealed the decision in respect of (iii), whilst BTI cross-appealed the dismissal of its breach of duty claim under (ii).

As to (iii), Sequana appealed on the grounds that a dividend is not a "transaction at undervalue" within the meaning of s. 423(1). Second, the May Dividend was not paid with the purpose of putting the dividend monies beyond the reach of BAT or otherwise prejudicing BAT's interests within the meaning of s. 423(3).

Giving the unanimous judgment of the Court, David Richards LJ held that the payment of a dividend was within the scope of s. 423(1) as a matter of linguistic analysis of that section and of the definition of "transaction" under s. 436 (1). Even assuming that payment of a dividend was a unilateral transaction, there was no reason of policy to exclude such a unilateral transaction from the ambit of the s. 423. In any event, it was not right to characterise a dividend as a unilateral act of a company. A dividend is paid pursuant to and in accordance with the rights of the shareholders under the articles. It is a return on an investment, and not "merely a disposition of money which results in one part's money landing up in the bank account of the other" (citing George Bompas QC's words in Re Hampton Capital Ltd [2015] EWHC 1905 (Ch)).

As to the statutory purpose under s, 423(3), this was essentially a question of fact. It was a matter of the subjective intention of the relevant person. David Richards LJ held that there was no basis to dispute Rose J's clear findings as to the statutory purpose. Accordingly, the substantive appeal in respect of s. 423 was dismissed. The Court of Appeal allowed Sequana's appeal on the narrower point of the appropriate starting point from which rate of interest ran.

As to BTI's cross-appeal against the dismissal of its claim that the payment of the May Dividend was a breach of the creditor duty, BTI contended that directors owe a duty to consider the interests of creditors in any case where a proposal involves a real, as opposed to a remote, risk to creditors.

David Richards LJ considered a large volume of authority. His Lordship rejected BTI's case on the relevant trigger point for the duty. A real as opposed to a remote risk of insolvency was a significantly lower threshold than being either on the verge of insolvency or likely to become insolvent. At [220], David Richards LJ said as to the correct trigger point:

"Judicial statements should never be treated and construed as if they were statutes but, in my judgment, the formulation used by Sir Andrew Morritt C and Patten LJ in Bilta v Nazir , and by judges in other cases, that the duty arises when the directors know or should know that the company is or is likely to become insolvent accurately encapsulates the trigger. In this context, "likely" means probable, not some lower test such as that adopted by Hoffmann J in construing the statutory test for the making of an administration order: see Re Harris Simons Construction Ltd [1989] 1 WLR 368" (emphasis added)

Accordingly, the Court of Appeal dismissed BTI's cross-appeal. ■

Company Law

Austin Michael Waldron, Gerard Dermot Waldron, Marian Waldron v Patrick James Waldron, Westshield Limited

[2019] EWHC 115 (Ch) (HHJ Eyre QC) 15 February 2019

Unfair Prejudice – quasi-partnership – equitable constraints

The case concerned a petition under s. 994 of the Companies Act 2006 for unfair prejudice brought against the managing director "R" of a family-owned Company. The petitioners (respectively, "P1", "P2" and "P3) and R were siblings. P3 had ceased to work for the Company for some time before the conduct complained of and had minimal involvement with the Company thereafter.

The petitioners alleged that R breached his fiduciary duties by procuring a company ("T") which he wholly owned and controlled to purchase certain assets from a third-party company in administration ("DCT"). In turn, T had made charges to the Company in respect of assets it had acquired from DCT. R claimed that he had acted with the prior agreement of the petitioners and that his actions benefited the Company. Following an incident P1 and P2 had requested an IT consultant to grant them access to R's email account, they were dismissed by R as employees of the Company. They claimed that their exclusion from involvement in the business was unfairly prejudicial.

The petitioners argued that where there had been an understanding between the members of the Company giving rise to equitable considerations restricting the exercise of R's strict legal powers, in other words, that this was a quasi-partnership type situation. R contended that even if there was or had been such an understanding between some members of the Company, the fact that there were other members who were not party to the understanding meant that the Company could not be regarded as a quasi- partnership. R relied in particular on obiter dicta of Fancourt J in Estera Trust Ltd v Singh [2018] EWHC 1715 (Ch), where his Lordship had expressed doubts as to whether the relevant equitable restraints could arise where there were shareholders who were not parties to the underlying understanding.

HHJ Eyre QC preferred the approach of the Hong Kong Court of Appeal in Re Yung Kee Holdings Ltd [2014] 2 HKLRD 313 on this issue to that of Fancourt J in Estera Trust Ltd v Singh. The crucial question is whether there are any equitable considerations arising from the dealings between the shareholders which call for restraint over the exercise of strict legal rights on the particular facts of the case. The existence of third-party rights and of third-party involvement in and membership of a company can be very significant in deciding whether such equitable considerations are present, but they are not without more determinative of the question.

In light of this conclusion on the law, the Judge held that in the circumstances of the case, the presence of third parties with rights in relation to the Company did not automatically remove the constraints flowing from the understanding between the family members. Accordingly, the equitable restraints remained in place and were effective to constrain R from seeking to exclude P1 and P2 without due cause, and also applied to R's conduct at the time T had acquired the assets of DCT.

The Judge found that P had procured T to purchase assets from DCT when P1 and P2 had been given the impression that it would be the Company doing so, and that R had not obtained their prior agreement. R had acted in breach of his fiduciary duties and his conduct was accordingly unfairly prejudicial. However, P1 and P2 had known about the position in respect of T's acquisition of the DCT assets within a very short time of the relevant events taking place. This amounted to acquiescence in R's conduct which precluded them from obtaining the discretionary relief they sought.

As regards R's dismissal of P1 and P2, the Court found that the dismissal arose due to the latter's attempt to obtain access to R's emails, and not some other motivation on their part. A director is not entitled to see all emails in the course of a company's business, and particularly the emails of a managing director. Further, P1 and P2 had sought access to R's email not to perform their duties but because of their dispute with R. That was behaviour which justified their removal from further involvement in the management of the Company even in the context of the family arrangements. Accordingly, the dismissal of P1 and P2 did not constitute unfair prejudice. ■

Auden McKenzie (Pharma Division) Limited v Amit Patel

[2019] EWHC 1257 (Comm) (Knowles J) 17 May 2019

Share Purchase Agreement – summary judgment/strike out – deceit – Duomatic

The parties made various applications for summary judgment and strike out in proceedings which related to a Share Purchase Agreement ("SPA").

C2 had entered into a share purchase agreement with the Defendants to acquire the shares in the holding company of C1 for the initial consideration of £323.5 million. The underlying litigation to the applications included claim in deceit by C2 and C3 (the assignee of C2's rights under the SPA) in relation to representation made by the Defendants about the financial circumstances of C1 prior to entry into the SPA.

The first matter for Mr Justice Knowles to consider was C1's summary judgment application against D1 for the sum of £13 million odd on the basis that D1 had procured C1 to make offshore payments to accounts owned or controlled by the Defendants. D1 relied on the principle in Re Duomatic, allowing for the approval of all members of a company to ratify a breach. As to this, Mr Justice Knowles said that the payments offshore were procured dishonestly in a way that dishonestly evaded tax consequences. Whatever the precise ambit of the Duomatic principle, C1 could not lawfully do what D1 had procured it to do and the assent of all its members could not alter that. Having considered other objections by D1, Mr Justice Knowles concluded that summary judgment should be granted in respect of the offshore payments.

The second matter related to the earn-out arrangements under the SPA, which provided for additional consideration to be payable to D1. D1 counterclaimed and sought summary judgment from C2 in respect of a sum under the earn-out arrangements. Mr Justice Knowles considered that C2 had a real prospect of success in relation to its contentions based on both the construction of the SPA, and the implication of a term, both of which were to the effect that the additional consideration was not payable.

The third matter, related to no-transfer obligations under the SPA relating to various facets of C1's business, which D1 contended had been contravened. The Claimants relied on an implied term which was said to exclude the application of the no-transfer obligation in circumstances where the divestment in question was required by law. Again, Mr Justice Knowles was not prepared to rule out the existence of such an implied term.

Finally, D1 applied to strike out C2's claim in deceit, or alternatively for summary judgment. D1 contended that C2 had suffered no loss from any fraudulent misrepresentation alleged against it in relation to the SPA, in circumstances where C3 was the assignee of rights under the SPA and had become the ultimate owner of C1. Mr Justice Knowles rejected that the law on this point was clear. His Lordship did not accept at an interlocutory stage that a party cannot show loss where it incurred and retained liability under a purchase transaction, and the purchase price was paid on its behalf by another. Accordingly, D1's application for strike of the deceit claim was dismissed. ■

Katherine Ma Wai Fong v Wong Kie Yik and Ors

(Webster, Nelson SC and Mendes SC JJA) 27 March 2019

Unfair prejudice – section 181 BVI Business Companies Act 2004 – conversion of non-voting preference shares - purpose of conversion – directors' duties – just & equitable winding up – late amendment

Katherine Ma Wai Fong ("Ma") brought proceedings under Section 181I of the BVI Business Companies Act 2004 ("the BC Act") alleging oppression, unfair discrimination and/or unfair prejudice in relation to the conversion of non-voting preference shares held by a BVI company. On the last day of the trial Ma sought to amend her claim to bring independent claims for the appointment of a liquidator of the BVI company under Section 159(1) and 162 of the BVI Insolvency Act on the just and equitable ground. The Judge refused to allow the amendment. He also dismissed the unfair prejudice proceedings. However, he went on to order that the Respondents should nevertheless buy-out Ma's shares in the BVI company.

Ma appealed against both the refusal to allow the amendments and the dismissal of her claim. The main appeal concerned the validity of the conversion. This was primarily an appeal against the Judge's findings of fact. In addition, Ma alleged that the conversion contravened Section 121 of the BC Act in that it was said to be for an improper purpose and that it breached certain shareholders' and/or family agreements and/or that the conversion should be set aside because it breached Section 175 of the BC Act and Section 59 of the Malaysian Companies Act 1959 ("MCA").

The BVI Court of Appeal dismissed the appeal in relation to the amendments and the main appeal and affirmed the orders of the judge. In doing so the BVI Court determined, among other things, that:

1. On an application under the BVI Insolvency Act on the just and equitable ground, once a member of a company satisfied the Court that it is just and equitable to appoint a liquidator for any of the reasons recognised by the decided cases, he can ask the court to appoint a liquidator. A member applying under section 184I of the BC Act for the appointment of a liquidator must satisfy the court that he has been unfairly prejudiced or discriminated against to get just and equitable relief to wind up a company. In this case, Ma was seeking to move from having to prove unfairly prejudicial or discriminatory conduct to get a winding up order on the just and equitable ground, to one where she does not have to prove such conduct only that it is just and equitable to wind up the company. If the proposed amendments were to be granted, Ma would achieve this transition without adequate notice to the Respondents and to the BVI company, and without complying with the statutory regime in the insolvency legislation. The judge was correct to recognise the differences in the procedures and in exercising his discretion to refuse the application.
2. An appellate court is rarely justified in overturning findings of fact which turn on the credibility of a witness as the trial judge would have had the benefit of hearing and seeing the witnesses give their evidence and would be in a far better position than an appellate court to assess their credibility and make findings of fact. However, the appellate court may interfere if it is satisfied that the Judge did not take proper advantage of having seen and heard the witnesses. In this appeal the Judge made several findings of fact which led to the conclusion that Ma was not unfairly treated and the guiding principles relating to assessing a judge's findings of fact apply: Watt (or Thomas) v Thomas [1947] 1 ALL ER 582 applied; Mark Byers and Mark McDonald (as liquidators of Pioneer Futures Company Ltd) v Chen Ningning BVIHCVAP2015/0011, 12 June 2018, followed;

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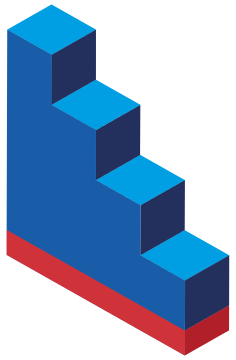
Central Bank of Ecuador v Conticorp [2015] UKPC 11 applied; Jan Harb v Prince Abdul Aziz Bin Fahd Abdul Aziz [2016] EWCA 556 considered.

3. The Judge erred in not giving reasons for his finding on the expert evidence of Malaysian law. The CA, in its discretion, made its own finding. The reasoning and conclusions of the Respondent's expert was preferred. In any event, a breach of Section 59 of the MCA would not be unfairly prejudicial to Ma in her capacity as a member of the BVI company.
4. The exercise of a contractual right to convert shares was not a sale or other disposition of more than 50% in value of the assets of the BVI company so there was no breach of Section 175 of the BC Act. The conversion was also not made outside the usual or regular course of the BVI company's business.
5. Ma was not unfairly prejudiced by any of the other allegations (e.g. non-payment of dividends, withholding of information or breach of any shareholders or family agreement). There was also no basis to interfere with the judge's decision that the BVI company was not operated as a quasi-partnership, and there was no breakdown of trust between the alleged quasi-partners. ■

[David Alexander QC]



Corporate Insolvency

Digested by Ryan Perkins

Re Peak Hotels and Resorts Ltd

[2019] EWCA Civ 345 (Underhill, Henderson and Moylan LJJ) 8 March 2019

Floating charges – section 245 – services supplied

The company had fallen into arrears with its solicitors. On 21 October 2015, the solicitors entered into an agreement with the company for the continued provision of legal services. The agreement provided for a fixed fee of £3.8 million secured by a floating charge. In February 2016, the company entered into liquidation in the BVI. The liquidation was recognised as a foreign main proceeding in England under the Cross Border Insolvency Regulations 2006.

Section 245(2) of the Insolvency Act 1986 provides: "Subject as follows, a floating charge on the company's undertaking or property created at a relevant time is invalid except to the extent of the aggregate of – (a) the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company at the same time as, or after, the creation of the charge …"

Section 245(6) provides: "For the purposes of subsection (2)(a) the value of any goods or services supplied by way of consideration for a floating charge is the amount in money which at the time they were supplied could reasonably have been expected to be obtained for supplying the goods or services in the ordinary course of business and on the same terms (apart from the consideration) as those on which they were supplied to the company."

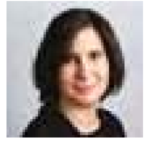
On any view, the floating charge granted in favour of the solicitors was invalid under section 245 save to the extent of the value of the legal services supplied to the company on or after 21 October 2015. The issue related to the valuation of those services. The solicitors argued that the services should be valued at £3.8 million, being the contractua fixed fee. At first instance, that argument succeeded. The Court of Appeal allowed the appeal and rejected the solicitors' analysis.

The Court of Appeal held as follows:

- It was wrong for the judge to focus on the question of what sum was contractually due from the company to its solicitors in return for the relevant services. That question was relevant only to the extent of the solicitors' claim in the liquidation as an unsecured creditor. The relevant issue was the extent to which the solicitors were entitled to enforce the floating charge under section 245(2)(a). For that purpose, what had to be ascertained was the value, calculated in accordance with section 245(6), of the services actually supplied by the solicitors to the company during the relevant period. That is the measure laid down by Parliament to ensure a fair balance between the interests of a chargee, on the one hand, and the interests of the general body of unsecured creditors on the other hand. It has nothing whatever to do with the commercial fairness, as between the company and the solicitors, of the contractual terms of the fixed fee agreement.
- The test is therefore an objective one, and the terms of the fixed fee agreement should be disregarded. Indeed, the whole concept of providing services for a fixed fee is incompatible with the exercise which section 245(6) requires to be performed. That exercise is retrospective, and requires a valuation with the benefit of hindsight of the work which has actually been done.
- For the purposes of the objective test under section 245(6) of the 1986 Act, the words "in the ordinary course of business" are intended to insulate the valuation of the services actually provided from any increase in the supplier's normal charging rates or any special terms of business attributable to the risk of non-payment by the recipient of the services. Further, the calculation of value under section 245(6) cannot include a charge for credit in the form of compensation for delay in payment.

The matter was therefore remitted to the High Court so that the value of the services actually supplied by the solicitors to the company on or after 21 October 2015 could be valued on the basis set out above. ■

[Felicity Toube QC, Stephen Robins]




Lady Moon SPV SRL v Petricca & Co Capital Ltd

[2019] EWHC 439 (Ch) (Mr Murray Rosen QC, sitting as a Deputy Judge of the High Court) 12 March 2019

Recast Judgment Regulation – forum non conveniens – lis alibi pendens

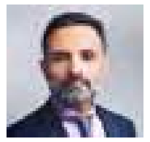
The defendant was an English company which carried on business as the manager of an investment fund. The fund was established under contracts governed by Italian law and regulated by the Italian financial authorities. The contracts establishing the fund provided that the liabilities of the defendant (as asset manager) could only be realised from the fund's assets. The claimant was a creditor of the fund under various defaulted loans which were secured over assets in Italy. It had issued enforcement and attachment proceedings against the defendant in Italy. The defendant maintained that the fund was solvent and that creditors and unitholders would be best served by active management of the fund's assets.

It was expected that the Italian proceedings would take some time to conclude. Accordingly, the claimant issued a parallel Part 8 claim in England under for directions under CPR Part 64 to wind up the fund. The claim was predicated on the proposition that the fund was a trust as a matter of English law. The defendant applied for an order that the Court had no jurisdiction or should not exercise its jurisdiction under the Recast Judgments Regulation (1215/2012).

The Court granted the defendant's application, and held as follows:

- The claim was a civil and commercial matter within Article 1(1) of the Recast Judgments Regulation. However, it fell within the exception under Article 1(2)(b), as it involved proceedings relating to the winding-up of insolvent companies, and so the Recast Judgments Regulation did not apply. Neither did the claim fall within the Recast Insolvency Regulation (2015/848), because the fund was a collective investment undertaking which was excluded from its scope. The "dovetailing" principle, which states that there is no gap between the Recast Insolvency Regulation and the Recast Brussels Regulation, did not have any application in relation to collective investment undertakings.
- Since the proceedings fell outside of the Recast Brussels Regulation, the Court was entitled to consider the issue of forum non conveniens. The defendant's overwhelming connection was with Italy rather than England. The unitholders and creditors must have contemplated an Italian forum and not a winding-up process in the English court. The claimant's claim as a secured creditor over the fund's Italian properties overlapped with, if not duplicated, the Italian proceedings. The claim in England should therefore be stayed.
- Even if that was wrong and the Recast Brussels Regulation applied, the English claim should be stayed under Article 29 of the Recast Brussels Regulation (lis alibi pendens) due to the overlap with the Italian proceedings. ■

[Tom Smith QC, Riz Mokal]

Corporate Insolvency

Re Lehman Brothers International (Europe)

[2019] UKSC 12 (Reed, Carnwath, Hodge, Briggs and Black JJSC) 13 March 2019

Statutory interest – withholding tax

The Supreme Court held that the statutory interest payable to creditors of the company (LBIE) under rule 14.23(7) of the Insolvency Rules 2016 was "yearly interest" under section 874 of the Income Tax Act 2007 and was therefore subject to withholding tax. It was held that statutory interest under rule 14.23(7) is a form of compensation for creditors' loss of use of their money, analogous to interest payable as a result of a judicial decision. The period for which interest is calculated commenced with the date of the administration order and ended with the payment of creditors' debts in full, that being the period during which creditors had been kept out of their money. These characteristics made it impossible to treat statutory interest as anything other than "yearly interest". ■

[Daniel Bayfield QC]

Re Core VCT plc

[2019] EWHC 540 (Ch) (Mr Jeremy Cousins QC, sitting as a Deputy Judge of the High Court) 15 March 2019

Restoration to the register – full and frank disclosure

The former liquidators of three dissolved companies applied to set aside orders restoring those companies to the register. Restoration had previously been ordered by the Court on the application of various minority shareholders. The purpose of restoring the companies to the register was to enable the appointment of new liquidators to investigate an allegation that the former liquidators had acted in breach of duty. At the hearing of the restoration applications, the applicant shareholders informed the judge that they had not served their application on the former liquidators, but mistakenly told the judge that the registrar of companies had been notified of that fact. The former liquidators contended that the restoration orders should be set aside for breaching the duty of full and frank disclosure.

