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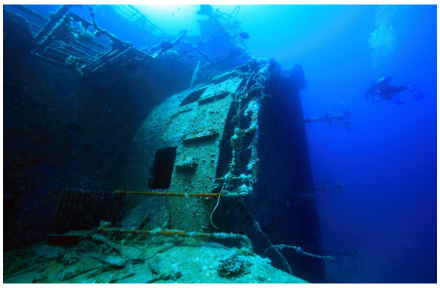

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SOUTH SQUARE

From the editors

MARCUS HAYWOOD AND WILLIAM WILLSON

Welcome to the first edition of the Digest of 2021

We hope all our readers and their families are well in what remain challenging times.

When the last edition of the Digest was published shortly before Christmas, the vaccine roll-out was just beginning, the Prime Minister had assured us we would all get our family Christmas and the fluid concept of a "*business lunch*" was sustaining the hospitality industry in the run-up to the festive period. Then, in the mother of all U-turns, on 19 December and at no more than a few hours' notice, nearly half the population were put into a new Tier 4 and family Christmas was cancelled.

Flash forward to spring 2021 and uncertainty still looms. More than 50% of the population have received their first vaccine and yet, amid '*vaccine wars*' with our former friends in the EU and a ban on non-essential foreign travel until the end of June, the fallout continues. We've been told that we can eat and drink out in a pub garden from 12 April – but how many pubs will be reopening for business? The furlough and other schemes have been extended further until September 2021 and insolvency statistics remain unrealistically depressed by various Government aid packages for an economy where GDP is down nearly 10%.

With all these uncertainties and with foreign travel restricted, what better place to take solace over Easter than in the pages of the South Square Digest?

In this edition, as our lead article, we have Mark Phillips QC's final article in his long-running Brexit series. Mark, together with Paul Fradley, considers what, from an insolvency lawyer's perspective at least, has turned out to be a "*hard Brexit*", as, from the start of 2021 the UK has left the EU's private international law orbit including the scope of the Judgments Regulation and the Insolvency Regulation. Mark and Paul show how the deal between the UK and the EU does not provide for any cooperation in insolvency law matters or private international law more generally.

In our regular offshore piece, Rocco Cecere (Partner at Collas Crill, Cayman Islands), alongside our Edoardo Lupi, considers the most recent developments in the Section 238 of the Cayman Islands Companies Act and looks at emerging patterns in Cayman Islands merger appraisal litigation. In recent years Section 238 has been and continues to be a substantial practice area in the Cayman Islands, and Rocco and Edoardo are already experienced veterans. The article is an illuminating summary of a complex area.

Our third cover piece is by Jeremy Goldring QC and Charlotte Cooke and looks at the recent *DeepOcean* restructuring plan. This was the first case of the English court sanctioning a restructuring plan with a cross-class cramdown under the new Part 26A of the Companies Act 2006. The authors conclude that *DeepOcean* is but a first expedition into previously uncharted waters: historically, class issues and analysis have been of central importance and will remain so; but valuation issues are likely to become of at least equal significance as debtors seek to utilise cramdowns to override the votes of dissentient classes.

Elsewhere we have articles by Clara Johnson, discussing the recent decision of the Commercial Court in *ING v Santander*; Richard Fisher QC and Mike Saville (Grant Thornton) provide a policy report entitled "*The Shifting Sands of Cross Border Insolvency*", as well as articles from Georgina Peters about the Supreme Court decision in *Marex* in July 2020 and Roseanna Darcy's guide to the new Practice Direction on witness statements.

Finally, we have two learned historical pieces from senior members of the Chambers: Michael Crystal QC writes on "*Company law and the Judiciary during the Palestine Mandate*"; and Simon Mortimore QC continues his canter through Chambers' history with his latest instalment.

The period since the last edition of the Digest was published has also seen the handing down of judgments in a number of important cases including the decisions of the Court of Appeal in *Etihad Airways PJSC v Flother* (in which Robin Dicker QC and Roseanna Darcy appeared), and in the *Phones 4U* case. A summary of these cases, along with other cases of note, many involving members of Chambers, appear as always in the Case Digests, with many thanks to Adam Al-Attar for his case digest editorial.

And to keep you busy over the Easter period, this edition's South Square Challenge is an insolvency quiz, asking players to identify distressed brands – and the purchasers who have purchased and saved them.

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 and Marcus Haywood

Brexit: A deal that leaves recognition of UK insolvency procedures uncertain

MARK PHILLIPS QC[1]

PAUL FRADLEY

The announcement of white smoke from Brussels on Christmas Eve was welcomed in most circles, providing a smoother landing for the UK at the end of the transition period on 31 December 2020. However, for insolvency and restructuring law, the announcement failed to prevent the consequences of a 'hard Brexit'. From the start of 2021 the UK has left the EU's private international law orbit including the scope of the Judgments Regulation and the Insolvency Regulation. The Deal between the UK and the EU does not provide for any cooperation in insolvency law matters or private international law more generally.

Lawyers and stakeholders will need to adapt rapidly to the changed position. The UK has the domestic legislation in place to ensure it can continue to recognise and assist EU Member State insolvency proceedings. However, the position for UK insolvency practitioners seeking recognition and/or assistance in the courts of an EU Member State is uncertain and unclear. It is quite possible that, while the UK will continue to recognise EU insolvencies, many EU Member States will not recognise UK insolvencies. This lack of reciprocity in recognition and assistance could affect the competitiveness of the UK restructuring market going forward and will create additional costs and uncertainties for UK insolvency officeholders and those seeking restructuring in the UK.

Cross-Border Insolvency in the UK

Following 31 December 2020, the UK has left the scope of the EU's Insolvency Regulation. The Insolvency Regulation is of central importance to insolvency proceedings in respect of debtors based in Europe. The EU Insolvency Regulation governs, in relation to all Member States of the EU (except Denmark), the jurisdiction to commence insolvency proceedings and the recognition and enforcement of judgments arising from such proceedings. The EU Insolvency Regulation seeks to allocate jurisdiction to open main proceedings and secondary proceedings within the EU.

The general scheme of the EU Insolvency Regulation is that the jurisdiction to open insolvency proceedings in respect of a company with its centre of main interests ('***COMI***') within the EU is conferred on the courts of the Member State where the debtor's centre of main interests is situated.[2] These proceedings are known as '*main proceedings*'. Where a debtor's centre of main interests is located in a Member State, the courts of other Member States only have jurisdiction to open insolvency proceedings in relation to the debtor if he has an '*establishment*' in that Member State;[3] the effects of such proceedings (known as '*secondary proceedings*') are restricted to the assets situated in that Member State.[4]

After Brexit, the UK has ceased to be within the scope of the EU Insolvency Regulation. By the Insolvency (Amendment) (EU Exit) Regulations 2019 (the '***2019 Regulations***'), the UK has made significant amendments to the Insolvency Regulation ('*the **Retained Insolvency Regulation***'). The amendments to the Insolvency Regulation, in so far as they relate to proceedings in England, are contained in paragraphs 1 to 15 of the Schedule to the 2019 Regulations. These amendments will only apply in the UK after Brexit and cannot affect the EU Insolvency Regulation as it applies in the EU27. One oddity is that no amendments have been made to the recitals. The status of the recitals after Brexit is accordingly unclear. They became UK law on 31 December 2020 in their current form and should continue to be an interpretive resource in relation to concepts found in the Retained Insolvency Regulation, particularly where those concepts have not been modified. The UK courts would continue to have regard to the rulings of the CJEU and other courts on provisions that remain unaltered.[5] One obvious example is the meaning of the COMI. That is unaltered and so UK courts ought to look at rulings of the CJEU and other European courts in determining its meaning and application. Thus, if a German court determines that the COMI of a debtor is in Germany and the CJEU effectively agrees, the UK courts are likely to reach the same decision.

However, aside from leaving the recitals and the possibility of consistent rulings in relation to common concepts such as the location of the COMI in place, the 2019 Regulations take a wrecking ball to the system of jurisdiction and recognition that was put together in the EU Insolvency Regulation. All the provisions on recognition of insolvency proceedings have been repealed, including the provisions dealing with court-to-court communication and communication between insolvency practitioner.[6] The provisions relating to the provision of information for creditors and the lodgment of creditor claims have been repealed, as have the provisions relating to groups.[7]

1. The authors gratefully acknowledge the assistance and advice given by our colleague Riz Mokal.

2. Insolvency Regulation, Article 3 (1).

3. Insolvency Regulation, Art 3 (2).

4. Insolvency Regulation, Art 3 (2).

5. See the European Union (Withdrawal) Act 2018, section 6.

6. The 2019 Regulations, para 7 of the Schedule.

7. The 2019 Regulations, para 7 of the Schedule.

The Retained Insolvency Regulation merely preserves, as a matter of English law, the grounds of jurisdiction which the EU Insolvency Regulation established.[8] These grounds of jurisdiction are expressly additional to any other grounds of jurisdiction the English court may have.[9] It allows the English courts to open insolvency proceedings in respect of a debtor which has its centre of main interests in the UK or an establishment in the UK. The list of insolvency proceedings that was in Annex A have been replaced so that the '*insolvency proceedings*' to which the Regulation would relate would be limited to the five UK procedures in Article 1 (1B), including interim proceedings.[10]

The English courts will be able to grant recognition and assistance to foreign insolvencies under the Cross-Border Insolvency Regulation 2006 ('*the **CBIR***'). The CBIR implements the UNCITRAL Model Law ('*the **Model Law***') into English law. It enables the English court to grant relief in support of foreign insolvency proceedings already taking place abroad. Foreign proceedings are either main or non-main depending on the location of the debtor's centre of main interests. Recognition as a foreign main proceeding gives an automatic stay on the commencement or continuation of actions or proceedings concerning the debtor's assets, rights, obligations, and liabilities.[11] In addition, the court may as a matter of discretion grant further forms of relief in support of the foreign insolvency.[12]

There are two differences, aside from the nomenclature of "*main proceedings*" in the EU Insolvency Regulation and "*foreign main proceedings*" in the CBIR. The first is that a line of English authorities has held that recognition under the CBIR is procedural rather than substantive.[13] The second is that recognition under the CBIR follows an application and is not automatic. In the immediate aftermath of Brexit, the UK will recognise insolvency proceedings brought in the EU27 by applying analogous procedures available in UK insolvencies. That would be the case whether the EU proceedings are in the country of the COMI or where there is an establishment.

Cross-Border Insolvency in the EU

It has been suggested in some quarters that the question whether the EU27 will recognise UK proceedings is simply a question of turning the clock back and applying the law in each EU27 country that applied before the EU Insolvency Regulation. That is wrong. It fails to recognise that the EU Insolvency Regulation is now a part of the domestic laws of each EU country and that the Regulation applies to aspects of all insolvencies both in Member States and in third countries. The domestic law applicable to the recognition of UK insolvencies and to the impact of insolvencies upon certain rights to property located in the UK, or contracts governed by a law of a UK jurisdiction, was altered in all EU

8. The 2019 Regulations, para 2(3) of the Schedule.

9. Retained Insolvency Regulation, Article 1.

10. The 2019 Regulations, regulation 3.

11. CBIR, Schedule 1, Article 20 (1).

12. CBIR, Schedule 1, Article 21 (1).

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

member states by the EU Insolvency Regulation. The EU Insolvency Regulation continues unamended in the EU27 – for those legal systems the clock has not been turned back and the EU Insolvency Regulation must be applied.

After 31 December 2020, the provisions of the EU Insolvency Regulation relating to Member States have ceased to apply to the UK. The automatic precedence given to main proceedings where the COMI is in the UK has been lost. EU Member States will not recognise a secondary insolvency proceeding opened in the UK on the ground of an establishment in a UK jurisdiction.

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

Turning to that domestic law, there are 4 EU Member States that have adopted the UNCITRAL Model law, although they do not include Germany, France, or Italy. Greece, Poland, Romania, and Slovenia have implemented the Model Law.[14] UK insolvency proceedings may be recognised and enforced in those countries by an application made to their courts under the local laws giving effect to the Model Law. One option for UK insolvency officeholders that merits consideration is to obtain recognition of the UK insolvency procedure in one of the EU states which have implemented the Model Law and then seek an ordinary civil order from the courts of that state protecting assets of the debtor from creditor action. That civil order could then be recognised across the EU under the Judgments Regulation[15]

In other EU Member States, the position will vary depending on the domestic cross-border insolvency apparatus. The one certainty is that the EU Insolvency Regulation will take precedence and no EU Member State will do something which is inconsistent with the provisions of that Regulation. The position concerning residual questions would of course depend on law of applicable law of the EU jurisdiction in which recognition and enforcement was sought, though there appears to be a broad divide between the Romantic and the Germanic jurisdictions. The Romantic jurisdictions are likely to give effect to residual aspects of a UK insolvency where the relevant EU member state national court determines that the COMI is in the UK. The Germanic jurisdictions are likely to give effect to residual aspects of a UK insolvency where the court proceeding by which the insolvency was commenced is itself recognised. The scope and application across the 23 EU jurisdictions that have not adopted the Model law remains uncertain.[16]

Civil Jurisdiction and Judgments

In relation to civil jurisdiction and judgments, the Judgments Regulation will continue to apply where the UK or foreign court was seised of proceedings before 31 December 2020.[17] For proceedings commenced after 31 December 2020 the Judgments Regulation does not apply.[18] The UK applied to join the Lugano Convention on 8 April 2020. While the Lugano Convention is not identical to the Judgments Regulation, it would allow the UK and EU to retain the benefits of the mutual recognition and enforcement of judgments. The UK's accession requires the unanimous agreement of the other contracting parties and at the time of writing the EU and Denmark have so far not indicated their support.[19] The Deal between the UK and the EU makes no mention of the Lugano Convention. In any event, even if the EU and Denmark do indicate support shortly, there is a three-month lag between an agreement and the entry into force of the Lugano Convention.[20]

As things stand, therefore, the rules for establishing jurisdiction in respect of defendants in the EU are essentially the same as the common law rules currently applied to non-EU defendants. The mutual recognition and enforcement of judgments from other EU Member States in the UK and vice versa has ended. Parties may be able to rely on one of two bases to obtain recognition and enforcement of judgments in EU Member States. Firstly, the UK is a signatory to the 2005 Hague Convention on Choice of Court Agreements ('***the Hague Convention***').[21] The EU is also a signatory to the Hague Convention, as is Singapore.[22] The Convention applies to cases where the courts take jurisdiction having been designated by an exclusive choice of court agreement i.e. an agreement designating the courts of one state to the exclusion of the jurisdiction of courts of any other state.[23] Signatories to the Convention are obliged to recognize and enforce such judgments subject to certain exceptions.[24]

By the terms of its instrument of accession, the UK government has sought to apply the Convention to choice of court agreements concluded over the period from 1 October 2015 (when the EU acceded to the Convention) to 31 December 2020 (when the Convention stops applying to the UK as an EU member upon the end of the transition period).[25]

14. https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status

15. It will be crucial to ensure that this civil order does not fall within the insolvency exception to the Judgments Regulation.

16. The UK Insolvency Service have published a high-level guide to the approach in each EU Member State. Published on 15 January 2021, available at: https://www.gov.uk/government/publications/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states-from-1-january-2021.

17. Judgments (Amendment) (EU Exit) Regulations 2019/479, regulation 92.

18. Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019/479, regulation 89.

19. Switzerland, Norway and Iceland have done so.

20. See the Lugano Convention, Article 72.

21. Private International Law (Implementation of Agreements) Act 2020.

22. https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

23. Hague Convention, Article 3. This may not extend to asymmetric jurisdiction clauses see *Etihad Airways PJSC v Flother* [2020] EWCA Civ 1707.

24. Hague Convention, Article 8.

25. Private International Law (Implementation of Agreements) Act 2020, Schedule 5, paragraph 7.

However, there is some indication that the European Commission regards the effective date as being 1 January 2021.[26] As a result, the position on enforcement of judgments in other EU states is uncertain where the choice of court agreement was entered into before 1 January 2021. It should be noted that the Convention excludes a number of subject matters from its scope including 'insolvency, composition and analogous matters'.[27] However, the Hague Convention might provide a useful basis for the recognition of schemes of arrangement or arrangements and restructurings which are sanctioned outside of insolvency proceedings.[28]

Secondly, the UK has treaties with a number of states that cover the recognition and enforcement of money judgments. These apply with states including Austria, Belgium, France, Germany, Italy, the Netherlands and Norway. The implementation of treaties in local law will depend on the state concerned. In English law, the treaties involving the EU states listed above are registered under the Foreign Judgments (Reciprocal Enforcement) Act 1933 ('*the **1933 Act***').[29] However, under the 1933 Act the foreign judgment must be "*final and conclusive*" and for the payment of "*a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty*".[30] Moreover, the English court must set aside the registration of a foreign judgment if it considers that the foreign court lacked jurisdiction according to a concept of jurisdiction which largely mirrors the common law rules for recognition and enforcement of judgments.[31]

If neither of these bases applies, then the recognition and enforcement of an English court judgment in EU Member States will depend on default rules for the recognition and enforcement of foreign judgments in each jurisdiction. In English law, for example, these are principally founded on the presence of the defendant in the foreign jurisdiction when proceedings began or their submission to the foreign court.[32] These default rules are likely to require local advice and a certain amount of uncertainty – a far cry from the automatic recognition and enforcement that the Judgments Regulation (or the Lugano Convention) would bring.

Governing Law

One thing that has stayed the same in the UK are the Rome I and Rome II Regulations. Those EU instruments determine the law governing contractual and non-contractual obligations. They continue to apply post-Brexit subject to amendments.[33] Rome I will continue to prove useful in achieving recognition of schemes of arrangement. Rome I enables the parties to a contract to choose the law applicable to their contract and provides that the chosen law governs "*the various ways of extinguishing obligations*".[34] That applicable law does not need to be the law of an EU Member State. If English law is chosen, the rule in *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux*[35] is that an English law contract will not be discharged by a foreign insolvency. In the context of a scheme of arrangement, where English law has been chosen only an English scheme will be effective to extinguish or vary the debt. Applying Rome I, where there is an English choice of law, and a scheme of arrangement varies or extinguishes that debt, that contractual effect will continue to be recognised across the EU.

Post-Brexit Challenges in Cross-Border Insolvency

With the UK out of the scope of the EU Insolvency Regulation, the challenges for the UK insolvency and restructuring industry will be large and varied. The UK will no longer benefit from guaranteed recognition in other EU Member States under the Judgments Regulation and Insolvency Regulation. The UK courts may refuse to sanction a scheme or restructuring plan if it will not be recognised in any of the relevant foreign jurisdictions where it mattered[36]. Going forward the position will involve considerable uncertainty. It may be necessary to go back to having an EU process or multiple processes in each country in which a UK based debtor operates as well as a UK process. This will

26. EU Commission Notice to Stakeholders dated 27 August 2020 available at https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/civil_justice_en.pdf.

27. Hague Convention, Article 2(2).

28. For the view that the Hague Convention will apply to schemes of arrangements see Matthews and Oehm, '*The Hague Convention on Choice of Court Agreements: an unexpected game changer for English schemes of arrangement*' (2016) 11 JIBFL 641-647.

29. Administration of Justice Act 1920 applies to treaties with some other states, principally Commonwealth ones.

30. See Foreign Judgments (Reciprocal Enforcement) Act 1933, sections 1 (2) and 11 (1).

31. Foreign Judgments (Reciprocal Enforcement) Act 1933, section 4. The fit with the common law is not exact, for example the common law unlike the 1933 Act regards presence as sufficient to found jurisdiction: see *Adams v Cape Industries plc* [1990] Ch 433, CA.

32. See Dicey, Morris & Collins on the Conflict of Laws (15th Ed), 14-054-14-096.

33. The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2019 (SI 2019/834).

34. Articles 3(1) and 12(1)(d) of Rome I.

35. (1890) LR 25 QBD 399, CA.

36. See the salutary warning of Zacaroli J in *Re Gategroup Guarantee Limited* [2021] EWHC 304 (Ch), [172].

inevitably increase the costs of restructuring in the UK and make the UK a less attractive destination for global restructurings to take place.

This uncertainty is bound to encourage other EU Member States to seek to compete with the UK as a destination for restructuring. A number of EU Member States have recently introduced new restructuring procedures to take advantage of this position. For example, the Dutch have developed a new restructuring procedure which allows for court confirmation of extrajudicial plans, combining features of both US Chapter 11 and the English scheme of arrangement.[37] This Dutch restructuring plan will, unlike the English scheme of arrangement, benefit from automatic recognition in the EU. The insolvency and restructuring industry will need to be prepared for EU Member States to have a competitive advantage over the UK.

One possible arrangement is to have an English scheme (or restructuring plan) linked to a Dutch plan. The English proceeding would secure the compromise of the company's English law debts,[38] while the Dutch proceeding would secure essential international recognition for the restructuring via the EU Regulations.

As for recognition and assistance for insolvency proceedings and jurisdiction to open insolvency proceedings, much will depend on the determination of a debtor's COMI by the courts of the EU Member State concerned. If that court decides that the debtor's COMI is in an EU Member State then it will be obliged to apply the EU Insolvency Regulation. If courts in the EU determine that the COMI is in an EU jurisdiction, EU insolvency proceedings commenced in that jurisdiction would be recognised across the EU, whereas UK insolvency proceedings would not.

The UK's absence from the scope of the EU Insolvency Regulation will raise difficult issues in relation to governing law under that Regulation. The basic rule under the Insolvency Regulation is that the lex concursus in both main and secondary proceedings governs both procedural and substantive matters.[39] The main and secondary proceedings must be in a Member State, so this basic rule applies to the laws of Member States. However, the EU Insolvency Regulation contains exceptions to this basic rule that apply the law of a Member State other than the lex concursus. After 31 December 2020 the UK is not a Member State and so these exceptions will not apply in the UK. That means that in the EU27 the lex concursus will apply. There are several examples:

(a) Article 8 of the EU Insolvency Regulation applies to rights in rem in respect of assets situated within the territory of a Member State protecting them from the effects of the opening of insolvency proceedings in another Member State. Now Member States will not be bound to recognise rights in rem of assets situated in the UK unless the lex concursus points to English or other UK law as the governing law.[40]

(b) Article 10 of the EU Insolvency Regulation provides that insolvency proceedings shall not affect sellers' ROT rights where "*at the time of the opening of proceedings the asset is [in a Member State].*" Therefore, after 31 December 2020, the EU Courts will only recognise the ROT rights of a seller whose assets are in the UK if the lex concursus points to English or other UK law .[41]

(c) Article 11 of the EU Insolvency Regulation concerns the effects of insolvency proceedings on a contract conferring the right to acquire or make use of immovable property. EU courts will now not apply this provision to immovable property in the UK.[42] A contract conferring the right to acquire or make use of immovable property in England will almost certainly be governed by English law.[43] Applying the rule in *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux*,[44] the effect of EU insolvency proceedings on an English law contract is limited.

However, there is considerable scope for uncertainty as to the effect of EU Insolvencies on such contracts.

37. The *Wet Homologatie Onderhands Akkoord* or 'WHOA'.

38. See the discussion of the point in the context of rule in *Antony Gibbs & Sons above.*

39. Article 7(1) of the EU Insolvency Regulation. This includes the Member State's law of applicable law ('*conflicts*'). So if the Member State's law of applicable law says that the *lex situs* governs rights in movable assets, and the assets are situate in England, then 7(1) requires ("*shall be that…*") that English law governs.

40. Pursuant to the EU Insolvency Regulation, Article 7. Of course, there is a practical aspect. To the extent that assets are situate in a UK jurisdiction, it may turn out that only such alterations in rights in rem in relation to such assets are effective as may be recognised by the courts of that UK jurisdiction.

41. Whilst there may be conflicts between potentially applicable laws, if the assets are in the UK it is likely to be UK law that matters.

42. The same practical question arises. There may be conflicts between potentially applicable laws but with the property situated in the UK it will be the law of the UK jurisdiction that matters.

43. Rome I, Article 4(1)(c).

44. (1890) LR 25 QBD 399, CA.

(d) Article 12 of the EU Insolvency Regulation provides that the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market "*shall be governed solely by the law of the Member State applicable to that system or market*"[45] although English law would govern securities that are publicly registered in England.[46] The provisions of Article 12 will not be applied by the EU27 to the UK's payment systems and markets after 31 December 2020. This could lead to UK courts and the courts of the EU applying different laws to different aspects of transactions on the London markets. It is difficult to see how this problem could be solved by the UK alone, because the problem is primarily the failure of the EU27 to apply English law to the London markets.

(e) Article 13 of the EU Insolvency Regulation provides that "*the effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.*" After 31 December 2020, if the COMI of a company is in an EU Member State, the effect of the insolvency on contracts of employment, for example whether the employment contract has terminated, will be governed by the law of the COMI jurisdiction.[47] However, as a matter of contract law in England, contracts governed by English law, could not be discharged or terminated by the foreign insolvency.[48]

Moreover, there are some provisions of the EU Insolvency Regulation which are not reciprocal. There is a distinction within the EU Insolvency Regulation between Member States and third countries. Whilst the UK has ceased to be a Member State, it has become a third country. There are provisions in the EU Insolvency Regulation that apply the law of a third country – these are provisions where reciprocity would be maintained even after the UK left the EU. However, the Retained Insolvency Regulation has repealed these provisions from UK law also. Far from the UK repealing provisions of the EU Insolvency Regulation on the ground that reciprocity has been lost, the UK has repealed provisions in circumstances where Member States would continue to reciprocate.

For example, Article 9 provides that set-off is available where "*a set-off is permitted by the law applicable to the to the insolvent debtor's claim.*" If set off applies in England to an English law claim,[49] that would be recognised by the EU Member States. However, the Retained Insolvency Regulation means that English courts will no longer recognise a set off permitted by the applicable law of a Member State. Article 17 gives protection to third party purchasers [50] in relation to acts concluded after the opening of insolvency proceedings where a debtor disposes of an immovable asset, a ship, an aircraft or securities. The validity of the disposition is governed by the law of the State within the territory where the immovable asset is or where the register is kept. This is not restricted to Member States and so will continue to apply to assets in the UK or registered in the UK. Notably it would apply to securities registered in the UK. However, the Retained Insolvency Regulation means that the UK will no longer apply the law of the EU Member state where the immovable asset or the register is kept.

The Future

In the insolvency context it is very difficult to take comfort from the Deal between the UK and the EU or the current position after 31 December 2020. What then is to be done about the situation? It is to be hoped that two measures will alleviate much of the difficulty caused by the current hard Brexit in insolvency cooperation:

(1) The UK's accession to the Lugano Convention; and (2) The EU's implementation of the Model Law.

It must be recognised that these two measures are not in the UK's gift but will depend on action from the EU side. The UK's accession to the Lugano Convention would remedy the majority of what has been lost by the UK's departure from the scope of the Judgments Regulation. The implementation of the Model Law by the EU would enable EU courts to give recognition and assistance to UK insolvencies on a more certain basis. It is not a complete remedy for the loss of the EU Insolvency Regulation. For example, the process of recognition under the Model Law is not automatic but requires a court application. Moreover, the issues relating to governing law under the EU Insolvency Regulation will remain. However, it will resolve the difficulties that will otherwise be faced by a UK insolvency practitioner seeking the recognition and/or assistance of the courts of an EU Member State, by providing a clear and predictable process to follow. In short, given where we are, an EU which has implemented the Model Law is much better for the UK insolvency and restructuring industry than one which has not.■

45. Article 12 of the EU Insolvency Regulation.

46. Article 12 (1) read with article 8 (3) of the EU Insolvency Regulation.

47. The law of the contract would be recognised under Rome I Article 8 and would almost certainly be English law.

48. Because of the rule in *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) LR 25 QBD 399, CA.

49. Rome I would continue to apply to determining the law of the contract because Rome I is not limited to Member States.

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

Emerging Patterns in Cayman Islands Merger Appraisal Litigation

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Introduction

Pursuant to section 238 of the Cayman Companies Act ("**Section 238**"), upon a merger or consolidation, a dissenting shareholder is entitled to a determination by the Grand Court of the "*fair value*" of its shares, along with a fair rate of interest. A long-form merger or consolidation under Part XVI of the Companies Act is authorised by a two-thirds majority in voting power of the company's members[1]. Upon giving notice of dissent, all of the dissenting shareholder's rights are replaced by an entitlement "*to be paid the fair value of that person's shares*"[2].

Section 238 has given rise to a large number of petitions in recent years, most of them involving Cayman Islands companies listed on United States stock exchanges with substantial business operations in the People's Republic of China.

In the majority of cases, the merger is initiated by the company's founder as a mechanism to take the company private by acquiring the shares of minority shareholders.

To date, comparatively few Section 238 petitions have gone to trial[3]. In light of international developments,[4] COVID-related market disruptions which depressed share prices and, more recently, confirmation of a dissenter's entitlement to a fair value determination irrespective of the *form* of merger (see further below), the number of Section 238 petitions has continued to increase.

Section 238 is a comparatively recent addition to the Companies Act. Since its introduction, the Grand Court has sought to grapple with what "*fair value*" means in this context and which valuation methodology, or combination of methodologies, it can rely on when determining fair value. In the recently decided cases, the battle lines between dissenting shareholders and petitioning companies[5] have followed a similar pattern. On the company-side, the tendency has been to rely on certain market indicators as proxies for fair value, namely:

(a) the adjusted share price (i.e., the price at which the company's shares would have been bought and sold on the relevant exchange as at the valuation date, in the absence of any proposed merger); and/or

(b) the merger price of the transaction which the dissenters have dissented from. On the dissenter-side, reliance has more frequently been placed on a discounted cash flow analysis ("**DCF**") with a view to establishing the intrinsic value of the dissenters' shares. From a commercial perspective, market-based approaches almost invariably produce a fair value determination equal to or only marginally better than the merger price.

As a result, the expert valuation evidence being adduced in Section 238 proceedings is increasingly sophisticated (and voluminous), addressing a broad spectrum of issues. These include:

(a) as regards the adjusted share price, the 'efficiency' of the market for the company's shares, as well as the existence or not of 'material non-public information' (or 'MNPI');

(b) as regards the merger price, the robustness of the deal process which led to the transaction, the conduct of the special committee appointed to negotiate the transaction on the seller-side, and any structural factors which may have prevented or inhibited competing bids from emerging; and

(c) as regards the DCF, evidence going to the different components making up the valuation model including the reliability of the company's projections and forecasts. Further, in a recent case, the parties were given permission to adduce expert evidence from '*industry experts*', as well as experts of Delaware law, in circumstances where Delaware's appraisal regime served as one of the models for Section 238 when it was enacted (see further below).

This article considers the most recent developments in this space, particularly the first instance judgments in *Re Trina Solar Limited* ("***Trina***") and *Re Nord Anglia Inc*. ("***Nord***") which have shed further light on the Grand Court's approach to determining "*fair value*" in the Section 238 context. From a procedural standpoint, there have also been some significant clarifications on the ambit of dissenter discovery, as well as confirmation of dissenters' entitlement to a fair value determination in the context of a short-form merger. These developments are also considered below.

The Delaware connection

Section 238 was enacted as recently as May 2009. In contrast, statutory merger regimes have been long-standing fixtures of the corporate codes of certain US states and Canada, with Delaware appraisal jurisprudence, in particular, being recognised as "*well-developed*"[6]. Delaware authorities have frequently been cited to the Grand Court in Section 238 cases. In *Trina*, the parties adduced expert evidence as to Delaware law, having been invited by the Judge to do so if they were intending to rely on Delaware law at trial.

In *Shanda Games Ltd v Maso Capital Investments Ltd* [2020] UKPC 2 ("***Shanda PC***"),[7] Lady Arden pointed to Delaware jurisprudence as being "*of great value in this field*" –but cautioned against importing Delaware law concepts without due regard to "*different economic and social policy considerations affecting legislation in Delaware*". Notably, on a number of matters, the Cayman Court has ploughed its own

1. Section 238(6) and section 60 of the Companies Act. This is to be contrasted with a 'short-form' merger, as described further below.

2. Section 238(7) of the Companies Act.

3. Only five cases have gone to trial to date: *Re Integra Group* [2016 (1) CILR 192], *Re Shanda Games* (Unreported, Grand Court, 25 April 2017), *Re Qunar Cayman Islands Ltd.* [2019 (1) CILR 611], *Re Nord Anglia Inc* (Unreported, Grand Court, 17 March 2020) and most recently, *Re Trina Solar* (Unreported, Grand Court, 23 September 2020).

4. For example, in December 2020, the Holding Foreign Companies Accountable Act was enacted in the United States and prohibits trading in a company's shares where it has failed to comply with United States auditing regulations. The legislation was enacted in response to growing bi-partisan concerns that Chinese companies listed on United States exchanges were refusing to submit their audited accounts to United States regulators, on the basis that such disclosure was prohibited under Chinese law. Also, in July 2019 the NASDAQ-style "*STAR Market*" was created on the Shanghai stock exchange amidst escalating United States-China trade tensions, designed to attract Chinese technology companies to listing in China.

5. The company is required to file a petition under Section 238(9)(a) of the Companies Act.

6. *Re Shanda Games* [2018 (1) CILR 352] at [46].

7. At [49].

furrow and departed from the approach taken in the Delaware authorities. For example:

(1) In *Shanda PC*, the Privy Council held that the Delaware approach to valuing the shares of a minority (on a *pro rata* basis, as opposed to by reference to the minority shares themselves) does not apply to Section 238 appraisals.

(2) Minority discounts are not applied in Delaware appraisal actions[8] but since the decision in *Shanda PC* minority discounts may be applied in Section 238 cases, though there is no bright-line rule to that effect and the Cayman Islands Court of Appeal was wrong to hold that there is such a rule.[9]

(3) In both *Trina* and *Nord* (as well as *Qunar* before them), the Grand Court determined fair value by blending different valuation methodologies. In *Trina*, Segal J noted that no Delaware cases had been cited to him in which the Delaware Court gave weight both to the merger price and the adjusted share price.[10]

The significance of market-based approaches

Much of the legal controversy in recent Section 238 cases has concerned the extent to which the Grand Court should have regard to market-based approaches when determining fair value, as opposed to adopting valuation techniques more commonly associated with intrinsic or fundamental value, such as the DCF. In *Nord*, the dissenters sought to contrast the way in which Section 238 mandates the Grand Court to "*determine*" fair *value* as opposed to the *price* produced among market participants. They found an unlikely mouthpiece in Oscar Wilde's Lord Darlington to summarise their case on this point:[11]

"*A cynic is a man who knows the price of everything and the value of nothing*".

The Grand Court has repeatedly held that a DCF can be "*an accurate measure of fair value*" depending, in particular, on the reliability of the management projections.[12] In all of the Section 238 cases to date, the DCF has featured in the Grand Court's final assessment of fair value: in *Shanda*, a DCF was given 100% weight; in *Integra*, a 75% weighting was applied to a DCF, with 25% given to the guideline public company methodology; in *Qunar*, 50% weight was given to a DCF and 50% to the adjusted share price; in *Nord*, a 40% weighting was applied to a DCF approved by the Grand Court, and 60% to the merger price; and in *Trina*, a 45% weighting was applied to the merger price, 30% to the adjusted share price, and 25% to a DCF.

Following the decision in *Shanda PC*, however, the company in *Trina* raised an argument which was intended "*to eliminate reliance on or to reduce the weight to be attached to a DCF valuation*".[13] The company argued that the decision in *Shanda PC* effectively mandated the Grand Court, in the case of a listed company, only to consider market-based indicators, having exclusive regard to publicly available information.[14] Segal J rejected this argument. The principle derived from Shanda PC said nothing about the *manner* in which the fair value of the dissenting shareholder's shares is to be ascertained, nor did it require the Grand Court to assume a hypothetical sale between a willing buyer and a willing seller.[15]

The Grand Court has now made clear in a number of cases that a market *price* cannot simply be equated with fair value within the meaning of Section 238. Indeed, in no decided case has the Grand Court placed exclusive reliance on market-based approaches. The question for the Grand Court as to the valuation methodology it adopts is not subject to bright-line rules, but is a fact-sensitive question to be decided in all of the circumstances.[16]

'Blending'

Faced with these often entrenched positions, the Grand Court has in recent cases proceeded to "*blend*" valuation approaches, applying different weightings to market indicators as well as to a DCF analysis in reaching its final determination of fair value.

In some cases, the Grand Court has taken this course having preferred the valuation evidence of an expert who opined that blending was appropriate in the circumstances.[17] Thus in *Trina*, the Judge held that he was satisfied that it was appropriate to adopt the blended approach preferred by the company expert. Segal J gave weight to three competing valuation methodologies, in circumstances where he considered each methodology to be subject to sufficiently serious uncertainty to justify some level of discounting.[18]

In *Nord*, neither expert advocated blending and, thus, had not opined on any particular weighting. The company expert believed that 100% weight should be accorded to the adjusted share price or, alternatively, 100% to the merger price. In contrast, the dissenter expert opined that 100% weight should be accorded to a DCF. Kawaley J held that Section 238 confers jurisdiction to permit "*adapting or blending*" the approaches proposed by expert valuers[19] and proceeded to do so despite finding the weighting exercise "*very difficult*".

The interrelationship between blending and the evidential burden on the parties to make good their case on particular issues is not altogether clear from these decisions. The Grand Court has tended to reflect perceived deficiencies in a particular methodology by discounting the weighting applied to it in the final determination of fair value.[20] This approach may well raise principled difficulties where, for instance,

8. *Shanda PC* [21].
9. *Shanda PC* [55].
10. At [340(c)].
11. *Nord* at [226].
12. *Qunar* at [73].
13. *Trina* at [84].
14. *Trina* at [103].
15. *Trina* at [90].
16. *Trina* at [94].
17. That was the position in *Qunar* and *Trina*, where the company valuation expert was the same individual.
18. *Trina* at [340(a)].
19. *Nord* at [235].
20. See *Trina* at [340(c)].

the Grand Court has determined that the deal process had some limited merits but overall was insufficiently robust and not conducted at arm's length. This is often an issue in the Cayman Islands cases, where the merger is frequently instigated by the founder of the company, whose buyer group has enough voting power to authorise the merger and has made it clear that it will not work with any other rival bidder (irrespective of their offer) thereby deterring competing bids. In such a case, it is not altogether easy to see why the merger price should be accorded *any* weight at all: *ex hypothesi*, there is no rational way to ascertain whether, had the deal process in fact been sufficiently open and robust, a competing bidder or bidders would have made topping bids and, if so, the size of the topping bid(s).

Minority discount

The *Shanda PC* judgment was handed down after trial in both the *Nord* and *Trina cases*, but prior to judgment. Substantial post-trial submissions were received on the *Shanda PC* decision in *Trina* but not in *Nord.*

In *Nord*, the Judge noted that the starting assumption was that a minority discount should be applied, but that there needed to be an evidential foundation for the Grand Court to make such a finding. The dissenter expert had opined, without contradiction by the company expert, that no minority discount was required on the facts. That being so, the Judge found himself unable to apply a minority discount based on the evidence before him.

In *Trina*, Segal J emphasised that the Privy Council had explained that a minority discount could be applied in an appropriate case, but did not rule out the possibility that there might be a case where such a discount was inappropriate. In *Trina* it was agreed that a minority discount was appropriate, with the experts disagreeing only on the size of that discount. The Judge preferred the dissenters' figure of 2% as opposed to the company's figure of 10%. Following judgment, an issue arose as to whether the 2% discount should be applied to the part of the fair value determination referable to the merger price (to which the Judge had applied a 45% weighting), as well as to the DCF. In a further judgment,[21] Segal J concluded that he should accept the views of the company expert and apply a discount to the merger price component as well, in circumstances where only the company's evidence had dealt with the point.[22] However, the Judge made clear that he was not deciding the point for the future, given that it had only appeared in post-trial submissions and was not fully canvassed at trial.

Other developments

As regards the contentious area of dissenter discovery, the Grand Court has clarified matters going to the scope of dissenters' obligation to give discovery in Section 238 proceedings in a number of recent decisions. In *Re eHi Car Services Limited*,[23] the company attempted to extend categories of disclosure to be provided by dissenting shareholders. The Grand Court rejected these categories as disproportionate, as it had done in prior cases. Subsequently, in *Re FGL Holdings*[24] the Grand Court once again rejected an attempt which sought to impose an obligation akin to giving general discovery.

21. (Unreported, Grand Court 18 December 2020).

22. *Trina* at [6] and [6(q)].

23. (Unreported, Grand Court 24 February 2020).

24. (Unreported, Grand Court,18 December 2020).

A further significant development concerns the availability of Section 238 relief in respect of '*short-form*' mergers. Short-form mergers may be effected where a parent entitled to exercise at least 90% of the voting power in a direct subsidiary merges with that subsidiary. In that scenario, there is no requirement for a shareholder vote to authorise the merger: all that is required is to give a copy of the plan of merger to every member of the subsidiary to be merged.[25]

In the recent *Changyou.com* decision,[26] shareholders dissented from a short-form merger notwithstanding that the company's public filings stated that dissent rights were not available in that case. Deciding the matter as a preliminary issue on a Section 238 petition, Chief Justice Smellie held that a shareholder in the case of a short-form merger is entitled to a determination of the fair value of its shares. The company had failed to identify any reason why a minority shareholder in a short-form merger was any less deserving of protection against the compulsory acquisition of its shares than a shareholder in a long-form merger. The *Changyou.com* decision has broad implications. Before it was handed down, there were a number of pending short-form mergers, which did not envisage minority shareholders being entitled to exercise the right to dissent. At least one of those mergers was subsequently revised to comply with the *Changyou.com* ruling, by offering dissent rights. Further, before the *Changyou.com* ruling, a number of companies had completed short-form mergers without offering dissent rights.[27] Minority shareholders have commenced proceedings against some of these companies and their management in the United States alleging breaches of the United States Securities Exchange Act.

Conclusion

Section 238 protects minority shareholders whose shares have been compulsorily acquired. It was described by the Chief Justice in *JA Solar Holdings Co., Ltd* as a "*vital safeguard for minority shareholders designed to protect their economic interests*"[28] and by Segal J in *Shanda* as "*the mechanism by which the rights of the dissenting minority are protected and such shareholders are given access to the Court (without interference with or delaying the statutory merger process)*"[29] The safeguarding role Section 238 plays within the scheme of the Companies Act is critical particularly in view of the comparatively low thresholds imposed under Part XVI for the authorisation of long-form and short-form mergers.[30] The Grand Court has now demonstrated its reluctance to permit petitioning companies from

(a) circumventing a dissenter's entitlement to a fair value determination by reliance on the short-form merger procedure and

(b) relying on market prices as a proxy for fair value in all cases as a rule of thumb. Rather, as is now clear, the determination of fair value pursuant to Section 238 requires the Grand Court to undertake a nuanced and technical valuation exercise without resorting to bright line rules. A number of Section 238 cases are expected to go to trial in the next six to twelve months: doubtless, companies contemplating reliance on Section 238 in the future, as well as their investors, will be watching this space closely. ■

25. Section 233(7) of the Companies Act.

26. (Unreported, Grand Court, 28 January 2021).

