Digest

SOUTH SQUARE

The UK Rescue Moratorium and the Australian SBR

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The BVI Year:
A round up from the islands by Phillip Kite and Peter Ferrer of Harneys

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Mark Phillips QC and Clara Johnson take a look at the UK Government's plan to deal with COVID period debt

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

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SOUTH SQUARE

From the editors

MARCUS HAYWOOD AND WILLIAM WILLSON

Welcome to the Summer 2021 edition of the South Square Digest.

This edition comes as many of our readers will be commiserating England's loss to Italy in the finals of Euro 2020 at Wembley. Whilst England's bid to end their 55-year wait for a major trophy ended in the familiar agony of defeat in a penalty shootout, the England team has provided the country with some wonderful memories and much needed optimism in difficult times.

Meanwhile, away from sport, it seems likely that England will move to the final stage of easing Covid restrictions on 19 July, when almost all legal restrictions on social contact will be removed. Whilst the Prime Minister has said it was vital to proceed with "caution", warning "this pandemic is not over", with the current wave of the pandemic expected to peak in mid-August concerns will remain as to whether the complete easing of restrictions is premature.

So as to avoid any "cliff edge" for businesses currently protected by the temporary measures restricting evictions and winding up, on 16 June the Government announced, amongst other things, an extension until 30 September 2021 of the current restrictions on winding up petitions together with an extension of the moratorium preventing landlords from forfeiting commercial leases and evicting tenants for non-payment of rent until 25 March 2022. Plans have also been announced for new legislation to help tenants and landlords to work together to reach agreement on how to handle outstanding unpaid rent arrears accrued during periods in which businesses have had to remain closed owing to COVID-19 restrictions. The plans include proposals for a form of binding arbitration process, in the event consensus cannot be reached.

These important announcements are all considered in this edition of the Digest in an article by Mark Phillips QC and Clara Johnson, "*Moving on to saving livelihoods – the Government's plan to deal with COVID period debt*".

Reflective of the growing easing of travel restrictions, we also have a number of articles with an international dimension in this edition of the Digest. In our lead article Felicity Toube QC and Hilary Stonefrost, together with Scott Atkins and Kai Luck of Norton Rose, review the new rescue procedures that have introduced in the last 12 months in both the UK and Australia. In our regular offshore piece, Philip Kite and Peter Ferrer of Harneys, BVI give a us a roundup of developments over the last year in the British Virgin Islands in what has been a busy period of cases and legislation. Finally, Gareth Steen and Emma Freeman of Dentons, Ireland consider what Ireland can offer its closest neighbour as it looks for candidates within the European Union to collaborate with in international restructurings post-Brexit.

In other articles, Lottie Pyper considers "*How to sanction a contested restructuring plan under Part 26A of the Companies Act 2006*" in the light of the judgments in *Virgin Active*, Marcus Haywood and Stefanie Wilkins consider the new pre-pack regulations and Toby Brown considers "*When are member of companies fiduciaries?*".

Following his retirement from practice at the Bar, we have a piece celebrating Michael Crystal QC's near 50 years of practice in which he was a leading advocate at the commercial bar and a bright light in the fast developing world of insolvency and restructuring.

Meanwhile, in our regular pieces Daniel Judd turns his Legal Eye to "*Law, Literature, and Lifeboats*" and, in Euroland, Professor Christoph Paulus gives us his view in relation to developments from across the Channel.

Last but by no means least, Simon Mortimore QC continues his history of South Square from its origins to the present day, this time with

Part 2 of the tale of Muir Hunter QC and the Poulson Bankruptcy.

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 decision of Mr Justice Zacaroli in *New Look* relating to challenges to CVAs (in which Tom Smith QC and Adam Al-Attar appeared) and of Mr Justice Snowden sanctioning the *Virgin Active* restructuring plan (in which Robin Dicker QC, David Allison QC, Tom Smith QC, Georgina Peters, Ryan Perkins and Lottie Pyper appeared). 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 Mark Arnold QC for his Case Digest editorial.

To keep you busy over the summer holidays, this edition's South Square Challenge is a light-hearted competition asking you to match the South Square member with their pet. But watch out – some barristers have more than one pet!

In the meantime, until the next edition, we wish all our readers a good summer.

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, which marks the welcome return to physical print as well electronic, with a hard copy being sent to all those who previously received a hard copy. 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

The UK Rescue Moratorium and the Australian SBR

Independence and Investigation Difficulties for Practitioners

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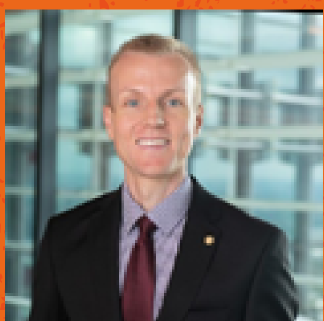

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New rescue processes have been introduced in both the United Kingdom and Australia in the last 12 months. While the passage of the implementing legislation was catalysed by the significant economic and financial impact COVID-19 has had since March 2020 in both countries, and the world, these new processes are now permanent features of each insolvency regime. Alongside these permanent changes the duration of the temporary pandemic relief measures has continued to be extended.[1]

Overview

In the United Kingdom, a new formal rescue process was enacted, in the form of a restructuring plan with a cross-class cram down in the *Companies Act 2006* (UK) (***"Companies Act"***) which is (apart from the cram down provisions and various other modifications) modelled on the scheme of arrangement in Part 26 of the *Companies Act*. In addition, the same legislation, the *Corporate Insolvency and Governance Act 2020* (UK), also introduced a standalone moratorium in new Part A1 of the *Insolvency Act 1986* (UK) ("***Insolvency Act***") designed to promote *informal* rescue.

The moratorium is the focus of this article. In essence, this process enables eligible companies to file for a minimum 20 business day moratorium, effective against both secured and unsecured creditors and under the supervision of an independent monitor, in circumstances where it is likely to result in the rescue of the company as a going concern. In practice, during this time, directors will work to negotiate an informal restructuring plan or otherwise position the company for a formal rescue process.

In contrast, the new small business restructuring ("**SBR**") process in Australia, which has applied since 1 January 2021 by way of amendments to the *Corporations Act 2001* (Cth) ("***Corporations Act***"), is limited solely to SMEs. It takes place under the supervision of a small business restructuring practitioner ("**SBRP**") while directors remain in possession of the company. Unlike the United Kingdom Part A1 moratorium, the Australian SBR process also expressly incorporates the development of a formal restructuring plan as an intrinsic part of its operation rather than as a distinct process that can result in an informal restructuring, a plan or a scheme, or a formal insolvency process.

Despite those differences, however, a monitor under the Part A1 moratorium and a SBRP under the SBR process face the same lack of clarity about what is expected of them in terms of their independence and investigatory duties. Given the collaborative working relationship contemplated by each of the debtor in possession ("**DIP**") modelled processes between directors and the monitor/SBRP, a broader interpretation of a practitioner's independence obligations might potentially be supported by the existing legislation. That said, in Australia, it is unlikely the courts would take this view given the traditional strict approach to the independence requirements of other insolvency practitioners, especially in the context of pre-appointment work. To date, the United Kingdom courts have not taken a similarly strict approach to independence requirements, in particular in the context of pre-pack sales in administration (but see further below).

In relation to investigations, there is a strong argument that, given the intention for Part A1 and the SBR process to operate as simple, expedient and cost-effective insolvency alternatives, it would not be feasible for a monitor or a SBRP to engage in the level of investigations expected of a liquidator or administrator. Unfortunately, that limitation of the monitor's role is not reflected in the express wording of the current legislation.

It is suggested that clarifying regulations should be introduced to provide practitioners with the certainty they require, in order to avoid a disincentive to the acceptance of future appointments and to avoid such appointments being prohibitively expensive, and instead to promote the use of the new processes in a manner that will enhance the rescue culture in both countries.

The United Kingdom moratorium

The new Part A1 moratorium is intended to facilitate the rescue and restructure of a company as a going concern. It is designed as a standalone pre-formal insolvency moratorium. It does not itself provide for the development and implementation of a restructuring plan, but rather is intended to encourage that outcome by giving a company breathing room from enforcement actions as it seeks to negotiate its future. Those negotiations may lead to an informal plan, or the company may enter into the new plan or the

1. For example, in Australia, between 25 March 2020 and 31 December 2020, the minimum statutory demand threshold was increased from $2,000 to $20,000 and the period for a debtor to respond to a demand was increased from 21 days to six months. Additionally, directors were provided with a moratorium on insolvent trading liability during that time. In the United Kingdom, in response to the economic consequences of the pandemic, since 27 April 2020 creditors have been prevented from presenting a winding up petition based on a statutory demand served since 1 March 2020 and is also prevented from presenting a winding up petition based on a company's inability to pay its debts unless the creditor has reasonable grounds to believe that COVID-19 had not had a financial impact on the company or that the company would have been unable to pay its debts irrespective of the impact COVID-19 had on the company. The periods during which these temporary measures continue to apply have been extended on a number of occasions. In the UK, the temporary restrictions on the use of statutory demands and winding up petitions, as well as further temporary relief for small suppliers from the prohibition of *ipso facto* provisions and the suspension of wrongful trading liability for directors, were extended to 30 June 2021 under the *Corporate Insolvency and Governance Act 2020* (Coronavirus)(Extension of the Relevant Period) Regulations 2021. The statutory demand and winding up petition restrictions were then further extended to 30 September 2021 under the Corporate insolvency and Governance Act

long-established scheme under the *Companies Act*, or a formal insolvency process pursuant to the *Insolvency Act*.

The moratorium is available to 'eligible companies',[2] a term that excludes important categories of companies such as banks, insurance companies, electronic money institutions, operators of payment systems, investment banks and investment firms and parties to capital market arrangements. In addition, a company that would otherwise be within the concept of 'eligible companies' cannot enter into a moratorium where the company has been subject to certain insolvency processes within the previous 12 months, although at present these criteria have been temporarily relaxed until 30 September 2021.[3]

It is a DIP model, under which the company's directors remain in office and can continue to cause the company to trade, but subject to the oversight of a monitor.

Upon an eligible company's directors filing the relevant documents with the court (there is no need for a court order[4] except where the company is already subject to a winding up petition[5] or is an overseas company[6]), the moratorium is available for an initial 20 business day period.[7] This period is then capable of being extended by the company's directors for up to a further 20 business days without creditor consent.[8] The moratorium can also be extended so that it applies for a maximum of 12 months (including the initial 20 business day period) with creditor consent,[9] or indefinitely with a court order.[10]

The moratorium is broad-based and applies to prevent enforcement by secured creditors (except in relation to the enforcement of a collateral security charge or security arising under a financial collateral arrangement), unsecured creditors and landlords during the moratorium period without the consent of the court.[11]

There are important underlying preconditions to the operation of the moratorium. Notably, the 'relevant documents' in connection with a moratorium filed by directors must include a statement from directors that the company is, or is likely to become, unable to pay its debts and statements from the proposed monitor that not only is the company an eligible company but also that, in the proposed monitor's view, it is likely that a moratorium for the company would result in the rescue of the company as a going concern.[12]

There are a number of issues limiting the effectiveness of the Part A1 moratorium in practice, arising from the wide scope of entities excluded as 'eligible' companies and the carve-outs in favour of creditors. Notably in the latter regard, debts and liabilities arising under a contract involving financial services, including loan agreements, are classified as 'pre-moratorium debts without a payment holiday' (whether falling due before or during the moratorium) that must continue to be paid for the moratorium to continue,[13] meaning that if substantial financiers do not support the moratorium, it will almost certainly need to be terminated. These limitations are not the focus of this article, which is concerned with the duties owed by the monitor, and how the current uncertainties in relation to those duties may impact on the uptake of the moratorium if left unresolved.

In addition to the requirement for a monitor to form the initial view that a proposed moratorium would likely result in the rescue of the company as a going

2020 (Coronavirus) (Extension of the Relevant Period) (No 2) Regulations 2021.

2. *Insolvency Act*, Part A1, s A2 and sch ZA1.

3. *Insolvency Act*, Part A1, sch ZA1 and the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021.

4. *Insolvency Act*, Part A1, s A7.

5. *Insolvency Act*, Part A1, s A4 (although the need for a court order is suspended until 30 September 2021 under the regulations referred to in footnote 3).

6. *Insolvency Act*, Part A1, s A5.

7. *Insolvency Act*, Part A1, s A9.

8. *Insolvency Act*, Part A1, s A10.

9. *Insolvency Act*, Part A1, ss A11-A12.

10. *Insolvency Act*, Part A1, s A13.

11. *Insolvency Act*, Part A1, s A21.

12. *Insolvency Act*, Part A1, s A6.

13. *Insolvency Act*, Part A1, s A18.

concern (as part of the preconditions for an original filing by the company's directors), Part A1 also places a positive duty on a monitor, once appointed, to oversee the company's affairs and also to assess (presumably on a continuing basis) whether it remains likely that the continuation of the moratorium will result in the rescue of the company as a going concern.[14] The monitor also has a further positive duty to bring the moratorium to an end by filing a notice with the court if, among other things, the moratorium is no longer likely to result in the rescue of the company as a going concern[15] or the company is unable to pay moratorium debts or pre-moratorium debts for which the company does not have a payment holiday during the moratorium.[16]

Part A1 also provides that a monitor is an officer of the court.[17] A useful summary of the standards expected of insolvency practitioners as officers of the court, which derive from the decision in *Ex parte James; In re Condon* (1874) LR 9 Ch App 609, was provided recently in *Lehman Brothers (Australia) (in liq) v MacNamara* [2021] Ch 1, [35]–[66]:

- officers must not (and the court will not permit them to) act in a way which, although lawful and in accordance with enforceable rights, does not accord with the standards which right-thinking people or society would think should govern the conduct of the court or its officers;
- the standards expected of an officer of the court therefore look beyond bare legal rights and duties;
- the question is determined with reference to what is fair and just in all the circumstances and the court will intervene to prevent an officer acting unfairly (even if the officer does not act or propose to act unconscionably); and
- this principle is applied to a failure to act as much as to positive acts.

However, in determining a monitor's independence and investigation obligations, it must be the case that it is necessary to have regard to the overarching purpose of Part A1.

Unlike the new SBR process in Australia, the Part A1 moratorium does not expressly contemplate a restructuring plan, whether informal or formal, as the means for rescuing the company as a going concern (the stated aim of the Part A1 process) and for a monitor to work with the company's directors to develop and implement such a plan.

Yet, in practice, in the absence of work to develop an informal plan, or otherwise to position the company for a formal restructuring, it may well be thought to be difficult for a monitor to form the required view (being a fundamental condition for the moratorium being able to remain on foot) that a moratorium will likely lead to the rescue of the company as a going concern. In that regard, the monitor will, necessarily, need to play an active role in reviewing the company's affairs and the intentions of directors with respect to the company's future and engaging with directors to suggest ways in which a contemplated plan may be cast and refined to meet the satisfaction of the monitor. The relationship between a monitor and the company's directors, who remain in office under the distinct DIP model adopted in the Part A1 moratorium, will therefore necessarily be more collaborative than the relationship between an administrator and directors, where it is the administrator who assumes sole control of the company's affairs and takes responsibility for developing a proposal for the company's future for the consideration of creditors while directors' powers are suspended.[18]

And yet, in the United Kingdom, unlike in Australia, to date courts have taken a broad view of administrators' independence obligations and have been less willing to canvass challenges to independence, including in the context of an administrator working with directors on a pre-pack sale before being appointed. The primary motivation has been to ensure efficiency and cost-savings, with a focus on practical measures to reduce the risk of any actual conflict such as requiring independent legal advice on distinct issues. Otherwise, 'a considerable amount of time, money and effort' spent on examining a company's affairs and working towards the best outcome for creditors could be wasted, when any potential conflict could be better dealt with through proactive and effective management.[19] It remains to be seen whether courts in the United Kingdom change their approach to independence obligations once the United Kingdom Government has acted on its intention, announced on 9 October 2020, to strengthen the professional regulatory standards of insolvency practitioners in the context of pre-pack sales made by administrators to connected persons.

On the present approach to administration, it is difficult to see how there could be an objection on the basis of purportedly compromised independence where there has been pre-appointment involvement between a monitor and directors which then continues throughout the moratorium. Indeed, it would seem to be a necessity that there is such involvement.

This is the approach the United Kingdom Government takes in the non-binding 'Guidance for Monitors' ("**Guidance**") published on 26 June 2020 in connection with the new Part A1 process. In the Guidance, it is stated:

> *'Prior to the moratorium the prospective monitor will need to engage with the directors and seek information about the company's assets, liabilities and business so that they are able to assess the company's financial position, prospects and eligibility for a moratorium. This will be a good opportunity for the prospective monitor to obtain a*

14. *Insolvency Act*, Part A1, s A35.

15. *Insolvency Act*, Part A1, s A38(1)(a).

16. *Insolvency Act*, Part A1, s A38(1)(d).

17. *Insolvency Act*, Part A1, s A34.

18. *Insolvency Act*, sch B1, para 64.

19. See, for example, the remarks of Hoffman J in *Re Arrows Ltd* [1992] BCC 121 at 123F–H and Warren J in *Sisu Capital Fund Ltd v Tucker* [2006] BCC 463 at [106]–[110].

list of the company's creditors, the amounts owing to them, details of any security held together with their contact details (postal and email addresses), which the monitor will need when appointed...[20]

'To ensure that the monitor can carry out the role with objectivity and independence, it is vital that any conflicts of interests are avoided or managed appropriately to safeguard the interests of all stakeholders[21]*...*

'The monitor is not prevented from taking up a subsequent appointment subject to the insolvency practitioner making an assessment of any threats to compliance with the fundamental principles.'

The Government also recommends that, as insolvency practitioners,[22] monitors comply with the new Insolvency Code of Ethics that came into effect on 1 May 2020. It is difficult to see how this will work in practice, as the Code is not adapted for the unique circumstances of a monitor, and the examples given to managing perceived conflicts occur in the context of prior involvement with a company and its directors in the case of an administrative or other receiver, an administrator, a liquidator or a bankruptcy trustee. Specific guidance in the case of monitors, recognising the enhanced level of consultation and engagement with directors that is part and parcel of the role of a monitor, would be useful in order to provide certainty for practitioners in navigating the new laws.

The management of any perceived conflict could, for example, be appropriately achieved by requiring a monitor to exercise his or her duties to conduct proper investigations of the company's affairs as part of the assessment of whether a moratorium is in fact likely to result in the rescue of the company as a going concern.

Again, however, those duties should properly be seen in the context of the nature of the Part A1 moratorium. The moratorium is not intended to be a long process, even with the extensions of time that are available, and it will inevitably not be possible for a monitor to complete the level of investigations expected of a liquidator or administrator with the benefit of a complete forensic examination of all of the company's affairs and records.

