Digest

SOUTH SQUARE

Brexit: to IP Completion Day and Beyond

Mark Phillips QC on whether the UK will be flying, or at least falling, with style

British Virgin Islands: A liquidator's year

Harneys BVI's Andrew Thorp and Peter Ferrer on an important year for liquidators

Litigation Funding in Insolvency

Stefanie Wilkins and Burford Capital's Robin Ganguly take a global look at litigation funding

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

In this issue

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SOUTH SQUARE

From the editors

MARCUS HAYWOOD AND WILLIAM WILLSON

Welcome to first edition of the South Square Digest for 2020

The start of 2020 has already seen a number of significant events around the world. On 31 January 2020, the UK left the EU and has now entered the 11-month "implementation" period. Finally, we've reached the end of the beginning. But time is short and much is to be decided. The negotiators are primed and the red lines have been drawn. Will there be a "Canada-style deal" with the EU, some other form of deal or no deal at all? After last editorial's (mis-) prediction that *"the surest [general election] bet looks like a record number of non-Conservative and non-Labour MPs in Parliament"*, we're keeping quiet this time.

In other news, over 15 years after the SARS outbreak, the world is facing another Coronavirus epidemic, COVID-19. Whilst the world's press has understandably focused to date on the human impact, there are grave economic consequences. When the WHO has warned that the outbreak has reached pandemic potential, the IMF replied that it is the *"most pressing uncertainty"* facing the world economy right. In late February European stock markets endured their worst session in 5 years. Millions of companies in China are struggling to stay afloat. Bloomberg has reported that only one third of Chinese SMEs had sufficient cash to cover fixed expenses for a month, with another third running out in two months. The global economic shockwaves are potentially catastrophic.

Ever topical, this edition of the Digest kicks off with an article by Mark Phillips QC in which he continues his Brexit series with a detailed analysis of the applicable laws during the "implementation" period and some of the important issues that are likely to affect us in the months ahead.

Moving from Europe to the Caribbean, we have an article from Andrew Thorp and Peter Ferrer of Harneys, British Virgin Islands, which reviews the important insolvency law related developments in the BVI over the last twelve months.

With an unerring eye on other important developments in the offshore world, we have a joint article from Alex Horsbrugh-Porter of Ogier, Guernsey and Daniel Judd of Chambers updating us on Guernsey's new insolvency law passed on 15 January 2020.

Given the increasing importance of litigation funding to lawyers and insolvency practitioners in complex international cases, we also have an article by Robin Ganguly of Burford Capital and Chambers' Stefanie Wilkins which examines the state of the law regarding litigation funding in insolvency in key litigation hubs around the world.

In another joint article, Piers Elliott of Henderson & Jones and Matthew Abraham consider the equally important and not unrelated topic of an administrator's duties when considering whether to pursue or assign litigation and the practical steps that can be taken to minimise the risk of claims being brought against administrators.

And in our regular "Legal Eye" piece, Madeleine Jones considers the future of "online justice" and how that might look. Meanwhile, Professor Christoph Paulus continues his regular Euroland column and updates us of recent developments of interest on the continent.

The period since the last edition of the Digest was published in November

2019, has also seen the handing down of judgments in a number of important cases including the decision of the Supreme Court in *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* and the decision of the Privy Council in *Pearson v Primeo* Fund. A summary of these cases, along with other cases of note, many involving members of Chambers, appear as always in the Case Digests.

And of course, we have the Digest Quiz, which in this edition adopts a sporting theme.

In other news, South Square is delighted to announce that Richard Fisher is to be appointed Queen's Counsel following the 2019 competition. The QC Ceremony will take place on Monday 16 March 2020 at Westminster Hall.

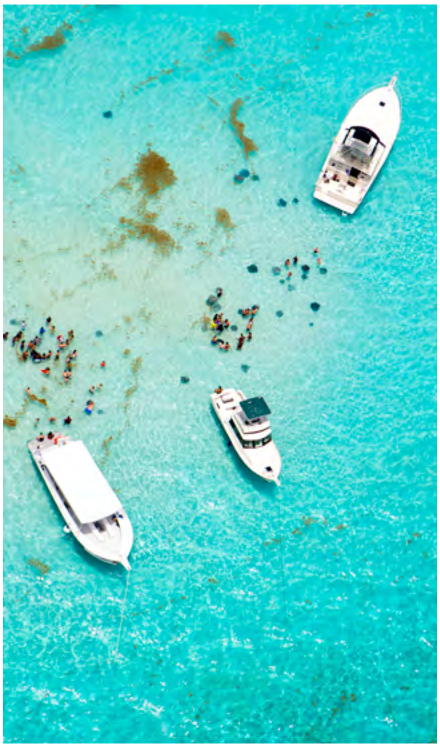
We also welcome Frank Newbould QC as an Associate Member of Chambers from January of this year. Frank is well-known and highly respected in the world of restructuring. Prior to his retirement from the bench, he was a Judge of the Ontario Superior Court of Justice and from 2013 to 2017 head of the Commercial List in Toronto, Canada's leading commercial court. A full article about his Associate Membership of Chambers appears later in this edition of the Digest.

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 & William Willson



Brexit: *to IP completion day and beyond!*

MARK PHILLIPS QC

Throughout the Brexit saga I have compared the process to a stressful car journey with noisy children fighting in the back. I cannot describe 11pm on Friday 31st January 2020 as the arrival of our surviving travellers at their final destination. They might be said to have driven to the airport, boarded the aircraft and left airport EU, but where they might land is something we will discover over the rest of 2020. The UK has passed through the door marked 'exit' and is no longer a Member State of the EU. However, until after completion of the "implementation period"[1], and probably beyond[2], the UK will continue to apply EU laws. The "implementation period" is the "transition or implementation period… beginning with exit day and ending on IP completion day, 31st December 2020."[3] During that period the UK and the EU will work towards entering into the more permanent arrangements to which the UK and the EU aspired in the Political Declaration. For the period following completion of the Implementation Period the provisions that would have applied following exit day under the original Withdrawal Act will, in broad terms, and subject to agreements in the meantime, apply. Those provisions are likely to be superseded by agreements made during the implementation period. In the context of insolvency and restructuring it would be surprising if no agreement could be made in the next 11 months to replicate, as between the UK and the EU, the provisions of the EU Insolvency Regulation, particularly given that absent agreement, the EU Insolvency Regulation will become UK domestic law.

There are now four sources of the rules that govern our legal relationship with the EU in the future. The European Communities Act 1972 (the "ECA 72"), which will not be repealed in full until after the IP completion day, the European Union (Withdrawal) Act 2018 (the "Withdrawal Act"), that has in turn been amended and supplemented by the European (Withdrawal Agreement) Act 2020 (the "Withdrawal Agreement Act"), which in turn gives effect to the withdrawal agreement.[4] There is also the Political Declaration but that does not give rise to present legal rights or obligations during the implementation period. The Political Declaration[5] is important in assessing what the UK's relationship will be after the end of the implementation period, the "IP Completion Day".[6]

The European Union (Withdrawal) Act 2018

For the next 11 months, whilst we keep one eye on the negotiations for the future relationship between the EU and the UK, the UK will continue to apply parts of the ECA 72. After completion of the implementation period, subject to any agreements made in the meantime, the UK will apply domestic law that incorporates provisions of EU law that are operative on IP Completion Day.

Part 1: the laws applicable during the Implementation Period

The continued application of the European Communities Act 1972 during the implementation period

The ECA 72 is repealed on exit day[7] but there is now an important saving for the implementation period. The Withdrawal Agreement Act introduced sections 1A and 1B into the Withdrawal Act:

1. As a result of the new mechanism in the saving of parts of the European Communities Act 1972 during the implementation period.

2. As explained below, section 3 of the Withdrawal Act provides that the operative provisions of EU law on completion of the Implementation Period become UK domestic law. That will be affected by two things, what the operative provisions are on that date and whether they have been superseded by agreements between the EU and the UK.

3. Section 1A of the Withdrawal Act, introduced by section 1 of the Withdrawal Agreement Act.

4. The "Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018".

5. The "Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom".

6. "IP completion day" means 31 December 2020 at 11.00 p.m (section 39(1) Withdrawal Agreement Act 2020). References in the Withdrawal Agreement Act 2020 to "before, after or on IP completion day, or to beginning with IP completion day, are to be read as references to before, after or at 11.00 p.m. on 31 December 2020 or (as the case may be) to beginning with 11.00 p.m. on that day (section 39(2) Withdrawal Agreement Act 2020).

7. Section 1 of the Withdrawal Act.

"1A(2) The European Communities Act 1972, as it has effect in domestic law .. immediately before exit day, continues to have effect in domestic law or the law of the relevant territory on and after exit day so far as provided by subsections (3) to (5) ."[8]

Section 1A(3) provides that the ECA 72 has effect on and after exit day as if references to "the Treaties" and "the EU Treaties" included part 4 of the withdrawal agreement, but are otherwise limited to anything falling within the definitions before exit day and "so far as it is not excluded by regulations made on or after exit day by a Minister of the Crown"[9]. The UK is treated "as if it were a member of the EU during the implementation period."[10] For the implementation period this replaces section 3 of the Withdrawal Act, which originally applied from exit day. Rather than incorporate EU laws into UK domestic laws, which is the mechanism adopted by section 3 of the Withdrawal Act, section 1A continues the effect of the European Communities Act 1972, by reference to EU law on exit day until IP Completion day. It is a relatively simple transition provision.

In addition, section 1B of the Withdrawal Act provides for further savings for EU derived domestic legislation during the Implementation Period. EU derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day.[11] The EU derived legislation[12] is to be read "so far as the context permits" as if references to EU law and related matters "were a reference so far as it is applicable to and in the UK by virtue of Part 4 of the withdrawal agreement."[13]

Saving provision during the Implementation Period

Section 8(1) of the Withdrawal Act provided that a Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate any failure of retained EU law to operate effectively, or any other deficiency in retained EU law, arising from the withdrawal of the UK from the EU. The Withdrawal Agreement Act has added section 8A of the Withdrawal Act. That gives a Minister the power by regulations to provide for modifications[14], or to disapply subsections 1B(3) or (4)[15] to particular cases or descriptions of cases[16] and make different provision in such cases[17] and to "make such provision not falling within paragraph (a), (b), (c) or (d) as the Minister considers appropriate for any purpose of, or otherwise in connection with Part 4 of the withdrawal agreement."[18] Schedule 7 of the Withdrawal Agreement Act provides for Parliamentary scrutiny of the power under section 8.[19]

Review of new EU laws during the Implementation Period

During the implementation period provision has been made for the review of EU legislation.[20] A review is triggered by the European Scrutiny Select Committee of the House of Commons ("the ESSC"). If the ESSC publishes a report in respect of any EU legislation made, or which may be made during the implementation period that (a) states that in the opinion of the ESSC the EU legislation raises a matter of vital national interest to the UK, (b) confirms that the ESSC has taken such evidence as it considers appropriate as to the effect of the EU legislation and has consulted any Departmental Select Committee of the House of Commons which the ESSC considers also has an interest in the EU legislation and (c) sets out the wording of a motion to be moved in the House of Commons,[21] a Minister must[22] make arrangements for the proposed motion to be debated and voted on by the House of Commons.[23] This provision is necessary because of the different mechanism introduced by the Withdrawal Agreement Act. Leaving the ECA 72 in force leaves the UK subject to new EU laws introduced during the implementation period. The previous mechanism crystallised EU law on exit day and incorporated that into UK laws. Given that EU laws will change during the implementation period, this provision is necessary. The review procedure gives the UK the opportunity not to adopt new EU provisions if those provisions raise an issue of vital national interest. In the insolvency context 2019 saw the introduction of the EU Restructuring Directive (EU/2019/1023). Whilst it does not appear likely that further insolvency related directives will be introduced during 2020, it is unlikely that they would raise issues of vital national interest, so they will become part of the retained EU law that is adopted by the UK under section 3 of the Withdrawal Agreement on IP Completion day.

The rights, liabilities, obligations and restrictions arising under the Withdrawal Agreement

The Withdrawal Agreement Act was passed with little debate. Amongst the new provisions is one that has not yet received much attention but which appears to be of potential far reaching effect. Rather than the mechanism previously in the Withdrawal Act, namely, the adoption into UK laws of EU law as it stood on exit day, the Withdrawal Agreement Act adopts a different mechanism; the ECA 72 continues in force during the transitional period but is subjected to the terms of the Withdrawal Agreement. The Withdrawal Act (as amended by the Withdrawal Agreement Act) gives legal effect to the "rights, liabilities, obligations and restrictions" from time to time created or arising by or under the withdrawal agreement.[24] Section 7A(2) provides:

"(2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be –

(a) recognised and available in domestic law, and

(b) enforced, allowed and followed accordingly."

8. Subsections (3) to (5) deals with references to treaties, objects of the EU and ancillary matters that are necessary because the UK is no longer a Member State.

9. Section 1A(3)(a) of the Withdrawal Act.

10. Section 1A(3)(e) of the Withdrawal Act.

11. Section 1B(2) of the Withdrawal Act.

12. EU derived domestic legislation is defined in section 1B(7) of the Withdrawal Act. In essence it is legislation made under or for a purpose mentioned in the ECA 72.

13. Section 1B(3) of the Withdrawal Act.

14. Sections 8A(1)(a) and 1(B)(3)(f)(i) of the Withdrawal Act. This is not limited to modifications necessary for part 4 of the Withdrawal Agreement which is provided for expressly in 1(B)(3)(f)(ii).

15. EU-derived domestic legislation both before and after exit day, up to IP completion day.

16. Section 8A(1)(b) of the Withdrawal Act.

17. Section 8A(1)(c) of the Withdrawal Act.

18. Section 8A(1)(e) of the Withdrawal Act.

19. This power continues for 2 years after the IP Completion day, section 8A(2) of the Withdrawal Act.

20. Section 13A of the Withdrawal Act introduced by section 29 of the Withdrawal Agreement Act. This includes amendments to the EU Treaty, and any new EU Regulations and EU Directives.

21. Section 13A(1) of the Withdrawal Act.

22. Within 14 Commons sitting days beginning with the day on which the report is published.

23. Section 13A(2) of the Withdrawal Act. There are similar provisions requiring motions to be debated by the House of Lords (section 13A(3) and (4) of the Withdrawal Act).

24. Section 7A of the Withdrawal Act, introduced by section 5 of the Withdrawal Agreement Act.

> *"The provisions of this Agreement and the provisions of the Union law made applicable by this Agreement shall produce in respect of and in the [UK] the same legal effects as those which they produce within the Union and its Member States"*

On its face this could give rise to numerous claims by individuals or legal entities asserting that things have been done that infringe their rights that arise as a result of the withdrawal agreement. The Explanatory notes say that "where provisions of the Withdrawal Agreement (or EU law made applicable by it) are capable of having direct effect, the Bill enables legal or natural persons to rely directly on those provisions in UK courts." Enforcement is "available in domestic law", and the power to enforce is generally available. It is intended to apply to all "powers, liabilities, obligations, restrictions, remedies and procedures" that are capable of having direct effect.[25] Article 4 of the Withdrawal Agreement informs the scope of section 7A:

> "*1. The provisions of this Agreement and the provisions of the Union law made applicable by this Agreement shall produce in respect of and in the [UK] the same legal effects as those which they produce within the Union and its Member States.*
>
> *Accordingly, legal or natural persons shall in particular be able to rely on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.*"

The Explanatory Notes say that section 7A "makes the rights and obligations etc. in the Withdrawal Agreement available in domestic law."[26]

The test of enforceability is first determined by reference to whether or not the right has direct effect. However, section 7A does not only apply only to the EU laws given effect by the Withdrawal Agreement, it applies to the Withdrawal Agreement itself. Article 4 provides that the right to rely on provisions which meet the conditions of direct effect under EU law is "in particular". It could go wider. It should be possible to spell out of the Withdrawal Agreement rights and obligations that can then be enforced.

In an insolvency context, during the implementation period the EU Insolvency Regulation continues in force as if the UK was a Member State. After IP completion day the EU Insolvency Regulation will become UK domestic law (unless it is superseded) and in the UK it will continue to operate, although the UK will be a third country rather than a Member State[27]. There is no need in that context to rely upon rights given by the Withdrawal Agreement because the relevant rights are found in the EU Insolvency Regulation as applied in the UK. However, there could be other rights, and section 7A could give rise to claims by individuals asserting that things have been done that infringe their rights that arise as a result of the withdrawal agreement. If it can be shown that an individual's rights or powers found in the withdrawal agreement have been infringed, or that they should have a remedy, on the face of it that is enforceable. The Prime Minister has said that absent a new agreement the UK will rely on the rights contained in the withdrawal agreement. It is possible that every UK citizen will be able to rely on rights in the withdrawal agreement. It follows that the withdrawal agreement should be analysed through the prism, that of identifying individuals' rights and possibly liabilities, to assess whether or not they are enforceable under section 7A.

In addition section 7(3) provides that "every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2)." Again, this is a general provision. This gives effect to article 4(2) of the Withdrawal Agreement:

25. Provisions meeting the conditions of direct effect is referred to in article 4 of the Withdrawal Agreement.

26. Paragraph 121 of the Explanatory Notes.

27. I have analysed the effect of this change in previous articles in the Digest.

"The [UK] shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation."

On its face it requires the UK courts to read every enactment, whatever its content, subject to the withdrawal agreement.

The Withdrawal Agreement and insolvency

The objective of the withdrawal agreement "is to ensure an orderly withdrawal of the [UK] from the [EU]"[28]. The withdrawal agreement is 584 pages long. In addition to assessing what it says, we need to identify the "rights, powers, liabilities, obligations, restrictions, remedies and procedures". The preamble recognises that EU citizens and UK nationals "have rights under [the withdrawal agreement] that are "enforceable and based on the principle of non-discrimination." That recognition indicates that the rights enforceable under section 7A include at least those types of right. There are numerous rights contained within the Withdrawal Agreement that could be important in an insolvency context, and as 31st December 2020 approaches a great deal of detailed analysis will be required.[29]

Ongoing Judicial cooperation in Civil and Commercial Matters is dealt with in Part 3, Title VI of the Withdrawal Agreement.[30] Rome I[31] applies to contracts concluded before the IP Completion date[32] and Rome II[33] applies to events occurring before the end of the transition period[34]. The Recast Brussels Regulation[35] continues to apply to questions of jurisdiction in respect of legal proceedings instituted before the end of the transition period and in respect of proceedings[36] or actions that are related to such legal proceedings. The Recast Brussels Regulation[37] will also apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period and to court settlements approved or concluded before the end of the transition period.[38]

The EU Insolvency Regulation[39] shall apply to insolvency proceedings in "situations involving the United Kingdom"[40], and to actions deriving directly from insolvency proceedings and closely linked to them[41], provided that the main proceedings are opened before end of the transition period[42]. Depending upon the arrangements following IP Completion day, there may be a number of filings before 31st December 2020 to secure recognition in the EU Member States.

Part 4 of the Withdrawal Agreement

Section 1A(3) provides that the ECA 72 has effect on and after exit day as if references to "the Treaties" and "the EU Treaties" included Part 4 of the Withdrawal Agreement. Part 4 of the Withdrawal Agreement is the Transition provisions. Article 127 provides that during the transition period EU law "shall be applicable to and in the UK during the transition period."

The main operative provision of Part 4 is article 127(1) which provides that "unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period." The applicable EU law produces the same legal effects in the UK as those which it produces within the EU and Member States and it is to be interpreted accordingly.[43]

28. Preamble.

29. For example, the rights of EU professionals, lawyers or accountants being the most obvious, to practice in the UK is protected, and those rights are enforceable by those professionals. In the context of a trading insolvency Articles 40 to 42 provide for the continuing circulation of goods placed on the market before the IP completion date. Article 41 provides that "any good lawfully placed on the in the [EU] or the [UK] before the end of the transition period" may be made available in the EU or the UK until they reach its end user or may be put into service either in the EU or the UK. If an insolvent company has goods circulating in the EU before 31st December 2020, they continue to be available to the company.

30. Articles 66 to 69.

31. Regulation (EC) No 593/2008.

32. Article 66(1)(a) of the Withdrawal Agreement.

33. Regulation (EC) No 864/2007.

34. Article 66(1)(b) of the Withdrawal Agreement.

35. Regulation (EU) No. 1215/2012.

36. Article 67(1)(a) of the Withdrawal Agreement.

37. Regulation (EU) no 1215/2012.

38. Article 67(2)(a) of the Withdrawal Agreement. It is arguable that there is a lacuna in that jurisdiction over proceedings will be taken under the Recast Brussels Regulation provided that the proceedings are commenced before 31st December 2020, but the recognition of court settlements depends on the court settlement being "approved or concluded" before 31st December 2020. The recognition of court settlements would have been better linked to the proceedings. It is possible that there will be proceedings commenced before 31st December 2020 a judgment made in such proceedings would fall within article 67(2)(a) and would be recognised, but a court settlement would not be recognised because it will have been "approved or concluded" after 31st December 2020.

39. Regulation (EU) 2015.848.

40. Article 3 of the Withdrawal Agreement.

Part 2: the applicable laws after the Implementation Period

Adoption into UK domestic law of EU laws applying on IP Completion day

Section 3(1) of the Withdrawal Act now applies after IP Completion day:

"Direct EU legislation, so far as operative immediately before IP Completion day, forms part of domestic law on and after IP Completion day."

Section 3(1) of the Withdrawal Agreement Act has been amended so that section 3(1) applies from IP Completion day, the period after the transition period[44]. As explained above, this mechanism is different to the mechanism in place during the Implementation Period. During the transition period sections 1A and 1B continue to apply the ECA 72 (subject to the withdrawal agreement). Section 3 will incorporate into English law Direct EU legislation on or after IP Completion day.

The starting point to how this will operate is to identify what is "direct EU legislation" and section 3(2) provides that it is *"any EU regulation, EU decision or EU tertiary legislation as it has effect in EU law immediately before IP Completion day so far as it is applicable to and in the UK by virtue of Part 4 of the withdrawal agreement."*[45] It is only the English language version of direct EU legislation that will be brought into domestic law.[46] In the insolvency context, absent any agreements made between now and 31st December 2020, the EU Insolvency Regulation will become part of the UK's domestic laws (in whatever form it is in on 31st December 2020). In that sense there will not be a 'hard brexit'[47] in relation to insolvency.[48] The law then operative will become part of the UK's domestic laws. The UK will no longer be a member state, so the application of the EU Insolvency Regulation will be lop sided; the UK will apply it to EU Member States, but EU Member States will apply it as if the UK is a third country and not a Member State.

Savings

Section 3(5) of the Withdrawal Act provides that the incorporation into English law of EU law is subject to the provisions of section 5 of the Withdrawal Act. Whilst the concept of EU supremacy does not apply to any enactment or rule of law passed or made on or after IP Completion day it continues to apply so far as relates to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP Completion day.[49]

EU Regulations forming part of UK law

Direct EU legislation is operative immediately before IP Completion day if it is in force and applies immediately before IP Completion Day.[50] Section 15 and schedule 5 of the Withdrawal Act make provision for the publication of copies of "direct EU legislation and related information".[51] This includes EU regulations, EU decisions and EU tertiary legislation.[52] In the insolvency context, this means that copies should be produced of the domestic law version of the Recast EU Insolvency Regulation (2015/848).[53]

EU Decisions forming part of UK law

Decisions are operative immediately before exit day if it has been notified to the person before IP Completion Day.[54] The Withdrawal Act provides that there may be publication of copies of "any decision of, or expression of opinion by the CJEU" or "any other document published by an EU entity"[55] Given that there is general access to decisions of the CJEU, it is unlikely to be necessary to exercise this power.

41. Referred to in Article 6(1) of the EU Insolvency Regulation (EU) 2015/648.

42. Article 67(3)(c) of the Withdrawal Agreement.

43. Article 127(3) of the Withdrawal Agreement.

44. IP Completion Day was substituted for exit day by section 25(2) of the Withdrawal Agreement Act.

45. The reference to the withdrawal agreement was inserted by second 25(2)(b)(ii) of the Withdrawal Act. There are exceptions to this definition. It does not include "exempt EU instruments" which are defined in section 20(1) and schedule 6 to the Withdrawal Act, which in broad terms is EU instruments that are not applicable to the UK or it does not include decisions that are not applicable to the UK. There are also exclusions relevant to the EEA Agreement that fall outside the scope of this article.

46. Section 3(4) of the Withdrawal Act. This does not affect the use of other language versions of legislation for the purposes of interpreting the English language version as a matter of English law.

