

Digest



Corporate Insolvency and Governance Bill 2020: a breath of fresh air

Mark Phillips QC, William Willson and Clara Johnson provide a detailed overview

Directors' Duties in the Age of Covid-19: Where to from here?

Gibson Dunn's Susy Bullock and Georgina Peters on directors' duties in the Age of Covid-19

Constellation: a dazzling success for BVI restructuring

Ogier's Grant Carroll and team on the recent BVI restructuring



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From the editors



MARCUS HAYWOOD AND WILLIAM WILLSON

Welcome to the Summer 2020 edition of the South Square Digest.

We hope that all our readers and their families are well in these difficult times.

In the last Digest editorial – written in the final days of February – we said that “*millions of companies in China are struggling to stay afloat*” and that the “*global economic shockwaves are potentially catastrophic*”. Fast forward three and a half months, and the UK is reported to be facing its worst recession since the early 18th century, has recorded at least 40,000 deaths and (if the international data is to be trusted) has the second worst death-rate globally, second only to the United States. A coronavirus which in February we all still hoped could be contained has now immutably changed our domestic and professional lives. For the “*millions of companies in China*” in the February editorial, now read the 100,000s of companies in the UK. Nearly one quarter of the workforce has been ‘furloughed’ (not a word most of us had heard of before the enactment of the Coronavirus Job Retention Scheme),

and some industries – particularly leisure, hospitality and entertainment – may never return to normality.

As we gradually emerge from lockdown, there are huge ethical questions to consider and re-consider: did we need to go into lockdown at all? should the most vulnerable have been shielded, so the rest of us could carry on as normal? or are we in fact coming out of lockdown too early? The advocates of science, utilitarianism, libertarianism and pragmatism will doubtless debate the moral calculus of our decision-making for a generation. The optimists among us will see change for the better: more time spent with family; a cleaner environment (in the short-term at least); more cost and time-efficient working practices; new skills learnt, amid a time for reflection. The advances in technology have also been a great mitigator and facilitator. For example, the inaugural Zoom version of the South Square Thursday drinks party

attracted the biggest member turnout in years.

Despite the restrictions imposed by lockdown, thousands of protestors joined anti-racism demonstrations across the UK at the start of June, prompted by the barbaric treatment of George Floyd, a 46-year-old black man, following his arrest in Minneapolis, USA. A chilling video shared across social media showed Mr Floyd – unarmed and in handcuffs – dying as a white policeman knelt on his neck for nearly nine minutes. The events in America have triggered anger and reflection across the world, with the Black Lives Matter movement exposing uncomfortable truths. It also serves as a sobering reminder of the urgent action needed to improve diversity within the UK legal profession. As our former head of Chambers Mr Justice (later Lord) Salmon said as long ago as 1958, handing down sentence in relation to a racially motivated GBH:

“Everyone, irrespective of the colour of their skins, is entitled to walk through our streets in peace with their heads erect and free of fear. That is a right which the Courts will always unfailingly uphold”.

On 20 May 2020, the Government presented the Corporate Insolvency and Governance Bill to Parliament (“CIGB”). The Bill proposes the most significant changes to UK domestic insolvency law since 1986. The Bill passed through the House of Commons in one day on 3 June 2020. Somewhat ominously, the Secretary of State for Business Energy and Industrial Strategy, Alok Sharma MP, was taken ill during his House of Commons speech (though he later tested negative for COVID-19). At the time of writing, the CIGB is being debated in the House of Lords, where key issues – for example, the *“it is likely that the moratorium will result in the rescue of the company as a going concern”* test for the new Moratorium – have already been identified, and are being debated (i.e. should the test be *“could result in a rescue as a going concern”*?). In our leading article, we have a detailed summary of the CIGB from Mark Phillips QC, William Willson and our newest member of Chambers, Clara Johnson, which unpicks the five key components of the Bill. This is to be followed, later this month, by a “mini-Digest” special edition devoted to a

more detailed analysis of the Bill before it becomes statute on or around 30 June.

This edition includes several additional articles which consider COVID-19 and the legal fall-out of the pandemic. The recently ennobled Richard Fisher QC and Clara Johnson consider furloughing and the adoption of contracts of employment in the wake of Carluccio’s and Debenhams. Turning to contract law, Toby Brown reviews *force majeure* and frustration during the pandemic. Turning to company law, Susy Bullock (Gibson Dunn) and Georgina Peters analyse how the pandemic has and will affect directors’ decision-making and the boardroom. Turning to civil procedure, Marcus Haywood looks at the Courts’ response: business as usual, with remote hearings here to stay. And finally, turning to history, Roseanna Darcy’s “Legal Eye” describes, in vivid terms, the impact that the Black Death had on the development of our legal system in 14th century England.

Beyond COVID-19 – for there is such a place – we have an article on retail CVAs by Tom Smith QC and Madeleine Jones; our quarterly offshore piece comes from the team at Ogier BVI, who recount the starry success of the Constellation restructuring; Roseanna Darcy writes on the scope and effect of asymmetric jurisdiction clauses; and we have the next instalments of, respectively, the

history of Chambers from Simon Mortimore QC, and the view from Euroland by Professor Paulus.

Finally, we welcome our newest member – Clara Johnson – who joined Chambers in April from 3 Hare Court (but who, somewhat uniquely, has not yet been able to physically meet any of her new colleagues since joining!).

And we congratulate Richard Fisher QC on taking silk. Thankfully the silk ceremony and Chambers’ lunch took place on 16 March, two days before the closure of schools, four days before the closure of pubs/restaurants and a week before lockdown started.

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.

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. ■

William Willson & Marcus Haywood





Corporate Insolvency and Governance Bill 2020

A breath of fresh air



MARK PHILLIPS QC



WILLIAM WILLSON



CLARA JOHNSON

On 20 May 2020 the Government introduced the much-awaited Corporate Insolvency and Governance Bill (“the CIGB”) to Parliament. The CIGB sets out the detail of the Government’s far-reaching reforms to the existing restructuring and insolvency regime as part of its response to the economic crisis caused by the Covid-19 pandemic. The CIGB makes sweeping reforms and marks a new era in promoting the rescue culture originally heralded under the Insolvency Act 1986 (“IA86”).

This article provides an initial review of the five reforms introduced by the CIGB.

Separately, South Square will be providing a “mini-Digest” later this month devoted entirely to the CIGB, whose 238 pages of detailed legislation are the most significant changes to our insolvency legislation for a generation.

Overview

The CIGB has been introduced on an emergency basis in a little over six weeks.¹ It is intended to and does compliment other legislation and schemes enacted in March/April, including the Coronavirus Act 2020 and the Coronavirus Business Interruption Loan Scheme (“CBILS”). Consistent with emergency legislation, the CIGB includes references, in no fewer than 23 places, to the ability of the Secretary of State to make amendments to its provisions by statutory instrument. In time, it is understood that the CIGB will be supplemented by a set of statutory rules (e.g. relating to the conduct of the Monitor), as well as (further) changes to the Practice Direction: Insolvency Proceedings.

The passage of the CIGB through the House of Commons was deliberately truncated, with all stages having taken place in a long parliamentary session on 3 June 2020 (which produced 13 pages of tabled amendments).² It will now be considered at further length by the House of Lords, where most amendments are anticipated³, before finally obtaining Royal Assent. It is anticipated that it will become law in or around 30 June 2020.

According to its Explanatory Notes⁴, the overarching objective of the CIGB is “to provide businesses with the flexibility and breathing space they need to continue trading, and to help them avoid insolvency during this period of economic uncertainty. The measures are designed to help UK companies and other similar entities by easing the burden on businesses and helping them avoid insolvency during this period of economic uncertainty”.

The Government has previously consulted on three of the five insolvency reforms: (1) the moratorium (2) the new arrangement and reconstruction plan and (3) the restriction on enforcement of ipso facto clauses. This consultation culminated in the publication by the Department for Business, Energy and Industrial Strategy in August 2018 of its response entitled “Response to the Insolvency and

Corporate Governance Consultation” (“the BEIS Response”).

These three reforms are permanent. They are intended to introduce “greater flexibility into the insolvency regime”⁵, and to allow companies breathing space to explore options for rescue whilst supplies are protected, so that they can have “the maximum chance of survival”. This puts the rescue culture established in IA86 (itself drawing on the recommendations from the Cork Report) at the front and centre of our insolvency legislation.

The other two central reforms are temporary emergency measures introduced specifically to assist businesses during the current crisis: (1) the suspension of liability for wrongful trading and (2) the restrictions on statutory demands and winding up petitions. These have been introduced to support directors to continue trading through the emergency without the threat of personal liability and to protect companies from aggressive creditor action.

Each of these five central reforms is considered in summary form below.

A comprehensive “mini-digest”, with a detailed breakdown and analysis of each aspect of the reforms, will be published by South Square later in June 2020.

The Moratorium

The centrepiece of the CIGB is the free-standing statutory moratorium (“the Moratorium”). The policy behind the Moratorium is to allow a company in financial distress a breathing space in which to explore its rescue and restructuring options free from creditor action. The provisions in relation to the Moratorium are set out in a new “Part A1”, which will be inserted before Part 1 (but within the First Group of Parts) of IA86.

The aim of the Moratorium is to facilitate a rescue of the company, which could be via a CVA, a new arrangement and reconstruction plan (as introduced by the CIGB, see below) or simply an injection of new funds⁶. Consistent with the ‘rescue purpose’ of the reforms, the intention is that the Moratorium will result in a better, more efficient rescue plan that benefits all of the company’s stakeholders.

Obtaining a Moratorium

The eligibility for and the process of obtaining the Moratorium are addressed in Chapter 2 of the new Part A1.

There are two routes to obtaining the Moratorium.

First, if the company is an English (as opposed to an “overseas”) company, and it is not subject to an outstanding winding-up petition, the directors can obtain a Moratorium by filing the “relevant documents” with the court.⁷ These relevant

1. For example, the emergence of legislation amending the wrongful trading provisions was first mentioned by Alok Sharma in late March 2020.

2. See https://publications.parliament.uk/pa/bills/cbill/58-01/0128/amend/corporate_day_cwh_0602.pdf.

3. The majority of amendments to the Insolvency Act 1985, and the consolidating legislation that became IA86, were also introduced in the House of Lords.

4. See paragraph 1.

5. See paragraph 2 of the Explanatory Notes.

6. See paragraph 7 of the Explanatory Notes, which also refer to a scheme of arrangement as a possible rescue outcome.

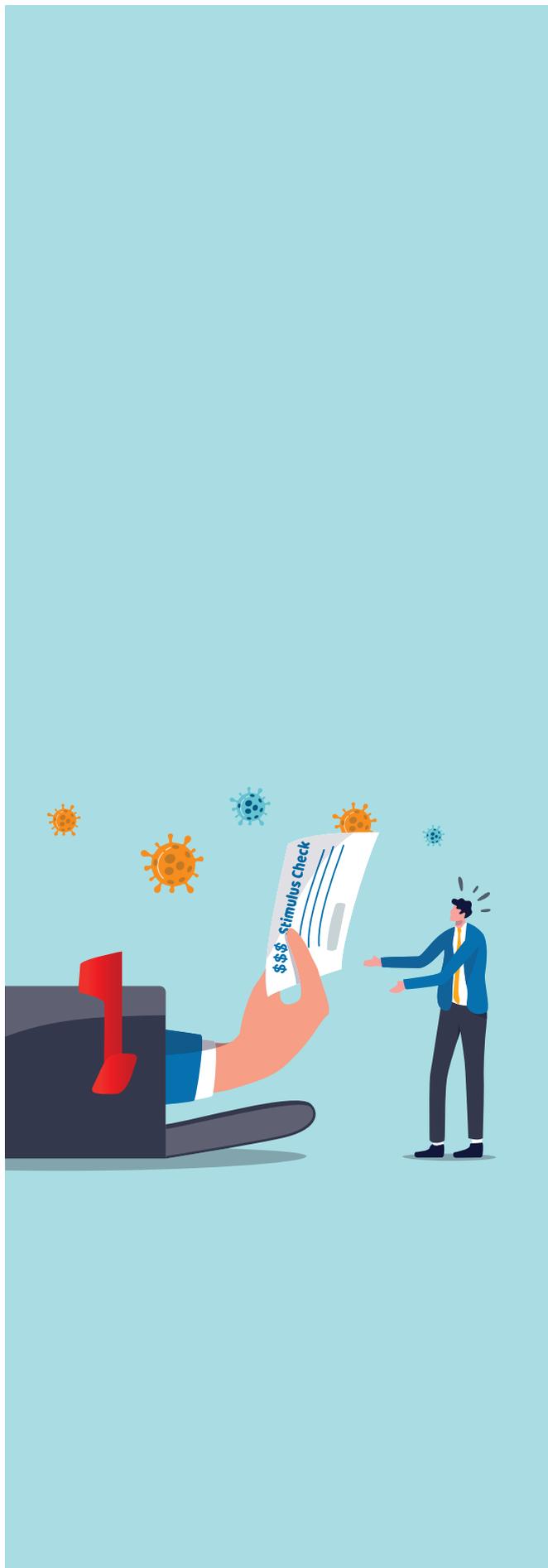
7. See A3.

documents are⁸ (1) a notice that the directors wish to obtain a Moratorium, (2) a statement from a qualified person (“the proposed monitor”) that they are (i) a qualified person who (ii) consents to act, (3) a statement that the company is an “eligible company” and, crucially, a statement (4) that the company is, or is likely to become, unable to pay its debts and (5) that, in the proposed monitor’s view, it is likely that the Moratorium for the company would result in the rescue of the company as a going concern.

Second, if the company is an English company that is subject to a winding up petition⁹, or is an overseas company, the directors may apply to court for a Moratorium.¹⁰ On the application of the directors, the Court may only make an order that the company should be subject to the Moratorium where it is satisfied that the Moratorium would achieve a better result for the company’s creditors as a whole than would be likely if the company were wound up (without first being in subject to a moratorium). This test bears an obvious resemblance to the second statutory purpose of administration in paragraph 3(1)(b), Schedule B1 of IA86.

The Moratorium is available to all “eligible companies”. These are defined in Schedule ZA1. A company is “eligible” unless it is an “excluded” company. The list of “excluded” companies is wide. It includes companies which already have their own bespoke insolvency regime: for example, insurance companies, banks, investment exchanges and securitisation companies. However, it also includes companies that have participated in capital market arrangements incurring debt of at least £10 million involving the grant of security to a trustee, a guarantee or security by one party for performance by another.¹¹ This is likely to rule out many SME and larger companies. Public private partnerships are also excluded.¹²

The Moratorium is *not* available to companies that either are subject or have recently been subject to a moratorium or other form of insolvency procedure. Again, this is provided for in Schedule ZA1, which provides that a company is excluded if, on the filing date, there is either a moratorium in force and/or it is subject to an insolvency procedure; alternatively, it is



8. See A6.

9. During the “relevant period”, i.e. the date of entry into force of the legislation and 30 June 2020 (or one month after the coming into force of the legislation, whichever is the later) a company subject to a winding up petition can obtain a Moratorium via the out of court procedure rather than by application to the court.

10. See A4 and A5.

11. Schedule 1, ZA1 paragraph 14. This is one of the provisions that can be amended by the Secretary of State and it is likely that it will be the subject of debate in Parliament.

12. Schedule 1, ZA1 paragraph 15.

13. See Explanatory Notes, paragraph 104. This is a reference to the “sufficient connection” test, which the courts are very familiar with in the context of winding up unregistered companies, as well as in relation to schemes of arrangement. For example, the company will usually have a sufficient connection to the United Kingdom where the underlying debt is governed by English law.

14. See A18(3). However, A18(5) specifically provides that the Secretary of the State may by regulations amend the section to make changes to the list of exceptions.

15. This is defined in Schedule ZA2. Such contracts include “financial contracts”, meaning a contract for the provision of financial services consisting of (i) lending (including the factoring and financing of commercial transactions); (ii) financial leasing; or (iii) providing guarantees or commitments.



The core precepts of the Moratorium ... mark a return to the original policy goals of the Cork Report, and the assumption of the flexible debtor-in-possession process that characterises Chapter 11



excluded where that has been the case at any point in the 12 months leading up to the filing date. For these purposes, an insolvency proceeding includes an interim moratorium under paragraph 44, Schedule B1, thereby protecting a creditor who has made an administration application or a qualifying floating charge holder who has filed a notice of intention to appoint an administrator.

Finally, an overseas company will only be eligible for a Moratorium if it is one which could be wound up under Part 5 of IA86; and in this regard the courts will apply similar principles when considering such an application as they would when considering the winding up of an overseas company.¹³

Effect of the Moratorium

This is addressed in Chapter 4 of A1.

The effect of the Moratorium is to provide the company with a “*payment holiday*” in respect of most of its “*pre-moratorium debts*” and with protection against legal and enforcement action (unless the Court has granted permission).

The new, core concept is the “*pre-moratorium debt*”. This is any debt or other liability that has fallen due prior to the commencement of the Moratorium or which becomes due during the Moratorium but under an obligation incurred by the company prior to the commencement of the Moratorium.

However, there are some wide-ranging and notable exceptions¹⁴ to what constitutes a “*pre-moratorium debt*” which qualifies for a “*payment holiday*”: these include amounts payable in respect of (1) the monitor’s remuneration and expenses; (2) goods or services supplied during the Moratorium (and which would otherwise be *pre-moratorium debts*

because the relevant contract pre-dated the Moratorium); (3) rent in respect of a period during the Moratorium (where the lease pre-dated the Moratorium); (4) wages or salary arising under contracts of employment; (5) redundancy payments; and (significantly, see below) (6) debts or the liabilities arising under a contract or other instrument involving financial services.¹⁵

This “*pre-moratorium debt*” is to be contrasted with a “*moratorium debt*”, which is any debt or other liability to which the company becomes subject during the Moratorium (other than by reason of an obligation entered into prior to the Moratorium) (e.g. a new debt arising under a new contract entered during the Moratorium) or to which the company may become subject after the end of the Moratorium because of an obligation incurred during the Moratorium.

Significantly, where a company commences administration or liquidation within 12 weeks of the end of the Moratorium, “*moratorium debts*” and “*pre-moratorium debts*” that do not qualify for a payment holiday are given super-priority, ranking behind fixed charge creditors but ahead of expenses, floating charge security and preferential creditors. This represents a major shift away from well-established insolvency priorities (and may well attract attention when the CIGB passes through the House of Lords).

The consequences of the Moratorium are far-reaching:

- A20 (“Effects on creditors”) stipulates that during a Moratorium, except in certain circumstances (e.g. a director presenting a winding-up petition, or a public interest petition presented by the Secretary of State) no insolvency proceedings shall be commenced against the company. Further, if the directors

intend to commence insolvency proceedings, they must notify the Monitor: see below.

- A21 (“Restrictions on enforcement and legal proceedings”) provides that, except with the permission of the court, no steps may be taken to enforce any security over the company’s property (unless it is a security created under a financial collateral arrangement or a step to enforce a collateral security charge) or to repossess any goods in the company’s possession under a hire-purchase agreement. The Moratorium would also prevent the forfeiture of a lease by peaceable re-entry of business premises by a landlord, and the commencement and continuation of legal proceedings against the company and its property (with limited exceptions). These aspects of the Moratorium bear a strong resemblance to paragraph 43(6), Schedule B1 of IA86. The Court can give permission to take the proscribed steps, save that an application for permission may not be made for the purpose of enforcing a “*pre-moratorium debt*” for which the company has a payment holiday: see A21(2). However, and unlike paragraph 43(6) of Schedule B1, the Moratorium also prevents a floating charge from crystallising and prevents restrictions being imposed on the disposal of any floating charge assets.
- A25–A32 provide for a series of restrictions on transactions and payments/disposals of property. For example, the company may not obtain credit to the extent of £500 or more unless the lender has been informed of the Moratorium; the company may only grant security over its property if the Monitor consents; and the company will not be permitted to make any payment

16. See Directive 2019/1023.

17. One feature of the initial consultation and the BEIS Response in 2018 was that the Monitor would be prevented from taking a subsequent insolvency appointment. That has not been implemented. A52(4) provides that the Secretary of State may by regulations amend the definition of “qualified person” so that persons who are not licensed insolvency practitioners may become entitled to act as monitors. This might give rise to debate about solicitors or accountants who are not licensed insolvency practitioners and perhaps others becoming qualified persons.

18. See A35(1). This obligation is modified in respect of a moratorium that is entered into during the “relevant period”. In that case, it is not necessary for the monitor to be satisfied that it is likely the moratorium will result in the rescue of the company as a going concern, if the worsening of the financial position of the company (which means a rescue is not possible) is related to the coronavirus.

19. See A36.

20. See A38(1)(c)

21. See A37.

22. Further, the Monitor must bring the Moratorium to an end where the objective of rescuing the company as a going concern has been achieved (see A38(1)(b)). As at many other points in the CIGB, there is a saving provision which allows the Secretary of State to make further regulations to change the circumstances in which the Monitor must bring the Moratorium to an end.

23. This is shorter than the proposed 28 days in the BEIS Response

24. See A13.

25. A13(8): an application for an extension can be made more than once.

26. However, during the relevant period, it is not necessary for a company to show that the moratorium is likely to result in the rescue of the company as a going concern, if its inability to do so is related to the coronavirus.

27. See A14(1).

or series of payments to any creditor in respect of any pre-moratorium payment obligations for which it has a payment holiday which exceed, in aggregate, £5000 or 1% of the total owed to unsecured creditors.

In this context, the CIGB does not introduce super priority DIP financing: however, this is one of the matters that will be considered going forward (and in relation to which there may be further consultation). It does facilitate secured borrowing that is enforceable during the Moratorium. In particular, A26 provides that the company may grant security over its property if the Monitor consents. The debt in respect of which security is granted is a “*moratorium debt*” that must be paid during the Moratorium, and in addition, A23 provides that such security is enforceable during the Moratorium. Whilst this does not deal with priority over pre-existing security it does allow companies in a Moratorium to obtain Moratorium financing.

The Monitor

The new role of the “monitor” is addressed in Chapter 5 of A1.

A striking characteristic of the Moratorium is that the directors will remain in control of the company during the Moratorium, making this a Chapter 11-style debtor-in-possession process. This overcomes one of the difficulties with administration. It aligns UK law with the approach in Chapter 11, as well as the European Restructuring Directive.¹⁶ As a counterbalance to this, the Moratorium will be overseen by a monitor (who must be a licenced insolvency practitioner¹⁷) and who must file their consent to act and confirmation that the relevant eligibility tests have been met (“**the Monitor**”). The Monitor will supervise the Moratorium and his or her consent will be required for, amongst other things, the payment of “*pre-moratorium debts*”, the disposal of assets and the granting of security.

The key obligation of the Monitor is to “*monitor the company’s affairs for the purpose of forming the view as to whether it remains likely that the moratorium will result in the rescue of the company as a going concern*”.¹⁸ The provision of information to the Monitor by the directors is central to the operation of the process. The Monitor is entitled to rely on information provided by the company, unless they have reason to doubt its accuracy. The directors are required to provide to the Monitor the information the Monitor requires as soon as practicable.¹⁹ If the Monitor thinks that, by reason of failure by the directors to comply with a requirement to provide information, they are unable to carry out their functions, the Monitor must bring the moratorium to an end.²⁰ The Monitor is an officer of the Court, and may apply to the Court for directions²¹ about the carrying out of their functions.

The likelihood of the rescue of the company as a going concern is the condition of not only entry, but also the “Termination of the moratorium by the monitor”: see A38.

The Monitor *must* bring the moratorium to an end²² by filing a notice with the court if they think that the Moratorium is no longer likely to result in the rescue of the company as a going concern or where they think that the company is unable to pay any of the following that have fallen due (a) moratorium debts and (b) pre-moratorium debts for which the company does not have a payment holiday during the Moratorium.

Length of Moratorium

This is addressed in Chapter 3 of A1.

The “*initial period*” of the Moratorium will be 20 days.²³ This will be extendable without creditor consent for a further maximum period of 20 days by the directors filing certain documents with the Court (at any time after the 15th business day of the initial period).

Where the company obtains creditor consent, the Moratorium may be extended for a maximum period of 12 months: see A11 and A12(3). The consent of creditors will be obtained through the qualifying decision procedure.

The Court²⁴ may also extend the period of the Moratorium on the application of the company.²⁵ On hearing the application, the Court must take into account and consider the interests of pre-moratorium creditors, and the likelihood that the extension will result in the rescue of the company as a going concern.²⁶

The Moratorium will also be extended over proposals for a pending CVA²⁷, or on convening meetings of creditors to consider a scheme of arrangement or an arrangement and reconstruction plan over approval and sanction.²⁸

In each of these cases, the directors must confirm, when applying for any extension, the payment of all “*moratorium debts*” and “*pre-moratorium debts*” for which the company does not have a payment holiday.

Challenges

This is addressed in Chapter 6 of A1.

A creditor, director or member of the company or any other person affected by the Moratorium may apply to the Court on the ground that an act, omission or decision of the Monitor during a Moratorium has unfairly harmed the interests of the applicant. On such an application the Court may confirm, reverse or modify any act or decision of the Monitor, give directions to the Monitor or make such other directions as it thinks fit. Such application may be made during the Moratorium or after it has ended. Any such challenge is necessarily limited by the Monitor’s

28. See A15.

29. See A44.

30. A44(2). A44(3) provides that the court may make such order as it thinks fit. A44(4) identifies orders that may “in particular” be made which includes an order regulating the management by the directors of the company’s affairs and the discharge of the Moratorium, but those are not exhaustive. On making an order the Court has to have regard to the interests of those who have dealt with the company in good faith and for value.

31. The Explanatory Notes to the Consent Protocol state that “The Joint Administrators have only provided their consent to the exercise of these powers on that basis that they have certified that the administration is reasonably likely to achieve the rescue of the company as a going concern, as is the required under Schedule B1”. This drafting is deliberately based on rule 2.3(5) (c) of the Insolvency (England and Wales) Rules 2016, where a proposed administrator is required to give their opinion that it is reasonably likely that the purpose of administration will be achieved.

32. It is assumed this means that a single plan can be proposed in relation to creditors and members.

role. The Monitor is not managing the company but monitoring the directors’ management of the company.

Of more significance is the power to challenge the management of the company by the directors. A creditor or member can apply to court for an order on the ground that during the Moratorium the company’s affairs, business and property are being or have been managed in a manner which has unfairly harmed the interests of the company’s creditors or members.²⁹ Such an application can be made during or after the Moratorium, which raises the possibility of post moratorium damages claims.³⁰ This puts upon the directors managing the company an additional duty not to harm creditors or members unfairly. In administration this duty falls upon the administrators because they are managing the company. In a Moratorium the directors continue to manage the company, but they are subject to this new duty.

Comment

The core precepts of the Moratorium – the focus on the rescue of the company as a going concern and the continuing management powers of the directors – mark a return to the original policy goals of the Cork Report, and the assumption of the flexible debtor-in-possession process that characterises Chapter 11.

Thankfully, there is one very key difference between the BEIS Response and the CIGB: the availability of the Moratorium for insolvent, as well as solvent companies. The Government had originally proposed that the Moratorium would only be available to a company that was prospectively insolvent. This raised obvious concerns about the number of companies that would not be eligible for the Moratorium and the fact that this would be counter-productive and would not sufficiently assist the policy of promoting the rescue culture. It also gave rise to difficulties formulating that policy into a coherent and workable test. The countervailing argument was that the Moratorium could be abused by the extension of a payment holiday to ‘zombie’ companies seeking to put off dealing with the company’s financial problems with yet further losses to creditors. It is understood that the shift from an entry test of *prospective* insolvency to *actual* insolvency took place relatively late in the drafting process: however, this was a critical intervention.

To protect against abuse by ‘zombie’ companies, the Moratorium imposes a high threshold i.e. that it is *likely* that a Moratorium would result in the rescue of a company as a going concern (and the termination of the Moratorium in the event that this is no longer possible). The Monitor will be required to state that in their view it is *likely* that the Moratorium will result in the rescue of the company as a going concern. This formulation is

to be compared to, for example, the “reasonable likelihood” test³¹ adopted in the “Consent Protocol” for “Rescue Administrations” publicised by the City of London Law Society and Insolvency Lawyers Association, and drafted by Mark Phillips QC, William Willson and Stephen Robins of South Square. Whether the threshold is, as some fear, too high, and whether insolvency practitioners will be willing to make the relevant declaration, will both be key points of interest once the Moratorium has passed onto the statute book.

Another notable feature of the Moratorium, and one which may be a cause for concern for some creditors, is the relaxation of the conditions for obtaining a Moratorium, and extending it, during the initial period. Thus, the process will still be available to companies which are terminally insolvent such that they are likely to enter administration or liquidation. Whilst the policy intention is to give such companies (of which there will be many) a chance of being rescued or restructured with the attendant protection of jobs, many will argue that the Moratorium is not the right process for such companies.

A further significant characteristic of the Moratorium is the sheer volume of exceptions to it. For example, the carve-out for any company that is party to a capital market arrangement, which will exclude numerous businesses which have bond financings (see above); and there are numerous exceptions to the definition of what is an “eligible company” (including financial services companies). The Moratorium will not be suitable for all companies in all parts of the market: it is far from being “one size fits all” legislation and appears to be better suited to SMEs. This will no doubt leave certain parts of the market relatively agnostic about the Moratorium and its inherent limitations, unless those are ironed out during the bill’s passage through Parliament.

Promoted by some as what administration (as originally envisaged) was always meant to be, there will be others who believe that administration is a well-established process which can already achieve the same policy goals.

The New Arrangement and Reconstruction Plan

The Plan

The CIGB introduces the new arrangement and reconstruction plan, as a new Part 26A of the Companies Act 2006, which is modelled on the scheme of arrangement, and pursuant to which a company can propose a restructuring plan to its creditors or members (“**the Plan**”).³² A company can use the Plan without first going into the Moratorium.

Its key feature is that it will allow a company to bind all creditors, whether senior or junior, even if they vote against the plan, through the use of the so-called “cross-class cram down” provision.

Eligibility and Conditions

Under the CIGB, all companies will be eligible to apply for an arrangement and reconstruction plan, including overseas companies with a sufficient connection to the UK.

Section 901A provides that the company must meet two conditions in order to propose a reconstruction plan: (1) the company must have encountered or be likely to have encountered financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern³³ (the company does not need to be insolvent); and (2) a compromise or arrangement must be proposed between the company and its creditors or members and the purpose of such compromise or arrangement must be to eliminate, reduce, prevent or mitigate the effect of any of the financial difficulties the company is facing.

That the Plan is to eliminate financial difficulties the company has or is likely to encounter which may affect its ability to carry on business is the context in which arrangements and reconstructions will arise and will inform the interpretation of the new Part 26A. However, no further guidance is provided on the meaning or scope of the term “*financial difficulties*”, which is seemingly very broad.

The Steps

The first step in the Plan process is for the company, either acting through its insolvency officeholder or its directors, to apply to the court for permission to convene class meetings to consider the Plan: see Section 901C.

At the first hearing, the court will examine the classes of creditors and members proposed by the company. Given the resemblance to schemes, the Court is likely to apply the same test when determining class issues: stakeholders should vote in the same class where their rights are “*not so dissimilar as to make it impossible for them to consult together with a view to their common interest*”.³⁴

As explained further below, there is a significant difference between schemes and arrangements and reconstructions. In schemes identification of the class is critical. That is because in schemes creditor votes in class meetings are determinative. The Court will not consider commercial questions. They are for the properly constituted class meetings. In an arrangement and reconstruction under Part 26A the identification of the classes is not determinative in the same way. If a difficult group of creditors are put into small classes that do not vote in favour of the Plan, the scheme can still be sanctioned under the cram down provisions.

However, the crucial distinction from schemes at the first hearing arises under Section 901C(4), which provides that the general rule that every creditor or member whose rights are affected must be permitted to participate in the meeting will *not* apply to a particular class of creditors or members who, on an application, the Court is satisfied do not have a “*genuine economic interest*” in the company. In such circumstances, this class or classes of creditors or members are not entitled³⁵ to participate in the meeting or in any stage of the Plan. This gives applicants an early opportunity to neutralise another creditor that is ‘out of the money’. This will inevitably give rise to difficult valuation disputes at the first hearing, in relation to which the Court will need to determine the scope and meaning of the new term “*genuine*” economic interest (i.e. whether that means real as opposed to fanciful, or something else).

The requisite vote will subsequently take place on the order of the Court at the meeting of creditors or members. Section 901F provides that, if the requisite voting majorities are met, the Plan will move onto sanction. The voting majority will be 75%³⁶ in value of the creditors in each class. This is different to schemes because the additional requirement for a majority in number has not been adopted. The 75% requirement has been questioned when compared to many restructuring processes that require 66% (and this is one of the provisions that might be changed by the Secretary of State). The Court has a discretion to sanction the Plan (“*the court may..... sanction*”), but (as referred to below), both the CIGB and the Explanatory Notes are silent as to the test that the Court should apply in the exercise of its discretion.

Cross-Class Cram Down

If all classes have approved the Plan, the Court may sanction it where 75%³⁷ in value of creditors or members present and voting in each class have agreed the compromise or arrangement.

33. This is a notable change to the scheme of arrangement under Part 26 of CA06, which can be implemented in relation to a company that is solvent (as opposed to in financial distress).

34. See *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241, per Chadwick LJ.

35. There is a further exclusion of creditors in respect of (a) moratorium debts and (b) pre-moratorium debts without a payment holiday, where the Plan is proposed within the 12-week period following the end of the Moratorium (see Section 901H)

36. Significantly, the CIGB has done away with the proposal in the BEIS Response of the additional requirement that more than half of the total value of unconnected creditors must vote in favour.

37. This is the same as the threshold for a scheme of arrangement.



38. See e.g. *Sea Assets v PT Garuda Indonesia* [2001] EWCA 1696.

39. This is the well-established test of *Plowman J in Re National Bank Ltd* [1966] 1 All ER 1006 at 1012 that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.

40. An aircraft-related interest is a registered interest within the meaning of the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (SI 2015/912).

However, even if the Plan is not agreed by 75% of a class, or more than one class, Section 901G (“Sanction for compromise or arrangement where one or more classes dissent”) provides that the Court may sanction the Plan provided that two conditions are met: first (“Condition A”) that the Court is satisfied that if the compromise or arrangement were to be sanctioned, none of the members of the dissenting class would be worse off in the “*relevant alternative*”; and second (“Condition B”) that the Plan has been agreed by a number representing 75% in value of a class of creditors or members who would receive a payment, or have a “*genuine economic interest in the company*”, in the event of the relevant alternative.

If these two conditions are satisfied the Plan can be approved. Significantly, this means the jurisdiction arises if only one class approves the Plan. Other classes may be ‘crammed down’ whether senior or junior to the approving class provided none of the dissenting classes would be worse off in the relevant alternative.

For these purposes, the “*relevant alternative*” is whatever the court considers in its discretion would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned by the Court under Section 901F. Given the context in which arrangements and reconstructions will be put to creditors the relevant alternative will be what the company faces absent (i.e. but for) the Plan in question to deal with its actual or likely financial difficulties affecting its survival as a going concern. That may be a liquidation. It might be an alternative Plan. This is likely to result in numerous valuation disputes about likely outturns.

As a consequence, where one ‘in the money’ class of creditors approves the Plan and the Plan delivers a better outcome than the next best alternative option (e.g. administration, liquidation, or an alternative plan) the Plan will become binding on creditors in all classes if sanctioned by the Court.

Recognition and International Aspects

The Plan will be available to any company which has a “*sufficient connection*” to the United Kingdom. As in relation to scheme of arrangements, this will provide debtors with broad scope to found jurisdiction before the English courts.

However, and unlike in Chapter 11, there is no express provision that the (English) Court’s orders have extra-territorial effect, though it may be possible to apply for recognition internationally e.g. under Chapter 15 of the US Bankruptcy Code or according to the principles of private international law.

Comment

The plan for arrangement and reconstruction gives companies a more flexible tool than schemes of arrangement. The introduction of the cross-class cramdown is a significant shift and marks a move from class composition to competing economic outcomes. The potential leverage wielded by creditors with ‘hold out’ claims in schemes of arrangement and CVAs will no longer be an issue under Part 26A. Moreover, potential ‘cram-ups’ by junior lenders of more senior lenders are likely to present new opportunities for some market participants.

Given its long experience of schemes of arrangement, the Court will be well-equipped to address many of the new concepts. In this regard, the Explanatory Notes state that “*The overall commonality between [Parts 26 and 26A of the CA 06] is expected to enable the courts to draw on the existing body of Part 26 case law where appropriate*”. Though there is currently no guidance on the meaning and scope of “*genuine economic interest*”, there is well-established authority addressing ‘out of the money’ creditors that do not need to be invited to vote on a scheme of arrangement.³⁸ The identification of a test for the exercise of the Court’s discretion on a sanction hearing may be a new and greater challenge for the Court given the obvious inapplicability of the scheme sanction test³⁹ to a procedure that anticipates cross-class cramdowns on dissenters.

One further concern that has been voiced is that the imposition of the Plan on a dissenting class will generate more litigation than has been the case with schemes of arrangement. There will certainly be hard-fought valuation issues, given their relevance not only to identifying creditors who do or do not have a “*genuine economic interest*”, but also to the application of the “*relevant alternative*” test. In current circumstances, where businesses have been mothballed during the Covid-19 crisis, the identification and determination of the relevant valuation assumptions will be crucial (including whether and how quickly the business in question can return and recover). However, the Courts are well-equipped to deal with valuation disputes, even if some of the issues will be novel.

A further, unexpected, feature initially introduced by the CIGB was that the Plan, and the existing scheme of arrangement framework, will not be available in respect of creditors with “*aircraft-related interests*”.⁴⁰ The net effect of these provisions, if enacted, would have been to deprive companies with aircraft assets in financial distress of a valuable tool to restructure outside of a formal insolvency process. However, this provision was removed from the draft CIGB before it was presented to the House of Lords at the end of the parliamentary session on 3 June 2020.

Ban on Termination Clauses

Restrictions on Ipso Facto

When a company enters a rescue, restructuring or insolvency procedure, suppliers often cease supply pursuant to a contractual termination clause triggered by insolvency. This was previously well-established under English contract law, and supported by the highest authority: “Where a contract provides for the performance in the future of reciprocal obligations, the performance of each of which is the *quid pro quo* of the other, I see nothing objectionable or evasive about a provision entitling one party to terminate if the other becomes bankrupt”.⁴¹

As foreshadowed in the BEIS Response, there will now be a ban on the enforcement of termination or so-called ‘*ipso facto*’ clauses. This will mean that (subject to certain exclusions) contracted suppliers will have to continue to supply, even where there are pre-insolvency arrears.

Again, this new provision has its origin in Chapter 11 of the US Bankruptcy Code and is already a feature of numerous insolvency systems throughout the world.⁴² Its purpose is to preserve a company’s operational abilities during restructuring.

The prohibition operates via the creation of broad new rules to supplement the existing ‘essential suppliers’ regime under Section 233 and Section 233A of IA86, which preserve the continuity of supplies of certain essential services (e.g. electricity, water and IT services). In this regard, Schedule 12 of the CIGB inserts a new Section 233B (“Protection of supplies of goods and services”).

As a result, the CIGB will prevent a much wider range of suppliers of both goods and services from terminating a contract due to a company entering a formal restructuring or insolvency procedure. The measures are intended to compliment the policy for the Moratorium and the Plan, which are aimed at enhancing the rescue opportunities for financially distressed companies.⁴³

Importantly the prohibition is limited to suppliers of goods and services.⁴⁴

The new Section 233B applies where the company enters the “*relevant insolvency procedure*”. This includes existing insolvency processes, the new Moratorium, the new Plan: but *not* the pre-existing scheme of arrangement.

Under Section 12(3), a provision of a contract for the supply of goods and services to the company ceases to have effect when the company becomes subject to the relevant insolvency procedure if and to the extent that, because the company becomes subject to the relevant insolvency procedure, (a) the contract of the supply would terminate or “*any other thing would take place*” or (b) the supplier would be entitled to terminate the contract or the supply or to do “*any other thing*”.

The “*any other thing*” provision is broad and unclear. It appears likely to be a reference to exercising rights under any other provision in the contract which are triggered by an insolvency event, for example, acceleration clauses, default interest or any other contractual consequence.

Section 12(4) provides that where an event has occurred that would have allowed a supplier to terminate a supply contract *before* the company entered a relevant insolvency procedure but that right has not been exercised, it is suspended once the company enters the relevant insolvency procedure and the entitlement may not be exercised. If the supplier’s right to terminate arises after the insolvency procedure begins (for example, non-payment for goods supplied after that time) then this right is not prohibited.⁴⁵

Crucially, Section 12(7) stipulates that the supplier may not make payment of outstanding amounts (in respect of supplies made prior to the insolvency trigger) a condition of continuing supply.

However, there are various exclusions to the ban.

First, Section 12(5) provides that where the prohibitions are in effect, the supplier may only terminate the contract if (a) the relevant office holder consents to the termination; (b) the company consents to the termination; or (c) the court is satisfied that the continuation of the contract would cause hardship and it grants permission for the termination of the contract.

Second, Section 13 provides for an exclusion which applies to small entities where the counterparty became subject to an insolvency procedure before 30 June 2020 (or one month after coming into force of the section (whichever is later). In order to qualify as a small entity, at least two of the following tests must be met: (a) turnover does not exceed £10.2 million; (b) the balance sheet total is not more than £5.1 million; and (c) there are no more than 50 employees.⁴⁶

Third, there are also exceptions for financial services entities and contracts involving financial services: see Schedule 4ZZA.

As in relation to the Moratorium and the Plan, there is a broad Henry VIII clause which allows the Secretary of State, by statutory instrument, to make amendments to Section 233B and Schedule 4ZZA: see Section 233C.

Comment

This is an important amendment to IA86 and brings UK insolvency law into line with much of the rest of the insolvency world. Companies will be entitled to maintain important supplies. If the company does not wish to continue with the supply, it is able to consent to the enforcement by the creditor of the *ipso facto* clause.

41. See Lord Mance in *Belmont Park Investments PTY Limited v BNY Corporate Trustee Services Limited* [2011] UKSC 38, at [177].

42. See for example the decision in *Re Pan Ocean* [2014] Bus LR 1041 in which it arose in South Korea, and in which there was a review of other jurisdictions including Canada. It also exists in Australia.

43. See Explanatory Notes, paragraph 32.

44. As with the Moratorium, there is a long list of “*Excluded Entities*”: these include deposit taking and investment banks and insurance contracts. See Part 2 of Schedule 12.

45. See Explanatory Notes, at paragraph 237.

46. See Section 13(4).



The introduction of the cross-class cramdown is a significant shift and marks a move from class composition to competing economic outcomes



47. The authorities cited being *Hill v CA Parsons* [1972] Ch 305; and *Sparks v Holland* [1997] 1 WLR 143.

48. See Schedule 10, paragraph 1(1).

49. See Schedule 10, paragraph 2.

50. See Schedule 10, paragraph 7. This fall-back provision will catch the position where a company has been wound up erroneously in spite of the new legislation.

It is very important to note that the CIGB only covers supplier arrangements in relation to goods and services. This may include commercial and financial contracts. Suppliers will still be able to terminate contracts on other grounds in the agreement – unless the ground in question had already arisen prior to the insolvency.

The CIGB does not define what hardship is. In the absence of further guidance, the Courts will need to develop principles to determine what factors to apply when determining whether the continuation of supply is causing the supplier hardship.

Temporary Ban on Statutory Demands and Winding Up Petitions

Ban

The CIGB puts into effect the Government’s proposal for a temporary “ban” on the use of statutory demands and winding up petitions in respect of debts that are unpaid as a result of Covid-19.

When the Government first announced on 23 April 2020 its intention to introduce the ban, it appeared to be focussed on commercial landlords in respect of unpaid rent. In *Re Saint Benedict’s Land Trust Limited*; *Re Shorts Gardens LLP Harper v Camden Borough Council and another*; *Shorts Gardens LLP v Camden London Borough Council* [2020] EWHC 1001, a case concerning a winding up petition threatened against a supplier of storage services, the applicant sought to rely upon the proposed ban as a ground for obtaining an injunction. Snowden J commented that it appeared to be “overwhelmingly” likely that the proposed legislation would only apply to certain limited sectors, e.g. retail and hospitality, and only in respect of claims by landlords for arrears of rent.

More recently there have two further injunction decisions in the context of the ban: first, *Travelodge Ltd v Prime Aesthetics Ltd* [2020] EWHC 1217 (Ch) (Birss J), which preceded the ban, but was based on ministerial statements; second, *Re a Company (Injunction to Restrain Presentation of a Petition)* [2020] EWHC 406 (Ch) (Morgan J), which was heard on 1 June 2020. In both cases, the Court took into account the possibility or likelihood of a change in the law.⁴⁷

The key temporary measures, set out in Section 8 and Schedule 10 of the CIGB, are as follows:

- Paragraph 1 provides that a creditor may not present a winding up petition on or after 27 April 2020 on the ground specified in Section 123(1)(a) of IA86 that a company has failed to satisfy a statutory demand, if the statutory demand was served during the “*relevant period*” i.e. between 1 March 2020 and 30 June 2020 or one month after the coming into force of the CIGB, whichever is the later;⁴⁸
- Paragraph 2 provides that a creditor may not present a petition for the winding up of the company between 27 April 2020 and 30 June 2020 or one month after the coming into force of the CIGB, whichever is the later, on any of the grounds specified in Section 123(1)(a)–(d) of IA86 unless it has reasonable grounds for believing that (i) Covid-19 has not had a financial effect on the company; or (ii) the company would have been unable to pay its debts even if Covid-19 had not had a financial effect on the company;⁴⁹ and
- Any winding up orders made between 27 April 2020 and 30 June 2020 or one month after the coming into force of the CIGB, whichever is the later, will be void if the order was not one that would have been made had the Court applied the relevant test, namely, whether or not Covid-19 has had a financial effect on the company before the presentation of the petition.⁵⁰

Paragraph 5 provides that, where a winding-up petition has been presented by a creditor during the relevant period that claims that a company is unable to pay its debts, the court will consider whether Covid-19 has had a “*financial effect*” on the company. The Court may only wind-up a company if (a) for a petition presented in respect of a statutory demand or unsatisfied judgment debt, the ground for winding up would have arisen even if Covid-19 had not had a financial effect on the company; or (b) for a petition presented in respect of a company that is insolvent (either on a cash-flow or balance sheet basis) even if Covid-19 had not had a financial effect on the company.

The CIGB applies a relatively low threshold test to assess whether Covid-19 has had a “*financial effect*” on a company. It will be met if the company’s financial position worsens in consequence of, or for reasons relating to, Covid-19. This is likely to catch the vast majority of businesses. However, as the Court must then go on to consider whether

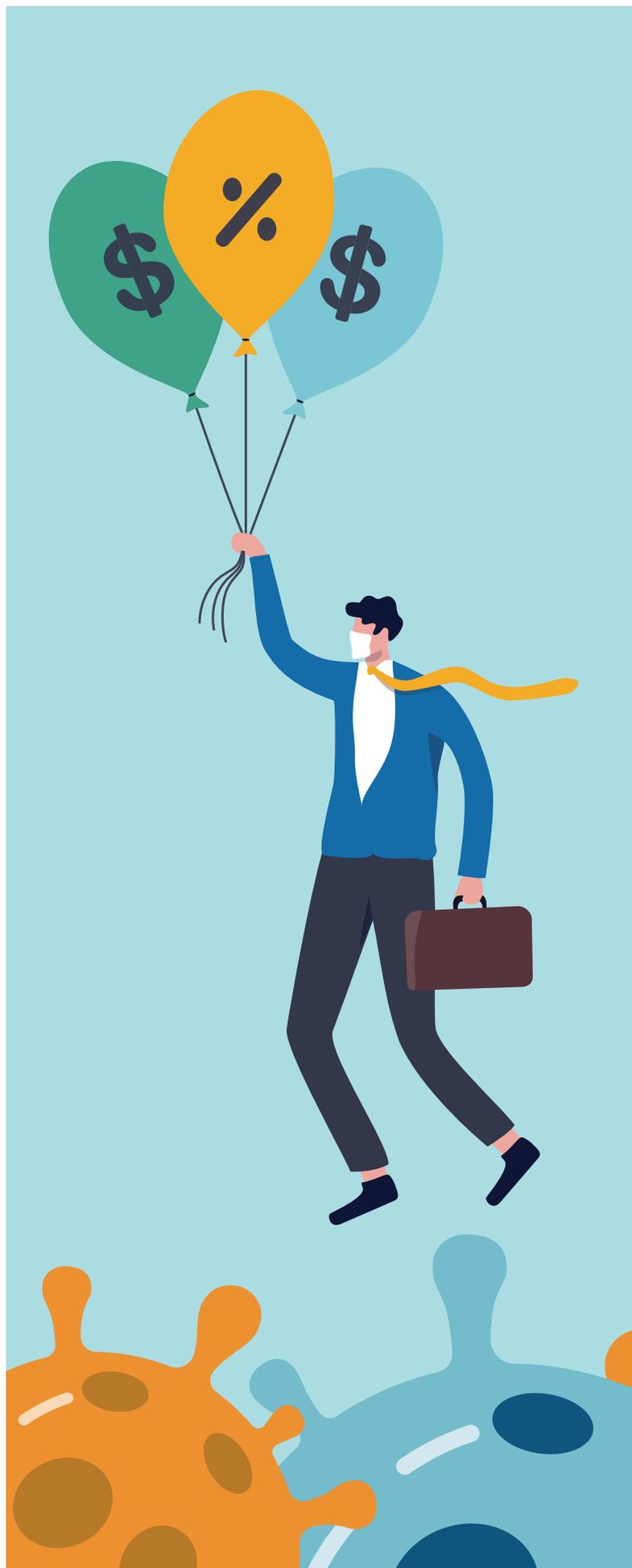
the company would have been unable to pay its debts even if Covid-19 had not had a financial effect on the company, this is likely to catch those companies that were unviable before the crisis. This goes some way to providing a necessary counterweight to balance these far-reaching provisions which restrict a fundamental class right to wind up a company.

