Digest

SOUTH SQUARE

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

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SOUTH SQUARE

From the editors

Marcus Haywood and William Wilson

Welcome to the November 2019 edition of the South Square Digest.

Since the last edition was published in July much has happened. Boris Johnson became the UK's new prime minister. Parliament was prorogued for five weeks to 31 October 2019 only to be recalled in September following the historic (and unanimous) decision of the Supreme Court that the prorogation was unlawful. 21 Conservative MPs lost the whip for backing a successful backbench bill to block "no deal". The Government agreed a framework "Brexit deal" with the EU, but Parliament voted down the (3-day) timetable to get it through the House of Commons by 31 October. The Prime Minister didn't "die in a ditch" on Halloween, but instead wrote an unsigned letter to the EU asking for a further extension. Now we find ourselves gearing up for the first December election since 1923. Can the "Boris bounce" last? How will "Workington man" vote? What will turnout be like? The surest bet at the moment looks like a record number of non-Conservative and non-Labour MPs in Parliament. The pieces remain in flux.

The last few months have also seen important developments at South Square.

On 8 October 2019 William Trower QC was appointed as one of her Majesty's High Court Judges, assigned to the Chancery Division. As well as his outstanding career at the Bar, William has made a huge contribution to Chambers over the years, serving as head of the Executive Committee and subsequently as Head of Chambers for a period time spanning 17 years. We thank William for all he has contributed to Chambers over the years, wish him the best in his new role and look forward to appearing before him. Chambers' loss will be the Chancery Division's gain. A full article on William's elevation appears below.

This month also saw South Square, for the third year running, named as Company/Insolvency Set of the Year at the Chambers Bar Awards. Congratulations also to Felicity Toube QC who was named as Company/Insolvency Silk of the Year at the Awards.

Since our summer edition, several important decisions have been handed down in which members of chambers have been involved, most notably the challenge to the Debenhams CVA, in which nine members appeared in August. A summary of this case, along with other cases of note, many involving members of Chambers, appear as always in our Case Digests.

As a number of members of Chambers head off to the Cayman Islands for the joint South Square/RISA conference on 18 November 2019, we have two articles which consider important recent decisions from the Cayman Islands (and which have wider implications for all those practising in our specialisms, offshore and onshore alike). Tom Smith QC together with Peter Hayden and Jonathan Moffatt of Mourant consider recent developments in relation to the reflective loss principle arising out of the decisions of the English Court of Appeal in *Garcia v Marex Financial Limited* and the Caymans Islands Court of Appeal in *Primeo Fund v Bank of Bermuda (Cayman) Ltd & Another.*

Meanwhile, Toby Brown and Maples' Nick Herrod ask: *"Has the Privy Council's Decision in Weavering Affected Investor Certainty in Cayman Islands Funds?"*.

Following on from the last edition's popular lead article on crypto-currencies, we have an article by Alex Riddiford on *"Cryptoassets, Cryptoliabilities – Bitcoin and Insolvency"* and we also reproduce a lecture given by Mr Justice Zacaroli on *"Crypto Currencies and Insolvency"* to the Insolvency Lawyers Association on 17 October 2019. This is a new and exciting area of the law where South Square looks forward to applying our expertise.

Taking several steps back from the age of crypto-currencies to post-war Britain, Simon Mortimore QC continues his history of South Square with a lively and fascinating account of Cyril Salmon KC's chambers in *"Austerity Britain (1946-1951)"*.

Following the sad loss of Gabriel Moss QC, Professor Christoph Paulus, who recently became an associate member of Chambers, takes over the regular Euroland piece and provides a round-up of recent developments on the continent.

And of course, for those in need of a break from Brexit and election news, we have the Digest Quiz. This time around, not only does a a magnum of champagne await the winner but also a brand new Galaxy Samsung Tab A!

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

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

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

Marcus Haywood and William Wilson

Elevation of the *Honorable Mr. Justice Trower*

South Square is proud to announce that on Tuesday 8 October 2019 Mr Justice Trower was sworn in as one of Her Majesty's High Court Judges, assigned to the Chancery Division.

Mr Justice Trower had an outstanding career at the Bar. He was called to the Bar by Lincoln's Inn in 1983, took silk in 2001, became a Deputy High Court Judge (Chancery Division) in 2007 and was made a Bencher of Lincoln's Inn in 2009. His reputation as an exceptional practitioner and a very fine lawyer was universally recognised both in the City and amongst the commercial community more widely.

Whilst William had a broad financial and commercial practice, he was one of the real insolvency and restructuring gurus of his generation, being named insolvency silk of the year twice and frequently ranked as a leading silk and 'star at the Bar' in the legal directories. He acted in disputes arising out of most of the high-profile and high-value insolvencies and restructurings. Back in the reasonably early days of his career he appeared, together with the late Gabriel Moss QC in relation to the affairs of Robert Maxwell and his companies where, courtesy of back trouble, he spent most of one lengthy trial on the floor on his back, from where he tried to ensure that Gabriel stuck to the script! A little later he appeared in the Bermuda Fire litigation in Bermuda. This trial was supposed to be two months long but, fortuitously for his suntan and pocket, it turned into eight.

His truly glittering career spanned all the way through the decades towards the more recent insolvencies of Lehman Brothers, Nortel Networks group, Kaupthing and Landsbanki where he was always instructed by accountants from the largest UK firms and the very best solicitors. In relation to Lehman he acted for the administrators for the whole of their more than 10 years of appointment, as well as appearing for them at all levels right up to, and including, the Supreme Court, a representative feat he also achieved in Nortel.

But William's achievements whilst at the Bar do not stop there. He was a Reviewer of complaints for the Insolvency Practitioners Association. He was a member of Insolvency Rules Committee for 11 years, and he was a non-executive member of the board of the Insolvency Service. He was also an author, contributor and consulting editor of a number of texts, including Corporate Administrations and Rescue Procedures, now in its third edition.

All of this led to some fantastic descriptions of him in the legal directories that anyone who practices in the insolvency and restructuring field would be envious of. He was described as "the go-to man" for many top law firms and the "first choice for the most difficult intellectual assignments in the restructuring and insolvency arena". He was described as "the master of cross-border insolvency law", "the leading insolvency lawyer" and "the best brain at the insolvency bar" with his opinions being said to be "utterly on the money".

Quite apart from Mr Justice Trower's practice, he was the head of the Executive Committee in our Chambers at South Square as well as subsequently becoming Head of Chambers: a period of time spanning 17 years. He carried out his duties with great attention, care, devotion, integrity and independence of mind and not a murmur of complaint despite the fact that it was both unpaid and must have taken up a considerable proportion of his time.

During his time at South Square William also, of course, was pupil master and mentor to our newer recruits, and many members of Chambers owe much of their own practices to the work ethic he instilled in them, and the care and humour, as well as unstinting time, that he devoted to them during their seats both with him and afterwards as they began their careers.

William will bring to the Bench his formidable intellect coupled with a modest and approachable judicial manner that will make him a delightful, if demanding, tribunal but also ensure that appearing in his Court will be a challenging yet thoroughly rewarding experience for all advocates, particularly those from South Square. His departure is in some senses sad for Chambers', loss is truly the Chancery Division's gain.

David Alexander QC

Reflective Loss: *the Unprincipled Principle*

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The reflective loss principle ('RLP') is designed to prevent a claimant from recovering damages for loss suffered because the company in which the claimant is invested has suffered loss.

It was introduced by the English Court of Appeal (CoA) in the decision in *Prudential Assurance Co. Ltd. v Newman Industries Ltd. and Others (No. 2)* [1982] AC 204 *('Prudential')*, which held that the claimant shareholder could not recover a sum equal to the diminution in the market value of his shares or dividend because such a loss was merely a reflection of the loss suffered by the company.

Although the RLP has been applied in common law jurisdictions for almost forty years, in recent years it has become more significant and controversial. The increased scrutiny has arisen from an uncertainty about its ambit, which has been expanded by the courts, in particular in two recent decisions in the United Kingdom and the Cayman Islands. Both decisions are currently on appeal to the United Kingdom Supreme Court and the Judicial Committee of the Privy Council respectively.

The first is the decision of the CoA in *Carlos Sevilleja Garcia v Marex Financial Limited* [2018] EWCA Civ 1468 (*'Marex'*), heard by the Supreme Court on 8 May 2019 and awaiting judgment. This case concerns the question of whether the RLP applies to claims by creditors as well as shareholders of a company and the breadth of the fraud exception to the RLP, where the wrongdoing of the defendant has disabled the company from being able to bring a claim. The CoA found that the fraud exception only applied in very limited circumstances.

The second is the decision of the Cayman Islands Cayman Islands Court of Appeal (CICA) in *Primeo Fund (in Official Liquidation)* ('Primeo') v (1) *Bank of Bermuda (Cayman) Limited and (2) HSBC Securities Services (Luxembourg) SA* (unreported, 13 June 2019). The CICA found that Primeo had valid claims but that its loss was reflective, notwithstanding that Primeo had suffered its losses before it acquired a shareholding in a company. The case raises a wide range of issues relating to the RLP.

As discussed below, the current uncertainty surrounding the limits of the RLP has come to the fore because of the draconian, and potentially very unjust, consequences of the RLP. Originally intended to prevent claimants from using a personal action to circumvent the rule in *Foss v Harbottle* (1843) 2 Hare 461 *('Foss')* – the "proper plaintiff" in an action in respect of a wrong alleged to be done to a company is the company and not the shareholder – the scope of the RLP may now extend to any situation where there is a prospect of a claimant receiving a contribution to separate loss which it has suffered from a company which may also have an action, even if the company's action is likely to fail, and the fraud exception may be so narrow that it has no practical effect. Given that the effect of the rule is to expropriate from the claimant its cause of action, and the courts have no discretion in relation to its application, obvious questions arise as to whether it operates in the interests of justice and is appropriate in its current extended form.

Expansion of the RLP since its origin

The rule in *Foss* operated to prevent shareholders from enforcing a cause of action belonging to the company.[1] The basis for the rule was that a company is a separate legal entity and liable for its own contracts and torts. Any irregularity or wrong which occurred in the management of the company was capable of being waived or ratified by an ordinary resolution of the company in general meeting. This preserved the rights of the majority and would generally bind individual shareholders. The exception to the rule was where there was a fraud on the minority, such that the company was under wrongdoer control, which enabled a minority shareholder to bring a derivative claim on behalf of the company in respect of the company's cause of action.

Approximately 140 years later, the courts began to embark on the exercise of applying the purpose of the rule in *Foss* to personal claims brought by shareholders to recover for their own loss. The first decision was *Prudential* in 1982. The CoA held that the shareholder's personal claim was misconceived because, in seeking to recover a sum equal to the diminution in market value of his shares his loss was merely a reflection of the loss suffered by the company. A personal action by the shareholder for this loss would subvert the rule in *Foss* that the company has the cause of action in respect of breaches causing it to suffer damage and no such cause of action vests in the shareholder, who knows that his investment will follow the fortunes of the company. The RLP was therefore born in the ordinary situation where the

1. See the classic definition of the "proper plaintiff" rule in the judgment of Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER 1064.

shareholder's loss was a reduction in the value of his shareholding. The scope was narrow, based upon company autonomy and preventing the "proper plaintiff" rule from being circumvented.

The RLP was then considered by the House of Lords in *Johnson v Gore Wood* [2002] 2 AC 1 *('Johnson')*[2]. The company had pursued professional negligence proceedings against solicitors, which it settled for a payment. There was a shortfall in the recovery and Mr Johnson, the managing director and majority shareholder, pursued personal claims against the solicitors in respect of the same episode. An application was made to strike out these claims in light of the company's claim. Lord Bingham set out the following three propositions, which are regarded as encapsulating the test for the RLP:

1. *"Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss...*

2. *Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding...*

3. *Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other..."*[3]

Lord Bingham explained the RLP by referring to the preservation of company autonomy, avoiding prejudice to the company's creditors and preventing one party recovering for another's loss. However, he envisaged some flexibility when applying the principle: "*the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation.*"[4] Lord Millett appeared to take a firmer approach, stating that the automatic bar to the shareholder's claim was a "*matter of principle and there is no discretion involved.*" He also referred to a number of considerations justifying the RLP, explored further below.

Two years later, the CoA heard *Giles v Rhind* [2002] EWCA Civ 1428 *('Giles')* and held that the lower

> "It is difficult to see how the RLP can properly be applied without considering the relevant causes of action giving rise to the loss incurred by the claimant and the company"

court was wrong to strike out a claim for reflective loss because the wrong done to the company had made it impossible for the company to pursue its claim against the wrongdoer. The defendant, in breach of duty, had diverted the company's most lucrative contract to another company in which he had an interest. The company commenced proceedings but soon went into administrative receivership and the defendant issued an application for security for costs. The company could not put up the security and had to discontinue the proceedings by consent order which precluded further action against the defendant.

Chadwick LJ decided that none of Lord Millett's considerations in *Johnson* were engaged. The company had not settled its claim so concerns about going behind any settlement did not arise. The company also had no choice but to abandon its claim because it was unable to secure the

2. The other decisions in the intervening period are listed in *Johnson* at 35D.

3. See *Johnson* at 35E – 36A.

4. This phrase was expressly relied upon by Chadwick LJ in *Giles* to justify the fraud exception.

defendant's costs, so there was no break in the chain of causation between the defendant's breach and the claimant's loss. In his view, the House of Lords, when formulating the RLP propositions, had not had in mind nor addressed this kind of scenario and he expressly relied upon Lord Bingham's warning against arbitrarily denying fair compensation to a party who has suffered loss.[5] This has become known as the fraud exception to the RLP.

In *Gardner v Parker* [2004] 2 BCLC 554 *('Gardner'),* the CoA confirmed that the RLP extended to losses suffered in the capacity as a creditor or employee. Neuberger LJ identified two essential ingredients: i) that the losses were suffered in the claimant's capacity as a shareholder/creditor/employee; and ii) that the damages would have been made good if the company had enforced its rights. He considered that the foundation and ultimate reason for the principle was the need to avoid double recovery.[6] He also stated that the nature of the cause of action made no difference because the principle was not concerned with barring causes of action but with barring recovery of certain types of loss.[5]

The observation about the irrelevance of the cause of action is, however, ambiguous and begs the question what type of loss is barred. For example, where there are clear differences between the causes of action of the claimant and the company, this could potentially affect the analysis of whether the claimant's loss arises from the depletion of the company's assets and is therefore reflective. It is difficult to see how the RLP can properly be applied without considering the relevant causes of action giving rise to the loss incurred by the claimant and the company, in order to consider whether the claimant's loss is merely reflective of the company's loss. As noted below, the ambiguity in Neuberger LJ's comments has given rise to some of the issues that have arisen in *Primeo*.

Policy justifications

The decisions since *Prudential* have expanded the RLP well beyond its company autonomy roots. This trend has been justified by reference to a number of policy objectives which the courts have suggested are engaged. In *Marex,* the CoA suggested that the authorities provided a four-fold justification for the RLP: i) double recovery; ii) causation; iii) conflicts of interest; and iv) company autonomy and prejudice to others.

However, these policy justifications are not compelling reasons for the general application of the RLP and only make sense in certain factual situations. Double recovery was not mentioned in *Prudential* but assumed particular significance in *Gardner.* It is based on the notion that it would be unsatisfactory for a defendant to pay out twice to both the claimant and the company. The authorities, however, do not explain why the risk of double recovery is of such significance where there is a corporate relationship in place that it requires a special rule. The potential for double recovery may arise in many contexts outside the scope of the RLP which are not subject to any bar and it can be dealt with satisfactorily without requiring the barring of the claimant's claim. It is also not clear why the "*risk*" of double recovery is enough. In many cases the prospects of the company's claim will not be clear at the time of striking out the claimant's claim. Why should the risk of the defendant possibly having to pay out twice always outweigh the injustice of a claimant's valid claim being expropriated? This risk could be addressed, as it is in other situations, by a requirement to give credit for other recoveries.

The causation point has been explained in the authorities as a break in the chain between the defendant's conduct and the claimant's loss, such that it can be said that the claimant's loss arises not through the defendant's conduct but rather through the decision of the company not to pursue a recovery. However, this is based upon the assumption that the company could have made a recovery but has failed to do so. This was not the case in *Marex*, where recovery by the company was impractical but not impossible, or in *Primeo*, where the company's claim could not be said to be likely to succeed.

The conflicts of interest point has been justified as encouraging settlements between the company and the defendant. However, it is not clear that the RLP has much, if any, role to play in this context. A defendant is likely to analyse the risk posed by a claim, and accordingly whether or not to seek to settle it, by reference to the merits of the underlying claim and tactical considerations as to whether there are other ways in which to dispose of it. If having carried out this risk analysis a defendant perceives sufficient risk to wish to pursue settlement, then the defendant may adopt that course of action. The existence of another potential claim is unlikely to have much impact on the risk analysis carried out by the defendant. In fact, the RLP principle may make settlement less likely, by complicating the position.

Company autonomy was the sole foundation of the RLP in *Prudential* and in the narrow context of the rule in *Foss* that is easy to understand. However, company autonomy becomes less compelling as a justification for a broader RLP, and in particular in relation to the suggestion that a claimant may scoop the pool ahead of the company. Firstly, the law does not generally, outside the scope of formal insolvency proceedings, impose any kind of moratorium on proceedings. It is open to creditors, if they wish, to aggressively pursue repayment of their debts even if this has the effect of leaving others with nothing. But, secondly, in many cases, the defendant may well be able to pay both the

5. See *Giles* at [66], [68] and [70].

6. See *Gardner* at [49] and [57].

claimant's claim and the company's claim in full, so no issue of scooping the pool will arise. And, if the defendant is in liquidation, both claims will be addressed though the claims procedure and issues of double recovery and scooping the pool will be properly managed by the liquidators. So, this justification might be said to provide a somewhat flimsy foundation for a rule which has the effect of expropriating property from the claimant.

Marex

The decision in *Marex* considered two key points: i) whether the reflective loss bar should apply to claims by unsecured creditors (who are not also shareholders); and ii) the ambit of the fraud exception in *Giles*.

Marex obtained a judgment in its favour against two companies. The companies could not pay Marex the amount due because Mr Sevilleja, the defendant, had stripped them of their assets after the release of the draft judgment. Marex therefore made a claim against the defendant in damages representing the judgment debt. The CoA found that a claim by an unsecured creditor for loss caused by the abstraction of money from the company was barred by the RLP because there was no logical distinction between a shareholder and a creditor. Lewison LJ also observed that the authorities since *Prudential*, which had expanded the scope of the RLP, were currently binding on the CoA. It is therefore for the Supreme Court to determine whether the RLP should apply to unsecured creditors.

As for the fraud exception, the CoA adopted a narrow approach and found that it could only be invoked where it was legally impossible for the company to bring a claim. The unfunded insolvency of a company was not sufficient in itself to engage the exception because the situation could, in theory, be resolved by an injection of funds by a third party shareholder/creditor to enable the company's liquidator to pursue the claim, or by taking an assignment of the company's claim. On the facts, the only party that could have funded the insolvency of the company was *Marex* but this made no difference.

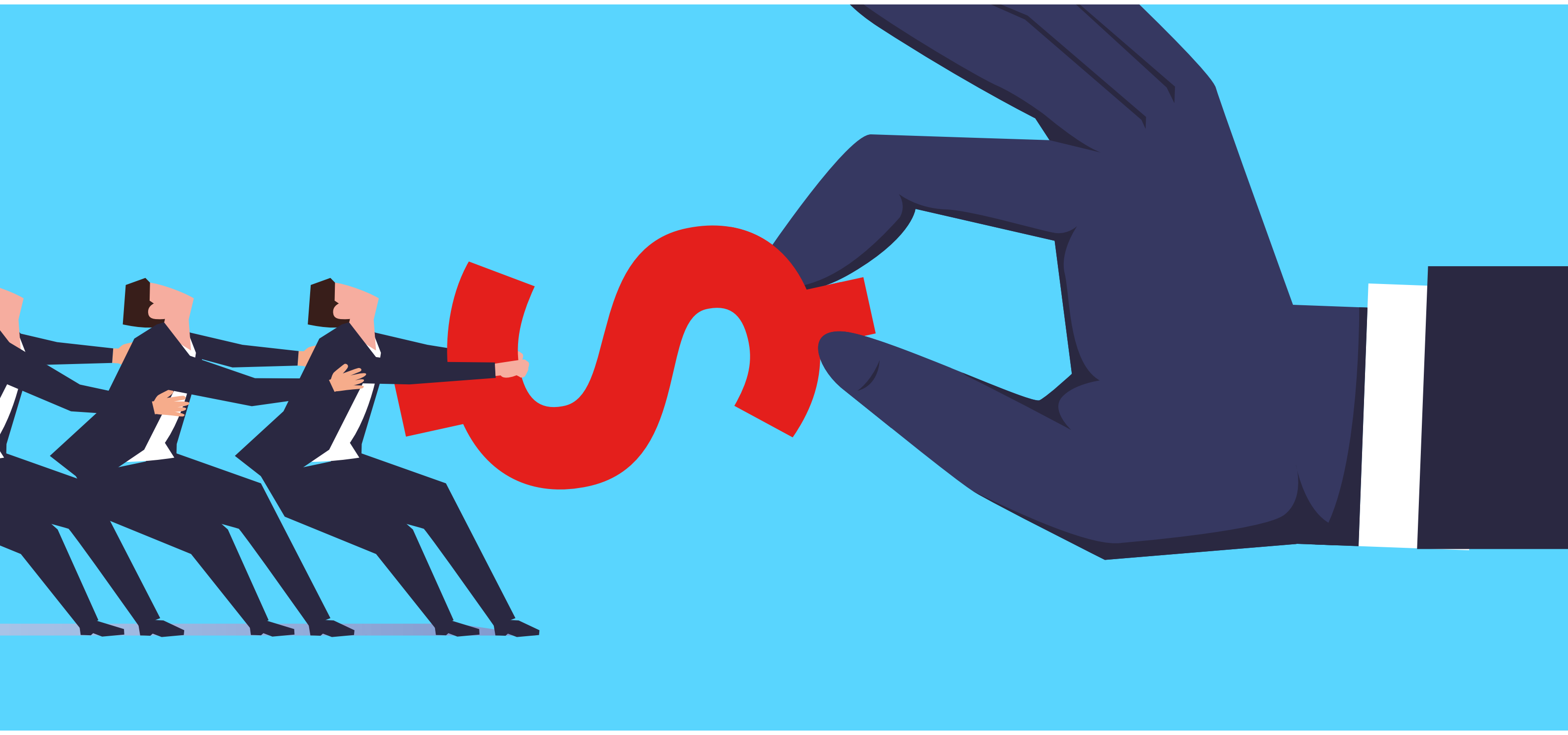
Whilst on one view it can be argued that *Marex* involved a traditional application of the RLP, the narrowing of the fraud exception and the overall outcome in the case, which is obviously unjust in allowing the fraudster to escape any liability, must be questionable. Given the overall merits of the case, the application of the RLP to bar entirely the claimant's claim might be said to involve the tail wagging the dog. It will be interesting to see how the Supreme Court approaches this issue.

Primeo

The other case is the decision in *Primeo*. Primeo was an investment fund which had invested with Madoff and which, following the collapse of Madoff, brought various claims in the Cayman Islands against its administrator (first defendant) and custodian (second defendant) for losses suffered in the fraud. The claims related to losses suffered by Primeo in the period up to May 2007 when it had invested directly into Madoff's company, BLMIS, and the defendants had acted for it pursuant to contracts with Primeo.

The CICA found that Primeo had good claims against both defendants in relation to the losses it had suffered but that any recovery for those losses was barred by the RLP. This was the case, according to the CICA, because in May 2007 Primeo had restructured its investments so that it no longer invested directly in BLMIS but rather

> "It will be a matter of keen interest to see whether the Supreme Court in *Marex* and the Privy Council in *Primeo* seek to rein the RLP back in"



invested indirectly through another fund called Herald Fund SPC ('Herald'). As long as Herald had a cause of action with a reasonable prospect of success (i.e. sufficiently strong to withstand an application to strike it out) which, if successful, would result in a recovery which went to reduce or extinguish Primeo's loss, that was sufficient to invoke the RLP.

In this respect, the CICA rejected the argument that the RLP should only apply when the company's claim satisfies the higher threshold of being likely to succeed on the balance of probabilities rather than the lower threshold of just having a real prospect of success. In the CICA's view the lower threshold (which Herald's claim satisfied) was sufficient.

However, in practice, the real prospect of success threshold can be relatively low. And it is not clear why a claimant which has an extremely meritorious claim with very high prospects of success should have that claim entirely barred simply because the company has a claim which just about manages to scrape over the real prospect of success threshold. If the purpose of the RLP is to prevent double recovery, then it seems arguable that the company's claim should have to be likely to succeed.

This issue – the threshold merits test which the company's claim has to satisfy in order for the RLP to be engaged – is a good example of the difficult issues which the extended application of the RLP gives rise to, which have barely been addressed in the authorities so far.

The other issue of principle which arises from the *Primeo* case concerns the fact that Primeo was not in fact a shareholder in the relevant company (Herald) at the time when it suffered the relevant losses and its own causes of action arose. It only became a shareholder subsequently. The CICA in effect extended the application of the RLP so that it applies not only where the claimant was a shareholder in the company at the time when its own cause of action arose, but also where the claimant was not a shareholder but subsequently acquired shares in a company which has its own cause of action which, if successful, might be said to reduce the claimant's loss.

Conclusion

The cumulative effect of decisions on the RLP since *Prudential* and *Johnson* has been to very substantially expand the boundaries of the principle – so that it now applies where the claimant is a creditor as well as a shareholder in the relevant company, where the company's claim cannot be said to be likely to be succeed but has sufficient merit to pass a real prospect of success test, and where the claimant was not in fact a shareholder in (or creditor of) the company at all at the time when its claim arose. The policy justifications for this expansionary approach seem questionable. It will be a matter of keen interest to see whether the Supreme Court in *Marex* and the Privy Council in *Primeo* seek to rein the RLP back in. ■

Has the Privy Council's Decision in Weavering Affected Investor Certainty in Cayman Islands Funds?

TOBY BROWN

NICK HERROD (MAPLES)

Toby Brown and Nick Herrod (Maples and Calder, the Maples Group's law firm) analyse the Privy Council's decision in *Skandinaviska Enskilda Banken AB (Publ) v Conway and another (as Joint Official Liquidators of Weavering Macro Fixed Income Fund Ltd)* [2019] UKPC 36. In particular, as to what impact the decision will have, if any, on investors in Cayman Islands funds.

Cayman Islands law has traditionally set a high bar for a liquidator to clear if he or she is to clawback payments made by a company in the run up to insolvency. In particular, in the context of voidable preferences, a dominant intention to prefer the creditor on the part of the company must be shown. Further, in the context of funds, where investors redeem their investment based on the fund's net asset value ('NAV'), the Privy Council's decision in *Fairfield Sentry* [2014] UKPC 9 held that a NAV determined in accordance with the constitutional documents is binding for all purposes and cannot be revisited.

This was the case even if it later turned out that the NAV was fictitious due to an underlying fraud (such as the Madoff ponzi scheme). In practice this should mean that when an investor (who has no knowledge of an underlying fraud or breach of duty by the directors) is paid there should be limited circumstances where that investor should have to repay those sums. Against those policy considerations is the well-established *pari passu* principle requiring that an insolvent company's assets are divided equally among its ordinary creditors.

These policy points were central to the issues in *Weavering* where the Privy Council upheld the decisions of the lower courts that redemption payments to a Swedish bank made shortly prior to the collapse of the Weavering fund were voidable preferences that must be repaid. In doing so, the Privy Council revisited the question of whether a fund's NAV calculated in accordance with its constitutional documents can be revised – holding that, in certain limited circumstances, it can. However, as will be explained, in a voidable preference claim this provides no assistance to the defendant, who is also unable to avail themselves of a change of position defence.

Background

The facts are now notorious. A Cayman Islands investment fund (Weavering) defrauded its investors by painting a picture of positive growth using worthless swaps with an affiliated company.

This caused the NAV to be calculated based on fictitious unrealised gains from the swaps. The reality was that Weavering was making huge losses through options trading. The fake swaps masked the losses. The guiding mind of the fund, and architect of the fraud, was Magnus Peterson (the UK based investment manager) whom the courts also found to be a *de facto* director of Weavering. This was, therefore, internal fraud.

A Swedish Bank, SEB, who was acting as custodian investor for third parties, redeemed shares shortly before the fraud was uncovered and received redemption proceeds based on what turned out to be a fictitious NAV. Other redeeming shareholders were not so fortunate and lost out. Weavering's Cayman Islands liquidators sued SEB for the return of the payments on the basis that they were voidable preferences under the relevant Cayman Islands legislation (s. 145, Companies Law (2018 Revision) ('the Companies Law'). Proceedings were also brought against numerous other custodians who had redeemed shareholdings, for which the SEB claim effectively acted as a test case.

Under that legislation, a payment will be a voidable preference if a company transfers property to a creditor when the company is unable to pay its debts (a cash flow insolvency test taking into account debts payable in the reasonably near future) with a view to giving such a creditor a preference over other creditors. Such a payment is 'invalid'. It is settled law that 'with a view' requires a dominant intention to prefer.