47. By a 'hard brexit' I mean a brexit in which there are no applicable rules between the UK and the EU.

48. The same will be true for many other areas.

49. Section 5(1) and (2) of the Withdrawal Act.

50. Section 3(3)(a) of the Withdrawal Act.

51. Section 15 and schedule 5 of the Withdrawal Act.

52. Schedule 5 of the Withdrawal Act.

53. There will be no need to publish copies of the EU Directives that have been implemented by UK legislation. The extent to which UK laws diverge from those EU Directives after the IP Completion Date is one of the questions that arises during the Implementation Period.

54. Section 3(3)(b) of the Withdrawal Act.

55. Schedule 5 para 1(3) of the Withdrawal Act.

> *After IP completion day the UK Supreme Court will not be bound by any retained EU case law, nor will the High Court in certain criminal matters*

Interpretation and Status of retained EU law

The English Court is not bound by any principles laid down or decisions made by the CJEU[56] after IP completion day, and will no longer refer any matter to the CJEU. Section 6(2) of the Withdrawal Act provides that a court or tribunal may have regard to anything done on or after IP Completion day by the CJEU, another EU entity or the EU, so far as it is relevant to any matter before the court or tribunal. In so far as the law is unmodified, questions as to the validity, meaning or effect of any retained EU law is to be decided in accordance with any retained case law and any retained general principles of EU law, and having regard (among other things) to the limits, immediately before IP Completion day, of EU competences.[57] This could prove significant in the context of the interpretation of the EU Insolvency Regulation. The definition of the COMI is a fundamental concept from which much of the application of the EU Insolvency Regulation flows. That definition is unlikely to change.[58] The effect of section 6(3) of the Withdrawal Act is that the case law and general principles applicable in the EU in relation to the COMI will be applied by the English courts. If there is uniformity across the EU27 and the UK in the application of the COMI, it is less likely that there could be a conflict between the English and EU courts in the insolvency and restructuring context. Whilst COMI is the most significant example, there will be many others.

Whilst the UK's courts will continue to make decisions in accordance with some EU cases and principles, and will have regard to those cases and principles, the Supreme Court will not be bound by any retained EU case law[59] and the High Court will not be bound by any retained EU case law in certain criminal matters and in relation to "retained domestic case law"[60] In deciding whether to depart from any retained EU case law, the Supreme Court or the High Court must apply the same test as it would apply in deciding whether to depart from its own case law.[61] The application of the case law and general principles make it very unlikely that an English court would make a decision contrary to a decision of an EU court. If the English court is aware that its decision would conflict with a decision of an EU court the English court is bound to need a great deal of persuasion, if it can be persuaded at all.

Section 7 of the Withdrawal Act provides that primary or subordinate legislation or other enactments continue to be domestic law on and after IP Completion day as an enactment of the same kind and sets out how such legislation can be amended.

There is provision for rules of evidence, judicial notice and admissibility. The detailed rules in part 2 of schedule 5 to the Withdrawal Act provide that where it is necessary, for the purpose of interpreting retained EU law in legal proceedings, to decide a question as to the meaning or effect in EU law of the validity meaning or effect in EU law of any EU enactment, which will include the EU Insolvency Regulation, the question is to be treated as a question of law and not a question of fact.[65] The practical consequence of this provision will be that questions, for example of the meaning of the COMI as a matter of EU law, will be addressed by submission based upon EU law up to IP Completion date and not upon expert evidence from lawyers in the EU27 countries. English practitioners will not only need to remain current on questions of EU retained law up to 31st December 2020, but will have to maintain that knowledge for so long as the concepts, such as the COMI, remain current.

There are also enabling provisions about judicial notice and admissibility. A Minister may by regulations make provision enabling or requiring judicial notice to be taken of a 'relevant matter',[66] or provide for the admissibility of specified evidence of a 'relevant matter', instruments or documents[67]. 'Relevant matter includes EU law and retained EU law.[68]

Part 3: future negotiations

Article 184 of the Withdrawal Agreement provides:

"The Union and the United Kingdom shall use their best endeavours, in good faith and in full respect of their respective legal orders, to take the necessary steps to negotiate expeditiously the agreements governing their future relationship referred to in the political declaration of 25/11/2018 and to conduct the relevant procedures for the ratification or conclusion of those agreements, with a view to ensuring that those agreements apply, to the extent possible, as from the end of the transition period."

The obligation is to use best endeavours, in good faith to negotiate. It is not the firmest of commitments. However, the question must already have arisen whether conducting the negotiations by press conference, stating publicly in advance what the red lines are, and why there is insufficient time to do a deal, complies with this obligation.

The Political Declaration

The Political Declaration is said to establish "the parameters of an ambitious, broad, deep and flexible partnership across trade and economic cooperation, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation."[69] It is 26 pages long and sets out a high level objectives. Those objectives recognise the "particularly important trading and investment relationship" between the UK and the EU.[70] Whilst there is no reference to insolvency matters there are three aspects of the Political Declaration that should inform the likely future shape of the relationship between the UK and the EU in relation to insolvency matters, trade, services and investment and financial services. The trading relationship is intended to be "as close as possible, with a view to facilitating the ease of legitimate trade."[71] The EU and the UK envisage comprehensive arrangements that will create a free trade area, combining deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field for open and fair competition."[72] The economic partnership between the EU and the UK "should ensure no tariffs, fees, charges or quantitative restrictions across all sectors, with ambitious customs arrangements that… build and improve on the single customs territory provided for in the Withdrawal Agreement which obviates the need for checks on rules of origin."[73] This appears to envisage a high degree of alignment between the UK and EU. As regards services and investment the UK and the EU "should conclude ambitious, comprehensive and balanced arrangements on trade in services and investment in services … respecting each [of the EU and the UK]'s right to regulate…" and the UK and the EU "aim to deliver a level of liberalisation in trade and services and well beyond the Parties' World Trade Organisation commitments."[74]

There are three paragraphs under the heading "Financial Services".[75] The concept at its heart is equivalence. There is a commitment "to preserving financial stability, market integrity, investor and consumer protection and fair competition, while respecting the Parties' regulatory and decision-making autonomy, and their ability to adopt or maintain any measure where necessary for prudential reasons."[76] It is intended that equivalence assessments should start with a view to concluding those assessments by June 2020[77] and it is agreed that "close and structured cooperation on regulatory and supervisory matters is in the UK and EU's mutual interest."[78]

Whilst these provisions are specific to Financial Services, the concept of equivalence is likely to be applied in the context of the future relationship between the UK and the EU in insolvency matters. Modified universalism, a form of equivalence in that it results in a system that applies different, but sufficiently equivalent, aspects of insolvency regimes to a cross border insolvency, rather than apply a single universal system of rules to every aspect. Taken together with the provisions in the Political Declaration on trade and services and investment, there is a strong argument that, in the context of cross border insolvency, the effect of the EU Insolvency Regulation is consistent with the intention behind the Political Declaration and should be adopted in a new bi-lateral cross border insolvency treaty, after IP completion date, that applies across the EU27 and the UK to continue to give continuing effect to the present arrangements.

Conclusion: flying or falling with style?

The car journey in Toy Story ends with Buzz Lightyear about to re-unite with Andy, his kid, with the response to Woody's "Buzz, you're flying", "This isn't flying, it's falling with style". As the UK and EU go beyond IP Completion date will we be flying or falling with style? In the insolvency context there is a system applicable in the context of cross border insolvencies that now avoids the costs and pitfalls of separate territorial insolvency regimes. As Sir Nicholas Browne-Wilkinson VC said in July 1991 when faced with liquidations of BCCI in several jurisdictions "there must be a better way". Between now and December 2020 it should be possible for the UK and EU to enter into similar arrangements. The same is true of the arrangements on recognition and enforcements of Judgments. If that is achieved we will be flying, or at the very least, falling with style. ■

56. Section 6(1) and (2) of the Withdrawal Act 2018. Article 86(2) of the Withdrawal Agreement provides that the CJEU shall continue to have jurisdiction to give preliminary rulings on requests from UK courts and tribunals made before the end of the transition period.

57. Section 6(3) of the Withdrawal Act. Subsection (3) does not prevent the validity, meaning or effect of any retained EU law which has been modified on or after IP Completion day from being decided if doing so is consistent with the intention of the modifications.

58. An indication that this will not be changed is found in the Insolvency (Amendment) (EU Exit) Regulations 2018 which did not alter the definition of the COMI in the context of a 'no deal' Brexit.

59. Section 6(4)(1) of the Withdrawal Act.

60. Defined in section 6(4)(b) of the Withdrawal Act. The Withdrawal Agreement Act has also introduced the possibility that courts or tribunals may not be bound by retained EU case law following regulations passed under section 5A of the Withdrawal Act (section 26(1)(b) of the Withdrawal Agreement Act). A Minister may by regulations provide "the extent to which, or circumstances in which, a relevant court or relevant tribunal is not to be bound by retained EU case law, or the test which a relevant court or relevant tribunal must apply in deciding whether to depart from any retained EU case law." (section 26(1)(d) of the Withdrawal Agreement Act). A Minister is obliged to consult the senior judiciary before making regulations.

61. Section 6(5) of the Withdrawal Act.

62. Section 15(2) of the Withdrawal Act.

63. Section 4 of the Withdrawal Act.

64. Interpreting EU law means deciding any question as to the validity, meaning and effect of any retained EU law.

65. It also applies to the meaning and effect of EU Treaties or any other treaty relating to the EU.

66. Section 4(1)(a) of the Withdrawal Act.

67. Section 4(1)(b) of the Withdrawal Act.

68. Section 4(5) of the Withdrawal Act.

69. Political Declaration paragraph 3.

70. Political Declaration paragraph 16.

71. Political Declaration paragraph 20.

72. Political Declaration paragraph 22. This should be compared to public statements made during January 2020.

73. Political Declaration paragraph 23.

74. Political Declaration paragraph 29.

75. Political Declaration paragraphs 37 to 39.

76. Political Declaration paragraph 37.

77. Political Declaration paragraph 38.

78. Political Declaration paragraph 39. Paragraph 37 refers to close cooperation on regulatory and supervisory matters in international bodies, which will include the Basel Committee on Banking Supervision.

79. There will be difficult questions. For example, the present system depends upon a single decision on the COMI of a company from which many of the subsequent rules governing the insolvency follow. Under the present system a conflict between the Courts of the Member States on that question can be resolved, ultimately at CJEU level. The question how a conflict between a UK court and the court of a Member State over the COMI should be resolved is not straight forward. Current political statements make it highly unlikely that the UK would agree to final determination by CJEU. An alternative approach would be to look to the position under the UNCITRAL Model Law in the context of which there have been such conflicts but no final binding arbiter and the courts in the different jurisdictions have worked to avoid them.

British Virgin Islands
a liquidator's year

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The British Virgin Islands (BVI) has always produced a rich seam of case law, necessarily diverging from its English common law roots as it interpreted its own statutes and developed themes of its own to fit the unique jurisdiction. The BVI is home to some 400,000 active companies deployed all across the world and utilized for a myriad of purposes. This, paired with a robust commercial court, has fuelled the available jurisprudence.

The last 12 months have not been any different. An increased appetite to explore restructuring options as well as a more dogged determination to trace assets has resulted in litigants pushing the envelope and creating some interesting new law. This article takes a look at some of the key changes and developments for liquidators and looks forward to what comes next for the world's leading asset holding jurisdiction.

A new line in restructuring

The landmark change this year was in *Constellation Overseas Limited*. Constellation is a troubled Brazilian oil and gas drilling group that had entered a reorganizational judicial process, *recuperação judicial*, in Brazil, where it was headquartered. The debt structure was very familiar to restructuring professionals with large swathes of debt held by bondholders and principally governed by New York law. Akin to the other large Latin American restructurings, the process sought Chapter 15 recognition in the USA. This time however, to close any gaps in the moratorium, the appointment of provisional liquidators was sought in the BVI over several vehicles to guard against "predatory creditor claims", the positions held by aggressive debt holders seeking to leverage their position in the restructuring.

The BVI court looked to established precedent in Cayman and Bermuda and found that the BVI Court *"had a very wide common law jurisdiction"* to appoint provisional liquidators for restructuring purposes. It also sought to distinguish the Hong Kong authorities that suggested a more traditional approach in support of liquidations.

The judgment moved away from the troublesome dynamics caused in *OAS* and *Oi*, two large Latin American restructurings that had fallen foul of agitating stakeholders. With creditor approval and no opposition the appointments went through. This, despite the unhelpful wording of the BVI Insolvency Act differing considerably to its Cayman counterpart, which provides specific provisional relief in furtherance of restructuring proposals. The debtor in possession dynamic also sits rather uncomfortably with directors' residual powers post appointment.

Notwithstanding the *"square peg round hole"* deployment of provisional liquidators in such circumstances, the restructuring could complete shortly. This in itself is a lesson that it is time for the BVI to embrace solid restructuring legislation rather than to rely on provisions designed to protect creditors pending a winding-up. Both industry and various committees are committed to pursuing a cutting-edge code required to fit BVI companies' position in the global market place.

Liquidator Flex

It would just be strange if a case round-up did not include a reference to the fallout from the Madoff scandal. Images of Madoff in his trademark Yankees cap outside of his Upper East side pile are now over a decade old. Many junior bankruptcy associates were yet to graduate from High School when news of the vast Ponzi scheme hit the press, yet law is still being made and clarified by estates' administration. Battles have waged over the recalibration of NAVs, seen in the recent Cayman decision in *Weavering* following on from *Fairfield Sentry*. The ability to amend the share register of entities in liquidation to seek to impose a "fair result" has also been under the microscope.

In a more understated review of liquidator powers, the BVI Court recently affirmed liquidators' powers to authorize the transfer of paid-up shares. *In the Matter of Futures One Innovative Fund*, the BVI Commercial Court found that there is no good reason *"not to leave the transfer of shares to the good sense of the liquidator."* What Jack J could not find, however, was the authority to give the liquidator a general pass to provide authorization for future share transfers without court oversight. This raises some questions of consistency and, in some cases, transparency. There is a large, ongoing liquidation that has provided the liquidator with the ability to require conditions on any future transfers of shares. Whilst the Court will be keen to protect the estate's position with respect to claw-back claims and set-offs, potential transferors have, in some cases, struggled to understand the actual order and reasoning, due to the sealing of the court file. Whilst this has implications for secondary market activity, it can also provide an uncomfortable dynamic for stakeholders.

Playing away

Returning to Madoff, the Privy Council was recently engaged again in the *Fairfield Sentry* matter (see *UBS AG New York v Fairfield Sentry* [2019] UKPC 20). This time, a collective of investors sought to block the liquidators of Fairfield from bringing claims in the United States under the voidable transaction provisions of the BVI Insolvency Act. The BVI Court gave leave to the liquidators to initiate the proceedings both under the Act and at common law. The claw-back claims were aimed at investors who had redeemed their positions at falsely inflated valuations. UBS, leading the charge for the investors, had sought an anti-suit injunction restraining Sentry's liquidators from pursuing proceedings in the United States. Their principal argument was that it was the BVI Court alone that should deploy BVI insolvency law. The Privy Council, however, held this to be a misconceived position. The BVI Court had given its blessing to the claims and it was now a matter for the US courts to gauge whether they should apply foreign law.

In further good news for liquidators, it would seem that time travel is not beyond them either, as the BVI Court of Appeal confirmed the ability of liquidators to seek retrospective sanction to enter into transactions disposing of estate assets. In *K&P Managerial Limited v Mr Paul Pretlove, Liquidator of Hadar And Invest Limited (In Liquidation)*, the company held a Moscow property via a wholly owned subsidiary. With no prospect of funding and against a back drop of defaulting loans, the liquidator entered into an agreement with a shareholder with pre-emption rights. The applicants challenged the sale on the basis that it was not at a suitable commercial rate and that there was no jurisdiction for the BVI Court to grant sanction retrospectively. The Court of Appeal agreed with Green J and found that the relevant factors had been taken into account when the transaction was blessed and that was something that the Act clearly provided for retrospectively. Liquidators can take some comfort from this and that it is thematically different from the view the BVI Courts took in the *Farnum Place* decisions. In that instance the liquidators had to seek the shelter of the US courts to disapprove a transaction, struck at a time prior to the huge injection of Picower estate cash into the Madoff SIPA Claim. So, all in all, a good year for liquidators… unless appointed pursuant to a just and equitable winding-up order (as discussed below).

Just and Equitable?

The just and equitable ground which is usually pleaded as standard in England but rarely used had developed a voice of its own in the BVI in recent years. There was a trend to expand the traditional categories pursuant to which an order could be made under the just and equitable grounds under English law. The early statutory introduction of minority oppression remedies (in 2004) provided the BVI Courts with a host of alternative remedies at their disposal. Further protection is supplied by the BVI Insolvency Act that provides that a

> *In Re Ocean Sino Ltd, the Court of Appeal reiterated that a winding up petition was not to be resorted to merely because of dissension within a company.*

liquidation order will only normally be made where there is no alternative remedy available. Traditionally, in cases such *Aris Multi-Strategy Lending Fund Ltd v Quantek Opportunity Fund Ltd*, the BVI Courts have been reluctant to wind-up companies on the basis of their operational function.

However, as part of the Pacific Andes litigation, in *Parkmond Group Limited (in liquidation) v Richtown Development Limited (in liquidation)* (decided in 2017), Justice Kaye acceded to an application on just and equitable grounds on the basis that the directors ought to have been able to provide books and records pursuant to section 98 of the Business Companies Act 2004 particularly in light of allegations of fraud that had been circulating for several years concerning the company. Richtown was described by its directors as performing the treasury facility for the group as a whole. The winding-up petition was based on three grounds, cash-flow and balance sheet insolvency as well as just and equitable grounds.

The applicants were able to show that the company was insolvent on both insolvency tests. The Court then went further to consider the inability of the company's directors to provide accounts and underlying documents to show the true financial position of the company (in accordance with section 98 of the BVI Business Companies Act). It was this failure combined with previous issues of conduct that was enough to provide the basis for a winding-up on just and equitable grounds.

Similarly, in *Re Green Elite Ltd* (decided in 2018), the BVI Court of Appeal overruled the first instance judge and held that there was a loss of substratum sufficient to merit a winding on just and equitable grounds in circumstances where the purpose of the company (to hold shares for an IPO) had been exhausted.

However in the recent case of *Re Ocean Sino Ltd* (January 2020), the Court of Appeal appears to have reverted to tradition and overruled Justice Kaye's decision to place the company into liquidation on just and equitable grounds albeit 3 years after the original order was made. The Court of Appeal reiterated that a winding up petition was not to be resorted to merely because of dissension within a company. Further since the company's constitution, articles and memorandum provided for an exit for a shareholder in the event of deadlock, there could not reasonably have been a finding of deadlock sufficient to satisfy the making of a winding up order on the just and equitable grounds. It remains to be seen what the Privy Council's view will be on this case.

Recognition of Just and Equitable Winding Ups in England

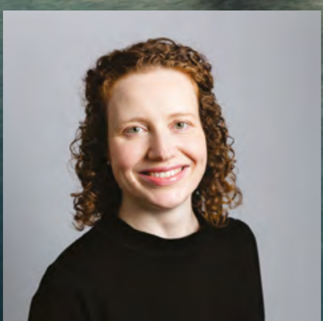
In further news relevant to the recognition of just and equitable winding up order made in the BVI, the English High Court was content in May of last year to recognise the provisional liquidators of Sturgeon Central Asia Balance Fund Ltd as a foreign main proceeding pursuant to the Cross-Border Insolvency Regulations (2006) (CBIR). The recognition was one of the first for a solvent liquidation in England, the JPLs having been appointed following a Bermuda Court of Appeal decision to wind the fund up on just and equitable grounds. However, following an application by a director for the termination of the recognition order made under CBIR, the English High Court reviewed the definition of a "foreign proceeding" contained in the Model Law. To coin a much used phrase on conference calls these days, Chief ICC Judge Briggs carefully "unpacked" the definition. He found that given the background to the CBIR, the commentary and recent guidance, the words "for the purpose" should be read as meaning for the purpose of insolvency (liquidation) or severe financial distress (reorganisation).

It would be contrary to the stated purpose and object of the Model Law to interpret the term "foreign proceeding" to include solvent debtors and more particularly to include actions that are subject to a law relating to insolvency but that have the purpose of producing a return to members not creditors.

This isn't the best news for BVI liquidators and certainly represents something of a clash between old case law and the new world of cross-border recognition.

On the whole, however, liquidators are in good shape in the BVI. Whilst heavyweight legislative reforms are debated, the Commercial Court has formed a pragmatic and flexible approach for their deployment and practice. This bodes well for any forthcoming recession which, as Economics Laureate Paul Sameulson once quipped, has been correctly predicted nine times out of the last five. ■

Litigation funding *in insolvency*



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Litigation funding (also referred to as litigation finance) is a crucial tool in the restructuring and insolvency context to assist insolvent, distressed or cash-poor claimants to maximise returns from litigation assets. It allows stakeholders to pursue valuable claims that otherwise may have to be abandoned or settled, thus increasing recoveries for creditors.

The options for litigation funding are increasingly relevant to lawyers and insolvency practitioners IPs in complex international cases. For example, it is possible for IPs to enter portfolio agreements under which multiple claims can be funded across jurisdictions. Because the cases in the portfolio are "cross-collateralised" (i.e. the funder can take its full entitlement from any case that wins), this arrangement enables funding for both claims and defences, and for cases where the economics would not support funding on a stand-alone basis.

In this article, we examine the state of the law regarding litigation funding in insolvency in key litigation hubs around the world.

England

As a general matter, litigation funding has been permissible in England since the 1960s following advice from the Law Commission that champerty and maintenance were effectively obsolete as crimes and torts; the rules were then subsequently abolished as crimes and torts by ss.13 and 14 of the Criminal Law Act 1967. However, the doctrines of maintenance and champerty continue to exist as rules of public policy, and funding agreements which are contrary to these rules (in their modern form) will be unenforceable.

Modern authorities give some guidance as to the factors that the court will take into account when assessing the validity of any funding agreement. This includes the extent to which the financier controls the litigation. Examples of excessive control might include influencing strategy, seeking to interfere with the client-lawyer relationship; or controlling or meddling in settlement negotiations. A funding agreement has a greater chance of being struck down by the courts as offending rules against maintenance and champerty if the legal finance provider attempts to exercise control over the litigation or stands to recover disproportionate sums.

The Association of Litigation Funders (the ALF) was formed in the wake of Lord Justice Jackson's positive endorsement of litigation finance in his Review of Civil Litigation Costs. In the 2009 report he espoused legal finance as beneficial in that it promoted access to justice. Members of the ALF agree to comply with a Code of Conduct. Under this Code, funders are prevented from taking control of the litigation or settlement negotiations and from causing lawyers to act in breach of their professional duties. It is generally the practice in the UK to keep the roles of financiers, claimants and their lawyers strictly discrete from each other.

In insolvency matters, the Small Business, Enterprise and Employment Act 2015 provides an exception to the usual prohibition on the sale of claims and permits insolvency practitioners to sell officeholder claims (TUV, preference, wrongful trading, etc). Litigation funders can either buy the claims from the Insolvency Practitioner outright, or often for some upfront payment plus a share of the proceeds. The purchase of claims can offer benefits both to the funder, since it allows the funder to control them, and to IPs, since the cash obtained can be used to investigate other potential claims.

Cayman

Maintenance and champerty have not been abolished as offences under Cayman law, and so litigation funding agreements outside the insolvency context have been uncommon – although there are indications that the position is changing (for example, the important judgment in *A Funder v A Company*). Cayman courts have endorsed the modern English approach to the doctrines, which holds that insofar as the doctrines persist, they are "primarily concerned with the protection of the integrity of the litigation process" (as explained in In the Matter of *ICP Strategic Credit Income Fund Limited* [2014] (1) CILR 314).

The use of litigation funding by insolvency practitioners is well-established in Cayman. This is because the liquidator's power to sell the property of the company extends to assigning a share in any proceeds of the company's causes of action.

However, liquidators require the sanction of the court to commence any legal proceedings in the name of the company. In practice, this requires some consideration of how litigation will be financed. In deciding whether to sanction the liquidator in the exercise of their powers, the court will consider whether the transaction is in the commercial best interests of the company, according deference to the liquidator's judgment unless the evidence indicates substantial reason not to do so.

A liquidator may not grant the funder the power to control the litigation in question – in *ICP Strategic* it was said that:

"*... where this court is asked to sanction a litigation funding agreement, its terms will be carefully scrutinized to ensure that it does not directly confer upon the funder any right to interfere in the conduct of the litigation or indirectly put the funder in a position in which it will be able, as a practical matter, to exert undue influence or control over the litigation.*"

The statutory power to assign the proceeds of a cause of action does not extend, however, to claims which vest personally in the liquidator.