Moreover, in the Guidance, the United Kingdom Government states that the moratorium is intended to operate as a '*light touch procedure*'. Yet the Guidance offers little in terms of the standard of investigations a monitor must complete. It simply states (in the context of pre-appointment work that is required to be undertaken to enable the monitor to take his or her initial view as to whether a proposed moratorium is likely to result in the rescue of the company as a going concern), that the extent of investigations '*will be for the insolvency practitioner using their professional experience and judgement to decide on and should be proportionate to the size and complexity of the company*'.[23]

The assessment of 'likely' in relation to the prospects of the company being rescued as a going concern, which a monitor has a duty to consider before and throughout the period of the moratorium, is also unclear and adds to the uncertainty for prospective monitors.

The issues concerning independence and investigatory duties are critical for monitors. If the existing uncertainty is not resolved, there is a real concern that it will be a deterrent to practitioners accepting monitorships. Indeed, the risk for monitors is that they may face personal liability if they are found to have breached their duties, and if it is not clear precisely what those duties are and the standards of performance that are expected of monitors, the risk may become too significant to take on. That outcome would undermine the very objective of the introduction of the Part A1 moratorium in enhancing corporate rescue in the United Kingdom. The introduction of clarifying regulations in relation to independence and investigations, including the interpretation of the 'likely' criterion of satisfaction, ought to be designed to reflect that overriding objective more clearly.

20. Guidance, page 6.

21. Guidance, page 8.

22. Guidance, page 8. *Insolvency Act*, Part A1, s A54(1), which defines '*qualified person*' as '*a person qualified to act as an insolvency practitioner*'.

23. Guidance, page 6.

Australian SBR process

The new SBR process in Australia is distinctly different from the Part A1 moratorium.

While the Part A1 moratorium is a standalone process, entry into a formal restructuring plan is a necessary component of the SBR process and the enforcement moratorium that it provides for.

At the same time, however, the concept of a '*restructuring plan*' under the SBR process in the *Corporations Act* is very flexible. Indeed, the express object of the SBR process is not to maximise the prospect of saving the company or as much of its business as possible (a marked difference to the Part A1 moratorium and also the voluntary administration process in Australia) but rather, simply, to '*provide for a restructuring process for eligible companies*' which enables directors to retain control of the company's business, property and affairs while developing a restructuring plan with the assistance of a small business restructuring practitioner and then entering into that plan with creditors.[24]

Apart from that structural difference, the eligibility criteria for a SBR are much tighter than for a Part A1 moratorium. Specifically, the SBR process is limited to companies with total liabilities that do not exceed $1 million, in circumstances where the company has not been through a SBR process or a simplified liquidation process in the past seven years and current or former directors (those acting within the last 12 months) have not been a director of a company that has undergone a SBR or simplified liquidation process in the past seven years.[25]

Essentially, the process is that a SBR begins simply upon directors of an eligible company appointing a SBRP in writing, conditional on a resolution from the board that, in its opinion, the company is insolvent or likely to become insolvent at a future time and that a SBRP '*should be appointed*'.[26] The appointment triggers a moratorium on the enforcement of creditors' claims against property of the company, and the commencement of proceedings against the company or its property, absent the written consent of the SBRP or the leave of the court.[27] There is also a stay on the enforcement of ipso facto contractual rights conditional on the company's entry into the SBR process or by reason of the company's financial position while it is undergoing restructuring.[28]

In contrast to the standalone Part A1 moratorium in the United Kingdom, the moratorium during the SBR process in Australia does not apply to creditors with security over the whole or substantially the whole of a company's assets that enforce their rights within 13 business days of the appointment of the SBRP, nor to creditors that have commenced enforcing their security before the SBR begins[30] or creditors with a security interest over perishable property.[31]

The SBR process is, like the Part A1 moratorium in the United Kingdom, a DIP model, so that directors remain in office and can exercise their usual powers as they work with the SBRP to develop a restructuring plan over a 20-business day period. Once it has been executed, the plan (conditional on directors ensuring that all outstanding taxes and employee entitlements are paid) is submitted to creditors, who have 15 business days to vote on it as a single class. The plan is approved if it receives the support of at least 50% of voting creditors,[32] although it is not binding on dissenting secured creditors unless the court otherwise orders.[33] If accepted, directors then continue to work with the SBRP to implement the restructuring plan.

In relation to the specific duties of the SBRP, on the face of the legislation, the duties are less onerous than those of a monitor under the Part A1 moratorium.

Unlike the Part A1 moratorium, the appointment of a SBRP is not conditional on a practitioner forming the view that the SBR will likely result in the rescue of the company, or at least its business, as a going concern. There is also no express requirement for a SBRP to subsequently hold that view as a condition for the SBR to continue. Rather,

24. *Corporations Act*, s452A.

25. *Corporations Act*, s453C.

26. *Corporations Act*, s453B.

27. *Corporations Act*, ss 453R, 453S, 453T.

28. *Corporations Act*, s 454N.

29. *Corporations Act*, s 454C.

30. *Corporations Act*, s 454D.

31. *Corporations Act*, s 454E

32. Corporations Regulations, reg 5.3B.25.

33. Corporations Regulations, reg 5.3B.29.

the SBRP is simply required to make a declaration, once a restructuring plan has already been executed by a company and before it is submitted for a vote by creditors, whether in the SBRP's view the company is likely to be able to discharge the obligations created by the plan as and when they become due and payable.[34] A negative answer does not mean the SBR process cannot continue.

Further, the legislation states that a SBRP *may* (but not must) terminate the restructuring at any time if he or she believes on reasonable grounds that, among other things, it would not be in the interests of creditors to make a restructuring plan or it would be in the interests of creditors for the restructuring to end or for the company to be wound up.[35]

At the same time, however, although a SBRP is not, in contrast to a monitor in the UK, an officer of the court, a SBRP is stated to be both an agent[36] and an officer of the company.[37] A SBRP therefore owes the company, as with directors of the company, a range of statutory duties, including the duty to act in good faith in the best interests of the company.[38] And in times of doubtful solvency, Australian courts have held that the identity of the '*company*' corresponds to the interests of *creditors*.[39]

Accordingly, the apparent discretion to terminate a SBR where it is not reasonably in the interests of creditors could be interpreted as an *obligation* in this context. This is a matter that would benefit from clarification.

Indeed, the nature of this obligation, seen in the context of a SBRP's broader duties to the company, raises difficult questions about the extent of the investigations a SBRP must undertake to be in a position to discharge those duties and the extent of a SBRP's independence obligations.

Just as with the Part A1 moratorium in the United Kingdom, there is a tension between the strict statutory description given to a SBRP and the context in which the SBRP performs his or her duties – specifically, in developing a restructuring plan in close coordination with directors and in a very short period of time during which full investigations are simply not feasible.

These contextual issues could possibly be seen to operate to attenuate the strict duties that a SBRP would otherwise owe as an ordinary officer of the company.

In relation to independence, it is to be noted that an agency relationship has been used in Australian case law as the basis for characterising a voluntary administrator (who, in the same manner as a SBRP, is described as an agent of the company in the *Corporations Act*)[40] as a fiduciary, who owes distinct fiduciary duties to the company.[41] In turn, the courts have used the characterisation of an administrator as a fiduciary as the basis for finding that an administrator 'should have imposed on him/her the same duty to act impartially as courts of equity impose on trustees.'[42] Unlike in the UK, the courts have strictly applied these independence obligations, so that any substantial involvement between an administrator and the company before his or her appointment, as well as consultation and coordination in relation to the administration itself, can form the basis of an order replacing the administrator and/or invalidating acts performed during the course of the administration.[43]

Yet it has also been said that '*differences in the circumstances in which they are required to work (especially the speed at which the administrator must work) may affect the standard*' of independence and impartiality required to be observed by an administrator in comparison to a liquidator in Australia.[44]

Similarly, the greater speed with which a SBR process is required to be completed in comparison to an administration, and the necessary close working relationship between a SBRP and directors of the company (who remain in control of the company's affairs unlike during a period of voluntary administration), could potentially be used to justify a lesser standard of independence and impartiality for a SBRP compared to that of an administrator. Indeed, the SBRP's functions include providing advice to directors in relation to the restructuring and also actively assisting them to prepare a restructuring plan.[45]

At the same time, however, the overarching duty to act in the interests of creditors, as an officer of the company, means that there is unlikely to be any relaxation of the standard of independence in practical terms. That duty can be seen to trump, and give contextual flavour, to every act that a SBRP performs during the course of an SBR. Any perception of a conflict arising, in particular, from substantial prior involvement with a company's directors, is likely to give rise to the same challenge to the appointment of a SBRP as is the case for a voluntary administrator.

Nevertheless, this ought not to be a matter of inference and supposition from reconciling alternate provisions of the new process. Rather, it should be precisely expressed in the legislation in the interests of certainty for practitioners, directors and creditors alike.

In relation to the investigations required of a SBRP, as with a monitor under the new Part A1 process in the United Kingdom, it cannot be the case that a SBRP will be able to conduct the same level of investigations as a voluntary administrator. This view is supported by the legislative intention for the SBR process, expressed in the Explanatory Memorandum to the Corporations Amendment (Corporate Insolvency Reform) Bill 2020 but not in Part 5.3B of the Act itself, to provide a simpler, less expensive restructuring option for eligible small businesses than voluntary administration.

34. *Corporations Act*, s 453E(1)(c); Corporations Regulations, reg 5.3B.18.

35. *Corporations Act*, s 453J(1)(a).

36. *Corporations Act*, s 453H.

37. *Corporations Act*, s 9 (definition of 'officer').

38. *Corporations Act*, s 181(1)(a).

39. A company need not be *actually* insolvent before officers will be required to consider the interests of creditors in making a decision on behalf of the company. Rather, it is sufficient if there is a real and not remote risk of insolvency – see, for example, *Kalls Enterprises Pty Ltd (in liq) v Baloglow* (2007) 63 ACSR 557, 589.

40. *Corporations Act*, s 437B.

41. *Correa v Whittingham* (2013) 278 FLR 310, [148]; *Re Eaton Electrical Services Pty Ltd (in liq)* (2006) 58 ACSR 403, [10]–[12].

42. *Commonwealth Bank of Australia v Fernandez* (2010) 81 ACSR 262, [63].

43. See *Commonwealth v Irving* (1996) 144 ALR 172 and *Domino Hire Pty Ltd v Pioneer Park Pty Ltd* [2000] NSWSC 1046.

44. *Bovis Lendlease v Wily* [2003] NSWSC 467, [133] (emphasis added).

45. *Corporations Act*, s 453E(1)(a) and s 453E(1)(b).

This view has also been supported in *obiter dicta* remarks in the only two decisions made to date in Australia in relation to the new SBR process, *Re DST Project Management and Construction Pty Ltd*[46] and *Re Dessco Pty Ltd*.[47]

Yet the new legislation expressly provides that a SBRP commits an offence if he or she makes a declaration in relation to the viability of a company under a proposed restructuring plan without making reasonable inquiries into the company's business, property, affairs and financial circumstances and/or taking reasonable steps to verify the company's business, property, affairs and financial circumstances.[48] This, along with ongoing tension in relation to role as officer of company, is a substantial source of uncertainty in practice and prevents SBRPs taking any real comfort in the potential to complete investigations to a lower standard than administrators. Again, this may serve as a deterrent on accepting appointments in the absence of further regulatory guidance.

Conclusion

Despite certain differences in eligibility and structure, the new Part A1 moratorium in the United Kingdom and the new SBR process in Australia share a common aim. They are both intended to incentivise corporate rescue by providing a more flexible, efficient and cheap insolvency process than the existing legislative alternatives. They also share a common weakness. Both processes suffer from a lack of certainty in relation to the duties owed by monitors and SBRPs, particularly in relation to their independence and investigatory obligations.

Regulatory amendments making it clear what standards of independence apply for each officer, including in the context of pre-appointment advice and other work, would be beneficial in the unique DIP operating context of both models.

Identifying the distinct investigatory obligations of both monitors and SBRPs would also resolve the tension that exists in treating each set of practitioners as officers of the court or of the company respectively, and the intention for Part A1 and the SBR process to operate as cheap and flexible insolvency alternatives.

Amendments of this nature would limit the current disincentives that exist for monitors and SBRPs accepting appointments due to the risk of being found personally liable for breaching their duties as they attempt to navigate the existing uncertainties in the interpretation of their obligations.

This is ultimately critical to ensure that the rescue objective is achieved in practice at a critical juncture in the broader economic and financial stability and future growth in the United Kingdom and Australia. ■

46. [2021] VSC 108. Steffenson JR said that '*there is some force*' to the argument that '*the level of investigation required of the restructuring practitioner in respect of the company's affairs is less than that required under Part 5.3A*' for a voluntary administrator (at [30]).

47. [2021] VSC 94. Irving JR said, in the context of a SBRP's view on the company's eligibility to undergo restructuring and the value of outstanding claims of creditors, that '*the restructuring practitioner must have reasonable grounds for ascribing a particular figure to the claim but is not, at this very early stage, required to carry out a comprehensive detailed enquiry*' (at [31]).

48. Corporations Regulations, reg 5.3B.18.

The BVI Year

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The BVI had another busy year of cases and legislation. We did not experience the worst ravages of COVID but, like other Courts, the BVI Commercial Court moved to online hearings and trials. After adjusting to this new World, the Court continued its business relatively smoothly, although it was notable that the Court, and counsel, still like their physical bundles.

Black Swan Resurrected

Perhaps the biggest and most welcome news was published in the BVI Gazette on 7 January 2021, when the Eastern Caribbean Supreme Court (Virgin Islands) Amendment Act came into force. For those of you that come across the BVI, you will know that practitioners love their interim relief and asset chasing, and the BVI Commercial Court was regularly asked to grant freestanding injunctions in aid of foreign proceedings.

The *Black Swan* jurisdiction was used for about 10 years following a Justice Bannister case of the same name and substantial assets were frozen and recovered until the Court of Appeal found in *Broad Idea International Limited v Convoy Collateral Limited* in May 2020, that the *Black Swan* decision was wrongly decided. Whilst *Broad Idea* was appealed and we await the Privy Council's decision, the ability to obtain a freestanding injunction in support of foreign proceedings is now on a proper statutory footing and can now be obtained against BVI and non-BVI parties.

The legislation was (deliberately) closely modelled on section 25 of the Civil Jurisdiction and Judgments Act 1982 (the "**CJJA**") in England and as a result also provides a statutory route for interim relief to be granted against non-cause of action defendants such as *Chabra* defendants.

This particular power to enjoin foreign NCADs has been a feature of English law as a result of s.25 of the CJJA for some time. The ability to do so in BVI common law has been stymied by strict judicial adherence to *stare decisis* and the majority decision of the Privy Council in *Mercedes Benz v Leiduck*, which recommended that a standalone Mareva injunction is not an injunction within the meaning of the injunction service out gateway.

This is perhaps the most eagerly awaited aspect of the Privy Council's determination. If *Mercedes Benz* is found to be no longer good law no further enactment will be required under the CPR to construe a standalone Mareva injunction under the service out gateway as an injunction.

In the orders made so far the BVI Court has taken a suitable flexible view of the jurisdiction, which is suitably encouraging news for asset tracing.

Not Just Injunctions

Although NP applications take their name from a 1974 English case, in reality the BVI common law has gone much further than that rather limited English authority, probably as the BVI does not have a separate specific disclosure rule in its CPR. The basic concepts of an NP order are still that:

(a) *a wrong has been committed;*

(b) *a party (always the local registered who set up the BVI company) has innocently become mixed up with wrongdoing; and*

(c) *the information is necessary to identify a wrongdoer or establish a wrong.*

The "*wrong*" can have a wide definition and can be a tort or a contract, as well as, in some cases, breaching a court order abroad or filing a suspect claim in a foreign bankruptcy. The target tends to be the company incorporation agent which tend to have an increased number of "*know your client*" information showing who has even a small beneficial ownership.

Many times this sort of discovery has led to successful claims abroad and significant asset recovery. Importantly a proper proprietary case will bolster an application and the separate High Court judges also can assist with discovery in oligarch divorce cases where a BVI company asset is located, through the Court's matrimonial powers.

The most recent procedure adopted by the Commercial Court is for a first *ex parte* application which imposes a seal and gag order on the registered agent, and a second *inter-partes* hearing then hears the application in full.

Directors Alert

As we move to an era of more public disclosures, the Privy Council gave a timely reminder to directors on their duties when a company slips into insolvency. In *Byers and Others v Chen*, Ms Chen was a sole director of a BVI company, PFF, and sought to appoint a replacement director and simultaneously resign by way of letter. There was some confusion as to whether a replacement director was appointed, but later a large payment was made to one of the creditors. PFF's liquidators pursued Ms Chen personally including

on the basis that she continued as the *de jure* director. The Privy Council exercised a rare jurisdiction to review findings of the trial judge and held that Ms Chen continued as *de jure* director even after her resignation letter, especially given Ms Chen retained important responsibilities including over decision making and over bank accounts.

In addition, the Privy Council stated *"a director may not knowingly stand idly by and allow a company's assets to be depleted improperly".*

It was a busy BVI year for the Privy Council which adopted remote hearings enthusiastically and there seemed no let-up in appeals and judgments including on unfair prejudice remedies *(Ming Siu Hung v J F Ming)*, Duomatic rule applies to beneficial owner who cannot be allowed to "*lurk in the shadows*" *(Ciban Management Corp v Citco (BVI) Ltd)*, waiver by election and restitution *(Delta Petroleum v BVI Electricity Board)*. In the context of a forum challenge, the Privy Council found that where governing law could not be ascertained, that became only a neutral factor which led to the BVI Court taking jurisdiction and the availability of particular common law remedies like tracing could be a strong factor in favour of the BVI being the more appropriate jurisdiction (*JSC Eurochem et al v Livingston Properties et al).* In an important decision for insolvency proceedings *(Chu v Lau)* the Board upheld Justice Kaye's judgment to wind up a deadlocked company on just and equitable grounds agreeing with the first instance judge that it was a quasi-partnership and the judge had been entitled to take account of disputes at a subsidiary level for the superimposition of equitable considerations.

Quick Justice

The Commercial Court also reminded directors to use their powers for a proper purpose. In *IsZo Capital v Nam Tai Property & Ors*, after a group of shareholders served notice to hold a shareholders' meeting to appoint new directors, the then board carried out a private placement of shares that diluted the minority shareholders. The BVI Court first granted an injunction to hold the position and then an expedited, virtual trial with the court sitting early to accommodate witnesses in Macau and Hong Kong.

The Court found that the directors who had voted for the placement had indeed breached their fiduciary duties and had acted for the improper purpose of diluting investors and making it more difficult for minority investors to challenge the then board. Whilst there is an appeal and the trial was very fact sensitive, it is useful to review the Court's approach to this type of case as they tend to recur on a regular basis.

The Court considered the following 4 stage test arising out of the renowned director's liability case of *Hogg v Cramphorn* [1967] Ch 254 in order to determine whether there had been a breach of the proper purpose rule. The Court agreed that it had to:

(a) *identify the power whose exercise is in question;*

(b) *identify the proper purpose for which that power was conferred upon the directors;*

(c) *identify the purpose for which the power was, in fact, exercised; and*

(d) *decide whether that purpose was a proper purpose.*

In relation to these questions the Court had particular regard to two BVI Court of Appeal decisions in this area. First of all, in *Independent Asset Management v Swiss Forfaiting*, Webster JA held that "*once a court determines that the dominant purpose for the directors' decision is an improper purpose it does not matter what were the motives of the directors, however altruistic.*" Secondly in *Antow Holdings v Best Nation Investments*, Pereira CJ held that "*a section 120(1) enquiry is largely, though by no means entirely, a subjective one. Directors must exercise their discretion bona fide in what they consider - not what a court may consider - is in the interest of the company, and not for any collateral purpose. Nonetheless a section 120(1) enquiry has an objective overlay as bona fides cannot be the sole test, 'otherwise you might have a lunatic conducting the affairs of the company and paying away its money with both hands in a manner perfectly bona fide yet perfectly irrational*'".