The Cayman Islands Grand Court and the Cayman Islands Court of Appeal ("CICA") held that the redemption payments to SEB were voidable preferences and ordered SEB to repay the sums received (approximately US$8.5 million). The Privy Council upheld these decisions; but, importantly, in some aspects, for different reasons. The Privy Council's reasoning differed both in respect of: (i) whether a NAV can ever be revisited; and (ii) how the Cayman Islands voidable preference regime works.

Is NAV always NAV?

The Privy Council held that where the NAV has been misstated due to an internal, as opposed to an external, fraud it is possible to challenge the NAV. However, in order to do so, legal proceedings need to be commenced by a party who has suffered loss as a result of the fraud. Without such a successful challenge, the struck NAV remains the NAV. However, no proceedings had been brought to rectify the NAV and in any event SEB had not been defrauded, to the contrary, SEB had received more on behalf of its underlying clients than they were entitled to receive had the NAV been honestly and accurately determined. Further, the Board stated

that it would have been a necessary precondition for setting aside the NAV on SEB's application that it would be ordered to repay the sums received under the incorrect NAV.

The Privy Council therefore rejected the arguments that: (i) no redemptions had taken place in accordance with Weavering's articles; and (ii) therefore the redeemers were not creditors for the purpose of the voidable preference provisions.

The Privy Council's earlier decision in *Fairfield Sentry* [2014] UKPC 9 was distinguished. In *Fairfield Sentry* the fraud was external: the fraud was perpetrated not by those managing the feeder fund, but by BLMIS, an independent entity, and the NAV had, accordingly, been struck by the directors in good faith. In contrast, in *Weavering* the fraud was internal – the fund (through its *de facto* director and directing mind Mr Peterson) was in breach of its duty to calculate the NAV in good faith.

The message may be that internal fraud unravels all – but, in respect of the NAV, it does not do so automatically. This gives rise to a number of questions.

First, when is a fraud internal as opposed to external, and what level of fraud is required in order for NAV to be re-struck? For example, where the fraud is initially external to the fund but there are allegations that the fund's directors turned a blind eye to the fraud; could this be internal fraud? Sir Donnell Deeny in his partially dissenting judgment also noted that the extent of any underlying fraud may vary enormously, suggesting that a NAV might have been influenced by a small or minimal fraud on the part of an employee who misstated part of the company's assets. If the fraud is minimal can NAV be re-struck? The lines will not always be bright.

Second, if an internal fraud is present, the NAV still needs to be rectified. The Privy Council has made it clear that this is not automatic, and "*it would be necessary for a party who wished to have the NAV avoided to bring proceedings... against the liquidators of the company, [with] notice...given to those who would be affected by a decision that the NAV was voidable*". The judgment does not make clear the scope or procedure for this remedy, which appears to be distinct from the liquidator's statutory power to rectify the share register in a solvent liquidation under s. 112, Companies

Law and O. 12, r. 2, Companies Winding Up Rules 2018 ('CWR'). One might question the necessity of bringing such proceedings in circumstances where (as was the case in *Weavering*) nobody was denying there had been an internal fraud which had resulted in misstated NAVs, and where the Privy Council held that the dishonest valuation of the NAV was not made pursuant to the articles and was not binding on all persons.

The answers to the above are likely to be highly fact sensitive; but the position that a contractually binding NAV cannot be revisited is no longer always the case. However, practically the impact of the ability to vitiate the NAV is likely to be small for the reasons expressed in the conclusion to this article.

Voidable Preferences

A dominant intention to prefer can be inferred

The Privy Council concluded that the CICA was entitled to find that there was a dominant intention to prefer SEB as a creditor. The CICA had concluded that dominant intention may be inferred by the court in accordance with the general principles of inference from the available evidence. SEB had not, after giving notice of redemption, put pressure on Weavering to pay (or even requested payment). Accordingly, there was nothing to displace the inference derived from board minutes and emails that SEB was paid pursuant to an intention to prefer.

The Privy Council's decision does not change the established principle that if a different intention for the payment can be demonstrated (and in particular to ward off threats of litigation) then the payment will not be a preference. The Privy Council's judgment does not consider the English authorities suggesting there is no voidable preference where the debtor in making a payment is seeking to protect himself from his own wrongdoing (e.g. *Sharp v Jackson* [1899] AC 419, HL) – this would seemingly have provided an avenue for the Privy Council to conclude that SEB had not been preferred.

It remains the case that proving a dominant intention to prefer will often be a challenge, and it remains to be seen whether inferring such intention is made easier by Weavering. There is often a cogent alternative explanation for payment, and in particular payment will be made to ward off threats of litigation. Accordingly, as has always been the case, generally speaking the more a creditor agitates for payment, the less likely such payment is to be a voidable preference.

Basis for recovery of a voidable preference

The statutory provision, s. 145 of the Companies Law, renders a payment 'invalid', the effect of which is the payment is voidable (not void *ab initio*). However, the Cayman legislation contains no statutory remedy to recover the payment (to be contrasted to ss 239 and 241 of the Insolvency Act 1986 in the UK). Given that legislative silence, the Privy Council overruled the lower courts and held that recovery of a voidable preference is governed by the general law. The Board noted that the consequences will vary according to the circumstances, such as whether the property remains in the hands of the transferee. In the present case no proprietary claim had been brought and so the remedy was restitution, based on the grounds of unjust enrichment. This raises the question of the availability of the usual defences to a restitutionary claim, namely that the party receiving the payment: (i) has not been enriched; or (ii) that it has changed its position so that it would be inequitable to require repayment.

SEB was a mere custodian – but it was still enriched

SEB had argued that, as custodian, it held the shares as bare trustee for its underling investor clients. As trustee, SEB did not have any beneficial interest in the proceeds of redemption and so argued that it was not enriched by the receipt of the money. The Privy Council disagreed. SEB dealt with Weavering as principal and SEB received payments as the registered shareholder. This was to be contrasted to the position had SEB been acting as agent, rather than mere trustee, of its clients. It did not matter that SEB was only a custodian for the funds and was obligated to pass them on to the beneficial owners (or that the Weavering knew this). Weavering was entitled and obliged under the articles to deal with SEB as the legal owner of its shares and had no legal relationship with the underlying funds or with the investors in them. SEB, as registered shareholder, was entitled to receive, and did in fact receive, the redemption proceeds – therefore it was SEB who was enriched.

Change of position defence contrary to public policy in insolvency

SEB argued that in accordance with the established principles of unjust enrichment, it could employ a change of position defence, and that it changed its position by paying over the redemption proceeds to its clients. This was rejected by the Privy Council, who held that in the context of a claim by a liquidator for the restitution of money paid to a preferred creditor, the change of position defence is not available.

The Board held that "*the common law gives priority to the operation of the statutory scheme of distribution over the detrimental impact which recovery may have upon the creditor against whom the claim is made*". Given the absence of any defence of change of position in centuries of case law on preferences, and the legislation opting not to include any protection for preferred creditors, the Privy Council did not consider they could override the legislature's intention by providing a common law defence. It is clear that the Privy Council were heavily swayed by the public policy considerations in not undermining the operation of the statutory scheme of *pari passu* distribution, which voidable preferences are intended to support.

Implications for Custodians

From that public policy perspective, the failure of these two defences may not be surprising. However, from the perspective of custodians and nominees (through whom investments are generally made in Cayman Island funds) the Privy Council's decision may causes difficulties given the potential liabilities arising from voidable preference claims, although in practice claims may prove relatively rare.

By the time a voidable preference claim is brought, the custodian will probably have long paid out the monies to the underlying client, pursuant to a contractual obligation to do so. The custody agreement will usually contain an indemnity in favour of the custodian from claims brought by third parties. However, this will only be of benefit to the custodian if the client can satisfy the indemnity at the appropriate time. In the case of SEB, the indemnities had been worthless from the outset.

The Privy Council's judgment serves to reinforce the risk inherent in acting as a custodian investor and the importance of robust and enduring indemnification arrangements with the underlying clients. It also highlights that upon a Cayman Islands fund entering insolvency proceedings, custodians should to take advice about whether to freeze the relevant client accounts in order to provide security over potential voidable preference claims which may be brought by the liquidators. In this regard, Sir Donnell Deeny noted that SEB had failed to protect its position by freezing the client accounts of the redeeming funds. Whether this is practical is another matter.

> "...in practice the Privy Council's decision is likely to lead to little actual erosion for investor certainty..."

Conclusion: Where does this leave investors in Cayman Islands funds?

At its heart *Weavering* may be seen as a battle of conflicting public policy objectives and in particular between certainty of transactions (i.e. investor certainty) versus *pari passu* distribution to unsecured creditors. The Privy Council clearly recognised the need for investor certainty in the determination of a NAV ("*in general, it is vitally important that valuations are definitively ascertained at the time of the transactions and are not liable to be varied subsequently with retrospective effect*"...), though noting that this principle is not unlimited ("*... this must yield where, as here, the fraud is internal to the company which is seeking to rely on the contract. Fraud is something apart.*"). While the longstanding *pari passu* principle comprehensively trumped, in practice the Privy Council's decision is likely to lead to little actual erosion for investor certainty for a number of reasons.

First, while the NAV may now be more susceptible to retrospective challenge, this will require that the fund itself has perpetrated a fraud (internal fraud), as opposed to having had a fraud perpetrated on it (external fraud, for example, in the case of the various Madoff feeder funds). In the overall context of the number of funds operating, cases of fraud, let alone internal fraud, remain relatively rare.

Second, there is no automatic adjustment even where there is internal fraud, and without any specific proceedings brought to challenge the NAV, it remains the NAV. As already noted, the Privy Council's judgment does not address the procedure or factors to be taken into account when proceedings are brought to vitiate the NAV based on internal fraud; neither does it provide complete guidance as to who would have standing to bring the action.

Third, the Privy Council did not suggest that they were lowering the bar in order for a voidable preference action to be successful, and dominant intention to prefer will still need to be established (although it remains to be seen whether the courts will now more readily *infer* such intention).

In the event of a dominant intention to prefer being proved (which often proves difficult), the unavailability of a change of position defence in voidable preference claims for custodian and nominees who invest in Cayman Islands funds is notable, and the implications have been highlighted above. Indeed, the Privy Council included a postscript which acknowledged that the rejection of the defence "*may be capable of leading to harsh results*". It noted that in the UK, s. 241(2) of the 1986 Act provides a defence for bona fide purchasers, and the Board suggested that amending Cayman Islands law to provide a measure of protection to creditors or third parties dealing with creditors may be a question worthy of consideration.

This is not the last word on whether the NAV really is the NAV in all circumstances. As already noted, s. 112 of the Companies Law and O.12 r. 2 of the CWR provide the liquidator with the power in solvent liquidations to rectify the register of shareholders where a NAV is not binding on the company and its shareholders by reason of fraud. The CICA held in *Pearson v Primeo* [2018 (1) CILR 329] that these provisions do not grant a power to calculate a correct NAV in substitution for a misstated NAV, which notwithstanding an external fraud has been calculated and is binding in accordance with the constitutional documents. An appeal to the Privy Council was heard on 29 October 2019 and the decision will be reported in a future edition of the South Square Digest. ■

Case Digest Editorial

Felicity Toube

There can be no doubt that the biggest case of the last few months was the Brexit decision handed down by the Supreme Court. Much has been said and written about that decision, and sadly it falls outside the purview of those in these Chambers. Nevertheless, away from the rarefied air of Parliament, it has been another busy few months in Chambers.

Thomas Cook was placed into liquidation, with another appointment for the Official Receiver (coupled with Special Managers) in what seems now to be an accepted way to proceed. The fallout of that insolvency, together with the earlier collapses of British Steel and Carillion, keep many members of Chambers busy.

As for older insolvencies, they also continue to occupy the courts. Despite the elevation of Mr Justice Trower, Lehman has not stopped its litigious advance. Daniel Bayfield QC (leading Alexander Riddiford) has donned the LBIE mantle with aplomb, asking the court to construe the contract entered into between the LBIE Administrators and the exotically name Exotix for the sale of global depository notes. Finding that a term should be implied into the contract in favour of the Administrators, the Judge found that LBIE had over-delivered GDNs and was entitled to restitutionary relief.

Meanwhile the Court of Appeal has told us in the *FSHC* case (in which Matthew Abraham appeared) that what we thought was the effect of *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 on the law of rectification is not the law at all. The correct position is that rectification for common mistake is available only where (1) the document fails to give effect to a prior concluded contract or (2) where it can be shown that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. Moreover, it is now necessary to show in a common intention case that the parties had the same actual intention in relation to the matter in question, and also that there was an *"outward expression of accord"*. It seems likely that a claim for rectification will now be much more rarely made out.

Valuation issues continue to abound in the Cayman Islands, with the decision in *Re Qunar* back in May, providing an example of what can and cannot be taken into account in assessing the fair value of shares under section 238 of the Cayman Islands Company law. Members of Chambers are involved in all the leading cases in this area, with Barry Isaacs QC leading the charge.

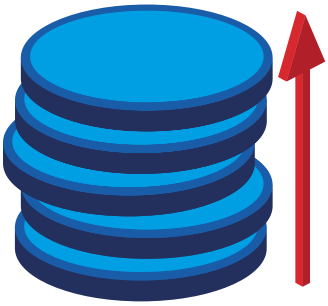
Office-holders have also done well in this last quarter. In *Fraser Turner v. PwC* (in which Daniel Bayfield QC and Stephen Robins appeared), the Court of Appeal considered whether Administrators owed the company a duty to protect it from losses caused by failing to require a purchaser to pay royalties. In the absence of specific representations or an assumption of responsibility, no such duty existed. In addition, no claim for "unfair harm" under paragraph 74 to schedule B1 to the Insolvency Act 1986, was found to exist where the Administrators were seeking in good faith to carry out their statutory functions in the interests of creditors as a whole.

Perhaps the biggest case in terms of numbers of members of Chambers involved, was the Debenhams case. Almost half of Chambers was involved at one point or another, and many barristers gave up or truncated their summer vacation plans to appear in the expedited September hearing. Norris J considered 5 grounds of challenge to the Debenhams CVA. Dismissing all but one of them, the Judge concluded that there had been no errors in the Proposal, save for the inclusion of rights of forfeiture as amongst the rights that were sought to be affected by the CVA. Such rights are proprietary, and therefore have to be excluded. As those provisions could be edited out, the CVA survived. Apart from that restriction, CVAs to rewrite the rights of landlords are now established as effective, at least unless and until any appeal succeeds.

Finally, we cannot leave this summary of the important cases of the past few months without mentioning the latest Weavering decision in the Privy Council. Payments had been made by the Company in response to share redemption requests made by a Swedish bank, prompted by the collapse of Lehman Brothers. Numerous other redemption requests had been received.

By the time it was discovered that Peterson had fraudulently inflated the net asset value (NAV) of the Company, the Company was unable to meet all the redemption requests and was insolvent. The liquidators alleged that a number of payments previously made to the Bank were fraudulent preferences under section 145(1) of the Companies Law (2013 Revision) 2013 (similar to section 239 of the Insolvency Act 1986). The Board held that where the fraud was 'internal', in the sense that it was internal to the company in the production of NAV figures, those figures may not be binding. However, this was to be distinguished from other kinds of 'external' frauds, where the directors may determine liabilities in good faith, even though the fraud may impact the NAV figures. In this situation, the figures would not be liable to be set aside. Of particular relevance to insolvency lawyers is the analysis by the Privy Council of the restitutionary claim made as a result of the payment having been determined to be a preference. The question of whether a recipient of a preference payment is 'enriched' does not depend on whether the recipient was a trustee for someone else. A bare trustee may resemble an agent, but the two are distinct. A trustee who is not acting as an agent is enriched at common law by the payments which they receive. The Bank was therefore enriched on receipt of the payments. Moreover, despite the restitutionary nature of preference provisions, there is no change of position defence available to a recipient (unlike under section 127). The statutory scheme that gives priority to pari passu distribution takes precedence. ■

Case Digests



Banking and Finance

Digested by Stefanie Wilkins

Lehman Brothers International (Europe) (In Administration) v Exotix Partners LLP

[2019] EWHC 2380 (Ch) (Hildyard J) 9 September 2019

Global depository notes – buyer and seller mistaken as to value, such that buyer received a windfall – construction of contract – unjust enrichment

The joint administrators of LBIE entered an oral contract with Exotix for the sale of Peruvian Government global depository notes (GDNs). The GDNs were sold as part of a group of assets which were regarded by the joint administrators as 'scraps' in the LBIE estate. However, both parties had been mistaken as to the true value of the GDNs, which was 1,000 times the sale price (LBIE had transferred 22,955 GDNs, rather than 22.955), with the result that when Exotix sold the GDNs to a third party, it obtained a very substantial windfall.

The first question for the court was to identify what the contract, properly construed, identified as the subject matter and price. A preliminary issue was to determine the admissible factual matrix. His Lordship observed that the factual matrix could extend beyond what the parties actually knew, to matters which were reasonably available. This required the court to identify, from an objective viewpoint, whether a reasonable person, who knew that the counterparty had certain information, would have regarded it as necessary to understand properly the contract, and whether there would have been any *"real difficulty"* in obtaining it. But this did not include any obligation to enquire about matters which, on the parties' shared understanding, did not require inquiry.

His Lordship concluded that, viewed objectively, the parties had intended to enter into a contract in respect of 22.955 GDNs (consistently with the understanding of both parties that they were contracting for 'scraps'). But this created a further problem, in that the contract intended the transfer of a fraction of a GDN (which was impossible). Hildyard J considered that a term ought to be implied that the fractional entitlement be settled in cash, as a matter of necessity in order to ensure the 'workability' of the agreement. His Lordship rejected the submission that such a term could be implied from trade practice. Accordingly, LBIE had over-delivered a quantity of GDNs, and was entitled to restitutionary relief.

Hildyard J also observed, in obiter, that had it not been possible to imply a term dealing with the fractional entitlement issue, then the contract would have been void for mistake, owing to the impossibility of giving effect to the strict terms of the agreement. ■

[Daniel Bayfield QC, Alexander Riddiford]

Banking and Finance

JP Morgan Chase Bank NA v Federal Republic of Nigeria

[2019] EWCA Civ 1641 (Baker and Rose LJJ, Sir Bernard Rix) 8 October 2019

Duty of care owed by bank to customer – Quincecare

The Federal Republic of Nigeria ('FRN') brought a claim against the bank for the recovery of some US$875 million, which had been held in a depository account by the bank, but paid out in three transfers, said by FRN to have been made in breach of the *Quincecare* duty of care. The bank had failed in its application for summary judgment.

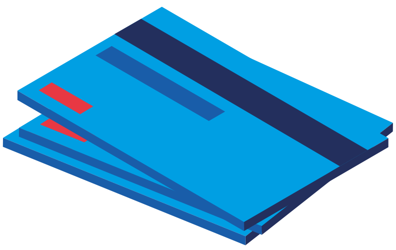
Quincecare is authority for the proposition that a banker ought to refrain from executing an order if it was put on inquiry (i.e. if there were reasonable grounds for believing) that the order was an attempt to misappropriate the funds of the company. Steyn J proposed this test as a compromise between the potentially conflicting duties to execute all valid orders, and to exercise reasonable care and skill, in circumstances where policy reasons were to avoid imposing onerous duties on bankers, and to protect customers from fraud.

The Court of Appeal held that the judge had made no error in his approach to the scope of the *Quincecare* duty, observing that:

- The question of what a bank should do when it is put on inquiry that a payment instruction ought not to be executed will vary according to the particular facts of the case.
- There may be circumstances in which a bank is prohibited from raising its suspicions with the client.

In most cases, the reconciliation of the conflicting duties owed by the bank to which Steyn J referred in *Quincecare* will require something more from the bank than simply deciding not to comply with a payment instruction. The bank will usually be anxious to resolve its concerns, not least so as to minimise the risk of incurring a liability to its client for any loss arising from the non-payment.

Properly construed, the depository agreement did not exclude the *Quincecare* duty (the remaining grounds of appeal concerned questions of construction). As no error had been made by the judge in construing the agreement, the appeal was dismissed. ■



Civil Procedure

Digested by Roseanna Darcy

Global Assets Advisory Services Ltd & Anor v Grandlane Developments Ltd & Ors

[2019] EWCA Civ 1764 (Patten, Asplin LJJ, Sir Rupert Jackson) 23 October 2019

Costs – Interim Payments – Part 36

The appellant appealed a decision in which their application for an interim payment on account of costs following the respondents' acceptance of a Part 36 offer was refused. They had applied for an interim payment on account under CPR r.44.2(8) in circumstances where under CPR r.44.9 the appellant was deemed to be entitled to the costs of proceedings up to the date of acceptance of the Part 36 offer which was made within the relevant period for the purposes of CPR r.36.13. At first instance, the judge held that there was no jurisdiction to make an interim order for payment of costs in accordance with the decision in *Finnegan v Spiers (t/a Frank Spiers Licensed Conveyancers)* [2018] EWHC 3064 (Ch), which the judge was required to follow unless convinced it was wrong. The appeal was allowed. The Court of Appeal found that there was no reason to restrict the power to make an order for a payment on account of costs under CPR r.44.2(8) to circumstances in which the court had physically made the costs order under the general discretion in CPR r.44.2 as opposed to circumstances in which a costs order was deemed to have been made pursuant to CPR r.44.9. *Finnegan* was disproved, the judge in that case being wrong to conclude it was only possible to look to the terms of Part 36 itself to find the jurisdiction to order an interim payment of costs. There was nothing in Part 36 to suggest it was an entirely freestanding provision and that all costs consequences of accepting a

Part 36 offer were to be found in Part 36 itself. Indeed, there was no conflict between CPR r.44.2(8) and Part 36 because express references was made in CPR r.36.16 to r.44.2(2) and r.44.2(9). Accordingly, there could be no logical distinction between the circumstances in which a deemed order was made on discontinuance under r.44.9(1)(c) and where a deemed order was made followed the acceptance of a Part 36 offer (applying *Barnsely v Noble* [2012] EWHC 3822 (Ch). A deemed order was no less an order of the court. ■

Kogan v Martin [2019] EWCA Civ 1654

(Floyd, Henderson, Peter Jackson LJJ) 9 October 2019

Witness evidence – Observations about memory

The claim concerned the authorship of the script to the film Florence Foster Jenkins which premiered in 2016. The claimant/respondent wrote the film, with the defendant/appellant asserting she was a co-writer. The dispute centred on what role the defendant/appellant played in the script. At first instance it was found that she had no effective role and that it was the claimant/respondent who was the sole author and copyright owner of the screenplay. On appeal the court had to consider questions of joint ownership, collaboration in successive drafts, as well as the treatment of evidence. Focusing on this last point, the judge at first instance had read Legatt J's statements in *Gestmin SGPS v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) as an "admonition" against placing any reliance at all on the recollections of witnesses. The Court of Appeal held this to be a serious error holding that *Gestmin* was not to be taken as laying down any general principle on the assessment of evidence. Instead it was one of a line of other distinguished judicial observations that emphasised the fallibility of human memory and the need to assess witness evidence alongside contemporary documentary evidence. It was said that *"a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence"* (approving *CXB v North West Anglia NHS Foundation Trust* [2019] EWHC 2053 (QB)). The *Gestmin* observations were expressly addressed to commercial cases, and the judge at first instance had applied them selectively and inconsistently to a situation involving private individuals. The judge's approach towards the evidence relying only on documentary evidence and agreed evidence led him to fail in making findings on key issues. A retrial was ordered. ■

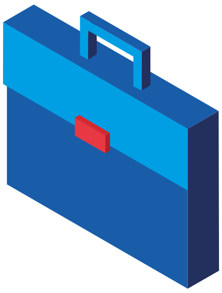
Clutterbuck v Brook Martin; Re Clutterbuck and Paton, Unreported

(Fancourt J) 31 July 2019

Civil Restraint Orders – Civil Procedure Rules

Ms Clutterbuck and Mr Paton (the "Debtors") had respectively made 12 and 7 claims or allegations which were declared to be totally without merit in 5 different proceedings. They had also made allegations of fraud which had been rejected in at least 11 different proceedings. The applicants applied for a general civil restraint order ("CRO") against them. The court held that there was a real risk that the Debtors would continue to make claims or applications which were totally without merit. It held that such claims or applications might not fall within the scope of an extended CRO, because they might not *"concern any matter involving or relating to or touching upon or leading to the proceedings in which the order is made"* (per CPR 3CPD.3), and that it was not appropriate to make extended CROs in other proceedings to which the Debtors had been party which were not formally before the court. The Court held that the Debtors had persisted in making claims or applications which were totally without merit in circumstances where an extended CRO would not be sufficient or appropriate. In the exercise of its discretion the Court made general CROs against the Debtors. ■

[Barry Isaacs QC]



Commercial Litigation

Digested by Madeleine Jones

NHS Commissioning Board (known as NHS England) v Vasant (trading as MK Vasant & Associates) and others

[2019] EWCA Civ 1245, Court of Appeal, Civil Division (Longmore, Lewison and Coulson LJJ) 16 July 2019

Contract – variation – no oral variation clauses – entire agreement clauses

Three dentists (R) entered into the General Dental Services Contract (the "GDS Contract"), a standard form contract with NHS England (A). The GDS Contract contained the following clauses:

"16. *Subject to clause 17 the Contract shall subsist until it is terminated in accordance with the terms of this Contract or the general law.*

"287. *Subject to clause 200, no amendment or variation shall have effect unless it is in writing and signed by or on behalf of the PCT and the Contractor.*

"366. *Subject to clause 200 and any variations made in accordance with Part 22, this Contract constitutes the entire agreement between the parties with respect to its subject matter.*

"367. *The Contract supersedes any prior agreements, negotiations, promises, conditions or representations, whether written or oral…*"

Initially, A supplied dental services under the GDS Contract and Intermediate Minor Oral Surgery ('IMOS') under a separate IMOS contract. The IMOS contract could be terminated by notice.

Subsequently, A wrote to R with a GDS Contract variation agreement form ('VAF'), which incorporated terms regarding the provision of IMOS services to A. The variation was signed by all parties. As far as R was concerned, IMOS were thenceforward supplied under the GDS Contract as varied by the VAF.

A purported to terminate the agreement for the supply of IMOS by notice. This notice was not adequate to terminate the GDS Contract. Whether the notice was a valid termination depended on whether the VAF had validly varied the GDS Contract, so that IMOS services were supplied under it, or whether it had not, so that IMOS services were still supplied under the IMOS contract.

The trial judge held that there had been a valid variation of the GDS Contract on the basis of pre-contractual material, the oral evidence of the contracting parties and the parties' post-variation conduct. The Court of Appeal held that none of this material was admissible for determining whether the variation had been made in accordance with the GDS Contract, and so the judge's reasoning could not be supported.

The Court noted that the courts will enforce clauses determining how a contract will be amended. So it fell to be considered whether the purported variation was in accordance with the variation mechanism set out in the GDS Contract. The VAF was in signed writing so satisfied clause 287 of the GDS Contract. Once amended the GDS Contract, including the variations in the VAF, was subject to cl. 366, the entire agreement clause.

Some entire agreement clauses are backward looking and do not have any impact on how the parties may alter the terms of their bargain once the contract has been made. In this contract clause 367 performed that function, so clause 366 could not be said to be wholly backward looking. Taken together, clauses 287 and 366 meant all the terms of the bargain are to be found in the combination of the original GDS contract and any written variation compliant with clause 287. Terms of the IMOS contract could not be used to correct any uncertainty in the GDS Contract as amended. However, extrinsic evidence is admissible to explain the meaning of unconventional expressions in a contract, especially where the expression in question is used in a particular sector of economic activity. This is the case even where there is an entire agreement clause. The IMOS contract was available as an aid to the construction of the term IMOS. With this aid, the varied GDS Contract was sufficiently certain.

Therefore, IMOS services were provided under the GDS Contract as varied, and the purported notice of termination had not been effective under its terms. Appeal dismissed. ■

Anderson and others v Sense Network Ltd

[2019] EWCA Civ 1395 (David Richards, Hamblen LJJ, Snowden J) 31 July 2019

Fraud – Authorised Representatives

Mr Anderson and others ('A') were the victims of a Ponzi scheme operated by the director and shareholder ('AG') of Midas Financial Services Ltd ('Midas'). AG and Midas made contracts with Sense Network Ltd ('R'). Under s. 39 of the Financial Services and Markets Act 2000 ('FSMA'), where a person authorised to undertake activities regulated by FSMA is party to a contract with a non-authorised person, which requires the non-authorised person to undertake a regulated activity, the non-authorised person may is exempt (subject to the provisions of s.39) from the general prohibition in FSMA on undertaking regulated activities on the basis that they are the Authorised Representative ('AR') of the authorised person. Section 39 was only applicable if the Ponzi scheme was a collective investment scheme under s. 235 of FSMA (as giving advice on deposits is not a regulated activity). Midas was the AR of R. The regulated activity was the giving of financial advice, which Midas provided to R's clients. Unbeknownst to R, AG caused Midas to advise R's clients to enter into AG's Ponzi scheme. R's clients suffered loss as a result of this advice.

R's clients sued R for this loss.

On appeal it was held that s. 39(3) of FSMA made clear that an AR is only exempt to the extent that the authorised person has accepted responsibility for the business carried on by the AR. The AR is subject to the general prohibition in FSMA on undertaking regulated activities for which the authorised person has not accepted responsibility.