BVI

Litigation funding is used in the BVI, although there has been remarkably little case law on the circumstances in which it will be permissible. There are no reported judgments in which the legality of litigation funding has been directly addressed, although it is possible to find judgments in which the use of funding was referred to by the court (without it being necessary for the court to rule on issues of legality). In the insolvency context, there are anecdotal suggestions that the court is willing to countenance funding (although the court files are often sealed in such cases, so that the judgments are not publicly available).

Against this background, the recent judgment of *Ieremeieva v Estera Corporate Services (BVI) Ltd* has provided some welcome guidance on the court's attitude to the question of champerty. Wallbank J recognised the possibility that commercial litigation funding might provide access to justice, whilst also noting that the doctrine of champerty would serve to curtail agreements that might affect the integrity of the curial process, stating:

"The Court is concerned to uphold the very long-standing public policy behind the disapproval of champerty, namely that third parties (typically solicitors who might be seeking to create work for themselves) should not be permitted to encourage lawsuits. There is a difference between that mischief, and the entirely laudable practice of encouraging access to justice for those with good claims who would otherwise be shut-out from the court system. Naturally, a third-party funder cannot be expected to provide funding upon a gratuitous basis. The issue for the court is whether a funding agreement has a tendency to corrupt public justice."

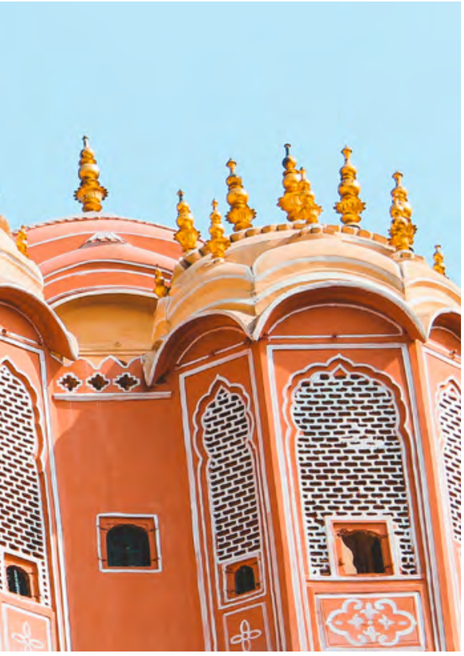
Mr Justice Wallbank identified that the indicia of champerty would include excessive control by the funder, or an excessive return to the funder. It should also be noted that the existence of an external funder will be relevant to the decision whether to make an order for security for costs against a claimant. The BVI CPR, 24.3(a), identify that one of the circumstances in which security may be granted is where *"some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover"*.

Hong Kong

Maintenance and champerty are still torts and crimes under Hong Kong law. Nevertheless, an important exception to the operation of the doctrines is the use of litigation funding in the context of insolvency proceedings.

Liquidators in Hong Kong have a statutory power to sell 'the real and personal property and things in action of the company'. This has been construed by the courts as conferring on a liquidator the power to assign a company's causes of action to a funder – but only those causes of action which are vested in the company rather than the liquidator personally. The power is exercised subject to the control of the court, and so liquidators may apply to the court for directions as to the lawfulness of a proposed sale (although this is not obligatory).

Separately to this, litigation funding is now permitted in Hong Kong in the context of arbitration and related proceedings. In this context, the Secretary for Justice has issued a Code of Practice for Third-Party Funding of Arbitration, which specifies the standards expected of funders in Hong Kong. It includes requirements that funders maintain access to certain levels of capital, provisions concerning the management of conflicts of interest, and identifies matters which must be addressed in the funding agreement (including the extent of liability for adverse costs, and the grounds upon which the agreement may be terminated).



Singapore

There have been substantial changes in recent years to the law governing litigation funding agreements in Singapore. In 2017, the Civil Law Act was amended to abolish the torts of maintenance and champerty, and also to permit the use of litigation funding in international arbitrations, provided that the funder meets certain qualifying conditions. This is to be extended to include domestic arbitration, certain proceedings in the Singapore International Commercial Court and mediations connected with these proceedings.

In the context of insolvency, the Insolvency, Restructuring and Dissolution Act 2018 ("IRDA") (which consolidated Singapore's various insolvency laws) has expanded and clarified the circumstances in which an insolvency practitioner may use litigation funding. Prior to the IRDA, the position concerning the use of litigation funding by insolvency practitioners had been somewhat unclear, but successive courts had been expanding the circumstances in which it could be used.

In *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597, the High Court held, for the first time, that the insolvency legislation (as it then stood) permitted the sale of the fruits of a cause of action that belonged to a company. In *obiter* remarks, Chua Lee Ming JC gave considerable support to the use of funding, expressing the view that it was "undeniable that litigation funding has an especially useful role to play in insolvency situations". Subsequently, in *Re Fan Kow Hin* [2018] SGHC 257, the High Court held that a trustee in bankruptcy was able to assign the benefits of claims in respect of transactions at an undervalue and unfair preferences. For this purpose, the fruits of the litigation were property of the estate – such that they could properly be assigned by a trustee in bankruptcy – and the High Court held that such an assignment would not be contrary to public policy, because it facilitated access to justice.

The IRDA has now given statutory support to the use of litigation funding by liquidators or judicial managers in respect of statutory claims. Specifically, s 144(1)(g) provides that the proceeds of various forms of action – may be assigned in accordance with the regulations.

Channel Islands

Until the landmark Jersey case of *Re Valetta Trust* (2012) the legality of legal finance agreements in the Channel Islands had not been considered by the Channel Islands courts. In that case the court established that there was no material difference between the law of Jersey and English law as to maintenance and champerty, recognising the 'sea change' in opinion elsewhere as to the permissibility of legal finance. The court held that it would not be an abuse for litigation to proceed on the basis of a litigation finance agreement citing the positive English and Australian case law history and Lord Justice Jackson's favourable report on the industry in his Review of Civil Litigation Costs: Final Report (2009) as rationale. The subsequent decision in *Barclays Wealth Trustees & Anor v Equity Trust* (2013) provided further clarification. The Court reviewed the terms of the funding agreement and, following the precedent in *Re Valetta Trust*, concluded that there was nothing in the agreement that could adversely affect the purity of justice.

The position in Guernsey is clear for insolvency cases but not quite as clear otherwise. The Guernsey Royal Court approved a litigation funding agreement in the case of *In re Providence Investment Funds PCC Ltd* (2017), and gave as its basis the statutory right of a liquidator to sell the assets of the company in liquidation, rights in respect of litigation being such an asset. As a result of the case, liquidators and administrators can have confidence to proceed to assign claims or enter into funding agreements in Guernsey. Commentators suggest that the Guernsey courts would likely follow Re Valetta Trust in non-insolvency matters.

In order to sanction a funding agreement, courts in the Channel Islands will want to know that there is not excessive control and that the funder has sufficient financial wherewithal. Being a member of the English ALF and meeting the requirements of that association is likely to be helpful in this regard.

India

In comparison with other common law jurisdictions, there is a longer history in India of jurisprudence on the concept of litigation financing. Judicial precedent has held since 1876 that the common law doctrines of champerty and maintenance do not apply to India and that funding agreements are generally enforceable unless the object of the contract is contrary to public policy.

In 2015 the Supreme Court in *Bar Council of India v AK Balaji*, clarified the legal permissibility of third-party funding in litigation and observed that "There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation." There is no legislation that expressly regulates funding in the region; however the Civil Procedure Code of certain Indian states expressly refers to "third parties financing litigation," and case law has generally been supportive of the industry. Additionally, various High Courts have both expressly recognised litigation financing and made provision for security for costs in such cases which all indicates a prevalent acceptance of the industry.

In spite of this, caution needs to be exercised when looking at funding in India as there remains a degree of uncertainty around its use. Additionally, a funder not based in India must structure the funding in compliance with India's foreign capital controls. This adds an administrative burden and tax consideration to any arrangement.

The recent implementation of the Insolvency and Bankruptcy Code and subsequent overhaul of the Companies Act has resulted in a rise in the number of insolvency cases resulting from creditors taking distressed companies to bankruptcy courts. The code has simplified the process for seeking redress and updated the previously outmoded complex corporate insolvency laws in India. It is therefore expected that the frequency of insolvency litigation will increase.

Dubai

Since the global financial crisis there have been a number of complex insolvencies with a significant Middle East nexus. The development of the financial free zone, the Dubai International Financial Centre (DIFC), has encouraged new business and foreign investment in the region, some of which inevitably leads to insolvency situations. The DIFC is a common law, English language jurisdiction completely separated from the local civil law courts and offers rules and regulations that are aligned with international best practices.

Funding is permitted in the DIFC courts and 2017 saw the release of Practice Direction No.2 of 2017 on Third Party Funding in the DIFC Courts. Under the Practice Direction parties must disclose the fact that they are funded and the identity of the funder but are not required to disclose the terms of the funding agreement.

There are no limits in the DIFC Practice Direction on the fees and interest that third-party financiers can charge. However, it is a common law regime modelled on English law, and so the doctrines of maintenance and champerty exist as a rule of public policy. Although a legal finance agreement does not per se amount to either maintenance or champerty, an agreement could be found contrary to public policy if there is a level of disproportionate control or the recovery of excessive profit to the detriment of potential claimants.

The position in the Dubai local courts is less clear. However, there are no laws that prohibit third party funding and no indication from reported cases that it is discouraged (although funding appears to be uncommon and precedent is scarce). Commentators agree that funding ought to be consistent with Shari'a law principles of benefitting public interest and allowing access to justice, but care would need to be taken in structuring and drafting the funding terms and agreement.

About the authors

Robin Ganguly is Counsel at Burford with responsibility for assessing and underwriting legal risk, focusing on contentious insolvencies.

Burford is a founding member of the Association of Litigation Funders and was instrumental in the launching of a voluntary Code of Conduct for third-party funders operating in England and Wales.

Stefanie Wilkins is a barrister at South Square. She will be submitting a DPhil thesis at the University of Oxford on the subject of third-party litigation funding. ■

The Honourable **Frank J C Newbould QC**

South Square is delighted to announce that The Honourable Frank J C Newbould QC joined Chambers as an Associate Member from January this year.

Well-known and highly respected in the world of restructuring and insolvency, Frank is no stranger to South Square, having given expert evidence in relation to the enforceability of the Syncreon scheme in Canada last year, and shared platforms with us at numerous international conferences.

Mr Newbould was appointed to the Ontario Superior Court of Justice in 2006. Until his retirement on 1 June 2017, he was from 2013 the head of the Commercial List in Toronto, the country's leading commercial court tasked with hearing a wide variety of complex cases including domestic and cross-border insolvency matters, corporate amalgamations and reorganizations, proceedings for relief under business corporation legislation, and oppression actions. In 2014, he presided over the first cross-border joint trial with the Delaware Bankruptcy Court in the Nortel insolvency litigation involving the allocation of $7.3 billion, and in 2017 over Fairfield Sentry's claim against PricewaterhouseCoopers LLP for auditors' negligence arising from the Madoff fraud.

Prior to his appointment to the bench, Mr Newbould was a partner at Borden Ladner Gervais in Toronto with a broad litigation and arbitration practice involving corporate and commercial disputes, banking and insolvency matters, class actions, re-insurance disputes, real estate and estate matters.

Frank is currently counsel to the firm of Thornton Grout Finnigan LLP in Toronto, a panel member of Arbitration Place in Toronto, a member of the London Court of International Arbitration User's Council, a panel member of the International Centre for Dispute Resolution (ICDR) of the American Arbitration Association, a panel member of the Singapore International Arbitration Centre, a panel member of the BVI Arbitration Centre, a member of the ICC Canada Arbitration Committee, a panel member of P.R.I.M.E. Finance, a member of INSOL International (International Association of Restructuring, Insolvency & Bankruptcy Professionals), a member of the International Insolvency Institute, and a fellow of the American College of Trial Lawyers. He is a director of Firm Capital Mortgage Investment Corporation, a TSX listed company.

In July 2017, Frank joined Arbitration Place, Toronto, and has since been appointed to many arbitrations involving energy projects, commercial and financial services disputes, partnership and shareholder disputes, construction and engineering design, real estate development and ground lease disputes.

Frank will continue to be based in Toronto but, given his international reputation, will also be available to provide strategic advice arising out of cross border insolvencies, neutral assistance with the facilitation of international disputes and the provision of expert evidence on Canadian law.

Please direct any enquiries about Mr. Newbould's availability to accept instructions in any particular case to **practicemanagers@southsquare.com**. ■

Cryptoassets, cryptocurrencies and insolvency:

The UK jurisdiction taskforce's legal statement

WILLIAM WILLSON

Introduction

In the last edition of the Digest (November 2019) we featured two pieces on the zeitgeisty topic of cryptoassets and cryptocurrencies: Alex Riddiford ventured down the rabbit hole to consider Bitcoin transaction avoidance and a creditor's standing to present a bankruptcy petition in respect of unpaid Bitcoin; and we were privileged to publish Mr Justice Zacaroli's lecture to the Insolvency Lawyers Association entitled *"Crypto-currencies and insolvency"*. The latter indicated that we were due an imminent statement from the UK Jurisdiction Taskforce (the *"UKJT"*) (under the Chairmanship of the Chancellor of the High Court, Sir Geoffrey Vos) on the legal status of crypto-assets and smart contracts.

The UKJT published its legal statement on 18 November 2019 (the *"Legal Statement"*). In the introduction, its authors make clear that the Legal Statement is not a treatise or an academic paper; it seeks to answer several groups of questions put to the authors in relation to the legal status of cryptoassets and, in particular, whether the law treats them as property. We are reminded that time and again over the years the common law has accommodated technological and business innovations: cryptoassets, distributed ledger technology and smart contracts are merely the most recent in a long history of fast-changing technologies.

Summary of Conclusions

Property

The UKJT have reached the following, broad conclusions on whether English law would treat a particular cryptoasset as property (whilst noting that in a given case the answer will depend on the precise nature of the asset and the rules of the system):

(a) Cryptoassets have all the indicia of property.

(b) The novel or distinctive features possessed by some cryptoassets – intangibility, cryptographic authentication, use of a distributed transaction ledger, decentralisation, rule by consensus – do not disqualify them from being property;

(c) Nor are cryptoassets disqualified from being property as pure information, or because they might not be classifiable either as things in possession or as things in action;

(d) Cryptoassets are to be treated in principle as property;

(e) But a private key is not in itself to be treated as property because it is information.

On the ancillary question of whether a cryptoasset is a thing in possession, a thing in action, or another form of personal property, the authors concluded that, to the extent it is necessary to characterise or classify it at all, then it is best treated as being another, third kind of property, as the court was prepared to do with the EU carbon emission allowances in *Armstrong v Winnington* [2013] Ch 156.

As the Legal Statement indicates, this conclusion is likely to have importance in a number of areas, most notably the vesting of property in personal insolvency and the rights of liquidators in corporate insolvency. The authors point out that the definition of property in Section 436[1] of the Insolvency Act 1986 is *"very wide indeed"*, and that so much is a deliberate decision of the legislature to allow as many valuable assets as possible to be classified as property so that they can be collected and realised for the benefit of the estate. Even if a particular cryptoasset is not property at common law, it could still be property for the purposes of IA86 if it falls, for example, within the words *"obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property"*.

However, cryptoassets cannot be physically possessed: they are purely *"virtual"*. This means they cannot be the object of bailment, nor would it be possible to sue for conversion in respect of them. Nor are they documents of title (i.e. documents that enable the holder to deal with the property described as if they were the owners), documentary intangibles or negotiable instruments. Nor are they *"goods"* under the Sale of Goods Act 1979. However, if and to the extent that a certain cryptoasset is property, a mortgage or charge can be created over, just as it can be created over other intangible property; but since cryptoassets cannot be possessed, they cannot be the object of a pledge or a contractual lien.

Finally, in relation to what factors would be relevant to determining whether English law governs the proprietary aspects of dealings in cryptoassets, the authors *"tentatively"* suggest the following factors will be of particular relevance:

(a) Whether the relevant off-chain asset is located in England & Wales.

(b) Whether there is any centralised control in England & Wales.

(c) Whether a particular cryptoasset is controlled by a particular participant in England & Wales.

(d) Whether the law applicable to the relevant transfer (perhaps by reason of the parties' choice) is English law.

Smart Contracts

The Legal Statement concludes that a smart contract is well capable of satisfying the basic requirements for formation of contract at common law and is therefore capable of having contractual force.

As the parties' contractual obligations may be defined by a computer – in which case there may be little room for *"interpretation"* in the traditional sense – or the code may merely implement an agreement whose meaning is to be found elsewhere – in which case the code is unimportant from the perspective of defining the agreement – the authors conclude that an English court can in principle *"interpret"* a smart contract (though one assumes that expert evidence will be necessary to do this)

Finally, a private key can amount to a statutory *"signature"*, since an electronic signature which is intended to authenticate a document will generally satisfy a statutory signature requirement; whilst a statutory *"in writing"* requirement[2] can be met in the case of a smart contract whose code element is recorded in source code (and to the extent that it is in readable format, object code). The authors of the Legal Statement conclude that in very many cases the terms of the relevant contract will not be contained in the code itself, and the correct analysis will be that the parties have agreed to be bound by the effect of whatever the code does, rather than what it says.

The Legal Statement in Practice

In the last 18 months the English courts have started to grapple with the novel legal and factual issues thrown up by cryptoassets and cryptocurrencies: see *Vorotyntseva v Money-4 Limited* [2018] EWHC 2598 (Ch) (Birss J) and *Liam David Robertson v Persons Unknown* (unreported 15th July 2019) (Moulder J).

However, in the recent case of *Aa v Persons Unknown* [2019] EWHC 3556 (Comm) the Business & Property Courts (Bryan J, Commercial Court) have considered the Legal Statement for the first time. The case concerned applications for freezing injunctions and Bankers Trust orders in the context of cryptocurrency ransom payments. In short, the applicant insurance company was hacked with malware that encrypted all its computer systems. A ransom was demanded, and paid, in Bitcoin. A specialist company tracked the transfer of 96 of the Bitcoins to a specified address linked to the exchange known as Bitfinex. Bankers Trust/Norwich Pharmacal relief and/or a proprietary injunction was sought against a variety of defendants.

The judge noted that, in his foreword to the Legal Statement, the Chancellor had not in fact endorsed its contents, and that it followed that the statement was not in fact a statement of law. However, he considered that the analysis of the proprietary status of cryptocurrencies was compelling, and concluded that, for reasons identified in the Legal Statement, a cryptoasset such as Bitcoin <u>is</u> property (meeting the four criteria set out in Lord Wilberforce's classic definition of property in *National Provincial Bank v Ainsworth* [1965] 1 AC 1175 i.e. 1) definable 2) identifiable by third parties 3) capable of assumption by third parties and 4) having some degree of permanence). On that basis Bryan J found that *"as elaborated upon in <u>the Legal Statement, which I consider to be an accurate statement as to the position under English law</u>, I am satisfied for the purpose of granting an interim injunction in the form of an interim proprietary injunction that crypto currencies are a form of property capable of being the subject of a proprietary injunction"* (emphasis added).

The Legal Statement has now, therefore, been endorsed as an accurate position of English law (at least in respect of its summary conclusions on the proprietary nature of cryptoassets).

Thus begins a new chapter in the evolution of the *"endlessly creative"* common law, *"a living law built on what has gone before, but open to constant renewal"*[3]. ■

1. *""Property" includes 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".*

2. Under Schedule 1 of the Interpretation Act 1978, *"writing"* is defined as included *"typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are to be construed accordingly".*

3. Sir John Laws, The Common Constitution, Hamlyn Lectures (Cambridge University Press 2014), 9–10.

Case Digest Editorial

Adam Al-Attar

The most significant case of general application in this edition of the *Digest* is *Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd* [2019] 3 WLR 997. It is the latest development in the Supreme Court of the illegality defence in the context of a claim by an insolvent "one man" company against a third party. On the facts, *Singularis* concerned a claim against a bank that had failed to act in accordance with its *Quincecare* duty of care in respect of suspicious payments. The case has wider implications for reliance and causation in negligence claims, including against auditors. The case is digested by Stefanie Wilkins in the Commercial Law section below. What follows is a further consideration of the principles discussed in *Singularis*.

First, there are different views as to whether reliance by the company is a distinct element in addition to causation in a claim for a breach of a duty of care owed to a company, for example, by an auditor. In *Berg Sons & Co Ltd v Adams* [2002] Lloyd's Rep PN 41, Hobhouse J found as a fact that even if the accounts had been qualified, as they should have been, by the auditor, that would not have stopped the company trading as it did because the sole shareholder and director already knew the relevant information. This view has been followed in other cases, albeit with a heavily diluted concept of reliance by the company. The contrary view has also been expressed, in which reliance is merely an aspect of causation save in the context of negligent misrepresentation in which context it also forms part of the analysis of the duty of care: see, for example, Salzedo and Singla, *Accountants' Negligence and Liability*, 1st Ed. 2016, para 8.48. *Singularis* goes some way towards the latter view. In its judgment, at [36], the Supreme Court considered *Berg* and observed that, depending on the facts, reliance might be a critical element in establishing factual causation in relation to an auditor negligence claim in connection with a "one-man company", i.e. where the "one-man" already knew the true position and therefore the audit opinion had no causal effect. The logical implication is that if factual causation can be satisfied by means that do *not* involve reliance (for example, by creditor action to initiate an administration) that is sufficient.

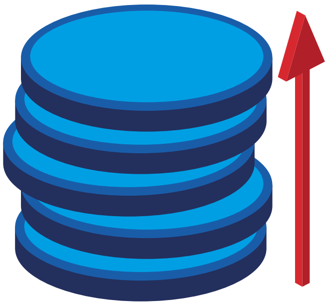
Secondly, the Supreme Court (finally) laid to rest *Stone & Rolls* [2009] AC 1391 (for now). In its judgement, the Supreme Court clarified that *"[t]here is no principle of law that in any proceedings where the company is suing a third party for breach of a duty owed to it by that third party, the fraudulent conduct of a director is to be attributed to the company if it is a one-man company",* and *"[t]he answer to any question whether to attribute the knowledge of the fraudulent director to the company is always to be found in consideration of the context and the purpose for which the attribution is relevant."*

However, there is an important qualification to this clarification. It is apparent that considerations of *"purpose"* and *"context"* are not factual matters that a first instance judge can definitively resolve. The question is one of law. The essential choice in *Singularis* was whether to apply the normal rules of attribution with the consequence that the company could not sue the bank, or to disapply those rules with the consequence that the bank was liable. The Supreme Court chose the latter. It held, at [35], *"[i]f the appellant's argument were to be accepted in a case such as this, there would in reality be no Quincecare duty of care or its breach would cease to have consequences. This would be a retrograde step."* Whilst such policy decisions will have to be made by judges at first instances, the final word is likely to be reached only after successive appeals. The next likely appeal will be another auditor's negligence case because the Supreme Court, at [36], distinguished the banker's *Quincecare* duty of care from that of an auditor's duty of care but without a definite statement as to how it was different and with what implications.

A further case of important general interest in this edition is *Auden McKenzie (Pharma Division) Ltd v Patel* [2019] EWCA Civ 2291, digested by Edoardo Lupi in the Company Law section. In that case, the Court of Appeal allowed an appeal against a summary judgment in which the judge had held a director liable to pay equitable compensation to a company for a transfer of £13m of its funds to a third party *notwithstanding* that, but for the breach of duty, the same amount would have been transferred to the same person for no value. The Court of Appeal held that the law was developing in this area and that the courts had been prepared to recognise in the company law context departures from the trustee analogy. The case was not therefore appropriate for summary determination. This case should be read with *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499 in which the Court of Appeal held that a defendant liable for dishonest assistance but who was *not* a fiduciary was not necessarily liable to the same extent as the fiduciary in whose breach that defendant had existed. These cases represent a further alignment of the rules of remoteness, causation and loss in equity with those of the common law. The extent to which those rules should differ in the sphere of equitable compensation is likely to be litigated further.

Finally, *Pearson v Primeo Fund* [2020] UKPC 3 is an important decision for the Cayman Islands and is worth a read for insolvency lawyers generally because of Lord Briggs' consideration of the operation of the statutory scheme in insolvency, the definition of members' rights thereunder and its explanation of the reluctance of an appellate court to conclude that a legislative change to that basic regime should be read as if a licence to the liquidator to re-write the priority under that scheme or the rights to a satisfied in accordance with it. ■

Case Digests



Banking and Finance

Digested by Stefanie Wilkins

Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd

[2019] UKSC 50 (Hale, Reed, Lloyd-Jones, Sales and Thomas SCJJ) 30 October 2019

Quincecare duty – illegality defence – attribution of conduct to a company

The liquidators of a company brought a claim against its bank for breach of its *Quincecare* duty – that is, the duty owed by a bank to its customer to use reasonable skill and care in carrying out the customer's orders. The bank had made payments out of the accounts of Singularis on the instructions of Mr Al Sanea, who controlled Singularis. The payments were a misappropriation of Singularis' funds, and it was found at trial that any reasonable banker would have recognised the 'glaring' signs.