The Court accepted that the applicants for restoration had a duty of full and frank disclosure, but rejected the allegation that the applicants had breached that duty and refused to set aside the restoration orders. The essential ground for the decision is that the former liquidators of the company did not have any interest in the restoration applications, and they had no entitlement to participate in or be heard at the hearing of those applications. That being so, any failure of disclosure could not have been material. ■

Bundeszentralamt v Heis

[2019] EWHC 705 (Ch) (Hildyard J) 22 March 2019

Appeal against rejection of proof – stay of proceedings

This case deals with the principles governing the grant of a stay in the context of an appeal against the rejection of a proof of debt.

The company had rejected the proofs lodged by two creditors: the German tax authorities (the "GTA") and Deutsche Bank. The GTA's claim was for the recovery of withholding tax refunds paid to the company prior to its entry into administration. It was contended by the GTA that the refunds had been obtained by the company on a false basis which was contrary to the applicable German tax legislation. Deutsche Bank's claim was for an indemnity from the company on the basis that it had acted as the company's agent when submitting the claims for tax refunds and was therefore at risk of a claim by the GTA. The company rejected both proofs, and the creditors appealed. The creditors then applied for a stay of their appeals in order to allow the determination of various issues by the German courts.

Hildyard J granted a stay of the GTA's appeal, but declined to grant a stay of Deutsche Bank's appeal. In relation to the GTA, Hildyard J relied on the following factors (inter alia) in support of his decision to grant a stay of the appeal:

- There was a risk of inconsistent judgments as a result of the parallel legal proceedings in England and Germany which involved broadly the same issues.
- The issues of German law were fundamental and of systemic importance. Other things being equal, it would be preferable for such issues to be determined by the German courts.
- Although a stay would result in a delay to the conclusion of the administration, creditors had already received substantial distributions. This reduced the concerns arising from delay.

In relation to Deutsche Bank, Hildyard J relied on the following factors (inter alia) in support of his decision to refuse a stay of the appeal:

- It was arguable that part one of Deutsche Bank's claim was barred by the rule against double proof (although no such bar would apply to the other part of Deutsche Bank's claim).
- If the GTA withdrew its proof, then Deutsche Bank would be entitled to re-submit its proof (to the extent that it had previously been barred by the rule against double proof) and any distribution attributable to the withdrawn proof would become payable to Deutsche Bank.
- There were not yet any parallel proceedings against Deutsche Bank in Germany. Moreover, there was a possibility of enabling a determination of Deutsche Bank's appeal in England without recourse to issues of German tax law which were to be decided in the GTA proceedings. ■

[Gabriel Moss QC, Tom Smith QC, Daniel Bayfield QC, Richard Fisher, Adam Al-Attar, Andrew Shaw]






Re Toisa Ltd

(ICC Judge Burton) 29 March 2019

Cross Border Insolvency Regulations - COMI

Toisa Ltd ("Toisa") was registered in Bermuda. Chapter 11 proceedings were commenced in the Southern District of New York on 29 Jan 2017 in respect of Toisa. In March 2019, the foreign representative, appointed by the US Bankruptcy Court, applied for recognition to the ICC Court in London under the Model Law. There was a potential question on the evidence filed as to whether the COMI of Toisa was in the USA when the Chapter 11 filing took place in 2017, albeit it was clear that the COMI of Toisa was in the USA at the time of the application for recognition in London in March 2019.

The facts established that after the Chapter 11 filing, there was no doubt that the affairs of Toisa (an international shipping company) had been managed from New York, to the knowledge of relevant third parties and creditors. As at the time of the Chapter 11 filing, it was likely, but not absolutely certain, that the COMI or an establishment was in New York.

Upon consideration of the facts, and the application, and upon considering whether an applicant for recognition must establish COMI in the local jurisdiction at the time of the opening of the foreign proceedings, or whether it was sufficient if the COMI was in place in the local jurisdiction at the time of the recognition application: held by ICC Burton on 29 March 2019 that for Cross Border Insolvency Regulations purposes, the time at which the COMI or establishment of the requesting entity should be determined was the time of the application for recognition, and not the time of the original local foreign insolvency filing. She held this approach was consistent with the wording of the Model Law, which utilised the present tense in Articles such as Art 17 (2)(a) ("if it is taking place in the State where the debtor has" its COMI), repeated by the present tense used in Art 17 (2)(b) as regarded an establishment (along with other passages in the Model Law using similar wording), and thus it was appropriate to construe the Model Law as allowing the English Court to recognise foreign proceedings even where the COMI or establishment was not at the place of the local process upon the opening of proceedings, but was in place by the time of the recognition application. This approach was also sensible, bearing in mind a Chapter 11 process in New York could be started without the need for the COMI to be in New York, and it would be unfortunate if the Chapter 11 could not be recognised in England and Wales because of this. The Court also took account of the decision of the Second Circuit in Re Fairfield Sentry Ltd, Morning Mist Holdings Ltd v Krys 714 F 3d 127 (2nd Circuit, 2013), where it was held that the debtor's centre of main interests for the purposes of Chapter 15 should be determined at the time the Chapter 15 case was commenced. ■

[Adam Goodison]

Re Strand Capital Ltd

[2019] EWHC 1346 (Ch) (Henry Carr J) 2 April 2019

Special administration – client assets – distribution plan

On 2 April 2019, Henry Carr J sanctioned a distribution plan for the return of client assets held by Strand Capital Limited, an entity in special administration under the Investment Bank Special Administration Regulations 2011 (the "IBSA Regulations"). The plan was supported by the FSCS (and not objected to by the FCA).

This is the fourth (known) distribution plan to be approved under the IBSA Regulations, following that sanctioned in Re Beaufort Asset Clearing Services Limited [2018] EWHC 2287 (Ch). The distribution plan was formulated and proposed in accordance with Chapter 3 of Part 5 of the Investment Bank Special Administration (England and Wales) Rules 2011.

Strand operated principally as a discretionary investment fund manager, in the course of which it held client assets and client money. The plan was proposed as a procedure pursuant to which client assets – having an indicative (aggregate) valuation of approximately £248 million – could be

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returned to clients who are entitled to them. The asset classes comprised both electronically-held securities (held via a number of third party custodians) and physically-held bond certificates.

The Judge was persuaded that the terms of the plan represented a fair, reasonable and efficient means of returning client assets: in particular, that the terms governing the allocation of the overall costs associated with returning client assets were fair. As to the cost allocation methodology (into which the FSCS had significant input), the Judge accepted that, as a matter of principle in this particular case, it was fair to allocate the Objective 1 costs (within the meaning of the IBSA Regulations) amongst clients on a fixed, per capita basis (as opposed to a rateable charge by reference to the value of assets in each account). ■

[Georgina Peters]

Yuri Rozhkov v Larisa Markus

[2019] EWHC 1519 (Ch) (Marcus Smith J) 10 May 2019

Fraud – Cross Border Insolvency Regulations 2006 – ancillary relief

Yuri Rozhkov ("YR"), the Russian financial manager and bankruptcy trustee of Larisa Markus ("LM") applied for recognition of LM's bankruptcy in England under the CBIR 2006 ("CBIR"), and associated relief. LM was the founder, shareholder and president of Vneshprombank, a Moscow-based bank ("the Bank"). In 2017 she pleaded guilty to a £1.3 billion fraud on the Bank and was sentenced to 8.5 years' imprisonment. YR had been granted Chapter 15 recognition in the US in February 2019. In March 2019 a £1.3 billion fraud claim was issued in London against LM's brother, Georgi Bedzhamov ("GB") in the Business and Property Court, Business List (ChD). A worldwide freezing order and a wide-ranging search order was granted by Arnold J, as well as provisional relief under the CBIR. YR applied for further interim relief against GB under the CBIR and against GB/the Bank under r 31.22 of the CPR.

On hearing the recognition application, Marcus Smith J granted recognition, applying the jurisdictional requirements in the CBIR (Re Agrokor [2018] EWHC 348 applied). The judge also considered applications for information/documents under Article 21(1)(d), Schedule 1 of the CBIR against two firms of solicitors, Dallas & Co ("D&C") and Jaffe Porter Crossick ("JPC"), both of which had been involved in the sale of a substantial property in Knightsbridge, which had completed only 2 days before the orders of Arnold J. The judge granted this further relief on the basis that it was a paradigm case where a court should exercise its discretion in favour of a foreign representative. ■

[William Willson]

Re Sturgeon Central Asia Balanced Fund Ltd

[2019] EWHC 1215 (Ch) (Falk J) 17 May 2019

Cross Border Insolvency Regulations 2006 – definition of "foreign main proceedings" – just and equitable winding-up

Under the Cross-Border Insolvency Regulations 2006, a "foreign main proceeding" is defined as "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation". The issue in the present case was whether a just and equitable winding-up of a solvent company under the law of Bermuda fell within that definition.

The obvious potential difficulty is that a just and equitable winding-up is not predicated on the financial position of the company, and is often initiated for companies that are entirely solvent. Thus, the issue was whether a just and equitable winding-up of a solvent company can be commenced "pursuant to a law relating to insolvency".

Falk J answered that question in the affirmative and recognised the Bermudian winding-up as a foreign main proceeding under the Regulations. In reaching that conclusion, Falk J considered the travaux and the authorities in some detail. She stated as follows:

- It is clear from the preamble to the UNCITRAL Model Law that its focus is on cross-border insolvency. The objectives are clearly set out, including increased cooperation, greater certainty and fair and efficient administration of cross-border insolvencies. There is however a specific reference to "financially troubled businesses", a term which is not defined but may include businesses that are not necessarily insolvent.
- It is also clear from the UNCITRAL travaux that there was a deliberate choice to focus on the question of whether the relevant proceeding was commenced pursuant to a law relating to insolvency, rather than using the concept of an insolvency proceeding or even defining insolvency. The latter alternative was rejected by UNCITRAL as not being feasible.
- Even in the context of financially troubled businesses, it was clearly intended that a recognising court should be in a position to recognise a foreign proceeding where it does not know the precise extent of the entity's financial problems, and in particular does not know whether it is in fact insolvent.
- The fundamental question is whether the Court can recognise a foreign liquidation as a "foreign main proceeding" where there is uncontradicted evidence before the court that the entity is (at least currently) solvent, and/or where it is clear that the purpose, or principal purpose, for which liquidation is sought is not to realise assets for creditors but instead to distribute surplus assets to shareholders.
- The answer to this question lies in the fact that the Bermudian legislation can be described as a "law relating to insolvency", since it includes other grounds for winding-up which require proof of insolvency. On that basis, a just and equitable winding-up of a solvent company can be treated as a "foreign main proceeding" under the Regulations. ■

UBS AG v Fairfield Sentry Ltd

[2019] UKPC 20 (Reed, Hodge, Briggs, Arden and Kitchin JJSC) 20 May 2019

Anti-suit injunctions – cross border insolvency – declaratory relief

This is another case arising out of the Madoff fraud. The company was being wound up in the BVI and had operated as a feeder fund within the Madoff empire. The liquidators of the company were taking steps to recover payments that had been made to certain investors prior to the collapse of the Ponzi scheme. These payments were sought to be recovered as voidable transactions under section 249 of the BVI Insolvency Act 2003, which empowers "the court" to grant appropriate relief after setting aside a voidable transaction. The liquidators commenced proceedings in the USA against a number of defendants and sought to obtain relief from the US court in the exercise of its jurisdiction to assist foreign insolvency proceedings. In particular, the liquidators argued that the US court had the power to apply BVI law and award relief under section 249 of the BVI Insolvency Act 2003.

The appellants were defendants to the actions brought by the liquidators in the US. They argued that the proceedings ought to have been brought in the BVI rather than the US. This argument was founded on the proposition that section 249 only conferred powers on the BVI court – not the US court. On that basis, the appellants sought an anti-suit injunction to restrain the proceedings in the US and/or a declaration as to the meaning of "the court" in section 249.

The Privy Council dismissed the appeal and held as follows:

- On its true construction, section 249 did not preclude a foreign court from granting relief. It was a question for the relevant foreign court whether it could grant assistance to the BVI court by applying section 249 or otherwise.
- The application for an anti-suit injunction was misconceived. Such an injunction would be contrary to comity and would undermine the enforcement of the BVI's insolvency regime overseas.
- The application for declaratory relief was likewise misconceived – both for the reasons set out above, and for the additional reason that the BVI court did not have the role of giving an advisory opinion to the US court at the request of a defendant in the US proceedings, particularly in circumstances where the US court treated foreign law as a matter of law rather than a question of fact. ■

[Gabriel Moss QC, Tom Smith QC, Henry Phillips]



Re British Steel Ltd

[2019] EWHC 1304 (Ch) (Snowden J) 22 May 2019

Winding-up petition – appointment of special managers – "Carillion" order

In this case, the Court made a winding-up order in relation to British Steel. The Official Receiver was appointed as liquidator, and partners of EY were appointed as special managers. In order to ensure that the winding-up could commence as quickly as possible, the Court dispensed with the requirement for advertisement and other formalities under the Insolvency Rules 2016. This approach was recently adopted in the Carillion insolvency, and the judgment follows that approach. Special managers had previously been an obscure part of insolvency law. The judgment explains the basis for the appointment of special managers and the reasons why it was appropriate to dispense with the usual formalities under the Insolvency Rules 2016. ■

[Lloyd Tamlyn, Adam Goodison]


Corporate Insolvency

Granada UK Rental & Retail Ltd & others v (1) The Pensions Regulator and (2) Box Clever Trustees Ltd

[2019] EWCA Civ 1032 (Patten, Newey and Males LJJ) 20 June 2019

Pensions Act 2004 – moral hazard – associated companies

The Box Clever group of companies was established between 1999 and 2000 as a joint venture between the Granada group of companies (Granada) and the Thorn group. The joint venture was formed against a background of a decline in the market for rented televisions, and the decline was viewed as likely to continue. The acquisition by the joint venture of the TV rental businesses of Granada and Thorn (for £980m) was financed in large part by a loan secured against the assets of the companies in the Box Clever group pursuant to the terms of a debenture. The joint venture did not prosper and administrative receivers were appointed to a number of the Box Clever companies in September 2003 and thereafter. At that time, the Box Clever pension scheme had a deficit of some £25m, which has since increased to £115m.

In September 2011, the Pensions Regulator issued a Warning Notice to various Granada companies (the Targets) specifying a look-back date of 31 December 2009, followed by its determination to issue a Financial Support Direction (FSD) on 21 December 2011.

The Targets made references under section 103 of the Pensions Act 2004. The case raises very interesting issues relating to the retrospective effect of the FSD provisions of the Pensions Act 2004, as well as the reasonableness of issuing an FSD in circumstances where the circumstances relied on were said to pre-date the time the Pensions Act came into force.

Relevantly for the purposes of this summary, however, the Targets contended (amongst other things) that there was no jurisdiction to issue an FSD because, as at 31 December 2009, they were not "connected" or "associated" with the Box Clever employers for the purposes of s 43(6)(c) of the Pensions Act, applying (by virtue of s 51(3)) s 435(7) and (10)(b) of the Insolvency Act 1986 (the Association Issue).

Section 435(7) provides that a company is an associate of another person "if that person has control of it ..."

Section 435(10)(b) provides that: "For the purposes of this section a person is to be taken as having control of a company if ... (b) he is entitled to exercise, or control the exercise of, one third or more of the voting power at any general meeting of the company or of another company which has control of it ..."

The Box Clever employers comprised a trio of companies (the Trio) and TUK Holdings Ltd (TUK). The parent company of the Trio and (indirectly) TUK was Box Clever Holdings Ltd.

The Targets accepted that they were associates of Box Clever Holdings at the relevant date, 31 December 2009. The question was whether the association between Box Clever Holdings and (i) the Trio and (ii) TUK, had been severed at that time, so as to sever the Targets' own association with them. The Targets argued that the association had been severed because:

- In the case of the Trio, the right of Box Clever Holdings to direct how the shares in the Trio should be voted terminated automatically on the occurrence of a declared default, without the need first for notice to be served by the debenture-holder (the Debenture issue).
- Alternatively, in the case of the Trio, and also in relation to TUK, notice was given by the debenture-holder in the terms of its demand made on guarantors (the Notice issue).
- In the case of TUK only, the association was severed because the intermediate holding companies between Box Clever Holdings and TUK had been placed in administrative receivership and remained so on 31 December 2009 (the Administrative Receivership issue). The Targets relied by analogy on *In re Kilnoore Ltd, Unidare plc v Cohen* [2006] Ch 489 (*Unidare*), which decided that it was necessary to look to the economic reality of the case, such that a registered shareholder who holds shares on a bare trust under which he is required to cast his vote in accordance with the directions of the beneficial owner is not to be regarded as having control of the company for the purposes of s 435(10)(b). So here (it was argued) control was vested in the Administrative Receivers, or the security agent for the debenture-holder, TUK's parents having no control in any real sense.

The Upper Tribunal (Tax and Chancery Chamber) rejected the Target's objections for the reasons fully stated in its decision reported at [2018] UKUT 0164 (TCC), but granted permission to appeal on all issues to the Court of Appeal.

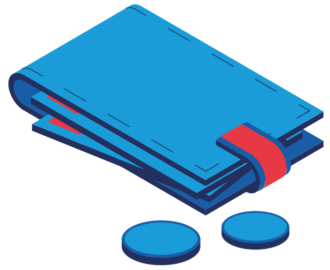
The Court of Appeal has now dismissed the Targets' appeal. Its reasons for rejecting the appeal on the Association Issue were, in summary, as follows:

- The Debenture issue: On the true construction of the relevant clauses of the Debenture, the right of Box Clever Holdings to direct how the shares in the Trio were to be voted did not terminate automatically on the occurrence of a declared default. Its right to do so would terminate only upon the service of notice. Accordingly, the association with the Trio was not severed automatically upon a declared default.
- The Notice issue: On its true construction, the demand made on the guarantors did not constitute notice that the debenture-holder thereby assumed (in place of Box Clever Holdings) the right to direct how the shares in the Trio should be voted. In the absence of such notice, the association with the Trio had not been severed. There being no such notice, the association with TUK was not severed either.
- The Administrative Receivership issue: The fact that administrative receivers remained in office in respect of TUK and the intermediate holding companies between it and Box Clever Holdings did not sever the association. The approach adopted in *Unidare* was disapproved as it "conflates entitlement 'to exercise ... voting power' and entitlement to 'control the exercise of ... voting power'". While the latter may be judged by reference to the position as between the registered shareholder and the controller of the voting power, the former naturally falls to be determined by reference to the position between the registered shareholder and the company itself. The fact that it would doubtless have been the Administrative Receivers who would have decided how the shares in TUK should be voted was neither here nor there: they would have been voting in the parent's name and on its behalf. That being so, each of the intermediate holding companies remained in control of TUK for the purposes of s 435(10)(b). So too did Box Clever Holdings and, with it, the Targets too.

Permission to appeal to the Supreme Court has been refused by the Court of Appeal. ■

[Gabriel Moss QC, Mark Arnold QC]


Gabriel Moss QC appeared in the Upper Tribunal for the Pensions Regulator, for whom Mark Arnold QC appeared in the Court of Appeal.