In the contact between R and Midas, R accepted responsibility for Midas' advice insofar as this was provided *"using a Company Agency."* This restriction enabled R to control and supervise the authorised business of Midas. The advice to invest in the Ponzi scheme was not given through a Company Agency, and R had not accepted responsibility for it.

Furthermore, R was not vicariously liable for the advice given by individuals at Midas. The trial judge had found that Midas was carrying on its own business, and it was not open to the Court to go behind this finding. When Midas gave advice, it was doing so in the course of its own business, not carrying out any activity assigned to it as part of R's business (which was providing a regulatory umbrella for independent financial services firms).

The Ponzi scheme was a collective investment scheme in the meaning of FSMA s. 235, having regard to the requirements in that section. Representations had been made to clients to the effect that their money would be invested and they could expect returns upon it. That these representations were false is not material to the classification of the scheme as a collective investment scheme.

FSHC Group Holdings Ltd v Glas Trust Corporation Ltd

[2019] EWCA Civ 1361 (Flaux, Leggatt, Rose LJJ) 31 July 2019

Contract – rectification - mistake

The Court of Appeal considered the law on rectification of contracts for common mistake. C (a company) and D (a security agent for various lenders) entered into a private equity financing transaction. As part of this, C was to provide security over a shareholder loan. The transaction was complex and the security was never granted, though no one noticed this until a review of the security documents some years later. When the parties realised their mistake, C sought to provide the security by way of two accession deeds. By a mistake, C assumed more onerous obligations under these deeds than necessary. At first instance, the judge granted rectification on the basis that it was the parties' common intention to execute a document which satisfied C's obligation to give security for the shareholder loan and did no more than this.

D appealed on the basis that the Judge had applied the wrong test and that, following Lord Hoffmann's judgment in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 (with which the other members of the House agreed), the test for a common intention for the purpose of rectification was what a reasonable observer with knowledge of the background facts and prior communications between the parties would have thought their common intention at the time of contracting to be.

The Court of Appeal held that Lord Hoffmann's comments in *Chartbrook*, which were expressly acknowledged to be *obiter*, were not binding. It fell to determine what the correct approach to rectification is. Following a comprehensive review of authorities, the Court held that before a written contract may be rectified on the basis of a common mistake, it is necessary to show: *"either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an "outward expression of accord" – meaning that, as a result of communication between them, the parties understood each other to share that intention."*

In this case, the Judge had been right to order that the deeds should be rectified.

[Matthew Abraham]

Commercial Litigation

Secretary of State for Health and another v Servier Laboratories Ltd and others

[2019] EWCA Civ 1160 (The Master of the Rolls Lord Justice Longmore, Lord Justice McCombe) 12 July 2019

Tort - unlawful means

The Secretary of State for Health and the NHS Business Services Authority appealed against the strike out of their action against the respondents, the former holders of the European patent for a drug, for conspiracy to harm them by unlawful means. R had obtained an injunction to prevent the sale of a generic version of their drug, but subsequently their patent was revoked. A commenced proceedings against R for damages for loss caused by unlawful means, on the basis that by representations made falsely or recklessly R had prevented makers of generic versions of the drug from entering the market, so that the A had been obliged to pay higher prices for R's product.

The law on the tort of causing loss by unlawful means is set out in *OBG Ltd v Allan* [2007] UKHL 21. Lord Hoffmann held that unlawful means do not include *"acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant"*. This applies to all torts involving unlawful means.

The claim could not succeed because the acts complained of were unlawful in respect of the English Courts and the European Patent Office, but it did not affect these entities' ability to deal with A. The appeal was dismissed. ■

Tillman v Egon Zehnder Ltd

[2019] UKSC 32 (Hale, Kerr, Wilson, Briggs, Arden SCJJ) 3 July 2019

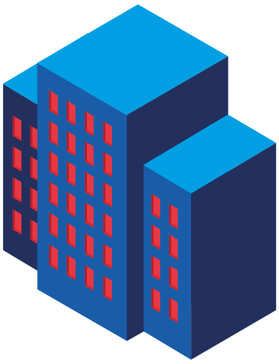
Contract - severance

The Supreme Court considered an appeal by a company against a decision that a post-termination non-compete covenant in the employment contract of a former employee was void as an unreasonable restraint of trade. In so doing the Court considered the law of severance of void contractual clauses.

The impugned provision prohibited the ex-employee from being "interested" in a competitor for a certain period. As a matter of construction being "interested" in a competitor included holding a minority shareholding in a competitor. A restraint on holding shares in competitors might restrict the employee's ability to work and so falls within the restraint of trade doctrine.

Attwood v Lamont [1920] 3 K.B. 571, which held that in order for a covenant to be severed it had to be a distinct covenant in a series of covenants, not part of one single covenant, was over-ruled. The correct test was set out in *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613. This is a three-stage test. The first stage is the "blue pencil" test: *"the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains"*. The second stage is that *"the remaining terms continue to be supported by adequate consideration."* The third stage is that *"the removal of the unenforceable provision does not so change the character of the contract that it becomes 'not the sort of contract that the parties entered into at all"*.

Applying these criteria, the impugned covenant could be severed. ■



Company Law

Digested by Edoardo Lupi

Re Qunar Cayman Islands Ltd Cayman Islands Grand Court

(Parker J), 10 May 2019 (Unrep.)

Section 238 Cayman Companies Law – Valuation approach

The Court assessed the fair value of shares under section 238 of the (Cayman Islands) Companies Law in relation to a Cayman-incorporated company which operated in China and whose shares were listed on the NASDAQ stock exchange. The Court held that the motivation and conduct of the company in effecting the merger and the character and motivation of the dissenting shareholders were not relevant considerations in determining fair value. The Court should look at all the information relevant to fair value and should not confine itself to information which would be relevant to market participants at the relevant time. The Court attributed a 50% weighting to the market value of the shares, and a 50% weighting to the value derived from a discounted cash flow analysis. The Court rejected the view that there was a systematic undervaluation of Chinese companies on US exchanges such that the publicly traded share price was not a reliable indicator of fair value. ■

[Barry Isaacs QC]

Re Paramount Powders (UK) Ltd

[2019] EWCA Civ 1644 (McCombe, David Richards, Simon LJJ), 8 October 2019

Just and equitable winding-up – Mutual trust and confidence – Directors' duties

The appellant director appealed against an Order of the late Henry Carr J, which declared that (i) the appellant had been validly removed as director of the Company, (ii) dismissed his winding-up petition in respect of the Company on the just and equitable ground, and (iii) declined relief on the appellants alternative claim under sections 994 to 996 of the Companies Act 2006. The appeal focussed on (i) and (ii).

The appellant was a shareholder of 25% of the Company's shares along with his brothers, it being common ground that a quasi-partnership type relationship subsisted based on mutual trust and confidence. Following a deterioration in the brothers' relationship, the appellant presented an unfair prejudice petition, which was subsequently amended to seek a winding-up order on the just and equitable ground. Thereafter, whilst acknowledging a breakdown in trust and confidence, the appellant's brothers removed him as a director by convening an extraordinary general meeting to pass a resolution to that effect, on the grounds of what they saw as his wrongful involvement in a competitor business.

Carr J declined to wind up the Company. The appellant's principal ground of appeal was that the Judge had erred in discerning a principle of law that a breakdown of mutual trust and confidence between the shareholders in a quasi-partnership cannot found a winding-up order without more. McCombe LJ (with whom David Richards and Simon LJJ agreed) noted that the seminal authorities on the just and equitable ground demonstrated that (in general) equity intervenes to enable the Court to subject the exercise of legal rights under a company's constitution to equitable considerations, and that a breakdown of mutual trust and confidence was one relevant factor for the Court to consider, but it was only one amongst a number. After a careful review of the authorities, McCombe LJ said that a petitioner may well not qualify for relief if the breakdown in trust and confidence has been due to his own misconduct. On the Judge's findings of fact, the appellant was solely responsible for the situation that had arisen and the breakdown in confidence had been due to his own misconduct. Accordingly, the Judge had not erred in declining to wind-up the Company. Finally, the Court of Appeal accepted that in declining to wind up the Company the Judge had been entitled to bear in mind that this would have left the field open for the competitor company to benefit from the Company being put into liquidation. ■

Company Law

Burnden Holdings (UK) Ltd (In Liquidation) v Fielding

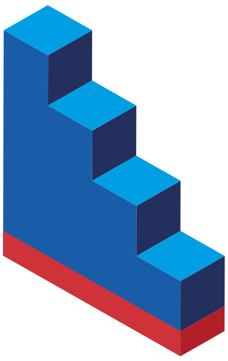
[2019] EWHC 1566 (Ch) (Zacaroli J), 19 June 2019

Unlawful dividends – Strict Liability – Breach of fiduciary duty

The claim involved two transactions effected by BHUK in 2007. The first involved the execution of a fixed and floating charge in favour the Defendants, who were directors and shareholders of BHUK (the "Grant of Security"). The second was a transaction by which a subsidiary of BHUK was demerged from the Burnden group of companies and involved a distribution in specie by BHUK of its shareholding in that subsidiary (the "Distribution"). The claimants (BHUK and its liquidator) brought numerous claims in respect of both the Distribution and the Grant of Security.

As regards the Distribution, a key basis on which the claimants put their case was that it had been paid unlawfully in contravention of the requirements of the Companies Act 1985 and thus, it was argued, in breach of the directors' fiduciary duties. In this regard, an important legal question considered by Zacaroli J was whether the liability of directors involved in the making of an unlawful distribution is strict. He noted the obiter comments of Lord Hope in *Revenue and Customs Comrs v Holland* [201] 1 WLR 2793 to the effect that the better view was that where it is accepted that the dividends were unlawful a director who causes their payment is strictly liable, subject to relief under statute. The Judge disagreed, holding that liability in this area was fault-based: if directors knew the facts which constituted an unlawful dividend, then they would be liable as if for breach of trust irrespective of whether they knew that the dividend was unlawful. However, if they were unaware of the facts which rendered the dividend unlawful then provided they had taken reasonable care to secure the preparation of accounts so as to establish the availability of sufficient profits to render the dividend lawful, they would not be personally liable if it turned out that there were in fact insufficient profits for that purpose.

The Judge concluded that the Distribution was not rendered unlawful either on the basis of a lack of distributable profits or on the basis that the interim accounts were such that no reasonable judgment could be made as to the matters identified in s. 270(2) of the Companies Act 1985. Based on his conclusions on fault-based liability, the Judge also found that if there had been insufficient distributable reserves, the Defendants would not have been culpable as to any breach of duty in causing the Distribution to be made. Zacaroli J found that in all the circumstances of the case, it had been reasonable for the defendants to rely on management and independent professionals in concluding that the relevant interim accounts had been prepared in accordance with the requirements of the Companies Act and that there were sufficient distributable reserves to enable the Distribution to be made. The claimants' other claims in relation to the Distribution also failed, as did the claims in respect of the Grant of Security. ■



Corporate Insolvency

Digested by Ryan Perkins and Daniel Judd

NN2 Newco Ltd, Re Politus BV

[2019] EWHC 1917 (Ch) (Norris J) 22 July 2019

Schemes of arrangement – jurisdiction – Recast Insolvency Regulation – Recast Judgments Regulation

In NN2 Newco and Politus, two schemes of arrangement were proposed as part of a wider restructuring of the debts of the Nyrstar Group, an international multi-metals business. Norris J was content to order the convening of scheme meetings. One particular group of issues discussed in this case concerns the jurisdiction of English courts. In order to facilitate the scheme, a number of debts had previously been transferred to the scheme companies, and had been varied to include 'asymmetric' jurisdiction clauses.

English jurisdiction over the two scheme companies could be established. NN2 Newco was an English company, newly incorporated for the purpose of the restructuring, which had effectively assumed joint and several liability under the debt instruments. Norris J added that neither measure constituted abusive forum shopping. The second scheme company, Politus, was a Dutch company, and therefore an unregistered company under English law. A 'sufficient connection' to the jurisdiction was accordingly necessary from the perspective of English law. Norris J found that this was established by the fact that English law governed the debts whose terms were to be varied by the scheme, as well as by the presence of asymmetric jurisdiction clauses (considered again below).

A second question was whether the court was inhibited by European law in exercising its scheme jurisdiction.

Norris J noted the established view that schemes of arrangement are not 'insolvency proceedings' under the Recast Insolvency Regulation, but observed that it was not settled that the Recast Judgments Regulation (which contains its own exception for insolvency proceedings) did apply to schemes. Norris J adopted the conventional approach that the two Regulations 'dovetail', such that the Recast Judgments Regulation applied.

This raised the question whether English courts had jurisdiction over the debts of scheme creditors under the Recast Judgments Regulation. That Regulation generally requires persons domiciled in a Member State to be sued in the courts of that Member State (Article 4), subject to exceptions where there are a number of defendants such that it is expedient to determine the claims together (Article 8) or where the parties agree that the courts of a Member State are to have jurisdiction to settle *"any disputes which have arisen … in connection with a particular legal relationship … such jurisdiction shall be exclusive unless the parties have agreed otherwise"* (Article 25). Norris J opined that sufficient creditors were domiciled in the jurisdiction for Article 8 to found jurisdiction over NN2 Newco's creditors. However, it was clear that Article 8 could not assist in relation to the Politus scheme.

The key issue was then whether the 'asymmetric' jurisdiction clauses contained in the debt instruments satisfied the jurisdictional gateway in Article 25. These clauses provided that, whilst the borrowers must use English jurisdiction, the lenders consented to English jurisdiction, but may make use of any other court with jurisdiction.

Norris J considered that Article 25, in terms, covers exclusive and non-exclusive agreements, and thus extends to asymmetric jurisdiction clauses. Focusing closely on the particular wording of the clause before him, as well as the wording of clauses in previous cases, he found that the clause represented an agreement between the parties that English courts were to have jurisdiction. ■

[Daniel Bayfield QC, Georgina Peters, Lottie Pyper]



Fraser Turner Ltd v PricewaterhouseCoopers LLP

[2019] EWCA Civ 1290 (Vos C) 19 July 2019

Administration – duties of care – unfair harm – paragraph 74 to Schedule B1

The central complaint in this case was that administrators of a company had failed to ensure that, when selling the business to a third party, the third party should be responsible for ensuring that the debts of a company creditor were paid. The claim was framed both as a contractual claim, and as a breach of duty claim against the administrators. The Court of Appeal dismissed the claims against the administrators.

Under a settlement agreement, the company was under a duty to pay Fraser Turner Ltd ('FT') a royalty of 0.3% of the market value of iron ore produced at a particular mine owned by the company. In 2014, the company went into administration after encountering financial difficulties. The administrators decided to sell the business of the mine owned by the company to a third party. The sale of the mine did not require the purchaser to pay FT the 0.3% royalty payments. The central question then arose as to whether FT could look to claim the royalty payments from the administrators.

The first group of arguments sought, by way of interpretation or by implying terms into the settlement agreement, to place an obligation on the company to ensure that the royalty payments were made in the event that the mine was sold. Sir Geoffrey Vos rejected this argument in light of the established case law on express terms and contractual interpretation, and the conflict between FT's proposed terms and the express terms of the settlement agreement.

This led FT to frame the matter in terms of breach of duty claims against the administrators of the company. Did the administrators owe FT a duty to protect it from losses caused by failing to require the purchaser to pay the royalties?

The court noted the general bar to the recovery of purely economic losses in tort, meaning that FT had to show either specific representations or an assumption of responsibility in order to establish a duty in respect of the royalties. Administrators were to be treated no differently from directors in this regard. No such representation or assumption was borne out on the facts. Vos C also pointed to the administrators' duty to realise the assets for the benefit of creditors as a whole. The complaint was in substance that the administrators failed to assist FT in obtaining a new royalty contract with the purchaser of the mine. However, this would have given FT a benefit not available to other creditors, and might have lowered the sale price of the mine to the detriment of creditors generally.

The final issue engaged the scope of paragraph 74 to schedule B1 to the Insolvency Act 1986, which allows a creditor to claim that the administrators have acted unfairly so as to harm their interests. In the present case, the administrators were seeking in good faith to carry out their statutory functions in the interests of creditors as a whole. Accordingly, Vos C considered that the 'unfairness' element was not established. ■

[Daniel Bayfield QC, Stephen Robins]


Corporate Insolvency

Re Weavering Macro Fixed Income Fund Limited

[2019] UKPC 36 (Reed, Wilson, Lloyd-Jones, Briggs SCJJ; Sir Donnell Deeny) 29 July 2019

Preferences – net asset value – fraud – unjust enrichment

These proceedings arose out of the fraudulent activities of Magnus Peterson, the principal fund manager of Weavering, which was a Cayman open-ended investment company ('the Company'). Payments had been made by the Company in response to share redemption requests made by a Swedish bank ('the Bank'), prompted by the collapse of Lehman Brothers. Numerous other redemption requests had been received. By the time it was discovered that Peterson had fraudulently inflated the net asset value (NAV) of the Company, the Company was unable to meet all the redemption requests and was insolvent. The liquidators alleged that a number of payments previously made to the Bank were fraudulent preferences under section 145(1) of the Companies Law (2013 Revision) 2013 ('the 2013 Law') which is similar to section 239 of the Insolvency Act 1986 ('the Act').

The defendant Bank lost in the Grand Court of the Cayman Islands and in the Cayman Islands Court of Appeal. It appealed on a number of grounds. Those included arguments that: (i) as a result of the fraud, the inflated NAV figure was not binding, in contrast to the *lower* NAV figure, relying on *Fairfield Sentry Ltd v Migani* [2014] UKPC 9 ('the Fraud Point'); and (ii) the bank received the payment as a bare trustee and distributed the funds to the beneficiaries, such that it was never enriched by the funds, and could rely on common law defences such as change of position ('the Repayment Issues').

Lord Reed gave the judgment of the Board. The Board considered as follows:

- In addressing the Fraud Point, whether or not NAV figures were liable to be set aside depended on the nature of the fraud. Where the fraud was 'internal', in the sense that the fraud was internal to the company in the production of NAV figures, those figures may not be binding. This was to be distinguished from other kinds of 'external' frauds, where the directors may determine liabilities in good faith, even though the fraud may impact the NAV figures. In this situation, the figures would not be liable to be set aside. On this basis, *Fairfield Sentry Ltd v Migani* could be distinguished.
- As regards the Repayment Issues, the Board explained that section 145 of the 2013 Law operated to invalidate preferential payments, but did not set out the consequences of that invalidation. These were instead left to the general law. In England and Wales the position is not identical; the language of section 239 of the Act allows the court to make such an order as it sees fit. In the present case, the money would be repayable on the basis of a personal claim in unjust enrichment.
- The question of whether a recipient of a preference payment was 'enriched' did not depend on whether the recipient was a trustee for someone else. While a bare trustee may resemble an agent, in law, the two were distinct. A trustee who is not acting as an agent is enriched at common law by the payments which they receive. The Bank was therefore enriched on receipt of the payments.
- Finally, there was a tension between reliance on the change of position defence and the statutory aim of section 145 of the 2013 Law, which was to distribute the estate *pari passu* to creditors. After considering the operation of avoidance provisions more generally, the Board held that the common law gives priority to the operation of the statutory scheme over the detrimental impact of its operation. This meant that the Bank could not rely on the defence.

As a result, the appeal to the Privy Council was dismissed, and the preference claims of the liquidators were upheld. ■

Discovery (Northampton) Ltd and others v Debenhams Retail Ltd and others

[2019] EWHC 2441 (Ch) (Norris J) 9 September 2019

CVA jurisdiction – leases – creditors

In *Debenhams*, Norris J considered five grounds of challenge to a Company Voluntary Arrangement (CVA). The case provides helpful guidance on the extent to which a CVA will be effective to compromise liabilities accruing under leases.

The company was Debenhams Retail Ltd, the large and well-known high street retailer. In view of economic pressures, particularly the cost of leasing its stores, it sought to restructure its debts. The principal debts sought to be compromised were liabilities accruing under store leases with commercial landlords.

A proposal for entering into a CVA grouped the Company's leases into six categories. In broad terms, these groups reflected the financial performance of the leases. The CVA proposal was approved by 94.71% of the Company's creditors in May 2019. However, one group of creditors, consisting of six Landlords and representing three categories of leases, regarded the CVA as unfairly prejudicial. They challenged the CVA on five grounds, considered in turn below.

The first ground was that 'future rent', rent under an existing lease that had not fallen due for payment, could not be compromised by a CVA. The Landlords contended that future rent was not a *debt* but an 'unearned future payment'. The Company did not have a claim for rent to be paid in the future at the time the CVA became effective, and accordingly there were no 'creditors' for the purpose of receiving notice of the CVA proposal, and no 'debts' capable of falling within section 1 of the Insolvency Act 1986.

Norris J rejected this argument, and considered that the term 'creditor' was to be given a wide meaning for this purpose. This could include *"someone towards whom the company had a present pecuniary liability which will in the future or many on a contingency become payable as a debt"*. In reaching this conclusion, Norris J noted that landlords could not prove in a liquidation for future rent (as *future debts*) until the rent fell due, but that they nevertheless had a pecuniary claim which had to be satisfied before dissolution of the company and distributions to shareholders. Future rent was at least a pecuniary liability to which the Company may become subject in the future by reason of an existing obligation. Norris J opined that future rent might be characterised as a 'contingent debt', but it was at least a 'debt' within the extended meaning of the term. He was careful to note that whilst future rent had the status of a 'debt', it was not a *provable* debt. In the present case, only status as a 'debt' was relevant; the relevant claims were 'debts' and capable of being compromised by the CVA.

The second main basis of challenge was that a reduction of rent payable under leases was automatically unfairly prejudicial, and that a company which benefitted from the use of a premises should pay the full contractual rent. Norris J dismissed this argument. The fundamental question was whether the new arrangement was 'fair', and this was to be considered in the round. The fact of varying rent did not render a CVA unfair, and landlords were to be treated in the same way as other past creditors. Norris J added that a CVA may be unfair where landlords were forced to accept less than market rates, though there was no suggestion of that in the present case.

The third point of challenge was that rights of forfeiture were proprietary, and therefore could not be varied by a CVA. Norris J considered that a landlord's right of re-entry was a property right; it was property belonging to the landlord, enabling the landlord to get their own property back. In this way, it lacked the fundamental characteristic of a security interest, even if it had the commercial effect of a security. A CVA could not deal with such a property right, and therefore this ground of challenge succeeded.

The fourth concern was that the CVA provided for the differential treatment of creditors which rendered the CVA unfair. This argument was rejected. Norris J considered the differential treatment of landlords and suppliers, and was satisfied on the evidence that the treatment of them was objectively justified given both the need for business continuity and how the market in fact operated.

The final ground of challenge was that the CVA failed to comply with the content requirement of the insolvency rules. In particular, it was argued that the company failed to disclose 'clawback' claims which might be made against the company if it entered into administration or liquidation. Norris J was unpersuaded on the material before him that, even if the CVA had referred to the prospect of such claims, creditors would have been influenced to vote differently.

Four out of the give grounds of challenge failed. The ground which succeeded did not, however, invalidate the arrangement. Norris J made a provisional declaration that the relevant forfeiture provisions be removed from the CVA, and upheld the CVA on that basis. However, Norris J gave the landlords permission to apply for an order revoking the approval of the creditors' meeting on the basis that the forfeiture provisions could not properly be severed from the CVA. The landlords have now made that application, and a further hearing is due to take place before Norris J in January 2020.

[Martin Pascoe QC, Jeremy Goldring QC, Tom Smith QC, Daniel Bayfield QC, Richard Fisher, Matthew Abraham, Andrew Shaw, Ryan Perkins, Madeleine Jones]

Re MKG Convenience Ltd (in liquidation)

[2019] EWHC 1383 (Ch) (HHJ David Cooke) 7 June 2019

Winding-up petition – section 127 – unjust enrichment

The liquidators of MKG Convenience Ltd sought orders under section 127 of the Insolvency Act 1986 invalidating payments made after the date on which the petition to wind up the company was presented, and demanded repayment of those sums to the Liquidators. Those payments consisted in direct debts made from the company's bank accounts. The recipient of those sums, NISA Retail Ltd ('NISA'), accepted that the starting point was that the payments were void under section 127. One basis on which NISA resisted the claim was by seeking a cross-order validating the payments. Interestingly, however, NISA also argued that it was not obliged to repay the sums to the Liquidators on the basis of the change of position defence.

HHJ David Cooke noted the view expressed in previous authorities that, where the underlying transaction was void under section 127, the defence of change of position was in principle

Corporate Insolvency

available in response to a claim in unjust enrichment. Those cases were criticised as undermining the policy of section 127 in trying to secure the *pari passu* distribution of insolvent estates. The judge considered that, while the defence was in principle available, it would likely only succeed in line with the court's discretion to validate payments under insolvency legislation. It would need to be shown that the policy imperative of section 127 made it unjust to require the enrichment to be repaid to the Liquidators. This could not be shown on the facts, and so the liquidators' claim for repayment succeeded. ■

Re Thomas Cook Group Plc and others

[2019] EWHC 2626 (Ch) (Marcus Smith J) 23 September 2019

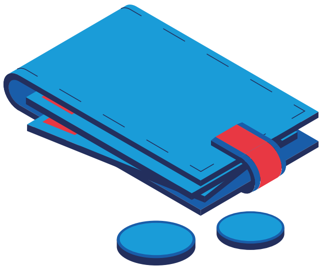
Winding-up petition – appointment of special managers – 'Carillion' order

The directors of numerous companies in the Thomas Cook Group ("the Group") petitioned for 26 Group companies to be wound up immediately. The court was also asked to dispense with the notice requirements which would ordinarily apply. This would enable the Official Receiver to be appointed as the liquidator immediately, and for the Official Receiver to apply to appoint special managers over the companies shortly thereafter.

Marcus Smith J was satisfied that there was no viable alternative to liquidation of the Group, referring in particular to attempts to inject new money into the Group or to restructure the business, and the considerable time already made available to the Group's creditors in deciding whether or not to offer financial support. The judge considered that it was appropriate to dispense with the requirement to give notice due to the situation being one of very real urgency. It would serve no useful purpose to delay the actual winding-up of the companies, as this would simply increase the inconvenience that would be suffered compared to an immediate entry into liquidation.

Marcus Smith J made the winding-up order, dispensed with notice, appointed the Official Receiver as liquidator, and appointed AlixPartners LLP and KPMG LLP as special managers. In adopting this relatively unusual course, the judge followed the approach in *Re Carillion plc* and *Re British Steel Ltd*. The winding-up order was made in the early hours of the morning, at a time at which the minimum number of planes would be in flight. ■

[Tom Smith QC, Adam Goodison, Ryan Perkins]



Personal Insolvency

Digested by Lottie Pyper

Oraki v Hall

[2019] EWHC 1515 (Ch) (HHJ Simon Barker QC) 19 July 2019

Suspension order – Trustee in bankruptcy

Mr and Mrs Oraki (the 'Os') were made bankrupt in 2005 and 2006 respectively, on account of a judgment debt that subsequently transpired to have been obtained fraudulently. Since then, they had made numerous unsuccessful applications to the Court, primarily against their successive trustees in bankruptcy. By the time this hearing came before the court, the existing trustee in bankruptcy (the 'Trustee') claimed in excess of £1.8 million for costs and remuneration.

The central dispute at this hearing regarded a writ of possession that the Trustee had obtained over the O's home on 17 December 2018 in relation to that sum. The Os had obtained an *ex parte* order suspending the writ of possession by an application issued on 9 January 2019 (the 'suspension order'), which the Trustee now sought to set aside. The Os also raised various other complaints against the Trustee, all of which were resoundingly dismissed by the judge.

The judge set aside the suspension order on the ground that it had been obtained as a result of material non-disclosure by the Os, and without any notice at all given to the Trustee. He also declined to grant the suspension order afresh at this hearing. The Os other applications were either abandoned during the course of the hearing, or dismissed as abuses of the court's process.

Finally, the judge granted the Trustee's application to exclude the Os and any other occupiers from the property, in order to enable the Trustee to progress the realisation of the property unhindered. ■

[John Briggs]

Azunonye v Kent

[2019] EWCA civ 1289 (Floyd, Simo, David Richards LJJ) 19 July 2019

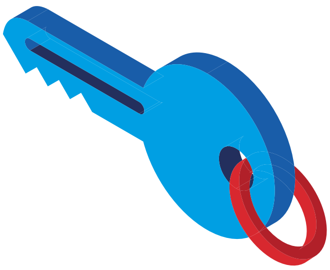
Income payments order – bankruptcy

The debtor was made subject to an income payment order ('IPO') during his first bankruptcy, pursuant to section 310 of the Insolvency Act 1986 ('IA 1986'). After having been automatically discharged from the first bankrupty, the debt was made bankrupt for a second time. The issue before the court was whether the IPO nonetheless remained enforceable against the debtor, or whether it simply gave rise to a provable debt in the second bankruptcy. This case fell outside of section 335 IA 1986 because the debtor had been discharged from the first bankruptcy when the second bankruptcy order was made.

Reversing the decision of the court below, the Court of Appeal held that the IPO was not enforceable against the debtor, and instead gave rise to a provable debt in the second bankruptcy. The starting point was that future payments due under the IPO fell within the scope of the bankruptcy debt in the second bankruptcy (section 382(1) IA 1986) and within the broad reach of provable debts endorsed by the Supreme Court in *Re Nortel GmbH* [2013] UKSC 52, and there was nothing in the IA 1986 or accompanying rules which indicated otherwise. This result was also consistent with section 335 IA 1986, which applies where the bankrupt has not yet been discharged.