The Court will therefore look for independent, objective evidence to test the director's claim to be acting bona fide. As Pereira CJ continued as part of her analysis of section 120(1), "*I reiterate that a court will look for objective independent evidence to determine whether there was an honest belief on the part of a director. A court will not accept in any unquestioning way a director's assertion that he acted bona fide when the facts might appear to suggest otherwise*".

Both this case, and *Byers vs Chen* are reminders of how to act as a director and there are many lessons to be learned, in particular that an unlawful plan before a resignation or allotment of shares risks a quick unwinding from the BVI Court.

Common Law recognition still alive

This has been the subject of some debate over the years but in *Net International Property Ltd v Adv. Eitan Erez*, the BVI Court of Appeal held that common law recognition of foreign insolvency proceedings continues to exist post the enactment of the BVI Insolvency Act. However, assistance will depend on whether the country involved is a designated country pursuant to the legislative provisions.

This appeal arose out of proceedings in Israel where the Supreme Court found that a bankrupt was the owner of the

shares of Net International. The Court ordered the Trustee in bankruptcy to take steps in the BVI to register himself as shareholder of Net International in accordance with the company's articles.

The Trustee applied to the BVI Commercial Court for an order, under the inherent or common law jurisdiction, for recognition as the trustee of the assets of the bankrupt in the BVI, namely, the beneficial and legal interests in all the shares of Net International. The Trustee also sought orders for assistance in registering himself as the shareholder of Net International and powers to deal with the shares of the company as if he was the registered shareholder of the Company. The claim was successful.

Net International appealed against the orders of the learned judge. The following material issue arose on appeal whether the BVI Court had jurisdiction to grant both recognition and assistance to the Trustee. Recognition is usually accompanied by assistance which gives the foreign office holder powers to deal with the local estate. However, recognition does not necessarily include assistance.

As for recognition: although Part XVIII of the Insolvency Act, 2003 provided a comprehensive scheme for the recognition of foreign office holders that may be sufficient to abolish the common law of recognition, it was not yet in force as a matter of BVI law. It was held therefore that the common law right of recognition survives in the BVI.

As for assistance: Part XIX of the Act provides a complete code for foreign representatives from designated foreign countries to apply to the BVI courts for assistance. However, Israel has not been designated as a relevant foreign country. Assistance is no longer available at common law to foreign office holders from non-designated countries. The Trustee therefore has to commence a new action in the BVI to seek rectification of the share register, rather than be granted the same in the form of statutory assistance. Whilst this guidance is helpful, it does potentially increase the time and costs of this sort of common enforcement action.

Nilon revisited?

The Privy Council's decision in *Nilon v Royal Westminster Investments* restricted the previous use of the rectification of the share register in the BVI Business Companies Act, effectively moving such disputes largely to be dealt with in courts where the parties reside. However, in *Pavel Sazonov v Elena Silkina* the BVI Commercial Court ordered that a company's register of members should be rectified on an interim basis, subject to determination of the ultimate ownership of the company at the trial of the underlying proceedings.

It is apparent from the judgment, which was given orally on 22 February 2021 but handed down in written form on 26 April, that the applicant, Mr Sazonov, commenced proceedings in the BVI to resolve the question of whether he or Ms Elena Silkina is the beneficial owner a BVI company, Emery Capital Limited. There are also ongoing proceedings in Russia where, it seems, Mr Sazonov needed to show that he was the shareholder of the company by 2 March if he was to avoid an outcome that would be "*extremely adverse*" to him. In order to avoid this situation Mr Sazonov made an application seeking urgent rectification of the Company's register of members to show him as shareholder.

It should be noted that the respondents to the urgent application appear to have been the registered agent of the company and Ms Silkina. The company was not named as a respondent. In addition, whilst it appears that Ms Silkina may have been notified of the application, the Court took into account that she was not formally served with the application (she was not represented at the hearing).

The registered agent took the position that rectification of the register is a final remedy and could not be granted on an interim basis so a more appropriate remedy in the circumstances would have been to appoint a receiver over the Company who could hold the ring. However, the Court took the view that there was insufficient time for the appointment of a receiver and was also mindful that such an approach could be expensive.

Ultimately the Court considered that the wording of the statutory provision that provides for the rectification of registers of members, s43 of the Business Companies Act, empowered it to rectify the register of members on an interim basis because it expressly says that "*the Court may, in the proceedings, determine any question that may be necessary or expedient to be determined for the rectification of the register of member*".

Whilst the Court was keen to point out that it was making an interim order that was subject to determination at the trial of the underlying proceedings (to determine the true beneficial owner), it does open up the possibility of a party in such circumstances dealing with the shares at least to protect them. Whilst the ruling appears to make available a novel form of interim relief, it remains to be seen how this decision will be reconciled with *Nilon v Royal Westminster Investments*, where it was held that "*the summary nature of the [rectification] jurisdiction makes it an unsuitable vehicle if there is a substantial factual question in dispute*". The Privy Council ultimately decided in *Nilon* that a claim for rectification can only be brought where legal title has been established and not where a claimant asserting a right to legal title is yet to succeed in their claim.

Unlawfully obtained evidence

In *Tall Trade Ltd v Capital WW Investment Ltd,* Justice Jack had to grapple with hacked communications in the context of a liquidation application being allegedly brought for an improper purpose and section 125 of the BVI Evidence Act which prohibits admissibility of improperly obtained evidence unless the "*desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained*".

And finally in *Showa Holdings Ltd* the EC Court of Appeal recently outlined the relevant principles for court supervision of an office holder such as a receiver and that the court will usually defer to the assessment of an officeholder unless it is shown that the assessment of the officeholder is perverse relying on Snowden J's decision in *Re Nortel*.

A BVI Moratorium

In a major development in BVI insolvency law and practice, the BVI Commercial Court held in *Constellation Overseas Limited and 5 Others* that provisional liquidation is available to facilitate a restructuring. The decision brings the BVI broadly into line with other jurisdictions, where provisional liquidations have been used to support a number of cross-border restructurings in recent years.

In the proceedings, six BVI companies (part of a group headquartered in Brazil) sought the appointment of provisional liquidators to support the group's restructuring, which is driven by a Brazilian Judicial Reorganisation procedure. That was in turn supported by Chapter 15 proceedings in the USA. The companies required the protection against "*predatory creditor claims*" afforded by the moratorium imposed by a BVI provisional liquidation; there was no current intention to wind up the BVI companies or the group.

The judge found that the BVI Court has a "*very wide common law jurisdiction*" to appoint provisional liquidators for restructuring purposes, based on authority from the courts of England, Cayman and Bermuda (amongst others). He distinguished certain Hong Kong cases that suggested that provisional liquidation was only available in that jurisdiction where the objective was a liquidation.

In 2020 the BVI Court again appointed joint provisional liquidators over four BVI companies on a "*light touch*" basis following the precedent set down in Constellation, and gave further, useful guidance for practitioners. The terms of the appointment mean that they will supervise the ongoing management of the companies by the existing boards of directors and ensure that the companies work towards a "*holistic*" restructuring of the wider Group's debts. However, the appointment of the provisional liquidators would not have automatically imposed a moratorium on creditor claims or actions because the companies are not considered to be in (full) liquidation. This meant that, without some added layer of protection, the companies would still be prone to creditor actions and claims, which could potentially undermine the wider Group restructuring.

The companies were able to circumvent this concern by having the Court impose a "*contingent moratorium*" within the appointment order.

Section 174 of the BVI Insolvency Act provides that where an application for the appointment of a liquidator has been filed but not yet determined, a person who would have the power to apply for the appointment of a provisional liquidator (which includes the company itself) may apply to stay any action or proceeding that is pending against the company in the BVI courts. In this case the companies sought a term in the order that would automatically impose a stay, pursuant to s.174, in the event that any suit action or other proceeding is commenced against the companies. This term means that the companies will not be required to apply to the court for a stay each and every time a suit or action is commenced against the company and should ensure that any associated costs with such applications are avoided.

The use of s.174 in this way is believed to be novel and has the effect of putting in place a moratorium in circumstances where provisional, but not full, liquidators have been appointed and where no automatic protection would automatically arise.

Whilst each case will likely turn on its own facts the key areas the Court is likely to review are whether:

(a) *the companies were cash flow (but not balance sheet) insolvent;*

(b) *there was a real prospect of a restructuring being achieved, resulting in a better outcome for creditors than would be the case on a winding up;*

(c) *the application was supported by a number of the group's major creditors.*

These rulings are a very welcome addition to the range of effective procedures available in the BVI to facilitate cross border restructurings. ■

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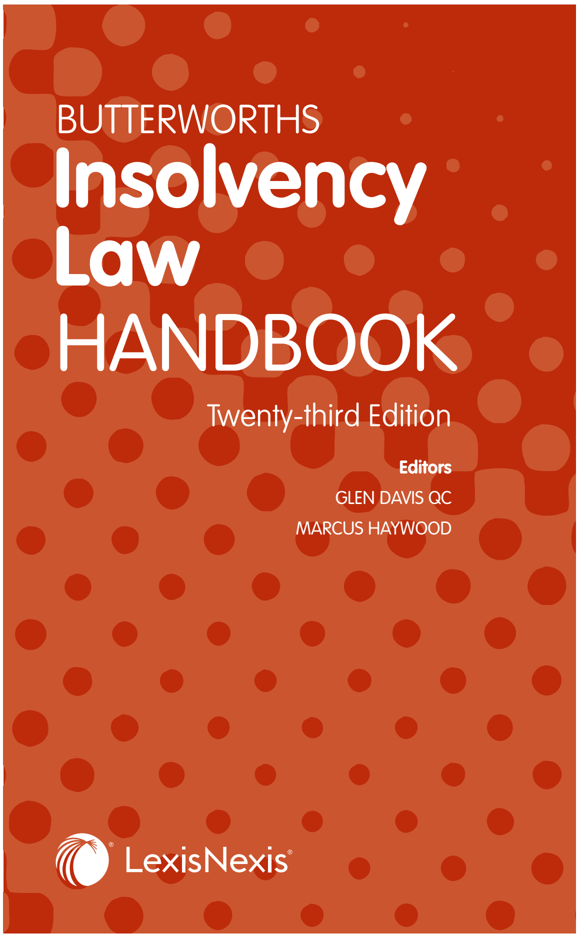

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Moving on to saving livelihoods – *the Government's plan to deal with COVID period debt*

MARK PHILLIPS QC

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On 15 June 2021, the Prime Minister announced an extension to the date for the easing of all remaining restrictions to 19 July 2021, described as a "*terminus*" date. Various temporary measures implemented by the Government since the start of the pandemic to protect businesses from eviction and winding up were due to expire on 30 June 2021s. In order to align ongoing restrictions with economic support for businesses, the Government has extended those temporary measures. More notably, and as discussed in this Article, the Government has announced proposals it intends to implement this parliamentary session to deal with rent liabilities that have accrued since the start of the pandemic. These rent liabilities are now at unprecedented levels and pose a serious threat to the recovery of many sectors of the economy. The Government's proposals are a welcome development: they provide a further means, alongside other formal restructuring and insolvency tools, of addressing the debt-bubble and avoiding the tsunami of business failures and job losses that are feared once the moratorium comes to an end.

The extension of temporary measures

The temporary measures which have been extended are:

(1) An extension until 30 September 2021 of the blanket prohibition on winding up petitions based upon statutory demands and the restriction on winding up petitions based on a company's inability to pay its debts (unless the creditor has reasonable grounds for believing that either COVID-19 has not had a financial effect on the company or that the circumstances forming the basis of the winding up petition would have occurred even if COVID-19 had not had a financial effect on the company) under Schedule 10 of the Corporate Insolvency and Governance Act 2020 ("**CIGA**").[1]

(2) An extension of the moratorium preventing landlords from forfeiting commercial leases and evicting tenants for non-payment of rent as originally enacted under section 82 of the Coronavirus Act 2020 from 30 June 2021 until 25 March 2022.

(3) The restriction of the use of the Commercial Rent Arrears Recovery scheme ("**CRAR**") under the Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 until 25 March 2022. The total number of days' outstanding rent required for CRAR will remain at 544 days.

Proposed legislation to deal with rent liabilities: the arbitration scheme

The effect of the extension of these temporary measures is that businesses will have a further nine months' breathing space and protection from eviction. However, these suspension measures by themselves do not address the massive liabilities for rent that have accrued since March 2020. It is reported that by June 2021, British retailers and other commercial tenants have delayed payment of £6 billion in rent.[2] This debt time-bomb poses a serious threat to many sectors of the economy. Once the moratorium ends and landlords are able to pursue businesses for unpaid rents and other debts, thousands of businesses are likely to fail with the attendant loss of jobs. This could not only affect the tenants, but the landlords who could find themselves with thousands of vacant properties with a consequent effect on rents. Many of the landlords and tenants will carry bank debt and CBILS and other loans. The potential for systemic problems if borrowing turned bad must be real.

In recognition of this impending crisis, the Government has announced that legislation will be introduced this parliamentary session to deal specifically with rent liabilities that have accrued since March 2020. The intention is to implement a form of binding arbitration between landlords and tenants. Whilst the detail has not yet been confirmed, the Government will legislate to ringfence outstanding unpaid rent which has built up during the period when a business has had to remain closed.

1. These provisions were considered in an article by Mark Phillips QC, William Willson and Clara Johnson and looked at in more detail by Hilary Stonefrost and Daniel Judd in the July 2020 "Special Edition" of the Digest.

2. https://www.ft.com/content/3e617ad0-b5c9-4288-846f-c81dca041262

> *...the result has been the creation of a commercial debt bubble to unprecedented levels. Many businesses have accumulated debt that they will be unable to finance through ordinary routes*

In the first instance, landlords and tenants will be expected to reach a consensual agreement in relation to the arrears – this may be an agreement by the landlord to waive some or all of the rent or agreeing a longer-term repayment plan. If agreement is not reached consensually, legislation will require the parties to engage in an arbitration process, which will result in formal binding agreement. The arbitration process will be delivered by arbitrators from the private sector who will be required to act in accordance with guidelines set out in the legislation. It is also intended that any person wanting to act as an arbitrator will need to go through an approval process to establish their impartiality.

The criteria for such an arbitration are as yet unknown. It cannot be a determination of existing rights, because those will be ascertainable from the lease, so perhaps it will be something like the criteria applicable to what will be a single creditor cram down without the involvement of other creditors. Questions of fairness and equity are likely to come into play, although this is likely to be approached from a different angle given that other creditors are unaffected. It may well take several months to consult on and implement the intended arbitration scheme, which may explain the length of the extended moratorium.

Whilst the extension to the existing temporary measures applies to all types of businesses, the new legislation will only apply to businesses impacted by closures (primarily, nightclubs and other hospitality businesses) and will only apply to rent accrued during the period of restrictions on trading. Rent debt accumulated before March 2020 and after trading restrictions are lifted in the relevant sector, will be actionable by landlords once the moratorium is lifted. In order to ensure landlords are protected, the Government has made clear that businesses who are able to pay rent, must do so.

The Government's intention is that the arbitration scheme will strike a balance between protecting landlords and helping businesses most in need so that they are able to open and keep trading, recognising that reaching compromises or arrangements in relation to commercial rent debts will be the key to enabling businesses to resume trading in the medium to long term. The extension of the temporary measures provides landlords and tenants with a period of time during which they can reach a consensual agreement before new legislation takes effect.

Comment

The rent moratorium has been one of a raft of measures implemented by the Government to support businesses during the pandemic. However, the result has been the creation of a commercial debt bubble to unprecedented levels. Many businesses have accumulated debt that they will be unable to finance through ordinary routes. The proposed legislation is aimed at avoiding an avalanche of business failures and job losses.

Businesses will still have available to them the usual restructuring and insolvency tools, including the new measures brought in under CIGA, namely, the Moratorium and the Restructuring Plan. There have been important developments in Restructuring Plans and CVAs which have redefined the parameters of permissible restructuring of rent liabilities (most notably, the New Look CVA and Virgin Active Restructuring Plan). The ringfencing in law of the pandemic period of rent will also have the result that those liabilities will be put into a different class for the purposes of arrangements or plans.

The extension of the temporary measures may well delay the much-anticipated rush to use arrangements or plans to deal with rent liabilities, and the proposed arbitration scheme is likely to reduce the number of businesses that seek to restructure their liabilities using more formal restructuring tools, although as the Government's announcement made clear, the ringfencing will only apply to businesses impacted by closures. The arbitration scheme is also likely to be more financially accessible to SMEs than arrangements or plans and will provide an important alternative to that sector of the market.

Back to Business UK – R3's initiative

As we turn to the question of refinancing or restructuring the debt accumulated over the COVID period the question of how to get information to UK businesses about options available to them will come into sharp focus. Whilst larger businesses will be able to access professional restructuring and insolvency advice, as recent large cases have demonstrated, SMEs and small businesses are more likely to need help navigating the options and implementing them. It is not only large businesses that now carry debt accumulated since March 2020. The profession is addressing this issue. R3 has recently launched a 'Back to Business' resource (backtobusinessuk.com) aimed in particular at the SME and smaller business sector. It offers a comprehensive guide to dealing with financial distress through both informal and formal routes on a website that puts the key questions in simple terms. The message is that businesses must act early and seek advice. That is the way to save livelihoods. A particularly important part of the initiative is that it guides businesses to local Insolvency Practitioners. As the guide makes clear, many (hopefully most) will offer a free first consultation. This initiative shows a desire among professionals in the restructuring and insolvency sector to offer accessible and affordable advice and provide support to those businesses which now need it, in a bid to help save livelihoods. It is a welcome initiative at a time of genuine need. ■

Michael Crystal QC

Michael Crystal QC retired from practice at the Bar at the end of March 2021

A young Michael Crystal (*left*) on his way to Wakefield County Court for the Poulson trial, together with David Graham, Muir Hunter QC and Leonard Saffman – see *The South Square Story* in the March 2021 edition of the South Square Digest

Michael Crystal QC was called to the Bar in 1970 and took silk in 1984. In his near 50 years of practice, he was a leading advocate at the commercial bar and a bright light in the fast-developing world of insolvency and restructuring. His contribution to the field has been widely recognised including by the American College of Bankruptcy (International Fellow, 2006) and the International Insolvency Institute (Outstanding Contributions Award, 2017).

Michael became famed, in England and across the common law world, for the potency of his courtroom skills. These were displayed in a series of lengthy trials stretching across his career including *Maxwell* (in London in the early 1990s), *Thyssen* (in Bermuda dates from 1995 to 2001) and *Saad* (in the Cayman Islands from July 2016 to July 2017). Michael's opponents, and witnesses he cross-examined, would often carry the bruises from a tenaciously fought battle.