Personal Insolvency

Digested by Lottie Pyper

Simon Matthew Gwinnutt (as the First Respondent's Trustee in Bankruptcy) v Nicholas Frank Raymond George, Michael Ryan

[2019] EWCA Civ 656 (Newey, Singh and Baker LJJ) 12 April 2019

Barristers – fees – legitimate expectation – trustees in bankruptcy – vesting

Barristers used to be prevented from entering into a contract with solicitors, and instead worked on a non-contractual honorarium with no right to sue for their fees. This case required the court to consider whether fees due to a barrister pursuant to an honorarium vest in a trustee in bankruptcy upon the making of a bankruptcy order. The question was whether the fees due to the barrister fell within the definition of 'property' such that they were caught by section 306 of the Insolvency Act 1986.

The court noted that the definition of 'property' for the purpose of the Insolvency Act 1986 was deliberately wide, and that the public policy underlying the act was to divest a bankrupt of all of his property, save for specific statutory exceptions, in order to enable it to be distributed to creditors.

It was therefore held that, even though the barrister had no contractual right to recover his fees, nor any means of legal enforcement, he still had more than a mere hope that he would be paid. The court considered that, in reality, a solicitor would consider himself under more than a purely moral obligation to pay the barrister, and in the majority of cases would do so. Further, the solicitor himself had a right to sue the client to recover his fees, including any payments made to counsel. The court also noted that the barrister was not entirely without remedy, as he could add the solicitors' name to the Bar Council's 'Withdrawal of Credit' Scheme. It was therefore held that the fees are 'property' within the Insolvency Act 1986, and so vest in the trustee in bankruptcy, and that any other result would be entirely anomalous.

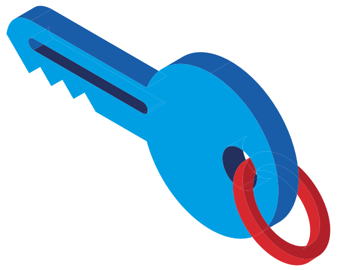
It was also noted, *obiter*, that, as barristers would likely have a 'legitimate expectation' of being paid their fees, it was likely that the barristers fees pursuant to an honorarium fell within the definition of 'possessions' for the purpose of the European Convention of Human Rights. ■

Promontoria (Chestnut) Ltd v Bell & Bell

[2019] EWHC 1581 (Ch) (Zacaroli J) 20 June 2019

Statutory Demands – meaning of "Security"

The appellant appealed against the setting aside of statutory demands it had served against the respondents. The respondents were shareholder/directors who entered a personal guarantee in respect of a loan facility the company obtained from a bank, limited to £170,000. The loan facility was also secured over company property. In addition, the respondents executed third-party mortgages over properties they owned to secure the facility. The appellant sent demand letters to the respondents demanding £170,000 under the personal guarantee, and then statutory demands. The demands were set aside on the basis that the appellant held some security in respect of the debt and, contrary to rule 6.1(5) of IR86, it did not specify the nature and value of the security. The appellant submitted that the security it held over the respondents' properties by way of the third-party mortgages was in respect of the company's indebtedness and did not secure the personal debt the respondents owed under the guarantee. Held that "Security in respect of the debt" in rule 6.1/6.5 of IR86 should be given the same meaning as the phrase "security for the debt" in Section 383 of IA86. Applying long-standing principle (see White v Davenham Trust [2011] EWCA Civ 747), the definition of secured creditors could extend to circumstances such as the instant case, where the creditor held security in respect of another party's debt. The security and the guarantee liability were rooted in the same debt. If the appellant gave up its security, that would augment the respondents' estates if they became bankrupt. The fact that recourse to the security over the respondents' property would discharge the personal debt owed by them was a powerful indication that the third-party charges were security "for" or "in respect of" the guarantee debt. In terms of the liability under the guarantee being less than the amount of the company's debt, the appellant would be entitled to participate in the bankruptcy of the respondents to the extent of the shortfall between the debt owed by the company and the value of the security over the guaranteed property. ■



Property and Trusts

Digested by Andrew Shaw

Wood v Watkin

[2019] EWHC 1311 (Ch) (ICC Judge Barber) 24 May 2019

Resulting trusts – presumption of advancement

This was an application by the trustees in bankruptcy of Mr Karl Watkin against Mr Watkin's daughter, Kate Watkin in relation to three properties. These properties had been purchased by Kate Watkin in her sole name. The trustees alleged that at all material times, Mr Watkin had been the sole beneficial owner of these properties "on resulting trust principles" by reason of his having provided the purchase moneys.

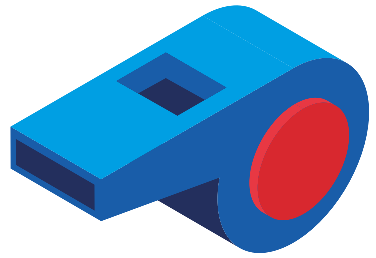
The judge found that the properties were purchased with the benefit of moneys from an account in the joint names of Mr Watkin and this wife, Jill Watkin. It was submitted by Gabriel Moss QC, acting for Kate Watkin, that a presumption of advancement had arisen in Kate Watkin's favour such that the presumption of a resulting trust was displaced by the presumption of advancement.

The judge reviewed the law on resulting trusts and the presumption of advancement. She noted that the starting presumption is that if A purchases a property for a stranger, B, with his own money then there is a presumption that B will hold the property on trust for A. However, if B is the wife, daughter or son of A, then the presumption of resulting trust may be displaced by a presumption of advancement i.e. that a gift was intended.

The trustees argued that the presumption of advancement should be restricted to minor children or, if it did apply to children over 18, it only applied to those who were still financially dependent on their parents. The judge rejected these submissions, holding that while the presumption of advancement might be weaker (i.e. more readily rebuttable) in the case of an adult child who was financially independent, it would still apply.

The trustees also argued that the presumption of advancement between parent and child was very weak in modern times, relying on Lavelle v Lavelle [2004] EWCA Civ 223. The judge rejected this submission, distinguishing Lavelle v Lavelle on the grounds that it concerned a presumption of advancement in relation to matrimonial property. She held that Shepherd v Cartwright [1955] AC 431 remained good law.

The trustees also maintained that the presumption had been rebutted in the present case. On analysis of the facts, the judge held that the presumption of advancement applied in the case of two properties and in the case of the third, there was clear contemporaneous evidence that Mr and Mrs Watkin did not intend to retain any beneficial interest. She dismissed the application. ■



Sport

Digested by Robert Amey

The English Football League v Birmingham City Football Club

EFL Disciplinary Commission, 22 March 2019

Breaches of the Championship Profitability and Sustainability Rules – appropriate sanction

Breaches of the Championship Profitability and Sustainability Rules – appropriate sanction

A football club wishing to gain a competitive advantage might be tempted to spend excessive amounts on player acquisitions and employee benefits in order to attract 'star players'. If this spending went unchecked, other clubs would either suffer a competitive disadvantage, or would have to spend similar amounts which they might be unable to afford in the long-term. Ultimately, the long-term viability and sustainability of club football would be threatened. Accordingly, financial fair play rules restrict the extent to which clubs can overspend and operate at a loss.

In the case of clubs competing in the English Football League, the EFL's Profitability and Sustainability (P&S) Rules prevent clubs from incurring losses over a particular threshold. Birmingham City Football Club (the Club) was accused of exceeding the relevant threshold over a monitoring period comprising seasons 2015/16, 2016/17, and 2017/18.

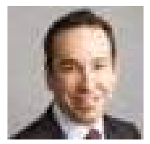
In the Club's case, the relevant threshold was £39 million, but the aggregate loss over the monitoring period was over £48 million, most of which had been incurred toward the end of the monitoring period. This was mainly accounted for by the expensive acquisition of players in the January 2017 and summer 2017 transfer windows. In January 2017 the manager Gianfranco Zola had signed four new players at a total cost of £7.45 million. In the summer 2017 transfer window the new manager Harry Redknapp had made 9 permanent signings and brought in 5 loan players at a total cost of £23.75 million.

In its initial response to the allegations, the Club had blamed its managers for the overspending. However, the Club later accepted that the Club's owner had agreed the transfer budgets available to the managers, with no controls imposed on the salary terms which could be offered to new players.

In determining sanction, the Commission held that it was unnecessary for the EFL to prove that the overspending had conferred a "measurable sporting advantage". Any substantial overspending was, in principle, detrimental to the interests of other clubs which comply with the rules, and therefore unfair. According to the sanctioning guidelines, the starting point in this case (where the Club had exceeded the threshold by around £9 million) was a points deduction of 7 points.

The Commission then took into account various aggravating factors. The Club had given inconsistent accounts of how the breach came to take place, and was found to have committed a serious, intentional breach, which had got progressively worse over time. The Commission therefore imposed a deduction of 9 points for the 2018/19 season, noting that this was equivalent to 3 wins in competition. ■

[Daniel Bayfield QC]



Remedies for *Unfair Prejudice*

DAVID ALEXANDER QC   ADAM GOODISON

David Alexander QC and Adam Goodison consider the remedies available to the Court when it is satisfied that an unfair prejudice petition is well founded and, in particular, share purchase orders.

In the last edition of the Digest, we reviewed the unfair prejudice legislation in England and Wales. In this article, the remedies for unfair prejudice are set out in more detail, with particular emphasis on share purchase orders and the many other matters which a court may have to decide when making such an order.

If the court is satisfied that an unfair prejudice petition presented pursuant to Section 994 of the Companies Act 2006 ("the 2006 Act") is well founded it may make such order as it thinks fit for giving relief in respect of the matters complained of: Section 996(1) of the 2006 Act.

Section 996(2) of the 2006 Act then provides a non-exhaustive menu of remedies. For it provides that

"without prejudice to the generality of subsection (1), the court's order may–

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

b) require the company –

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

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

c) authorise civil proceedings to be brought in the name of 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 in 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 share capital accordingly."

A number of matters are worth highlighting:

1. There must be a finding of unfair prejudice or there is no power to grant relief at all: *Re Bird Precision Bellows Ltd* [1986] Ch 658; *Re a Company (No 007623 of 1984)* [1986] BCLC 362 at 368b; *Re a Company (No 004175 of 1986)* [1987] 1 WLR 585 at 588G-H.

2. Once there has been a finding of unfair prejudice the court's remedy is a discretionary one. In that respect the court has a wide power as to what, if any, relief is to be granted: *Re Bird Precision Bellows Ltd* [1986] Ch 658 at 669D-E where Oliver LJ said that the effect of the equivalent predecessor section "is to confer on the court a very wide discretion to do what it considered fair and equitable in all the circumstances of the case ..." and *Profinance Trust SA v Gladstone* [2002] 1 WLR 1024 at [18]. The court even has power to grant no relief at all: *Re Hailey Group Ltd* [1993] BCLC 459 at 473h; *Amin v Amin* [2009] EWHC 3356 (Ch) at [587]; *Re Full Cup International Trading Ltd, Antoniades v Wong* [1995] 2 BCC 682 at 694C-D; *Re Sunrise Radio Ltd* [2010] 1 BCLC 367 at [10] "...it does not follow even where unfair prejudice is established, that the court will necessarily grant relief. There will be cases where the court concludes that the unfair prejudice is not sufficiently serious to justify its intervention ...".

3. The discretion must be exercised judicially and on rational principles: *O'Neill v Phillips* [1992] 2 BCLC 1.

4. Where unfair prejudice is established, the court must consider the whole range of possible remedies and choose the one which, on its assessment of the existing state of relations between the parties, is most likely to remedy the unfair prejudice: *Grace v Biagioli* [2006] 2 BCLC 70 at [73]-[74].

5. The remedy must be proportionate to the unfair prejudice: *Re Phoenix Office Supplies Ltd* [2003] 1 BCLC 76; *Re Neath Rugby Club* (No 2) [2007] EWHC 2999 (Ch) at 246; *VB Football Assets v Blackpool Football Club* [2017] EWHC 2767 (Ch) at [447].

6. The Petitioner should specify in the petition the relief sought: *Re Antigen Laboratories Ltd* [1951] 1 All ER 110 ("From the prayer of the petition... it is impossible to know what the petitioner wants...The Prayer...must ...contain enough to leave no doubt what the petitioner desires the court to do") . The petition should also include a prayer for such other order as the court thinks fit: *Re J E Cade & Son Ltd* [1992] BCLC 213 (at 223). The court is not, however, limited to granting the relief which the petitioner has sought: *Hawkes v Cuddy, Re Neath Rugby Ltd* [2009] 2 BCLC 427 at [88]-[91]; VB *Football Assets v Blackpool Football Club* [2017] EWHC 2767 (Ch).

7. The relief sought must be appropriate to the conduct of which the petitioner has companied: *Re J E Cade and Son Ltd* [1992] BCLC 213.

8. The court will consider the appropriate relief at the time of

the hearing of the petition not as at the time when the petition was presented: *Re Hailey Group Ltd* [1993] BCLC 459; *Re Little Olympian Each-Ways Ltd* (No 3) [1995] 1 BCLC 636.

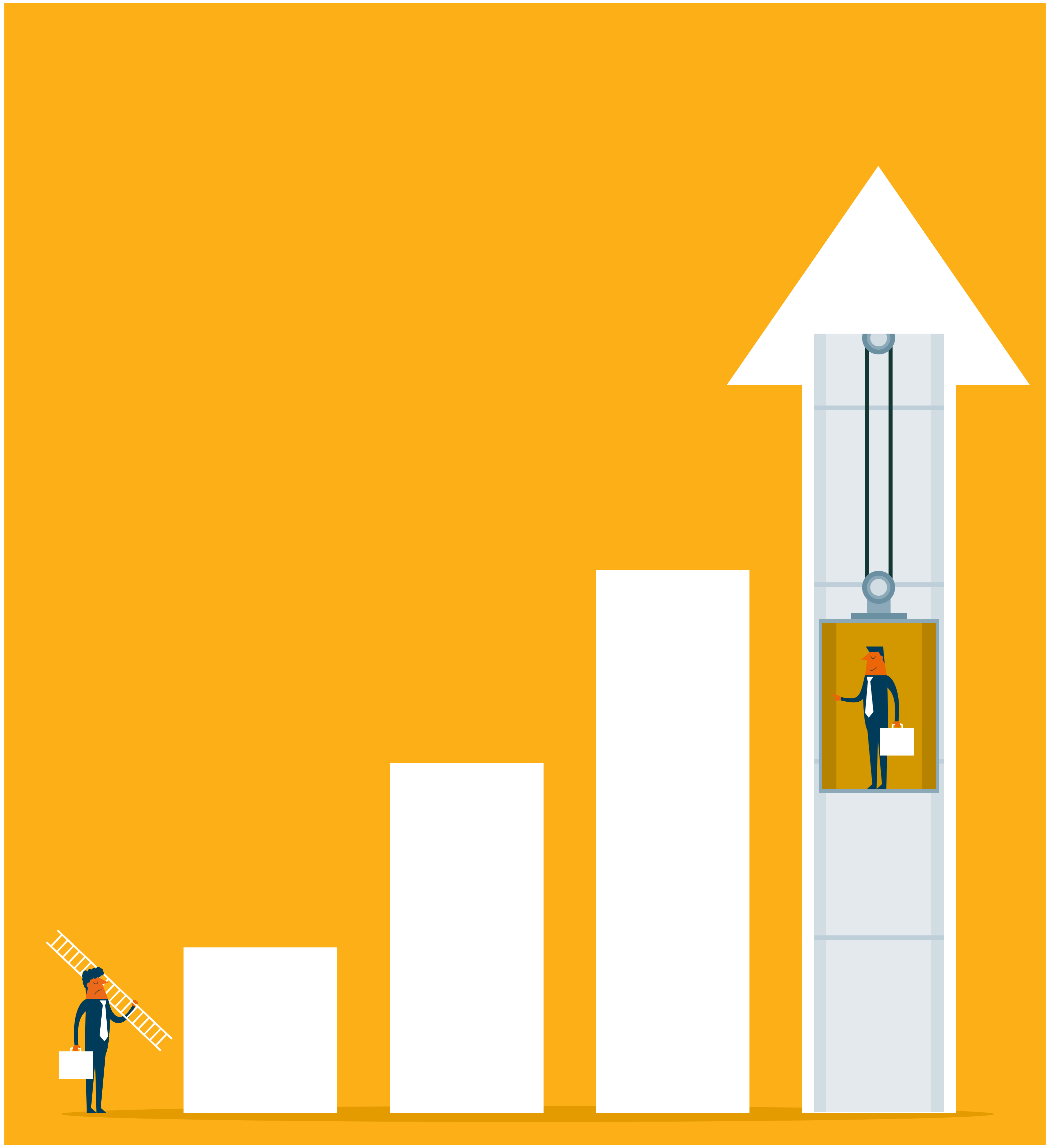
9. In deciding what order to make, the court is entitled to look at the overall situation, past, present and future: *Grace v Biagoli* [2002] BCLC 70 at [73].

10. In deciding upon the relief to be granted the court is not limited to putting right the conduct which justifies the order. The court should seek to put matters right for the future, not just to sanction for what has happened before: *Re Bird Precision Bellows* [1986] Ch 658; *Grace v Biagioli* [2006] 2 BCLC 70.

11. The court can grant relief to a petitioner even if the petitioner has for the most part failed: *Re Elgindata* [1991] BCLC 959 at 1005.

12. The court is not, however, permitted to substitute a different agreement to that which exists between the parties simply because the court takes the view that such is fairer: *Re J E Cade and Son Ltd* [1992] BCLC 213.

The most common order that a court makes, at least in relation to small private companies, where there has been a finding of unfair prejudice, is that the majority shareholders purchase the minority's shares: *Grace v Biagioli* [2006] 2 BCLC 70 at 96 ("In most cases, the usual order will be one requiring the respondents to buy out the petitioner at a price to be fixed by the court. This is normally the most appropriate order to deal with intra-company disputes involving small private companies" per Patten J). The reason for that is because it means that the petitioner can leave the company, with the petitioner taking a fair share of the company's business and assets. At the same time the company will be able to continue without the petitioner being a shareholder (thereby eliminating future difficulties between shareholders). In rare cases the court can order the minority purchase the majority's shares: *Re a Company (No 00789 of 1987) ex parte Shooter* [1990] BCLC 384; *Re Brentfied Squash Racquets Club Ltd* [1996] 2 BCLC 184. But that is "comparatively unusual": *Brentfiled* at 190h-1. The court can make a share purchase order even where the company in question has subsequently become insolvent: *Re Hailey Group Ltd* [1993] BCLC 459 (where an administrative receiver had been appointed by the hearing of the petition); *Re Via Servis Ltd, Skala v Via Servis Ltd* [2014] EWHC 3069 (Ch) (where the company appears to have entered into some form of insolvency proceedings in Austria).



Buy-Out Orders: Valuation

When the court makes a share purchase order, further critical questions still have to be answered by judicial decision, agreement or an independent valuer. The overriding requirement is clear: "the valuation should be fair on the facts of the particular case": *Re London School Electronics* [1986] Ch 211. However by what method is the valuation to be reached? Should the shares be valued on the basis of there being no discount to be applied for the fact that the petitioner's shareholding is a minority one? Should it be on the basis that the petitioner's shareholding is only a minority one? As at what date is the valuation to be carried out? Should it be the date when the petitioner was excluded from participating? Should it be the date of the presentation of the unfair prejudice petition? Should it be the date of the trial of the petition? Should it be the date of the Order? Should it be some other date? Should interest be awarded?

Method

The court will usually value a company on a going concern basis rather than a break up basis in circumstances where the purchaser intends to continue the business: *Parkinson v Eurofinance Group Ltd* [2001] 1 BCLC 720 at [99]-[100]; *CVC/Opportunity Equity Partners Ltd v Demarco Almeida* [2002] 2 BCLC 108 at [38] where Lord Millett said "…it is difficult to see any justification for adopting a break up or liquidation basis of valuation where the purchaser intends to carry on the business of the company as a going concern". In the absence of a clear indication to the contrary in an order for a buy-out, a company's share capital will be valued at its market value: *Wann v Birkinshaw* [2017] EWCA Civ 84 at [37].