On a practical level, the court observed that the requirements and consequences of a bankruptcy order made it impossible for debtors to avoid an IPO by voluntarily entering second bankruptcy proceedings after discharge of the first bankruptcy. ■

[John Briggs]



Property and Trusts

Digested by Riz Mokal

High Commissioner for Pakistan in the United Kingdom v Prince Maffakham Jah

[2019] EWHC 2551 (Ch) (Marcus Smith J) 2 October 2019

Fund held in account to order of Nizam of Hyderabad — transferred to account in name of Pakistan High Commissioner upon India taking control of Hyderabad — whether inter-state transaction can create trust — whether transfer an absolute one or on trust — whether trust express, constructive, or resulting

Indian armed forces entered the princely state of Hyderabad as part of "Operation Polo", which ran from 13 to 18 September 1948. The Nizam, the state's absolute ruler, accepted his government's resignation on 17 September. At or around 20 September, the (by then) erstwhile Finance and External Affairs Minister for the Hyderabad Government ('Moin') caused a sum of just over £1 million ('the Fund'), held in a Westminster Bank ('the Bank') account in the Hyderabad Government's name ('the Hyderabad Account'), to be transferred (by 'the Transfer') to an account in the name of the then Pakistan High Commissioner to the UK ('Rahimtoola') ('the Rahimtoola Account'). Pakistan initially did not claim any beneficial interest in the Fund and instead, in relation to its bare legal title to the Fund, claimed sovereign immunity; this was eventually upheld in the House of Lords. In 2013, Pakistan waived immunity to commence the present proceedings, asserting a beneficial interest in the Fund for the first time and seeking an order requiring the Bank to pay the Fund over to it.

The first of Pakistan's arguments was that the Fund had been transferred to it absolutely in payment for a clandestine supply of arms to Hyderabad by Pakistan or through its good offices. Marcus Smith J found ample contemporaneous evidence that Pakistan was supplying weapons to Hyderabad to resist what Pakistan and Hyderabad perceived as Indian aggression. Further, the two accounts in which the Fund had variously been held had been used to pay for some such supplies and the Hyderabad Account had been established for that specific purpose. However, there was no basis for the contention that the Transfer itself had been by way of payment for any such supply and several factors pointed in the opposite direction. The more plausible explanation was that the Transfer was motivated by Moin's concern to keep the Fund out of India's hands.

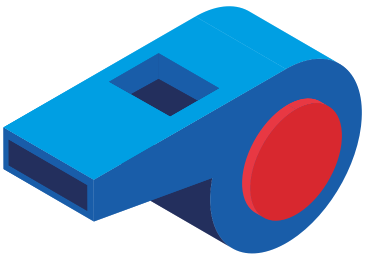
Pakistan's second argument was indeed that the Fund had been transferred to the Rahimtoola Account to keep it safe from India. However, Pakistan claimed that the Transfer had been to it absolutely. Marcus Smith J rejected this argument. Instead, he held that the Transfer was on trust.

The Judge found, firstly, that while the resignation of the Hyderabad

Government on 17 September 1948 terminated Moin's authority to act on behalf of Hyderabad, it did not affect the Nizam's authority qua absolute ruler. Secondly, the Transfer was not explicitly authorised by the Nizam but was consistent with his unexpressed wishes and executed by Moin in what the latter considered to be in Hyderabad's and the Nizam's best interests. Thirdly, by the date of the Transfer, the Nizam would have wanted the Fund protected from India but left under his control. Marcus Smith J considered this suggestive of some kind of trust arrangement. This was consistent with the use of the word "trust" in a 15 September 1948 letter from Moin to Rahimtoola, and with the terms of a letter by Moin to The Times published on 1 October that year. Fourthly, both the Nizam and Moin would likely have sought to entrust this safeguarding function to Pakistan, and not to an individual. This suggested that the Transfer was to Rahimtoola not personally but ex officio as representing Pakistan. Fifth, that the Transfer was on trust was also consistent with Rahimtoola's 15 September response to Moin, in which he agreed *"to keep the amount…in trust".*

Against this background, Marcus Smith J held, firstly, that since the Fund belonged to the Nizam and since Moin did not have the Nizam's authority to make the Transfer, no express trust could arise. Even if Moin had had authority to make the Transfer, it would have been in broad terms to safeguard the Nizam's assets from India, which would not require disposal of the beneficial interest. An express trust would have arisen. It did not, since, as noted, there was no actual authority. Second, however, a constructive trust did arise. Rahimtoola acting *ex officio* accepted in good faith the obligation to act as trustee for the Nizam in circumstances where Moin had ostensible authority to act on the Nizam's behalf. For this purpose, Moin's intentions as transferor were irrelevant. Third and if there had not been a constructive trust, the Fund would have been held on resulting trust for the Nizam, there being no intention on the Nizam's part as the Fund's beneficial owner to transfer that ownership to Pakistan.

Pakistan had also argued that private law notions of trust had no application to transactions between sovereign states. Marcus Smith J rejected this on the basis of established law: sovereign states are recognised as persons for private law purposes and with all the attendant capacities and powers, such as to enter into contracts and hold and transfer property. In this respect, a state's position is no different to that of the Crown. ■



Sport

Digested by Robert Amey

New Balance Athletics Inc v The Liverpool Football Club and Athletic Ground Ltd

[2019] EWHC 2837 (Comm) (Teare J)
25 October 2019

Football – sponsorship – contracts

The Claimant ('New Balance') was a sponsor of the Defendant ('Liverpool FC') and had the right to manufacture and sell replica shirts. Its sponsorship deal was due to end in 2020 but it wished to renew it and its contract had a right enabling it to match any offer made by a competitor. Nike had made an offer for the right to produce replica shirts which Liverpool FC preferred. New Balance claimed that it had matched this offer but this was disputed by Liverpool FC and there was an expedited trial before Teare J.

Teare J considered whether New Balance's offer matched that made by Nike. He found that New Balance did match the distribution obligation that Nike was willing to assume, and acted in good faith in doing so. However, in relation to marketing, New Balance omitted to specify, as Nike had done, that its marketing initiatives would feature athletes and influencers of *"the calibre of Lebron James, Serena Williams, Drake etc".* Teare J held that the calibre of the athletes named by Nike could be measured by reference to their social media exposure and that this omission by New Balance meant that it had not matched the offer made by Nike. Liverpool FC was therefore not obliged to enter into a new contract with New Balance. ■

EUROLAND

PROFESSOR CHRISTOPH PAULUS

This section of the Digest was historically Gabriel's place; it should be he who informs the reader, with his unique legal mind and his wit, about what is and has been happening on the continent.

When I was asked to step in I was not only greatly honored but decided to continue this part of his oeuvre in order to keep his memory alive. After all, it was no less a person than Cicero who wrote in his ethical main work – *De Officiis* – that we all strive for immortality, which he concluded from the fact that we procreate children, that a farmer plants a tree the fruits of which he will never eat. Immortality, in other words, is to be understood as being remembered and it is with this understanding that I step in here for Gabriel. I dedicate my present and future notes to his ongoing memory.

In this issue, two decisions of the CJEU are presented, and both deal with the interference of the Brussels la Regulation and the European Insolvency Regulation (EIR – in both cases still the original Insolvency Regulation: 1346/2000). Transferred to the present situation under the Recast EIR, the issues refer to the applicability of art. 6 EIR. Finally, a note on the Directive (EU) 2019/1023 on preventive restructuring frameworks etc, which came into being on 20 June this year.

CJEU, decision from 18 September 2019 – C-47/18 – Riel

Mr. Riel was appointed as liquidator (Masseverwalter) in the insolvency case of Alpine Bau GmbH (debtor), the then biggest construction firm in Austria, which had been contracted by the Polish Department of Roads to carry out a number of road construction projects in Poland. The Polish Department of Roads (the plaintiff) launched a claim against Mr Riel, in his position as liquidator, for tens of thousands of Euros for various road constructions in Poland which were performed, in the plaintiff's opinion, defectively.

Before legal action was taken in mid-June 2013, Alpine Bau GmbH entered into an insolvency proceeding in Vienna. Slightly later this action was explicitly declared to be a main proceeding pursuant to art. 3 par. 1 EIR. Later on, upon a filing by Mr. Riel as administrator of the main proceeding, a secondary proceeding was opened in Poland (near to Poznan). Pursuant to the facts given in the decision (the defendant, in his rebuttal to the CJEU [thanks to the administrator, on file with the author] corrected the court in pointing out that the first lodging of claims took place at the Austrian court), the plaintiff lodged its claims first in the Polish and afterwards in the Austrian proceeding – it is to be assumed (the court fails to clarify this question) that most (if not all) such claims were identical in both proceedings. Both administrators, however, contested these claims.

Accordingly, the plaintiff filed a declaratory action before the Polish court on 1 April, 2015; a year and a half later, on 31 October 2016, he did the same before the Austrian court whereby he asked the judge to stay the proceedings until the Polish decision had become final. The Austrian judge, however, ignored this latter motion (possibly following the defendant's assumption that the plaintiff hoped for a more favorable judgment in Poland and its potential factual influence on the Austrian judge) and decided on the merits by rejecting the claim partially.

The plaintiff then appealed to the Vienna Court of Appeal, contending that the court of first instance had violated art. 29 of the Brussels Ia Regulation in that it had failed to stay its proceeding. This complaint prompted the Appeals Court to submit three questions to the CJEU:

1. Is the present action which seeks a declaratory confirmation of the claim one that is governed by the Jurisdiction Regulation (Brussels Ia, 1215/2012) or by the Insolvency Regulation (here still 1346/2000, nowadays art. 6 EU 848/2015)?
2. Is, possibly by way of analogy, art. 29 of the Brussels Ia Regulation to be applied in the present case where the same claims are subject to suits before different courts?
3. How are the requirements listed in art. 41 Reg. 1346/2000 (now 55 848/2015) to be interpreted when the date that the claim arose is not precisely given but can be easily derived from the form by which the claim was lodged?

Is the present action which seeks a declaratory confirmation of the claim one that is governed by the Jurisdiction Regulation (Brussels Ia, 1215/2012) or by the Insolvency Regulation (here still 1346/2000, nowadays art. 6 EU 848/2015)?

The first question aims at what under the Recast Regulation would have to be classified as a potential further type of action falling under the regime of art. 6: is the action for the determination of a claim an action deriving directly from insolvency proceedings and, additionally, closely linked with it?

The positive answer of the court is based on the following argument. Beginning with the Court's mantra-like clarification that the two relevant Regulations are to be interpreted in a way that any lacuna and overlapping is avoided, it then refers to its previous line of reasoning pursuant to which the respective action must be filed on occasion of an insolvency proceeding – combined with the assessment whether this action is derived from "*insolvency procedural law*" (Insolvenzverfahrensrecht) or not. What has always been the crucial criterion, however, is the legal foundation (Rechtsgrundlage) of that action, depending on whether "*the underlying claim or obligation of the law suit is based on civil or commercial law or on insolvency law*". From here the Court turns to the case at hand and concludes that the legal foundation is Austrian insolvency law; since sec. 110 Austrian Insolvency Ordinance obliges a

creditor whose claim has been contested by the administrator to file the determination claim in the form of a declaratory action. Therefore, the Court concludes, that the legal foundation of the present action is insolvency law.

This reasoning is irritating even though it goes somewhat along trodden paths. The general understanding of what constitutes a legal foundation of a claim would be “from what basis is that claim derived– from contract, tort, or such like?” And it appears that the CJEU shares this understanding in, for instance, its decision Paribas Fortis (C-535/17, par. 28 with further references; cf. below). However, the determination action in the mandatory form of a declaratory action provides the form rather than the foundation. After all, outside of insolvency such a claim would have to be commenced as a law suit for performance (damages resulting from inadequate performance of contractual duties), but since this would be contrary to the fundamentals of insolvency law this very law changes, as it were, the procedural vehicle into a declaratory action. Nevertheless, in the present case the CJEU returns to its understanding in the F-Tex decision (C-213/10) when it decided that the assignment of an insolvency claw-back claim to a third party deprives that claim from its insolvency essence. Accordingly, the present decision fails again to clarify the precise contours of an insolvency related judgment.

Is, possibly by way of analogy, art. 29 of the Brussels Ia Regulation to be applied in the present case where the same claims are subject to suits before different courts?

The second question deals with the issue of possibly contradicting court decisions. To be sure, it is not a question of *lis pendens* (and, accordingly, of art. 29 Brussels Ia-Regulation) when more or less the same claims are subject to suits before different courts but when the parties involved are not identical; after all, the defendants in those law suits were different. But where a secondary insolvency proceeding is dealing with the same debtor as the main proceeding, giving rise to the danger of one court deciding there is no claim and the other court coming to the opposite result, this is a prospect as unpleasant as the situation addressed in art. 29 Brussels Ia-Regulation. The CJEU, however, sees the “*system of the EIR disregarded*” and “the practical efficiency of its rules compromised” when and if art. 29 were applied in the present context. Since the EIR’s system provides for communication and cooperation duties among the two proceedings, contradicting decisions are said to be avoidable.

It is irritating that the Court refers in the context of this argument, para. 44, to the parallelism of main and secondary proceeding – which is not at stake at all here. When and if a jurisdiction which has no *vis attractiva concursus* (where other judges than the insolvency judge decide about the determination action the cooperation and coordination between judges as provided for (only) in the Recast EIR) is of no help for contradicting decisions. Accordingly, it seems as if the Court came to the right result but in the wrong way.

The right way would be that it is a logical consequence of the admissibility of parallel proceedings regarding one debtor's insolvency that disputed claims might have to be determined by different courts (what's more, in different countries). Accordingly, inconsistent decisions might be the outcome. This problem is, as it were, pre-programmed by that very insolvency system of the EIR through its adherence to the concept of modified universalism and its admission of parallel proceedings.

The solution to this problem is available only under the Recast EIR, art. 42 if the insolvency judges are in charge of the claim's determination; if this is not the case, though, the civil procedural remedy of suspension of the court proceedings is likely to be the right way to go. Strategic filing must then be defended by cooperation between the administrators.

How are the requirements listed in art. 41 Reg. 1346/2000 (now 55 848/2015) to be interpreted when the date that the claim arose is not precisely given but can be easily derived from the form by which the claim was lodged?

The third question deals with a formality. Art. 41 EIR 1346/2000 (now 55 Recast) prescribes for the lodging of claims that the date has to be indicated on which the claim arose. Pursuant to the Austrian law, however, it is admissible to lodge a claim without such a date. In the present case the relevant date was easily determinable from the attached forms, and the Vienna Court wanted to know whether this is sufficient for an admission of the claim in the Austrian proceeding or whether art. 41 EIR 1346/2000 "beats" the local law. Concluding from the Regulation's goal to provide an efficient and practical functioning of cross-border insolvencies, the Court interpreted the requirements in art. 41 (55 respectively) as maximum requirements. A lodging of claims can, in other words, fall short of those requirements – when "*without particular difficulties*" the date of the claim's coming into existence can be determined through the attached documents. The latter restriction gives, as a matter of fact, an invitation to further disputes; since it is arguable what exactly is to be understood by "*without particular difficulties*".

CJEU, decision from 6 February 2019 – C-535/17 Paribas Fortis NV

This case was brought to the CJEU by the Hoge Raad der Nederlanden (The Supreme Court of the Netherlands) and deals with a recovery claim

> The problem is pre-programmed by the insolvency system of the EIR

which the liquidator in the bankruptcies of two Dutch companies (PI Gerechtsdeurwaarderkantoor BV ('PI.BV') and PI) believed he had against BNP Paribas Fortis NV ('Fortis'), concerning the recovery by the liquidator, in bankruptcy proceedings opened in the Netherlands, of a sum unduly debited by one of the bankrupt parties from an account with Fortis in Belgium.

Pl worked as a bailiff in the Netherlands. For the purpose of the bailiff practice he opened a bank account in Belgium with Fortis, this account being that which was intended to credit the persons whose debts he sought to recover. In 2006 Pl. founded a Dutch company, Pl.BV, of which he was the sole shareholder and administrator and whose purpose was to run the bailiff practice, the assets of which he contributed to PI.BV, including the current account with Fortis. PI.BV also owned a third-party bank account in the Netherlands which held the funds of about 200 clients of the bailiff practice. During three days in September 2008, PI transferred the sum of €550,000 from the third-party account to the Fortis account. A few days later, Pl. withdrew this amount in cash from the current account with Fortis. This was classified by the criminal court as a breach of trust and ended Pl.'s career as a bailiff.

Some ten months later, Pl.BV commenced insolvency proceedings and, another ten months thereafter Pl. himself filed for bankruptcy. The liquidator in both proceedings sued Fortis in the Dutch city of Maastricht for repayment of the €550,000, stating that by cooperating with the cash withdrawal the bank violated its legal duties and incurred a liability towards the general body of creditors of both PI.BV and PI by causing a loss to creditors of both insolvent estates.

The liquidator succeeded at first instance after the court had given an interlocutory judgment on the court's international jurisdiction which was confirmed by the Court of Appeal.

This was then appealed by Fortis; the court started the appeal by deciding, through another interlocutory judgment, on its jurisdiction. It declared that it was bound by its own decision, although the court indicated it had doubts as to its correctness – the CJEU having rendered in the meantime two decisions (C-157/13; C-649/13) – and granted an interim appeal on a point of law in that respect. Moreover, the appellate court expressed doubts whether the action brought by the liquidator against Fortis was a "*Peeters-Gatzerl*" action. This action is (probably) customary law and is granted, under certain circumstances, to, amongst others, a liquidator for damages against third parties involved in causing loss to the general body of creditors. Repayments can, thereby, be reclaimed even if the debtor himself could not do it, and they accrue to the insolvency estate.

Both parties appealed to the Hoge Raad. Fortis complained that the lower instances had assumed jurisdiction under the EIR. The Dutch Supreme Court shared those doubts and referred to the CJEU several questions, of which that Court was bound to answer only the first one. This was whether such a *Peeters-Gatzerl* action should be interpreted as one that is covered by art. 1 par. 2(b) Brussels Ia Regulation.

The Court's negative answer was based on the following argument. After the aforementioned mantra of the custom-fit bordering of both Regulations the Court stated that the applicability of the Brussels Ia Regulation is to be interpreted broadly and stands, thus, in contrast to the EIR's applicability. Moreover, the decisive criterion for the insolvency related action test is said to be its legal basis, rather than its procedural context: "*(a)ccording to that approach, it must be determined whether the right or obligation which forms the basis of the action has its source in the ordinary rules of civil or commercial law …*"

It further said that the fact that the claim was brought by the administrator after the opening of an insolvency proceeding, and that a successful claim would be for the common benefit of the creditors, is of minor relevance compared to the closeness of the link between the court action and the insolvency proceeding. All this, plus the additional feature of the *Peeters-Gatzerl* action, namely that the defendant of such claim cannot bring all defences against the liquidator that he would have against individual creditors, were, according to the Court, nothing but procedural context which did not change the civil law nature of the claim – and that is an action for liability for a wrongful act.

Finally, since a *Peeters-Gatzerl* action can also possibly be brought by individual creditors at any time outside or inside of an insolvency proceeding, the Court treated this action as non-insolvency related. Consequently, such action is not covered by the EIR but by its Brussels Ia counterpart.

As indicated in the comment on the *Riel* decision *supra*, it is hard to harmonize the qualifications in these two judgments. After all, when insolvency law obliges a creditor to file a declaratory action (rather than an action for performance) when the claim is based on damages resulting from inadequate contractual performance, one would conclude from the Fortis decision that the procedural context is irrelevant for the qualification. But yet, it is not according to the CJEU.

One is – one more time – tempted to complain about the judges' incomplete understanding of insolvency law and its specific mechanisms. All the more so as as the Court does not even mention its previous decision in the case "H" (C-295/13), where a liquidator's action against the debtor's manager based on the German norm (sec. 64 GmbHG) was decided to be insolvency related. There the Court declared as insignificant that such action can also be brought by other persons than just the administrator; it sufficed that the administrator was the plaintiff in the case at hand (par.20). Sec. 64 GmbH obliges managers of a limited liability company under certain circumstances to compensate the company for any payment made after the company's material illiquidity or overindebtedness.

This is admittedly slightly different from the *Peeters-Gatzerl* action, but certainly not entirely. The CJEU, accordingly failed to shed some light on its own understanding of what the decisive factors might be for the qualification of an insolvency related action. Therefore, legal practice has to keep attentive and to stay hopeful for another occasion.

Directive (EU) 2019/1023 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency)

Finally, on 20 June 2019, the Directive became formally adopted by the European Council and gave the go-ahead to the member states to transform it into national legislation within the next two years.

However, what was originally planned as a more-or-less uniform instrument primarily for SMEs was changed into an instrument of almost any desired result. Towards the end of the deliberations and discussion in Brussels, the Directive became more and more filled up with alternate options – allegedly 80!

Since the English scheme of arrangement has been one of the preventive framework's godfathers, the English reader will have less interest in the details than on what the consequence of the Directive's enactment is. Well, it is, amongst other things, the beginning of a race to the best places on the market. To the degree that the English scheme might become less attractive on the continent, thanks to Brexit, at least some jurisdictions see their chance to fill this gap and conquer the market share. So far, it is the Netherlands which has won this race – at least with regard to timing. On 5 July 2019, the Dutch Ministry of Justice released its draft law on confirmation of private plans (Wet Homologatie Onderhands Akkoord).

This Dutch plan proceeding is made particularly flexible so that the invitational character for foreigners becomes palpable at almost any rule. The entry test is that the debtor is "acceptably" imminently insolvent, and the imminence stretches possibly to one year. The manager of the debtor remains in office but a creditor, shareholder, or workers have the right to request the appointment of a restructuring expert whose task it is to draft a plan. Moreover, for the protection of the creditors, the court might additionally appoint a person in charge of overseeing the manager and the proceedings.

This plan may encompass all sorts of reliefs such as deferments, debt reductions, debt-equity-swap, sale of assets, and may even deal with third party obligations. Labour contracts, however, are immune. It may provide a minimum period of at least eight days after which the voting (also by electronic communication) takes place. The voting itself follows a class formation; a class is deemed to agree when, and if, two thirds of the aggregate claims amount in that class votes in favour. There is no majority requirement as to number of creditors. It is only when, and if, the plan is accepted that the courts get involved.

Within two weeks a special court – the Netherland Commercial Court in Amsterdam, composed of specially trained judges – will decide on the confirmation of that plan. The criterion is the absolute priority-rule, whereby the best interest of creditors' test provides the comparator. It is, in other words, the liquidation scenario which is the mandatory alternative. Cross-class-cram down is admitted, too, if at least one class "in the money" has accepted the plan. Creditors of a class which has voted against the plan are given the right to exit the company (for the price of cash in the amount of their claim's value in a liquidation scenario) so they would not be forced to finance a company against their own intents.

To make this new product really attractive for foreigners as well, the law follows a bifurcated approach. The first type, called public proceeding, will be notified for an enlisting in Annex A of the EIR and participates, thus, on all advantages and disadvantages of this legislative setting. The second type is called confidential proceeding and not included in the EIR regime. Thereby, the COMI requirement is eliminated and use of that type shall be permissible for all sorts of foreigners – including groups – when there is a sufficient connection with the Netherlands. Examples given for such connection are material assets located there, or an essential part of the obligations to be restructured are governed by Dutch law, or a part of the group (not the debtor) has its seat in the Netherlands, or the debtor is liable for the debts of another debtor who is subject to Dutch jurisdiction. The examples amplify that the Dutch legislator pursues a rather aggressive marketing strategy, particularly by facilitating the consolidation of an entire group at one court. It is assumed by Dutch authors that recognition of the confidential proceeding within the EU will be automatic pursuant to the Brussels Ia Regulation. This is certainly a fair assumption when, and if, one accepts the justification of the said bifurcation.

But precisely that might be subject to doubts. The division of one and the same proceeding into one EIR branch and one non-EIR branch sounds odd, to say the least. It would be more easily acceptable if there were not a description in art. 1 par. 1 EIR of what is to be understood as an insolvency proceeding. Moreover, it is not entirely unlikely that the CJEU will one day discover that its abovementioned mantra of the seamless interconnectedness of the Brussels Ia and the Insolvency Regulation is less strict than so far assumed when one takes recital 7 of the EIR into account. There one reads: "*However, the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012.*" ■

New Tenant *at South Square*

Daniel Judd

Daniel Judd graduated with a First Class degree in Jurisprudence from Oxford University, ranking joint third in his year. He subsequently completed an LL.M. at McGill University on a Canada Memorial Foundation scholarship, and was called to the Bar by Gray's Inn as a Holt Scholar. Daniel won a number of academic prizes during his degrees.

Before joining South Square, Daniel volunteered on the Company Insolvency Pro Bono Scheme, and won the inaugural Michael Mustill Essay Prize (2018) for his essay on the independence of arbitrators. Daniel also worked as a legal translator alongside his studies.

During pupillage, Daniel gained exposure to all of Chambers' core areas of practice, including corporate insolvency and restructuring, bankruptcy, banking and finance, offshore and fund litigation, commercial litigation and arbitration, company law, and trusts. He was supervised by Stephen Robins, Marcus Haywood, William Willson, Georgina Peters, Adam Al-Attar, Henry Phillips, Charlotte Cooke, and Alexander Riddiford.

As a pupil, Daniel assisted on a number of major matters. These include the special administration of MF Global *(Bundeszentralamt Für Steuern v Heis)*, subordinated debt litigation arising out of the collapse of Lehman Brothers, claims in the liquidation of British Steel, and the Court of Appeal's recent decision on insolvency set-off *(Bresco Electrical Services v Michael J Lonsdale)*. Daniel also worked on substantial offshore cases, such as the recent appeal arising out of the Madoff Ponzi scheme *(Primeo v HSBC)*, and the appeal from the largest fraud trial in the history of the Cayman Islands *(AHAB v Saad)*.

Daniel is currently taking part in the new Judicial Assistant scheme in the High Court, where he is based in the Chancery Division. He returns to Chambers in January 2020. ■

Mourant South Square Litigation Forum

We were delighted to host our annual joint litigation forum with Mourant on Thursday 19 September, held at Landing Forty Two of London's Leadenhall Building.

The forum was co-chaired by Mourant's Jessica Roland and South Square's David Allison QC with panels of speakers covering topics including recent developments in economic torts, reflecting on loss before litigation and legal developments in the offshore world. David Smith, Economics Editor of The Sunday Times, was our entertaining and informative keynote speaker. Very many thanks to all who attended and helped to make the event a great success. ■


Edward Strickland (Strickland Search)


Anna Freund (Stewarts Law)


Samuel Ouriach (Grant Thornton)


Frank Illett (Haberman Illett)


Celeste Aubee (Domestic and General Group)


Peter Hayden (Mourant), Jenni Jenkins (Memery Crystal), Marcus Haywood, Jeremy Goldring QC


Carly Schiff (Fieldfisher LLP)


Gordon Dawes (Mourant), Christopher Marks (Weil), Jamie Maples (Weil), Barry Isaacs QC


Mark Arnold QC


Julie Nettleton (Grant Thornton)


Susan Moore (Stephenson Harwood)


Peter Hayden (Mourant)


Co-chair Jessica Roland (Mourant)


Keynote Speaker David Smith


Jessica Roland (Mourant), Abel Lyall (Mourant)

Co-chair David Allison QC


Christopher Harlowe (Mourant) Kit Jarvis (Fieldfisher) Hilary Stonefrost


Jeremy Goldring QC, Jenni Jenkins (Memery Crystal)
Peter Crystal (Memery Crystal)


Mark Price (Dentons), Rosalind Meehan (Weil Gotshal Manges)


Edward Davis (Stephenson Harwood)

Cryptoassets, cryptoliabilities: *bitcoin and insolvency*

ALEX RIDDIFORD

Much ink has been spilt of late, including in the pages of the South Square Digest[1], on the legal nature and aspects of cryptoassets. The tempo of academic and practitioner interest in these issues has quickened in recent months, as questions previously confined to discussion in academic journals and FCA Discussion Papers have begun to spill over into the Courts.

In March of this year Simon Thorley IJ gave judgment in the Singapore International Commercial Court in *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03, holding that a company operating a cryptocurrency exchange platform (Quoine) acted in breach of contract and in breach of trust when it unilaterally reversed trades for the sale of Ethereum for Bitcoin. Over the summer the High Court in London (*Robertson v Person Unknown*) granted, pending trial of the claim, an asset preservation order over bitcoin worth more than £1m which had apparently been stolen by fraudsters.

The legal aspects of cryptocurrencies have also garnered significant extra-judicial attention, Mr Justice Zacaroli having delivered a speech only last month to the Insolvency (see pages 53-59 of this edition) Lawyers' Association on the subject of cryptocurrencies and insolvency. As the Learned Judge noted in that speech, the UK Jurisdiction Taskforce – under the chairmanship of the Chancellor of the High Court – is imminently to publish a "Legal Statement" on the legal status of crypto-assets and smart contracts, with a view to providing a degree of clarity around some of the fundamental issues, in particular whether the English common law, as it currently stands, is capable of recognising: (i) cryptoassets as a form of personal property; and (ii) the enforceability of smart contracts.