A feature of the CIGB which was not anticipated is the change in the date of the commencement of the winding up in respect of petitions presented during the relevant period. Paragraph 8(9) of Schedule 10 provides that the commencement of the winding up will be the date of the order rather than the date of presentation of the petition, as provided under Section 129 of IA86. This means that Section 127 of IA86 is of no effect: dispositions of the company's property made between the presentation of the petition and the date of the winding up order will not be void. Rather, paragraphs 10 to 18 of Schedule 10 makes modifications to various 'look-back' periods under the IA86, the most notable of which is in respect of transactions at an undervalue and preferences. The period is to start either (a) 2 years before the date of presentation of the petition (in the case of transactions at an undervalue) or six months (in the case of preferences) or (b) 2½ years before the day on which the winding up order was made (in the case of transactions at an undervalue) or 12 months (in the case of preferences) whichever is the later, ending with the day on which the winding-up order is made.

Comment

Many practitioners will be keen to see how the courts will interpret and apply the relevant tests under these provisions.

The key battleground is likely to be over the second limb of the test, namely, whether the debtor company would have been unable to pay its debts even if the Covid-19 pandemic had not had a financial effect on the company. There will be many different factual scenarios that will test the boundaries of this pre-condition. For example, it is unclear how the Court will treat those companies which faced temporary liquidity problems prior to the onset of the Covid-19 pandemic, and which expected them to be resolved in a reasonably short period of time but were not as a result of the pandemic. Does a company in this scenario fall within the second limb of the test? There will doubtless be many other scenarios in respect of which it is unclear what the outcome will be. Uncertainty will be felt by creditors and debtors alike.



In the majority of cases, creditors are unlikely to know very much about the detail of a company's finances or the causes of its insolvency. Creditors will also be at risk of an adverse costs order if they litigate the issue and lose. As such, many creditors may well be deterred from seeking to wind up a company and will instead have to consider other insolvency processes, such as administration. Alternatively, this may encourage creditors and debtors to engage in a more consensual resolution of their disputes.

As to the change in the date of the commencement of the winding up, this is aimed at facilitating the ongoing trading of a company that is subject to a winding up petition by avoiding the automatic freezing of a company's bank account.

However, there will be concern that this removes an important protection to creditors at a time when the company's assets are under the control of the directors. The operation of Section 127 seeks to ensure that some creditors are not unfairly paid ahead of others and to give effect to the fundamental principle of *pari passu* distribution. Where a payment to a creditor during this period promotes the interests of creditors as a whole, it can be validated by the court. Further, given the limited circumstances in which a creditor may present a winding up petition, essentially only against a company that was not viable before the pandemic, some will argue that the protection afforded to creditors under Section 127 is still required and would not undermine the promotion of the rescue culture.

Temporary Suspension of Liability for Wrongful Trading

Suspension

The CIGB introduces a suspension of personal liability for wrongful trading under sections 214 and 246ZB of IA86.

On 28 March 2020 the Government announced that the wrongful trading regime would be temporarily suspended "*to give company directors greater confidence to use their best endeavours to continue to trade during the pandemic emergency without the threat of personal liability should be company ultimately fall into insolvency*".

As anticipated, the suspension will apply retrospectively from 1 March 2020 until 30 June 2020 (or one month after the coming into force of the CIGB, whichever is the later).

However, the CIGB does not in fact suspend the wrongful trading regime. Instead, it directs the Court – when determining the contribution a director who has wrongfully traded is to make to

a company's assets – to *assume* that a director is not responsible for any worsening of the financial position of the company or its creditors that occurs during the relevant period.⁵¹ As such, the CIGB reduces, rather than removes entirely, personal liability for wrongful trading. It is not intended to allow directors with pre-existing wrongful trading issues to avoid liability. Directors will still have to consider during the relevant period whether to place the company into liquidation or administration.

Further, the provisions do not impact other routes to establishing personal liability of directors. Fraudulent trading is unaffected, as is the common law remedy for breach of duty. This means that directors will remain under the duty to act in the best interests of creditors at the point it when it was known, or ought to have been known, that the company was, or was likely to become insolvent (see *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112). Nor do the measures impact the operation of the disqualification provisions under the Company Directors Disqualification Act 1986.

Comment

The necessary corollary of the continued operation of these provisions – and the narrower relief provided under the CIGB than anticipated – is that most directors will treat the proposed relaxation of the rules with caution.

Further, as with many of amendments in the CIGB, there are broad and notable exceptions, which mean that the temporary suspension does not apply to certain excluded companies, including parties to capital markets arrangements.⁵² The £10 million threshold that applies to the Moratorium will not apply in this context.

However, in reality, few directors have been able to make decisions about the trading of their companies during the Covid-19 period.

Conclusion

The insolvency reforms in the CIGB represent the most significant reforms in insolvency law since 1986. UK insolvency laws will become more debtor friendly. In the context of the current financial crisis they give the insolvency profession additional tools they can use to save businesses and livelihoods.

We look forward to providing you with a more detailed analysis of the reforms on an issue-by-issue basis in the forthcoming "mini-Digest" to be published later this month. ■

51. Section 10(1).

52. Section 10(3) to (4)

Adoption without intent: “light touch” administrations and the consequences of furloughing employees



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On 9 April 2020, the Administrators of Debenhams Retail Limited applied to the High Court for directions concerning the application of the Coronavirus Job Retention Scheme (“the Scheme”) to administrations. Trower J directed the administrators to proceed on the basis that the contracts of employees furloughed under the Scheme would be adopted if the administrators proceeded to make payments to the employees in accordance with the Scheme (such that liabilities for wages or and salary thereunder would carry super-priority status in the administration). The Court of Appeal in due course agreed. This article examines the Courts’ reasoning and considers whether the Courts missed an opportunity to apply the notion of adoption in a more flexible and policy orientated manner.

On 20 March 2020, the Government announced the introduction of the Scheme. Under the Scheme, the Government in broad terms indicated that it would make payments to an employer where it is incurring the ongoing costs of retaining employees in employment but is unable to continue normal operations due to the health, social and economic emergency in the UK resulting from the coronavirus. Those payments reflect 80% of a “furloughed” employee’s wages or salary, subject to a cap of £2,500 per month. Under the Scheme, the employees remain employed by the employer but are not permitted to attend for work.

On 23 March 2020, the Prime Minister announced that the UK would face unprecedented restrictions on movement to prevent the rapid spread of Covid-19 amongst the population. These restrictions included, amongst other things, the closure of all shops, apart from those selling “essential” items.

Debenhams operated 142 department stores in UK. It had been facing financial difficulties for some time such that in 2019 it had entered administration. The business had been restructured, including a restructuring of its leasehold liabilities through CVAs. However, the closure of its stores caused acute financial pressure and, on 9 April 2020, the directors appointed administrators.

Prior to its entry into administration, the vast majority of Debenham’s employees had been told that they were to be furloughed pursuant to the Scheme. Shortly after their appointment, the Administrators wrote to around 13,070 employees to obtain their express consent to accept a variation to their employment contracts which required them to accept 80% of their wages (subject to a cap of £2,500 per month) during the furlough period, and to not attend for work. By the time of the first instance hearing, consents had been received from around 12,700 employees. Only four had objected and 359 had not responded. By the time of the appeal, only 10 employees had

failed to reply and the number of those who had refused to give their consent was unchanged.

The Administrators considered that the purpose of the administration would be best furthered if the employees remained on furlough under the Scheme. The Administrators’ strategy was to “mothball” the business and rescue it as a going concern in due course. It was proposed to be a “light touch” administration with the directors continuing to be involved in the running of the business. An important part of this strategy was to maintain the workforce in employment, as this would maximise the options for exiting administration, including a return to trading once restrictions were lifted.

It was plain from the guidance issued by the Government that the Scheme was meant to be applicable when companies were in administration. The Guidance expressly stated that an administrator of a company would be able to access the Scheme albeit:

“...we would expect an administrator would only access the scheme if there is a reasonable likelihood of rehiring the workers. For instance, this could be as a result of an administration and pursuit of a sale of the business.”

What was unclear was whether taking steps to continue the furloughed status of the employees through the payment of wages would by itself lead to adoption of the employment contracts for the purpose of paragraph 99 of Schedule B1 of the Insolvency Act 1986 (“the Act”), and create super-priority status for the wages and salary arising thereunder. The Administrators of Debenhams therefore sought urgent directions from the Court concerning the interrelationship between the Scheme and Schedule B1 of the Act. Under paragraph 99, an administrator has a 14-day “grace period” which prevents any action taken by them from being treated as amounting to or contributing to adoption of a contract of employment.

The particular problem in Debenhams arose in the following way. Even though Debenhams would be reimbursed in respect of the payments it made to furloughed employees by the Government under the Scheme, there remained the risk that, if the Administrators adopted the employment contracts, certain liabilities arising under the contracts would obtain super-priority status. In particular, a risk arose in respect of:

- (1) any liability to pay the 20% shortfall between the sums reimbursed by the Government and the sums due under contracts of employment (this would only arise in respect of those employees who had not agreed to the Administrators’ request to vary their employment contracts); and



(2) any liability in respect of holiday pay, which would have to be paid at the employee’s “normal” rate.¹ There was a potential issue as to whether this normal rate would be at the lower furloughed rate, rather than the higher pre-furloughed rate, and the position in respect of accrued holiday if an employee was in due course made redundant.

At the time of the first instance hearing, the Administrators estimated that such liabilities could amount to as much as £3 million per month. Given that the furloughed employees would not be providing services to the Company, the Administrators needed clear guidance as to whether such liabilities would obtain super-priority status in the administration for planning purposes.

Paramount and the construction of “adoption”

Paragraph 99 of Schedule B1 does not define what is meant by “adoption”. The seminal decision relevant to the construction of paragraph 99 therefore remains the House of Lords decision in *Powdrill v Watson & Anor (Paramount Airways Ltd)* [1995] 2 AC 394 (“*Paramount*”), and the speech of Lord Browne-Wilkinson at 448E-449B, 449F-450B and 452-D.²

Lord Browne-Wilkinson made clear that the mere continuation of an employment contract, as a result of the officeholder being appointed but doing nothing, does not amount to adoption in the required sense (p.448G)³. What is required for adoption to occur is:

“... some conduct by the administrator or receiver which amounts to an election to treat the continued contract of employment with the company as giving rise to a separate liability in the administration or receivership.”

That test is an objective test and does not depend on the administrator’s subjective intentions (as confirmed by the Court of Appeal’s decision in *Debenhams* at [46]).

As to what was meant by “a separate liability”, Lord Browne-Wilkinson appears to have been referring to the liability under the contract of employment enjoying super-priority status. That is apparent from the submissions of Mr Sumption QC recorded at pp418-419 of the report, in large part accepted by Lord Browne-Wilkinson, in which it was said that “adoption signifies some words or conduct on the part of the officeholder that objectively construed, evince an intention to treat the relevant debt or liability as an expense of the administration or receivership rather than as an unsecured claim against the company”.⁴

As a result, adoption in accordance with *Paramount* prior to the Court of Appeal’s decision in *Debenhams* appeared to require: (i) conduct on the part of the administrator (ii) which, objectively construed, evidences an election on the part of the administrator (iii) to treat the liabilities arising under the contract of employment as enjoying super-priority status.

What was also notable from *Paramount* for current purposes was the emphasis placed by Lord Browne-Wilkinson on policy, and the need to construe section 19(5) of the Act (and the notion of adoption) in a manner which takes into account its consequences, including whether its impact on

1. Working Time Regulations, 1998.

2. The court considered section 19(5) of the Act, the statutory predecessor to paragraph 99. It also considered sections 44(1) and (2) which contained similar provisions to those set out in section 19, dealing with “adoption” by an administrative receiver.

3. This proposition is supported by the later decision of Laddie J in *Re Antal International Ltd* [2003] BCLC 406. In that case, the administrators only discovered the existence of 16 employees after the expiry of the 14-day period but, upon doing so, made clear they were not adopting their contracts of employment and would be terminating them. Laddie J was satisfied that there had not been adoption simply because the 14-day period had expired in circumstances where the administrators had not known of the existence of the relevant contracts.

4. As observed by the Court of Appeal in *Debenhams* at [42], the submissions of Mr Sumption QC were not accepted in their entirety, Lord Browne-Wilkinson omitting the reference to “words” in addition to conduct.

the rescue culture, i.e. that which “*seeks to preserve viable businesses*” which “*was and is fundamental to much of the Act of 1986*”⁵.

Carluccio’s

The first instance hearing in *Debenhams* took place two days after Snowden J handed down his judgment in *Re Carluccio’s Limited* [2020] EWHC 886 (Ch) (“*Carluccio’s*”). Carluccio’s went into administration on 30 March 2020. Unlike Debenhams, its employees had not been furloughed prior to its entry into administration. The administrators applied to the court for directions as to what the effect would be if they chose to furlough the employees.

Soon after their appointment, the Carluccio’s administrators wrote to the employees asking them to accept a variation to their employment contracts, namely that they would accept a reduction of 20% of their salary during the period of furlough (subject to a maximum of £2,500 in each case). By the time of the hearing, the vast majority of employees (i.e. 95%) had accepted the variation (“the Consenting Employees”), a handful amounting to approximately 1% had rejected it (“the Objecting Employees”) and about 4% had not responded (“the Non-Responding Employees”).

Snowden J held that, in respect of the Consenting Employees, their contracts had been successfully varied and that, as varied, the contracts of employment would be adopted for the purposes of paragraph 99(5) when the administrators applied under the Scheme or made payments to them (either from monies received from the Government pursuant to the Scheme or from funds which might unexpectedly become available to them). At that point, any liability of the Company to pay the Consenting Employees would carry super-priority status, although this would be limited to the sums due under contracts as varied.

As to the Objecting Employees, there was no variation. If the Carluccio’s administrators chose to terminate their contracts and make the employees redundant, there would be no adoption and any liabilities owed to them would rank as unsecured debts.

As regards the Non-Responding Employees, Snowden J concluded that, on the facts before him, he could not be satisfied that the relevant contracts of employment had been impliedly varied (applying the decision of the Court of Appeal in *Arbrahall v Nottingham CC* [2018] ICR 1425, [85]–[89], [107]–[110]), although the Judge noted that the position might well be different in other cases depending on the particular fact patterns. Snowden J also held that the contracts (as unvaried) would not be adopted merely by virtue of the fact that the administrators had not formally terminated them within the 14-day period, nor treated as adopted merely by virtue of the fact

that the Non-Responding Employees accepted the terms of the variation after the 14-day period (but were not attending for work). The relevant contracts of employment would only be adopted if the administrators applied under the Scheme in respect of those employees or made payments to them (as with the Consenting Employees).

Snowden J analysed the decision in *Paramount* with great care, and in a manner that is difficult to criticise. It was the application of the relevant test to the facts at hand which was more contentious. The primary reason given by Snowden J for his conclusion was at [91], where he said that: “*In either case, applying the concept of adoption as explained by Lord Browne-Wilkinson in Paramount at page 449B, the Administrators would be doing an act which could only be explicable on the basis that they were electing to treat the varied contract as giving rise to liabilities which qualify for super-priority.*” Why this was so was not expanded upon.

Finally, and of relevance to what was later to be argued in *Debenhams*, Snowden J concluded as part of his analysis that paragraph 99 is the provision which is specifically designed to deal with the ability and obligation of administrators to pay wages or salary to employees in administration i.e. it is the source of the relevant power. Snowden J expressed the view that paragraph 66 (which allows an administrator to make payments when they are thought likely to assist achievement of the purpose of the administration) does not provide the power to make such payments, or need to do so in light of the scope of paragraph 99.

Debenhams: the first instance decision

The *Debenhams* application came before Trower J, who dealt with the application with commendable expedition. Having reviewed the decisions in *Paramount* and *Carluccio’s*, the Judge concluded that, in order to satisfy the test for adoption, it was “*necessary to identify some conduct which causes the relevant employment contract to be continued*” (at [51])⁶, or to ask whether the administrator has treated the company as having continuing liabilities under the contracts which are separate liabilities that arise in the administration: ([62] and [63]). Whichever formulation was used, on the facts Trower J made clear that he considered that it would not be possible for the Administrators of Debenhams to participate in the Scheme without electing to treat the contracts of furloughed employees as continuing and therefore adopting them in the required sense.⁷

Before Trower J, the Debenhams administrators raised several issues for clarification arising from the judgment of Snowden J in *Carluccio’s*. In particular, the Administrators argued that Snowden J had not explained (as he had held in paragraph 91 of his judgment) why making a payment to an employee or making an application for a grant under the Scheme could “*only be*

5. At pp.441-442.

6. Although the Judge at [51] states that he is agreeing with the Administrators, the test advanced by the Administrators was slightly different, focussing not merely on causing the contract of employment to be continued but on a test which required the conclusion that, in so doing, the administrator was to be treated as having elected to cause the liability for wages and salary to gain super-priority status.

7. At [55], and [63] and [64].

explicable” on the basis that the administrators were electing to treat the employment contract as giving rise to liabilities which qualify for super-priority status.

In the case of *Debenhams*, it was argued that both acts would be entirely explicable on the basis that the Administrators were *not* electing to treat the liabilities arising under the contracts as having super-priority in the administration. Under the Scheme, the Government pays to the employer the grant and the employer pays the employee. Thus, in economic substance, the company acts a conduit through which payments of wages are made to employees by the Government.

The court disagreed. Trower J considered that the mere fact that the company continues its liabilities to the employee under the contract and makes payment to them necessarily gives rise to a “*separate liability*” in the required sense.⁸ The fact that no services were being provided to the company was not considered to be such as to alter this conclusion, because employee retention was one of the necessary incidents to achievement of the purpose of the administration.⁹

The court also disagreed that the policy underlying the Scheme would be undermined if contracts of employment were adopted where administrators do no more than participate in the Scheme and make payments to furloughed employees. It noted that in this case (and in *Carluccio’s*) that pragmatic solutions had worked relatively effectively, that most employees had been willing to agree to variations to their contracts of employment such that the only liabilities that would end up

qualifying for super-priority would be reimbursed under the Scheme.¹⁰

The court held that even if this was not case, the “*mere fact*” that the Scheme is designed to try and prevent employee redundancies in companies driven into financial distress by the Covid-19 pandemic, could not of itself prevent contracts from being adopted if that is the consequence of established principles of construction of paragraph 99.¹¹

Debenhams: Court of Appeal

The Debenhams’ administrators appealed to the Court of Appeal. The Court of Appeal was able to accommodate and deal with the appeal within a week (including indicating its decision, with reasons to follow).

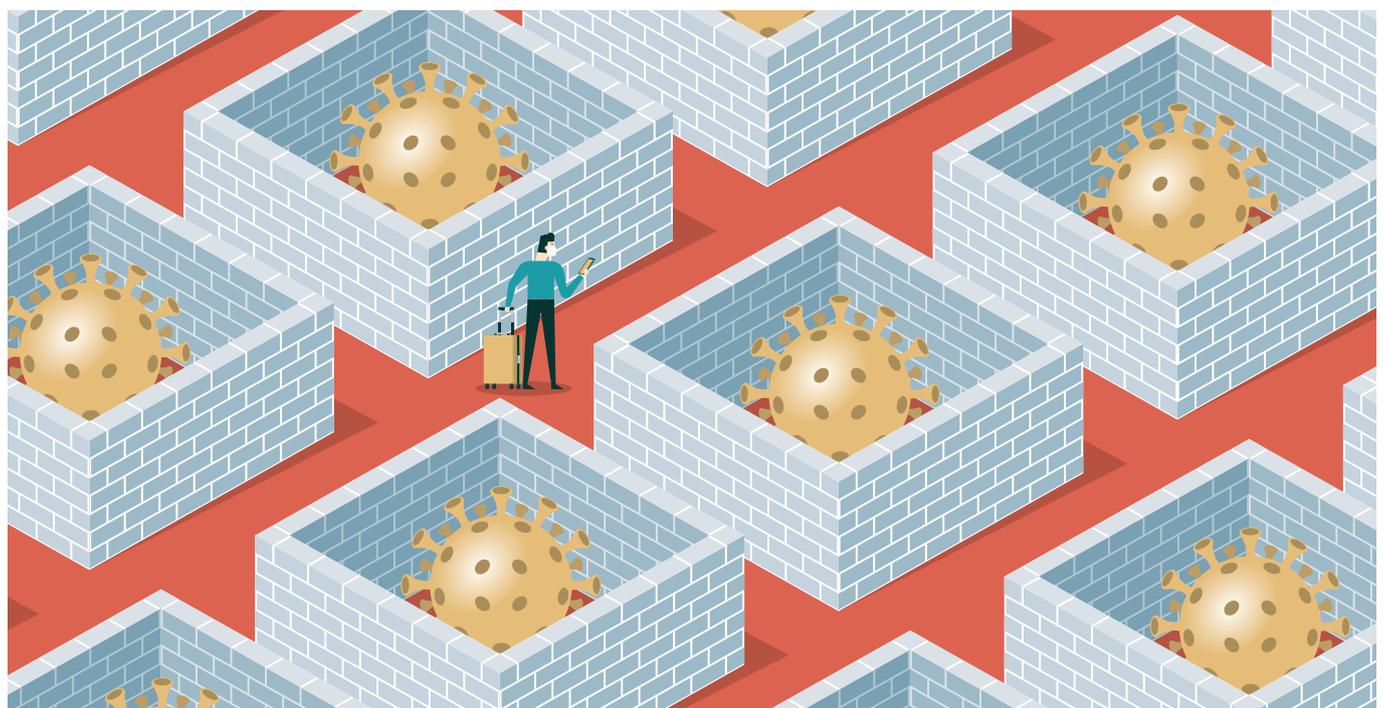
Before the Court of Appeal, it was accepted that the speech of Lord Browne-Wilkinson in *Paramount* identified the correct test for adoption, and that the real question was how that test should be applied in the unusual circumstances of the case at hand. In making their appeal, however, the Administrators observed that Trower J had potentially applied two slightly differently worded tests, each of which might be said to differ from that in fact applied by Snowden J in *Carluccio’s*. It was submitted that the real issue (applying *Paramount*) was whether objectively the conduct of the administrators evidenced an election on the part of the administrator to treat the liabilities arising under the contract of employment as enjoying super-priority.

8. At [63] to [64].

9. At [59].

10. At [60].

11. At [61].



The Court of Appeal (the judgment of the Court being given by David Richards LJ) emphasised that the test to be applied for these purposes was an objective one (see [46]) and that the Administrators subjective intention was irrelevant (see [53]). Whether adoption occurred was said to be a question of law, the test being (in the words of David Richards LJ):

“is the conduct of the administrator such that he must be taken to have to accept that the relevant amounts falling due under the employment contract enjoy super-priority? It is a wholly objective question, focussed entirely on the conduct of the administrator. As Lord Browne-Wilkinson repeatedly said, the issue is whether the officeholder has “continued” the employment of the relevant employees. This is the essence of the test propounded by him. If the officeholder has taken active steps to continue their employment, that necessarily results in super-priority for the relevant liabilities under the contracts of employment. As earlier noted, and by contrast, doing nothing involves no continuation by the administrators of the employment.”

The Debenhams administrators argued that the decisions of Snowden and Trower JJ gave rise to two problems: first, that there was no good reason to conclude that the contracts of employment had to be treated as adopted simply by reason of making payments in accordance with the Scheme, or by making an application under the Scheme. Neither act necessarily demonstrated the required election to treat the liabilities under the contract of employment as being super-priority expenses. Secondly, both judges, it was submitted, had erred in considering paragraph 99 as the source of the power to make such payments, which was in fact found in paragraph 66 of Schedule B1. It was not necessary to conclude that contracts of employment were adopted in order for the administrators to have the power to make those payments and, once that link was broken, the question of adoption could be seen as simply going to priority: had the administrators conducted themselves in a manner that, objectively, was such that they must be taken to have treated the liabilities under the employment contracts as carrying super-priority status?

In answering the first of these concerns, and explaining why the Administrators were to be taken as having continued the contracts of employment in the required sense (and therefore adopted them) notwithstanding the furloughed status of employees, the Court of Appeal emphasised that there were a number of factors tending to support that conclusion (see [57]–[59]). In particular, wages would continue to be paid pursuant to the contracts of employment, the employees would remain bound by the terms of their contracts of employment and the administrators, in making payments, would be seeking to achieve the statutory purpose of the administration. The Debenhams’ administrators relied on the fact that furloughed employees were not carrying out work for the company or providing services (and were not permitted to do so under the Scheme), that their remuneration was limited to that payable under the Scheme (such that it was economically neutral on the company) and the fact that any decision on termination would only be made once the Scheme had ended ([60]). The Court considered these factors to be relevant but not decisive, and that all were ultimately outweighed by the continued performance of the employment contract in all other respects, the fact that as a matter of law payments were made under the contracts of employment and that ultimately the Administrators were choosing to keep the employees employed for the benefit of the administration and in the hope that they will be able to resume employment after the Scheme ended thus preserving the business (see [61]–[65]).

The Court of Appeal did accept that paragraph 66 rather than paragraph 99 of Schedule B1 was the most obvious source of authority for the making of the payments to employees, such that paragraph 99 was primarily concerned with questions of priority. Although not ruling out paragraph 99 as potentially providing additional authority for such payments, paragraph 99 could not therefore be prayed in aid of the argument on adoption (i.e. that it was necessary to have adopted the contracts of employment in order to have power to make the payments in question). Notwithstanding the Administrators’ success on this point, it did not alter the

Court’s conclusion that adoption of the contracts of employment had occurred in any event.

The final observation of Lord Justice David Richards is of note:

“We can see that there may be good reasons of policy for excluding action restricted to implementation of the Scheme from the scope of “adoption” under paragraph 99, but such exclusion cannot be accommodated under the law as it stands.”

Conclusion and commentary

The decisions in *Carluccio’s* and *Debenhams* were made by some of the most experienced and knowledgeable insolvency judges on the English bench, and unsurprisingly provide a clear and robust guide to the concept of adoption and its application even in the most unusual of circumstances. It now seems clear that any positive conduct on the part of administrators to continue the employment relationship with employees beyond the initial 14 day grace period is likely to amount to adoption save in the most unusual of circumstances. The attraction of a clear and practical test is obvious.

If one were to seek to be critical, it would be on the basis that the approach adopted failed to accommodate the highly unusual circumstances of the COVID-19 pandemic, and the obvious policy reasons (alluded to by the Court of Appeal) for reaching the contrary conclusion. The conclusion reached is potentially at odds with the policy underlying the Scheme, and more generally the rescue culture. These cases were not instances (such as the example given by Snowden J at [71]) where it would be unfair to deny the employee super-priority status in the administration. On the contrary, the purpose of continuing employment (and payment) in accordance with the terms of the Scheme was meant to be to benefit the employee and employer. In cases where the administrators are unable to obtain the express or implied consent of the majority of employees to vary the terms of their employment contracts, adoption potentially presents a material risk to the viability of an administration and will undoubtedly impact on its conduct.

The law as stated prior to the Court of Appeal decision in *Debenhams* suggested that such policy considerations were

meant to inform the meaning and application of the notion of “adoption”. Lord Browne-Wilkinson said as much in *Paramount* at 447G–H, as did Lord Justice Neuberger (as he then was) in *Re Huddersfield Fine Worsteds Ltd* [2005] BCC 905 at [41]. Trower J at [59]–[61] addressed the Administrators’ policy arguments but did not really engage head on with the critical point: that an informed interpretation of the meaning of “adoption” in the current circumstances, taking into account the implications and consequences of the decision, was one that (in accordance with *Paramount*) should probably lead to the conclusion that the contracts of employment were not adopted in the required sense. The Court of Appeal was equally unpersuaded, seeing no scope for such policy arguments to compel a different conclusion once the test identified in *Paramount* was applied.

However, it can be argued that one cannot form a view on whether adoption has occurred until the policy considerations (and consequences) of so holding have been taken into account. That was the basis of Lord Browne-Wilkinson’s criticism of the Court of Appeal’s approach in *Paramount*. Policy considerations might therefore be accommodated by adopting a more fact sensitive approach to “adoption”.

In that regard, it is worth looking again at the key passage in the Court of Appeal’s judgment ([53]):

“is the conduct of the administrator such that he must be taken to have to accept that the relevant amounts falling due under the employment contract enjoy super-priority? It is a wholly objective question, focussed entirely on the conduct of the administrator. As Lord Browne-Wilkinson repeatedly said, the issue is whether the officeholder has “continued” the employment of the relevant employees. This is the essence of the test propounded by him. If the officeholder has taken active steps to continue their employment, that necessarily results in super-priority for the relevant liabilities under the contracts of employment. As earlier noted, and by contrast, doing nothing involves no continuation by the administrators of the employment.”

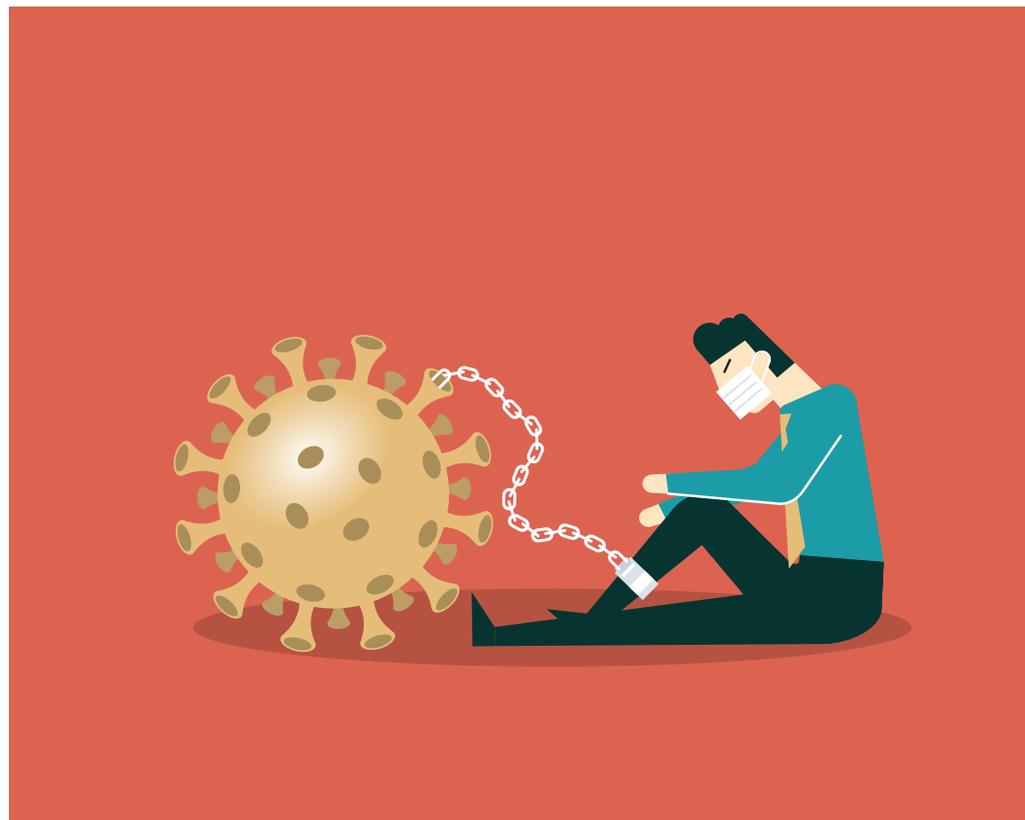
The first part of this paragraph (underlined) does reflect the ratio of *Paramount*. However, the second part (not underlined) does not necessarily

follow. Although Lord Browne-Wilkinson did refer to the continuation of the employment relationship on repeated occasions, the key part of the speech concerned with what amounts to adoption seemed to focus on the notion of an election to treat the liabilities as carrying super-priority status i.e. that, when assessed objectively, the administrator through his conduct has made a choice which requires the liability to be treated as a super-priority liability. The approach of the Court of Appeal is to equate a positive decision to continue the employment status of the employees with an election to treat the liabilities under the employment contract as having super-priority status. That is one reading of Lord Browne-Wilkinson’s speech, but it is equally possible to conclude that what should be required is conduct such that the administrator is to be taken as accepting that the liabilities are to be given super-priority status in the administration. Continuing the employment relationship will undoubtedly typically constitute the required election or acceptance of super-priority status. But it ought not necessarily to lead to the conclusion that there has been adoption in all circumstances.

The distinction is potentially important because, once the conclusion is reached that active continuation of the employment relationship is the crux of the test, the conclusion in *Carluccio’s* and *Debenhams* at first instance almost inevitably followed. But if the test was focused on an election to create super-priority status, the position was much more finely balanced and would be in future cases. In order to provide greater certainty, the Court of Appeal’s decision excludes the possibility of a more policy driven approach in almost every case. Certainty is to be welcomed, but the conclusion in *Debenhams* was not inevitable and it has come at a price. In circumstances where the government has confirmed the continuation of the Scheme through to October 2020, legislative clarification would be desirable if (as the Court of Appeal acknowledged was entirely possible) there are good policy reasons to conclude that participation in the Scheme ought not to lead inexorably to adoption of employment contracts. ■

[Tom Smith QC and Richard Fisher QC acted for the Debenhams administrators]

[Felicity Toubie QC and Madeleine Jones acted for the Carluccio’s administrators]



Contracts and Coronavirus: *frustration and force majeure*



Temporarily
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COVID-19}



TOBY BROWN

Toby Brown considers how the law of frustration and *force majeure* may be relevant to commercial contracts during the COVID-19 pandemic.

Much of the response to the commercial difficulties caused by the pandemic and resulting lockdowns has no doubt been governed by business common sense, rather than resorting to the terms of the contract, let alone to the courts. Indeed, on 7 May 2020 the Cabinet Office issued guidance urging what it describes as “*responsible and fair behaviour*” in the enforcement of contracts impacted by coronavirus. But many of our clients still need to know where they stand legally where, for example, they feel it is impossible to meet their contractual obligations. In that context, this article provides a reminder of the key principles of *force majeure* and then frustration, in each case followed by a more practical consideration of how the principles might be applied to the pandemic.

Force majeure – the principles

First it is worth recalling that *force majeure* (unlike the doctrine of frustration, considered below) is not a rule of English law, in contrast to some other jurisdictions such as France. Donaldson J commented that “*the precise meaning of this term, if it has one, has eluded lawyers for years*” (*Thomas Borthwick (Glasgow) Ltd v Faure Fairclough Ltd* [1968] 1 Lloyd’s Rep 16, 18). That said, the expression is normally used to describe a contractual term applying to events beyond the control of one or both parties, where they can delay performance, or be excused in whole or part from their obligations, or even terminate the contract.

The contract might contain a non-exhaustive definition of *force majeure*, for example “*any circumstance not within a party’s reasonable control, including acts of God, terrorist attack, riot, any law or action taken by government...[etc]*”, or conversely might seek to restrict the provision to a complete set of events. The same or another provision will then need to specify what consequences or rights follow upon the occurrence of a *force majeure* event, given that as mentioned English law contains no general rule of *force majeure*.

As should be clear from the foregoing, we are in the realms of contractual interpretation. There are authorities suggesting that *force majeure* clauses are to be construed strictly, and that the *contra proferentem* rule applies, though it is worth noting that the Court of Appeal

recently found that these principles did not assist them in deciding between competing constructions of a *force majeure* provision in *National Bank of Kazakhstan v Bank of New York Mellon SA/ NV* [2018] EWCA Civ 1390 at [50]. In any event, unsurprisingly the party relying on the *force majeure* provision has the burden of proving the facts to bring the case within the clause.

The party will also need to establish causation – in that the event in question caused them to be unable to perform the contract (or delayed in performance etc, as applicable to the wording of the contract). They will also need to show that their non-performance was beyond their control, and that there were no reasonable steps which if taken could have avoided or mitigated the *force majeure* event.

So if the provision forgives a party from performing the contract where he is “unable” or “prevented” from doing so, they will need to show that the performance became physically or legally impossible, not merely more difficult or unprofitable. The drafters of the contract might, however, extend the definition of *force majeure* to include where performance is “hindered”, which is a wider concept than impossibility.

The contract usually provides that a party must follow a particular process such as serving notice in order to take advantage of the *force majeure* provision. This may be construed as a condition precedent, though compliance may be waived by the other party.

A final point in this short summary is that the provision may be subject to the requirement for reasonableness in section 3 of the Unfair Contract Terms Act 1977 (standard terms of business), and to the test of unfairness in section 62 of the Consumer Rights Act 2015 (consumer contracts). That said, it may be easy to conclude that a *force majeure* provision which applies when performance is prevented by events beyond a party’s control is unlikely to be unreasonable or unfair!

Force majeure – practical application to COVID-19

With that overview, we turn to how *force majeure* might apply in the present pandemic. The caveat has of course to be given that each contract and factual

circumstances will differ and no article such as the present can be sufficiently comprehensive, but it is hoped that the following six points will be of practical assistance.

- First, to state the obvious, the contract needs to be reviewed to consider if it contains a *force majeure* provision. Although you would expect to see a heading “*force majeure*”, the clause need not have such a label. Also, the *force majeure* provision might be incorporated by reference to a further document (such as to standard terms).
- Second, if the contract does not include a *force majeure* provision, absent any other helpful provision in contract (and assuming no relevant term can be implied, which may be difficult), you will need to consider whether the contract has been frustrated at common law.
- Third, if there is a *force majeure* provision, carefully consider how it defines *force majeure* events and whether the COVID-19 pandemic falls within this. As already stated, this is a question of contractual interpretation of the particular contract. Some precedents expressly include “*plague, epidemic*” together with acts of God and other natural disasters (such as the International Chamber of Commerce *force majeure* clause) or even include “*epidemic or pandemic*” separate to acts of God (Practical Law long form *force majeure* clause). That said, Professor Ewan McKendrick QC (Hon) in a recent seminar observed that he had not seen many clauses expressly referring to pandemics. In which case, you need to consider whether the event falls within more general words such as acts of God or changes in the law, or alternatively within a non-exhaustive definition such as “*or any other event outside the control of the parties*”.
- Fourth, consider whether the pandemic caused the party’s inability to perform and whether this was beyond their control, or whether reasonable steps could have been taken to mitigate or avoid the non-performance. Relevant factors may include the effects of a government-imposed lockdown, staff illness from the pandemic,

closure of international borders, and suspension of flights bringing in goods. If your client is facing potential litigation, evidence will need to be collated on these issues.

- Fifth, consider whether the contract requires that notice or some other process must be followed in order to take advantage of the *force majeure* rights, and whether this has been waived by the other party.
- Sixth, and finally, consider what relief or other consequences the contract provides to one or both parties in the event that *force majeure* applies. If faced with a damages claim, consider whether the *force majeure* clause can be used as a shield, even if it was not proactively relied upon at the time.

Frustration – the principles

Moving now to frustration, this is a common law doctrine which may discharge a contract where something subsequently happens, without default of either party, which renders an obligation incapable of being performed because it has been transformed into a radically different obligation. The test has been formulated in different ways, the foregoing being based on the House of Lord's decision in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696. For a useful review of the authorities see the recent judgment of Marcus Smith J in *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch); [2019] L & TR 14 at [21]–[40] (which interestingly decided that the EU agency's lease for its headquarters in London was not frustrated by Brexit).

There is no limit to the types of frustrating event, and various categories have developed in the case law, including frustration of common or commercial purpose; impossibility of performance due to the destruction of the subject-matter of the contract; the death of a person contracted to perform personal services; and subsequent legal changes making performance illegal.

Perhaps the most famous examples of the first category are the “coronation cases” when King Edward VII's illness led to his coronation being postponed together with many celebratory events. In *Krell v Henry* [1903] 2 KB 740, the defendant had agreed to hire for two



days the plaintiff's flat overlooking Pall Mall, and the evidence (though not the terms of the contract) indicated that the sole purpose was to watch the coronation procession. The Court of Appeal held that the contract had been frustrated because the procession was "the foundation of this contract, and that the non-happening of it prevented the performance of the contract". However, showing the narrow confines of the principle, in another coronation case *Herne Bay Steam Boat Company v Hutton* [1903] 2 KB 683, a contract to hire a steamboat to view the Royal naval review was not frustrated, notwithstanding the postponement.

As to the fourth category mentioned above, there are a number of cases from war time (which has some parallels to the very different present crisis) showing how supervening illegality can frustrate the contract. Subsequent changes to the law affecting a contract may also amount to frustration. In *Metropolitan Water Board v Dick Kerr & Co Ltd* [1918] AC 119 a firm of contractors agreed with the Water Board to construct a reservoir, but were required to cease work by a notice issued by the Ministry of Munitions, further to powers conferred by the Defence of the Realm Acts. The House of Lords held that the contract had been frustrated, Lord Findlay LC stating that the "the interruption is of such a character and duration that it vitally and fundamentally changes the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made".

This article cannot of course cover all the categories of frustration but it is worth emphasising that the principle operates narrowly. As Lord Roskill stated in *The Nema* [1982] AC 724, 752 "the doctrine is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains".

If the contract has indeed been frustrated, what are the consequences? The contract is automatically discharged, releasing both parties from any further performance. The Law Reform (Frustrated Contracts) Act 1943 applies to most categories of

contracts and in summary provides that all sums already paid are recoverable, and further payable sums cease to be recoverable. There are exceptions, the first permitting the Court to allow a party to retain or be paid a sum for "expenses" incurred before discharge, and the second relates to a non-monetary "valuable benefit" obtained before discharge. In addition, where a part of the contract can be severed and was wholly performed before discharge, that part is treated as a separate contract that was not frustrated.

Frustration – application to COVID-19

With that necessarily incomplete summary of the law (for a full review see *Chitty* cited below), we move to consider how the doctrine of frustration might apply to those facing contractual difficulties caused by the pandemic. As with *force majeure*, it is difficult to generalise given the variety of contracts and factual situations, but here follows another six points which may be helpful to consider.

- First, does the contract contain a *force majeure* or other relevant provision? If the parties made full provision for the event there is normally no room for the application of frustration (unsurprising perhaps, given that the doctrine is concerned with unforeseen events not anticipated by the contract!). However, even if the clause at first glance appears to be relevant to the pandemic, it is necessary to consider whether the contract makes "full and complete" provision for the scenario in order that frustration be excluded.
- Second, consider the various categories of frustration so far established in case law (as already mentioned, *Chitty* is a good starting point). Given we have not faced an epidemic or pandemic like the present, we await authorities specifically on all fours with the present crisis.
- Third, to take one obviously relevant category of frustration, consider whether the party can rely upon performance having become illegal

as a result of the Health Protection (Coronavirus) Regulations 2020 which in England implemented the lockdown and required many business to close their doors. If the illegality arises under foreign legislation passed in response to the pandemic, as a general rule this may not be sufficient under English law, but this is subject to exceptions such as for foreign places of performance.

- Fourth, moving to another relevant category, has the common purpose of the contract become impossible as a result of the lockdown or other consequences of the pandemic? Although this type of frustration was established in the coronation case of *Krell*, this may be difficult in other cases, as in *Herne Bay*, where the hirer could still have used the steamboat for a day's cruise even though the naval review could not be viewed. Indeed, of potential relevance to COVID-19, in *Herne Bay* Vaughan Williams LJ gave the example that where "a person has engaged a [taxi] to take himself and a party to Epsom to see the races there, but for some reason or other, such as the spread of an infectious disease, the races are postponed. In such a case it could not be said that he could be relieved of his bargain" (pg 681). In other words, just because the pandemic means that one party no longer needs the service, does not necessarily mean that the contract has been frustrated.
- Fifth, consider whether in reality the complaint is that the contract is now harder to perform due to the pandemic, or more costly to one side, rather than actually meeting the narrow requirements for frustration. In the allocation of risk under the contract, did one party assume the risk for the difficulties, and so should not be relieved of their "bad bargain"?
- Sixth, and finally, consider whether it might be argued that the party seeking to rely on frustration is in fact at fault. No-one would wish to accuse someone of taking advantage of the pandemic, but it is worth recalling Bingham LJ's summary

of the law in *The Super Servant Two* [1990] 1 Lloyd's Rep 1, 8 that “the essence of frustration is that it should not be due to the act or election of the party seeking to rely on it” and that “a frustrating event must take place without blame or fault on the side of the party seeking to rely on it”.

Applying these to some hypothetical examples, a contract between an events company and catering company for the provision of refreshments at a concert might be frustrated by its forced cancellation as a result of the pandemic (assuming that the contract did not contain a *force majeure* provision). In contrast, a contract between a client and a firm for the provision of consultancy or indeed legal advice may well not be frustrated by coronavirus on the basis that the services could still be provided by the employees working remotely from home, even if this made the contract more difficult to perform.

Business common sense

As stated at the outset, much of the pandemic's disruption to the performance of contracts will be addressed on a commercial level, without considering, let alone

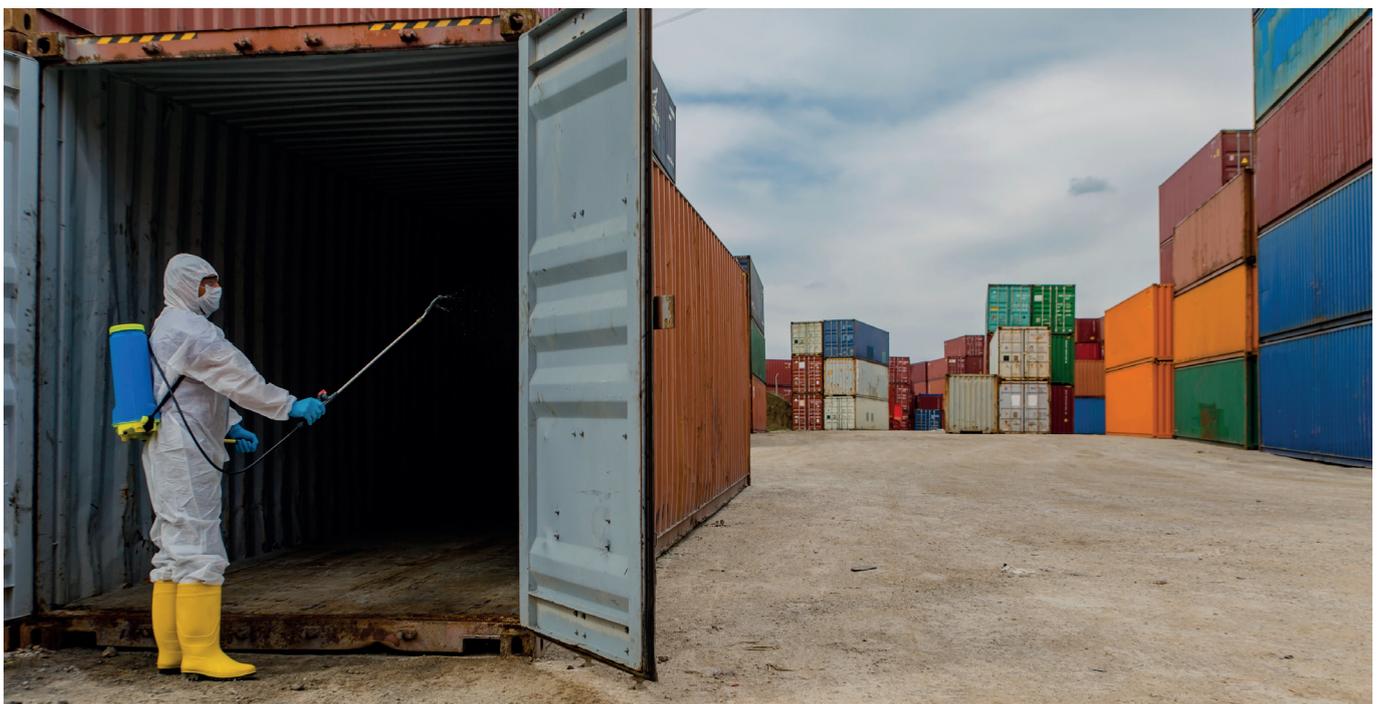
enforcing, *force majeure* provisions or the doctrine of frustration. On a practical level, the parties' interests (and the wider interests of the economy and peoples' livelihoods) will often be best served by businesses coming to practical solutions to keep their contractual relationship alive. Many will record those arrangements informally, though from a legal perspective it may be prudent for deeds of variation or formal side letters to be used to embody those agreements.