Michael was equally happy as an advocate and advisor in more technical disputes, often involving important questions of insolvency law. *Re BCCI (No 8)*, for example, went to the House of Lords, Lord Hoffmann accepting Michael's submission that charge-backs granted over credit balances by a customer to its bank were not conceptually impossible but could provide valid security. Michael has a particular interest in the development of cross-border insolvency law, illustrated by *Re BCCI (No 10),* a judgment of Sir Richard Scott V-C, which concerned the history and scope of ancillary liquidations. The judgment, which remains a cornerstone of English international insolvency law, owed much to the clarity of Michael's masterly exposition on behalf of the bank's liquidators.

Michael's biggest contribution was to chambers, its members and its staff, over 50 years. Having completed a pupillage, Michael commenced practice in 1972 at

Michael on being made QC in 1984

Receiving the Global Restructuring Review Lifetime Achievement Award in 2018 (with Mark Phillips QC on the left)

what was then 3 Paper Buildings, a small bankruptcy set located in the Temple, becoming head of chambers in 1984, in succession to Muir Hunter QC. By 2008, when he retired from that role, chambers had moved to South Square, established as a large and leading set, pre-eminent in the insolvency field in England and well known internationally. This process has involved many. But there can be no doubt that the evolution was made possible by Michael's limitless energy, his clarity of thought, the high standards he set for himself and others, and his generosity in supporting other members as their practices developed. Indeed, it is impossible for most of us to think of life in chambers without Michael.

We emphasise that Michael is very much alive and well! Following his retirement from practice at the bar, he has become an Associate Member of South Square and remains available as an arbitrator and expert witness. ■

Everybody needs good *(restructuring)* neighbours

GARETH STEEN
HEAD OF RESTRUCTURING, DENTONS, DUBLIN

GEMMA FREEMAN
COUNSEL, DENTONS, DUBLIN

The United Kingdom can no longer avail of the Insolvency Regulation[1] or the Brussels Regulation[2] and has not been permitted to accede to the Lugano Convention. As new restructuring regimes are implemented throughout the European Union due to the EU Directive on Restructuring and Insolvency[3], we focus on what Ireland can already offer its closest neighbour as it looks for candidates within the European Union to collaborate with in international restructurings post-Brexit.

Ireland and Recent International Restructurings

There are a number of tried and tested restructuring tools under Irish law, which have attracted large-scale and complex international restructurings to the Irish courts. In the last three years Ireland has been the centre of some of the world's largest restructurings leading to tens of billions of euros' worth of debt being restructured through standalone or parallel restructuring processes: *Norwegian Air, Nordic Aviation Capital DAC, Cityjet, Re Weatherford Group* and *Ballantyne RE plc* to name but a few.

The success of these has largely been down to the ability of Irish restructuring procedures to grapple with issues such as recognition, foreign law governed debt, cross-class cram down, releases for third party debt and most notably, in the retail and aviation context, the ability to repudiate leases, guarantees and other contracts in an examinership process.

Ireland's proximity to the United Kingdom, familiar common law regime, the absence of a language barrier and, most importantly, its proven track-record in successfully implementing international restructurings gives it an obvious platform for collaboration with the United Kingdom post-Brexit. This is particularly so given that Ireland is the only EU jurisdiction that can avail of statutory recognition in the form of foreign recognition assistance under s.426 of the Insolvency Act 1986 for inbound recognition in the United Kingdom.

Ireland's Restructuring Procedures

The two most common restructuring options for companies under Irish law (and utilised in the above-mentioned cases) are: (i) examinership; and (ii) schemes of arrangement. These can be utilised variously for: (i) Irish incorporated companies; (ii) entities who can show that their centre of main interests is in Ireland or that they have an establishment in Ireland; or (iii) any foreign company that can be said to have a sufficient connection to Ireland. The flexibility of the Irish courts' approach in determining what constitutes a "*sufficient connection*" to Ireland for the purposes of foreign entities utilising these procedures is discussed in more detail below.

Examinership

Examinership is a fast, court-supervised rescue process that is available to a company (or a group of companies) which is unable or unlikely to be able to pay its debts as they fall due and where the court is satisfied that the company has (or companies have) a reasonable prospect of survival as a going concern.

An independent expert must vouch the company's prospects of survival. When an examiner is appointed (usually an insolvency practitioner), the company remains in possession and control of its business and assets and the authority and responsibility of directors continues. It is *"essentially a 'debtor in possession' remedy"*[4] in which the examiner reviews the company's affairs in order to formulate and implement a rescue plan.

The main functions of the examiner, once appointed, are to seek investment and formulate proposals for a compromise or a scheme of arrangement in relation to the company aimed to rescue all or part of the failing business. In doing so, he or she convenes statutory meetings of members and creditors to consider and vote on the proposals. Provided at least **one** class of creditors whose interests will be impaired by them approves the proposals (requiring a simple majority in number and value of that creditor class) the examiner may then present the proposals to the court for confirmation.

1. Regulation (EU) 2015/848 of 20 May 2015 on Insolvency Proceedings (recast).

2. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

3. Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on Restructuring and Insolvency).

4. Per Quinn J., In the Matter of Arctic Aviation Assets DAC and Ors and Part 10 of the Companies Act 2014, [2021] IEHC 268 at paragraph 104.

In order for the proposals for a scheme to be confirmed by the court, an examiner needs to show that: (i) they are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by their implementation; (ii) they are not unfairly prejudicial to the interests of any interested party; (iii) there was no material irregularity at or in relation to the statutory meetings held; and (iv) there is nothing improper about the proposals or in the matter in which acceptance for the proposals was obtained (e.g. where the sole purpose for the proposals is the avoidance of a revenue liability).

If these thresholds are reached, confirmation of an examinership scheme will invariably occur which will facilitate a cross class cram down binding on the company and on all creditors affected by the proposals (including those voting against the proposals). The unfair prejudice test is typically satisfied by demonstrating that that class is treated at least equivalent to what that class would have received in an alternative liquidation scenario.

Examinership is commenced by petition with standing given to the company, creditors, directors, members and certain financial institutions (with company petitions being the most common). Once presented, it gives the insolvent company (or companies) statutory automatic protection from its creditors (including secured creditors) for a period of up to 100 (and in very limited Covid-19 related scenarios up to 150) days. During this timeframe, the examiner must adhere to strict statutory deadlines in terms of reporting to court on progress and the timing for any proposed scheme, convening creditor meetings and raising any issues likely to affect these deadlines. If a scheme of arrangement has not been proposed or confirmed during this period, the company or companies will invariably go into liquidation or receivership.

Schemes of Arrangement

A Scheme of Arrangement under Irish company law (“**Scheme**”)[5] provides a statutory mechanism for a company to agree with its shareholders and/or creditors on the restructuring of its debt obligations. A Scheme under Irish law is broadly similar in most respects to its equivalent under English law. It allows a company to come to a binding compromise or arrangement with its creditors or classes of its creditors. In order to be effective, the Scheme must be approved by a majority in number representing 75% by value of the creditors (or each class of creditors). It must then be sanctioned by the High Court.

In considering whether or not to sanction a Scheme under Irish law, the court will consider a number of criteria which have been applied in previous cases involving the sanction of schemes. The company must be able to show that: (i) statutory requirements (such as reaching the required voting thresholds) have been complied with; (ii) sufficient steps to locate and notify all interested parties have been taken; (iii) the classes of creditors voting on the Scheme have been properly constituted; (iv) there was no element of improper coercion or bad faith with respect to seeking approval of the Scheme; and (v) the Scheme itself is one which an intelligent and honest person being a member of a class voting and acting in respect of its interests might reasonably approve.[6]

If the above criteria can be satisfied, the court will be reluctant to differ from creditor/stakeholder wishes. Once sanctioned, the Scheme then becomes binding on the company and all members and creditors the subject of the Scheme. While court approval is ultimately required, the court is unlikely to second guess the commercial judgement of creditors once it is satisfied that the legal thresholds above have been met. Therefore, reaching a binding compromise or agreement with creditors can be a straightforward process.

Schemes versus Examinership

Schemes are different to schemes of arrangement proposed by an examiner under the examinership provisions of the Irish Companies Act. Unlike examinership, there is no automatic court protection pending the approval of a Scheme, however a moratorium on existing and future proceedings is available on application to court by the scheme company, its directors or any creditor or member of the company. This is a key distinction from the scheme process in the UK.

While both examinership schemes and traditional Schemes involve court sanction and are binding on creditors, there are some differences between the two processes. To implement a Scheme, the company need not be insolvent. It can be used to effect a solvent reorganisation of a company or group structure and is not limited to going concerns but can include holding companies. While a Scheme must be sanctioned by the court in order for it to be binding, the process is not court initiated or court led. Unlike an examinership, there is no prior examination into the company’s affairs by an outside party and significantly, no requirement to show that the company the subject of a scheme has a reasonable prospect of survival. In addition, there are no statutory imposed deadlines within which a Scheme must be formulated and presented for court sanction.

What can be achieved?

The Examinership regime has been a creature of Irish law since 1990 and is notable for its ability to deal with sizeable restructurings in short periods of time. There has been extensive case law relating to examinership issues since its introduction on

5. Chapter 1, Part 9 of the Irish Companies Act 2014.

6. *Re Ballantyne Re* [2019] IEHC 407 (Barniville J) citing with approval the five criteria with which the court has to be satisfied in order to sanction a scheme as identified by Mr. Justice Kelly in *Re Depfa Bank Plc* [2007] IEHC 463.

issues such as impairment and unfair prejudice where the case law largely emphasises the rescue objectives of the regime. Its low voting threshold in comparison to the majorities needed for Schemes, the new restructuring plans under Part 26 A of the UK Companies Act or Chapter 11 plans makes it a compelling proposition. As is the fact that there is a finite timeline within which to complete the examinership making it an efficient and controlled process that has increasingly been used in parallel with Chapter 11 plans to implement restructuring plans across the EU. It can also, particularly with prior negotiation, successfully stand alone in its own right. As an example, in eircom (Ireland's former State owned telecommunications group), some €1.4bn of a total debt of approximately €3.8bn was written off the group's balance sheet. The examinership was confirmed by the Irish High Court (and the companies came out of examinership with a new balance sheet) just 54 days after the companies entered into the process.

The Irish Scheme has its genesis in English law and has been implemented in various iterations of the Irish company law (most recently the Companies Act 2014). By virtue of the availability of examinership, the Scheme had until recently been underutilised. We are, however, now seeing a resurgence in its use in circumstances where through lock ups and active creditor engagement pre-process the 75% majority voting threshold is unproblematic, insolvency is not a pre-requisite and the parties can take advantage of a less stringent timeline for implementation.

In any event, both processes are considerably cheaper than Chapter 11 proceedings and at a glance, a huge amount has been achieved by these processes in recent cases:

- In April 2021, the Irish Court approved the examiner's proposals in the Norwegian Air Group (*Norwegian Air*) examinership. On entry to the examinership, *Norwegian Air* had accumulated debts of €5.2 billion, where through the process c. €3 billion of this was written off. In addition, the examinership facilitated a pared back version of the airline, which saw *Norwegian* scale back its operations considerably where it wanted to focus on its core business in the Nordic countries and step away from long haul routes.

- In July 2020, the Irish High Court approved a Scheme to restructure the liabilities of Nordic Aviation Capital DAC (*Nordic*), the world's second largest regional aircraft lessor. The scheme implemented a 12 month standstill and deferral of payments to both secured and unsecured creditors. Without the Scheme, covenant breaches and a cross default of *Nordic's* principal and interest obligations would have arisen. The Scheme was implemented across 89 different facilities, which were governed by a mixture of New York, English and German law. It covered the Scheme creditors' claims against both *Nordic* and all companies within the group who were debtors under the facilities, even those not party to the scheme.
- Regional airline CityJet utilised Ireland's examinership regime to implement a significant restructuring over the summer of 2020 where its fleet was grounded by the Covid-19 pandemic. The examinership scheme saw tens of millions of euro worth of debt being written off and allowed CityJet to continue as a going concern on a more streamlined basis and gave most creditors dividends ranging between 1.24% and 15%. The successful outcome of the scheme meant that CityJet was also able to retain over 400 out of its original 1,100 strong workforce.
- In 2019, Weatherford Group (*Weatherford*) one the largest multinational oilfield service companies commenced a Chapter 11 process in the US to restructure over US$8 billion of secured and unsecured debt the implementation of which necessitated an examinership for its Irish parent, Weatherford International plc, to implement the restructuring plan. Under the plan, *Weatherford* wrote off about $5.85 billion in debt through a debt-for-equity swap whereby noteholders received 99% of the shares in Weatherford International plc.
- In June 2019, Ballantyne Re (*Ballantyne*), a reinsurance SPV implemented a Scheme allowing for the restructuring of $1.65 million of New York law governed debt and

providing for the novation of its reinsurance obligations to two other entities. In approving the Scheme, the court facilitated the release of third party guaranteed obligations on the basis that these were viewed as ancillary to the primary obligations the subject of the Scheme in the face of an objection that it did not jurisdiction to sanction any scheme of arrangement that makes provision for third party releases.

Cross Border Recognition

As noted above, the Irish courts have been flexible in the approach to dealing with how these procedures can affect parties outside of Ireland and the EU in either a traditional Scheme or examinership context.

In the context of Schemes, the Irish court in *Nordic* was able to assume jurisdiction under Article 8(1) of the Recast Brussels Regulation on the basis that there was a significant Irish-domiciled scheme creditor. In *Nordic*, it was accepted on the basis of foreign law expert evidence relevant to the governing law of the 89 debt facilities involved (New York, English and German law) that the Nordic Scheme would likely be effective in the required foreign jurisdictions. *Nordic* predated Brexit and therefore recognition of its scheme in England (and Germany) was relatively straightforward by virtue of the Brussels Recast Regulation.

In *Ballantyne*, Ireland was able to assume jurisdiction easily on the basis that Ballantyne Re is an Irish plc where all of the directors were Irish. In the face of a challenge however that the Scheme should have been put forward in New York on the basis that, among other reasons, it sought to compromise New York law governed debt, the Court cited with approval a number of English cases where the English court sanctioned schemes of arrangement under equivalent statutory provisions to those contained in Part 9 which compromised New York governed debts conditional on Chapter 15 Recognition.[7] From a US perspective, a Scheme under the Irish Companies Act is capable of recognition in the US under the Chapter 15 recognition process.

The question of the applicability of the examinership regime to foreign companies was dealt with most recently in the *Norwegian Air* examinership. While five of the companies admitted into the process were Irish incorporated, the parent company, Norwegian Air Shuttle ASA ("**NAS**") was (and remains) incorporated in and operates out of Norway. For the first time, the Court examined in detail how a foreign entity (NAS) could avail of examinership in circumstances where Norway is beyond the scope of the Recast Insolvency Regulation and considered its jurisdiction under Irish company law to bring NAS as a non-EU entity into the examinership proceedings as a related company.

In doing so, the Court considered a provision of the examinership legislation which allows the court, when an examiner has already been appointed to a company, to appoint that examiner to a related company (a "**Related Company Appointment**"). In order for a Related Company Appointment to be made, the court must: (i) be satisfied that there is a reasonable prospect of survival of that related company; and (ii) have regard to whether making a Related Company Appointment would be likely to facilitate the survival of the original company or related company in question.

By definition under the Irish Companies Act, a related company for the purposes of a Related Company Appointment includes its *"holding company or subsidiary"* and *"any body that is capable of being wound up under [the Irish Companies] Act"*. This can include unregistered companies, i.e. companies incorporated outside of Ireland (section 1328 of the Irish Companies Act). While NAS undoubtedly came within the definition of holding company, the Court, for the first time, went on to consider the jurisdiction (and the jurisprudence generally) of an Irish court to wind up a foreign unregistered company under s.1328 of the Irish Companies Act in the context of its ability to make a Related Company Appointment.

The Court referred with approval to the core principles set down by the English Court of Appeal in *Stocznia Gdanska SA v. Latreefers Inc. [(No. 2)]* [2000] TLR 182; [2001] 2 BCLC 116] (and applied by the Irish High Court in *Re Harley Medical Group (Ireland) Ltd* [2013] 2 IR 596) to be considered before a court will exercise its discretion to wind up an unregistered company. These include a requirement that there be a sufficient connection to the jurisdiction which may, but does not necessarily have to, consist of assets within the jurisdiction and that there be some benefit accruing to a creditor or creditors in making such an order. In relation to the "*sufficient connection*" principle, the Court agreed that the absence of assets within the State was not a bar to the jurisdiction of the Court and that a connection could be established from choice of law clauses and submission to Irish jurisdiction in agreements.

In any event, on the basis that much of NAS' activity was (and is) performed through subsidiary companies incorporated in Ireland, the Court was satisfied to find that the commercial operations of the group were so closely linked and interdependent such that NAS was deemed to have a *"real and deep connection to the State"*.

The Court being satisfied that it had jurisdiction to include a foreign entity within the examinership, it also needed to be satisfied that any order made in the exmainership proceedings would

7. *Re Magyar Telecoms BV* [2015] 1 BCLC 418; *Re Noble Group Ltd* [2018] All ER (D) 100; *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch); and *Re Zlomerex International Financial SA* [2015] 1 BCLC 36.

not be made in vain and would be recognised and enforced in Norway. In determining this question, the Court had the benefit of Norwegian law evidence which concluded that there had never been a case before the Norwegian courts where the question of recognition of a foreign scheme had been decided. However, the evidence went on to say that as an Irish examinership and scheme of arrangement is capable of recognition by the English courts – and because English judgments are capable of recognition in Norway – an Irish examinership and scheme similarly would be capable of recognition in Norway.

That being the case, the Court helpfully analysed English law evidence given on the question of recognition of Irish insolvency processes in England. The evidence given identified two possible grounds on which an English court would recognise an examinership; (i) the availability of recognition assistance under s. 426(4) of the Insolvency Act 1986 on the basis that Ireland is a "*relevant country or territory*" for the purposes of s.426; and (ii) common law. For the purposes of s.426, the Court was referred to English precedent for such recognition in *Re Business City Express Ltd* [1997] 2 BCLC 510, a pre-Insolvency Regulation case. In that case, Rattee J. granted an application under s. 426 for recognition of a scheme of arrangement following confirmation of proposals for a scheme of arrangement before the Irish High Court. In *Business City Express,* Rattee J. considered the provisions of Examinership (under a previous iteration of the Companies Acts) and the process which led to the confirmation of the scheme of arrangement, namely, the formulation of proposals for a scheme of arrangement by the examiner, the consideration and approval of those proposals at statutory meetings of members and creditors, and the sanction by the court. He described the Irish examiner as *"roughly (but only roughly) equivalent to an English administrator".* As regards common law recognition, the English law evidence given was that as Ireland (like England) is a common law jurisdiction with a well-regarded judicial system, recognition at common law would be more likely to occur than not. This was on the basis of the similarities between the Irish examinership process and scheme of arrangement to the English administration procedure and its "*rescue*" objectives.