27. Since the introduction of the statutory merger regime, at least seven short-form mergers have been completed. Only two of those mergers have offered dissent rights to minority shareholders.

28. *JA Solar Holdings Co., Ltd* (Unreported, Grand Court, 18 July 2019) [14] – [15].

29. (Unreported, Grand Court, 25 April 2017), at [74].

30. By way of comparison, see the requirements for a scheme of arrangement under Section 86(2) of the Companies Act, requiring a 75% majority in value and a majority of shareholders in number. The statutory majority must be obtained in respect of each class meeting convened by the Court.

Marex Revisited: Blurring the boundaries of a bright line rule

GEORGINA PETERS

Georgina Peters analyses the post-Marex landscape, in light of subsequent Court of Appeal and first instance decisions. She is the author of the chapter on "Members' Personal and Derivative Claims" in Company Directors: Duties, Liabilities and Remedies (OUP, 2017).

The Supreme Court decision in *Marex Financial Ltd v Sevilleja* [2021] AC 39 last year focussed, above all, on the existence of principle and its precise boundaries. The majority judgment represented, first, a clear reaffirmation of the (extensively criticised) reflective loss principle (*the* "***RLP***") in relation to shareholder claims. It was, secondly, a firm rejection of the exception to the rule established in *Giles v Rhind* [2003] Ch 618, in cases where the company is prevented from pursuing its own claim by reason of the wrong which has been done to it. Thirdly, the decision confined the RLP's ambit to shareholder claimants, disapproving previous *dicta* which had expanded application of the RLP to non-shareholder claims, such as claims brought by company creditors, and overruling the Court of Appeal decision in *Gardner v Parker* [2004] 2 BCLC 554.

The majority judgment – which upheld the RLP in relation to shareholder claims whilst rationalising it as part of the principles of company autonomy – characterised the RLP as a '*bright line rule*' (or, as the minority put it more than once, as a "*crude bright line rule*"). By disassociating the RLP from the rule against double recovery, the certainty of legal principle was promoted over more uncertain flexibility and complexity. The majority pointed expressly to "*the advantage of establishing a clear principle, rather than leaving the protection of creditors and other shareholders of the company to be given by a judge in the complexities of a trial*" (at [38]).

So far, so clear. It might, therefore, naturally be assumed that disputes arguably engaging the RLP will now be easily resolved by reference to the *Marex* parameters, without the need for litigation. But that outcome is most unlikely. On its face, the *Marex* judgment alone still gives rise to factual scenarios which are likely to test yet further the RLP's precise scope: perhaps the most obvious being to assess whether the claimant has indeed suffered a loss that is '*separate*' and '*distinct*' from that of the company's loss. Moreover, in the eight months since *Marex*, three decisions, one in the Court of Appeal, another heading to the Court of Appeal, have already illustrated the ongoing complexities to which such disputes give rise.

This article focuses on likely points of remaining uncertainty post-*Marex*, and considers the subsequent case law.

The RLP

The RLP was designed to prevent a shareholder from recovering damages for loss suffered because the company in which the shareholder is invested has suffered loss. It was identified by the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) [1982] Ch 204, 222–3, as the principle that a shareholder cannot sue to make good a diminution in share value, which is merely a reflection of the loss suffered by the company.

The RLP was subsequently upheld by the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1, in which the claimant shareholder was precluded from recovering in respect of losses caused by the third-party solicitors' breach of duty, which were held merely to reflect losses suffered by the company. Lord Bingham's classic statement of the principle was as follows (at 35):

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

The principle was originally regarded as necessary to prevent the circumvention of another principle of company law, universally known as the rule in *Foss v Harbottle*, a 19th century decision ((1843) 2 Hare 461), which in fact established two general propositions: first, the '*proper plaintiff*' principle, by which *prima facie* the company is the only proper claimant in proceedings to redress a wrong alleged to have been done to it or to recover money or damages alleged to be due to it; and secondly, the '*majority rule*' principle, by which an individual shareholder may not pursue proceedings on behalf of himself and other shareholders if the alleged wrong was within the company's powers, since, in those circumstances, the majority of the shareholders might lawfully ratify the allegedly wrongful transaction.

The relationship between those two propositions was explained in *Edwards v Halliwell* [1950] 2 All ER 1064, *per* Jenkins LJ, at 1066H: the assertion that the company is *prima facie* the proper plaintiff is equivalent to holding that the majority have the sole right to determine whether or not the action shall be brought. Its rationale was to

prevent the court from interfering with the company's internal management at the instance of a minority shareholder, dissatisfied with the board's conduct of its affairs.

Two points bear emphasis. The first is that, recognising that an otherwise meritorious claim might be stultified by wrongdoing director(s) having control of the company, the courts developed the derivative claim to permit an individual shareholder to bring the claim on behalf of the company, by way of exception to the rule in *Foss*. The derivative claim is now a statutory procedure under Part 11 of the Companies Act 2006, designed to compensate a shareholder for damage or prejudice to their investment arising out of a director's conduct. It is '*derivative*', because it is a procedure by which the shareholder enforces the company's claim. It is available only to redress a wrong arising out of the director's wrongdoing (though a claim may be brought against a third party, so long as the cause of action arises out of the director's wrongdoing).

The second point is that the reasoning in *Foss* was that the shareholders are the ultimate *proprietors* of the company, who would in most cases act by majority rule (*per* Sir James Wigram VC, at 494). However, *Foss* was decided some fifty years prior to the House of Lords' decision in *Salomon v A Salomon & Co Ltd* [1897] AC 22, which established the proposition that the company has a separate legal personality from its shareholders, who have no legal or equitable interest in and are not part owners of the company's assets. Rather, a shareholding confers a bundle of rights on the shareholder, including a right of participation in the company's affairs pursuant to its constitutional documents (see *Marex*, at [103]).

Marex recapped

The facts in *Marex* were straightforward: the claimant was a judgment creditor of two BVI-incorporated forex companies, who alleged that after release of the draft judgment, the defendant, a Dubai resident and the ultimate beneficial owner of the companies, had asset-stripped the companies and moved their assets overseas, to prevent the judgment from being enforced. The defendant placed both companies in insolvent voluntary liquidation in the BVI, and the liquidator took no steps to recover the companies' loss. The claimant sought damages in tort against the defendant for inducing or procuring the violation of its rights under the judgment (the *Lumley v Gye* claim) and intentionally causing it to suffer loss by unlawful means (the *OBG* claim). The question whether the claim was barred by the RLP was litigated in the course of the parties' dispute over whether the claim could be served out of the jurisdiction.

Rather than solely focussing on the RLP's scope (and whether it extended to a creditor's claim), a seven-member Supreme Court was effectively invited to reappraise whether the RLP warranted a continued role in English company law, and if so, on what basis. There were (at least) three routes open to the Supreme Court: (i) to hold that the RLP had application to claims by creditor claimants, thereby affirming the widening ambit of the principle as interpreted in a number of cases, said to be supported by Lord Millett's judgment in *Johnson*; (ii) to reverse the widening ambit of the RLP, but to preserve the rule so far as it has applied to claims by shareholder claimants; or (iii) to overrule *Johnson* in so far as it endorsed the RLP identified in *Prudential*, even in relation to shareholder claims.

The Supreme Court unanimously held that the RLP did *not* apply to a claim made by a person who is a creditor of the company (permitting *Marex*'s claims against the former director to proceed). The decision was, however, most striking for its divergence between majority and minority judgments. The majority (Lord Reed PSC, Lord Hodge DPSC, Lady Black and Lord Lloyd-Jones JJSC) reaffirmed the RLP as "*a limited principle of company law*" in relation to claims by shareholder claimants; the minority (Lord Kitchin and Lord Sales JJSC and Baroness Hale of Richmond) dissented from this element of the decision, and would have held that *Johnson* (in so far as it endorsed the RLP identified in *Prudential*) should be overruled. The RLP thus came very close to being abandoned altogether in English law.

Overall, *Marex* decided the following:

- The RLP is a limited principle of company law, namely that shareholders in a company cannot bring an action to make good a diminution in the *value of their shareholding*,or in the *distributions* they receive, *which flows from loss* suffered by the company, and in respect of which the company has a cause of action against the same wrongdoer ([79]; [89]).
- The rationale for the RLP is that the shareholder has not suffered a *loss* which is *recognised* in law as having an existence which is *separate and distinct* from the company's loss, given the long-established principle of company law that the only person who could seek relief for an injury done to a company, where the company has a cause of action, is the company itself. A reduction in share value (or attendant distributions) was not, therefore, viewed as '*separate*'

or '*distinct*' from loss suffered by the company. It is characterised as '*reflective*' of the company's loss, and as such, not recoverable.

- Where a claim is brought in respect of a *loss* not falling within that description, whether by a shareholder or creditor of the company, the claim falls to be adjudicated on in the ordinary way, notwithstanding that the company may have a right of action in respect of substantially the same loss ([63]; [75] to [79]). This element of the decision, which overruled *Gardner* and was also accepted by the minority in *Marex*, was sufficient to dispose of the defendant director's defence based on the RLP in *Marex*.
- The RLP applies to bar an otherwise valid claim even if the company declines or fails to make good that loss, for whatever reason – including the conduct of those in control of the company and/or the defendant (at [69] to [71]), thereby overruling *Giles* (the fraud exception) and *Perry v Day* [2005] 2 BCLC 405.

So far as concerns the first two points above, the legal rationale for the RLP was closely connected to its scope. The majority judgment (*per* Lord Reed) explicitly rejected the proposition held in previous cases (e.g. *Gardner*, *per* Neuberger LJ) that the RLP was a general rule of the law of damages, and that it was founded on the principle that double recovery under concurrent claims should be avoided (at [33]; [52] to [55]).

The general position in cases where two claimants have concurrent claims, which are based on different causes of action, but in respect of what is in substance the same '*debt*' is that their concurrent rights of recovery are permitted. That is limited by the principle that double recovery against the defendant (or in the case of insolvency, double proof against the insolvent estate) should be avoided: *The Halcyon Skies [1977] QB 14, 32*. Such a principle does not deflect the law from compensating both claimants, but it affects the remedial route by which the law achieves that objective: such as by according priority to the cause of action held by one party, or by the procedural means of permitting (or directing) joinder of the other party, or even by the equitable remedy of treating the defendant as subrogated to, e.g., the shareholder's rights against the company, to the extent that the defendant's liability to the shareholder is discharged (a solution suggested by the High Court of Australia in *Gould v Vaggelas* (1984) 157 CLR 215).

Instead, the majority in *Marex* held (at [10]) that the RLP had nothing to do with the law of damages, and reaffirmed it as a limited rule of company law, as first established in *Prudential*. It was held to apply specifically to concurrent claims of companies and their shareholders, where the diminution in share value (or attendant distributions) is merely the result of the loss suffered by the company in consequence of a wrong done to it by the defendant, *even* if the defendant's conduct *also* involved commission of a wrong against the shareholder. The result is that "*where there is no recoverable loss, it follows that the shareholder cannot bring a claim, whether or not the company's cause of action is pursued*" (at [39]). Excluding the shareholder's claim on this basis means that there is no risk of double recovery, because the shareholder's '*loss*' – despite being actionable loss – is not *recognised* in law as having an existence distinct from the company's loss in the first place.

On this basis, Lord Reed justified the RLP explicitly by reference to the principle of company autonomy, safeguarded by the rule in *Foss*. He approached the matter on the premise that to allow a shareholder to pursue the concurrent claim would *"subvert the rule in Foss v Harbottle"* ([35] to [37]; [81] to [82]). Lord Hodge also emphasised that the RLP is "*moored*" in company law ([95] to [100]).

By viewing the matter through the lens of the shareholder's loss (and whether such loss is recognised in law under the strict version of the RLP which the majority upheld), the focus was not on the *duties* which the defendant may owe independently to the shareholder in respect of the same activity which has caused loss to the company, and whether the independent duty means that the shareholder's particular interest should be protected. For similar reasons, the majority did not grapple with the fact that the rule in *Foss* was concerned only with a cause of action belonging to the *company* itself (and the question of who is the proper plaintiff to bring that action) – as opposed to the situation where the defendant's conduct gives rise to a distinct right of action on the part of the shareholder (e.g. where the defendant assumes a duty in tort). They also did not address the obvious tension between rooting the RLP in the rule in *Foss* (which as noted, treated the shareholders as the proprietors of company assets), and the *Salomon* principle of the company's separate legal personality.

Focussing on the second aspect of the rule (which, as explained above, reflects the fact that a shareholder is taken to have entrusted the management of the company's right of action to, ultimately, the majority of members voting in general meeting), Lord Reed observed that a shareholder "*accepts the fact that the value of his investment follows the fortunes of the company*" (citing *Prudential*, at [37]). Or put another way, the rule recognises "*the unity of economic interests which bind a shareholder and his company*" (*ibid*, citing the Singapore Court of Appeal's decision in *Townsing v Jenton Overseas Investments Pte Ltd* [2008] 1 LRC 231, [77]). Put simply, the shareholder has accepted that the company has the power to decide how their investment will be protected.

By identifying the legal basis for the RLP as company autonomy in the sense explained above, the rule's scope had to be defined by reference to the value of the shareholder's investment (the shares, and rights appertaining to them), which was viewed as wholly coincident with the company's rights or property. It means that the RLP covers loss which cannot be viewed as having any existence distinct from that of the company.

Unresolved scenarios

Marex's immediate impact may well have been to stop in their tracks contemplated or pending claims by shareholder claimants which fell within the *prima facie* scope of the RLP, yet were thought to be saved by the *Giles* exception. Lord Sales put it well in the minority judgment (at [212]): "*cases such as Giles v Rhind, exemplifying the dissonance between the rule and practical justice on the facts, will continue to arise. This will put pressure on the acceptability of the rule itself*".

A further serious problem is that there will potentially be cases in which the safeguard of a derivative claim is not available, because the defendant is a professional adviser to the company, rather than a director or third party who is connected with the director's conduct, such that the company's cause of action falls outside Part 11 of the Companies Act. Neither will unfair prejudice proceedings provide a means of redress, for similar reasons. The egregious consequence, in both cases, is that the defendant may escape liability, leaving the innocent claimant undercompensated, or expropriated altogether.

The harder question will be the extent to which a shareholder's loss can be said to be '*separate*' or '*distinct*' from the company's loss (terms which were criticised by Lord Sales, at [132], as "*unhelpfully slippery and imprecise*"). It will depend on how the loss is formulated. Dispute will arise in cases where the relief sought is deliberately framed to avoid engaging the RLP (particularly given that the *Giles* exception no longer provides a safety net for claimants). In cases other than a loss of dividends or reduced share value, Lord Bingham in *Johnson* recognised that "*inevitably, a finer judgment will be called for* ". And as Lord Sales observed (*Marex* , [132]), "*[t]here clearly are some cases where the shareholder does suffer a loss which is different from the loss suffered by the company*".

This necessarily fact-specific assessment, focussed as it is on how the shareholder's loss should be characterised, as opposed to the juridical nature of the cause of action, will inevitably give rise to future disputes.

For example, is the matter to be tested solely by a formal analysis of whether the loss is pleaded expressly in the form of reduced share value or distributions, or rights of which the commercial substance might be said to equate to distributions? Is the right approach to examine whether in substance a payment by the defendant to the company (discharging the full extent of the company's loss) would have the practical effect of making good the loss suffered by the shareholder? Or should the test be a broader question of whether the shareholder's loss is borne in *consequence* of the loss sustained by the company?

So far as the first approach is concerned, Lord Reed considered that it is the specific heads of loss which are rendered irrecoverable, the enquiry apparently being focussed (narrowly) on whether the claimant is seeking compensation for the fall in share value, or distributions received by virtue of the shareholding (at [47]). This has the attraction of simplicity, but as recent cases have demonstrated, may give rise to arbitrary effects where the claimant is a former shareholder seeking to be compensated for loss suffered upon a subsequent share sale. It may also give rise to inventive pleading which seeks to characterise the loss as something other than, for example, akin to distributions that would have been received but for the defendant's wrongdoing.

As to the second possibility, it appears the majority in *Marex* may not have considered this to be the correct approach, given their observation that cases may be envisaged "*where there is not a precise correlation, and where recovery by the company might not therefore fully replenish the value of its shares, but where the rule in Prudential would nevertheless apply*" (at [42]; see also [81] which illustrated the point by reference to the scenario of the market's valuation of the shares not being a simple reflection of the company's net assets).

The third possibility, which asks more broadly whether the shareholder's loss is borne in consequence of the loss sustained by the company, might be said to be implicit in the *Marex* definition, which requires a causal connection between the company's loss and that suffered by the shareholder ("*as a result of actionable loss suffered by their company*", at [89]). It is quite possible to conceive of a claimant formulating a claim for relief by reference to rights which are connected with the investment, but do not strictly comprise corporate distributions, yet which may be caught by analysing the scope of the RLP in this way.

What then are some of the issues to be alive to in future cases?

At least the following unresolved matters of principle are likely to give rise to disputes post-*Marex*, or have already done so in recent decisions:

- ***Crystallising loss***: where the shareholder claimant has sold their shares after the defendant's wrongdoing, but is forced to sell at a loss and seeks recovery of the crystallised loss, does such a claim fall outside the RLP's ambit, and if so, how can this result be justified? (*cf. Nectrus Ltd v UCP Plc* [2021] EWCA Civ 57 ("***UCP***"))
- ***Nature of the loss***: what is the correct test for deciding whether a shareholder's loss is '*separate*' or '*distinct*' from the company's loss, and which (if any) of the approaches set out above ought to be applied? (*cf. Broadcasting Investment Group Ltd v Smith* [2020] EWHC 2501 (Ch) ("***BIG***"))
- ***Position of indirect shareholder***: is an indirect shareholder of the loss-suffering company in a different position to a direct shareholder, and again, if so, what is the justification for this? (*cf. BIG; Naibu Global International Co Plc v Stewart* [2021] PNLR 4 ("***Naibu***"))

UCP

UCP was a professional adviser case (investment advice provided by Nectrus under an IMA). The claimant, UCP, was the sole parent of a company which invested cash in, ultimately, a number of Indian companies which became '*stranded*'. UCP then sold its 100% shareholding in the company, with the

sale price being discounted to reflect the value of the '*stranded*' deposits, upon the company's agreement that it did not wish to purchase the right to recover them. UCP claimed damages from Nectrus for breach of the IMA, in the amount of the discount from the purchase price.

In the context of a permission to appeal application to the Court of Appeal, the issue was whether the RLP applied to a claim made by a former shareholder in the company who has crystallised their loss by selling the shares. So far as concerns the time when applicability of the RLP should be assessed, Flaux LJ held this to be the date when the claim was made, on the basis that the loss will at that point have crystallised ([43]). Having approached the timing issue in this way, Flaux LJ characterised UCP's claim as "*a free-standing claim in breach of contract for loss suffered by UCP through ceasing to be a shareholder*" , as a result of which UCP had "*a separate and distinct claim from that of the company*".

What is interesting about Flaux LJ's judgment, is the manner in which his analysis is premised on the *Marex* majority's rationale for the RLP. He agreed with the submission that the rule in *Foss*:

> "*manifestly does not apply to an ex-shareholder, so there is no reason for the rule against reflective loss to apply ... Once UCP has sold its shares, in my judgment* ***there was no unity of economic interest between UCP and Candor*** *and the claim was not made in the capacity of a shareholder*" (at [50]) (emphasis added).

The prospect of a shareholder selling their shares at a loss with a view to reviving an otherwise moribund claim for reflective loss, received the support of Lord Sales in *Marex* (at [158]), but was not dealt with by Lord Reed. Lord Sales's view was that the price received by the claimant will have reflected the market's view of the value of the company's claims against the defendant (alongside its other assets and general trading prospects) – such that the company's claims against the defendant should be regarded as having been taken into account for the credit of the defendant, to the extent that they are material to valuing the claimant's loss.

However, such an assumption would surely need to be demonstrated by evidence. More fundamentally, it is conceptually quite difficult to rationalise drawing a distinction between a current and former shareholder: on what basis should a shareholder, who has succeeded in disposing of shares in a company afflicted by wrongdoing, be in a better position than a shareholder who has not managed to do so? When a shareholder is left with shares that are worthless because the company has been entirely denuded of its assets – and thus incapable of being sold – the arbitrariness is all the more stark. Viewed in this light, Lord Sales's statement that "*it should not make any difference to the position whether the claimant has sold his shares or has decided to retain them*" (at [158]) has obvious force.

BIG

BIG concerned a claim for breach of an alleged joint venture agreement, under which a JV enterprise, SS Plc, was held in differing proportions by, *inter alia,* the claimant company (BIG) and one of the defendants, Mr Smith. Certain of Smith's ownership interests in two companies were to be transferred to SS Plc, but this failed to take place, following which SS Plc entered liquidation. Despite not being incorporated at the time of the JV agreement, it was held that SS Plc had a concurrent claim under it by virtue of the Contracts (Rights of Third Parties) Act 1999.

Perhaps unsurprisingly, therefore, BIG's claim to enforce the JV agreement was struck out on the basis that it was a "*paradigm example*" of a claim within the scope of the RLP, whilst a claim brought by its indirect, majority shareholder, Mr Burgess, was allowed to proceed to trial. The decision is subject to a pending appeal. Two aspects of the judgment bear noting.

The first is that BIG's claim comprised both a claim for damages and a claim for specific performance to enforce the JV agreement (*viz.* transfer of the Smith companies to SS Plc). Applying Lord Reed's observation in *Marex* (at [52]) that a shareholder should not be permitted to evade the rule by the "*device*" of seeking "*other relief*" (a phrase also used in *Prudential*), the specific performance claim was held to engage the rule. Although the point was not put quite in this way, it would seem that the specific performance claim was treated as equivalent to a claim for restoration of the value of the assets of which SS Plc had been deprived, and accordingly, to be equated with the reduced share value of BIG's shares in SS Plc. What it demonstrates is that despite *Marex*'s continued adoption of the diminution in share value (or distributions) heads of loss, the court will still look more broadly at remedies which are in substance regarded as equivalent to a damages claim for loss caused to the investment.

The second aspect is that the judgment specifically addressed the question whether post-*Marex* the RLP has application to the claim of an indirect shareholder in the company. The Deputy Judge rejected the submission that the indirect shareholder's loss was "*reflective, ultimately, of the loss sustained by SS Plc*", and interpreted Lord Reed's judgment as applying exclusively to "*shareholders in the relevant loss-suffering company*" (at [61] to [62]).

On one view, this result is consistent with the majority's rationale for the rule (company autonomy), particularly having regard to the second element of the rule in *Foss* (at its simplest, entrusting the management of the investment to the company). However, it has obvious conceptual difficulties, particularly where the interest in the loss-afflicted company is held through a structure which has no other commercial purpose (e.g. where the immediate holding company is an SPV).

It is also difficult to reconcile with the now well established common law approach to derivative claims,

which is to permit a so called '*double derivative*' or '*multiple derivative*' claim: where the claimant is a shareholder in a parent, and seeks to bring the claim on behalf of its subsidiary or sub-subsidiary (see, for a recent example, Zacaroli J's decision in *Tonstate Group Ltd v Wojakovski* [2019] BCC 990, confirming that such claims survive at common law irrespective of Part 11 of the Companies Act). Arguably, allowing the double or multiple derivative claim recognises the "*unity of economic interests which bind [an indirect] shareholder and his [indirect] company*". It would be surprising if this was not recognised in the RLP context, especially given that the safeguard of the derivative claim is typically invoked to justify the RLP (as it was in *Marex*).

Naibu

Essentially the same point of principle arose in *Naibu*, another professional adviser case (legal adviser's alleged negligence in preparing a newly incorporated holding company for its initial public offering on the AIM). The primary loss was sustained by a Chinese sportswear company, whose assets were allegedly disposed of by its founder, rendering its shares valueless; the claimants were its parent (Naibu HK) and the holding company (Naibu Jersey). Naibu Jersey, which held 100% of the shares in Naibu HK, was incorporated solely for the purpose of the AIM flotation. The defendants' RLP-based objection was framed in terms which treated the immediate parent as the relevant loss-suffering company for these purposes, thus enabling it to contend that Naibu Jersey's loss was merely reflective of the loss claimed by Naibu HK.

Bacon J articulated the essential question of loss as follows (at [52]):

> "*The decisive question is therefore the nature of the loss claimed by the shareholder. There is no further requirement that the amount of the loss to the company should be identical to the loss to the shareholder. Indeed Lord Reed expressly acknowledged at ss.32-33 of his judgment that a company's loss and any fall in its share value may not be closely related, particularly in cases where a company's shares are traded on a stock market*".

The principal heads of loss claimed by Naibu Jersey, being loss consisting of a fall in the value of the Naibu HK shares (to nil), were held to be excluded by the RLP and this part of the claim was struck out. An attempt to categorise its loss as "*disbursement of the proceeds of flotation*" was rejected as artificial, being "*in reality, part of the same loss, representing the investment made by Naibu Jersey in Naibu China, through Naibu HK, the value of which has now been reduced to nil*" ([53]). Naibu Jersey's claim was permitted to proceed only in respect of its costs in taking steps to assert control over and investigate the loss suffered by Naibu HK and the Chinese sub-subsidiary, which were held to be distinct from the value of its investment in Naibu HK.

There is an evident conflict of principle between the decisions in *BIG* and *Naibu*, which proceeded on different bases as to which entity was the relevant loss-suffering company for purposes of the RIP. The Judge in *Naibu* characterised the holding company's loss as '*reflective*' because she accepted that the intermediate company (Naibu China's immediate parent) was the loss-suffering company. However, as noted, her reasoning was clearly influenced by the commercial reality of the holding structure, which meant that Naibu Jersey's loss was "*part of the same loss*" as Naibu HK's lost investment in Naibu China. Whichever analysis is adopted, the result upholds the *Marex* focus on "*unity of economic interests*", arguably overlooked in *BIG*.

Whether or not one prefers the legal certainty of the majority in *Marex* over the perhaps more intellectually attractive approach of the minority, there clearly remains serious scope for debate over the RLP's scope. Real difficulty may arise on the facts of a particular case in assessing whether the loss claimed engages the rule. Such debate may not always be resolved by resort to the rationale for the RLP: in part because of the differing reasoning of the majority and minority in *Marex*, but in part also because the majority's justification – being not to subvert the rule in *Foss v Harbottle* – is, as explained, not straightforward given the independent nature of the duty which the shareholder will be seeking to enforce. ■

ING v Santander

CLARA JOHNSON

The insolvency of Marme Inversiones 2007 S.L.U (“**Marme**”) in 2014 has brought much varied and interesting litigation to this jurisdiction. The most recent case is no exception. In *ING Bank N.V. & Anor v. Banco Santander S.A.* [2020] EWHC 3561 (Comm) Mrs Justice Cockerill had to decide whether the English court had jurisdiction to hear the claim brought by ING, or whether, as contended by Santander, it could only be brought in the Spanish Insolvency Court as ancillary proceedings in Marme’s liquidation.

This involved the examination of two issues: (1) whether Santander was bound by an exclusive jurisdiction clause entitling ING to rely upon Article 25 of the Brussels Recast Regulation (Regulation (EU) No 1215/2012) as founding the jurisdiction of the English court, and (2) whether the claim was nonetheless excluded from the scope of the Brussels Recast Regulation under Article 1(2)(b) because it concerned “*proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings*” and therefore fell within the scope of the Insolvency Regulation (Regulation (EC) No 1346/2000).

Background

In 2008 a syndicate of eight lenders, including ING, entered into a loan facility for €1.5 billion and related swap agreements with Marme, to finance the acquisition of the Ciudad Financiera, Santander’s headquarters located just outside Madrid. The loan agreement and the swap agreements (the latter in ISDA Master Agreement form (the “**Marme Agreements**”)) contained exclusive jurisdiction clauses in favour of the English Courts.

In March 2014, shortly after the loan and interest fell due, Marme entered into a voluntary insolvency process in Spain. As part of the insolvency procedure, a Liquidation Plan was approved by the Spanish court and a tender process commenced for the acquisition of Marme’s assets, i.e. the Ciudad Financiera, and its liabilities. Sorlinda Investments S.L.U. (“*Sorlinda*”) was the successful bidder. As part of its bid, Sorlinda agreed to assume Marme’s contingent and non-contingent liabilities, which included sums due to ING under the Marme Agreements.

Sorlinda took the position that as a result of two rulings by the Spanish Supreme Court concerning the recognition and accrual of interest on secured loans after the opening of Spanish insolvency proceedings, the interest due under the Marme Agreements had not properly accrued and was not payable by Sorlinda. In December 2019, Sorlinda issued ancillary insolvency proceedings in the Spanish Insolvency Court seeking declarations as to the entitlement of ING to retain interest paid under the loan agreement and to be paid interest under the swap agreement.

On 2 January 2020, Sorlinda merged into Santander. In February 2020, ING issued proceedings in the English High Court against Santander for payment of outstanding swap interest and a declaration that it was entitled to retain the loan interest, relying on the exclusive jurisdiction clauses in the Marme Agreements. The relief sought by ING mirrored the relief sought by Sorlinda in the ancillary proceedings.

Effect of the Marme Agreements

The parties disagreed on the meaning and effect of the assumption by Sorlinda of Marme’s liabilities: Santander’s position was that Sorlinda had agreed with the Insolvency Receiver to provide sufficient funds to pay Marme’s insolvency liabilities as the consideration for the transfer of the Ciudad Financiera. ING argued Sorlinda had assumed a direct liability to Marme’s creditors.

The Court received expert evidence on the scope and effect of the assumption of liabilities under Spanish law in the context of Marme’s liquidation. The experts agreed that there had been no novation of the Marme Agreements, but disagreed as to whether there had been a succession of or assumption of direct liability under the Marme Agreements.

Whilst acknowledging that both perspectives were arguable, Mrs Justice Cockerill preferred the analysis of Santander's expert, Professor Virgós (co-author of the Virgós-Schmit Report, a key document in the legislative history of the Insolvency Regulation and often referred to by European Courts), that in the absence of clear and unequivocal consent of all Marme's creditors amongst other factors, Sorlinda had not become directly liable to ING under the Marme Agreements. The actual effect was that Sorlinda had assumed a commitment to the Marme Insolvency Administrator to pay sums to enable Marme's liabilities in the insolvency to be discharged.

The Jurisdiction Clause

The primary ground of Santander's application was that ING could not rely on Article 25 of the Recast Brussels Regulation because Santander was not a party to the Marme Agreements containing the exclusive jurisdiction clauses on which ING relied, and did not otherwise agree to be bound by them.

It was common ground that because the governing law of the Marme Agreements was English law, the question of whether Santander was bound by the exclusive jurisdiction clause was to be determined by English law. It was further agreed that because the Marme Agreements prohibited transfer or assignment without the consent of all lenders, there was no novation under English law.

ING sought to argue that this situation fell within a line of cases concerning transfers of obligations in bills of lading cases, starting with the *Tilly Russ* [1985] 1 QB 931, so that Santander was bound by the exclusive jurisdiction clause in the Marme Agreements notwithstanding that it had not signed or accepted it. ING argued that if as a matter of fact a transfer of the rights and obligations of the Marme Agreement had taken place, then the English law should treat that as succession under English law. ING invited the Court to accept this latter submission notwithstanding that neither English law nor Spanish law provided that succession of those obligations had taken place.

The Court rejected ING's arguments on this point, finding that the *Tilly Russ* line of authority was indeed restricted to bills of lading; and that considering whether a *de facto* succession had taken place went beyond the rule which requires jurisdiction to be determined by the relevant national law.

The Insolvency Regulation/ Brussels Regulation Dichotomy

Although the Court's finding in relation to Article 25 was sufficient to determine the application, the Judge nonetheless considered whether the Court's jurisdiction over ING's claim was to be characterised as a civil and commercial matter under the Brussels Recast Regulation, or whether it was excluded from the scope under Article 1(2)(b) as "*proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings*". If it was excluded, it was common ground that it fell under the Insolvency Regulation.

ING argued the matter fell under the Brussels regime: although Santander's rights and obligations originated in Marme's insolvency, now those rights had been assumed there was no longer any relevant link to the winding up, so Santander's position was analogous to a third party who had taken assignment of a claim. ING relied on, *inter alia the case of F-Tex SIA v. Lietuvos-Anglijos UAB Jadecloud-Vilma* [2013] Bus. L.R. 232 [18] to [51], in which an insolvent German company had made a pre-liquidation transfer to a third party in Lithuania.

Santander's position was that the case fell squarely under the Insolvency Regulation. First and foremost, the relief sought by ING concerned '*core matters*' in the insolvency proceedings, namely, the conduct, course and effect of the insolvency proceedings which were all subject to the supervision, control and determination of the Spanish court. Alternatively, the relief amounted to an '*ancillary matter*' and was an action which derived directly from and was closely connected to Marme's liquidation. In that context, it argued that the decisive factor was the legal basis of the action and whether it had its source in ordinary rules of civil and commercial law or in derogating rules specific to insolvency, relying on *Nickel & Goeldner Spedition GmbH v "Kintra" UAB* (Case C-157/13) [2015] QB 96 at [27] and *Tünkers France v Expert France* (Case C-641/16) [2018] I.L.Pr. 7 at [22].

The Judge accepted that fairly compelling cases could be made for both analyses but considered that she had to approach the issue in two stages.

The first was to ask what is the legal basis of the claim – is it derived directly from the insolvency, and how closely connected is it with the insolvency? The Judge looked to the formulation of ING's claim in the pleadings, which explicitly raised the issue of Sorlinda's liability to all of Marme's creditors, the Spanish insolvency proceedings, and to the Liquidation Plan. She determined that the legal basis of ING's claim was inextricably a part of the assumption of liabilities which made Sorlinda (subsequently Santander), liable to ING and (on ING's case) a party to the Marme Agreements.

The second stage was to review that analysis in light of established case law. The Judge found this case was distinguishable to the cases relied on by ING. It was accepted that similar points could be made to those in *F-Tex*, but in this case the link to insolvency was plainly closer, and unlike *F-Tex* the dispute could not be detached from the insolvency event. In this case, it could be established that there was a direct and close link to the insolvency process – albeit a more complex one than in the cases considered.

Accordingly, the claim was excluded from the Brussels regime, and jurisdiction determined by the Insolvency Regulation. The Court accordingly granted the declaration that it had no jurisdiction to hear the claim.

Comment

The Judge's reasons for declaring that the Court had no jurisdiction to hear the claim were, on both issues, consistent with well-established European and domestic jurisprudence. In relation to the second issue, as the Judge noted, compelling arguments could be made for both analyses. Indeed, in many cases there will be a fine line between the Brussels Recast Regulation and the Insolvency Regulation. This decision serves as a reminder that in cases where there are factors pointing in both directions, a weighty factor will be the legal basis of the action and whether it has its source in ordinary rules of civil and commercial law or in derogating rules specific to insolvency.

Robin Dicker QC and Clara Johnson acted for Banco Santander SA

Felicity Toube QC and Marcus Haywood acted for ING Bank NV

Charting new waters: *DeepOcean* and restructuring plans

JEREMY GOLDRING QC

CHARLOTTE COOKE

DeepOcean is the first case of the English court sanctioning a restructuring plan with cross-class cramdown under the new Part 26A of the Companies Act 2006

Introduction

Schemes of arrangement were introduced to English company law by the Joint Stock Companies Arrangement Act 1870. The statutory provisions, drafted with typical Victorian brevity and elegance, have stood the test of time, providing a flexible framework for the re-arrangement of capital structures for 150 years. But prior to the enactment of the Corporate Insolvency and Governance Act 2020 ("**CIGA**"), it was not possible for the Court to sanction an arrangement unless each class of creditors[1] to be bound by the scheme voted to approve it by the requisite statutory majorities, including three quarters in value. This means that dissenters holding at least a quarter in a class whose rights are to be affected by an arrangement can veto the scheme as a whole.

The restructuring plan is a new tool available to debtors for the re-arrangement of debt and equity, which is not subject to this dissenters' veto. Inserted by the CIGA in June 2020, Part 26A of the Companies Act 2006 ("**Part 26A**") enacts a mechanism based on the scheme, but available only to a debtor in financial difficulties. In such circumstances, the Court has a new power to sanction a binding restructuring plan even where one or more classes of creditors have not voted to approve that plan by the requisite majority in value. But the statutory wording makes plain this power to cram down dissenting classes is subject to checks-and-balances, being both conditional and discretionary. Most importantly, the Court must be satisfied that, if the arrangement were to be sanctioned, the dissenting creditors would not be worse off under the *"relevant alternative"* (i.e. the alternative most likely to occur if the plan were not sanctioned).

Although *DeepOcean* was the third case in which a restructuring plan was sanctioned by the Court, it was the first case in which the cross-class cram down mechanism was required.[2] It was also the first case in which a restructuring plan has been used to facilitate a solvent wind-down, rather than the rescue of a company as a going concern and the first restructuring plan with a bar date. Trower J's convening judgment is found at [2020] EWHC 3549 (Ch) and the sanction judgment, also of Trower J, is at [2021] EWHC 138 (Ch).

This article looks at the guidance in DeepOcean as to how the Court will approach restructuring plans under Part 26A and, in particular, the exercise of its power to sanction such a plan where this entails a cross-class cram down. References to sections in what follows are to those in the new Part 26A of the Companies Act 2006 which are numbered section 901A to section 901L.

Background

The DeepOcean group is a provider of subsea services around the world. Following a period of financial difficulties, exacerbated by the Covid-19 pandemic, the group launched restructuring plans under Part 26A (the "**Plans**") for three UK subsidiaries (abbreviated as DO1, DSC and ES, the "**Plan Companies**"). The Plan Companies had, for some time, been reliant on funding from the wider group, which no longer considered this viable. That being so, unless the Plans were sanctioned, it was considered that the Plan Companies would go into administration or liquidation (the "**Insolvency Scenario**").

Key features of the Plans were that:

(1) Secured creditors would release their claims against the Plan Companies, but retain their rights against wider group companies; and

(2) Unsecured creditors, in return for the extinguishing of their claims, would receive a payment that was approximately 4% better than what they would receive in the Insolvency Scenario, the payments being funded by members of the wider group.[3]

A bar date for claims submission was set in order to ensure finality,[4] with the Plan Companies then to be wound-down on a solvent basis.

1. 1. Or members (if applicable).

2. 2. The earlier cases were Re Virgin Atlantic Airways Ltd (see the convening judgment of Trower J [2020] EWHC 2191 (Ch) and the sanction judgment of Snowden J [2020] EWHC 2376 (Ch), both reported at [2020] BCC 997) and Re Pizza Express Financing 2 plc (see the convening judgment of Sir Alastair Norris [2020] EWHC 2873 (Ch). The sanction judgment has not yet been released).

3. Certain claims including employee claims, tax claims and intercompany claims were excluded.

4. A bar date was similarly set in the Noble Group scheme of arrangement: [2019] BCC 349.

Part 26A – The Law

Section 901A sets out thresholds for a restructuring plan. It provides:

"(1) The provisions of this Part apply where conditions A and B are met in relation to a company.

(2) Condition A is that the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.

(3) Condition B is that – (a) a compromise or arrangement is proposed between the company and- (i) its creditors, or any class of them, or (ii) its members, or any class of them, and (b) the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties mentioned in subsection (2).

(4) In this Part … 'company' … means any company liable to be wound up under the Insolvency Act 1986 …"

Where the requirements of section 901A are met, the court is empowered by section 901C to order a meeting or meetings of creditors (in language which mirrors the language of section 896(1) in relation to schemes under Part 26).

Section 901F provides that if a number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting summoned under section 901C, agree a compromise or arrangement, the court may, on an application under that section, sanction the compromise or arrangement. Unlike with schemes of arrangement, there is no additional requirement that 50% by number of the class vote in favour.

Even if a restructuring plan is not approved by one or more classes of creditors or members, the plan does not automatically fail, as would a scheme, but can still be sanctioned by the Court under section 901F if two additional requirements set out in section 901G are met. This is described in the Explanatory Notes to CIGA as a cross-class cram down. Section 901G, a key provision, says:

"(1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors or (as the case may be) of members of the company ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C.

(2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F.

(3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)).

(4) For the purposes of this section "the relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.

(5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative…"

The additional jurisdictional conditions that must be satisfied for a cross-class cramdown are therefore that (i) if the plan is sanctioned, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative; and (ii) the plan has been approved by at least one class of creditors or members who would have a genuine economic interest in the company in the relevant alternative.

The relevant alternative is defined as *"whatever the Court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned"*: see section 901G(4). The relevant alternative is broadly similar to the concept of the "comparator" to a scheme (which has been developed in the case law under Part 26). In DeepOcean's case the relevant alternative was the Insolvency Scenario.

Issues at the convening hearing

Jurisdiction

The jurisdictional issues familiar from the scheme context were relatively straightforward in this case. The Plan Companies were companies liable to be wound up under the Insolvency Act 1986 and therefore companies inrespect of which the jurisdiction to sanction restructuring plans was available: see section 901A(4). Trower J was also satisfied that the Recast Judgments Regulation (EC/1215/2012), potentially relevant because the proceedings were issued before the end of the transition period,[5] was not an impediment to the Court's jurisdiction as a substantial number of Plan creditors were domiciled in the United Kingdom such that Article 8, if relevant, could be relied upon.[6]

5. See Article 67 of the Withdrawal Agreement.

6. However, note the more recent decision in Gategroup Guarantee Limited: [2021] EWHC 304 (Ch) where Zacaroli J held that restructuring plans fall within the bankruptcy exception in Article 1(2)(b) of the Lugano Convention.

"On the question of whether the purpose of the Plans was to eliminate, reduce, prevent, or mitigate the effect of any of the Plan Companies' financial difficulties, the fact the Plans would result in a better return to Plan creditors than in the relevant alternative was considered to amount to mitigation of the effect of the financial difficulties."

As noted above, before Part 26A CA06 can apply in relation to a company it must, however, also be shown that the company has encountered or is likely to encounter financial difficulties that are affecting, or will, or may affect its ability to carry on business as a going concern and that the purpose of the compromise or arrangement proposed between the company and its creditors, or any class of its creditors, must be to eliminate, reduce, or prevent, or mitigate the effect of any of the financial difficulties mentioned in the description of condition.

Trower J was satisfied that each of the Plan Companies' financial difficulties meant that it was on the point of becoming unable to carry on business as a going concern. He was also satisfied that the Plans would involve a sufficient amount of give and take to constitute a compromise or arrangement.