Minority Discount

The question of any discount is a question of law to be decided by the court: *Re Bird Precision Bellows Ltd* [1984] Ch 419.

In a company which was a quasi-partnership, it would "not merely be fair but most unfair" for the petitioner to be bought out on the fictional basis applicable to a free election to sell his shares in accordance with the company's articles, or on any other basis that involved a discount price. In such a case the right valuation is one which fixes the price pro rata according to the value of the shares as a whole and without any discount, that being the only fair way of compensating an unwilling vendor of the equivalent of a partnership share: *Re Bird Precision Bellows Ltd* [1984] Ch 419. See also *Strahan v Wilcock* [2006] 2 BCLC 555.

In other cases, a minority shareholding is often to be valued for what it is – a minority shareholding, unless there is good reason to attribute to it a pro-rata share of the overall value of the company: *Strahan v Wilcock* [2006] 2 BCLC 555. As Blackburne J put it "Short of a quasi-partnership or some other exceptional circumstance, there is no reason to accord to it a quality which it lacks": *Irvine v Irvine* [2007] 1 BCLC 445. However, there is no rule of universal application excluding an undiscounted valuation where there is no quasi-partnership: *Re Sunrise Radio* [2010] 1 BCLC 367.

Date of Valuation

There is no general rule as to which date is picked by reference to which a valuation is carried out. As with the question of remedy as a whole, the overriding requirement is that the valuation should be fair on the facts of the case in question: *Profinance Trust SA v Gladstone* [2002] 1 WLR 1024. The starting point is usually taken to be the date on which the shares are ordered to be purchased: *Re London School of Electronics* [1986] 1 Ch 211 ("Prima facie an interest in a going concern ought to

> *Prima facie an interest in a going concern ought to be valued at the date on which the shares are ordered to be purchased*

be valued at the date on which it is ordered to be purchased": per Nourse J); *Re Sunrise Radio* [2010] 1 BCLC 367. This, of course, reflects the value of what the shareholder is actually selling.

However other factors present in a particular case might point to another date being the most appropriate. An earlier date might be more appropriate where, for example, the company has been deprived of its business or there had been a major change in the company's business or there had been a general fall in the market post presentation of petition: *Profinance Trust SA v Gladstone* [2002] 1 WLR 1024. Similarly the acceptance or refusal of offers before or during the proceedings can be relevant.

Dates which courts have suggested or selected other than the date on which the shares were ordered to be purchased include (1) the date of expulsion from the company: *Croly v Good* [2011] BCC 105; *Re Via Servis, Skala v Via Servis Ltd* [2014] EWHC 3069 (Ch); *In Re Foundry Minatures* [2017] 2 BCLC 489 (2) another date prior to the presentation of the petition: *In Re Blue Index* [2014] EWHC 2680 (Ch); *Wann v Birkinshaw* [2017] EWCA Civ 84 (3) the date of the petition: *Re Cumana Ltd* [1986]; *In Re London School of Economics* [1986] 1 Ch 211; BCLC 430; *Profinance Trust v Gladstone SA* [2002] 1 BCLC 141; (3) the most recent date for which reliable figures were available: *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354. However the court cannot select a date prior to the time when the unfair prejudice started.

Interest

Where the Court picks a date earlier than the date on which the shares are ordered to be purchased, the court has power to award the equivalent of interest. However the court's power to award this should be exercised with great caution and only where it was necessary to achieve a just result: *Profinance Trust SA v Gladstone* [2002] 1 WLR 1024. See also *Re Blue Index Ltd; Murrell v Swallow & Ors* [2014] EWHC 2680 (Ch).

Other Matters

As part of the valuation exercise, and so as to ensure fairness, the court can order that adjustments be made to the value of the petitioner's shares: *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354 at 409-410 so as to reflect wrongs which have been done to the company, for example, by way of the diversion of business from the company, sums taken from the company, excessive remuneration, excessive management fees, excessive consultancy fees, excessive expenses and even one off items. Similarly the court can order that a valuation be carried out on assumed factual assumptions, for example that no unfair prejudice had happened.

A share purchase order can be made despite the fact that a respondent does not have the money to pay: *Re Cumana Ltd* [1986] BCLC 430 where Lawton LJ said that "The fact that a wrongdoer is impecunious is no reason why judgment should not be given against him for the amount of compensation due to his victim". See also *Re Ghyll Beck Driving Range Ltd* [1993] BCLC 1126 at 1134 and *Re Regional Airports Ltd* [1999] 2 BCLC 30.

Where a court has found unfair prejudice and ordered the shares of a company to be purchased by the petitioner, the trial judge has a broad discretion to determine the basis on which the purchase should be made and on appeal the Court of Appeal will be slow to interfere with the exercise of that discretion: *Re Cumana Ltd* [1986] BCLC 430. ■

Dispute resolution: *A new beginning?*

HON. PAUL HEATH QC

There are various means by which disputes arising in the course of insolvency or restructuring may be resolved, wholly or in part, through involvement from the private sector. One example is the process of mediation. Another is the use of arbitration, in cases where there is no need to appoint representatives for particular classes of creditors. A third is the use of a less rigid adjudication regime where, for example, resolution might be achieved subject to court consent. In addition to the likelihood of bringing a more swift and cost-effective end to disputes of this type, in cases where that is not achieved there remains the advantage of potentially narrowing issues for court determination.

INSOL International has been exploring ideas to promote mediation (in its broadest sense) to assist in the resolution of cross-border claims. The purpose of this article is to draw attention to INSOL's work, areas in which further consultation is necessary, and the possibility of enlarging the scope of its project to encompass other forms of dispute resolution.

Working Group 22

In late 2018, as part of its "Toward 2021" Task Force, INSOL formed Working Group 22. The Working Group's mandate was to review the operation and performance of the College of Mediation that INSOL had previously established, and to make recommendations about the way in which it could encourage mediation of cross border insolvency or restructuring disputes. Before discussing the mandate given to Working Group 22 and its recommendations, I explain the various types of processes that might fall under the rubric of mediation.

"Mediation" can mean different things to different people. Some regard that term as denoting a formal process under which an independent person is appointed by all parties, on strictly defined terms, to facilitate resolution of disputes among them. But, the concept can go wider than that. In the insolvency and restructuring context, the idea of an independent facilitator, perhaps one appointed by a court of competent jurisdiction to sound out stakeholders as to their intentions and needs in a confidential manner, and to assist in reaching agreement, is likely to enhance the possibility of negotiating a means by which particular debt is restructured, or priorities are compromised. That may, for example, take the form of active negotiations or a report to a court designed to narrow issues. Using the notion of "mediation" in that broader context is not dissimilar from the appointment of persons to act as agents for courts to craft a protocol to enable proper discussions to take place before a court is asked to approve any proposed compromise or restructuring.

I was asked to chair Working Group 22. I was fortunate to have a distinguished group of practitioners, judges and bankers to consider the issues raised. The late Gabriel Moss QC was a member of the Working Group. As everyone would expect, he was able to provide many constructive comments for development of the Group's thinking. At the end of this article, I add a short personal tribute to Gabriel.

In addition to Gabriel Moss and myself, the Working Group comprised Mr Justice Alastair Norris of the High Court of England and Wales; Hon Allan Gropper, a retired Judge of the US Bankruptcy Court for the Southern District of New York; Hon Anselmo Reyes, a retired Judge of the High Court of Hong Kong and (presently) an International Judge of the Singapore International Commercial Court; Mr Justice Geoffrey Kiryabwire, of the Court of Appeal of Uganda; Mr Justice Ian Kawaley, of the Grand Court of the Cayman Islands; Mr Mark Robinson, a past president of INSOL from Sydney, and Mr Mark Sutton, of the Commonwealth Bank of Australia, now based in Melbourne. Mark Sutton is the Chair of INSOL's Financiers' Group.

Recommendations of the Working Group

The Working Group reported to the Executive Committee of INSOL on 21 December 2018. Recognising that its mandate was directed to the use of "mediation", the Working Group recommended:

a. The existing INSOL "College of Mediation" should be disestablished in its present form.

b. A new panel of mediators should be established by INSOL, on the basis that it is marketed as a group of accredited persons whom INSOL is prepared to hold out as capable of facilitating the resolution of cross border insolvency disputes.

c. INSOL should take primary responsibility for the accreditation function, appointment mechanisms and the preparation of standard form agreements and orders to assist parties in the use of mediation as a dispute resolution tool.

d. To ensure that the panel meets market needs:

i. The underlying ideas should be presented to judicial, academic, financiers' and regulators' meetings.

ii. After feedback from those groups has been received, further market research should be undertaken through organisations such as G36, INSOL's small to medium size enterprise taskforce, and the African Round Table.

iii. The final terms of the panel accreditation and appointment processes should be fixed after that consultation has taken place.

The "College of Mediation"

By way of background, some years ago INSOL created its "International College of Mediation" in an endeavour to fill what was perceived to be a market void in relation to the use of mediation in cross border insolvency or restructuring. The nature and purpose of the appointment of panel members was set out in a document called "College of Mediation Panel Appointment," which remains on INSOL's website.

In short:

a. Application was to be made by individual INSOL members for appointment to the panel. During the period of his or her appointment, the mediator was entitled to describe himself or herself as an "INSOL International Mediator".

b. An INSOL International Mediator's role was focussed on work arising out of cross-border insolvency proceedings or restructuring, or otherwise involving insolvency law, regulation or practice.

c. Appointed mediators were required to agree that they would not accept any appointment within that scope of work other than as an INSOL International Mediator.

d. The INSOL International Mediator was to pay to INSOL a commission (in sterling) on fees received in respect of each appointment.

e. INSOL agreed to publicise the existence of the panel of mediators and to provide, on request, details of panel members, together with biographical information.

f. The underlying principles under which an INSOL International Mediator was to perform his or her functions were "objectivity, impartiality and proportionality".

Although the Working Group considered that INSOL should maintain a mediation panel, it took the view that the "College of Mediation" should be rebranded (and its focus changed), so as to avoid undesirable linkages with a process that has not received market support.

No empirical research has been undertaken to ascertain why appointments have not been sought from the International Mediation Panel. Some anecdotal evidence was available, from members of the Working Group and beyond. We concluded that the main reason for the lack of market interest was the nature of the disputes in which an INSOL International Mediator might be engaged. In cases involving large multi-party insolvency/restructuring disputes, the stakeholders will often be able to identify an appropriate person to facilitate negotiations, without recourse to an INSOL panel. At the other end of the scale, fees charged by someone with the standing and experience of an INSOL panel mediator may have been too high for the amounts involved to bear.

Opportunities for the future

It did seem to the Working Group that there were other market needs that were not being met, to which INSOL could usefully contribute. The Working Group identified three specific examples of opportunities for INSOL to promote a mediation service:

a. The first involved (what was perceived rightly or wrongly to be) a relative lack of support in civil law countries for mediation running parallel with court proceedings. Greater education of the mediation process and the ways in which courts might assist resolution in parallel may be desirable.

b. The second involved the need for care in promoting a mediation service in a State in which English is not the predominant language. Anselmo Reyes mentioned Japan as an example of a country in which the idea of mediation would be attractive, but some work would need to be done to ensure that mediators with appropriate language and cultural skills were available.

c. In States where further assistance may be required to make a mediation panel attractive to the market, consideration should be given to INSOL entering into collaborative arrangements with institutes that carry out roles in the accreditation and appointment of mediators. By way of example only, such institutes may include organisations such as the Chartered Institute of Arbitrators in the United Kingdom or the Arbitrators' and Mediators' Institute of New Zealand. No approach has yet been made to any organisation of that type.

We identified three discrete functions that INSOL could perform, either on its own or in collaboration with other organisations:

a. As a body responsible for the accreditation of mediators to perform this type of work. In other words, by accepting an application for appointment to its panel, INSOL is holding out the applicant as someone competent and experienced to carry out the necessary work.

b. As an appointor, in cases where the parties cannot agree on who should be the mediator and seek appointment by an independent third party in whom they repose confidence. A court may also use INSOL as the appointor in certain circumstances.

c. As a body responsible for preparing standard form appointment agreements (referable to specific governing law or more widely expressed), mediation agreements that set out the proposed structure of the mediation and a standard form of order that a court could make to give effect to an agreed facilitated settlement.

Some of the work in which INSOL is involved is directed towards capacity building for the judiciary of developing countries. The aim is to provide information from experienced judges and practitioners from other countries to enable judges in those countries to deal with cross-border insolvency proceedings efficiently and effectively. One opportunity is to encourage judges in such jurisdictions that have adopted the UNCITRAL Model Law on Cross-border Insolvency to use art 27 (or any enacted equivalent) to appoint a person to be nominated by INSOL to undertake functions involving co-operation and direct communication under arts 25 and 26. In some cases, a court in a developing country may choose to appoint one mediator nominated by INSOL and another local practitioner whom the INSOL appointee could assist in gaining practical understandings of the issues that arise. The need for cross-border disputes to be resolved more efficiently and effectively by judges and mediators working in tandem is something we considered ought to be promoted.

The idea that a standard form of court order to enforce mediation agreements could be developed has some synergy with the UNCITRAL Convention on International Settlement Agreements Resulting from Mediation, to which I refer later. That Convention opens for signature in Singapore on 7 August 2019, and provides a mechanism whereby courts in different states may enforce mediated outcomes in much the same way that the New York Convention operates to ensure multi-jurisdictional enforcement of arbitral awards.

Allied to our impression that the reason for the moribund state of the College of Mediation is a need to focus more directly on disputes to which the parties would not necessarily appoint someone of their own choosing. It is important for the INSOL Financiers' Group, and G36 Members (such as South Square) to be prepared (in appropriate cases) to embrace the use of the mediation model and promote it within their own spheres of influence. The support of financial institutions that are likely to have debt recovery problems in multiple jurisdictions is important. Consultation with those groups will be progressed soon.

We did not consider that there was any reason to restrict the number of panel members from any particular jurisdiction. Often a person from a neutral jurisdiction, in the sense that it has no participant in the particular cross-border case, may be the best appointee. INSOL's unique selling point is that it is regarded as a trusted neutral in the area of cross-border insolvency and is known to promote multinational solutions to problems in a principled and cost-effective manner. INSOL has the market gravitas to be taken seriously in accrediting mediators and in appointing them, whether working alone or in collaboration with institutes of mediators in other jurisdictions who have experience in the accreditation and appointment processes.

The types of dispute that might be resolved by mediation are manifold. As indicated previously, in a restructuring case, whether appointed by a court or not, an independent facilitator may be able to move among stakeholders to facilitate discussion of the way in which they will each participate, either as a holder of debt or equity, in a restructured company. In such cases it will be important that the facilitator seeks in advance and is given

> *"The INSOL initiative to create "Mediation Colloquium" comes at an opportune moment"*

(confidentially) proper information as to the aims of each participant stakeholder and the opportunity to discuss their concerns in advance of a formal meeting at which all can attend with their advisers. Such discussions would remain confidential unless disclosure were authorised by the particular stakeholder. Even at a plenary meeting, it may be necessary for separate meetings to be held with senior members of the participant entities and/or their lawyers to assess costs and risks of litigation, so that the business people involved are encouraged to make pragmatic economic decisions later, on the basis of the risks identified.

INSOL initiatives

INSOL is to establish shortly a presence in Maxwell Chambers in Singapore, to promote itself within the region. Maxwell Chambers is the place from which the Singapore International Arbitration Centre operates and is the home to many chambers from London and beyond who are involved in both mediation and arbitration. Bankside Chambers in Auckland (the Chambers of which I am a member in New Zealand) has taken a room in proximity to the one to be occupied by INSOL International.

INSOL has decided to create a "Mediation Colloquium" in order to develop the Working Group's ideas. I have been appointed as the Inaugural Chair of that Colloquium. Soon, a co-chair will be appointed. I intend to ensure that representatives of INSOL's Financiers' Group and G36 are invited to that Colloquium, the first of which will be held in Cape Town, South Africa in March 2020. It is important both that the efforts undertaken by INSOL meet the needs of its members and the broader financial markets, and that they are supported by them.

I emphasise that the name "Mediation Colloquium" is not set in concrete. If it were decided that other resolution options, including arbitration, should be considered, it is likely that the name could change to "Dispute Resolution Colloquium", or something similar.

The INSOL initiative comes at an opportune moment. The General Assembly of the United Nations recently adopted the Convention on International Settlement Agreements Resulting from Mediation. That Convention will become known as the "Singapore Convention". The Singapore Convention concerns commercial mediation agreements and provides a mechanism by which such agreements can be enforced internationally. Such a mechanism may assist when, for example, a number of secured creditors dispute priority in an international insolvency. It is different, however, from the types of dispute which may arise among stakeholders when deciding the form of a reorganisation plan or scheme. This adds a consensual dimension to international enforcement regimes. It complements the more engrained recognition and enforcement mechanisms found under the New York Convention, for arbitration, and various procedures for the reciprocal enforcement of court judgments that are in force in particular countries. There will be a need to promote adoption of the Convention in individual jurisdictions.

A personal tribute to Gabriel Moss QC

I first met Gabriel Moss in 1990. We were on the opposite sides of a Privy Council appeal, Elders Pastoral Ltd v Bank of New Zealand. Sadly, for me, Gabriel won! However, I admired the silky style of advocacy that he brought to argument of the issues that arose and the way in which he had mastered elements of unfamiliar (and, perhaps, uniquely) New Zealand law, dealing with a security interest over the progeny of sheep and the proceeds of their sale!

Over the following years, I had the privilege of speaking with Gabriel at a number of international conferences. The most notable of these were at the INSOL Quadrennial Congresses in 2001 (London) and 2017 (Sydney). At the first of those, we jointly chaired a session called "In My Judgment" in which we interviewed in turn three eminent judges. One was Lord Millett. When starting his question on the issue of conflicts of interest, Gabriel referred to the (then) recent Pinochet litigation. Gabriel commenced his questioning by saying to Lord Millett: *"I gather one of your colleagues* [Lord Hoffmann, who was in the audience] *has had a spot of bother with this recently"*. In Sydney, we presented at a "Hot Topics" session.

Gabriel took the lead in nominating me to become an associate of South Square, something for which I shall always be grateful. I regard it as a privilege to be associated with South Square; Gabriel's set.

Last year, Gabriel spoke as a keynote speaker at our annual insolvency conference in Auckland, which is run by New Zealand's affiliate of INSOL International. He presented a typically insightful paper.