Indeed, in guidance issued on 7 May 2020, the UK Government strongly encouraged what it describes as “responsible and fair” contractual behaviour, including in relation to asserting and responding to reliance on *force majeure* and frustration. The document is non-statutory and non-binding, so it remains to be seen if the Courts would consider it of assistance. Not least because the guidance is somewhat vague as to what actually constitutes “responsible” or “fair” behaviour, but there is obviously sense in the suggestion that parties act reasonably for example in responding to requests for relief from delayed or impaired performance. The guidance

also contains an encouragement for parties to seek to resolve disputes without escalating to what it describes as “formal intractable disputes”. Yet, by way of concluding thought, litigation of such disputes would help clarify how the law of frustration is to be applied to the present crisis. ■

Further reading

- Chitty on Contracts 33rd Ed with 1st supplement, Chapter 15 section 8 (*force majeure*)
- Chitty on Contracts, Chapter 23 (frustration)
- Treitel, Frustration and Force Majeure, 3rd Ed





Directors' Duties in the Age of Covid-19

Where to from here?



SUSY BULLOCK



GEORGINA PETERS

Susy Bullock, Partner at Gibson Dunn and former Head of EMEA Litigation at UBS, and Georgina Peters, South Square, Contributor to *Company Directors: Duties, Liabilities and Remedies* (OUP, 2017), consider the prominence of environmental, social and governance factors in board decision-making in the Covid-19 context and how these fit with directors' duties under the English Companies Act, amidst rising calls for stakeholder capitalism.

Needless to say, the Covid-19 pandemic has dominated the corporate landscape of 2020. Writing on 18 May, Paul Polman, Chairman of the International Chamber of Commerce and a former CEO of Unilever, said this:¹

"This crisis has proven companies with strong ESG credentials are far more resilient. And if anything, the emphasis on the "S" – social – is even more important than before.

Shareholder primacy was already a tired precept and this pandemic has shown that we need companies to subscribe to a much more powerful article of faith – stakeholder primacy".

The argument may sound dramatic, but it is not a novel one. The philosophical underpinnings of ESG issues were well advanced at the corporate level by the start of 2020, with increasing emphasis on human rights and climate change in more recent years. In this context, it is not surprising that the collective trauma of Covid-19 is already dominating the ongoing discussion on stakeholder capitalism.

For corporates and financial services firms, handling the fallout of this crisis responsibly and seeking to sustain operations, while protecting staff, suppliers and communities, has placed extraordinary pressure – and often conflicting demands – on boards of directors in their decision making. Companies' traditional corporate governance structures and expressed corporate purposes have been put to the test.

There have been expectations from governments, stakeholders and investors that boards will be driven by considerations more akin to the stakeholder capitalism model. This model gives equal respect to all stakeholders of the company, including customers, employees, suppliers and communities: a process described by Klaus Schwab, Founder and Executive Chairman of the World Economic Forum, as "*positioning private corporations as trustees of society*".² It stands in contrast to the traditional (dominant) model of shareholder primacy, which focuses on maximising profit for investors.

In this article, we examine recent ESG developments and consider how, particularly in the Covid-19 era, new pressures faced by company directors will square with the established English law approach to directors' duties.

Good corporate governance pre-Covid-19

Even before the pandemic, questions of appropriate governance structures and corporate purpose had risen up the agenda for multinationals. In 2015, the United Nations set 17 Sustainable Development Goals (SDGs): a sustainability blueprint for global challenges such as climate change, environmental degradation, social justice and inequality, adopted by member states and expressly supported by many corporates. By 2019, the agenda was largely driven by the climate change debate, with significant focus on reducing carbon emissions and adopting measures (by states and private actors) to reach the targets set by member states in the Paris Climate Agreement of 2015.

Against this backdrop, in August 2019 the Business Roundtable (an influential business lobby comprised of the CEOs of America's leading companies) published a new Statement on the Purpose of a Corporation.³ The 181 CEOs who signed it committed to lead their companies for the benefit of all stakeholders. The Roundtable is US-based, but many of the signatories were CEOs of multinational organisations with UK operations which are subject to English law.

As recently as December 2019, a new "Davos Manifesto"⁴ was launched by the World Economic Forum, following which stakeholder capitalism formed a key theme during the Davos sessions in January this year. The Manifesto stated the purpose of a company as being:

"to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders – employees, customers, suppliers, local communities and society at large. The best way to understand and harmonize the divergent interests of all stakeholders is through a shared commitment to

1. <https://www.telegraph.co.uk/business/2020/05/18/time-redesign-traditional-capitalism-put-focus-values/>

2. <https://www.weforum.org/agenda/2019/12/why-we-need-the-davos-manifesto-for-better-kind-of-capitalism/>

3. <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>

4. Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution.

policies and decisions that strengthen the long-term prosperity of a company” (emphasis added).

This has been matched, from the European perspective, by a study undertaken by the European Commission into directors’ duties and sustainable corporate governance⁵ (still ongoing at the time of writing). One stated objective is to analyse how possible reform in corporate law and board duties could contribute to more accountability for sustainable value creation and implementation of the Paris Climate Agreement, as well as the United Nations’ SDGs.

Investor focus

Significantly, impetus for these developments has been driven equally by the investor community, placing additional expectations on boards. The United Nations-supported Principles for Responsible Investment (PRI) were launched in 2006, based on the notion that ESG issues should be considered alongside more traditional financial factors. The PRI have gained notable traction over recent years, as asset and investment managers and pension funds doubled down in their scrutiny of good governance and sustainability policy and practice by corporates.

Most vocal in his commentary on this issue is, of course, Larry Fink, CEO of Global investment manager Blackrock. In his January 2020 letter to CEOs, he stated that climate change has brought us to *“the edge of a fundamental reshaping of finance”* and *“in the near future ... a significant reallocation of capital”*. BlackRock has committed to *“place sustainability at the center of [its] investment approach”*. While BlackRock cannot divest of companies in its index funds, Fink is clear that they will be *“increasingly disposed to vote against management and board directors when companies are not making sufficient progress on sustainability-related disclosures and the business practices and plans underlying them”*.

Emergence of new soft and hard law impacting director responsibility

Recent years have seen an emergence of industry standards or guidelines which speak to stakeholder interests. In financial services, for example, the “Principles for Responsible Banking”⁶ were launched by 130 banks representing more than USD47 trillion in assets in September 2019.⁷ Principle 1 requires business strategy to align with individuals’ needs and societal goals (as expressed in the SDGs, Paris Climate Agreement and relevant national frameworks), while Principle 4 states that signatories will proactively and responsibly consult, engage and partner with relevant stakeholders to achieve those goals. Companies typically embrace these kinds of principles publicly and embed them in their policies, as recorded in both financial and corporate social responsibility (CSR) disclosures each year.

Climate change has been a growing focus of regulators: for example the Prudential Regulation Authority is set to examine the resilience of the largest financial firms’ business models to climate change risks in an exercise due to commence mid-2021 (deferred due to the pandemic), and the Financial Conduct Authority has various ongoing workstreams in relation to climate change and green finance, including a focus on *“challenging firms where we see potential greenwashing.”*⁸

Moves are already afoot to introduce European-wide legislation in 2021 which would mandate due diligence by companies for human rights and environmental impacts, announced by Justice Commissioner Reynders on 29 April 2020. At an event hosted by the EU Parliament’s Responsible Business Conduct Working Group,⁹ Commissioner Reynders spoke directly of the challenge of managing short-term interests against long-term sustainability, and the important duty of care of directors in this regard. If adopted in the form which appears contemplated, these legal requirements will become embedded in the operations and risk management processes of European companies. The proposal comes at a time when many countries have already implemented (or are close to doing so) laws which require corporate due diligence (or greater transparency) for human rights issues such as child labour.¹⁰

Director responsibilities are also engaged when meeting corporate disclosure requirements. European member states (including the UK¹¹) have implemented the Non-Financial Disclosure Directive (2014/95/EU), containing rules on disclosure of non-financial information such as environmental protection, respect for human rights and anti-bribery and corruption. In addition, in the UK, s 54 of the Modern Slavery Act 2015 includes a requirement for commercial organisations with annual turnover of more than £36 million to disclose a board-approved statement each year detailing its steps to tackle slavery and human trafficking throughout its supply chain and business.

Rapid Covid-19 decision making

Against this background struck Covid-19. Despite extensive challenges faced by boards in managing their organisations and liquidity during the crisis, numerous companies have made choices which respond to the interests of their stakeholders or communities, as part of their drive towards sustainability and corporate responsibility.

The ability to protect employees’ interests was made easier by the introduction of the UK Government’s Coronavirus Retention Scheme, enabling employers to put employees on furlough, at least in the short-term. When it comes to active employees, Google has announced that home-working for the majority will be permitted

5. <https://emeia.ey-vx.com/4429/82548/landing-pages/dg-just-sustainable-corporate-governance---survey-for-legal-practitioners.pdf>

6. Developed as a partnership between the United Nations Environment Programme Finance Initiative and 30 founding banks, and launched in September 2019.

7. www.unepfi.org/banking/banking-principles/

8. <https://www.fca.org.uk/publications/feedback-statements/fs19-6-climate-change-and-green-finance>

9. <https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/>

10. E.g.: the French Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre; the Dutch Child Labour Due Diligence Law (Wet zorgplicht kinderarbeid) of 14 May 2019.

11. The Companies, Partnerships and Groups (accounts and Non-Financial Reporting) Regulations 2016 (SI 2016/1245).



until the end of this year, whilst Facebook gave employees US\$1000 bonuses for their home-working costs.

More widely, examples of corporate responses to Covid-19 are plentiful. In the manufacturing and car industries, for instance, many boards swiftly moved to repurpose their factories to produce PPE or other critical machinery for the NHS. On a global level in the retail sector, companies such as H&M and Inditex have pledged to honour orders which were cancelled post production to protect their supply chains, or have repurposed manufacturing hubs to prepare PPE for health services.

And in financial services, banks across Europe have taken a variety of steps to support government programmes and their own clients, including: suspending mortgage payments, offering significant credit lines for SME and corporate clients, and rolling out bridge loans and relief programmes.¹² Santander has established a EUR 25 million fund for medical equipment (funded by a reduction in salaries of senior management), whilst UBS made a US\$30 million commitment to fund Covid-19 relief efforts globally.¹³

Numerous banks and insurers have also resolved (often at the urging of their regulators) to withhold current dividend payments. Aviva, for example, announced on 8 April that the board had withdrawn its recommendation to pay the 2019 final dividend to ordinary shareholders “*in the wake of the unprecedented challenges Covid-19 presents for businesses, households and customers...*”.

All these moves evidence short-term corporate responsiveness to wider stakeholder interests; but it should be recognised that these decisions have been taken in a crisis situation, their short-

term nature perhaps being more easily justifiable on that basis. What remains to be seen is how companies will behave in the long-term, against the Covid-19 backdrop. Will board directors – as the ICC Chairman pithily put it – “*subscribe to a much more powerful article of faith – stakeholder primacy*”? And even if they have the desire, how is the vision of stakeholder capitalism accommodated within existing English law on directors’ duties?

English law on directors’ duties

It is some fourteen years since the general duties which directors owe to a company were codified in Part 10, Chapter 2 of the English Companies Act 2006 (although the substance of those duties were, in part, already well-entrenched at common law or in equity). S 170(1) makes clear that the duties in ss 171 to 177 are owed by a director to the company. Now well-known, the general duties are:

- to act within powers (s 171)
- to promote the success of the company (s 172)
- to exercise independent judgment (s 173)
- to exercise reasonable care, skill and diligence (s 174)
- to avoid conflicts of interest (s 175)
- not to accept benefits from third parties (s 176)
- to declare an interest in a proposed transaction or arrangement (s 177).

Codification of directors’ duties was not intended to be a comprehensive code: as Lord Goldsmith, then Attorney-General, said of the general statement during the bill’s passage through Parliament:

“*The directors may owe a wide range of duties to their companies in addition to the general duties listed.*”

12. Steps taken by signatories to the Principles of Responsible Banking are summarised at: <https://www.unepfi.org/banking/responsible-banking-in-the-covid-19-crisis/>

13. <https://www.businesswire.com/news/home/20200430005830/en/COVID-19-Crisis-UBS-Americas-Financial-Support-Address>

Those are general, basic duties which it is seen as right and important to set out in this way. The statement that these are the general duties does not allow a director to escape any other obligation he has, including obligations under the Insolvency Act 1986¹⁴.

Of course, the statement is formulated in terms which make clear the duty is owed “to the company”, reflecting the company’s separate legal personality (from the shareholders) – not to individual shareholders nor to the company’s creditors.¹⁵ Nevertheless, prior to 2006, for the most part, the company’s interests were historically determined by reference primarily to the interests of shareholders (as a general body).

S 172, however, which contains the duty to promote the company’s success, is framed as follows:

- “(1) A director of a company must act in the way **he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole** and in doing so have regard to (amongst other matters) –
- (a) the likely consequences of any decision in the long term,
 - (b) the interests of the company’s employees¹⁶,
 - (c) the need to foster the company’s business relationship with suppliers, customers and others,
 - (d) the impact of the company’s operation on the community and environment,
 - (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
 - (f) the need to act fairly as between members of a company.
- (2) Where to the extent that **the purposes of a company consist of or include purposes other than the benefit of its members**, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to **achieving those purposes**.
- (3) The duty imposed by this section **has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interest of the creditors of the company**” (emphasis added).

On one hand, this provision did no more than to codify a director’s pre-existing duty to act in the way he considers would be most likely to promote the company’s success for the benefit of its members as a general body. How this provision departed significantly, however, was in its express requirement for a director to have regard to

identified (but non-exhaustive) considerations, certain of which are directly referable to the interests of wider stakeholders. Those which were identified were said to reflect wider expectations of responsible business behaviour.¹⁷

Legislative background to section 172

In considering where to from here, it is important to understand why we are where we are. There are two facets to this. First, s 172 saw stakeholder considerations expressly introduced, but as part of a core duty having foundations in a company model deriving from the Victorian era: that a company is a legal person distinct from its members, but (in the case of a company limited by shares) operated for their benefit.¹⁸ Legislative intention was not revolutionary; as Lord Sainsbury remarked, it maintained:

*“the important principle, established by our predecessors, of enabling shareholders to be the primary regulators of corporate behaviour ...”*¹⁹

Secondly, this essential model was maintained despite the stirrings of stakeholder debate even at that time. During the Act’s evolution, a House of Commons committee report on the White Paper on Modernising Company Law²⁰ recognised the debate reigning between “Enlightened Shareholder Value” (ESV) and the pluralist approach to defining directors’ duties.

In short, the ESV approach maintained that the director’s primary duty was to maximise value for shareholders, but accepted other relationships as being significant in this and the need for them to be taken into account when judging how to carry out this duty. The interests of employees, customers, suppliers, and local residents, as well as the environmental impact of the company’s activities and its good standing in the eyes of the public, were all noted as factors which had to be considered when judging what was in the interests of shareholders.

By contrast, the pluralist approach would require a more fundamental change in the way that directors’ duties had been applied at common law, forcing directors to consider the interests of stakeholders in their own right (as opposed to considering the *impact* of their attempts to produce shareholder value, on the wider stakeholders). In other words, shareholders would become merely one of a number of parties whose interests the directors would weigh against each other when making decisions.

This divergence represented a fundamental disagreement about the purpose of company law (although even the pluralists felt the ESV approach represented progress on existing law). ESV advocates, on the one hand, viewed the ultimate objective of generating maximum shareholder value as the best means of achieving overall prosperity and welfare. Pluralists, for their part,

14. Lords Grand Committee, 6 February 2006, col 249.

15. Recognised (at common law) by Dillon LJ in *Multinational Gas and Petrochemical Co Ltd v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258, 288 (CA).

16. Which in fact replaced s 309 of the Companies Act 1985.

17. Explanatory Notes to the Companies Act 2006, para 326.

18. It was in 1844 that companies could be incorporated otherwise than by Royal Charter or Special Act; in 1855 that a registered company could assume limited liability; and in decisions of the late 19th century that the separate legal personality of a company began to be recognised, i.e. *Ashbury Rail Carriage & Iron Co Ltd v Riche* (1874) LR 7 HL 653; *Trevor v Whitworth* (1887) 12 App Cas 409.

19. Hansard, House of Lords, Vol 677, Col 182 (11 January 2006).

20. Trade and Industry Committee, *The White Paper on Modernising Company Law*, Sixth Report of Session 2002–03.

21. Company Law Review Steering Group, Modern Company Law: For a Competitive Economy – Developing the Framework, DTI (March 2000), paras 3.30 to 3.31.

22. As recognised in the pre-s 172 case law: e.g., *Re Smith and Fawcett Ltd* [1942] Ch 304, 306 (CA) per Lord Greene MR; *Re Regentcrest plc v Cohen* [2001] BCC 494, [120], per Jonathan Parker J; and post-s 172, e.g. *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm), [191] et seq., per Poplewell J.

23. There are currently conflicting positions on this: see *The Bell Group Ltd v Westpac Banking Corporation* [2008] WASC 239, [4598] et seq.; however, the rationality test was expressly rejected by the Royal Court of Guernsey in *Carlyle Capital Corporation Ltd v Conway*, 38/2017 (4 September 2017) at [396] to [412] (the judgment as a whole being upheld on appeal: [2019] GCA 014).

24. See, e.g., dicta of Pennycuik J in *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62, 74.

25. Hansard, House of Lords, vol 678, cols 255–6 (6 February 2006).

26. Hansard, House of Lords Grand Committee, col 846 (9 May 2006).

advocated using company law as an instrument for forcing companies to serve the wider range of interests – being valuable in their own right, and not as a means of achieving shareholder value.

For example, one model by which to implement pluralism (proposed by the TUC) required representatives of various stakeholder groups to be included in the company's decision-making process, challenging the standard model of a single board comprising executive and non-executive directors. The Corporate Social Responsibility Commission (CORE) supported the introduction of a duty of care, forcing directors into responsibility for the impact of their decisions on other stakeholders.

The Company Law Review Steering Group ultimately rejected the pluralist approach, considering that it would confuse the issue of directors' duties, giving directors little in the way of guidance in decision-making. The Group considered that it also ran the risk of creating a litigious climate for business, where those parties who felt they had not been treated as they would have liked by a company's directors sought recompense through the courts.²¹

The essential thrust, therefore, of the s 172 approach (as ultimately legislated) was not whole-scale, surgical reform of existing company law, but a gentler progression towards ESV. It still views the purpose of company law as being to promote the long-term success of companies, whilst requiring management to have regard to factors such as goodwill that involve interest groups other than shareholders.

Section 172 – what is success?

There are (at least) three elements to s 172(1). The first is incontrovertible: it makes plain that a director's core duty is to act in the way he considers would promote the company's success (for the benefit of members). The second and third, perhaps less straightforward: what does "success" mean in each case, and by what means or to what extent must directors consider the interests of other stakeholders when fulfilling that core duty.

Taking them in reverse order, the result is that directors are obliged to take stakeholders' interests into account and to consider the impact of their decisions on those parties (not only shareholders), but (under the statute) they are not to be considered independently from (nor superior to) what is ultimately judged to promote the company's success in members' interests. In other words (as the law presently stands), shareholder primacy: but with a statutory requirement ("have regard to") to take account of stakeholder interests.

And as to the company's success, evidently the decision as to what will promote this is one for the director's good faith, business judgment. Directors have an unfettered discretion on decision making

(subject to the company's constitution and articles), so long as they behave in what they judge to be most likely to promote the company's success.

This test is essentially subjective, embodied in the words "*he considers, in good faith*".²² This has been tempered to some extent in dicta of certain decisions, holding that the analysis may involve taking account of objective considerations, such as where the challenging party can show there are no reasonable grounds on which the decision could have been made (i.e. a rationality test),²³ or where there has been a wholesale failure to consider the company's interests.²⁴

It forces the shareholder seeking to challenge a decision to demonstrate that the director failed to behave in a manner in which he considered was in the company's interests: in other words, putting the court to the task of assessing the director's state of mind – but subject, where relevant, to any objective considerations demanded by the particular facts, such as irrationality or an obvious absence of good faith.

Further, legislative intention appears to have been that the company's "success" would be informed by the company's express corporate purposes. At least this seems to have been in Lord Goldsmith's mind, when he said:

*"...it is for the directors, by reference to [the objective of the company] – to judge and form a good faith judgment about what is to be regarded as success for the members as a whole... they will need to look at the company's constitution, shareholder decisions and anything else that they consider relevant in helping them to reach that judgment ...".*²⁵

Clearly this permits a director to promote the interests of the stakeholders identified in ss 172(1) (b) to (d) (or any other relevant stakeholders) – so long as the director has, in good faith, concluded that doing so would be regarded as "success" for the company, having regard to its constitution, articles, any resolutions which might have been passed by the shareholders, and "*anything else that they consider relevant*". Again, Lord Goldsmith articulated the limits to the role of stakeholder interests in this way:

"We want the director to give consideration to the factors identified as necessary for the decision that he has to take, and no more than that. We do not intend a director to be required to do more than good faith and the duty of skill and care require ..." (emphasis added).²⁶

When a director assesses how to achieve corporate success, the weight to be given to those different interests is a matter for his/her good faith judgment, which gives a director a certain amount of protection when facing complaints (or allegations of breach of duty) by aggrieved shareholders or stakeholders. However, what

is increasingly becoming clear in the wider corporate debate is the perennial (potential) tension between short-term shareholder gain and long-term value creation. Where those different interests present different (conflicting, even) courses of action, navigating a balance between them will ultimately (on the wording of the statute) point back to the director's interpretation of the company's success (his core duty): as above, informed by the expressed corporate purpose and anything else which is relevant.

As to this, s 172(2) makes expressly clear that success has to be judged by reference to the purposes of a company, and recognises that in a particular case those purposes may "*consist of or include purposes other than the benefit of its members*". Whilst it might traditionally have been thought that for most businesses, shareholders' primary concern will be maximising investment returns, the focus by investors (e.g. the Principles for Responsible Investment, referred to above) indicates that priorities are now changing (at least at the institutional investor level). This suggests, within the confines of s 172, that renewed focus ought now to be placed on how a company's purposes are articulated and implemented.

Duties owed to distressed companies

In reality, for certain boards, decisions in response to the Covid-19 impact will be made in relation to companies in financial distress. Where the relevant insolvency threshold is met, the distinguishing feature of this scenario is the director's obligation to "*consider or act in the interest of the creditors of the company*": preserved, or recognised, by s 172(3). The established position now is that when the company is or is likely to become insolvent, directors owe a duty to creditors to act in their interests.²⁷

The rationale for the duty is normally regarded as being the prospective interests of creditors in the assets of the company through the operation of the statutory insolvency scheme.²⁸ In many cases, it will see the debate shift significantly to an analysis of whether decision-making is in the interests of the company's creditors (as opposed to its shareholders).

The question of precisely when this threshold is reached, as well as the content of the duty, was last year considered by the Court of Appeal in *BTI 2014 LLC v Sequana SA*.²⁹ The Court went only so far as to confirm that once a company is presently and actually insolvent, "*it is hard to see that creditors' interests could be anything but paramount*". The question whether, and when, those interests might "*be considered without being decisive*" was not answered definitively by the Court of Appeal.³⁰

The harder question (post-*Sequana*) might be: to what extent is a director still required – or permitted – to consider the wider stakeholder

interests in s 172(1), if the company is likely to become (but is not yet) insolvent, and the director believes that a decision taken which promotes those interests will ultimately enhance the company's long-term prosperity. Once the insolvency threshold is met, it would be challenging (to say the least) for a director to justify taking decisions in aid of stakeholders if the result is to deplete the company's assets, and where it would put at real risk the creditors' prospects of being paid. Or as Norris J has put it, "*the acts which a competent director might justifiably undertake in relation to a solvent company may be wholly inappropriate in relation to a company of doubtful solvency where a long-term view is unrealistic*".³¹

Section 172 in the Covid-19 era

Whilst it has been recognised that the precise content of the core s 172 duty "*may vary from case to case depending on the circumstances of the company and on the type of decisions that the directors are called upon to make*",³² the draftsman is unlikely to have contemplated a global crisis of the scale and nature of Covid-19. Consideration of stakeholder interests (whether those identified under ss 172(1)(b) to (d) or otherwise) have not featured largely in the case law to date (allegations of breach of duty instead tending to focus on the more frequent occurrences of diversion of corporate opportunities, loans to or unprofitable contracts with affiliated companies, and so on).

In practice, the type of decisions now facing company directors are materially impacted by the pandemic (inevitably), with boards operating in uncharted territory. In particular, directors of financially distressed companies may have questions as to the extent of their existing duties, in light of the Government's temporary suspension of a director's liability under the wrongful trading provisions in s 214 of the Insolvency Act 1986 (retrospectively from 1 March 2020, and at the time of writing, currently proposed in s 10 of the Corporate Insolvency and Governance Bill, with exclusions for certain types of financial institutions and firms, or entities that are FCA-regulated). This temporary relief is aimed at enabling directors to keep unprofitable businesses in operation without personal liability for depletion of company assets, notwithstanding that they may know (or ought to know) that there is "*no reasonable prospect that the company would avoid going into insolvent liquidation*".

However, this does not relieve a director of his s 172(3) duties, where, for example, the business is being conducted unprofitably and the insolvency threshold under s 214 would be met (no reasonable prospect of avoiding insolvent liquidation).³³ In such a case (as the law stands), a director will likely struggle to justify, for example, the unnecessary acquisition of expensive supplies

27. Pre-2006, under the line of authority deriving from *West Mercia Safetywear Ltd v Dodd* [1988] 4 BCC 30, 33; most recently, the Court of Appeal examined the meaning of the insolvency threshold in *BTI 2014 LLC v Sequana SA* [2019] 2 All ER 784, per David Richards LJ.

28. [2019] 2 All ER 784, [217]. The reason for this is that once the company enters insolvent liquidation or administration, the creditors will look to the company's assets to discharge their debts, whilst shareholders are left to participate in any surplus remaining after (and only if) the creditors' debts have been discharged in full.

29. [2019] 2 All ER 784, [220] to [222]. The specific question of whether there is a pre-insolvency duty to consider creditors' interests, and if so at what point it is triggered, is subject to a pending appeal before the Supreme Court.

30. Which left the question to be decided on the facts of cases which might arise in the future, because it was not an issue which arose on the *Sequana* facts.

31. *Roberts v Frohlich* [2012] BCC 407, [98].

32. *The Bell Group Ltd v Westpac Banking Corporation* [2008] WASC 239, [4395] et seq.

33. Neither is a director relieved from his duties arising in connection with s 239 of the Insolvency Act (should the company ultimately enter an insolvency process), precluding a director from giving a preference to one creditor to the ultimate detriment of others (within the meaning of that section).



What is clearly occurring—both pre-Covid-19 and now—is a changing dialogue as to the meaning of a company's success



or entry into a substantial loan as serving the company's best interests (judged by reference to its creditors), if the company is unlikely to have sufficient funds to repay its debts. Moreover, the long-term interests of stakeholders are unlikely to hold much significance at this point in the company's decision-making, at least if they have economic impacts on the company's immediate financial health.

Even for healthier companies, of some interest is the note released by the Government on 7 May entitled "Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency"³⁴. The guidance is non-statutory, and said to be "for [contractual parties'] collective benefit and for the long-term benefit of the UK economy".

A diverse list of contractual matters is set out (for which responsible behaviour is advocated), ranging from issues concerning compliance with contracts, to those concerning forbearance to contractual counterparties. The options available to parties are considered from both sides: e.g. "making, and responding to, force majeure, frustration ... claims". Responsible and fair behaviour in relation to contracts materially impacted by Covid-19 is said to include:

"being reasonable and proportionate in responding to performance issues and enforcing contracts (including dealing with any disputes), acting in a spirit of co-operation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other party, the availability of financial resources, the protection of public health and the national interest".

Of course, in reality, the extent to which directors interpret and adopt the guidance (to preserve contractual relations), will still require the appropriate balance to be struck between all the relevant interests, arriving at decisions which best promote the company's success. Having said that, from the director's perspective it seems unjust (to say the least) if the content of a director's duty under s 172 (whether pre-insolvency or not) will not in some way be shaped by these developments.

For example, where a director continues the business unprofitably even though the s 214 threshold has been crossed (so no reasonable prospect of avoiding insolvent liquidation), might (should?) the s 214 relaxation not influence his/her pre-insolvency duty to consider creditors' interests, enabling the director to, for example, expend company funds in aid of its long-term economic survival, even though it might place creditors' immediate chances of being repaid on time at risk? And might (should?) a director be protected from a breach of duty action where he/she has acted in compliance with the Government's guidance on responsible contractual behaviour (for example, bringing a premature end

to a burdensome contract, even where this risks a counterparty breach of contract claim)?

Concluding remarks

What is clearly occurring – both pre-Covid-19 and now – is a changing dialogue (at both board and investor level) as to the meaning of a company's success, and in particular, the philosophy that providing value for shareholders may lead to short-termism, as opposed to the long-term financial health and prosperity of the company (and, in turn, its investors). Long-term consequences are, after all, expressly recognised as a factor to be considered under s 172(1)(a).

Even in the case, though, where this impetus derives from investors, it has been held that shareholder pressure cannot justify cutting across the duties contained in s 172(1). In an administrative law decision of Sales J in *R (on the application of People & Planet) v HM Treasury*,³⁵ the possibility of a majority shareholder (HM Treasury) exerting influence on the board of directors (of Royal Bank of Scotland) to have regard to environmental and human rights considerations under s 172 was recognised. However, any more interventionist policy (by seeking to impose HMT's specific policy on these matters, contrary to the board's own judgement³⁶) was given short shrift as an attempt to press the board beyond the limits of its statutory duties. As English law currently stands, the core duty to promote the company's success will be determinative.

How the company's success is defined is especially prescient in the Covid-19 context. Boards are being seen to make operational or financial decisions which are actively driven by the wider interests of employees, suppliers, or the local community, informed by concerns over sustainability and the long-term future of both the company and the communities which it serves. In cases where there is scope for argument – or direct conflict – between different interests as to what will best promote the company's success, the way in which these questions are resolved will inevitably be tied directly to the factual position of each company, its corporate purposes, the specific interests which it serves, and, of course, its current financial health. The point: that against this background, the ongoing calls for stakeholder capitalism, corporate responsibility and sustainability could not be more timely, nor demand more careful consideration. ■

34. <https://www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency>

35. [2009] EWHC 3020 (Admin).

36. Required to act in the interests of all shareholders, not just the majority: made clear by both s 172(1) and s 172(1)(f).



Covid-19: *The courts' response*



MARCUS HAYWOOD

The crisis presented by COVID-19 and the responses required to deal with it have been unprecedented. They have also required an unprecedented response from the courts.

Even before the lockdown had been announced by the Prime Minister on 23 March 2020, guidance issued by the Lord Chief Justice on 19 March to Judges in the Civil and Family Courts indicated that the gathering emergency would require courts in all jurisdictions to use technology to conduct hearings in circumstances that had never been usual before.

Since then, the courts have risen to the challenge presented by COVID-19 in a remarkable way. This article endeavours to set out (1) a description of the response of the civil courts to the pandemic to date, with a particular emphasis on the response in so far as it affects users of the Business and Property Courts; (2) some practical guidance to dealing with the challenges that remote hearings pose; and (3) some thoughts on how the present crisis may effect the conduct of commercial litigation in both the near- and long-term future.

The Response

The Lord Chief Justice's Message of 19 March 2020

As the effects of the growing public health emergency created by COVID-19 unfolded and even before the lockdown was announced, it had become clear by mid-March that it would no longer be possible for the business of the civil courts to carry on as normal.

In response to the crisis on 19 March, the Lord Chief Justice issued a message to Judges in the Civil and Family Courts.¹ That message made the following clear:

- There was an obligation to continue with the work of the courts as a vital public service. However, for the foreseeable future, it would not be “business as usual”.
- The default position now in all jurisdictions was that hearings should be conducted with one, more than one or all participants attending remotely.
- The Civil Procedure Rules were flexible enough to enable telephone and video hearings of almost any type of hearing.
- Going forward, the courts would be using technology to conduct business in a way which even a few months ago would have been unthinkable.
- Whilst it might be difficult to maintain trials and final hearings in the short term, as events develop individual decisions on priorities and

practicalities would have to be made. Inevitably, final hearings and hearings with contested evidence very shortly will be conducted using technology. Otherwise, there will be no hearings and access to justice will become a mirage.

The Protocol Regarding Remote Hearings

Further clarity for civil court users came in the form of the Protocol for Remote Hearing issued on 22 March (the “Protocol”). The Protocol was subsequently updated on 26 March.² The Protocol applies to hearings of all kinds, including trials, applications and those in which litigants in person are involved in the County Court, High Court and Court of Appeal (Civil Division), including the Business and Property Courts. The Protocol makes clear that the pandemic necessitates the use of remote hearings wherever possible. The Protocol states in terms that it should be applied flexibly.

The Protocol seeks to provide basic guidance as to the conduct of remote hearings. Some points of particular importance to note in Protocol include the following:

Introductory Points

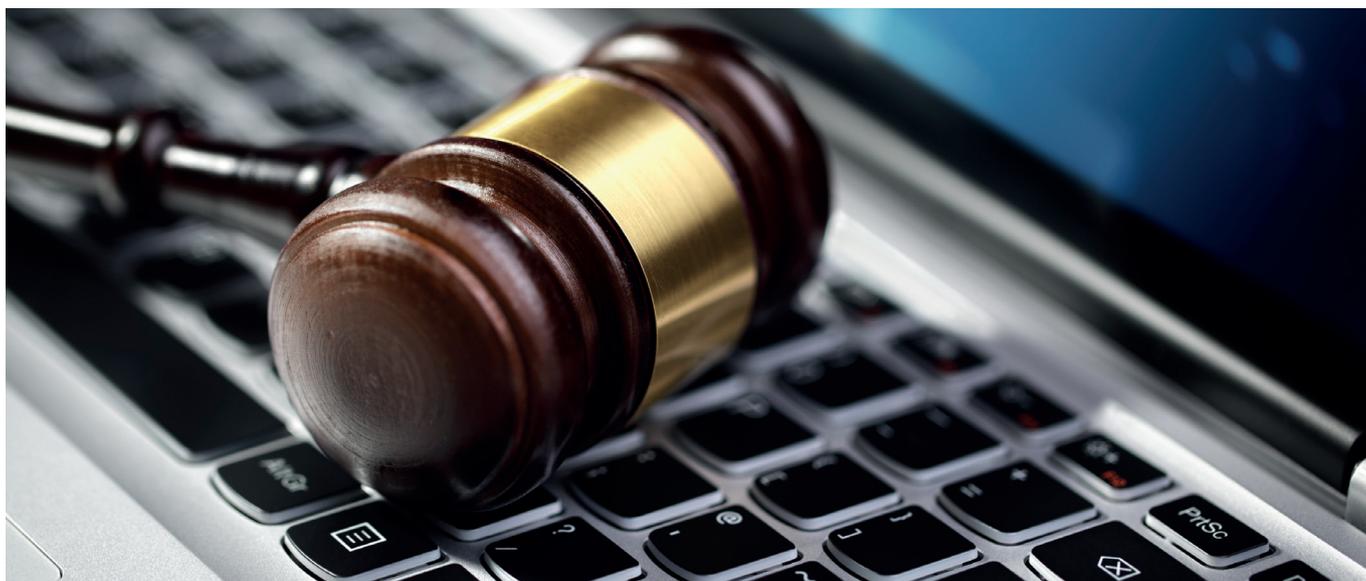
- The method by which all hearings, including remote hearings, are conducted is always a matter for the judge(s), operating in accordance with applicable law, Rules and Practice Directions.
- It is inevitable that undertaking numerous hearings remotely will cause teething troubles. All parties are urged to be sympathetic to the technological and other difficulties experienced by others.

Public / Private Hearings and Recording

- The following legal issues are to be addressed before any remote hearing can begin: (i) whether the hearing is to be in public or in private; if in private, on what grounds, and (ii) how is the hearing to be recorded, or can an order properly be made to dispense with recording?
- As to the first, remote hearings should, so far as possible, still be public hearings. This can be achieved in a number of ways: (a) one person (whether judge, clerk or official) relaying the audio and (if available) video of the hearing to an open court room; (b) allowing a media representative to log in to the remote hearing; and/or (c) live streaming of the hearing over the internet. The principles of open justice remain paramount.

1. https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/?dm_i=4CGD,SZWI,1837T7,3HOHI,1

2. https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicable.Version.f-amend-26_03_20-1.pdf



3. The decision is unreported. However, extracts from the judgment of Teare J are set out in *Re One Blackfriars Ltd (in Liquidation)* [2020] EWHC 845 (Ch) and *Municipio de Mariana v BHP Group Plc* [2020] EWHC 928 (TCC).

- As to the second, the hearing will usually be recorded by the judge’s clerk, a court official or by the judge, if technically possible. The parties and their legal representatives are not permitted to record the hearing.

Types of Hearings to be Conducted Remotely

- It will normally be possible for all short, interlocutory, or non-witness, applications to be heard remotely. Some witness cases will also be suitable for remote hearings.

Preparation for Remote Hearings

- In advance of any remote hearing, the parties should, if necessary, prepare an electronic bundle of documents and an electronic bundle of authorities. Each electronic bundle should be indexed and paginated and should be provided to the judge’s clerk, court official or to the judge (if no official is available), and to all other representatives and parties well in advance of the hearing.
- Electronic bundles should contain only documents and authorities that are essential to the remote hearing.

Hearings Following the Introduction of the Protocol

Following the introduction of the Protocol and as directed by it short, interlocutory and non-witness applications have largely been heard remotely.

As to trials, where practicable these have continued and applications to adjourn based on the effect of the pandemic have, in the main, tended not to have been looked upon favourably.

For example, on 19 March 2020, Mr Justice Teare directed that the trial in the matter of *National Bank of Kazakhstan v Bank of New York Mellon*³ would continue as planned, subject to a two-day adjournment to allow preparation for the use

of video conferencing technology. The trial was listed for seven days and involved testimony from witnesses and expert witnesses. The trial was conducted via Zoom and live streamed on YouTube. The witnesses, several of whom were subject to travel restrictions, gave evidence remotely.

Teare J took that approach in the light of the guidance as to remote hearings given by the Lord Chief Justice on 19 March 2020. In his judgment, the Judge made the point that “*the courts exist to resolve disputes*” and that they should strive to continue to do so even when that involves doing so by way of remote hearings.

In *Re Smith Technologies* (Unreported, 26th March 2020), in which Hilary Stonefrost appeared for the Applicant liquidators, ICC Judge Jones noted the approach taken by Teare J in *National Bank of Kazakhstan* and similarly rejected an application by the Respondents to adjourn a trial made by reference to the difficulties flowing from the consequences of the pandemic (although he did leave open the possibility of adjournment for particular health reasons). ICC Judge Jones held that the difficulties arising from self-isolation and from parties and their lawyers being in different locations were to be addressed robustly and that the parties were to be expected to take proactive measures to overcome such difficulties.

Likewise, in *Re One Blackfriars Ltd (in Liquidation)* [2020] EWHC 845 (Ch), John Kimbell QC, sitting as a Deputy High Court Judge, refused an application to adjourn a five-week trial, involving four live witnesses of fact and thirteen expert witnesses, listed to take place in June. The Judge took into account the various guidance issued by the senior judiciary, as well as legislation passed in response to the coronavirus outbreak (specifically, sections 53–55 of the Coronavirus Act 2020 and regulations 6 and 7 of the Coronavirus Regulations

SI 350/2020) which, he noted (at [23]), “sent a very clear message that [the legislature] expects the courts to continue to function so far as they able to do safely by means of the increased use of technology to facilitate remote trials.”

The Judge also noted (at [49]) that the experience of the courts in conducting remote trials to date was that they had been, on the whole, successful, even when the proceedings involved multiple parties and large numbers of witnesses.

These decisions were reviewed by HHJ Eyre QC in *Municipio de Mariana v BHP Group Plc* [2020] EWHC 928 (TCC) in the context of an application for an extension of time, due to the effect of Covid-19, for service of evidence in respect of an application to stay proceedings on jurisdictional grounds (which if granted would lead to the hearing of the jurisdiction challenge being vacated). Granting the application, the Judge held (at [24]) that the following principles govern the question of whether a particular hearing should be adjourned if the case cannot be heard face to face:

- Regard must be had to the importance of the continued administration of justice. Justice delayed is justice denied even when the delay results from a response to the currently prevailing circumstances.
- There is to be a recognition of the extent to which disputes can in fact be resolved fairly by way of remote hearings.
- The courts must be prepared to hold remote hearings in circumstances where such a move would have been inconceivable only a matter of weeks ago.
- There is to be rigorous examination of the possibility of a remote hearing and of the ways in which such a hearing could be achieved consistent with justice before the court should accept that a just determination cannot be achieved in such a hearing.
- Inevitably the question of whether a fair resolution is possible by way of a remote hearing will be case-specific. A multiplicity of factors will come into play and the issue of whether and if so to what extent live evidence and cross-examination will be necessary is likely to be important in many cases. There will be cases where the court cannot be satisfied that a fair resolution can be achieved by way of a remote hearing.

The New Practice Directions

In the period between 25 March to 2 April 2020 a series of new Practice Directions to the Civil Procedure Rules were also introduced with the intention of responding to particular issues of importance that had arisen. For present purpose two of those Practice Directions are worthy of note.

Firstly, on 25 March, Practice Direction 51Y⁴ relating to video and audio hearings during the Coronavirus pandemic (“PD 51Y”) was introduced.

PD 51Y is a technical amendment, which is intended to clarify the manner in which the court may exercise its discretion to conduct hearings remotely in private. It also clarifies what steps the court may make to ensure access by the public to remote hearings that have been held in private. The Practice Direction is intended to remain in force for no longer than the Coronavirus Act 2020 remains in force.

The main changes brought about by PD 51Y are as follows:

- To clarify that the court may exercise the power to hold a remote hearing in private where it is not possible for the hearing to be simultaneously broadcast in a court building. It may do so consistently with the power to derogate from the principle of open justice and may do so under the provisions of PD 51Y in addition to the bases for doing so set out in CPR r. 39.2.
- To clarify that where a media representative is able to access proceedings remotely while they are taking place, they will be public proceedings.
- To clarify that any hearing held in private must be recorded, where that is practicable, in a manner directed by the court. Where a remote hearing is either audio or video recorded, any person may request permission to access the recording.

Secondly, on 2 April 2020 Practice Direction 51ZA⁵ in relation to the extension of time limits during the Coronavirus pandemic (“PD 51ZA”) was introduced. The main changes brought about by PD 51ZA are that:

- It allows the parties to agree an extension of time to comply with procedural time limits up to 56 days without formally notifying the court (rather than the current 28 days), so long as that does not put a hearing date at risk.
- Any extension of more than 56 days needs to be agreed by the court.
- In so far as compatible with the proper administration of justice, the court will take into account the impact of the COVID-19 pandemic when considering applications for the extension of time for compliance with directions, the adjournment of hearings, and applications for relief from sanctions.

PD 51ZA ceases to have effect on 30 October 2020.

The increased flexibility created by PD 51ZA to agree extensions will undoubtedly have assisted many litigants and practitioners as they have adapted to the challenges presented by the

4. <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic>

5. <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51za-extension-of-time-limits-and-clarification-of-practice-direction-51y-coronavirus>



pandemic. However, not all extensions have been agreed without dispute and in *Municipio de Mariana v BHP Group Plc* (referred to above) HHJ Eyre QC gave the following guidance as to the approach to be taken to applications for the extension of time in the context of the pandemic:

- The objective, if it is achievable is to keep to existing deadlines and where that is not realistically possible, to permit the minimum extension of time which is realistically practicable. The prompt administration of justice and compliance with court orders remained of great importance even in the circumstances of a pandemic.
- The court could expect legal professionals to make appropriate use of modern technology.
- The court could expect and require from lawyers a degree of readiness to put up with inconveniences, to use imaginative and innovative methods of working and to acquire the new skills needed for the effective use of remote technology.
- The approach required of lawyers could also be expected from professional expert witnesses. However, rather different considerations are likely to apply where the persons who would need to take particular measures are private individuals falling outside those categories.
- The court should be willing to accept less polished evidence and other material.
- However, the court had to take account of the realities of the position and while requiring lawyers and other professionals to press forward care had to be taken to avoid requiring compliance with deadlines which were not achievable even with proper effort.
- The court must have regard to the consequences of the restrictions on movement and the requirements to work from home which had been taken to address the pandemic.
- Those factors are to be considered against the general position that an extension of time which required the loss of a trial date had much more significance and would be granted much less readily than an extension of time which did not have that effect.

The Temporary Insolvency Practice Direction

Perhaps of particular note to readers of the Digest, on 6 April a new temporary practice direction on insolvency matters (the “TIPD”)⁶ came into force, drafted by amongst others, former member of Chambers, Mr Justice Zacaroli. The Temporary IPD will expire on 1 October 2020 unless amended or revoked in the meantime.

The TIPD supplements the existing Insolvency Practice Direction (July 2018) and applies to all insolvency proceedings throughout the Business

and Property Courts, subject to any variations outside London as directed by the relevant supervising Judge.⁷

In the present context, the TIPD provides important guidance on the adjournment of pending applications and petitions listed for hearing prior to 21 April 2020, the listing of urgent hearings before a High Court Judge or Insolvency and Companies Court Judge and in relation to the conduct of remote insolvency related hearings more generally.

In particular, the TIPD provides (at para 6.1) that, unless ordered otherwise, all insolvency matters will be heard remotely, by Skype for Business or BT MeetMe, or suitable alternative technologies to be agreed in advance of the hearing.

Remote Hearings: Some Guidance

The measures put in place to tackle the spread of COVID-19, described above, have resulted in significant changes to the operation of the civil justice system, particularly the swift expansion of the use of remote hearings. It is unknown how long these measures will continue for. With these changes in mind, it is worth reflecting on what is likely to constitute best practice for the conduct of remote hearings.

COMBAR's Guidance Note on Remote Hearings

On 12 May 2020, the Commercial Bar Association issued a Guidance Note on Remote Hearings⁸ which provides some invaluable insights as to what might be considered best practice.

In so far as interlocutory hearings are concerned, the Guidance makes two important points:

- First, the importance of testing the functioning of any applicable video conferencing platform in good time ahead of any hearing.
- Second, the importance of liaising with the clerk to the Judge ahead of the hearing as to the Judge's preference is relation to bundles and specifically the Judge's preference for hard or electronic copies (or both). If the bundles are to be produced electronically (which will be the norm), it is essential that appropriate thought is given to the use of those bundles at the hearing and that, amongst other things, only essential documents should be included.

As to trials, the Guidance makes the following additional points:

- The success of a remote hearing is heavily dependent upon the relative ease with which the participants can refer to documents at the hearing, as to which careful thought will be required to be given.
- It has been observed that "*remote hearings remain court hearings and the solemnity of the occasion should be observed as closely as it is in a*

courtroom. Within this context, and insofar as is possible, the decorum of a court hearing should be maintained commensurate with the gravity and seriousness of the issues being decided in a formal legal arena. Steps should be taken to avoid matters that detract from the ordinary gravitas of a court hearing".⁹ In keeping with these requirements, participants in remote hearing should dress as if they were attending Court, should ensure (to the extent possible) that the background visible on screen is appropriate for a Court hearing and should ensure that they are not interrupted or distracted during the course of the hearing.