On the question of whether the purpose of the Plans was to eliminate, reduce, prevent, or mitigate the effect of any of the Plan Companies' financial difficulties, the fact the Plans would result in a better return to Plan creditors than in the relevant alternative was considered to amount to mitigation of the effect the financial difficulties. As to this, Trower J considered that it was not necessary for the Plans to have any effect on the ability of the Plan Companies to carry on business as a going concern. That such an approach would be "*too narrow*" (at [48]) is supported by the fact that restructuring plans (like schemes) are available even after a company has gone into liquidation (see section 901C(2)(c).

Classes

As in *Virgin Atlantic* and *Pizza Express*, the approach in the scheme context was adopted in relation to class constitution. The question was therefore whether the rights of the various groups and categories of creditor were so dissimilar as to make it impossible for them to consult together with a view to their common interest. Applying this approach, Trower J accepted that (i) secured creditors should form one class; (ii) the landlord creditor should form a separate single class in the DO1 Plan (in light of its proprietary rights in property in the possession of DO1 and an entitlement to take steps to forfeit and repossess that property in circumstances of non-payment), (iii) the vessel owner creditors should form a separate single class in the DO1 Plan (in light of their rights as against DO1 to recover the vessels which are the subject of their charterparties); and (iv) the remaining (unsecured) Plan creditors (referred to as the "**Other Plan Creditors**") form a single class under each Plan.

Cross-class cramdown at the sanction hearing

The statutory majorities were achieved at each of the Plan meetings save for the DSC Other Plan Creditors' meeting, where a majority of less than three-quarters in value voted in favour so that the requirements of section 901F(1) were not satisfied. It was therefore necessary for DSC to rely on section 901G to cram down the DSC Other Plan Creditors. This required the Court to consider both the statutory conditions and the scope of the Court's power.

Requirements of section 901G

First of all, section 901G requires that the Court must be satisfied (A) that if the restructuring plan is sanctioned, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative; and (B) that the restructuring plan has been approved by at least one class of creditors who would have a genuine economic interest in the company in the relevant alternative (section 901G(5)).

As to Condition A, Trower J was satisfied that none of the members of the dissenting class would be any worse off than they would be in the event of the Insolvency Scenario in light of the 4% increase on their estimated return built into the Plans. Valuation disputes are likely to be of far greater significance in other contexts where the factual position is less clear-cut. Also of interest for

future cases is the Court's observation that, whilst the starting point will normally be a comparison of the value of the likely dividend, or the amount of any discount to the par value of each creditor's debt, the phrase used is *"any worse off"*, *"which is a broad concept and appears to contemplate the need to take into account the impact of the restructuring plan on all incidents of the liability to the creditor concerned, including matters such as timing and the security of any covenant to pay"* (at [35]).

As to condition B, DSC's secured creditors had approved the Plan and the evidence established that they would make a small recovery from the charged assets in the Insolvency Scenario and, while there may be artificiality in some cases in the constitution of classes in order to ensure that the requirements of the section 901G are satisfied, there was no such artificiality in this case.

Trower J also noted that the secured creditors would also make a return from the assets of other group companies in the Insolvency Scenario, but it was not necessary for him to decide whether that alone would have been sufficient.

Discretion

As is made clear by the use of the word *"may"* in section 901F(1), the court has a discretion whether to sanction a restructuring plan, a point that is emphasised by the Explanatory Notes to CIGA which say the Court *"may refuse sanction on the grounds that it would not be just and equitable to do so, even if the conditions in section 901G have been met"* (at [192]).

In *Virgin Atlantic* Snowden J followed the approach established in relation to schemes when determining whether or not to sanction a restructuring plan under Part 26A where section 901G was not engaged (at [51] and [52], referring to the summary of David Richards J in *Re Telewest Communications plc (No. 2)* [2005] BCC 36 at [20]-[22]). Noting that in the scheme context the Court will be slow to differ from the meeting, unless the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class, or some blot is found in the scheme, Trower J (at [21]) took the view that a slightly different approach was, however, needed where the Court was considering whether to sanction a restructuring plan in circumstances where reliance is placed on section 901G. A cross-class cram down is premised on the Court overriding the decision of a dissenting class.

As to the Court's approach to its discretion, Trower J indicated that, if the conditions in section 901G are satisfied, then a company will have *"a fair wind behind it"* in obtaining the Court's sanction (at [48]). In other words, all other things being equal, satisfaction of conditions A and B is capable of justifying an override of the views of a dissenting class.

As to matters which might be relevant to whether sanction should be refused, Trower J considered that the overall level of support for the Plan Companies' proposals, together with the question of whether the Plan Creditors were fairly represented at their respective Plan meetings remain relevant questions, whether or not section 901G is engaged. In particular, a low turnout at a dissenting class meeting may impact how much weight is to be given to the fact the requisite majority did not vote in favour.

On the facts:

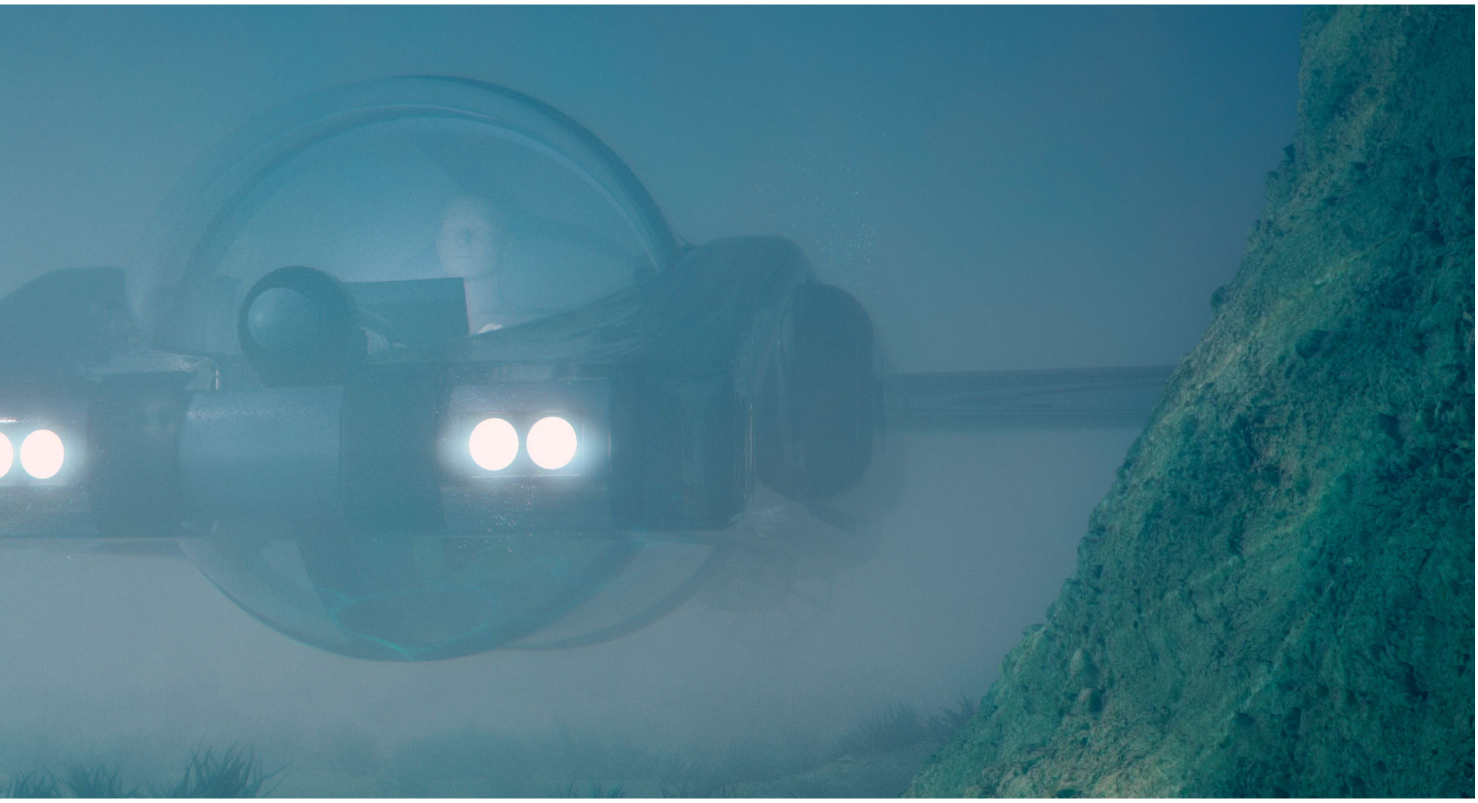
(1) The turnout at the meetings of the Other Plan Creditors was low (between 25% and 32%), but this was not particularly surprising as the Other Plan Creditors were primarily trade creditors;

(2) Over 99% of total claims against DSC by value voted in favour of the Plan (although given the different nature of the deal for secured creditors this was of limited significance);

(3) 84% by value of all claims by Other Plan Creditors of DO1, ES and DSC voted in favour of the Plans, which was important given that all Other Plan Creditors were to receive the same percentage uplift of their estimated recovery in the Insolvency Scenario.

Notably, the consenting class was fully locked-up, removing some of the doubt as to whether cross-class cram down is available in such circumstances which arose following obiter comments of Snowden J in *Virgin Atlantic*.

What is also clear from *DeepOcean* is that the Court will then look at whether a restructuring plan treats creditors differently as between themselves and whether such differential treatment can be justified. This is similar to what is termed a *"horizontal comparison"* in the context of a challenge to a company voluntary arrangement on the basis that it is unfair. Trower J noted that the Court will be concerned to ascertain whether there has been a fair distribution of the benefits of the restructuring between those classes who have agreed the restructuring plan and those whohave not.



On the facts, the differential treatment of DSC's secured creditors and the Other Plan Creditors was justified by reference to the secured nature of the former's claims, as well as the fact that the latter were out of the money in the Insolvency Scenario. Trower J also noted that, whilst certain claims had been excluded, the Plan Companies had good commercial reasons for doing so such that differential treatment as between Other Plan Creditors and those excluded creditors was similarly justified.

Conclusions

Cross class cramdown is an incremental development in English insolvency law. For well over a century, since at least *Re Tea Corp* [1904] 1 Ch 12, there have been other techniques for restructuring a company's indebtedness which can in practice achieve a similar effect to the binding of a dissentient class. A company in financial difficulties might propose a scheme with one or more classes of senior creditors, with the scheme providing for the assets of the company to be transferred to a new entity (usually one owned by the senior creditors, thereby effecting a *"debt-for-equity"* swap). The company's junior creditors may be excluded from the scheme altogether (so that they are not entitled to vote at any of the scheme meetings) and left behind with worthless claims against the original company, which will become an empty shell with no assets. This technique effectively operates to remove the junior debt from the finance structure of the business without the consent of the junior creditors.[7]

Whilst the *Tea Corp* technique is a powerful restructuring tool, it has limits. It does not enable any specific restructuring deal to be imposed on the junior creditors as a matter of contract. They are simply left behind with nothing. If the junior creditors are not entirely *"out of the money"* (but would make a partial recovery if the scheme did not proceed), then it may be difficult or impossible to use the *Tea Corp* technique to implement a restructuring which binds the junior creditors without their consent. Part 26A fills those gaps.[8]

More broadly, the new provisions of Part 26A are important in expanding the scope of what can be achieved by a debtor in a restructuring plan as compared with a scheme. A dissenting creditor, or group of creditors, will not have a veto power on a compromise or arrangement. This in turn may have behavioural consequences, altering both the scope of restructuring negotiations and (potentially) the value of hold-out positions in the debt markets. At the same time, there may well be a shift in the disputes coming before the English court in the restructuring context. Historically, class issues and analysis have been of central importance and will remain so. But valuation disputes are likely to become of at least equal significance as debtors seek to utilise cramdown to override the votes of dissentient classes. DeepOcean is but a first expedition into previously uncharted waters.■

Tom Smith QC and Charlotte Cooke acted for the Plan Companies

Jeremy Goldring QC and Ryan Perkins acted for the Original Locked Up Lenders

7. There is nothing unjust or unfair to junior creditors in that approach. A similar technique was deployed in Re Tea Corp [1904] 1 Ch 12 and has been deployed in numerous subsequent schemes such as Re MyTravel [2005] 1 WLR 2365.

8. Trower J noted (at [51]): "One aspect of this incremental development is that Part 26A has introduced an ability to bind a dissenting class where they have an economic interest in the company and are not therefore out of the money in the relevant alternative. However, where the evidence is that the members of the dissenting class are out of the money in the relevant alternative, and that their exclusion would in any event have been achievable if a Part 26 scheme had been proposed, it seems to me that their receipt of any benefits under the terms of the proposed Restructuring Plan means that they are unlikely to have been treated in a manner that is not just and equitable. Indeed, in such a case, section 901C(4) means that it may not have been necessary for such creditors to be summoned to a class meeting in the first place."

Case Digest Editorial

Adam Al-Attar

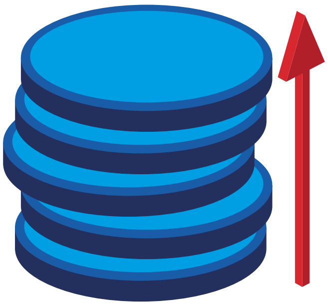
The courts have busy since the last digest. In reviewing the digested decisions a few caught my eye. Of practical importance to litigators is the *Phones 4U* decision digested in the Civil Procedure section. It held that an order for disclosure of employees' personal electronic devices for work-related communications was appropriate and proportionate in circumstances where this would interfere with their Article 8 ECHR rights. The Article 8 right is a qualified right and the decision of the Court of Appeal brings welcome clarification as to how that right impacts on disclosure in commercial cases.

In the arena of Commercial Litigation, in the *Etihad* case, in which Robin Dicker QC and Roseanna Darcy acted, the Court of Appeal has held that '*asymmetric*' jurisdiction clauses fell within the scope of article 31(2) of the Recast Brussels Regulation. In the *IS Prime* case, in which I acted, the Commercial Court has held that the heavy dispute arbitration procedure under the America Arbitration Association is not an arbitration within the meaning of the Arbitration Act 1999 in circumstances in which the parties have agreed the award shall not binding. The parties' contrary agreement removed the proceeding from the Act, notwithstanding that the proceeding had all the hallmarks of heavy litigation, and it was not merely a contrary expression as to the enforcement of the award. In the *Stoffel* case, the Supreme Court has (again) considered the illegality defence following its reformulation in *Patel v Mirza*. The return of the doctrine to the Supreme Court does raise, to my mind at least, the question of whether the majority in *Patel v Mirza* court took a wrong turn in that case.

In terms of legal certainty, there is much to be said for the reliance based test favoured by the minority in *Patel v Mirza*. Finally, of greatest interest in the Commercial Litigation section, is the decision of the Supreme Court in *Okpabi*, which builds on its earlier decision in *Vedanta*, in both describing the correct approach to disputed matters of fact on a jurisdictional challenge and the circumstances in which a parent company can properly be the subject of a claim and thus the anchor defendant for its subsidiaries and other parties for the purpose of a claim in the English courts.

In the fields of Company and Insolvency, the courts have provided some further guidance on the new Part 26A restructuring plan. In *Gategroup*, *Zacaroli* J held that that proceedings under Part 26A are within the bankruptcy exclusion in the Lugano Convention, such that the English Court had jurisdiction notwithstanding the exclusive jurisdiction clause in the bonds. The test of financial difficulties applied in Part 26A was important to his reasons for distinguishing that part from Part 26. In *DeepOcean*, Trower J applied the cross-class cramdown power, albeit in a case without active opposition. As to the discretion to sanction and the important question of what test should be applied (unstated in the legislation and note merely as "*just and equitable*" in the explanatory note to the statute), Trower J applied the honest, intelligent and reasonable creditor test developed in Part 26. He noted however that that test was not in all respects appropriate in the different context of Part 26A. It remains to be seen whether this approach will ultimately be endorsed by the court in a disputed case. There is a coherence to that test in the context of Part 26 which is concerned with fairness *within* a class, as opposed to Part 26A which, as regards the cramdown power, is concerned with the fairness of imposing a plan favoured by other classes on the dissenting class. In circumstances in which the majority of the dissenting class have voted against the plan, it seems odd to adopt the perspective of a hypothetical honest intelligent creditor, whether of that class, another class or anything in between.

Case Digests



Banking and Finance

Digested by Stefanie Wilkins

CFL Finance Ltd v Laser Trust

[2021] EWCA Civ 228 (David Richards, Newey and Popplewell LLJ) 23 February 2021

Tomlin orders – Application of Consumer Credit Act 1974

The question for the Court of Appeal was whether (and if so in what circumstances) the Consumer Credit Act 1974 applied to the schedule to a Tomlin order. It was accepted that the Act would not apply to the terms of a court order.

However, the schedule to a Tomlin order has contractual force. As the Court observed, Tomlin Orders are neither ordered by the court nor enforceable in the absence of a court order. In the present case, if the schedule fell within the scope of the Act, it would be unenforceable for non-compliance with various provisions of the Act.

The Court held that the Consumer Credit Act applied to agreements between "*an individual... and any other person*", and that there was nothing to prevent a settlement agreement being within the scope of the Act if it met the other requirements. The critical question, therefore, was whether the agreement involved the provision of '*credit*'.

The Court considered that it was clear from s 11(1)(c) of the Act that the provision of '*credit*' could be in the form of a refinancing. This required that a debt be deferred, pursuant to an agreement involving some consideration. That consideration could take the form of a promise to forego a claim or defence that was made on reasonable grounds (in the sense that it had a fair chance of success).

The Act would not apply to an agreement by which a creditor simply gives a debtor more time to pay, for no consideration. It would, therefore, not apply where a debtor simply gave up a defence that had no fair chance of success – the debtor would not have provided any consideration. The Act could not apply to an agreement that compromised a claim that was entirely disputed by the debtor on substantial grounds. But if the debtor did not dispute the debt, and there was an agreement for payment in instalments (for which the debtor provided consideration), the Act would apply.

In the present case, it was accepted that the debtor had given consideration, because he had agreed to make a contribution to costs. In those circumstances, the Court indicated that the strength of the underlying claim that was being compromised was relevant. If a creditor sought the payment of a debt, and a debtor presented a spurious defence in the hope of buying time, then the Court considered that the arrangement could fairly be treated as one that provided credit.

The Court left open the question of where to draw the dividing line between a debt (to which the Act could apply) and a mere claim (to which it would not). The Court observed that it might be said that the debt existed only if the defence was invalid as a matter of law – a purely objective test. On the other hand, there were good policy reasons for saying that the Act should not apply when a purely subjective threshold was met – i.e., whether the debtor believed that there was substance to his defence.

Meng v HSBC Bank Plc

[2021] EWHC 342 (QB) (Fordham J) 19 February 2021

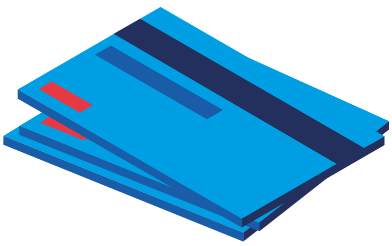
Bankers' Books Evidence Act 1879 – Definition of 'entries in a banker's book' – Meaning of 'legal proceeding'

The applicant, Ms Meng, was the CFO of Huawei TCL. Ms Meng had been detained in Canada, and was the subject of extradition proceedings in which the United States sought her extradition so that she could be a co-defendant to criminal proceedings which were on foot in that jurisdiction.

Ms Meng applied to the English court for certain documents held by the respondents, which were UK-based subsidiaries of the HSBC group. It was said that these documents were available to the United States, that they were needed in support of her submissions in the Canadian extradition proceedings, and that they were not available to her in either those proceedings or the US criminal proceedings.

Two principal issues of statutory construction arose for the Court's determination. The application was made under 7 of the Bankers' Books Evidence Act 1879, which provided (in summary) that the Court may order inspection of entries in a banker's book "*On the application of any party to a legal proceeding*", for the purpose of use in that proceeding. The first issue was whether "*legal proceeding*" meant a legal proceeding in the United Kingdom, or anywhere in the world. Construing the Act as a whole, Fordham J held that it was limited to UK proceedings. The principal reasons for this conclusion were that (1) the Act was concerned with the availability of evidence, and it was clear that Parliament was not purporting to legislate for the reception of foreign evidence; (2) the term 'legal proceeding' was used repeatedly throughout the Act; in other sections, the phrase necessarily related to UK proceedings, and there was no reason to read section 7 more broadly; (3) there was a link between a 'legal proceeding' and a 'court' which would hear an application under section 7, and 'court' was defined to include only courts within the United Kingdom; and (4) there was other legislation that made provision for the assistance of foreign proceedings, and to construe section 7 broadly would circumvent those statutes.

The second issue concerned the scope of 'entries in a banker's book' in section 7. A banker's book was defined in s 9(2) as including 'ledgers, day books, cash books, account books and other records used in the ordinary business of the bank'. The question arose whether this was limited to transactional records, or whether it also included records maintained for the purpose of regulatory compliance. Fordham J held that only transactional records were captured. This was because, amongst other things, (1) the Act had never been directed towards the entire range of documents created by a bank in its ordinary course of business, but was instead concerned with 'facilitating the proof... of concrete banking actions'; and (2) it would be difficult in any event to draw a line between documents kept for the purpose of regulatory compliance, and those kept for the bank's own purpose.



Civil Procedure

Digested by Roseanna Darcy

Bilta (UK) Ltd (In Liquidation) v Tradition Financial Services Ltd

[2021] EWCA 221 (David Richards, Peter Jackson, Nugee LLJ) 22 February 2021

Adjournment of Trial – Witnesses

The Court of Appeal allowed an appeal against a refusal to adjourn a trial based on the unavailability of a witness due to illness.

The substantive matter on which the trial was based concerned alleged VAT fraud and dishonest assistance. The claims alleged, amongst other things, dishonesty on the part of the defendant's employees, including a manager, for whom it was said the defendant was either responsible or vicariously liable. The defendant denied any dishonesty and had indicated its intention to call witnesses, including the manager, during the trial which was due to commence in January 2021. However, in August 2020, the manager was diagnosed with a serious illness and it was clear this would prevent her from giving evidence in the trial in January. At that stage the defendant did not seek an adjournment and instead served a hearsay notice in respect of her witness statement already served. However, in December 2020, the manager received a much-improved prognosis which meant, whilst she would still be unable to attend trial to give evidence in January 2021, there was good reason to expect her to be fully recovered by the end of September 2021 and so be able to attend trial thereafter.

The application to adjourn the trial was then made. The evidence accompanying the application from the manager expressed in detail how she strongly opposed the allegations of dishonesty against her being resolved without hearing from her directly. At first instance, it was considered that an adjournment would be inappropriate, and the application was dismissed.

Allowing the appeal, the Court of Appeal held that the guiding principles on whether there should be an adjournment of a trial was whether that trial would be fair in all the circumstances if it went ahead. It was artificial to seek to draw a distinction between the unavailability of a party and the unavailability of a witness. The inability of a witness to attend trial due to illness would usually be material and may be decisive. Therefore, if the refusal of an adjournment would make the resulting trial unfair, an adjournment should ordinarily be granted, regardless of inconvenience to the other party, unless this were outweighed by injustice to the other party that could not be compensated for. In the present case, it was appropriate for the trial to be adjourned.

Phones 4U Ltd (In Administration) v EE Ltd

[2021] EWCA Civ 116 (Sir Geoffrey Vos, C, Asplin, Green LLJ) 2 February 2021

Disclosure – Proportionality – Article 8 ECHR'

The Court had to consider whether an order for disclosure of employees' personal electronic devices for work-related communications was appropriate and proportionate in circumstances where this would interfere with their Article 8 ECHR rights.

The background to the appeal concerned proceedings issued by Phones 4U asserting the infringement of certain anti-competitive arrangements. A disclosure order was granted under CPR Part 31 allowing four of the defendants' custodians to provide access to IT consultants of their personal electronic devices and emails to enable a search for work-related communications. An undertaking had been given by the consultants that only relevant material would be disclosed and that the devices would be returned to the custodians with any copies being destroyed.

The primary issues on appeal were whether the Judge had jurisdiction to make the disclosure order, and whether the mechanism involving the IT consultants was appropriate and proportionate.

The appeal was dismissed. Although the employees' Article 8 rights would be interfered with, the disclosure order was nevertheless appropriate and proportionate. As to jurisdiction, the Court considered that CPR Part 31 had been written in broad terms to allow the Court maximum latitude to ensure that the relevant documents were before the Court at trial to enable just and fair decisions to be made. It was at least reasonably possible that relevant work-related documents would be on the custodians' personal devices which would be considered to be under the control of the defendants for the purposes of CPR r.31.8. There was, therefore, no jurisdictional impediment to the Judge's disclosure order. As to proportionality, although it was accepted that personal and private material would also be contained on the custodians' devices thereby meaning the disclosure order would interfere with their right of privacy under Article 8 of the ECHR, this did not preclude an order for access to the devices being made. The Court had to ensure that the interference was as little as possible. It was also reasonable to make the disclosure order when considering the context of the underlying proceedings which concerned an alleged unlawful agreement. It was reasonably possible that the individuals involved might deliberately avoid using work-based devices meaning it was appropriate for personal devices to be searched. The Court could not be powerless to ensure that any hidden documents were disclosed. Using IT consultants to conduct the search for material was therefore a proportionate mechanism.

PricewaterhouseCoopers LLP v BTI 2014 LLC

[2021] EWCA Civ 9 (Henderson, Flaux, Coulson LLJ) 11 January 2021

Res Judicata – Abuse of Process – Strike Out

The appellant, PwC, appealed against an order dismissing its application to strike out the claim of the respondent, BTI. That claim was for damages against PwC in respect of its audit of the annual accounts of "AWA" for whom BTI was an assignee. BTI had brought two sets of proceedings in 2014, the first against AWA's directors and parent company ("*Sequana*") for the recovery of two dividend payments paid by AWA to Sequana, and the second against PwC for professional negligence. BTI's parent company, "BAT", had also brought proceedings against Sequana under s.423 of the Insolvency Act in its capacity as creditor seeing repayment of the two dividends. BTI's claim against AWA failed (*BTI 2014 LLC v Sequana SA* [2016] EWHC 1686; [2017] Bus LR 82). However, BAT's claim succeeded in respect of one of the dividend payments which was upheld on appeal (*BTI 2014 LLP v Sequana SA* [2019] EWCA Civ 112; [2019] 2 All ER 784). Sequana subsequently entered liquidation and none of the liability was paid. The claim against PwC was therefore pursued. It had been stayed by consent pending the outcome of the claim against AWA and Sequana. PwC had previously resisted the suggestion for the claims to be heard together.

PwC's contended that to allow the claim against them to proceed would be an abuse of process and that the claim was doomed to fail in any event. That Judge dismissed that contention.

PwC's appeal was dismissed. No question of res judicata or issue estoppel arose where the parties to the second set of proceedings were not the same as those to the first proceedings. This meant that the parties to the second proceedings were not bound by the findings in the first. The fact that the same issues were involved in the first and second proceedings did not, without more, amount to an abuse of process. The circumstances when an abuse would be found were where (i) it would be manifestly unfair to a party of the later proceedings that the same issues should be re-litigated, or (ii) to permit such re-litigation would bring the administration of justice into disrepute. However, these did not apply to the present case. On the second ground, it was wrong to assume that the evidence would be the same as in the prior proceedings and that a second judge would inevitably reach the same conclusion.

Civil Procedure

Re Ide (in Bankruptcy)

[2020] EWCA Civ 1469 (Lewison, Arnold, Nugee LLJ) 9 November 2020

Insolvency Rules – Transfer of Proceedings – Extension of Time

This appeal largely concerned certain procedural points. The first issue was whether it was possible for the County Court to transfer part (only) of insolvency proceedings to the High Court. The second issue was whether the same principles apply to an extension of time for service of an insolvency application as apply to the extension of time for service of a claim form under the CPR. At first instance the answer to the first issue was held to be yes. On the second issue, it was recognised that where a claim form has been issued, but not served, within the limitation period, an extension of time should not, save in exceptional circumstances be granted as it would deprive the defendant of a limitation defence. This had been applied to insolvency proceedings in Re Kelcrown Homes Ltd [2017] EWHC 537 (Ch) ("*Kelcrown*"). However, the Judge declined to follow Kelcrown holding that vacating and re-fixing the first hearing of the application had the practical effect of extending time for service and so there was no need to have regard to limitation considerations in the same way as under the CPR.

On the first issue, the question was whether "*insolvency proceedings*" in r.12.30(2) of the Insolvency Rules referred to the entirety of a set of insolvency proceedings, or whether it was capable of including only a particular application within those insolvency proceedings. The Court held that rule 12.30(2) did enable a County Court to transfer a particular application without having to transfer the entirety of the relevant insolvency proceedings.

As to the when then considering the impact of the expiry of the limitation period, the principles applicable under the CPR to an application to extend the time for service of a claim form equally applied to an application under the Insolvency Rules. One would expect the applicable principles to be similar under both sets of rules and not lead to radically differing outcomes. A defendant under both the CPR and the Insolvency Rules should expect that a claimant, absent exceptional circumstances, would not be able to obtain an extension of the limitation period after it had expired.

Diriye v Bojaj

[2020] EWCA Civ 1400 (Coulson, Nicola Davies, Rose LLJ) 4 November 2020

Deemed Service – Signed For Deliveries – Relief from Sanctions

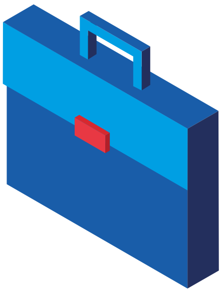
Within the context of a personal injury claim, the Court made an unless order requiring reply evidence to be served by 4pm on 4 April 2018. The claimant served his reply by Royal Mail's "*Signed For 1st class*" service at 17.46 on 4 April 2018. Although the Royal Mail aimed to delivery Signed For 1st class items the next working day after posting, the reply was not delivered and signed for until 9 April 2018. Two months later the claimant applied for relief from sanctions.

The two issues were (i) the length of the default and whether the Signed For 1st class service fell within CPR r.6.26 so that service was deemed to have taken place on the second day after posting; and (ii) whether relief from sanctions should be granted applying the Denton test.

At first instance, the Judge held that r.6.26 did not apply and relief should be refused.

The appeal was dismissed. However, the Court did consider that the Judge had been wrong as to whether r.6.26 applied. The Court held that "Signed For 1st class" post was a version of the normal first-class post, and that even it was "*another service providing for delivery on the next business day*", by the Royal Mail's description, "*Signed For 1st class*" should be delivered the next day. Attempting any distinction between two first class services was wrong in principle and ignored the concept of deemed service which avoided the need for the Court to consider when a document was in fact served/delivered. Deemed service provided certainty and made the actual circumstances of delivery irrelevant. Any other result would mean an unscrupulous intended recipient could simply evade service by refusing to sign for the item in question.

However, as to whether relief should be granted, despite r.6.26 applying service was still carried out after the time specified in the unless order. In this instance relief was not granted as the claimant had failed to comply not only with the timing of the reply, but also with a requirement to set out certain evidence within it. The claimant had also waited 2 months to seek the relief which could have impacted the trial and the other side's ability to take a view about the strength or weakness of the claim they faced. There were no good reasons for the default.



Commercial Litigation

Digested by Jamil Mustafa

Etihad Airways PJSC v Flöther

[2020] EWCA Civ 1707 (Henderson, Hickinbottom, Newey LLJ) 18 December 2020

Conflict of laws – Loan agreements – Jurisdiction clauses – Stay of proceedings

In a significant decision, the Court of Appeal held that '*asymmetric*' jurisdiction clauses fell within the scope of Article 31(2) of Regulation (EU) No 1215/2012 of the European Parliament and Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) ("Brussels Recast"). The case concerned an asymmetric jurisdiction clause in a facility agreement entered into by Etihad Airways PJSC ("Etihad"), as lender, and Air Berlin PLC ("Air Berlin"), as borrower, forming part of a financial support package advanced by Etihad to Air Berlin. The relevant effect of the clause was that Air Berlin was bound to commence proceedings in England and Wales to settle any disputes arising under the facility agreement, whereas Etihad was free to commence proceedings in any other court with jurisdiction.

Subsequently Air Berlin entered into insolvency proceedings in Germany. Professor Flöther, in his capacity as insolvency administrator of Air Berlin, then commenced proceedings in Germany against Etihad in respect of a comfort letter provided by Etihad in connection with the financial support package. Six months later, Etihad commenced English proceedings, which sought negative relief that mirrored the relief sought in Germany. Thereafter, Air Berlin made an application disputing the jurisdiction of the English court. The court at first instance gave judgment in favour of Etihad. Air Berlin obtained permission to appeal on one the issue of whether the English court was obliged to stay the English proceedings under Article 29 of Brussels Recast or whether Article 31(2) of Brussels Recast applied to the asymmetric jurisdiction clause in the facility agreement.

Article 29(1) confers jurisdiction on the court first seised in respect of identical proceedings. It is however without prejudice to Article 31(2) of Brussels Recast. Article 31(2) provides that where a Member State court is designated by a qualifying jurisdiction agreement for the purposes of Article 25 of Brussels Recast, any other Member State court shall stay its proceedings until the designated court determines it has no jurisdiction. It was common ground on appeal that the proceedings were identical and that the German court was first seised. It further became common ground that the asymmetric jurisdiction clause was within the scope of Article 25. The issue was whether it was within Article 31(2), which required that the agreement confer '*exclusive jurisdiction*' on a Member State court.

The Court of Appeal held that it was, affirming the principle of party autonomy enshrined within Brussels Recast. The Court of Appeal found that Article 31(2) had been accorded express priority over Article 29(1), and there was nothing in the wording of the former indicating that asymmetric jurisdiction clauses fell outside its scope. Further, as the Court of Appeal observed, if asymmetric jurisdiction clause were not captured by Article 31(2), then that provision would fail to address the abusive litigation tactics that it was introduced to remedy (the infamous '*Italian torpedo*'). The Court of Appel also rejected an additional argument based on an analogy to the Hague Convention 2005.■

[**Robin Dicker QC; Roseanna Darcy**]

IS Prime Ltd v TF Global Markets (UK) Ltd

[2020] EWHC 3375 (Comm) (Andrew Baker J) 9 December 2020

Arbitration agreements – Stay of proceedings

The Commercial Court considered whether an agreement to submit to a non-binding arbitration under the commercial arbitration rules of the American Arbitration Association ("AAA") amounted to an arbitration agreement for the purposes of section 6(1) of the Arbitration Act 1996 (the "1996 Act"). The alleged arbitration agreement was contained within a sale agreement between two Delaware Companies. The claimant and the defendants were not parties to the sale agreement. However, the sale agreement contemplated that there would be contracts between them for the provision of services. The claimant affirmed that relevant contracts were subsequently concluded and were subject to English law and jurisdiction. An AAA arbitration process was latterly commenced in Florida between the

Commercial Litigation

two Delaware companies pursuant to the sale agreement to which the claimant and defendants were made party.

The claimant then commenced proceedings in England alleging that the defendants had breached the terms of one of the contracts they had concluded (an exclusivity agreement). The defendants sought a stay pursuant to section 9 of the 1996 Act on the basis that the claimant's participation in the AAA process amounted to an agreement to submit to arbitration for the purposes of section 6(1) of the 1996 Act, or alternatively, a stay under section 49(3) of the Senior Courts Act 1981 (the "1981 Act"). The defendants' application for a stay under the 1996 Act thus turned on whether there was an arbitration agreement between the parties for the purposes of the Act.

The Court held that there was no such agreement. The Court held that it was necessary, for an agreement to amount to an arbitration agreement within the meaning of section 6(1) of the 1996 Act, that the agreement provide that the parties would be bound by the decisions and awards made by the individual or panel to whom disputes were to be submitted. The AAA process was expressed to be non-binding and therefore there was no qualifying arbitration agreement. Accordingly, the Court refused a stay of the English proceedings under section 9 of the 1996 Act, and further refused one under section 49(3) of the 1981 Act because there was no promise between the claimant and defendants that no litigation would be commenced, or (in particular) suit would be brought, in England (relying on English law) in parallel to the AAA process, nor was a stay justified on case management grounds.

[Adam Al-Attar]

Stoffel & Co v Grandona

[2020] UKSC 42 (Lord Reed, P, Lord Hodge, Lord Black, Lord Lloyd-Jones, Lady Arden) 30 October

Illegality – Mortgage fraud – Professional Negligence

The Supreme Court provided guidance with respect to the application of the approach to the reformulated illegality defence laid down in *Patel v Mirza* [2016] UKSC 42. The case concerned the sale and purchase of a lease. The claimant was the buyer, and the defendant was the firm of solicitors involved in the transaction. The defendant had negligently failed to register the transfer of the property to the claimant or her bank's new charge. The claimant subsequently defaulted in her mortgage repayments, and her bank commenced proceedings against her. In turn, the claimant commenced proceedings against her solicitors, advancing claims in contract and tort. However, the claimant had procured her mortgage advance by mortgage fraud. Accordingly, her solicitors admitted negligence and breach of contract but sought to run an illegality defence. This defence was unsuccessful at first instance and before the Court of Appeal.

Applying the tripartite approach laid down in *Patel v Mirza*, the Supreme Court likewise rejected the defendant's illegality defence. The Supreme Court confirmed that the approach set out in *Patel v Mirza* ought not be applied mechanistically, and that the essential question was whether allowing the claim to proceed would be inconsistent with the policies to which the legal system gave effect and thereby damage the integrity of the legal system. The Supreme Court held that in relation to the first of the three considerations outlined in Patel v Mirza, the Court was simply concerned to identify (at a relatively high level of generality) the policies to which the law gives effect which are relevant to the claim and determine whether to allow the claim would be inconsistent with those policies, or where there are competing policy considerations, identify where the balance lies. The Supreme Court further affirmed that it would not be necessary to exhaustively consider all three of the relevant considerations in any given case. In particular, there was no need to consider proportionality where it is clear that the illegality defence should not be allowed.

The Supreme Court concluded that no illegality defence was available to the defendants. Allowing the claim to proceed would not undermine the public policies underpinning the prohibition of mortgage fraud and would further protect the interests of the victim of the fraud (the claimant's bank), while denying the claim would contravene other important public policies. It would be inconsistent with policy that the victims of solicitors' negligence should be compensated for their loss and disincentivise conveyancing solicitors from properly performing their duties, and also give rise to incoherence in the law given the law's recognition of the claimant's equitable interest in the property. It was therefore not strictly necessary to consider whether denial of the claim was proportionate. The Supreme Court nevertheless did so and found that denial of the claim would have been disproportionate. The Supreme Court further clarified that while reliance upon the illegality was not the sole focus of the enquiry, it remained potentially relevant to the assessment of the proportionality of denying a claim, and in particular the question of the centrality of the relevant illegality. Similarly, whether the claimant would profit from their wrongdoing was also relevant to proportionality but not determinative of the analysis. In the instant case, however, the Supreme Court considered that the mortgage fraud was conceptually separate from the claim, and the claimant would not profit from her illegality if the claim were allowed to proceed, but rather acquire the means to meet a substantial judgment against her.

Business Mortgage Finance 4 Plc & Ors v Hussain & Ors

[2021] EWHC 171 (Ch) (Miles J)
3 February 2021

Declarations – Injunctions – Rectification – Securitisation structures

The issuers of notes under four securitisation structures and their majority shareholder (the 'claimants') obtained declaratory and injunctive relief against various individuals and corporate entities that had taken numerous steps to interfere with those structures since 2019. Amongst other things, certain of the defendants had purported to assume, either themselves or through related entities, the status of a noteholder and remove the trustee of the notes, and the role of receiver of one of the issuer's assets and sell them to what was later learned to be an entity connected to the defendants. These steps had been the subject of previous declarations and injunctions from the Court in previous proceedings.

Regardless, the defendants continued to interfere with the securitisation structures. From May 2020 onwards the defendants had, without legal basis, purported to assume various roles in relation to the issuers and the securitisation structures and had, amongst other things, purported to remove and replace the original directors of the issuers, forfeit the shares held by the majority shareholder and sell them to one of the defendants, and make various filings at Companies House for and on behalf of the issuers. The claimants sought declarations that these various steps were invalid and of no effect, and that the defendants did not hold the statuses or positions they had assumed in relation to the issuers. The issuers also sought injunctions restraining the defendants from holding themselves out as having those statuses and positions and from taking actions in respect of the issuers. The claimants also sought orders for the removal for the removal of the various entries made at Companies House in respect of the issuers. The central question in the proceedings was whether the defendants had been validly appointed as directors of the issuers, on the basis of which purported appointment they had taken the steps which were subject to the proceedings. That question had been the subject of a previous judgment of the High Court where it was held that they were not.

Concurring with that previous judgment, the Court held that the defendants (who were unrepresented and chose not to participate in the proceedings) were not appointed as directors of the issuers. The Court accordingly granted declarations that the purported appointments and the various acts of the defendants were invalid and of no effect, to provide clarity as to who was in control of the issuers' and their assets. The Court further granted wide-ranging final injunctions restraining the defendants from holding themselves out as having assumed certain positions and from taking various steps in relation to the issuers since there was a real and substantial risk of imminent damage to the issuers resulting from unlawful interference with their affairs. In particular, the Court was satisfied that, were the defendants permitted to continue to falsely hold themselves out as having certain statuses or positions in relation to the issuers, there would be damage caused to the issuers and other involved in the securitisations. The Court noted that the issuers had already incurred approximately £2.4 million of unrecovered and unrecoverable legal costs (which loss would ultimately fall in noteholders) and was concerned to prevent further abusive and wasteful litigation and draw a line under the wrongful conduct of the defendants. The Court also ordered the rectification of the filings made by the defendants at Companies House.■

[Alexander Riddiford]

Galapagos Bidco SARL v Kebekus

[2021] EWHC 68 (Ch) (Zacaroli J) 19 January 2021

Foreign proceedings – Declaratory relief – Intercreditor agreements – Jurisdiction – Restructuring

Two creditors sought to challenge the jurisdiction of the English court to determine a company's ('Bidco's') claim for declaratory relief against them and other defendants that a financial restructuring that Bidco had enacted complied with the terms of an intercreditor agreement. The intercreditor agreement was expressly subject to English law and jurisdiction. One of the creditors ('GSA') was domiciled in Germany, where it was subject to insolvency proceedings, and its insolvency administrator ('Dr Kebekus') had been joined to the proceedings to ensure that effective orders could be made against the GSA. The other creditor ('Signal') was domiciled in Luxembourg, which at the commencement of the English proceedings, had a beneficial interest in certain high-yield notes issued by the holding company of Bidco, and later became a holder of certain of the said notes (and so subject to the intercreditor agreement). The remaining defendants were domiciled in England and Wales. Signal issued proceedings in New York shortly after Bidco issued the English proceedings, while, related proceedings were further commenced in Luxembourg by Dr Kebekus and GSA, and in Germany by Dr Kebekus.