The bank argued, before the Supreme Court, that the fraud of Mr Al Sanea ought to be attributed to Singularis. As such, any *Quincecare* claim must fail, either because of a lack of causation (in that the company was the architect of its own loss), or because of the illegality defence, or because any such claim would be cancelled out by a claim in deceit by the bank against the company.

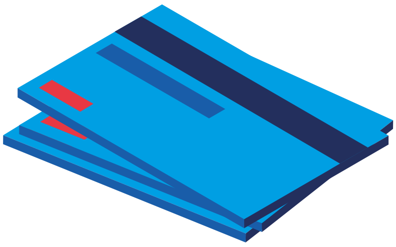
On the question of attribution, the Court explained that, following *Bilta (UK) Ltd v Nazir (No 2)*, there was no general rule that where a one-man company sued a third party for breach of duty, the fraud of a director would necessarily be attributed to the company. Rather, the question whether to attribute the conduct of a director to a company was "always to be found in considerations of the context and the purpose for which the attribution was relevant". Thus, the Court's earlier judgment in *Stone & Rolls v Moore Stephens* could be "laid to rest".

In the present case, the purpose of the *Quincecare* duty was to protect companies against the fraud of those who were trusted to control payments from its bank accounts. If the fraud of the agent was attributed to the company, the result would be to "denude the duty of any value in cases where it is most needed" – it would render the *Quincecare* duty effectively otiose.

In any event, the bank could not succeed in respect of its causation argument: the *Quincecare* duty was a duty to protect a customer from the actions of the company's agents. It would defeat the purpose of the duty to say that there was no breach because the customer itself had caused the loss. Further, the action of the customer – i.e. the fraudulent instruction from Mr Al Sanea – was the very matter which engaged the *Quincecare* duty.

Similarly, a claim in deceit by the bank against the company would fail. Whilst it was true that the instructions were fraudulent, it was the very duty of the bank to protect the customer against such instructions.

In respect of the illegality defence, the Court observed that it necessarily depended on the question of attribution. It also noted that there were cases pending before the Court which squarely raised questions concerning the illegality defence; as such, it ought not to be assumed that the approach of the Court of Appeal would be endorsed. ■



Civil Procedure

Digested by Roseanna Darcy

King v City of London Corp

[2019] EWCA Civ 2266 (Newey, Coulson, Arnold LJJ, 18 December 2019)

Costs – Part 36 Offers – Interest

In the context of detailed assessment proceedings, the Court of Appeal was required to consider whether a Part 36 Offer was effective in circumstances where it had been made exclusive of interest. The deputy master had concluded that the offer was not a valid Part 36 offer. This was upheld by the High Court. However, submissions were made that differing opinions on the topic had been expressed by other costs judges. For example, in *Horne v Prescot (No.1)* Ltd [2019] EWHC 1322 (QB), Nicol J dismissed an appeal, holding that at least in the context of detailed assessment proceedings, an offer excluding interest could be effective.

In giving judgment, Newey LJ addressed three questions: (i) Can a Part 36 offer generally exclude interest? (ii) If not, can a Part 36 offer nevertheless exclude interest in the context of detailed assessment proceedings? (iii) Should the offer made nevertheless be treated as inclusive of interest as a result of CPR 36.5(4)?

The answer to the first question was no. The court rejected the submission that r.36.5(4) was not mandatory. In making this argument, the appellant had relied on CPR PD 49 para.19 which provides that an offer to settle made under Part 36 should specify whether or not it was intended to include interest. However, it was determined that Part 47 could not control the interpretation of Part 36, it merely supplementing the rule, and that a proper analysis of r.36.5(4) indicated that it was mandatory. The court also rejected the appellant's argument based on r.36.2(3) that there could be no objection to an offer excluding interest because Part 36 allowed an offer to be limited to a part of a claim, so that in this case, the offer was limited to the part of the claim that did not account for interest.

The answer to the second question was also no. CPR 47.20(4) provides for Part 36 to apply to the costs of detailed assessment proceedings subject to certain modifications, none of which applied. Also, r.36.5(4) states that an offer to accept a sum of money is to be treated as inclusive of "all interest". This applied to all forms of interest as confirmed by CPR 36.17(6). *Horne v Prescot* was not of assistance, and the judgment there did not provide a satisfactory explanation of how r.36.5 could be reconciled with the conclusion reached.

In answer to the third question, it was inconceivable that r.36.5(4) was meant to turn an offer specifically stated to be exclusive of interest into one including interest.

Whilst Coulson LJ and Arnold LJ agreed with Newey LJ's judgment, Arnold LJ considered that the issue merited consideration by the Civil Procedure Rules Commitments, as there were arguments in favour of permitting Part 36 offers to be made exclusive of interest, at least in detailed assessment proceedings. ■

Griffith v Gourgey

[2019] EWCA Civ 2046 (Etherton MR, David Richards, Newey LJJ, 22 November 2019)

Statements of Case – Case Management – Unfair Prejudice

This was an appeal by the appellant director against orders made in respect of two unfair prejudice petitions brought against his co-directors in two companies, G and B. The proceedings had been ongoing for six years, with various applications being made by each party. In the early stages, the parties agreed to submit combined points of claim, defence, and reply. In May 2015, the court struck out the points of defence as the respondents had failed to respond to requests for further information. Their appeal against this was unsuccessful. Further applications were issued throughout 2018. Of relevance, in May 2018, a successful strike out application was made in respect of G on the basis that neither the petition nor the points of claim contained a sufficient pleading of unfairly prejudicial behaviour. Permission was subsequently granted for the petitions to be amended, the judge also allowing the first respondent to plead a full defence to the B petition. The appellant appealed against this, as well as the earlier May 2018 strike out order.

The appeal was allowed. The petition in respect of G should not have been struck out on the basis of pleading inadequacies. The court considered that the respondents could have sought further information before submitting points of defence, or, made an application for strike out earlier. As to the B petition, the court held that the proposed amendments simply extended the claim for existing relief, rather than introducing a new claim for relief, meaning there was no reason to allow the respondents to plead back and bypass the earlier order striking out the points of defence.

Within this wider context, David Richards LJ also gave comments on the importance of proper pleadings in unfair prejudice petitions, in which he endorsed the numerous judgments at first instance, such as *Re Tecnion Investments Ltd* [1985] BCLC 434. This importance, it was said, was especially because of the breadth of the court's jurisdiction in unfair prejudice cases (as well as just and equitable winding up cases) meaning respondents must know the case they have to meet, and the court be able to keep proceedings within manageable

Civil Procedure

bounds. It was also noted that it was not generally the practice to have points of claim and defence in such petitions, although the court could direct them under paragraph 5 of the Companies (Unfair Prejudice Applications) Proceedings Rules 1986 (the "Rules"). Where, however, the petition is the only pleading, they must be fully and properly pleaded, and in all causes, the petition must define "the ambit" of the case. This was not just a question of good practice, but a requirement under s.996 of the Companies Act 2006 and paragraph 3(2) of the Rules. It was explained that the modern practice of the court is to issue directions in standard form shortly after the presentation of a petition, which would include a direction for the petition to stand as points of claim and for the service of points of defence. This does not mean however that the court cannot vary those directions upon application of a party, and in any event, in some cases there will be separate points of claim. ■

Burnden Holdings (UK) Ltd v Fielding

[2019] EWHC 2995 (Ch) (Zacaroli J, 7 November 2019)

Costs – Funding Arrangements – Third Party Funding

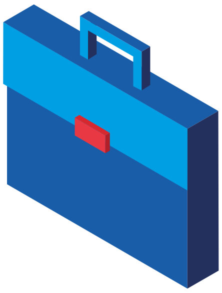
Following unsuccessful claims brought by the company and liquidator against two of the company's directors, the court was required to determine the costs liabilities of the liquidator and a third-party funder, who happened to be the liquidator's firm, in which he was a partner. The firm had advanced funds interest-free to appeal the decision that certain claims against the directors were struck out on limitation issues. That appeal was successful, and another funder provided funding to take proceedings forward. Following the dismissal of the claims, the company was ordered to pay the directors' costs and to make a payment on account of £1.2million. The directors submitted that the liquidator's firm should be regarded as a commercial funder and so held on a joint and several basis with the claimant for the director's costs.

There were three issues for the judge to consider: (i) whether the liquidator's firm could be considered a commercial funder, (ii) whether there should be a limitation on time for the amount of costs the firm should be liable for, and (iii) whether the Arkin cap applied.

On the first point, generally, it was recognised that s.51 of the Senior Courts Act 1982 gave the jurisdiction to award costs against a third party. It was common ground that where a non-party not only funded the litigation but substantially controlled it, or benefitted from it, justice ordinarily required that they would pay the successful party's costs, as the non-party was seeking to gain access to justice for their own purposes, rather than for the benefit of the funded party (*Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Costs)* [2004] UKPC 39 applied). The judge therefore had to consider whether the liquidator's firm should be characterised as a 'pure funder' or a 'commercial funder', with the question being whether the firm was to be regarded as having done more than merely facilitate access to justice for the company and so become a 'real party' to the litigation. Zacaroli J held that the answer to that question was yes as the firm stood to benefit financially, with an uplift having been negotiated, amongst other factors. It was therefore seen to have sufficient interest in the proceedings to characterise it as a commercial funder.

As to whether there should be any limitation by reference to time, the judge considered that the firm should not be liable for costs awarded after it had ceased funding. The fact that the firm maintained a potential upside after it had ceased funding did not cause either the continuation of the proceedings or the incurring of any further costs.

Further, the judge considered that it was appropriate to apply the Arkin cap (derived from *Arkin v Bochard Lines Ltd (Costs Order) EWCA Civ 655)* and that it was just to apply a cap on the firm's liability equal to the amount of funding it had contributed. This was held to strike the right balance between the entitlement of the directors, as the successful party, being paid their costs, and the risk of discouraging funding which facilitated access to justice. ■



Commercial Litigation

Digested by Madeleine Jones

Barton v Gwyn-Jones

[2019] EWCA Civ 1999 (Davis, Asplin, Males LJJ, 21 November 2019)

Contracts – unjust enrichment

Mr Barton lost £1.2m in an unsuccessful attempt to purchase a property from a company. The company agreed to allow Mr Barton the chance to recoup his loss by offering him a £1.2m introduction fee in return for introducing a purchaser willing to pay £6.5m for the property. Mr Barton introduced a purchaser who paid £6m. The company refused to pay any of the introduction fee. Mr Barton made claims in breach of contract and unjust enrichment which failed at first instance.

The Court of Appeal allowed Mr Barton's appeal.

The question for the court was what, taking into account the informality of the agreement, a reasonable person, with all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the agreement, would have understood the parties to have meant. The agreement was silent on what would happen if Mr Barton introduced a purchaser willing to pay less than £6.5m. There was nothing in the terms of the agreement, objectively construed, which meant that Mr Barton should receive nothing at all unless the £6.5 million purchase price was achieved.

The principle in *MacDonald Dickens & Macklin v Costello* [2011] EWCA Civ 930 is that an unjust enrichment claim will not be allowed where the claim would undermine the contractual arrangement and agreed allocation of risk between the parties. This principle did not apply here. The contract did not expressly exclude any claim for remuneration other than in relation to a sale at £6.5m and so allowing the unjust enrichment claim did not affect any agreed allocation of risk in relation to this.

The measure of damages for unjust enrichment is the value of the benefit gained not damages for loss. In this case the starting point was the market value of the services rendered, for which it was appropriate to rely on the evidence of other agreements which the company had reached with introducing agents. ■

Abbhi v Slade (t/a Richard Slade and Co)

[2019] EWCA Civ 2175 (King, David Richards, Flaux LJJ, 6 December 2019)

Guarantees – Statute of Frauds

This was a case about section 4 of the Statute of Frauds 1677. This provides that no action shall be brought upon a "special promise to answer for the debt default or miscarriages of another person" (ie a guarantee) unless it is made or recorded in writing.

Mr Abbhi told Mr Slade, a solicitor, that if Mr Slade agreed to represent Mr Abbhi's father-in-law, Mr Abbhi would put the father-in-law in funds to pay Mr Slade's fees. The agreement was not recorded in writing. Mr Slade acted for the father-in-law, but Mr Abbhi did not provide the funds to pay Mr Slade's fees.

The Court of Appeal confirmed the finding of the first instance judge that this agreement was not a guarantee to which s. 4 of the 1677 applied, and therefore it was enforceable.

Mr Abbhi's promise was a promise to pay in any event, not a promise to pay upon his father-in-law's default. Mr Abbhi had agreed to put the father-in-law in funds before the debt came due. It was even a term of the oral agreement that the father-in-law could not pay. The fact that the agreed method of payment was for Mr Abbhi to put the father-in-law in funds and for him to pass funds on to Mr Slade was irrelevant. The agreement was an independent promise to put the father-in-law in funds, for which Mr Abbhi was liable as primary obligor and thus s. 4 did not apply. ■

Etihad Airways PJSC v Flother

[2019] EWHC 3107 (Comm) (Jacobs J, 18 November 2019)

Jurisdiction – Recast Brussels Regulation

Mr Justice Jacobs considered the validity of an "asymmetric" jurisdiction clause – that is one which contained different provisions regarding jurisdiction depending on which party commenced proceedings.

The claimant, Etihad, was a shareholder in and creditor of Air Berlin, whose administrator defended the claim. Etihad lent funds to Air Berlin under a facility agreement with an English governing law clause and a clause providing that the English courts had exclusive jurisdiction, but also a provision that Etihad, but not Air Berlin, could open proceedings in any court with jurisdiction.

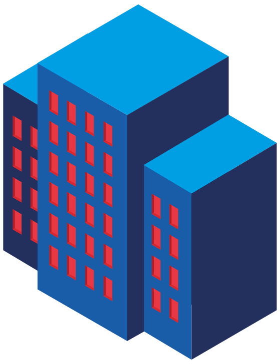
Air Berlin then went into administration in Germany and the administrator made claims against Etihad in Berlin. In the English proceedings Etihad sought a declaration that the claims started in Berlin were subject to the English Court's exclusive jurisdiction under Regulation 1215/2012 (Brussels Recast) art.25. It also argued that the substantive actions started in Berlin did not give rise to any liability under English law, because the comfort letter relied on by the administrator did not give rise to a legally binding contract under English law, and the other claim, *culpa in contrahendo* ("fault in contracting"), was not a cause of action known to English law.

Mr Justice Jacobs first considered whether the jurisdiction clause in the facility agreement applied to a comfort letter provided by Etihad, which was the subject of the claims.

The standard of proof to be applied in determining whether the English court has jurisdiction under Article 25 of the Recast Brussels Regulation is that of good arguable case. The scope of the English jurisdiction clause in the facility agreement (and therefore whether it extended to the comfort letter and claims relating to this) was itself a question of English law. The starting point is that a jurisdiction clause will govern the parties' whole relationship so long as there are not several agreements containing competing jurisdiction clauses. The question is, applying the good arguable case test, whether looking at the overall scheme the parties' intention, as revealed by the agreements reached between them, was that a dispute under the comfort letter fell within the jurisdiction clause in the facility agreement, considering the closeness of the connection of the comfort letter and the facility agreement. Applying these standards, the Judge found the letter and facility agreement were part of an overall support package, the jurisdiction clause was broadly drafted and there was no competing jurisdiction clause in any other agreement. It was reasonably foreseeable that disputes of this sort would arise. Therefore, the jurisdiction clause in the facility agreement did extend to the comfort letter.

He also found that the jurisdiction clause was applicable under EU law. Under Art. 25 the clause would apply to a dispute arising in connection to the "particular legal relationship" between the parties. In this case the dispute arose between the parties as borrower and lender, so Art. 25 was satisfied.

The effect of Art. 31.2 of the Recast Brussels Regulation was that the English court was not obliged to stay proceedings pending judgment of the German court. The administrator argued this article did not apply because the jurisdiction clause was "asymmetric". The judge dismissed this contention. Each "asymmetric" obligation was to be considered on its own. The fact that the other party was not under such an obligation did not come into the question of whether it fell under the Regulation. ■



Company Law

Digested by Edoardo Lupi

Dickinson v Nal Realisations (Staffordshire) Ltd

[2019] EWCA Civ 2146 (David, Newey, Baker, Dingemans LJJ, 3 December 2019)

Duomatic principle – share acquisitions – section 1157 Companies Act 2006

The case concerned the validity of the transfer of a property from the first respondent, NAL, to the first appellant, Mr Henry Dickinson, and a share buy-back which NAL undertook in 2010. NAL's shareholders included Mr Dickinson, Mrs Dickinson and the trustees of a pension scheme.

At first instance, the trial judge held that the property transfer had been made without authority and declined to grant Mr Dickinson relief under section 1157 of the Companies Act 2006 ("the 2006 Act"). As regards the share buy-back, the Judge concluded that it was void for non-compliance with section 691 of the 2006 Act.

On appeal, the appellants first challenged the judge's conclusions on the transfer of the property by relying on the Duomatic principle. An initial obstacle was that certain shares were registered in the names of the pension scheme trustees. Newey LJ was prepared to assume, without deciding, that the assent of beneficial owners of shares could meet the *Duomatic* requirements. Nevertheless, there remained insuperable difficulties with the submission that the *Duomatic* principle applied in relation to the property transfer. For instance, Mrs Dickinson was not shown to have approved the transfer: it was not sufficient to say that she left matters to her husband. The Court of Appeal reiterated that nothing short of unqualified agreement, objectively established, will suffice for the Duomatic principle. Moreover, it was clear from a version of the pension scheme rules that the Dickinsons were not the only potential beneficiaries of the scheme, such that they could not have required the scheme to transfer all of the shares in NAL to them.

The alternative ground of appeal relating to the property transfer rested on section 1157 of the 2006 Act. There was an initial jurisdictional hurdle. After a comprehensive review of the authorities, Newey LJ concluded that there was jurisdiction to grant relief under s. 1157 of the 2006 Act in the case notwithstanding that the relief awarded was proprietary in nature. Section 1157 applies to *"proceedings for negligence, default, breach of duty or breach of trust"*. The trial judge found Mr Dickinson to have caused company property to be transferred to himself without authority. The words *"negligence, default, breach of duty or breach of trust"* were apt to describe that conduct. Section 1157 was not limited in its terms to personal liability. However, exercising the discretion afresh, the Court of Appeal refused to grant relief.

As regards the share buy-back, section 691(2) of the 2006 Act provides that in order for the acquisition by a company of its shares to be valid, the shares *"must be paid for on purchase"*. Newey LJ held that it was not sufficient for a contract to provide for payment forthwith; payment must in fact be made. Accordingly, the arrangement whereby payment was by loan but not actually effectuated at the time of the transfer did not meet requirements of the section, such that the share buy-back was void. ■

Auden McKenzie (Pharma Division) Ltd v Patel

[2019] EWCA Civ 2291 (David Richards, Lewison, Newey LJJ, 20 December 2019)

Summary judgment – equitable compensation

The case involved an appeal against the summary judgment awarded by Knowles J on a claim for equitable compensation (digested in a previous edition). The first appellant accepted that he had caused the company to make £13 million odd in payments to offshore entities to enable the company to evade corporation tax and him and his sister (the second appellant) to evade income tax (the "Payments"). At first instance, Knowles J awarded judgment in the sum of £13,149,479 plus interest.

The first appellant had unsuccessfully argued that if the Payments had not been made lawfully, the shareholders would have caused the company to make equivalent payments to them as dividends or in some other lawful manner. Accordingly, it was submitted that the company could show no loss flowing from the Payments.

The Court of Appeal formulated the following question of law on the appeal as follows: in a claim for equitable compensation in respect of the misappropriation by a director of a company's funds, is a defence open to the director on the grounds that, if the misappropriation had not occurred, the funds would have been lawfully transferred to the same persons for no value, so that it can be said that the company has sustained no loss as a result of the misappropriation that can be recovered by way of equitable compensation?

Company Law

In the summary judgment context, the question was whether the first appellant's argument was unsustainable in law. Having considered the authorities on equitable compensation and noting that they did not appear to lend direct support to the first respondent's contention, David Richards LJ nevertheless observed that the cases did demonstrate a willingness on the part of the courts to develop the equitable remedies for breach of trust and breach of fiduciary duty and, where required, to do what is practically just, to entertain some departure from the strict obligation of trustees and fiduciaries to restore the fund under their control. Noting that he was far from being convinced that the first appellant would be successful on this legal argument even if he established the assumed facts, David Richards LJ said he was not prepared to hold that the argument was unsustainable in law: the area was a developing one, required fuller submissions and was best decided at trial after factual findings were made. Accordingly, the appeal was allowed. ■

BTI 2014 LLC v Pricewaterhousecoopers LLP

[2019] EWHC 3034 (Ch) (Fancourt J, 15 November 2019)

Strike out – abuse of process – professional negligence

BTI brought a claim against PwC for professional negligence in respect of their auditing of the second defendant, AWA. The negligence claim was related to the claim in BTI v Sequana digested in previous editions, with the former stayed pending the resolution of the latter. In BTI v Sequana, BTI had challenged the payment of two interim dividends in the sum of €443 million and €135 million to its parent company, Sequana, respectively in December 2008 and May 2009 (the "Dividends"). Prior to the payment of the Dividends, AWA effected a reduction of capital by special resolution supported by a solvency statement in order to free up distributable reserves. AWA's accounts, audited by PwC, made provision for the company's liability to BTI during the relevant period. BTI's claim against Sequana failed. Rose J held that the accounts relied on by the directors for payment of the dividends were proper accounts for the purposes of Part 23 of the 2006 Act and that accordingly the dividends could not be recovered from the defendants.

In the professional negligence claim, BTI alleged that PwC negligently audited AWA's 2007 and 2008 annual accounts thereby causing it loss, in that the directors would not have resolved to pay the very large dividends had PwC acted non-negligently. They would not have done so, BTI alleged, because the accounts of AWA would then have shown that it had considerably greater liabilities and fewer distributable reserves. BTI claimed the loss in the full amount of the Dividends paid to Sequana. In light of Rose J's judgment and the subsequent appeal, PwC sought summary judgment, alternatively, judgment in default.

Fancourt J rejected PwC's application. It had been alleged on behalf of PwC that BTI's claim amounted to an abuse of process, which involved a collateral attack on the findings of Rose J. The question therefore was whether litigation of issues not decided as between the same parties was nevertheless abusive. Having reviewed the cases, Fancourt J summarised the following principle. Whilst it is not prima facie an abuse of process to bring a second claim against a different party, who would not have been bound by any material findings in the first claim, and usually will not be so, it may be abusive in a case where success on the second claim will involve re-litigating the very same issues as in the first claim and the court reaching different conclusions on those issues on the basis of the same evidence: the ultimate question is a general one of whether, in all the circumstances, a party is abusing or misusing the court's process.

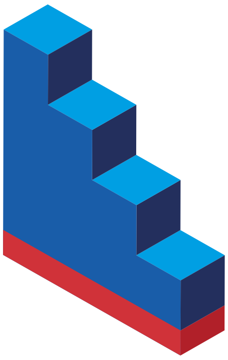
Applying this principle to the facts, Fancourt J held that the claim did not involve a collateral challenge to the findings made by Rose J. Rather, BTI was contending that the directors would in fact have made different provision and disclosure in the accounts if PwC had done what it should have done. It was not therefore simply a claim based on what the relevant accounts should have stated: it was a claim based on what the directors would have done had they had had the benefit of a non-negligent audit report, and thus the negligence claim did not constitute an abuse of process. ■

Re Shanda Games

[2020] UKPC 2 (Reed, Wilson, Briggs, Arden, Kitchin SCJJ, 27 January 2020)

Minority discount – valuation – Section 238

In the first case under section 238 of the Cayman Islands Companies Law ("section 238") to reach the Privy Council, the principal issue before the Board concerned the applicability of a minority discount to a dissenter's shares. Under section 238, a dissenting shareholder has the right to payment of the fair value of its shares. At first instance, adopting a discounted cashflow valuation, Segal J awarded the dissenting shareholders $8.34 per share and held that no minority discount should be applied. He was reversed on the minority discount point by the Cayman Islands Court of Appeal ("CICA"). The Privy Council held that a minority discount should be applied in most circumstances when determining the fair value of dissenters' shares under section 238, but did not agree with the CICA that one fell to applied in every case as a matter of law. Rather, the legislature directed the Cayman Court to find the fair value of the dissenter's shareholding, such that the Board could not rule out the possibility that there might be a case where a minority discount was inappropriate due to the particular valuation exercise under consideration. A cross-appeal concerning the fair rate of interest was also dismissed. ■



Corporate Insolvency

Digested by Ryan Perkins & Daniel Judd


Pearson (as Additional Liquidator of Herald Fund SPC (in Official Liquidation)) v Primeo Fund (in Official Liquidation) (Cayman Islands)

[2020] UKPC 3 (Kerr, Carnwath, Black, Briggs, Arden SCJJ, 27 January 2020)

Liquidators' powers – register of members

This case concerned the powers of liquidators to rectify a company's register of members under the Cayman Islands Companies Law ("the Companies Law"). The issue arose in further litigation following discovery of the Madoff fraud which, as is well known, was carried out through Bernard L Madoff Securities LLC ("BLMIS"). Herald Fund SPC ("Herald") operated as a feeder fund in BLMIS. Primeo Fund ("Primeo") operated, in turn, as a feeder fund in Herald.