Contractual Obligations and Third Party Debt

Among the many advantages of the examinership framework is to the ability of a company to seek leave of the court to repudiate executory contracts during the process. As noted by Quinn J in the Norwegian Air examinership:[8]

"Repudiation of a contract is traditionally understood to mean the termination of a contract by one party which is justified by conduct on the part of the other party which amounts to what is referred to as a repudiatory breach. Section 537 [of the Irish Companies Act] creates a statutory exception to this by conferring on a company the power to repudiate a contract, without establishing repudiatory breach on the part of the counterpart."

In order to avail of the power to repudiate within an examinership: (i) the contract must be one where some element of performance other than the payment of money remains (i.e. non-monetary obligations); and (ii) the company needs to establish that the repudiation is necessary in order to formulate proposals for a scheme of arrangement or the survival of the company as a going concern. In essence, the company must be in a position to prove that its survival will be prejudiced if the repudiation is not effected. While the power to repudiate is a power given to the company and not the examiner, given that the examiner's primary role is to formulate the proposals for any scheme, evidence as to his or her support for the repudiation(s) sought will be necessary.

Noted as being a *"special and unique provision"*[9] of an *"exceptional nature"*[10], the Court in *Norwegian Air,* despite objection from various counterparties, exercised its discretion to allow the companies' application to repudiate a wide range of contracts including: (i) various aircraft and aircraft engine head leases and subleases; (ii) aircraft purchase agreements; (iii) other ground handling and fuel line service contracts; and significantly, (iv) guarantees given within the Norwegian Group to third parties. While various counterparties objected, the Court ultimately determined that repudiation of such contracts was necessary to allow the examiner to formulate proposals to facilitate the survival of the group. Overall, the companies issued applications pursuant to s. 537 for approval to repudiate some 425 contracts with 68 counterparties. *Norwegian Air* is among the first examinerships in which guarantees were repudiated utilising s. 537 of the Companies Act – demonstrating the Court's broad approach to the range of contracts that were repudiated and the method in which the repudiation applications were brought. The Court acknowledged that the question of whether or not guarantees are executory contracts was less clear in comparison to leases and required an examination of the contracts in each case.

The Court in *Norwegian Air* was satisfied that the guarantees the subject of the repudiation application were guarantees given by NAS (the Group's ultimate holding company) or AAA (the Group's centralised asset manager) in respect of counterparties to operating leases, finance leases and financing in respect of the purchase of aircraft. The guarantees contained an undertaking (as guarantor) that in the event of the failure by

"the company must be in a position to prove that its survival will be prejudiced if the repudiation is not effected"

8. Per Quinn J., *In the Matter of Arctic Aviation Assets DAC and Ors and Part 10 of the Companies Act 2014*, [2021] IEHC 268 at paragraph 136.

9. Ibid at paragraph 109.

10. Ibid at paragraph 139.

> *We see Ireland as an obvious contender for collaboration with the UK to work together in cross-border restructurings*

the relevant entity counterparty to the underlying lease or finance arrangement to pay or perform its obligations under the relevant agreement, NAS (or where relevant AAA) would do so as primary obligor. Because all of the relevant leases contained obligations to effect performance other than payment of money (such as, for example the maintenance and storage of aircraft), the Court agreed that NAS or AAA were required under the guarantees to effect performance other than payment of money. As they had "*step in*" obligations of a monetary and non-monetary nature under the guarantees, such agreements were capable of repudiation on the basis that there was some element of performance other than payment involved. Furthermore, the Court was satisfied that the repudiation orders made could have extraterritorial effect which was relevant to contracts entered into by NAS which were governed by English law. The Court's conclusion was that in light of the objectives and purposes of the examinership regime as a whole, to limit its application and effect to only those members, creditors and counterparties of the companies which are within the jurisdiction of the State would undermine the objective of the legislation, and would deprive examinership of its purpose.

The primary benefit of having a statutory power to effect the repudiation of executory contracts gives the Irish examinership process greater clarity to deal with these issues early on in what is already a short process and well in advance of the confirmation stage. Although the power to repudiate in an examinership has been invoked in numerous cases since the enactment of the examinership legislation in Ireland (in 1990) and particularly within the retail context, as noted in *Norwegian Air* there have been relatively few cases in which applications under s. 537 have been opposed (and the Court in *Norwegian* was only referred to three such cases). Being able to deal with lessors and guarantors early limits the scope for challenge at the confirmation stage, giving greater clarity earlier on the prospects of its success, which is a further unique selling point for Ireland in terms of its jurisdictional appeal in cross border restructurings.

While the *Norwegian Air* examinership was the first examinership to facilitate the repudiation of guarantee obligations in an examinership context, the Irish court has to date shown much flexibility and pragmatism in dealing with the issue of third party releases in Schemes by following a "*pro release interpretation*" of the Companies Act. Such an approach enables third party releases to be provided for in a Scheme. Once it can be established that there is "*sufficient nexus*" between a release and the creditor and the Scheme company, a Scheme can validly incorporate releases of contractual rights or other rights of action against related third parties as necessary where these are ancillary to the arrangement between the company and creditors the subject of the Scheme, even where, as in the case of *Nordic*, those third parties are not a party to the Scheme.

Working Together

Given the difficulties that Brexit presents the UK for large-scale restructurings involving companies within the EU, Ireland has shown its ability and expertise in dealing with such mandates. As further restructuring regimes come on stream in light of the EU Directive on Restructuring and Insolvency for UK practitioners to consider using in parallel processes, the unchartered territory of these (both substantively and in terms of recognition capabilities) poses a challenge. In circumstances where there is both a clear avenue and precedent for recognition of Irish restructuring processes in the UK under s.426(4) of the Insolvency Act 1986, we see Ireland as an obvious contender for collaboration with the UK to work together in cross-border restructurings. ■

How to sanction a contested restructuring plan under Part 26A of the Companies Act 2006: *guidance from Virgin Active*

LOTTIE PYPER

A: Introduction

The restructuring plans (the "**Plans**") proposed by the key UK entities of the Virgin Active group (the "**Plan Companies**" and the "**Group**" respectively) were sanctioned by Snowden J in early May 2021. Virgin Active Limited ("**VAL**") and Virgin Active Health Clubs Limited ("**VAHCL**") are the tenant companies of the Group's UK clubs. Virgin Active Holdings Limited is VAL and VAHCL's parent company and a guarantor of a number of their leases, as well as being the parent company of the remainder of the Group's Europe & Asia Pacific subdivision (the "**Europe & APAC Group**"). The Plans were part of a wider restructuring of the Europe & APAC Group. The purpose of the Plans was to compromise the Plan Companies' liabilities towards their secured creditors (the "**Secured Creditors**") and the majority of their unsecured creditors (together, the "**Plan Creditors**"). The Plan Creditors included certain unsecured creditors with liabilities relating to properties currently or previously occupied by the Group (the "**General Property Creditors**") and almost all of the landlords of the UK clubs (the "**Landlords**"). The Plans also amended the rent payable to certain Landlords going forwards. The structure of the Plans in relation to the Landlords will be familiar to practitioners who have worked on retail CVAs. The Landlords were divided into five classes (A to E) depending on the profitability of their premises, with their treatment under the Plans differing accordingly.

In the event, only the Secured Creditors and the Class A Landlords approved the Plans, with the remaining creditors forming dissenting classes. The court was therefore asked to sanction the Plans under section 901G of the Companies Act 2006 ("**CA 2006**"). This application was opposed by a group of Landlords (the "**AHG Landlords**"). The AHG Landlords contended that the court could not be satisfied that none of the dissenting creditors would be no worse off than they would be in the relevant alternative (the "*no worse off*" test in section 901G(3)), and that in any event the court should decline to sanction the Plans as a matter of discretion.

The three decisions handed down by Snowden J in these proceedings provide valuable guidance about how companies wishing to propose a restructuring plan that is likely to require sanction under section 901G should approach the preparation of valuation reports and analysis regarding the relevant alternative, the formulation of the proposed restructuring plan, and the provision of information to hostile creditors prior to the sanction hearing. The first judgment convened the meetings of Plan Creditors (the "**Plan Meetings**"): see [2021] EWHC 814 (Ch) (the "**Convening Judgment**"). The second judgment considered the costs of the convening hearing: see [2021] EWHC 911 (Ch) (the "**Costs Judgment**"). The third judgment sanctioned the Plans: see [2021] EWHC 1246 (Ch) (the "**Sanction Judgment**"). These decisions highlight the court's willingness to ensure that, as far as possible, restructuring plans are and remain a practical tool that enable companies to restructure their liabilities within a tight timeframe and without being forced to incur exorbitant costs.

The remainder of this article is structured as follows:

- Section B sets out the relevant factual background;
- Section C summarises the non-controversial issues in the proceedings;
- Section D addresses the Convening Judgment;
- Section E addresses the Costs Judgment;
- Section F addresses the Sanction Judgment; and
- Section G contains the conclusion.

B: Background

The Relevant Alternative

The challenge advanced by the AHG Landlords was primarily concerned with the analysis produced on behalf of the Plan Companies about what was likely to happen if the Plans were not implemented. This was contained in a report dated 19 March 2021 produced by Deloitte LLP ("**Deloitte**"), setting out its views on the likely outcome for Plan Creditors if the Restructuring Plans were not approved (the "**Relevant Alternative Report**"). In addition, two valuation reports were produced by Grant Thornton LLP, one dated 18 February 2021 (the "**Grant Thornton Report**") and the other dated 19 April 2021 (the "**Updated GT Report**"), each of which set out a consolidated valuation of the Group, produced by valuing each of the regional businesses and combining the results. Deloitte used the GT Report to inform its conclusions in the Relevant Alternative Report. The Updated GT Report was produced just before the sanction hearing, and confirmed that the position of the Plan Companies had not altered materially.

The Relevant Alternative Report

In Deloitte's view, the most likely alternative to the Plans was a trading administration followed by an orderly sale of the Group's UK business and assets, in conjunction with a sale of each of the Group's regional businesses (the "**Relevant Alternative**"). Although a trading administration would require additional funding, Deloitte considered that the Secured Creditors were likely to provide this, given the significant upside for them in a trading administration as opposed to an immediate liquidation of the Group's assets (the projected outcomes being 84.6p/£ in a trading administration *vs* 21.8p/£ if no further funding could be obtained).

It is evident from the preceding paragraph that even a sale following a trading administration was not anticipated to clear the value of the debt owed to the Secured Creditors. Returns for unsecured creditors in that scenario were therefore projected to be extremely poor, being limited to the prescribed part under section 176A of the Insolvency Act 1986 of up to £600,000 for each Plan Company, plus the value of any guarantees held by Plan Creditors against other entities in the Group. Deloitte include the estimated value of any guarantees when calculating the anticipated returns for each Plan Creditor.

Deloitte considered that in the Relevant Alternative the administrators would only retain the Class A Leases and Class B Leases in the sale of the UK business. Deloitte relied on a report from Mason Partners LLP (the "**Mason Partners Report**") to inform their analysis of the likely outcome for the Class A Landlords and Class B Landlords in this scenario. Given the profitability of their premises, Class A Landlords were expected to recover their rent arrears as a condition of any assignment to a purchaser. Class B Landlords were not expected to recover any rent arrears, but were expected to consent to the assignment in exchange for rent being paid at a level between their existing contractual rent and the market rent for their property. Class B Landlords would therefore be entitled to prove in the relevant administration for their rent arrears claim. Class C, D and E Landlords would also be able to prove in the relevant administration for any claims owed to them, as would the General Property Creditors.

The GT Report and the Updated GT Report

Grant Thornton's valuation was based on a discounted cash flow analysis ("**DCF**"), which was then cross-checked against a leveraged buy-out ("**LBO**") valuation and a market multiple valuation. Each of these are established ways of producing a desktop valuation. A DCF valuation forecasts cash flows attributable to the business and then discounts them to their net value at the present date. Key inputs into the calculation include the weighted average cost of capital ("**WACC**"), which models the anticipated cost of the company's equity and debt, and the long-term growth rate ("**LTGR**"), which models the rate at which the company is anticipated to grow indefinitely. A LBO valuation seeks to determine the price that a buyer would pay for a target company with financing from the current debt markets. A market multiple valuation looks at the estimated enterprise value to EBITDA ratio of comparable listed companies in order to determine the appropriate ratio to apply to the company being valued.

Grant Thornton provided three valuations of the business using this methodology, each of which contemplated a range of results. The first was based on the Group's business plan for each regional business prepared based on forecasts made in January 2021 (the "**Base Case**"). The second was based on an updated forecast prepared on late February 2021, which overlaid sensitivities that reduced the Group's EBITDA to reflect delays to the reopening of gyms in England and Italy by that time (the "**Downside Case**"). However, the Updated GT Report set out a new valuation influenced by developments in the period to 19 April 2021 (the "**Updated Case**").

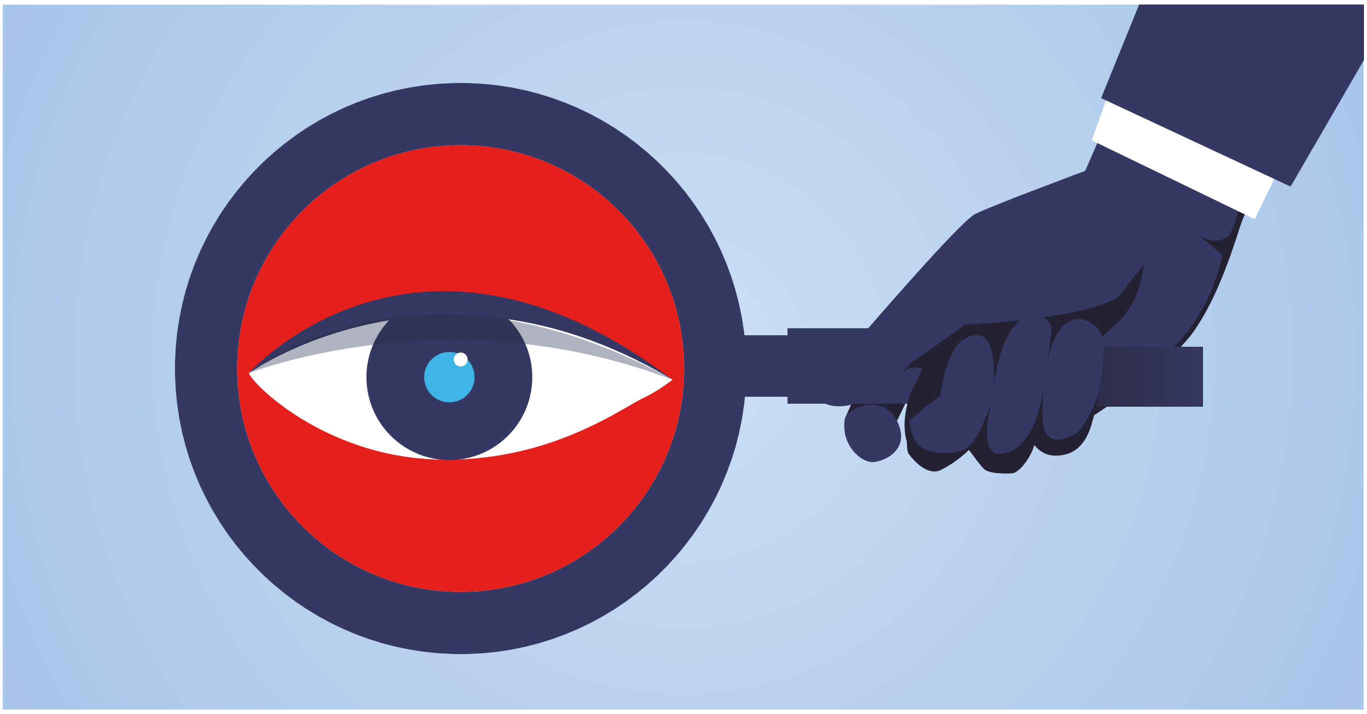
Deloitte's analysis of the likely proceeds of a sale of the Group was largely based on the Downside Case. They did not adopt Grant Thornton's conclusions regarding the UK business, but rather produced separate valuation including only Class A Landlords and Class B Landlords in the sale, as described in the section above.

The Plans and the wider restructuring

Contributions from the Shareholders

Under the wider restructuring, the two major shareholders of the Group (the "**Shareholders**") and their affiliates agreed to provide a package including the capitalisation of approximately £185 million intercompany liabilities; the waiver or deferral of approximately £24.8 million owed to the licensor of the Virgin brand; the provision of a secured loan of £25 million to enable the Plans to be proposed (the "**Pre-Implementation Facility**"); the provision of a further loan of £20 million to provide additional liquidity after the Plans became effective (the "**Post-Implementation Facility**"); an obligation to contribute up to £6 million of equity into the Plan Companies to enable payments to be made to compromised creditors under the Plans; and the waiver of certain events of default (Sanction Judgment, [38]).

The Pre-Implementation Facility was made available to the Europe & APAC Group on the same day that the practice statement letter was



distributed (10 March 2021), and provided critical liquidity in the two-month period before the Plans were sanctioned. The rest of the package would be made available after the Plans became effective.

Impact of the Plans

The Plan Creditors for each Plan Company comprised the Secured Creditors, the Landlords (divided into classes A to E) and the General Property Creditors.

Secured Creditors

The Secured Creditors did not suffer any reduction in the amount owing to them under the Senior Facilities Agreement. The maturity date of the Senior Facilities Agreement was extended by three years, certain interest payments were deferred and capitalised and the Secured Creditors also agreed to various amendments to the Senior Facilities Agreement which were capable of diluting their security.

Landlords

The division of landlords into different categories depending on the profitability of their premises has been used in CVAs for many years. Until the introduction of Part 26A, it was not possible to adopt this structure in a restructuring process under the Companies Act 2006, given the need for each class to approve a scheme of arrangement under Part 26. However, the new ability to bind dissenting classes under section 901G enabled the Plan Companies to differentiate between the Landlords in this way.

From an evidential perspective, it is important that the differential treatment of creditors who would otherwise rank equally in the relevant alternative can be objectively justified. In this case the Landlords were divided into classes based on the profitability of their premises, with certain adjustments being made to ensure that any particular features of individual premises were taken into account. The most profitable premises and other premises that were considered essential to the survival of the business were put in Class A; premises that were still profitable but less so were put in Class B; premises that were only marginally profitable were put in Class C; premises that were loss making were put in Class D; and Class E comprised premises that had been sub-let to new tenants and were therefore also loss making for the Plan Companies.

Under the Plans, the Class A Landlords received all rent arrears within three business days of the Plans becoming effective. Their payment cycles were changed to being paid monthly in advance for three years, but otherwise their leases were unchanged.

The rent arrears owing to the Class B Landlords were released and discharged in exchange for a payment equal to 120% of what that creditor would have received in the Relevant Alternative (a "**Restructuring Plan Return**"). Their payment cycles were changed to being paid monthly in advance for three years, but otherwise their leases were unchanged.