Bidco sought to establish jurisdiction in respect of Signal and Dr Kebekus pursuant to Article 8(1) of Regulation (EU) No 1215/2012 of the European Parliament and Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast) ('Brussels Recast'), using the trustee of the high-yield notes (the 'HYN Trustee'), which was party to the proceedings and domiciled in England, as an anchor defendant to bring in the challenging creditors. In the alternative, Bidco submitted that it had a

Commercial Litigation

sustainable claim for declaratory relief against the other three English-domiciled defendants (the 'GLAS defendants'), who could also serve as anchor defendants, and further that the English court had jurisdiction over Signal pursuant to Article 25(1) of Brussels Recast (by reason of the jurisdiction clause in the intercreditor agreement to which Signal was party). The Court agreed with Bidco on all these points.

Signal and Dr Kebekus contended that there was no real or genuine dispute between Bidco and the anchor defendants. The Court disagreed. The Court considered that there was a sustainable claim against the HYN Trustee as anchor defendant. It found that there was a real and present dispute between the parties before the court and a real prospect that the arguments for and against declaratory relief would be made. Further, each party would be affected. The Court rejected Signal's submission that the HYN Trustee would not be affected because it had no economic interest, holding that it was affected in its capacity as trustee because those whom it represented had an economic interest. The Court also held that it was wrong for a defendant (in this case Signal) to defeat a claim for declaratory relief by refusing to participate in the relevant proceedings. The Court further considered that there was a sustainable claim against the GLAS defendants for declaratory relief. The mere fact that the GLAS defendants agreed with the declarations sought was immaterial, and there was a real prospect that the Court would grant the declarations sought for the same reasons as if the HYN Trustee was the anchor defendant.

In the respect of the further alternative, the Court also found it had jurisdiction over Signal pursuant to Article 25 of Brussels Recast by reason of the jurisdiction clause in the intercreditor agreement. While Article 25 of Brussels Recast did not apply when the proceedings were commenced, there was nothing preventing Bidco from seeking to re-join Signal to the proceedings relying on the jurisdiction clause and Article 25(1). The jurisdiction clause was asymmetric, and the Court rejected Signal's construction of the same, the effect of which was that Bidco would be prevented from commencing proceedings at all where a Secured Party to the intercreditor agreement, such as Signal, had first commenced proceedings in respect of the same matter in a foreign court. The Court also rejected a further argument by Signal for a case management stay of the English proceedings, since it was impermissibly based on *forum conveniens* grounds.

[David Allison QC, Tom Smith QC, Henry Phillips, Ryan Perkins]




Okpabi and ors v Royal Dutch Shell Plc and anor

[2021] UKSC 3 (Lord Hodge, DP, Lady Black, Lord Briggs, Lord Kitchin, Lord Hamblen) 12 February 2021

Duty of care – Foreign subsidiaries – Jurisdiction – Parent company's liability for acts of subsidiary

The Supreme Court heard a jurisdiction appeal which raised the question of whether there was an arguable case that a UK domiciled parent company ('RDS') owed a duty of care to the claimants in respect of actions of its foreign subsidiary ('SPDC') so as to found jurisdiction against RDS as a necessary and proper party to the proceedings.

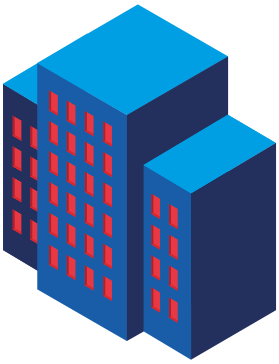
The appeal arose in connection with two sets of proceedings in which it was alleged that SPDC had negligently caused oil spills in the claimants' communities leading to extensive environmental damage. SPDC was a subsidiary of RDS, which the claimants alleged owed them a duty of care since RDS exercised significant control over material aspects of SPDC's operations and/or assumed responsibility for its operations. This was rejected at first instance and by a majority in the Court of Appeal.

The Supreme Court disagreed. It emphasised the importance of proportionality in the determination of jurisdiction disputes and held that the Court of Appeal (and the Court at first instance) had been drawn into an inappropriate mini-trial and had made determinations in respect of contested factual matters and documentary evidence which it should not have done at the interlocutory stage. This was a material error of law. The Supreme Court held that, at the interlocutory stage, the factual averments in support of a claim should be accepted unless they were demonstrably untrue or unsupportable.

The Supreme Court further accepted that the Court of Appeal had adopted an erroneous approach to the question of whether RDS owed a duty of care to the claimants for the actions of SPDC (although it reserved its position as to whether the relevant errors of law were material). The Supreme Court considered that, to the extent the

Court of Appeal indicated that the publication by a parent company of group-wide policies or standards could not lead to the imposition of a duty of care, that was inconsistent with the Supreme Court's decision in *Lungowe v Vedanta Resources plc* [2019] UKSC 20. The Supreme Court further held that the Court of Appeal had focused myopically on the issue of control, which was just the starting point, and the issue was the extent to which the parent company took over or shared with the subsidiary the management of the relevant activity. Equally, the Court of Appeal had erred in analysing the case by reference to the threefold test in *Caparo Industries plc v Dickman* [1990] 2 AC 605, which was again inconsistent with the decision in *Vedanta*.

The Supreme Court did not consider that the averments of fact in the particulars of claim were demonstrably untrue or unsupportable, and on the claimants' pleaded case, as supported by other evidence, there was a real issue to be tried in light of *Vedanta*, and that the majority of the Court of Appeal had been wrong to conclude otherwise.■



Company Law

Digested by Edoardo Lupi

Byers & others v Chen Ningning

[2021] UKPC 4 (Lord Kerr, Lord Briggs, Lady Arden, Lord Kitchin, Lord Leggatt) 22 February 2021

Misfeasance – Factual findings on appeal – BVI

The liquidators appealed the dismissal of a misfeasance claim against one of the company's former directors, Miss Chen. The liquidators alleged that Miss Chen had acted in breach of her fiduciary duties in causing or procuring payments to be made by the company to a third party. The trial judge had held that Miss Chen had ceased to be a director before payments to company "Z" were made, and that she owed no fiduciary duties to the company at the relevant time.

The Court of Appeal, which had delivered its judgment nearly two-and-a-half years after hearing the appeal, dismissed all grounds of appeal. Whilst the Board accepted that the Court of Appeal's delay had been excessive, it was not persuaded that the correctness of the Court of Appeal's judgment could be impugned merely on the grounds of excessive delay.

The appellant liquidators accepted that their appeal involved challenges to findings of fact. Applying the approach set out in *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600, the Board nevertheless accepted that Miss Chen had not ceased to be a *de jure* director before the payments were made. The Board held that there was no evidence that she had in fact ever ceased to be a *de jure* director, such that the trial judge had erred in making the finding that he did. That mistake was of fundamental importance to the outcome of the appeal, making it one of those rare cases in which it was appropriate to intervene. The Board went on to hold that Miss Chen's failure to intervene to prevent the payments to company Z was a breach of her fiduciary duties: it was well established that a director who knows that assets are being misapplied must take reasonable steps to prevent those activities from occurring.■

Company Law

Re Keeping Kids Co

[2021] EWHC 175 (Ch) (Falk J) 12 February 2021

The Official Receiver sought the disqualification of all of the directors of the well-known children's charity, Kids Company under s 6 of the Company Directors Disqualification Act 1986, together with its CEO. The Official Receiver alleged that the directors (referred to as "Trustees") were unfit on the basis that they caused and/or allowed Kids Company to operate an unsustainable business model.

There was a threshold question as to whether the CEO, Ms Batmanghelidjh, was a *de facto* director such that she could be properly the subject of disqualification proceedings. After a review of the case law on de facto directorship, Falk J summarised the applicable principles at [167]. Her ladyship proceeded to consider the corporate governance structure at Kids Company, in accordance with Arden LJ's guidance in Smithton Ltd v Naggar [2015] 1 WLR 189, finding that the Board was entitled to delegate management functions. There was no significance *per se* in the "label" of CEO: what matters is what the relevant individual actually did. In this case, Ms Batmanghelidjh accepted the Trustees to be the ultimate decision makers, recognised that she needed to abide by their instructions, and was not part of the ultimate decision-making structure. In all the circumstances, the Official Receiver did not establish that the CEO was a *de facto* director.

As to the directors themselves, the Judge held that the allegation of unfitness was not made out. Whilst there was validity in the criticisms of the charity's cash flow issues, the expectation of continued support from the government in particular was highly relevant. Having regard to the primary purpose of section 6 CDDA, the Judge noted that the public needed no protection from these directors, who had given enormous amounts of their time in respect of a challenging trusteeship.

Re Gategroup Guarantee Limited

[2021] EWHC 304 (Ch) (Zacaroli J) 17 February 2021

Part 26A – Lugano Convention – Convening hearing

The Judge ordered the convening of two meetings of creditors of the Plan Company under section 901C of the Companies Act 2006. The Plan related to a senior facilities agreement ("SFA") and a bond issuance of some CHF350 million, and formed part of a broader restructuring of the Group. The Plan involved extending the maturity dates of the SFA and the Bonds by five years and making certain other amendment to each.

An important question considered by the Judge concerned the Lugano Convention. Given that the claim form was issued on 30 December 2020 in this case, the Lugano Convention continued to apply. The question was whether the Lugano Convention applies to applications under Part 26A in circumstances where, if it did, Art. 23(1) would have conferred exclusive jurisdiction in favour of the courts of Zurich under the Bonds, such that the English Court would have no jurisdiction. The Plan Company contended that Part 26A falls within the bankruptcy exception in Article 1(2)(b). In view of this, contrary to previous cases, the point needed to be decided.

In this connection, the Judge rejected a submission that Part 26A is materially indistinguishable from a Part 26 Scheme. Threshold conditions A and B under section 901A make a significant difference, and are sufficient to position Part 26A within the bankruptcy exception. The Judge held that the rationale for excluding bankruptcy proceedings as explained in the Jenard Report extends to proceedings under Part 26A, and that this was a strong indication that the bankruptcy exclusion should be construed so as to encompass those proceedings. The Judge also had regard to whether proceedings under Part 26A comply with the requirements of Article 1(1) of the Insolvency Regulation. Zacaroli J concluded that proceedings under Part 26A are within the bankruptcy exclusion in the Lugano Convention, such that the English Court had jurisdiction notwithstanding the exclusive jurisdiction clause in the bonds.

As to classes, the Judge considered it necessary to look through the structure that had been put in place by a Deed Poll, concluding that senior lenders under the SFA had different rights to the bondholders by reason of the different identity of the obligors in respect of the SFA and the bonds. The Judge held that there were materially different rights which made it impossible for the bondholders and senior lenders to consult together with a view to their common interest. Accordingly he directed that two meetings of creditors be convened.

[Felicity Toube QC and Riz Mokal]

Re Prudential Assurance Co Ltd; Re Rothesay Life plc

[2020] EWCA Civ 1626 (Sir Geoffrey Vos C, David Richards LJ, Sir Nicholas Patten)

Insolvency – Scheme – Sanction

The Court of Appeal gave guidance on the approach to applications to sanction an insurance business transfer scheme under Part VI of the Financial Services and Markets Act 2000 (FSMA). The factors set out in Re London Life Association Ltd, Unreported 21 Feb 1989 and *Re AXA Equity & Law Life Assurance Society Plc* [2001] 1 All ER (Comm) 1010 were not a comprehensive statement of the factors to be applied in all insurance business transfers. In the present case, which involved the transfer of annuity business from Prudential (P) to Rothesay (R), the paramount concern was to assess whether the transfer would have a material adverse effect on the receipt by the annuitants of their annuities, or any such effect on payments that were or might become due to the other annuitants, policyholders and creditors of the transferor and transferee. The Court would also be concerned to assess whether there might be any material adverse effect on the service standards provided to the transferring annuitants or policyholders. Whether any other factors required consideration would depend on the circumstances.

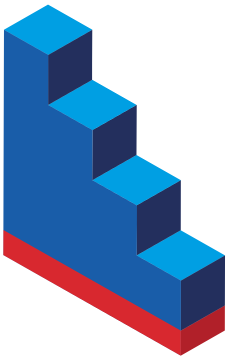
The first duty of the Court was carefully to scrutinise the reports of the independent expert and the regulators, and the evidence of any person required to be heard under s110 FSMA including those that alleged that they would be adversely affected by the scheme. Full weight had to be accorded to the recommendations of the expert or the non-objections of the regulators, so that a court would not depart from them without significant and appropriate reasons for doing so. That was particularly so in relation to the financial and actuarial assessments required as regards the security of financial benefits.

That approach to the exercise of the Court's discretion applied to the crucial question of whether the proposed scheme would have any material adverse effect on policyholders, employees or other stakeholders. An adverse effect on policyholders would only be material if it was (i) a possibility that could not sensibly be ignored having regard to the nature and gravity of the feared harm, (ii) a consequence of the scheme, (ii) material in the sense that there was the prospect of real or significant, as opposed to fanciful or insignificant, risks to the position of the stakeholder concerned. Even if there might be a material adverse effect on some policyholders, the Court might still sanction the scheme. If there were differential effects on the interests of different classes of persons affected, the Court would need to consider whether the proposed scheme as a whole was fair as between those interests. The same approach should be adopted when making the more general comparison between the positions that would exist with or without the proposed scheme in respect of the security of policyholders' benefits and the standards of service and corporate governance that the policyholders could expect. Once those evaluations had been undertaken, the court would decide whether in all the circumstances it was appropriate to sanction the scheme.

The Judge had not been justified in concluding that there was a material disparity between the potential need for external support for each of P and R. He had disregarded the opinions of the expert and regulator as to P and R's future financial resilience on the false basis that they were founded on only a snapshot of the current year. He could take into account a wider set of factors than the expert and regulators, but that did not include speculation about what support might be available in the future from a parent company. He had failed to give adequate weight to the regulator's lack of objection. The subjective factors that the objecting policyholders had chosen P because of its age and reputation, and had assumed that P would provide their annuity throughout, were not relevant to the exercise of discretion. The question of whether the scheme should be sanctioned was remitted to the High Court.

[Barry Isaacs QC]

Corporate Insolvency



Corporate Insolvency

Digested by Daniel Judd and Paul Fradley


Re Debenhams plc, Frasers Group plc v Debenhams plc

[2020] EWHC 3768 (Ch) (Chief ICC Judge Briggs)
25 November 2020

Section 118 of Companies Act - Inspection of share register – Winding-up petition

Debenhams plc entered administration in April 2019. All of its directors and its secretary resigned. In March 2020 its administrators gave notice under Insolvency Act 1986, Schedule B1, Paragraph 84, to move Debenhams from administration to dissolution, and the administrators vacated office. Frasers Group plc presented a contributory's winding-up petition against Debenhams on the just and equitable ground, alleging that its affairs required investigation, and the Court suspended the Debenhams' dissolution pending determination of the petition. Frasers issued a claim under Section 118 of the Companies Act 2006 to inspect Debenhams' register of members, so as to be able to call a meeting of shareholders for the purpose of appointing directors, who could investigate Debenhams' affairs. Certain of Debenhams' noteholders applied for the hearing of the claim to be adjourned so that they could have a longer opportunity to prepare for the hearing. The Court held that, if it were to proceed with the hearing of the claim, interested parties would not be on an equal footing, and this would be contrary to the overriding objective. The claim was therefore adjourned to be heard with the hearing of Frasers' winding up petition.■

[Barry Isaacs QC; Lloyd Tamlyn; William Willson]



Re Debenhams plc, Frasers Group plc v Debenhams plc

[2021] EWHC 473 (Ch) (Deputy ICC Judge Schaffer)
25 January 2021

Contributory winding-up petition – Winding-up order on Court's own motion

Frasers Group plc presented a contributory's winding-up petition against Debenhams on the just and equitable ground, alleging that its affairs required investigation, and the Court suspended Debenhams' dissolution pending determination of the petition. Frasers also issued a claim under Section 118 of the Companies Act 2006 to inspect Debenhams' register of members. The claim was before the Court for determination, and the petition was before the Court for directions. The claim and the petition were opposed by the trustee of certain notes which had been issued by Debenhams. The court held that 6 matters were clear in relation to Debenhams: (1) it was balance sheet insolvent; (2) it was cashflow insolvent; (3) it was not trading; (4) it had no directors; (5) it had no officeholders; and (6) the only reason it had not already been dissolved, as requested by its former administrators, was the presentation of Frasers' winding up petition. The court exercised the jurisdiction first recognised by Neuberger J in *Lancefield v Lancefield* [2002] BPIR 1108, and refined in *Secretary of State for Business, Innovation and Skills v PLT Anti-Marketing Limited* [2015] EWHC 3981 (Ch), to order of its own motion that Debenhams be wound up on the ground of inability to pay debts. The note trustee's application for permission to appeal was refused.■

[Barry Isaacs QC; Tom Smith QC Lloyd Tamlyn; William Willson]




Stronghold Insurance Company Limited (in administration)

[2020] EWHC 3478 (Ch) (Sir Alastair Norris, convening hearing)

[2021] EWHC 271 (Ch) (Green J, sanction hearing)

Schemes of Arrangement – Insurance companies

Stronghold Insurance Company Limited is an insurance company with asbestosis, environmental pollution, and other health hazard claims. An administration order was made in June 2019. Two schemes of arrangement were proposed by Stronghold by its administrators (the "Schemes"). The Schemes were designed to bring claims forward by the use of a bar date for claims, and by an adjudication process for the determination of disputed claims. At the convening hearing, Sir Alastair Norris held that insurance creditors should meet as a class in relation to one scheme, and reinsurance creditors should meet as a class in relation to the other scheme, with the meetings held by webinar (following Re Castle Trust). The reason for the two schemes was that, by reason of regulation 21 (2) of the Insurers (Reorganisation and Winding Up) Regulations 2004/353, insurance creditors would in administration or winding up receive payment in priority to reinsurance creditors and other creditors. It followed that insurance creditors would be paid first from assets, and assuming a surplus, reinsurance creditors would only be paid after full payment to insurance creditors. The Schemes were designed to replicate this payment priority. The creditors at their meetings were able to consult together and voted in favour of each of the Schemes. At the sanction hearing, Green J held that the requirements for sanction were fulfilled, and observed that the holding of meetings by webinar assisted in encouraging creditors to participate, especially where as in the present case the majority of creditors were abroad (in this case, in the US). Green J ordered sanction of the Schemes.■

[Barry Isaacs QC; Adam Goodison]


Re PGS ASA

[2021] EWHC 222 (Ch) (Miles J); [2020] EWHC 3622 (Ch) (Miles J) 21 December 2020

Scheme of Arrangement – Sanction – Application for Sanction of Scheme

The Court sanctioned a single class scheme pursuant to Section 899 of the Companies Act 2006, following a near-unanimous vote in favour of the scheme at the meeting, attended by 99.88% of scheme creditors.

PGS ASA is a Norwegian company listed on the Oslo stock exchange, and the parent of a group which is a global leading provider of marine seismic services. The group's principal services consist of imaging and processing data for the oil and gas industry. When oil prices plummeted in the Covid-19 pandemic, the consequential effect on the oil and gas industry rendered the group unable to service its principal debt obligations. The relevant comparator was PGS's likely bankruptcy proceedings in Norway. The scheme's purpose was to amend and extend PGS's liabilities. The *quid pro quo* was the payment of certain fees, partly in cash and partly in kind, and certain other features such an enhanced security package.

At the sanction hearing, the Court considered whether it should exercise its jurisdiction over the foreign company as matter of discretion, thereby following the approach confirmed in *Re ColourOz Investment* 2 LLC. A sufficient connection with England was found on the basis of several connecting factors: first, the English governing law and jurisdiction clauses under the relevant credit agreement, notwithstanding their recent amendment from New York law to English law; and secondly, the fact that all scheme creditors had acceded to the lock-up agreement, which contained a specific submission to the English jurisdiction. The asymmetry of the jurisdiction clause was not held to be a bar in this respect, in line with the decisions in *Re Vietnam Shipbuilding Industry Group* (non-exclusive jurisdiction clause) and *Re Politus BV* (asymmetric jurisdiction clause).

So far as fairness was concerned, Miles J considered anew the various features of the scheme which he had determined (at convening) did not fracture the single class composition. He held, on analysis, that such factors were unlikely to have had a material influence on creditors' voting decisions. These included payment of a range of fees (lock-up fee, work fee and adviser fees), the evidence demonstrating that the cumulative effect of the lock-up and work fees was not material in light of the substantial difference between the anticipated scheme recoveries and projected return under the insolvency comparator.■

[Tom Smith QC; Georgina Peters]


Corporate Insolvency

Re Hertz UK Receivables Ltd

[2020] EWHC 3649 (Ch) (Sir Alastair Norris) 11 December 2020

Coronavirus – Creditors' meetings – Liquidity – Loan Notes – Schemes of Arrangement

The Court granted an order convening a single class meeting of scheme creditors pursuant to Section 896 of the Companies Act 2006.

The company, Hertz UK, is an indirect subsidiary of The Hertz Corporation ("THC"). The scheme creditors were unsecured noteholders under two separate issuances, relating to some €731 million of the Group's financial indebtedness. The essential elements of the proposed scheme, which would form part of a wider European restructuring to be conducted in parallel to the Chapter 11 proceedings, were: (i) a €250 million new money raise in the form of new secured notes; (ii) a cash payment in partial redemption of the existing notes, to be raised by seeking a 'bifurcation order' from the US Bankruptcy Court which would (if granted) enable the noteholders' guarantees against the US entities in Chapter 11 to be bifurcated from their claims against Hertz's International Group, and sold via an auction process; and (iii) as to the remaining claims under the existing notes, their exchange for new secured notes to be issued in two tranches, with the effect that the claims of noteholders participating in the new money would be elevated to first-ranking priority, bear interest at a higher rate and be shorter-dated.

Principal features of potential relevance to class composition were: (a) the different (and more advantageous) rights under the scheme for creditors participating in the new money; (b) various fees, including a consent fee and payment of adviser fees (not conditional on the scheme taking effect); and (c) a backstop fee payable to the *ad hoc* group for their backstopping services in connection with the new money, and potentially to be provided in relation to the prospective sale of the US guarantee claims. On analysis, none of these features was held to fracture the single class.

International jurisdiction was held to exist over Hertz UK, being an English company, and in the event that the Recast Brussels Regulation applied, over scheme creditors under both Articles 8 and 25. In addition, although Hertz UK had originally been a guarantor of the notes, it acceded as co-issuer under various consent solicitations shortly prior to the hearing, following the approach taken (at that time) in *Re NN2 NewCo Ltd and Re Hema UK 1 Ltd*.

[Tom Smith QC; Georgina Peters]


PSJC Uralkali v Rowley

[2020] EWHC 3442 (Ch) (Miles J) 15 December 2020

Claims against office-holders – Purposes of administration – Disappointed bidders

Force India, a formula one team, was by July 2018 heavily insolvent and subject to a winding up petition. The company was placed into administration. After obtaining emergency short-term funding, the administrators – and defendants – urgently sought to find a solution for the company. They invited bids from parties interested in achieving the first objective of administration, rescuing Force India as a going concern and achieving an exit from administration, as well as offers from bidders interested in achieving the second objective of administration, by purchasing the company's business and assets. If a rescue bid did not complete within a short window, the administrators would immediately proceed with a purchase offer with that same bidder.

Two rounds of bidding were held. In the second and final round, the claimant had provided the highest purchase offer, but Racing Point Limited provided the only rescue offer. The defendants selected the rescue offer. In the end, the exit from administration could not be completed in time, and the administrators proceeded with a business and asset sale with Racing Point Limited. The claimant challenged the bidding process, claiming that it lost an opportunity to acquire the team or its business and assets.

The claims all failed both on the facts and on the law. The claims were made principally in negligence and negligent misstatement. It was first claimed that during the bidding process the administrators negligently misrepresented that they would select bids on the basis of the highest purchase offer. Among other things, no such representation was made, relied upon, or would have made a difference. A second claim was that the defendants negligently and falsely misrepresented that they would operate a level playing field, when they had no intention of doing so. But in each challenged respect Miles J found that the administrators operated a level playing field. A separate claim – that between the first and second round bids, the defendants breached an equitable duty of confidence towards the claimant – also failed.

The proceedings had been commenced against the administrators personally. The Judge held that in conducting the bidding process, the administrators were acting as agents of the company, Force India. The court would be slow to find that administrators had assumed a responsibility in tort to participants in a bidding process, and particularly so where administrators are said to have assumed a '*personal*' responsibility which would render them personally liable. Administrators were already subject to oversight from the court's supervisory jurisdiction and accountability by those given standing under insolvency legislation. Imposing personal duties of care in tort to disappointed bidders may lead to an unduly cautious approach to what is a demanding commercial task.

[Stephen Robins; Stefanie Wilkins; Daniel Judd]



Re DeepOcean 1 UK Ltd

[2020] EWHC 3549 (Ch) (Trower J) (convening hearing) 15 December 2020

Restructuring plans – Section 901A conditions – Purpose of compromise

Three companies in the DeepOcean group sought orders from the Court convening meetings of creditors for the purpose of considering a restructuring plan under the new Part 26A of the Companies Act 2006. After addressing the plan companies' financial position and the proposed convening of four separate classes, Trower J provided guidance in particular as to when a restructuring plan would meet the two conditions for such a plan in Section 901A: condition A (that each plan company has encountered or is likely to encounter financial difficulties) and condition B (that the purpose of the compromise is to eliminate, reduce, prevent or mitigate the effect of any of the financial difficulties in condition A). Conditions A and B were points of jurisdiction, which had to be satisfied at the convening hearing, and before the court would make an order convening a meeting of creditors.

The effect of the plan companies' financial difficulties was to imperil their ability to trade as a going concern, and there was no intention that the *DeepOcean* plan companies would carry on business as a going concern if the restructuring plan became effective. In those circumstances, could the purpose of the compromise be sufficient to satisfy condition B?

The Judge responded in the affirmative. The question was twofold: first, to identify what constitute the effects of the financial difficulties, and second, whether the compromise or arrangement has, as its purpose, a lessening or reduction in the gravity or seriousness of the financial difficulties. The legislation was not confined only to granting relief in order to enhance the ability of a company to carry on business as a going concern, and in that connection the Judge observed that liquidators may initiate the procedure. If it could be said that the effect of a company's financial difficulties is that it is no longer able to carry on business as a going concern, with the consequence that creditors would receive only a small dividend, there was no reason why a compromise or arrangement which provides for a slightly enhanced dividend on those claims should not be treated as mitigating the effect of those financial difficulties. Even if there is no mitigating effect on the company's ability to continue to carry on its business as a going concern, there is a mitigating effect on the severity of the losses which its creditors could otherwise sustain.

[Jeremy Goldring QC; Tom Smith QC; Charlotte Cooke; Ryan Perkins]




Corporate Insolvency

Re DeepOcean 1 UK Ltd

[2021] EWHC 138 (Ch) (Trower J)
(sanction hearing) 28 January 2021

Restructuring plans – Cross-class cram down – Section 901G conditions – Discretion to sanction

A restructuring plan proposed by three DeepOcean companies met the statutory threshold of 75% in all classes in relation to two plan companies, but met the 75% threshold in only three out of the four constituted classes in relation to the third plan company. A class of 'Other Plan Creditors' approved the plan by only 64.6% in value. There was no evidence as to why creditors who voted against the restructuring plan took the course that they did.

The Judge held that where an applicant seeks to rely on the cross-class cram down power under Section 901G, a slightly different approach was appropriate from the principles applicable to the sanction of schemes of arrangement under Part 26.

The first statutory condition was that no members of a dissenting class would be any worse off than they would be in the event of a '*relevant alternative*', i.e. whatever the court considers would be most likely to occur in relation to the company if the compromise were not sanctioned. The Judge considered that this exercise was similar to identifying the appropriate comparator for class purposes in schemes of arrangement, and when conducting a 'vertical' comparison when a company voluntary arrangement is challenged on the basis of unfair prejudice. The starting point would usually be a comparison of the value of the likely dividend, or discount to the par value of each creditor's debt. The phrase 'any worse off' was broad, and contemplated a need to account for the impact of the restructuring plan on all incidents of the liability to the creditor concerned. On the evidence, the Other Plan Creditors were clearly better off under the plan.

The second condition was that the plan was approved by at least one class of creditors which had a genuine economic interest in the event of the relevant alternative. That was satisfied here by the support of classes of secured creditors of the third company, who would have stood to make a recovery even where the plan was not approved. The Judge added that there was no indication that the classes had been artificially constituted to ensure that the second condition was met, but if that concern became apparent only at the sanction stage.

The Court also considered factors relevant to its discretion to sanction a restructuring plan where Section 901G was engaged. First of all, by its very nature, the legislative intent of the Section 901G power contemplated that the court might override the views of a class meeting. A reluctance to differ from the meeting could not have the same place in the court's approach to sanctioning a restructuring plan to which Section 901G applies that it has under Part 26. Other things being equal, meeting the two conditions in Section 901G was capable of justifying an override of dissenting creditors, in circumstances where the rights of dissenting creditors would be varied in a manner which objectively was neutral or beneficial to them. Secondly, in the present case, the benefits to be received by dissenting creditors would be received by non-plan companies, and those creditors would otherwise be out of the money: these were powerful pointers in favour of sanctioning the plan. Thirdly, the Judge referred to the turnout majorities of creditors voting at the meeting, which were representative, and the fact that the outcomes for dissenting creditors were similar for plan companies where the statutory majorities had been reached.

The Judge identified the relative treatment of creditors as a factor relevant to the exercise of its discretion to sanction a restructuring plan under Section 901G, which was akin to the 'horizontal' comparison applicable in unfair prejudice challenges to company voluntary arrangements. Justice may require the court to consider whether there has been a fair distribution of benefits of the restructuring between those who agree to it, and those who do not. Whilst there was differential treatment of the Other Plan Creditors from other classes of creditor, that treatment was objectively justified. The Court sanctioned the restructuring plan. ■

[Jeremy Goldring QC; Tom Smith QC; Charlotte Cooke; Ryan Perkins]




R (on the application of KBR Inc) v Director of the Serious Fraud Office

[2021] UKSC 2 (Lloyd-Jones, Briggs, Arden, Hamblen, Stephens SCJJ) 5 February 2021

Extra-territorial effect – Notices under the Criminal Justice Act 1987

KBR Inc is a company incorporated in the United States. The Serious Fraud Office had issued to that company a notice under the Criminal Justice Act 1987 Act requiring the production of information and documentation. Some but not all of the information was provided. KBR Inc then challenged the notice as unlawful, on the basis that the SFO notice required the production of documents held entirely outside the UK jurisdiction by a company situated outside of UK jurisdiction. The question for determination was therefore whether the SFO notices could have extra-territorial effect.

The Supreme Court held that SFO did not have the power to compel a foreign company to produce documents held abroad, and that the interpretative presumption against extra-territorial effect was not rebutted. The language of the provisions did not clearly rebut that presumption, which would depend on the purpose and context of the particular statute. But the court considered that the legislative history of the provisions favoured the view that there was no extra-territorial effect, and allowed KBR Inc's appeal.

Of particular interest is the court's discussion of cases in which powers under the Insolvency Act 1986 were considered to have extra-territorial effect. The authorities addressing the extra-territorial effect of powers under insolvency legislation might be relevant by way of analogy. However, the Court ultimately considered that the differences in the language, purpose, and statutory safeguards between the insolvency law context on the one hand, and provision under the Criminal Justice Act 1987 on the other, meant that no sufficiently close analogy could be drawn from them.

Re Beaufort Asset Clearing Services Limited (In Special Administration)

[2020] EWHC 2309 (Ch) (Miles J) 16 December 2020

Special administration – Compulsory winding up – Client assets

On a directions' application, winding-up petition and application for ancillary relief by Beaufort's special administrators, determined at two hearings designed to accommodate a '*long stop date period*' built into the timetable, the Court granted various declarations and orders which had the effect of blessing the administrators' next steps, and subsequently made a compulsory winding-up order. Beaufort had been in special administration since 1 March 2018, under The Investment Bank Special Administration Regulations 2011. The administrators had returned the vast majority of client assets to clients with proprietary claims, with a 'rump' of assets valued at approximately £10 million remaining.

The '*long stop date mechanism*' did not – unlike other elements of the plan – reflect any specific requirement of the IBSA regime. The effect of the notice would, ultimately, be to engage various provisions of the plan releasing the administrators from their obligations to return the rump assets and granting them certain powers to liquidate assets and deal with the proceeds. Under the plan, the notice could be issued once the administrators had returned client assets so far as reasonably practicable (mirroring Objective 1 of the IBSA regime). On the extensive evidence, Miles J found this threshold had been satisfied, and furthermore, that it was appropriate to grant the declaration sought, this being a momentous step in the administration.

At a subsequent hearing, the Court granted the relief sought in the winding-up petition, determining that this was not precluded by the fact that Beaufort was already in special administration, having regard to the facts that: (i) neither of the exit routes expressly permitted by the IBSA Regulations were available, (ii) although the IBSA regime did not expressly provide for this exit route, it was well-established that the Court has power to make a winding-up order where Paragraph 79 of Schedule B1 to the Insolvency Act 1986 applies (which it did), and (iii) it was highly improbable that legislative intent would have required the special administrators to remain in office indefinitely where rump assets could not reasonably be returned.

As to discretion, the Court considered, *inter alia*, the obstacles which clients may face in recovering rump assets in the future, now valued at some £7.4 million; in particular, the fact that assets held electronically may be liquidated to discharge fees or, in the case of assets held via Crest/Euroclear, potentially non-recoverable due to gateway access expiring prior to winding-up. Miles J held that those matters, on the facts, should not prevent the Court terminating the special administrators' appointments and granting the winding up order.

[Daniel Bayfield QC; Georgina Peters]

Re Reyker Securities Plc (In Special Administration)

[2020] EWHC 3286 (Ch) (Trower J) 16 October 2020

Bonds - Client assets – Costs – Distribution - Investment banks - Special administration regime

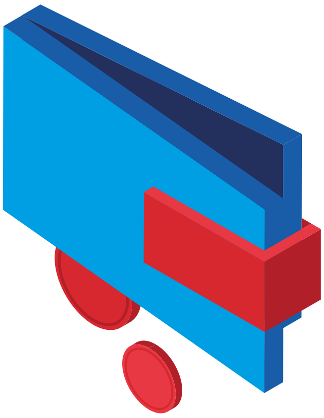
The Court approved a client asset distribution plan formulated and proposed in accordance with Chapter 3 of Part 5 of The Investment Bank Special Administration (England and Wales) Rules 2011. Prior to its special administration, Reyker Securities Plc operated as an investment firm, in the course of which it held client assets and client money. The client asset portfolio had an aggregate value of over £900 million, held by Reyker for some 9,000 clients. The vast majority of assets were intended to be transferred to other investment firms to be held for Reyker's clients, in a series of (most likely) five "*bulk transfers*".

So far as jurisdiction was concerned, Trower J found that the two statutory requirements for approval of the plan under rule 146(5)(a) of the IBSA Rules had been met, namely that the notifications to potential claimants under rule 143 had been made, and that the creditors' committee had approved the plan. The Judge also found that the minimum parameters for the content of the plan prescribed by rule 144 were satisfied.

As to discretion, the Judge accepted and applied the principles which had been articulated in the three most recent cases concerning client asset distribution plans (*Beaufort*, *Strand* and *SVS*). Namely, first, whether the plan provides a fair and reasonable means of returning the assets as soon as is reasonably practicable. Secondly, that the court will give particular weight to the approval of the creditors' committee and its role in relation to the plan, the FCA's position, the response from individual clients (or lack thereof), and the fact that the administrators have, as officers of the court, exercised their professional judgment to bring the application in the first place. Thirdly, that in the absence of any objections from relevant persons, the court is likely to be slow to withhold approval or substitute its own assessment of what is fair and reasonable as a means of returning client assets.

Having rejected the objections of one individual (retail) client, the Judge approved the distribution plan in the terms proposed.

[Daniel Bayfield QC; Georgina Peters]

Personal Insolvency

Digested by Lottie Piper

Re Derev

[2021] EWHC 392 (Ch) (Mr Justice Adam Johnson) 24 February 2021

Recognition orders – Freezing Injunctions – Section 25 of CJJA

Mr Derev was declared bankrupt in Russia in July 2019. Shortly before being declared bankrupt he left Russia for London, where he has substantial property. In December 2020 the bankruptcy order was recognised in England as main proceedings under the Cross Border Insolvency Regulations 2006 (the "CBIR").

Prior to the recognition order being granted, the applicant obtained interim relief, in the form of a freezing order, to suspend the respondent's right to transfer, encumber or otherwise dispose of any of his assets worldwide, on the basis that there was a risk of dissipation of assets by the respondent (the "Zacaroli Order").

The applicant applied for the continuation of the freezing order in light of the continuing risk of dissipation of assets by the respondent, under its power in Section 25 of the Civil Jurisdiction and Judgments Act 1982 (where proceedings had been commenced in another jurisdiction); or under Article 21 of the CBIR.

The application was refused. The foreign proceedings had to be "*substantive proceedings*" in the context of Section 25 (*ETI Euro Telecom Internatioanl NV v Bolivia* [2008] EWCA Civ 880). Even adopting a generous interpretation, the Russian bankruptcy process did not fall within that description. Further, even though Mr Derev's conduct continued to be a matter of concern, this did not justify the continuation of the Zacaroli Order under Article 21 of the CBIR. Now that the bankruptcy order had been recognised in England, the trustee was intended to be in the same position, as far as practicable, as a trustee in bankruptcy appointed under domestic law. It was not established practice for the interests of a trustee in bankruptcy to be protected by a freezing order. The bankruptcy regime offers other forms of protection such that, absent an exceptional reason, a freezing order would not be required or justified. In this case, no such exceptional reason existed. Accordingly, the freezing order fell away.

[William Willson]

Re Hood (A Debtor)

[2020] EWHC 3232 (Ch) (Green J) 27 November 2020

Carriage of petition – Disposition of property – Payments by third parties

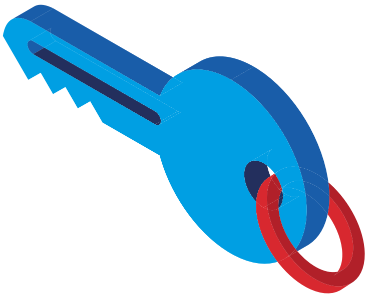
Rule 10.29 of the Insolvency Rules 2016 enables a creditor other than the petitioning creditor to take carriage of a bankruptcy petition and seek a bankruptcy order at the hearing in circumstances where the petitioning creditor has declined to do so. However, rule 10.29(3)(a) provides that the court "*must not*" make such an order if satisfied that the petitioner's debt has been paid, secured or compounded by "*a disposition of property made by some person other than the debtor.*"

The petition was presented by HMRC. Prior to the hearing, the petition debt had been discharged by payments made directly to HMRC from the debtor's former wife and one of his business associates. The payment by the former wife was a gift, but the payment by the business associate was a loan. The question for the court was whether these payments fell within rule 10.29(3)(a) so as to prevent the respondent from taking carriage of the petition.

At first instance, ICC Judge Jones granted the respondent carriage of the petition and made a bankruptcy order. On appeal, the respondent argued that, since the payment by the business associate was a loan, it amounted to a disposition of the bankrupt's property within section 284 IA 1986. Since it had not been approved or ratified by the court, it was void, and therefore the respondent should be allowed to take carriage of the petition.

The court rejected this argument, holding that the payment by the third party did not amount to a disposition of the bankrupt's property, since he never had a beneficial interest in that sum, and there was no requirement for a disposition by a third party to be a gratuitous payment in order to fall under rule 10.29(3)(a). This mean that rule 10.29(3)(a) did apply, such that the court was precluded from permitting the respondent to take carriage of the petition.

[Felicity Toube QC; Adam Al-Attar]



Property & Trusts

Digested by Madeline Jones

R. (on the application of Day) v Shropshire Council

[2020] EWCA Civ 1751 (David Richards, Hickinbottom, Andrews LLJ) 23 December 2020

Football – Disciplinary proceedings – Financial fair play regulations

A town council ("R") sold land which was subject to a statutory trust for public recreational purposes under Section of the Open Spaces Act 1906 but without making the buyer aware of the trust's existence, in breach of statutory advertising requirements.

The appellant applied to challenge the sale by judicial review but his application was refused. The Court of Appeal upheld this decision. A Section 10 trust was not a trust in the usual private law sense, but a statutory construct in respect of which Parliament alone determined the rights and obligations involved. On a reading of the relevant statutory provisions the disposal was valid and the buyer, lacking actual knowledge of the trust, took the land free of it. A buyer with actual knowledge would have obtained the land subject to the Section 10 trust.

Property & Trusts

Surrey CC v NHS Lincolnshire Clinical Commissioning Group

[2020] EWHC 3550 (QB) (Thornton J)
25 November 2020

Restitution

A local authority ("C") succeeded in a claim in restitution against a clinical commissioning group ("D") for the costs of caring for a young man with autism ("J"). D had unlawfully refused to accept responsibility for J, and C had borne the costs of caring for him. The Court found that the claim should have proceeded by judicial review since it is generally contrary to public policy to allow a complaint against a public authority's infringement of public law rights to proceed by way of private claim. However, an inflexible procedural divide between public and private law claims is no longer applied, and barring the claim would have created a perverse incentive for health bodies to unlawfully delay assessments.

Claims in unjust enrichment have a limitation period of six years running from the date of any benefit received by the defendant. C should therefore claimed for restitution in respect of any sums paid to J's care home in the six years immediately before the claim's issue.

C's claim in restitution was novel, as it had not paid money to a public authority as a result of unlawful demands (an established scenario where restitution lies pursuant to Woolwich Equitable *Building Society v Inland Revenue Commissioners* [1993] AC 70). *Auckland Harbour Board v King* [1924] A. 318 supports a broader principle of recovery for the unlawful obtaining of a benefit by a public authority, but on its face this also did not apply to C's claim since C's payments were not illegal but made under its statutory obligations in the absence of an acceptance of responsibility by D. It had an obligation to confer the benefit on D, albeit in circumstances that had been unlawfully engineered by D. However, on the basis of the analysis of the Auckland principle in Professor Burrows' A Restatement of the English Law of Unjust Enrichment, the judge found that the existence of C's legal obligation to make the payments was outweighed by the unjust factors at play so that the restitution action could succeed.

D relied on the defence of change of position, on the basis that the money it would have spent on J had been spent on others. The defence of change of position was available under the Auckland principle, but D failed to discharge the evidential burden to succeed in this defence. Accordingly, the claim succeeded.