The hope is that this Legal Statement, once issued by the UK Jurisdiction Taskforce, will introduce a welcome counterweight to the uncertainty which currently bedevils this nascent area of English law. Indeed, the spectrum of academic opinion on certain fundamental, threshold questions could hardly be broader:

- Is cryptocurrency personal property? Not a form of personal property (neither a chose in possession nor a chose in action)[2] → A new hybrid category of personal property, a "virtual chose in possession[3];
- Is cryptocurrency money? Not money (and lacking certain of its fundamental characteristics)[4] → Already (or soon to become) a form of money, in all material respects, and therefore property in that sense[5].

Against that backdrop the most pressing desideratum, which may well be fulfilled in the context of the ongoing proceedings in *Robertson v Person Unknown*, is some decided case law on these fundamental points[6]. Lord Mansfield's words on the law of barratry[7] in *Vallejo v Wheeler* (1774) 1 Cowp 143, 153, are equally applicable today in the context of fintech law generally (and the legal nature and status of cryptoassets in particular): *"In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon."*

In this article I propose to venture a little further down the rabbit hole, going beyond these threshold questions (e.g. Is a cryptoasset capable of being personal property under existing common law principles?) to consider

1. See Robert Amey's article on page 14 of Digest July 2019 Edition.

2. Quest, "Taking security over bitcoins and other virtual currency" [2015] 7 JIBFL, 401, 402: "English law concepts of property cannot therefore easily be applied to bitcoins."

3. Perkins and Enwezor, 'The Legal Aspect of Virtual Currencies, Perkins and Enwezor' [2016] 10 JIBFL 569, 570: *"With this attribute of sharing certain characteristics of both intangible property and choses in possession, it may be convenient to understand virtual currencies – where the currency is economically robust enough to be classed as "property" – as a kind of hybrid: "virtual choses in possession". That is, intangible property with the essential characteristics of choses in possession."*

4. See the report of the UK Cryptoasset Taskforce (comprising representatives of the Treasury, the Bank of England and the FCA) (October 2018), at §2.13: *"While cryptoassets can be used as a means of exchange, they are not considered to be a currency or money, as both the Bank of England and the G20 Finance Ministers and Central Bank Governors have previously set out.11 They are too volatile to be a good store of value, they are not widely-accepted as means of exchange, and they are not used as a unit of account."*

5. Yeo and Farmer, 'Mapping the landscape: cryptocurrency disputes under English law (Part 1)' [2019] 2 JIBFL 80, 81: *"The total quantity of cryptocurrencies presently in circulation is so small compared to cash and instantly available cash-like money, and the (legitimate) opportunities to use payment tokens for the purposes of a currency are presently so limited, that it is unlikely in the near future that any particular payment token will function as money to a sufficient extent to be so classified. But if and when such a point is reached then those tokens will also be regarded as "property" on the basis that "money" is clearly "property"."*

6. Indeed, even the decision of Simon Thorley IJ in B2C2 Ltd v Quoine Pte Ltd [2019] SGHC(I) 03 provides only limited assistance in this regard, given that Bitcoin's status as some form of property went by way of concession in that case: *"Whilst there may be some academic debate as to the precise nature of the property right, in the light of the fact that Quoine does not seek to dispute that they may be treated as property in a generic sense, I need not consider the question further."* (at [142]).

7. A fraud or "knavery" in the master or mariners of a ship, by which the owners or freighters are injured.

> "Different cryptoassets vary significantly in fundemental respects so it is important to emphasise that a proposition of law which may be correct in the context of bitcoin may not hold for other cryptocurrencies"

two topics which are apt to arise in the insolvency/bankruptcy context, specifically: (i) the getting in of an insolvent's bitcoin by the officeholder and the avoidance of misapplied or misappropriated bitcoin; and (ii) whether a "debt" owed in bitcoin is a "debt" for a "liquidated sum" such that it can found a statutory demand.

The selection of these topics is necessarily arbitrary to some extent – the area is rich with interesting and knotty questions – but the two topics addressed here have been selected on the basis that they may be of some practical interest to practitioners with clients trading in (or otherwise exposed to) cryptocurrency.

What is a "bitcoin" and is it property/money?

First, however, some words on these threshold questions concerning the nature and correct legal characterisation of a holding of bitcoin:

Bitcoin, first developed in 2008, is generally considered to be the first cryptoasset. It is also by some way the largest and most significant cryptocurrency by market capitalisation. Given that Bitcoin is in a sense the archetypal cryptoasset, the rest of this article considers bitcoin in particular (rather than cryptoassets or cryptocurrencies generally). However, it is important to emphasise that different cryptoassets vary significantly in fundamental respects, including in relation to the "distributed ledger technology" underpinning them (which itself varies considerably across different types of cryptoasset). For this reason, it is important to emphasise that a proposition of law which may be correct in the context of bitcoin may not hold true in the context of other cryptoassets.

So what is Bitcoin/a bitcoin? First, one must draw a distinction between the application and the system: The cryptocurrency application ("bitcoins") exists on a public, decentralised crypotocurrency system ("Bitcoin"). Transactions involving bitcoins are effected on a public, time-stamped ledger or chain of digital signatures (the blockchain), whereby each transaction (or block) is added to the series of all previous transactions (or chain). The technology by which blocks are added to the chain is called a "distributed ledger technology" (or DLT), whereby the ledger, rather than existing in a single physical form under the custodianship of an intermediary, exists in as many copies as there are participants in the Bitcoin system (i.e. a distributed or diffuse ledger as opposed to a single centralised ledger). In this way:

- If the ledger changes then it changes across all of its copies at the same time, with each participant able to verify independently the validity of a change to the ledger. The ledger is changed in this way when a bitcoin is transferred from one participant to another, i.e. when a "block" is added to the "chain".
- A block is added to the chain (and a bitcoin holding transferred from one participant to another) when the transferor combines its "public key" with its "private key". The public key (a long string of numbers) is visible to and known by all participants in the Bitcoin system. The private key (a long string of numbers and letters) is known only to the participant.
- All that is visible to the participants in the Bitcoin system are the public keys to which particular bitcoins are attached and one sees nothing identifying the person to whom a public key belongs. Moreover, if a participant loses the private key to which his or her public key corresponds, then the bitcoin attached to that public key is lost with it.
- Accordingly, if a thief steals the piece of paper or hard drive on which your private key is written, then that thief can transfer your bitcoin to another public key as readily as you could and no other participant in the Bitcoin system will be able to infer from the information encoded in the blockchain that there is anything untoward or improper about the transfer.
- However, whilst the private key is the instrument by which possession and control may be exercised over a bitcoin, it would be a mistake to confuse the private key itself with the "thing" which constitutes the bitcoin[8]. As Mr Justice Zacaroli has observed in his recent ILA speech: *"a bitcoin is an entirely imaginary thing: it is the concept which users in the system treat as being transferred from one public address to another when a block is successfully added to the chain recording that the transfer has taken place... But a block added to a chain on a digital system is of no actual use to anybody. It has value only because sufficient users of the system believe that it does. But that (as I have explained) is not so different from many fiat currencies: as demonstrated at moments of financial crises by runs on banks and runaway inflation."*
- Having described these features of the Bitcoin system (and the mechanism for transferring a bitcoin from one participant in that system to another), I shall not dwell on questions concerning what sort of right a person "holding" a bitcoin has thereby acquired. This is a topic likely to be elucidated in the forthcoming report of the UK Jurisdiction Taskforce – and perhaps also by the High Court in the ongoing proceedings in *Robertson v Person Unknown*. However, suffice it to say the following for present purposes:
  - A bitcoin cannot be a chose in action, not least because a holding of bitcoin gives the holder no rights against any other person.
  - A bitcoin is not a chose in possession because, in the absence of statutory intervention (e.g. regulation 3(2) of the Financial Collateral Arrangements (No.2) Regulations SI 2003/226, as amended), one cannot take possession of an intangible (such as a block added to a chain on a digital system): see *OBG v Allan* [2007] UKHL 21.
  - The difficulty the two bullet points above pose is that, at least at Court of Appeal level, it is settled law that choses in action and choses in possession are the only two categories of personal property: see *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281.
  - That said, this problem does not mean that a holding of bitcoin cannot, in principle, be a type of personal property at common law. As Gullifer/Sarra have pointed out[9], the appellate courts may well be attracted to the analysis that a holding of cryptocurrency such as bitcoin falls within Lord Bridge's suggested third category of "other intangible property" into which things like export quotas might fall (see Privy Council's decision in *Attorney General of Hong Kong v Nai-Keung* [1987] 1 WLR 1339, 1342), a category extended (obiter) by the High Court to include an EU carbon trading allowance (*Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), at [61])). It may be that this hybrid new third category of person property will be most aptly described as a "virtual chose in possession", noting that it shares certain features in common with the traditional chose in possession (for example that, unlike a chose in action, it can be lost)[10], albeit not all of them. The precise characterisation adopted by the Court will matter (in particular as to which features of the existing categories of personal property this new category will have), given that (for example) an action in conversion only arises in the context of a chose in possession and not a chose in action[11].

8. In any event it is unlikely that the common law would consider the private key itself (i.e. mere information: a series of numbers and letters) as "property". See *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281, at [42]: *"Although information may give rise to intellectual property rights, such as database right and copyright, the law has been reluctant to treat information itself as property. When information is created and recorded there are sharp distinctions between the information itself, the physical medium on which the information is recorded and the rights to which the information gives rise. Whilst the physical medium and the rights are treated as property, the information itself has never been."*

9. Sarra and Gullifer, "Crypto-claimants and bitcoin bankruptcy: Challenges for recognition and realization", International Insolvency Review, 2019;28:233-372, 245.

10. See fn.3 above.

11. See further L. Chambers, "Misappropriation of cryptocurrency: propelling English private law into the digital age?" [2016] BJIBFL (May), 263, 263-4.

Getting in an insolvent company's bitcoin and bitcoin transaction avoidance

Whilst it remains unclear whether (and if so on what basis) the English court will recognise a holding of bitcoins as personal property at common law, nonetheless it is tolerably clear (although there is no authority on point) that, in the insolvency context at least, the English court would recognise a holding of bitcoin as falling within the concept of "property" as defined in section 436 of the Insolvency Act 1986, specifically: "*money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property*".

As to this:

- The question whether a holding of bitcoin is personal property as a matter of common law is plainly relevant but not determinative in this context.
- One notes in particular that this statutory definition of "property", being very widely drafted, appears apt to extend to (i) a bankrupt's possession/control (or entitlement to call for possession/control) over a private key and (ii) the value which that private key can unlock[12].
- This statutory definition of "property" is a fundamentally pragmatic one, driven by the question of the realisation of value for creditors. Accordingly, as Mr Justice Zacaroli concluded in his recent speech to the ILA, there is "*little doubt*" that the English Court will find that a holding of bitcoin will fall within the definition of "property" provided by section 436 of the 1986 Act[13].

It follows that the liquidator's duty to "*secure that the assets of the company are got in, realised and distributed*" (section 143(1) of the 1986 Act) and to take custody of "*all the property and things in action to which the company is or appears to be entitled*" (section 144(1) of the 1986 Act), as well as the administrator's power to "*take possession of, collect and get in the property of the company*" (paragraph 1 of the Schedule 1 to the 1986 Act), include the duty/power to get in and realise any bitcoin which the insolvent company holds or to which it is entitled[14].

By the same token, the liquidator/administrator will be able to avail himself or herself of the powers under section 236 of the 1986 Act, which include the ability to apply to Court for an order summoning "*any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company*" (s.236(2)(c)) to give "*an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in paragraph (c) of the subsection*" (s.236(3)), with a view to compelling the production of information concerning the company's property – for example, the existence of a holding of bitcoin

and the private key to that holding. Importantly, noting that the private key is *(per se)* just a string of letters and numbers (which may be recorded on any form of physical or other medium), the relief available under s.236(3) is not limited to the compelled production of books, papers or other records, but extends to the giving of an "*account*" (i.e. the provision of the information *per se*). Again, the Court's focus here should be on the utility of the information sought for the purpose of realising value for the company's creditors. Accordingly, it is difficult to imagine the Court entertaining any argument from a recalcitrant director (or other person declining to disclose the details or private key relating to a company's bitcoin holding) that a private key is not "*information*" relating to "*property*" for the purposes of s.236..

Of course, a key practical issue IPs are likely to face in this context is the unlawful dissipation/misappropriation of a debtor's bitcoin, whether this be (i) at the debtor's instigation (e.g. a

preference, a transaction at an undervalue, a transaction defrauding creditors) or (ii) against the debtor's will (hacking or the theft of the physical medium on which a private key is held). The law's solution to these forms of unlawful dissipation/misappropriation is that the transactions in question will be voidable or (for example in the case of theft or a transfer of bitcoin in breach of s.127 of the 1986 Act) void ab initio. However, this solution gives rise to further questions of its own, in particular given the following practical issues: (i) the irreversibility of a transfer of bitcoin (i.e. the addition of a block to the chain); (ii) the anonymity of participants in the Bitcoin system; and (iii) the possibility of the mixing and splitting[15] of bitcoin holdings with a view to obscuring the transactional history of stolen or unlawfully dissipated bitcoins.

As to this:

- The issues raised by (iii) – i.e. mixing, splitting and the obscuring of bitcoin transaction histories – require one to take a view as to the exact nature of bitcoin as "personal property" at common law (i.e. rather than as "property" for the purposes of the 1986 Act), which, once answered in a particular way, will in turn suggest the correct formulation of subsequent questions regarding the availability of tracing-based remedies, the applicability of the rule in *Clayton's Case* and so forth. These issues are beyond the scope of the present article[16].
- The issues raised by (ii) – i.e. the anonymity of participants in the Bitcoin system – take one back to the question considered above as to the scope of the officeholder's powers of investigation, in particular under s.236 of the 1986 Act. The anonymity implicit in the Bitcoin system can be overstated, noting that blockchain cluster analysis can establish the possibility/probability of particular public keys being connected with particular real-world persons[17]. However, as Fox and Green have noted, "*[even] if the transactional history of a crypto-coin is traceable, evidence extrinsic to the blockchain would be needed to identify the people in the real world who control the public keys recorded on it.*"[18] In this context the powers under s.236 of the 1986 Act are the officeholder's best bet in terms of ascertaining the appropriate Defendants to any claim.
- As to (i), i.e. the irreversibility / immutability of the bitcoin transaction: It is important, in this context, to note that the blockchain record (immutable though it is as a matter of fact) cannot be the thing which is *per se* constitutive of a person's title[19] to particular bitcoins (which is a question of law). If A hacks or otherwise steals B's private key and uses B's private key without B's consent to transfer B's bitcoins to A, then A's title to those bitcoins, notwithstanding the information encoded on the blockchain, will be void at law and in equity[20]. Similarly, if A obtains bitcoin from B as a consequence of a fraudulent misrepresentation made by A to B, then A's title will be voidable[21]. As Fox and Green note: "*Cyber-currency systems could only opt out of the general rules of property law if all users of the system agreed to dis-apply them. There would need to be a system-rule to this effect, which users accepted when they made transactions on the system. Only then could the blockchain record be constitutive of a person's title to the coins.*"[22] The same analysis applies *a fortiori* in relation to transactions which are void or voidable under the insolvency legislation, something which cannot be contracted out of even in principle.
- Once a transfer of bitcoin has been held to be void or has been set aside by the Court, the question will then arise as to what, as a matter of practicality, can be done in order to vindicate the insolvent's title to the misappropriated or unlawfully dissipated bitcoins – at which point the officeholder may well need to grapple with points (ii) and (iii) referred to in the bullet-points above. However, as regards the relatively simple case of an action by B

12. See Patel v Jones [2001] PLR 217, [39] (emphasis added): "*the statutory objective of the provisions of the 1986 Act [is] that, subject to certain specified exceptions, all a debtor's property capable of realisation should be vested in the trustee for him to realise and the proceeds among the creditors.*"

13. A view echoed in, for example, Sarra and Gullifer (op. cit.), 252.

14. There are likely to be complex issues arising from the custodian relationship obtaining in the context of insolvent companies/individuals who use intermediaries to hold bitcoin, in particular as to who is the true owner of the legal and/or beneficial title to the bitcoin. This is likely to turn, to a large extent, on the terms governing the custodian relationship. For further discussion, see Sarra and Gullifer (op. cit.), §4.2.

15. For a description of these processes of mixing and splitting, and a consideration of the legal consequences of those processes, see David Fox and Sarah Green, Cryptocurrencies in Public and Private Law (OUP 2019), §§6.67-96.

16. But see Fox and Green (op. cit. fn.15), §§6.67-96, for an excellent introduction to these issues.

17. See Sarah Meiklejohn and others, 'A fistful of Bitcoins: Characterizing Payments among Men with No Names' (December 2013), the Advanced Computing Systems Association https://cseweb.ucsd.edu/~smeiklejohn/files/imc13.pdf , accessed 4 November 2019.

18. Fox and Green (op. cit. fn.15), §6.78.

19. I assume, for present purposes, that a holding of bitcoin is a species of personal property at common law.

20. *Clarke v Shee* (1774) 1 Cowp 197 (common law) *and Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 715-6, per Lord Browne-Wilkinson (equity).

21. *Shalson v Russo* [2005] Ch 281.

22. Fox and Green (op. cit. fn.15), §6.49.

(the bankruptcy trustee/insolvent company) against A (the recipient of B's bitcoin pursuant to a void or avoided transaction), there is no reason in principle why the officeholder could not seek the usual remedies, whether the transfer in question is void/voidable under the insolvency legislation or at common law/ in equity. For example, if the Court finds that an insolvent company's transfer of bitcoin amounts to a preference or a transaction at an undervalue then, notwithstanding the practical impossibility of reversing that transaction as such, it could nonetheless declare that the transaction was a preference and grant an order under s.241(1)(d) of the 1986 Act requiring A "*to pay, in respect of benefits received by him from the company, such sums to the office-holder as the court may direct*". Indeed, although a transfer of bitcoin is irreversible and immutable (a block cannot be removed from the chain once it has been added), nonetheless a particular misappropriated or misapplied bitcoin is in principle identifiable in the "hands" (i.e. public key) of its "recipient" (i.e. holder of that public key)[23]; and, once a particular bitcoin has been so identified, it would be open to the Court to grant an order under section 241(1)(a) of the 1986 Act requiring the property unlawfully transferred from B to A (i.e. that particular bitcoin) "*to be vested in the company*" (i.e. transferred back to B's public key).

In summary, then, whilst clarification from the Court as to the nature and status of a bitcoin holding as "personal property" at common law is sorely needed, nonetheless it is tolerably clear: (i) that a bitcoin holding is in any event "property" for the purposes of the insolvency legislation, if and insofar as it has a value which can be realised for the benefit of the insolvent's creditors; and (ii) that, notwithstanding the practical problems an officeholder may face in seeking to realise a insolvent's bitcoin holding and/or to avoid voidable transfers of the insolvent's bitcoin to third parties (particularly insofar as the irreversibility of transactions and the anonymity of Bitcoin participants are concerned), nonetheless these practical problems are not, at least in principle, a bar to obtaining appropriate relief against third-party recipients of misappropriated/misapplied bitcoin.

Standing to petition for bankruptcy/ winding-up

Question: If (i) X provides goods to Y pursuant to a contract providing that in consideration of the provision of those goods Y shall pay 3 bitcoin to X, and (ii) Y cannot or declines to pay 3 bitcoin to X, is X able to serve a valid and effective statutory demand on Y in respect of the unpaid 3 bitcoin with a view to presenting a bankruptcy petition against Y?

A creditor's bankruptcy petition must be presented "*in respect of one or more debts owed by the debtor, and the petitioning creditor or each of the petitioning creditors must be a person to whom the debt or (as the case may be) at least one of the debts is owed*" (s.267(1) of the 1986 Act) and it may be presented only if (relevantly): (a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the bankruptcy level; (b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured; and (c) the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay (s.267(2) of the 1986 Act). For the purposes of (c), the debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and (relevantly) "*the petitioning creditor to whom the debt is owed has served on the debtor a demand (known as "the statutory demand") in the prescribed form requiring him to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least three weeks have elapsed since the demand was served and the demand has been neither complied with nor set aside in accordance with the rules*" (s.268(1)(a) of the 1986 Act).

Now, for present purposes it is right to proceed on the assumption that the Court will not recognise bitcoin (or other virtual currency) as equivalent to a fiat currency like GBP or USD. There are good reasons to make this assumption: Sensible arguments can be made that a virtual currency like bitcoin is identical or proximate to a fiat currency insofar as it operates as (i) a medium of exchange, (ii) a store of value (albeit query the stability of the value) and (iii) a unit of account. However, the classic definitions of fiat currency stipulate that the medium must also be: (a) issued under the authority of the law in force within the State of issue; (b) under the terms of that law, denominated by reference to a unit of account; and (c) under the terms of that law, to serve as the universal means of exchange in the State of issue[24]. As Fox and Green note, it is "*this divorce between currency and State... which seems at the moment to be the most likely reason why virtual currencies would not fit within any existing category of 'money'*"[25].

Against that backdrop, the question at hand turns on whether an "amount" of bitcoin "owed" by Y to X is a "debt" for a "liquidated sum" for the purposes of s.267(2)(b) of the 1986 Act. As to this:

- The concept of a "debt" for a "liquidated sum" is not limited to a debt claim for a specific sum of money.
- In particular, it may also extend to a sum owing under a liquidated damages clause. See McGuinness v Norwich and Peterborough Building Society [2011] EWCA Civ 1286, at [37]: *"The most obvious use of the term "liquidated" has been in relation to liquidated damages. "Liquidated" has been defined judicially as meaning the sum which the parties have by their contract assessed as the damages to be paid for its breach: see Wallis v Smith (1882) 21 Ch D 243 at 267 per Cotton LJ. If a genuine pre-estimate of loss the provision is enforceable according to its terms. I would therefore regard a claim for liquidated damages as one for a liquidated sum within the meaning of s.267 unless a claim in damages is excluded by the use of the word "debt"."*
- The touchstone test is not whether the measure of liability is readily calculable under the terms of the contract, but whether a specific sum is envisaged under the terms of the contract as being payable to the creditor. See, for example, *Ex p. Broadhurst* (1832) 22 LJ Bank 21, a partnership case, where Maule J concluded that a covenant to pay *"the difference between the debts due from the old firm stated in the schedule and any further debts"* was not a covenant to pay a liquidated sum (or indeed any sum). As Patten LJ put it in *McGuinness v Norwich and Peterborough Building Society* at [36], in support of the conclusion that the liability under a guarantee of the "see to it" type would not constitute a "debt" for a "liquidated sum", what one is looking for is *"a pre-ascertained liability under the agreement which gives rise to it. This can include a contractual liability where the amount due is to be ascertained in accordance with a contractual formula or contractual machinery which, when operated, will produce a figure."*
- Now, proceeding on the basis that bitcoin is not money *per se* (for the reasons explained above), the better view is that a claim for a specific amount of bitcoin is not a "debt" for a "liquidated sum" (for the purposes of founding a statutory demand). As to this:
- First, the right under a contract to receive a specific amount of bitcoin does not, absent a contractual provision for the calculation of a liquidated claim expressed in a fiat currency *in lieu* of bitcoin, give rise to a *right* to a specific sum of money. As Fox and Green observe the holder of a bitcoin, despite the existence of "exchange rates" as between bitcoin and

23. Fox and Green (op. cit. fn.15), §6.52: *"Although the blockchain record of transactions cannot be legally constitutive of Bob's title to the coins at his public key, it must be the best evidence of it. If Carol seeks to allege that the 5 BTC at Bob's pk8 are the proceeds of a fraud or theft then, if all other things are equal, the burden is on her to prove it by challenging Bob's title."*

24. Charles Proctor, Mann on the Legal Aspect of Money (7th ed., OUP 2012), §1.17; Fox and Green (op. cit., fn. 15 above), §2.10.

25. Op. cit., §2.10.

“

The advantages of using a virtual currency come at the expense of losing many of the upsides of trading in fiat currencies, not least the ability to petition for the defaulting counterparty’s bankruptcy

”

various fiat currencies, has no automatic *right* to exchange his or her bitcoin for an amount of fiat currency – only a *power* to do so[26]. Indeed, this makes a holding of bitcoin distinguishable from (and further removed from a fiat currency than) the forms of ‘money’ issued by certain local communities or traders (e.g. ‘Brixton money’ or ‘Bristol money’): *“payment using ‘money’ issued by local communities or traders, such as the Brixton pound in London, may constitute money for the purposes of a sale contract where the scheme gives holders of the notes the right to exchange them for legal tender and in so far as a holder of such a note uses it to pay for goods”* (emphasis added)[27]. Accordingly, an obligation to “pay” a specific amount of bitcoin does not, without more, carry with it a pre-ascertained liability which can be expressed in terms of a specific sum of money. For this reason the better view is that an obligation to pay a specific number of bitcoin does not, without more, amount to a “debt” for a “liquidated sum” for the purposes of establishing a right to issue a statutory demand.

- Indeed, the better view is that a contract for goods in exchange for bitcoin is not a contract for the “sale” of goods at all, but rather a contract for exchange or barter (therefore falling outside the Sale of Goods Act legislation). As Fox and Green observe[28], the *“principal consequence for a disappointed seller, having agreed to accept Bitcoin, would seem to be remedial, since she thereby loses the ability to sue for the price. This denies the seller the ability to enforce the primary obligation, and its corresponding advantages: debt claims are not discretionary, nor are they subject to the common law constraints of remoteness, mitigation, or penalties, and it is both procedurally and substantively easier for debt claimants to obtain summary judgment.”* To this one might add that the “seller” of goods for bitcoin also lacks that other advantage of being owed a debt for a liquidated sum, namely the ability to petition for the buyer’s bankruptcy.
- Finally, for the avoidance of doubt it is important to emphasise that, whilst the better view is that a “debt” owed to a seller (or other contractual counterparty) “payable” in bitcoin cannot found a valid statutory demand (absent a contractual provision for the calculation of a liquidated claim expressed in a fiat currency in lieu of bitcoin), this does not mean that such a “debt” would not be provable in a bankruptcy or liquidation/administration, noting that the relevant definitions in this context (see in particular s.382 of the 1986 Act and rule 14.1(3) of the 2016 Rules) are much broader and not limited to debts for liquidated sums.

The analysis above illustrates the limitations inherent in the use of a virtual currency as a medium of exchange for real-world goods and services. Depending on the industry and sector in question the advantages of using a virtual currency, in particular the confidential, opaque and disintermediated nature of such transactions, may well be considerable. However, any such advantages come at the expense of losing many of the upsides of trading in fiat currencies, not least the ability to petition for the defaulting counterparty’s bankruptcy. ■

26. Op. cit., §§2.31-33. See also P Carl Mullan, The Digital Currency Challenge (Palgrave 2014), 10: “When determining the value behind a digital currency unit, the linchpin of this equation is the point where digital units are swapped for national currency.”

27. Michael Bridge, The Sale of Goods (2nd ed., OUP 2009), §1.034, n.233.

28. Op. cit. §§2.42-43.

Crypto-currencies *and insolvency*

MR. JUSTICE ANTONY ZACAROLI

This lecture was delivered by Mr. Justice Zacaroli to the Insolvency Lawyers Association on 17 October 2019, and it is reproduced here with their kind permission.

This lecture is dedicated to the memory of Gabriel Moss QC, in honour of his outstanding contribution to the development of English insolvency law

There is a moment, in Douglas Adams' Hitchhikers guide to the galaxy when a spaceship carrying a motley crew of management consultants, account executives and telephone sanitizers crash lands on Earth 2 million years ago. One day they decide upon adopting the leaf as legal tender and are immensely satisfied as they become enormously rich, overnight. But pretty soon, as summer turned to autumn, they ran into a small inflation problem, due to the unexpectedly high level of leaf availability. So, to obviate the problem, and effectively revalue the leaf, they embarked on a massive defoliation campaign, and burned down all the forests.

This, written long before the invention, even, of the internet, neatly encapsulates one of the problems facing legal tender as it strays further from fiat currencies. Cryptocurrencies create many more prompting Nouriel Roubini to describe bitcoin, to the US Senate last year, as the "mother of all scams". This evening, I am going to focus on one particular set of problems: how crypto-currencies are to be treated in the insolvency of one or other of the players involved in transactions.

Crypto-currencies, sometimes referred to as virtual or digital currencies, exist in many forms, employing a wide range of different technologies. No, one, definition is possible. In broad terms, however – and so as to distinguish them from other forms of crypto-asset – I intend to refer to an asset which exists in digital form and is designed to act as a medium of exchange.

Even within this broad definition, wide variations exist. At one extreme, there are electronic tokens issued within a closed system, such as "Linden Dollars" in the online game "second life", where the rules governing their use and exchange are laid down by the game's creator, and signed up to by those who join. These tokens may be exchanged for services and products within the game. Sometimes – as with Linden Dollars themselves – they may be exchanged outside of the game for 'real' currencies. At the other extreme, are intangible, de-centralised systems, having no terms or conditions, using distributed ledger technology and ruled by consensus rather than a central operator. The first, and the paradigm example, is bitcoin. I will use it as the basis for much of this talk.