Herald was in solvent liquidation, and a surplus was available for distribution to members. In this regard, the liquidator of Herald produced proposals for the distribution of the surplus in a way which, in his view, resulted in a more just outcome given the adverse consequences of the Madoff fraud than would be achieved by distributing in accordance with the shareholdings set out in Herald's register of members. The question became whether the liquidator had the power to do so.

The powers of the liquidator were set out in section 112(2) of the Companies Law as being *"to settle and, if necessary rectify the company's register of members, thereby adjusting the rights of members amongst themselves".*

The question considered by the Privy Council was short but important. Is the scope of the liquidator's power confined to altering the register consistently with the members' underlying legal rights at the commencement of the liquidation, or did it allow the liquidator to amend the register of members in a way which alters the members' legal rights, so as to bring about what the liquidator considered achieves substantial justice between the members?

Conflicting views were reached at first instance, where Jones J adopted the broader view, and in the Cayman Islands Court of Appeal, which adopted the narrower view.

The Privy Council dismissed the appeal. Lord Briggs considered section 112(2) of the Companies Law in the context of that legislation as a whole, and while the provision has no direct antecedent, it uses words, phrases and concepts which engaged established legal ideas (such as to 'settle', 'rectify', or 'adjust' the register of members). In addition, the obvious purpose of the process contained in that section was to enable the liquidator to establish by enquiry what were the true legal rights of the members, and to bring the register of members in accordance with them, as the basis for the proper distribution of any surplus. A broader power of liquidators to impose a fair scheme of their own devising, in substitution for members' legal rights, would work a large and unprecedented change in the law. The statutory history did not support such a consequence, and in any event the equitable remedy of rectification was available. Lord Briggs also observed that the proposed power would run contrary to the pari passu principle, which required distribution of estates in accordance with the legal rights of stakeholders as at the commencement of the liquidation. As a result, the appeal was dismissed. ■

[Tom Smith QC, Adam Al Attar]


Corporate Insolvency

In the Matter of Nektan (Gibraltar) Limited

[2020] EWHC 65 (Ch) (Falk J, 17 January 2020)

Winding up – foreign companies – EU Insolvency Regulation – Gibraltar

This was the full judgment of Falk J, following an order made in the interim applications court. An administration order had been sought on an urgent basis. The judge considered the evidence and concluded that the purpose of the administration was reasonably likely to be achieved. The evidence showed that the company had negotiated the sale of its gambling business to a third party, but that an administration order was required in order for the sale to be concluded. This was for reasons principally connected with the preservation of the company's gambling licence.

The case also raised, for what appears to be the first time, a jurisdictional difficulty of particular interest. The question can be shortly stated. Is a company incorporated in Gibraltar, and which has a centre of main interests ("COMI") in Gibraltar, a *"company"* within Schedule B1 of the Insolvency Act 1986, such that English courts have jurisdiction to make administration orders over such companies?

Falk J granted the administration order, and decided that the case could be decided on the basis that the company's COMI was ultimately located in England. Nevertheless, Falk J set out her analysis of the position regarding Gibraltarian companies in full, should the matter arise for determination in the future.

Gibraltar is not referred to by name under the EU Recast Insolvency Regulation. However, commentary and case law treats the EU Recast Insolvency Regulation as applying to Gibraltar, including on the basis that the component parts of the United Kingdom are treated as one jurisdiction thereunder.

The judge located the legal basis of this position in Article 355(3) of the Treaty on the Functioning of the European Union ("TFEU"), which provides that the provisions of EU treaties apply to *"the European territories for whose external relations a Member State is responsible"*. The case law of the Court of Justice of the European Union had already affirmed that Gibraltar was such a territory with respect to the United Kingdom, even though Gibraltar was not itself a Member State in any way.

The remaining issue concerned the meaning of 'company' under Schedule B1. For this purpose, 'company' was defined in paragraph 111(1A), which at (b) includes *"a company incorporated in an EEA State other than the United Kingdom"*. The EEA State concept was further defined in section 436 of the Insolvency Act 1986. Gibraltar was not an EEA State as *defined*, not being a 'Contracting Party'. Reference to 'The United Kingdom of Great Britain and Northern Ireland' did not ordinarily extend to Gibraltar.

The judge went on to consider that jurisdiction could be established on the separate basis of paragraph 111(1A)(c). On considering the background to the current wording of paragraph 111(1A), Falk J concluded that the draftsman should be treated as being aware that the EU Recast Insolvency Regulation did not address the question of COMI *within* the territories of an individual Member State, only the position *between* Member States. Accordingly, reference to 'Member State' should be read as referring to the concept as it is used in Article 3 of the EU Recast Insolvency Regulation, and here the United Kingdom encompasses Gibraltar.

The judge also concluded that, on the facts, the company's COMI was located in England, and that the presumption of COMI in favour of the company's registered office was rebutted. The judge held than an administration order could equally be made on that basis. ■

Michael Carter v Roy Bailey and Keiran Hutchison (as foreign representatives of Sturgeon Central Asia Balanced Fund Ltd)

[2020] EWHC 123 (Ch) (Chief ICCJ Briggs, 27 January 2020)

Foreign proceedings – CBIR – just and equitable winding up

These proceedings follow the making of the first order to recognise the liquidation of a solvent company as a foreign main proceeding under the Cross-Border Insolvency Regulations ("CBIR") in this jurisdiction.

An order of the Supreme Court of Bermuda appointed Joint Provisional Liquidators over the company, following an earlier decision of the Court of Appeal of Bermuda that the company should be wound up on just and equitable grounds.

The central question arising for determination was whether that winding up in Bermuda should continue to be recognised in this jurisdiction, the answer depending on whether or not those proceedings were a *"foreign main proceeding"* for the purposes of the Model Law and the CBIR.

The application was advanced by way of a review of the order already granted by Falk J at an ex parte hearing.

Chief ICCJ Briggs concluded that the proceedings should be not considered 'foreign proceedings' under the CBIR. After an extended consideration of the case law, commentary, and materials underlying both the Model Law and the CBIR, he ultimately considered that it would be contrary to the stated purpose and object of the Model Law to interpret 'foreign proceedings' to include solvent debtors, which would have the purpose of producing a return for members. Adopting a purposive approach, Chief ICCJ Briggs took the view that the reference to 'purpose' Article 2(i) of Schedule 1 to the CBIR should be interpreted as meaning for the purpose of insolvency (liquidation) or severe financial distress (reorganisation).

The consequence of the judge's conclusion was that the recognition order had been wrongly made, and was terminated accordingly. ■

Candey Limited v Russell Crumpler and Christopher Farmer (as Joint Liquidators of Peak Hotels & Resorts Limited)

[2020] EWCA Civ 26 (McCombe, Moylan, Rose LJJ, 23 January 2020)

Foreign-appointed liquidators – solicitors' fees – equitable lien

This appeal concerned the recovery of legal costs. Candey Limited ("Candey") acted for a number of years as the legal representative of Peak Hotels & Resorts Limited ("Peak") which went into liquidation in the BVI. A dispute then arose as to Candey's claim to unpaid legal fees owed to it by Peak. These appellate proceedings are one of a number of iterations of this litigation.

Rose LJ identified two principal issues for determination.

The first was whether the liquidators were bound, by an order to pay some of Candey's costs, to also pay a success fee under a conditional fee agreement. That in turn depended on the status of the liquidators, and the extent to which they were similar to or different from English liquidators.

The recovery of success fees was prohibited by section 44 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO Act"). The introduction of the LASPO Act into force was made subject, however, to saving provisions, one of which applied to *"proceedings in England and Wales brought by a person acting in the capacity of ... a liquidator of a company which is being wound up in England and Wales or Scotland under Parts IV or V of the 1986 Act"*, among others. This meant that, in the case of English liquidation proceedings, such fees may still be recoverable. In the present case, the complication was that the liquidators were appointed in the BVI, and had obtained recognition in England and Wales. Candey submitted that such liquidators were not acting 'in the capacity of' English liquidators. Candey pointed to other limitations applying to liquidators appointed overseas.

Rose LJ rejected this argument. On analysing the Cross-Border Insolvency Rules ("CBIR"), a recognition order does not have the effect that foreign representatives are thereafter treated as either acting as, or in the capacity of, an English liquidator. Their treatment under the rules was clear and was distinguished from that of an English liquidator. One odd consequence of Candey's submission would be that where a foreign representative brings proceedings in the company's name, that company would need to be a company being wound up in England and Wales, in order to recover the success fee.

A second issue related to a claim by Candey in the liquidation of Peak for work done. Candey asserted an equitable lien, and submitted that the court can and should convert this into a charge on Peak's assets. Reliance was also placed on section 73 of the Solicitors Act 1974 ("1974 Act").

This issue was also decided against Candey. Solicitors have long had a lien to recover their unpaid fees out of the money recovered by their client as a result of the litigation in which they are instructed, and it is also established that the lien prevails despite the client's insolvency. It gives the solicitor a first-ranking charge.

There was no appeal against the finding that Candey was instrumental to obtaining certain Settlement Proceeds for the purpose of imposing under section 73 of the 1974 Act. The issue which followed concerned whether Candey had waived its equitable lien. Rose LJ addressed the tests for waiver, including in the light of the solicitor's position as a fiduciary, and considered that here the lien had been waived. She relied principally on various inconsistencies between the continued existence of the lien and new arrangements for the provision of security. In addition, the lien was not effectively reserved. Rose LJ underlined that the reservation by a solicitor of their lien had to be made in a transparent and straightforward way.

Rose LJ also noted that there were difficult questions regarding the nature of the interest held by a solicitor as a result of the equitable lien, before a fund comes into sight, though these issues did not need to be decided in the appeal.

[Stephen Robins]

Corporate Insolvency

Stanford International Bank Ltd (in Liquidation)

[2019] UKPC 45 (Wilson, Carnwath, Briggs, Arden, Longmore SCJJ, 16 December 2019)

Liquidators' powers – unfair prejudice – Ponzi schemes

Stanford International Bank ("SIB"), a company registered in Antigua and Barbuda, was the vehicle used for a Ponzi scheme by Mr Robert Stanford. The scheme collapsed, and SIB was placed into liquidation in April 2009.

In advance of the liquidation, a number of investors managed to withdraw $1.3 billion. The losses therefore fell on creditors still invested in SIB at the time when the Ponzi scheme failed. The central question was whether or not the liquidators of SIB, in accordance with their perception of what was fair and equitable, could adjust the losses among SIB's depositors under unfair prejudice legislation. The Privy Council addressed three issues that arose in order to determine this question.

The first and principal hurdle related to whether relief for oppressive or unfairly prejudicial conduct was available where the company was in an insolvent liquidation. In the instant case, the point arose in the context of section 204 of the Antiguan International Business Corporations Act ("the IBC Act"), which on its face gave wide scope for making discretionary relief available to creditors and shareholders.

Lord Briggs, giving the judgment of the majority, held that such relief was not available where a company was in an *insolvent* liquidation. While there was nothing express in the language of the statute that prohibited such relief, on considering authorities from across the Commonwealth, he considered that liquidator must take the company's property and rights as he or she finds them. The liquidator must also take the insolvency scheme as he or she finds it; it is not the liquidator's job to achieve some other outcome. Entry into insolvent liquidation is a watershed event. It is accepted that investors who escape before the onset of any insolvency process receive the payments they do, whereas others may get little or nothing; a Ponzi scheme was merely an extreme example of this common occurrence. There was nothing in section 204 of the IBC Act which compelled provision of such relief. Further, there was a fundamental incompatibility between granting discretionary relief for unfair prejudice on broad equitable principles, and the implementation of an applicable insolvency scheme. Once a company has crossed the threshold into insolvent liquidation, the framework for granting relief from oppression was wholly displaced. Aggrieved creditors could not therefore claim for section 204 relief based upon the conduct of the company prior to its liquidation.

The above point decided the outcome of the appeal, with Lady Arden and Lord Carnwarth dissenting.

Nevertheless, even if section 204 relief were available in principle, all members of the Board agreed that the judge was right to refuse the liquidator permission to pursue claw-back claims, and to allow the same would have been an improper exercise of discretion. Those receiving payment had a reasonable expectation that they could keep the money, and there was no basis in the applicable insolvency regime for regarding them as preferred. In addition, those depositors were also bona fide purchasers for value without notice, having been paid pursuant to contractual entitlements. An equitable claim under section 204 would fail in such circumstances.

A third issue was whether, if section 204 relief was in principle available, the re-adjustment of creditors' claims in the liquidation should have been permitted. This, in effect, sought to account for any credits received in full by creditors, when determining the entitlements they would receive as creditors in the liquidation. The Board regarded such relief as no more principled under section 204 than permitting claw-back claims, with similar considerations applying, and held that the judge at first instance was wrong to allow it.

Accordingly, the joint liquidators' appeal was dismissed. ■

System Building Services Group Limited (in Liquidation) v System Building Services Limited

EWHC 54 (Ch) (ICCJ Barber, 21 January 2020)

Directors' duties – administration – CVL

System Building Services Group Limited ("the Company") went into administration, followed by creditors' voluntary liquidation ("CVL"), and was finally dissolved. The office-holder on both occasions was Mrs Gagen Sharma. In her capacity as an office-holder of other companies, Mrs Sharma was subsequently found liable for misfeasance. She was then adjudged bankrupt. In light of those events, the Company was restored to the register, and placed into compulsory liquidation. Following various investigations, the liquidator then brought claims against a former director of the company, Mr Brian Michie, as well as another company which received a number of payments whilst the Company was in administration.

Those claims included claims against the director for purchasing property from the Company at what he knew to be a substantial undervalue, and for causing payments to be made from the company to a particular creditor. These actions were alleged to constitute breaches of a director's fiduciary duties, owed under sections 170-177 of the Companies Act 2006.

These proceedings required a preliminary question of law to be resolved. It was accepted that, if there was a breach of duty, then constructive trusts would arise in favour of the Company. It was also accepted that, notwithstanding the CVL, Mr Michie remained a director of the Company. However, the question for ICCJ Barber was whether a director's 'general duties' under the Companies Act 2006 survived entry into a formal insolvency process at all, in the present case, administration and a CVL.

The judge considered that the general duties did continue to apply notwithstanding a formal insolvency process. Simply 'being' a director was sufficient to trigger the director's duties, and entry into administration or CVL did not itself result in the removal of a director from office. There was no need for an individual to exercise powers qua director in order to be subject to the fiduciary duties binding company directors. It was also apparent more generally that, where Companies Act 2006 provisions did not apply to an administration, compulsory liquidation, or CVL, this was expressly stated. In any event, the underlying common law and equitable duties – codified in sections 170-177 of the Companies Act 2006 – were themselves sufficiently flexible to extend beyond entry into a formal insolvency process. Accordingly, the general duties of directors under the Companies Act 2006 survived entry into administration or CVL. Those duties are independent of, and run parallel to, the duties owed by an administrator or liquidator appointed in respect of the company.

The judge went on to find that Mr Michie acted in breach of his directors' duties, ordered that the property was held on trust for the Company, and declared that Mr Michie was liable to the Company for those sums paid out from the Company in breach of duty. ■

Re Asia Private Credit Fund Limited and Re Adamas Asia Strategic Opportunity Fund

(in Voluntary Liquidation) (Civil Appeal No. 17 of 2019 and Civil Appeal No. 27 of 2019 (Consolidated) (Cause No. FSD 232 of 2018); (in Voluntary Liquidation) (Civil Appeal No. 26 of 2019) (Cause No. FSD 72 of 2019) (Field, Morrison, Beatson JJA, 8 November 2019)

Voluntary liquidation – supervision orders

The Cayman Islands Court of Appeal heard consolidated appeals against the making of supervision orders by the Grand Court. In both cases, the Petitioner (being the sole participating shareholder of each Fund) had requested that the Fund Manager exercise shareholder voting rights (exercisable only in respect of the Founder or Manager Shares held by the Fund Manager) to appoint representatives of FTI as voluntary liquidators of the Funds. Notwithstanding such request, the Fund Managers unilaterally elected to appoint their own voluntary liquidators. The Petitioner commenced proceedings under Section 131(b) of the Companies Law (2018 Revision) citing concerns regarding the operation of the Funds and seeking orders that the voluntary liquidators be brought under the supervision of the Court and appointing representatives of FTI as official liquidators.

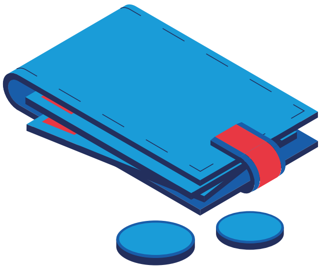
In the first appeal, McMillan J had ordered that the voluntary liquidation be brought under the supervision of the Court and directed that the FTI liquidators be appointed in addition to the voluntary liquidators appointed by the Fund Manager. In the second appeal, Kawaley J had ordered that the liquidation be brought under the supervision of the Court and that the FTI liquidators should be appointed in place of the incumbent voluntary liquidators. The Fund Manager appealed against both decisions. The Petitioner cross-appealed against the joint appointment of the voluntary liquidators in the first appeal. The Court of Appeal dismissed both appeals brought by the Fund Managers and upheld the cross-appeal brought by the Petitioner.

In the first appeal, the Court of Appeal set aside the supervision order made by McMillan J on the basis that the Judge had failed to identify the jurisdictional basis on which the order was made. Notwithstanding this, the Court of Appeal found that it was open to it to make its own findings on the evidence and ordered that the voluntary liquidation be brought under the supervision of the Court and that the Petitioner's nominees (representatives of FTI) be appointed as official liquidators. The Court of Appeal commented that, if it appointed the incumbent joint voluntary liquidators of the Fund, such appointment would undermine the effectiveness of the supervised liquidation by an appearance of partiality attaching to the voluntary liquidators resulting from their original appointment by the Fund Manager (whose role and conduct of the affairs of Fund Company would be the subject of investigation).

In the second appeal, the Court of Appeal upheld the supervision order made by Kawaley J. The Court of Appeal found that Kawaley J adopted the correct approach in that whilst the articles of association gave the power to commence a voluntary liquidation to the holder of management or founder shares, the participating shareholders were the primary economic stakeholder in relation to a voluntary liquidation, and that the starting assumption in determining the choice of voluntary liquidator should be to give weight to the views of the majority of economic stakeholders. The Court of Appeal agreed that it was appropriate to reject the Fund Manager's submissions that, in such circumstances, participating shareholders have no right to influence the choice of voluntary liquidator (or decide the appropriate winding up process).

The Court of Appeal confirmed that once it has been established that a solvent liquidation will be more "effective", "economic" or "expeditious" if brought under the supervision of the Court pursuant to Section 131(b) of the Companies Law (2018 Revision), the views of participating shareholders as to the identity of the liquidators should be respected, and that a fund manager should take a measured and neutral approach to any such application by a shareholder to assist the Court to determine whether the grounds for the application have been made out as well as the identity of the liquidators. The Court of Appeal found that it is not appropriate (without justification) for a fund manager to seek to oppose a petition or to frustrate a participating shareholder's attempts to appoint its preferred choice of liquidators. ■

[David Allison QC]



Personal Insolvency

Digested by Lottie Pyper

Mark John Wilson, George Maloney (Joint Trustees in Bankruptcy of Michael Bernard McNamara) v Moira McNamara, Marine House Trustees Ltd, Irish Life Assurance Plc, Michael Bernard McNamara

[2020] EWHC 98 (Ch) (Nugee J, 23 January 2020)

Bankruptcy – pension schemes – freedom of establishment – EU law

This case raised the question of whether the impact of bankruptcy on accrued pension rights with within the scope of Article 49 of the Treaty on the Functioning of the European Union ("TFEU"). Article 49 prohibits restrictions on the freedom of establishment of nationals of one Member State in the territory of another member state. Freedom of establishment includes operating as a self-employed individual and protects the right to take up and pursue activities *"under the conditions laid down for its own nationals by the laws of the country where such establishment is effective"* (subject to certain provisions). It is presently unclear whether this extends to the impact of bankruptcy in different Member States, and accordingly Nugee J made a reference to the Court of Justice.

The background to this question arose because Mr McNamara had spent the majority of his working life as a self-employed property developer in Ireland, where he set up certain pension arrangements. However, having shifted his centre of main interests to England, he was made bankrupt here on his own petition in November 2012.

Under English law, specifically section 11 of the Welfare Reform and Pension Act 1999 ("WRPA 1999), the rights of a person who is made bankrupt under any approved pension arrangement are excluded from his bankruptcy estate. The definition of an "approved pension scheme" includes a scheme registered with HMRC for tax purposes under section 153 of the Finance Act 2004 and any pension arrangements prescribed by regulations made by the Secretary of State. Pursuant to section 112 WRPA 1999 the Secretary of State may also make regulations enabling rights under an unapproved pension arrangement to be excluded from a bankrupt's estate.

Mr McNamara's Irish pension arrangements did not constitute an "approved pension scheme", and fell outside of both sections 111 and 112 WRPA 1999. Accordingly, the position under the English legislation was that his accrued pension rights were included in his bankruptcy estate.

Mr McNamara contended that, if this were the case, the English pensions legislation was contrary to EU law. Although it was possible for nationals of other Member States to register their pension rights for tax purposes under section 153 of the Finance Act 2004, in practice it was far more likely that English nationals would benefit from having an approved pension scheme than nationals of other Member States. It followed from this that, if the impact of bankruptcy on accrued pension rights is within the scope of Article 49 TFEU, the English legislation constitutes discrimination in enjoyment of a social advantage by English nationals, and is therefore contrary to EU law.

Rather than determining the case, the Court made a reference to the Court of Justice on its own initiative. However, Nugee J indicated that, in his view, Article 49 was engaged, such that the English legislation was incompatible with EU law. He suggested that the appropriate approach in this case would be to read down section 11 WRPA 1999 so as to include any unapproved pension arrangements of nationals of other Member States that are recognised for tax purposes. ■

[John Briggs]

Personal Insolvency

Karen Mulville v Jonathan Sandelson

[2019] EWHC 3287 (Ch) (Roth J, 4 December 2019)

Bankruptcy petitions – liquidated sum – independent and dependent obligations – contractual interpretation

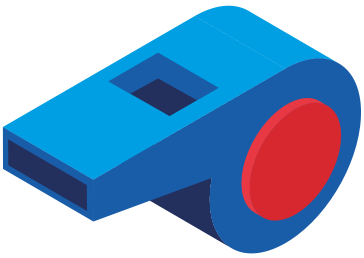
Mr Sandelson ("JS") sought to strike out a bankruptcy petition issued against him by the petitioner, Ms Mulville ("KM") on the basis that the alleged debt was not a liquidated sum, but was instead a damages claim.

The petition was founded on a financial obligation of £1,250,000 (the "Settlement Sum") owed by JS to KM under a settlement deed (the "Agreement"). Under the terms of the Agreement, JS was required to pay the Settlement Sum by 31 January 2019, which he had failed to do. KM had therefore not discharged any of her obligations under the Agreement.

The legal analysis turned on whether the obligations of JS and KM under the Agreement were independent or dependent obligations. If they were dependent obligations, then KM's claim against JS was a damages claim, not a liquidated sum.

The Court analysed the terms of the Agreement in order to ascertain whether the obligations were dependent or independent. It was notable that the Settlement Sum was described as being payable *"without any set-off, dedication, counterclaim, reduction or diminution of any kind or nature"*. In addition, KM was not required to take any steps under the Agreement until after the Settlement Sum had been paid: her obligations were subject to receipt of that sum. In those circumstances, the obligations of JS and KM were independent, and KM was entitled to petition for Settlement Sum as a debt claim. Accordingly, the Court refused to strike out the petition. ■

[Jeremy Goldring QC]



Sport

Digested by Andrew Shaw

Premier Rugby Limited v Saracens Limited

Rugby – disciplinary proceedings – salary cap

A disciplinary panel imposed financial penalties and a points deduction on Saracens Rugby Club ("Saracens") for its breaches of the Premiership Rugby Salary Regulations (the "Regulations").