- Useful guidance on advocacy at remote hearings (and as to common technological mistakes) has been published by the Inns of Court College of Advocacy.¹⁰ In particular, participants that are not speaking at any particular time during the hearing should ensure that their microphone is muted.
- Technical issues may arise in remote hearings. To the extent possible, steps should be taken ahead of the hearing to agree upon how notification is to be provided of the occurrence of a technical issue. For example, it may be agreed that the participants and the Court will be alerted to the problem by telephone, text or email.
- Judges and other participants have observed that using technology to conduct hearings is unusually tiring. In addition, participants may have caring or other responsibilities that may create difficulty in attending during normal court hours. Careful thought should, therefore, be given to the appropriate timing and length of each hearing day and to the breaks that are required throughout the day.
- Counsel will need to be able to maintain a separate line of communication with other members of the counsel team and their instructing solicitors. The manner in which this is done is not a matter of concern for the Court, but care will need to be taken to ensure that the method of communication does not interfere with the hearing and that the communications are kept confidential.

Further Guidance From the Courts

The importance of the proper preparation of electronic bundles in advance of any remote hearing has also been emphasised by the court. In *Re TPS Investments (UK) Ltd* [2020] EWHC 1135 (Ch), a case which concerned an application for an extension of an administrator's term of office, HHJ Hodge QC addressed the question of how the instruction to restrict the electronic bundle to "essential" documents should be followed. He made the following points (at [2]–[5]):

- The word "essential" conveyed the notion that the bundle should contain only those

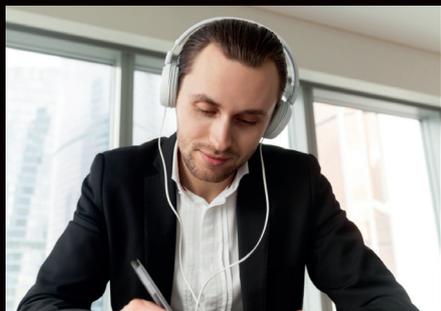
6. https://www.judiciary.uk/wp-content/uploads/2020/04/Temporary-IPD-April-2020_.pdf

7. The TIPD should be read alongside the guidance issued by Chief ICC Judge Briggs on 7 April 2020 (<https://www.chba.org.uk/news/listing-guide-for-hearings-before-an-iccj-london>), by Snowden J for the North and North Eastern Circuits of the Business and Property Court on 6 April 2020 (<https://www.chba.org.uk/news/temporary-insolvency-north-guidance>), and the protocol in relation to insolvency and company work issued by the County Court at Central London (<https://www.chba.org.uk/news/protocol-for-insolvency-company-work-in-cccl>) as well as the equivalent guidance issued by other courts and Circuits.

8. <https://www.combar.com/wp-content/uploads/2020/05/Combar-Guidance-Note-on-Remote-Hearings-12-May-2020.pdf>

9. <https://www.judiciary.uk/wp-content/uploads/2020/04/The-Remote-Access-Family-Court-Version-4-Final-16.04.20.pdf>

10. <https://www.icca.ac.uk/wp-content/uploads/2020/04/Principles-for-Remote-Advocacy-1.pdf>



documents that were “indispensable” or “important in the highest degree”.

- Restricting the bundle to such documents was best achieved by engaging the advocate who would be conducting the hearing at an early stage so they could advise what documents were essential.
- If possible, the bundle should have a searchable index. If that was not possible it should be sequentially paginated so that it could be searched by scrolling. In the case before the Judge, the only essential documents were the application notice, the administrator’s witness statement, and a short witness statement from the administrator’s solicitor evidencing the lack of opposition to the proposed extension.

Guidance on the preparation of PDF bundles has also been issued by Sir Andrew McFarlane (President of the Family Division), Lady Justice Thirlwall (Senior Presiding Judge) and Mr Justice Mann (Judge in charge of Live Services)¹¹ which, amongst other things, emphasises the following in relation to the preparation of PDF bundles:

- The importance, where the character of the document permits, of PDF documents being the subject of OCR (optical character recognition).
- Documents should appear in portrait mode (and none should appear upside down).
- Proper thought should be given to the number of bundles required. It is generally not helpful to have to open a significant number of PDF files during the course of a hearing in order to access documents.
- An index or table of contents of the documents should be prepared which, if practicable should be hyperlinked to the indexed document.

The Civil Justice Council Review

The Civil Justice Council has also commissioned an independent rapid review of the impact of COVID-19 arrangements on the civil justice system.¹² Amongst the difficulties highlighted in some initial responses to that review are the following:

- The availability of court staff to facilitate hearings.
- Unfettered talking by some parties and talking over the Judge in some instances.
- The difficulties for an advocate in taking instructions during the course of a hearing and being able to converse privately with solicitors and/or clients.
- The lack of standardisation of platforms being used by different courts.
- Reports that using technology to conduct hearings is unusually tiring, particularly those hearings which were relatively long.
- Difficulties associated with cross-examining witnesses remotely, particularly where the credibility of a witness was in issue.

The outcome of the review will be awaited with interest.

The Future

The court system has risen to the challenge of keeping the machinery of justice functioning in these unprecedented times in a remarkable way. Whilst there will undoubtedly have been negative experiences and there remains a good deal to learn and improve upon, much of what has been experienced is positive and much progress has been made in such a very short space of time.

11. <https://www.judiciary.uk/wp-content/uploads/2020/05/GENERAL-GUIDANCE-ON-PDF-BUNDLES-f1.pdf>

12. <https://www.judiciary.uk/announcements/rapid-consultation-the-impact-of-covid-19-measures-on-the-civil-justice-system/>



However, as the Lord Chief Justice said at the outset in his message of 19 March, it is clearly not “business as usual” and realistically it cannot be so until the emergency subsides. A message circulated by the Commercial Bar Association suggests that as from 1 June 2020 (as the lockdown restrictions are eased) changes are likely to be introduced in the arrangements for hearings in the Rolls Building such that from that date there are likely to be four kinds of hearing taking place: (i) fully remote hearings with the Judge at home; (ii) remote hearings with the Judge in his/her office or Court in the Rolls Building; (iii) hybrid hearings with the Judge and some participants in Court, and some participating remotely; (iv) normal physical hearings in which all the participants attend in person.

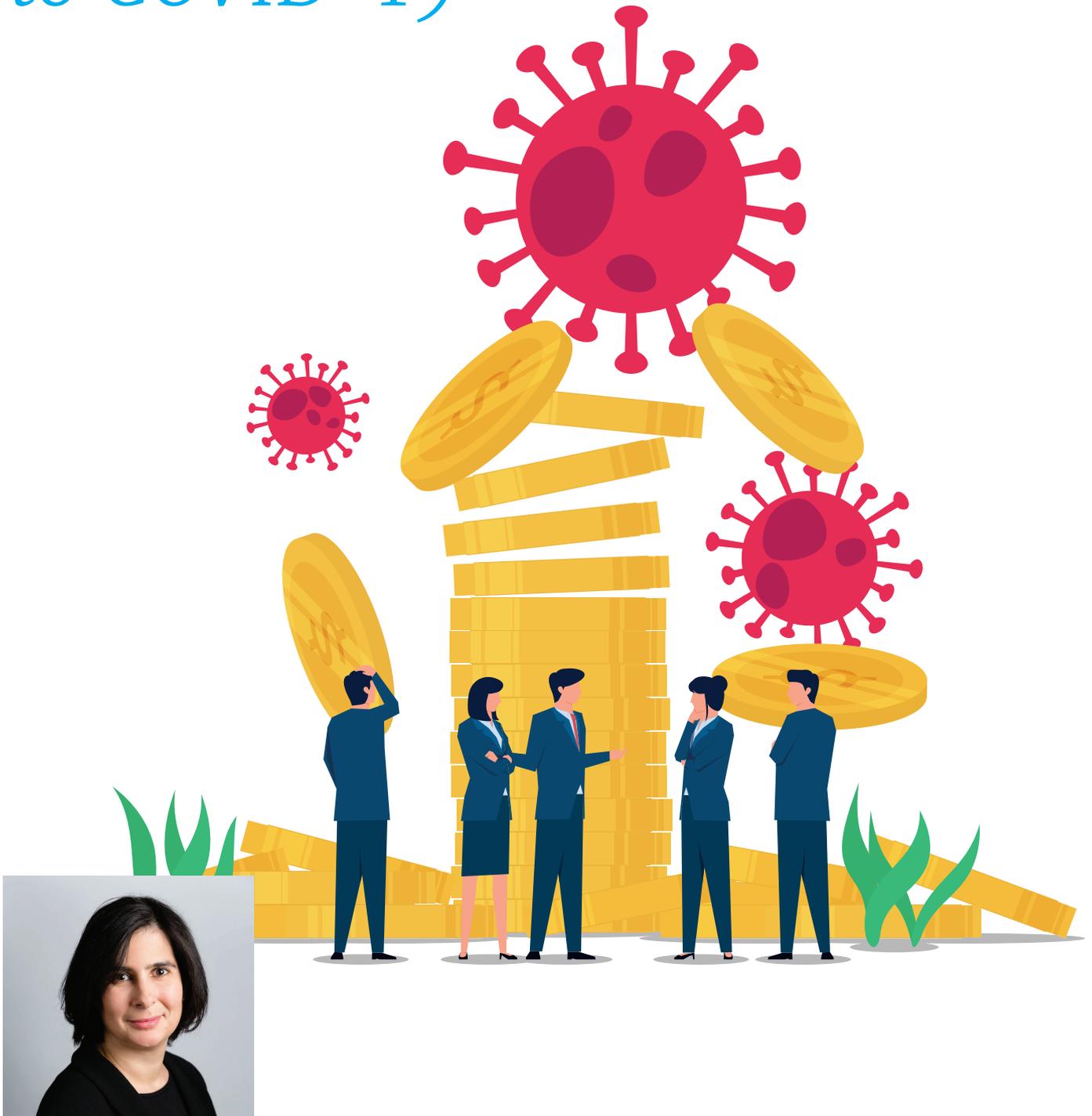
The decision as to which sort of hearing is appropriate in a given case will be a judicial decision. In particular, there are likely to be only 13 Courts in the Rolls Building which will be suitable (with appropriate social distancing) for hybrid or normal physical hearings and so only a limited number of cases will be able to be accommodated in this way. Similar considerations are likely to arise in other courts across England and Wales. Accordingly, in the medium term it seems likely that the majority of hearings will likely continue to take place remotely.

So what then does that mean for the future? In the medium term, it is now clear that whilst some hearings may not be suitable for a fully remote approach, the mere fact that a case is complex or involves multiple witnesses does not mean that it cannot be conducted remotely. Nor will proceedings necessarily be adjourned simply because they must be conducted remotely.

In the long term, experience may show that (all things being equal) in-person hearings are to be preferred, particularly for trials where the credibility of a witness is in question or for other complex matters. However, the present circumstances provide the perfect opportunity for judges, legal practitioners, and parties to fully investigate both the benefits and limitations of remote justice. As with other aspects of our lives, the present crisis is likely to bring long term changes that could not have been imagined a few months ago. In the context of commercial litigation, that is likely to mean that we will all need to get used to the increased use of “remote justice”, particularly in the case of short, interlocutory, or non-witness, applications. ■

International Insolvency Institute

International responses to COVID-19



FELICITY TOUBE QC

Felicity Toubé QC summarises a special members meeting of the International Insolvency Institute (III), held over Zoom to review some of challenges and responses around the world to the Covid-19 crisis

COVID-19 has given rise to the most significant challenges to life, health, and the economy in recent times. For those of us working in the restructuring and insolvency space, it has not only highlighted issues in substantive law, but challenged every aspect of our professional and home lives. In the absence of any co-ordinated international response, countries have been scrambling around to find a way to protect and preserve their economies.

In the UK, the opportunity has also been taken to enact a wide-range of reforms to insolvency and company law, ranging from the introduction of a moratorium and cross-class cram downs in schemes, through amendment of the law on *ipso facto* clauses and (temporarily) wrongful trading, and ending up with temporary limitations on statutory demands and winding-up petitions (at least where the financial difficulties are COVID related). But what of the position around the world? What measures have other jurisdictions introduced?

On 19 May 2020, III hosted a fascinating Special Members' Meeting on COVID-19, in which six high calibre international speakers set out the position in their own jurisdictions. Although this was necessarily a high-level view, with speakers only allowed 5 minutes to pick up the big picture points, what was particularly interesting was (a) the range of different responses in different countries, and (b) the underlying similarities in some of the issues likely to arise in all jurisdictions (such as those relating to Government loans that would have to be repaid at some point).

Asia

Patrick Ang kicked off the session with a whistle-stop tour of Asia. His analysis covered the position in Singapore in particular but also extended to various other jurisdictions on the continent. It

was interesting to note that at least in the developed jurisdictions in Asia the steps taken have been very similar to those in the UK, involving suspensions of winding up petitions (none heard since March), and the special position in relation to landlords.

Europe

Ignacio Tirado from UNIDROIT was given the difficult choice of covering all of Europe. In the main he focussed on Germany, Spain, and Italy, but he started with a look at the Netherlands where he noted that there have been no measures introduced in relation to insolvency, mirroring their much more lax rules on lockdown. At the EU level, Ignacio noted that there has been no institutional response, but instead temporary measures have had to be taken independently by Member States. The pandemic has slowed down reform measures in some countries, but speeded them up in others. Italy, for example, has postponed any reform until 2021, whereas in contrast Spain has speeded up its measures. Duty to file has been suspended in Germany (until 30 September 2020, with a possible extension to 31 March 2021) and Spain (until 31 December 2020). Germany's suspension, however, only applies to COVID related situations where there was no insolvency as at 31 December 2020. Spain has no such limit, with a blanket removal of the duty to file. Spain and Italy have also suspended creditor petitions (Spain until 31 December 2020 and Germany until 30 June 2020). These countries have removed limitations on inter-company financing, such as in particular the removal of subordination of inter-company loans. There are also other postponement of payments for tax and social security.

Helene Bourbouloux then spoke on the position of France. The French have also postponed social security and taxation

liabilities. They have introduced loans with a state guarantee of up to 90%. Helene questioned, quite rightly, the long-term effect of loading companies with debt in the current situation. She suggested that direct help in financing companies would have helped more than loading up the debt position. No new insolvency proceedings have been created in France to deal with the current position. However, the duty to file has been postponed until 2 months after lock down, with the economic position to be considered as at 12 March (i.e. no changes to be taken into account if after that date). The Commercial Courts have continued to function with online filing and remote hearings. She noted that no-one would have thought that these hearings would have been possible, if they had been asked about this even one month before the pandemic hit France. The position in the Commercial Courts is, however, in stark contrast to the position in relation to the civil courts in France, which have been completely closed down. She predicted that the biggest wave of insolvency would be likely to hit this summer, with a need for funding to be prioritised for companies in need.

Canada

Chief Justice Morawetz then spoke about the position in Canada, and in particular in Ontario where he is Chief Justice. He noted the difference in approach in a common law jurisdiction (as opposed to in a civil law jurisdiction) in particular with a debtor in possession proceeding without any obligation to file. There had been some limited response to deal with the time periods (most of which have been suspended) but no other legislative insolvency response. Legislative responses were linked to the financial needs of individuals and companies. The interesting questions would come when it was necessary to consider how

companies would come out of lockdown. All in-court hearings were suspended, but remote hearings immediately started, with over 5000 in Ontario alone. The hope was that there would be gradual reopening after the summer, but remote hearings would continue for now. Paper filings had stopped, and electronic had replaced them. He expressed his view that going forward only substantial hearings would likely take place in court, with other hearings taking place remotely. Judges had already got together to talk about what was needed, including adding more judges if needed.

USA

Judge Louise Adler spoke about the position in the USA from her position as a Californian bankruptcy judge. She started with the recognition of the unfortunate numbers of infections and deaths in the USA. In the absence of Federal lockdowns, the position had been left for individual States. The Judge noted the particular effect on the restaurant and leisure industries, with a hike in unemployment and the effect on companies. At the Federal Level she noted the introduction of financial

support with the CARES Act, which was shortly followed by the Paycheck Protection Program and Health Care Enhancement Act (the “PPPHE Act”). Together these two measures gave US\$2 trillion in aid to business and individuals. Also at the Federal Level there was now expanded access to the Code to Chapter 11 (and in particular Subchapter V) which enables a fast track access to Chapter 11 for SMEs up to a limited maximum level (although it could not be used for SMEs with a greater amount of debt, but who wanted to restructure part of their debt, in contrast to the case in Canada with their equivalent provisions). Added to this, Government Loans of up to \$10m are available with very low interest rates, and are capable of being forgiven up to 75% if used for operating expenses. The most concerning development from her presentation was the decision of banks to refuse to loan to companies in Chapter 11. This refusal has led to some companies having to exit Chapter 11 so that they can try to access Federal lending outside bankruptcy instead. There have already been some cases which have made it clear that banks should

be required to lend to a company in Chapter 11 (including injunctions from refusing to lend). There has also been Federal relief granted to debtors in individual bankruptcy, allowing them to extend their plans from 5 years to 7 years. Mortgage loans and student loans have also been extended, the latter allowing 6-month suspensions on repayment. US Courts are open for business. Telephone hearings are common. Electronic filing is common, and video hearings have started. Insofar as those who need bankruptcy support, it is individual States which have had the most problems. Many cannot balance their budgets and cannot borrow to fund hospitals and the unemployed. States cannot file Chapter 9 bankruptcy, so there is currently no route out for them (absent future legislative amendments). Finally, the Judge noted that bankruptcy filings are down, 35% lower than usual in California, which she suggested was the calm before the storm.

Latin America

The final speaker, Javier Armando Lorente, spoke about the position in Latin America. He noted that it was a vast jurisdiction, with a combination of developed jurisdictions and less advanced regimes. Some countries had legislation on the books, but it was not used (like Mexico which has had fewer than 1000 insolvencies in 30 years). There are, however, common concerns: SMEs disappearing, the likelihood of an avalanche of insolvency filings, the possibility of the collapse of court systems. In most Latin American countries, there has been a mandatory court recess except for urgent matters. In Mexico airline filings are not considered urgent. In Argentina, insolvency filings are not considered urgent. In contrast, in Columbia and Chile the courts have proceeded as normal, with Columbia moving to online hearings. As for insolvency reforms, not all countries have introduced the same reforms, but several countries have suspended creditor action against debtors,



postponed deadlines in insolvency cases, amended already confirmed restructuring plans, and recommended that parties use out of court settlement processes if possible. In addition, there have been improvements to liquidation proceedings and procedures available for SMEs. Columbia has been ahead of the pack, with a bold amendment to expedite insolvency filings within 3 days (giving rise to an automatic stay), expedition of payment to small creditors, improvement of DIP financing, and decentralisation of insolvency proceedings allowing Chambers of Commerce to run insolvency proceeding. They also introduced two new fast track processes. Peru has also introduced new fast track insolvency proceedings. In Argentina, the response has been a bit more disorganised with at least 15 different proposals to amend insolvency proceedings, including processes for SMEs akin to Chapter 13 of the US Bankruptcy Code. Brazil has also been working on an amendment to their insolvency law (including amending the amendment) to introduce a moratorium for 90 days for the debtor to have a negotiator appointed by the Court to reorganise. Brazil has also sought to introduce an automatic stay for extra judicial organisations, with reduced majorities required. Creditor petitions have not been barred, but the level of the petition debt has been increased.

Questions and Conclusions

Following these presentations, comments came from participants about the position in Switzerland. It was noted that there was a new tool introduced to deal with COVID-19 filings, with no access threshold, and no need for a plan, but just an argument that the enterprise had not been insolvent before COVID-19. This new process had only been used once.

As for the position in the US, Judge Gerardo Carlo pointed out that the reason why bankruptcy was used less than it should be was likely because it



was too expensive and cumbersome and DIP financing was too difficult to obtain. Judge Adler suggested that a possible response might be to use Chapter 13 more often for SMEs, as there was no voting by creditors, the debtor has to be very transparent about its income and expenses, it follows the usual priorities in the Bankruptcy Code, and required less in the case of a simple business. There then followed much discussion about the need for loans from banks to be capable of being made in Chapter 11.

All in all, an essential and informative way to spend an hour and a half on a sunny afternoon. If only work caused by the pandemic had not called me back to this jurisdiction. There could have been many happy hours considering these interesting esoteric and practical questions about the effect of COVID-19 on businesses around the world. Another superb III presentation. ■



Statements of Insolvency Practice: *the current consultation by the JIC*



JOHN BRIGGS

Introduction

The Joint Insolvency Committee (“JIC”) is a committee made up of representatives of the various recognised professional bodies (“RPBs”) supported by a staff member from each of the RPBs and lay members¹ and representatives from the Insolvency Service (“IS”).

The JIC’s role is to promote consistency across the insolvency profession and act as a forum for discussion and standard setting. Its responsibility is to develop and revise the Code of Ethics applicable to insolvency practitioners, Statements of Insolvency Practice (“SIPs”) and Insolvency Guidance Papers. The JIC also comments on legislation.

The IS is, of course, the RPBs Oversight Body and it is significant that the JIC actively and effectively promotes its tasks and responsibilities because the Government Department of Business, Energy and Industrial Strategy (“BEIS”) only recently, in July 2019, issued a Call For Evidence on whether changes are necessary to the current regulatory framework for insolvency practitioners, including whether to create a single regulator for IPs. The IS is currently gauging how the current regulatory regime is working.

Irrespective of the current challenges facing the insolvency profession in these testing times and legislative changes recently announced by Government, the JIC considers that various SIPs require review and it has issued a Consultation commencing 27 April 2020 and closing 20 July 2020 (12 weeks) to canvass views on its proposals.

In this article I shall discuss a number of the main points applying only to SIPs covering England & Wales (not Scotland). The SIPs in question are: (1) SIP 3.1 Individual Voluntary Arrangements (IVAs), SIP 3.2 Company Voluntary Arrangements (CVAs) which I shall take together, and (2) SIP 7 Presentation of Financial Information in Insolvency Proceedings and SIP9 Payments to Insolvency Office Holders and their Associates, which I shall also take together.

As a current lay member of the Regulation and Conduct Committee of the Insolvency Practitioners Association (“IPA”) and a member of its now disbanded Members & Authorisation Committee² I have some insight into the problems and issues which have given rise to the proposed revisions and the need for them. However, insofar as I express views on any aspect, these views are mine alone and are not to be attributed to the IPA and other members of the IPA’s R&C committee.

I should also emphasise that this short article is only intended to deal briefly with a number of the major points of proposed revision. For more

information readers should go to the internet and read and download the clean copy and track changed proposals in full together with the detailed “SIP Consultation Questionnaire”.

Objectivity and Transparency

JIC Consultation

- (1) SIP 3.1 – IVAs
- SIP 3.2 – CVAs

It is understood that the JIC decided to review SIP 3.2 because of the increased significance of CVAs in particular, the outcome of the Government’s review of the corporate insolvency framework and the focus therein on corporate rescue³ and academic research into CVAs carried out by Prof Walton and presented to the working group set up for this purpose by the JIC.

The major changes relate to transparency and objectivity. Including, the need for the office holder to give explanations to directors both before and during the CVA of their responsibilities and role, to maintaining records throughout all stages of the CVA specifically documenting an explanation to directors of the roles of the nominee and supervisor and detailed notes of strategy and all options including the impact of trading within a CVA for a prolonged period and the continued viability of the business during that period. To my mind this last aspect is especially important today during this period of lockdown and coming out of lockdown when some staff will have been furloughed and business restricted.

Greater emphasis is placed in the reviewed SIP 3.2 on the IP when asked to prepare or assisting in preparing the proposal having procedures in place to ensure that the proposal is considered objectively, has substance and contains a list of 14 items of specified information.

New or revised additions include considerations of alternative options, sufficient information to support any profit and cash projections, and separate itemisation of why some creditors are to be treated differently and why, how debts are to be valued for voting purposes, disclosure of estimated costs of the CVA, the identity of any source of referral and the relationship or connection with the referrer and the amount or reason for payment to the referrer and an explanation of how debts proposed to be compromised are to be treated should the CVA fail and the circumstances in which the CVA may/will fail and what will happen to the company. Lastly, I mention the requirement that the CVA should be closed promptly on completion or termination.

The reasons for many of these revisions are easy to follow. The failure to properly consider options and the substance of the proposed CVA, leading to a

1. E.g. lay members from the Association of British Insurers, the British Property Federation and HMRC.

2. Jointly as South Square representative with Felicity Toubé QC.

3. See A Review of the Corporate Insolvency Framework A Consultation on options for reform May 2016.

high failure rate among CVAs particularly trading CVAs. The need for proper explanation of why some creditors, such as landlords are to be treated differently from other creditors and even among themselves (vide the recent Debenhams Retail CVA⁴ with six different categories of landlord). Failure of “case progression” and failure to action CVA default are reasons for prompt closure.

It is understood that proposed changes to 3.1 IVAs were simply carried over from relevant changes to SIP 3.2.

The debtor needs proper guidance on debt management options. A very significant change is that the IVA proposal should contain information to creditors of any other attempts that have been made to solve the debtor’s difficulties “and the alternative options considered, both prior to and within formal insolvency by the debtor”.

In my experience options discussed with the debtor by the IP (and the referrer) tend to mislead the debtor about the possible advantages of other options, such as bankruptcy, debt relief or debt management and downplay the possible disadvantages of an IVA such as income contributions greater than or over a longer period than bankruptcy. Discussion simply tends towards confirming the debtor’s misconception that in all cases bankruptcy will for various reasons be a worse option. The suspicion here is that the IP is inclined towards recommending an IVA because it is in the IP’s own interests, not necessarily the debtor’s interests.

- (2) SIP 9 – Payments to Insolvency Office Holders and their Associates
- SIP 7 – Presentation of Financial Information in Insolvency proceedings

In 2019 the JIC was asked to review SIP 9 by the IS because of concern that in the volume IVA sector “there is limited evidence that certain disbursements charged are providing real value to debtors and their creditors and it is not clear that some are required at all”. And “limited if any explanation provided by IPs as to why they are fair and reasonable. Some disbursements may instead be business costs that should not be charged to individual estates or do not provide fair and reasonable value to creditors.....nor sufficient clarity in relation to distinguishing between disbursements and business overheads”.

From my own experience it is fair to say that together with misleading representations as to the potential advantages of an IVA, the issue of the reasonableness of disbursements and whether disbursements are not just business overheads and hence at the end of the day additional or disguised remuneration is a troublesome area for regulation by the RPBs. It is also right to point out that the classification of specific expenses as disbursements rather than business overheads has

historically been troublesome. By way of example, secretarial costs have generally been regarded as overheads; see the cases of *Re Cabletel Installations Ltd (in liquidation)* 2005⁵ and *Re Independent Insurance Company Ltd (No 2)* 2003⁶. In more recent times, the cost of introducing and operating new IT systems, to manage insolvency cases, often charged on a case by case basis yet used across the practice.

Apparently the JIC working party considered that SIP9 could be refined in certain specific aspects as follows:

- (a) The treatment of “per case fees” charged to the estate as an expense or disbursement;
- (b) Being clear that overheads cannot be recovered from an estate;
- (c) Whether SIP 9 should distinguish between disbursements and other expenses;
- (d) Whether relying on the statutory definition of “associates” was appropriate;
- (e) Whether lists of examples is helpful since non-inclusion as an overhead could be thought to be an expense; and
- (f) Whether SIP9 should even apply to MVLs since almost all MVL fees are paid by the parent or other member of the group and not out of the “estate”.

Consequently, the revised SIP 9 proposed specifies that “associate” although defined in the insolvency legislation has an expanded meaning to include a likely perception of association between the IP, their firm or an individual within the IP’s firm and the recipient of payment. The significance here is that these payments would fall into Category 2 expenses which require approval in the same manner as the IP’s remuneration, before being paid.

In my view this revision is required since although appreciated by the insolvency profession as a whole that an “associate” for the purpose of payment of expenses has an expanded meaning just occasionally the defence is raised to an allegation of breach of Category 2 expenses that the associate concerned is not an associate within the meaning of the insolvency legislation and no prior approval of payment was required.

To add strength to the self-interest threat, the revised SIP 9 specifies that all payments to associates should be fair and reasonable reflections of the work necessarily and properly undertaken in an insolvency appointment. And disclosure now includes the form and nature of any professional or personal relationships between the office holder and their associates.

Overhead or expense: who decides?

To attempt to deal with the knotty problem of overheads as opposed to expenses the revised SIP 9 specifies that not permissible as either

4. *Discovery (Northampton) Ltd v Debenhams Retail Ltd* [2019] EWHC 2441 Ch.

5. [2005] BPIR 28.

6. [2003] BPIR 577.



remuneration or an expense are (a) an expense or charge calculated as a percentage of remuneration, (b) an administration fee or charge additional to remuneration, and (c) the recovery of any overheads other than those absorbed in charge out rates. Moreover, under the heading “Expenses” the proposed SIP 9 goes on:

“31. Any shared or allocated payments incurred by the office holder or their firm are to be treated as category 2 expenses and approval sought before payment. This is irrespective of whether the payment is being made to an associate, because the office holder will be deciding how the expenses are being shared or allocated between insolvency appointments. Requiring approval of these payments enables those who are approving the expenses to confirm that the approach being taken by the office holder is reasonable.”

In my opinion this formulation and approach is a fudge. Far from giving guidance as to what is an expense and what is an overhead it is pushing on to creditors responsibility for what is fair to allocate between insolvency appointments when they are ill-equipped to make a determination, and their determination on a case by case basis may well be inconsistent. It would be better for the JIC to give specific guidance by list and to come down one side or the other. It can always add to the list if needs be, in the event of abuse. It is a case of protecting the insolvency profession from itself by preventing abuse and maintaining its integrity and good standing in the eyes of the public.

Another difficult area is the basis of remuneration and fees estimates. Interestingly, moving away from a complete set of estimated fees across staff levels the proposed revised SIP 9 states that creditors and other interested parties may find a blended rate (or rates) and total hours anticipated to be spent on each part of the anticipated work more easily understandable and comparable than detail covering each grade or person working on the appointment. A “blended rate” is stated as calculated as the prospective average cost per hour for the appointment based on the estimated time to be expended by each grade of staff at their specific charge out rate.

As to SIP 7 – “*Presentation of financial information in insolvency proceedings*” – the changes to this SIP essentially mirror the changes to SIP 9.

The last point that must be borne in mind is that the changes proposed to these SIPs are in the context of current legislation. It would be interesting to see what changes Covid 19 might necessitate particularly in the context of advice to directors regarding their modified obligations under section 213 (wrongful trading) of the Insolvency Act 1986. ■

Case Digest Editorial



Mark Arnold QC

Judges have never been more remote, it may now truthfully be said. Yet, as the Case Digests in this edition show, court business continues unabated and demonstrates just how efficient, accessible and robust the judicial process can be, even when conducted from the dining-room table.

The Government's furlough scheme for employees has already added to the jurisprudence, with decisions from Snowden J in *Re Carluccio's Ltd* (in which Felicity Toubé QC and Madeleine Jones acted), and from Trower J and the Court of Appeal in *Re Debenhams Retail Limited* (in which Tom Smith QC and Richard Fisher QC acted). That the furlough scheme should apply to companies in administration is clear, but what constitutes adoption of the employment contract by the Administrators in this context, with all the consequences that flow from adoption? Both cases address this issue in detail, and are digested by Ryan Perkins and Daniel Judd in the pages ahead.

We will see in good time what effect the introduction of Part 26A into the Companies Act 2006 will have on the scheme of arrangement as a restructuring tool, if the Corporate Insolvency and Governance Bill is enacted as currently envisaged. For now, Trower J has confirmed that meetings may be convened and held remotely in *Re Castle Trust Direct plc* (in which Barry Isaacs QC and Adam Al-Attar acted). What is important is that members of the class can hear and participate such that collective consultation with a view to their common interest can take place. The case is digested here by Edoardo Lupi.

Schemes of arrangement north of the border rarely cause such excitement as that generated by *Premier Oil Plc v Fund*

III Investment 1 (Cayman) Ltd, in which a number of members of South Square were involved (even if unable to address the Scottish Court directly), including David Alexander QC and Daniel Bayfield QC as experts. As appears from the case digest, a number of objections were raised and dismissed, including as to the efficacy of the provision now commonly to be found in schemes by which powers of attorney are created and conferred on the scheme company to execute documents on behalf of scheme creditors. I understand the decision is subject to appeal.

The rule in *Ex parte James* is alive and well, as the decision of the Court of Appeal in *Lehman Brothers Australia Ltd v MacNamara* (in which Tom Smith QC, Daniel Bayfield QC and Ryan Perkins acted) demonstrates. It requires unfairness rather than unconscionability: simply stated, the Court will not permit its officers to act in a way that it would be clearly wrong for the Court itself to act, judged by the standard of the right-thinking person representing the current view of society.

Bilta (UK) Ltd v Natwest Markets Plc (digested here by Stefanie Wilkins) is another important case, in which Snowden J decided that a person may be guilty of dishonest assistance by causing a company to participate in a transaction which entailed a breach of duty by a fiduciary of a company further along the chain of transactions, assuming the person assisting can be shown to have been dishonest and a factual nexus is established between the transaction in question and the breach of duty.

In the field of arbitration, the Court of Appeal in *Enka Insaat v Chubb* (in which Robin Dicker QC appeared) has given

guidance on the principles applicable to determining the proper law of the arbitration agreement when found in a contract containing an express choice of law. Meanwhile the Cayman Islands Court of Appeal has explained the approach to be adopted to the arbitrability of underlying issues in circumstances where members seek a winding up order on just and equitable grounds, in *China CVA (Cayman Islands) Holding Corp* (in which Hilary Stonefrost acted).

There are many other interesting cases digested in this edition, including important decisions of the Court of Appeal in relation to legal professional privilege digested by Roseanna Darcy, and personal insolvency digested by Lottie Pyper. But for a little learning on the (legal) attributes of fish as animals *ferae naturae*, look no further than *Borwick Development Solutions Ltd v Clear Water Fisheries Ltd*, digested by Madeleine Jones. ■

Case Digests



Banking and Finance

Digested by **Stefanie Wilkins**



National Bank of Kazakhstan v Bank of New York Mellon SA/NV London Branch

[2020] EWHC 916 (Comm) (Teare J)
22 April 2020

Undisclosed principals – actual authority

The question for the English court was whether securities or cash, which were held by the Bank of New York Mellon SA/NV ('the Bank') as part of the National

Fund of Kazakhstan ('NFK'), were subject to a claim by the Republic of Kazakhstan. This question had been referred to the English court by the Belgian court, where the second to fifth defendants ('the Stati parties') had brought proceedings to enforce an arbitration award made in their favour against the Republic of Kazakhstan; in the course of these proceedings, an attachment or garnishment had been ordered against the Republic of Kazakhstan, including on claims that it had against the Bank.

The NFK is a sovereign wealth fund, which in Kazakh law is under "the trust management" of the National Bank of Kazakhstan ('the NBK'), which is the central bank of Kazakhstan.

The Bank held cash for the NFK pursuant to the terms of an English-law governed Global Custody Agreement between the Bank and the NBK. Notwithstanding that the NBK was the named party to the Global Custody Agreement, the Stati parties sought to establish that the Republic of Kazakhstan had a right to draw on the funds held by the Bank.

The Stati parties argued first that the NBK had entered the Global Custody Agreement as agent of the Republic of Kazakhstan. Teare J recounted that English law permits a third party to an agreement to give evidence that he was an undisclosed principal of a named party, and that the agreement was made by the party as his agent. However, for the putative undisclosed principal to be bound by the contract, the agent must

have had actual authority to have entered it on his behalf. The question whether the NBK had actual authority was to be determined in accordance with Kazakh law, although the significance of the NBK having such authority would be a matter of English law. Having considered the expert evidence of Kazakh law, the content of the Law on the National Bank, and the terms of the Trust Management Agreement between the NBK and the Republic of Kazakhstan (which governed the operation of the NFK), Teare J concluded that the NBK had no authority to enter into the Global Custody Agreement as agent for the Republic of Kazakhstan.

Secondly, it was said that the NBK held the debt on trust for the Republic of Kazakhstan. Teare J accepted that the Republic of Kazakhstan might be able to enforce the payment of the debt by the Bank to the NBK, but concluded that the Bank nevertheless still owed the debt to the NBK.

Teare J also observed that, irrespective of the position in Kazakh law as to the 'ownership' of the assets of the NFK, the Republic of Kazakhstan had no right, as a matter of English law, to claim funds from the Bank.

Accordingly, his Lordship granted declarations including that the Bank had no obligation to pay any debt due under the Global Custody Agreement to the Republic of Kazakhstan. ■

Bilta (UK) Ltd (In Liquidation) v Natwest Markets Plc

[2020] EWHC 546 (Ch) (Snowden J) 10 March 2020

Dishonest assistance – breach of fiduciary duty by directors – fraudulent trading

Directors of the claimant companies had, in breach of their fiduciary duties to those companies, caused them to participate in missing trader intra-community VAT fraud during 2009. The fraud entailed the companies purchasing EU carbon credits from EU member states and selling them on to purchasers in the UK, whilst misappropriating VAT payable on the sales. The companies defaulted on their obligations to HMRC, and were in liquidation by the time of the proceedings.

The first defendant was a bank and the second defendant was an indirect subsidiary which employed traders who dealt in EU carbon credits. In the claim before Snowden J, the directors' breaches of fiduciary duty were said to have been dishonestly assisted by two traders who were employed by the second defendant, and had caused the first defendant to purchase large volumes of EU carbon credits. In the alternative, it was said that the first and second defendants were liable under s 213 of the Insolvency Act 1986 for knowingly participating in the companies' fraudulent trading.

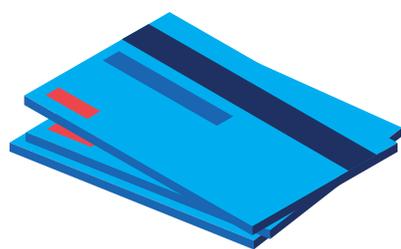
Snowden J observed that the nature of the dishonest assistance here was somewhat unusual: the acts of assistance complained of were in causing the first defendant bank to enter into spot contracts, without which the errant directors would not ultimately have been able to misappropriate the VAT monies.

The defendants contended that this would extend the scope of dishonest assistance too far, and that the conduct of the traders was too far removed from the breaches of duty.

Snowden J held that in principle, a person could provide assistance by causing a company to participate in a transaction which entailed a breach of duty by a fiduciary of a company further along the chain of transactions. The scope of the doctrine would be limited by the need to prove dishonesty on the part of the person providing assistance, as well as by the need to establish a factual nexus between the transaction in question and the breach of duty. Snowden J also observed that

s 213 could impose liability on persons who were not involved in the management of the company which had been trading fraudulently.

His Lordship found that from 25 June 2009 at the latest, the traders had deliberately chosen to ignore an obvious risk of VAT fraud, and that subsequent trading had been dishonest. The defendants were liable for dishonest assistance and knowingly being a party to fraudulent trading in their subsequent trading. ■



Civil Procedure

Digested by Roseanna Darcy



R (on the application of Jet2.com) v Civil Aviation Authority

[2020] EWCA Civ 35 (Patten, Hickinbottom, Peter Jackson LLJ) 28 January 2020

Legal Advice Privilege – Dominant Purpose Test – Multi-Party Correspondence

The Court of Appeal confirmed that legal advice privilege is subject to the “dominant purpose” test more typically associated with litigation privilege, although it was acknowledged that the jurisprudence was far from straightforward and the authorities did not speak with a single clear voice.

The Civil Aviation Authority (‘CAA’) had appealed against an order that certain

documents it was ordered to disclose did not attract legal advice privilege within the context of judicial review proceedings brought by Jet2.com (‘Jet 2’).

The appeal raised two issues concerning legal advice principle: (i) whether, for a communication to fall within the scope of that privilege, it must have had the dominant purpose of seeking or giving legal advice, and (ii) in light of the answer to (i), the proper approach to determining the privileged status of email communication between multiple parties where one of the parties is a lawyer.

On the first issue, the Court of Appeal accepted that there were good grounds for applying the dominant purpose test to legal advice privilege. It was observed that whilst litigation privilege and legal advice privilege had different characteristics they were limbs of the same, more general, legal professional privilege. It was also acknowledged that the common law in other jurisdictions had incorporated a dominant purpose test for both limbs (including in Australia, Singapore and Hong Kong).

On the second issue, the Court of Appeal set out the appropriate approach to multi-addressee emails which included:

- (i) the dominant purpose test focuses on documents and communication rather than the general role of the relevant lawyer;
- (ii) if the dominant purpose of multi-addressee email is to seek commercial advice from the non-lawyer parties then it will not attract legal advice privilege even

if the secondary purpose of the email is to simultaneously obtain legal advice;

- (iii) the response from the lawyer will almost certainly be privileged if it contains legal advice even if copied to more than one addressee;
- (iv) generally, multi-addressee communications should be considered as separate communications between the sender and each recipient;
- (v) one approach is to consider whether, if the email were sent to the lawyer alone, it would have been privileged;
- (vi) generally, where a multi-addressee email seeks both legal and non-legal advice, if regarded as separate communications, those to and from the lawyer will be privileged and otherwise they will not be unless the real dominant purpose of emails to non-lawyers is that of instructing the lawyer; and
- (vii) where a communication might realistically disclose legal advice then that communication will in any event be privileged. ■

Cowley v LW Carlisle & Company Ltd

[2020] EWCA Civ 227 (McCombe, Holroyde, Peter Jackson LLJ) 25 February 2020

Strike Out – Dissolution – Restoration – Insurers

The Court of Appeal confirmed that the earlier Judge did not err in the exercise of his case management powers under CPR r.3.4 in striking out a claim against a dissolved company where no timely steps were taken to restore it to the Register of Companies.

The underlying proceedings involved a claim by the appellant for damages for noise induced hearing loss sustained during the course of employment at the respondent company, as well as other companies. The respondent company had previously been struck off the Register and dissolved. This was known by the appellant's solicitors when proceedings were issued. The claim was purportedly served at the respondent's last known place of business with a letter stating that the appellant would seek the restoration of the company. Copies were also sent to the respondent's insurer who stated that as the respondent was dissolved, proceedings could not be served on them. However, subsequently, solicitors for the insurer purported to lodge an acknowledgment of service indicating the intention to contest jurisdiction, issuing an application notice for an order striking out the claim under CPR r.3.4(2), or in the alternative, an order under CPR r.11(6) for a declaration that the court did not have jurisdiction or would not exercise jurisdiction.

Before a District Judge, it was held that the court would only allow process against a company that exists and would only correct errors in procedure where restoration was imminent.

It was not considered that the appellant had done enough to seek the restoration of the respondent in a timely manner. The claim was therefore struck out. On appeal, that decision was upheld.

The Court of Appeal held that the District Judge was entitled to strike out the claim. In holding that he was, the Court of Appeal pointed out that regardless of whether the insurer's application was properly brought or not, the Judge was entitled to consider whether the overriding objective was properly served by the continued presence in the action of a non-existent company and to reach the conclusion he did in line with his case management powers.

The Court of Appeal also gave guidance to insurers who might be in a similar position and where an order restoring the company to the Register might render insurers retrospectively liable in proceedings which they have been in no position to resist. It was suggested, without being prescriptive, that an insurer in such a position should notify the claimant of the dissolution of the company and to invite them to make a restoration application and to apply to the court seised of the main proceedings for a stay of the substantive proceedings in the interim. In the absence of co-operation from the claimant, the insurer should write to the court notifying it of the situation and asking it consider making an order for a stay of its own motion until notified of any order to restore the company. Following such a stay, if nothing is done after a sensible time, then it would be open to the insurer to invite the court, of its own motion, to strike out the proceedings. ■

Dawson-Damer v Taylor Wessing LLP

[2020] EWCA Civ 352 (Floyd, Newey, Arnold LLJ) 11 March 2020

Legal Professional Privilege – Joint Interest Privilege – Trusts – Data Protection Act – Subject Access Requests

In proceedings relating to a Bahamian trust in which the beneficiaries had made certain subject access requests to the trustees' solicitors under the Data Protection Act 1998 (the 'Act'), the Court of Appeal held, amongst other things, that joint interest privilege was a matter of procedure and evidence rather than one of trust law meaning it was to be determined on the basis of domestic principles rather than the governing law of a trust.

The claimant beneficiaries had originally made an application for relief in relation to the defendant trustees' solicitors failing to comply with a

subject access request under the Act. This was dismissed at first instance on the basis of legal professional privilege ('LPP') claimed by the firm. On appeal it was held that LPP did not extend to documents not disclosable to a beneficiary of a trust, and so remitted the case to a deputy High Court Judge to determine whether documents of the type in issue carried LPP.

In relation to the issue of LPP, the question for the Court of Appeal was whether the firm could rely on LPP in relation to data to which litigation privilege did not attach. The respondent asserted that they could not on the basis there was joint interest privilege as between herself as the beneficiary of trust and the firm's client as trustee. The appellant on the other hand maintained that the availability of joint interest privilege depended on the respondent's rights as a beneficiary of the trust which was subject to a Bahamian governing law. According to s.83(8) of the Trustee Act 1998 (Bahamas) a trustee could not

be compelled to disclose to a beneficiary any document relating to the exercise of its discretion. At first instance it had been considered that joint interest privilege would arise under English trust law but that s.83(8) of the Bahamas Trustee Act meant, in the circumstances of the case, there could be no joint interest privilege. On appeal, it was argued by the respondent that the Judge had looked at this the wrong way as this was not a matter of trust law but of procedure and evidence in which case *lex fori* applied. This was accepted by the Court of Appeal, who on a review of the authorities, considered that whilst joint interest privilege may have originated in trust authorities, it had since evolved into a principle of procedure and evidence that had been used in many different contexts.

Accordingly, as joint interest privilege arose as a matter of procedural law, its scope fell to be determined on the basis of domestic principles. ■

Civil Procedure

Re Blackfriars Limited

[2020] EWHC 845 (Mr John Kimbell QC sitting as Deputy High Court Judge) 6 April 2020

Covid-19 – Adjournment of Trials

The High Court refused an application to adjourn a 5-week trial on the basis of difficulties caused by Covid-19. The judgment provides a detailed consideration of the Coronavirus Act 2020 (the ‘Act’) and connected regulations concluding there were strong arguments that, so far as is possible and safe, proceedings including lengthy trials, should continue.

The Joint Liquidators of One Blackfriars Limited had applied to adjourn the trial of their claim against the former administrators of the company for the alleged mishandling of the administration, due to take place in June 2020, on the basis that this was a necessary response to the restrictions imposed by the Government in light of Covid-19.

The application was refused, the parties being ordered to cooperate to explore ways in which a remote trial, involving an internet-based video communication platform and electronic bundle, might proceed.

It had been submitted that the technological challenge posed by a 5-week trial which was to involve four live witnesses of fact and 13 expert witnesses was too great with there being a real risk of unfairness if the trial took place remotely. This was disputed by the respondents who considered that suitable technology was in place and no unfairness would be caused.

In his judgment, the Judge explained that sections 53 to 56 of the Act, making provision specifically in relation to the operation of courts and tribunals and the ability of the public to participate, gave strong indication that the legislature intended the work of civil courts to continue with the aid of video and audio technology. This was supported by various guidance notes such as that produced by the Lord Chief Justice published on 19 March 2020 which explained the rules in the civil courts were flexible enough to enable telephone and video hearings of almost everything, with the default position being that hearing should be conducted remotely. The Protocol regarding Remote Hearings first published on 20 March 2020 confirmed this included trials, with further guidance on how courts should conduct remote hearings being provided in Practice Direction 51Y. It was also noted that s.71(7) of the Senior Courts Act 1981 provided that sittings of the High Court could be held in any place in England and Wales. There was therefore no difficulty in a High Court Judge hearing a trial remotely or for counsel and witnesses to participate from their homes.