O'Neill v Holland

[2020] EWCA Civ 1583 (David Richards, Henderston, Nugee LLJ)
27 November 2020

Beneficial interests – Cohabitation – Constructive trusts – Equitable ownership – Reliance

Ms O'Neill ("A") appealed against a finding that she did not have a 50% beneficial interest in a property in the sole name of Mr Holland ("R"). A's father had purchased the property in 1999 and A and her partner R had lived in it from 2000. In 2008 A's father transferred the property to the sole name of R for no consideration. The trial judge found that the reason it was not transferred jointly to A and R was that R had wrongly told A she would not get a mortgage. In 2012 A and R split up, and A left the property with their children. A brought proceedings seeking a declaration that R held 50% of the beneficial interest in the property on constructive trust for her. She succeeded before a district judge at first instance but the judgment was overturned on appeal to HHJ Pelling. However, the Court of Appeal allowed A's appeal.

In order successfully to claim a beneficial interest in a residential property under a common intention constructive trust, in the class of case where the legal estate is in the sole name of the other party, it is necessary for the claimant to show that the defendant has by his words or conduct he has induced the claimant to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.

HHJ Pelling found that the detrimental reliance had not been adequately pleaded and that the district judge's findings of fact were not sufficient to establish detrimental reliance.

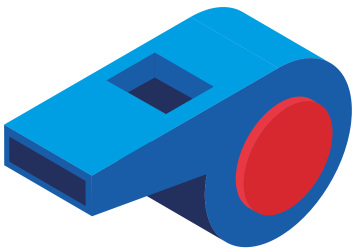
The mere fact that A's father had purchased the property to be a family home for A could not have given rise to a constructive trust. However the district judge's finding that R had instructed his solicitor to include A's names on the deeds but then obtained a mortgage offer in his sole name. When it was pointed out to him that this would preclude the property being transferred to their joint names, R chose not to try to obtain an amended mortgage offer in joint names, but instead procured A's agreement to the transfer proceeding into his name alone. This supplied the necessary element of detrimental reliance. Although the district judge did not wholly accept A's case as pleaded, and although she had misdirected herself in relation to detrimental reliance, the facts which she found were nevertheless sufficient to establish a broadly similar case which led to the same conclusion as that for which she had always contended, namely that R held the beneficial interest in the property on trust for himself and A in equal shares.

Leeds City Council v Barclays Bank Plc

[2021] EWHC 363 (Comm) (Cockerill J)
22 February 20210

Fraudulent misrepresentation – Reliance

A bank applied to strike out claims brought against it by two local authorities for rescission of loans said to be affected by the LIBOR fixing scandal. The local authorities claimed they had entered into the loans in reliance on fraudulent misrepresentations relating to the basis for the LIBOR benchmarks. The main issue was the correct test for demonstrating reliance on a fraudulent misrepresentation. Cockerill J held that it was fatal to the local authorities' claims for fraudulent misrepresentation that they were not aware at the time of entering into the contracts that representations regarding LIBOR had been made. It was not enough for them to show that they had assumed that LIBOR would be set in a straightforward and proper manner and that the misrepresentation operated on the representee's mind "*knowingly or not*". Instead, it is necessary for a representee to show that they were aware of and understood a misrepresentation to prove reliance upon it. The claims were struck out.■



Sport

Digested by Riz Mokal

Eynsham Cricket Club v HMRC

Community amateur sports club — Whether charity for VAT purposes

A key question in this appeal concerned whether the Eynsham Cricket Club ("the Club") in Oxfordshire and registered with HMRC as a "*community amateur sports club*" ("CASC"), was a "*charity*" for the purposes of Schedule 8 to the Value Added Tax Act 1994. This in turn depended in part on whether the Club was "*established for charitable purposes only*" pursuant to Schedule 6 to the Finance Act 2010. A positive answer would entitle the Club to receive construction services to rebuild its pavilion, destroyed in 2012 by a suspected arson attack, on a zero-rated basis.

At first instance, the First-tier Tribunal held that the Club would have been a charity but for the fact that it had been established for the subsidiary non-charitable purpose of providing social facilities to Eynsham residents. The Upper-tier Tribunal dismissed the appeal but (amongst other things) on the ground that while the Club was established exclusively for charitable purposes, it was to be deemed as not established for such purposes pursuant to section 6 of the Charities Act 2011, which provides (relevantly) that a CASC "*established for charitable purposes is to be treated as not being so established, and accordingly cannot be a charity*". It was common ground that a purpose of the introduction of the deeming provision (in the Charities Act 2006, predecessor to the 2011 Act) was to absolve CASCs from the potentially burdensome administrative requirements of registering as a charity.

The Court of Appeal dismissed the Club's appeal. Rejecting the Club's argument that the deeming provision should be construed as applying only for regulatory and administrative purposes, Simler LJ (with whom the other Lords Justices agreed) held that the result of the introduction of the deeming provision — which on its natural construction applies without limitation and therefore for all purposes, including VAT rating — was to confront CASCs with a choice. A CASC could cease its CASC registration, register as a charity (if eligible) instead, and bear the attendant administrative burdens but also obtain the full tax benefits allied to that status. Alternatively, it could remain registered as a CASC and therefore without the administrative burdens of charitable status but with access only to a more limited range of tax reliefs not including VAT. The Club fell in the latter category.■

Ipso Facto Clauses: The International Dimension

WILLIAM WILLSON

PAUL FRADLEY

William Willson and Paul Fradley consider the new provisions in the Corporate Insolvency and Governance Act 2020 (‘**CIGA**’) on so-called Ipso Facto Clauses and how those provisions interact with cross-border contracts.

Ipso Facto Clauses

An Ipso Facto Clause is a clause which allows a contracting party to terminate the contract or impose different terms in the event of an insolvency, or potential insolvency, event. The termination can be either automatic or follow an election by the other party. Ipso Facto Clauses provide a key safeguard for the contractual counterparty of a company in financial distress. An Ipso Facto Clause protects a party from the difficulties of doing business with a company which has entered, or may soon enter, an insolvency process. Given that suppliers usually have greater contractual bargaining power to impose their standard terms and conditions, Ipso Facto Clauses have become standard terms in supply contracts. However, for the company in financial distress, and any insolvency practitioner appointed in respect of it, they create particular headaches. The company can be held to ransom by creditors holding out for payment. They also risk a loss of key supplies at a time when the company is already in financial distress. The exercise of Ipso Facto clauses can derail restructuring attempts by removing significant value from the business and may put at risk the continued survival of the company as a going concern.

The traditional approach of English law has been to respect parties' freedom to contract on the terms of their choosing. As Lord Collins noted in *Belmont Park*, "*party autonomy is at the heart of English commercial law… it is desirable that, so far as possible, the courts give effect to the contractual terms which parties have agreed.": Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38; [2012] 1 AC 383 (SC), [103]. As a result Ipso Facto Clauses have been upheld as a matter of common law: *Belmont Park* (supra), [177]. As David Richards J has put it:

> *"[i]n the absence of specific statutory provision, insolvency law does not compel a party to continue to deal with a company in administration or liquidation, nor does it prohibit a party from stipulating that all future dealings shall be on terms that not only future debts but also existing debts are paid in full. It is then for the administrator or liquidator to decide whether to accept these terms.": Revenue and Customs Commissioners v Football League Ltd* [2012] EWHC 1372 (Ch); [2012] Bus LR 1539, [166].

However, in the UK and globally, the legislative balance between debtor-friendly and creditor-friendly insolvency provisions has shifted in recent decades in favour of the debtor. There is an increasing focus on the rescue of struggling businesses, something which unites all the provisions in CIGA. Given the adverse effects of Ipso Facto Clauses for insolvent parties, a number of jurisdictions have prohibited (to some extent) the operation of such clauses. Such protections can be found in Chapter 11 of the US Bankruptcy Code (sections 363(I) and 543(C)) and in the Canadian Companies' Creditors Arrangement Act (section 34). They have also recently been introduced in Australia (by amendments to the Corporations Act 2001) and in Singapore by the Insolvency, Restructuring and Dissolution Act 2018 (section 440).

Prior to 2020, English law had introduced protections only for the supply of "*essential goods or services*", such as utilities and (from 2015) various IT supplies: Insolvency Act 1986 ('IA'), section 233. In 1986 suppliers were banned from insisting on payment of charges outstanding on the date of a debtor's entry into insolvency proceedings as a condition of continued supply: IA, section 233. In 2015, section 233A of the IA was introduced, which limits reliance on Ipso Facto Clauses in contracts for the supply of essential goods or services but only in respect of companies which have entered administration or a company voluntary arrangement.

Ipso Facto Ban

CIGA represents a step-change for the treatment of Ipso Facto Clauses in English law. It has introduced a new section 233B into the IA ('the **Ipso Facto Ban**'). Unlike the previous law, this applies when a company enters any insolvency procedure under the IA, including the new rescue moratorium, and when the company enters into a restructuring plan under the new Part 26A of the Companies Act 2006: IA, section 233B(2). Moreover, it applies to any "*contract for the supply of goods and services* ", not just essential goods and services. It prohibits any provision where:

> *"(a) the contract or the supply would terminate, or any other thing would take place, because the company becomes subject to the relevant insolvency procedure, or*
>
> *(b) the supplier would be entitled to terminate the contract or the supply, or to do any other thing, because the company becomes subject to the relevant insolvency procedure.":* IA, section 233B(3).

In addition, section 233B prohibits a supplier from exercising any contractual entitlement to terminate the contract or supply "*because of an event occurring before the start of the insolvency period* ", where the entitlement has arisen before the start of that period, for the duration of that insolvency period: IA, section 233B(4). The applicable "*insolvency* *period"* under section 233B(8) depends on the type of insolvency process concerned. There are a number of carve-outs in section 233B(5) which include company/officeholder consent or where the court is satisfied that "*the continuation of the contract would cause the supplier hardship*". Moreover, by section 233B(7) all suppliers are now prohibited from making it a condition of continued supply that outstanding charges are paid.

Under section 233C the Government has a wide power to exclude any insolvency procedures from the scope of the provision and to exclude certain kinds of suppliers. Of particular note are the exclusions in Part 2 of Schedule 4ZZA to the IA which exclude companies or suppliers involved in financial services. This list includes insurers, banks, investment banks, investment firms and securitisation companies amongst others – the result is that it is mostly trade creditors who will be affected by section 233B. Moreover, contracts which involve financial services, such as financial contracts and derivatives, or which relate to financial markets and set-off and netting exclusions which are already protected in insolvency, are excluded.

Cross-Border Element

The Ipso Facto Ban raises interesting cross-border questions for three reasons. Firstly, in an increasingly globalised world contracts with international dimensions are commonplace. Many English law governed contracts involve contractual parties with little, if any, connection to the jurisdiction. Secondly, English insolvency law processes can be used by foreign companies. The new restructuring plan under Part 26A of the Companies Act 2006 is one example which, following the lead of the scheme of arrangement under Part 26, is likely to be of great utility to foreign companies. Thirdly, the English courts have a range of powers to recognise and assist foreign insolvency proceedings – could banning the enforcement of Ipso Facto Clauses be a new way to assist?

We will consider the impact of the Ipso Facto Ban in three different factual patterns:

(1) an English law governed contract with an English insolvency proceeding but international contractual parties;

(2) an English law governed contract with a foreign insolvency proceeding; and

(3) a foreign law governed contract with an English insolvency proceeding.

(1): English Contracts with an English Insolvency Process

The first question is whether the Ipso Facto Ban has extra-territorial effect; i.e. whether it purports to bind persons located outside the jurisdiction. The extra-territorial effects of section 233 IA were considered *ex parte* in *Official Receiver v Sahaviriya Steel Industries UK Ltd* [2015] EWHC 2877 (Ch); [2016] BCC 456. In that case the Official Receiver as liquidator of an English company wished to make a request for continued IT system supply from the company's parent in Thailand. The High Court granted permission to serve out on the Thai supplier. The Judge was satisfied that there was a serious issue to be tried that section 233 IA could have extra-territorial effect.

The final resolution of this point is still open. However, the English courts have separately held that provisions of the IA on transactions defrauding creditors, wrongful and fraudulent trading and transactions at an undervalue do have extra-territorial effect: see for example *Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd* [2018] EWCA Civ 1660; [2018] 1 WLR 4847, *Bilta (UK) Ltd v Nazir* [2015] UKSC 23; [2016] 1 AC 1, and *Re Paramount Airways Ltd* [1993] Ch 223. Moreover, the question is at root one of statutory construction; it would seem odd, particularly in the context of the increasingly globalised supply of goods and services, for Parliament not to have intended the Ipso Facto Bans to have extra-territorial effect. Limiting the territorial effect would significantly weaken the power of the Ipso Facto Ban in a way that undermines the stated aim of promoting the rescue of companies.

Assuming the Ipso Facto Ban does have extra-territorial effect, the English courts will regard the validity of Ipso Facto Clauses as a matter governed by the contract's governing law. The applicable law to contractual obligations is governed by Regulation 593/2008 (commonly known as 'the **Rome I Regulation**'). This has been retained

subject to some minor amendments post-Brexit. At the heart of the Rome I Regulation is the principle of party autonomy – subject to some exceptions, contractual parties are free to choose the law that will govern their contract. Under Article 12 of the Rome I Regulation the applicable law governs "*in particular*" the "*interpretation*" and "*performance*" of the contract and "*various ways of extinguishing obligations*". In circumstances where the governing law of the contract is English law, the validity of Ipso Facto Clauses will be governed by English law and the Ipso Facto Ban will provide the answer.

This leaves the question of how foreign courts will view the impact of the Ipso Facto Ban in English law governed contracts where the company has entered an English insolvency process but the supplier, or even the company, is a foreign entity. The answer to this question will depend on the private international law of the foreign country. Local advice is likely to be required to ensure that foreign courts will give effect to the Ipso Facto Ban. Within the EU it is possible to provide some general guidance. For the reasons set out above, the Rome I Regulation points towards the application of the Ipso Facto Ban to such Ipso Facto clauses.

(2): English Law Contracts with a Foreign Insolvency Process

Where a company enters a foreign insolvency process it may at first sight appear that the Ipso Facto Bans will have no impact. The insolvency processes covered by the Ipso Facto Ban are distinctly English insolvency processes. However, the English courts have a suite of powers to give recognition and assistance to foreign insolvency processes. Chief amongst them is the Cross-Border Insolvency Regulations ('the **CBIR**') which implement the UNCITRAL Model Law on Cross-Border Insolvency ('the **Model Law**'). The impact of the CBIR on English law governed Ipso Facto Clauses triggered by foreign insolvency processes arose in *Re Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch); [2014] Bus LR 1041. In that case a shipowner had gone into a rehabilitation process in South Korea; a contract of affreightment with charterers contained an Ipso Facto Clause, allowing the charterer to terminate the contract on notice. Under South Korean law the Ipso Facto Clause was unenforceable, and the representatives of the shipowner sought relief from the English court restraining the exercise of the termination power. Morgan J held that the English courts did not have the power to grant the relief sought under Article 21 of the Model Law. There was no specific power in the Model Law to grant such relief and at that time there was no English law provision which could be applied by analogy.

However, following CIGA, the English court will have jurisdiction to grant relief in support of a foreign insolvency process if the contractual provision falls within the scope of the Ipso Facto Ban. Article 21(1)(g) of the Model Law enables the English court to grant "*any additional relief that may be available to a British insolvency officeholder under the law of Great Britain*". This should enable the representatives of the company to obtain relief under section 233B since this would have been available to them if the insolvency process was a British one.

The approach of foreign courts may well depend on existence (and scope) of the provisions in their law banning Ipso Facto Clauses and the interaction of this with their rules of private international law. It is possible to envisage a legal system which (a) banned Ipso Facto clauses regardless of the governing law of the contract, and (b) required as part of its private international law that the ban be given effect regardless of the law applicable to the contract. However, assuming this is not the case, then a recognition application under the CBIR in England with an application for additional relief under Article 21(1)(g) of the Model Law would be advisable. If such relief is granted, then as a matter of English law the Ipso Facto Clause will be ineffective. Although the effect of this will depend on local private international law, one would expect most legal systems would give effect to the applicable law of the contract on this point.

(3): Foreign Law Contracts with an English Insolvency Process

Where there is a foreign law governed contract and an English insolvency process, the first port of call will be the governing law. That law may provide for a ban on Ipso Facto Clauses which applies regardless of the jurisdiction in which insolvency proceedings are

taking place. If the foreign law has a ban on Ipso Facto Clauses but it applies only to local insolvency processes, it may be possible to have the English insolvency process recognised in the foreign jurisdiction, for example under a local implementation of the Model Law. The representatives of the company would then be able to apply in the foreign country under Article 21(1)(g) of the Model Law (as implemented) for the relief that would have been available if the insolvency process was taking place under local law.

If the governing law does not provide for a ban on Ipso Facto Clauses, or if it is not possible to obtain recognition of the foreign insolvency process in England, then the position is more difficult. Under the Rome I Regulation, as set out above, the default position is that the English courts will apply the foreign governing law, meaning that the company will have no protection from the effects of Ipso Facto Clauses. However, Article 9 of the Rome I Regulation allows the English to apply "*overriding mandatory provisions of the law of the forum*," which are "*provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable*". The company could argue before the English courts that the Ipso Facto Bans are such an overriding mandatory provision. Such an argument will need to satisfy the court that the Ipso Facto Ban must be applied regardless of the normal rules of the conflict of laws and that the Ipso Facto Ban is sufficiently important to come within Article 9.

Conclusion

The Ipso Facto Ban represents a key shift towards a debtor-friendly model of insolvency law in English law. Its international implications are likely to be highly significant.

The Ipso Facto Ban has the potential to be of great utility in cross-border situations involving an English law governed contract, either by direct application of the Ipso Facto Ban or by a recognition application under the CBIR. Its impact on foreign law governed contracts is more uncertain at present and will depend on the identity of that governing law.

A copy of this article first appeared in the Butterworth's Journal of International Banking and Financial Law, February 2021.

Practice Direction 57AC – Trial Witness Statements in the Business and Property Courts: A necessary change of culture?

ROSEANNA DARCY

Introduction

On 1 February 2021, the 127th update to the CPR Practice Direction was published. Schedule 3 of the update includes the final version of the new Practice Direction 57AC which will apply to the preparation of all trial witness statements in the Business and Property Courts signed on or after 6 April 2021.

The Practice Direction is the result of an extensive project initiated at a meeting of the Commercial Court Users' Committee in March 2018 where concerns were raised that factual witness statements were often ineffective in performing their core function of achieving best evidence at proportionate costs in Commercial Court trials.[1] A working group comprising judges, barristers, solicitors and a representative of lay client users was set up with a view of obtaining the views of lay and professional users of the Business and Property Courts and considering ways to improve the system. It was identified early on that there was little appetite for radical reform on witness statements. However, it is notable that only 6% of participants thought that the current system of witness statements "*fully*" achieved the aim of producing the best evidence possible. Whilst 47% of participants felt the current system achieved that aim "*substantially*", 45% considered it did so only partly or not at all. The aim of the working group was thus to identify a number of ways in which the use of witness statements could be improved.[3]

The need for change

At the heart of the working group's final report, and the founding concern that led to its creation, was the view that trial witness statements are "*over-long*" and "*over-lawyered*".[4] It was considered that parties before the Business and Property Courts had lost the discipline to the core principles set out in rules 32.1, 32.2, 32.4 and 32.5 of the Civil Procedure Rules: namely (i) that factual witness evidence should be adduced at trial only on matters on which such evidence is required on disputed issues that stand to be resolved at the trial, and (ii) that a factual witness statement for trial should only contain the evidence in chief the witness could and would be allowed to give at trial if the witness statement were not being taken as their evidence in chief.[5]

Key Changes

The key changes and requirements set out in Practice 57AC and its appended Statement of Best Practice essentially seeks to move witness statements away from a re-telling of the story based on a long, detailed narrative of the factual events reconstructed from documents that the witness attests to believing to be true. This is largely achieved through narrowing the scope of what should be included in a trial witness statement by reinforcing the simple point that evidence should be constrained to matters which the witness can personally attest to, based on their own recollection of events.

Accordingly, paragraph 3 of the Practice Direction sets out that a trial witness statement must only contain matters of fact which the witness has personal knowledge of, and which are relevant to the case. These matters should be expressed in the witness's own words.

Significantly, and controversially, by paragraph 3.2 of the Practice Direction, a trial witness statement must now identify by list what documents, if any, the witness has referred to or been referred to whilst preparing the evidence. Although the paragraph confirms that this requirement does not affect privilege.

This proved to be the most contentious of the new provisions suggested by the working group and is the one point on which a consensus was not achieved.[6] Those in favour (who represented the majority) took the view that it was desirable to know the extent to which a witness had been influenced by the documents. The provision tackles the concern that in practice, witnesses are shown lots of documents, unfamiliar to them contemporaneously, which lead them to make the conclusions set out in their evidence.[7] It was considered the provision would therefore encourage discipline in the out-of-court handling of factual witnesses, revealing when their testimony has been influenced by large numbers of documents they did not see at the time.[8] Those against, considered the provision could lead to adverse inferences being drawn in trial depending on how many documents the witness reviewed. There were also concerns on the additional time and costs incurred by drawing up the list and determining whether a certain document should be shown to a witness or not.[9] However following a '*test-drive*' of the new provision, it was determined the extra time required to draw up the list was insignificant, and any concerns that the exercise could lead to witnesses being shown more documents than was reasonably required for fear of criticism that the witness has not been shown something, was not a reasonable interpretation of what was required, which prefers the less is more approach.[10]

Other key provisions include the requirement for a witness to sign a confirmation of compliance, alongside the usual statement of truth.[11] This requires a witness to confirm (i) their statement sets out their own personal recollection of events in their own words, (ii) how well matters have been recalled and whether their memory has been refreshed by considering documents, and (iii) they have not been encouraged by anyone to include anything in the statement that is not their own account.

1. Report of the Witness Evidence Working Group prepared in July 2019, paragraph 1.
2. *Ibid*, paragraph 29.
3. *Ibid*, paragraph 3.
4. Implementation Report of the Witness Evidence Working Group dated 31 July 2020, paragraph 10.
5. *Ibid*, paragraph 12 and paragraph 2.1 of Practice Direction 57AC.
6. Implementation Report of the Witness Evidence Working Group dated 31 July 2020, paragraph 40.
7. *Ibid*, paragraph 44.
8. *Ibid*, paragraph 47.
9. *Ibid*, paragraphs 48-50.
10. Addendum to the Implementation Report of the Witness Evidence Working Group, dated 19 October 2020, paragraph 7.
11. Practice Direction 57AC, paragraph 4.1

Additionally, a certificate of compliance is now also required from the relevant legal representative to confirm (i) the purpose and proper content of trial witness statements was explained to the witness, and (ii) it is believed the witness statements complies with the Practice Direction and Statement of Best Practice.[12]

However, it is worth noting that a without notice application can be made to vary or depart from the requirements concerning certifying compliance, to be dealt with without a hearing. Although, the grounds for getting such an order are not set out.

As to sanctions for a failure to comply with the Practice Direction, these are outlined at paragraph 5 and include striking out the witness statement, requiring the statement to be re-drafted, making an adverse costs order, or ordering for a witness to give their evidence in chief orally.

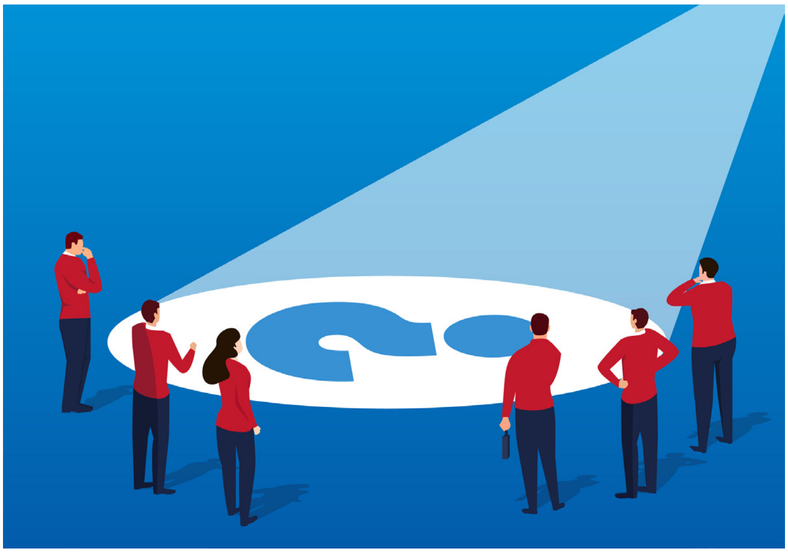
Given these changes, and recognising that it is often more junior lawyers who prepare at least the first draft of evidence, the working group were strongly in favour of including the Statement of Best Practice as an appendix to the Practice Direction. The hoped-for result is that witness statements will become more focused and will be limited to their proper content.[13]

Paragraph 3 of the Statement, in particular, will no doubt become a much-consulted guide when preparing trial witness statements. In particular, many of the points go to the actual preparation of the statement and the methodology that should be adopted. For example, the preparation of trial witness statements should involve as few drafts as reasonably practicable. This is on the basis that repeatedly revisiting a draft statement may "*corrupt rather than improve recollection*".[14] Further, a trial witness statement should be based upon a record or notes made by legal representatives during an interview.[15] That interview should avoid any leading questions being asked of the witness and should be recorded by a contemporaneous note. [16] The content of the witness statement should not go beyond the content of the interview notes and any clarifying questions raised after the first draft of the statement should again be done by non-leading questions.[17]

Whilst certain of these points relate solely to legally represented clients, litigants in person must also comply with the Practice Direction and understand that any witness statement they prepare must set out only what is known personally to the witness i.e. they must not be used to argue their case.

Application

Accordingly, all trial witness statements signed on or after 6 April 20201 and falling within the scope of Practice Direction 57AC must comply with it.



"*Trial*" is defined at paragraph 1.2 of the Practice Direction as meaning "*a final trial hearing, whether of all issues or of only one or some particular issues, in proceedings (except as provided in paragraph 1.3 below) in any of the Business and Property Courts under CPR Part 7 or Part 8 or upon an unfair prejudice petition under section 994 of the Companies Act 2006 or a contributory's just and equitable winding up petition under section 122(1)(g) of the Insolvency Act 1986*". The decision to include unfair prejudice petitions and '*just and equitable*' winding up petitions, despite not being instituted by either a Part 7 or Part 8 claim, was an add on during the fine-tuning process of the Practice Direction undertaken by Fancourt J, in consultation with Snowden J.[18]

As to the exceptions, these are set out in paragraph 1.3 of the Practice Direction, and notably include applications under the Insolvency Act 1986 and Insolvency Rules 2016 (save for '*just and equitable*' winding up petition) as well as certain claims under the Companies Act 2006 (not including unfair prejudice petitions).

It is also worth bearing in mind that in the event of any inconsistently with another Court Guide, Practice Direction 57A and its Statement of Best Practice will take precedence.[19]

Conclusion

Whether Practice Direction 57AC represents a change of culture, as called for by the working group, remains to be seen.[20] Certain of the best practice requirements are likely to already be done such as interviewing witnesses and limiting statements to the contents of contemporaneous notes as far as possible. However, other requirements such as including the list of documents referred to by the witness may take some getting used to. Whilst this may seem another onerous step in the course of preparing evidence, the aim of focussing statements and essentially stripping them back should help to stream-line the process overall. However, only time will tell whether it really is possible to move away from the "*over-long*" and "*over-lawyered*" statements we are no doubt all familiar with.

12. Practice Direction 57AC, paragraph 4.3.

13. Report of the Witness Evidence Working Group prepared in July 2019, paragraphs 42-43.

14. Statement of Best Practice, paragraph 3.8.

15. Statement of Best Practice, paragraph 3.10.

16. Statement of Best Practice, paragraph 3.11.

17. Statement of Best Practice, paragraph 3.13.

18. Addendum to the Implementation Report of the Witness Evidence Working Group, dated 19 October 2020, paragraph 4.

19. Practice Direction 57AC paragraph 3.4.

20. Implementation Report of the Witness Evidence Working Group dated 31 July 2020, paragraph 18.

Company Law and the Judiciary during the Palestine Mandate

MICHAEL CRYSTAL QC

Introduction

In an article which Professor Harris[1] and I wrote some years ago[2] we mentioned that a purpose of the harmonization of company legislation in the British Empire was to allow the application of English case law throughout the Empire. The laws of Mandatory Palestine[3] allowed the importation, and hence transplantation, of English case law by two methods. The first was through Article 46 of the Palestine Order in Council 1922, the *de facto* constitution of Palestine. This permitted the Courts in Palestine, in short, to have recourse to the substance of the common law and the doctrines of equity in England in prescribed circumstances.[4] The other was through Palestinian legislation on company law expressly providing that it should be interpreted by reference to the law of England relating to companies[5]. This article contains a description of the judges and their contribution to Palestine company law during the Mandate.

Timelines

One commentator has suggested that it is convenient, albeit simplistic, to divide the British legal mandatory heritage into two periods. The "*period of faith*" between 1917 and the mid 1930's, and the "*period of strife*" from the beginning of the Arab revolt of 1936 until the end of the Mandate in 1948[6]. In the company law context, it is, perhaps, preferable to divide the 30 year Mandate period into two slightly different time periods. These are 1920 – 1929 and 1929 – 1948. The first period runs from the onset of civilian rule in Palestine in 1920 up to the Palestine Companies Ordinance in 1929[7]. The second period runs down to the formal end of the Mandate on 15 May 1948. However, the civil justice system in Palestine, along with other departments of the civil administration, had begun to frayby the end of 1947[8].

Company Law Legislation

1920 – 1929

There was an increasing volume of company law legislation in Palestine during this period as the Mandatory authorities moved away from previous Ottoman law in commercial fields. Among the most significant Companies Ordinances were the Companies Ordinance 1921[9], the Companies Winding Up Ordinance No. 21 of 1922, the Companies Ordinance No. 29 of 1924, the Debentures Ordinance No. 34 of 1924 and the Companies Ordinance 1925.

1929 – 1948

In 1929 the Palestine Companies Ordinance came into force [10]. It has been suggested that the underlying philosophy of the 1929 Ordinance was a paradigm of 'enabling' corporate legislation, a state-of-the-art approach to contractual freedom in the Western world prior to the great depression of 1929[11]. But its legislative purpose was not to codify the entire body of English corporate law.

Further company legislation followed in the years down to 1936[12]. In that year new Winding Up Rules were also introduced[13].

It has also been said that "*it was widely assumed that the Bench and Bar were already familiar with the principles of common law and the doctrines of equity applicable to companies*"[14]. This is correct so far as the judicial centre of the British Empire in London was concerned[15]. But it was not necessarily so in the case of British judges serving in Palestine in the Supreme Court[16] or in the District Courts, let alone any Palestinian judges, Jewish or Arab, trained under and familiar with the Ottoman legal system.

1. Ron Harris is the Kalman Lubowsky Professor of Law and History, and former Dean, at the Faculty of Law in Tel-Aviv University. I am very grateful to Professor Harris for his assistance.

2. "*Some Reflections on the Transplantation of British Company Law in Post-Ottoman Palestine*" (2008) TIL Vol. 10 561, 587.

3. "*The main constitutional instrument of the Mandatory government*": See Bentwich "*Mandate Memories 1918-1948*" (1965) at 205.

4. Article 46 is set out *verbatim* below.

5. See eg s.84 Palestine Companies (Winding up) Ordinance 1922; s.2(2) Palestine Companies Ordinance 1929 set out *verbatim* below.

6. See chapter 1 "*History and Sources of Israeli Law*", pages 1,4 Yoram Shachar (ed. Shapira: Kluwer Law International 1995).

7. Enacted 15 May 1929.

8. See Shepherd "*Ploughing Sand:British Rule in Palestine 1917-1948*" (1999) 236 et seq.

9. Published in a Special Gazette dated August 1921. This Ordinance was based on the English Companies Act 1908.

10. For a discussion of its genesis see Harris and Crystal *ibid* at 571-573.

11. See chapter 10 "*Corporate Law*" "*History and Sources of Israeli Law*", 193, 194 Uriel Procaccia (ed. Shapira *ibid*). Professor Procaccia describes the 1929 Ordinance as an almost verbatim copy of the British Companies Act 1929. This is not entirely accurate: see Harris and Crystal ibid at 564.

12. See Kantrovich and Baker "*Palestine Company Practice*" (1937) pp 143 et seq.

13. Companies (Winding Up) Rules 1936.

14. Procaccia *ibid* at 193.

15. See below.

16. For a selection of biographies see below.

17. See Micklethwait & Wooldridge "*The Company*" (2003) at p. 86.

18. Including Oxford and Cambridge.

Company Law at the centre of the Empire

A '*snobbish*' late Victorian '*distaste for business*[17]'was still reflected during the Mandate period in the undergraduate legal subjects which could be studied at the ancient universities in the UK[18]. There was also a major absence of academic law discussion or academic treatises on company law issues. However, the leading company law text books were written by distinguished company law practitioners such as Buckley[19] and Palmer[20]. There was also a reliable volume on "*Companies*" in the magisterial "*Laws of England*" series[21]. These textbooks were of outstanding quality[22]. Furthermore, in addition to specialist solicitor company law practitioners in the City of London and elsewhere in the UK, there were specialist company law barristers in Lincoln's Inn in London. From 1893 onwards there were specially designated company law judges in the Chancery Division of the High Court in London. Many Chancery judges with experience in company law achieved high judicial office in the UK during the Mandate period. A number of these sat in the Privy Council in London and dealt with company law appeals from the British Empire to the final court of appeal there.

Company law at the periphery: Palestine

The leading company law text books written in London, including Buckley and Palmer, and Halsbury's Laws of England, were available to practitioners in Palestine and to the judiciary in Jerusalem. Practitioners in Palestine also had access to specialist London lawyers in appropriate cases. Cases which reached the Privy Council in Downing Street in London were invariably argued by leading barristers from London. In fact, only one case involving an aspect of company law made the journey from Palestine to the Privy Council during the Mandate[23].

Recourse to specialist practitioners in London was not, however, a resource available to the local judiciary in Palestine, who themselves had little or no academic training in, or practical experience of, company law issues. However, as is discussed below, from the mid 1930's onwards there was an efficient and organised system of law reporting in place in Palestine and there was a contemporary treatise on Palestinian Company Law.

Sir Michael McDonnell

Law Reports in Palestine

There was no system of law reporting until the mid 1930's. In his publisher's note in January 1935 to his "*Collection of Judgments of the Courts of Palestine, 1919 – 1933*" Rotenberg observed that prior to publication of any systematically arranged law reports, save for a very few cases reported in the Official Gazette, Courts and advocates were obliged to resort to type-written copies of judgments available in the archives of advocates.

Notes of Judgments kept by the British judges and by officers of the Judicial Department covering the period down to 1933 were the basis for the inclusion of judicial decisions from 1920 onwards in Volume 1 of the Law Reports of Palestine[24] 1920-1933, selected and edited by Sir Michael McDonnell[25] and published in 1934. Volume 2, under the same author, covering 1934-1935 was published in 1937.

19. Buckley's "*The Law and Practice Under the Companies Acts*" ("Buckley"). Henry Burton Buckley was the leading company law barrister of his day. He became a judge of the Chancery Division in 1900, appointed to hear company cases, a judge of the Court of Appeal in 1906 and a member of the House of Lords in 1915 as Lord Wrenbury. In the preface to the 11th ed. (1930) Lord Wrenbury described how "*in 1872 he employed his not-overburdened professional time in writing the first edition*". Lord Wrenbury was still contributing to the 11th ed. The book took the form of an annotated guide to companies legislation. The 11th ed. was the last edition of Buckley published during the remainder of the Mandate. The next major reform to English company law was the Companies Act 1948, which came into force on 1 July 1948.

20. Palmer's Company Law ("*Palmer*") by Sir Francis Beaufort Palmer, 1st ed 1898. The 14th ed. was published in 1930 and the 17th ed. in 1942. Sir Francis edited the first nine editions down to 1911.

21. The 1st ed. was published in 31 Volumes between 1907 and 1917 under the editorship of Lord Halsbury, Lord Chancellor 1885-1886, 1886-1892, and 1895-1905. The 2nd ed. was published in 37 Volumes between 1931 and 1942 under the editorship of Lord Hailsham, Lord Chancellor 1928-1929 and 1935-1938. The series is still known as "*Halsbury*".

22. Buckley, Palmer and Halsbury were (and their current editions remain) authoritative descriptions of English company law.

23. See *Linz v. Electric Wire Company of Palestine Limited* (1948) AC 371 discussed below.

24. Abbreviated PLR.

25. See below.

Volumes 3 to 14 of the Law Reports of Palestine, covering the years 1936–1947 were reported by an Official Law Reporter[26]. These law reports followed the style and format of the Official Law Reports in England and Wales[27].

From the late 1930's onwards there were also a variety of other law reports available[28] . These also included decisions of the District Courts.

Palestine Company Law Textbooks

Goadby

In July 1922, Goadby, a lecturer at the Government Law Classes, Jerusalem, produced an Introductory Note to the Palestine Companies Ordinance 1921. He pointed out that the 1921[29] Ordinance, to a great extent followed textually the language of the English Companies (Consolidation) Act 1908, but only dealt with the formation and management of limited companies and not their winding up[30]. The winding up of limited companies in Palestine was dealt with by the Companies (Winding Up) Ordinance 1922. Section 84 of that Ordinance expressly required that it be "*interpreted by reference to the law of England relating to companies*"[31] .

Kantrovitch and Baker

In February 1937 Henry Kantrovitch, Junior Government Advocate, Registrar of Companies and Official Receiver[32], and Henry Baker, a lecturer at the Government Law Classes, Jerusalem[33] published their "*Palestine Company Practice*"[34] .

The book contains the whole of Palestine Company Law in a consolidated form, comparative tables of the English legislation and its Palestinian counterpart and a 76 page sketch of Palestine company practice. The book, with forms and appendices, ran to almost 600 pages[35].

The Palestine Senior Judiciary: some biographies

Chief Justices

McDonnell[36]

Sir Michael McDonnell was Chief Justice of the Supreme Court of Palestine[37] between 1927 and 28 November 1936[38]. He joined the British Colonial Service and from 1911 onwards served in various judicial offices in Africa. In 1920 he was appointed Attorney General in Sierra Leone. Between 1920 and 1926[39] he was also acting Chief Justice and an acting judge of the Court of Appeal, Sierra Leone. Whilst Chief Justice of Palestine he edited Volumes 1 and 2 of the Law Reports of Palestine[40] He left office in acrimonious circumstances[41]. He was replaced by Trusted[42].

Trusted[43]

Sir Harry Trusted was Chief Justice in Palestine between 28 January 1937 and 1941[44]. He had previously been Attorney General in Palestine between 1932 and 1937[45]. He then became Chief Justice of the Malay Federated States between 2 October 1941 and 1945. His final judicial post was as a divorce commissioner in England.

Fitzgerald [47]

Sir William Fitzgerald was the last Chief Justice of Palestine during the Mandate, appointed on 1 May 1944. He had joined the Nigerian Administrative Service in 1920[48]. He was Attorney General in Northern Rhodesia between 1933 and 1936.

He served as Attorney General of Palestine from30 January 1937 to 1943. After the Mandate, Fitzgerald served as President of the Lands Tribunal in England between 1950 and 1965.

Sir Harry Trusted

26. Saleem Azouri, a member of the Palestine Bar, covered the years 1936–1937 and 1942 (part) to 1947. By 1945 he had also become a Magistrate. The years 1938 to 1942 (part) were reported by Henry Baker (see below).

27. Published by The Incorporated Council of Law Reporting for England and Wales.

28. See eg Rotenberg "*Collection of Judgments of the Courts of Palestine*" (down to 1937) ("Rotenberg"); Levanon and Apelbom "*Annotated Law Reports*" (down to 1947) ("Apelbom") and Bursi "Selected Decisions of the District Courts of Palestine (down to 1947) ("Bursi").

29. As amended by Companies (Insurance Companies) Amending Ordinance 1922, and Companies (Winding up) Ordinance 1922. The Introductory Note was based on a brief course of lectures on the company law of Palestine which Goadby had recently delivered to the students of the Jerusalem Law Classes – see Frederick Goadby "*Palestine Companies Ordinance 1921*", preface. Goadby referred to Palmer (see fn. 20 above) as the standard English textbook on company law.

30. Goadby *ibid* introduction, 1.

31. Discussed further below.

32. And a lecturer at the Government Law Classes, Jerusalem. One former student described Kantrovitch as a somewhat pedantic company law lecturer (*ex rel* Adv. Arnold Spaer in a conversation with Crystal in Jerusalem on 9 June 2009).

33. Not to be confused with Francis Horace Baker, an acting British Puisne Judge of the Supreme Court of Palestine until his appointment as a Puisne Judge in Nigeria in 1936.

34. The authors observed in their preface: "*...There being a number of excellent treatises on English company law and practice, on which the Palestine company law and practice are modelled, there might seem to be no need for a necessity for a book on the latter subject*".

35. But it did not contain any detailed annotation or discussion by reference to decided cases either in England or in Palestine.

36. 15 June 1882 – 12 April 1956. Educ. St. Paul's School, St. John's Coll. Cambridge University (scholar), President, Cambridge University Union 1904. Called to Bar Inner Temple, London. Knighted 1929. After his departure from Palestine he held various minor judicial offices in the UK. He was created KBE in 1949.

37. The Supreme Court of Palestine, in its most usual capacity, sat as a Court of Appeal from the District Courts and the Land Courts. Appeals from the District Courts were of two classes, criminal or civil.

38. He succeeded Sir Thomas Haycraft, who was the first Chief Justice of Palestine. Haycraft came to Palestine in 1921.

39. In 1925 he edited both the Laws of Sierra Leone and the Law Reports of Sierra Leone.

40. These included a number of company law decisions in the period 1920 - 1935.

41. See Shepherd ibid at 186–189.

42. As a contemporary joke went, McDonnell was replaced because he could not be trusted (because of his pro-Arab stance during the Arab rebellion), see Frumkin Derekh Shofet at 347 (referred to in Likhovski "*Law and Identity in Mandate Palestine*", 2006 at 67).

43. 27 June 1888 – 8 December 1985. Educ. Ellesmere College, Trinity Hall Cambridge University. Called to the Bar Inner Temple, London. QC. Puisne Judge Supreme Court, Leeward Islands 1927 – 1929. Attorney General Leeward Islands 1927 – 1929. Attorney General Cyprus 1929 – 1932. Knighted 1938.

44. Trusted was succeeded by Frederick Gordon-Smith K.C. on 12 February 1942. He left office in 1943 and was succeeded by Fitzgerald in 1944.

45. Replacing Norman Bentwich, the Jewish first Attorney General of Palestine until 1931. For an account of the circumstances of Bentwich's enforced resignation, see Shepherd ibid at 113. Bentwich's own account is in "*My Seventy-Seven years*" (1962) at 96-97.