The Regulations contain detailed rules which limit the amount of salary that rugby clubs may pay their players within each year running from 1 July to 30 June. The Regulations define the role of the Salary Cap Manager (the "SCM") who is responsible for all aspects of their operation. An important part of the scheme provided by the Regulations is that clubs must cooperate with the SCM, including by disclosing to him all contracts and other arrangements entered into with their players.

The panel considered the breaches of the Regulations by Saracens to be serious because: (i) it had recklessly and continually failed to cooperate with the SCM; (ii) there were several breaches in the salary cap years 2016/17 and 2018/19; and (iii) the breaches involved Saracens massively exceeding the salary cap for both of those salary cap years.

The panel exercised its discretion to halve the points sanction provided for by the Regulations to 35 points for the salary cap years 2016/17 and 2018/19 because it considered that otherwise Saracens would almost certainly have been relegated from the Premiership and this outcome would not have been within the spirit or underlying purpose of the Regulations. The panel also decided that Saracens should pay a fine of £5,360,272.31 for its breaches of the Regulations in the salary cap years 2016/17, 2017/18 and 2018/19. ■

Champions League Ban for **Manchester City**

On 14 February 2020, UEFA announced that its independent Adjudicatory Chamber had determined that Manchester City Football Club ("MCFC) had *"committed serious breaches of the UEFA Club Licensing and Financial Fair Play Regulations by overstating its sponsorship revenue in its accounts and in the break-even information submitted to UEFA between 2012 and 2016"* and that MCFC had failed to cooperate with the investigation carried out

by UEFA's Club Financial Control Body ("CFCB"). The Adjudicatory Chamber imposed a ban on MCFC from UEFA club competitions for the 2020/21 and 2021/22 season and a fine of €30 million.

The case was referred to the Adjudicatory Chamber in May 2019 by the CFCB Chief Investigator, the former Belgian prime minister Yves Leterne. The CFCB is tasked with ensuring that football clubs comply with the Financial Fair Play Regulations, which were implemented with the objectives of encouraging football clubs to be more self-sufficient and introducing more discipline and rationality into club football finances.

According to a report in the Guardian, the investigation opened by the CFCB Chief Investigator in March 2019 followed leaks of MCFC's emails, which were published by Der Spiegel the previous November. The Times has reported that these emails *"appeared to show that Sheikh Mansour bin Zayed al Nahyan, the City owner and head of the Abu Dhabi United group that runs the club, was mostly funding the £67.5 million annual shirt, stadium and academy sponsorship deals himself, rather than Etihad, the Abu Dhabi airline."*

However, the grounds on which the Adjudicatory Chamber made its findings have not been published and will not be until the final determination by the Court of Arbitration for Sport of the appeal which MCFC has stated it intends to make "at the earliest opportunity".

Mark Phillips QC and Andrew Shaw were appointed English legal counsel to the CFCB Chief Investigator.

Time Estimates: Attention, Attention!

For anyone who missed it, important recent guidance on ½ day time estimates sent to commercial practitioners by Andrew Baker J, in his capacity as the Chair of COMBAR, and taken from his recent decision in Kazakhstan Kagazy PLC & Ors v Zhunus & Ors [2020] EWHC 128 (Comm):

"Under estimation of the time required to argue applications in the Commercial Court, especially those for which the parties seek a Friday listing, is a significant current problem. In the hope that it may do something to start to turn the tide in that regard, I wish to emphasise that a half-day hearing estimate in this court is supposed to mean that a maximum of 21/2 hours will be required for all the substantive argument, an oral judgment and the determination (with argument as required) of consequential matters.

As a realistic rule of thumb, therefore, parties should not ask for a half-day hearing unless they are confident, having considered the matter with care, that substantive argument will be completed within 1 ½ hours maximum. It should not be assumed that judgment will be reserved; and if it is reserved, the final hour or so of hearing time not spent in court can and should be available to the judge to reflect and make key notes, fresh from the argument, for the structure and content of the judgment that he or she will need to write".

SOUTH SQUARE

INSOL 2020 Annual Conference

Cape Town, South Africa

Learn, Unlearn, Relearn

The venue for this year's INSOL Annual Conference, to be held between 15 and 17 March 2020, is the Cape Town International Convention Centre in South Africa. South Square, the only set of chambers who are members of the G36 Group, is delighted once again to be one of the sponsors of the event in this city of beauty, splendour and complex history.

INSOL conferences are always insightful and enjoyable and members of Chambers are much looking forward to catching up with old frien[illegible] and meeting new faces. Some 800 ins[illegible]ncy professionals from around the[illegible]ld are[illegible]pec[illegible] to attend. At present from Sou[illegible]re [illegible]city Toube QC (joint con[illegible]e chai[illegible]th [illegible] Stefan Smith), Fideli[illegible] QC, [illegible]ds of Chamb[illegible] Alex[illegible]der [illegible]and [illegible]rk Arnold QC, T[illegible] Smith QC, W[illegible]on and Stefa[illegible] Wilkins are [illegible] to be there, together with C[illegible]bers [illegible]ect[illegible] Will Mackinlay, with others k[illegible]n should commitments permit.

CANCELLED

The conference begins with a range of ancillary meetings, including the INSOL Offshore Meeting, on the Sunday, followed by a welcome cocktail reception sponsored by BDO LLP. There then follows a two-day technical programme with the theme of 'Learn. Unlearn. Relearn.' to help delegates challenge their thinking, acquire new silks and mull over the significant issues of our day.

We hope to see you there.

For further information, please visit **www.insol.org**

Felicity Toube

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Mark Arnold

Stefanie Wilkins

Fidelis Oditah

Tom Smith

William Willson

Will MacKinlay

Guernsey modernises *its insolvency law*

ALEX HORSBRUGH-PORTER
OGIER, GUERNSEY

DANIEL JUDD

Guernsey has updated its insolvency law with the Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance, 2020, passed on 15 January 2020. The changes include increasing creditor participation in insolvency processes, introducing clearer statutory transaction avoidance provisions, and enhancing the investigatory powers of office holders. The Ordinance brings Guernsey's insolvency law into line with other commonwealth jurisdictions such as the UK, the Cayman Islands, and the British Virgin Islands. The changes will affect all new liquidations and administrations, and will come into force when Regulations to that effect are made by the Committee for Economic Development. This article sets out the principal changes that affect future administrations and liquidations in Guernsey.

Declarations of solvency in members' voluntary liquidations

The distinction between a solvent and insolvent members' voluntary winding up is one of significance. While the company is solvent it is the members with the economic skin in the game, for creditors' claims can be met in full. The reverse is true when the company is insolvent. The new amendments introduce into Guernsey's members' voluntary winding up provisions the requirement of a statutory declaration of solvency by the company's directors, bringing Guernsey insolvency law into line with other offshore jurisdictions.

Guernsey insolvency law has almost uniquely permitted members to resolve, by special resolution, to wind up their company even when the company is insolvent, subject to creditor ratification. This position has enabled companies to be quickly and cheaply wound up without needing to involve the creditors or a professional insolvency practitioner. The obvious difficulty, however, is the reduced control over the process exercised by creditors. It might have been possible for a director to wind up a company made heavily insolvent as a result of his or her own acts and omissions.

The new provisions now require that, where a company is to be placed into a members' voluntary liquidation, the directors must declare that the company is able to satisfy the statutory solvency test. If they are unable to make that declaration, the directors can only appoint liquidators who are independent third parties, unconnected with the directors or members of the company. This will normally be a professional insolvency practitioner, ensuring that where a company is insolvent, and the creditors of that company are at risk of being prejudiced, an independent insolvency professional will safeguard the interests of creditors and preserve the assets of the company pending distribution to creditors.

Where a statutory declaration of solvency is not signed by the directors, creditor participation in a members' voluntary winding up is ensured by a requirement on the liquidators, within one month of their appointment, to call a meeting of all creditors, unless in their opinion there are no assets for distribution.

New statutory powers of investigation for liquidators

The powers of liquidators to consider the company's affairs have now been put on a statutory footing.

The Ordinance makes it clear that liquidators are able to require any prior officers of the company, anyone employed by the company within the previous 12 months to the liquidation, or indeed any other person (with leave of the court), to produce all documents and information relating to the company that liquidators may reasonably require to carry out their duties. The amendments also enable the liquidator to apply to the Guernsey Court for the appointment of an Inspector to interview officers or former officers regarding the company's formation, business and affairs, and the conduct or dealings of the company's personnel. A liquidator is additionally obliged to make such an application as soon as reasonably practicable where requested to do so by one half in value of the company's creditors.

Before these new amendments there was no statutory power or authority allowing a liquidator to demand documents from directors or employees of the company, or to interview directors or former directors. There was some common law authority following *Re Med Vineyards*, Royal Court, 25 July 1995 (unreported) permitting the interviewing of directors, but the extent of such common law powers was uncertain and was recently doubted by Lieutenant Bailiff Marshall QC in *Re X (a Bankrupt), Brittain v JTC (Guernsey)* (2015). The position was certain where the Letters of Request procedure was used, such as under section 426 of the UK Insolvency Act 1986, though this involved a degree of additional delay and cost. All these doubts have been swept aside by clear statutory powers outlined in the amendments.

Additionally, liquidators have now been granted the same powers as administrators to require a statement of affairs (summarising assets and liabilities and providing the names of creditors) from past and present officers of the company, present employees, and those employed in the year preceding the commencement of the liquidation.

It is now clear that Guernsey liquidators benefit from clear and enhanced powers to administer the company's estate for the benefit of creditors and shareholders, aligning Guernsey insolvency law substantially with the position in the UK and major commonwealth jurisdictions generally.

Transaction avoidance claims and extortionate credit transactions

The adjustment of pre-liquidation transactions is an important feature of modern insolvency codes. The new legislation contains a clear provision allowing liquidators to challenge transactions entered into at an undervalue, drafted in similar terms to the familiar rules in section 238 of the UK Insolvency Act 1986. The new law also addresses extortionate credit transactions, as would be found under section 244 of the UK Insolvency Act 1986, but does not independently cover preferences, which are already included in the present company law.

These developments provide a surer basis on which the Guernsey Court can make various orders against third parties where property has been transferred to them for no consideration, or for consideration which is significantly less than that provided by the company.

In situations where reciprocal assistance has been unavailable, Guernsey liquidators have hitherto had to rely on its customary law provisions, the availability of which was recently confirmed in express terms by Lieutenant Bailiff Southwell as well as the Deputy Bailiff in *Batty v Bourse* [2017] GLR 54. Common law and customary principles of transaction avoidance have a long history, the most famous perhaps being the Roman *law actio Paulina*. These principles will continue to be useful where the new transaction avoidance provisions do not apply.

Under the new law, transactions will be challenged as made at an undervalue where: (i) the transaction took place within six months of the insolvency proceedings, extended to 2 years where the transaction is with a related party; (ii) the company was insolvent at the time of the transaction, or as a result of it; and (iii) the transaction cannot be justified as entered into in good faith for the purpose of carrying on the business of the company, where there were reasonable grounds that the transaction would benefit the company. If those requirements are met, the Guernsey Court can order that the property is returned to the company, and can make orders against third parties (except for good faith purchasers for value without notice).

Express provision is also made in the new rules for extortionate credit transactions. As with section 244 of the UK Insolvency Act 1986, the new Guernsey law provisions apply to those transactions which take place within 3 years of the commencement of the insolvency and which involve grossly exorbitant terms in relation to the provision of credit or which grossly offend the principles of fair dealing. The Guernsey Court has the power to set aside the transactions and to amend the terms of the provision of credit. There has been relatively little case law on the meaning of *"grossly exorbitant"* and *"grossly contravened ordinary principles of fair dealing"*. Cases in England and Wales indicate that the test is *"stringent"*, by reference to the fact that the test is modelled on the UK Consumer Credit Act 1974. It remains to be seen how the Guernsey courts will approach the provision in the insolvency context.

Disclaimer of onerous property

The recent amendments grant liquidators the power to release the company from 'onerous property', such as unprofitable contracts, and property (including real property) which may not be readily saleable or which will lead the liquidator to incur liabilities. The wording of the new provisions bears very close resemblance to section 178 of the UK Insolvency Act 1986.

There are protections in place for persons affected by any disclaimer in that they can force the liquidator to make a decision about whether to disclaim the property or contract or not, and they can also apply to the Court for relief including the vesting of the property in the interested party. The new legislation also makes it clear that any person who suffers loss as a result of the disclaimer would then rank as an unsecured creditor of the company.

For the disclaimer to be effective, a notice must be served by the liquidator on a variety of people including the Registrar, Her Majesty's Receiver General, and anyone interested in the property to be disclaimed and any person who may incur a liability in respect of the disclaimed property. The property in question must also be identified.

Wider powers in administrations

One particularly useful change effected by the Ordinance is the express power given to administrators to make distributions to secured creditors and preferential creditors. The administrator may make distributions which, in their view, are likely to assist the achievement of any purpose for which the administration order was made. The benefits in making clear that such powers exist are obvious. It was previously doubted whether or not the court's approval was required, given that the Guernsey Companies Law provided that an administration order would not have any effect on the rights of secured creditors. Administrators in Guernsey can additionally make distributions to unsecured creditors if the court's permission is obtained.

It is now possible for a company to proceed immediately from administration to dissolution.

In cases where there are no assets to distribute to creditors, Guernsey companies are able to avoid the need for an interim liquidation which may prove costly. This may prove practical and economical, for example, where the company's estate is exhausted in making distributions to secured and preferential creditors, where it is clear that no distributions could be made to creditors.

Administrations will also involve greater creditor participation. Within 10 weeks of the date of the administration order (unless the Court orders otherwise) Guernsey administrators are now required to send a notice to all creditors inviting them to a meeting and explaining the aims and likely process of the administration.

Powers to wind up foreign companies

Guernsey Courts now have the power to compulsorily wind up overseas companies, and the position closely reflects that found in section 221 of the UK Insolvency Act 1986.

A non-Guernsey company may be wound up where: (i) it has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs; (ii) it is unable to pay its debts under section 407 of the Guernsey Companies law; or (iii) the Court is of the opinion that it is just and equitable that the company should be wound up.

English cases under section 221 of the Insolvency Act 1986 provide that there must be a 'sufficient connection' to the jurisdiction in order to wind up a foreign company. The locus classicus is the judgment of Lawrence Collins J in *Re Drax Holdings Ltd* [2003] EWHC 2743. Given the nature of financial and business disputes heard in Guernsey courts, it is difficult to conceive of many circumstances in which that will not occur. A place of business, assets, and registered office in the jurisdiction typically suffices. One would expect considerations of comity to be relevant, as they are in England and Wales.

Duties of office holders to report delinquent company officers

Liquidators and administrators are now under an obligation to report to the Registrar of Companies and the Guernsey Financial Services Commission (as regards supervised companies) where they consider that there are grounds for making a disqualification order against a present or past officer of the company. The report must be submitted within six months of the administrator or liquidator vacating office. Office holders are also required to assist the Registrar and Commission by providing them information which they may require.

Maintenance of essential services and utilities

The amendments bring Guernsey into line with the UK by allowing the Insolvency Committee to make rules preventing providers of essential services, such as electricity and water, from making it a condition of continued supply that the company in liquidation pay all previous invoices up front. However, providers can ask that the liquidator or administrator personally guarantee the payment of future invoices following commencement of the liquidation. This gives some protection to payments due to service providers whilst disallowing threats to withhold essential services.

Conclusion

The new changes are to be welcomed. They ensure that office holders in Guernsey insolvency process have the necessary tools and powers to tackle, draw in and preserve the assets of an insolvent company for the benefit of creditors. A number of powers are placed on a clear statutory footing, ensuring that pre-insolvency transactions can be challenged with greater clarity, and former directors can be questioned and required to produce documents more expeditiously. The changes also save time and cost, as with the new power to dissolve a company in administration. The substantive and procedural changes help bring Guernsey into line with many other Commonwealth jurisdictions, and enable parties and office holders alike to know where they stand with greater certainty.

Alex Horsbrugh-Porter advised on the amendments as a member of the Legal and Regulatory committee of ARIES, the pan-Channel Islands industry body. ■

Duties of administrators *in respect of company claims*

MATTHEW ABRAHAM

PIERS ELLIOTT
HENDERSON & JONES

Introduction

In recent years there has been a rise in litigation surrounding the steps taken by administrators while in office. In particular, there has been an increased level of creditor claims against administrators either arising from acts carried out by administrators while in office or, relevant to this article, the failure to take proper action.

This article focuses on the duties of administrators when considering whether to pursue or assign litigation and the practical steps that can be taken to minimise the risk of claims being brought against administrators. In this context the article reviews the principles that can be drawn from the decisions in *LF2 v Supperstone* [2018] EWHC 1776 (Ch) and *Brewer v Iqbal* [2019] EWHC 182 (Ch).

Duties of administrators when realising company property

An administrator owes a duty to the company over which he is appointed to take reasonable steps to obtain a proper price for its assets per *Re Charnley Davies Ltd* (No.2) [1990] *BCLC 760* in which Millett J held that:

"An administrator must be a professional insolvency practitioner. A complaint that he has failed to take reasonable care in the sale of the company's assets is, therefore, a complaint of professional negligence and in my judgment the established principles applicable to cases of professional negligence are equally applicable in such a case. It follows that the administrator is to be judged, not by the standards of the most meticulous and conscientious member of his profession, but by those of an ordinary, skilled practitioner. In order to succeed the claimant must establish that the administrator has made an error which a reasonably skilled and careful insolvency practitioner would not have made."

The duties of administrators when acting as agents to sell the assets of a company in administration was reconsidered in the recent decision of *Davey v Money* [2018] *EWHC 766 (Ch)*.[1] In that case it was held that administrators owe a duty to the company to take reasonable care to obtain the best price which the circumstances of the case permit. They do not owe the more onerous duties of a trustee selling trust property and the relevant standard of care is that of an ordinary skilled practitioner.

Realising value from causes of action

Causes of action vested in an insolvent company are to be treated as assets in the same way as other property owned by the company. As a result, administrators have the same obligation outlined above to obtain a 'proper price'. The key question is how administrators should go about achieving a 'proper price'.

Administrators could, of course, pursue causes of action themselves on behalf of the company. This is the most obvious method of unlocking value – and is likely to be effective when dealing with relatively simple claims (e.g. debt claims).

Problems may emerge, however, when dealing with more complex claims. Complex claims are likely to take time to litigate and require significant investment – for example in the services of solicitors, barristers and other experts (e.g. forensic accounting experts to advise on quantum). Such claims are also likely to carry significant risk – not only in terms of the loss of any investment in the claim itself but also in terms of adverse costs awards in the event the claim is ultimately unsuccessful. Additionally, defendants to claims brought by insolvent companies may unscrupulously seek to deny liability and/or use tactics to drag out claims in the hope that administrators run out of patience. Litigating such claims may therefore be unattractive to administrators. That does not, however, mean that such claims do not hold value. Value in such circumstances may be realised by assigning the cause of action to a third party.

LF2 v Supperstone

It is well established that administrators have the power to sell causes of action as part of their general powers to sell the company's property pursuant to Schedule 1, Paragraph 2 of the Insolvency Act 1986; per the decision in *Re Park Gate Waggon Works Co (1881) 17 Ch. D. 234.*

Assignment can have a number of benefits for administrators:

1. Administrators can realise value from causes of action without incurring the costs and risks associated with litigation.
2. Litigation can be a lengthy process; assigning the claim can enable administrators to resolve matters in a timely fashion so that they can close the administration.
3. Assignees bring proceedings in their own name so they also bear the risk of adverse costs awards.

But what duties do administrators owe when considering whether to assign a cause of action? This question has recently been considered by the Court in *LF2 v Supperstone*.

The decision centred upon a conditional fee arrangement (CFA) which had been entered into by Pennyfeathers Ltd with its solicitors,

1. See the October 2018 edition of South Square Digest for further analysis of this decision by Tom Smith QC.

Fieldfisher LLP in relation to its claim in a real estate dispute. The claim was successful and the Court made a declaration in favour of Pennyfeathers and an order for costs. The costs order was insufficient to cover the costs of Fieldfisher. Pennyfeathers did not have sufficient funds to meet the shortfall and Fieldfisher subsequently applied for an administration order.

The directors of Pennyfeathers later sought advice from a solicitor on the prospects of a claim against Fieldfisher for professional negligence. The solicitor offered to act for the company in connection with that claim on a CFA basis or alternatively, to purchase the claim outright for £10,000. The administrators did not believe the claim had any real prospect of success and rejected the offer of £10,000 on the ground that it would not make a material difference to the unsecured creditors.

The solicitor took an assignment of a debt owed to one of the directors of Pennyfeathers and in turn assigned the debt to a company, LF2 Limited, of which he was sole director and shareholder. In doing so, LF2 became a creditor of Pennyfeathers and made an application under paragraph 74 of schedule B1 to the Insolvency Act 1986 to challenge the conduct of the administrators in refusing to assign the claim, alleging that it unfairly harmed LF2's interests.

The application was dismissed by Deputy ICC Judge Barnett who held that:

1. The claim against Fieldfisher was frivolous and vexatious.
2. He was not satisfied that LF2 had discharged the burden of showing that the creditors would derive any benefit from an assignment of the claim and there was no evidence that the creditors would suffer unfair harm by the administrators declining to assign the claim.
3. The applicable legal principles included the following:

a. officeholders are under a positive duty not to assign a cause of action that is without merit;

b. the court should not direct the assignment of a claim which is frivolous or vexatious, which includes a claim with no real prospect of success;

c. the applicant bears the burden of proving that the claim does have prospects of success; and

d. where the proposed assignee of the cause of action is unlikely to be able to meet an adverse costs order made against it, the court will need to be satisfied that there are clear and certain benefits for the creditors.

LF2 appealed against this decision, on the basis that the claim was not frivolous or vexatious. The appeal was dismissed by Morgan J. Although he agreed that, on the available evidence, it was not possible to say whether the alleged claim was frivolous or vexatious, for the claim to succeed it would need to have been shown that there was evidence of unfair harm to Pennyfeathers' creditors and LF2 had not appealed on this ground.

In dismissing the appeal, Morgan J took the opportunity to consider the approach administrators should take when considering whether to assign a claim to a third party. Morgan J disagreed with the proposition that when it is not clear whether the cause of action has merit, the administrator ought not to assign it and should instead place a burden on the party seeking the assignment to demonstrate that the claim is not frivolous or vexatious:

"The administrator's power to assign a cause of action is conferred by paragraph 2 of schedule 1 to the 1986 Act, as a cause of action is "property" within that paragraph. That paragraph is not limited by any words which require the administrator to satisfy himself as to the arguability of an alleged cause of action.

A viable claim by the company against a third party is an asset of the company. A claim which is arguably viable, is a potential asset of the company. In principle, an administrator ought to be ready to investigate whether such an asset should be preserved and pursued [...]

If the administrator has no funds to investigate a possible claim against a third party and he receives an offer from a potential assignee of the claim to pay for an assignment, that offer will potentially constitute an asset of the company. The administrator should normally wish to preserve and pursue that asset. If it is clear to the administrator that the claim would be hopeless and that the potential assignee is bent on pursuing a hopeless claim in order to harass the third party, then the administrator should normally decline to assign the hopeless claim. The administrator is an officer of the court and the court expects him to behave honestly and fairly [...]

But there will be other cases. One such case is where the administrator does not have a clear view that the proposed claim would be vexatious and he is offered a sum of money for the assignment of the claim. In such a case, the administrator should be prepared to obtain a proper payment for the assignment. If it is not clear that the offer reflects the true value of the cause of action, then the administrator may well be advised to conduct some process of inviting rival bids or to hold an auction of the cause of action. The receipt of a sum of money for the claim would be likely to benefit someone, whether it is the administrator (as a contribution to his expenses) or the creditors."[2]

Morgan J noted that the administrators had focussed their submissions on protecting a third party from the possibility of being harassed by unmeritorious litigation rather than – as they should have – on the administrators

2. See paragraphs 64-67.

3. See paragraph 69.

realising assets of the company for the benefit of creditors.[3] The Court's rules and procedures will protect third parties from being harassed by unmeritorious litigation. Defendants have the ability to apply to strike out or seek summary judgment in respect of frivolous or vexatious claims. Defendants can also protect themselves against the prospect of being unable to enforce an adverse costs award made against an impecunious Claimant by seeking security for costs.

How can administrators obtain a 'proper price' for causes of action?

One issue facing administrators will be the question of how to discharge their obligation to obtain a 'proper price' for the assignment of a cause of action. It is incredibly difficult to place a value on litigation – particularly at an early stage in the proceedings – due to the uncertainties associated both with measuring the prospects of proving primarily liability and also in calculating the quantum of recoverable sums.