Whilst it was accepted that there may be challenges in using remote hearing technology it was considered that suitable platforms were in place to allow a remote trial to occur and it could not be said there would be any unfairness caused as the challenges, as well as the benefits of proceeding remotely, would apply to both sides equally. ■

Richard Slade v Deepak Abbhi

[2020] EWHC 935 (QB) (Master Hill) 20 April 2020

Applications without notice – examination of judgment debtors – personal service

In proceedings for a Part 71 examination of the defendant judgment debtor (‘D’), D applied to set aside (a) a declaration that the requirement for personal service of the Part 71 order on him had been waived, alternatively (b) an order for substituted/alternative service of the order on him via email. D was a judgment debtor who lived in the United States. The Part 71 order and application notice were served on D’s English solicitors via email. The following day D’s solicitors replied to say that “you are entitled to treat our address as Mr Abbhi’s address

for service”. The Part 71 examination was subsequently stayed, pending D’s appeal to the Court of Appeal. The appeal was dismissed, the stay was lifted and C obtained a new date for the Part 71 examination. D wrote to C’s solicitor arguing that the Part 71 order had not been served personally in accordance with the mandatory terms of Part 71.3 of the CPR. C’s solicitors did not engage, applied without notice and C was granted a declaration and an order that the service by email on D’s solicitor was good service. Held, setting aside the order, that: the Court had applied the wrong legal test for service out of the jurisdiction via alternative means in a Hague Service Convention territory, which was the “exceptional circumstances” test (see *Cecil v Bayat* [2011] 1 WLR 3086; *Marashen Limited v Kenvett Limited* [2017] EWHC 1796) and not the “good reason” test (*Abela v*

Baadarani [2013] UKSC 44); the evidence showed that there were no exceptional circumstances (there had been no attempt at personal service, and there was no evidence of a desire to avoid personal service); the evidence had incorrectly failed to disclose that D was resident outside of the jurisdiction; the factual dispute in relation to the issue of whether the need for personal service had been waived was unsuitable for *ex parte* determination; and the lack of an order for service out of the jurisdiction was in any event fatal to an application for alternative/substituted service (*Marashen v Kenvett*). ■

[William Willson]





Commercial Litigation

Digested by Madeleine Jones



Alfred Street Properties Limited (formerly known as Killultagh Estates Limited) v National Asset Management Agency

[2020] EWHC 397 (Comm) (Phillips LJ) 26 February 2020

Contractual construction – ISDA Definitions

The claimant property developer entered into numerous banking facilities with commercial lenders, and hedged part of these facilities with five extendable interest rate swaps (the ‘Swaps’), with options to extend the Swaps for a further three years (the ‘Options’). The Swaps were evidenced by five identically-worded confirmations from the lender (the ‘Confirmations’) which incorporated the 2000 ISDA Definitions, and were governed by the 1992 ISDA Master Agreement (Multicurrency-Cross Border). The Confirmations set out the consequences of the counterparty exercising the Options.

The defendant, NAMA, a statutory corporation of the Republic of Ireland created in response to the 2008 global financial crisis, became the beneficial

owner of the swap counterparty’s rights under the Swaps. Prior to the end of the initial term of the Swaps, NAMA notified the claimant by telephone that it would be exercising the right to extend. It recorded and transcribed this call. Later the same day it confirmed this by email, attaching copies of each of the relevant Swaps.

The claimant claimed the Options had not been validly exercised by telephone. It said although the 2000 Definitions permitted exercise by telephone in Article 12, the relevant right was only engaged in relation to “*Option Transactions (including Swaptions)*”, as defined in the 2000 Definitions. The Confirmations did not expressly refer to the Options by these defined terms. It followed, according to the claimant, that the right to exercise an option by telephone did not apply to the transactions identified in the Confirmations. The claimant supported this “*strict and highly technical approach*” by authorities for the view that standard form agreements, and particularly such a widely used agreement as the ISDA master agreement, must be interpreted in a way which serves the objectives of clarity, certainty and predictability.

Lord Justice Phillips held that although the starting point is to interpret the relevant provisions of the 2000 Definitions and the ISDA Form on the basis that they are standard market agreements, the question of whether and to what extent parties have agreed to incorporate and/or vary such provisions falls to be interpreted according to the principles of contractual construction.

In this case, the relevant article in the 2000 Definitions could have provided that parties must use the precise name or label ‘Option Transaction’ or ‘Swaption’ in the confirmation in order to engage the ensuing provisions, but did not do so. Instead, the Article employed the broader concept of a transaction being “*identified*” as such. There is no reason why identification should be strictly limited to naming or labelling, even in the context of the need for certainty and clarity. A transaction was sufficiently

described for the purpose of the article concerning telephone confirmation if the confirmation labels it as an Option Transaction or Swaption, or otherwise defines or describes it or its operation in terms which make it clear that it falls within the provisions dealing with those transactions.

In this case it was “*plain beyond sensible argument*” that the confirmations did identify the Options as Option Transactions. In any event the Procedure for Exercise in Article 12 had been incorporated into the Options first and foremost because the Options and their terms are structured solely by reference to terms defined in Articles 11 and 12 of the 2000 Definitions. Even if the Options were not strictly “*identified*” as Option Transactions, it is nonetheless clear that the procedure for exercising them is incorporated into the transactions set out in the Confirmations. The broader business context and the fact that it was market practice to exercise them by telephone also supported this conclusion.

The court also rejected the argument that in the telephone call NAMA had only expressed an intention to exercise the Options, and had not actually exercised them. On an objective construction of what was said, the Options had been exercised.

The Judge criticised the claimant’s decision to bring this “*remarkably opportunistic and unattractive*” claim years later, after both parties had fully performed the obligations which would have arisen under the extended Swaps on the common assumption that they had indeed been extended. This meant that NAMA would have been able to rely on estoppel by convention, since the claimant and NAMA had continued to deal with each other on the common assumption that the Swaps had been extended validly and effectively, an assumption which thoroughly “*crossed the line*”. It would also have been able to rely on waiver by estoppel, since NAMA had relied on certain statements by the claimant based on the fact that the Swaps had been extended. ■

Commercial Litigation

Dowman Imports Ltd v 2 Toobz Ltd

Ltd [2020] EWHC 291 (Comm) (Judge Russen QC) 28 February 2020

Unjust enrichment – Restitution

The claimant, a supplier of toys, had held discussions with the defendant, a toy designer, over two years relating to a toy with moving eyes that the designer was developing. The claimant claimed it had taken part in those discussions on the understanding it would be granted the contract to manufacture the final product. In fact, the designer entered into a merchandising deal with a third party. The claimant claimed in restitution the value of services it had allegedly provided to a toy designer in developing the toy. The designer counterclaimed in respect of the allegedly defective toys supplied by the claimant.

The questions for the court were: (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?

In this case, the supplier had made a significant input into the toy's development and the designer had made significant demands on its time. The fact that there had been no concluded contract did not mean the supplier should be regarded as having taken the risk of going unrewarded. The designer was contractually free to walk away but its doing so was unconscionable. Therefore, the claim in restitution succeeded. The counterclaim failed as it had been understood that the production of the toys was part of the design process and they had not been produced for sale. ■

Endurance Corporate Capital Ltd v Sartex Quilts and Textiles Ltd

[2020] EWCA Civ 308 (McCombe, Leggatt, Dingemans LLJ) 5 March 2020

Insurance – Measure of damages – Reinstatement basis

An insurer appealed an award for the cost of reinstating fire-damaged property. The insurer argued that the Judge had erred by assessing damages on a reinstatement basis where the insured did not have a genuine, fixed and settled intention to reinstate the premises and no costs had actually been incurred. Dismissing the appeal, the Court of Appeal held that in the absence of any express provisions in the insurance contract as to the amount payable, this fell to be determined under default principles of law, and that in this case these led to the choice of the reinstatement basis as the correct measure of damages.

Where an insurer agrees to "indemnify" the insured against loss or damage caused by an insured peril, the nature of the insurer's promise is that the insured will not suffer the specified loss or damage. The general object of an award of damages for breach of contract is to put the claimant in the same position so far as money can do it as if the breach had not occurred. Where the breach of contract arises from loss or destruction of or damage to property this can be achieved either by awarding the cost of replacing or repairing the

property or by awarding the market value of the property in its condition immediately before the damage occurred (less any residual value).

Which measure is appropriate depends, at least in the first place, on the use to which the claimant was intending to put the property.

Where the property is a building insured against damage or destruction which the owner (or other person with an insured interest in the building) was intending to use, or continue to use, as premises in which to live or from which to carry on a business, the sum of money required to put the insured in a materially equivalent position to its position immediately before the insured peril occurred will generally be the cost of repair, if the building is damaged, or the cost of replacement, if the building is destroyed. Replacement may take the form of constructing a new building on the site of the old one or acquiring substitute premises.

Where, on the other hand, at the time when the damage occurred the insured was intending to sell the building (and the land on which it was built), the loss to the insured is appropriately measured as the amount by which the market value of the property has been reduced as a result of the damage.

Subjective intention to reinstate is relevant where there is some feature of the property which it would be expensive to reinstate, which has, or is said to have, particular subjective value to the claimant which it would

not naturally be expected to have to other owners who intended to use the property for the same purposes. In such a case whether or not the claimant genuinely intends to reinstate this feature of the property if awarded the cost of doing so is relevant in the first place from an evidential point of view in ascertaining whether the feature does indeed have such subjective value. It may also be said to be unreasonable to require the defendant to pay the cost of reinstating a feature which is only of such subjective value if the claimant does not or will not actually incur that cost.

In this case, there was no suggestion by the insured that any feature of the original buildings had any special subjective value and were intended to be restored at additional cost. The sum claimed and awarded was the cost of building a modern property substantially similar in shape and general style to the one which was there before the fire, but using cheaper modern materials rather than original materials. The insurer did not suggest that any of the other options considered by the insured after the fire which involved acquiring or constructing another building elsewhere was one that the insured ought reasonably to have adopted in order to mitigate its loss, nor that the value of the property was increased as a result of the fire.

In those circumstances, the existence of a subjective intention to restore was of no possible relevance to the measure of indemnity. ■

Bank St Petersburg PJSC v Arkhangelsky

[2020] EWCA Civ 408 (Sir Geoffrey Vos C, Patten, Males LLJ) 18 March 2020

Standard of proof – Dishonesty

The Court of Appeal considered an appeal on the basis of the standard of proof applied by the first instance Judge when determining the defendants' counterclaim of dishonest conspiracy against the claimants. Hildyard J had dismissed the counterclaims "having regard to the strength of the evidence that was necessary to discharge the burden of proof". He said that proof of dishonesty "could only be discharged by showing the facts to be incapable of innocent explanation."

The Court held that he had erred by adopting a heightened standard of proof: "In general it is legitimate and conventional,

and a fair starting point, that fraud and dishonesty are inherently improbable, such that cogent evidence is required for their proof. But that is because, other things being equal, people do not usually act dishonestly, and it can be no more than a starting point. Ultimately, the only question is whether it has been proved that the occurrence of the fact in issue, in this case dishonesty in the realisation of the assets, was more probable than not."

The correct approach is that set out by Lord Hoffmann and Lady Hale in *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2008] UKHL 35 [13]–[15] and [70]–[72], and the law was correctly summarised by Bryan J in *JSC BM Bank v Kekhman* [2018] EWHC 791(Comm) at [46]–[66].

The judgment had been handed down 22 months after the end of the hearing, in violation of the 'unwritten rule' that that judgments in the Business and Property Courts and the Court of Appeal should be delivered within three months. However, this delay alone was not enough to require a retrial. ■

A v C

[2020] EWCA Civ 409 (Flaux, Newey, Males LLJ) 19 March 2020

Arbitration – Non-party evidence

The Court of Appeal considered ss. 44(1) and 44(2)(a) of the Arbitration Act 1996, which provide that the Court has for the purposes of and in relation to arbitral proceedings the same power

of making orders about the taking of the evidence of witnesses as it has for the purposes of and in relation to legal proceedings. The Court of Appeal held that this gives the Court jurisdiction to order the taking of evidence from non-party witnesses, whether in support of domestic or international arbitrations. There was no justification for construing the statute narrowly in order to restrict this jurisdiction. ■

Enka Insaat ve Sanayi AS v OOO Insurance Co Chubb

[2020] EWCA Civ 574 (Flaux, Males, Popplewell LLJ) 29 April 2020

Arbitration agreements – Choice of law – Choice of forum – Anti-suit injunctions

The Court of Appeal gave an important judgment on jurisdiction and choice of law in arbitration agreements.

The Court considered an appeal against a Judge's refusal to grant an anti-suit injunction to a Turkish company, Enka. Enka sought the injunction on the basis of an agreement which it had entered into with the defendant, a Russian company, Chubb. The agreement contained no choice of law provision, but it stated that disputes should be settled under the Rules of Arbitration of the ICC and in London. Chubb had started proceedings under the agreement in Moscow; Enka claimed that this was a breach of the agreement's arbitration clause and sought an anti-suit injunction from the High Court in London.

Andrew Baker J heard a trial at which the claimant, Enka, contended that, pursuant to English conflict of laws principles, the arbitration agreement was governed by English law and the defendant, Chubb, contended that, pursuant to those principles, it was governed by Russian law. The Judge, on his own initiative, declined to decide the choice of law question on forum non conveniens grounds, holding that questions of

the scope of the arbitration agreement fell to be decided in the Moscow court.

The Court of Appeal held that the Judge's approach was wrong in principle. The English court, as the court of the seat of the arbitration, was necessarily an appropriate court to grant an anti-suit injunction and questions of forum conveniens did not arise. This is because in choosing London as the seat of the arbitration the parties submitted to the jurisdiction of the English court in respect of the exercise of such powers as the choice of seat confers, and because the grant of an anti-suit injunction to restrain a breach of the arbitration agreement is an exercise of such powers. By the choice of English seat the parties agreed that the English Court is an appropriate court to exercise the power to grant an anti-suit injunction.

The Court of Appeal also considered the proper law of the arbitration agreement (referred to as the 'AA law'). This might be different from the proper law of the main contract; in this case it was not in dispute that the main contract was governed by Russian law.

The authorities did not speak with one voice on the questions of whether, in the absence of an express choice of AA law, the law of the main contract or the curial law (ie the law of the forum governing procedure) should be accorded greater weight in determining what the AA law is. ■

Commercial Litigation

On a review of the authorities, the Court held that the principles applicable to determining the proper law of an arbitration agreement, when found in an agreement governed by a different system of law, are as follows:

The AA law is to be determined by applying the three stage test required by English common law conflict of laws rules, namely (i) is there an express choice of law? (ii) if not, is there an implied choice of law? (iii) if not, with what system of law does the arbitration agreement have its closest and most real connection?

Where there is an express choice of law in the main contract it may amount to an express choice of the AA law. Whether it does so will be a matter of construction of the whole contract, including the arbitration agreement, applying the principles of construction of the main contract law if different from English law.

In all other cases there is a strong presumption that the parties have impliedly chosen the curial law as the AA law. This is the general rule, but may yield to another system of law governing the arbitration agreement where there are powerful countervailing factors in the relationship between the parties or the circumstances of the case.

Applying these principles to the instant case, the Court held that English law – as the curial law of the arbitration agreement – was the AA law.

The Judge at first instance gave as an alternative, secondary basis for his decision, identifying three discretionary factors against granting the injunction: (1) Enka’s delay (2) Enka’s participation in the Russian proceedings and (3) Enka’s failure

to commence arbitration. The Court of Appeal held that the Judge had erred in according weight to these.

The Judge had exercised his discretion from the wrong starting point, since he inclined strongly to the view, without expressing it as a final conclusion, that the arbitration agreement was not governed by English law. He failed to appreciate the primary role of the English Court as the court of the seat in granting anti-suit relief in the exercise of its curial jurisdiction and the fact that it would be necessary to provide a strong reason for not giving effect to the parties’ bargain. He also fell into error in treating Enka’s failure to commence arbitration as a “very significant factor” counting against it. It was not a relevant factor at all.

The Court of Appeal therefore exercised the discretion to grant an injunction afresh. Enka’s participation in the Moscow proceedings did not count against it, since all it had done was properly attempt to get the Moscow court to force Chubb to respect its bargain not to litigate the claim there. The only ground which might have justified a refusal to grant relief was delay by Enka and its effect on the Russian proceedings. On the facts there was no delay justifying not granting injunctive relief. The Court of Appeal therefore granted the appeal and the injunction. ■

[Robin Dicker QC]



Borwick Development Solutions Ltd v Clear Water Fisheries Ltd

[2020] EWCA Civ 578 (Sir Timothy Lloyd, Peter Jackson, Rose LLJ) 1 May 2020

Torts – Fish

The respondent in this case was the former owner of a fishery in Lancashire. It had borrowed money secured by a charge on land. The charged land contained nine enclosed lakes. The lakes contained many fish, which could not escape nor be joined by any new fish swimming in. When the respondent defaulted on the loan, LPA receivers were appointed and they sold the land to the new owner, the appellant. The receivers did not consider that the lender’s charge extended to the fish and they had given no warranties to the appellant in relation to the transfer of ownership of the fish on completion.

Following completion, the respondent claimed it retained a proprietary interest in the fish and successfully

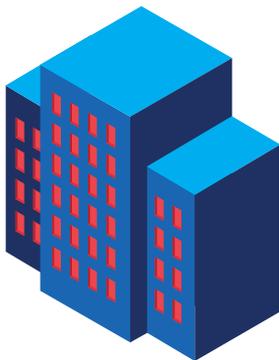
sued the appellant in conversion. The appellant appealed.

English law draws a distinction between wild and domestic animals – referred to as animals *ferae naturae* and animals *domitae naturae*. Fish are always animals *ferae naturae*. The respondent argued that these fish were in fact domestic fish, since they have never lived in the wild, are not free to escape from the lakes, and are not in any sense dangerous to man. The Court, however, held that it was not open to the court to alter the long-established classification of animals and to regard certain fish as animals *domitae naturae*.

An animal *domitae naturae* can be the subject of ownership just like an inanimate chattel, whereas live animals *ferae naturae* cannot. However, there may be a qualified property in animals *ferae naturae*. This can be acquired in one of three ways: (1) *per industriam* (through work); (2) *ratione impotentiae et loci* (by virtue of the animals being too young to leave the place of their birth); or (3) *ratione soli* and *ratione privilegii* (by virtue of the freehold ownership of the

land on which the animals are located or by virtue of a privilege granted by the crown relating to the land).

The respondent argued it had a property right in the animals *per industriam* – since it had established the fish in the lakes and that the right had not passed to the appellant on sale. The Court held that rights *per industriam* arose when animals were in a person’s possession, even if the animals were on someone else’s land. The right lasted as long as the animals remain in the person’s possession. Where the person asserting the right was not a landowner it was necessary for him to show he had “close control” over the animals. In this case, whether the respondent’s rights in the fish had arisen *ratione soli* or *per industriam*, they came to an end when the land was transferred to the appellant, since at that time, both the appellant’s ownership of the land on which the fish were located and its possession of the fish ceased. The appeal therefore succeeded. ■



Company Law

Digested by **Edoardo Lupi**



Re Castle Trust Direct Plc & Ors

[2020] EWHC 969 (Ch) (Trower J)
3 April 2020

Scheme of arrangement – Covid-19 – Remote meetings held by technological means with no physical meeting

The applicant companies asked the court to convene creditors' meetings to approve two related pairs of schemes of arrangement.

One of the applicants (CTC) was involved in each pair. The other company in each pair was a special purpose vehicle which had issued bonds, which had been resold to CTC and by CTC to investors. The purpose of the schemes was to facilitate the conversion of CTC into a fully regulated UK bank and to convert the bond debt into deposit debt owed by

CTC on economic terms that were the same as the bond debt, and at the same time to release and discharge the former bond debt as between the investors and CTC and between CTC and the bond issuers. The bank deposits would receive interest at the same rates and mature on the same date as the corresponding bonds. The overwhelming majority of the bond holders as scheme creditors were domiciled in the UK. The principal issue of practical concern was how to deal with the creditors' meetings during the currency of the Covid-19 pandemic. The applicants proposed to conduct the scheme meetings by telephone; to provide a telephone facility for scheme creditors to dial into the meeting in order to consult with one another at the meeting and to ask questions in relation to the schemes, having received opening addresses from the chairman and representatives of the companies; to provide a further telephone facility for the conduct of the meeting to be paused in order that a vote could be taken, including by creditors registering their votes by telephone and, as required, by voting to override any proxies previously submitted; and to resume the telephone meetings after the votes had been cast and tallied in order to declare the results.

Trower J was satisfied for the purposes of convening meetings of scheme creditors that the bond holders of each issuing company formed a singled class despite the range of maturity dates and interest rates of the bonds. Trower J also held that it was possible to hold the scheme meetings remotely by telephone and other technological means. The word "meeting" in the Companies Act 2006 Pt 26 did not require a physical meeting in the same place. In *Byng v London Life Association Ltd* [1990] Ch. 170, in relation to a company meeting, counsel had submitted that for there to be a meeting

at all everyone had to be in the same place, face to face; that submission had been rejected in *Byng*, on the basis that given modern technological advances, the same result could be achieved without all the members coming face to face: without being physically in the same room they could be electronically in each other's presence so as to hear and be heard and to see and be seen. Trower J said the same approach prevailed in relation to convening meetings. He noted that David Richards J had previously observed that the coming together required for the ordinary meaning of "meeting" could be achieved by the use of technology: see *Re Altitude Scaffolding Ltd* [2006] EWHC 1401 (Ch). The essential requirement was that the members of the class had a real opportunity to consult together on the scheme with a view to deciding whether it was in their common interest. It did not matter that they would not be able to see and be seen by telephone so long as they could hear and participate and in that way the necessary coming together and collective consultation could be achieved. The court at the sanction hearing would require to be satisfied about what had happened at the meetings and that the technology had worked and that any difficulties in participating at the meeting were not such as to invalidate the result on the basis that the necessary coming together had not been achieved. The court accordingly directed the holding of scheme meetings by telephone and other remote means. ■

[Barry Isaacs QC and Adam Al-Attar]



Company Law

Re Nord Anglia Education, Inc.

(FSD 235 of 2017) (Kawaley J) 17 March 2020

Section 238 Companies Law – Fair Value Appraisal

In these fair value appraisal proceedings under section 238 of the Cayman Islands Companies Law, the Court determined the fair value of the Company’s shares by blending the transaction price of \$32.50 per share with a value derived from an adjusted discounted cash flow valuation (“DCF”) of approximately \$44 per share, weighting them respectively 60:40.

Kawaley J rejected the Company’s primary case that the fair value of its shares was represented by the adjusted market price, namely, the closing price of the Company’s shares on the NYSE immediately prior to the merger announcement, rolled forward to the agreed valuation date. The Company’s expert calculated the adjusted market price to be \$30.45, below the transaction price itself. The Court considered the evidence of “efficiency” for the market of the Company’s shares to be insufficient to justify determining fair value based on the adjusted market price, and held that there was material non-public information unavailable to market participants that was relevant to the value of the shares, which needed to be taken into account. In the Court’s assessment of fair value, the adjusted market price was attributed no weight.

As regards the transaction price, the Court considered that the robustness of the deal process which led to the take private

transaction was diminished by certain features of the deal, including the existence of a controlling selling shareholder which had already agreed to sell to an affiliated bidder so as to leave the Court with “*anxious doubts about whether [the transaction price] can be relied upon (in part or in whole) without considering the more elaborate DCF analysis*”. However, the Court considered that these features did not deprive the transaction price of all commercial reality.

Turning then to the DCF analyses conducted by the experts, the Court rejected the Company expert’s primary view that no weight should be placed on a DCF analysis, but ultimately preferred his selection of DCF inputs to those used by the Dissenting Shareholders’ expert. Having made certain adjustments to the Company expert’s DCF, the Court derived a DCF share valuation of approximately \$44 per share. Finally, the Court considered that it had jurisdiction to blend two indicators of fair value and proceeded to do so, attributing the transaction price and the DCF value respectively a 60:40 weighting, which produced a final fair value figure significantly in excess of the both the adjusted market price and the transaction price. ■

[Edoardo Lupi]



Re Inmarsat Plc

[2020] EWHC 776 (Ch) (Norris J) 3 April 2020

Takeover schemes of arrangement – Costs – Opposition

The Court considered the costs position following the sanction of a takeover scheme of arrangement. Two parties had opposed the scheme, instructing leading counsel and lodging skeleton arguments setting out grounds of opposition. On the morning of the sanction hearing, however, opposition was withdrawn and both parties submitted that their objections had not touched upon the Court’s jurisdiction to sanction the scheme. The Company and the Bidco acquiring it submitted that these parties should pay their additional costs in responding to opposition that was ultimately abandoned, while the objectors submitted that the Company should pay their costs of raising grounds of opposition which, though not pursued, were raised for the assistance of the Court.

Norris J reviewed the authorities on costs in the context of schemes of arrangement, considering *Re Stronghold Insurance Company Ltd* [2018] EWHC 2909 (Ch) and *Re Ophir Energy plc* [2019] 1278 (Ch). The Judge endorsed certain comments made by Hildyard J and Snowden J on the costs position in schemes in those cases, but continued to state that: “*Neither of those experienced scheme judges would have intended their words to be taken as an encouragement to objection itself, or as providing a “tick box” list which (if met) would result in a particular order thereby introducing rigidity into the undoubted discretion as to costs (going beyond a “guideline”).*” Norris J considered that the primary consideration was not the identity of the objector but the nature and substance of the objection, where here the objections themselves were “*very thin gruel*”. Nevertheless, the Judge considered that this was not a case where the objectors should bear either the Company’s or Bidco’s costs, ultimately making no order as to costs. ■

In the matter of China CVS (Cayman Islands) Holding Corp; Family Mart China Holding Co. Ltd v Ting Chuan

(Cayman Islands Court of Appeal) (Moses JA, Martin JA, Rix JA) 3 April 2020

Arbitration clauses – just and equitable winding up petitions

The appeals were triggered by a just and equitable winding up petition presented by Family Mart China Holding Co. Ltd (“FMCH”) to wind-up China CVS (Cayman Islands) Holding Corp (“the Company”).

The underlying disputes between the shareholders, FMCH and Ting Chuan (Cayman Islands) Holding Corporation (“Ting Chuan”) were susceptible to arbitration.

The first instance Judge stayed the petition pursuant to section 4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) (“FAAEL”) until the complaints in the petition had been arbitrated. FMCH appealed this decision.

The key case relied on by the Judge and the Cayman Islands Court of Appeal (“the CICA”) was *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855. This concerned a complaint that the chairman of the Premier League, in breach of his fiduciary obligations, had preferred the interests of Portsmouth FC over those of Fulham FC in arranging the transfer of Peter Crouch to Spurs. The relevant rules contained an agreement to arbitrate. Fulham FC failed in its appeal against the Judge’s decision to stay the unfair prejudice petition. The CICA considered that once the court in the *Fulham* case had concluded that the

unfair prejudice petition did not involve making a winding up order, there was no reason not to submit the issue to arbitration. The CICA also considered *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575 in which the court required the parties to arbitrate the dispute as to the debt. The CICA concluded that both cases, in different contexts, decided that a decision as to whether a company should be wound up is a matter for the exclusive jurisdiction of the court.

The CICA’s approach to the arbitrability of the underlying issues was, in summary, as follows:

- (1) The question as to whether a company should be wound up on just and equitable grounds is a threshold question and not a question of relief because this is the “sole gateway” to obtaining the alternative relief in s.95(3) of the Companies Law (2018 Revision); *Tianrui (International) Holding Company Ltd v China Shansui Cement Group Ltd* (CICA 5 April 2019)). The Law does not include any separate statutory provision for members complaining of unfair prejudice.
- (2) The decision for the CICA was whether the distinction drawn between the grounds of the petition and the relief which may follow can be maintained where the grounds of the petition themselves require the court to decide whether a company should be wound up, not as a matter of relief, but as a gateway to relief.
- (3) The *Fulham* case and the cases that have followed this decision depend on the court’s ability to identify discrete substantive issues

which do not invoke the exclusive jurisdiction of the court to wind up a company. These cases envisage a two-stage process: a decision by an arbitrator and then a further decision of the court taking into account the decision of the arbitrator. Where the underlying issues are central and inextricably connected to the determination of the statutory question whether the company should be wound up on just and equitable grounds, the possibility of hiving off those issues becomes more difficult.

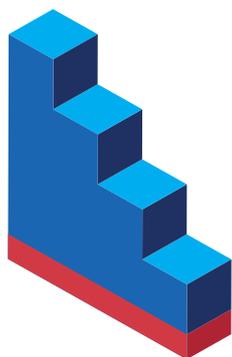
- (4) In this case there were no discrete issues that were not within the exclusive jurisdiction of the court; all the primary and secondary facts go to the resolution of the statutory threshold question as to whether it just and equitable the Company should be wound up.

In this context, the CICA decided that the issues raised in the petition were not arbitrable and, therefore, concluded that Ting Chuan was not entitled to a mandatory stay of the petition pursuant to s. 4 of the FAAEL because that statutory provision was “*inoperative*”.

In addition, as neither the Company nor the directors whose conduct formed part of the subject matter of the petition were parties to the SHA, the mandatory provisions of s.4 of the FAAEL could not have applied to the entirety of the petition. ■

[Hilary Stonefrost]





Corporate Insolvency

Digested by **Ryan Perkins**
& **Daniel Judd**



Colt Technology Services v SG Global Group SRL

[2020] EWHC Ch (Joanne Wicks QC)
3 June 2020

*MTIC fraud – illegality – injunctions
to restrain presentation of winding-up
petition*

The applicant (“A”) applied to restrain presentation of a winding-up petition in respect of unpaid invoices on the basis that the underlying debt was unenforceable. A submitted that the payment of the invoices to the respondent (“R”) (pursuant to an English contract) would cause A to commit an illegal act in the place of performance, which was Italy (applying *Re Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287). A argued that R was a buffer company in an MTIC fraud and, if A paid, it would be exposed to criminal liability in Italy for aiding/abetting R’s fraud; further, A was solvent, and the presentation of a petition would provide a collateral benefit to R in Italy, where the same parties had already been litigating the same issues for approximately 3 years. R denied the

fraud, and raised a new point, shortly before the hearing, that Italy was not the mandatory place of performance. Held, granting the application, that it was to be implied into the agreement that, pending the giving of a valid notice as to the place of payment under clause 4.6, payments were contractually required to be paid at R’s registered office, which was in Italy, such that the relevant question under the Ralli principle was whether such payment was illegal under Italian law; that there were a number of issues which warranted further investigation which meant that A had a properly arguable case that R had participated in an MTIC fraud; and there was a properly arguable illegality defence on the basis of the Italian expert law before the Court. Further, A was solvent. The Court would therefore grant an injunction. ■

[William Willson]



Rawbank Sarl v Travelex Banknotes Ltd

[2020] EWHC 1210 (Ch) (Birss J)
11 May 2020

Freezing orders – proposed restructuring – risk of dissipation

A customer of Travelex had placed an order for US\$60m of US dollar banknotes, for which it had paid advance. The order had not been satisfied by Travelex, which was facing financial difficulties. The customer issued proceedings against Travelex and applied for a freezing order. The customer initially claimed fraud, although by the time of the hearing the fraud claim had been abandoned and the customer was pursuing a claim for breach of contract. The court held that, although the customer clearly had a good arguable case on the contract claim, it had not established a relevant risk of dissipation. The fact that the customer had a strong claim did not itself mean that there was a risk of dissipation, as it depended on the reason why the claim had not been paid. The existence of a proposed restructuring process also did not demonstrate a relevant risk of dissipation, although the

existence of such a proposal did not mean that a freezing order could not be granted on other grounds. Nor was there any evidence of the type of restructuring transaction being contemplated which had justified the freezing order in *Felixstowe Dock Rwy Co v US Lines Co* [1989] QB 360. It was also not the function of a freezing order to give an unsecured creditor an effective veto right in relation to a proposed restructuring. Accordingly, there was no risk of dissipation and the application for the freezing order would be refused. However, because Travelex’s asset disclosure about its assets had been unsatisfactory, the court would make a “notification” order requiring notice to be given of any proposed transaction which reduce Travelex’s assets by more than £5 million. ■

[Tom Smith QC]



Christine Harper v London Borough of Camden Council; Shorts Gardens LLP v London Borough of Camden Council

[2020] 1001 (Ch) (Snowden J) 27 April 2020

Injunctions to restrain presentation of a winding up petition – landlords

The Court considered two applications to restrain presentation of a winding up petition, the petitions relating to unpaid liability orders in respect of National Non-Domestic Rates and certain unpaid costs orders. One of the grounds relied upon by both applicants was the COVID-19 pandemic. After the judgment had been reserved, on 23 April the Ministry of Housing, Communities and Local Government announced that the Government intended to bring forward emergency legislation relating to the use of statutory demands and the presentation of winding up petitions. The focus of the announcements appeared to be on retail and commercial

tenants facing demands from their landlords, but the applicants submitted that some parts of the announcement could be interpreted as indicating a far broader ban was intended. The judge dismissed this ground of the application (having already dismissed others relating to bona fide dispute and the existence of a cross claim). At the time of the judgment there was no draft legislation that had been published; and the scope of the intended restriction and how it would be implemented was unclear. Further, the judge held that it seemed overwhelmingly likely that the proposed legislation would be limited to companies in certain identified sectors of economic activity, and to relate to statutory demands based on claims of landlords for arrears of rent. Finally, it seemed from the announcement that some threshold test was envisaged where the reason that the company was unable to pay its debts was due to COVID-19. Taking all of these factors into account, the judge could see no reason to exercise his discretion in favour of the applicants based on the prospect of legislative measures that would be introduced to assist more deserving companies. ■

Re Carluccio's Ltd

[2020] EWHC 886 (Ch) (Snowden J)
13 April 2020

Employment contracts – administration expenses – super-priority – Coronavirus Job Retention Scheme

This case concerned the furloughing of employees by companies in administration in the context of COVID-19 pandemic. The government announced the Coronavirus Job Retention Scheme (“the Scheme”) in response to the crisis, under which employee wages would be for the most part underwritten while on furlough, and prevented from working for the company. In the insolvency context, the central question for these purposes is: when and how will employment contracts be adopted such that payments under them qualify for super-priority status in an administration?

Re Carluccio's was the first English case to consider the government’s Furlough Scheme. The Court of Appeal in *Re Debenhams*, upholding the judgment of Trower J, would later approve the judgment of Snowden J in *Re Carluccio's*.

A first concern was whether the Scheme was available to *administrators*, as

contrasted with a company’s board of directors, at all. Snowden J considered that it was available, noting the prospect of resuming business.

The administrators had written to employees offering to continue to employ them on varied terms of employment, so as to take advantage of the Scheme, and seeking their consent by return. The terms of the letter provided, among other things, that due to its financial position the company would only be able to pay employees if and when it received grant monies from the government under the Scheme. Otherwise it would be forced to terminate their employment. Almost all employees accepted the letter expressly, and Snowden J found those employment contracts to be validly varied.

Snowden J observed that the Scheme monies would be paid into company’s funds as income, and not under any trust. In order to pay furloughed employees, there had to be a basis for doing so given the order of priorities under insolvency legislation. Paragraph 66 of Schedule B1 contained a general basis for allowing payments outside the normal order priorities. But here, the Judge considered, the specific provisions of paragraph 99 would apply, which was

targeted specifically at the payment of employee wages. (This would be revisited by the Court of Appeal in *Re Debenhams Retail*, which identified paragraph 66 as the better source of authority.)

Paragraph 99(5) provides that the ‘adoption’ of a contract of employment would give sums payable thereunder ‘super-priority’, payable before even the administrators’ own remuneration. When was an employment contract adopted? The administrators were under time pressure since their 14-day grace period, during which their actions would not be taken to adopt an employment contract, was soon to run out.

Snowden J considered the leading case, in the House of Lords, of *Powdrill v Watson (Paramount Airways Ltd)* [1995] 2 AC 394. That provided that the mere continuation of employment did not necessarily mean that the employment contract had been adopted, and that some conduct would be required that amounted to an election to treat the continued contract of employment as giving rise to separate liabilities in the administration.

Snowden J considered the relevance of providing services. He rejected the suggestion that an employee would need to render services to the Company in

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order for their contract to be capable of adoption. The Judge referred to other benefits, even in normal times, of retaining an employee's status, such as keeping them from a competitor or retaining value in a business with a view to a possible sale.

If the administrators failed to terminate an employment contract within 14 days, would it be necessarily adopted? Snowden J confirmed that, in law, it would not. The contract could 'continue', subject to conduct of the administrator (such as the payment of wages) which was only explicable on the

basis that they were electing to treat the varied contract as giving rise to liabilities for super-priority.

In the context of the Scheme, however, an application by the administrators under the Scheme in respect of employees who had consented to variations in their employment contracts would amount to an adoption. The adoption of those contracts would, in turn, provide a basis for paying out grant monies (when received) under insolvency law.

As to those few employees who did not respond to the administrators' letter,

if nothing else happened, even after the 14-day grace period, those contracts would not be treated as adopted. They would merely continue, meaning the administrators were prevented from having to take the precaution of dismissing those employees. ■

[Felicity Toubé QC; Madeleine Jones]



Re Debenhams Retail Limited (In Administration)

[2020] EWCA Civ 600 (Sir Geoffrey Vos C, Bean, David Richards LLJ) 6 May 2020, [2020] EWHC 921 (Ch) (Trower J) 17 April 2020

Employment contracts – administration expenses – super-priority – Coronavirus Job Retention Scheme

In *Re Debenhams Retail*, the factual position was very similar to that described in *Re Carluccio's* (above), and engaged the same statutory provisions under Schedule B1 to the Insolvency Act 1986. The administrators sought a direction that, if they took no action other than to pay amounts to furloughed employees that would be reimbursed by the Scheme, the administrators would not be taken to have adopted the employment contracts of those furloughed employees. Otherwise, the administrators were concerned that they have no alternative but to dismiss those employees whose contracts would be adopted.

There were some critical points of distinction, as Trower J identified at first instance. Here, the employees had already been placed on furlough by the company, prior to going into administration. At the start of the administration, the consent of employees to a variation in their terms of employment (and wages) was then invited, the significant majority agreeing. It was accepted the administrators were causing the company to make an application under the Scheme and to make payment of 80% of wages under the employment contracts.

The administrators took issue with Snowden J's judgment in *Re Carluccio's* that either action would amount to an 'adoption' of employee contracts. It was not disputed that these were positive actions which presupposed that the contracts of the furloughed employees continued in existence. But the test applied by Snowden J and evident in *Paramount*, it was argued, went further. The actions had to objectively evidence an intention to treat the payments as eligible for super-priority under insolvency legislation. In applying that test to the facts,

this is not what the administrators were objectively seeking to do, given (for example) that adoption of the contracts would thwart their attempts to rescue to the company. It was possible to explain their actions without an election to treat those sums as qualifying for super-priority.

The Court of Appeal, for reasons that did not essentially differ from those of Trower J at first instance, rejected those submissions. The meaning of 'adoption', in light of *Paramount*, could be interpreted in light of policy considerations such as rescue culture, but this could only go so far. The approach did not require the administrator to evidence an election either way. David Richards LJ held that the question was instead one of law: is the conduct of the administrator such that he must be taken to have to accept that the relevant amounts falling due under the employment contract enjoy super-priority? The issue was therefore whether the administrators have continued the employment of the furloughed employees.

A number of considerations indicated a positive answer. One was that wages and salaries, up to the Scheme limit, would be paid under the employment contracts. A further reason was that all furloughed employees would remain bound by their various terms of employment.

It is worth mentioning two countervailing arguments of the administrators of particular interest. A first was that, as mentioned in *Re Carluccio's*, employees would not be providing services to the company. While a significant factor, it was not sufficient by itself to prevent an adoption from taking place.

A second argument was that, while furloughed, employee remuneration was limited to that covered by the Scheme. The effect was therefore neutral as regards the administration estate, and the company operated as a conduit for government funds. The Court of Appeal rejected this submission. The legal analysis was clear. The government had chosen a mechanism which routed funds via the company, and if that company was in administration, its ability to pay sums out to employees as

an expense would in turn depend on whether the employment contract was adopted, applying the test in *Paramount*.

While there may be good reasons of policy for excluding the implementation of the Scheme from the scope of ‘adoption’, this could not be accommodated under the law as it stands.

This meant that any remuneration due under an employment contract, which is not covered by the Scheme, qualifies for super-priority. That includes amounts such as holiday pay and sick pay.

David Richards LJ added that paragraph 66 of Schedule B1, which permitted payments outside the normal order of

priorities where this was considered likely to achieve the purpose of administration, was the more appropriate source of authority for the payments from the company to the employees. It may also be possible to derive authority from that paragraph, as noted by Trower J at first instance. ■

[Tom Smith QC; Richard Fisher QC]



Re Altair Asia Investments Limited

Limited (FSD No. 200 of 2019) (Mr Justice Parker, Grand Court of the Cayman Islands) 16 March 2020

Winding up petitions – adjournment pending foreign insolvency proceedings – risk of conflicting judgments – redemption events

Safe Castle Limited, a BVI company (the Petitioner), sought to wind up Altair Asia Investments Limited (the Company) in the Cayman Islands. The grounds for the petition included that the Petitioner was a redemption creditor, and was unable to pay its debts.

The Petitioner had invested in the Company and was allotted shares. The terms of the investment provided for a series of ‘extraordinary redemption events’ (EREs), following which the petitioner could redeem its shares in the Company. The triggering events concerned the price of shares on the Hong Kong Stock Exchange. The Petitioner relied on two such events, claiming that it had thereby become a creditor of the Company after giving appropriate notice to the Company. Settlement negotiations subsequently took place between the parties, and a Waiver Letter was entered into that was governed by Cayman Law.

The effect of that letter was disputed. The Petitioner’s position was that conditions precedent in the letter had not been complied with, such that the underlying debts had not been compromised and remained due. Accordingly the Company was insolvent and should be wound up. The Company disagreed. While some of the conditions precedent to the waiver had been complied with late, as a matter of law the Petitioner had waived the right to rely on any delay, the payments having been accepted. In any event, the Company added, there was a bona fide dispute as to whether the redemption requests had been validly made in the first place, such that the petition should be dismissed.

The Petitioner had already commenced parallel insolvency proceedings in Hong Kong, and these engaged similar issues. The Petitioner had presented a bankruptcy petition against Mr Frank Dominick, a director of the Company, who was domiciled

in Hong Kong. It also presented a winding up petition in Hong Kong against another company of which Mr Dominick was a director, China Silver Asset Management (Hong Kong) Ltd. Both were presented on the basis that they were guarantors of the redemption debts. The petitions had been heard by the Hong Kong Court in September 2019, and judgment had been reserved. An issue in those proceedings duly concerned the effect of the Waiver Letter on whether or not the redemption debts were due. The Company argued that the Cayman winding up petition against the Company should be adjourned, since the Hong Kong proceedings would cover very similar ground to the Cayman petition. The Petitioner by contrast sought an immediate winding up order in the Cayman Islands. The Company was not a party to the Hong Kong proceedings.

The judge referred to the desirability of granting a stay in order to avoid conflicting judgments, and decided that it was appropriate to grant an adjournment in the light of the pending Hong Kong proceedings. It was important that a critical issue in those proceedings was equally whether the Company was liable to the Petitioner on the basis of the redemption debts and the Waiver Letter. Even though the Hong Kong petitions were in respect of different persons and entities, and would not bind the parties by *res judicata* or issue estoppel, the Petitioner was relying on the same factual matters as those raised before the Cayman Court in order to establish a debt that had in turn been guaranteed. In view of the risk of conflicting judgments, and in the circumstances, the judge exercised his discretion to adjourn the petition until after judgment by the Hong Kong Court. The Court also indicated, without deciding, that the redemption debt was genuinely disputed on the facts. ■

[Jeremy Goldring QC; Tom Smith QC]



Corporate Insolvency

Lehman Brothers Australia Ltd (In Liquidation) v MacNamara

[2020] EWCA Civ 321 (Patten, David Richards, Newey LLJ) 4 March 2020

Duties of administrators – Ex p James and paragraph 74 – Mistaken proofs of debt

This is another case about two Lehman group companies. Lehman Brothers Australia Limited (in liquidation) (“LBA”) was the creditor, and Lehman Brothers International (Europe) (“LBIE”) was the company. LBA appealed against the rejection of its proof of debt in the administration of LBIE.

LBA’s proof of debt had been agreed in accordance with a claims determination deed (“CDD”) entered into between LBA and LBIE by their respective office-holders on 12 March 2014. A number of such agreements had been entered into between the parties, and their purpose was to determine more easily the amounts due as between LBA and LBIE, in circumstances where their intercompany dealings were complicated. The proof of debt in question was in the sum of around £23 million. That sum had been duly paid.

Due to an error in reconciling the data on the mutual claims of LBA and LBIE – a bond had been denominated in the wrong currency – the proof had been understated by approximately £1.67 million. The error was not noticed until early August 2016. The LBA liquidators, the creditor, requested that the amount of LBA’s provable claim be varied. The administrators of LBIE accepted that an error had been made, but declined to vary the proof. Both parties accepted that the remedy of rectification was unavailable to LBA.

LBA then sought a direction to increase its proof of debt to the correct figure. It sought this under the court’s inherent jurisdiction to supervise its officers, the principle in *Ex parte James* (1874) LR 9 Ch App 609, or under paragraph 74 of

Schedule B1 to the Insolvency Act 1986 (“Schedule B1”).

At first instance, Hildyard J considered the principle in *Ex p James* in detail, and considered that the correct test was one of ‘unconscionability’ if an office-holder’s conduct is to be challenged. While the Court would give effect to the parties’ obligations, it was accepted that rectification was not available to vary them. The Judge expressed doubt at whether *Ex p James* could be used to override the parties’ contractual commitments on the basis of ‘unfairness’ or ‘unconscionability’. Even if this route were open to the Court, the Judge would not exercise any such jurisdiction under *Ex p James*.

The Court of Appeal disagreed. The Court also considered the rule in *Ex p James*, which concerned whether a trustee in bankruptcy should retain money paid to it under a mistake. David Richards LJ noted that the rule was objective, and had been generalised to one of fair dealing applying to the court’s officers. It prevented an officer of the Court from enforcing their strict legal rights where to do so would be unfair. The authorities clearly favoured characterising the test for the rule in *Ex p James* as one of unfairness, and not one of unconscionability, for which there was only slender support in the cases. Nor was ‘fairness’ an unruly horse. The central principle could be formulated thus: the Court will not permit its officers to act in a way that it would be clearly wrong for the Court itself to act. That is to be judged by the standard of the right-thinking person, representing the current view of society.

A second question concerned paragraph 74 of Schedule B1. This empowers the Court to grant relief where an administrator acts or proposes to act so as to ‘unfairly harm’ the interests of the applicant, either alone or in common with other members or creditors. LBA claimed that the administrators of LBIE would unfairly harm their interests by refusing to admit the proof. Where an administrator was acting in accordance

with his statutory obligations, there would be no question of causing *unfair* harm. However, where the administrator was exercising his discretion, but in a manner which unfairly harms a creditor, there was no reason why the language of paragraph 74, or its evidence purpose, should prevent the court granting relief. The Court of Appeal rejected arguments that the paragraph 74 jurisdiction was restricted to cases where the administrator’s act could not be justified by reference to the creditors’ interests, and/or was discriminatory in such effect.

Taking *Ex p James* and paragraph 74 together, there was no authority for the proposition that the either basis could not be used to prevent an administrator from relying on their rights under a contract. Indeed, in all cases under *Ex p James* (and some cases under paragraph 74), the rule will be invoked for that very purpose.

David Richards LJ then turned to the facts. In the absence of significant contrary indications, no legitimate reason existed for the administrators not to correct the common mistake admittedly made by them and by LBA, and no statutory purpose was served by not correcting the error. Leaving matters as they stood would deprive LBA of its true entitlement. Importantly, the mistake here was a *common* one, and correcting it would not undermine the purpose or finality of the CDD which sought to determine claims finally. It was in the very nature of *Ex p James* and the drafting of paragraph 74 that they should provide extra-contractual restraints on the actions of administrators. ■

[Tom Smith QC; Daniel Bayfield QC; Ryan Perkins]



Stephen John Hunt v Transworld Payment Solutions UK Limited

[2020] SC (Bda) 14 Com (Supreme Court of Bermuda)
6 March 2020

Cross-border insolvency – Recognition – Legitimate purpose and investigatory powers

The Company, Transworld Payment Solutions UK Limited (“Transworld UK”), had been wound up compulsorily in England and Wales in September 2014, and Mr Stephen Hunt was appointed liquidator. The Supreme Court of Bermuda recognised the liquidation at common law by an order it made – ex parte – in July 2019. Another “Transworld” company, incorporated in Bermuda, Transworld Payment Solutions Limited (“TWPS”), sought to discharge the ex parte order made in July 2019.

The main ground of challenge related to the use of Mr Hunt’s investigatory powers. The principal purpose of recognition here was to facilitate the use by Mr Hunt of powers of the Bermudian Court for information gathering. However, TWPS submitted that the Bermudian Court would be bound to refuse such relief, since the Mr Hunt had already determined he would bring certain claims against the Company.