46. 1953 – 1963.

47. May 1894 – 4 July 1989. Educ. Blackrock Coll., Trinity Coll. Dublin (Hon LLD 1960). Called to the Bar Kings Inns Dublin 1922 and Middle Temple, London. Knighted 1944.

48. Police Magistrate Lagos 1921, Crown Council Nigeria 1924, Solicitor General N. Rhodesia 1932, QC N. Rhodesia 1936.

Senior British Judges

Corrie[49]

Owen Corrie was the Senior Puisne[50] Judge in the Supreme Court of Palestine between 1924 and mid-1936[51]. He moved on to become Chief Justice of Fiji in 1936. After WWII he became a judge of the Supreme Court, British Zone of Control Germany[52] and then in Africa[53].

Manning[54]

Richard Manning was the Senior Puisne judge in Palestine between 11 June 1936[55] and 1939[56]. He started his colonial service as a police officer in British Guyana[57].He then had a number of judicial posts in Africa[58] and the West Indies[59] before coming to Palestine. After leaving Palestine his next major judicial appointment was as a Puisne Judge in the Straits Settlements, seconded to Uganda between 1942 – 1946[60].

Rose[61]

Alan Rose became Solicitor General in Palestine in October 1936. He was appointed a British Puisne judge in Palestine on 28 August 1939[62] and served until 1945. He was chairman of the Commission of Inquiry into the loss of the SS Patria in 1940 and into corruption in the Customs Department in Palestine in 1942. He acted as temporary Chief Justice of Palestine in 1944. He became a judge of the Supreme Court of Ceylon in 1945. After distinguished service there[63], he became the first Chief Justice of the State of Singapore between 1958 – 1963.

Edwards[64]

David Edwards had a long period of service in Palestine. He entered the colonial service in 1921, holding various posts in Kenya until 1934[65]. He became a Relieving President, District Court Palestine in 1935 and President in 1936. He was appointed a Puisne judge of the Supreme Court of Palestine in 1941 and served until towards the end of the Mandate. He was Chief Justice of Uganda between 1947 – 1952.

Shaw[66]

Bernard Shaw was a Puisne Judge in the Supreme Court of Palestine between 1945 and the end of the Mandate. Shaw started in the Indian Police service[67]. He was then called to the Bar in England and joined the colonial service in Kenya[68]. He moved to Palestine in 1936 and held a number of judicial offices there before his appointment to the Supreme Court[69]. After Palestine he held a number of judicial posts in England and in Cyprus.[70].

The Expertise of the British Judges

As can be seen from the above selection of biographies, most of the senior British judiciary in Palestine had long experience of the administration of justice elsewhere in the British Empire before their service in Palestine. And many went on to distinguished judicial posts elsewhere after the Mandate. But none had any specialist experience as company law practitioners or judges, or, indeed, of commercial cases generally.

The British District Court Judges

Company law cases also occupied the time of the District Courts in Palestine. Two important areas within the jurisdiction of the District Court were the winding up of companies[71] and the enforcement of the companies legislation where there had been infractions of the law[72]. The District Court judges gave a number of important rulings in the company law field.

The Palestinian Supreme Court Judges

During the Mandate one Jewish and a number of Arab judges sat in the Supreme Court. The law reports suggest that they made a real contribution to the judicial decision-making process in mandatory Palestine. In the company law field, however, their judicial contribution was much more modest. The Palestinian judges had no formal training in, or experience of, English company law. And, like their British counterparts, they had no specialist experience in this field. However, this did not prevent their very occasional, reasoned dissenting judgments from their British brethren[73] on company law matters.

The Jewish Judge

Frumkin

Gad Frumkin[74] was one of the few qualified advocates[75] in Palestine under the Ottoman regime[76] .In June 1918 he was appointed a Magistrate in Jerusalem[77]. In 1920 he was appointed to the Supreme Court of Palestine.

49. 3 March 1882 – 28 August 1965. Educ. Monkton Combe School, Trinity Coll Cambridge University (Exhibitioner). Called to the Bar Gray's Inn, London. Served in France, Belgium and Palestine 1915 – 1919. Judicial Officer Nablus, Palestine 1919. Vice-president Court of Appeal Jerusalem 1919 – 1924. Judge Frumkin (see below) wrongly thought Corrie was *"a graduate of Eton"* (Frumkin Derekh Shofet 243-244 referred to in Likhovski *ibid* at 66).

50. Meaning a more junior judge (see The Chambers dictionary, 1993).

51. Chief Justice of Fiji 1936 – 1945. Knighted 1939.

52. 1946 – 1951.

53. Puisne Judge, Supreme Court of Kenya, 1953 – 1956, Judge of Court of Appeal for Eastern Africa 1958 – 1961.

54. 28 March 1883 – 2 April 1979. Educ. Clongowes Wood Coll., Univ Coll. Blackrock, Ireland.

55. Another 1936 appointment as a British Puisne judge was Randolph Copland (appointed on 1 October 1936). Copland had served in the Palestine District Courts since the 1920's.

56. He was awarded the Palestine General Service medal in 1939.

57. Inspector of Police, British Guyana 1909 – 1920.

58. Resident Magistrate Tanganyika 1920 – 1925, Police Magistrate Gold Coast 1927 – 1932.

59. Resident Magistrate Jamaica 1925-1927, Puisne Judge Trinidad and Tobago 1932 – 1936.

60. After his retirement in 1946, he sat as an additional judge in a variety of jurisdictions including British Guyana and the Windward and Leeward Islands. He received a variety of decorations but was never knighted.

61. 8 October 1899 – 20 June 1975. Educ. Aldenham School, Trinity Coll. Cambridge University. Called to the Bar Inner Temple, London. Entered Colonial Legal Service 1929. Chief Police Magistrate Fiji. Crown Counsel N. Rhodesia 1931. Knighted 1950. KCMG 1955.

62. In 1939 the other British Puisne judges in Palestine were Copland and Maurice Cherry Greene. Greene retired on 12 August 1939 and was replaced by Rose.

63. First Attorney General, Dominion of Ceylon 1947 – 1951. QC Ceylon 1948. Chief Justice Dominion of Ceylon 1951 – 1955.

64. 3 February 1892 – 28 February 1966. Educ. Aberdeen University (LLB with distinction 1914). Member of the Scottish Bar. Knighted 1951.

65. He edited Vol. 1 of the Law Reports HM Court of Appeal for Eastern Africa 1934.

66. 28 June 1891 – 28 May 1984. Educ. St. Paul's School, Called to Bar Gray's Inn, London. Knighted 1957.

67. 1910 – 1923. Shaw was the nephew of the author George Bernard Shaw.

68. He became Resident Magistrate Kenya 1928. He edited the Kenyan Law Reports between 1927 and 1932.

69. Including Relieving President, District Court Palestine 1936 and President 1941.

70. Including Senior Puisne Judge Cyprus 1955 – 1957.

71. Jurisdiction to wind up companies was originally conferred on the District Court, Jerusalem. It was subsequently extended to District Courts in Jaffa, Haifa, Nablus and Tel Aviv.

72. See e.g. "A Banker Fined" below.

73. See e.g. the dissenting judgment of Khayat J. discussed in n87 below.

74. 2 August 1887-10 March 1960. A native of Jerusalem. Educ. Faculty of Law, University of Constantinople.

75. See Bentwich "Mandate Memories 1918-1948" (1965) at 208.

76. He also contributed a Hebrew translation of the Ottoman civil code, the Mejelle.

77. See Nathan Brun "Judges in Mandatory Palestine" at 6.

Thereafter, he remained until the end of the Mandate as the only Jewish judge on the Supreme Court[78].

Arab Judges

Mustapha Bey Khaldi[79]

During the Ottoman period he served as a Commander of the Beirut Police. He was appointed a Magistrate in Acre and thereafter, in 1920, to the Supreme Court. He sat in the Supreme Court until October 1938.

Francis Khayat[80]

He was appointed a District Court Judge in Jaffa and Jerusalem. He was then appointed to the Supreme Court in 1926. He retired in 1944.

Majid Bey Abdul Hadi [81]

He was appointed a District Court Judge in Haifa, Nablus and Jerusalem.He was then appointed to the Supreme Court in 1934. He retired at the end of the Mandate.

Style of Judgments

Many of the reported judgments on company law matters during the Mandate are relatively concise[82]. In this respect, they follow the tradition reflected in judgments in company law cases in other parts of the British Empire in the 20th Century. I discuss below a selection of Palestine Court decisions in the Mandate in three time periods, 1920-1929, 1930-1940 and 1940-1948.

A Selection of Court Decisions 1920-1929

Non-registration

The consequences of carrying on business in Palestine without registration under the applicable legislation, gave rise to difficulty and a number of reported cases during the Mandate.

In *Hazine's* case[83] , the Court of Appeal held that a foreign company carrying on business in Palestine without being registered under the Companies Ordinance 1921 was an illegal company and not entitled to bring bankruptcy proceedings in Palestine. A more controversial decision was given in another case on non-registration.In *Hallaq's* case[84], the Court of Appeal had to consider whether the Anglo Italian Palestine Maritime Company, which had been registered under the Registration of Partnerships Ordinance 1919, but not under the Companies Ordinance 1921, was an illegal company so enabling the claimants to recover possession of certain vessels delivered to the firm for the purposes of its business of transporting goods by sea. As the Court observed, this required the claimants to demonstrate that the partnership did not exist in law.

The legal position of a partnership was then governed by section 2(1) of the Companies

Mustapha Bey Khaldi

Ordinance 1921. This provided that no partnership consisting of more than 10 members shall in Palestine carry on any business for the acquisition of gain unless registered as a company under the Companies Ordinance. The Chief Justice contrasted this legislation with the corresponding legislation in England[85] which provided that no partnership of more than 20 persons shall be formed for the purpose of carrying on any business for the acquisition of gain unless registered under the English Companies Law. Relying on the distinction between carrying on business and formation, the Chief Justice held that although such a company could not lawfully trade in Palestine, it nonetheless had a legal existence and could hold property.[86] Corrie J. agreed. Khayat J. dissented.[87]

In *Katrane v. Silberman, Diskin & Kaplan*,[88] the Court of Appeal held that where a company registered as a foreign company for the purposes of carrying on business in Palestine, the registration rendered the company responsible for all contracts entered into by it before WWI with Palestinians.

Further decisions on this topic are discussed below.

Winding-up proceedings

In *Woolfson v. Gurevich*[89] the Court of Appeal decided that persons who had not been parties to the liquidation proceedings of the Russian

78. He was appointed a Commander of the British Empire in 1941.

79. Educ. Faculty of Law, University of Constantinople.

80. Educ. Faculty of Law, University of Paris

81. Educ. Faculty of Law, University of Constantinople.

82. There are more illustrations of a discussion of applicable English case law in reported decisions in the later Mandate period.

83. *Zeev Hazine v N. V. Algemeine and Staalmatshappj "Ferrostall Haag"* (Haycraft CJ, Seaton Ag. J, Khayat J) 9 July 1926 1 PLR 99. For subsequent proceedings in the Court of Appeal on 2 August 1928 see 1 PLR 303.

84. *Hallaq and others v. Pharaon and others* (McDonnell CJ, and Corrie J, Khayat J dissenting) 16 December 1927, 1 PLR 206.

85. S.1 (2) of the Companies (Consolidation) Act 1908.

86. Vessels registered in the name of the company.

87. In his dissenting judgment Khayat J. held that wrong registration was like non-registration and that juristic personality could only be created by complying with the provisions of the law. There appears to be force in this approach.

88. (Baker Ag. J, Khaldi and Khayat JJ) 26 July 1927. 1 PLR 156.

89. (Corrie, Frumkin and Kayat JJ) 12 March 1929. 1 PLR 361.

Zionist Centre in the District Court of Jerusalem could not appeal therefrom.[90]

In *The Anglo Palestine Company, Jaffa v. Kfar Gvanim Company Limited*,[91] the Court of Appeal had to determine whether a secured creditor could petition for the winding-up of a company. Section 84 of the Companies (Winding up) Ordinance 1922 provided that the 1922 Ordinance "*shall be interpreted by reference to the law of England relating to companies*". Section 9 of the 1922 Ordinance provided for the service of a statutory demand for payment of a debt exceeding E.P. 50, neglect to pay being a ground for winding-up the company. The District Court, Jaffa, had held there could be no neglect to pay where the creditor was secured. The Court of Appeal disagreed[92]:

"We do not think that this view can be supported. Sec. 84 … directs that 'this Ordinance shall be interpreted by reference to the law of England relating to companies.'. Moreover, except for the substitution of 'Egyptian Pounds' for 'Pounds,' the sub-section is taken verbatim from sub-section (1) of sec. 130 of the Companies (Consolidation) Act 1908, which re-enacted sec. 80 of the Act of 1862.'Egyptian Pounds' for 'Pounds,' the sub-section is taken verbatim from sub-section (1) of sec. 130 of the Companies (Consolidation) Act 1908, which re-enacted sec. 80 of the Act of 1862.

Now it is clear that by the law of England, a secured creditor of a company can petition for the winding up of a company even though he may have attempted to recover the amount due to him by the exercise of a remedy conferred upon him by his security (Re. Portsmouth Borough Tramways Company [1892] 2 Ch. 362). Hence we have no doubt that the secured creditor of a company registered under the Companies Ordinance can petition for the company to be wound up."

Compromise between company and creditors

In case number 289/27[93] the District Court, Jerusalem, had to consider the ambit of s.84 Companies (Winding Up) Ordinance 1922. The District Court ruled[94] that:

"Section 84 … does not empower the Court to apply the provisions of Section 120 of the Companies (Consolidation) Act, 1908, the said Section only empowering the Court to interpret the Ordinance as it stands by reference to the law of England and not to introduce an article of the English law not contained in the Ordinance…Under the present Ordinance there is no power to compromise with creditors and members as provided for in the English Act…"

Failure to Comply with Reporting Requirements

In *Re the Palestine Import and Export Co. Ltd*[95] the company had failed to hold general meetings, to make annual returns, to appoint auditors and to issue any balance sheets. The District Court, Jerusalem, held that its failure to do so was, on the facts, due to inadvertence and that it was just as equitable to extend time to enable the company to comply with the Companies Legislation.

Payment of Fees

In *Government Advocate v. The Portland Cement Co. "Nesher" Limited*[96], the Government of Palestine brought an action in the District Court, Jerusalem, for the balance of fees alleged to be due on registration of the Nesher company in Palestine.

The company had been incorporated in England in 1922 and made an application to the registrar of companies in Palestine for registration as a foreign company under the Companies Ordinance 1921. The company was duly registered as a foreign company.

It then purchased 3,000 dunams of land at Haifa, and built a cement factory there. The Government alleged that as one of the objects of the company was the carrying on of business in Palestine it was therefore liable to pay the same registration fees as a Palestinian incorporated company[97]. The company relied on two defences.Its first defence was that its principal object was not to carry on business in Palestine. This defence was shortly dismissed by the District Court which held[98] :

"… where we have a company which spends two thirds of its original capital on buying land in Palestine and then proceeds to erect a factory on this land … at the time at which they applied for registration their object was to carry on business in Palestine … it is also worthy to note that the name of the company is a Hebrew word which affords some slight evidence as to the place of the company's operation; the use of Hebrew would appear to imply a connection with Palestine".

A Selection of Court Decisions 1930 – 1940

The Judicial Approach to the 1929 Ordinance

In two cases[99] decided relatively shortly after the introduction of the 1929 Ordinance, the Court of Appeal made clear its view as to the width of the legislation which had been introduced.

In the *Eliash* case[100] the claimant argued that because certain sections of the Companies Ordinance 1929[101] referred to trusts and trustees, the Legislature had introduced the doctrine of private trusts into the law of Palestine[102]. And that, accordingly, the Director of Lands should register certain immovable property held in the name of a person by way of trust.

The Chief Justice held[103]:

"… The Companies Ordinance 1929 and the Partnership Ordinance 1930 are very lengthy enactments based on English Statutes which have been, if one may

Nesher Cement Factory

use the expression, swallowed virtually holus-bolus by the legislator of Palestine with comparatively small alterations[104]*. Now there is the presumption that the legislator does not intend to make any substantial alteration in the Law beyond … the immediate scope and object of the statute … it is more reasonable to hold that the Legislature expressed its intention in a slovenly manner than that a meaning should be given to its enactment which could not have been intended… I do not think one can seriously hold, knowing the nature of the Legislation with which we are dealing, that the legislature intended by a mere side-wind to introduce a new principle of law, such as the doctrine of private trusts, into Palestine."*

In the *Gaitanopolus* case[105], the Court of Appeal had to consider whether the mention of goodwill[106] in the Companies Ordinance 1929 and the Partnership Ordinance[107] 1930[108] introduced the English doctrine of goodwill into Palestine. The Court held, for the same reasons as were explained in *Eliash*, that it had not.

Security

In *Liquidator of the Palestine Co., Hyram Ltd., v the Ottoman Bank Haifa*[109] , the Court of Appeal had to consider whether non-registration of an agreement held "*en gage*"[110] in relation to goods of a company in liquidation rendered the bank's security void under s.68 (c) of the Companies Ordinance 1921. The Court commented that *"the draughtsman of the Companies Ordinance 1921 has been at some pains to render obscure the application of that Ordinance to foreign companies"*[111]. It held that as s.68 was not expressly declared to apply to foreign companies there was no obligation on a foreign company to register particulars of the security. The correctness of this decision appears questionable[112].

It also appears inconsistent with the philosophy underlying the decision in *Hazine's* case in relation to unregistered foreign companies.

In *Vinograd v. Registrar of Companies*[113] the applicant applied to extend time for registration of a mortgage. The District Court, Tel Aviv, after discussing English case law, made an Order for the extension of time, in accordance with English practice that it should be without prejudice to rights acquired by charge, execution or otherwise against the property prior to registration.

Non-registration

In *Rohold v. Khouri*[114] , a foreign firm forwarded goods to Palestine and appointed a commission agent in Palestine to receive and transmit orders on commission. Such orders were endorsed "*sauf approbation de la maison*". The Court of Appeal held that this did not constitute the foreign firm desirous of carrying on business in Palestine within s.80 of the Companies Ordinance 1921 and hence subject to registration.

In *Stybel's* case[115] the appellant[116] was registered as a partnership under the Registration of Partnerships Ordinance 1919, but not under the Palestine Companies Ordinances 1921 or 1929 or the Partnership Ordinance 1930.

It applied to the District Court, Jaffa, for confirmation of an arbitration award. The District Court held it could not bring an action before the Court. The Court of Appeal held, following *Hazine's* case[117], that if the appellant was carrying on business in Palestine it was doing so illegally and it could not take proceedings in the Courts of Palestine in respect of such trading. The Court remitted the case to the District Court to make the appropriate findings of fact. The Court observed[118]:

> "*… It does not necessarily follow, however, from the fact that the appellant association was unregistered, that it cannot under any circumstances maintain an action in these Courts.*

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90. This was also the prima facie rule in England: c.f. *Re Bradford Navigation Co.* [1870] 5 Ch. App. 600.

91. (Corrie, Jarallah and Frumkin JJ) 6 March 1929. 1 PLR 357.

92. At 358.

93. (District Judges Baker and Valero) 2 February 1928, Rotenberg (1935) 344.

94. This is, so far as material, the whole of the judgment on this point.

95. (District Judge Baker in Chambers) 31 July 1925. Rotenberg (1935) 341.

96. (District Judges Copland and Valero) 14 July 1924. Rotenberg (1935) 338.

97. £150 being half a percent on the original capital of the company less £E25 already paid.

98. At 339.

99. *Eliash v. Director of Lands, Jerusalem*, 19 July 1932. 1 PLR 735 (McDonnell CJ and Khayat J). *Gaitanopolus v Kremer*, 25 January 1933. 2 PLR 2 (McDonnell CJ, Frumkin and Khayat JJ).

100. fn99.

101. Ss. 29(2), 78(1)-(3), 79(1) and (3), 98(1)(b), 119(3), 124(1), 180 and subs (o) and (w) of schedule 2, and s. 29(2) of the Partnership Ordinance 1930.

102. It was accepted that Ottoman law was silent as to the creation of private trusts and that the land in question could not be made the subject of Waqf – a charitable trust.

103. At 735-736. Khayat J. agreed on different grounds.

104. This appears to be inaccurate. See Harris and Crystal ibid at 564

105. fn99.

106. It was accepted that there was no provision of Ottoman law which permitted such a claim under the law of Palestine.

107. Ss. 86(1)(ii) (previously s.54(1)(g) of the Companies Ordinance 1921), 121(2) and 127(1)(a).

108. S. 3(7).

109. (Corrie Ag. CJ, Tute Ag. J. and Frumkin J.) 10 July 1931. 1 PLR 560

110. A form of security in the nature of a pledge.

111. Registered under Ordinance No. 118 of 29 May 1919.

112. The raison d'etre of a registration of security system is to give public notice to creditors extending credit to a company. The distinction drawn by the Court of Appeal in this case makes no commercial sense. Indeed, in his brief afternote on this decision in the Palestine Law Reports, Sir Michael McDonnell commented at 567 "*see the change in phraseology between sec. 68 (c) of the Companies Ordinance and sec. 127 (1) (c) of the Companies Ordinance 1929.*

113. (R/President Curry and Judge Many) 17 April 1939. [1939] Bursi 34.

114. (McDonnell C.J., Khaldi and Frumkin JJ) 30 September 1930 Rotenberg (1935) 350.

115. *A J Stybel, Publishing House Limited Partnership v. The Amanut Company Limited* (Corrie, Frumkin and Khayat JJ) 12 April 1935. [1935] 2PLR 289.

116. Formed under German law on the basis of limited liability, but not authorised by the Government of Palestine under section 6 of the 1919 Ordinance before commencing business.

117. fn83 above.

118. At 290.

A foreign commercial association, manufacturing goods abroad, and having no place of business or agency in Palestine, which sells its good to a purchaser in Palestine, is not carrying on business in Palestine within the meaning of s.6 of the Ordinance of 1919 and it can take proceedings in the Palestine Courts to recover the price of such goods without first registering as a foreign company or partnership."

In *Khalil Malas and Co. v Bucowina Society*[119] the question of entitlement to sue in the Courts of Palestine arose again. The respondent company, resident abroad, agreed to sell wood to be shipped to Palestine on consignment. The appellant contended that the respondent was not entitled to sue in Palestine, relying on *Hazine's* case[120]. The argument was rejected. The Court of Appeal held that the respondent had not committed any illegality, and was entitled to sue in Palestine for any breach of contract

Parties

In *Doukhan v. Wolf*[121] the joint liquidators of the Phoenix Life Insurance Co., Vienna, wished to appeal a judgment of the District Court, Jerusalem. The Notice of Appeal was not signed by both liquidators, the second liquidator being out of Palestine, but by one of his partners on his behalf holding a general power of attorney. The Court of Appeal dismissed the appeal on a preliminary technical point, holding that a liquidator appointed by the Court could not delegate his powers to any one designated by him[122].

Winding up Proceedings

Appointment of Liquidator

In *Attorney General v. Kupat Am Bank*[123] the District Court, Jaffa, held that on the making of a winding up order the Court had power to appoint a liquidator other than the official receiver under s.162 of the Companies Ordinance 1919. The Court of Appeal reversed this decision, holding that it was clear under the Ordinance that in such circumstances the official receiver automatically became the liquidator and no order of any court of any kind was required for this.

Meaning of "Court"

In *Mashat v. "Hamumche" etc. Limited*[124] the Court of Appeal held that throughout the Companies Ordinance 1929 "*Court*" meant Court and not "*The Registrar of Companies*" or "*The Registrar of Co-operative Societies*". It therefore reversed the decision of the District Court, Haifa.

Failure to Introduce the Bankruptcy Ordinance

In *Menouchin v Bodenheimer*[125] the Court of Appeal was faced with a complication caused by the failure of the Legislature to introduce the Bankruptcy Ordinance into Palestine until some years after the Companies Ordinance 1929. A winding up order had been made against the Phoenix Life Assurance Company, Vienna. One issue was whether creditors could set off loans on the surrender values of their policies against amounts due on their policies. Under English law the answer was *"perfectly clear"*[126] that there would be a mandatory set off[127] The District Court had held that there was no set off in accordance with Ottoman law which applied until 1936. The Court of Appeal allowed an appeal holding that, on the facts, there was a contractual entitlement to set off.

Gad Frumkin

A Banker Fined

On 7 December 1932 the Palestine Post[128] in its regular section headed "*In the Courts*"[129] carried a prominent report under the headings "*A Banker Fined*" and "*Judge Copland on Companies Law*" of the prosecution of a banker before the District Court of Jaffa whose bank had commenced business without being registered in accordance with the Companies Ordinance 1929. The Eastern Lloyd Bank had commenced business as a bank without making the necessary declaration before the Registrar of Companies in accordance with the Companies Ordinance. The defendant's lawyer admitted the charge but pleaded that his client (Mr. Cohen) had been ignorant of the existence of the law and had had no evil intentions. Judge Copland, President of the District Court[130], replied that the purpose of the section with regard to the registration of companies was clear; the section had been enacted so that companies should not accept money from

119.(Manning SPJ, Khayat and Abdul Hadi JJ), 13 October 1937. [1937] 4 PLR 302.

120. fn83 above.

121. (Copland, Greene and Khayat JJ), 3 March 1938. [1938] 5 PLR 158.

122. This appears a somewhat unfortunate result. It also appears inconsistent with the view of an earlier Court of Appeal in a bankruptcy appeal where there were two syndics only one of whom was before the Court of Appeal: see *Heirs of Iskander Kassab v Bathesh* (Civ.No.172/32). (Baker, Frumkin and Khayat JJ) reported in the Palestine Post "In the Courts" 20 January 1933.

123. (McDonnell CJ, Frumkin and Khayat JJ), 19 February 1934. [1934] 2 PLR 43.

124. (Copland AgCJ, Frumkin and Khayat JJ), 19 July 1938. [1938] 5 PLR 420.

125. (Copland, Frumkin and Khayat JJ), 11 June 1937. [1937] Apelbom 452.

126. Per Copland J at 452.

127. Under the English Companies Act 1929 the English bankruptcy rules as to set off applied to the insolvent winding up of companies in England.

the public or give pledges until it was certain that the companies in question were in a sound financial position.

The declaration required, Judge Copland said, was a written statement setting out the finances of the company and its capacity for fulfilling such obligations as it might take on itself. It was highly necessary that the Registrar should be able to supervise the activities of all companies in order to safeguard the interests of the public. The Court did not know if there was any evil purpose underlying this company, but it was the duty of the founders of such a company to acquaint themselves with the law and act in accordance with it. The offence was not purely technical in nature and in such cases it was impossible to be lenient for the interests of the public must be secured.

It was fortunate for the accused that the prosecution had not mentioned the number of days prior to receiving permission from the Registrar of Companies the accused had been carrying on the business of a bank, or he might have been subject to a fine of £P1500. As it was, it was assumed the company was in operation for less than a day without a permit and Mr. Cohen was therefore ordered to pay only £P20.

Defeating the Banking Ordinance

In *Pro-Palestine Bank Ltd v Registrar of Companies*[131] the Court of Appeal dismissed an appeal by the Bank from the refusal by the District Court, Haifa, to confirm an alteration to the Bank's memorandum of association. The Bank had changed its name from Pro-Haifa Palestine Bank Limited to Kupah Lemaan Eretz Israel. It wished to abandon its banking business and constitute itself a loan fund. The bank accepted that it wanted to be constituted as a loan fund so as to avoid complying with the applicable banking legislation. The District Court, after discussing English case law, declined to sanction the alteration as defeating the real object or purpose of the memorandum of association, and as a means of defeating the provisions of the Banking Ordinance. The Court of Appeal agreed.

A Selection of Court Decisions 1940 – 1948

Security

In *Levin v. Liquidator of "Brosh" Co-operative Society Limited*[132] , Brosh granted first and second mortgages on 6 August 1936. The first mortgagee never registered his mortgage. The second mortgagee did so on 10 July 1938 within 21 days after the certificate of registration was issued by the Land Registry[133]. On 9 January 1939 Brosh went into liquidation. The Court of Appeal held that the 21 day period ran from the date of the issue of the certificate and not from any other date. It also held, obiter, that from the date of liquidation the question of priorities was a matter for the liquidator and not an unregistered prior mortgagee who had no practical interest in its outcome.

A similar issue arose in *Joffe v. Registrar of Companies*[134]. On 26 March 1940 a mortgage was registered by A in favour of B and subsequently transferred to C. No certificate of registration was delivered by the Haifa Land Registrar prior to 12 July 1940, but when it was it contained an endorsement "*date of issue 18 April 1940*". Notwithstanding this, the Court of Appeal held that the date of issue was 12 July 1940 and that the 21 day registration period ran from that date.

In *The Trust Fund for Palestine v. Hakfar Haivri Cooperative Society Limited*[135] the District Court, Jerusalem, held that failure to register a mortgage under s.127(1) of the Companies Ordinance did not render the mortgage void as between the parties to it, but solely as against any liquidator or creditor of the mortgagor. The judge held[136]:

"… The object of the Section seems to be only to prevent a mortgagee from acquiring undisclosed prior rights against other creditors in the property of a company, and to enable future creditors to see by inspection the real state of the company's finances and what debts are secured on its property."

Winding up Proceedings

In *Re Haj Muhammad Nimer El Nabulsi and Sons Ltd*[137] there was animosity and friction between the Arab directors and shareholders of the company.

128. The leading English language newspaper during the Mandate.

129. The next article to catch the reader's eye was headed "*First Lawyer to become a Saint*"!

130. He was promoted to the Supreme Court in 1936.

131. (Copland and Khayat JJ) 5 January 1939 [1939] 6 PLR 1.

132. (Rose, Khayat and Abdul Hadi JJ) 3 July 1940 [1940] 7 PLR 346.

133. As required by s127(1) of the Companies Ordinance 1929.

134. (Rose and Khayat JJ) 13 November 1940 [1940] 7 PLR 528.

135. Bodilly PJ 28 June 1943 (1943) Bursi 132.

136. At 134.

137. (R/President Bourke) 18 October 1944 [1944] Bursi 520

A state of deadlock existed which did not permit the proper carrying on of the business of the company. The District Court, Jerusalem ordered the company to be wound up under s.148(g) of the Companies Ordinance on the just and equitable ground. The Court reviewed the current English decisions on the point.[138]

In *The Jerusalem Radio Company Ltd*[139] the two Jewish directors and shareholders were not on speaking terms and the position amounted to a complete deadlock. Again, the District Court, Jerusalem, having reviewed the current English decisions on the point, ordered that the company be wound up on the just and equitable ground.

In *Trachtengott v Sommerfeld*[140] a liquidator rejected certain proofs of debt while he was seeking directions from the Court under s.173(3) of the Companies Ordinance for their referral to arbitration. The Court of Appeal held that once the liquidator had given his decision as an officer of the Court, the only remedy a dissatisfied person had was to apply to the Court. In these circumstances, having given his decision, the liquidator could not apply for directions that the matter be submitted for arbitration.

In *Trachtengott No. 2*[141] the Court of Appeal had to consider whether the remuneration of a private liquidator should substantially exceed that of the Official Receiver where a scale of fees fixed the latter's remuneration. The Court held that the scale fixed for the Official Receiver was a useful yardstick but in exceptional cases a private liquidator would be entitled to claim more.

Rectification of Register

In *Zitawi v. Saleh*[142] the Court of Appeal had to consider an application for rectification of a share register. The legal title to the shares had not been established in the District Court, Jerusalem, although that Court had, in effect,ordered rectification. The Court of Appeal, having discussed English decisions on the point, delivered a judgment[143] allowing an appeal.

Tension between the Palestine Order in Council and the Companies Ordinance

In *Giha v. Hurvitch*[144] the Court of Appeal had to deal with a tension between the provisions in s.165 of the Companies Ordinance enabling the Court to vest property in a liquidator and the Lands Court Ordinance which gave the Land Court exclusive jurisdiction to deal with any question regarding the ownership or possession of land. The District Court, Jerusalem, vested certain immovable property in the liquidator of Bank Geulah Ubinyan Limited. The Court of Appeal discharged that order, relying on the approach in *Gaitanopolus v. Kremer.*[145] The Acting Chief Justice said[146] :

"… in the legislation in this country Land Courts have the exclusive jurisdiction to deal with any question regarding the ownership or possession of land … and … section 165 of the Companies Ordinance cannot over-ride that distinct provision in the Land Courts Ordinance based as it is upon Article 42 of the Palestine Order in Council. An Ordinance cannot vary an Order in Council, unless power to vary in any manner is conferred by the Order in Council itself …"

Directors' Duties

In *Credit Hadidi Limited v. Bishtein*[147] the District Court, Tel Aviv[148], had to consider a claim by a cooperative society to recover interest paid to a former director in respect of monies he had lent to the society. The society alleged that because the director had been in a fiduciary position, he could not contract with it. The Court held there was a distinction between a director contracting with a company and lending money to it. There was no objection to the latter provided the terms of the loan were not disadvantageous to the company. The Court found that the rate of interest[149] was not unduly high for Palestine and dismissed the Society's "*mean*"[150] claim.

In *The Rumanian Palestine Trading Corporation v. Mohrus* [151] the District Court, Tel Aviv, had to consider misfeasance claims by the liquidator of a company concerning continuing payments to directors after the company's business ceased in 1940[152] and its liquidation in 1942. The Court held that the directors were in breach of duty and liable to compensate the company as their behaviour was not "*above reproach*".[153] However, on the facts, they were entitled to be partially excused under s.78(1) Companies Ordinance 1929.

Minority Shareholder Oppression

In *Hirshson v. Osem Haklai' Limited*[154] the company allotted shares not for the purpose of raising capital but to secure control of majority actions in the company by the directors who had issued the shares. The District Court, Haifa, after considering English decisions, set aside the allotment as not being for the general advantage of the company.

138. Including the leading case of Re. *Yenidje Tobacco Limited* [1916] 2 Ch D. 426.

139. (R/President Bourke) 23 November 1944. [1944] Bursi 368.

140. (Edwards AgCJ and Curry AgJ) 5 November 1945 [1945] 12 PLR 485.

141. *Trachtengott v. Sommerfeld* (Shaw J and Curry AgJ) 14 March 1947 [1947] 14 PLR 85.

142. (Fitzgerald CJ and Edwards J) 12 July 1944 [1944] 11 PLR 360.

143. By Edwards J. The Chief Justice concurred.

144. (Copland AgCJ) 23 February 1943 [1943] 10 PLR 96.

145. See fn99 above.

146. At 101.

147. (R/President Curry and District Judge Korngrun) 31 January 1940. [1940] Bursi 29.

148. Sitting in its Appellate capacity

149. 6 – 8 %.

150. At 30.

151. (District Judge Plunkett) 24 July 1944. [1944] Bursi 536.

152. After Italy entered WWII.

153. At 542.

154. (District Judges Shems and Baraday) 12 March 1946 [1946] Bursi 166.

Representative Actions

In Herman Glatke v. Galia Co. Limited[155] the District Court, Tel Aviv, held that where a company's articles provided that two or more directors must act together, the Court cannot authorise a single director to defend proceedings in the name of the company. The Court observed[156] as follows:

"... The Companies Ordinance does not provide any relief in the nature of the relief sought herein ... and it seems that there is not a single precedent in English law directly in point ... on perusing the cases as summarised in Palmer, and the comments of the author thereon, it becomes clear that in none of them has the question arisen whether a Court is empowered to authorise one of several directors of a company, who may jointly act on behalf of the company, to appear and defend singly in the name of the company in an action instituted against it. All cases which have been cited deal with merely with the question when and in what circumstances a minority of the shareholders may sue in the name of the company...

This is entirely a matter of the internal management of the company's affairs and the Court will not direct a company in the ways of its management. If the directors of a company find that the company owes a certain sum of money to a given person and that it is unfair to stand in the way of that creditor seeking to enforce his rights, this is entirely their own business, and the Court will not force them to deny the indebtedness. If such act amounts to a breach of trust on the part of the directors any shareholder affected thereby may take legal steps against those directors. But it is clear, in my opinion, that a Court has no power to authorise one director to do something which in the opinion of the other lawfully elected directors ... ought not be done, more particularly where the matter concerned is an action brought against the company..."[157]

Mrs. Linz in the Privy Council

Shortly before the end of the Mandate, a case involving an aspect of company law[158] finally reached the Privy Council in London. It was argued by leading barristers from London[159] on 9 and 10 February 1948[160]. The Board of the Privy Council hearing the appeal included two distinguished Chancery judges[161]. Judgment was given on 8 March 1948[162] The case is reported in the official English law reports but not in any of the Palestine law reports[163].

The appellant in the Privy Council was Mrs. Linz. The respondent was the Electric Wire Company of Palestine Limited. The respondent was a public company which had been registered in Palestine in 1934. On 19 April 1935 Mrs. Linz had applied for L.P. 775 of the company's preference shares to be paid for by Reichsmarks in Germany. The preference shares were allotted to her on 7 July 1935 and she was duly registered as the proprietor thereof. Mrs. Linz held her shares for four years and then sold them through the Holland Bank Union. She executed transfers in blank which were ultimately on 28 September 1941 completed in favour of the Palestine Independent Trust Association Limited. These transfers were duly registered and the transferees placed on the register of members. Later in 1941 another original allottee of the company's preference shares commenced an action in Palestine against the company, claiming repayment of the money paid for such shares on the ground that they had not been lawfully issued. In those proceedings on 18 February 1943, an order was made confirming terms of compromise by which the company accepted that the allotment of preference shares to that allottee was void.

The company then circularised the then-registered holders of its preference shares offering to repay them the amounts paid by them for their shares. No similar offer was made to Mrs. Linz who had previously disposed of her shares at a loss. She, however, offered to repay the sale proceeds received through Holland Bank Union if she obtained repayment from the company of her original payments. The company refused. Litigation followed. Mrs. Linz's claim was for money had and received on a total failure of consideration.

It was based on the original allotment of shares to her being ultra vires the company and therefore a nullity. The District Court, Haifa, dismissed her claim on 28 July 1944. On appeal, on 7 February 1945, the Court of Appeal[164] dismissed her appeal. The Privy Council dismissed her further appeal on 8 March 1948.

Lord Simonds, giving the judgment of the Board of the Privy Council, said[165]:

> "*Their Lordships do not question the general proposition that, where an ultra vires issue of shares has been made, the subscribers are entitled to recover their money. But this does not justify the claim of one, who has sold her shares at a later date to assert that they have not been lawfully issued, much less to assert, contrary to the plain fact, that there has been, so far as she was concerned, a total failure of consideration.*"

155. (District Judge Chesin) 4 June 1946 [1946] Bursi 333 (Judgement translated from the Hebrew).

156. At 334-335.

157. This appears to be one of the last significant company law decisions in the District Courts in Palestine. Judge Chesin subsequently served in the Supreme Court of Israel.

158. And also aspects of what would now be classified under English law as the law of restitution.

159. Appeal No. 63 of 1946.

160. Including Sir Valentine Holmes Q.C. and Mr. Denys Buckley, (a son of Lord Wrenbury – see n. 19 above) an editor of Buckley and himself later to become a distinguished company law judge in England.

161. Lord Simonds and Lord Morton of Henryton. The third judge was Sir Madhavan Nair.

162. By Lord Simonds on behalf of the Board.

163. (1948) A.C. 371.

164. Shaw and Frumkin JJ.

165. [1948] AC 371 at 377.

Although the judgment of the Privy Council appears to accord with a broad common sense approach to justice, leading English academic commentary on the decision has described it as "*anomalous*"[166] and "*controversial*".[167] The decision is still cited in the English Courts .[168] On one recent citation, an experienced chancery judge in the Court of Appeal described the reasoning of the Privy Council as "*difficult to understand*".[169] This appeal appears to have been the first and only reported illustration of a decision on a company law issue during the Palestine Mandate reaching the Privy Council.

Article 46

Article 46[170] was a critical element in the transplantation of English common law and equitable rules into the jurisprudence of Palestine. It was in the following terms:

"46. *The jurisdiction of the civil courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1 November, 1914, and such later Ottoman Laws as have been or may be declared to be in force by public notice, and such orders in council, ordinances and regulations as are in force in Palestine at the date of the commencement of this Order or may hereafter be applied or enacted; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in accordance with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before courts of justice and justices of the peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions. Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limit of his Majesty's jurisdiction permit, and subject to such qualification as local circumstances render necessary.*"

The Privy Council discussed Article 46 for the first time in *Abdullah Bey Chedid v. Tennenbaum*[171]. The case concerned a contractual dispute over the sale of land. In delivering the judgment of the board,[172] Lord Tomlin said at p. 844

"*Their lordships' attention has not been directed to any provisions of the Turkish law or any local ordinance which deals with the question whether in an action to recover damages for breach of contract the plaintiff is bound to establish his readiness and willingness to perform his part. In the absence of any such provision, their lordships are of opinion that regard must be had to the English Law applicable in the case of concurrent obligations.*"

In a second case[173] , *Farouqi v. Ayub,*[174] Lord Atkin, delivering the judgment of the Board,[175] said at p394, after quoting the proviso,

"*... all that, of course, has to be very carefully considered; but, subject to all those observations, their lordships think there can be no doubt that the provisions of the Order in Council do enrich the jurisdiction of the courts in Palestine with all the forms and procedure and all the different remedies that are granted in England in common law and equity and also enrich their jurisdiction with the principles of equity, among other things the well-established distinction between a penalty and liquidated damages.*"

The Board did not express any opinion on the actual impact, if any, of Article 46 on the issues in that case. Perhaps, inevitably, therefore the litigation came back to the Privy Council for a second time in 1941.[176]

On the ground in Palestine, the Court of Appeal's view as to Article 46 ebbed and flowed[177] throughout the Mandate. The Court of Appeal, however, was never called upon to express any view as to the application of Article 46 in a company law context.[178]

Section 2(2)

Section 2(2) of the Companies Ordinance 1929 provides that "*this Ordinance shall be interpreted by reference to the Law of England relating to companies*".[179] However, it did not allow importation of English legislation not itself enacted as part of the Laws of Palestine. And it did not override provisions of the Palestine Order in Council 1922.

Furthermore, the 1929 Palestine Ordinance occasionally contained definitions not found in the English legislation and where the English position remained covered by case law only. For example, the 1929 Ordinance contained a definition of "*floating charge*".[180]

However, the transplantation provision enabled Palestinian judges to refer to a substantial number of English decisions in the late 19th and early 20th Centuries[181] to resolve company law problems in the Mandate Courts. A review of the reported

166. See e.g. Goff and Jones on the Law of Restitution (4th ed.) at 402.

167. See e.g. Birks "An Introduction to the Law of Restitution" (1989) at page 248.

168. See e.g. the citation by Hobhouse J (later Lord Hobhouse) in Westdeutsche Landesbank v. Islington LBC [1994] 4 All ER 890. The decision is discussed at length by Robert Walker LJ (later Lord Walker of Gestingthorpe) in Guinness Mahon & Co. Ltd. v. Kensington and Chelsea Royal LBC [1999] QB 215, 237-240.