At the heart of legal uncertainties around crypto-assets generally is the question whether they are a form of property recognised by English law, or something else. That is an issue which, while capable of a straightforward yes or no answer at a relatively high level of generality, raises many more subtle questions when placed into a particular context. In the context of insolvency, it raises at least the following three issues, which I will address in this talk.

First, if the bankrupt or insolvent company holds crypto-currencies at the point of insolvency, are they 'property' within the meaning of s.436(1) of the Insolvency Act 1986, so as to fall within the insolvency estate?

Second, is a claim to crypto-currencies within the control of an entity (such as a broker or intermediary) that becomes insolvent, a claim to recover property, or a personal claim?

Third, if it is a personal claim, is it to be characterised as a claim to recover money, but in a different currency, or as a claim for loss arising from the failure to deliver an asset?

The question whether crypto-assets qualify, generally, as items of property under the common law is the subject of important recent work by the UK Jurisdiction Taskforce, under the chairmanship of the Chancellor of the High Court. It is due, imminently, to publish a "Legal Statement" on the legal status of crypto-assets and smart contracts. It is written by senior lawyers expert in the field, with the benefit of wide consultation with and feedback from other expert practitioners, academics and technicians. Its purpose is to seek to provide clarity around their status within existing principles of the common law with a view to removing potential impediments to their development. So far as crypto-assets are concerned, the central question it sets out to answer is whether the English common law contains sufficient tools and flexibility to recognise them as a form of property. I do not propose to travel that same ground, other than to note that a number of commentators have supported the proposition that even though (as I will explain) crypto-assets do not fit within the established categories of property under English law, they should be recognised as such at common law.

Whether or not they fall into established categories of proprietary right, however, it might be thought, in respect of the first specific question I am concerned with (whether crypto-currencies are property within the meaning of s.436 of the Insolvency Act), that the answer is obvious. There is no doubt that they are a store of value. In the case of bitcoin they can be a store of very considerable value, given that the current exchange rate is approximately £6,600 to one bitcoin.

Since the purpose of bankruptcy and liquidation is to realise the value residing in all assets of the bankrupt or the company and divide it *pari passu* between all creditors, it would be an extraordinary omission if (however it might otherwise legally be classified) it did not form part of the estate.

The question has not, so far as I am aware, arisen for decision in England, but it arose in Russia in 2018 in the bankruptcy of Mr Tsarkov. The insolvency practitioner appointed over his estate sought an order from the Commercial Court in Moscow seeking disclosure of a crypto-currency wallet holding bitcoin, which it was claimed belonged to Mr Tsarkov. The Court declined, refusing to recognise

bitcoin as an asset in the estate. Among its reasons were, first, that the legal nature of crypt-currencies was unclear, and not analogous to other forms of property and, Second, that the anonymity surrounding holding of bitcoin made it difficult, in practice, to establish ownership.

The case was reversed on appeal, however. The appeal court, noting that the definition of property in the Russian legislation was not exhaustive, but included "other assets", said that "taking into account current economic realities and the level of development of information technologies, the broadest interpretation [of "other assets"] was justified". S.436 of the Insolvency Act is similarly an inclusive, not exhaustive, definition of property, and includes "every description of property ... and every description of interest arising out of or incidental to property." I have little doubt that the same conclusion would be reached here.

The second issue is more challenging. Let me put it into a practical perspective. Despite the fact that one of the benefits of bitcoin is that it enables financial transactions to take place without the need for banks or intermediaries, nevertheless there is a large quantity of bitcoin that is traded by intermediaries. If I am the client of a broker who trades bitcoin "on my behalf" (using that term in a legally neutral manner), and that broker goes into liquidation, what is the nature of my claim in relation to the bitcoin?

This might be thought to be no different from the case where a broker trading traditional assets (securities or cash) becomes insolvent: the answer depends upon the nature of the relationship made between us in the real world. Did I transact on terms that the broker held assets on trust for me? And, if not expressly, was the broker required to deal with my assets, for example by segregating them from his own, or from those of other clients, such that the law might imply a trust. But there is an important prior question in the case of bitcoin. What does it mean to say that a person either "holds" or "owns" bitcoin? That, in turn, poses a further prior question: what is a bitcoin?

I will turn to these questions in a moment, but I first need to step back, and ask (from the perspective of a property lawyer) what we mean by "money", then see how bitcoin fits, as a practical matter, into that analysis.

When we talk of someone 'having' an item of currency, we generally mean one of two things: either they possess physical money, namely an actual coin, or they have a right against another person to have something of value transferred to them. The paradigm case being money in a bank account, which in law consists of a debt, namely a right of action against the bank. In fact – although the concept of 'virtual' currencies is relatively new – traditional money has long since lost its connection with actual things of value. Coins were originally items of intrinsic value, being made of precious metals. But there is no longer any intrinsic worth in a £1 coin, let alone silver or copper coins. They have value only because of what they represent. The promise by the bank of England to pay the bearer of a banknote £10 or £20 has been practically meaningless since they long ago ceased to represent deposits of gold. And what does it actually mean to say that an institution has funds on deposit with the Bank of England? If you ask: How does the Bank satisfy the obligation owed to institutions which have deposited funds? you might quickly get stuck in an existential circle.

But – legally – these all have a clear foundation in property law. Personal property has long recognised two categories: choses in possession and choses in action. The former is a thing of which physical possession may be taken. The latter may only be enforced by action against a third party. A coin is obviously a chose in possession.

A bank account is obviously a chose in action: it can only be obtained or enforced by taking action against another. Banknotes are something of both: they are transferred by delivering possession and in the real world are dealt with in precisely the same way as coins, but in form they are a promise by the bank of England to pay – a form of action.

But Bitcoin is different. With apologies to those in the room with more awareness of the technology than I have, I will attempt to offer an explanation of what we mean when we talk of a bitcoin.

It depends upon three essential concepts: the blockchain; distributed ledger technology ("DLT"); and the public and private keys of users.

Blockchain is, at its simplest level, a record of transactions in which each transaction comprises a "block" which is added to the "chain" of all prior transactions.

Divorced from DLT, we could create a blockchain on a whiteboard in this room with an invented currency: the Insolvency Lawyers Association Dinarius, or the "ILAD". I have one ILAD which I record on the whiteboard. I then transfer half to A and half to B. The whiteboard contains the identification details of me, each of A and B, the amount I transfer to each of them, and the date and time. And so on: each onward transaction is recorded by adding another block to the whiteboard containing similar details. The ledger will show a series of chains of transfers so that you can see precisely how each ILAD ended up where it is currently shown to be.

This example, however, is still close to traditional money, because I hold the pen, so I decide which transfers of ILAD it is appropriate to record on the whiteboard ledger. I am playing the part of the banking system, which we currently rely on to verify and authorise transactions.

The next step is to add in the distributed ledger technology. Instead of one whiteboard ledger, the ledger exists in digital form, and there are as many copies as there are participants in the system and any change to the ledger happens simultaneously in all copies. The really important feature, which distinguishes it from traditional money, however, is the absence of a central operator who determines which transfers are valid, and which are not. Instead, the task of verifying transactions is undertaken by users, who can choose to lend their computing power to solve complex mathematical problems which (in a way which I confess I have consistently failed to understand) has the result of determining whether a block is to be added to the chain.

Finally, rather than identifying any person in the real world as a party to transactions, the only information known by the system, and published in a block to be added to the chain, is something called the public key of a user. That is – in essence – its digital address; a number containing 256 bits. So each block will record a transfer from one public key to another, the amount of bitcoin being transferred and a time stamp.

Each user also has a private key; a long string of 64 numbers and letters, connected to but impossible to reverse engineer from the public key. Bitcoin are transferred by a user combining his or her private key with their public key. The private key is thus an essential component. If someone else has it – they can control "your" bitcoin. If it is lost, you have lost the ability to control (and so realise any value in) your bitcoin. There are plenty of stories of people having lost a hard drive on which a private key was stored and, in the process, have lost forever bitcoin worth tens of millions of pounds.

Returning to the first of my prior questions (what *is* a bitcoin? what is the *asset* which we say we hold or own when we say we hold or own bitcoin?), some might suggest that it is the private key, because (as I said) the private key is essential to controlling the bitcoin. As a famous bitcoin podcaster (Andreas Antonopoulos) put it: "your keys, your bitcoin; not your keys, not your bitcoin". But the fact that the private key is necessary in order to transact bitcoin does not make it the thing that is the bitcoin. Indeed, it presupposes the opposite, since it gives control, but over something else. Therefore, it is to the something else we must look to identify that which is the "bitcoin".

In any event, the private key is merely information: a string of numbers with no intrinsic value. It is just that knowledge of them is required in order transact bitcoin. It may be recorded on a piece of property, for example on a computer, or even written down on a piece of paper. But there are significant hurdles in the way of regarding it as property itself. For example, although knowledge can be acquired by it being passed from one person to another, it cannot be the subject of a transfer as property can, in the sense of a subtraction from the transferor and addition to the transferee, because the person who passes on the information does not thereby cease to have the information.

The second candidate is the computer code recording the blockchain itself. While the code is a record of every prior transaction in that bitcoin, however, it is difficult to equate this with "the bitcoin". If A transfers bitcoin to B, this is not effected by a transfer of the code. Instead, it is effected by addition of new code. That is, a new block is added to the chain.

So, what are we left with? As Louise Gullifer and Janis Sarra put it in an article entitled "Crypto-claimants and Bitcoin Bankruptcy: Challenges for Recognition and Realisation" in March 2019: the most likely candidate for being considered property is the "thing that is the subject matter of the transfer, which does not even exist as a piece of code". In other words, a bitcoin is an entirely imaginary thing: it is the concept which users in the system treat as being transferred from one public address to another when a block is successfully added to the chain recording that the transfer has taken place. It is of less intrinsic value - even - than the leaf that the imagined ancient earth-dwellers used for currency. As Adam and Eve discovered, a leaf has its uses. But a block added to a chain on a digital system is of no actual use to anybody. It has value only because sufficient users of the system believe that it does. But that (as I have explained) is not so different from many fiat currencies: as demonstrated at moments of financial crises by runs on banks and runaway inflation.

So far, I have considered the first prior question – what *is* a bitcoin. I turn, then, to the second prior question: how do you identify the owner of the bitcoin? With traditional forms of money, since they exist either as things in possession or things in action, the identity of the owner (subject only to real world relationships of trust, bailment and the like) is in the first instance straightforward: it is the person in possession of the thing in possession, or the person in whom the right of action against another is vested. Going back to my broker/client analysis, it is conceptually possible (but practically unlikely) that the broker will be in physical possession of coins or notes. More likely, the broker will be the person in whom the relevant right of action is vested. Generally speaking, that is because the broker is the named holder of a bank account, or of a securities account with another intermediary. In either case, therefore, it is the broker who can be said, in law, to hold or be the owner of the money. The extent to which the client has a proprietary interest in the money is to be defined by the terms of the relationship - express or implied - between the client and the broker.

From my analysis of what a bitcoin actually is, however, it can be seen that it fits into neither category of property – at least as those categories are currently understood. They cannot be things in action, since they do not constitute a right against any third person. Of course, a right can be generated by a contract with a third person to require the transfer of a bitcoin, in the same way that a contract can be made with someone to transfer pound coins, but the bitcoin itself is no more a right against a third person than a pound coin. While the computer code records all prior transactions between public keys (behind which we might assume sit real people), it does not itself represent a right of action against any counterparty. The participants in the system do not undertake any legal obligations towards each other.

Nor – under traditional legal analysis – can a bitcoin constitute a chose in possession. As recently re-affirmed by the Court of Appeal in *Your Response v Datateam Business Media* in 2015 , "Possession is concerned with the physical control of tangible objects." In that case, although entering information onto a digital database altered the physical properties of the equipment, it did not render the information itself capable of being possessed. Whatever a bitcoin (or probably any other crypto-asset) may be, it is intangible, and not something capable of physical control.

There is a good argument, and strong academic support, for the proposition that it is not beyond the wit of the common law to recognise a new category of property: virtual choses in possession. See, for example an article by Joanna Perkins and Jennifer Enwezor in the journal of international banking and finance law entitled "The Legal Aspects of Virtual Currencies" , where they point out that bitcoin share many of the characteristics of physical property: they can be transferred and stored in a way that they can be lost; and they can be transferred by – at least notionally – placing them in a digital wallet on the user's computer.

Even if we conclude that there is a new category of virtual things in possession, however, that does not in itself solve the problem of how to identify its owner. Going back to the broker/client again, in contrast to the case with bank accounts or securities, there is no physical thing which the broker possesses and no account (representing a claim against any third party vested in the broker). The most that might be said is that the broker is the person who in practice operates the private key so as to exercise control over the transfer of bitcoin in the system.

So, even though the private key is not to be equated with the bitcoin, should we equate ownership of the bitcoin with the person "in possession" of the private key? This is the obvious starting point, because it is the private key which connects a person in the real world to the virtual system. It is problematic, however, given the difficulties I have already mentioned: because of the difficulties surrounding possession and in particular the transfer of possession of something which exists only as information. If knowledge of the private key is shared, for example among friends to avoid it being lost, is there joint ownership among all with knowledge? What about someone who stumbles across a copy of the private key, or forces it from the broker at gunpoint: surely, that would not make that person the owner of the bitcoin any more than someone who obtains at gunpoint the secret code of the entry system to a building owns the building.

> Should we equate ownership of the bitcoin with the person "in possession" of the private key?

And in relation to the broker/client relationship, what if that knowledge has from the outset been shared between the broker and client – such that they both have a copy for safekeeping? Which of them is then the "owner"? And what if the client, fearing the insolvency of the broker, ensured it obtained a copy of the string of numbers shortly before the broker went bust? Would the client have thereby become the owner and, if so, how could that be described as a transfer of property in the bitcoin from the broker to client?

The practical consequences in the insolvency of the broker could be very significant, particularly where the broker has wrongly transferred bitcoin away. With money in a bank account, ownership rights of the client will depend upon a trust being declared over the broker's legal interest in the account. The client's rights are always equitable. But if the true analysis is that the client – not the broker – is the direct owner of the bitcoin, and not merely an equitable interest carved out of the broker's legal interest – then the analysis of the client's rights against third party transferees might be very different (dependent on the *nemo dat* principle as opposed to being at the mercy of equity's darling) and that much stronger.

I do not purport to have the answers to these conundrums, but if there is one piece of practical advice arising from this, it is that - given the uncertainty surrounding legal ownership as between the intermediary and client, it is essential that this be expressly addressed in the terms of the contract between them. For example, by way a term that states, at least as between the two of them, that one or other is intended to be the owner of the bitcoin. If the client is the intended owner, then the contract will spell out that the broker is simply employed to effect transactions in the client's bitcoin. If the broker is the owner, then the contract will define the nature of the client's interest by reference to that ownership right of the broker: probably by declaration of trust in the client's favour.

I have deliberately focused on a simple, bi-partite arrangement. The uncertainties multiply once you are dealing with an intermediary acting for numerous clients, and have to consider concepts such as co-ownership and pooling.

As the Russian court in Mr Tsarkov's case noted, the difficulties in identifying the owner of crypto-assets have important practical consequences in insolvency as well. First, the informality and lack of transparency surrounding bitcoin may make it difficult to identify that the bankrupt had an involvement with bitcoin at all. There are no bank statements, and no transaction records other than the blockchain itself, which is wholly anonymised: it records all public keys but does not identify any real person behind those keys.

On the other hand – while existing in the ether – bitcoin have value in the real world only when exchanged for something of use such as fiat currency, products or services. So it is likely that there will have been interactions with other people in the real world, which have left a trace – in bank accounts or emails or other communications, from which conclusions can be drawn about the bankrupt's likely involvement with bitcoin.

Second, assuming that the bankrupt did have such an involvement, the informality makes it much easier for the bankrupt to hide assets, either by effecting transfers to friends or family, or purporting to hide behind such people, e.g. by not holding any record himself of the public or private key, but leaving it to others to do that, so that he can claim that it is they, and not he, who "own" the bitcoin.

Third – and conversely – if the trustee discovers the record of a private key in the possession of the bankrupt, he may claim the reverse position, that he is merely the keeper of the record of the key for X or Y, who actually "owns" the bitcoin.

Ultimately – these are similar problems to those that already exist with bankrupts intent on hiding assets from their trustee (perhaps with an added layer of complexity) and are to be addressed using the existing tools: s.366 in particular.

Turning to the third and final issue on my list: if the claim to recover bitcoin is personal, then what is the nature of that claim? This might arise in the claim against my insolvent broker. If the broker fails to return to me bitcoin, but my claim is a purely personal one, is it characterised as a secondary claim for damages based on the broker's failure to comply with his primary obligation to account to me for bitcoin? Or is it a claim for payment in the currency of bitcoin?

The same question could arise in other circumstances: for example, what if I conclude a transaction of sale with someone on terms that they will pay me in bitcoin, but they become insolvent while the contract is still executory. Do I have an action for the price (in bitcoin)? Or merely a claim for unliquidated damages based on breach of contract to deliver a commodity?

If the claim is analysed as one in debt, i.e. for payment of bitcoin as money, then in order for a *pari passu* distribution to be made it is essential for it to be converted into the currency in which the insolvency estate is to be administered before any distribution can be calculated and made. This is enshrined in statute: Insolvency Rule 14.21 requires any debt payable in a foreign currency to be converted to sterling at the date of commencement of the insolvency.

Although as a matter of language, it may be a strain to say that bitcoin is a "foreign" currency, the rule is an embodiment of the *pari passu* principle I have just mentioned, combined with the principle of a notional realisation and distribution of assets on day one. Accordingly, there is a good argument for saying that "foreign" should – on a purposive construction – include any non-sterling currency.

Given the volatility of bitcoin -and other crypto-currencies – and the fact that the valuation of the claim may well depend on a different date in either case, the difference between treating it as a foreign currency claim, or as a damages claim for failing to deliver a commodity could be enormous.

The question whether crypto-currencies can be considered money has been the subject of much debate. As with all questions relating to crypt-assets, there is no one-size fits all answer. In 2016, the FMLC produced a paper which concluded "that virtual currencies which have achieved status as a medium of exchange within a significant user community have a good claim to be regarded as money". They pointed out that there is no single wholly satisfactory theory of what money is, as a matter of law. Some commentators focus on its function as a sovereign currency, i.e. that it must be backed by a state. But this arguably fails to account for something which is widely accepted to be money – namely a credit in a current bank account – which consists solely of a private law relationship of debtor-creditor. Some commentators focus on the concept of legal tender. But this fails to account for the fact that under English law we undoubtedly regard US dollars and Japanese Yen as money, but neither is legal tender in this jurisdiction. Of greater use is the "societary" theory of money, in the words of Charles Proctor in Mann on the Legal Aspects of Money, negotiability of coins and notes stems from their ability to "pass in currency" –that is that they are commonly and continuously accepted as payment in exchange for articles of commerce.

This involves a question of fact – the answer to which will change over time. So, the more that bitcoin is in fact commonly and continuously accepted as payment in exchange for articles of commerce, then the more it is likely to acquire the status of money.

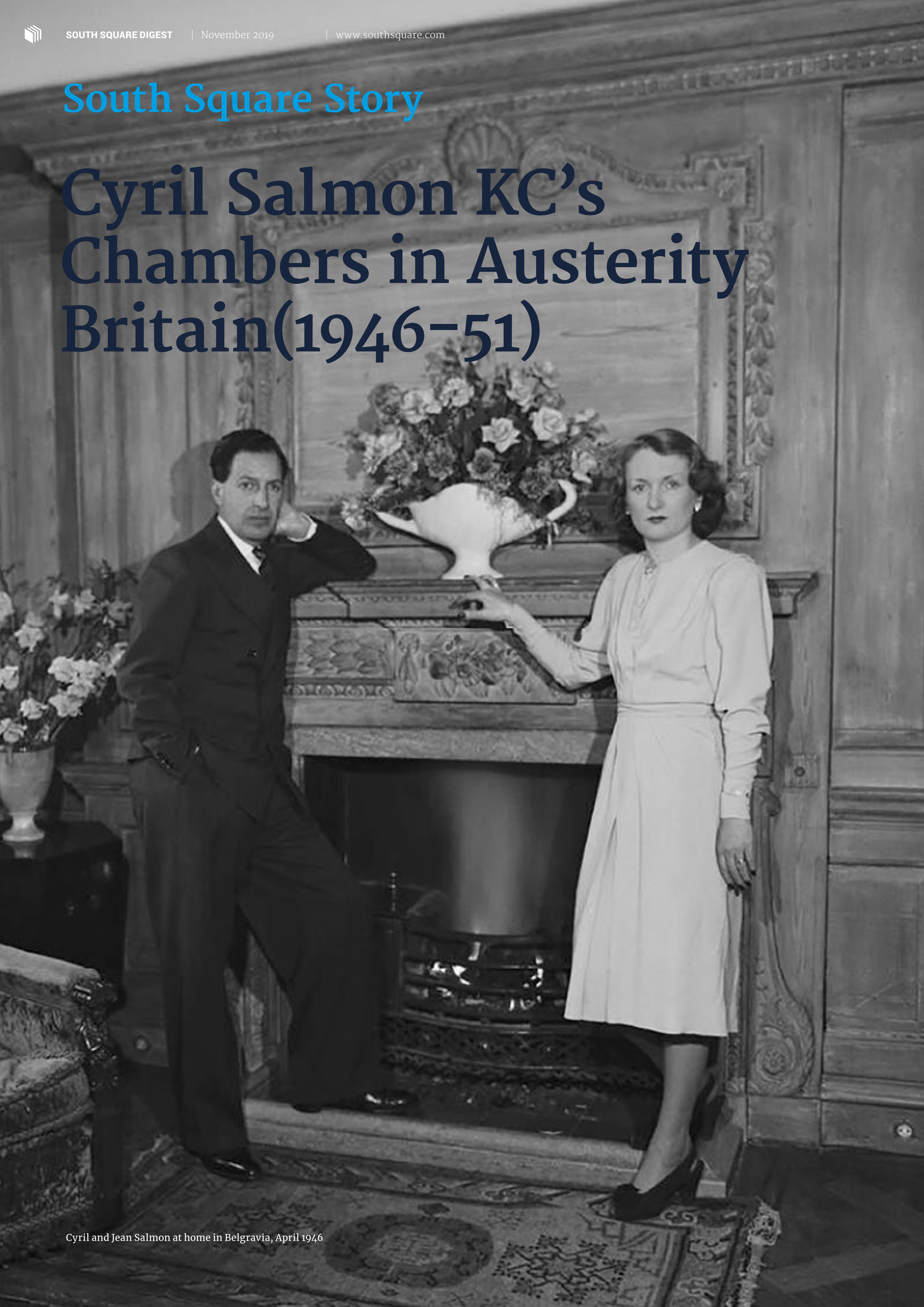
Economists point to a three-fold test for money: (1) it is a store of value; (2) it is a medium of exchange; and (3) it is a unit of account. The UK Cryptoasset Taskforce (comprising representative from the Bank of England, the FCA and the Treasury) concluded in a paper in 2018 that crypto-assets are not to be considered as a currency or money, precisely because they are too volatile to be a good store of value, they are not widely-accepted as a means of exchange and they are not used as a medium of account. The taskforce's principal focus was, however, on regulatory issues, rather than on the narrow, legal questions I have posed in this insolvency context. While there may be good reasons for not regulating crypto-currencies as "currency", and their volatility cannot be denied, as I have pointed out, the question of consistent use as a medium of exchange and the question of use as a unit of account are fact based, and can change over time. If volatility alone was a ground for excluding something from the definition of money, then did that disqualify the Italian Lire in times past? Or the Mexican Peso more recently?

If a crypto-currency is inherently unstable, then that may be a reason why it is not widely used as a medium of exchange, but it would seem doubtful that volatility alone precludes it from qualifying as "money".

In conclusion, these are just three questions that might arise in the insolvency of parties involved in crypto-currency transactions. There are many more I could have considered. For example: is a claim to be paid in crypto-currency a "debt", so as to found a statutory demand in bankruptcy? And, given that transactions in Bitcoin are intended to be immutable, and wholly anonymised, there may well be practical difficulties in relation to transactions rendered void, or voidable, by the Insolvency Act: how do you approach the setting aside of a transaction where (a) the transaction cannot be reversed and (b) the identity of the counterparty is unknown? But these, and other, questions I leave to another day. ■

South Square Story

Cyril Salmon KC's Chambers in Austerity Britain(1946–51)



Cyril and Jean Salmon at home in Belgravia, April 1946

3 Paper Buildings in Austerity Britain

The previous article about the history of the chambers now at South Square (Digest, July 2019, pp74–85) concluded with Cyril Salmon KC, Douglas Potter and Claude Duveen resuming their practices at the end of World War II from chambers at 3 Paper Buildings, Inner Temple. Their clerk was Eric Heymer, the younger son of their pre-war clerk, Albert Heymer. Over the next five years to the beginning of 1951, the only changes in the personnel at their chambers were that Arthur Figgis became a member in about 1948 and, at some stage, Arthur Gibbon replaced Eric as clerk.

This immediate post-war period was a time of extreme austerity, with bomb-damaged cities and rationing. The Bar was not immune from these social and economic pressures and for the first couple of years after the end of the War, work was in short supply.

None of this gloom seems to have affected the life enjoyed by Cyril Salmon, who quickly rose to become one of the most successful common law silks. Duveen established a busy common law and bankruptcy practice, which enabled him to take silk in 1953, and Douglas Potter pursued his common law and criminal practice. Arthur Figgis joined them in about 1948, after being called to the Bar in 1947 and completing his pupillage with Duveen. His studies at Cambridge had been interrupted by war service and so he did not begin his career at the Bar until he was nearly 30. His life and career will be described in subsequent articles.

This article focuses on Salmon's life and career during the five years after the end of the War and ends with Claude Duveen's role as junior counsel for the accused in one of the most sensational murder cases of the post-war period; a case where the successful defence of the accused had fatal consequences.

Cyril Salmon's family life

Since the death of his first wife in 1942, Salmon had been a widower with two young children. This changed on 6 April 1946, when he married Lady Jean Beatrice Makgill Morris,[1] the divorced wife of Lord Morris,[2] who had two daughters and two sons of her own. The Morris's marriage at the Brompton Oratory in 1933 had been a magnificent society occasion. The bride, whose maiden name was Maitland-Makgill-Crichton, haled from a distinguished Lauderdale family. The groom, whose father had been Prime Minister of Newfoundland, was one of Salmon's closest friends and Salmon was best man. They were contemporaries at Cambridge and had been called to the Bar in the same year, 1925. In 1931 Morris left the Bar and became a solicitor. As a partner in Blount, Petre & Co, which specialised in insurance and personal injuries work, he had been a loyal provider of work to Salmon. The Morris marriage had foundered, and Lady Morris obtained a divorce in 1946, shortly before she married Salmon. Salmon knew that marriage to Jean would sever his friendship with Lord Morris. He was also worried (unnecessarily as it turned out) that the stigma which attached to divorce might harm his prospects for becoming a High Court judge. Their marriage was a happy one and Salmon became an adored step-father to the four Morris children. Salmon marked his marriage to Jean with a series of photographs taken by the society photographer Lenare at his home at 12 Wilton Place, Belgravia.

In 1947, Salmon, who then had a handicap of 12, joined The Royal St George's Golf Club at Sandwich. To provide his family with a weekend retreat near his new Club, Salmon bought the Quaives, a fine 17th century house in the Flemish style set in 19 acres, at Wickhambreaux, near Canterbury.[3]

Cyril Salmon's style of advocacy

The Times obituary of 9 November 1991 describes Cyril Salmon as *"a person of unique talents and charm, widely liked and admired for the breadth of his knowledge, his courtesy, humour and patience, and also for the strength of his will."* His style of advocacy was *"delightful and urbane"*.[4] Like his pupil-master, Walter Monckton, he was not theatrical, but was invariably courteous and low-key. His cross-examinations were highly effective, *"based on meticulous preparation and on his high intelligence, which never involved raising his voice or bullying a witness."*[5] Like Sir Patrick Hastings, he preferred a fluid approach to advocacy. His retentive memory gave him instant recall of dates, facts and page references. He conducted his cases with minimal notes and sometimes no notes at all.[6]

He also had a sharp wit. In one of his early forays to a magistrates' court, he had a disagreement with the clerk who asked: *"Are you trying to teach me my job?"* To which, Salmon replied: *"I haven't the time. I am hoping to catch the afternoon train."* Salmon could be equally sharp with more august tribunals. Once, when he was arguing a case in the Court of Appeal, one of the judges complained:

"I do not understand your point, Mr Salmon." To which, Salmon replied: *"My Lord, I apologise. I must take comfort from the fact that your Lordship's learned brethren grasped it twenty minutes ago."*[7]

In 1949, the newly qualified Michael Sherrard was asked by Salmon's junior, Charles Du Cann, to help Salmon prepare the argument on a procedural issue in a case where their client had been charged with brothel-keeping.[8] Salmon thanked Sherrard for the offer of help, said he was familiar with the procedural point but added:

"I don't know about brothels. I'm sure you'll be able to give me adequate assistance."

1. 1912–89.