The rent arrears owing to the Class C Landlords were released and discharged. For a period of up to three years (the "**Rent Concession Period**"), the Class C Landlords would be paid 50% of their contractual rent, with all payments until 1 January 2022 deferred and paid in 60 equal monthly instalments from that date. After that, payments would be made monthly in advance. However, no payments would be due in the Rent Concession Period if the property was required to be closed for at least 28 days as a result of any government regulation relating to Covid-19. After the end of the Rent Concession Period, the leases would revert to their original terms. Each Class C Landlord would be entitled to terminate their lease on 30 days' notice, provided that such notice was given within 90 days of the Plans becoming effective. If a Class C Landlord exercised this right, they would be paid 30 days' worth of its rent in full. If this payment was insufficient to provide the Class C Landlord with a Restructuring Plan Return, they would also receive a further top-up payment to make up the shortfall.

From the date of the Plans becoming effective, no past, present or future rent or any other obligations would be payable to the Class D Landlords. In exchange, the Class D Landlords would be entitled to a Restructuring Plan Return. Each Class D Landlord would also have a rolling break right exercisable on 30 days' notice. If they exercised this right within 6 months of the Plans becoming effective, they would be paid 30 days' worth of their contractual rent. If this payment was insufficient to provide the Class D Creditor with a Restructuring Plan Return, they would also receive a further top-up payment to make up the shortfall.

The Class E Landlords were the landlords of properties sub-let by VAL or VAHCL. From the date of the Plans becoming effective, no past, present or future rent or other obligations would be payable to the Class E Landlords. In exchange, the Class E Landlords would be entitled to a Restructuring Plan Return. The Class E Landlords would be paid any amounts received by VAL or VAHCL by the sub-tenant, and would also be given a rolling break right exercisable immediately after the Plans became effective.

General Property Creditors

The claims of the General Property Creditors would be compromised in exchange for a Restructuring Plan Return.

C: Non-controversial matters

In a judgment handed down on 12 March 2021, two days after the practice statement letter was circulated, Chief Master Marsh stayed proceedings commenced by one of the Class B Landlords seeking to recover their unpaid rent arrears: see *Riverside CREM 3 Ltd v Virgin Active Health Clubs Limited* [2021] EWHC 746 (Ch). Chief Master Marsh noted that by this stage the Plans were well-developed, the threshold conditions under section 901A were plainly satisfied, and sufficient support from the Secured Creditors was already locked in. In these circumstances, there was a real prospect of the Plans being sanctioned. Permitting one Class B Landlord to obtain a judgment in these circumstances would partially undermine the Plans, since they would receive full payment instead of the amount it would otherwise receive under the Plans. In light of this, he stayed the claim until a week after the proposed sanction hearing.

In many ways, this judgment accurately foreshadowed the live issues in the proceedings. The traditional hurdles in satisfying the requirements of Part 26 and Part 26A CA 2006 were not in dispute. There was no real controversy over class composition, jurisdiction or the threshold conditions in section 901A.

As to class composition, an expansive approach was taken by the Plan Companies, with the Secured Creditors, General Property Creditors and each of the classes of Landlords voting at separate meetings for each Plan Company.

There was likewise no issue regarding jurisdiction. The Plan Companies are all incorporated in England; and, as is routine in such cases, expert evidence was obtained from all relevant jurisdictions regarding the recognition and/or enforcement of the Plans in the local courts.

The threshold conditions in section 901A were also obviously satisfied. The evidence demonstrated that the Plan Companies had suffered a dramatic loss of income as a result of the Covid-19 pandemic and resulting periods of lockdown in all of the Europe & APAC Group's territories. If the Plans were not sanctioned within the compressed timetable proposed by the Plan Companies, they were forecast to run out of cash and were likely to be put into administration by their directors. The purpose of the Plans was to restore the Plan Companies to financial health by compromising the majority of their outstanding liabilities and enable the wider restructuring to be implemented. There was therefore no doubt that the Plan Companies had encountered financial difficulties that threatened the Europe & APAC Group's ability to continue as a going concern (Condition A in section 901A) nor that the purpose of the Plans was to address these financial difficulties (Condition B in section 901A).

At the Plan Meetings, the Plans were approved by the Secured Creditors and Class A Landlords for each Plan Company. The Plans were not approved by any of the other classes of Landlords or the General Property Creditors. Therefore, by the time of the sanction hearing, therefore, the only live issues were whether the "*no worse off*" test in section 901G was satisfied and whether the court would exercise its discretion to sanction the Plans under that section. The AHG Landlords advanced their challenge on this basis.

D: The Convening Judgment

The AHG Landlords made two broad sets of submissions at the convening hearing. First, they submitted that the timetable proposed by the Plan Companies was too compressed. Snowden J rejected this submission. Extending the timetable would have rendered the proceedings nugatory, as the Plan Companies' evidence suggested that if the Plans were not sanctioned by early May, they would run out of money and need to enter administration. This was a case of genuine urgency, and both the Plan Companies and AHG Landlords were well-resourced parties who had engaged experienced advisors to assist them in meeting tight deadlines.

Second, the AHG Landlords submitted that the Explanatory Statement was inadequate, because it did not contain a number of documents that the AHG Landlords considered to be essential. Snowden J rejected this submission. He held that the information in the Explanatory Statement was adequate, and that the additional information sought by the AHG Landlords was only relevant (if at all) to a potential challenge to the Plans. Given the commercial sensitivity of a number of the requested documents, Snowden J indicated that the parties should seek to agree confidentiality orders pursuant to which certain documents could be provided to the advisors to the AHG Landlords (but not the AHG Landlords themselves) (the "**Confidentiality Orders**"). If an agreement could not be reached, the parties were invited to return to court in order to seek further disclosure.

In addition to the usual provisions, the convening order provided for the service of witness statements by the AHG, reply evidence from the Plan Companies, a pre-trial hearing after the Plan Meetings and scheduled the sanction hearing in a three- to four-day window running over the early May bank holiday. It also recorded that Plan Creditors were not precluded from raising issues as to class composition or jurisdiction at the sanction hearing.

E: The Costs Judgment

There was a separate hearing to determine the costs of the convening hearing. Snowden J refused to make a costs order at this stage, and instead reserved the costs of the AHG Landlords (and one other Plan Creditor who had appeared at the convening hearing) until after the sanction hearing.

Having carried out a detailed analysis of the authorities, Snowden J summarised the principles applicable to schemes under Part 26 (Costs Judgment, [29]):

> *"i) In all cases the issue of costs is in the discretion of the court.*
>
> *ii) The general rule in relation to costs under CPR 44.2 will ordinarily have no application to an application under Part 8 seeking an order convening scheme meetings or sanctioning a scheme, because the company seeks the approval of the court, not a remedy or relief against another party.*
>
> *iii) That is not necessarily the case (and hence the general rule under the CPR may apply) in respect of individual applications made within scheme proceedings.*
>
> *iv) In determining the appropriate order to make in relation to costs in scheme proceedings, relevant considerations may include,*
>
> > *a) that members or creditors should not be deterred from raising genuine issues relating to a scheme in a timely and appropriate manner by concerns over exposure to adverse costs orders;*
> >
> > *b) that ordering the company to pay the reasonable costs of members or creditors who appear may enable matters of proper concern to be fully ventilated before the court, thereby assisting the court in its scrutiny of the proposals; and*
> >
> > *c) that the court should not encourage members or creditors to object in the belief that the costs of objecting will be defrayed by someone else.*
>
> *v) The court does not generally make adverse costs orders against objecting members or creditors when their objections (though unsuccessful) are not frivolous and have been of assistance to the court in its scrutiny of the scheme. But the court may make such an adverse costs order if the circumstances justify that order.*
>
> *vi) There is no principle or presumption that the court will order the scheme company to pay the costs of an opposing member or creditor whose objections to*

> "…in light of the more extensive analysis in other cases, Snowden J readily accepted that the comment in Noble overstated the approach of the court"

a scheme have been unsuccessful. It may do so if the objections have not been frivolous and have assisted the court; or it may make no order as to costs. The decision in each case will depend on all the circumstances."

In reaching this conclusion, Snowden J noted that his comment in *Re Noble Group* [2019] BCC 349 (convening judgment) at [152] that "*creditors who attend to raise legitimate points in a constructive manner at a convening hearing can expect to receive their reasonable costs irrespective of the outcome*" was *obiter* and not the result of being referred to any relevant authority or adverse argument on the point. In these circumstances and in light of the more extensive analysis in other cases, he readily accepted that the comment in *Noble* overstated the approach of the court.

Snowden J also emphasised that the end point of the analysis in relation to Part 26A would not necessarily be the same as under Part 26, but that he had formed no view in this respect. He reserved costs until after the sanction hearing since, until then, it was not possible to determine whether the information provided under any Confidentiality Orders would prove relevant to questions of class composition and/or how any challenge to the sanction of the Restructuring Plans would play out. The applicable principles remain an open question, as all outstanding costs questions were settled between the parties after the sanction hearing without the need for further submissions.

F: The sanction judgment

Section 901G provides that, if the compromise is not approved by one or more classes of creditors (a "**dissenting class**"), the court is not prevented from sanctioning the restructuring plan if two conditions are satisfied.

Condition A is 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*" (section 901G(3)). 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*" (section 901G(4)).

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*" (section 901G(5)).

Given that the Restructuring Plans were approved by the Secured Creditors and the Class A Landlords, the two live issues were whether the "*no worse off*" test (Condition A) was satisfied and whether the Court should exercise its discretion to sanction the Restructuring Plans.

The "no worse off" test

There are three limbs to satisfying Condition A in section 901G.

First, identifying the relevant alternative. Snowden J noted that it is not necessary for the court to be satisfied that a particular alternative will definitely occur or even that it is more likely than not. The question is which outcome is most likely to occur, such that "*if there were three possible alternatives, the court is required only to select the one that is more likely to occur than the other two*" (Sanction Judgment, [107]).

Second, determining the outcome for the dissenting classes in the relevant alternative. This is an inherently uncertain exercise, because it involves the court considering a hypothetical counterfactual.

Third, comparing the outcome under the relevant alternative for the dissenting classes to the outcome under the if the proposed restructuring plan is sanctioned.

Identifying the relevant alternative

As discussed above, the Plan Companies's evidence was that if the Restructuring Plans were not sanctioned, the Plan Companies would enter administration during the following week. In this case, the Relevant Alternative Report considered that the most likely outcome would be trading administration following by a sale of the regional businesses, funded by the Secured Creditors. Although the AHG Landlords raised a number of questions about the way in which the restructuring had been negotiated, Snowden J held that these considerations were not relevant to determining what the relevant alternative was as at the time of the sanction hearing (although they would be relevant at the discretion stage). He was therefore satisfied by the Plan Companies' evidence that the Relevant Alternative was a trading administration followed by a sale of the Group in the manner contemplated in the Relevant Alternative Report. Although the AHG Landlords did not materially challenge this evidence, they challenged the conclusion reached in the Relevant Alternative Report about the likely outcomes for creditors in that scenario.

The outcome for the Plan Creditors in the Relevant Alternative

The AHG Landlords advanced a number of arguments that sought to undermine the Plan Companies' evidence regarding the likely outcome for Plan Creditors in the Relevant Alternative, as follows:

1. The court should not place too much weight on the fact that the AHG Landlords had not produced an alternative valuation report, given the deficiencies in the process;
2. The Relevant Alternative Report could not be relied on due to the absence of market testing carried out prior to launching the Plans;
3. The Relevant Alternative Report and Grant Thornton's reports could not be relied on due to the disclaimers in those reports;
4. The valuation in the Relevant Alternative Report was too conservative;
5. The Mason Partners Report could not be relied upon; and
6. Contrary to the Relevant Alternative Report, the Class B Landlords were likely to recover some or all of their rent arrears in the Relevant Alternative, and therefore would be better off in that scenario.

Snowden J rejected all of these submissions.

The absence of an alternative valuation report

The AHG Landlords submitted that, as a result of the various alleged deficiencies in the process, the court should not place too much weight on the fact that only the Plan Companies had adduced a formal valuation report, with no competing valuation offered by the AHG Landlords.

Snowden J rejected this line of submissions, holding that "*I do not accept that I can, as a matter of principle, do anything other than assess the Plans on the basis of the evidence before me, and I am not persuaded that my starting point should be to view the evidence of the Plan Companies with scepticism because of the difficulties the AHG Landlords claim to have faced in obtaining information*". The AHG Landlords and their advisers had been provided with "*an enormous volume of information and documents*" following the convening hearing, and although the AHG Landlords would have preferred to have more time to work with those documents before the sanction hearing, there was no reason for the Court to place less weight on the Plan Companies' evidence as a result, particularly given the compressed timetable and real urgency in this case (Sanction Judgment, [122]-[123]).

In reaching this conclusion, Snowden J placed weight on the fact that the AHG Landlords were commercial parties who had instructed experienced and sophisticated advisors with the ability to operate to very tight deadlines (Sanction Judgment, [124]). He also noted that the AHG Landlords had not acted with particular expediency after the Convening Hearing in order to obtain the confidential documents, and had agreed to vacate the pre-trial review listed before the Sanction Hearing rather than use it to make a disclosure application. In addition, the fact that the Sanction Hearing had involved cross-examination of the Plan Companies' witnesses meant that their evidence "*was tested much more rigorously than is typically the case in Part 26 schemes or in any of the Part 26A plans that have thus far come before the Courts*" (Sanction Judgment, [125]-[127]).

Snowden J was also mindful of the need to ensure that Part 26A can deliver expedient restructuring solutions, and that it was therefore "*obviously important that the potential utility of Part 26A is not undermined by lengthy valuation disputes, but that the protection for dissenting creditors given by the "no worse off" test (and the Court's general discretion) must be preserved.*" He provided the following guidance, which should be borne in mind by future parties proposing or challenging

a restructuring plan under Part 26A (Sanction Judgment, [130]–[132]):

"I consider that the Court is entitled to expect and require companies proposing Part 26A plans to cooperate in the timely provision of information. In an appropriate case this may include information over and above that which can sensibly be contained in a concise explanatory statement, but which may be relevant to the efficient resolution of genuine valuation disputes that have been raised by dissenting creditors.

It would also be most unfortunate If Part 26A plans were to become the subject of frequent interlocutory disputes. However, if a dissenting creditor is to rely on an argument that it did not have enough information with which to challenge the evidence of a plan company, it will obviously be relevant to consider whether that dissenting creditor used the means legitimately available to it under the CPR to obtain the information prior to the sanction hearing."

The absence of market testing

The AHG Landlords argued that the estimated outcomes for creditors in the Relevant Alternative Report could not be relied on because there had been no market testing prior to launching the Plans.

Snowden J rejected this submission. There is no absolute obligation to conduct a market testing process as part of a restructuring (Sanction Judgment, [139]) and he was not persuaded that the Plan Companies acted unreasonably in not carrying out any market tested based on the advice of their advisers (Sanction Judgment, [141]). It was unclear how funding for a marketing process would have been obtained, and even if such a process had been carried out, the results would have had to be treated "*with extreme caution.*" Marketing a gym business in January 2021, with the pandemic ongoing and many of the Group's territories in lockdown, would have involved market conditions that "*could hardly have been less favourable*" (Sanction Judgment, [145]). Indeed, potential buyers might well be unwilling to commit the time and resources to putting together a serious bid that would actually result in a sale. He also noted that although market testing was sometimes carried out, it was by no means the norm in cases under Part 26 or Part 26A.

The disclaimers in the Relevant Alternative Report and the GT Report

Snowden J also rejected the argument that he could not rely on the Plan Companies' valuation evidence in light of the disclaimers and caveats in the Relevant Alternative Report and the GT Report, holding that these were not of any real significance: "*the disclaimers bear all the hallmarks of having being inserted without sufficiently clear thought about the wording and the context in which the reports were likely to be used in these proceedings, together with a defensive over-abundance of caution designed to protect the firms concerned from claims against them in the event that matters did not turn out as predicted*" (Sanction Judgment, [153]). He also noted that PwC, the AHG Landlord's advisers, included similar disclaimers and caveats in a report that they prepared in a different restructuring.

The Relevant Alternative Report was unduly conservative

The AHG Landlords argued that the valuation of the regional businesses was overly conservative, and that in fact a sale in the Relevant Alternative was likely to generate a surplus, which would have increased the returns to unsecured creditors above what they would receive under the Plans (including the dissenting classes). First, the AHG Landlords argued that the Downside Case valuation was too low, and that it was more appropriate to use the Updated Case (without applying a distressed discount) when calculating the value of the business. Second, they argued that the WACC and LTGR figures used by Grant Thornton in preparing the DCF valuation were unduly conservative.

Snowden J rejected both of these arguments. It was not appropriate to base the valuation on the Updated Case without applying a distressed discount. The GT Report and the Updated GT Report valued the company in a solvent scenario with a willing buyer, and Grant Thornton anticipated that a distressed discount of 30-50% was likely to be applied in a sale from administration. Therefore even if the Updated Case were used in calculating the relevant alternative, the Updated Case would need to be subject to a distressed discount.

Snowden J noted that if a distressed discount were applied to the Updated Case, then there was only one scenario which generated a surplus, which involved applying the lowest suggested distressed discount to the highest valuation point in the Updated Case. In light of Grant Thornton's evidence "*that the most likely outcome is typically the midpoint between two extremes (which I accept), that outlier scenario appears to me inherently unlikely*" (Sanction Judgment, [181]). Therefore, the most likely outcome was that the Relevant Alternative would not generate a surplus for the unsecured creditors.

Snowden J also rejected the AHG Landlord's attempts to challenge the WACC and the LTGR used in the DCF valuation. There was no reason to doubt the approach taken by Grant Thornton in landing at those figures for the purpose of the DCF valuation, and in turn it was reasonable for Deloitte to rely on the conclusions in the GT Report.

The Mason Partners Report

The AHG Landlords submitted that the Mason Partners Report was inherently unreliable. Snowden J rejected this submission, noting that it had been open to the AHG Landlords to adduce their own evidence about the market value of their properties by way of rent or arrears,
but they had chosen not to do so.

The possibility of Class B Landlords receiving rent arrears

The AHG Landlords contended that, whereas the Relevant Alternative Report contemplated that the Class B Landlords would forego all rent arrears as the price of an assignment on a sale by administrators, in reality they might negotiate payment of some or all of their arrears. In this case, the Class B Landlords would be better off in the Relevant Alternative than under the Restructuring Plans. Snowden J held that although it was "*not impossible that this could happen*", he did not "*accept that it is what is most likely to happen*" given that in practice there was likely to be a negotiation between the administrators and the Class B Landlords, and there were substantial downsides for the Class B Landlords if they refused to consent to the assignment (Sanction Judgment, [194]-[195]).

Comparison of outcomes for the dissenting classes in the Relevant Alternative vs the Plans

Having rejected each of the AHG Landlords' challenges, Snowden J concluded that all of the dissenting classes were likely to be no worse off than in the Relevant Alternative. Condition A was therefore satisfied (Sanction Judgment, [207]).

Should the court exercise its discretion to sanction the Plans?

The second prong of the AHG Landlords' challenge was to argue that the court should decline to sanction the Plans as a matter of discretion. The main thrust of this argument was the fact that the Shareholders were permitted to retain their equity stake in the Group after the restructuring, despite the fact that they ranked behind unsecured creditors in the insolvency waterfall and therefore would have received nothing in the Relevant Alternative.