Valuing litigation claims is something that experienced lawyers find difficult – let alone insolvency practitioners. However, a lack of expertise does not excuse or discharge administrators' obligations. The recent decision in *Brewer v Iqbal*, although not a case in the context of assigning causes of action, is a helpful reminder that the Courts will not look kindly on administrators that fail to take specialist advice in order to obtain a proper price for a company's assets.

Brewer v Iqbal

In *Brewer v Iqbal*, Mr Iqbal was the former administrator of a company called ARY Digital UK Limited – a specialist broadcaster of Asian satellite television channels. Following his appointment in 2011, Mr Iqbal sought to sell the assets of the company rather than trade out of administration. The company's key assets were 'Electronic Programming Guides' (EPGs). The EPGs were licensed from British Sky Broadcasting (BSB) and, in essence, facilitated the broadcasting of content on certain digital channels.

After Mr Iqbal's appointment as administrator, the company continued to lose money. In particular, its debts owed to BSB were increasing and the directors of the company informed Mr Iqbal that BSB would *"switch off the signal within a week, as the Company had not been paying its fees"*. Mr Iqbal's view at the time was that if there was a "switch off" the EPGs, the main asset of the company, would be rendered worthless.

Mr Iqbal was advised by the company's accountant that the EPGs were worth approximately £10,000 and a director and shareholder of the company offered to purchase them for £35,000. Mr Iqbal instructed a third party to advertise the EPGs for sale for at least

£35,000. However, the EPGs were advertised on a website that was unlikely to attract potential purchasers of EPGs and the advertisement failed to refer to the EPGs themselves or provide significant detail about the EPGs. Mr Iqbal instructed the third party to remove the EPGs from sale three days later due to pressure from the company's management to sell the EPGs to them.

The EPGs were sold to the company's management for £40,000. After the sale, Mr Iqbal produced a report to creditors outlining his proposals for the administration. The creditors failed to approve his proposals, the Company entered insolvent liquidation and Mr Iqbal was discharged. The Claimants were appointed as joint liquidators and issued an application pursuant to paragraph 75(6) of Schedule B1 to the Insolvency Act 1986 to examine the conduct of Mr Iqbal.

The application was heard by Chief ICC Judge Briggs who held that Mr Iqbal had breached his duty of care to the company. The judge summarised that Mr Iqbal breached his duty of care by failing to exercise reasonable skill and care in that *inter alia* he:

- Failed to take specialist advice from a person in the EPG industry;
- Failed to obtain a proper valuation of the EPGs prior to sale;
- Failed to advertise in publications or websites likely to attract purchasers of EPGs;
- Failed to expose the assets to a proper market for a reasonable period of time; and placed too much reliance on the directors for: (i) a value for the EPGs; (ii) approval of advertising the EPGs on an inappropriate website; and (iii) dictating the timing of the sale of the EPGs.

How to avoid the same mistakes when assigning a cause of action

A few key (low cost) steps can help to avoid the same mistakes:

1. Obtain specialist advice: As much as it can be difficult to value litigation, solicitors and barristers can advise on the prospects of success and expert advice (e.g. from accountants) can also be sought on quantum.
2. Test the market: Directly approach a number of litigation funders or buyers. There are also an increasing number of specialist brokers who can test the market and solicit bids from third parties specialising in the assignment, funding or after the event insurance of claims. The process often includes assessing cases where there is limited information (which assists in obtaining comfort on point 1 above).
3. Consider deferring consideration: Consideration for an assignment may be paid in the form of a 'lump sum' upfront premium – but can also be deferred and structured in the form of a share of the proceeds. Taking a share of the proceeds can guard against the risk of missing out on the upside of a successful outcome. It is often possible to request a right of first refusal if the claim ultimately isn't pursued by the purchaser.

Conclusion

If an administrator is deciding what to do with a claim, in order to protect themselves from criticism they should consider claims as an asset unless it is clearly *"…a hopeless claim [used] in order to harass the third party…"* .[4] In considering this, administrators are reminded they are officers of the Court but the Court's rules and procedures are there to protect third parties from being harassed.

If there is doubt in the administrators' mind about merits and value of a claim they should obtain independent advice from solicitors and also test the market in the manner outlined above. Ultimately, the administrators should bear in mind that: *"…The receipt of a sum of money for the claim would be likely to benefit someone…"*[5] Whatever decision is reached, it will be important to document how that decision was reached to protect against the risk of future challenge. ■

4. See LF2 Ltd v Supperstone at paragraph 66.

5. See LF2 Ltd v Supperstone at paragraph 67.

Open all hours?

WILLIAM WILLSON

As many practitioners will know, 2019 saw a cluster of cases addressing the messy overlap between three pieces of relatively recent secondary legislation: (1) rules 3.20-3.22 of the Insolvency Rules 2016 ("IR16") dealing with out-of-court appointments by qualifying floating charge holders ("QFCs") (introduced on 6 April 2017); (2) paragraph 2.1 of PD51O of the CPR, the Electronic Working Pilot Scheme, as amended, introduced on 6 April 2018; and (3) paragraph 8.1 of the Practice Direction on Insolvency Proceedings ("PDIP"), introduced on 4 July 2018.

As drafted, the three pieces of legislation pose difficult questions about the interaction between the general regime for the electronic filing of documents (which is broadly intended to enable all parties to issue proceedings and file documents online 24 hours a day, all year round), and the bespoke regime for the filing of notices of appointment out-of-court by QFC holders (which was an exceptional right given to QFC holders when the Enterprise Act 2002 was introduced and QFC holders lost the right to appoint administrative receivers).

Live issues include: (1) Can directors/companies apply out-of-hours? (2) (If so) when does such an appointment take effect? (3) Are QFC holders special, and if so why? (4) (the one issue everyone appears to be agreed on) do the rules/provisions need to be changed (and, in particular, does paragraph 8.1[1] of PDIP need to be redrafted?)

The uncertainty is reflected (in chronological order) by: *Re HMV Ecommerce Limited and HMV Retail Limited* [2019] EWHC 903 (Ch) (Barling J); *Re Skeggs Beef Limited* [2019] EWHC 2607 (Marcus Smith J); *Re SJ Henderson & Company Limited* [2019] EWHC 2742 (Ch) (ICC Judge Burton); *Re Keyworker Homes (North West) Limited* [2019] EWHC 3499 (Ch) (HHJ Hodge QC); and *Causer v All Star Leisure Group* [2019] EWHC 3231 (Ch) (HHJ David Cooke).

As HHJ David Cooke said (with some judicial exasperation) at the start of his judgment in *Causer v All Star Leisure Group: "[this is] another application.... as a result of uncertainties arising from the interaction of the regime for electronic filing of documents...the Insolvency Rules... and the PDIP......The very fact that such applications are having to be made and that the answers are not straightforward indicates that there is an urgent need for a review of the drafting of these provisions to ensure that they operate effectively in conjunction with each other and do not produce unnecessary traps for the unwary".*

The cry for help has not gone (completely) unheeded. On 29 January 2020, the Chancellor of the High Court, The Rt. Hon. Sir Geoffrey Vos, noted that ("the Practice Note"):

"Practitioners have expressed concern regarding the effect of the appointment of an administrator purportedly made by filing a notice of appointment via the court's electronic filing system, outside the court's usual counter-opening hours. It is anticipated that these issues will be addressed by amendment to the Insolvency (England and Wales) Rules 2016. Until then, court clerks will be directed to process filings in the manner set out in this note".

The Practice Note provides that, in the case of notices of appointment by a company/its directors under paragraph 22, Schedule B1 of IA86 which are CE-filed when the court is closed, they will be referred by the court clerks *"at the first possible opportunity to a specified High Court Judge. The Judge will determine the validity and, if appropriate, the time at which the appointment takes effect. The Judge's determination will be made on paper or following a short hearing, for which he may request written or oral submissions".* In the case of an a notice of appointment which is (incorrectly) not filed under rule 3.20 of IR16 (*"by fax to a designated telephone number or by email to a designated email address"*), but is instead CE-filed when the court is closed, it will again *"be referred at the first available opportunity to a specified High Court Judge who will determine the validity and, if appropriate, the time at which the appointment takes effect. The Judge's determination will be made on paper or following a short hearing, for which he may request written or oral submissions".*

This note, of course, without more does not solve the inconsistent case law, with HHJ Hodge QC in *Re Keyworker Homes (North West) Limited* preferring (to the surprise of some) to follow *Re HMV Ecommerce Limited* and *HMV Retail Limited* (which the ILA Technical Committee had previously commented should be treated with a degree of *"caution"* given concerns about its *"precise legal rationale"*) over *Re Skeggs Beef Limited* and *Re SJ Henderson & Company Limited.*

The very fact that such applications are having to be made and that the answers are not straightforward indicates that there is an urgent need for a review of the drafting of these provisions...

HHJ David Cooke

The new procedure does at least put the dispute under the microscope, and disputes will now be reserved to a specified High Court Judge (who will determine both the validity of the appointment and, where appropriate, the time at which the appointment takes effect).

However, it remains unclear whether one specified judge will be allocated to deal with all out-of-hours NOAs and what factors will guide their decision, so that caution should still prevail in relation to all out of hours appointments, unless a QFC holder intends to use the designated fax/email process provided in rules 3.20-3.22.

Pending the anticipated amendments, applying well-inside court hours remains strongly preferable to avoid potentially being summoned to an urgent and unplanned hearing.

As if there could be any doubt of this, at the time of going to press, there had been a further flurry of cases: *Re Carter Moore Solicitors Limited* [2020] EWHC 186 (Ch) (Snowden J); *Re Statebourne (Cryogenic) Limited [2020] EWHC 231 (Ch)* (Zacaroli J) Re Symm & Company Ltd [2020] EWHC 317 (*Ch*) (Zacaroli J).

The first addressed a director's NOA rejected due to clerical errors with the result that the e-filing was not in fact made until the following Monday. Snowden J treated the clerical error as an error of procedure under CPR 3.10(b), which he directed should be remedies with the effect that the original filing did not fail (though he made it clear that the case was not subject to the new Practice Note, pre-dating it by a matter of days),.

In the second, Zacaroli J considered an NOA rejected on the basis of a similar defect – this time the inclusion of the incorrect court. The judge followed the approach of Snowden J in *Re Carter Moore* – though this time the Practice Note did apply, as the events post-dated 30 January. He was satisfied that the mistake constituted an error of procedure which could be waived pursuant to CPR 3.10(b), and directed that the NOA should be treated as having been filed at 14:54 on 31 January 20 (i.e. on the day it had initially been rejected). He noted that *"I should make it clear, for obvious reasons, that wherever possible and until the position is clarified by a rule change, practitioners should attempt to avoid CE-filing a notice of appointment of administrators outside of Court hours".*

Finally, in the third and most recent decision, Zacaroli J validated an NOA that had been electronically filed by the insolvent company's directors outside court hours, and deemed the NOA to take effect at 10am on the next working day. This was because: the out-of-hours filing was a defect that was simply an irregularity and caused no substantial injustice so could be cured under rule 12.64 of the Insolvency (England and Wales) Rules 2016 (IR 2016); and it was appropriate that an NOA filed by directors should be deemed only to take effect when the Court next opened, rather than at the out-of-hours time at which it was originally filed. This was to be contrasted with the position where an NOA was filed outside court hours by a QFC holder, where it could be appropriate that the NOA be deemed to be filed at the time it was originally submitted. This was because the IR16 and Insolvency Rules 1986 had long permitted QFCHs (and only QFCHs) to file outside court hours. The intended meaning of paragraph 8.1 of the Practice Direction on Insolvency Proceedings is to prevent any NOA from being filed electronically outside court hours. The remaining method of filing outside court hours through the email and fax process in the IR 2016 had always been intended solely for QFCHs, to compensate them for the loss of the 24-hour ability to appoint administrative receivers.

As the first post-Practice Note guidance from the High Court, and not a binding precedent, this decision hints that a future 24-hour filing window for all types of appointors is perhaps not a given.

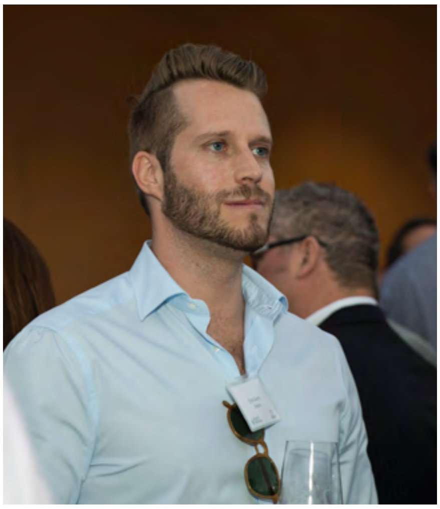
1. This provision, described generously in the case-law as "Byzantine", and less generously as a "clear mistake" provides that: *"For the avoidance of doubt, and notwithstanding the restrictions in sub-paragraph (c) to notices of appointment made by made by QFC holders, paragraph 2.1 of the Electronic Practice Direction 510 shall not apply to any filing of appointment of an administrator outside Court opening hours, and the provisions of Insolvency Rule 3.20 to 3.22 shall in those circumstances continue to apply".*

South Square RISA joint conference *in the Cayman Islands*

David Alexander QC (*South Square*), Clare Loebell (*Rawlinson and Hunter*), Mark Goodman (*Campbells*), Hilary Stonefrost (*South Square*)

Barry Isaacs QC, Colette Wilkins (*Walkers*) Jeremy Goldring QC, Jennifer Colegate (*Collas Crill*)

Co-Chair Felicity Toube QC (*South Square*)



Chris Keefe (*Walkers*)

Michael Hurst (*LynnPinkerCoxHurst*)

We were delighted to host our 5th joint conference with RISA Cayman in November 2019, held once again at the Ritz Carlton on Seven Mile Beach, Grand Cayman.

The conference was co-chaired by Rebecca Hume of Kobre & Kim together with South Square's Felicity Toube QC, with three panels of speakers covering Provisional Liquidations, Economic Torts and Shareholder Disputes with speakers drawn from both South Square and some of our local friends and colleagues.

We are delighted to maintain our close links with the Cayman Islands, and are very pleased to announce that we are once again funding the South Square/RISA scholarship, and we look forward to hosting a Caymanian lawyer for a secondment. The purpose of the South Square Scholarship is to provide a leading junior Caymanian lawyer with an insight into the workings of the English commercial courts. The winning applicant will work closely with South Square barristers, assisting with the drafting of documents and attending court. Both South Square and RISA fund the scholarship, which includes accommodation, airfare, and a living allowance. Further details will be announced in due course. ■

Carolyn Lum (*BDO*), Alice Carver (*Nelson & Co*)

Chris Rowland (*FFP*), Colette Wilkins (*Walkers*)

Emma Clifton (*Kalo Advisors*)

Mark Kish (*Ogier*), Rebecca Hume (*Co-Chair, Lobre and Kim*), Declan Magennis (*BDO*), Barry Isaacs QC (*South Square*), Mark Goodman (*Campbells*)

Helen Ennis (*Duff and Phelps*), Philip Pierson (*Krys Global*), Marie Spillane (KRyS Global), Orla O'Regan (*Duff and Phelps*), Mehreen Siddiqui (*Appleby*)

Post-conference drinks on the terrace at the Ritz Carlton

Declan Magennis (*BDO*), Toby Brown, Laura Stone (*Broadhurst*), Harry Shaw (*Campbells*)

Matthew Arvier (*Borelli Walsh*), Alex Riddiford (*South Square*), Zoe Nolan (*Walkers*)

Jason Trautman (*Deloitte*), Kirsten Celliers (*Deloitte*), Blake Egelton (*Walkers*)

Paula Richmond (*Kalo Advisors*), Robert Amey (*South Square*), Elizabeth Mackay (*Kalo Advisors*)

Euroland

PROFESSOR CHRISTOPH G. PAULUS

In this issue of the Digest, I report on three decisions of the Court of Justice of the European Union (CJEU), each one of them dealing one way or the other with insolvency related issues.

CJEU, decision from 17 January 2019 – C-639/17 – KPMG Baltics v. Ķipars Al

This decision clarifies that an "ordinary" payment order given by an "ordinary" person on the street to a credit institution for a transfer to another credit institution is not subject to the regulatory framework of Directive 98/26/EC of the European Parliament, and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ 1998 L 166, p. 45), as amended by Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 (OJ 2009 L 146, p. 37) (the Settlement Finality Directive). The case was submitted by the Supreme Court of Latvia (Augstākā tiesa) and was initiated by a payment order from the plaintiff, Ķipars Al.

Ķipars Al had a bank account at Latvijas Krājbanka and wanted all his funds there transferred to another bank account at a different bank. However, after all necessary internal steps to execute this order but before the final transfer to the alternate bank took place, Latvijas Krājbanka was declared insolvent and was immediately subject to a direction of the Financial and Capital Market Commission of Latvia to stop the execution of any transaction above €100k. In other words, the plaintiff found himself in the deplorable situation of seeing his funds frozen.

Unwilling to accept this and the administrator's (KPMG, the defendant) refusal to comply with his request to finalize the transaction, he turned to the courts and, indeed, found support from the Latvian courts at first and second instance – based on the application of the Settlement Finality Directive. Those courts applied the mechanism of that Directive (more precisely: the respective national transmission statute) which enables ongoing transactions to be performed irrespective of the commencement of an insolvency where those transactions were entered into the system before the commencement of insolvency.

The Latvian Supreme Court, however, had doubts about the applicability of that Directive and referred to the CJEU the following question: "Does the term "transfer order", within the meaning of Directive 98/26, include a payment order given by a depositor to a credit institution for the transfer of funds to another credit institution?" The subsequent question was dependent on an affirmative answer to the first one and need, therefore, not be addressed here.

The CJEU gave a negative answer to the first question. In its reasons for doing so, the CJEU made reference to the Directive's recitals (1–4) which clarify its purpose, namely to reduce systemic risks and ensure the stability of payment and securities settlement systems by minimising disruption to such a system caused by insolvency proceedings against one of its participants. The CJEU held that an article 3(1) pre-insolvency "transfer order" – legally enforceable and binding on third parties in the event of a system participant's insolvency – only covers instructions entailing financial obligations given by participants in a securities settlement system, in connection with the system, to other participants responsible for executing them. It does not include instructions involving financial obligations issued by third parties, outside of such a system. The CJEU, therefore, saw the transfer order under discussion as being outside the scope of the Settlement Finality Directive (see paragraph 15 of the judgment). Indeed, it would be hard to argue that the non-fulfilment of the plaintiff's order could possibly transcend into anything like a systemic risk for the Latvian, let alone for the European banking system!

The remainder of the judgment mostly centred around the wording of the Directive. Art. 2(f) of the directive provides an "exhaustive list" of entities covered by the concept of "participant". These may be an "institution", a "central counterparty", a "settlement agent", a "clearing house" or a "system operator": the "ordinary" person on the street could be included only by explicit national legislation which is absent in the case of Latvia (para. 19, 23–26). Art. 2(a), (b) and (i) indicate that a transfer order in the Directive's meaning is only one that is given by a participant within such system (para. 22) from which it follows that an order from outside (like in the present case) is not included.

In sum, the decision is certainly not ground-breaking; to the contrary, the result is most likely the only reasonable one. But it is good to know that the CJEU copes with challenges like this one in a genuine, non-presumptuous way.

CJEU, decision from 21 Novmber 2019 – C-198/18 – CeDe-Group

This case was brought to the Luxembourg Court by the Swedish Supreme Court, the Högsta domstol. A bit like in the Ķipars Al case, one wonders, however, at what level of simplicity a reference to the CJEU may be justified. In this case the simple question to be answered was whether or not a law suit brought by an insolvency administrator of a main proceeding in another member state falls under art. 6 EIR (in the case at hand, the old law was still to be applied) by which he tries to collect a claim of the debtor against its customer. Even a cursory examination of previous decisions (e.g. C-133/78; C-111/08; C-292/08; C-213/10; C-353/15; C-641/16; C-535/17; C-47/18 – to name but a few) would quickly have revealed the answer to be negative. Such lack, or fear, of decisiveness in the present case is all the more regrettable as questions 2 to 5 in the matter address highly interesting issues which await competent answers; but these questions were dependant on an affirmative answer to the first one and, therefore, no answer by the CJEU.

The facts are as follows: CeDe from Sweden and PPUB Janson from Poland had concluded a contract on the supply of goods in 2010. It was agreed that Swedish law would govern any question relating to the interpretation of the contract. In 2011, PPUB Janson was declared insolvent in Poland and a respective procedure there was commenced. The liquidator of that proceeding commenced proceedings against CeDe at the District Court of Malmö for payment of a previous delivery of goods. CeDe opposed the claim by arguing that it had a counter claim resulting from non and defective deliveries. This attempt to set-off was rejected by the plaintiff by referring to the liquidator's rejection of those very claims when they were lodged in the Polish proceeding. Accordingly, the Malmö court had to deal with the issue of set-off and its applicability in light of art. 9 EIR. The Polish plaintiff referred to the Polish rule which admits a set-off in an insolvency proceeding and argued that, consequently, there was no room for art. 9 in the present case. The defendant relied upon art. 3 Rome I-Regulation and to an interpretation of art. 9 EIR pursuant to which a set-off is permissible in any case when and if the debtor's claim is governed by the law of the party which requires set-off. The Malmö Court rejected the latter argument and decided in favour of the Polish plaintiff.

CeDe appealed against this decision in the course of which the plaintiff assigned the claim at issue to KAN, a Polish company which then took the place of PPUB in those proceedings. The Court of Appeal upheld the first instance judgment and the case was transferred to the Swedish Supreme Court. In the course of that proceeding it was now KAN which was declared insolvent in Poland. The appointed administrator there stated that the creditors would not pursue the lawsuit so that from then on it was KAN in liquidation which acted as plaintiff.

In its referral to the Luxembourg Court the Supreme Court noted that it was aware that the CJEU had already decided several times on the demarcation of the Brussels I-Regulation and the EIR but wondered whether the claim in question would not fall by reason of tis subject matter within the scope of art. 7 (in the judgment: art. 4) and if so whether it should then be interpreted in line with the reasoning underlying art 6 (in the judgment: art. 3). This is, at the end of the day, exactly the aforementioned rather simple question.

In its answer, the CJEU refers primarily to the Advocat General's Opinion. There it is stated that a parallel reading of artt. 3, 6 and 7 EIR evidences that jurisdictional competence and applicable law should be paralleled to the degree possible (para. 30); but it should also be noted that the scope of art. 7 EIR is broader than that of art. 6 EIR (para. 33). And since a payment claim like the one in question here is, irrespective of the plaintiff being an insolvency official, not derived directly from and closely connected to an insolvency proceeding (para. 31, 36) it follows that the law suit is not covered by the European Insolvency Regulation. In other words, the rules of the Brussels Ia-Regulation are to be applied.

It is hard to predict what the CJEU would have done with the Advocate General's (Michal Bobek) arguments regarding the last four (and unanswered) questions. The Advocate General's Opinion is certainly not binding but might serve anyway as a guidance for future cases. It deals with the uncertain interpretation of art. 4 par. 2(d) and with the problem of whether art. 6 EIR becomes inapplicable as soon as there is a general rule in the lex concursus permitting set-off or if this rule is also applicable when there are differences in the concrete case at hand.

CJEU, decision from 4 December 2019 – C-493/18 – Tiger

In Tiger and Others [2019] EUECJ C-493/18 the Court of Justice of the EU (ECJ) issued a preliminary ruling on whether an EU member state's court has the power to confer its insolvency jurisdiction in clawback proceedings on another member state's court.

The decision is the CJEU's answer to a referral of the French Cour de Cassation. The facts are somewhat complicated but the result was, due to a decision given by the CJEU between the referral and deciding in the present case, predictable.

The plaintiff, UB, was a debtor of an English insolvency proceeding. The insolvency administrator was WZ. The latter sued UB, his sister VA and Tiger – a freshly-founded company that had bought UB's French real estates – before a French court to get that sales transaction declared null and void. After losses at first and second instance, the Cour de Cassation turned to the CJEU.

The background of the case reaches back to 2008. In August of that year, Wirecard, a German company obtained from a court in the UK an order freezing the assets of UB who, on that date, owned an apartment and a property complex in France. Just three weeks later, UB and his sister VA signed, before a French notary, an acknowledgment of a debt of over €500.000 which UB owed to VA, and UB undertook to repay by 22 August 2017, subsequently securing a mortgage in favour of VA on those French real estates. One and a half years later, in March 2010, UB sold the properties to Tiger, a company that was founded just a few weeks before and whose shares were held by VA to 90%.

In May 2011, UB went to the Croydon County Court to file a voluntary petition and was declared bankrupt. That Court appointed WZ as UB's trustee in bankruptcy and later authorized WZ to bring an action before the French courts to have the sale of the French properties nullified on the basis of the English claw-back rules.