2. Michael William Morris (1903–75) had become 2nd Baron Morris in 1934.

3. For 25 years until 2015, this was the home of Christine McVie of Fleetwood Mac.

4. Sir Neville Faulks, No Mitigating Circumstances, p 103.

5. Recollection of J Michael Edwards QC passed to Sir Anthony Evans in 2002.

6. Times obituary.

7. Both anecdotes recorded in the Times obituary.

8. *Waroquiers v Marsden [1950] 2 KB 1.*

J Lyons & Co's factory and warehouse at Cadby Hall, Hammersmith

This case gave Sherrard the opportunity to watch Salmon's fastidious preparation for an appearance in court. In the robing room he would give a few shrugs of the shoulders so that his suit jacket could slip into the arms of Tom, the robing room attendant. After putting on his immaculate starched white collar and bands, his court waistcoat and coat, he would check in the mirror that the waistcoat was exactly in place, before being assisted by Tom into his silk gown. Finally, the wig; again, he would check in the mirror that it was in exactly the right place. When he arrived at court, he would take from his waistcoat pockets his gold-edged diary, his gold Parker pen, several sharpened pencils and his cigar case and place them carefully on the sides of his lectern.[9]

Cyril Salmon KC's career as a silk

In these post-war years, Salmon's practice covered the full range of the common law: bankruptcy, contract, divorce, employment and trade disputes, landlord and tenant, libel, and personal injury. Between June 1948 and January 1951, he appeared in four leading cases in the House of Lords, discussed below.

Salmon was even willing to accept briefs in the criminal courts; briefs he had avoided as a junior after the chastening experience of defending the Baroness Strabolgi (Digest, March 2019, pp 80 – 84). He was Recorder of Gravesend between 1947 and 1955 and was appointed a JP for Kent.

The first case in which Salmon appeared as a silk to attract the attention of newspapers was not the glamourous brief for which he might have hoped. In June 1946, he was called on to represent the family business, J Lyons & Co, which had had to destroy seven tons of food, including 30,000 meat patties, which had been contaminated by mice in a store room at Cadby Hall, its West Kensington factory. J Lyons was charged with unlawfully permitting food to be wasted contrary to the Waste of Food Order 1940, for which the maximum fine was £500, and with failing to take necessary and practical steps to prevent premises from being infested with mice, contrary to the Rats and Mice (Destruction) Act 1919, for which the maximum fine was £5. There was little that Salmon could do to prevent the magistrate from finding the charges proved and imposing the maximum fines. He pointed out that the firm's inspection regime was

such that it had not previously fallen foul of food standards laws and that, although all seven tons of the food had been condemned, only about 3% had been contaminated. As the magistrate put it, this was a *"sad story of mice and men"*, in which the mice had their own way in the store room for three weeks without interruption.

Salmon's first appearance in the law reports as a silk was in the important but difficult divorce case, *Squire v Squire*.[10] Salmon represented the husband, who petitioned for divorce on the ground of his wife's cruelty, which was then a relatively new ground for divorce.[11] As a result of serious illnesses, the wife suffered from acute insomnia and insisted on her husband reading to her until she went to sleep. Sometimes he would be forced to read all night; sometimes for half the night. The law reports do not indicate whether the wife showed any discernment in the reading matter. For the husband, the readings were an oppressive chore, seemingly unmitigated by literary benefit, which made him ill and unable to carry out his duties as a colonel in the army. After four years of enforced reading, the husband could stand it no more and petitioned for divorce. The trial judge dismissed the petition, because the wife's demands and nagging were the product of her ill-health, and not "deliberate, malignant, and intentional" acts, as in the judge's view were required to prove cruelty. At the hearing of the husband's appeal in April 1948, Salmon persuaded the Court of Appeal that the judge had misdirected himself; the test was an objective one and the wife must be presumed to have intended the natural and probable consequences of her acts, which harmed her husband and it was not necessary for him to prove her intent to harm or malignity. That was not the end of the matter, because Salmon still had to deal with the wife's counsel's arguments that her conduct did not amount to cruelty and that, even if it did, the husband had acquiesced in or condone it, by putting up with it for four years and writing affectionate letters. The majority, Lord Justices Tucker and Evershed, rejected those arguments and held that the husband was entitled to a divorce. Mr Justice Hodson dissented, because he considered that the facts did not amount to cruelty and were no more than the strains to be expected in married life when one spouse is ill, which the husband had to accept, having taken his wife *"for better or for worse, in sickness and in health."* This case remained a leading authority until the reforms made by the Divorce Reform Act 1969.

Four of Cyril Salmon KC's House of Lords cases

Money alleged to be won upon a wager

The first case in the history of chambers to reach the House of Lords was an exceptional one, requiring a panel of seven Law Lords: *Hill v William Hill (Park Lane) Ltd*.[12] Salmon's client, Mr Hill, owed debts to William Hill, the bookmakers, for bets on horseraces which he could not pay. William Hill referred the matter to Tattersalls, which determined that Mr Hill should pay an initial sum and the balance of the debts by monthly instalments, failing which he could be barred from betting or entering horse for races at Newmarket. Mr Hill defaulted, but persuaded William Hill to accept a post-dated cheque, after which he would pay the monthly instalments determined by Tattersalls. The cheque was dishonoured, but Mr Hill paid some money on account. William Hill sued him for the unpaid balance of the cheque and instalments then due under the post-dated cheque agreement. Mr Hill accepted that this agreement was not *"a contract by way of gaming or wager"*, which was void under the first limb of section 18 of the Gaming Act 1845, but contended that William Hill's claim was for payment of *"a sum of money alleged to be won upon a wager"* within the second limb of the section and was not recoverable. This defence could not succeed before the judge and Court of Appeal, since it was controverted by earlier Court of Appeal authority, by which
those courts were bound.[13] For the appeal to the House of Lords, Neville Faulks, Mr Hill's junior counsel, selected Cyril Salmon as the man to win the argument.

Salmon's task was to persuade the House of Lords that that the second limb of section 18 applied to a subsequent independent agreement to pay betting debts and that the earlier authorities were wrong. In a speech lasting no more than about 20 minutes,[14] Salmon explained that the statutory purpose of section 18 was to prevent people from having recourse to the courts to collect money won on a wager, which would be defeated if people could rely on the artifice of a subsequent agreement. He said that the test was whether what was to be paid under the agreement was paid in discharge of a gaming debt, as was the case here. He went on to explain how his interpretation gave full effect to the language of section 18, whereas, on William Hill's case, the second limb of section 18 added nothing to the first limb and was merely tautologous. Salmon succeeded by the narrow margin of four (Lords Simon, Greene, Normand and MacDermott) to three (Lords Jowitt LC, Oaksey and Ratcliffe), with all seven Law Lords giving reasoned judgments. The outcome of the Hill case had a profound effect on the ability of betting shops and casinos to collect gaming debts through deferred payment agreements and remained a leading authority until the Gaming Act 1845 was repealed in 2005.

Mr Kahler's share certificates

Salmon argued the Hill case in the House of Lords in the second week of June 1949. A week later, he was back in the House of Lords, leading Douglas Potter, and arguing an even more challenging appeal in *Kahler v Midland Bank Ltd.*[15]

Mr Kahler, who was a Jewish Czechoslovak citizen, owned bearer shares in a Canadian corporation, the certificates for which were held for him by Zivnostenska Bank, a Czech bank (Z Bank), in an account with Midland Bank in London. In March 1939 the German army invaded Czechoslovakia and Mr Kahler determined to save his life and leave as soon as possible. The German authorities would only give him a permission to leave if he transferred all his securities from his account at Z Bank to an account at Bohemian Discount Bank (B Bank), which the Germans controlled. Mr Kahler executed the transfers and a power of attorney. On 1 April 1939 he was given permission to leave Czechoslovakia and he left the next day. He went first to France and then to the USA, where he became an American citizen. In July 1939, he brought proceedings in England against Midland Bank, claiming delivery up of the certificates on

9. Linda Goldman and Michael Sherrard10, *Wigs and Wherefores, a Biography of Michael Sherrard*, p 33.

10. [1947] 2 All ER 529, Finnimore J; [1949] P 951, CA.

11. The Matrimonial Causes Act 1937 made cruelty a ground for divorce for the first time.

12. [1949] AC 530, HL.

13. *Hyams v Stuart King* [1908] 2 KB 696; *Bubb v Yelverton* (1870) LR 9 Eq 471.

14. Faulks, No Mitigating Circumstances, p 113.

15. [1948] 1 All ER 811, CA; [1950] AC 24, HL.

Bank, was agent for him as disclosed or undisclosed principal and he was entitled to enforce its rights to delivery; alternatively, in detinue, since he was the beneficial owner of the certificates, which the Midland Bank had wrongly refused to return to him.

Midland Bank defended the claim on the ground that its contract was with B Bank, which held the certificates under a contract with Mr Kahler and could not release them without breaching Czechoslovak exchange controls which were in force before Mr Kahler dealt with Z Bank and which remained in force. These controls made it an offence for B Bank to release the certificates to Mr Kahler without the consent of the Czechoslovak National Bank even though the certificates were in England. B Bank indicated it had no interest in the certificates but could not obtain the requisite consent.

At the trial in June 1947, Mr Justice Macnaghten rejected Mr Kahler's claim in contract but allowing the claim in detinue. During argument, pointing at the certificates in front of him, the judge said that he could not understand how a Czechoslovak prohibition could be said to prevent an English judge from ordering that the certificates should be delivered up to their rightful owner.[16] Midland Bank appealed to the Court of Appeal, which agreed with the judge that Mr Kahler's contractual claim failed, but allowed the appeal on the detinue claim, because Mr Kahler could not show an immediate right to possession of the certificates. This was because Midland Bank held them for the B Bank, which held them under an agreement with Mr Kahler and could not release them without infringing Czechoslovak exchange controls, which would be illegal. Lord Justice Evershed pointed out that if Mr Kahler could obtain delivery up of the certificates, it would have defeated the arrangements the German authorities put in place with B Bank as a condition of Mr Kahler being allowed to leave Czechoslovakia, which would have been senseless. In saying this, the Lord Justice seems to have disregarded the oppressive and discriminatory nature of those arrangements.

Mr Kahler appealed to the House of Lords, which unanimously dismissed his appeal on the contractual claim and by a majority of three (Lords Simonds, Normand and Radcliffe) to two (Lords McDermott and Reid) dismissed his claim in detinue. The speeches of Lords Normand, MacDermott and Reid all note that the contract that Mr Kahler was compelled to enter into with B Bank was void for duress, but all the judges had to deal with the appeal on the footing that Mr Kahler had affirmed this contract in his pleadings (as had been necessary for the contractual claim). This contract qualified the right that Mr Kahler would have had to possession of the securities. The question then was what was the law applicable to the performance of that contract? The majority decided that it was Czechoslovak law. Since the exchange controls were part of Czechoslovak law and they made it illegal for B Bank to release the certificates, it followed that the claim in detinue failed. Lords MacDermott and Reid found that English law applied to the performance of the contract with B Bank, with the result that the exchange controls could be ignored.

Monaco during WWII

The outcome was profoundly unjust, because Mr Kahler was permanently deprived of his property. So long as Czechoslovakia was under communist control, the National Bank would be unlikely to agree to the release of securities to an American citizen. With hindsight, the result might have been different if Mr Kahler had avoided the agreement with B Bank for duress and simply claimed in detinue. Then, he would not have qualified his right to possession by his agreement with B Bank. In the uncertain legal landscape of the time, with almost no guiding authorities, that would have been a bold tactical decision to make. Even on the basis that Mr Kahler was bound by the agreement with B Bank, FA Mann has criticised the decision, because the House of Lords allowed Midland Bank to assert the public law of the Czechoslovak government and thereby indirectly enforced its exchange control regulations in England, contrary to the rule that the public law of a foreign State cannot be directly or indirectly enforced in England.[17]

Unrequited benefaction

In January 1950 Cyril Salmon KC was back in the House of Lords, defending a judgment of the Court of Appeal, where his client's case was entirely unburdened by moral merit.[18] This time the House of Lords found unanimously in favour of Salmon's client, Mrs Weil, a Jewish English citizen. During World War II, she had been involuntarily resident in Monaco, which was in the military occupation of the enemy. She needed to raise money so that her son could obtain an exemption from being deported to Germany, and approached Mr Boissevain, a Dutch citizen, similarly trapped in Monaco, for a loan. He agreed to lend her 960,000 French francs to be repaid in sterling, at the rate of 160 francs to the pound, with interest at 5% p.a. from one month after the end of hostilities between Great Britain and Germany. As security, Mrs Weil gave Mr Boissevain cheques drawn on a London bank and a letter to the bank manager asking him to honour the cheques as soon as he lawfully could. After the end of the war, Mrs Weil failed to repay the loans and it turned out that she never had an account at the London bank on which the cheques were drawn.

Mr Boissevain brought proceedings in England to recover £6,000 as money lent with interest. At the trial, the judge rejected all Mrs Weil's defences. For the appeal, she instructed Cyril Salmon KC, who abandoned all her defences, except for illegality under the Defence (Finance) Regulations 1939, as amended by the Emergency Powers (Defence) Act 1940, which made it an offence for Mrs Weil, as a British subject, to borrow foreign currency from someone who was not a licensed dealer. The Court of Appeal accepted this defence and Mr Boissevain's appeal to the House of Lords was unanimously dismissed. Giving the leading judgment, Lord Radcliffe held that Mrs Weil committed an illegal act, when she borrowed the French francs from Mr Boissevain and the loan could not be enforced against her. The Regulation cast the net wide and it did not matter what the proper law of the loan agreement was; nor was it critical that the loan was to be repaid in sterling, as the Court of Appeal had thought. Lord Radcliffe did, however, express his *"distaste for the attitude [Mrs Weil] appears to have taken up against her benefactor"*. She had managed to avoid having to repay a debt freely entered into by relying on legislation enacted to protect the financial position of Great Britain in time of war.

Abuse of military uniform

A year later, in January 1951, Salmon returned to the House of Lords for *Reading v Attorney-General*,[19] which was another case where, as Salmon admitted in opening his argument, his client had no merit. The case raised an intriguing legal issue: in what circumstances, if any, does the law allow a master to take advantage of the servant's crime, by giving him a legally enforceable right to the proceeds of that crime. Reading was a sergeant in the British army, stationed in Egypt during the war. Towards the end of the war, on behalf of the Crown, the army seized from Reading just under £20,000, the proceeds of bribes he had received for accompanying a lorry containing contraband round Cairo, while wearing his uniform, to give the impression that he was in the course of his military duties and so enabling the lorry to avoid inspections. Reading objected to being deprived of his ill-gotten gains and issued a petition of right to recover the money, on the basis that there was no recognised legal principle entitling the Crown to take it. The petition was dismissed by Mr Justice Denning and the Court of Appeal affirmed his decision.

In the House of Lords, Lord Porter referred to the *"interesting and closely argued contentions of Mr Salmon"*. Salmon argued that Reading was not liable to account for a secret profit, because his profits were not earned during the course of his employment, in a fiduciary capacity and while he was engaged in a legitimate business. Instead they were earned in his spare time on illegitimate business. Salmon gave several examples to show that a master has no right to the proceeds of his servant's crime. Nor could the Crown rely on an implied term, because an express term covering the circumstances of the case would have been unlawful. Finally, English law did not recognise unjust enrichment as a basis of recovery. In reply, Sir Hartley Shawcross KC, leading for the Crown, submitted that a master is entitled to profits earned by a servant through using his master's property (the uniform) or time or where the servant is engaged in activities in competition with his master's interests.

Lord Jowitt LC and Lord Porter held that the Crown, as Reading's master, was entitled to recover the money as money had and received, since he had earned it through use of his official position as a sergeant in uniform and even though the money was earned through a criminal act and the Crown had suffered no loss. They also thought that the Crown was entitled to recover, because of the fiduciary relationship between Reading and the Crown. Lord Normand agreed with the fiduciary basis for recovery but was more doubtful about money had and received. Lord Oaksey imputed an implied promise to repay and Lord Radcliffe agreed with the judgment of the Court of Appeal.

Criminal cases

Salmon's criminal cases covered a wide range of nefarious activity and those reported in the press, included gross indecency, a cot death murder charge, a fraudulent prospectus and bribery.

Cashiered for gross indecency

In December 1947, with Claude Duveen as his junior, Salmon represented Lord Colwyn, a 33-year-old married lieutenant in the London Scottish and Gordon Highlanders, at the Chelsea court-marshal, where Lord Colwyn, pleaded guilty to five charges of gross indecency and attempted gross indecency with Italian males on the island of Ischia and in Turin in 1947. The task for the defence team was to save the accused from imprisonment, which would be the normal punishment for such offences. They called evidence as to character, establishing that he had been a good officer, who had *"led his men with dash"* in the Normandy invasion, where he was badly wounded. His wife told the tribunal that she would take him back into the family home with their children. Dr Ellis Stungo, a Harley Street psychiatrist, described Lord Colwyn as a *"repressed homo-sexual"*, who could return to a normal life with

> *"interesting and closely argued contentions of Mr Salmon"*

16. His judgment is not reported, but MacNaghten J's comment is recorded in FA Mann, *Studies in International Law (1973)*, p 506.

17. FA Mann, *Studies in International Law* (1973), pp 506-508; Dicey, Morris & Collins, *The Conflict of Laws* (15th ed) rule 3. In Mann's view, the decision went beyond recognising and noting Czech exchange control rules, which is permissible, and, instead, enforced their extraterritorial reach. For the distinction between enforcement and recognition, see Dicey at [5-026].

18. *Boissevain v Weil* [1948] 1 All ER 893, Croom-Johnson J; [1949] 1 KB 482, CA; [1950] AC 327, HL.

19. [1948] 2 KB 268, Denning J; [1949] 2 KB 232, CA; [1951] AC 507, HL.

> Salmon's criminal cases covered a wide range of nefarious activity

his family, but whose condition would be made much worse by the isolation and degradation of imprisonment. In his plea, urging the tribunal to be merciful and not impose a prison sentence, Salmon observed that the offences had occurred when Lord Colwyn was in bad health and in places notorious for their immorality since the time of Emperor Tiberius. Salmon's submissions evidently persuaded the tribunal which ordered that Lord Colwyn be cashiered (dismissed from the army in disgrace).

A cot death

On 17 March 1949, the three months old baby daughter of Maurice and Miriam Thompson was found face down and dead in her pram at their cottage in Penshurst, Kent. Maurice was aged 17 and the young couple had married in July of the previous year. They appeared to be a happy young couple with a healthy, well-looked after baby. On the evening in question, Miriam was not feeling well and went to bed at about 5 pm, leaving Maurice to feed and look after the baby. He gave the baby her six o'clock feed and left her in the pram. When he looked at the baby again at about 10.35 pm, she was lying face down and not moving. He realised the baby was dead and alerted Miriam. They went to a neighbour's cottage and called the police. The Detective Sergeant quickly formed the view that the baby had been suffocated because the pillow was wet, there was wool round her nose and deep marks on her face, as if she had been held down. He told Maurice that the police would get him or Miriam. Maurice asked if he would hang; to which the Detective Sergeant said he would not. Maurice then made a statement in which he admitted he had held the baby's head onto the pillow for about three minutes and explained he had money worries. Later, in the presence of the police, Miriam asked

Dr and Mrs Ellis Stungo

Maurice if he had done it and he told her he had.

Maurice was committed for trial at the Old Bailey, charged with murder, and Cyril Salmon KC was retained as his counsel. The trial began on 29 April 1949 before Mr Justice Humphreys and a jury. Christmas Humphreys, the son of the judge and senior prosecuting counsel, accepted that the baby had been well-looked after by two devoted parents. He explained that there were two witnesses he could not call; Miriam Thompson, who could not be compelled to give evidence against her husband, and another lady who had *"gone out of her mind"*. The prosecution case was founded on Maurice's confession statement. There seems to have been no evidence from a medical expert about cause of death. Salmon's first line of defence was to try to have the statement ruled inadmissible. If that failed, it would be up to Maurice to explain why he had made a false confession. Mr Justice Humphreys rejected Salmon's argument that the confession statement was inadmissible, because there was no suggestion of threats or promises from the police.

The statement was then read to the jury.

The second day of the trial took place on 6 May 1949. Christmas Humphreys was unable to appear and was replaced as prosecuting counsel by A Morton. Maurice went into the witness box. He said that he had not killed the baby, but had made the statement, admitting murder, to protect his wife and that, to provide a motive, he made up a false story about money worries. Miriam then gave evidence in support of her husband. The prosecution did not address the jury. In his address, Salmon emphasised that this was a pitiful case. No one could help feeling sorry for this very young couple with their *"healthy and happy child"*. *"Then suddenly tragedy intervenes, and they lose their child and this boy is whisked away from the sunny fields of Kent to the austerity of this building on a charge of murder."* The jury took 15 minutes to return a verdict of not guilty. Mr Justice Humphreys then turned to the accused and said: *"Let this be a lesson to you not to confess to a murder you have not done."* Grateful for that advice, Maurice left the court arm in arm with his wife and mother.

A fraudulent prospectus

A year later, in May 1950, Cyril Salmon KC led Neville Faulks for the prosecution in a trial at the Old Bailey about a fraudulent prospectus, which lasted 17 days. The prospectus had been issued on behalf of Miles Aircraft Ltd and two of its directors, Frederick George Miles and Sir William Malcolm Mount,[20] were charged with offences under the Prevention of Fraud (Investments) Act 1939.

The company was a public company, which carried on the business, founded in 1930, of designing and manufacturing light civil and military aircraft at Woodley Aerodrome, near Reading. It also made duplicating machines and manufactured biros. By the end of the war, it had become a large concern with over 1,000 employees. The Ministry of Supply engaged it to design and develop a supersonic aircraft, but, at the Paris Air show in September 1946, the Ministry announced its withdrawal from the project. This was because the Ministry had decided it was not safe to proceed, because it could not be sure what would happen to the pilot if an aircraft broke through the sound barrier.

Seemingly undeterred by this setback, in March 1947, at a time when the 1946 accounts had not been finalised, the company issued a prospectus inviting subscriptions for £350,000 of new preference and £50,000 new ordinary shares to finance what it described as its expanding businesses. The offer was oversubscribed, but soon afterwards the company's financial position became dire. In September 1947, it told its shareholders that it was operating at *"a considerable loss"*. By the end of that month, it had stopped paying it creditors and not long afterwards, it started to dismiss large numbers of employees. In November, a creditor presented a petition for winding up, which led the debenture holders to appoint a receiver. The petition was adjourned while a scheme for restructuring the company's debts was promulgated. In March 1948 the scheme was presented to the company's creditors. The accompanying documents revealed the grim reality: the company had lost over £950,000 in the ten months to 31 October 1947, mainly due to selling aircraft at less than production costs, and unsecured creditors would receive no more than six shillings in the pound. All the company's share capital had been lost. Creditors and shareholders had little choice but to accept the company's restructuring scheme, which was duly approved by the court, and which provided for the injection of new loan capital, a reduction of share capital, the disposal of the aircraft business and for the other profitable businesses (manufacturing duplicating machines and pens) to be transferred to a new company, from which the company's shareholders would receive a proportion of any future profits.

Not surprisingly, there was considerable concern about the circumstances in which the company had solicited for new capital in March 1947. In May 1948, the Board of Trade obtained an order f or the appointment of inspectors of the company. The outcome of the inspection was that in November 1949 Mr Miles and Sir William Mount were charged with twenty-four counts of dishonestly concealing material facts about the state of manufacture of certain aircraft and recklessly making misleading statements and forecasts about the company's business and its prospects in the March 1947 prospectus.

The trial before the Common Sergeant, judge Beazley, and a jury, which began on 10 May 1950 and lasted 17 days, did not go well for the prosecution. By the end of the prosecution's case, 20 of the 24 counts had been dismissed. When the two directors went into the witness box, they assured the court that they had no intention of misleading anyone and believed that every word in the prospectus was true. Mr Miles blamed the Government for the company's demise. He claimed that it had failed to pay the company £1,500,000 in August 1947.

On Wednesday 31 May, counsel for the defence concluded their lengthy submissions. Salmon would start his final speech the following morning, after which the judge would sum up. The judge assumed that, after such a lengthy trial, Salmon's speech would last all or most of the day and that he could safely leave preparing his summing up to the jury until Thursday evening. To the judge's dismay, Salmon delivered a short succinct speech, which finished by lunchtime, and left the judge ample time to sum up that day. Caught by surprise, the judge took as long as he could in giving the jury a comprehensive explanation of the burden of proof and then adjourned the case until the following morning when he would be ready to give his summing up. When the court resumed the next morning, the foreman of the jury handed the judge a note, explaining that they had heard enough and had found the defendants not guilty of the four remaining charges. This was most irregular, but the jury was not likely to change its collective mind after hearing the judge's summing up and

20. 1904-93. A grandfather of David Cameron, the former Prime Minister.

so the defendants were acquitted on all charges. The only consolation for the prosecution was that the defendants' application for costs, said to be £20,000, was refused.

Looking back at the bare outline of the facts of this case with modern eyes, it is difficult to understand why the prosecution failed. But, since 1947, the standards of financial record keeping, the diligence and competence expected of directors have increased markedly and in ways that should make it harder for a defendant director to satisfy a court of his belief in the truth of statements or forecasts that are in fact false or over optimistic. The defendants performed well in the witness box. Frederick Miles was an enthusiastic designer of aircraft, doing his best to invigorate the British aviation industry after the war, and readily admitted that he relied on others to do the figures. Sir William was every inch the English gentleman; not the sort of person who would deliberately or recklessly mislead anyone.

Bribery at the BBC

In November 1950, Roy Speer, then a well-known producer of the popular BBC radio shows, "Educating Archie" and "Starlight Hour", who earned £1,000 p.a., was charged with receiving corrupt payments totalling £80 from Albert Rostron Parker (known as Ross Parker), contrary to section 1 of the Prevention of Corruption Act 1906. The Crown alleged that Parker, who was a composer and scriptwriter, had made the payments to induce Speer to favour him with employment, by recommending him as scriptwriter for some other BBC radio shows in 1947 and 1948 – "Cavalier of Song", "Beginners Please" and "Sweet Serenade" – for which he was paid nearly £1,500. Parker was not charged, but, instead, gave evidence for the prosecution. Speer's answers to the charges were that the money he received from Parker was in repayment of loans made by him when they were both serving in the army in India during the war and that, anyway, the payments had nothing to do with the engagement of Parker as a scriptwriter for the BBC, so that there was no corrupt inducement. Speer had not recommended Parker for work for the BBC after 1948 as his style was not suitable for the programmes then being produced.

At the trial in January 1951, Parker denied that the money had been paid in repayment of loans, but Cyril Salmon KC, leading Duveen, had little difficulty in getting Parker to admit that the payments had not been made corruptly. After the prosecution had closed its case, Salmon was dismissive: *"it was not good enough to hang the proverbial dog"*. Salmon put Speer in the witness box and called on his behalf Michael Standing, the head of the BBC variety department, and William Deedes MP, who both confirmed that Speer had the highest reputation for integrity and competence. In his closing speech, Salmon said: *"The case for the prosecution is about as substantial as the flimsiest spider's web, and the first puff of reason has destroyed it."* The jury agreed; it took them 20 minutes to return a not guilty verdict.

Stanley Setty's torso

Duveen also had a substantial criminal practice, which from time to time attracted the attention of the press. In November 1949 he was retained as junior counsel for Brian Donald Hume in one of the most widely reported and gruesome murder cases to enliven the gloom of post-war austerity Britain.

On the morning of Sunday 22 October 1949, Sydney Tiffen a farm labourer was fowling in a punt on the Essex marshes, when he saw a large bundle floating in the water. This turned out to be a man's torso, wrapped in a blanket. He alerted the police, who found that the torso was dressed in a white silk shirt, vest, braces and the top part of a pair of blue trousers. The head and legs had been severed, but not the arms. It did not take the police long, through comparing finger prints, to discover that the man was Stanley Setty, a 46-year-old undischarged bankrupt who had been convicted of bankruptcy offences. He was a Warren Street car dealer,[21] who lived in a flat in Bayswater and had a garage at Cambridge Terrace Mews, not far from Warren Street. He had been missing since 4 October and had been killed by five stab wounds to the chest. Police inquiries led them to Hume, a 29-year-old company director and pilot, who lived in a flat on the Finchley Road in Golders Green with his wife, Cynthia, their baby daughter and a dog called Tony (a large dog with traces of Alsatian and husky). On 28 October the police charged Hume with the murder of Setty.