The Court agreed. The sole purpose of recognition was to further investigate claims against the First Curaçao International Bank (“FCIB”), involved in an ‘MTIC’ (Missing Trade Intra-Community) fraud. These were claims that Mr Hunt already intended to bring. Indeed, Mr Hunt had already settled draft pleadings to that effect.

Attempts by Mr Hunt to support the recognition by reference to matters requiring investigation were dismissed summarily as unable to give rise to any claim, already available to Mr Hunt given his powers as English liquidator, or simply mistaken in fact.

Referring to Lord Sumption’s judgment in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675, the Judge agreed that there was a specific restriction on the use of common law powers of assistance for obtaining material to use in actual or anticipated foreign litigation. An office-holder does not stand in any privileged position and must use ordinary rules of procedure. Here, recognition would not serve a useful purpose in aid of a legitimate object. The recognition order was therefore discharged.

TWPS relied on two additional grounds for discharging the recognition order. However, the Judge noted that, if the order otherwise served a legitimate purpose, he would not have discharged the order. One ground was that Mr Hunt’s information requests were barred by settlement terms entered into between the Company’s liquidator and FCIB, pending before the Curaçao courts. The Judge decided not to express a view on the effect of those agreements.

The other ground was a breach by the liquidator of his duty of full and frank disclosure. Mr Hunt had failed to disclose detailed information requests already made in England. He was also in a clear position of conflict of interest, given his role as a liquidator of other companies with claims into Company (which claims he had admitted), and his unusually high remuneration as the Company’s liquidator, which had been approved by a creditor under the control of an associate of Mr Hunt. While accepting that the court had not been made aware of all the circumstances of Mr Hunt’s appointment, in the circumstances, the Judge would have refused to discharge the recognition order on this ground if the recognition order were otherwise granted for a legitimate purpose. ■

[Tom Smith QC]



Premier Oil Plc v Fund III Investment 1 (Cayman) Ltd

[2020] CSOH 39 (Lady Wolffe) 29 April 2020

Challenges to schemes of arrangement – Jurisdiction – Voting rights – Insolvency comparator – Powers of attorney

Two Scottish companies, one public and one private, sought sanction of a scheme of arrangement under Part 26 of the Companies Act 2006 (“the Schemes”) in order to extend the maturity debt of the group’s debt, as well as to effect an acquisition of oil and gas-producing assets. The Group had already undergone a restructuring by way of schemes of arrangement in 2017.

In Scottish practice, there is no prior convening hearing. So, the court considered all questions at the sanction hearing, but with the benefit of a report prepared by the ‘reporter’, a court-appointed official who enquires into the proposed scheme of arrangement. The largest single creditor of the Companies, ARCM, opposed an order for sanction. Unusually, ARCM held a short position of the Group’s stock. It nevertheless challenged the Schemes on almost every conceivable basis, and at every stage of the Buckley test.

A number of objections centred on what was permissible under Part 26, some of which are considered further below. Other concerns included the nature of voting rights, the use of an insolvency comparator, the alleged inadequacy of

the explanatory statement, ARCM’s short position and statements made in Scheme Meetings about ARCM, ARCM’s alleged exclusion from prior negotiations, a suggestion that the Schemes were not fair given the decline in oil and gas prices, ARCM’s special interests, and a variety of class issues. The court sanctioned the arrangement, noting the breadth of the variety of arrangements which could be sanctioned and the fairness of the Schemes as a whole. Four objections of particular interest, which were ultimately rejected, are set out below.

One jurisdictional point concerned the scope of the court’s power to sanction “a compromise or arrangement” under section 899 of the Companies Act 2006. An arrangement was broader than a

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compromise. But did it extend to non-pecuniary rights, such as voting rights? The Judge began by noting that an ‘arrangement’ must deal with the rights of a company and its creditors inter se as debtor and creditor. Here he concluded that the voting rights were incidents of the debts owed in such a capacity, and therefore the proposed amendments to voting rights were permissible under Part 26 as within the scope of an ‘arrangement’. Even though they had been varied by previous schemes of arrangement, the Judge regarded the voting rights in question as simply contractual rights. The acquisitions involved in this case were novel, but novelty was not itself a jurisdictional bar.

Voting rights gave rise to a separate objection, namely ARCM’s contention that the Schemes would remove its de facto blocking veto. The Judge applied the accepted distinction between rights and interests, and considered that the veto was merely a function of the quantum of the debt held within each debt instrument. He added that the practical ability to block is not itself a legal right in any meaningful sense, and was no more than an interest.

Another challenge concerned the comparator to be used in considering what would happen absent the Schemes. The problem facing the Group was the debt wall, with the totality of the Scheme facilities falling due within 14 months.

It was common ground that absent the Schemes, the Scheme Companies would likely be unable to refinance before maturity. The comparator chosen (for example, a future liquidation) was relevant to determining whether creditors were in the same class, and whether they could consult together with a view to their common interest. The parties divided over the definition of ‘insolvency’. ARCM argued that the test was the same as section 123 of the Insolvency Act 1986. The Companies, however, argued for a more flexible approach. By reference to decided cases, the comparator might be a ‘real likelihood’ or ‘real risk’ of insolvency, or indeed merely that the Companies might not repay certain facilities. The Judge accepted the Companies’ view. There was no support in the case law for the formal approach put forward by ARCM. The fact that the Group may not satisfy the technical definition of cash flow or balance sheet insolvency for the purpose of section 123 of the Insolvency Act 1986 did not preclude the use by the Group of an insolvency comparator in identifying the correct class composition. Even so, the Judge considered that an insolvent comparator was correct on the facts, given the magnitude of the debt to fall due, and the fact it would fall due on the same date.

The Schemes were also challenged based on their provision for constituting

powers of attorney over the Scheme Creditors in favour of the Companies, such that the Scheme Companies could validly sign deeds and other agreements on the Scheme Creditors’ behalf. ARCM objected that under English law a scheme of arrangement with such a clause was not a deed granted by a donor of the power, here the Scheme Creditors, as would be required by section 1 of the Powers of Attorney Act 1971; the Schemes were not deeds. However, that challenge was rejected. A scheme of arrangement could have this effect. Relying on an opinion prepared by Daniel Bayfield QC, the Judge observed that a scheme of arrangement has binding force according to its terms not as a matter of contract, but by statute. That meant there was no need for any additional formalities required under the general law. For example, there was no requirement for offer and acceptance, and by parity of reasoning, no there was no need to comply with section 1 of the 1971 Act. The Judge noted that, while not determinative of the point, such power of attorney clauses featured in a number of other schemes of arrangement which had been sanctioned, including reported cases. ■

Re London Oil & Gas Limited

[2020] EWHC 35 (Ch) (ICC Judge Jones) 14 January 2020; [2020] EWHC 482 (Ch) (ICC Judge Jones) 10 March 2020

Validity of out of court appointment of administrators – Standing

London Capital & Finance plc (‘LCF’), which issued so-called “mini-bonds” to investors, entered administration in January 2019 after the FCA effectively required it to cease trading on the grounds that its marketing material was misleading. LCF on-lent moneys it raised from investors, and its largest borrower was London Oil & Gas Limited (‘LOG’). LOG was placed into administration by its directors in March 2019.

Mr Barker was a director of LOG. In October 2019, following the issue of an application against him by the LOG administrators under section 236 of the Insolvency Act 1986, Mr Barker issued an application for a declaration that the appointment of the LOG administrators was invalid and an order that they be removed from office. The application was opposed by the LOG administrators and by LCF, which issued an application for an administration order to have retrospective effect from the date of the original out of court appointment.

At the first hearing, ICC Judge Jones decided that he should first determine the administration application made by LCF. Mr Barker accepted that LOG should be in administration but opposed the re-appointment of the LOG administrators with retrospective effect.

ICC Judge Jones held that an administration order should be made which, in the event that the LOG administrators had been validly appointed out of court, required that their appointment be terminated. He further held that LOG was, or was likely to become, unable to pay its debts as at March 2019 when the LOG administrators were appointed and that an administration order would have been reasonably likely to achieve the purpose of the administration as at that date. However, he declined to give the administration retrospective effect at that time, holding that LCF or any other party with a legitimate interest could apply at a later date if that were necessary. The issues raised by Mr Barker’s application, including whether he had standing to pursue it, were adjourned to a further hearing.

At the adjourned hearing, Mr Barker indicated that he was no longer pursuing his application, which was dismissed. The Judge identified that the grounds on which Mr Barker

pursued his application fell into two categories: (i) those which concerned alleged procedural defects in the appointment of the LOG administrators; and (ii) those which concerned alleged serious misconduct on the part of the LOG administrators.

It was accepted by Mr Barker's counsel that the allegations of misconduct would not have been pursued in any event. The Judge further held that Mr Barker had no standing to make the application because he had no legitimate interest to pursue his application, which has been made for the purpose of opposing an application made against him under section 236 of the Insolvency Act 1986. The Judge ordered that Mr Barker should

pay the LOG administrators' costs and that those costs arising from the allegations of misconduct made by Mr Barker should be assessed on the indemnity basis. ■

[Barry Isaacs QC; Andrew Shaw]



Personal Insolvency

Digested by **Lottie Pyper**



Edgeworth Capital (Luxembourg) S.A.R.L., The Libyan Investment Authority v Glenn Maud

[2020] EWHC 974 (Ch) (Snowden J)
24 April 2020

Abuse of process – Bankruptcy orders – Bankruptcy proceedings – Classes of creditors – Intention

Two bankruptcy petitions had been presented against the debtor, Mr Glenn Maud. The first was presented by The Libyan Investment Authority ('LIA') based on an undisputed debt of €22.5m (the 'LIA Petition'). The second was presented by Edgeworth Capital (Luxembourg) S.A.R.L. ('Edgeworth') based on debts of €42.6m and €40m,

which Mr Maud contended had been extinguished prior to the hearing (the 'Edgeworth Petition'). The hearing was also attended by Nabarro Ventures S.a.r.l. ('Nabarro') an opposing creditor owed a debt of €65m. Nabarro was connected to Mr Maud via his family.

The LIA Petition was considered first, as it was presented first in time and the debt was undisputed. On the date of the hearing, LIA was willing to consent to a short adjournment requested by Mr Maud, in order to give him a final chance to pay. However, by the time that judgment was handed down, the time for the adjournment had elapsed and the rationale for the adjournment had fallen away. Therefore, Snowden J proceeded on the basis that both LIA and Edgeworth supported the making of an immediate bankruptcy order at the time of the judgment.

When considering the views of creditors with differing views, Snowden J held that the starting point is to look at the value of the debts of the creditors on each side of the disagreement. The court's role was not limited to simple mathematics, and it would also look at the reasons advanced by the creditors and assess the weight to be attributed to them. However, it was not for the court to impose its own view of the commercial merits or best interests of the class. Performing this task, the starting point was that Nabarro was in the minority both in number and value, since both Edgeworth and LIA now supported the making of a bankruptcy order.

Two objections were raised as to Edgeworth's ability to support the LIA Petition or pursue its own. First, it was suggested that each of Edgeworth's

debts had been extinguished by the time of the hearing, such that it did not have standing as a creditor. Snowden J rejected the arguments advanced in this respect. Second, there was an ongoing issue as to whether Edgeworth had an any improper motive in seeking to make Mr Maud bankrupt, such that its petition was an abuse of process.

Edgeworth accepted that its primary motivation in presenting the Edgeworth Petition had not been to recover its debts. Snowden J noted that even where the petitioning creditor's primary motive was not to seek repayment of its debts, the petition would not be an abuse of process unless it was shown that the petitioner had no real purpose of seeking repayment of the debts through a distribution of the debtor's assets. That test had not been met in this case. Edgeworth had a further collateral purpose in seeking a bankruptcy order other than repayment of its debts, namely that Mr Maud would be removed from his current position of influence over certain Spanish insolvency proceedings if made bankrupt. However, this collateral purpose was also not relevant, as it had not been shown that the making of a bankruptcy order would be detrimental to Mr Maud's creditors.

Mr Maud and the opposing creditor further opposed the making of a bankruptcy order, arguing that that it would serve no useful purpose since Mr Maud had no assets. Snowden J identified the key principles for assessing this as follows: (1) the court has a discretion not to make a bankruptcy order if to do so would be completely pointless; (2) the relevant test was whether there is no possibility of any benefit to creditors; (3) this impossibility of benefit must be

obvious at the petition hearing without any detailed investigations; (4) the concept of benefit includes a reasonable desire on behalf of the creditors that there should be an investigation by the trustee in bankruptcy; and (5) the court will not simply accept uncorroborated statements by the debtors that he has no assets or a bankruptcy order will serve no useful purpose.

Applying these principles, Snowden J was not satisfied that a bankruptcy order would be pointless in this case.

In light of this analysis, the clear weight of votes and reasons given inexorably lead to the conclusion that a bankruptcy order should now be made on the LIA Petition. For the purpose of costs, Snowden J held that, but for the LIA Petition having been presented first

in time, he would also have made a bankruptcy order on the Edgeworth Petition. ■

[Stephen Robins]



Islandsbanki HF and Others v Mr Kevin Stanford

[2020] EWCA Civ 480 (King, Henderson, Asplin LLJ) 2 April 2020

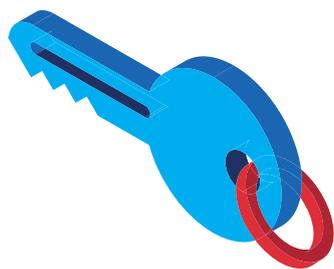
Bankruptcy petitions – Enforcement – Execution – Registration – Registration of Foreign judgments – Writs of control

The Debtor, Mr Kevin Stanford, was adjudged bankrupt on 22 August 2017 on a petition presented by HMRC (the ‘HMRC Petition’). Islandsbanki HF (‘IB’) appealed that decision, arguing that the Debtor should have been made bankrupt on their petition (the ‘IB Petition’) instead. The IB Petition was presented some four months before the HMRC Petition therefore would afford different powers to the trustees in bankruptcy in respect of certain transactions.

The IB Petition was based on section 268(1)(b) of the Insolvency Act 1986 (the ‘1986 Act’). In 2013 IB obtained an Icelandic judgment against Mr Stanford in excess of £1.5 million. It subsequently applied to register the Icelandic judgment in England and Wales under the Lugano Convention on 16 March

2016 (the ‘Registration Order’). The Registration Order gave Mr Stanford a month to appeal. However, within that time period IB commenced enforcement proceedings by obtaining a Writ of Control on 30 March 2016 and subsequently seeking to enforce it. The Writ of Control was returned “unsatisfied in whole” on 14 February 2017 and the IB Petition presented thereafter. IB accepted that the Writ of Control had been sought prematurely, as the time for appealing the Registration Order had not yet expired.

Having considered the relevant provisions, the Court of Appeal held that execution of the Icelandic judgment was not permitted under the Lugano Convention during the time when the Registration Order could be appealed, and that the Court’s powers under the CPR could not be relied on to side step this result. In these circumstances, the steps taken by IB could not be regarded as “execution” of the Icelandic judgment for the purpose of section 268(1)(b), as the defect in execution was fundamental and not a mere technicality. Since the Writ of Control has been unlawfully issued, it was liable to be set aside at any time. ■



Property and Trusts

Digested by Riz Mokal



In the estate of Kingsley

[2020] EWCA Civ 297 (Ch) (Patten and Moylan LJJ and Mann J) 3 March 2020

Trust of land – Whether court may fix price for sale of interest in land without land being marketed – Whether it may only do so if “low” or “no perceptible” risk of undervaluation

A brother (‘Roger’) and sister (‘Sally’) farmed land which was beneficially owned by them in equal shares. Upon her brother’s death, Sally remained in occupation of the land and continued a farming business. Roger’s executors, including his widow (‘Karim’), brought proceedings under (among other things) the Trusts of Land and Appointment of

Trustees Act 1996 (‘the Act’) for an order of sale of the land. The first instance Judge made the order and, having received and considered valuation evidence from both sides, determined the value of the estate’s share of the land at which it might be acquired by Sally without first having to be exposed to the market. He held that this approach would meet the purpose of the trust of enabling the land to continue to be farmed by members of the family while meeting Roger’s apparent concern to provide financial security for his wife and daughter. The executors appealed principally on the basis that the order should have been for sale in the open market with Sally being free to bid alongside others.

The Court of Appeal decided two main points. Firstly, it was common ground on the basis of the Court of Appeal’s decision in *Bagum v Hafiz* [2016] Ch 241 (‘*Bagum*’) that the Act does not give the court jurisdiction to order one beneficiary to sell their beneficial interest to another. The executors claimed that the Judge’s order had just that result. Mann J, with whom the other judges agreed, held that there was nothing in this point since the order technically and in substance was for the sale of the entire legal and beneficial interest, and was certainly one that the court could make under the Act.

Secondly, the executors argued that the court could only order sale to a beneficiary at a price it had assessed – as opposed to ordering an open-market sale with liberty for the beneficiary to bid – if there was only a “low” or “no perceptible”

risk that the assessed price might be lower than a market sale price (‘the undervaluation risk threshold’). Mann J rejected this argument on the basis of dicta in *Bagum* that the Act gave the court very broad discretion (by section 15) to make an order (under section 14) which might (relevantly) permit trustees to do what they could not do without the court’s permission. This discretion was not constrained by any undervaluation risk threshold of the sort for which the executors contended. Instead, the risk of such undervaluation was one of the factors to which the court would have regard in exercising its discretion. Mann J further held that while Article 1 of the First Protocol to the European Convention on Human Rights might be engaged where the court ordered sale for a price that fell below full value so that there was a deprivation of possession for the purposes of the Article, compliance with section 15 of the Act would generally satisfy the Article’s requirements. The European Court’s jurisprudence showed that reimbursement of full market value was not a necessary condition for compliance with the Article. In any case on the fact, there was no deprivation of possessions since Karim only had a purely financial interest in the property (as the first instance Judge had found) for which she would receive value as determined by the court in a proper and fair manner. ■



Retail CVAs: *Taking Stock*



TOM SMITH QC



MADLINE JONES

Since the original JJB Sports CVA back in 2009, CVAs in respect of retailers and similar companies have become an increasingly prominent feature of the insolvency landscape. The continuing stress in the retail sector, coupled with the continuing fallout from the coronavirus pandemic, means that this is very likely to continue. Typically, these CVAs have followed a common model: grouping landlords into different categories with varying degree of rent reduction depending on the viability of the premises, whilst leaving trade creditors unimpaired. The recent decisions in *Debenhams*¹ and *Instant Cash Loans*² mean that is now a good time to take stock of the extent to which this model has emerged unscathed.

Debenhams

Debenhams involved a root and branch challenge brought by a number of dissentient landlords to the Debenhams CVA. The majority of the arguments advanced by the landlords were rejected, and the challenge failed. As such, the Court upheld the validity of the basic CVA retail model. In particular, the decision confirms that:

- landlords are “creditors” for the purposes of future rent, and so such claims can be compromised under a CVA. This is notwithstanding the fact that claims for future rent might not be provable in an administration or liquidation.
- there is nothing per se which is unfair in the rent due to landlords under leases being reduced.
- a CVA which treats different categories of creditor differently is also not necessarily unfair provided that the differential treatment can be justified.

The first point is perhaps unsurprising. However, the second and third points deserve further comment.

Reduction of future rent

So far as the second point is concerned, the dissentient landlords argued that a CVA which sought to reduce the rent payable to landlords for future occupation of the premises was by definition unfair. The usual retail CVA model has sought to deal with this point by typically providing that, where a landlord is in one of the impaired categories (i.e. where the rent is reduced), then it will have an option to recover the premises if it so wishes – a so-called break right. Accordingly, such a landlord is not bound to continuing making the premises available at the reduced rent if it does not wish to do so.

The Debenhams CVA contained such a break right for the impaired landlords. Importantly, the Court held that the existence of this break right meant that it was not unfair for the CVA to reduce the future rent due to landlords³. However, there was a further point: this is because, as is typically the case, the break right provision provided for a period of notice to be given by the relevant landlord to the company. In the Debenhams’ CVA, this was a period of 60 days.

The dissentient landlords argued that the CVA was unfair because it did not provide for the landlord to receive the contractual rent during this period of time. This argument was, however, also rejected by the Judge. Provided that the landlord received at least the market rent during this notice period, and that it could be said that the contractual rent was being interfered with to the minimum extent necessary in order to achieve the purpose of the CVA, then this would not be unfair.

So, the judgment helpfully upholds the basic CVA model of comprising a landlord’s right to future rent, but giving the landlord a break right to recover the premises if he so wishes. However, it does emphasise the importance of giving careful attention to the notice period attaching to the break right and the treatment of rent during that period.

Different treatment of creditors

Another key aspect of the retail CVA model is the differential treatment of different categories of creditors – both different categories of landlords, and as between landlords and other creditors such as suppliers and employees. The Debenhams CVA helpfully confirms that this approach is not per se unfair, provided that there is a proper justification for the differential treatment. Moreover, it confirms that a proper justification for such differential treatment may be a legitimate concern that, if suppliers and employees were impaired, they might cease to provide future supply and services thereby threatening the continuity of the business.

A potential caveat to this, however, is that the reductions made to the rent payable to landlords should not be to a level below market rent. The Court said that “[t]here would have been ‘unfairness’ if landlords were expected to take reductions in rent to below the market value of the premises concerned”⁴. There was no evidence in Debenhams that the reduction in rent did go below market value. However, this comment is to be seen in the context of the argument being run by the company in Debenhams in relation to horizontal fairness, namely, that the purpose of the CVA was to deal with an “over-rented” lease portfolio and

1. [2020] BCC 9.

2. [2019] EWHC 2795 (Ch).

3. Para. 75.

4. Para. 110.

5. Para. 71.

6. Para. 100(e).

7. Para. 74.

8. Paras. 23–25.

to return the leases to market terms, and so in line with suppliers who were also supplying on market terms. It does not necessarily follow that in every case the rent cannot be reduced below market rent; it will depend on the facts of the case, the rationale for different treatment of different creditors, the break rights given and the reason for rent reduction (e.g. to deal with an “over-rented” portfolio or, alternatively, to temporarily reduce the rents to a level which is commercially sustainable for the particular company).

Right to forfeit

One of the grounds of challenge advanced by the landlords was that a CVA could not validly alter a landlord’s right to forfeit a lease. This ground of challenge was upheld by the court.

The context to this issue is that a typical lease provides for the landlord to have a right to forfeit the lease for breach of covenant (including for example a failure to pay the rent) but also in the event of the tenant becoming insolvent or being subject to an insolvency process. The Court in *Debenhams* confirmed that there is no bar on a CVA indirectly restricting the landlord’s right to forfeit for breach of covenant, because there is no bar on a CVA varying the terms of the covenants themselves since these are essentially contractual in nature⁶.

However, the Court held that a CVA could not directly affect the proprietary right to forfeit on insolvency grounds, since this formed part of the conditions on which the lease was granted to the tenant.

It is fair to say that this conclusion gives rise to a fine distinction in that a CVA can affect the landlord’s right to forfeit in relation to non-payment by varying the underlying covenant to pay the rent, but cannot affect the landlord’s right to forfeit on grounds of insolvency. In any event, it may be doubtful whether this will have a significant effect on CVAs in practice since under many leases landlords will already have a right to forfeit on the proposal of the CVA and under the terms of a CVA an impaired landlord will invariably have a break right to recover the premises if he so wishes. Nevertheless, going forwards, on the law as it stands it will not be possible for CVAs to purport to vary directly a landlord’s right to forfeit.

Business rates

The final point to note from *Debenhams* relates to the treatment of business rates. In more recent CVAs, it has become common for CVAs to compromise the current year’s business rates liabilities of the company. (Indeed, it has on occasion been suggested that it might be unfairly prejudicial for a CVA not to compromise the rates liabilities when it is compromising landlords.) But in *Debenhams* the dissentient landlords also

argued that business rates were relevant to the issue of the “vertical comparator” i.e. whether creditors do better under the CVA than they would in the alternative scenario absent a CVA, which will often be an insolvency proceeding in respect of the company.

The argument which was advanced was that the vertical comparator was not satisfied in respect of the most impaired category of landlords in the *Debenhams* CVA. This was said to be because under the CVA the landlords would become liable for business rates (after a 3 month void period) whereas under the counterfactual scenario of an administration landlords would not be liable for business rates for the duration of the administration. The Court, however, rejected this argument, on the basis that any liability for business rates as a result of possession of the relevant premises reverting to the landlord was not a direct consequence of the CVA⁷. It seems, therefore, that it is not necessary to take into account potential liability for business rates as part of the analysis as to whether or not the vertical comparator is satisfied. In any case, the premise of this argument – that a CVA can compel a landlord to take back possession of the premises – no longer holds good in light of the subsequent decision in *Instant Cash Loans*.

Instant Cash Loans

The decision in *Instant Cash Loans* concerned a scheme of arrangement under Part 26 of the Companies Act, rather than a CVA. However, since both a scheme and a CVA are based on the same core concept of an “arrangement”, the reasoning in *Instant Cash Loans* applies equally to CVAs.

Part of the scheme in ICL included a provision to deal with the various shop leases which were held by the company and which it was seeking to exit from as part of the winding down on of its business. The scheme included a provision compelling landlords to accept a surrender of the leases. At the convening hearing, the Judge questioned whether this provision might be objectionable, in light of the *Debenhams* decision, on the basis that it might be said to be interfering with the proprietary rights of landlords. The issue was, however, deferred to the sanction hearing.

At the sanction hearing, the company argued that the provision did not interfere with the landlord’s proprietary rights. This was because the continued existence of the lease depended on the tenant having a right to exclusive possession of the property. The right to exclusive possession is contractual in nature and is therefore susceptible to being varied, modified or terminated by a scheme. The fact that the termination of such (contractual) right may have proprietary consequences (i.e. by bringing the lease to an end) does not mean that the right itself cannot be the subject of a scheme.



Zacaroli J accepted much of that analysis. Thus, the decision confirms that the fact that the modification or termination of a contractual right may have proprietary consequences does not preclude it from being the subject of a scheme (or CVA).

However, the Judge disagreed with the company on the question of whether the termination of the tenant's right to exclusive possession fell within the scope of an "arrangement"⁸. He held that it did not, because the termination of the tenant's right to exclusive possession was not necessary in order to ensure that the compromise of the relevant debt claims which were the subject of the scheme – in this case, under the covenants contained in the lease – was effective. The claims under those covenants could be compromised effectively without the tenant's right to exclusive possession being released.

The reasoning in the judgment in this respect is based on the test for the release of ancillary claims laid out by the Court of Appeal in the *Lehman* case⁹ which requires the release of such claims to be necessary in order to give effect to the arrangement for the compromise of the debts and liabilities of the company owed to its creditors. Other jurisdictions such as Australia and Singapore have adopted a broader test based on *nexus*. However, the *Lehman* decision plainly represents English law on this point.

It follows that the position in relation to termination of leases through a scheme or CVA can be summarised as follows:

- The scheme or CVA cannot force a landlord to accept a surrender, and therefore cannot

compel him to resume occupation of the premises against his wishes;

- However, the scheme or CVA can effectively terminate all of the covenants in the lease – including the covenant to pay rent but also all the other the covenants commonly given by a tenant in a lease;
- The scheme or CVA can also contain an offer by the tenant company to surrender the lease.

It would then be a commercial decision for the landlord as to whether or not to accept that offer, presumably balancing the fact that resuming occupation would involve assuming a liability for business rates, as against the fact that it would be receiving no rent on the property and have the benefit of no other covenants in the lease.

Conclusion

Debenhams and *Instant Cash Loans* are helpful in that they uphold the validity of the basic CVA model which has been used to deal with lease portfolios, whilst at the same time mapping out what is and is not permissible in such CVAs. Future CVAs will need to adapt to follow the guidance which has been given in *Debenhams* and *Instant Cash Loans*. However, provided this is done, the retail CVA model should be even more robust going forwards.

Tom Smith QC and Madeleine Jones appeared for the company in Debenhams and Tom Smith QC appeared for the company in Instant Cash Loans. ■

9. *Re Lehman Bros (No 2)* [2010] Bus LR 489 per Patten LJ at [65].



Constellation: *A dazzling success for BVI restructuring*



GRANT CARROLL,
PARTNER, OGIER BVI



MICHAEL KILLOURHY,
PARTNER, OGIER BVI



REBECCA CLARK
MANAGING ASSOCIATE,
OGIER BVI



EWELINA CLYDE-SMITH
SENIOR ASSOCIATE,
OGIER BVI

Olinda Star at KG Basin near Kakinada.
(Indian Navy/Twitter)

Summary

In February 2020 the British Virgin Islands Commercial Court (the ‘BVI Court’) sanctioned a creditor scheme of arrangement, which was part of a much larger cross boarder restructuring in relation to the Constellation group (which operates one of the world’s largest offshore and onshore oil and gas drilling businesses). This scheme of arrangement, which as a creditor scheme was itself rare for the BVI, was preceded by the BVI’s first ever “soft touch” provisional liquidation (in linked proceedings), which commenced in December 2018.

The proceedings in the BVI utilised provisions of the BVI Business Companies Act 2004 (the ‘BC Act’) as well as the BVI Insolvency Act 2003 (the ‘IA’). In total, 11 BVI companies were restructured, by way of the ground breaking “soft touch” provisional liquidation in the BVI, a simultaneous judicial reorganisation in the Brazilian courts, a BVI Scheme of Arrangement, as well as ancillary relief for recognition and protection under Chapter 15 of the US Bankruptcy Code.

The efficacy of the soft touch provisional liquidation was tested almost immediately. Within approximately one week of the appointment of provisional liquidators, a tropical cyclone hit India, where one of the rigs, the Olinda Star (owned by a BVI company, Olinda Star Ltd (‘Olinda’)), was located. For safety reasons the crew had been evacuated before the cyclone hit. The ensuing damage and severity of the storm left the Olinda Star listing and unattended. The terms of the soft touch liquidation, and in particular the protocol to regulate the conduct of the management, allowed the Group to act quickly to rescue its asset, and ensured that the rig remained operational and the value of the security to creditors preserved.

The case clearly demonstrates that the jurisdiction of the BVI is open and available for the most complex restructurings and has the

necessary legislative framework and professional expertise to deliver focused practical legal solutions that achieve both creditor objectives while allowing viable businesses to keep operational and trading. The BVI Court is willing and able to participate in multi-jurisdictional proceedings in the corporate rescue sphere and is a signatory to the JIN Guidelines (Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters).

Creditors can also take comfort from the ability of the BVI Court to act promptly when presented with an urgent application and appoint provisional liquidators to oversee and monitor a potential restructuring to ensure that creditor interests are adequately protected.

The Constellation Group and its Financial Distress

Constellation Oil Services Holding S.A. (Luxembourg) together with its direct and indirect subsidiaries (collectively, the ‘Group’) operates one of the world’s leading offshore and onshore oil and gas drilling businesses using its rigs and drillships.

The Group employs over 1,000 individuals in various locations around the globe within a highly integrated and complex corporate structure, comprised of a number of different entities across multiple jurisdictions, including several companies incorporated in the BVI. Although the Group’s assets are deployed worldwide, its principal operations are in Brazil where the Group’s modern fleet of drilling rigs, constructed by some of the world’s leading shipyards, is one of the largest fleets in Brazil. The Group has consistently ranked among the safest, highest-performing and most cost-effective offshore drilling companies operating in Brazil and, as a consequence, Petrobras group, Brazil’s semi-public, multinational oil & gas group, has historically been the Group’s largest customer.

In recent years however, the Group has experienced financial distress attributable to the ongoing recession in the oil and gas sector.

To address the financial strains, the Group began in 2017 to evaluate its options to restructure its debts and during that year the Group completed a successful exchange offer for some of its corporate bonds. However, this alone was not sufficient to relieve matters and the Group continued to explore restructuring options with its shareholders, lenders and bondholders to resolve the Group’s financial difficulties. Critically, due to the interconnectedness of the Group’s debt, a default on certain of the Group’s debt obligations would trigger additional defaults across the Group’s capital structure and so it was necessary to negotiate with all parties at the same time.

BVI Soft-Touch Liquidation

As 2018 progressed the financial position of the Group showed no improvement and it was decided to seek the protection of a court-supervised restructuring in three different jurisdictions: the BVI, Brazil and US.

The Group’s legal advisors had already been working with the Group for many months, exploring a number of different alternatives for the BVI elements of the Group before a final decision was reached. On 7 December 2018 the Group applied to the BVI Court for the appointment of “soft touch” joint provisional liquidators (‘JPLs’) over six of the Group’s BVI companies.

Timing was critical to ensure that assets and resources were not depleted through opportunistic individual creditor litigation in the BVI or elsewhere. The Group, together with its legal advisors, worked around the clock to ensure the filing process (across three separate jurisdictions) ran smoothly and entirely to plan. First there was a filing in Brazil to commence a judicially supervised restructuring, and hours later the BVI

filings were made, followed by filings in the US for Chapter 15 recognition. The approach was to facilitate an implementation of a restructuring plan of the Group's debt under the supervision of the Brazilian Court and, at the same time, prevent rogue creditors taking action against the Group in the BVI (primarily being the asset holding entities) or the US (being the governing law of the principal debts).

The approach taken in the BVI was only possible because of the BVI Court's Order allowing the BVI Companies to enter into a "soft touch" provisional liquidation. The Order (which was entirely novel in the BVI) allowed the BVI companies to continue to be managed by their directors, but at the same time required that the restructuring be independently monitored and assisted by the JPLs, as officers of the BVI Court. Therefore, the assistance sought from the BVI Court was of great importance and the process was greatly aided by the appointment of two highly experienced restructuring experts, Paul Pretlove and Eleanor Fisher.

At the time of the application, there were no reported BVI cases in which the BVI Court had appointed JPLs over a BVI company for the purpose of enabling a "soft touch" provisional liquidation in aid of a foreign restructuring. However, there was nothing that would prevent such an application, and persuasive precedent in jurisdictions with comparable laws suggested that it could be done within the present parameters of the BVI legislation. In order to assist the BVI Court in this respect, comprehensive submissions were made to the BVI Court regarding the approach taken in other jurisdictions to facilitate cross-border restructurings.

The arguments put before the BVI Court succeeded and the Judge, Justice Adderley [Ag], adopted the opinions of general principle relating to the flexibility of the BVI Court and the principles to be applied in appointing JPLs. Justice Adderley concluded that the BVI Court had a very wide common law jurisdiction to appoint JPLs in order to preserve and protect the assets of the Group.

In addition, the BVI Court took comfort from the fact that the application for the appointment of the JPLs was supported by creditors holding a substantial amount of the Group's debt. The BVI Court was also satisfied that there was wide support of the majority of the Group's creditors in the Brazilian proceedings, which indicated that the restructuring had reasonable prospects of success.

Although, at the time of the application, the Group was balance sheet solvent, the BVI Court was satisfied that the Group was in a sufficiently precarious position that it would not be able to satisfy the upcoming maturities of certain of its debts, which would trigger various cross defaults. Therefore a restructuring was required to ensure the continued viability of the Group. The BVI Court was also satisfied that the evidence showed that the realisation value of the Group's assets would be significantly higher if measured on a going concern basis as against their breakup value. It was therefore considered to be more beneficial to the creditors of the Group if the going concern value of the Group's assets could be maintained in order to facilitate a restructuring.

In order to assist a distressed but still economically viable Group in restructuring its debts while continuing to operate as a going concern, the BVI Court approved a protocol addressing the allocation of powers of governance over the Group's various BVI companies, as between the JPLs and the sole director of each BVI company, during the term of the JPLs' appointment.

The result was that on 19 December 2018 new precedent was established with the BVI Court making its first ever Order appointing "soft touch" JPLs over six of the Group's subsidiaries and putting a protocol in place to regulate the ongoing efficacy of the appointment.

The Brazilian Judicial Restructuring and Ancillary US Restructuring Proceedings

On 6 December 2018 a number of entities within the Group filed a petition for a jointly administered *recuperação judicial* ("RJ") in the First

Business Court of Rio de Janeiro (the 'Brazilian Court'). On the same day, the Brazilian Court entered an Order formally accepting the Group's entities into the RJ.

Shortly after the RJ proceeding was commenced in Brazil, certain companies within the Group commenced ancillary proceedings in the US for protection under Chapter 15 of the US Bankruptcy Code (the 'Chapter 15').

The Group elected to commence its centralised restructuring in Brazil because Brazil has historically been and still is the operational centre of the Group's business; Brazil is the *principal estabelecimento* of the Group for purposes of Brazilian restructuring law; and Brazil was considered to be the "center of main interests" or "COMI" of each debtor for the purposes of US restructuring law (relevant here because of the Group's New York-law governed debt).

As a result, a restructuring plan (*plano de recuperação judicial*) (the 'RJ Plan') with respect to the BVI companies (with the exception of Olinda, as explained below) was approved at a creditors' meeting, by creditors holding approximately 90% in value of the claims present and voting at the meeting affected by the RJ Plan. Although the RJ Plan was eventually approved, the creditors' meeting was held over two days and involved tough negotiations between the Group and the creditors. BVI counsel were heavily involved in advising the Group and JPLs at the creditors meeting.

The BVI Restructuring and Scheme of Arrangement

As mentioned above, shortly after the JPLs were appointed over Olinda, the Olinda Star drilling rig was hit by a cyclone and listed precariously. Following the physical rescue and recovery of the rig, the rig was thankfully restored to operational capacity, but unfortunately Olinda's problems did not end with the stabilising of its rig.

After the Brazilian Court made an Order formally accepting the Group's debtors into the RJ, a small number of



the Group's stakeholders challenged the jurisdiction of the Brazilian Court to supervise an RJ over foreign entities. As a result, the Brazilian Court of Appeal ultimately decided that, out of the eighteen filing entities in Brazil, three, including Olinda (being the only BVI entity with a rig operating outside of Brazil), should be excluded from the RJ for lack of jurisdiction. Olinda's exclusion from the Brazilian proceedings presented a threat to the success of the overall reorganisation process and a significant headache for the advisors. Olinda had, along with the other five BVI companies in provisional liquidation, guaranteed and secured New York law governed notes issued by the Group due in 2024. The agreed restructuring required all six BVI companies in provisional liquidation to guarantee and secure the new notes that were to be issued in replacement of the old notes. Consequently, it was necessary to consider how to incorporate Olinda into the restructuring, without it being a part of the RJ. Parallel proceedings in the BVI were required that could mirror the RJ.

It was decided that Olinda's restructuring in the BVI would be conducted separately from the RJ restructuring, to commence immediately upon the completion of the RJ and Chapter 15 restructuring the other entities. It would mirror the terms of the RJ restructuring so far as Olinda was concerned, so that the end result would have Olinda adopt the same position in relation to the new notes and old notes as the other five BVI companies that had restructured through the RJ.

Initially a BVI plan of arrangement was the preferred method of corporate restructuring for Olinda as there was a concern the Group would not meet the higher threshold of creditor support required by a scheme of arrangement. A BVI plan of arrangement can be approved by a director of a company and then an application is made to the BVI Court for approval: however, the application can be challenged by dissenting creditors and there is a dissenting creditor framework to be followed.

Fortunately one of the major creditors of Olinda agreed to the proposed restructuring, ensuring the higher threshold of creditor support required by a scheme of arrangement could be met. It was swiftly decided to utilise a BVI scheme of arrangement pursuant to section 179A of the BC Act (the 'Olinda Scheme'), though to do so for a pure debt restructuring was a further rare procedure for the BVI.

To commence the Olinda Scheme, Olinda was required to apply to the BVI Court for permission to convene the meeting of Olinda's creditors at which their approval of the Olinda Scheme would be sought. Given it was just before Christmas and availability during that time is always a challenge, the timing could not have been worse. Yet, the BVI Court made arrangements to hear the application on short notice and saw fit to order the convening of the creditors' meeting.

The meeting of Olinda's creditors resulted in the Olinda Scheme being approved by all scheme creditors who attended the meeting (either in person or by proxy), constituting a 100% vote in favour both as to number and value of those attending (thus exceeding the required majority in number, representing over 75% in value of the scheme creditors present and voting). The BVI Court was then asked to sanction the Olinda Scheme pursuant to section 179A of the Act.

The novel aspect of the Olinda Scheme for the BVI was that it was a pure "creditor scheme", an arrangement between the company and its creditors in relation to debt, rather than the more common "members scheme", an arrangement between members in relation to their equity.

Following the leading authorities on English creditor schemes of arrangement sanctioned by the High Court in London, at the sanction hearing, in exercising its discretion, the BVI Court considered whether:

- (i) the relevant statutory requirements had been complied with;
- (ii) the classes of creditors were properly identified;

- (iii) each class was fairly represented by those attending the court ordered meeting;
- (iv) the statutory majority was acting bona fide in the interests of the class; and
- (v) an honest and intelligent member of the class could have voted in favour of the Olinda Scheme.

The BVI Court, in its assessment of the fairness of the Olinda Scheme, was also invited to take considerable comfort from the extensive work which had already been carried out in the RJ in order to agree and implement a fair, carefully negotiated compromise between the Group and its creditors. The RJ Plan (as reflected in the terms of the Olinda Scheme) had already been subject to a robust approval process under the supervision of the Brazilian and US courts, which required significant consensus among each class of the Group's secured and unsecured creditors.

The BVI court sanctioned the Olinda Scheme allowing the restructuring of over US\$600 million secured notes to effectively proceed. This, as intended, brought Olinda into the same position as the other BVI companies that were restructured pursuant to the RJ.

The Olinda Scheme also required a new recognition order to ensure that Olinda's prior obligations under the notes were compromised under New York law. Consequently, upon reading evidence from the BVI Counsel on the

matters of the BVI law, the US court granted recognition to the JPLs of Olinda and gave full force and effect to the Olinda Scheme which became effective upon filing with the Registrar of Corporate Affairs in the BVI (the 'BVI Registrar'). As an added complication, at the time the filing was to be made the BVI was under lockdown due to the Covid-19 pandemic: however the continuity measures implemented by the BVI Registrar and the BVI Financial Services Commission ensured that the ability of the BVI Registry to accept and process filings was not impaired.

Conclusion

The Constellation restructuring demonstrates that the BVI is at the forefront of global legal developments in insolvency and restructuring. By granting its first ever "soft touch" provisional liquidation and sanctioning a rare creditor scheme of arrangement, the BVI continues to prove that it will constantly evolve to keep pace with global developments.

The availability of soft-touch provisional liquidation in the BVI is a significant development for the BVI, making it an attractive jurisdiction to conduct cross-border corporate restructurings. With over 400,000 companies incorporated in the BVI, coupled with the current global economic position, it is highly likely that the BVI courts will see many more restructuring matters in the coming months and years.

The BVI Court has shown throughout this process that it is willing to hear matters on an urgent basis and grant assistance, consider the position and be prepared to cooperate with international courts to put in place the necessary protections in order to act in the best interests of the parties involved.

Once again the BVI has shown that the BVI Court and its approach to the Territory's corporate and insolvency laws offers a truly modern and adaptable forum for dealing with the largest and most complex corporate restructurings – whatever outside circumstances may prevail. ■

About the authors

Partner Grant Carroll and Senior Associate Ewelina Clyde-Smith are members of Ogier's BVI Dispute Resolution team.

Partner Michael Killourhy and Managing Associate Rebecca Clark are members of Ogier's Corporate and Banking and Finance team in the BVI.

All four acted for the Group in the restructuring and are members of the Cross-jurisdictional Restructuring and Corporate Recovery team.



Richard Fisher QC



Everyone at South Square is delighted that Richard Fisher has been appointed Queen's Counsel. His appointment was announced in January and the ceremony took place on 16 March 2020.

Richard read Law and French law at University College London, and completed his BCL at St Edmund Hall, Oxford. He graduated with first class honours in both degrees, and was a British Academy scholar. He was called to the Bar in 2000, having been awarded a Lincoln's Inn Major Scholarship, and has been a tenant at South Square since September 2000.

Richard specialises in insolvency law, restructuring, banking law and general commercial litigation. Over the last 20 years, he has played a role in most of the major UK insolvencies and restructurings. Having commenced practice as part of one of the teams acting for the BCCI liquidators, and the asset recovery team acting for the Brunei Investment Agency against Prince Jefri Bolkiah, the last 20 years have seen Richard involved in some of the most high profile commercial and insolvency/restructuring litigation, including most of the significant disputes arising out of the Lehman Brothers administration. Other landmark decisions with which Richard has been involved include *Cheyne*, *Eurosail*, *Firth Rixson*, *LBIE client money*, *International Bank of Azerbaijan*, *Mills v HSBC*, and *Servaas (state immunity)*. He has also been heavily involved in high profile matters such as *Cape Plc*, *Codere SA*, *Debenhams*, *House of Fraser*, *Re IMO/Bluebrook*, *Kaupthing*, *MF Global (German tax issues)*, *Re Save Group*, and *Re T&N*.

Richard has spent a significant part of his practice acting in relation to off-shore litigation, including the *Fortuna* and *Primeo/HSBC* disputes in the Cayman Islands, and the *IPOC* litigation in the British Virgin Islands.

Richard was a member of the Attorney General's A-Panel of counsel. He was consistently identified in the Legal Directories as one of the leading juniors for insolvency and restructuring matters, as well as being recommended in the fields of Commercial: Chancery, Commercial Litigation and Banking and Finance, described as "one of the best juniors in the city," "forthright and unflappable," "always very sound in his judgment," as well as being "fantastic on his feet and never one to be ruffled". ■

Clara Johnson joins South Square



We are delighted to announce that Clara Johnson, a junior barrister specialising in restructuring and insolvency, joined South Square in April.

Clara was called to the Bar in 2005 and completed her pupillage at 3 Hare Court, where she was subsequently offered tenancy. Clara initially had a broad practice, including working on criminal and constitutional appeals to the Privy Council. Soon after starting tenancy, Clara was offered a Pegasus Scholarship by the Inns of Court, which took her to Allen & Gledhill LLP in Singapore, where she worked on a range of commercial disputes.

Within a few years of tenancy, Clara increasingly specialised in insolvency, company, commercial and civil fraud work. By 2011, she was ranked as leading junior in insolvency in the Legal 500, having appeared in a number of reported cases across the fields of bankruptcy and corporate insolvency. Clara has continued to grow these practice areas and the decision to join South Square was the obvious next step.

In the insolvency field, Clara acts for office-holders, creditors, directors and debtors, in the context of liquidations, provisional liquidations, administrations, CVAs and IVAs, bankruptcies and director's disqualification proceedings. Many of her cases have a cross-border element and require strategic advice around the various regimes for cross-border recognition and assistance. Other experience includes acting in director's disqualification proceedings in *BHS Limited (In Liquidation)*; acting for the Joint Liquidators of *Maplecross Properties Limited (In*

Liquidation) in the liquidation of a Guernsey "top-co" which raised several complex issues relating to international sanctions (culminating in the decision of the Royal Court in *Maplecross Properties Limited (In Liquidation)* (unreported, 29 January 2018); and acting for R3 in *Coventry v Lawrence* [2015] UKSC 50, the Supreme Court costs appeal which considered whether to strike-down CFAs under the Access to Justice Act is incompatible with the ECHR.

In the field of company law, Clara acts in a whole range of shareholders' disputes, including s.994 petitions and derivative claims. Her recent experience includes acting as junior counsel to the claimant in *Stubbins Marketing Limited v Stubbins Food Partnerships (In Administration) & anor* [2020] EWHC 1266 (Ch), a decision of Trower J concerning the scope of the doctrine of informal unanimous consent, in the context of a failure by the company's directors to obtain the requisite resolution of the shareholders in respect of a substantial property transaction falling under section 190 of the Companies Act 2006. Clara also recently acted for the petitioner in *Re Tonstate Group Limited* in a dispute between family shareholders of the Hilton Hotel owning company, which involved allegations of unlawful extractions running into several millions of pounds on both sides.

In addition, a large number of Clara's instructions involve allegations of fraud. Clara has been involved in bringing fraudulent trading claims, claims involving Ponzi-schemes, carousel or tax frauds, and claims involving allegations of bribery and conspiracy (a recent example being *IOEC v Dean & ors* [2019] 1 WLR 82, a case which due to its international dimension (a fraud allegedly committed in Iran and the UAE) raised a number of complex jurisdiction and applicable law issues).

Clara continues to be ranked as leading junior in Restructuring and Insolvency in Chambers & Partners and the Legal 500 in which she is commended for providing "excellent advice" and as having "incredible" knowledge of the insolvency regime, as well as for being "excellent on her feet" and "well-liked by clients".