General principles

Snowden J started by considering the judgment of Trower J in *Re DeepOcean 1 UK Limited* [2021] EWHC 138 (Ch), the only prior case where section 901G had been invoked. He emphasised that even if the conditions in section 901G were satisfied, the court would still need to consider all relevant factors and circumstances that it would ordinarily take into account when considering whether to sanction a restructuring plan that was approved at each plan meeting, since "*the approach cannot be any less rigorous because one class has voted against a plan than where all classes have voted in favour*" (Sanction Judgment, [224]).

Snowden J then considered the correct approach towards creditors who were '*out of the money*', in that they would not receive any returns in the relevant alternative. He concluded that the established approach under Part 26 "*reflects the view that where the only alternative to a scheme is a formal insolvency in which the business and assets of the debtor company would be held on the statutory trusts for realisation and distribution to creditors, that business and assets in essence belongs to those creditors who would receive a distribution in the formal insolvency. The authorities take the view that it is for those creditors who are in the money to determine how to divide up any value or potential future benefits which use of such business and assets might generate following the restructuring (the restructuring surplus)*" (Sanction Judgment, [242]). There was nothing that suggested a different approach should be taken towards Part 26A. Indeed, the point was reinforced by section 901C(3), which expressly contemplates an out of the money class being bound by a restructuring plan without even having voted at a class meeting. Snowden J noted that "*if creditors who would be out of the money in the relevant alternative could be bound to a plan which effects a compromise or arrangement of their claims without even being given the opportunity to vote at a class meeting, the fact that they have participated in a meeting which votes against the plan should not weigh heavily or at all in the decision of the court as to whether to exercise the power to sanction the plan and cram them down. Nor is it easy to see on what basis they could complain that the plan was "unfair" or "not just and equitable" to them and should not be sanctioned*" (Sanction Judgment, [248]-[249]).

Snowden J therefore concluded that the "*key principle therefore appears to be that both under Part 26 schemes and Part 26A plans it is for the company and the creditors who are in the money to decide, as against a dissenting class that is out of the money, how the value of the business and assets of the company should be divided*" (Sanction Judgment, [259]). However, he noted that there were still questions about the allocations of benefits as between different groups of creditors. Traditionally companies are entitled to select which creditors to include in a scheme or restructuring

plan, and may discriminate between creditors with equal pre-restructuring rights provided that there is a "*good commercial reason*" for that approach (Sanction Judgment, [260]-[262]). The same reasoning applied regarding differential treatment of creditors included within a restructuring plan.

Treatment of the Shareholders

In light of this analysis, Snowden J rejected the AHG Landlords' submission regarding the treatment of the Shareholders. There was nothing to suggest that the Plan Companies conferred favourable treatment on the Shareholders when the restructuring was being negotiated. Indeed, the Shareholders were the only parties willing to advance the necessary funds on terms acceptable to the Secured Creditors (whose consent to the deal was essential in order to enable new money to be advanced). The contributions provided by the Shareholders were significant, and primarily involved advancing new money or writing off existing debt. This was materially different to the compromise of existing unsecured claims that would receive little to no return in the Relevant Alternative.

Snowden J therefore conclude that the retention of equity by the Shareholders should not lead him to decline to sanction the Plans (Sanction Judgment, [300]).

Other discretionary factors

Snowden J also considered whether the Plan Creditors were fairly represented at their Plan Meetings. The Plans were rejected by every one of Classes B through E of the Landlords and the General Property Creditors. However, in the absence of any evidence clarifying why those classes had not approved the Restructuring Plans, Snowden J attached little weight to this numerical opposition. 11 of the 17 Class B Landlords who voted were in favour of the Plans, with the voting outcome being largely determined by one of the AHG Landlords. The remaining classes of Landlords and the General Property Creditors were out of the money such that "*little or no weight should be placed on their votes, and certainly not so much weight that it should cause me to decline to sanction the Plans*" (Sanction Judgment, [311]). In addition, there was no "*blot*" on the Plans nor any issues as to whether the Plan would have a substantial effect in relevant jurisdictions.

G: Conclusion

The guidance given in the *Virgin Active* case sets out a framework for determining valuation disputes in the context of Part 26A. In particular, where opposition to a restructuring plan is anticipated, companies should prepare to disclose confidential documents, either directly or under a confidentiality order, at the earliest opportunity. Snowden J's careful judgments underline the importance of obtaining robust valuation evidence and evidence as to the relevant alterative. Provided that the company proposing the restructuring plan can demonstrate that the "*no worse off*" test is satisfied and the allocation of consideration after the restructuring plan has been done in a commercially rationale manner, it will be more difficult for opposing creditors to bring a successful challenge where the dissenting class or classes are "out of the money". Creditors looking to challenge future restructuring plans would be well advised to take all possible steps to prepare a competing valuation report, in order to provide an evidential basis for departing from the plan company's evidence. ■

Case Digest Editorial

Mark Arnold QC

Welcome to the July edition of the Case Digests.

It must be getting on for a century now since, for the advancement of the common law generally and the law of negligence in particular (and, perhaps, for reasons of its own), the snail found its way into the ginger beer bottle whence it emerged sometime later, somewhat decomposed, as it was poured into the tumbler of the unsuspecting shop assistant, having a drink with her friend in a café in Paisley.

Donoghue v Stevenson has, of course, become the stuff of legal legend, but the tort of negligence continues to be refined. In ***Manchester Building Society v Grant Thornton UK LLP***, digested here by Jamil Mustafa, a seven-strong Supreme Court has (by a majority) provided general guidance as to the proper approach to determining the scope of the duty and the extent of liability of professional advisors (auditors here; medical advice in *Khan v Meadows* [2021] UKSC 21 heard at the same time) in the tort of negligence. Both should be read against the background of *Caparo Industries v Dickman* [1990] 2 AC 605 (auditors and shareholders), *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 (valuation advice; recovery of damages for economic loss) and *Hughes-Holland v BPE Solicitors* [2018] AC 599 (legal advice). In summary, the scope of the duty of care assumed by a professional adviser is governed by the *purpose for which the advice is being given, judged objectively*. It is concerned with the question what the risks of harm to the claimant are, against which the law imposes on the defendant a duty to take care, bearing in mind that the fact that the defendant owes such a duty does not mean that the duty extends to every kind of harm which might be suffered by the claimant as a result of the breach of that duty. As such, it forms the second in a six-stage conceptual framework for the analysis of negligence claims, preceded by (i) actionability (whether the harm is actionable), and followed by (iii) breach, (iv) causation, (v) whether there is a sufficient nexus between a particular element of the harm for which damages are claimed and the subject-matter of the duty of care (the nexus question) and (vi) remoteness.

Much has already been written – including in these pages – about the impact in recent times of CVAs on landlords. That seems set to continue with the recent important decision of Zacaroli J, in which he rejected the landlords' challenges to the ***New Look*** CVA based on grounds of jurisdiction, unfair prejudice and material irregularity. The decision (digested here by Daniel Judd and Paul Fradley) is understood to be on its way to the Court of Appeal, permission having been granted by the Judge himself.

Landlords have also been unsuccessful in their attempt to bypass or prevent the progress of ***Virgin Active's*** Part 26A Plan, in the context of which Snowden J has given important guidance on the exercise of the new cross-class cram-down powers, following Trower J's decision in *Deep Ocean*. The ***Virgin Active*** decisions are digested here and are also the subject of Lottie Pyper's excellent main article.

Identifying and establishing the relevant comparator when asking the court to sanction a scheme of arrangement is a matter of fact to be established by evidence. The question has arisen in two recent decisions. In the first, ***ALL Scheme Limited***, Miles J refused sanction on the basis (and for other reasons) that the scheme company's evidence fell short; conversely, in ***DTEK Energy BV***, Sir Alastair Norris considered that the evidence of the likelihood of "domino" group insolvencies absent the scheme was sufficient. Both repay close attention.

Meanwhile, the Court of Appeal has delivered important decisions relating to:

- the *Quincecare* duty: ***Stanford International Bank Ltd v HSBC Bank Plc***, digested by Stefanie Wilkins;
- extensions of time for compliance with unless orders: ***Athena Capital Fund v Crownmark Ltd***, digested by Roseanna Darcy;
- tax avoidance in the context of section 580 of the Companies Act 2006: ***Chalcot Training Ltd v Ralph***; and the rights of a third party under section 4 of the Contract (Rights of Third Parties Act) 1999, in the face of the rule in Prudential: ***Broadcasting Investment Group v Smith***), both digested by Edoardo Lupi;
- third party debt orders after bankruptcy has intervened: ***Michael Wilson & Partners v Sinclair***, digested by Lottie Pyper;
- dishonest assistance and the consequences of a 19-month delay between trial and judgment: ***Natwest Markets Plc v Bilta (UK) Ltd*** (in liquidation, digested by Madeleine Jones, and
- mandatory relief for registered charities from non-domestic rates: ***London Borough of Merton v Nuffield Health***), digested by Riz Mikal.

Many thanks to all our Case Digesters for their contributions.

Happy reading!

Case Digests

Banking and Finance

Digested by Stefanie Wilkins

Bhattacharya v Oaksix Holdings Ltd

[2021] EWHC 1326 (Ch) (Elizabeth Jones QC) 26 May 2021

Financial Services and Markets Act 2000 Pt II s.26(1) – Limitation period

The appellants had brought a claim against the defendant ("**OHL**") under sections 26 and 28 of the Financial Services and Markets Act 2000 ("**FSMA**"). Its case was that certain loan agreements that they had entered into were unenforceable because they were in the nature of regulated mortgage contracts, and OHL was not an authorised person. The appellants appealed against the striking out of their claim relating to the first loan on the ground that it was statute-barred and against the entry of summary judgment in the respondent's favour.

It was accepted that the claim for a declaration was an action on a specialty, to which a 12- year limitation period would apply (pursuant to section 8(1) of the Limitation Act). Further, the claim for repayment of the monies paid by the appellants was subject to a six-year limitation period (as provided for in section 9(1) of the Limitation Act).

The Judge considered when the cause of action accrued in respect of the repayment claim. It was critical to this question that sections 26 and 28 of the FSMA did **not** require a borrower to commence an action in order to obtain relief. Rather, the borrower could simply not perform its obligations under the (unenforceable) contract. If they did so, however, it did not necessarily follow that they would be entitled to any net repayment by the lender – whilst they would be entitled to a repayment of the funds paid by them, they would also be required to return the funds that they had been lent. In the present case, there was no need for the appellants to have commenced a claim until 27 August 2013, which was the date on which they had repaid the capital. Accordingly, the Deputy Master at first instance had been in error in holding that there was no real prospect of the appellants showing that there was no limitation defence to their claims.

Stanford International Bank Ltd (In Liquidation) v HSBC Bank Plc

[2021] EWCA Civ 535 (Sir Geoffrey Vos, Moylan and Arnold LJJ) 15 April 2021

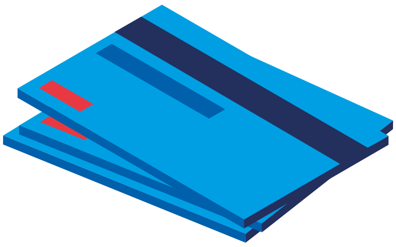
Quincecare duty – No loss caused by payments to creditors – Dishonest assistance

The claimant ("**SIB**") had been the vehicle for a Ponzi scheme carried out by Mr Stanford. It brought two claims against the defendant bank ("**HSBC**"). The first (the "**loss claim**") was that it had made various payments in a total amount of £116.1 million out of the claimant's account, in breach of its *Quincecare* duty (that is, the duty owed by a bank to its customer to use reasonable skill and care in carrying out the customer's orders). These payments occurred at a time when SIB was insolvent, and therefore reduced the estate available for creditors. Secondly, it was alleged that HSBC had dishonestly and/or recklessly assisted in Mr Stanford's breaches of fiduciary duty. The judge had struck out the dishonest assistance claim, but not the loss claim. SIB and HSBC, respectively, appealed against each of those decisions.

In respect of the loss claim, Sir Geoffrey Vos (with whom the other members of the Court of Appeal agreed) considered it fatal to SIB's claim that the payments in question had been paid to creditors of SIB. Thus, there was no loss to SIB – its asset position was unchanged as a result of the payments. SIB had alleged no consequential loss, nor had it claimed that its net asset position would have been different but for the breach of the *Quincecare* duty. Critically, it was irrelevant that the payments reduced the funds that were available to creditors. Whilst SIB's directors owed a duty to its creditors once SIB became insolvent, HSBC did not. Had SIB had more cash on hand at the start of its liquidation, that would have been a benefit to the creditors – but it was not a benefit to the company whilst it was trading.

In respect of the dishonest assistance claim, SIB contended that the test for a large corporation such as HSBC would be different for an individual. In essence, its case was that HSBC's senior management had dishonestly allowed HSBC to conduct its business in such a way that no one ever realised that SIB was conducting a Ponzi scheme. Moreover, SIB did not point to the individual(s) at HSBC whose behaviour was impugned; it said that it may never be able to identify those culpable. The Court of Appeal rejected these submissions. Dishonest assistance required, as a subjective element, some dishonesty of a person within a corporation, or blind eye knowledge. That dishonesty had to be the dishonesty of one or more natural persons; "*it was not possible to aggregate two innocent minds to make a dishonest whole*".

Further, blind eye knowledge required the existence of a suspicion that certain facts existed, and a conscious decision not to enquire. The pleaded case was, essentially, that an untargeted and speculative suspicion should have been pursued. That was insufficient, as it was essentially a pleading of negligence – which could never be the basis for a finding of dishonesty. ■



Civil Procedure

Digested by Roseanna Darcy

Laser Trust v CFL Finance Ltd

[2021] EWHC 1404 (Ch) (Marcus Smith J) 21 May 2021

Third-Party Costs Order

This was an application by Laser Trust ("**Laser**") for a third– party costs order under CPR 46.2 against Colosseum Consulting Limited ("**Colosseum**"). Laser already had three separate costs orders against the Respondent, CFL Finance Ltd ("**CFL**"). It was clear that CFL lacked the funds to satisfy the remaining balance of over £330,000 on those costs orders. Colosseum had been the third– party funder for CFL's participation in the underlying litigation. It was submitted, and accepted by the Judge, that Colosseum had "*absolute control*", or at least "*a considerable degree of control*" over the conduct of the litigation by CFL which is why it was appropriate for the order to be granted.

Pursuant to s.51 of the Senior Courts Act, the Court has full power to determine by whom, and to what extent costs shall be paid. Although orders against non– parties were exceptional, the Court must look to the specific facts of the case in exercising its discretion.

On the facts of this case, it was clear that the test of going beyond the mere funding of litigation had been met and that Colosseum had had a "*massive degree of control*" over the litigation between Laser and CFL.

On that basis it was also appropriate to make the third– party costs order without reference to the cap which could be said to apply, namely to limit the order to those costs which had actually been paid by the funder. The nature of Colosseum's interest in the proceedings was so great that the *Arkin*–cap (*Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055) should not apply. It was entirely appropriate in the circumstances for Colosseum to pay the amounts as already assessed without requiring the costs to be re–assessed.

Although Colosseum's sole director had resolved to place the company into voluntary liquidation on the same day as the application was served, this did not prevent the application from proceeding as normal.

[Felicity Toube QC, Robert Amey]

Athena Capital Fund v Crownmark Ltd

[2021] EWCA Civ 414 (Haddon–Cave, Nicola Davies, Popplewell LJJ) 23 March 2021

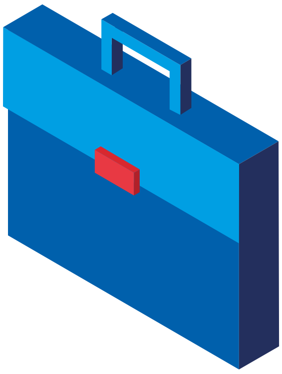
Extensions of Time – Unless Orders – Disclosure – Funding

This was an appeal by Athena Capital Fund ("**Athena**") against an order that allowed the Cypriot registered respondent Crownmark Ltd ("**Crownmark**") an extension of time within which to comply with an unless order on the disclosure of certain hard copy documents.

The substantive matter concerned a claim by Athena against Crownmark for moneys due under a facility agreement in excess of $50 million which Crownmark denied and counterclaimed for $52 million. Disclosure orders were made in March 2019, although Crownmark subsequently entered CVL in August 2019. One of Crownmark's primary assets was its Counterclaim. However, as the liquidator had no funds to instruct lawyers or to continue to defend the claim, it was made clear that a creditor would need to fund the proceedings which had been estimated to cost between £500,000 and £700,000. An unless order was made against Crownmark in May 2020 providing that unless Crownmark gave the required disclosure its Defence and Counterclaim would be struck out.

Following this, one of Crownmark's creditors agreed to fund the Defence and Counterclaim and an application to set aside a further order refusing to extend the disclosure deadline and to vary the unless order was made. This was on the basis that there had been a material change in circumstances, namely the agreement of the creditor to provide funding. That reason was accepted by the Judge and the application was granted. The Judge was particularly mindful that there had been no history of defaults by Crownmark prior to the most recent events, the claim itself was very substantial, and the effect of disallowing the extension would be to reduce the sums to which other creditors would be entitled in the liquidation. Although there were also factors going against allowing the application, such as the public interest in ensuring compliance with Court orders and the fact that Crownmark's creditors had had ample time to decide to fund the proceedings, the Judge was nevertheless persuaded by the Supreme Court's decision in *Goldtrail Travel Ltd v Onur Air Tasimacilik* [2017] UKSC 57; [2017] 1 WLR 3014 which made it clear that the shareholder's distinct legal personality should be respected.

Permission to appeal was granted, including on whether *Goldtrail* could be relied on. However, subsequent to that the creditor who had agreed to fund proceedings decided they no longer wished to, with no particular reason given. Athena subsequently appended this to its grounds of appeal, asserting there had not been a material change of circumstances. It was accepted by the Court of Appeal that the overwhelming evidence suggested that the creditor never intended to do more than to fund the application to vary the unless order and that the Judge had been misled in that respect. On that basis the appeal was successful. The Court of Appeal also confirmed that given Crownmark failed to provide disclosure by the amended date in the unless order, this had the effect that its Defence and Counterclaim were struck out and that Athena was entitled to register judgment against it. ■



Commercial Litigation

Digested by Jamil Mustafa

Gordian Holdings Ltd v Sofroniou

[2021] EWHC 235 (Comm) (Butcher J) 12 February 2021

Share transfers – Strike out – Transactions at an undervalue – Transactions defrauding creditors

The defendants unsuccessfully applied to strike out parts of the claimant's Particulars of Claim or alternatively 'reverse' summary judgment in relation to the same parts. The claim related to a demand for repayment under a facility agreement. A Cypriot bank had obtained judgment from a Cypriot court which held that the defendant was jointly and severally liable for c.€700,000 in respect of that facility agreement. Following the Cypriot judgment, the first defendant transferred his entire shareholding in a company to his wife (the second defendant) in May 2017 (the "**Share Transfer**"). The Cypriot judgment was then registered in England. In 2018, the second defendant returned the shareholding to her husband (the "**Share Return**").