Gabriel was someone whom I respected greatly. His academic and practical influence of the law in the area of cross-border insolvency is unparalleled in common law countries. I learned a great deal from him and was saddened to hear of his tragic and sudden death. I offer my condolences to Gabriel's wife, Judith, and his family on their loss; as well as his colleagues at South Square. ■

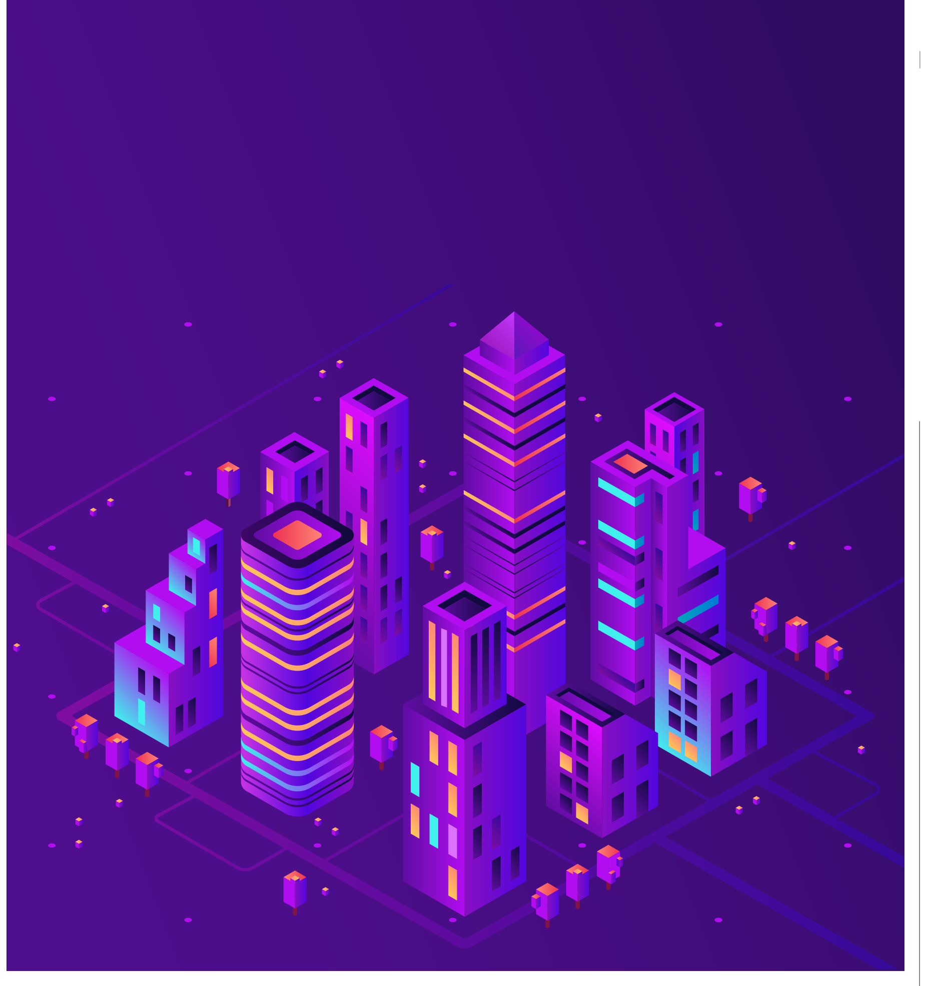
Since writing this article Felicity Toube has been appointed co-chair. If you wish to comment on the proposals set at in this article, do please contact us at paulhearth@southsquare.com or felicitytoube@southsquare.com

Bermuda: *Back to the Future*

ALEX POTTS QC

In August 2014, I wrote an article for South Square Digest, in which I tried to predict the sorts of disputes that would keep us busy in Bermuda over the next 5 years.

I even offered to report back to you in 2019 (five years later) to reflect on the accuracy (or inaccuracy) of my predictions.



For those readers who might not have the August 2014 edition of South Square Digest readily to hand (or who might need to refresh their memory), I am pleased to remind you that I had forecast that Bermuda would generate, and witness:

- An increase in claims and disputes involving Insurance Linked Securities (ILS) and collateralized reinsurance products (in addition to traditional insurance and reinsurance coverage disputes);
- An explosion in the number of regulatory enforcement actions and commercial public law disputes; and
- An increasing number of high-value trusts disputes.

Back to the Future

Was my five-year weather forecast correct? To a large extent, yes, I think it was: although not unequivocally so, and more by luck than by design.

ILS disputes

There have indeed been a significant number of ILS-related disputes in the past five years, reflecting the growth in the ILS market.

The main litigation activity in Bermuda, however, has not been triggered by catastrophic and unpredictable events of the sort that I had in mind.

Instead, it has been largely caused by predictable human behavior and regrettable misunderstandings in the workplace, resulting in the usual sorts of claims for breach of directors' duties, breach of confidence actions, wrongful dismissal proceedings, and claims for breach of employees' restrictive covenants (often involving allegations of fraud and dishonesty).

Various claims and disputes of this sort have involved Bermuda companies such as Athene Holding Limited, Markel Catco Investment Management Ltd, Hiscox Insurance Co (Bermuda) Ltd, and Karson Management (Bermuda) Ltd, with proceedings having been brought in Courts and arbitration tribunals in Bermuda, the USA, and the UK. These proceedings have resulted in the usual (extensive) skirmishing over issues such as jurisdiction, interim injunctive relief, confidentiality, and discovery obligations.

In the more traditional Bermuda insurance and reinsurance space, there have been the usual sorts of arbitration-related disputes on the issue of arbitrator bias (*Halliburton Co v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817), third arbitrator appointments (*S v T* [2018] SC Bda 9 Civ), and anti-suit injunctions (*Allied World & Inshore v MF Global* [2017] SC Bda 6 Com, [2017] SC Bda 7 Com). It is reassuring to note that arbitration agreements continue to provoke almost as much litigation as they are designed to avoid!

Regulatory enforcement actions and commercial public law disputes

As I guessed in August 2014, the Bermuda Courts have dealt with a variety of regulatory enforcement actions over the past five years, a reflection of the Bermuda Government's strong desire to satisfy international regulatory and tax information co-operation standards (while respecting commercial confidentiality and the right to a fair hearing, to the extent appropriate): see, for example, *Minister of Finance v AD* [2015] CA (Bda) 18 Civ, and *Minister of Finance v AP* [2016] CA (Bda) 29 Civ.

The Bermuda Courts have also seen their fair share of commercial public law disputes over the past few years, a number of which have made their way to the Privy Council in London.

In *Mexico Infrastructure Finance LLC v The Corporation of Hamilton* [2019] UKPC 2, the Privy Council held that a guarantee granted by the Corporation of Hamilton (a Bermudian local authority responsible for the management of the main business district, the City of Hamilton), to support borrowing by a private developer for a hotel project, was *ultra vires* and unenforceable. The underlying hotel project (and the project finance that went missing) has generated asset recovery and satellite litigation in numerous jurisdictions, including the US, Bermuda, and the UK: see, for example, *Argyle UAE Ltd v Par-La-Ville Hotel & Residences Ltd* [2018] EWCA Civ 1762, in which the English Court of Appeal upheld the award of summary judgment on an unjust enrichment claim.

In *Bermuda Bar Council v Walkers (Bermuda) Limited* [2019] UKPC 25, the Privy Council held that the Bermuda Bar Council had been wrong to refuse Walkers' newly established Bermuda office a Certificate of Recognition, thereby restricting Walkers' ability to practice Bermuda law through a corporate vehicle. The Privy Council's ruling should prove to be a positive development for all local businesses seeking to attract foreign investment and foreign talent to Bermuda.

> *"Was my five-year weather forecast correct? To a large extent, yes"*

Trusts disputes

It did not take much imagination on my part to predict that the Bermuda Courts would be (and have been) very busy with high-value trusts litigation and trusts restructuring applications over the past five years. At the risk of disappointing you, dear reader, I will not provide you with all of the various judgment citations, since most of Bermuda's reported trusts judgments have been anonymized to protect the private lives of the rich and famous.

Most noteworthy, perhaps, is the pending (public) litigation in the case of *Wong, Wen-Young v Grand View Private Trust Company Limited*, some of the background of which has been published in an interlocutory judgment at [2019] SC Bda 1 Com. The 10-week trial is scheduled to take place in 2020 (coinciding, strangely enough, with the 21st anniversary of the notorious Thyssen-Bornemisza trial of 1999).

Bermuda trusts-related litigation has also stretched as far as Courtrooms in Canada, the USA and in the UK. In *St. John's Trust Co (PVT) Ltd v Evatt Tamine* [2018] EWHC 3629, for example, the English High Court ordered a former director of a Bermudian trust company to deliver up property and documents belonging to the company. No surprise, there.

Restructuring and insolvency disputes

South Square Digest readers will be pleased to note that there have been a decent number of Bermuda restructuring and insolvency cases during the past five years: certainly more than I had predicted there might be.

The names of Bermuda-incorporated but foreign-listed companies such as Up Energy Development, Energy XXI, Celestial Nutrifoods Ltd, Opus Offshore Ltd, Z-Obee Ltd, C&J Energy Services Ltd, and Seadrill Drilling have all been added to the annals of the Bermuda Law Reports.

In *PwC v Saad* [2014] UKPC 35 and *PwC v Singularis* [2014] UKPC 36, the Privy Council brought "clarity" to the scope of the Bermuda Court's common law powers to assist a foreign liquidator or to wind up a foreign company. The Privy Council subsequently concluded that the Bermuda-registered branch of PwC was not entitled to recover its costs of compliance with disclosure orders obtained by foreign liquidators, even though those disclosure orders were subsequently set aside: see *PwC v Saad* [2016] UKPC 33.

In *Majuro Investment Corp v Timis* [2015] SC Bda 87 Civ, [2015] SC Bda 88 Civ, the Bermuda Supreme Court conducted a thorough analysis of the common law relating to derivative actions in Bermuda (in the case of a Bermuda company that was in UK administration). The Chief Justice subsequently changed the Rules of Court to make it easier for directors and officers of Bermuda companies to be sued in Bermuda on the one hand, while bringing some degree of procedural order to the chaos of common law derivative actions on the other.

The restructuring of Bermuda-incorporated Noble Group Ltd involved some creative litigation in Singapore, a COMI-shift from Hong Kong to London, and the approval of a UK and Bermuda Scheme of Arrangement: see *In the matter of Noble Group Ltd* [2018] EWHC 3092 (Ch) and [2018] EWHC 2911 (Ch).

In *Capital Partners Securities v Sturgeon Central Asia Balanced Fund Ltd* [2018] CA Bda 5 Civ, the Bermuda Court of Appeal took the unusual course of winding up a solvent fund on just and equitable grounds, on appeal. Subsequently, the Liquidators secured recognition in England and Wales under the Cross-Border Insolvency Regulations 2006, despite the notable absence of any state of insolvency: see *Re Sturgeon Central Asia Balanced Fund Ltd (in Liquidation)* [2019] EWHC 1215 (Ch).

In *Kingboard Chemical Holdings Ltd v Annuity & Life Re* [2017] CA (Bda) 3 Civ, the Bermuda Court of Appeal reversed the trial judge's finding of minority oppression, and the appeal to the Privy Council was not pursued.

Conclusion

Above and beyond the disputes of the past five years, the Bermuda legal profession and the Bermuda judiciary have experienced significant changes, on both a structural and individual level.

Bermuda's Government and the private sector continue to respond and adapt to changing regulatory and economic conditions, which present as many challenges as they do opportunities.

Whatever else the future holds, I feel fairly confident (based on past performance) that the next five years will be busy ones for dispute resolution in, and involving, Bermuda.

Quo fata ferunt!

LEGAL EYE:

Helena Normanton (1882–1957): *A woman of many firsts*

ROSE LAGRAM-TAYLOR

"I believe that the sex-exclusiveness of the legal profession is doomed. Women won't stand it, and men, who have been learning a great deal lately about women's capabilities, will not tolerate it either."

So were the words of Helena Normanton in her first application to be admitted to The Honourable Society of the Middle Temple in 1918 following the Representation of the People Act 1918 (which had given suffrage to property owning women over 30).

Despite her application being rejected, her prediction proved true, and only one year later, the Sex Disqualification (Removal) Act 1919 was passed allowing women to enter the legal profession for the first time. Within just 48 hours of the Act becoming law, Helena made a second and successful application to Middle Temple. She was called to the Bar on 17 November 1922 (a few months after the non-practicing Ivy Williams had become the first woman to do so) and went on to become the first practicing female barrister.

This was not Normanton's only "first". She was the first woman to obtain a divorce for a client (1922), she was first woman to lead a prosecution in a murder trial (1948), she was the first female counsel to appear in the High Court of Justice (1922), the Old Bailey (1924), and the London Sessions (1926). She was the first woman to obtain the highest amount of damages in a case involving a breach of promise (£1250 plus costs). She was also the first woman to conduct a case in the United States (1925) and, along with Rose Heilbron in 1949, she became the first female King's Counsel.

And it was not only in the legal world where Helena Normanton was a pioneer. On 26 October 1921 Helena married Gavin Bowman Watson Clark. In doing so she refused to take her husband's surname, wanting to maintain continuity of identity in her professional career, and became the first married British woman to be given a passport in her maiden name (using her passport to travel to the US to mentor a group of women campaigning for the same right). On being called to the Bar, the Lord Chancellor is said to have tried to persuade her to take her husband's name. Normanton again refused. Of this, she wrote in the Yorkshire Post on 26 March 1954: "*I could see that if a Lord Chancellor was interested, I must have been exercising an important liberty...Anne Boleyn did not change her name even though she married the King. He at least had the decency to leave her with her own name even though he took her head.*"

It will be no revelation to readers that Helena was a staunch advocate for female rights, especially those of working women. She was a member of the Women's Social and Political Union, described by her niece Elsie Cannon as "*a suffragette – though not of the ultra-militant kind.*" Indeed, words were clearly her weapon (an unsurprising choice for a member of the Bar), and in 1914 whilst pursuing a teaching career in which she lectured, predominantly in history, at both Glasgow and London universities, she published a pamphlet entitled "Sex Differentiation in Salary". Arguing that women should have equal pay for equal work, the front cover of the pamphlet queried whether women should "*be paid according to their sex or their work?*": a question that still dominates society today.

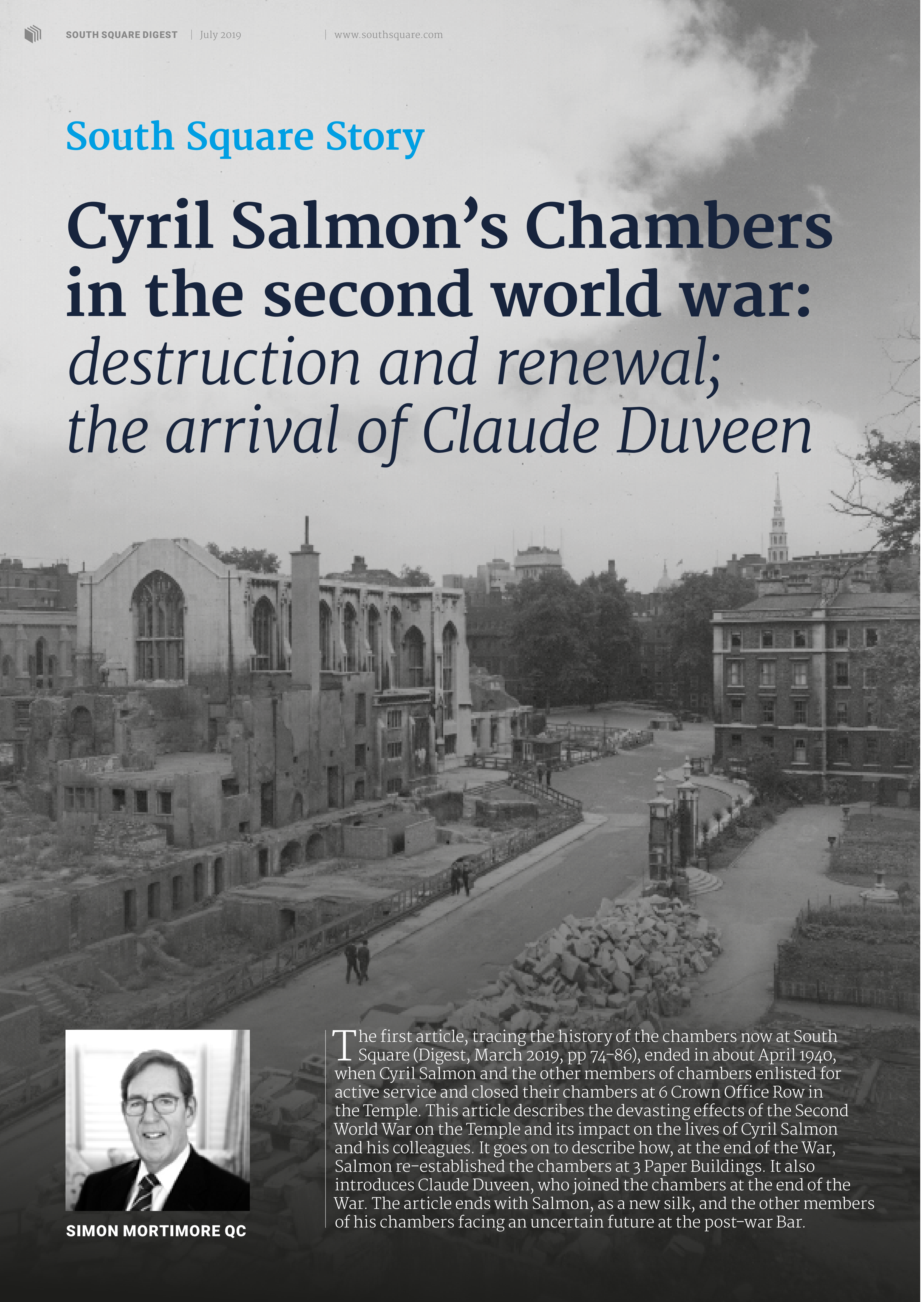
In the same vein as the recently announced reforms to divorce law, Normanton also fought hard to equalise and standardise the grounds on which a petition of divorce could be brought. She argued that the cost of divorce and the limited grounds on which a petition could be filed resulted in separated partners who could not divorce, who remained legally married, and who were forced instead to form new relationships which could not be recognised by the state. At the annual meeting of the National Council of Women in October 1934, her resolution to reform matrimonial law was strongly opposed by the Mother's Union and was passed only with the addition of a clause which disallowed divorce during the first five years of marriage. As recorded in the Helena Normanton Archive, she publicly declared that the inclusion of this clause was a "*cowardly capitulation to reactionary ecclesiastics, who would rather never see young people free to marry.*"

As a historian, who founded the Magna Carta Society and was a founding member of the Horatian Society, Normanton is said to have been convinced that the limitations and restrictions placed on the women of her day were a recent phenomenon, often referring to women's past achievements in her arguments supporting the extension of women's rights. Indeed, she urged women to "press forward to open the Church, the Stock Exchange, the House of Lords, the Diplomatic and Consular Services, the Press Gallery in the House of Commons, and the Overseas Civil Services to women". We are fortunate that such rallying cries were listened to.

It is sad to see that press coverage of her tour of America in 1925 focused on her appearance rather than her accolades – a trait that is often still prevalent today – with a reporter for The World recording in an article dated 7 January: "*Mrs. Normanton is tall and stout build. She is in every respect the typical matron. Distinctly feminine in appearance and manner and also in inclination, as was proved when she left the group of reports cooling their heels in her hotel while she walked up and down Fifth Avenue 'to look at the shops'.*"

Nevertheless, Helena Normanton was a trailblazer, both as a barrister and as a campaigner for women's rights. Her legacy certainly lives on. Indeed, only earlier this year did Helena become the first woman after whom a set of barristers has been named: Normanton Chambers. And so, 100 years on, Helena Normanton is still a woman of firsts, paving the way for the rest of us to follow. ■

> "Helena Normanton was a trailblazer, both as a barrister and a campaigner for women's rights. Her legacy certainly lives on"



Blitzed crown office row and the shell of Inner Temple with Paper Buildings on the right

South Square Story

Cyril Salmon's Chambers in the second world war: *destruction and renewal; the arrival of Claude Duveen*

SIMON MORTIMORE QC

The first article, tracing the history of the chambers now at South Square (Digest, March 2019, pp 74-86), ended in about April 1940, when Cyril Salmon and the other members of chambers enlisted for active service and closed their chambers at 6 Crown Office Row in the Temple. This article describes the devasting effects of the Second World War on the Temple and its impact on the lives of Cyril Salmon and his colleagues. It goes on to describe how, at the end of the War, Salmon re-established the chambers at 3 Paper Buildings. It also introduces Claude Duveen, who joined the chambers at the end of the War. The article ends with Salmon, as a new silk, and the other members of his chambers facing an uncertain future at the post-war Bar.