169. Ibid per Robert Walker LJ at 240F.

170. Palestine Order in Council, 1922.

171. (1933) 1 PLR 831.

172. Lord Tomlin, Lord Wright and Sir George Lowndes

173. This case also concerned a contractual dispute over land.

174. (1935) 2 PLR 390

175. Lord Atkin, Lord Alness and Lord Maugham

176. See [1941] 8 PLR 116. The Board then consisted of Viscount Sankey, Lord Atkin and Luxmoore LJ.

177. A detailed discussion of the changing attitudes of the senior Palestinian judiciary to the ambit and function of Article 46 during the Mandate is contained in Likhovski *ibid* at 61-83.

178. The matters for decision invariably involved questions of contract law or tort.

179. Other examples of Palestine Ordinances on commercial subjects which included a transplantation clause, are s.2 Bills of Exchange Ordinance 1925, s75 Partnership Ordinance 1930 and s.141 Bankruptcy Ordinance 1936.

Court decisions shows its considerable utility in core areas such as corporate security, winding up and aspects of corporate governance.

Finally, the consideration of English case law by the Palestinian judiciary, where necessary, appears to have been analytical and interpretative, however concise the actual judgments themselves.

Reconciling Article 46 and Section 2(2)

One area of potential conflict between Article 46 and Section 2(2) never discussed[182] by the Palestinian Courts, was whether local circumstances or practices as to corporate governance issues[183] required a different legal standard to be applied from those applicable to those of an English company. During the Mandate there were no generally applicable international standards of behaviour in this field. In England, there was what the Chancery judges thought the rules of equity required. It is possible that this approach would have been thought inapplicable by a Palestinian judge if he had been called upon to decide the point.

Afterword

His Majesty King George VI, in his address[184]to members of the British Section of the Palestine Police, who paraded at Buckingham Palace in 1948 prior to a final stand down, was moved to say "*You can look back on a job well done*".[185]

After a possibly chequered start in the 1920's, it is suggested that the same description could be applied to the judges in Palestine dealing with company law issues during the Palestine Mandate.

180. The English Companies Act 1929 contained no such definition and this concept in England remained as defined by a plethora of judicial decisions: see e.g. the discussion of floating charges in Buckley 11th Ed. (1930) 183-189.

181. When English Judges were going through a creative period.

182. So far as I am aware.

183. E.g. the behaviour of directors.

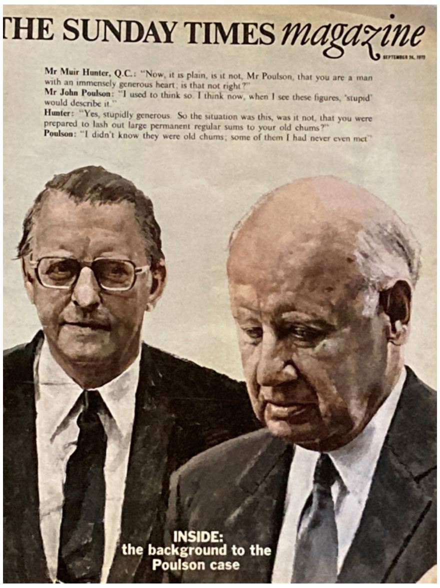
184. On 20 July 1948.

185. See "A History of the Palestine Police Force 1920 - 1948" Edward Horne (The Book Guild Limited, 1982) Introduction.

South Square Story

Muir Hunter QC and the Poulson Bankruptcy, Part 1: Setting the Country on Fire

SIMON MORTIMORE QC



My last article about the history of South Square described Cyril Salmon KC's chambers at 3 Paper Buildings in the 1950s. (Digest, June 2020, pages 99-111). My next article should have been about Muir Hunter's early career and how chambers became known as bankruptcy specialists, but the coronavirus restrictions have frustrated my research on that subject. Instead, this article is about the Poulson bankruptcy case, which caused more controversy and had greater repercussions than any other English bankruptcy case.

In the estimation of *The New Oxford History of England*, the Poulson corruption scandal in 1972 ranks alongside Suez in 1956 and the Profumo affair in 1963 as one of the three events that did most to damage faith in British political institutions, because they showed politicians in a poor light. As the Report of Lord Salmon's Royal Commission on Standards of Conduct in Public Life observed, Poulson's corruption might never have been revealed and the protagonists prosecuted and punished but for two factors: Poulson's bankruptcy and *"his habit of meticulously preserving copies of everything he wrote or was written to him – however incriminating those pieces of paper might be."*

The Poulson bankruptcy case is a large subject. This article takes the story down to the arrest of Poulson on corruption charges and the adjournment of the public examination pending the conclusion of the criminal proceedings. The next article will deal with the criminal proceedings, the political repercussions, and the later stages of the bankruptcy case, ending with Poulson's discharge.

Poulson becomes bankrupt

On 4 January 1972, John Garlick Llewellyn Poulson presented his own bankruptcy petition to the Wakefield County Court (No 1 of 1972), the court with bankruptcy jurisdiction for the Pontefract area where Poulson lived and worked. In his statement of affairs, Poulson showed unsecured creditors owed about £250,000 and assets claimed by him to be worth enough to pay his creditors in full and produce a surplus. Poulson's problem was that he was unable to pay judgment debts owed to the Inland Revenue and a former partner. As was the practice under the Bankruptcy Act 1914, the court made an immediate receiving order, putting the official receiver in control of his estate, and adjudicated Poulson bankrupt.

Poulson handed over to the official receiver some 27,000 files. Over a period of about eight weeks, he attended on the official receiver to be questioned about his affairs and to sign a statement, which would provide the basis for the official receiver's questions at the public examination. Under the 1914 Act, all bankrupts had to undergo and complete a public examination. A bankrupt could not obtain his discharge from bankruptcy without doing so.

On 1 March 1972 John Priestley, an accountant and partner in the Sheffield firm of Poppleton & Appleby, was appointed trustee in bankruptcy. He retained Desmond Simpson, a partner of RC Moorhouse & Co of Leeds, as his solicitor. By the standards of the day this was a very large and remarkable bankruptcy. To put the case in perspective, the purchasing power of £1 in 1970 was equivalent to about £15 today; meaning that Poulson's debts were equivalent to about £3.75 million today. It was remarkable that such large debts should have been racked up by such an apparently respectable man, who had owned the largest architectural practice in Europe and was an Inland Revenue Commissioner.

Desmond Simpson instructed Muir Hunter QC and David Graham to advise the trustee and represent him at Poulson's public examination which would be held before Mr Registrar Garside in the Wakefield County Court on 13 June 1972.

The Wakefield Trinity

Muir Hunter was then aged 58. He had been called to the Bar in 1938 and joined Victor Aronson's chambers at 3 King's Bench Walk. During the war, Muir served in India, where he achieved the rank of Lieutenant Colonel and was appointed a judge on a special Anti-Corruption Tribunal in Punjab and Sind. On returning from war service, Muir specialised in bankruptcy law, learning about its intricacies from Victor Aronson, who was junior counsel to the Board of Trade in bankruptcy matters and editor of the authoritative textbook *Williams on Bankruptcy*. In 1949, Aronson took silk and Muir replaced him as junior counsel to the Board of Trade. When Aronson died a couple of years later, Muir took over the editorship of *Williams* (producing the 17th edition in 1958 and the 18th in 1968). In 1954, Muir joined Salmon's chambers at 3 Paper Buildings and five years later became head of chambers.

With his comfortable figure encased in a three-piece suit, his formal manner and elegant turn of phrase, Muir might have looked like central casting's vision of a successful senior barrister, but he was not an establishment figure. He had been a Labour Party candidate before the war, was a member of the Society of Labour Lawyers, was an active member of Justice and Amnesty International, and in 1969 he was one of the founders of the first English neighbourhood law centre in North Kensington. He was a passionate and strong-willed man who had an unshakeable belief in the importance of whatever he was doing. He did not take silk until 1965, by which time he was aged 51 and a more sympathetic Labour Lord Chancellor was in office.

David Graham was aged 38. After being called to the Bar in 1957 and undertaking common law and chancery pupillages, he came to 3 Paper Buildings as Muir's devil, helping in the preparation of cases. David became a member of chambers in 1959 and over the following years worked with Muir on many cases. In an article about the Poulson bankruptcy, The Times recognised that it was David who *"really sets the guidelines along which the case should be conducted."*[1]

Because of the volume of material to explored, Michael Crystal, the junior tenant at 3 Paper Buildings, was brought in to assist Muir and David.[2] He was then aged 24 and had been called to the Bar in 1970.

The background to the Poulson bankruptcy

John Poulson was born in 1910 in the village of Knottingley, near Pontefract, in the West Riding of Yorkshire. His authoritarian father owned a pottery business and some slum property. The family were devout Methodists and so young John was sent as a boarder to Woodhouse Grove Methodist public school, near Bradford, where he was a dismal failure; leaving without a certificate. From there, he went to Leeds College of Art, with equal lack of success. For some reason, Poulson was set on becoming an architect. Although strongly disapproving of this choice of career, Poulson's father helped him to obtain articles with a firm of architects in Pontefract. Poulson went there in 1927, when he was 17, and stayed for five years. He failed to impress his employers, one of whom said that he *"could not design a brick shithouse"*. Another employee said that Poulson *"couldn't draw plans for toffee"*.

Undeterred by this failure to appreciate his talents, on 1 July 1932 Poulson founded his own

John Poulson (center front) and some of his his 750 employees in the garden at Manasseh

firm on Ropergate in Pontefract, under the name *"JGL Poulson, Architects and Surveyors"*, with financial support from his father. He employed two 16-year-olds to draw the plans, while he went about finding business. He registered under the Architects (Registration) Acts 1931-38 and in 1942 was elected a licentiate member (non-qualified) of the Royal Institute of British Architects and became bound by RIBA's rules. These rules prohibited members from touting for business or being involved in companies connected with the practice or engaged in building or contracting.

Poulson's business was not affected by the war, as he had a medical exemption. After the war, Poulson's firm expanded dramatically. By 1960 he was drawing nearly £40,000 a year from the profits of the business. Six years later the Poulson organisation had become the largest architectural practice in Europe, employing 750 people and engaged in projects throughout Great Britain and in Europe, Africa and the Middle East. By this stage annual turnover was over £1 million and Poulson's drawings had more than doubled to nearly £100,000. He and his wife, Cynthia, lived in a house on the outskirts of Pontefract called *"Manasseh"*, which he had designed and built at a reputed cost of £60,000 and which in 1958 won the Ideal Homes House of the Year award. He drove a Rolls Royce, Bentley or Jaguar and stayed in a suite at the Dorchester Hotel on his frequent visits to London.

How had this been achieved by a single unqualified, albeit hardworking, architect? It was not through charm; Poulson was a dour, sanctimonious man who could be a brutal and unpredictable employer. Nor was it the quality of

1. The Times, 31 March 1973.

2. Muir, David, and Michael were known in chambers as the Wakefield Trinity in homage to the local rugby league club.

his architecture. The firm's style was functional and utilitarian, using system building for economy and speed of construction. His buildings have not stood the test of time; many of the more prominent ones have been demolished and replaced by better buildings. At Poulson's criminal trial in 1973-74, prosecuting counsel, John Cobb QC, had a simple answer: *"John Poulson was an ambitious, ruthless and friendless man whose object in life was to get as much money and work as he could by bribery and corruption".*

To further his ambitions, Poulson exploited several insights which set him apart from most rival architects. He was one of the first architects to spot the opportunities from the vast post-war expansion in public sector development and construction work. His firm's work included designs for city centres, public buildings (swimming pools, libraries etc), offices, hospitals, schools, public housing and roads.

Poulson realised that clients would appreciate a comprehensive service. He was sole owner of an organisation which provided architectural, quantity surveying, town planning and engineering services. In 1965 he moved the engineering business into a partnership with three of his employees under the name JGL Poulson and Associates.

Poulson knew that every man has his price. Since public sector and local government officers and employees were either volunteers or on modest salaries, they were likely to be susceptible to his favours and, in return, give preference to his organisation. The favours might be cash or presents, ranging from "Christmas cheer" (turkeys and drink) to holidays, trips to Ascot with accommodation in the Dorchester, and even houses.

Poulson was an assiduous networker. He was a Freemason and an active member of the National Liberal Party (a rump of the old Liberal Party, which since the 1930s had been closely linked to the Conservative Party and was absorbed into it in 1968). He met leading Conservative politicians at National Liberal events at London's Caxton Hall, where he regularly acted as host. After the event, he would provide the speaker and other dignitaries with a well-earned dinner at the Dorchester.

As someone on the Conservative side of the political divide, Poulson realised he needed help in building bridges to Labour controlled local authorities. In about 1961, he met T Dan Smith, "Mr Newcastle", a prominent figure in the Labour Party in the North-East. He was leader of Newcastle City Council from 1960-65 and in 1962 started a public relations business to support urban redevelopment. He introduced Poulson to several Labour controlled authorities and, most usefully, to Alderman Andy Cunningham, head of the Northern District of the General and Municipal Workers' Union, who held many public appointments in the North-East.

Poulson appreciated that MPs could be useful ambassadors for his organisation, particularly for the overseas work that he pursued from the early 1960s. Their names might be familiar to foreign governments and they could further Poulson's cause by writing letters on House of Commons notepaper and asking questions or making speeches in the House. To supplement their modest annual salary – £1,750 between 1957-64 and £3,250 from 1964-71 (including expenses) – MPs would welcome the opportunity to earn fees as directors or consultants. Sir Henry Butcher MP became a director of two of Poulson's companies and when he died in 1966, he was replaced by The Right Honourable Reginald Maudling MP, the former Chancellor of the Exchequer, who was then Deputy Leader of the Conservative Party. Between 1966 and 1970, when the Conservatives returned to power and Maudling became Home Secretary, he was a director of three Poulson companies. The Poulson organisation retained two other MPs as consultants. One was Albert Roberts, the Labour MP for Normanton (a constituency adjacent to Pontefract). He was an enthusiastic supporter of the Spanish and Portuguese dictators who were then in power, and could help Poulson secure work in Portugal's African colonies. The other was the Conservative MP John Cordle, an expert on West African affairs, who might open doors for Poulson in Nigeria, Liberia and the Gambia.

Poulson realised he could circumvent RIBA restrictions on the use of companies by appointing people who would do his bidding. Acting on Sir Henry Butcher's advice that a service company could save tax on the firm's profits, Poulson incorporated Ropergate Services Ltd. He took a controlling shareholding and installed Butcher and his solicitor as directors. Following Butcher's death, Sir Bernard Kenyon, clerk to the West Riding Council, and Poulson were appointed directors (the former with the consent of his employers and the latter with the approval of the Architects Registration Council). Ropergate became more than a mere service company for the practice. It was the conduit through which funds from the practice were channelled to support three companies, which would provide architectural and design work for Poulson's firm. All three were firmly under Poulson's grip, although the controlling shareholdings were in the name of Mrs Poulson and he was not a director. Two of the companies, Construction Promotion Ltd (CP) and International Technical and Constructional Services Ltd (ITCS), were engaged in overseas projects, whereas Open System Building Ltd (OSB) built industrialised houses for local authorities. Maudling and Kenyon were directors of all three companies.

By 1968 the Poulson organisation was in deep financial trouble. The expenses of the business were far too high. On top of that, vast sums had been spent unsuccessfully pursuing work in Africa, the Middle East and Mexico. On 1 June 1968, William Marr, Poulson's solicitor, wrote to warn him of potential disaster and advised him: *"Turn off the taps for the sake of yourself, your wife, and your family and staff"*. That month a cheque sent by Poulson to the Inland Revenue bounced. Poulson tried to remedy the situation with bank borrowings, secured on his home and his wife's shares in the companies, but it was not enough. In November the Inland Revenue obtained judgment against him for £211,000 (including unpaid tax going back to 1965/66). He made some payments to reduce the debt but could not keep to an instalment plan.

In June 1969, Poulson's employees told him that the business was insolvent to the extent of £100,000 and that he was approaching bankruptcy. He appointed Coopers to give accountancy advice and, on the recommendation of John King, the husband of his wife's sister, retained Clifford Turner as his solicitors.[3] Towards the end of the year,

Reginauld Maudling MP

after Coopers had confirmed that the business was insolvent, Poulson was presented with plans for drastic cost-cutting, including the disposal of the Rolls and the Bentley, and for the transfer of the business to a company to which Poulson would be a consultant. On the last day of the year Poulson agreed to transfer his business to Interplanning & Design Ltd (IPD), which would be managed by Thomas Sweetman (an accountant) and some of his employees. The transfer was completed in March 1970. Most of the shares in IPD were held under a trust for Poulson's creditors and others were issued to the managers and Mrs Poulson. The effect of this disposal was that Poulson could not use his business assets, including fee income, to pay those of his creditors, such as the Inland Revenue, who IPD did not need to pay.

In 1971 Poulson sold Manasseh to pay off the bank. The Poulsons moved into a bungalow he owned at Carleton Green, Pontefract and which he transferred to Mrs Poulson. In November 1971, one of the former partners in the engineering firm, who had obtained a judgment, presented a bankruptcy petition. In response, in January 1972, Poulson presented his own bankruptcy petition.

Lighting the fuse: the public examination, days 1 and 2

Although Poulson's business practices had been the subject of a few critical articles in the local press and in Private Eye (e.g. "*The Slicker of Wakefield by Oliver T Dan Goldsmith*" in April 1970), only a few reporters attended the public examination on 13 June 1972. The official receiver spent the morning session questioning Poulson about his affairs. His questions included references to Reginald Maudling, Roberts, Cordle, T Dan Smith, and several public sector officers. The most eye-catching revelation concerned George Pottinger, a senior civil servant in the Scottish office. That office had supported the development of the Aviemore ski resort, designed by Poulson. Poulson had given Pottinger money to pay for the construction of his house overlooking Muirfield golf course and had recorded the payments as consultancy fees. The official receiver asked Poulson if there was "*any connection between these payments to Mr Pottinger and the fact that he is a high ranking official*". Poulson indignantly answered: "*Certainly not*". Poulson could not see what was wrong with making gifts to Pottinger: "*I can surely give to who I like*." In the afternoon, Muir took over the questioning. He began by exploring when Poulson became unable to pay his debts. After that, he turned to the transactions, after Poulson knew he was insolvent, by which he disposed of his property: the transfer of the business to IPD and transfers to Mrs Poulson of the bungalow, the proceeds of the contents of Manasseh, and the money to pay for her shares in IPD.

In the days after the hearing, the official receiver extracted from Poulson's cash book and accounts prepared by Poulson's accountants, a schedule of "consultancy fees" paid in the period 1 March 1962 to 28 February 1970, when IPD took over the business, which totalled £334,000. Of this sum, £155,000 had been paid to T Dan Smith. The official receiver shared this schedule with the trustee and his legal team. Michael Crystal remembers spending a considerable time in Leeds, investigating these payments in preparation for the second day of the public examination. The trustee asked T Dan Smith to explain the payments to him, but he declined, saying it would take too much time and effort. One issue facing the legal team was what use could be made of these payments. Proving they were corrupt would not help recovery, but, if they

3. John King was by then a successful businessman and would become chairman of British Airways and be ennobled as Lord King of Wartnaby.

were gifts, they might be recoverable as voluntary settlements under section 42 of the 1914 Act, if made within two years of the bankruptcy or when Poulson was unable to pay his debts.

The first day of the public examination had attracted minimal interest from the regional press and none from the national press. On 30 June, Private Eye published an article reminding readers of the potential interest of the Poulson case. The result was that, for the second day on 3 July, the court was packed with reporters.

The official receiver began by taking Poulson to the schedule of payments and asking about the payments to T Dan Smith. Apart from the first ones, when Smith was agent for a Swedish industrialised building company, Poulson could only say: "*It is fantastic. I had no idea it was this big.*" When the official receiver asked what he had got from Smith, Poulson replied: "*Well, I can't answer that question I am afraid. I can't see anything positive as a result of it.*" He could not explain why the amounts varied: "*There is just no understanding it.*" Poulson was equally unable to explain why he had made payments to AJ Merritt, principal regional officer at the Ministry of Health in Leeds, and why he had organised and paid for Merritt's retirement cruise: "*Not in the foggiest. I haven't any idea whatever.*"

About halfway through the morning, Muir Hunter began his examination. He referred Poulson to the £334,000 worth of payments in the official receiver's schedule, including £22,000 paid under a deed of covenant to Mrs Maudling's favourite charity, the Adeline Genée Theatre Trust. Poulson explained that the payments to the Theatre Trust were made at Maudling's request instead of paying him remuneration at the rate of £5,000 pa as a director of CP and ITCS (but without accounting for tax). Poulson accepted that the payments in the schedule had contributed to his insolvency.

Muir moved on to explore Poulson's reason for making them. The questioning took on a farcical, almost surreal aspect as the interrogator invited the witness to agree that he was an exceptionally generous philanthropist, solicitous for the welfare of senior civil servants. Poulson found it difficult to work out how to respond, given that he could not reveal the real reason: to obtain influence, which he knew was corrupt.

> [Q] "*Now, it is plain is it not, Mr Poulson, that you are a man with an immensely generous heart; is that not right?*" [A] "*I used to think so. I think now, when I see these figures, "stupid" would describe it.*" [Q] "*Yes, stupidly generous. So the situation was this, was it not, that you were prepared to lash out large permanent regular sums to your old chums?*" [A] "*I didn't know they were old chums; some of them I had hardly even met.*"

Poulson accepted that, apart from those who had done work for him, "*everybody else is the recipient of a philanthropic donation*" and said that he understood that if the gifts were made after he was unable to pay his debts, they might be recoverable. Muir started to go through the schedule to find out whether each payment was a "*philanthropic donation*" or for services rendered. He started with Mr Pottinger, the Scottish civil servant, who had received about £21,000, including payments for the house, holidays, nights in the Dorchester, a Rover car, and a suit from Huntsman, the Savile Row tailors:

> [Q] "*You will not, of course, have it, will you, Mr Poulson, that this was a payment for any sort of services rendered?*" [A] "*Of course not. I should be – ." [Q] "Of course not. It would be dreadful, scandalous, would it not?*" [A] "*Well, it wouldn't be honest.*"
>
> … [Q] "*What was the relationship between you and him that justified such payments which you describe as gifts?*" [No reply] [Q] "*Have you anything further to say?*" [A] "*I don't think so, sir.*"

Muir then referred Poulson to Pottinger's solicitors explanation for the payment towards his house: it was a gift made because of "*the high personal regard*" between the two men. Poulson agreed with that and accepted that he had "*a very, very open purse for him*".

Muir moved on to Merritt, who received nearly £6,000 made up of amounts paid before and after he had retired as a civil servant. While Poulson resisted the suggestion that these were gifts, made of the goodness of his heart, he accepted that Merritt did not do anything to earn the money. The money had nothing to do with Poulson's work on the Airdale Hospital; although Poulson observed that Merritt had "*not been obstructionist*".

Next, Muir turned to the £155,000 paid to T Dan Smith and pressed Poulson for an explanation: [Q] "*Think. Try again. What was Mr Dan Smith doing for the Poulson organisation?*" [A] "*I can't think of any, sir. I just can't; it's no good.*" Since Poulson had told the official receiver that Smith had asked for an increase in his monthly sum, Muir asked what the monthly sum was for. Poulson answered: "*I don't know, because he never produced anything.*" After taking Poulson to the individual payments to Smith, which Poulson did not accept were gifts, Muir said: "*Not gifts? You will not say any other reason?*" Poulson replied: "*Well, I don't know what to say, sir, I just don't know what they were, except that they are absolutely ridiculous.*"

Poulson outside the Wakefield County Court

The strain of concealing the corrupt purposes and countering Muir's suggestions of philanthropy, became too much for Poulson who, Muir could see, was showing signs of being unwell. The court adjourned and after lunch Poulson's solicitor reported that Poulson had been taken to hospital in an ambulance suffering from severe shock. The examination was adjourned to 1 August. Muir observed that Poulson's illness had prevented him from asking about his dealings with Mr Maudling, Mr King and the companies CP and ITCS and said that it might be necessary to ask the court to provide time for private examinations of other witnesses to investigate those matters. He hesitated, however, "*to envisage the possibility of examining the Home Secretary himself.*"

The country on fire

The press and political reaction to the examination was immediate; everyone could see that this was a case about corruption. The Times' headlines over the next two days focused on the payments to Mrs Maudling's charity and to Pottinger. In Parliament, Willie Hamilton MP (Scottish Labour MP and anti-monarchist) demanded an investigation into the payments to Maudling, Roberts and Pottinger. The Liberal Party put down an early day motion for a public inquiry into allegations of financial corruption in public life. Jeremy Thorpe MP, the leader of the Liberals, repeated his demand for a register of MPs' interests. T Dan Smith issued a statement, explaining that the payments to his firms were for fees and expenses and "*far from excessive*". Maudling said that it was public knowledge that he was chairman of ITCS which worked wholly overseas and obtained contracts for hospitals and hotels designed by Poulson. Nor could he see why payments to a charity he supported should be the subject of criticism. Pottinger's solicitors issued a statement, saying that their client was disturbed at the inference that he used his official position to benefit Poulson.

The Cabinet resented the speculation about corruption, but could not work out how to react, because it did not know what had happened in the Wakefield County Court. It needed to see the transcript, which was not available until 10 July. On 12 July, the Prime Minister informed the House of Commons that the Attorney-General (Sir Peter Rawlinson) and the Lord Advocate, in consultation with the Director of Public Prosecutions, were considering the evidence given at Poulson's public examination and were awaiting a preliminary report from the official receiver. A further statement would be made the following week.

On 18 July, the Prime Minister informed the House that, having received the official receiver's preliminary report, the DPP had instructed the head of the Fraud Squad at the Metropolitan Police to investigate and report to him; after that, there might be a public inquiry. He also reported that Reginald Maudling had resigned as Home Secretary; not because of the payments to the Theatre Trust but because he would be the minister supervising the investigation of Poulson's dealings.

Maudling's resignation was met with sympathy and regret. He was a popular figure in Parliament and the media. He had a first-class brain, moderate political views, a genial personality, and a discerning and frequently indulged palate for fine wine. The People injected a sour note into the chorus of commiserations. It wondered if Maudling's luck had run out and observed that Poulson was not the only dubious businessman with whom Maudling had engaged during his years in opposition. In his quest for "*a little pot of money for my old age*", between January and July 1969 Maudling had been president of The Real Estate Fund of America; a Liberian Ponzi scheme set up by the American fraudster Jerome Hoffman, which was barred from soliciting investors in New York and the UK.[4]

4. In March 1968, Hoffman consented to a permanent injunction banning him from share dealing in New York. In October 1970, REFA closed its London offices and the DTI appointed inspectors. On 6 May 1971, Hoffman was indicted in New York on 31 counts of mail fraud relating to REFA. On 14 February 1972, Hoffman pleaded guilty and was sentenced to two years imprisonment.

Michael Crystal, David Graham, Muir Hunter QC and Leonard Saffman walking to Wakefield County Court

Attempt to stop the public examination: days 3 and 4

On 21 July, Leonard Saffman, Poulson's solicitor, announced that Poulson would apply for the examination to be adjourned indefinitely. By the end of the week, the Attorney-General and the Department of Trade and Industry (which employed the official receiver) had decided to support the application. The official receiver had evidently changed his mind, because, a week earlier, after the Prime Minister's announcement, he had said he thought the public examination would proceed. There was no evidence to support the application concerning the timescale of the criminal investigation or the likelihood of charges.

Mr Registrar Garside's court was packed for the resumed hearing of the public examination on Tuesday 1 August. The proceedings began with Mr Saffman's application for an indefinite adjournment in view of the police investigation and because the public examination, at which Poulson could not refuse to answer questions on the ground of self-incrimination, might prejudice a fair trial. Poulson had no complaints about how the official receiver and trustee and those acting for them had handled the matter. Harry Bennett QC, for the official receiver, and Gerald Coles, for the Attorney-General, supported the application. Mr Bennett submitted that there should be an adjournment so that "*the police inquiries can be continued without hindrance or obstruction*". He also referred to the impact of the public examination on third parties against whom allegations might be made during the examination; specifically "*a third party who may hold a position in public life, or may have held until recently a position in public life*". This was plainly a reference to Maudling, who had repeatedly complained about the proceedings in his press statements.

In his reply, Muir asked: "*Why has this great scandal or alleged scandal burst on this country and its public?*" The answer was that between the first and second hearings, the official receiver, with "*exceptional devotion to public duty*" had prepared the schedule of presents which Poulson appeared to have made to his friends and which totalled £334,000, of which £155,000 had been received by "*his old friend Smith*". It was those payments, notably the ones to Smith, that attracted attention.

"*Having set the country on fire and attracted attention measured by the presence of representatives of the Press today, it is now desired that none of these matters should be pursued in public – not even for the benefit of innocent people who may have been falsely traduced.*"

The Registrar declined to adjourn: "*We know there is a criminal inquiry pending, but no charges have been brought. In my view, this public examination should continue without prejudice to any further application when charges are brought.*"

The public examination then proceeded. Among the topics on which Muir questioned Poulson was the money he poured in to ITCS, a company owned by Mrs Poulson and Maudling's family, at a time when he owed the Inland Revenue £160,000. After Poulson's cheques to the Revenue had bounced, he had written off the £70,000 debt owed to Ropergate by ITCS. Poulson explained that he did this to save Maudling's face; so that he should not be a director of a company with a large debit balance. Maudling was outraged. The next day, page 1 of the Daily Mirror had the headline: "*Maudling: I protest*" and quoted the aggrieved former Home Secretary: "*He is making ridiculous claims. I am helpless. I am in an intolerable position. This man is talking complete and utter nonsense. ...what he is claiming is complete bunkum.*"

In the House of Commons on 3 August, the Attorney-General was asked to explain why he had instructed counsel to support the adjournment application. He replied that he had not acted on behalf of the government but in support of his

> "*Having set the country on fire... it is now desired that none of these matters should be pursued in public*"

Andrew Cunningham leaves his solicitors office under arrest

constitutional responsibility for the fair administration of the criminal law. He had wanted to ensure that nothing was done that might prejudice any possible prosecution. He said that the official receiver had supported the application because it was not in the public interest to pursue the public examination while criminal investigations were under way.

It was plain that the Government was anxious to dispel any suggestion that it had wanted to smother investigation into Poulson's affairs because of the collateral damage it was causing. On day 4, 7 August, Gordon Slynn, the treasury counsel, appeared for the Attorney-General to explain that his client's constitutional role made him independent of the Government, and that, in supporting the application to adjourn, the official receiver had not acted on behalf of the Department of Trade and Industry. Mr Slynn did not suggest that the Registrar's decision to proceed with the public examination should be reviewed or appealed. As a result, the public examination continued over five more days and more than 7,000 questions until charges were brought.

After Mr Slynn had concluded his statement, the Registrar referred to Mr Maudling's press statement about the effect the public examination had on third parties and explained that the bankrupt's answers were not evidence against other people.

Day 4 proceeded with Muir questioning Poulson about the £155,000 paid to T Dan Smith and the gifts he had made, including those to "*well-deserving civil servants*". After taking Poulson to several of these gifts, Muir suggested that, with money that should have gone to his creditors, Poulson had gone round "*sprinkling largesse all over the countryside like Henry VIII.*"

The private examination of T Dan Smith on 24 July had enabled the trustee's lawyers to identify some of the beneficiaries of the money paid by Poulson to Smith. They included: Ken Allen, the deputy general manager of Peterlee and Aycliffe New Town who received £1,000 pa; Alderman Roy Hadwin, former Lord Mayor of Newcastle and chairman of its Town Planning Committee, who received £1,560 pa; and Alderman Andy Cunningham, the head of nine public bodies, who received £1,000 pa. Poulson said he did not know they were on Smith's payroll or what they did for the money they received. He accepted that he had paid for Mr and Mrs Cunningham's holidays, including one in Portugal, but that was because he had designed offices for Cunningham's Union. He also paid Mrs Cunningham consultancy fees at the rate of £1,500 pa. There was some confusion about what she did to earn these fees: Poulson thought she worked as a caretaker at his Newcastle office, but she had told the trustee that she advised on interior design. Muir suggested she just had a sinecure. Eventually, Poulson conceded that Smith's role (which he had been unable to explain on Day 2) was to put the Poulson organisation in the frame to compete for town centre development work.

After reading press reports of the day's hearing, Andy Cunningham issued a statement, saying that the suggestions against him were "*a laugh*"and his conscience was clear. Even so, Cunningham decided to pay Poulson's trustee for the cost of the holidays. Cunningham's Union rallied to his defence and he easily defeated an attempt to remove him as chairman of the Durham Police Authority. Initially, he managed to prevent a police inquiry into his actions on behalf of Felling Urban Council; but two months later, after a heated meeting, the Council appointed a sub-committee to investigate its dealings with Poulson. Hadwin and Allen both denied any wrongdoing.

Muir Hunter QC, media icon

By now, Muir had become something of a celebrity with the press. On 9 August, the Daily Mirror described Lieutenant-Colonel Muir Vane Skerrett Hunter QC as the star turn. He was popular with reporters, one of whom said: "*He carries these enormous files but never has to search for anything. He pursues every question until he gets the answer he was after and he is well aware of what makes a quotable phrase.*"

The Sunday Times colour supplement for 24 September featured large portraits of Muir and Poulson on the cover. Inside there was an article about the Poulson case, which has "*assumed a political significance far beyond its provincial surroundings*". It referred to Muir's "*relentless questioning*" and "*mordant wit*", which had produced moments of high comedy. The article contained choice extracts from the first four days of the public examination, photographs of several of the buildings designed by Poulson, and illustrated biographies of the "*bizarre cast of characters*": Mr and Mrs Poulson, the MPs (Butcher, Cordle, Maudling and Roberts), the senior civil servants (Braithwaite, Merritt, and Pottinger), and the two North-Eastern power brokers (T Dan Smith and Andy Cunningham).

On 1 October, the Sunday Mirror honoured Muir with a profile headed, "*HUNTER QC Poulson examiner makes Perry Mason seem just like a soft-hearted sloth*". The article included a picture of Muir relaxing in the drawing room of his Kensington home in a three-piece suit. The newspaper was impressed with the detail that Muir had been able to "*hack out*" out of Poulson by relentless questioning and commended "*the extraordinary brain-power which enables him to weave his way through all the complications and financial details with barely a reference to his notes*".

Philanthropic donations: days 5-8

At these hearings (25, 26 September, 20 November 1972 and 29 January 1973), Muir probed Poulson about "*the disappearance of money on an unbelievable scale*".[5] The questioning may have lacked the sparkle of the earlier hearings, but it revealed some more public officials who had benefitted from Poulson's open purse.

In the late 1950s, Bill Shee, a fellow Freemason and secretary of the Leeds Hospital Board, had introduced Poulson to hospital building, which was a regular and lucrative source of work for the architect. When Shee retired in 1963, Poulson rewarded him with a £2,500 pa consultancy. George Braithwaite, the secretary of the South-West Region Metropolitan Hospital Board (for whom Poulson designed Shoreham Hospital), was given £3,500 (but Braithwaite said it was a loan). When Poulson learnt that Mrs Braithwaite, who was a solicitor and an old friend of his, wanted to set up in practice in London, he rented an office for her in Craven Street and paid the rent from 1962-69. In 1970, she sent Poulson a cheque for the rent, which he refused to cash.

Poulson also looked after William "Billy" Sales,[6] the chairman of the Yorkshire Division of the National Coal Board, for whom Poulson had designed Coal House, the NCB's Northern Division headquarters in Doncaster. While Sales was chairman, Poulson gave him £300 in cash, bought the carpets for the house he rented from the NCB, and gave Sales chauffeur-driven trips to Ascot and stays in a suite at the Dorchester. When Sales was nearing retirement and wanted to buy for £12,500 the house he rented, Poulson stepped in to help. Poulson arranged the mortgage, paid all the cash required for the purchase and even paid the monthly mortgage instalments. It seems that the plan was for Sales to repay Poulson by working as a director for OSB and setting-off the fees he would earn against what Poulson had paid for the house. Things did not work out as intended, because Sales was only a director of OSB for about nine months. Poulson lamely said that he had forgotten to include the debt owed by Sales in his statement of affairs.

Graham Tunbridge was particularly useful to Poulson. He was the estates surveyor for British Railways, for whom Poulson designed the offices above Cannon Street, Waterloo, East Croydon and Guildford stations. Poulson gave him over £1,000 by monthly payments of £100 each and provided him with a Rover car.

Hostile reaction to the revelations

The point that attracted the attention of the press on day 6, 26 September, was a letter from Poulson to Maudling, referring to a £2 million hospital project in the Middle East, in which Poulson said that the son of a former president of a Gulf state would do anything for us, but needs paying. Poulson could not explain what he meant by this, but the exchange provoked Maudling into a furious response; "*I do not get a chance. They can say what they bloody well like and I do not get a chance to reply.*" Through his solicitors, Maudling issued a statement, saying that no action was taken, and no business was done with the man concerned.

Mr Maudling was not the only person to complain about the proceedings in the Wakefield County Court. The secretary of the Northumberland branch of the Rural District Councils' Association , wrote to Muir to protest about his statement in court on 26 September, day 6 – "*I would have thought there was not an alderman or councillor in the North East corner of England Mr Poulson does not know*" – which he said impugned the integrity and reputation of honourable men and women. The letter was published in the local press on 29 September. This was not a battle in which Muir wished to engage and so, by solicitors' letter, he apologised.

After the end of day 6, the British Legal Association, representing 3,000 solicitors, urged steps to protect people whose names are bandied about in legal proceedings. The Solicitors Journal was more specific; it suggested the appointment of a neutral lawyer to help bankruptcy courts to protect the interests of persons not directly involved (but that of course begged the question of whether persons, such as those who were beneficiaries of Poulson's

5. The Times, 26 September 1972.

6. He was privately examined on 13 November 1972.

largesse or directors of his companies, were not directly involved).

The Prime Minister, Edward Heath, was also keen to stop the Poulson public examination from producing yet more revelations. It was not just that they were damaging to his old colleague, Reginald Maudling; they were damaging to the Government itself, because they revealed rottenness in Parliament and throughout the public sector: local government, the Ministry of Health, the NCB and British Railways. On 2 October 1972, his Private Secretary, Robin Butler, wrote to the Lord Chancellor's Office:

"*The Prime Minister has been greatly disturbed, as no doubt have others of his colleagues, by the procedure in the Bankruptcy Court during the Poulson case … He would also like urgent consideration to be given to some effective means of dealing with the situation… He would be very grateful for suggestions on how this situation can be remedied.*"

Lord Hailsham blamed an "*inexperienced provincial registrar*" for giving Muir too much latitude. Although his Office considered several options, by the end of the year, it concluded that nothing could be done to stop the public examination.

Mr Crosland's coffee pot

Muir's questions about two relatively minor gifts dominated the headlines after day 8 of Poulson's public examination on 29 January 1973. The first was the gift of a coffee pot to Anthony Crosland in January 1966 when, as Secretary of State for Education and Science, he opened the Tong Comprehensive School in Bradford, which had been designed by Poulson. Poulson said he thought it was silver and cost £100, not £500, as suggested by Muir. The coffee pot certainly pleased Mr Crosland, who wrote: "*You gave us a quite exceptionally beautiful gift and I tremble to think how much it cost.*"

The second gift was mentioned in a letter dated 8 June 1964 from Poulson to T Dan Smith. The letter referred to a holiday Poulson had arranged for Mr and Mrs George Brown at the Hotel Formentor in Majorca between 11 and 26 July 1964. The letter explained that to ensure there was no publicity, the booking was made in the names of Mr and Mrs T Dan Smith. Poulson said he did not know about this letter, but presumed it referred to George Brown, the politician, who he did not know. It was certainly plausible that the letter referred to Lord George-Brown, who in 1964 had a high profile and might not have wished people to know he was enjoying a luxurious holiday. At the time he was Deputy Leader of the Labour Party, which was expected to win the imminent general election. After the election, he held several cabinet offices, including Foreign Secretary. This George Brown knew Smith well and would give Smith a fulsome character reference at his corruption trial in 1974.

Mr Crosland's immediate response was to return the coffee pot to Poulson's trustee; "*All I want is to get rid of the bloody thing*". Before doing so, he had the pot valued by Sotheby's, who advised it was worth about £40 in 1966. Lord George-Brown said that the entire story of the Majorca holiday was a fabrication; he had never been to the island. In case anyone thought it might have been him, Colonel George Brown, chairman of Tyneside Conservative Party and director of Scottish & Newcastle Brewery, issued a statement, denying that he had taken the holiday.

The Times leader for 31 January, headed "*The reputation of third parties*", criticised Muir for "*showing more than a little carelessness for other men's reputations*"; particularly when it was a matter of public record that during the period of the supposed holiday, George Brown had spoken three times in the House of Commons and had attended the Durham Miners' Gala. In the same newspaper, Richard Crossman MP referred to the remarks in court of "*a voluble QC*" being turned into a hard news story.

The next day, The Times' front page reported that the professional conduct committee of the Bar Council would investigate Muir's conduct of the Poulson bankruptcy case to determine whether he should be exonerated, or disciplinary proceedings considered.

The Crosland coffee pot incident and the investigation into Muir's conduct elicited strongly held views. On one side, Reginald Maudling, expressing sympathy with Crosland, said it is "*disgraceful the way prominent politicians can be smeared without the chance to reply.*" The British Legal Association was equally appalled by "*name-dropping in court*". On the other hand, in an article entitled "*Muir Hunter Hunted*", the New Law Journal criticised the Bar Council investigation as a panic measure in response to "*hustling*" from MPs. The Haldane Society of Socialist Lawyers also criticised decision to investigate.