The case against Hume was based on circumstantial evidence but seemed overwhelming. Hume knew Setty, he was short of money and was found with some £5 notes which had the same serial numbers as those that Setty had received when he cashed a cheque for over £1,000 shortly before he disappeared. On 5 October, Hume had gone to a local garage to get a carving knife sharpened. On the same day he had taken a carpet to be cleaned and dyed and had been seen loading two large parcels into a light aircraft he had hired at Elstree airport. The parcels were not on the plane when it landed at Southend. On the following day Hume had arranged for a decorator to come to the flat to stain the floorboards. Blood of the same group as Setty's was found in cracks in the floorboards of the sitting room at the flat and more blood was found in the plane that Hume had hired. The prosecution case was that Hume had murdered Setty in his flat, cut up the body with the carving knife and disposed of it by dropping it in the Thames estuary from the hired aircraft. Hume denied the murder or knowing anything about it, although at one stage he did say to the police: *"I am several kinds of a bastard, aren't I?"*

Duveen represented Setty at the remand hearing at Bow Street Magistrates Court and at the committal proceedings, which lasted two days, as the prosecution called 30 witnesses to show that there was a case fit for trial. Hume pleaded

21. In those days Warren Street was a market overt for the sale of cars, often used for the disposal of stolen vehicles.

Sydney Tiffen, the farm worker who discovered the torso

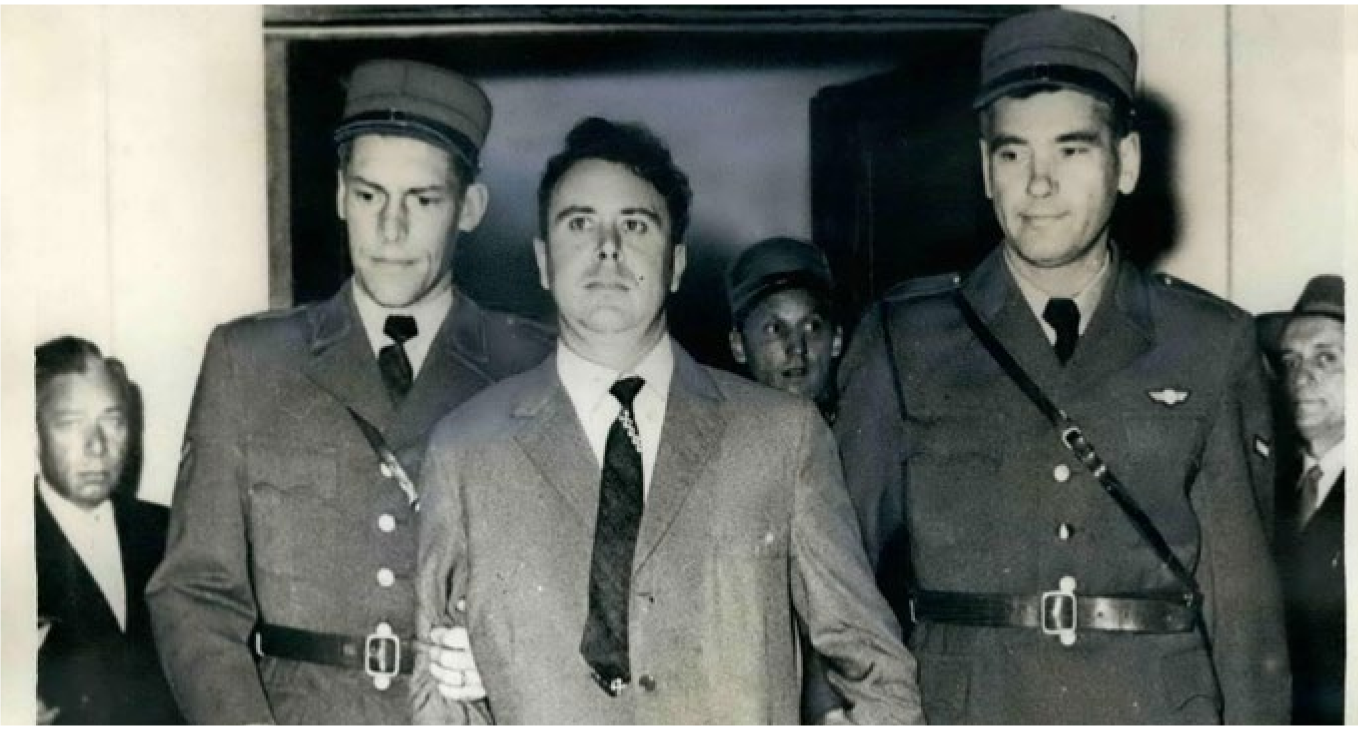
not guilty and Duveen reserved his defence. On 6 December, the magistrate committed Hume for trial at the Old Bailey in the January 1950 sessions. At some stage, Hume made a statement in which he denied the murder but accepted that three sinister characters – Mac or Maxie, Green and "The Boy" – had paid him £150 in £5 notes to dispose of the body, which he had done by dropping it from the plane on two flights; first the head and legs and second the torso.

The trial began on 18 January 1950 but had to be restarted the following day before Mr Justice Sellers and a jury, as the original judge had been taken ill. Christmas Humphreys was leading counsel for the Crown and RF Levy KC (better known as a commercial barrister) led Duveen for Hume.

It only took about one day for the prosecution to present its case. After a lengthy opening statement from RF Levy, Hume went into the witness box. He admitted that he was called the *"flying smuggler"*, having learned to fly in the RAF, and was not entirely honest, but as RF Levy KC put it, *"he does not pretend to be an angel, but there is a long way between an angel and a murderer"*. Hume explained that Mac, Green and the Boy had come to his flat with two large parcels, which they said contained equipment for forging petrol coupons which they wanted dumped in the sea. They produced a revolver. Later they brought Hume a third larger parcel which he put in a cupboard at the flat. When he moved this parcel, it gurgled, and, as he carried it out of the flat with the help of the decorator (who had no idea what was in the parcel), blood leaked onto the carpet. His wife had asked him to get the carving knife sharpened. Hume repeated what he had already admitted to the police: he had been paid £150 in £5 notes for disposing of the parcels, which he did in two flights over the sea beyond the Thames estuary; one from Elstree to Southend and the other from Southend to Gravesend. Under cross-examination from Christmas Humphreys, Hume became increasingly snappy and angry. Mr Justice Sellers tried to calm him down: *"Mr Hume, please don't take this personally."* To which Hume retorted: *"They're trying to hang me and you're telling me not to take it personally. My life is personal."* [22]

Mrs Hume gave evidence that she was in the flat on the evening of 4 October, listening to a radio programme "Justice in other Lands", and had heard no sound of a struggle or of a body being chopped up either that night or the following day. A London school headmaster who lived in the flat below, said that he was in the flat on that evening, but heard nothing untoward. The defence called a pathologist who gave his opinion that the carving knife was not the murder weapon; that Hume, who was much smaller than Setty, could not have stabbed him to death without a struggle; that it was more likely that Setty was being held from the back while he was stabbed, since the body showed no signs of bruising; and that it would take several minutes to chop up the body and the noise of the chopping would drown out conversation. A person who lived near Setty's garage said that spivs and thugs used to visit it, so supporting RF Levy's case that Setty moved in a world of *"rivalries and gangsterdom"*. Another witness said he had met Maxie and the Boy, who he believed were involved in smuggling and gun running to Palestine. The problem for the prosecution was that there was no direct evidence that Hume had killed Setty and

22. The quotations are in Linda Goldman and Michael Sherrard, *Wigs and Wherefores*, p 2. Sherrard watched the trial, since he had an interest in the case as he remembered Hume as the proprietor of an electrical store on the Finchley Road.



Donald Hume released from Dartmoor prison in Janoury 1958

had not merely disposed of the body, as he admitted. Subject to one point, all the prosecution evidence was consistent with what Hume had admitted, but did it show beyond reasonable doubt that Hume was also the murderer? There was no evidence of motive. Hume said he had not seen Setty for some time and there was no evidence to contradict that. The one piece of forensic evidence that was inconsistent with Hume merely being the disposer of the body was the traces of blood on the floorboards of the sitting room at the flat. Hume would not have carried the torso into the sitting room when he moved it between the front door of the flat and the cupboard. So, the traces of blood supported the prosecution case that Setty had been murdered in the sitting room. But the state of medical evidence at the time was such that Mr Levy could say without fear of contradiction that for all anyone knew the blood might have come from an animal.

The novelist and writer, Rebecca West, watched the trial and admired Mr Levy's closing speech for its logical and lucid presentation of his client's case. He demonstrated that the prosecution case was vague and contradicted by some of its own evidence. He certainly convinced West that Setty had not been murdered and cut up in the flat as the prosecution alleged.

The trial ended on 28 January 1950, when, after two hours of deliberation, the foreman informed the court that the jury had been unable to agree on their verdict. The Crown did not ask for a re-trial. Instead a fresh jury was sworn in and the Crown offered no evidence on the murder indictment and Hume was accordingly acquitted. Hume then pleaded guilty to the indictment of having been an accessory after the fact in the murder of Setty, by disposing of his body. Mr Justice Sellers sentenced Hume to 12 years imprisonment.

In January 1958, Hume was released from Dartmoor prison. In June of that year, he sold his confession to the Sunday Pictorial for £2,000. He was quite safe in doing this, because the common law doctrine of autrefois acquit meant that he could not be tried again for murder, having been formally acquitted at the end of the trial in January 1950.[23]

In his confession, Hume admitted that, on the evening of 4 October 1949, he had killed Setty by stabbing him with a German SS dagger in a furious argument in the sitting room of the flat in the Finchley Road. It seems that Hume had not forgiven Setty for kicking his dog, Tony, a few weeks before and that whatever words were said between them caused Hume to erupt in murderous rage. Hume went on to explain how he managed to conceal the murder and dispose of the body. The following summary does not adequately convey Hume's ingenuity, or the physical effort involved in disposing of a 13-stone corpse.

Overnight Hume hid the body in the coal cupboard in the breakfast room, cleaned up the sitting room and drove Setty's car back to Cambridge Terrace Mews. That night, he devised a scheme to get away with the murder: he would cut up the body and dispose of it at sea from an aeroplane. The following morning, he completed cleaning up the sitting room, arranged for the carpet to be cleaned and re-varnished the floorboards. He had 90 minutes during the middle of the day, between his wife taking their baby to Great Ormond Street Hospital and the arrival of the cleaner, to deal with the body. Hume laid out the body on the kitchen floor, then chopped off the legs and severed the head. He used a linoleum knife for cutting through the skin and flesh and a hacksaw for chopping through bone. He wrapped up the legs, still with shoes and socks on, and the suit in a piece of

23. Now Part 10 of the Criminal Justice Act 2003 permits a retrial for serious offences in careful proscribed circumstances.

felt which he tied up with rope. Then he found a cardboard box containing tins of baked beans, which he emptied and put in it the head and some rubble to weigh it down. Finally, he wrapped the torso, with lead weights, in a blanket, which he tied up and put back in the coal cupboard. After cleaning up the kitchen and just before the cleaner arrived, Hume walked out of the flat with Tony. The dagger, linoleum knife and hacksaw were wrapped up in his raincoat pocket and he carried the parcel containing the legs under one arm and the box containing the head under the other. He drove in a hired car to Elstree airport, where he loaded his cargo onto an Auster aeroplane and left Tony at the airport. Hume flew south over the English Channel, where he jettisoned first the dagger, knife and hacksaw and then the parcel and the box. Looking down, Hume could see that his cargo had disappeared below the waves. He turned the plane round and flew to Southend airport, from where he returned to the flat by taxi. The following morning, he arranged for a local decorator to come to the flat to have some of the floorboards properly stained and varnished. He then went to Elstree airport to collect Tony and his hired car. When he got back to the flat, the decorator was already at work on the floorboards, so Hume was able to enlist his help in carrying the torso, wrapped in its blanket, out of the flat and down the stairs to the car. Hume, with Tony as his companion, drove to Southend airport. As he was struggling to load the parcel onto the plane, an engineer saw him and asked what was in the parcel. *"Fish"* said Hume, declining the engineer's offer of help. Hume placed the torso on the seat beside him and Tony jumped into the back. This time Hume flew out over the North Sea. Pushing the torso out of the plane door was much more of a challenge than jettisoning the previous day's cargo; particularly as he did not want Tony to fall out of the plane as well. As he pushed the torso out of the door, he saw that the lead weights had become detached and fell to the sea separately from the torso, which came to rest on the surface of the sea, from where it began its nautical journey to the Essex marshes.

Had the torso sunk, Hume would indeed have got away with murder. Once he was arrested, he worked out a story which fitted with what the police knew. He invented Maxie, Green and "The Boy" and based his descriptions of them on the features of the police officers who interrogated him.

In November 1958, the Daily Herald, describing Hume as a *"flamboyant man about town"*, reported that he was wanted by the police in connection with the attempted murder of a bank clerk in a robbery of the Brentford branch of the Midland Bank and a second attempted robbery of the same bank a few months later. Hume had left England before the Sunday Pictorial published his confession and based himself in Switzerland, where he had become engaged to a red-headed hairdresser, called Trudi Sommers. When he needed money, he returned to England to rob banks, or at least the Brentford branch of Midland Bank. In January 1959 he was arrested in Zurich for attempted armed robbery of a bank in that city, the attempted murder of a cashier and the murder of a taxi driver as he tried to escape the scene of the failed robbery.

In September 1959, he was tried by a Swiss court in Winterthur and convicted on all charges and sentenced to life imprisonment with hard labour (with the first three months being spent in solitary confinement). In 1976 he was transferred to England and sent to Broadmoor. At some point he was released, because he died in 1998 in the grounds of a hotel near Basingstoke, where he lived.

Chambers at the beginning of 1951

By the standards of the time, by early 1951, Cyril Salmon's chambers were prospering and could consider expanding into rooms in the basement of 4 Paper Buildings. The next article will describe the changes in chambers in the 1950s, the practices of Salmon, Duveen and Potter before they became judges, Arthur Figgis's background and the arrival of some new members – Christopher Lubbock, Adrian Head and Muir Hunter – and a new junior clerk, Tony Allen.

Acknowledgements

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

Bibliography

Dicey, Morris & Collins, The Conflict of Laws, 15th ed

Neville Faulks, No Mitigating Circumstances, William Kimber, 1977

Linda Goldman and Michael Sherrard, Wigs and Wherefores, a biography of Michael Sherrard, Wildy, Simmonds & Hall, 2008

David Kynaston, Austerity Britain 1945-51, Bloomsbury, 2007

FA Mann, Studies in International Law, Oxford, 1973

Rebecca West, A Train of Powder (Mr Setty and Mr Hume), Viking Press 1955

John Williams, Hume, portrait of a double murderer, Heinemann, 1960

Oxford Dictionary of National Biography, article on Salmon by Anthony Evans

Obituaries of Salmon in the Times and Daily Mail

British Newspaper Archive

Times Archive

Who Was Who

Wikipedia

News in brief

Chambers Bar Awards 2019

Mark Arnold QC, Felicity Toube QC, Jim Costa and Dylan Playfoot

Very many congratulations to Felicity Toube QC who was named as Company/Insolvency Silk of the Year at the Chambers Bar Awards 2019, held at the London Hilton on Park Lane. South Square was also, for the third year running, named as Company/ Insolvency Set of the Year. A huge thank you to all our clients and friends for you continued support.

Hannah Thornley

Hannah Thornley has been appointed to the Attorney General's Panel of Counsel to the Crown (B Panel). Competition for places on the panels is fierce and only advocates of the highest quality are chosen.

International Women's Insolvency & Restructuring Confederation

South Square was delighted to be involved in the IWIRC conference in September this year.

Felicity Toube QC, pictured here with (L to R) Liz Osborne (Akin Gump) Stephane Bonifassi (Bonifassi Avocats) and Willem van Nielen (Recoup Advocaten), spoke on a IWIRC/INSOL Europe breakfast panel discussion on recent cases in the UK and Europe, touching on cross-border restructuring issues and the challenges of jurisdiction choice.

We were also delighted to sponsor the networking lunch at the inaugural GRR Live – IWIRC London Women in Restructuring event on 7 November 2019 at London's Painters' Hall. Hannah Thornley was part of the steering committee.

London International Disputes Week

Following a very successful inaugural event earlier this year, LIDW returns in May 2020. LIDW is the first event of its kind collectively organised by a group of leading barristers chambers, law firms, legal publishers and dispute resolution organisations.

The event will explore the future of international dispute resolution and celebrate the heritage of London as a leading centre for handling international disputes, through a programme of interactive sessions and networking events.

Look out for further details and booking information in the next edition of the Digest.

Treasury Insolvency "Cash Grab"

Under legislation included in the draft Finance Bill, the Government plans that, from 6 April 2020, certain tax debts owed by insolvency companies (including VAT, PAYE and employee NICs) will be repaid to HMRC in priority to debts owed to unsecured creditors and floating charge holders, including a company's suppliers and its pension scheme. HMRC is currently repaid alongside other unsecured creditors.

Whist these changes were announced in the 2018 Budget, leading business groups and insolvency experts have now written to the Chancellor to warn that giving priority to HMRC over other creditors in an insolvency will have damaging consequences for the UK economy. The signatories say that such proposals would make it more difficult to rescue a business, would increase the impact of an insolvency on other businesses and would limit access to finance throughout the economy.

Litigant in Person jailed over failed Denton test

A litigant in person has been jailed for faling the three stage *Denton* test for relief from sanctions.

Mr Su had been made subject to a committal order by Sir Michael Burton, sitting as a High Court Judge, in March 2019 for multiple breeches of orders requiring disclosure of assets, freezing orders and orders requiring him not to leave the jurisdiction. The deadline to file a notice of appeal was 19 April, but the notice was eventually filed on 27 August 2019.

Lord Justice Lewison, presiding over *Lakatamia v Su* in the Court of Appeal, decided that Mr Su should not be treated more leniently because he was acting as a litigant in person and rejected his attempts to excuse his lateness and the submission he did not have access to the necessary £1,199 for the court fee. The judge refused the application to extend time, a decision agreed by Lady Justice Asplin.

Barrister suspended for Facebook posts

In October the Bar Standards Board issued new guidance to barristers, warning them that they could face disciplinary action if they post 'distasteful' comments online, take part in 'heated' internet debates or even reveal their location via social media (in case by so doing they inadvertently reveal for whom they are acting).

Such advice, however, came too late for Richard Miles, against whom the BSB brought charges of professional misconduct after he posted a number of offensive and disparaging comments about a member of the public on a Facebook chat forum. He has been suspended from practice for 10 months.

The BSB has made it clear that they regulatory guidelines cover all content, whether posted in a professional or personal capacity.

News in brief

Lord Harley rides again

Regular readers of the Digest may well remember self-styled 'Lord Harley of Counsel' (real name Dr Alan Blacker), the solicitor who created a CV full of far-fetched claims which resulted in him being struck off by the SRA in 2006 and made bankrupt in 2008.

Seemingly unable the stay out of trouble, Dr. Blacker has once again fallen foul of the law, accused of benefit fraud and illegally pocketing £60,000 in disability handouts, including a high rate disability component that is usually applicable to claimants who have no legs or feet, or who are 100% blind and/or 80% deaf.

Appearing at Manchester's Minshull Street Crown Court in late October, Blacker is accused of failing to notify the Department for Work and Pensions (DWP) of a change in his circumstances and dishonestly making statements about his physical capacity, which he denies.

The court heard how the 47-year-old had allegedly claimed he was only able to walk with "much intrepidity, pain and fear of falling after only 20 yards". But the jury reportedly heard how Blacker, struck off in 2016 after multiple misconduct charges were proven, was filmed by investigators "moving with ease" at Cardiff Crown Court in 2014 following a trial victory. (Blacker is now a solicitor advocate and practices law through a charity.) He is also said to have helped build a model railway and took part in first-aid training — which required physical action — while claiming state handouts between September 1997 and October 2015.

The DWP stopped his benefits in 2016 following a review. The trial continues.

Lawtech investment at £62m in 2019

Research by Thomson Reuters and Legal Geek has revealed that investment in UK legal technology has almost tripled in the past two years, with start-ups receiving £61m in 2018 and £62m invested in UK lawtech start-ups so far this year, compared to £22.2m in 2017 and just £2.5m in 2016.

The UK has generated 44% of all lawtech start-ups in the EU, almost double its share of the European legal services market (23%). The report suggests the rapid development of the sector is the result of an extensive network of 'tech labs' created by law firms, universities and other corporate organisations.

Spanish court blocks David Guetta London arbitration

A Spanish court has used the European Insolvency Regulation (EIR) to void an English arbitration clause contained in a contract between the French DJ David Guetta and the Spanish-based insolvent concert promoter Delfuego Booking.

Guetta's representatives had signed a contract, governed by English law and which specified that any dispute over its terms would be resolved through a London-based arbitration, guaranteeing his performance at a concert in Santander in July 2018. In the event, Guetta claimed that travel difficulties meant he was unable to get to the concert and returned part of the €203,000 performance fee.

In September 2018 Delfeugo entered Spanish insolvency proceedings and is now hoping to bring a €600,000 claim against Guetta in the Spanish courts to recover the balance of the performance fee, expenses and damages. To that end, it asked the Santander Commercial Court to set aside the arbitration clause, stating a London arbitration would frustrate its insolvency proceedings through delays and additional costs.

On 30 September 2019, the court found that, under the EIR's conflicts of law rule, the arbitration clause was subordinate to the laws of Spain, where the insolvency proceedings were taking place. The EIR states that the lex concursus determines the effect of insolvency proceedings on contracts that a debtor is a party to and, as Delfeurgo's insolvency proceedings were opened in Spain, the court found that the contract with Guetta would be subject to Spanish law. Contra to the 2009 judgment of the English High Court in *Syska & Anor v Vivendi Universal*, the judge found that the location of the arbitration panel did not need to be considered as the arbitration was a pending proceeding and there was, therefore, no question of English law to consider.

Counsel for Guetta did not appear. He had until 19 October to file an appeal.

Hays Travel buys Thomas Cook retail estate

Following the collapse of Thomas Cook in the early hours of 23 September 2019, Hays Travel (the country's largest independent travel agent) has agreed to acquire 555 stores around the UK, providing re-employment opportunities for a significant number of former employees of the Thomas Cook retail operations.

Thomas Cook's Indian, Chinese, German and Nordic subsidiaries will continue to trade as normal as, from a legal standpoint, they are considered separate to the UK parent company and are not under the jurisdiction of the UK's Official Receiver.

Thomas Cook had secured a £900m rescue deal, led by its largest shareholder, Chinese firm Fosun, in August but a demand from its banks to raise a further £200m in contingency funding put the deal in doubt. The company blamed a series of issues for its problems, including political unrest in holiday destinations such as Turkey, last summer's prolonged heatwave and customers delaying booking holidays because of Brexit.

What was once considered the mightiest brand in travel had modest origins. In July of 1841 Thomas Cook, the teetotal founder who gave his name to the company, organised a successful one-day rail excursion at a shilling a head for a group of fellow temperance campaigners from Leicester Campbell Street railway station to a rally in Loughborough, eleven miles away.

Whistleblowing judge wins landmark ruling

A judge, who says she was bullied and had a breakdown after speaking out about government cuts, has won a landmark appeal at the Supreme Court.

Overturning a Court of Appeal ruling from 2017, the five Supreme Court justices ruled unanimously that District Judge Claire Gilham could be classified as a "worker" and was therefore entitled to whistleblowing protection.

Following major cuts to the Ministry of Justice budget from 2010 District Judge Gilham had raised the matter of a lack of secure court rooms, a severely increased workload and administrative failures with her senior court staff. The judge, who sat at Warrington County Court in Cheshire, claimed that as a result of her complaints, she was seriously bullied, ignored and undermined by her fellow judges and court staff.

The Supreme Court ruling means her case can now be heard at an employment tribunal.

Convicted bank robber makes 5-day closing speech to court

Under German law, a defendant is given the opportunity to have a "last word" after a verdict is given. Most defendants generally use the time to show remorse or say nothing. However, 71-year-old Michael Jaurenik (who has previous convictions for a series of bank robberies in the 1970's and 80's and led a 5-day prison riot in Hamburg's Fuhlsbüttel prison in 1990) ranted about allegedly incompetent investigators during a "last word" speech which spanned 5 days.

A district court in Hamburg, Germany, sentenced Jauernik to more than 12 years in jail for three bank robberies, attempted murder and violation of weapons law. As the verdict was delivered Jaurenik, who wores sunglasses throughout the entire proceedings, continually interrupted the judge.

Jauernik's lawyer, Johannes Rauwald, told German media that his client would appeal the sentence.

News in brief

Airline Insolvency Measures in Queen's Speech

Regulators will be given the power to grant temporary airline operating licences to carriers which go bust in measures unveiled as part of the Queen's Speech to Parliament on 14 October 2019. Currently, these licences are withdrawn when airlines become insolvent, meaning their aircraft are effectively grounded and other aircraft and crews are used in the event of an airline's collapse.

These proposals, which follow the government's Airline Insolvency Review, would allow regulators could make use of the troubled airline's planes and crews to bring passengers home. The legislation follows the recent collapse of Monarch and Thomas Cook, in which the government and the Civil Aviation Authority were responsible for repatriating passengers.

Historic paper maker Arjowiggins bought from administration

The mangers of an historic UK paper maker, Arjowiggins Creative Papers, which owns two paper mills dating back to the 1700s have bought the company out of administration.

The company had been trading in administration since January 2019 following insolvency proceedings against French parent companies Arjowiggins and Sequana. The management buy-out covers Arjowiggins Fine Papers, which runs the group's Stoneywood mill in Aberdeen plus an office in Basingstoke, and Arjowiggins Chartham, which operates the Chartham mill in Canterbury.

The Stoneywood mill pioneered the production of fine paper in the 1800s and now manufactures products under well-known brands such as Conqueror. The Chartham mill, one of the oldest employers in the area, specialises in the production of translucent papers.

'Boris Bus' maker enters administration

Northern Irish engineering company, Wrightbus, entered administration at the end of September. Founded in 1946 and based in Ballymena, County Antrim, Wrightbus was the only remaining UK-owned bus manufacturer.

In 2012 it secured a major deal to produce a fleet of hybrid diesel/electric busses for London, commonly dubbed the 'Boris Bus' after the then-Mayor, Boris Johnson. Johnson's successor, Sadiq Khan stpped ordering the busses four year later. The company also produced buses for customers in Hong Kong, Singapore and Chile.

Cash flow problems forced two rounds of redundancies in 2018 but a failure to securer a rescue bid resulted in the company falling into administration. The administrators have confirmed that all but 50 of the company's 1,250 employees were immediately made redundant.

Diary dates

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

Autumn 2019 onwards

23 November 2019
Annual Bar & Young Bar Conference
Grand Connaught Rooms, London

January 2020
Chancery Bar Association Annual Conference
Further details to follow

6 February 2020
International Insolvency Institute EMEA Seminar
London

25 February 2020
Westminster Legal Policy Forum
London

15–18 March 2020
INSOL Annual Conference
Cape Town, South Africa

3 April 2020
Insolvency Lawyers Association Annual Conference
11 Cavendish Square, London

13–15 May 2020
R3 Annual Conference
Beaumont Estate, Windsor

4 June 2020
INSOL Channel Islands One Day Seminar
Radisson Blu Waterfront Hotel, St Helier, Jersey

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

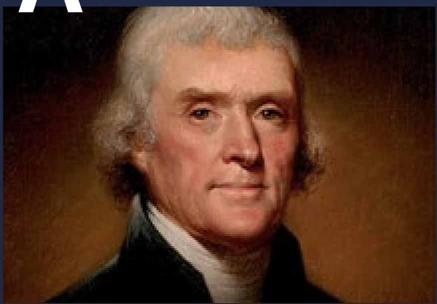
South Square also runs a programme of in-house talks and seminars – both in Chambers and on-site at our client premises – covering important recent decisions in our specialist areas of practice, as well as topics specifically requested by clients.

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

SOUTH SQUARE COMPETITION

SET BY
Martin Pascoe

A



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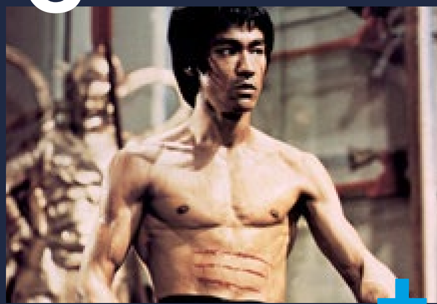

JULY CHALLENGE ANSWERS

1. Baroness Scotland. First woman appointed Attorney General for England and Wales and Advocate General for Northern Ireland, 2007
2. Cornelia Sorabji. First woman at Oxford University to sit the Bachelor of Civil Law examinations, 1892
3. Lady Arden. First female High Court Judge assigned to the Chancery Division, 1993
4. Dame Rose Heilbron QC. First woman to be awarded a scholarship at Gray's Inn, 1936
5. Eliza Orme. First woman to gain a law degree, having previously been refused permission to the Law Society's exams to become a solicitor, 1888
6. Dame Elizabeth Lane. 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, 1965
7. Baroness Hale. First women Justice of the Supreme Court, 2009
8. Sybil Campbell. First women to be appointed to the professional judiciary full-time, 1945
9. Barbara Calvert. First female head of Chambers, at 4 Brick Court, also know the 'Monstrous Regimen of Women', 1974

Enter our November 2019 South Square Competition and you could win a magnum of champagne and a brand new Samsung Galaxy Tab A!

For this, our final competition of the year, all you have to do is look at the sets of pictures, work out to what they are clues, and then identify the link between all the answers.

ENTRY DETAILS

Please send our answers to Kirsten either by e-mail to kirstendent@southsquare.com, or to the address on the back cover, by 7 January 2020. The winner, drawn from the wig tin, will receive a magnum of champagne, a Samsung Galaxy Tab A and one of our much-coveted South Square umbrellas!
Best of luck!

D

E

F

G

We had many correct answers for this competition and the winner, drawn from the wig tin, is Lucinda Orr of Enyo Law to whom we send our congratulations, a magnum of champagne and a South Square Umbrella.

SOUTH SQUARE

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

Michael Crystal QC
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Richard Hacker QC
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Richard Fisher
Stephen Robins
Marcus Haywood
Hannah Thornley
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Georgina Peters
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