In the first article, I said that Salmon's clerk must have given good service, because Salmon regretted that he did not return after the War. At the time the article was published I did not know who this clerk was. Since then, Sir Anthony Evans has kindly lent me the papers he used in writing the article about Lord Salmon in the Oxford Dictionary of National Biography. These include the recollections of Colin Sleeman who had joined the chambers in June 1939, having been one of Salmon's pupils. They give a vivid picture of life in chambers and reveal not only the identity of the clerk, but also another glamorous, but short-lived, member of chambers. I will begin with these discoveries.

Albert W Heymer

It is very likely that one of the reasons why Salmon left Walter Monckton's chambers in 1933 was that he had found an experienced clerk to manage his new chambers. This was Albert W Heymer, who had been clerk to Robert Wright KC, when he had been in practice at 2 Pump Court, and who had followed his master to the King's Bench, when Wright was appointed a High Court judge. In April 1932, Wright was appointed to the House of Lords and Albert, who was then nearly 60, wanted another clerking job. It was perhaps because Wright and Salmon were neighbours in Hornton Street, London W8, that Salmon became aware that Albert was available. Lord Wright retained a strong affection for Albert and would often call in at 6 Crown Office Row to see his old clerk. This connection between Lord Wright and Albert seems to have led Sleeman to regard Lord Wright as the titular head of the chambers.

Albert proved to be an excellent clerk who was utterly dedicated to Salmon's practice. Each morning Salmon would arrive at chambers by taxi, get out, leaving the cab door open, and march straight into his room. Albert would come out, collect Salmon's brief case from the taxi and pay the cabbie. As an experienced clerk, Albert knew how to manage and build Salmon's practice. To prevent Salmon from feeling overwhelmed by the volume of work coming into chambers for him, Albert would conceal the papers on their arrival and produce two or three sets each day for Salmon to take home and work on in the evening.

Albert was keen that Salmon should not become known as a moneylending and bankruptcy specialist and worked hard on expanding the range of Salmon's clientele. The sort of solicitor that Albert liked to see instructing Salmon was Lord Morris, a partner at Blount, Petre & Co and an old Cambridge friend of Salmon's, who regularly briefed Salmon in insurance and personal injuries cases. Lord Morris would arrive in court to sit behind Salmon, wearing a morning coat and carrying a silk hat.

Michael Weaver

Michael Weaver was born in the Wirral in 1912. He was a tall, elegant man who had been educated at Eton and Trinity College, Cambridge, where he had been captain of the University skiing team. In 1936 he was called to the Bar and became a member of chambers at 3 Temple Gardens. He had rather wider social and political interests than could be satisfied by a career restricted to the Bar. In 1936 he was adopted as Conservative party candidate for Workington.[1] His support for the Republicans in Spain and his concern about old age pensions show him to be a man on the left of the party. In 1938, he travelled to Spain, where he witnessed the latter stages of the Spanish Civil War from both Franco's Nationalist and the Republican sides. In Madrid he met La Pasionaria[2] and experienced the aerial bombardment of that city by Franco's forces. He returned to England in the autumn of 1938 as a fervent supporter of the Republican cause. He spoke at public meetings in its support and helped to arrange shipments of food to Spain.

By December 1938, Weaver had joined Salmon's chambers at 6 Crown Office Row, but he does not seem to have developed much of a practice there. Instead he continued with his political activities and was commissioned as a Regular Army Reserve Officer and became a second lieutenant in the cavalry. In March 1939, he attended a reception at 10 Downing Street, given by the Prime Minister. At meetings and in letters to the Times in July 1939,[3] Weaver urged the Government to increase the old age pension from the inadequate rate of 10 shillings per week.

World War II: destruction and personal tragedy

Destruction of the Temple

Sometime after April 1940, the chambers at 6 Crown Office closed as the members of chambers enlisted for active service. Salmon and Potter were both commissioned in July 1940; Salmon in the Royal Artillery and Potter in the RAF Volunteer Force. Weaver joined the King's Dragoon Guards as a second lieutenant.[4] Barratt and Sleeman also joined the army.

Between 19 September 1940 and 11 May 1941, the Temple was subjected to German bombing, which destroyed the Inner Temple Hall, the Parliament Chamber, the Library, the Master's house and many other buildings including the whole of Crown Office Row. On the night of 26-27 September 1940, a bomb fell outside 5 Crown Office

1. This constituency, created in 1918, has returned a Labour MP in every election, except for the 1976 by-election.

2 Dolores Ibárruri, 1895-1989. The daughter of a Basque miner, she worked as a journalist under the name "La Pasionaria" (the passion flower) and helped found the Spanish Communist Party in 1920. During the Spanish Civil War, she became famous for her passionate exhortations to the Spanish people to resist the Fascist forces, declaring: "*It is better to die on your feet than to live on your knees.*" After Franco's victory, she fled to the USSR and did not return to Spain until 1977.

3 Like his letter of 20 December 1938, about the courage of Republican women, these were written from 6 Crown Office Row. Below his first long letter of 18 July, the editor of the Times wrote in capital letters: "*Very heavy pressure compels us to ask correspondents to write as concisely as possible. Letters intended for publication should be typed or written on one side only of the paper.*"

4 Weaver may have separated from his colleagues, because the 1941 Law List shows him at 1 Crown Office Row, but the others still at 6 Crown Office Row.

Row, which smashed many windows and did much damage to the building. It uncovered the air raid shelter beneath the building and shattered the gas main, causing a furious blaze. On the night of 16-17 October 1940, the Temple was subjected to an even more serious bombing raid: a landmine, floating down on two parachutes, burst on top of Elm Court (just to the north of Crown Office Row) and caused massive damage, including wrecking 1-7 Crown Office Row. Remarkably, the 25 people who had been sheltering under Crown Office Row all emerged unharmed. In January 1941, bombs rendered Harcourt Buildings uninhabitable. The final blow to the Temple occurred on the night of 10-11 May 1941, when it was subjected to the most sustained bombing raids of the war. What had remained of Crown Office Row was totally destroyed by two direct hits. After that massive raid, the bombing stopped as the German air force concentrated its efforts on the Russian front.

Salmon must have heard about these disasters soon after they occurred, because with effect from 29 September 1940 he terminated his tenancy of the chambers at 6 Crown Office Row. Until they returned to practice at 3 Paper Buildings in 1945, Salmon, Potter and Barratt used 2 Essex Court in the Middle Temple as their professional address.

Death at Tobruk

On 17 October 1941, Weaver was killed in action at the age of 29. He had been serving with the King's Dragoon Guards in its campaign to relieve the siege of Tobruk in Libya, which was ultimately lifted in November 1941. On 26 November 1941, the Times published a tribute to Lieutenant MH Weaver, written by "CS", which is worth recording for what it reveals about the qualities of the fallen Michael Wheeler and the writer, Cyril Salmon:[5]

"*...It is indeed hard to think of him as dead who was so vividly and gloriously alive. I remember him so well when he first came to the Temple...The first things one noticed about him were his good looks, his infectious gaiety, and his quite extraordinary charm. Underlying these somewhat obvious traits were a courage and determination, a kindliness, loyalty, and goodness that endeared him to all. His future at the Bar seemed full of promise. Had he lived, politics, however, would probably have proved a formidable rival to the law... His personal popularity wherever he went, whether at home or abroad, whether in the company of the most distinguished or the lowliest, was immediate and lasting. The future, no less than his friends had need of him. I know that he has gone to take an honoured place among "the very brave, the very true," that he has found a different and more permanent kind of glory and self-fulfilment...*"

Cyril Salmon's family life and personal tragedy

In 1929 Salmon, who was then aged 25 and a member of Barrington-Ward's chambers at 2 Harcourt Buildings, had married Rencie Vanderfelt, the 20-year-old daughter of a City stockbroker. Their first home was at 40 Hornton Street, London W8, where they had two children; Gai, born in 1933, and David, born in 1935. When War broke out, Salmon moved the family to the safety of a house near Godalming.

By the second half of 1942, Britain's prospects in the war looked much brighter: the bombing of London appeared to have ceased, the Axis forces had been defeated at El-Alamein and, on the Eastern Front, the German Sixth Army was bogged down in the disastrous battle of Stalingrad which would lead to its surrender at the end of January 1943. Salmon decided to plan for his family's return to London and for the resumption of his practice at the Bar. He bought an elegant new home at 12 Wilton Place, Belgravia.[6] But then Salmon suffered a great personal tragedy. On 9 October 1942, Rencie died at the age of only 33, leaving him to bring up their two young children.

Even so, Salmon was determined to resume his practice at the Bar. He approached the Inner Temple to rent rooms at 3 Paper Buildings, part of an early Victorian building which had emerged unscathed from the bombing of the Temple. On 14 December 1942[7] the Inner Temple Estates Committee approved the letting to Salmon of the four rooms on the ground floor south side of 3 Paper Buildings but required sureties. To satisfy the Inn, Salmon turned to two of his friends, both members of the Inner Temple, to be his guarantors: Major Walker Kelly Carter, who had been a colleague in 2 Harcourt Buildings, and Major Aubrey Melford Stevenson, who took silk in 1943 and would become one of the more colourful of post-War High Court judges. They agreed to be sureties and on 7 April 1943 Salmon entered into a tenancy agreement to take the chambers with effect from Christmas Day 1942.


The wreckage of Crown Office Row

Cyril Salmon as judge advocate

In 1943-44 Salmon joined the 8th Army, where he served at the staff headquarters as a judge advocate, reaching the rank of major and being decorated for his services in Egypt and Italy. According to his son, David, Salmon rarely spoke about the war. He complained that bivouacking in Italy had been extremely uncomfortable. He also mentioned a court-marshal in which he presided over a case of desertion, which he found very disturbing, because desertion on active service carried the death penalty.[8]

Salmon then returned to England. In September 1944 he presided over a court-marshal in Birmingham,[9] where Major Kenneth Elwyn Jones, the major in charge of a REME base near Birmingham, was charged with 14 charges of misusing petrol and War Department transport and one charge of improper association with ATS Sergeant EJ Hill (female),[10] the messing sergeant for his unit. Five of the misuse charges were proved. As to the improper association charge,[11] there was evidence that the Major and the Sergeant had been seen kissing. This was hardly surprising as the couple loved each other and would have married, if the Major had been free to do so. Major Salmon was unmoved by the emotional bond between the couple and was rigorous in upholding military discipline in the mess when he said:[12]

"*However difficult it might be to define the relationship which should exist between an officer and an ATS under his command,*

5. David Salmon recalls that, in the years after the War, his father often spoke of Weaver's early death with great regret.

6. Salmon told his son that 12 Wilton Place had cost £1,500.

7. The rent was £158 p.a. This tenancy agreement was followed by one dated 12 August 1946, which increased the rent to £280 p.a., guaranteed by Carter and Stevenson.

8. The Army Act 1881, s 12.

9. Corps of Royal Electrical and Mechanical Engineers, formed in October 1942 to repair and maintain the Army's vehicles, weapons and equipment.

10. The Auxiliary Territorial Service, which was the women's branch of the British Army during World War II.

11. This would have been under s 40 of the Army Act 1881, which provided that where a person subject to military law was guilty of "*any act, conduct, disorder, or neglect, to the prejudice of good order and military discipline, on conviction by a court-martial [he shall] be liable, if an officer, to be cashiered, or to suffer such lesser punishment as by this Act mentioned.*" If an officer was cashiered, he was dismissed from the HM's service in disgrace. The lesser punishments for officers under s 44 were: dismissal from HM's service, forfeiture of rank and reprimand or severe reprimand.

12. Birmingham Daily Gazette 14 September 1944.

I suggest anyone would conceive it meant conduct prejudicial to the good order and military discipline if a commanding officer kisses the sergeant of the ATS unit who happens to be in charge of the mess."

Return to practice

Towards the end of 1944, Salmon was released from war service. Since he would be 41 at the end of the year, he decided to apply for silk even though the prospects for work at the Bar in the aftermath of the War were so uncertain. On 29 June 1945 he was appointed a KC with, among others, Patrick Devlin, another future law lord. In 1945, Potter, who had reached the rank of squadron leader (equivalent to the rank of major in the army), was released from the RAF Volunteer Reserve.

When they resumed practice at their new chambers at ground floor south, 3 Paper Buildings, Salmon and Potter found a much changed and shattered Inner Temple. The chambers themselves were the familiar arrangement of four rooms on either side of a narrow corridor at the end of which was a cupboard. There was no internal lavatory, but communal facilities could be found at the bottom of the stairs in the basement. Salmon's large room was elegantly proportioned, with two high windows, giving views over the Inner Temple gardens. But that was not the tranquil and graceful view enjoyed today. Looking across the wrecked gardens, Salmon could see, immediately opposite his room, the broken ruin of Harcourt Buildings. Looking to the right, there was an empty rubble-strewn space where his old chambers at 6 Crown Office Row had once stood. Walking to the Royal Courts of Justice in the Strand, Salmon would pass the wreckage of the Inner Temple Library, where 45,000 books had been destroyed (although the most valuable ones had been removed to safety and survived), and the bombed-out shells of the Inner Temple Hall, the Parliament Chamber, the Master's house, the Temple church and several buildings which had accommodated barristers' chambers.

For the next ten years or so, Salmon and his colleagues would have to work among the noise and dust of a major building site, as the destroyed buildings were rebuilt. To some, like Lord Justice MacKinnon, who had thoroughly disliked the old Victorian gothic style Inner Temple Hall and Library, there was some benefit in their destruction, since the new designs were for "*far finer buildings, and more convenient, than those we have lost*".[13] The total cost of rebuilding the Inner Temple's buildings was just over £1.5 million, of which more than £1.4 million was recovered from the War Damage Commission, leaving the Inn to find the balance of over £100,000.

Albert had retired and so his younger son Eric took over the clerking. Since Salmon had taken silk, there was room for another junior barrister and so Salmon invited his friend, Claude Duveen, to join. Colin Sleeman returned from the war after Duveen had joined the chambers, but only stayed for a couple of terms before moving to another chambers. It is not clear whether Geoffrey Barratt returned to active practice.[14]

Duveen, like Salmon, came from a privileged background and in the pre-war years, although his practice may not have matched Salmon's, Duveen was involved in several cases which received newspaper coverage; particularly ithe field of defamation.

Claude Duveen's family background and arrival at the Bar

Claude Duveen was born at 246 Finchley Road, Hampstead on 6 April 1903, some eight months before Cyril Salmon was born at 232 Finchley Road. Claude's parents were Louis Duveen, a younger son of Joel Joseph Duveen, the founder of what was then the largest firm of art dealers in the world, and Helen Beatrice Salamon.

Claude's grandfather, Joel Joseph Duveen, was born in Holland and came from a Sephardic Jewish family which had a long history of dealing in antiques, works of art and other goods. In 1877 Joel and one of his younger brothers, Henry Duveen, had formed Duveen Brothers to deal in antique china, silver and works of art. Joel, who had a 70% share, was responsible for the English and European side of the business, finding works of art and dealing with customers at its London show rooms, while Henry, who had a 30% share, went to New York to develop relationships with the new breed of exceptionally wealthy American art collectors. By having partners on both sides of the Atlantic, able to communicate instantly through cable or telephone, Duveen Brothers was uniquely well-placed to exploit a situation in which Europe had plenty of art (much of which came on the market as land and grain prices fell) and America had the money with which to buy it. The business was enormously successful and sold to American collectors many of the great works of art that now adorn the museums of the United States.

Joel's eldest son, Joseph Joel (Joe), later Lord Duveen of Millbank, joined Duveen Brothers on leaving school and became a partner when he was 21. The partnership shares were adjusted so that Joel had 50%, Henry 35% and Joe 15%. Claude's father, Louis, who was quieter and more academic, continued his education at Oxford University before joining the family business. From about 1891, Joel suffered from ill-health and spent the winter months abroad in warmer climates, leaving the London business under the control of Joe and Louis. Joe had the entrepreneurial flair and negotiating skill to drive the business forward, while Louis ran the show rooms in Bond Street and acted as art historian and researcher, scouting for and advising on acquisitions. Under their stewardship the business continued to prosper, tripling in volume in the five years up to Claude's birth in 1903 and opening a Paris showroom on the Place Vendome. In 1907, as Joel's health worsened, there was a dispute about the future ownership of the business which was resolved by Joe acquiring Joel's interest and those of his brothers who remained involved, including Louis, being employed on generous salaries. In the following year, shortly before he died, Joel was knighted in recognition of his philanthropy, including donating the room for the Turner collection at the Tate Gallery.

Venice, 1919 – Left to right: Sir Joseph Duveen, Miss Dorothy Duveen, Claude Duveen and Mr Heilbut

> Duveen, like Salmon, came from a privileged background and in the pre-war years was involved in several cases which received newspaper coverage

Two years after Claude's birth, Louis Duveen and his family moved to Mayfair, where they lived in a succession of grand houses.[15] Reflecting the rising social status and wealth of the Duveen family, Claude was educated at Eton College.

Louis continued to play a key role in the business until about 1916 when he fell out with Joe. By the following year Louis was no longer on speaking terms with Joe or his Uncle Henry. Eventually a settlement was agreed, under which Louis departed and was paid off. Not long afterwards Henry died, leaving Joe Duveen in sole control of the whole business, which by 1920 was generating net profits of over US$700,000 per year. For the next twenty years until his death in 1939, Joe continued the successful operations of the firm and made donations to the British Museum, National Gallery and Tate Gallery, which led to him being knighted in 1919 and made a peer in 1933.

The dispute between the brothers does not seem to have affected Joe's affections for Louis's family. There is a photograph, taken in 1919, which shows the sixteen-year-old Claude, dressed in a splendid checked bathing robe, sitting at the Lido in Venice with his uncle Joe and cousin Dorothy. In the following year Louis died unexpectedly. Two years later, in 1922, Claude's mother re-married and in 1925 the family, including Claude, moved to 26 Grosvenor Street, Mayfair.

Meanwhile, after Eton, Claude went to New College, Oxford, where he decided on a career at the Bar. Claude was admitted to the Middle Temple in November 1924.

13. Sir Frank Douglas MacKinnon's Inner Temple Papers (1948, republished 2003) p 233.

14. Colin Sleeman recalls that at some stage Barratt became a clerk at the Old Bailey.

15. 8 Green Street, 56 Upper Brook Street and 51 Berkeley Square.

Claude's call to the Bar was delayed by illness until November 1927. His call papers reveal that he was then the pupil of Denis Pritt, the socialist barrister, but that did not stop Claude from pursuing a gilded social life. There is a photograph of Claude at a charity ball at the Gleneagles Hotel in October 1927. He is standing behind three ladies of impeccable pedigree with, among others, John Foster, his friend from Eton and New College and later the distinguished international lawyer.

DN Pritt

DN Pritt was a remarkable figure. After four years at Winchester College, spending time in Europe learning languages and attending London University, he was called to the Bar in 1909. By the time Claude Duveen became his pupil, Pritt had become an extremely successful barrister, specialising in commercial law at Robert Wright KC's chambers at 2 Pump Court. In 1927, after Wright had become a High Court judge, and about the time when Claude was his pupil, Pritt took silk. For the next 33 years until he retired in 1960, Pritt appeared frequently in the Court of Appeal, House of Lords and Privy Council, often leading other silks or juniors of great distinction. Initially, as a KC, he continued to be instructed in commercial work, but as his increasingly extreme political views became widely known, he was only retained for political and civil liberties cases.

By the end of the First World War, Pritt's political journey had taken him from supporting the Conservative Party to the Labour Party for whom he became an MP in 1935. He remained an MP until 1950 but was expelled from the Labour Party in 1940 for failing to condemn the Soviet invasion of Finland. By the early 1930s he had become an enthusiastic supporter of the Soviet

Pritt at Third Reich: Burning of the Reichstag – counter trial, London.
DN Pritt is sitting second left at the back.