On 8 February, Lord Hale initiated a debate in the House of Lords about whether the Government was satisfied with the state of bankruptcy law. Although he did not know Muir Hunter personally, "*he knew that Mr Hunter was the editor of the standard work on bankruptcy, which was always regarded as brilliant, and was extremely dull to read. He knew the esteem in which Mr Hunter was held by some contemporaries.*" In his response, the Lord Chancellor, Lord Hailsham, indicated that some reforms of bankruptcy practice were under consideration; including powers to adjourn the public examination when criminal proceedings had started or were likely and to exclude and remove from the record irrelevant and scandalous matter. He said that the problem of harm to third parties had not arisen before and it was difficult to see how they could be protected. His concluding remarks indicated that he had Muir Hunter and Mr Registrar Garside in his sights. He said that the independence of advocates must be respected, but, equally the judge or registrar must exercise strict control over the proceedings "*however eminent*" the advocate. "*Advocates have in addition to their absolute privilege a great responsibility to exercise that privilege with restraint, and failure to observe that could in extreme cases amount to professional misconduct.*"

The next day, the Bar Council announced that Muir had been exonerated, there being no misconduct in his questioning of Poulson about Mr Crosland's coffee pot or the holiday for a Mr and Mrs George Brown.[7]

Even so, the debate about the Poulson public examination and the role of counsel did not disappear. In the House of Commons on 20 March, Sir Peter Rawlinson A-G rejected a suggestion that, in view of the scandalous aspects of the Poulson case, legislation should define counsel's privilege. He reminded the House that courts can exclude scandalous or irrelevant questions "*and there is a strict duty on counsel to exclude questions solely to insult or annoy*"; but counsel must be "*fearless*".

7. Papers concerning the inquiry no longer exist, but it seems that Muir retained Sir Derek Walker-Smith QC, MP to assist him (letter dated 19 February 1973 from Sir Derek to Muir).

8. In May 1973, an amendment to the Bankruptcy Rules had come into effect. This gave the court discretion to adjourn a public examination where criminal proceedings have been, or are likely to be, instituted.

The public examination is adjourned as Poulson is charged

Day 9 of Poulson's public examination took place on 5 March 1973. Muir moved from investigating the beneficiaries of Poulson's philanthropic donations to exploring his dealings in the Middle East with the help of the Beirut agent's reports and correspondence, which were found among 300 files recovered from Poulson's former offices in January.

Day 10 of the public examination was due to take place on Monday 25 June 1973. In the week before the hearing there seemed little reason to doubt that it would go ahead. On 20 June, the Attorney-General informed the House of Commons that the DPP expected to receive a report from the police "*within the next few days*". The previous week, he had indicated that criminal proceedings, if justified, would begin within a few months after the report had been received. On 21 June, in rejecting a call for a public inquiry, the Prime Minister repeated the "*within the next few days*" estimate.

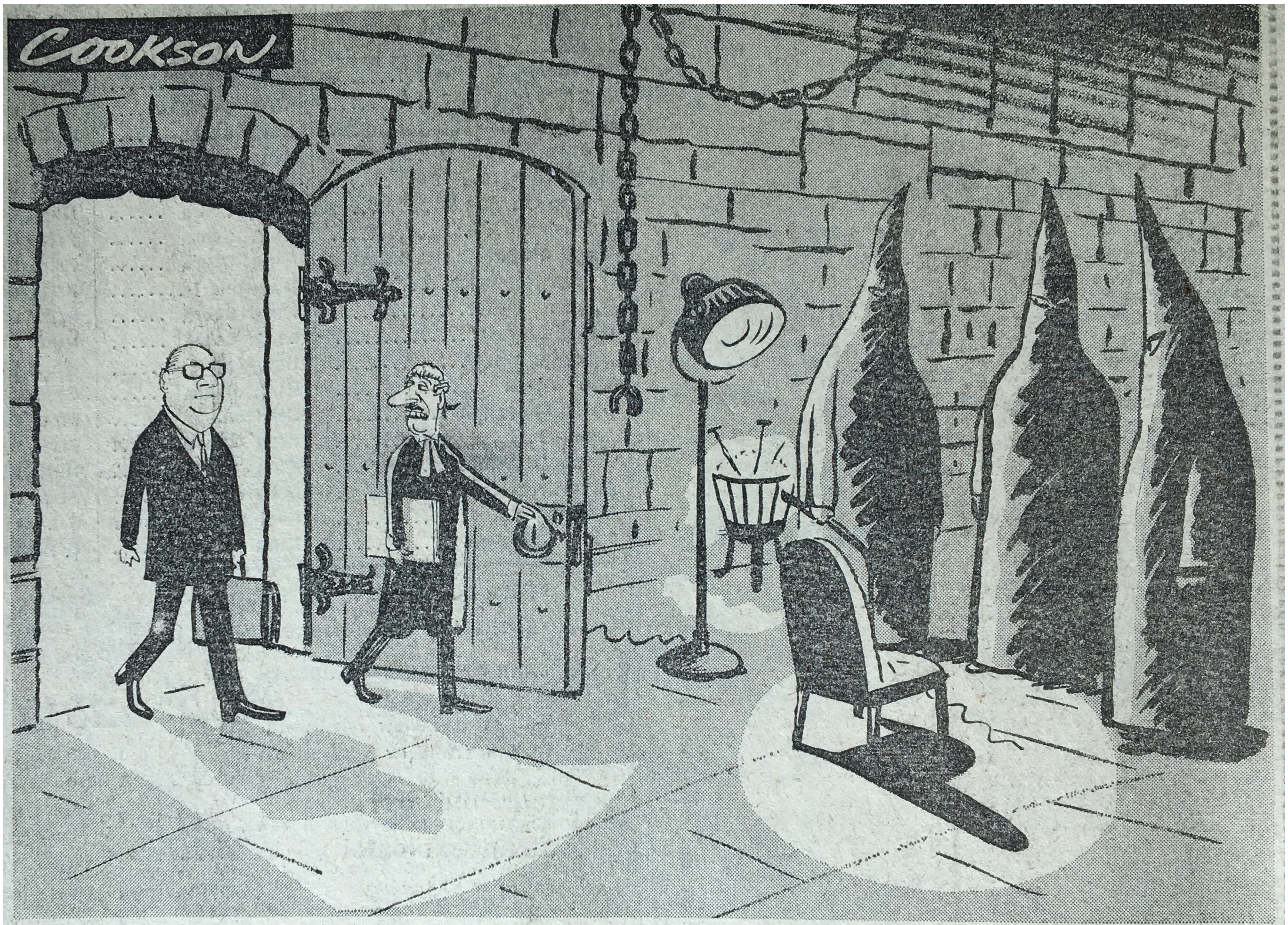
On Friday 22 June, Sir Peter Rawlinson A-G invited Muir and David Graham to come to his rooms in the Royal Courts of Justice that afternoon. When they arrived, Sir Peter gave them the somewhat surprising news that the previous evening he had authorised warrants to be issued for the arrest of Poulson and Pottinger on corruption charges, which were about to be served. All agreed that the public examination would have to be adjourned[8] Muir offered to support the adjournment application, subject to obtaining instructions.

Poulson was arrested at his home that evening and taken to Leeds police station, where he spent the night. Pottinger had to be extracted from a formal dinner of the Honourable Company of Edinburgh Golfers in the Muirfield clubhouse so that he could meet the police officers who had come to arrest him. Pottinger spent the night at Edinburgh police station before being taken to Leeds, where he and Poulson obtained bail at a Saturday morning hearing.

That evening, The Times prepared a leader for publication in the Saturday 23 June edition, in which it compared the Poulson case to Watergate (i.e. a cover-up) and repeated its demand for an inquiry, but withdrew the article when it learnt that Poulson had been arrested.

In a telephone conversation on the morning of Sunday 24 June, Muir told Sir Peter that, after a long consultation the previous day, he had obtained instructions to support an adjournment,

John Poulson leaves Leeds Magistrates court after being charged.



"Don't be nervous Mr. Hunter—you'll find the Bar Council proceedings quite simple and straightforward . . ."

but wished to proceed with private examinations of Poulson and Alderman Cunningham. He said his clients had been reluctant to adjourn the public examination because there were already rumours about a cover-up.

In a short hearing on the morning of Monday 25 June, Mr Saffman, with Muir's support, applied for and obtained an adjournment of the public examination to a date to be fixed.

The Chancellor of the Exchequer

After the court had been closed to the public, Muir applied for Poulson to be privately examined about several specific matters that had emerged from investigation of Poulson's files. One matter concerned Anthony Barber, the Chancellor of the Exchequer. Documents indicated that in 1967 (when Barber was in opposition) Poulson had spent some £41 on painting and decorating work at Barber's house and booked the cost as a business expense. After the furore over Mr Crosland's coffee pot, Muir told the Registrar that he considered that the Prime Minister should be made aware of these documents and that he proposed to send the papers to Sir Peter Rawlinson. Over the luncheon adjournment, Muir telephoned Sir Michael Havers, the Solicitor-General, to inform him that some documents would be sent to the Attorney-General but did not give details. In the afternoon, Poulson, through his solicitor, explained that the Barber family lived near the Poulsons,[9] their daughters were friends and it was agreed that the two girls would hold a party in rooms in the Barbers' house which needed decorating. The costs, including decoration, were shared by the two families. Notwithstanding this innocent explanation, at the end of the hearing, Muir told the Registrar that the papers, with his junior counsel's note, would be sent to the Attorney-General in an envelope headed "*Most confidential – Law Officers only.*"

It is unlikely that Sir Peter felt it necessary to trouble the Prime Minister with these documents, but they troubled him. Whether they did so when Sir Peter first saw them is not known, but he took action after The Times leader on 4 July: "*Justice Should Never Be Secret*", in which the newspaper criticised the Attorney-General's decision the previous August to try to stop the public examination and complained that Poulson's examination was now taking place in private "*behind doors which were not only closed but sealed with strips of brown paper*". If the documents that Muir had sent him leaked (which they never did), there would be an uproar with the press suggesting that the arrests had been rushed through to prevent the embarrassment of a

9. Anthony Barber lived at The Red House, Wentbridge, near Pontefract and in 1975 took the title Baron Barber of Wentbridge.

10. In his memoirs, *A Price Too High*, Sir Peter gives a more colourful description of the meeting on 22 June. He says that when he told Muir and David about the arrests, Muir thanked him and said: "*Well, that has stopped the next stage of my cross-examination, which would have been interesting. I was just coming to a matter concerning the Chancellor of the Exchequer, Anthony Barber.*" He says he froze and cravenly sought the protection of a letter from Muir. This description does not accord with the transcript of the hearing and the letters of 5 July.

11. On 18 July 1972 John King and Thomas Sweetman, who had been involved in the transfer, were privately examined. Mrs Poulson was also privately examined.

second minister being named in the public examination. Accordingly, on 5 July, Sir Peter wrote to Muir, asking him to confirm his description of their meeting and subsequent telephone call and to confirm that Muir did not acquaint Sir Peter with the questions he would put to Poulson at the private examination or give Sir Michael Havers any details of the documents he was going to send. Muir replied the same day, giving the confirmations requested and adding that he did not know about the Barber documents until the Sunday evening. On 6 July, Sir Peter thanked Muir for his reply.[10]

The outcome of the public examination

By 25 June 1973, the claims against the estate had increased to £600,000, half of which were local authority negligence claims. To meet those claims, the trustee had recovered £190,000, including £130,000 paid by a City consortium to settle claims relating to the transfer to IPD. Mrs Poulson had offered a further £40,000 to settle claims against her.[11]

In view of the exceptional nature of Poulson's public examination, stretching over nine days, and the hostile reaction to it from some quarters, it is perhaps worth making some concluding points. First, Poulson's bankruptcy was probably the largest since the war. To unravel his complex affairs, the trustee had to investigate a huge number of transactions under which funds were dissipated. Second, Poulson was an unhelpful witness. He was often evasive, contradictory, or forgetful; even to the extent of denying knowledge of his own correspondence. Thirdly, a bankruptcy examination is not like the examination of a witness at a trial. It is concerned to elicit information. Questions about apparently trivial matters may reveal a line of inquiry which produces benefit to the estate. Fourthly, the probing of the facts at public and private examinations was a successful litigation strategy. Third parties were made aware of the strength of the claims against them and could make offers of settlement. Except for the claims against Pottinger and Symes (both of whom made settlement payments), the trustee did not have to issue proceedings. Finally, it should not be forgotten that the trustee's lawyers were, in the words of David Graham, "*battling against the establishment*". Had they not persisted with the public examination, which was so unpopular with the Government and many powerful figures, it is far from certain that the criminal cases would have been pursued with the vigour that they were. ■

Acknowledgements

Grateful thanks to:

Professor David Graham QC and Michael Crystal QC for sharing their memories of the Poulson case.

Sir Edward Evans-Lombe, HH Peter Beaumont QC, Christopher Brougham QC and John Briggs for sharing their memories of Muir Hunter QC

Dr John Tribe, senior lecturer in law at the University of Liverpool, for giving me a copy of his article about the public examination and for making the Cork Archive available to me. Without it, I would not have been possible to write this article under coronavirus restrictions.

(left) Leeds International Pool, designed by Poulson and noted for its brutalist architecture, demolished in 2009

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The Cork Archive, containing a section on the Poulson case, which includes copies of examination transcripts and the correspondence between Muir Hunter and the Attorney-General of 5 and 6 July 1973

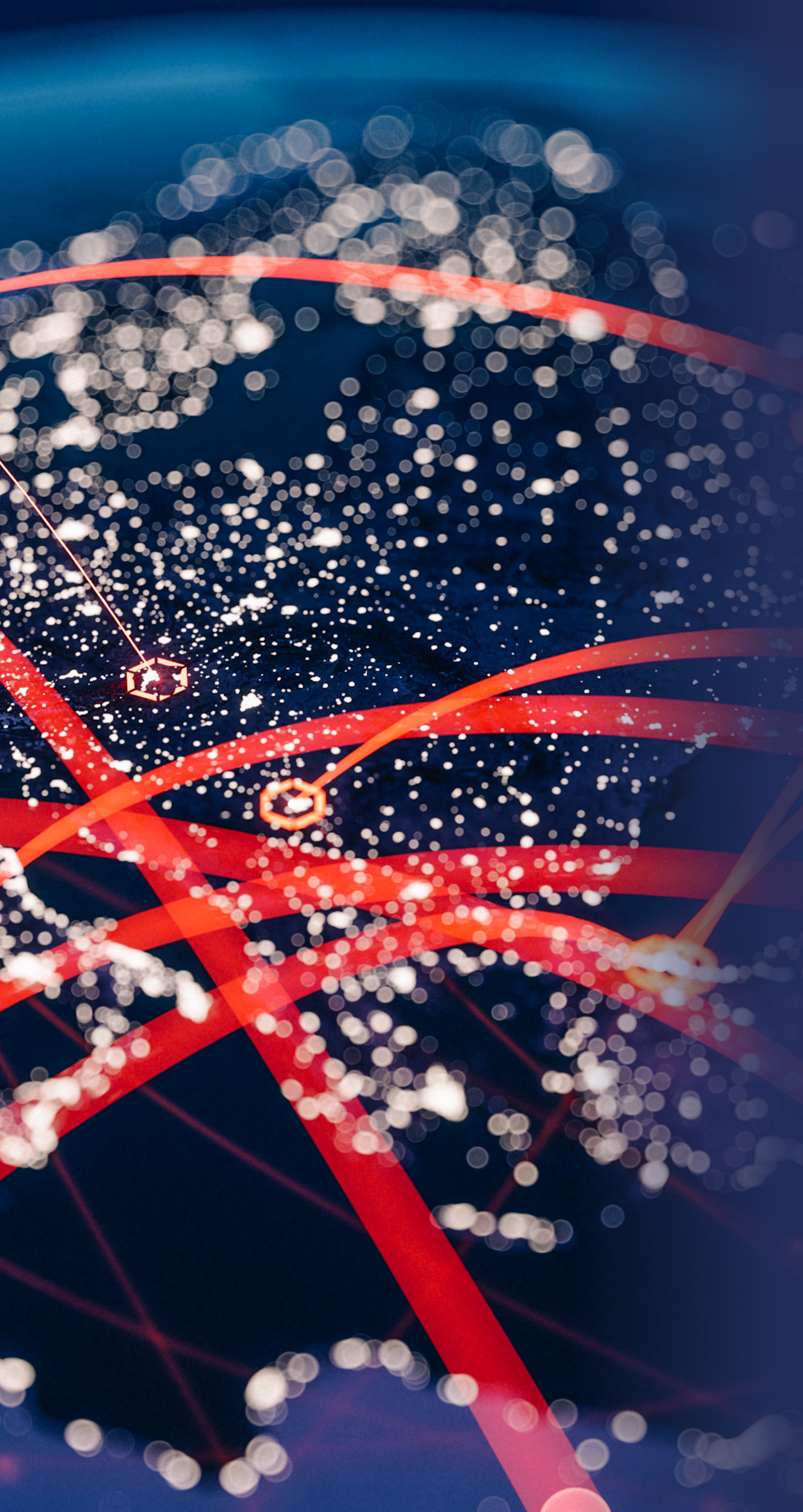
The Times Archive

Wikipedia

The "Shifting Sands" of cross border insolvencies

MIKE SAVILLE
(GRANT THORNTON)

RICHARD FISHER QC
(SOUTH SQUARE)



Given the nature of recent world events, choosing what jurisdiction in which to begin cross border insolvencies can seem like a guessing game.

Our Shifting Sands report, a joint project between Grant Thornton and South Square, explores the changing dynamics of international jurisdictions in insolvency proceedings.

This report follows the Discord To Harmony paper we produced in 2015. At that time, the report highlighted the growing prominence of offshore jurisdictions in international insolvencies and the move towards greater harmonisation.

Much has changed since then. The past five years has seen a series of unprecedented shocks:

- the decision on Brexit
- the election of the Trump administration and the events surrounding his departure
- the ongoing COVID-19 situation and its impact on the global economy

For the report, we surveyed 150 lawyers and market participants in more than 25 on and offshore jurisdictions. Their views paint a picture of a changing cross-border insolvency landscape, and this was all before the full ramifications of COVID-19 were known to us.

The UK was considered to be the most-effective insolvency regime amongst the global participants surveyed. This is some consolation given the potentially adverse implications that Brexit may have on the UKs share of the global restructuring market.

Offshore access to funding, and the cost and speed of hearings remain challenging. These issues were cited as challenges back in 2015 and remain the areas where offshore jurisdictions are rated less strongly.

Although our research reveals a general preference to instruct local advisors, 60% of respondents said the presence of cross border aspects would have a significant influence on their decision to instruct counsel or insolvency practitioners based onshore.

For further insights into cross border insolvencies, download the full report here:
https://southsquare.com/the-shifting-sands-of-cross-border-insolvencies/

News in brief

Updated Pre-Pack Legislation

Towards the end of February, the UK Government published amended draft legislation around the scrutiny of pre-pack administrations. The regulation follows a report published by the Government on 8 October 2020, in which recommendations were made to improve the transparency of pre-pack sales in administration. The headlines from the report were –

(1) An administrator will be unable to dispose of property of a company to a person connected with the company within the first 8 weeks of the administration without either the approval of creditors or an independent written opinion (positive or negative).

(2) The connected party purchaser will be required to obtain the written opinion. The provider of the opinion (the evaluator), must be independent of the connected party purchaser, the company and the administrator, and must meet certain eligibility requirements.

The regulations largely follow the recommendations made by the report and will now be debated in both Houses of Parliament before taking effect from 30 April 2021.

The Insolvency Service ('IS') received a total of 15 responses to its request for feedback on the original draft regulations published in October of last year. The majority of the concerns raised have been dismissed by the IS, but as a result of the feedback:

- with regard to concern over the connected person's ability to go 'opinion shopping', the regulations will require the evaluator to state in the report that they have considered any previous report obtained; and
- with regard to the concern of lack of requirements as to the qualification of the evaluator, the regulations will be tightened to specify that the evaluator requires professional indemnity insurance (PII) that will provide them with cover in the role of evaluator, and the administrator will also need to be satisfied that the evaluator has sufficient knowledge and experience to produce the report.

R3, the insolvency and restructuring trade body, had voiced concerns that these '*tweaks*' are minor and that, particularly with regard to the evaluator, the measures require further improvement.

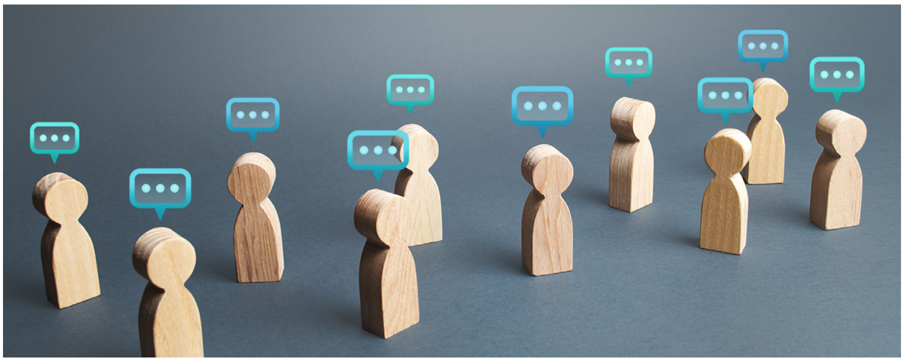
Artificial Intelligence in Dispute Resolution:

On 21 January 2021 Robin Dicker QC gave the Senior Practitioner Lecture at the Oxford Faculty of Law, entitled *"AI in dispute resolution: possible roles and legal limitations"*. The talk focused on how our existing legal process may be transformed by artificial intelligence over the coming years. A copy of the talk can be found at https://southsquare.com/wp-content/uploads/2021/03/2021-01-Oxford-Talk-on-AI-12pt-PDF-1-RD.pdf

Mask-up-manship

Leading the field in the mask stakes must be Lord Justice Nugee, whose daughter, Rose, commissioned the Savile Row's bespoke embroiders, Hawthorne & Heaney, to fashion a face mask to complement his ceremonial robes. Made from black, washable silk and lavishly embroidered with three shades of gold thread, the mask also has the initials CGN stitched into one corner so that none of the other judges can mistake it for their own. How very smart!

Beware the negative review, my son



A man who left a negative review of solicitors firm Summerfield Browne on the TrustPilot website has been ordered to pay £25,000 in libel damages.

Philip Waymouth engaged the London-based law firm online to provide advice to him in a dispute over the enforcement of a court order, paying a fixed fee of £200. However, unsatisfied with the service he received he left a review on TrustPilot accusing the firm of being "*another scam solicitor*", going on to claim that the advice he received from the law firm had been "*full of errors showing a lack of understanding for the situation and the law*".

Summerfield Browne took legal action, stating that this was untrue and defamatory and brought a claim in the High Court seeking damages and an order that TrustPilot remove the comments from their website. The firm produced evidence that the number of business enquiries it received had dropped since the publication of the review, and that Mr Waymouth had not engaged with Summerfield Browne's complaints procedure before leaving the review.

Finding for the firm, Master David Cook said that Waymouth "*tends to shoot wildly from the hip*" and that it was "*beyond any dispute*" the words in the review "*had a clear tendency to put people off dealing with the claimant firm*". As a result, Mr. Waymouth now has a bill more than 100 times greater than his initial outlay.

As well as awarding damages, the Judge made an order requiring Trustpilot to remove the defamatory review on the basis that Waymouth was unlikely to take it down himself. As the review site was not represented at last month's hearing, the court order contained a provision that it may apply for it to be varied or discharged.

In a statement, Trustpilot said it had not yet been served with any order requiring the post to be removed but, in the event this did happen, the order would be challenged, citing concerns over freedom of speech.

The Gabriel Moss Memorial Lecture

INSOL Europe Academic Forum renamed the key-note lecture for its annual conference in Copenhagen in September 2020. The Gabriel Moss Memorial Lecture was given in honour of our late colleague from South Square who was a keen contributor to and supporter of INSOL Europe.

The Lecture was given by Professor Ignacio Tirado (General Secretary of UNIDROIT), who talked of the protection of creditors' rights within the framework of the Preventive Restructuring Directive.

Double-Dip?

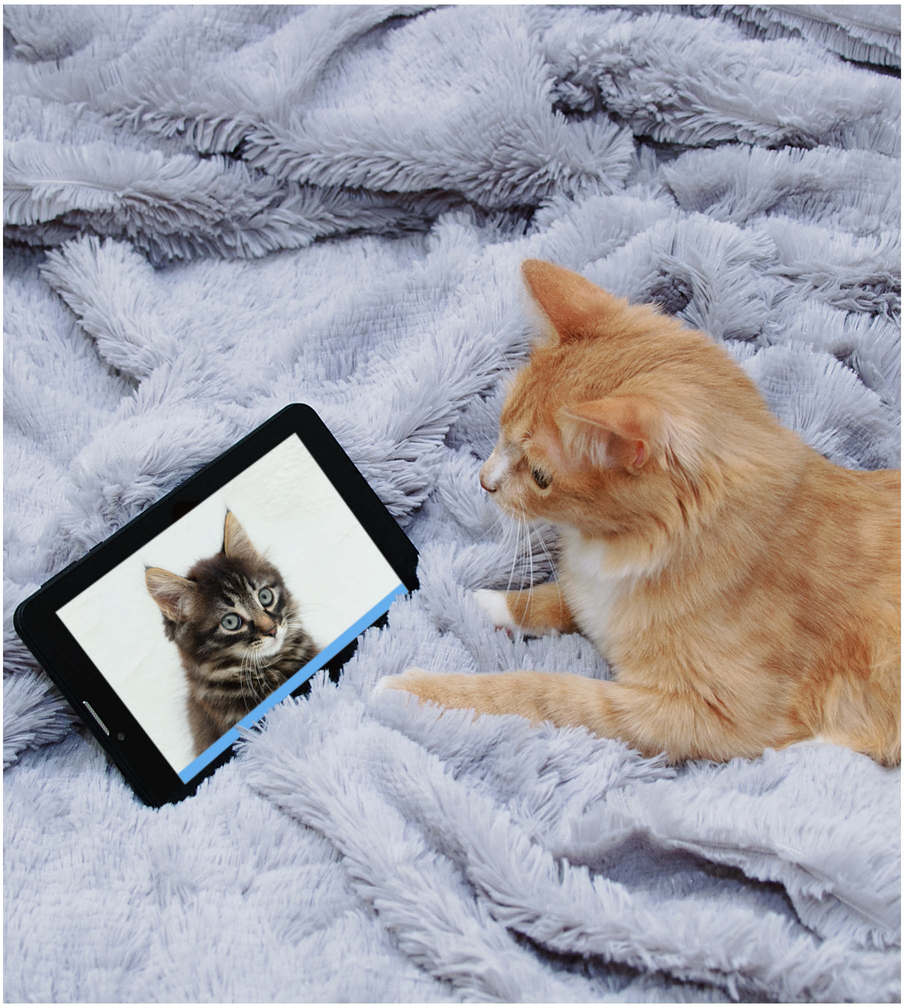
Both the UK and Eurozone nations' escalating restrictions to tackle the coronavirus pandemic have significantly slowed economic activity, fuelling fears of a double-dip recession. Two successive quarters of falling gross domestic product (GDP) are needed to qualify for a recession and a double-dip involves two recessions, separated by a small gap.

Travel to retail and hospitality venues and workplaces, as well as consumer confidence and spending, all took a hit in the first weeks of 2021, according to high-frequency activity trackers, which are said to offer a more timely gauge of the economy than official statistics.

In the UK, figures from the Office for National Statistics show that the pandemic has caused the greatest contraction in GDP for over 300 years. The 1973-1975 double-dip recession, the last that the UK experienced, was triggered by OPEC's oil embargo for countries that supported Israel in the Yom Kippur war. Soaring oil prices led to inflation and weak growth.

Stagflation (persistent high inflation combined with high unemployment and stagnant demand in a country's economy) exposed UK industrial weaknesses, and union power helped drive inflation above 20 per cent.

News in brief



Lessons in Zoom:

Whilst virtual meetings may have become commonplace over the last year, it seems many have not quite got to grips with the technicalities, with mishaps ranging from the hilarious to the career-ending. Lawyers are not immune.

Most recently, at a remote court hearing in a district of southwest Texas, Rod Ponton, an attorney for Presidio county, appeared as a white kitten. When Judge Roy Ferguson calmly pointed out that he thought the lawyer had a filter turned on, the image of the cat nodded vigorously and replied "*It is, and um, I don't know how to remove it*." After the event Judge Ferguson wrote: "*Everyone involved handled it with dignity, and the filtered lawyer showed incredible grace.*"

Sadly, the same could not be said for Héctor Cipriano Paredes Robles, a lawyer supposed to be taking part in a hearing involving a local criminal gang (Los Z de Chanchamayo) in the central Peruvian region of Junin. During the proceedings Robles, under the impression that the court was in recess, was seen stripping off and having sex with a woman believed to have been his client connected with the gang.

A court assistant repeatedly tried to warn the lawyer that his antics were clearly visible on the public feed, to no avail. Robles had switched off the sound from his computer but not the camera. The Junin Bar Association confirmed that an investigation into the lawyer's professional future was under way.

Guidance on Cross-border Insolvencies

The Insolvency Service has published new guidance for insolvency officeholders regarding the applicable frameworks in the different EU members states from January 1, 2021, as a starting point towards seeking recognition for UK insolvency proceedings and dealing with assets in the EU. The guide can be found here: https://www.gov.uk/government/publications/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states-from-1-january-2021/

New Chancellor of the High Court

Following the elevation of Sir Geoffrey Vos as Master of the Rolls, Sir Julian Flaux has been appointed Chancellor of the High with effect from 3 February 2021.

The Chancellor of the High Court (CHC) is one of the most senior judges in England and Wales and holds day-to-day responsibility for the operation of the Business & Property Courts (B&PCs) in London and its seven city centres across the country, in consultation with the President of the Queen's Bench Division.

Originally created as the office of Vice-Chancellor in 1813 and having undergone a number of changes in role since then, the CHC also presides in the Court of Appeal (Civil Division) and sits at first instance in the B&PCs.

Coronavirus Zombies

Britain's government has risked creating a legion of '*zombie*' companies by encouraging banks to lend £45 billion to small businesses with a 100% state guarantee during the COVID pandemic, warned think tank The Resolution Foundation in mid-February of this year.

Whilst stating that most of the support given by the government to businesses and workers was useful, it warned that the structure of the Bounce Back Loan Scheme - allowing small businesses to borrow money equivalent to three months' sales, up to £50,000 - gave banks an incentive to keep alive firms with weak long-term prospects.

However, The British Retail Consortium (BRC) reported that the country's three national lockdowns have cost 'non-food' stores – mainly '*non-essential*' retail – an estimated £22 billion in lost sales. For example, clothing retailer Ted Baker reported a Q4 47% reduction in sales and many retailers are expecting incremental costs associated with Brexit, reflecting extra duty and shipping costs. The BRC has called for further extensions to business rates holidays and on the moratorium on debt enforcement by landlords.

Small talk for Lawyers

BPP University Law School is offering students what is thought to be the first module in chitchat and networking, considered by the course designer, Georgie Nightingall, to be vital in opening social doors.

The university decided to launch the classes after internal polls found that 43 % of its students feared they would be judged by the way they speak, and a third worried about being asked a question they did not know how to answer.Previous research has found that nearly half of young people feel more comfortable communicating over digital platforms than in person.

22 sites off the menu for Prezzo

Italian chain Prezzo will permanently close 22 restaurants after being bought out of pre-pack administration by private equity firm Cain International in December 2020, with the loss of 216 jobs.

Prezzo was forced to go into administration after failing to reach agreement with landlords on rent payments, and first put itself up for sale back in July 2020 in response to the first coronavirus lockdown.

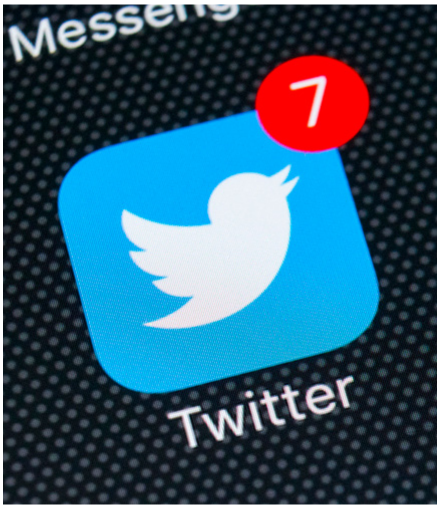
A Tweet Too Far

Barrister Jon Holbrook was expelled from Cornerstone Barristers Chambers in February this year after he refused to take down a tweet in which he described a black teenage girl, who had won a settlement worth £8,500 for alleged discrimination, as a "stroppy teenager of colour".

From the ages of 14 to 17 Ruby Williams was repeatedly sent home from school because of her Afro hairstyle, which contravened the school regulations then in place in terms of size. Her case was brought by the Equality and Human Rights Commission under the Equality Act in 2018, and they later described in a video how they had assisted Ruby and her parents.

Commenting on that video, in January of this year Mr. Holbrook tweeted that "The Equality Act undermines school discipline by empowering the stroppy teenager of colour". He was then widely pilloried for his comment on the social media platform.

After refusing to remove the tweet, Cornerstone Barristers undertook an internal investigation resulting in Mr. Holbrook's expulsion from the set. Mr. Holbrook claimed that he had, in fact, resigned from the set 4 days before the expulsion took place. Writing in The Critic, Mr. Holbrook defended his tweet and stated his "unblemished professional record" of thirty years had been ended by a "one sentence tweet on a platform designed to be polemical."



News in brief

'Burn It'

Grocery delivery business Ocado has been granted permission to make a committal application against Raymond John McKeeve, formerly a partner with City firm Jones Day, who advised that potential evidence in litigation be destroyed.

McKeeve was both a friend and legal adviser to Jonathan Faiman, one of the Ocado founders and owner of a start-up company called Project Today. Ocado had commenced proceedings against various parties, including Mr. Faiman, alleging that confidential information had been misappropriated and could be destroyed unless prohibited by court order.

Within minutes of being notified that an order for search of premises had been made against his clients, McKeeve used 3CX, a private messaging system, to contact the IT manager of his client's firm with instructions to "burn it". McKeeve admitted sending the instruction, alleging it referred only to 3CX and not because the material contained within the app was relevant to the underlying case, but because of references to his wife, former Brexit Party MEP Belinda de Lucy.

Ocado had been refused permission to apply to commit McKeeve for contempt of court by Mr Justice Marcus Smith in the High Court last year. Following a challenge in the Court of Appeal, Lord Justice Davis said in Ocado Group PLC & Anr v McKeeve, that decision was "plainly wrong".

He added: "The obvious inference, in the absence of any explanation, was that the 'burn' instruction, given at a time when it was known that Ocado had started proceedings against Mr McKeeve's clients, was that destruction of (at least) the 3CX app was intended in order to prevent Ocado studying it for the purposes of its case: an intent to thwart the due administration of justice, in other words."

Permission was granted to make the committal application. It was also ruled that Marcus Smith J should not hear the trial and committal application.

Consultation on Debt Relief Orders

Proposals have been outlined by the government to increase the financial eligibility criteria for debt relief orders (DROs), helping more people dealing with financial difficulties to get a fresh start.

Research shows that the demand for debt advice could increase by up to 60% by the end of 2021 and that around 3 million more people than before the pandemic will need support with problem debt by the end of 2021.

The government is publicly consulting on changing the eligibility criteria to enter a DRO to:

- increase the total amount of debt allowable to £30,000 (from £20,000);
- increase the value of assets owned by the individual to £2,000 (from £1,000); and
- increase the level of surplus income to £100 (from £50) per month.

A DRO is a low-cost and easily accessible debt solution that helps vulnerable people. Delivered in partnership with the professional debt advice sector, DROs protect people from creditor action and after 12 months all debt within the order is written off.

Construction collapse

Nearly 40,000 UK construction firms could face insolvency by the end of April this year according to data from the Office of National Statistics. The latest data set focusing on the business impacts of COVID-19 shows 13.6% of construction companies have low, or no, confidence that their businesses will survive the next three months - a predicament affecting 39,491 firms.

Red Flag Alert, a supplier of business information and credit reports, has warned that their collapse would mean £2.2 billion in unpaid invoices are at risk of disappearing from construction supply chains. Their data reveals that when companies go out of business, they now leave behind an average insolvent debt of £55,949. The rate of insolvent debt in the construction industry increased by 6.6% in 2020 – double the rate of growth in total UK insolvent debt – despite the Government's coronavirus support measures.

The construction industry is facing a double-whammy of mothballed projects thanks to the pandemic, and a huge increase in shipping costs with carriers reluctant to take bookings for the UK because of port congestion and additional paperwork thanks to Brexit. According to the Buildings Material Foundation the shipping cost of one container of materials imported from the Far East has risen from $2,100 to around $15,000 and above.

A CVA at Sea

Harding Retail, which operates 250 boutiques on 80 cruise ships, has implemented a company voluntary arrangement (CVA) after 10 months of no revenue.

In retail CVAs, landlords are typically asked to agree to store closures or lower rents while other creditors, such as tax authorities, employees and suppliers, are left relatively unscathed. However, the nature of cruise-line stores means that these usually significant stakeholders are either not present or have only small claims. Cruise lines themselves generally take a percentage of sales from on-board concessions rather than charging a fixed rent, and most staff are employed on short-term contracts that reflect the seasonality of the industry. Selling mostly fashion items, jewellery, watches, perfume and alcohol, many of Harding's creditors are ultimately owned by global conglomerates.

It is believed that Harding is asking suppliers to accept reduced amounts in settlement of unpaid invoices, suggesting an upfront payment alongside a mechanism for creditors to recover up to four-fifths of their arrears, depending on its future financial performance.

The cruise industry has been severely affected by the Covid-19 pandemic, but there are hopes that, as the typically older customers are amongst the first cohorts to be vaccinated in many countries, cruise lines may be able to start operating again later this year.

Fortress Restructuring to be wound-up

An investigation by Scottish newspaper, The Daily Record, has led to the lodging of a petition to wind up Fortress Restructuring Limited.

Fortress Restructuring Limited - which claims online to be able to write off all business debts including those owed to HMRC, leaving business owners able to restart their business with assets intact - is allegedly owned by Thomas Whyte, father of Craig Whyte. Whyte junior is perhaps best known for his controversial stint at Rangers FC, following which he is still serving a 15-year ban from being a director or in a senior management position of any business.

The newspaper claims to have passed to the Insolvency Service evidence that Craig is the de facto director of Fortress, despite his father Thomas being the sole officially listed director. A reporter for the Daily Record taped phone calls with Fortress Restructuring where he allegedly recognised the voice of Craig, passing himself off as his 74-year old father.

The Daily Record also claims to have unearthed evidence of Craig's directorship of the Dutch company that appears to have close links to the Whytes' UK firm, using an identical website.

News in brief

Lady Justice Rose joins the Supreme Court

Lady Justice Rose joins the Supreme Court

Following the retirement of Lady Black from the Supreme Court on 10 January 2021, Lady Justice Rose will join the Supreme Court on 13 April 2021.

Dame Vivien Rose took her first degree at Newnham College, Cambridge and a post-graduate degree at Brasenose College, Oxford. She was called to the Bar by Gray's Inn in 1984 and was in practice at Monckton Chambers for ten years. She was appointed Standing Counsel to the Director General of Fair Trading in 1992.

In 1995 she left private practice to join the Government Legal Service serving as a legal adviser on financial services at HM Treasury until 2001. In 2002 she was appointed to the Senior Civil Service and moved to the Ministry of Defence as Director of Operational and International Humanitarian Law. From 2005 to 2008 she was seconded to the Office of Counsel to the Speaker of the House of Commons.

In 2006 she was appointed to her first judicial role as a fee-paid Chairman of the Competition Appeal Tribunal. She was appointed to further tribunal posts and became a Recorder in the criminal jurisdiction, South Eastern circuit in 2010. In May 2013 Dame Vivien was sworn in as a High Court Judge in the Chancery Division. She was President of the Upper Tribunal (Tax and Chancery Chamber) between 2015 and 2018 and was a nominated judge of the Financial List from its inception.

Metal Fatigue

On 8 March Greensill Capital, a chain financier, called in the administrators, finding itself unable to repay a $140 million loan to Credit Suisse and experiencing defaults from one of its main clients, GFG Alliance, said to be in the region of $4 billion. GFG Group own British Steel and a South Australian steel mill in Whyalla. Unless GFG can refinance around 6,000 jobs in the UK and Australia are at direct risk, with thousands more dependent upon it as either contractors or suppliers. The GFG mill also underpins the economy of the entire town of Whyalla.

Greensill, led by the former Bundaberg sugar farmer Lex Greensill, had been trying to sell itself to private equity group Apollo Global Management, but action against the group by regulators in Europe and revelations in an Australian court that its insurance was under investigation unravelled its complex structure over the past week.

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

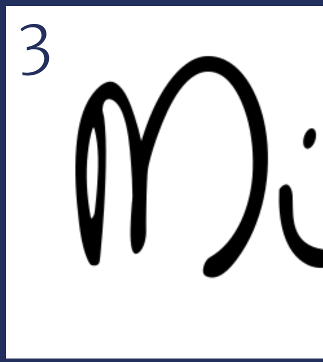
SOUTH SQUARE CHALLENGE

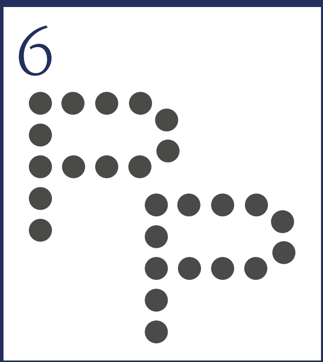
In the spring-like spirit of renewal that this season brings, our first Challenge of 2021 asks you to work out the various brands from the images opposite, and then identify the new purchasers who have rescued the brands, though in many cases not the brand stores, from demise.

Please send your answers to Kirsten, either by e-mail to kirsten (kirstendent@southsquare.com) or to the address on the back cover, by 1 May 2021. 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. Good Luck!

The winner of our fiendishly difficult word search in the December 2020 Digest is Bhavesh Patel of Travers Thorp Alberga who found the greatest number of correct words in the grid. All the words below were hidden:

1. BLUSDAY
2. CIRCUIT BREAKER
3. COMMUNITY SPREAD
4. CONTACT TRACER
5. CORONAVIRUS
6 . COVID
7. COVIDIOT
8. ELBOW BUMP
9. FACEMASK
10. FLATTEN THE CURVE
11. FURLOUGH
12. HAND GEL
13. HAND SANITIZER
14. HEROES
15. KEY WORKERS
16. LOCKDOWN
17. MASKNE
18. MILEY CYRUS
19. NEW NORMAL
20.PANDEMIC
21. PPE
22. QUARANTINE
23. R NUMBER
24. REMOTE HEARING
25. REMOTE TRIAL
26. RULE OF SIX
27. SELF ISOLATION
28. SKYPE
29. SOCIAL DISTANCING
30. SPANISH FLU
31. SUPER SPREADER
32. WUHAN
33. ZOOM





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SOUTH SQUARE

South Square "Dominates in the insolvency and restructuring market." **LEGAL 500**

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Felicity Toube QC
Mark Arnold QC
Jeremy Goldring QC
David Allison QC
Tom Smith QC

Daniel Bayfield QC
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Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn
Stephen Robins
Marcus Haywood
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