WZ did so and commenced the proceedings referred to above. The successful first instance judgment was rendered on the very day on which UB's bankruptcy case was closed by the English court. After WZ's further success before the Court of Appeal, it was finally the French Supreme Court which paid attention to UB's allegation that the

> *Can an administrator pursue an avoidance claim when and if it is clear from the outset that a home-judgment will not be recognised in the defendant's jurisdiction?*

French courts might not have jurisdiction for an action the purpose of which is to set aside a pre-bankruptcy transaction.

Although not mentioned in the reported facts, it is to be assumed that the CJEU decision in *Wiemer & Trachte* (C-296/17) had not yet been rendered or published when the Cour de Cassation referred its questions to the CJEU. The first two questions considered by CJEU concern whether or not the jurisdiction granted to the opening jurisdiction in the Seagon case (C-339/07) and which is now codified in art. 6 European Insolvency Regulation is an exclusive one or not. This was the outcome of the Wiemer & Trachte case so that the court's confirmation of its previous ruling appears from an ex post-perspective foreseeable.

Therefore, just two minor issues shall be reported here. Firstly, the CJEU sees no reason and basis for an exception of the exclusivity with regard to immovable property issues. Secondly, it accepts the French nullification action as a variant of the avoidance actions which are addressed in art. 7 par. 2(m) EIR. The latter is certainly correct, given the explicit mentioning of "voidness" in art. 7 par. 2(m). The former, though, can be doubted with a view to art. 11 EIR: after all, the contracts mentioned there are to be governed "solely" by the law of the member state in which the premise is situated. The CJEU ignores this stumbling block and confines its argument (par. 34) to the necessary speed and efficiency of any insolvency proceeding. This is a rather weak argument given the special treatment that immovable property enjoys in many jurisdictions. Moreover, since respective transactions are often governed by the local law it is to be feared that objections will regularly be raised with regard to art. 16. It is, thus, questionable whether efficiency is really served by this decision.

The third question raised by the Cour de Cassation refers to the possibility to change the jurisdictional competence through a decision of the originally competent court. This is based on WZ's explicit authorisation by the Croydon County Court to sue for recovery in France. WZ argued that this is a decision which had to be recognized pursuant to art. 25(1) EIR 1346/2000 (now art. 32 EIR 2015/848). However, the CJEU rejected this assumption. It is hard to see in par. 37 – 40 of the judgment more of an argument than just that the exclusivity is immune against any modifications – or, as the German writer Morgenstern phrased it: It can't be, since it shouldn't be. This reasoning is weak, however, since can an administrator pursue an avoidance claim when and if it is clear from the outset that a home-judgment will not be recognised in the defendant's jurisdiction? This is likely to happen quite often after the CJEU's decision in the Hertel case (C-328/12). ■

LEGAL EYE:

Online justice

MADELEINE JONES

In 2016, Lord Justice Briggs (as he then was) produced two reports on the structure of the civil courts.[1] The reports contain a radical proposal: the introduction of an "Online Solutions Court" "which will enable civil disputes of modest value and complexity to be justly resolved without the incurring of the disproportionate cost of legal representation" (Interim Report, 6.1).

Online dispute resolution is not a new idea. British Columbia has an online Civil Resolution Tribunal which deals with debts, damages, recovery of property and certain condominium disputes. The portal requires parties to make submissions on a mediation platform in an attempt to reach settlement before enabling them to pass to adjudication – a process which itself takes place online or by telephone. The Dutch introduced an online dispute resolution system called Rechtwijzer for landlord-tenant disputes, debt and divorce in 2014.

Results have been mixed. Rechtwijzer was dissolved in 2017 (though it was replaced by another online offering for divorce cases).

Still, online courts are a tempting proposition to administrators for whom the high cost of maintaining courts relative to the low value of the majority of disputes heard in them seems problematic. Commenting on the commissioned report, Sir Ernest Ryder said that austerity "*provides the spur to rethink our approach from first principles… [to] look at our systems, our procedures, our courts and tribunals, and ask whether they are the best they can be, and if not how they can be improved.*"[2]

Online platforms are capable of dealing with a large volume of disputes efficiently and economically: each year eBay resolves about 60 million disputes between buyers and sellers.

The proposed Online Solution Court was to offer a three-stage procedure:

"*… by way of summary, stage 1 will consist of a mainly automated process by which litigants are assisted in identifying their case (or defence) online in terms sufficiently well ordered to be suitable to be understood by their opponents and resolved by the court, and required to upload (i.e. place online) the documents and other evidence which the court will need for the purpose of resolution. Stage 2 will involve a mix of conciliation and case management, mainly by a Case Officer, conducted partly online, partly by telephone, but probably not face-to-face. Stage 3 will consist of determination by judges, in practice DJs or DDJs, either on the documents, on the telephone, by video or at face-to-face hearings, but with no default assumption that there must be a traditional trial.*"
(Interim Report 6.7)

The automated triage system envisaged for Stage 1 is surely technically possible (Beijing's Internet Court offers "pleading automatic generation" based on structured questions, along with a host of other technically impressive features, including AI litigation risk assessment), but it is not clear how close HM Courts are to obtaining any such technology. In that connection, more than one commentator has pointedly remarked upon the poor quality of the wifi connection in even the most modern courts in England and Wales. Shortly before a public beta test for the first element of the Online Court went live in April 2018, Mr Justice Birss, chair of the Civil Procedure Rule Committee's Online Court subcommittee, was quoted as saying that the pilot "may have been oversold, in that the idea the online court would be implemented [on its launch] is completely incorrect".

Nonetheless, the pilot, which was expanded in January 2019, enables litigants to issue, respond to and propose mediation for claims of £10,000 or less in value (excluding claims for personal injury, and subject to certain other restrictions). Details are set out in Practice Direction 51R.

Some aspects of the justice system cannot be captured in virtual proceedings: the psychological satisfaction felt by litigants of having their case heard in person before a decision is reached and the salutary effect of a dressing down by a critical judge, for example. Respondents to the consultation informing Lord Justice Briggs' final report express concerns about the quality of judgments that would be handed down by an online tribunal. This is an important concern: proportionality in the civil courts must not mean sacrificing the principle that every litigant is entitled to justice, and lower value cases are not necessarily less complex than high value ones. At a more fundamental level, according to the Office of National Statistics, 7.5% of adults in the UK (more than 4 million people) have never used the internet in 2019; clearly an online-only offering is not yet an option.[3]

Nonetheless, remarks from the Chancellor of the High Court and other senior members of the judiciary indicate that the judiciary are committed to a movement towards online justice. Members of the legal profession must start thinking about how they want that future to look. ■

1. https://www.judiciary.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf, https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf

2. Sir E. Ryder, 'The Modernisation of Access to Justice in Times of Austerity' (2016) <https://www.judiciary.gov.uk/wp-content/uploads/2016/03/20160303-ryder-lecture2.pdf

3. https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/internetusers/2019

News in brief

The Wolf of Wall Street Sues for Fraud

Jordan Belfort, the former stockbroker whose story inspired the hit film The Wolf of Wall Street, is suing the filmmakers for $300m (£229m) – the amount made at the box office. The film, released in 2013 and nominated for 5 Oscars, was based on Belfort's book of the same title, and described his rise as a young New York broker in the late 1980s, and his subsequent fall, through a haze of drugs, women, corruption and fraud.

Belfort claims Red Granite, the production company who put up the film's $100m budget, lied about being "legitimately funded" when he sold them the rights to his story. Red Granite's co-founder, Riza Aziz, is currently under arrest in Malaysia on money laundering charges, accused of siphoning $700m from the government-run 1MDB into his own personal bank accounts. The Wolf claims he would never have signed up to the film if he had known about the true source of the film's funding.

Matthew Schwartz, lawyer for Red Granite, said in a statement: "Jordan Belfort's lawsuit is nothing more than a desperate and supremely ironic attempt to get out from under an agreement that for the first time in his life made him rich and famous through lawful and legitimate means."

Barrister to the Rescue

Hero barrister Oliver Glasgow QC, who practices criminal law from 2 Hare Court chambers, leapt into action at the Old Bailey on 27 January 2020 to protect a female police officer as a brawl broke out in the courtroom. The judge had just passed sentence of a collective 116 years imprisonment on a gang of violent drill rappers convicted of killing a rival with swords. Enraged by the sentence, supporters of the gang began shouting abuse, fighting broke out between members of the public in the gallery and one man clambered over the railing of the gallery to rush at the police officer. Glasgow, who had been prosecuting the gang, grabbed and restrained the intruder as an umbrella and a seat from the dock were hurled across the court.

Mr Glasgow, who apparently remained clad in his wig and gown throughout the fracas, is an accomplished athlete, competing for GB in the duathlon world championships in Hungary in 2007.

Richard Fisher QC

South Square is delighted to announce that Richard Fisher has been appointed one of her Majesty's Counsel. His appointment was announced in January this year, and the ceremony will be held on Monday 16 March 2020.

Becker to remain bankrupt until 2031

Former tennis champion Boris Becker has been handed a 12-year extended bankruptcy restriction after the Official Receiver investigated undisclosed transactions occurring before and after his bankruptcy totalling over £4.5m. Bankruptcy restrictions are usually lifted after 1 year but the Insolvency Service has said that 'owing to the nature of Becker's actions, the Official Receiver pursued extended restrictions to prevent him causing further harm to his creditors'.

Becker offered a Bankruptcy Restrictions Undertaking, which was accepted and will last until 16 October 2031. Becker was originally made bankrupt on 21 June 2017 following an application by Arbuthnot Latham Bank in relation to a £3m loan.

HMRC increases winding up petitions

HMRC asked the courts to liquidate more businesses, a total of 4,308, in the 12 months to the end of September 2019 than at any other time over the past four years. The taxman can file a winding-up petition if a company has overdue bills of £750 or more, allowing HMRC to liquidate the business and begin the process of paying off its creditors. It is thought that the global economic slowdown, combined with Brexit uncertainty, has resulted in a rise in the numbers of businesses struggling to pay VAT, corporation tax and PAYE on time. As reported in the last issue of the Digest, from April this year HMRC will regain its status as a preferential creditor in an insolvency which may increase winding-up petitions yet further.

Law Society goes up in flames

The roof of the historic Law Society headquarters in London has been destroyed after a fire broke out during an annual dinner for junior lawyers on 1 February 2020. Twenty-five fire engines and 150 firefighters were called to the blaze in Chancery Lane in Holborn at 10.40pm, and fought through the night to bring the blaze successfully under control on the Sunday morning.

The roof of the six-storey building and a staircase from the third to the fifth floor was destroyed by the fire and there was also damage to the third and fourth floors.

113 Chancery Lane was built in 1832, seven years after the creation of The Law Society itself, and is Grade II listed.

QC Appointments builds up massive surplus

Amidst the celebrations in the Inns of Court in early January as the new round of Silks were announced, it has emerged that the not-for-profit company that runs the appointments process has built up a surplus of £1.35m. The company is wholly owned by the Bar Council and the Law Society.

The current system for appointing Silks began in June 2006 with the aim of increasing diversity within the rank of silk, as the old method of 'confidential soundings' was widely considered to inhibit diversity. However, under the new system the cost of applying for and taking silk has risen dramatically, itself possibly damaging diversity particularly for those applicants in less lucrative practice areas. Traditionally, no application fee was charged, though a modest sum was payable on appointment for the letter patent. Currently, the fee payable to QC Appointments is £1,800 to apply, and a further £3,000 on success.

BBC invites the wrong man to talk law with Lord Sumption

Presenter of the Radio 4 PM show, Evan Davis, had wanted a discussion between two legal heavyweights over plans to televise sentencing in Crown Courts: former Supreme Court Justice, Lord Sumption, and Robert Shapiro, lawyer for OJ Simpson whose televised trial in the US is surely one of the most famous in history.

The mix up began to dawn during Davis' introduction of Mr Shapiro, describing him as OJ Simpson's "main man". The response came back: "First of all, let me say it's an honour to be on with Lord Sumption. Second let me say that I am Robert Shapiro, an adviser to Democratic Presidents, not the lawyer. You've called the wrong Robert Shapiro".

Fortunately, the wrong Shapiro had plenty to say on the issue at hand.

Flybe keeps its wings

In 2019 alone 23 carriers worldwide went out of business, including the UK's Thomas Cook, Flybmi and WOW Air. However, in January of this year the government bailed out Flybe, agreeing to delay the payment of the airline's outstanding £106m air passenger duty bill until the spring of this year to allow it to weather a cashflow crisis. Flybe is also understood to be in negotiations with the government over a loan, which the airline insists would not be a bailout as it would be taken on commercial terms. The move has angered rivals such as IAG and Ryanair over concerns that this breaches state air rules.

How to defraud a Dragon

David Shipley, a Conservative Party activist and one of the leading voices behind 'Brexit: The Movie', has been jailed for defrauding the Dragons' Den entrepreneur James Caan's business out of a £519,000 investment.

Shipley had approached Mr Caan's business, Resourcing Capital Ventures, with a Dragons' Den-style pitch requesting the loan for his firm, Spitfire Capital Advisors. To support his pitch Shipley had photoshopped bank statements and a P60 to inflate his salary from £60k to £377k, and claim he received £540,000 in commissions. In reality, Shipley had only earned £19,928 in commission between 2011 and 2014 and was described as an 'underachiever' who had left his previous employer in disgrace after lying about his father's death: a lie uncovered when the company phoned Shipley's house to express their condolences and the phone was answered by the father, very much alive.

Mr Caan's business made the loan to Shipley's company before the fraud was uncovered by Spitfire, who fired Shipley for gross misconduct and reported his actions to the police.

Shipley admitted one count of fraud by false representation and was jailed for three years and nine months and disqualified from being a director for seven years.

Judge Martin Griffith told Shipley: "Your possible political career has gone, that's what happens when you commit an offence of dishonesty . . . Good."

The Twinning Project

Chambers is proud to support The Twinning Project, a charity which twins professional football teams with their local prison. Launched in October 2019 under the guidance of the then prisons minister Rory Stewart and now supported by the present prisons minister, former Member of South Square Lucy Frazer QC MP, Mark Phillips QC is on the board of trustees.

The charity offers 12-week courses to groups of 16 prisoners, coaching them from their first football coaching badge through to learning how to be a steward. It now operates in 46 prisons countrywide, aiding prisoner rehabilitation.

The inaugural fund-raising event is at the London Palladium on 27 April 2020 when Arsène Wenger, David Dein MBE and a host of Special Guests will be taking to the stage for a one-off event to reveal the secrets of their, and the Invincibles', success. In addition, an array of prizes will be auctioned on the night, including the chance to have dinner with Wenger or Ian Wright and a dance lesson with Alex Scott MBE.

For further information and to book tickets please visit **lwtheatres.co.uk/wenger-dein** or call **020 7087 7755**

Forestry ponzi operators ordered to pay

On 18 February Mr Justice Kramer ordered two men charged in connection with an alleged forestry investment scam to pay over £8.6 million under a deal previous reached in 2018 to resolve civil proceeding brought by liquidators for the companies they allegedly defrauded.

Junie Omari Bowers and Andrew Skeene were the directors of Global Forestry Investments, which alleged to offer ethical investment in Brazilian teak plantations, promising returns of up to 20%. It was estimated that more than £20 million was received by Global Forestry Investments (GFI) from the Belem Sky scheme, and a further £3 million plus from another scheme called the Para Sky Project.

Liquidators, companies and their bankruptcy trustees filed a civil suit against the pair and Bowers' wife in late 2017, seeking more than £10 million. The claims were settled out of court by a civil settlement agreement, requiring Bowers and Skeene to pay £6 million or, if the pair defaulted on the repayments, the full £10 million would be due. In January 2018, both Skeene and Bowers gave disqualification undertakings to the Secretary of State for Business, Energy and Industrial strategy.

Initially Bowers and Skeene paid £1.45 million but by August 2019, after both had been arrested by the Serious Fraud Office (SFO) which had become interested in the civil claim allegations, they had ceased to make further payments.

In July of that year the SFO announced it had charged Bowers and Skene with conspiracy to defraud and other charges relating to alleged investment schemes between August 2010 and December 2015. While some money was received by investors in GFI – and was believed to have come from funds from other investors in a typical ponzi scenario, and from a currency trading fraud also operated by Bowers and Skeene - an investigation also found that around £13 million from plot sales was paid into bank accounts held by the directors.

In issuing his ruling, Kramer J rejected arguments from Bowers and Skeene, who represented themselves, that the settlement agreement had been breached by the companies and liquidators by handing over a copy of the settlement to the SFO before the mens' arrest. They claimed the agreement was covered by litigation privilege, an argument the judge rejected. The judge also found that the decision by the SFO to charge the defendants occurred before the copy of the settlement agreement was handed over.

Bowers and Skeene also argued that the civil proceedings related to the request for the £8.6 million judgement should be stayed in order not to prejudice the criminal case, which is scheduled for trial in Spring 2021. The judge rejected this application, stating that the civil proceedings were not focused on the alleged fraud claims but on the settlement default.

Cayman Islands 'blacklisted' by EU

Mere weeks after the UK left the European Union, Brussels has included the UK overseas territory of the Cayman Islands in its tax havens blacklist, along with further additions of Panama, Palau and the Seychelles, taking the jurisdictions on the list to a total of 12.

Cayman was previously on a so-called 'grey list', along with Turkey, which Brussels implemented in order to give the jurisdiction time to introduce new laws to bring it into line with EU regulations. However, as of 18 February 2020 the Islands have not been deemed to have 'appropriate measures' in place to prevent tax abuse, allowing firms to register there despite having minimal presence in the territory.

It is understood that Cayman Islands' Premier, Alden McLaughlin, has already contacted the EU about the process of being removed from the blacklist, as the jurisdiction has approved many reforms sought by the EU.

The blacklist of 'non-cooperative tax jurisdictions' was adopted by the EU in 2017 as a response to tax avoidance in the EU, and screens 92 countries. The screening processes does not include any members of the EU, despite the 2019 vote of the European Parliament to overwhelmingly accept a report that likened Luxembourg, Malta, Ireland, the Netherlands and Cyprus to tax havens.

Diary dates

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

Upcoming conferences

15–18 March 2020
INSOL Cape Town
Cape Town International Convention Centre

3 April 2020
Insolvency Lawyers Association Annual (ILA) Conference
II Cavendish Square, London

10–13 May 2020
R3 Annual Conference
Beaumont Estate, Windsor

1 June 2020
ChBA Summer Conference
Royal College of Physicians, London

11 June 2020
Banking and Regulation Forum
Mayfair Hotel, London

14–16 June 2020
III Annual Conference
New York

17 June 2020
INSOL Channel Islands One Day Seminar
Radisson Blue Waterfront Hotel, St Heiler, Jersey

25 June 2020
South Square | RISA Conference
BVI Arbitration Centre, Tortola

7–11 September 2020
London International Disputes Week
Central Hall, Westminster, London

1–4 October 2020
INSOL Europe Annual Congress
Sorrento, Italy

17 November 2020
South Square | RISA Conference
Ritz Carlton, Grand Cayman

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

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

Practice areas

Insolvency & Restructuring

Banking & Finance Litigation

Offshore

Commercial Litigation & Arbitration

Company Law

Civil Fraud

Sport

Insurance

Trusts & Property

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

Sectors

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

SOUTH SQUARE CHALLENGE

SET BY
David Alexander QC

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02

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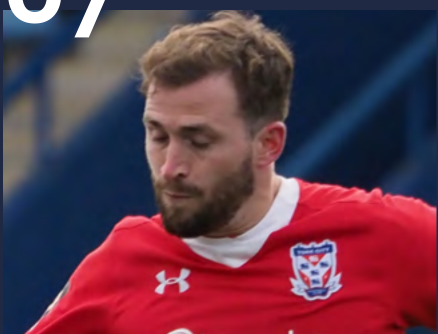

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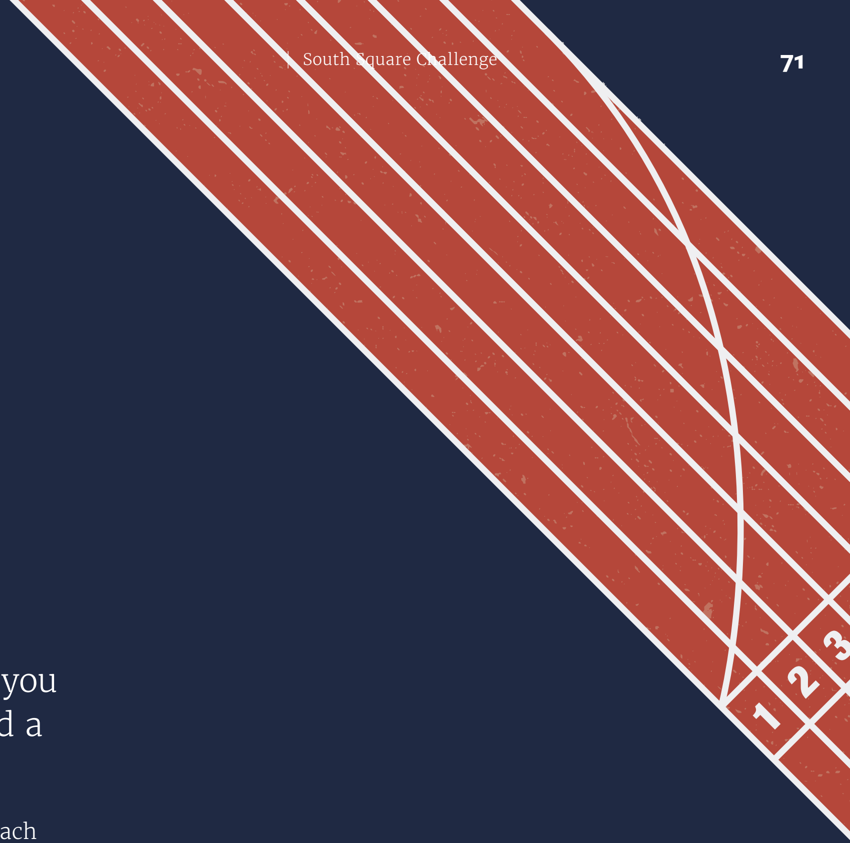

Enter our March 2020 competition and you could win a magnum of champagne and a much-coveted South Square umbrella!

This time around, all you need to do is correctly *identify* each of the individuals in the images to the left and work out the *connection* between them all.

Please send your answers to Kirsten, either by e-mail to kirstendent@southsquare.com or to the address on the back cover, by 1 June 2020. The winner, drawn from the wig tin if we have more than one correct answer, will receive a magnum of champagne and a South Square umbrella. **Best of luck!**

NOVEMBER CHALLENGE ANSWERS

(A) Thomas Cook Group Plc, Re [2019] EWHC 2626 (Ch)

(B) Discovery (Northampton) Ltd v Debenhams Retail Ltd [2019] EWHC 2441 (Ch)

(C) Lehman Brothers International (Europe) (In Administration) v Exotix Partners LLP [2019] EWHC 2380 (Ch)

(D) UBS AG New York v Fairfield Sentry Ltd [2019] UKPC 20

(E) Granada UK Rental & Retail Ltd & Ors v The Pensions Regulator [2019] EWCA Civ 1032 (Box Clever)

(F) Steinhoff International Holdings NV restructuring

(G) Primeo Fund (in Official Liquidation) v Bank of Bermuda (Cayman) and HSBC Securities Services (Luxembourg) S.A. CICA (CIVIL) Appeal No. 21 of 2017

The link between all of the answers is that they are matters in relation to which members of South Square have advised during 2019.

The winner, drawn from the wig tin, is Owen Hallam, as Associate at Slaughter & May. Owen wins not only a magnum of champagne and a South Square umbrella, but also a Samsung Galaxy Tab A.

SOUTH SQUARE

South Square "continues to dictate the standard to which others must pitch." **LEGAL 500**

Michael Crystal QC
Christopher Brougham QC
Richard Hacker QC
Mark Phillips QC
Robin Dicker QC
Martin Pascoe QC
Fidelis Oditah QC
David Alexander QC
Glen Davis QC
Barry Isaacs QC
Felicity Toube QC
Mark Arnold QC
Jeremy Goldring QC
David Allison QC

Tom Smith QC
Daniel Bayfield QC
John Briggs
Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn
Richard Fisher
Stephen Robins
Marcus Haywood
Hannah Thornley
William Willson
Georgina Peters
Adam Al-Attar
Henry Phillips

Charlotte Cooke
Alexander Riddiford
Matthew Abraham
Toby Brown
Robert Amey
Andrew Shaw
Ryan Perkins
Riz Mokal
Madeleine Jones
Edoardo Lupi
Roseanna Darcy
Stefanie Wilkins
Lottie Pyper
Daniel Judd

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