For any enquiries about instructing Clara, please contact her practice managers: Mike Killick michaelkillick@southsquare.com or Jim Costa jimcosta@southsquare.com ■

Etihad Airways PJSC v Prof. Dr. Lucas Flöther

*The scope and effect
of an asymmetric
jurisdiction clause*



The
Royal
Court
of
Justice



ROSEANNA DARCY

Introduction

In a judgment handed down in November 2019, Mr Justice Jacobs held that a jurisdiction clause in favour of the English courts contained in a facility agreement would extend to claims brought in connection with a comfort letter. It was also confirmed that asymmetric jurisdiction clauses are valid and effective for the purposes of Articles 25 and 31(2) of the Brussels Recast Regulation (the “Recast Regulation”), following the earlier decision of *Commerzbank Aktengesellschaft v Liquimar Tankers Management* [2017] EWHC 161 (Comm). The judge observed he would have had no difficulty reaching this decision even without prior authority. The clarification is of particular interest and importance given the prevalence of asymmetric jurisdiction clauses in international financial agreements.

Background

The proceedings arose within a wider dispute between Etihad Airways PJSC (“Etihad”) and Prof. Dr. Lucas Flöther, the insolvency administrator of Air Berlin plc (the “Insolvency Administrator”) (“Air Berlin”).

Etihad was a shareholder of Air Berlin and had a history of providing financial support to the company. In 2016 following a period of particular financial difficulty, Air Berlin began working on a restructuring. As part of the restructure Etihad indicated that it would be willing to lend €350 million subject to formal approval. Around the same time, Air Berlin, which was a UK public limited company with its registered office in London, required its annual financial statements to be prepared.

During this process KPMG identified certain further requirements to allow it to sign-off on the accounts on a going concern basis. Following a period of negotiation between Air Berlin, Etihad, and KPMG, Etihad agreed to provide a comfort letter indicating its intention to provide continued financial support to Air Berlin, in addition to the loan of €350 million and as part of a wider package of measures.

It was the facility agreement for this loan which contained the relevant asymmetric jurisdiction clause. It provided that (i) the courts of England would have exclusive jurisdiction to settle any disputes arising out of or in connection with the agreement, and (ii) that the clause was for the benefit of the lender only, meaning Etihad as lender would not be prevented from taking proceedings in any other courts with jurisdiction. It is this which makes the clause asymmetric, as the purely exclusive element requiring a dispute to be settled in the English courts only applied to Air Berlin as borrower. Etihad was not subject to this exclusive element and was entitled to bring any dispute in another court with jurisdiction.

Despite the financial support from Etihad, over the summer months of 2017 Air Berlin encountered severe operational challenges, and at the end of July 2017, a revised liquidity forecast indicated Air Berlin would need additional financing of up to €1 billion through to 2020. As a result Etihad refused to provide further drawdowns under the facility agreement, it being clear Air Berlin was insolvent.

Air Berlin subsequently applied to the Berlin court to open insolvency proceedings and on 27 October 2017 ceased operations.

In July 2018 the Insolvency Administrator commenced proceedings in Germany against Etihad asserting that Etihad had breached the comfort letter as it had failed to provide continued support to Air Berlin thereby causing its insolvency (the “German Proceedings”). However, in January 2019 Etihad issued a Part 8 claim in the English High Court seeking declarations of non-liability in the German Proceedings. Etihad also applied to the Berlin court seeking a stay of the German Proceedings under Article 31(2) of the Recast Regulation, on the basis that the German court, although seised first, should stay its proceedings in favour of the English court, which had exclusive jurisdiction through the jurisdiction clause contained in the facility agreement (the comfort letter containing no

jurisdiction clause of its own). The German court has recently acceded to that application, and has stayed the proceedings before it.

Air Berlin did not accept that the English court had jurisdiction and so issued the current application challenging the court’s jurisdiction on the grounds that (i) the jurisdiction clause contained in the facility agreement did not extend to claims brought under the comfort letter (the “Scope Issue”) (ii) the jurisdiction clause was inapplicable as a matter of EU law as the relevant dispute did not arise in connection with the “particular legal relationship” between the parties as required by Article 25 of the Recast Regulation (the “Legal Relationship Issue”), and (iii) Article 31(2) of the Recast Regulation did not apply to asymmetric jurisdiction clauses and so the Part 8 claim had to be stayed in favour of the German Proceedings (the “Asymmetric Issue”).

Scope Issue

The question which the court had to consider was whether Etihad had a good arguable case that a dispute under the comfort letter fell within the jurisdiction clause of the facility agreement, i.e. that it had the better of the argument on the material available (applying *Airbus SAS v Generali Italia SpA* [2019] EWCA Civ 805).

Etihad argued that the starting point in answering this question was for the court to adopt a broad, purposive, and commercial approach to interpreting the jurisdiction clause, as had been mandated by a long line of English authorities beginning with *Premium Nafta Products Limited v Fili Shipping Company Limited* [2007] Bus L.R 1719 (known as “Fiona Trust”). The Fiona Trust principle provided that parties, as rational businessmen, would likely have intended any disputes arising under their relationship to be decided by the same tribunal. This was not limited to disputes arising under a single agreement, but was equally applicable where agreements formed part of a package or arrangement.

Air Berlin, in contrast, asserted that the Fiona Trust principle did not apply, it



only being applicable where there was a single contract with a jurisdiction clause. It could not apply where there was more than one written contract (the comfort letter being portrayed as a contractual document). In referencing *BNP Paribas SA v Trattamento Rifiuti Metropolitan SpA* [2019] 2 All ER (Comm) 992, it was said that it would be unusual for parties to intend a jurisdiction clause in one contract to apply to disputes within the sphere of influence of another contract.

Mr Justice Jacobs agreed with Etihad and confirmed that a broad, purposive and commercially minded approach had to be followed. The judge was also satisfied that it was for the national court, in this case the English court, to interpret the clause conferring jurisdiction in order to determine which disputes fell within its scope (applying *Hydrogen Peroxide SA v Azko Nobel NV C-352/13* and *Powell Duffryn plc v Petereit C- 214/89*). Accordingly this meant that, as a matter of contractual interpretation, whether the jurisdiction clause extended to claims under the comfort letter was to be determined by reference to English law.

Drawing the threads together from a variety of authorities (such as *Deutsche Bank AG v Sebastian Holdings Inc* [2010] 2 All ER (Comm) 245, said to summarise the general principles applicable to the construction of jurisdiction clauses), Jacobs J considered that the position was:

- (i) There was no reason in principle why the jurisdiction clause in the facility agreements should

not extend to disputes under the comfort letter;

- (ii) The Fiona Trust starting point was potentially applicable if it could properly be said that the comfort letter was part of a package of agreements with no competing jurisdiction clause;
- (iii) The question was whether the parties' intention was that a dispute under the comfort letter would fall within the jurisdiction clause in the facility agreement, looking at the overall scheme of agreements entered into between the parties; and
- (iv) In ascertaining the parties' intention, it was relevant to consider the closeness of the connection between the comfort letter and the facility agreement.

Applying these points to the facts of the case, it was found that:

- (i) The jurisdiction clause was very wide, covering both contractual and non-contractual obligations arising out of or in connection with the facility agreement;
- (ii) It was beyond serious argument that the comfort letter and the facility agreement were part of an overall support package;
- (iii) It was evident that the comfort letter was closely connected with the facility agreement when considering the background of the two documents;
- (iv) Etihad had a good arguable case that the comfort letter was no

more than a statement of present intention and did not create legally binding obligations, with there also being a good arguable case that the comfort letter was governed by English law (albeit the applicable law was not a point that could be finally decided at this juncture);

- (v) This was not a case where Air Berlin were contending that the comfort letter, or the dispute itself, was more closely related to another agreement, and in any event, the documents making up the support package between the parties were all governed by English law and subject to English jurisdiction; and
- (vi) It was foreseeable that the resolution of a dispute under the facility agreement might require the court to determine the effect of the comfort letter and vice versa.

All these factors were said to lead to the conclusion that the parties had intended disputes arising in relation to the comfort letter to fall within the scope of the jurisdiction clause of the facility agreement.

Legal Relationship Issue

The court also needed to be satisfied on the same "good arguable case" test that the disputes in the German Proceedings arose "in connection with a particular legal relationship" in accordance with Article 25 of the Recast Regulation.

Air Berlin submitted that the task of the court was to first identify the



Mr Justice Jacobs said he had no difficulty in finding that Article 31(2) of the Recast Regulation applied to asymmetric jurisdiction clauses



“particular legal relationship” by (i) looking at the legal relationship in the agreement which contained the jurisdiction clause, (ii) characterising the relationship, and (iii) looking at the German claim and asking whether it was in connection with that relationship. In doing so, Air Berlin contented that it was not permissible for the court to look at the background facts or the parties’ previous course of dealing. Following this approach it was said that the relationship under the facility agreement was that of lender/borrower, but under the comfort letter the relationship was patron/ protégé. As the claims in Germany arose under the latter relationship, Article 25 of the Recast Regulation could not be satisfied.

In contrast, Etihad submitted this was not the right approach. Instead, in applying *Powell Duffryn plc*, it was said that the task of identifying the relationship in connection with which the agreement was concluded was a question of fact and that it was permissible to look at the parties’ background relationship. One had to bear in mind that the purpose of identifying the relationship was to prevent a party from being surprised by the referral of a particular dispute to the specified court. In applying this approach the relationship could be viewed a number of ways, including as a shareholder providing support, derived from the support package itself, or as lender/borrower. Whichever stance was preferred, it still led to the same conclusion.

Although Mr Justice Jacobs agreed with Air Berlin that it was important

to identify the legal relationship in connection with which the agreement conferring jurisdiction was concluded, and then to ask whether the dispute had originated in a different relationship, he did not share Air Berlin’s view that a narrow approach that disregards the factual background was the right one. Instead, it was held that the test required identification, by reference to the facts of the case as a whole, of the legal relationship between the parties in connection with which the jurisdiction agreement was concluded. It then required consideration of whether the dispute originated from that legal relationship or a different one (*Altera Absolute Global Master Fund v Sapinda Invest Sarl* [2018] 1 All ER (Comm) 71 applied). Asking whether a party would be taken by surprise would then act as a useful cross-check i.e. if a party would be taken by surprise by the referral of the dispute, then it is very likely that the dispute did not arise in connection with the relevant agreement.

In applying this test, Jacobs J agreed with Etihad that the particular legal relationship could be characterised in different ways. He had no doubt that the relationship of lender/borrower could apply and that the dispute could be said to arise from this especially given the genesis of the comfort letter, and the factors discussed above in relation to the Scope Issue. It was also accepted that the relationship could be said to have arisen from the support package itself with Etihad being the provider of financial support, and Air Berlin the recipient. Although this

may not be a text book description of a legal relationship, it was said to be a perfectly sensible commercial description of the present case. Similarly, the relationship could also be of shareholder and company, especially given the history of financial support offered to Air Berlin by Etihad.

This conclusion was held to be fully in accordance with *Powell Duffryn*. Identifying the legal relationship with which the agreement was concluded was not necessarily the same as identifying the legal relationship contained in the contract which contains the jurisdiction clause. It was possible in some instances to say that the jurisdiction clause was concluded in connection with a wider legal relationship. There was nothing in Article 25 itself that required the relationship to be given a precise label, and there was nothing wrong with simply identifying the contract as containing the relevant legal relationship.

Article 25 of the Recast Regulation was therefore satisfied, with the dispute arising from a relevant particular legal relationship.

Asymmetric Issue

The asymmetric issue was treated as a stand-alone question of law. The important question was whether the jurisdiction clause was a clause which “confers exclusive jurisdiction” within the meaning of Article 31(2) of the Recast Regulation. A related question was whether the English court could properly be described as being “seised on the basis” of an exclusive

jurisdiction within the meaning of Article 31(2) in circumstances where the jurisdiction was asymmetric. Air Berlin’s answer was “no” to both questions, whilst Etihad’s was “yes”.

Air Berlin’s stance was that the jurisdiction clause in the Facility Agreement could not be properly described as exclusive, it permitting Etihad (but not Air Berlin) to take proceedings in any other court with jurisdiction, thus not giving the English court complete exclusivity with the result that Article 31(2) could not apply. Although in their application notice Air Berlin had asserted that asymmetric jurisdiction clauses were also out of scope for the purpose of Article 25, this was not taken up during the hearing (although the position was reserved).

Etihad said this was the wrong way to look at the issue. It did not matter what the position was in relation to Etihad, because the clause was exclusive in respect of Air Berlin: i.e. Air Berlin had contractually agreed to bring any proceedings before the English courts. Etihad also pointed to the fact that asymmetric clauses had long been widely used in international finance transactions meaning it would be a perverse result if it were found that such agreements could no longer benefit from the provisions of the Recast Regulation.

One of the reasons why this issue was so prevalent was due to the lack of authorities on the point. There were in fact only two reported English cases which had previously considered whether an asymmetric clause fell within Article 31(2). The first, *Codere SA v Perella Weinberg Partners* [2016] EWHC 1182 (Comm), briefly touched on the point, following the hearing of related proceedings in Spain. Prior to the case being heard in England, Codere had raised the argument (which had been unsuccessful in Spain) that asymmetrical clauses could not constitute an exclusive jurisdiction clause for the purpose of Article 31(2). The point was dropped however before the hearing with Walker J noting in his judgment that Codere was plainly right for doing so, considering there to be no good commercial reason for Article 31(2) not applying to asymmetric clauses. In his view there was nothing in the article requiring the party relying on the exclusive jurisdiction clause to be under a symmetrical obligation.

The identical issue was also subject to detailed argument in *Commerzbank v Liquimar Tankers* [2017] 1 WLR 3497. Cranston J in his judgment held that the natural meaning of the words in Article 31(2) did include asymmetric jurisdiction clauses, and just because the exclusive jurisdiction element only applied to one of the parties, this did



not detract from the fact that the English court rightfully had jurisdiction. Support for this view was taken from *Nikolaus Meeth v Glacetal* Case 25/78. In that case, the jurisdiction clause provided that if Meeth sued Glacetal, the French court alone had jurisdiction, while if Glacetal sued Meeth, the German courts alone had jurisdiction. The ECJ considered that although the clause designated the courts of two states, it could still be regarded as one where the courts of one contracting state had exclusive jurisdiction under Article 17 of the Brussels Convention (the predecessor of Article 25 of the Recast Regulation).

In giving his judgment Mr Justice Jacobs said he had no difficulty in finding that Article 31(2) of the Recast Regulation applied to asymmetric jurisdiction clauses as in the present case. There was no doubt that Air Berlin had agreed upon the exclusive jurisdiction of the English courts in respect of the proceedings they had filed against Etihad.

As in *Commerzbank*, support was found for this conclusion in *Meeth v Glacetal*, which had made it clear that the necessary approach was to identify the relevant obligation. That case had made it clear that it was perfectly possible for parties to divide up their disputes into two or more groups, even when arising from the same contract, recognising the importance of party autonomy. Therefore, it was clear that parties could designate the courts of one state for the purposes of one party, and another state for the other party. The fact that the clause may not be symmetrical or reciprocal did not affect the analysis of whether one party was bound to an exclusive jurisdiction agreement.

Mr Justice Jacobs considered that, in line with Cranston J's own reasoning in *Commerbank*, the aims of the Recast Regulation and the background to Article 31(2) supported this conclusion. Article 31(2) had been introduced into the Recast Regulation after the much criticised decision of the ECJ in *Erich Gasser GmbH v MISAT Srl* Case C-116/02. There, although the Austrian court was the designated court in an exclusive jurisdiction agreement, proceedings were first initiated in Italy. The ECJ held that the Austrian court, which was second-seised, had to wait until a judgment was given by the Italian courts as to jurisdiction, which had a reputation for taking a long time to issue judgments. The outcome became known as the "Italian torpedo". Article 31(2) sought to enhance the effectiveness of choice-of-court agreements to ensure that the designated court would have priority to decide on the validity of the jurisdiction agreement. Therefore, Air Berlin's stance would mean that this aim would not be achieved, and the "Italian torpedo" would continue to have effect.

Overall, Jacobs J considered that there was no reason not to follow the decision in *Commerzbank*. The judgment of Cranston J was said to be

supported by the aims of Article 31(2), the ordinary meaning of its text, as well as a body of academic writings.

One final point worth noting relates to the Hague Convention on Choice of Court Agreements. Air Berlin had sought to draw assistance from this as its Explanatory Notes stated that it would not apply to asymmetric clauses, suggesting it would be something of an oddity should the Convention and the Recast Regulation produce different results. However, Jacobs J was not persuaded by this argument, which had also been made in *Commerzbank*. He similarly considered that in any event there were good arguments that the rules in the Hague Convention would apply to asymmetric clauses. What those good arguments are will have to be presented at another time.

Conclusion

The judgment serves as a reminder of the complexities that can arise over jurisdiction. The court was very clear on the ability of a jurisdiction clause contained in one agreement to apply to disputes arising under a different agreement, and Mr Justice Jacobs' conclusions on the Scope Issue have recently been upheld and applied in *Terre Neuve Sarl v Yewdale Ltd* [2020] EWHC 772 (Comm) (although in that case it was held that certain Swiss jurisdiction clauses did not extend to the relevant oral agreements).

The judgment also serves to highlight the flexibility the court is willing to take in finding a relevant legal relationship for the purposes of Article 25 of the Recast Regulation.

As to the validity of asymmetric jurisdiction clauses, for the time being, the English court will recognise and enforce them in matters concerning Article 31(2). However, it should be noted that Air Berlin were granted permission by Jacobs J to appeal on this one point. The hearing is scheduled to take place in November 2020 and so we, along with many other parties reliant upon asymmetric clauses, keenly await its judgment.

[Robin Dicker QC and Roseanna Darcy appeared on behalf of Etihad]. ■

Euroland



PROFESSOR
CHRISTOPH G. PAULUS

A. Corona virus

The by far dominant subject of this reporting period is – unsurprisingly – the various jurisdictions' attempts to cope with COVID-19 and its devastating impact on the economy and daily life. Like any changes in existing law, the necessary – and, under the given circumstances, rushed – legislative steps have been welcomed by a veritable armada of critics who see their chance to prove their acumen by letting the legislator and the reader of the respective articles know that the law should and could have been made better! This, of course, is a sort of ritual within the legal profession which is, on the one hand a bit tedious but, on the other, also slightly helpful. The former reason is why I abstain from listing the various measures enacted in different Euroland jurisdictions (and hundreds of webinars are available, provided by all manner of experts and semi-experts should the reader wish to avail himself of them) and confine myself to just a few observations of a more fundamental approach, for it is here where the critics might provide helpful results.

There is a certain underlying pattern which reappears in the present crisis. It is not the first time – not even within the last 20 years – where legislators have needed to react swiftly to adjust their laws (in particular: insolvency laws) to an emergency situation; and we have every reason to believe, or even trust, that this coronavirus will not be the last trigger of a crisis. After all, the present virus was certainly not an unknown unknown, but (just) a known unknown. In Germany alone there have, within the last two decades, been three occasions of disastrous flooding in different regions, following which the legislator was bound to temporarily amend certain rules, among them the rule on the duty to file for insolvency within three weeks. This is the reason why I branded these rules as 'bad weather insolvency law' as opposed to the, traditional 'fine weather insolvency law'.¹ But it is not just rain or melting snow, it can also be the collapse of a financial market on the other side of the Atlantic which causes the legislators on this side of the Atlantic (and in the rest of the world, to be sure) to react quickly and to come up with measures to mitigate the negative impacts.

The present crisis is just one of a series of recurring events that has led to the realisation that the common 'good weather insolvency law' is based on trust in the continuing functioning of many, primarily economic, factors. Greece, for instance, had to learn that it is just another form of bad weather when there is no market to liquidate a debtor's assets; many unfinished buildings along the coast line and elsewhere are

the remnants of insolvent debtors whose assets could not be liquidated as there was no market for them. Traditional 'good weather insolvency law' is also based on the assumption that lost jobs can be absorbed by the common labour market. The gigantic attempt made by the European Commission to overcome the stigma of insolvency and to implement a culture of a 'second chance' makes it evident that this assumption rests on an increasingly shaky ground.

There are certainly further implicit, and possibly even unconscious, extrinsic preconditions in the traditional insolvency laws which are only discovered in a crisis. The present one, for instance, forces us to think again – and somewhat more deeply than usual – about the fundamentality of insolvency laws *pari passu* principle (*par condicio creditorum*). Generally speaking, it seems to correspond with an innate feeling of justice that when and if the creditors cannot be satisfied *in toto* – when, in other words, there is a common pool-problem – there should be a proportional distribution of the losses. When everyone is equally suffering, forfeits are seemingly easier to tolerate.

In times of the ravages of COVID-19, though, this distribution mechanism becomes somewhat questionable. Here is a global natural disaster which potentially hits everybody and it is more or less happenstance whether a person finds him- or herself in the position of a creditor or a debtor of an insolvency proceeding. What would normally appear to be perfectly fair under the equal treatment principle is, possibly, less fair in the present time. For instance, when a supply chain breaks down in "normal" times because in country A there is a strike or because in country B shipping has become impossible due to drought (as happened a few years ago on the river Rhine) one could always argue that the parties of the supply chain have made their choices in selecting specific partners in that chain. That, however, is a less convincing argument in the context of COVID-19. It seems as if another standard of fairness, a more solidarity one, should be applied.

It is here where the abovementioned criticisms could become helpful. The time seems ripe to develop more imaginative ideas about 'bad weather insolvency law'. Fall-out options should be readily available for legislators when the next crisis pops up. Instead of obliging (usually inexperienced and unprepared) individuals within government ministries to re-invent the wheel, collected wisdom from earlier experience and from inventive practitioners and thinkers should be retrievable. One such innovative idea was presented recently by some German parliamentarians: for medium-sized enterprises

1. Cf. Paulus, Fine-Weather Insolvency Law and Bad-Weather Insolvency Law – On the Extrinsic Framework of Insolvency Law, in: Paulus/Pottow (eds.), *Bankruptcy's Universal Pragmatist*, Festschrift for Jay Westbrook, to appear in 2020, p. 647 ff.

they demanded the creation of a special insolvency law which allows for what they term a “hibernation”. This would include a normal insolvency proceeding but would give the debtor a preemption right for a certain period after the crisis. This might not be an ideal solution, but it is at least an idea off the beaten track.

A seemingly different topic which, however, upon closer inspection also turns out to be fairness-related is the need for introducing an orderly debt restructuring proceeding for states; I call this a *resolvency* proceeding. The case of insolvent states is nowadays treated, more or less, on an ad hoc-basis; and usually, there is a plethora of politics in place so that similar cases might be treated entirely differently. The COVID-19 crisis is likely to cause a reaction which might be compared with a triple-jump. The first jump is an insolvency wave in the real economy, such as that we see heading towards us as I write. Measures are taken from various sides – European Commission, European Central Bank, Solidarity measures (French-German proposal), Governments, National Banks, etc. – to mitigate the impact of the crisis.

To the degree that they imply just deferrals of payment obligations (i.e. loans, moratoria, postponement of maturity, etc.) they have the potential to create a second jump in the future: those who are benefitting from such measures will have to earn at least twice the amount they did until January or February 2020 in order to comply with their future obligations which include not just running costs but also those costs from the mitigation measures. A not-unlikely consequence of this somewhat illusory prospect is a considerable increase of non-performing-loans, which have already created an enormous problem in many economies. In Italy, for instance, some smaller banks went (almost) bankrupt and the Banca Monte dei Paschi di Siena was only saved by much ingenuity and good-will. Thus, the second jump could be a wave of bank insolvencies.

It is a well-known fact that bank insolvencies are special insofar as they are distinct from “ordinary” commercial insolvencies, there being a huge ‘contagion’ threat: bank insolvencies tend to cause state insolvencies and *vice versa*. Ireland, Cyprus, Portugal, Italy, Greece are just a few examples which prove the existence and danger of this correlation. And this is the third jump – the biggest one. It is hard to believe, but there are no rules for this scenario. If it were a new scenario, this lacuna might be forgivable and explicable. But the contrary is true: States go bankrupt, and not only in this century – Germany was bankrupt twice in the last century, and it appears that ancient Rome was bankrupt in the 3rd century BC (sic!) through the Punic wars. We lawyers, thus,

could/should(?) have made use of the experience of literally millennia within the devastating situation we now find ourselves in – but in the past we never came up with a procedure or even just a proposal.² Adam Smith wrote about exactly this subject in his ‘*Wealth of Nations*’, that a bankruptcy procedure for states would be “*least dishonourable to the debtor*”. The COVID-19 crisis seems to be the right situation to give that great man’s remark a second thought.

B. CJEU

The last decision of the CJEU before the current crisis was the matter of *Tiger*, which has been described already in a former issue of this Digest.³ Therefore, I will make just a brief mention regarding the request of a preliminary ruling from the German Supreme Court (Bundesgerichtshof).⁴ After three other decisions of the CJEU on this norm,⁵ the request aims one more time at the correct interpretation of art. 16 of EU 848/2015.

Plaintiff in the case is the insolvency administrator of a German company which had paid, pre-insolvency, a certain sum to the defendant, a Dutch company. The payment was not made on a debt of its own but on the debt of another company which belongs to the same group of companies as the insolvent debtor which, however, was insolvent at the due date.

Under German law, such a third party payment is subject to the claw-back rule on transactions at an undervalue when and if the claim on which the payment was made was economically worthless – which is the case when the debtor is, as in the case at hand, insolvent. The Dutch defendant opposed the administrator’s request by referring to the said art. 13 EIR (old) as the underlying contract is, pursuant to the Rome-I-Regulation, subject to Dutch law.

This issue is primarily a German law peculiarity, since only German law pursues a strict separation of what is called the underlying causa and the subsequent fulfilment of the duty resulting from such contract. Therefore, German commentators are in dispute about what the relevant law might be in case of such an isolated payment: is it still the underlying causa or is it the isolated fulfilment? In the latter case, the relevant law would be the German law. Given the singularity of the German *Trennungs- und Abstraktionsprinzip* (division and abstraction principle) and given the emphasis on the trust protecting nature of artt. 5 – 15 EIR (old, i.e. 8 – 18 Recast), it would be very surprising if the CJEU’s answer was that any law other than the Dutch law is the relevant here. But, as we all know, the CJEU is always ready to provide surprises.■

2. That changed only very recently, cf. IMF paper “Sovereign Debt Restructuring – Recent Developments and Implication for the Fund’s Legal and Policy Framework”, released on 26 April 2013. It is available at <http://www.imf.org/external/np/pp/eng/2013/042613.pdf>; Paulus, Should Politics be Replaced by a Legal Proceeding?, in, idem (ed.), A Debt Restructuring Mechanism for Sovereigns – Do we need a legal procedure?, 2014, p. 191 ff.

3. Cf. South Square Digest March 2020, p. 60.

4. Resolution from 23 January, 2020 – IX ZR 94/19.

5. CJEU, dec. from 16 April, 2015 – C-557/13 – Lutz; CJEU, dec. from 15 October 2015 – C-310/14 – Nike (on this cf. Moss, Insolvency Intelligence 30, 2017, No. 1, p. 2 f.; CJEU, dec. from 8 June, 2017 – C-54/16 – Vinyls.



LEGAL EYE:

Keep Calm and Carry On: The impact of the Black Death on the law in 14th century England



ROSEANNA DARCY

I sit writing this latest Legal Eye article from my desk at home during the enforced lockdown due to Covid-19. By the time it reaches publication I would hope that things will have moved on from where they are today and hopefully for the better, but only time will tell.

Pondering on what this pandemic may mean, and what the world may look like in the weeks, months, and even years to come, my mind wandered back to previous pandemics from which our country has had to recover. As a student of medieval history, my mind turned to the Black Death; one of the most notorious and deadly outbreaks we have endured. It is estimated that between one third and one half of the population died, with London taking 150 years to recover the same level of population it had prior to the illness. This clearly would have had a severe impact on every aspect of life, including the law and the legal profession.

The Black Death itself is thought to have originated in the Gobi Desert of Mongolia in the earlier fourteenth century; the exact cause unknown, but presumed to be due to crop failures which drove rats, carrying infected fleas, inside for food. It then travelled along the Silk Road into central Asia and subsequently into the Mediterranean, perhaps carried by returning Crusaders, as well as traders, as they made their way into France, Spain and Italy. Venice, in fact, became the first city to close its ports to incoming vessels which were subjected initially to 30 days of isolation, later raised to 40 days and known as “quarantinaro”, hence the term “quarantine”.

The Black Death first arrived on English shores during the summer months of 1348, specifically thought to be at Melcombe Regis (now known as Weymouth) in Dorset, where a ship from the Continent docked carrying, amongst other things, rats bearing the infected fleas. By around November

1348 it had reached London; by the summer of 1349 it was in the Midlands; by 1350 Scotland and Ireland had also succumbed. Parliament was in fact prorogued (a term with which we are now all familiar for very different reasons) in January 1349 through to Easter 1349 due to the outbreak and its seemingly uncontrolled spread.

King Edward III is thought to have taken a particularly tough stance against the disease in a bid to control the pandemic as his daughter, Princess Joan, had died in 1348 after contracting the illness in Bordeaux, whilst travelling to Spain to marry Peter of Castile. King Edward clearly suspected the unsanitary conditions of London as playing a role in the spread of the outbreak, writing to the Mayor of London in 1349 to complain that *“the streets and lanes through which people had to pass were foul with human faeces and the air of the city was poisoned to the great danger of men passing, especially in this time of infectious disease.”*

Another of King Edward’s responses to the pandemic was to enact legislation to stabilise wages and prices to their pre-Black Death levels. The Ordinance of Labourers was issued in 1349, and formally enacted in Parliament as the Statute of Labourers in 1351 (with other versions being re-affirmed in Parliament throughout the 14th century). These laws required people under the age of sixty who were able to work to do so, keeping their wages at the same level as before the plague. They also prohibited vendors from selling goods at higher prices to their pre-plague levels.

One of the many effects of the introduction of such laws was the system introduced to enforce them. In 1351, keepers of the peace were appointed to maintain order and record pleas of the Crown. They were also given judicial power to be exercised in four sessions a year. In what seems to be clear evidence of the law being upheld, in 1389 800 prosecutions

for offences against the labour laws were recorded in Essex alone. Other prosecutions were also instigated by the new laws, with one claim seeking direction from the court as to whether the clergy came within the meaning of the act after certain parishioners, again in Essex, sought to prosecute their parson for refusing to administer the sacraments without imposing exorbitant fees.

Indeed, the courts showed little sign of slowing down following the outbreak. The Court of Common Pleas, which heard civil cases in Westminster, sat throughout the Michaelmas term in 1348, as well as the Hilary and Easter terms of 1349; although these central law-courts were adjourned in the Trinity Term of 1349 when the mortality rate was particularly high. However, the King’s Bench which could ‘correct’ the Court of Common Pleas as well as hear cases of royal interest moved to Lincoln and continued sitting.

Contemporary chroniclers, such as John of Reading, also recorded an increase in criminal hearings and, although more recent commentators point out that the amount of civil litigation in the central courts actually declined, given the collapse of the population, the lower volume of cases was actually consistent with a higher *per capita* rate of prosecution and litigation.

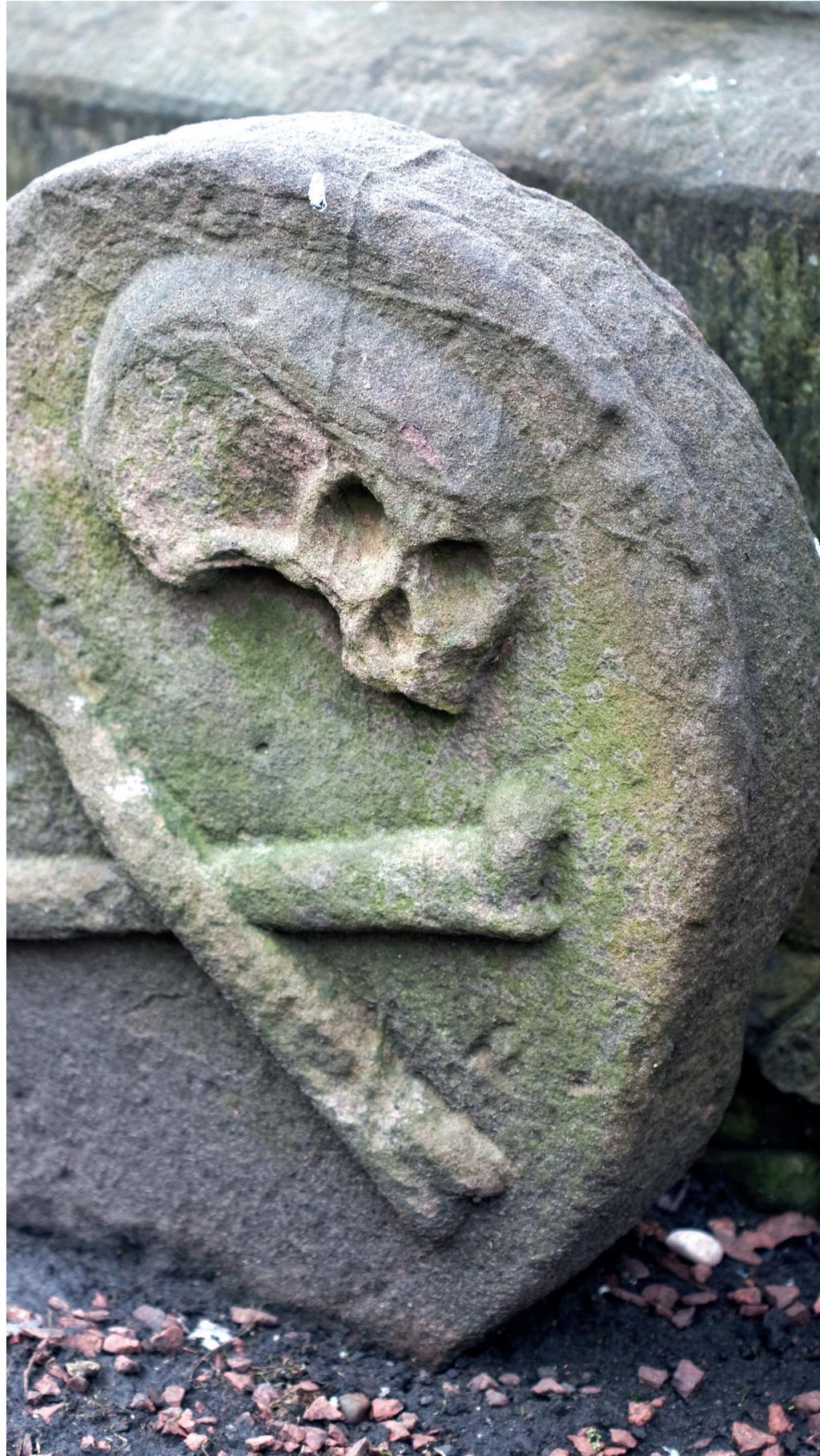
Generally speaking, the period following the Black Death appears to have been a time of professionalisation and consolidation for the legal industry, which although had begun prior to the pandemic, certainly benefitted from the catalyst of the plague. Most significantly, the latter 14th century is marked by the introduction of the Inns of Court, in which training for barristers became centralised and formalised. It was this body of barristers and apprentices who were able to monopolise the business of pleading in the Court of Common Pleas. Once promoted to a rank of “sergeant”,

barristers were placed within a pool from which judges were appointed, and seemingly introduced the bond between Bar and Bench.

A question which has been mooted is whether this growth of a more formal legal system was prompted by the need for increased recruitment, or an attempt to take advantage of a shortage of qualified persons to bring about a monopoly of accreditation. Both are possible, although given such a high mortality rate, especially in London, there can be no doubt that new recruits were needed. According to another contemporary chronicler, one development from the “first plague” was that the teaching of Latin was now taught in the medium of English, rather than French. A similar move to the use of English is evident from a parliamentary statute of 1362 which declared that pleadings should be in English (although legal French did remain a feature for many years to come). What may be suggested from this is that a wider range of persons had now been assimilated into the more educated ranks, as well as the legal profession.

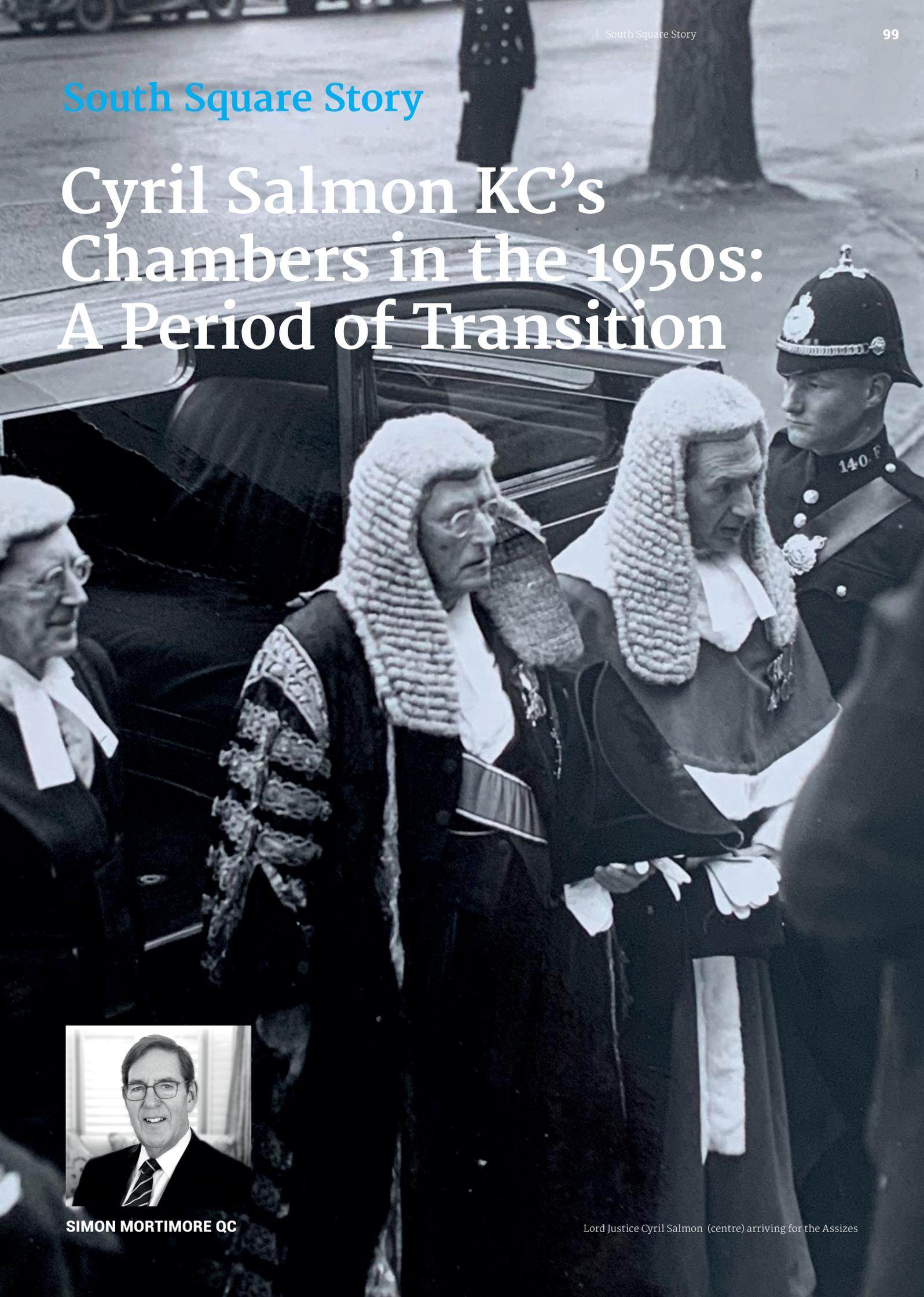
And so by the end of the 14th century, and as the country pulled through the effects of the Black Death (although further outbreaks were sadly still to come) it would seem that changes were afoot, and ones which introduced the foundations for our legal system that we know today.

Whilst we may still be grappling on what the true effect of this current pandemic may be, historians of the future will no doubt be able to look back to this time and trace the beginning of something new. What this will be, we may not yet know. However, as history also tells us, for the time being, we must simply do our best to Keep Calm, and Carry On. ■



South Square Story

Cyril Salmon KC's Chambers in the 1950s: A Period of Transition



SIMON MORTIMORE QC

Lord Justice Cyril Salmon (centre) arriving for the Assizes

The previous article (*Digest*, November 2019, pages 60–71) took the story of Cyril Salmon KC's chambers up to the beginning of 1951. At that time Salmon only had three other practicing colleagues: Douglas Potter, Claude Duveen and Arthur Figgis. Arthur Gibbon had become the senior clerk in place of Eric Heymer. This article describes the expansion of the chambers in the 1950s, as a new annex was acquired, and new members joined. It introduces Arthur Figgis, who had joined in 1948 or 1949 and Christopher Lubbock and Adrian Head who joined in 1953. After turning to the careers of Salmon and Duveen in their final years at the Bar and as judges, the article ends in 1959, after Salmon, Duveen and Potter had taken up judicial appointments, with chambers having lost the annex and been reduced to five members and their clerks, occupying the original four rooms in 3 Paper Buildings.

Changes in chambers in the 1950s: expansion and contraction

With four practicing members of chambers, some pupils, clerks and perhaps a secretary, the four rooms on the ground floor at 3 Paper Buildings were no longer adequate for chambers' needs. It was time to acquire more space, upgrade the accommodation and perhaps take on some new members, including Michael Edwards, one of Duveen's pupils, who joined in 1951.¹ In February 1951, Salmon took a tenancy of rooms in the south basement at 4 Paper Buildings. In November of the following year, the Inn gave Salmon permission to make structural alterations to ground floor south at 3 Paper Buildings. These alterations may have included the installation of a lavatory, for which there was now room as chambers had more space next door at number 4.

In 1951 Tony Allen, who had left school at the age of 15, answered an advertisement about careers in barristers' chambers. This led to an interview with Salmon, who, after establishing that Tony shared his enthusiasm for rugby, took on Tony as junior clerk. This meant Tony had to wear a black jacket, striped trousers, stiff white collar and black tie (it was not acceptable for clerks to wear suits until the 1960s). Tony took to all aspects of the job with enthusiasm, except for carrying barristers' papers and books to and from court (a burden to which he attributed one of his shoulders being lower than the other). He was soon being given clerking responsibilities beyond his years. This was because Arthur Gibbon, although a likeable man, was not

an entirely satisfactory clerk, in that he was only interested in Salmon. Not long after Tony arrived, Gibbon decided to accompany Salmon on a long case in the Caribbean, leaving the young Tony to look after the other barristers' practices.

In 1953, Duveen took silk, Lubbock and Head joined Chambers and Tony went away for two years on National Service. In the following year Muir Hunter, junior counsel for the Board of Trade in bankruptcy matters, joined chambers from 3 King's Bench Walk, where he had been in chambers with the late Victor Aronson KC, the well-known bankruptcy specialist. Hunter would become the third major figure in the development of chambers (after Salmon and Duveen) and will be described in later articles.

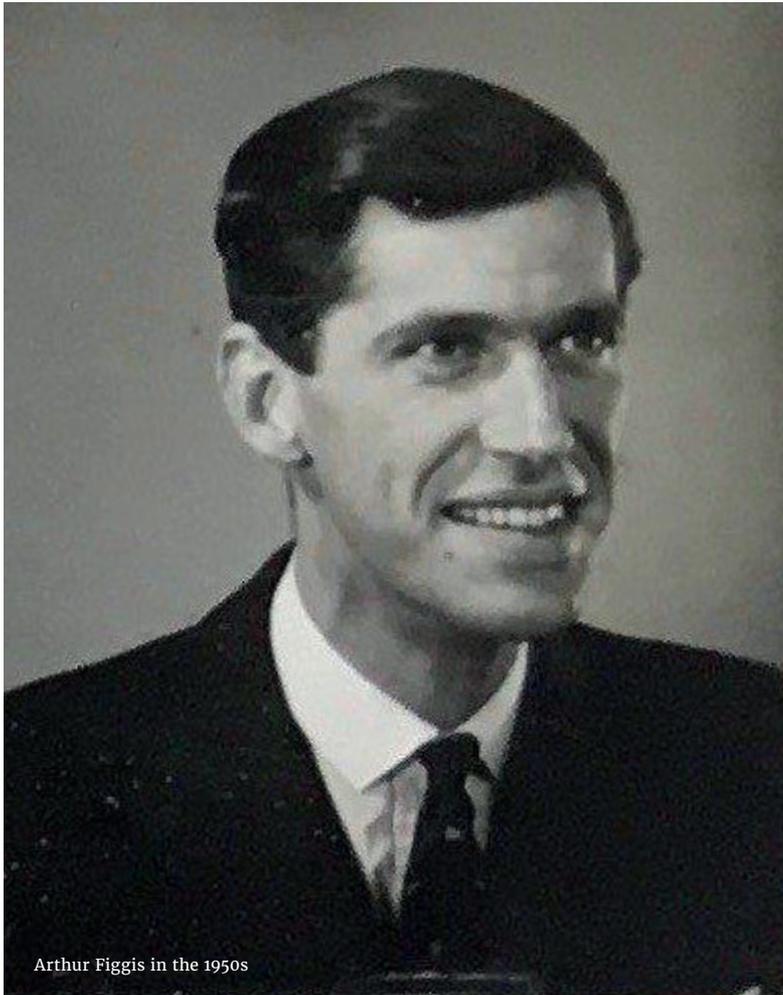
In about 1954, Duveen decided to leave chambers and move to 2 Hare Court (the origin of Blackstone Chambers). There seems little doubt that the main reason for Duveen's departure was the inadequate clerking that he received; particularly with Tony away on national service. Not only did Gibbon concentrate on Salmon's practice, but he was also distracted by a romantic entanglement with a secretary, occasionally indulging in non-clerical activity in the dark recesses of the cupboard at the end of the corridor.

In 1955, Tony returned from national service. In May 1956, at the age of 21, he married Sylvia, who was aged 19 and a secretary in the City. She remembers that Gibbon's wife threatened to appear at their wedding and create a scene. By this stage, members of chambers were becoming increasingly dissatisfied with the goings on in the clerks' room. Not long afterwards, Gibbon's services were dispensed with and Tony was appointed senior clerk. He would go on to hold that position for about 40 years.

In April 1957 Salmon was appointed to the High Court bench and Potter took over as tenant of the chambers. By June, Duveen was back in chambers, but he did not stay long. He became a county court judge in October 1958. At the end of that year, the Inn gave Potter notice to quit the annex at the end of January 1959. In October of that year Potter was appointed a county court judge and Figgis became the tenant, with Hunter and Head as guarantors.

It is now time to describe the accomplishments of Figgis, Lubbock and Head before they joined chambers; respectively as a soldier, cricketer and poet.

1. Edwards (1925–2007) left chambers in 1955, when he moved to HM Treasury as a Parliamentary Counsel. In 1960, he moved into industry, first with Courtaulds, 1960–67, and then with British Steel, 1967–81. He retained an interest in the Bar. He was a member of the General Council of the Bar, 1971–83. He was appointed an Honorary QC in 1981 and a CBE in 1986.



Arthur Figgis in the 1950s



Christopher Lubbock in 1938

Arthur Figgis

Arthur Figgis was born in Belfast in 1918, the son of a flour and grain merchant. He won a scholarship to Tonbridge School from where he won a scholarship to Peterhouse College, Cambridge, to read mathematics. He was also an outstanding shot; he won the Kent County Rifle Association Medal and was runner up in the Daily Mail trophy in 1936, he represented Ireland in the Elcho Shield in the years 1935-39 and, in 1939, he gained a half-blue at Cambridge. On the other hand, his advocacy skills needed refining. According to the Tonbridgian, his contribution to a debate in 1935 was “*interesting but rambling and threw no new light on the discussion*”.

Figgis went up to Cambridge in 1937. At some point, probably in 1939, he decided to switch from mathematics to law. However, before he could start studying law, in September 1939 Britain and France declared war on Germany. A month later Figgis joined the 9th Field Regiment of the Royal Artillery and received his commission as a second lieutenant.