Union's version of communism. He visited Moscow in 1932, when he was impressed by the "*flowers, pictures and photographs*" in the prison cells,[16] and again in 1936, when he attended the first show trial, whose procedures he commended for their fairness. Pritt was a prolific writer in praise of the Soviet Union and other socialist causes;[17] indeed, George Orwell described him as "*perhaps the most effective pro-Soviet publicist in the country*".[18] However, Pritt's political enthusiasms did not prevent him from being friends with an establishment figure like Walter Monckton. A pupillage with Pritt would have been a stimulating but bracing experience for someone of Duveen's background.

Duveen's career and family life before World War II

Claude Duveen did not stay in Pritt's chambers. Between completing his pupillage and leaving the Bar for war service, he practiced in common law and crime at 5 Paper Buildings between 1929 and 1931, at 10 King's Bench Walk between 1932 and 1935, and at 2 Garden Court from 1936. He joined the Midlands Circuit.

At the end of 1939 or the beginning of 1940, Duveen left the Bar for military service in the RAF Volunteer Regiment. In April 1940 he was commissioned as a flight lieutenant (legal branch). A year later he became a squadron leader (legal branch). His war career was not entirely plain-sailing, since in January 1943 he was fined 10s in Maidenhead Magistrates Court for riding his bicycle at night without lights. The Bench was so impressed by Duveen's letter, explaining that it had been a fine moonlit night and he wanted to save irreplaceable batteries, that the Chairman asked the clerk to write to the Minister of Supply, urging an increase in production of batteries. At the end of the War, in 1946, Duveen was promoted to wing commander (equivalent to a colonel) and awarded an MBE.

In 1930 Claude Duveen married Eileen Dora Schomberg with whom he had one daughter. In 1930 he bought Foxleigh Grange, Holyport, near Maidenhead, which remained their home until his death some 46 years later. Duveen's Who Was Who entry suggests that he lived a quiet life, since his only admitted recreation was "roses". That can't be entirely true, since he was a member of the MCC, a keen cricketer, and a passionate commentator on the game. He is credited with being party to a discussion with Walter Monckton and Charles Russell in the Temple one winter day in the early 1930s about organising some cricket for fellow members of the Bar the following summer. This discussion led to the foundation in 1935 of the Refreshers Cricket Club, for which Cyril Salmon occasionally played and which continues to flourish.[19]

Duveen at 5 Paper Buildings

Duveen's first appearance in the law reports was in 1931 in a case in the Court of Appeal,[20] which attracted a good deal of attention in the newspapers in England and Ireland. He was led by Gilbert Beyfus, at that time the leading expert on gaming laws, in an unsuccessful attempt to challenge the registrar of companies' refusal to register Irish Hospitals (Sweeps) Ltd, a company formed in England to sell or deal with tickets in a lottery in Ireland. The lottery was lawful under Irish law but the sale of tickets in England would be illegal. Since a company could not be formed for an unlawful purpose, the Court of Appeal held that the registrar had been right to refuse registration. Lord Justice Scrutton conjectured that the two gentlemen who wished to form the company did so to avoid prosecution under section 41 of the Lotteries Act 1823,[21] under which offenders were liable to be punished as "*rogues and vagabonds*", which could not apply to a company.

Duveen at 10 King's Bench Walk: Hayley Morriss's revenge

By 1932 Duveen had moved to chambers at 10 King's Bench Walk. In May of that year he acted as junior to Roger Bacon, another member of those chambers, in a libel action brought by Hayley Eustace Morriss against the proprietor, publisher and printer of the Bristol Times and Mirror. By 1932, Morriss had a somewhat tarnished reputation, which added to the challenge of winning for him substantial damages for libel. In the words of the Daily Express, he was "*A debauchee and dare-devil. Lover of animals but defiler of women*".[22]

Hayley Morriss (1887-1962) was the younger son of Henry Morriss, a wealthy Shanghai-based bullion dealer. His elder brother Henry E Morriss was the owner of Manna which won the 1925 Epsom Derby by a record distance. Morriss worked in the family bullion dealing business in China until about 1921 when he returned to England and was divorced from his first wife. In 1922, he bought Pippingford Park, a 1,000 acres estate on the edge of Ashdown Forest in Sussex, from where he ran what was reputed to be the third largest pig farm in the country. By 1925, Morriss was aged 37 and enjoying

> "*A debauchee and dare-devil. Lover of animals but defiler of women*"

16. Richard Overy The Morbid Age, p 289, quoting from DN Pritt's *The Russian Legal System in Twelve Studies in Soviet Russia*, edited by Margaret Cole (London 1933).

17. In the 1930s he published *The Zinoviev Trial*, Victor Gollancz 1936; *At the Moscow Trial*, 1937; *Light on Moscow, Soviet Policy Analysed*, Penguin 1939.

18. Kevin Morgan, article on Pritt in Oxford Dictionary of National Biography.

19. David Alexander QC and Marcus Haywood are prominent members of the Refreshers.

20. *R v Registrar of Joint Stock Companies, ex p More* 1931 2 KB 197, CA.

21. Repealed by the Betting and Lotteries Act 1934. By s 29 of the 1934 Act, a director or officer of a body corporate was deemed guilty of offences under the Act of which the body corporate had been convicted, unless he proves that the offence was committed without his knowledge. By s 30 the court had power to impose fines as punishment for offences under the 1934 Act.

22. Times, 15 May 1929.

> "a more appalling case of this kind is not within the recollection of the court"

life at Pippingford Park which he shared with his twenty-one-year old housekeeper, Madeleine Roberts, (also known as Eliza Phyllis Thurston Ward Roberts) several other employees, three Irish wolfhounds, eight puppies, and a fleet of cars, including a Rolls Royce. Morriss's undoing arose from advertisements he and Madeleine placed for attractive young girls to come to work at the Park, either indoors or outdoors as kennel maids. When the girls arrived, Morriss made indecent proposals to which some of the girls yielded. Others did not and one reported Morriss's conduct to the police.

In October 1925 Morriss and Madeleine were arrested and charged with conspiracy to procure young girls for immoral purposes.[23] Later, Morris was also charged with carnal knowledge with girls under the age of 16 and indecent assault[24] and Madeleine was charged with aiding and abetting those offences. During the committal proceedings in Uckfield Police Court, Morriss and Madeleine Roberts married. They were committed on bail to Lewes Assizes to answer the charges.

At the opening of the Autumn Assizes at Lewes on 10 December 1925, Morriss and Madeleine surrendered to their bail and heard Mr Justice Avory charge the Grand Jury with these words:[25]

"Judging by the calendar here, and my recent experiences both at Maidstone and Guildford, there appears to be a recrudescence of crime in the country. Whether this is due to the growth of Communism or whether it is due, as sometimes appears to be the fact, that imprisonment has not now the same terror for evildoers that it used to have, I will not conjecture."

These were not encouraging words for Morriss and his young wife. Two days later her counsel applied for an adjournment because she was not well enough to stand trial. Mr Justice Avory regarded the application as a scheme to defeat justice and rejected it. He also took the opportunity to revoke Morriss's bail.

At the trial the following week, Sir Edward Marshall Hall KC prosecuted. Roland Oliver KC, leading St John Hutchinson (the father of Jeremy Hutchinson QC), defended Morriss and Sir Henry Curtis Bennett KC, leading Sir Travers Humphreys, defended Madeleine. The defendants did not give evidence and Mr Oliver said very little on behalf of Morriss. It took the jury 30 minutes to reach their verdict of guilty on all but a few of the charges. Mr Justice Avory sentenced Morriss to two years imprisonment with hard labour for the offences concerning girls under the age of sixteen (the maximum sentence he could impose) and a further one year's imprisonment without hard labour for the other offences, to be served consecutively. He sentenced Madeleine to imprisonment for nine months with hard labour. He also ordered Morriss to pay £1,000 towards the costs of the prosecution. Morriss's application for permission to appeal against sentence was dismissed by the Court of Criminal Appeal. The Lord Chief Justice said that *"a more appalling case of this kind is not within the recollection of the court"* and Mr Morriss's crimes merited a longer sentence if the legislation had permitted it.[26]

Morriss served his sentence at Portsmouth, Winchester and Pentonville Prisons. While in prison, Morriss learnt that, on her release, his wife had had an affair at Pippingford Park with Walter Dudley Wood, a detective with an address in Park Lane. Morris petitioned for divorce on the ground of her adultery with Wood, from whom he claimed damages for loss of his wife. At the trial before Lord Merrivale, President, and a Special Jury, Morriss obtained his divorce and an order for costs against Wood, but no damages. In 1929 Morriss had the satisfaction of bankrupting Wood for failing to pay the costs.

On 21 July 1928, Morriss was released from prison and returned to Pippingford Park to launch a campaign of litigation to right the wrongs he considered he had suffered at the hands of the prison governors and the newspapers and periodicals which had published articles about him while he was in prison. In 1934, after the conclusion of the campaign, he found a new young wife.[27] He even managed to obtain indirect revenge on Mr Justice Avory, who had died in 1935, by recovering damages of £500 and three-quarters of his costs from the publisher and author of the judge's biography for calling him a *"rich seducer"* and for a defamatory description of the proceedings at the trial in 1925.[28]

Within days of obtaining his liberty, Morriss sued the prison governors for damages for wrongful imprisonment, claiming that he was released a day late, because he had been denied 5 remission marks. The claim failed for many reasons,[29] but at least it gave Morriss to explain in public the brutal nature of his treatment in prison. Morris brought many libel claims, of which by far the most successful was the Bristol Times claim for which he instructed Claude Duveen and Roger Bacon and where he recovered damages of £2,500. In the other claims, decided before the Bristol Times case, juries awarded him damages ranging between 50 guineas and £500.

The case for which Duveen acted for Morriss concerned two articles in the Bristol Evening Times and Echo. Morriss claimed that one article, reporting on the committal proceedings, gave the impression that he had raped a *"pretty Coulsdon girl, aged 18"*, rather than having consensual sex with her. He complained that the other article, published just after he had been convicted, made him out to be *"an odious hypocrite"*, who, when he was living in China, affected a *"religious devotion"* while making a habit of undertaking journeys into the interior for immoral purposes as a result of which he was divorced by his beautiful European wife. The article also implied that Morriss was a coward for remaining at ease in China during the Great War and not coming home to fight. It added that when he returned to London after the end of the Great War, Morriss led a life which alternated between idleness in luxury hotels and frequenting disreputable places, such as nightclubs and cheap dancehalls, where he made friends with girls he met casually. Mr Justice Swift ruled that there was no case to go to the jury regarding the report of the committal proceedings. The defendants (who were represented by Sir Patrick Hastings KC and Theobald Mathew) did not dispute that the other article was defamatory and so the only question for the jury was the amount of damages to be awarded, if any. As to that, Mr Justice Swift directed the jury that the fact that Morriss had been convicted of sex offences did not mean that he had no reputation capable of being damaged. Turning to the offences for which Morriss had been convicted, the judge observed (perhaps surprisingly): *"Many people were convicted of that sort of offence every year"*.[30] The judge went on to say that the jury might think that the article did Mr Morriss an infinite amount of harm by giving people the impression he was a *"thorough scoundrel"* long before the offences for which he was convicted. With that guidance, the jury awarded Mr Morriss damages of £2,500.

The outcome of this case caused grave concern among the newspapers, because of the impact the direction given by Mr Justice Swift about Morriss's offences and the size of the damages awarded might have on six other libel cases brought by Morriss, which were waiting to be tried. Sir Patrick Hastings immediately applied for the defendants' appeal to be expedited. Duveen appeared with Bacon to successfully oppose that. The Court of Appeal's refusal to expedite led to the prompt settlement of two other libel cases and the withdrawal of the appeal in the Bristol Times case.

Duveen at 10 King's Bench Walk: A legal horsewhipping and other cases

In January 1934 Duveen had a watching brief in *Bevir v Burton-White*, a slander trial for which ladies queued for places in the public gallery and which filled columns of the nation's newspapers. Mr Bevir, a solicitor, sued Miss Dallas Burt-White for slander for saying that he had presented a

23. Under s 2 of the Criminal Law Amendment Act 1885, it was an offence to procure or attempt to procure any girl or woman under twenty-one years of age, not being a common prostitute, or of known immoral character, to have unlawful carnal connection, either within or without the Queen's dominions, with any other person or persons. The 1885 Act was repealed by he Sexual Offences Act 1956.

24. Section 5 of the 1885 Act (defilement of girls between 13 and 16 years of age) and s 52 of the Offences against the Person Act 1861 (indecent assault).

25. Times 11 December 1925.

26. *R v Morriss (Hayley)* (1927) 19 Cr App R 75; Times 2 February 1926.

27. In April 1934 he applied to Uckfield magistrates under the Guardianship of Infants Act 1925 for consent to marry Diana Violet Yates (aged 17 ½) but withdrew the application. A few months later, in July 1934, he married his secretary, Marie Louise Ross (aged 25). In 1942 he divorced her for adultery with Captain Crawshaw, who was billeted at Pippingford Park, after he found the Captain in pyjamas under his wife's bed.

28. In *Morriss v Victor Gollancz Ltd and Stanley Jackson*, Times 17 April 1937.

29. *Morriss v Winter* [1930] 1 KB 243, Horridge J.

30. Nottingham Evening Post, 10 May 1932.

Gleneagles Hotel, October 1927. Duveen is standing far right and John Foster on the left.

divorce petition in order to blackmail her brother, Harold Burt-White, a gynaecologist, who was named as co-respondent.[31] The allegation exposed Mr Burt-White to being struck off the Medical Register, since it alleged that Mrs Bevir had committed adultery with Mr Burt-White, while she was one of his patients. Miss Burt-White had uttered the offending words at the home of Mr and Mrs Bevir on two occasions; once to Mrs Bevir in the presence of her sister and a friend and the second time to one of Mrs Bevir's friends in the presence of Mrs Bevir and another lady. By the time the slander action came on for trial before Mr Justice Horridge and a special jury, the Bevirs were reconciled and, on the complaint of Mr Bevir, Mr Burt-White had been struck off for, among other things, having a secret and improper relationship with one of his patients. These developments did not deter Mr Bevir from pursuing the slander action against Miss Burt-White in order to humiliate her brother, regardless of the collateral damage to the reputation of his own wife. He regarded her brother as a cad, fit to be horsewhipped. Accordingly, over 7 days Claude Duveen had the opportunity to absorb evidence of revenge, assignations in hotels round the country and tapped telephone conversations and to watch Patrick Hastings KC (who appeared for the defendant with Valentine Holmes) deploy his cross-examination skills on Mr Bevir and his witnesses. In the end the jury found for Mr Bevir and awarded him damages of £3,500. Duveen had a watching brief on Miss Burt-White's appeal, which was heard in June 1934. In giving judgment dismissing the appeal, Lord Justice Scrutton said: "I see no need for further comment on this very unpleasant case or on the people concerned in it."[32]

In 1935, Duveen took on the distinguished combination of Gavin Simmonds KC and Philip Sykes in making the bold but vain argument that interest was payable under s 33 of the Bankruptcy Act 1914 on the surplus under a deed of arrangement to which the 1914 Act did not apply.[33]

Duveen 2 Garden Court

Duveen remained in contact with DN Pritt KC who led him in *Poliakoff v News Chronicle*,[34] a defamation case, which turned on issues of procedure in libel trials, but which gives a tantalising glimpse of the dark world of 1930s Europe. The plaintiff, Vladimir Poliakoff, a Russian, owned a French German language newspaper, Pariser Tageblatt, which was the organ of anti-Nazi German refugees in France. In 1936, he sold the newspaper to the Nazi German government, which promptly supressed it. Before it was closed down, the editor and staff announced the sale in the newspaper and said that they would start another newspaper to "*prevent this Hitler propaganda coup and expose the shameless treachery of the proprietor*". The News Chronicle published an abbreviated version of that announcement under the heading "Hitler's Deal in France", which the plaintiff claimed showed him to be "*a base and despicable individual*", particularly since he was Jewish. The News Chronicle accepted that its article was defamatory but challenged the plaintiff's motive in bringing the claim against it, given that he had already successfully sued other newspapers in France and the United States, which had reported the sale, but had delayed in suing the News Chronicle. In his summing up, Lord Hewart, Lord Chief Justice, described the claim as "*gold-digging*" and suggested that the jury should ask itself: "*What is he here for?*" With that guidance and without leaving the jury box, the jury gave judgment for the defendants. That verdict enabled DN Pritt to open the appeal to the Court of Appeal with the words: "*I can describe this as an undefended action for libel, in which the jury returned a verdict for the defendant*" and asked for a new trial. The Court of Appeal was unimpressed with the logic of this submission; holding that the proper order would have been for nominal damages and that there had been no miscarriage of justice, since the plaintiff would not have beaten the payment into court. A few months later, Mr Poliakoff died in Paris at the age of 74.

One relatively minor case in the Buckinghamshire Quarter Sessions perhaps demonstrates Claude Duveen's early advocacy skills. In October 1938 he secured the acquittal of Clive Churton Castle, a 30-year-old commercial traveller, who was charged with driving a motor car at a dangerous speed.[35] The evidence was that the accused had driven at over 80 mph on a derestricted road in Iver, Buckinghamshire, at night, overtaking buses and weaving through oncoming traffic. The jury did not trouble to retire before returning a verdict of not guilty, evidently impressed, at Duveen's urging, by the accused's evidence that his car was in good condition, its lights were on, he knew the road and he did not think he was driving too fast.

Salmon KC's chambers in the aftermath of war

At the end of the Second World War there were only three active members of Salmon's chambers: Salmon, Duveen and Potter, who were all born in 1903 and called to the Bar in the years 1925-28. To begin there was not much work for barristers, but from 1947 work began to return to pre-war levels. Cyril Salmon KC became one of the busiest silks at the common law Bar, appearing in several important cases in the House of Lords. Claude Duveen began to receive instructions from Salmon's pre-war solicitors and developed a reputation for bankruptcy work as well as for general common law cases. The practices and judicial careers of Salmon and Duveen and developments in chambers after the end of the war will be described in subsequent articles.

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, for providing a mass of information about the Inn's buildings and the effect of World War II on the Temple and photographs of the damage.

Barnaby Ryan, Assistant Archivist at the Middle Temple, for providing information about Claude Duveen

For information about Lord Salmon and his family: Sir Anthony Evans, for providing his papers on Salmon; the Hon David Salmon for his recollections and photographs; and Lord Brown of Eaton-under-Heywood, Michael Anderson, Mary Morris and Adrian Thompson for their help in tracing the Salmon family history.

For information about Claude Duveen and his family: Emma Duveen, a great niece, who clarified aspects of family history and Sylvia Allen, the widow of Tony Allen, former clerk to chambers between 1951-95, for her recollections of Duveen.

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Who Was Who

Wikipedia

31. Although the offending words were spoken in a private place and no damage ensued, Mr Bevir had a good cause of action for slander because Miss Burt-White's statement that Mr Bevir's intent was blackmail imputed that he had committed a crime punishable by imprisonment.

32. Montgomery Hyde, Sir Patrick Hastings, pp 266-274.

33. *Re Rissik* [1936] Ch 68. Philip Sykes was the father of Richard Sykes QC and, like him, a doyen of company law.

34. *Poliakoff v News Chronicle* [1939] 1 All ER 390, CA.

35. Presumably, contrary to s 11 of the Road Traffic Act 1930: "driving a motor vehicle on a road … at a speed … which is dangerous to the public".