Figgis saw active service on three fronts – Belgium, Madagascar and Burma – and was promoted to the rank of captain. His regiment was part of the British Expeditionary Force, which in spring 1940 tried to halt the German advance in Belgium. After being engaged in the fierce battle at the Ypres-Comines Canal, Figgis was evacuated from Dunkirk. In March 1942, Figgis’s regiment was sent to Madagascar, then under the control of the Vichy French, to take Diego Suarez, a port in the north of the island. The purpose of this operation was to prevent Japan from using Diego Suarez as a base from which it could sever British shipping routes to the Middle East and India. The operation was a success. Diego Suarez was taken in May 1942 and by November 1942 the British forces had gained control of the whole island and the Vichy French had surrendered. In 1943, Figgis transferred to India, where after some leave, he went to Manipur, in north-east India, to join the headquarters of the Allied forces protecting India from the Japanese, who were then in control of Burma and Malaya. From the summer of 1944 until about April 1945, Figgis was part of the forces engaged in driving the Japanese from those countries. After that arduous campaign, for which he was awarded the Burma Star, Figgis moved to the Army Selection Centre within South East Asia Command, where he remained until October 1945. After spending some time with the British Army of the Rhine, Figgis received his discharge in 1946.

Although he had been given a BA by proxy in 1940 and had obtained his MA in December 1945, Figgis returned to Cambridge to complete his studies. In 1947 he achieved 1st Class Honours in the Cambridge Law Tripos and was called to the Bar. He became Duveen’s pupil. Although Figgis

was much more cerebral than Duveen, who had a great sense of humour, the two men got on well and became life-long friends. After completing his pupillage, Figgis developed a successful career as a bankruptcy and liquidation specialist, appearing in more than forty cases reported in the law reports. Some of his cases will be described in a later article. In 1953 he married and made the family home in Surrey.

Christopher Lubbock

Christopher Lubbock (usually called Bill) was born in 1920. He went to Charterhouse, where he excelled at cricket as a left-handed batsman and medium-fast right arm bowler. In 1938 he was captain of the school team. After the summer term ended, he played six games for Northamptonshire. In October 1938 Lubbock went up to Brasenose College, Oxford, to read law. In the summer of 1939, he played six matches for the University team and then returned to Northamptonshire for the rest of the season. At one time he was top of the first-class bowling averages and he ended the season in second place behind Hedley Verity, the Yorkshire and England slow left-arm spin bowler.

Lubbock's university career was cut short by the war; he never graduated and did not obtain a blue. He served in the Royal Navy Volunteer Regiment between 1939 and 1946. As flag lieutenant to Admiral Lord Tovey, the Commander-in-Chief of the Home Fleet, Lubbock escorted George VI when he inspected the fleet at Scapa Flow. By May 1941, Lubbock was on board the battleship King George V, from which Tovey commanded the battleships, cruisers and destroyers that tracked down and sunk the Bismarck, the largest and most powerful battleship in the German Navy. The sinking of the Bismarck 500 miles off the Brittany coast, with the loss of some 2,000 German lives, was one of the first British triumphs of the war and did much to ease the pressure on trans-Atlantic shipping. Lubbock ended the war as a signals officer in Trincomalee in Ceylon.

After the war, Lubbock did not return to Oxford, but instead joined the Inner Temple, where he was called to the Bar in 1947. He began his practice as a member of the South East Circuit at 3 Hare Court, but by 1949 he had moved to chambers at 4 Paper Buildings. His move to Salmon's chambers in 1953 simply involved going downstairs to a room in the basement.

In Salmon's chambers, Lubbock pursued a common law and family law practice. He lived in the Essex countryside and built up a following among East Anglian solicitors. He was an elegant, well-dressed figure with a long stride. From 1 June in each year he would sport a straw boater with an I Zingari ribbon.

Adrian Head

Adrian Head was born in 1923. His father, who was a county court judge in York and who came from a leading Quaker family in Ipswich, died in 1927. Two years later the family moved to Burnham Overy Staithe near the north Norfolk coast. In 1937 Head became a naval cadet at the Royal Naval College in Dartmouth, where in 1939 he contracted polio and was left permanently disabled. For the rest of his life he was unable to walk without the aid of a stick.

In 1941 he went to Magdalen College, Oxford to study modern languages. He was president of the Oxford University Conservative Association, librarian of the Oxford Union and an accomplished poet. One of his poems was published in the collection *Oxford Poetry 1942-43* with poems by Philip Larkin and other noted poets. Head's two long poems, *The Seven Words* and *The Civilian*, published in 1946, displayed his deep religious faith and opposition to war. In 1948 he gave the Tredegar Memorial lecture to the Royal Society of Literature on the poetry of Geoffrey Fyson, an obscure first world war poet.

Rather than pursuing a life of poetry, Head decided to join Gray's Inn and read for the Bar. In 1947, he was called to the Bar and joined the South Eastern Circuit. In the same year he married. By 1949 he had joined chambers in Goldsmiths Buildings, but a couple of years later he moved to chambers at 1 Temple Gardens. In 1953 he joined Salmon's chambers. There he pursued a common law practice, with a strong East Anglian element. Head was always keen to settle cases and regarded it as a personal failure if the case went to court. While this legal philosophy might have had the client's best interests at heart, it was not the most effective way of promoting a career as a barrister. In 1959, Head and his family moved from London to Burnham Overy Staithe, but he kept a flat in Gray's Inn.

The final years of Salmon's practice at the Bar

The 1950s was a time when common law work was in short supply and many barristers gave up the struggle. Salmon was immune from troubles of that sort. He continued to be in high demand. He was retained by one of the defendants in libel proceedings brought by Winston Churchill against the Daily Mirror and others for accusing Churchill of being a warmonger on the front page of its 1951 election day edition. The case settled with an abject apology from the Mirror. Salmon's varied workload included two more appeals to the House of Lords, a leading case about cattle trespass, and two reported bankruptcy cases. Rather than dwell on cases of that sort, I will turn to two of Salmon's cases that attracted the attention of the popular press.

The Miracle Man of Harley Street

When he appeared at Bow Street Magistrates Court in August 1951, Dr Henry Alexis Chodak-Gregory was a small 62-year-old man with thinning hair, who had just been extradited from France, where he had spent 120 days in a prison, manacled to a German prisoner of war in a cell with seven other prisoners. Dr Gregory was charged with offences under the Bankruptcy Act 1914: transferring about £30,000 with intent to defeat his creditors and making the transfer after he had been adjudicated bankrupt. He was committed to trial at the Old Bailey, where he was represented by Salmon, instructed by Isadore Goldman & Co.

Dr Gregory had been born in Turkmenistan, but came to Scotland, where he qualified as a doctor. He acquired British nationality in 1914, served in World War I and was awarded the Military Cross. After the end of the war, he set up a practice in Harley Street, where he specialised in manipulative medicine for the cure of rheumatoid arthritis. He soon became wealthy and famous as the “*Miracle Man of Harley Street*.” In about 1939, he gave up medical practice and moved to Fineshade Abbey in Northamptonshire, which he filled with fine art and furniture, including a collection of paintings by Constable. His pride and joy, however, was a herd of 500 prizewinning Ayrshire cattle, which he acquired with money borrowed from the bank. By 1949, Dr Gregory’s bucolic idyll had turned sour; his creditors came after him and he was adjudicated bankrupt. Meanwhile, he left England and transferred £30,000, mostly to his common law wife. By the time of the trial, the trustee in bankruptcy had realised about £60,000 to pay bankruptcy debts of about £76,000.

Dr Gregory’s defence turned on trying to show the innocence of his conduct in leaving England with £30,000, when he was in debt. He thought he had ample assets in England to pay his creditors, mainly because the herd of cattle should have fetched £200,000,



The Miracle Man arriving at Northolt, accompanied by detectives, having been arrested in Paris, August 1951.

or at least £100,000, which, with his other assets, should have been enough to pay all his creditors. He broke down in the witness box twice; once when Salmon asked him what he thought when he learnt that the herd had been sold for £35,000 and again when asked why he had not returned to England to face his creditors. This performance evidently impressed the Recorder, who regarded Dr Gregory’s change of career as a foolish mistake: “*I am sorry to hear that doctors are drawn into this magnet of farming.*” The jury went out for one-and-a-half hours, before returning verdicts of not guilty to all charges. Outside court Dr Gregory was surrounded by a group of supporters, when two tipstiffs from the Bankruptcy Court arrested him for not attending a hearing in that court and took him back to Brixton Prison. Dr Gregory was philosophical: “*I don’t mind going back to Brixton as I shall be much more comfortable than I was in a French prison.*”

Pity these Patinos

One of Salmon’s last cases before becoming a judge was his most

newsworthy case. Sylvia Allen recalls the buzz of excitement in 3 Paper Buildings, which felt under siege from reporters. The reason for this had all to do with the protagonists, rather than the legal interest of the case, which was minimal. In 1956, Salmon was instructed to represent Joanne Connelly Ortiz-Patino, a glamorous American model and the wife of Jaime Ortiz-Patino, in a dispute, arising from the breakdown of their marriage, about the ownership of a Cartier diamond engagement ring and a bracelet and clips, given to Joanne as a wedding present. This jewellery was said to be worth about £57,000. The dispute about the jewellery was a skirmish in the divorce proceedings, which lasted far longer than the marriage.

The reason why the litigation between Jaime and Joanne was so newsworthy was that Jaime was a member of the Patino family, one of the richest families in the world. The family fortune derived from Jaime’s grandfather, Simón Iturri Patino, who had acquired a monopoly of the Bolivian

tin industry. On Simón's death in 1947, the bulk of his fortune passed to his son (and Jaime's uncle), Antenor Patino Rodriguez. Antenor's luxurious lifestyle and family feuds were seldom out of the news in the 1950s. First, there were the vicious divorce proceedings between Antenor and his wife, Maria Christina de Borbón y Borsch-Labrus, the third Duchess of Dúrcal, who at one stage obtained from a New York court a warrant for Antenor's arrest for failing to pay her a large sum of money.

Then there was the question of Antenor's daughters' marriages. In 1953, the elder daughter Maria Christina, married the Seventh Prince of Beauvau-Craon, a most satisfactory son-in-law, but the younger daughter, Maria Isabel, who was then aged eighteen, wanted to marry James Goldsmith (then aged twenty). Antenor considered Goldsmith totally unsuitable and refused to consent. Goldsmith refused to take "no" for an answer and so, in January 1954, he and Isabel eloped to Scotland, where they could marry without parental consent. With the press in hot pursuit, Antenor followed them to Edinburgh in a vain attempt to stop the marriage, which turned out to be tragically brief. In May 1954, while pregnant, Isabel died of a brain haemorrhage. Before she died, a baby daughter was delivered prematurely by caesarean section. When the baby was about three months old, the nanny took her to visit her grandmother, the Duchess of Dúrcal, at a hotel in Versailles. This provided the Duchess with the opportunity to take the baby into her care; or as Goldsmith put it, to kidnap the baby. With Antenor's support, the Duchess claimed custody in a Parisian court. The judge rejected her claim, finding that Goldsmith could provide a more than adequate home for his young child.

In January 1955, Antenor went to the Queen's Bench Division, seeking redress for what his counsel, Gilbert Beyfus QC, called "*a foul, filthy and unspeakable libel*". In October 1953, the Daily Mirror had published an article reporting that Antenor had insisted that the Prince of Beauvau-Craon should be present and assist at Christina's confinement and that, if he did so, the reward would be a christening present of 17 Canadian gold mines. Beyfus said this article showed that Antenor was an uncivilised person, lacking proper feelings of decency and propriety. The jury agreed and awarded Antenor damages of £13,000.

Meanwhile, in early 1954, Jaime Ortiz-Patino had fallen for Joanne Connelly Sweeney, a glamorous American model and socialite, who was recently divorced from Robert Sweeney, a leading amateur golfer.² They married in France in April 1954. The honeymoon was spent in Rome and Capri, where Joanne ran off, taking the jewellery with her. She was found unconscious in a cheap hotel and taken to a clinic in Rome for treatment for drug addiction from where she escaped. The marriage had lasted 49 days.

In July 1954, Jaime brought divorce proceedings in France and Switzerland. Not long afterwards, he also brought proceedings in England to recover the jewellery he had given Joanne and obtained an interim order for the engagement ring to be kept in safe custody at a London bank. In response, Joanne counterclaimed for the return of some jewellery she had given Jaime.

Meanwhile, Joanne's defence to the divorce proceedings, which was not a public document, had come into the hands of the Sunday Graphic. In January 1956, it published an article under the heading "*Pity these Patinos*", which, relying on defence documents, blamed the breakdown of the marriage on Jaime's sadistic cruelty. Following the example of his uncle Antenor, Jaime sued Kemsley Newspapers, the proprietors of the Sunday Graphic, for libel and retained Gilbert Beyfus QC as his counsel.

In this highly charged atmosphere, on 6 July 1956, the jewellery proceedings came on for trial before Mr Justice Slade. By this stage, Jaime had decided to withdraw his claim and to pursue instead a claim to recover the jewellery under section 17 of the Married Women's Property Act 1882.³ Salmon, for Joanne, explained to the judge the implausible nature of the claim that Jaime was giving up and on which Salmon suggested Jaime did not want to be cross-examined. As explained by Salmon, Jaime's case was that when he and Joanne chose the diamond engagement ring at Cartiers, he told her that he was merely giving her a revocable licence to wear it and, when he gave her a bracelet and clips as a wedding present, he told her the same thing. In those circumstances, the judge gave judgment with costs to Joanne and discharged the interim order preserving the jewellery. On that basis, Joanne got possession of the jewellery and withdrew her counterclaim.

Two weeks later, on 21 July 1956, the parties were back before Mr Justice Stable for directions on the section 17 proceedings. Jaime contended that Swiss law governed the gift of the jewellery and that under that law he had the right to revoke a gift. In explaining the issue to the judge, Salmon said that the choice of law was between the laws of (i) England where the gift was made (as he contended), (ii) the USA as Joanne's domicile, (iii) Switzerland where Jaime was domiciled and where the parties intended to live, (iv) France where the parties were married, and (v) Bolivia where Jaime was brought up. In directing that there should be a trial in December 1956 of the issue as to which law governed the gift of the jewellery, the judge commented on the multitude of possible answers: "*This sounds almost like a joke*". In the event, this trial did not take place and a year later Joanne still had the jewellery.

Instead, the parties' attention turned to Jaime's libel action, which came to trial in February 1957.

2. He won the Amateur Championship at Royal St George's in 1937. In 1954 he was beaten on the last hole in the final of the US Amateur Championship by Arnold Palmer.

3. This Act recognised the right of a wife to own property. In a dispute between husband and wife as to title to or possession of property, s 17 gave the court power to decide the issue in a summary way in private and to make such order with respect to the property as it thought fit.

Gilbert Beyfus QC, appearing for Jaime, told the court that it was *“the gravest case I have ever handled in a civil court”*. Kemsley’s defence of justification relied on the unstable foundation of Joanne’s evidence. She attended court every day, taking a note of proceedings, but when the time came for the defence to present its case, she decided to go to Switzerland for a skiing holiday instead of giving evidence. Kemsley had no choice but to withdraw its defence. After Mr Justice Ashworth had reminded the jury that the newspaper had branded Jaime as *“a sadist and pervert”*, it awarded damages of £20,000. The judge ordered the newspaper to pay costs.

In July 1957, Joanne’s lawyer announced that after three years of litigation the divorce arrangements had been completed and that the Swiss court would announce the divorce in 10 days’ time. On the following day, Joanne was found dead from heart failure in her villa in Switzerland. While Joanne’s life had been tragically short, Jaime would go on to make the most of his life. In due course, he took over management of the Patino business interests and pursued to the full his passions for golf and bridge.⁴

Salmon as a judge

In 1955 Cyril Salmon was appointed Commissioner of Assizes for the Wales and Chester Circuit. Such an appointment was often the prelude to appointment to the High Court bench. In consequence Salmon retired as Recorder of Gravesend and spent time away from London on Circuit. On 30 April 1957 Salmon was appointed to the High Court bench, sitting in the Queen’s Bench Division. An article about the history of chambers is not the place to dwell on Salmon’s long judicial career, but it worth mentioning at least some of the landmarks.

On 15 September 1958, Salmon was sitting for the first time in the Old Bailey, when nine youths, who had engaged in what the Times law report described as a *“nigger-hunting expedition”* in Notting Hill, came before him. They pleaded guilty to charges of wounding with intent to cause grievous bodily harm five men of colour, three of whom were gravely injured. In sentencing them each to four years in prison, Salmon combined scathing condemnation of their conduct, with a trenchant statement of liberal values:

“You are a minute and insignificant section of the population who have brought shame on the district in which you live and have filled the whole nation with horror, indignation and disgust.

Everyone, irrespective of the colour of their skins, is entitled to walk through our streets in peace with their heads erect and free of fear. That is a right which the Courts will always unflinchingly uphold.”

Those words, accompanied by a photograph of the judge in his robes and wearing his military medals,

occupied the whole of the front page of the next day’s Daily Mirror and attracted a great deal of public attention and debate. The Court of Criminal Appeal dismissed the youths’ appeal against their sentences. Giving the judgment of the Court, Paull J said that Salmon J’s words were *“wise, just and necessary”*.

In 1964, Salmon was appointed to the Court of Appeal. Of the many occasions when he sat in that Court with Lord Denning MR, it has been said: *“It is a mark of Salmon’s intellectual distinction that he acquired a reputation which rivalled Denning’s own for reconciling the justice of the case with the intellectual demands of the law.”*⁵ In Salmon’s view, the law develops to meet the needs of justice: *“Our law, however, develops in accordance with the changing needs of man. These have always been ascertained by experience rather than by the rigid application of abstract theory.”*⁶

The two cases most frequently mentioned to illustrate Salmon developing the law to meet the changing needs of time are *Nagle v Fielden*,⁷ affirming that a woman should not be denied a licence to train racehorses on the ground of her sex, and *R v Savundranayagan*,⁸ where he savagely criticised David Frost’s cross-examination of Dr Emil Savundra on television shortly before Savundra was arrested and charged with conspiracy to defraud. Although Savundra’s conviction on those charges was sound, Salmon said: *“This court hopes that no interview of this kind will ever again be televised. Trial by television cannot be tolerated in a civilised country.”*

In February 1966, Salmon was appointed chairman of the Royal Commission on the Working of the Tribunals and Inquiry (Evidence) Act 1921, which was established because of concern about the way Lord Denning had investigated behind closed doors allegations of a security risk from John Profumo, the Minister of Defence, sharing Christine Keeler as a mistress with a Russian naval attaché. Salmon’s Commission reported in November 1966 (Cmnd 3121) and recommended that the form of the Profumo inquiry should never be adopted again, that inquiries should be limited to cases of crisis in national confidence, and that in those cases the inquiry should be conducted under the 1921 Act with appropriate safeguards for witnesses and advocates.

In 1972, Salmon was elevated to the House of Lords as Lord Salmon of Sandwich. In the same year he was Treasurer of the Middle Temple and Captain of Royal St George’s Golf Club. To mark his appointment to the House of Lords, chambers held a dinner in his honour at the United Oxford and Cambridge University Club (as it was then called). At the end of the evening, Salmon made a gracious speech of thanks to which Lubbock, who was by then a Queen’s Bench master, added: *“I agree and have nothing to add.”* Salmon was not amused.

4. In 1984 he acquired the Valderrama golf course, near Marbella, which became the No.1 course in mainland Europe and the venue for the 1997 Ryder Cup, as well as several professional tournaments. He played bridge for Switzerland. He contributed to the administration of golf and bridge and accumulated the largest collection in the world of golf and bridge memorabilia. He died in 2013.

5. Article on Lord Salmon in the Oxford Dictionary of National Biography.

6. Re Valentine’s Settlement [1965] Ch 831, 852, CA. There is a similar statement in Re Chic Fashions Ltd [1968] 2 QB 299, 319, CA.

7. [1966] 2 QB 633, CA.

8. [1968] 1 WLR 1761, CA.



The Salmons at Quaives in 1951

9. *Peter Dumenil & Co Ltd v James Ruddin Ltd* [1953] 1 WLR 815, CA, leading Figgis.

10. [1955] Ch 600, CA.

Following the corruption and impropriety exposed by the Poulson case (largely through the endeavours of Muir Hunter QC and his juniors, David Graham and Michael Crystal), in 1974 Salmon was appointed chairman of the Royal Commission on Standards in Public Life. The many recommendations for reform made in his report (Cmnd 6524) were not implemented in legislation but did lead to improvements in standards among public bodies.

On 29 July 1980, Salmon retired from the House of Lords at the age of 76. The Times marked the occasion with a lengthy tribute (an accolade accorded to few other retiring judges), describing him as “among the most distinguished judges of the last quarter century and a man of outspoken liberal views”. He died on 7 November 1991.

Claude Duveen QC

By 1953, Duveen’s practice was prospering. He was much in demand in the world of showbusiness. In February 1953, he achieved a satisfactory settlement of a libel claim for the actress Olga Lindo, who complained that a passage in Tallulah Bankhead’s autobiography had implied that her performance in the role of Sadie Thompson in Somerset Maugham’s play *Rain* had been responsible for the play’s failure at the Garrick Theatre in 1925. The Times had given the play a favourable review, describing it as “an exciting, sordid, and sub-tropically hot little drama” in which “the triumph of the evening is Miss Olga Lindo”, so Miss Bankhead’s criticism of her performance may have been unmerited.

In the same month, Duveen appeared for Charlie Naughton, a member of the Crazy Gang, who

was sued for damages by a chorus girl, Irma Cicily Hanson. She complained that he had caused her injury by deliberately tripping her as she left the stage during a performance of *Knights of Madness* at the Victoria Palace theatre. Mr Justice Pilcher dismissed the claim, as he was not satisfied that Charlie Naughton, although an agile 66-year-old, could have moved across the stage quickly enough to deliberately trip Miss Hanson as she left the stage.

In April 1953 Duveen was appointed a Queen’s Counsel. His career as a silk began auspiciously with a triumph in the Court of Appeal in a commercial case about non-delivery of cases of skinned Australian rabbits.⁹ In his five years as a silk at 3 Paper Buildings and 2 Hare Court, Duveen’s practice was much as it had been as a junior. It included property and bankruptcy cases, including *Re Major*,¹⁰ where he led Muir Hunter, and which remains an important authority on extortion in bankruptcy proceedings. But the cases that attracted public attention were his show business and murder cases.

Blond bombshells

In January 1957 Duveen acted for Eric Winstone, a well-known bandleader, in the trial of a claim his company had brought against Diana Mary Fluck, otherwise known as Diana Dors, who was known as “Britain’s most glamorous film star”. While the Eric Winstone Orchestra were performing at Butlins at Clacton during the summer of 1954, Essex, Winstone agreed that one night in July his orchestra would perform at a Clacton cinema to raise money for the RAF Association. The fee was £210 plus £40 if all seats were sold. He engaged

Diana Dors to make a 15 minutes guest appearance for a fee of £80. Miss Dors failed to appear, saying that she had a cold and a sceptic throat. Mr Winstone did not believe this, because he knew that Diana Dors was working on a film and had to be at the studios early in the morning on the day after the scheduled Clacton appearance. Winstone told the audience that Diana Dors was not a woman of her word, did not respect her obligations and considered the people of Clacton to be unworthy of her talents. He also told a journalist that he had been let down by Miss Dors. His annoyance was compounded when he discovered that she had turned up at the film studio the following morning to honour her obligations there.

Winstone's company sued for damages for breach of contract and Diana Dors sued for damages for slander, saying her reputation for reliability had been damaged. The weakness of the Winstone case was that no damage had been suffered from Miss Dors's non-appearance; her fee had not been paid. Equally, her claim for reputational damage was difficult, given that her career did not appear to have suffered any setback as a result of anything Mr Winstone had said about her. Neither side would back down, and their claims came on for trial before Mr Justice Hallett ("*the judge who talked too much*"¹¹) over three days in January 1957.

During the trial an issue arose as to whether the audience would have been satisfied if Diana Dors had come to the Clacton cinema with a sore throat and simply croaked "Hello". Displaying the ignorance of popular culture for which English judges of the day were famed, Mr Justice Hallett said: "*I know nothing about the lady in question and am not entitled to know anything. Do her attractions consist of singing or something else, which else which would not be consistent with a sore throat?*" When Duveen assured the judge that the audience would be amply satisfied by her mere appearance, the judge perhaps inadvertently revealed that he knew more about Diana Dors than he was letting on, for he added: "*It depends on the proportion of Miss Dors's other charms to the charm of her voice.*" Duveen replied: "*We may have an opportunity of forming a view of that later in the case.*" The judge was not tempted, saying: "*I am not going to do that.*" When Diana Dors gave evidence, she insisted that her cold and sore throat were the reasons she did not go to Clacton, but she assured the court that, had she done so, she would have worn "*a very, very flimsy evening dress.*" There was only so much of this that the judge could take. At one point in his evidence Diana Dors' husband, Dennis Hamilton, said that "*coming to court is just a waste of time*". Seeing an opening for bringing the case to a speedy conclusion, the judge indicated that the parties might well find out that that was the case and that they might be disappointed with the result.

The court then adjourned for settlement negotiations. These were unsuccessful and so, the following morning Mr Justice Hallett gave judgment. He awarded Winstone's company nominal damages of £5 for breach of contract, since it had lost nothing, and Diana Dors damages of 100 guineas for slander. He found that Diana Dors had "*courage and tenacity*" and her reputation is "*wholly untarnished by what has happened in this unfortunate affair.*" He made no order for costs, which were estimated at £2,000, so both sides lost heavily.

In one of his last cases before becoming a judge, Duveen acted for Sabrina (Norma Ann Sykes), a glamorous starlet with an hour-glass figure, who was marketed by the BBC as "*the bosomy blond who didn't talk*". She and her father sued the publishers of a novel, *Cinderella Nightingale*, for libel. The novel, which described the life of a television and variety star, was said to be based on the life of Sabrina and on occasions implicitly showed her and her father in an unpleasant light. At the end of July 1958, Duveen appeared before Mr Justice Barry to inform him that the publishers had agreed to cease publishing the book, to withdraw existing copies from the market and to pay the costs of Sabrina and her father on the indemnity basis.

More murder cases

In the eight months between December 1954 and July 1955, Duveen appeared for four clients charged with murder. At the time, the death penalty was mandatory on conviction for murder and so, as counsel for the accused, Duveen quite literally had the life of his client in his hands. Many barristers have attested to the strain that this imposed on them and Duveen's fortitude in handling this caseload is remarkable. In each case, Duveen's task was to persuade the jury that his client was not guilty of murder, because the death was the unintended consequence of what his client did.

In December 1954 he appeared in a case reported under the banner: "*A mother's hug killed her*". His client, Mrs Georgina Tebbutt, aged 36, was charged with murdering her two-year-old daughter, Christine, by smothering her. Duveen secured Mrs Tebbutt's acquittal by persuading the jury that she had held Christine against her shoulder to comfort her and that Christine's doll had pressed against her neck, causing her to die.

Later that month, Duveen had the challenge of defending Thomas Walton, aged 20, a trooper in the Royal Horse Guards, who was charged with murdering his former girlfriend, by stabbing her with a sheath knife, after she had broken off their relationship. Duveen tried to set up a defence of insanity, saying that Walton had behaved like "*a raging lunatic*" and "*behaved more like an animal than a human being and did not know what he was doing when he did it.*" After the judge had instructed the jury that the medical evidence did not support

11. Hallett J's persistent interruptions became so disruptive that Lord Kilmuir LC asked him to resign; which he did at the end of the summer term 1957.



Miss Diana Dors attending the Cannes International Film Festival, 5 May 1956

a plea of insanity, Walton was found guilty of murder and sentenced to death by hanging. His appeal against sentence was dismissed, but two days before the sentence was due to be carried out, the Home Secretary reprieved Walton.

In March 1955, Duveen defended Leonard Kirby, aged 31, who, with his younger brother, was charged with murdering Henry Le Maistre, a 58-year-old who had won £40,000 on the football pools. The brothers had attempted to rob Mr Le Maistre at his home. In the ensuing fight, Le Maistre was struck in the face and kicked. He suffered six fractured ribs and died a few days later from his injuries. When questioned by the police, Leonard said: *"All right, I did the screwing, but I never booted the old man"*. But, as Duveen said in his final speech: *"Because this young man was a thief and he lied, that does not point to him being criminally responsible for the death of this man"*. The judge directed the jury that murder might be committed without deliberate intent to kill *"if the death results from a crime of violence in which grievous bodily harm or resistance to lawful apprehension is intended."* After deliberating for one hour, the jury returned verdicts of not guilty to murder but guilty of manslaughter. Leonard was sentenced to 12 years imprisonment and his brother received a shorter sentence.

In July 1955, Duveen represented Ernest Charles Harding, in a terrible murder case of a type all too familiar today. Harding, a burly and suntanned 42-year old bricklayer (as the Daily Mirror described him) was a married man and father of two grown-up children who lived in Coventry with his wife. One of his workmates described him as *"a friendly and likeable sort of fellow"*. On Wednesday 8 June 1955, he persuaded Patsy Higgins, a 10-year-old schoolgirl, to come for a drive in his car. He took her to a wood where, after sexually assaulting her, he tried to asphyxiate her and then killed her by repeatedly stabbing her in the neck. After that, he buried her in a shallow grave near a silver birch tree and disposed of his knife.

At the trial at Birmingham Assizes, Harding gave evidence. He had not intended to pick up a schoolgirl but found himself near Patsy's school. He offered to take her for a drive, and she got into his car. After a while, he stopped the car and started to kiss Patsy. When she screamed, he put his hand over her mouth but could not remember anything after that. On realising that she was dead, he decided to bury her and throw away her belongings. He also gave evidence about being concussed a few years earlier and suffering from trouble in his head, but he had not been to the doctor about it. Under cross-examination, Harding admitted that he knew what he was doing to Patsy, that he had *"wicked impulses"* and that he supposed he knew what he was doing was wrong. There was medical evidence that three years earlier he had suffered a fractured skull. The doctor who

gave evidence for the defence said that he had seen Harding since the murder and opined that he suffered from traumatic epilepsy and could have stabbed Patsy without knowing what he was doing. Mrs Harding said that her husband suffered from mood swings and had become bad-tempered. On the other hand, medical evidence for the prosecution found nothing to indicate that Harding suffered from any disease of the mind.

On that unpromising material, Duveen urged the jury to find that Harding was insane at the time he killed Patsy, even though he was sane before and after the crime. He pointed out that Harding had no recollection of the stabbing. The judge took 45 minutes to sum up to the jury, reminding it that the issue was whether Harding knew what he was doing or whether he was suffering from the effects of epilepsy and acting like an automaton. The jury went out for 90 minutes, before returning to the court to say that it found Harding guilty of murder. The judge donned the black cap and pronounced the death sentence. There was no appeal against sentence and no reprieve from the Home Secretary. In the early hours of

the morning of 9 August 1955, Harding was hanged at Winsom Green Prison, Birmingham. He had been judicially dispatched within two months of his crime.

Duveen's judicial career

In October 1958, Duveen was appointed a county court judge. To begin with, Duveen sat in Hertfordshire and Middlesex and the divorce courts in London. In 1962 he moved to the Reading circuit, which included the courts in Slough and Amersham and was more convenient for his home in Berkshire. Between 1958 and 1966, he was deputy chairman of the Berkshire Quarter Sessions and between 1966 and 1971 he was chairman.

To many barristers and solicitors, Duveen was a terrifying tribunal. Edward Evans-Lombe, who frequently appeared before Duveen, thought that he could not resist showing off. He refused (or appeared to refuse) to listen to legal arguments and objected to the citation of House of Lords authorities. If counsel said that the case was about proprietary estoppel or that he wished to refer the judge to a provision in the Law of Property Act 1925, Duveen would

respond "*Not in the Reading County Court*". Once, when counsel was making submissions, the telephone could be heard ringing in the judge's chambers. Duveen stood up, bowed and, as he went to his room to answer the telephone, said to the barrister "*don't mind me; you just carry on.*" One famous story about Duveen, concerns a traffic case between a female plaintiff and a male defendant in which the judge is supposed to have said: "*Both sides impress me as reliable, honest people, but my usual practice in such cases is to decide in favour of the one whose advocate is wearing the pin-striped trousers.*"

Members of Duveen's old chambers (including the author) were however protected from the judge's sharp tongue, provided they were able to draw that connection to his attention. The best way to do this was to refer him to a case in Morrell's Bankruptcy Reports (regardless of whether the case was relevant). Duveen would ask for the report to be handed up to him. Rather than looking at the case, Duveen would turn to the first page of the book, where he would see his own name. He had left his set of Morrell's Bankruptcy Reports to chambers when he became a judge.



The 1974 Free Pop Music Festival, Windsor Great Park

Once he knew that the barrister appearing before him came from his old chambers, he would treat him with all the courtesy and indulgence that could possibly be wished for.

One might think that Duveen's conduct as a judge would have led to constant successful appeals, criticisms from the Court of Appeal and calls from local solicitors for his removal. Quite the reverse. The Court of Appeal treated his judgments with respect; sometimes complimenting him for his careful note or judgment. Although opinions among solicitors and counsel varied, many appreciated the dispatch of business in Duveen's court and some enjoyed the entertainment value. Nearly 25 years after Duveen's death, Lord Justice Ward, hearing an appeal where one of the parties was appearing in person, recalled Duveen with affection and respect, saying:¹²

"I cannot look at the claim that is pursued in this case, running as it does to 76 pages, and not wonder how the late lamented His Honour Judge Claude Duveen would have dealt with a matter of this kind. Undoubtedly, he would have urged the parties to call the evidence, let him find the facts and then he would sort out the pleadings at the end of the case. It is His Honour Judge Claude Duveen's first rule, and it has much to commend it..."

The story about the pin-striped trousers may well have been an illustration given by Duveen to parties appearing before him, to explain the hazards of litigation and to encourage them to settle. Although he professed dislike of House of Lords judgments and esoteric legal concepts like proprietary estoppel, he was not so foolish as to ignore the law. Most of the cases before him could be determined on the facts and in accordance with well-established legal principles.

Duveen's last case to attract public attention illustrates that even the most unlikely of litigants, hippies at a pop festival, could obtain justice in his court. It arose out of scuffles when the police broke up the 1974 Windsor Free Festival, which was filmed by Independent Television News. The three plaintiffs – Nicholas Albery, Diana Senior and the poet John Heathcote Williams – appeared in person and claimed damages for assault from the Chief Constable of the Thames Valley police. They also wanted the court to see the whole of ITN's film. Duveen ordered ITN to produce it, but ITN objected except for the parts that had been broadcast. The trial proceeded on that basis. Duveen found that the police plan for ending the festival was *"an admirable scheme and admirably executed"*, but that some of the young police officers had been provoked by *"conflicts with savages of the kind that were among the campers"*. As a result, two of the plaintiffs had been injured. Albery had suffered *"an extremely painful"* blow on the nose in an *"entirely unjustified assault"* by a police officer. The judge awarded him damages

of £70 and costs. A police officer had pulled out a *"substantial chunk"* of Miss Senior's hair while she had been playing Tibetan bells *"in a peace-inducing manner"*. She was awarded damages of £35 and costs. On the hand, the judge dismissed Heathcote Williams' claim for £35 for loss of his sleeping bag and damages for shock and bruising when he was *"carried off by the nose"*, while meditating in the name of God. Turning to ITN, the judge said that its failure to produce all the film was *"a serious contempt of court"* and that he intended to take *"such steps as I see fit."* ITN appealed to the Court of Appeal to set aside the order for production of the film. In an important judgment, the Court of Appeal decided that the judge had power to make the order, but that it should be set aside as it was too wide.¹³

Duveen's heavy smoking took a toll on his health. He was still in office as a judge when he died on 6 September 1976 at the age of 73.

Douglas Potter

In October 1959 Potter was appointed a county court judge. His last reported case was *Fourmaids Ltd v Dudley Marshall (Properties) Ltd*,¹⁴ in which he led Muir Hunter, and which is often cited for Harman J's statement: *"The mortgagee may go into possession before the ink is dry on the mortgage, unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right."* As a judge, Potter sat at Willesden, Croydon and Kingston county courts until he retired in 1971. He died in 1983.

Chambers in 1959

When Potter departed to the county court bench, he left just five members of chambers at ground floor south, 3 Paper Buildings. Muir Hunter had been called to the Bar in 1938 and was then aged 45. Figgis, Lubbock and Head had all been called to the Bar in 1947 and were aged between 35 and 40. They were joined by David Graham who had been called to the Bar in 1957 and had just completed his pupillage with Hunter.

With the departures of Salmon, Duveen and Potter to judicial offices and the arrival of Hunter, chambers began to transform itself from a general common law set into one that, through Hunter and Figgis, became well-known for expertise in bankruptcy law. ■

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12. *Vedatech Corp v Crystal Decisions (UK)*, CA, 28 January 2001.

13. *Senior v Holdsworth* [1976] QB 23.

14. [1957] Ch 317, 320.

Acknowledgements

Celia Pilkington, Archivist at the Inner Temple, and Ben Taylor, Archive Assistant, for making available the Inn's tenancy record books and tenancy agreements

Sylvia Allen for providing information about Tony Allen and life in Chambers.

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Sir Anthony Evans for his file on Salmon

Patrick Figgis for providing information about Arthur Figgis and the photograph of him

Mary Morris for providing the photographs of Salmon

Northamptonshire County Cricket Club for providing the photograph of Lubbock

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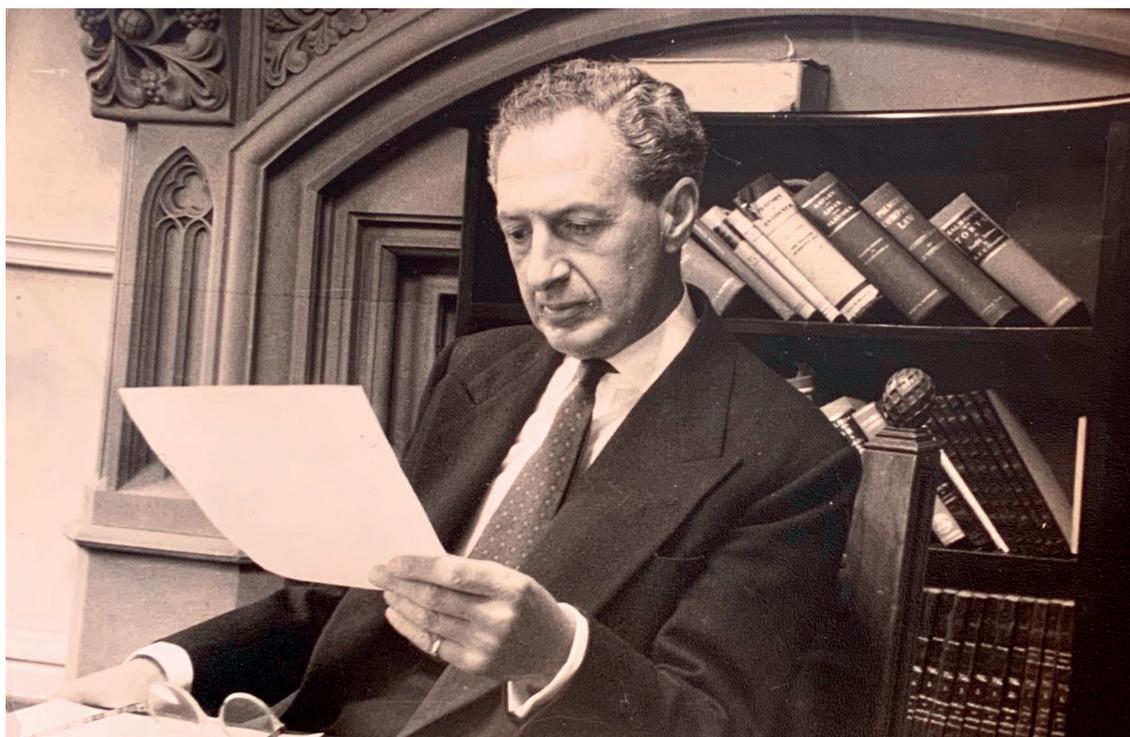
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News in brief

Pining for the Fjords?



In a parody of the famous Monty Python sketch, the purchaser of a soon-to-be-ex-parrot has won an implied warranty claim against the seller of one male *Electus roratus* parrot named “Tiberius”.

Electus parrots are said to have a life expectancy of 30 to 40 years and a Mr Kidwai sold, on 5 September 2019, for the sum of \$2,100, the then-two-month-old Tiberius to a Mr Davy of British Columbia.

Tiberius appeared to thrive at first but within three weeks he was ailing and losing plumage at a rate of knots. A visit to the vet confirmed that Tiberius had contracted Psittacine beak and feather disease, an incurable and often fatal condition.

By the end of 2019 Tiberius’ health had declined significantly and Mr Davy sued Mr Kidwai for fraud (alleging that Kidwai told him the bird was healthy) and breach of implied warranty. The case was tried by British Columbia’s Civil Resolution Tribunal.

Mr Davy failed on his fraud claim as he had told Mr Kidwai some 10 days after purchase that the bird was ‘doing great’ and he had not taken Tiberius to the vet until the end of September 2019. However, the claim for breach of implied warranty – that the parrot was legally ‘defective’ at the point of sale – was upheld. The Tribunal, citing a ‘defective puppy’ case for the proposition that the animal should live at least six months in order to be considered ‘durable for a reasonable period of time’, held that Kidwai had breached the implied warranty. Mr Kidwai was ordered to pay a little over \$2,500 for the breach of the parrot warranty.

Tiberius was still alive when judgment was handed down on 24 April 2020. The Digest has been unable to ascertain the bird’s current condition.

Defence barrister fined for ‘pulling faces’ at judge

A Bar Tribunals and Adjudication Service panel has found experienced barrister, Marguerite Russell, (called to the Bar in 1972) guilty of conduct likely to diminish the public’s trust and confidence in the profession.

Over a period of three months in 2016, whilst instructed as counsel

for the defence, it is said that Russell constantly interrupted her opponent’s submissions, failed to sit down when instructed to do so by the judge, and pulled faces and shouted at the judge, including describing one of the judge’s decisions as “‘insane”.

Russell was reprimanded and fined £1,000. The decision is open to appeal.

Virtual learning becomes reality at the Bar

Remote learning is to become the norm at the Inns of Court College of Advocacy (ICCA). From this coming September the first cohort of 58 students on the newly-launched course (devised before the global pandemic) will complete 14 weeks of study, with the aid of 32 specially-made films focussing on problem cases.

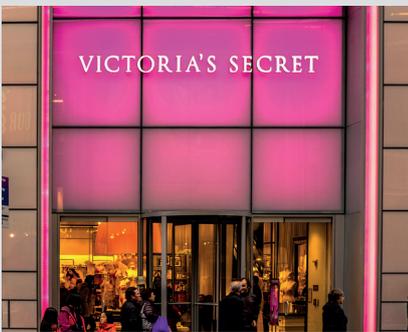
In an attempt to make remote learning as realistic as possible, the ICCA wrote case studies and then briefed barristers at Lincoln House chambers, Manchester, and Field Court, London to conduct the hearings which were then recorded and transcribed into scripts. Actors, who had been observing real-life trials at the Rolls Building and Blackfriars Crown Court prior to lockdown, then filmed the scenes. The filming involved was equivalent to the making of 9 feature films, with up to 24 camera angles being employed at some points.

Elsewhere, £1.5 million has been invested by BPP University Law School to develop its online and AI resources for its law conversion and Bar training courses.



'The Most Recession Friendly' Chambers in the Country

The Lawyer has declared South Square, with 99 big-name insolvency disputes since 2015, as the most 'recession friendly' chambers in the country. Chambers closest competitor comes second with 44. In its 'Horizon' newsletter the magazine noted that South Square is often the common denominator linking many of the big-name casualties of insolvency, including Carluccio's, Debenhams and BrightHouse.



Victoria's Secret Assets for Sale

The UK arm of Victoria's Secret has fallen into administration, putting more than 800 jobs at risk. The firm had already furloughed 785 workers in the UK before appointing administrators.

The lingerie chain, in/famous for its fashion shows several of whose 'Angels' went on to be supermodels, has 25 shops in the UK which, as non-essential retailers, have been shut since March. However, the brand had already been weakened by reduced consumer spending and changing consumer tastes, with the fashion shows drawing criticism for a sexist and outdated approach and their lack of diversity. Former chief marketing officer, Ed Razek, left the company after an interview with fashion magazine Vogue after suggesting 'transsexual' people should not be part of the show.

Administrators Deloitte, who are aiming for a 'light touch' administration, are now seeking buyers for the UK assets and to re-negotiate the stores' High Street rents.

Celebrity Secrets for Sale

REvil, one of the most notorious hacking groups in the world, has allegedly broken into the files of Grubman Shire Meiselas & Sacks, an American law firm whose roster of clients includes entertainment heavyweights such as Madonna, Lady Gaga and Bruce Springsteen.

The hackers claim to have 756 gigabytes of confidential data, including contracts, phone numbers and non-disclosure agreements. To prove the hack as genuine, and to add leverage to their ransom demands, the group released an excerpt from Madonna's recent 'Madame X' tour onto the dark web, along with screenshots showing named files for a swathe of high-profile clients.

REvil, which also goes by the names Sodin and Sodinokibi, frequently uses 'steal, encrypt and leak' tactics: it encrypts the stolen data with malicious software and, if not paid an exorbitant sum in ransom, begins to leak the data onto the web. REvil normally demands payment in untraceable bitcoin.

Earlier this year Cyberint, a security researcher, discovered that REvil was actively recruiting new hackers on the dark web and Russian cybercriminal forums, asking that only "serious and experienced professionals" bother applying.



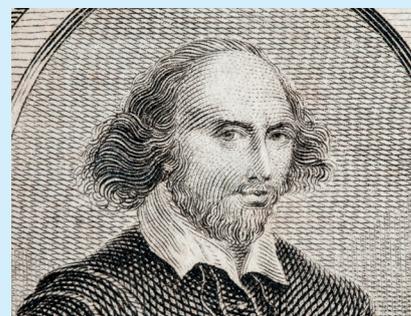


So do our minutes hasten to their end

Shakespeare's Globe has warned that it is at risk of closure following the financially 'devastating impact' of COVID-19.

The venue, which opened in 1997, usually attracts more than a million visitors a year during its open season, leading to a turnover of around £24 million. However, like all theatres up and down the kingdom, its gates are closed.

In written evidence to the House of Commons digital, culture, media and sport select committee the theatre has warned that, without emergency funding and the continuation of the coronavirus job-retention scheme, it will be at risk of insolvency and permanent closure. The Bankside venue receives no funding from the Government or Arts Council England.



Moos in Brief

A six-year-long legal battle concerning the cow bells of five Bavarian cattle – Sabrina, Sabine, Anneka, Sandra and Melissa – has finally been settled, with the cows emerging victorious.

When car-dealer 'Herr Reinhart U' and his wife moved to the village of Erkam in 2014, they initially agreed that the five cows belonging to Regina Killer could graze up to 20 metres from their home. However, 'Herr U' and his wife soon found the 'continual clanking' of the cows' bells irksome and kept them awake all night. Having installed a sound monitor in their home they declared the bells exceeded 70 decibels

in volume. 'Herr U' and his wife went to court six times in an attempt to have the bovine menace halted.

This issue was resolved by the investigating judge in the spring when they visited the farm and, using a phone app, measured the volume of the bells. It was found to only reach 60 decibels within a few meters of the cows. To resolve the case, Ms Killer has agreed in future to use bells no larger than 12cm in diameter and on no more than three cattle at a time.



Diary dates

South Square members will be attending, speaking and/or chairing the following events. Please note that, due to the global pandemic, events are likely to change or be cancelled.

Upcoming conferences

17 September 2020

Mourant/South Square Litigation Forum

📍 Unknown

23 September 2020

INSOL Channel Islands One Day Seminar

📍 Radisson Blue Waterfront Hotel,
St. Helier, Jersey

5 October 2020

London Legal Walk

📍 London

17 November 2020

South Square | RISA Conference

📍 Ritz Carlton, Grand Cayman

18 November 2020

INSOL Cayman Islands One Day Seminar

📍 Ritz Carlton, Grand Cayman

14-17 March 2021

INSOL Eleventh World Quadrennial Congress

📍 Manchester Grand Hyatt,
San Diego, USA

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

01



02



03



04



05



06



07



08



09



With live sport currently suspended during lockdown, you have a second chance to win our Digest sporting challenge, to which we received no correct answers from the last edition.

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 August 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!**



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 Toubé QC

Mark Arnold QC

Jeremy Goldring QC

David Allison QC

Tom Smith QC

Daniel Bayfield QC

Richard Fisher QC

John Briggs

Adam Goodison

Hilary Stonefrost

Lloyd Tamlyn

Stephen Robins

Marcus Haywood

Hannah Thornley

Clara Johnson

William Willson

Georgina Peters

Adam Al-Attar

Henry Phillips

Charlotte Cooke

Alexander Riddiford

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Toby Brown

Robert Amey

Andrew Shaw

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