News in brief

Re British Steel Limited

At 9am on Wednesday 22 May 2019, Mr Justice Snowden presided over an urgent application in respect of British Steel Limited ("British Steel") in Court 8 in the Business and Property Courts of England and Wales. The application was made by members of South Square. An immediate winding up order was requested, along with an application for the appointment of special managers to assist the Official Receiver as liquidator. Lloyd Tamlyn of South Square acted for the directors of British Steel in the application for immediate winding up. Adam Goodison of South Square acted for the Official Receiver in the application for the appointment of special managers.

The application followed the collapse of negotiations with the British Government for taxpayer support for British Steel to continue its operations. Mr Justice Snowden granted an immediate winding up order, timed at 9.51am on 22 May 2019. The judge also made a special manager appointment, appointing partners of Ernst & Young LLP as special managers with powers as specified in the special manager order to assist the Official Receiver in his task as liquidator. As has been widely reported in the press, the Official Receiver now has a window of opportunity to attempt to sell the business or otherwise attempt to realise assets. It is not expected that unsecured creditors will receive anything other than the prescribed part.

Mourant & South Square Litigation Forum

South Square and Mourant will be holding their annual conference this year on 19 September 2019 at Landing 42 in The Leadenhall Building, London.

A selection of speakers from both South Square and Mourant will be covering sessions on 'Economic Tort Actions', 'Reflective Loss' and an Insolvency Focus. We do hope you can join us for what promises to be an engaging and interesting seminar. Do visit out website for further details (www.southsquare.com).

INSOL International Channel Islands Seminar

Andrew Shaw and Hannah Thornley attended the annual INSOL International Channel Islands One Day Seminar, which took place at the Duke of Richmond Hotel on Guernsey on 20 June 2019. Paul Heath QC, who is an associate member of South Square, also participated as a speaker.

The topics covered by the seminar included issues arising when the criminal and civil proceedings arise out of the same circumstances; innovative alternatives to insolvency; offshore adaptions to onshore changes (such as public registers); and the future of audit. The delegates were also treated to a panel discussion of recent big cases chaired by Mathew Newman, of Ogier, in which Andrew Shaw summarised the recent Saad litigation in the Cayman Islands.

Becker Bankruptcy Auction Resumes

Three-time Wimbledon Champion Boris Becker is auctioning off items from his illustrious career to pay off the debts he owes after being declared bankrupt two years ago.

The 82 items include trophies, such as his 1989 US Open trophy, tennis rackets, shoes and clothes that he wore on the court and even a watch gifted to him by Novak Djokovic.

The sale, planned for last year, was postponed after Becker claimed that his appointment by the Central African Republic as a sporting, cultural and humanitarian attaché to the European Union, meant he could not be subjected to legal proceedings. Mr. Becker has now dropped this claim and the trustees to the Becker estate hope to declare a dividend to creditors later this year.

Africa Commercial Law Foundation

Glen Davis QC has been appointed a Trustee of the Africa Commercial Law Foundation. The ACLF is established to support the practice and development of commercial law across the African continent, in particular by researching, analysing and publishing comparative information on African Commercial Law systems. Other trustees include Professor Christopher Forsyth of Cambridge University and Richard Gordon QC, and the Director is Rebecca Perlman, a corporate lawyer at Herbert Smith Freehills.

ACLF's first substantive project is to support a commercial-law module on AfricanLII, collating and indexing commercial judgments from a number of African jurisdictions and making them available for free on-line. The first phase of the project is currently being prepared, and will cover cases from Ghana, Nigeria, South Africa, Tanzania and Uganda. More information about ACLF can be found on ACLF's website at www.clfafrica.org, and AfricanLII's website (where the digested cases will appear in due course) is at www.africanlii.org.

Glen is also the Chair of the Africa Committee of the Commercial Bar Association and has long taken an interest in the development of commercial law (including cross-border insolvency law) in African states.

Georgina Peters speaks at COMBAR North American Meeting 2019 in New Orleans

On 29 to 30 May 2019, Georgina Peters attended and spoke at the COMBAR North American Meeting 2019, which this year took place in the wonderful setting of New Orleans, Louisiana. On the second day of the conference, Georgina took part in a highly entertaining debate on the motion "This House believes that cross-examination of factual witnesses merits its central place in the trial process in commercial cases".

Georgina argued forcefully against the motion, alongside Charles Béar QC (Fountain Court Chambers) and Nicole Sullivan (White and Williams LLP, New York). Supporting the motion were Joe Smouha QC (Essex Court Chambers), F. Paul Morrison (McCarthy Tétrault LLP, Toronto) and Steven Molo (Molo Lamken LLP, New York). The debate centred on themes such as the fallibility of human memory (in light of evolving psychological theory, as considered in the judgment of Leggatt J (as he then was) in Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm)), the continued validity of allowing a judge to be the single arbiter of fact, and the ability of our current trial model to function against the backdrop of an explosion in the volume of available documentary evidence.

Image by David Castor

Record Year for the London Courts

The seventh annual Commercial Courts Report, produced by communications consultancy Portland, was published in May. The report, which analyses judgements form the London Commercial Courts to find trends over time – both who uses the Courts and how London measures up in an increasingly competitive international market – reveals that the London Courts had a record year.

The report states that the London Commercial Courts heard 258 cases, an increase of 63% on the previous year, with 1012 different litigants from 78 countries. Whilst 40% of litigants were from the UK, 60% were non-UK based. Just behind the United States, Kazakhstan and Russia continued to dominate. They were joined in the top 10 by Ukraine for the first time since 2014. Despite the increased UK Government scrutiny of high-profile Russian, Kazakh and Ukrainian nationals, London clearly remains the forum of choice for litigants from these jurisdictions.

News in brief

Woodford's Woes

Investors in Neil Woodford's £3.5bn UK Equity Income fund continue to wait to access their money, as Britain's best-known stockpicker announced that the fund's suspension would continue indefinitely.

The suspension of Woodford Equity Income on 3 June 2019 by Link, the firm that manages the fund's governance, sparked the biggest controversy in UK fund management for a decade, with hundreds of thousands of retail investors unable to reclaim their capital from a fund that has since been forced into a fire sale of its assets. The suspension is designed to give Mr Woodford space to sell investments so that he can raise cash and switch into more liquid stocks. This is so that, if and when Link decides the fund is in a fit state to be reopened, it is able to satisfy redemption requests from investors. The decision to maintain the suspension reflects the fund's inability to meet such requests while staying below a regulatory cap on hard-to-sell illiquid assets in the fund.

The fund's suspension prompted investors to sell their holdings in other Woodford Investment Management funds. The group's other open-ended fund, Income Focus, has shrunk more than 40% in the past month to £296m, while the share price of the closed-ended fund, Patient Capital Trust, has dropped by a third.

Mr Woodford has attracted widespread criticism for continuing to charge total management fees of at least £65,000 a day on the Equity Income fund during its suspension.

Administrators visit Jamie's Italian

KPMG have been appointed administrators of Jamie Oliver's restaurant group which includes the Jamie's Italian chain, Barbecoa and Fifteen. In total 25 restaurants are affected by the move, of which 23 are from the Jamie's Italian chain which had run up £71.5 million in debt. Bailiffs were seen clearing out the flagship site near Piccadilly Circus days after the chain's collapse.

Jamie's Italian was on the brink of collapse two years ago with the chef revealing in an interview it had 'simply run out of cash' and run up millions in debt. In 2017 Mr. Oliver had to close the last of his Union Jacks restaurants, and also shut down his magazine 'Jamie', which had been running for almost 10 years.

The chef himself has previously blamed his empire's parlous state on Brexit, which he said was among the factors which caused a 'perfect storm', as well as rental costs, local government rates and the increase in the minimum wage. Whilst many agree, Jamie's Italian in particular had suffered from poor reviews with the restaurant critic Marina O'Loughlin famously saying she would need to be paid to go back to the branch in Westfield, London.

According to Companies House, Jamie Oliver Holdings Ltd – the umbrella company under which Mr Oliver runs all his – turned over £32 million last year. Jamie Oliver Limited, Jamie Oliver Licensing Limited and the international restaurant franchise business, Jamie's Italian International Limited, will continue to trade as normal.

Hadlow College wins dubious honour

In mid-May the Department for Education decided to end bailouts to Hadlow College (which has been engulfed in a series of financial irregularities since an investigation earlier in the year) which has led to it having the dubious honour of becoming the first institution to be taken through the new college insolvency regime.

Investigations into the Hadlow Group (which includes Hadlow College and West Kent and Ashford College) were triggered after a request to the Department for Education for restructuring funds. Accounting irregularities relating to land sales within the group were revealed by the Further Education Commissioner and, at the end of January deputy principal, Mark Lumsdon-Taylor resigned. At the start of February, Paul Hannan, principal and chief executive, went on sick leave. It subsequently emerged that both Hannan and Lumsdon-Taylor had been suspended over allegations around college funding.

The Further Education Insolvency Regime came into force on 31 January this year. The new legislation, similar to the measures introduced last year for private registered providers of social housing, will apply aspects of corporate insolvency law to colleges that are statutory corporations. There will also be a new special administration regime known as education administration, with a special objective to protect learner provision for existing students at an insolvent college.

Rococo Administration

Luxury chocolate retailer Rococo has fallen into administration, making it yet another victim of the UK's tough high street conditions. Insolvency specialists BDO were appointed as administrators towards the end of May this year, and are seeking a buyer for the business. All five Rococo stores are still trading and no redundancies have yet been made.

The business was founded in 1983 by Chantal Coady, then aged 23. She has subsequently written five books and was awarded an OBE in 2014 for "services to chocolate".

Bolton Wanderers

One of the English Football League's oldest members is on the brink of collapse, following the appointment of David Rubin and Partners to oversee its administration. A winding-up petition against the club over unpaid taxes, with the former Championship side still owing over £1m to HM Revenue & Customs, has been suspended by the High Court as a result.

The news will not have come as a surprise to fans, as the club has been in financial turmoil for the duration of its current ownership. It was only able to avoid administration in September 2018 after an emergency loan of £5m by former owner Eddie David, just days before his death.

Bolton are far from the only club in the lower leagues in serious financial trouble, or which are struggling to pay wages. Morecambe FC, Oldham Athletic, Bury, Coventry City and Southend United are in all in a similar situation. More than 23% of English Championship clubs and 40% of those in the Scottish Premiership believe that their finances are in need of urgent attention, or are a cause for real concern.

The club have endured a miserable season both on and off the pitch, being relegated after 2 years in the Championship. Bolton begin next season in League One, with a 12-point deduction, the standard punishment faced by footballing entities that enter into administration.

As the DIgest went to press Bolton cancelled their friendly against Chester, citing players and coaching staff under 'severe mental and emotional stress' having not been paid for 20 weeks.

News in brief

Both judge and jury

> *‘Your appeal for refusal has been rejected but you could apply to the resident judge’,but I told them, ‘I am the resident judge’*

Judge Keith Cutler, resident judge of Winchester and Salisbury, was surprised earlier this year when he received an official summons to sit as a juror in a case over which he was also expected to preside.

Speaking to a jury at Salisbury crown court, Cutler said he had to make several attempts before he managed to excuse himself from his public jury. “I was selected for jury service here at Salisbury crown court for a trial starting 23 April,” he said. “I told the jury central summoning bureau that I thought I would be inappropriate, seeing I happened to be the judge and knew all the papers. They wrote back to me. They picked up on the fact I was the judge but said ‘Your appeal for refusal has been rejected but you could apply to the resident judge’, but I told them, ‘I am the resident judge’. I had to phone them up and they [eventually] realised it was a mistake.”

Rise for High Court Judges

In a bid to stem the recruitment crisis across the judiciary, eligible High Court judges have been given a 25% pay boost, and circuit and tribunal judges a 15% rise. The allowance will only be given to eligible judges – those eligible for a new, less valuable pension scheme introduced in 2015, which is currently being challenged in the courts on the grounds of age discrimination (Lord Chancellor v McCloud and Mostyn & Ors [2018] EWCA Civ 2844). It will be retained only until the McCloud litigation is complete, and will be taxable, non-pensionable and non-consolidated.

The 25% rise replaces the temporary recruitment and retention allowance of 11% that was introduced in 2017 and will bring the annual salary for eligible High Court Judges to £188,901 from October. Circuit and tribunal judge salaries will rise to £140,289. These figures include a permanent 2% salary rise given to all judges. The increases, however, fall short of the Senior Salaries Review Body’s recommendations of 32% for High Court judges, 22% for Circuit and Upper Tribunal judges, and 8% for District and First-tier Tribunal judges.

Three successive recruitment exercises for High Court positions failed to fill all available vacancies, with 14 posts unfilled last October and more vacancies due to arise this year.

Top of the shops no longer

Sir Philip Green, no stranger to the News in Brief section of the Digest, is no longer listed as a billionaire in the Sunday Times Rich List, published in May of this year. This is the first time since 2002 that Sir Philip and his wife Tina have failed to make the billionaire echelons. The Times Rich List valued his high street fashion empire, Arcadia Group as “worthless” as it struggles with pensions debt as well as harassment and bullying scandals.

This may be the least of Sir Philip’s woes, however. On 12 June his retail empire staved off collapse, by winning the backing of creditors, including The Pensions Regulator, the Pension Protection Fund and Landlords, for seven Company Voluntary Arrangements (CVAs). The CVAs involve closure of at least 23 stores, rent cuts on another 200 sites and are part of a wider restructure in which about 25 more UK stores will close as the property arms of Miss Selfridge and Evans are put into administration. Further UK stores could also close under the deal as landlords subject to rent cuts have 1 year in which they can replace Arcadia in favour of better-paying tenants.

The backing of The Pensions Regulator and the Pension Protection Fund was obtained after Lady Tina (the official owner of Arcadia) agreed to put £100m into the scheme over a three year period, alongside £285m in property assets and cash payments form the company itself.

London Legal Walk

Members and staff were proud to take part in the London Legal Walk in support of the London Legal Support Trust on Monday 17 June 2019. This is an annual event where thousands of judges, barristers, solicitors, legal staff and students cove one of two 10km routes around London, raising much-needed funds through sponsorship to support free legal advice centres.

The money raised enables the centres to offer help to the homeless, housebound, elderly, victims of domestic violence, people trafficking and many more. In 2018 a record breaking £830,000 was raised by 13,000 walkers. Donations for this year are still be counted and can still be made through the following website: www.londonlegalsupporttrust.org.uk

Glory on the Golf Course

Simon Mortimore QC has been appointed captain of Royal St George’s Golf Club, Sandwich, for 2019/20. Simon is the first member of the Bar to be appointed captain of Royal St George’s since Lord Salmon, the founder of our Chambers, who was captain in 1972-73. The only other barristers or judges to have been captain were Sir Muir Mackenzie KCB, KC (1907-08), who among other things wrote the article about bankruptcy in Halsbury’s Laws of England (1st ed), and Sir Henry Kekewich (1895-96), a judge of the Chancery Division.

Royal St George’s will host the Open Championship in July 2020, the 15th time it will have done so. Apart from helping in the preparation for the Open, Simon will be host for the Vagliano Trophy, a women’s amateur match between Great Britain and Ireland and the Continent of Europe, played at Royal St George’s in June of this year. He will attend the 2019 Open Championship at Royal Portrush GC and the Walker Cup at Royal Liverpool GC, Hoylake. His own golfing exploits involve him in matches against the R&A and Prestwick GC (the venue for the first Open Championship) and trips to Royal Liverpool for its 150th anniversary celebrations and to Valderrama, which is reputed to be the finest golf course on mainland Europe.

Down the plughole for Bathstore

Bathstore, the UK’s biggest bathroom specialist, has collapsed into administration after failing to find a buyer. The ailing business embarked upon a turnaround plan last year with its owner, American billionaire Warren Stephens, providing a £15m loan and extending the maturity of previous loans to the end of July 2019. However, it is understood Stephens was unwilling to inject more cash into the ailing business before rent day in June of this year.

Administrators BDO have been appointed and the business will continue to trade for now in the hope it can be sold as a going concern. So far, no offers have been received.

Rival bathroom providers, Better Bathrooms, slumped into administration in March with the loss of 325 jobs. The £1bn-a-year bathroom retail sector has been hit by the slowdown in the housing market and weak consumer confidence, with sales of big-ticket items particularly hard hit.

Patisserie Valerie arrests

On 18 June five arrests took place in relation to the alleged accounting fraud at Patisserie Valerie in a joint operation by the Serious Fraud Office and police. None of the arrests are thought to relate to any current employees of Patisserie Valerie which was bought for £5m by Irish private equity firm Causeway Capital after in entered administration in January of this year with debts valued at £94m.

Before the arrests Causeway revealed that, before the buy-out, the patisserie chain had been under such financial pressure that managers had ordered the puff pastry to be made form margarine instead of butter in a bid to cut costs. That order has now been reversed.

SOUTH SQUARE CHALLENGE

SET BY
Charlotte Cooke

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02

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Enter our August 2019 South Square Challenge and you could win a magnum of champagne!

Our competition for this issue celebrates the 100 year anniversary of the 1919 Sex Disqualification (Removal) Act, following the 1914 Court of Appeal case of Bebb v Law Society which found that the entire female gender failed to fall within the definition of 'persons'.

Your task on this occasion is to correctly identify each of the remarkable women in the photographs below and then assign them not only to their 'first' but also the correct year in which that 'first' happened.

Please send our answers by e-mail to kirstendent@southsquare.com, or by post to Kirsten at the address on the back page. Entries to be in by 1 September 2019 please. Best of luck!

FIRST WOMAN TO ...

A. First female High Court Judge assigned to the Chancery Division.

B. First woman at Oxford University to sit the Bachelor of Civil Law examinations.

C. First woman to be awarded a scholarship at Gray's Inn.

D. First woman to gain a law degree, having previously been refused permission to take the Law Society's exams to become a solicitor.

E. First female head of Chambers at 4 Brick Court, also known as 'the Monstrous Regimen of Women'.

F. First woman appointed Attorney General for England and Wales and Advocate General for Northern Ireland.

G. First woman to be appointed to the professional judiciary full-time.

H. First woman to be awarded a scholarship at Gray's Inn.

I. First woman Justice of the Supreme Court.

J. First woman appointed High Court Judge, and also credited with bringing 'Your Ladyship' into legal vocabulary after years of being addressed as 'My Lord' in court.

IN THE YEAR...

i. 1888

ii. 1892

iii. 1936

iv. 1945

v. 1965

vi. 1974

vii. 1993

viii. 2007

ix. 2009

MARCH CHALLENGE

The answers to the March 2018 challenge were:

1. Sir Colin Birss, Beekeeping
2. Sir Peter Gross, cross-country skiing
3. Sir Andrew Longmore, Fell walking
4. Sir Terence Etherton, Fencing (competing as part of the 1980 Moscow Olympics team)
5. Sir Richard Snowden, Rugby referee
6. Sir Launcelot Henderson, Botany
7. Sir Antony Zacaroli, steam trains
8. Sir Christopher Nugee, Tideway sculling
9.

The winner is Chris Chapman of Quayside Chambers, Wellington, New Zealand to whom we send our congratulations, a magnum of champagne and a fabulous South Square umbrella!

Diary dates

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

Spring 2019 onwards

19 September 2019
South Square Mourant Litigation Forum
Landing 42, The Leadenhall Building, London

26–29 September 2019
INSOL Europe Annual Congress
Scandic Copenhagen Hotel, Copenhagen, Denmark

7 November 2019
IWIRC Women in Restructuring conference
Painters' Hall, London

18 October 2019
INSOL International Hong Kong One Day seminar
Four Seasons Hotel, Hong Kong, SAR China

18 November 2019
South Square/ RISA Cayman Seminar
The Ritz Carlton Hotel, Seven Mile Beach, Grand Cayman

15–18 March 2020
INSOL Cape Town
Further details to follow

8–9 June 2020
International Insolvency Institute 20th Annual Conference
Grand Hyatt, Hong Kong, SAR China

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

SOUTH SQUARE

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Marcus Haywood
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