In May 2019, the claimant alleged that the bank's rights relating to the clam were transferred to it and commenced proceedings for a declaration that the share transfer was a transaction defrauding creditors under section 423 of the Insolvency Act 1986 ("**Section 423**"). The defendants applied to strike out certain paragraphs of the Particulars of Claim, or alternatively summary judgment, on the basis that the claimant had no claim under Section 423 because of the Share Return which meant that the claimant was not a 'victim' for the purpose of that section and in any event the Court could grant no relief that would go further than the Share Return. The High Court rejected these arguments. There was no suggestion in Section 423 that a person who was a victim when the impugned transaction occurred could lose that status by reason of something subsequently and unilaterally done by the debtor. Equally, while the Court accepted that the Share Return would have to be taken into account in determining whether and if so what relief could be granted, it was not sufficiently clear that no relief would or could be granted to justify a strike out or summary judgment. ■

[Robert Amey]

Boyse (International) Ltd v Natwest Markets Plc

[2021] EWHC 1387 (Ch) (Trower J) 25 May 2021

Deceit – Fraudulent misrepresentation – Interest rate hedges – LIBOR – Limitation– Loan Agreements

The High Court upheld the decision of the Master to dismiss a claim for deceit in connection with LIBOR rigging on the basis that the claim was statute– barred by limitation.

The claimant entered into loan agreements with the defendant bank to purchase two properties. The second of the loans (which refinanced the first) provided that the bank's obligations were conditional on the claimant also entering into interest rate hedging products ("**IRHPs**"). In 2007 and 2008, the claimant entered into a IRHP linked to LIBOR. The claimant entered into two IRHPs with the bank linked to LIBOR but was then forced to sell the properties at a significant undervalue as a result of the costs of the IRHPs. Then, in early 2012, the bank's conduct with respect to LIBOR became the subject of widespread concern and adverse press comment, and in June of that year, the Financial Services Authority ("**FSA**") found that there had been serious failings in the bank's sale of IRHPs and on 6 February 2013 issued a final notice against the bank which detailed a fine imposed on the bank for misconduct in relation to LIBOR (the "**Final Notice**"). In late 2014, the claimant accepted the bank's offer of redress in relation to the sale of the IRHPs in the amount it had paid to the bank (without prejudice to its right to bring a claim for consequential loss).

On 19 February 2019, the claimant brought a claim against the bank for consequential loss. One of the claims was based on alleged misrepresentations made by the bank in relation to the setting of the LIBOR benchmark upon which the claimant relied in entering into the IRHPs (the "**LIBOR misrepresentation claim**"). The bank successfully applied to the Master for summary judgment in respect of that claim as being statute– barred under sections 2 and 32(1) of the Limitation Act 1980 ("**LA 1980**"). His decision was upheld by the High Court. The High Court agreed that a reasonably diligent person in the position of the claimant could have discovered the alleged fraud by no later than the publication of the Final Notice on 6 February 2013, just over six years before the claim was issued. ■

Betamax Ltd v State Trading Corporation (Mauritius)

[2021] UKPC 14 (Lord Hodge, Lady Arden, Lord Leggatt, Lord Burrows, Lord Thomas) 14 June 2021

Contracts – Illegality – International Arbitration – Jurisdiction – Public Policy

The Privy Council overturned the decision of the Supreme Court of Mauritius to set aside an arbitral award on the basis that it breached a public procurement law.

Betamax entered into a contract of affreightment ("**COA**") with STC, a public company, operating as the trading arm of the Government of Mauritius with responsibility for the importation of essential commodities. The COA contained an arbitration clause. In January 2015, a new Mauritian Government considered that the COA was unlawful, having been entered into in breach of public procurement law, and STC gave notice that it could no longer continue to use Betamax's services. In response, Betamax terminated the COA under its default provisions and filed a notice of arbitration claiming damages.

Amongst other things, STC argued that the dispute was not suitable for arbitration because it concerned questions of public policy under national law. The arbitrator, however, found that the dispute was susceptible to arbitration under the COA because the national law did not preclude the civil consequences of its breach from being adjudicated in arbitration, and made an award in favour of Betamax. On appeal, the Supreme Court of Mauritius set aside that award on the basis that it conflicted with the public policy of Mauritius. The Privy Council allowed Betamax's appeal. The Board held that it was open to the arbitrator to determine, as a matter of statutory interpretation, whether the COA was exempt from the public procurement law and so lawful, as distinct from the question as to the nature and scope of public policy. The set aside provisions under Mauritian arbitration law (adopting UNCITRAL's Model Arbitration Law 1985 (as amended in 2006)) could not be used to review a decision of an arbitral tribunal on an issue of interpretation of the contract or legislative provisions where, on one of the alternative interpretations of the provisions, the agreement was illegal. It was not open to the Court to reopen issues relating to the meaning and effect of the contract and its compliance with a regulatory or legislative scheme under the cover of public policy. ■

Manchester Building Society v Grant Thornton UK LLP

[2021] UKSC 20 (Lord R, P, Lord Hodge, DP, Lady Black, Lord Kitchin, Lord Sales, Lord Leggatt, Lord Burrow) 18 June 2021

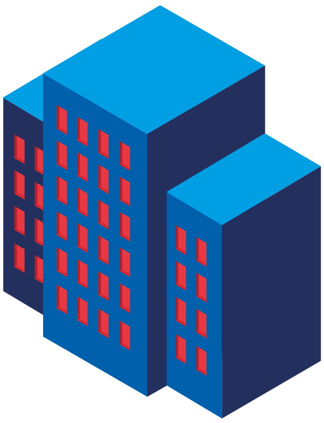
Auditors – Causation – Duty of care – Hedging – Interest rate swaps – Professional negligence

The Supreme Court laid down a six– stage conceptual framework for the analysis of negligence claims.

The defendant auditor had negligently advised the claimant building society to prepare its accounts using a particular accounting technique to reduce volatility on its balance sheet and ensure sufficient regulatory capital to enter into long– term swaps. Relying on that advice, the building society entered into certain long– term interest rate swaps to hedge the cost of borrowing money to fund its mortgage lending. However, the accounting technique adopted concealed volatility in the building society's capital position and also a severe mismatch between the negative value of the swaps and the value of the loans. When the auditor realised the error seven years later, the building society restated its accounts and then prematurely closed out the swaps at a cost of £32.7 million. The building society claimed this sum from the auditors, minus £6 million of gains it had made on the loans it would not have entered but for the swaps. The auditor admitted negligence but argued that the losses claimed were not within the scope of its duty. The High Court and the Court of Appeal found in favour of the auditor. The Supreme Court allowed the building society's appeal but agreed with the Judge at first instance that a 50% reduction in the damages recoverable for contributory negligence was appropriate.

The majority of the Supreme Court confirmed that: (i) the scope of the duty question should be located within a general conceptual framework within the law of tort; (ii) the scope of the duty of a professional adviser turned on the objective purpose of the duty; (iii) the distinction between 'information' and 'advice' cases within the professional adviser context should not be treated as rigid and inflexible, and was liable to mislead - the focus should remain on the purpose of the duty; and (iv) counterfactual analysis should only be used as a tool to cross– check the analysis of the purpose of the duty and not supersede it.

The majority confirmed that the scope of duty question might determine a negligence claim at an anterior stage before questions of breach or factual causation arise. However, where the scope of the duty was relevant to the extent of loss of a particular kind, it was generally more appropriate to consider the scope of duty question after ascertaining on a 'but for' basis the extent of the loss said to flow from the alleged breach of duty. ■



Company Law

Digested by Edoardo Lupi

Chalcot Training limited v Ralph

[2021] EWCA Civ 795 (Lewison, Arnold, Edis LJJ) 27 May 2021

Discounted shares – Limited liability companies – Tax avoidance schemes

The principal issue on the appeal was whether arrangements made between a company and its two employed shareholder/directors with a view to avoiding tax amounted to the allotment of shares at a discount, contrary to section 580 of the Companies Act 2006. Section 580 provides that a company's shares must not be allotted at a discount.

The tax avoidance scheme in question involved a director receiving a payment (say £100) in return for offering to subscribe for shares (say 100 shares) with a nominal value of £1 per share (in aggregate £100). On receipt of the payment, the director only paid 1 p per share in return for which the shares are allotted as partly paid. The director remained liable for the balance of 99 p per share, which was payable when called. The trial Judge had found that the directors in this case had been awarded remuneration, coupled with an obligation to subscribe for the shares. The directors remained liable to a call for the full nominal value of the shares, such that there could be no question of a discount in contravention of section 580.

The Court of Appeal agreed with the trial Judge and dismissed the appeal. Lewison LJ noted that the prohibition under section 580 flowed from the statutory machinery for the creation of a limited liability corporation, in the sense that the liability of members is limited to the amount, if any, unpaid on the shares held by them. The principal mischief at which section 580 is directed is the depletion of the company's nominal share capital, where the issue of shares at a discount is just as much an unauthorised reduction of capital as the purchase by a company of its own shares.

In this case, the scheme involved paying directors remuneration, with an obligation to subscribe for shares. The Court of Appeal held that if a payment is made out of what would otherwise have been trading income, it does not fall within the mischief against which section 580 is directed as it does not involve the depletion of share capital. Moreover, if the argument that section 580 was engaged was correct, the payee director would have had to pay the discount to the company under section 580(2) *and* also been liable to pay the remaining 99p on the shares as and when called. Lewison LJ held that it could not have been Parliament's intention to permit a double recovery of this sort. ■

Pleshakov v Sky Stream Corporation

[2021] UKPC 15 (Lord Briggs, Lady Arden, Lord Sales, Lord Hamblen, Lord Stephens) 14 June 2021

Nominee directors – Trusts – Factual findings on appeal – BVI

The case was concerned with questions of trust law in respect of the beneficial ownership of the shares in the first respondent. The Judge had found that the appellant ("**P**") was the beneficial owner of the shares in the Company, which were registered as to 50% in the name of the second respondent and as to 50% in the name of the third respondent. The Eastern Caribbean Court of Appeal had overturned the trial Judge, preferring to apply a contractual analysis to the relationship between P and the respondents.

The principal question before the Privy Council was whether, applying a trusts analysis, there was certainty of intention on the part of the respondents to create a trust in favour of P. The Board held that the Judge had drawn a fair inference that the respondents' intention when setting up the company was to implement a plan for P's benefit. The Privy Council disagreed with the Court of Appeal that the Judge had committed certain fundamental errors in evaluating the facts. There was no proper basis on which the findings and conclusion reached by the Judge could be interfered with. ■

Broadcasting Investment Group Ltd v Smith

[2021] EWCA Civ 912 (Asplin, Coulson, Arnold LJJ) 18 June 2021

Reflective Loss – Contract (Rights of Third Parties) Act 1999

The Court of Appeal considered the scope and effect of the rule in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 ("**Prudential**") as recently explained by the Supreme Court in *Sevilleja v Marex Financial Limited* [2020] 3 WLR 255. In particular, it considered the effect of the rule in *Prudential* when taken together with the Contract (Rights of Third Parties) Act 1999 (the "**1999 Act**") in respect of a contract that benefits a company but to which it is not a party.

The case involved an attempt by company B to enforce an oral agreement. At first instance, the Deputy Judge struck out B's claims to enforce the agreement on the basis that the claims were barred by the rule in *Prudential*. This was because company S, in which company B owned shares, itself had a right to enforce the agreement under the 1999 Act.

Having carefully considered the Supreme Court's judgment in *Marex*, Asplin LJ considered the terms of the 1999 Act. The question was whether company B, a promisee under the agreement, lost its right to enforce it as a result of the creation of company S, which was conferred rights to enforce the agreement under the 1999 Act. Asplin LJ held that company B's claims under the agreement were not barred by the rule in *Prudential*. To the contrary, they were expressly protected by section 4 of the 1999 Act. That was because the acquisition of a right under section 1 of the 1999 Act by company S could not affect company B's rights as contractual promisee. It would be artificial to treat the rule in *Prudential* as if it were independent of the right which exists as a result of section 1 of the 1999 Act. Accordingly, if the rule in *Prudential* were treated as if it were entirely separate from the statutory right under section 1 of the 1999 Act, the express terms of section 4 would be sidestepped. ■

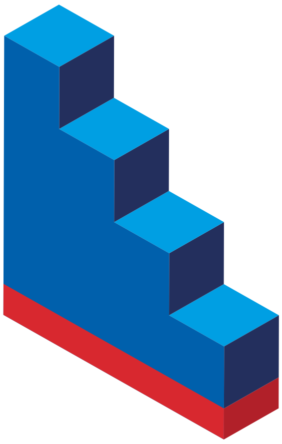
Tattersalls Limited v Douglas McMahon

[2021] EWHC 1629 (QB) (Calver J) 18 June

Agency – Company directors – Joint and several liability

A company ("**B**") was incorporated to purchase a portfolio of bloodstock assets. The Defendant was one of its two directors. At an auction, the Claimant auctioneer's conditions of sale provided that the highest bidder in the ring and any principal for whom the person was acting would be jointly and severally liable under the contract of sale. The Defendant successfully bid for two foals. Company B failed to raise the investment funds it had intended to raise. The Defendant was sued personally by the auctioneer.

The Defendant submitted that the purchases could only have been made on behalf of company B, relying on sections 40 and 43 of the Companies Act 2006. The Defendant relied on those two sections to support an argument that he could only have been agreeing to bind the company to the contract to purchase the two lots. The Judge held that both the Defendant as highest bidder in the ring as well as the Company were jointly and severally liable for the purchase price of the two lots. Sections 40 and 43 of the Companies Act were of no assistance in circumstances where section 40 was there to protect persons dealing with the company in good faith, and section 43 was dealing with the ways in which a company can contract. The Judge accepted that there was no question that the director was authorised by the company and did bind it, but this did not displace the contractual wording which made him personally liable as an agent in this instance. ■



Corporate Insolvency

Daniel Judd and Paul Fradley


Riverside CREM 3 Ltd v Virgin Active Health Clubs Limited

[2021] EWHC 746 (Ch) (Chief Master Marsh) 12 March 2021

Restructuring plans – Stays of creditor action

A claimant landlord sought summary judgment against Virgin Active Health Clubs Limited (“**VAHCL**”) for payment of outstanding rent arrears. At the time, VAHCL was one of three companies which were promoting restructuring plans under Part 26A of the Companies Act 2006. VAHCL accepted that the claimed sums were due, but cross– applied for the claim to be stayed temporarily under CPR 3.1(2)(f), to allow the restructuring plan to continue to proceed. The Practice Statement Letter was circulated after the claim (or application for summary judgment) was made, but before the hearing.

There was no question that the Court had jurisdiction to make the orders sought for a stay. The Judge referred to previous authorities, and in particular *Bluecrest Mercantile BV v Vietnam Shipbuilding Industry Group* [2013] EWHC 1146 (Comm), in which the Court ordered a temporary stay of a debt claim to which there was no defence in order to permit the company to proceed with a scheme of arrangement that had a real prospect of success. It was common ground that the granting of a stay lay in the discretion of the Court.

Chief Master Marsh considered that the issue should be determined as at the time of the hearing, and that the claimant should not be able to trump the effect of the proposed restructuring due to the time of their claim. The Judge turned to the proposed restructuring plan under Part 26A, noted that it appeared to have a reasonable prospect of success, including apparent satisfaction of conditions A and B in section 901A of the Companies Act 2006, and that the purpose of the plan would be undermined if the claimant’s action were not stayed. The Judge also referred to the claimant’s concerns that the debt had been due for a long time, and that a creditor should not lightly be prevented from taking steps to enforce their debts.

The Court ultimately concluded that, balancing the interests of the claimant and the wider class of creditors, the interests of the wider class of creditors trumped the private interests of the claimant. As a result, it was right to grant a temporary stay, and the process under Part 26A should be permitted to proceed without being impeded by enforcement of a judgment against VAHCL. The claimant was also given permission to apply to lift the stay. ■

[Ryan Perkins]

Corporate Insolvency

ALL Scheme Limited

[2021] EWHC 1401 (Ch) (sanction hearing) (Miles J) 24 May 2021

Schemes of arrangement – Relevant comparator – Fairness and allocation of benefits

ALL Scheme Limited was incorporated for the purpose of compromising certain claims of the 'Amigo' group of companies. The business of the Amigo group included lending to customers who would not be able to access finance from mainstream lenders. A company in the Amigo group, Amigo Loans Ltd ("**ALL**"), faced potential claims from customers seeking redress on the basis that they could not afford the loan that was extended to them, or that a guarantee should not have been accepted ("**redress claims**"). ALL Scheme Limited had assumed liability for those claims – subject to an expiry date later that year – and sought to compromise them, among other things, for 10p in the £. The scheme was approved by 95.1% in number, and 95.7% in value, of scheme creditors. ALL Scheme Limited's directors explained that if the scheme of arrangement were not sanctioned, it would be likely to enter into administration. The Financial Conduct Authority ("**FCA**") appeared at the sanction hearing and opposed the scheme. It objected that the scheme was not fair, but involved a transfer of value from compromised creditors to the shareholders who would retain their interests, noting that the share price in Amigo rose considerably following announcement of the scheme. The Judge considered this not to be conclusive where creditors who were properly consulted and informed of their options voted in favour of the scheme.

That led to two further issues of dispute. The FCA disputed that the relevant comparator was an administration. It maintained that ALL Scheme Limited would instead put forward a revised or improved scheme. The Court agreed, and considered that the scheme company's evidence did not justify an imminent need to enter into administration, and had not provided the Court with cashflow evidence to show the scheme company would run out of cash. The Judge was not satisfied that there was no room for further proposals.

The Court turned to the fairness of the scheme. The Court noted that redress creditors were unlikely to have had access to legal or financial advice in relation to the scheme, had limited financial sophistication and literacy, that the scheme did not result from negotiation with them, that the turnout was low (around 9%), that the scheme creditors were unlikely to have understood that it was not binary ("*it's this scheme or nothing*"), and that there was no adequate explanation in the explanatory statement as to why it was fair for the shareholders to retain their equity interests, and therefore no adequate explanation as to the basis on which benefits and losses of the scheme were being allocated. The Court appreciated the imperative of addressing potentially unsustainable levels of claims, but declined to sanction the scheme, and urged the directors to continue their efforts to promote a restructuring. ■

[Robin Dicker QC, Tom Smith QC, Stefanie Wilkins]



Re New Look Retailers Ltd

[2021] EWHC 1209 (Ch) (Zacaroli J) 10 May 2021

CVA challenges – Arrangements – Jurisdiction – Unfair prejudice – Material irregularity

In what is now the leading judgment on CVA challenges, Zacaroli J provided a thorough discussion of the legislation and authorities applicable to CVA challenges in the course of rejecting a challenge brought against the CVA of New Look Retailers Ltd ("**New Look**") by a group of its landlords (the "**Landlords**").

New Look had been severely impacted by the COVID-19 pandemic. It entered into a CVA with a number of its landlords and other creditors as part of a largely inter-conditional wider restructuring of the group's liabilities, which included consensual variations to loan facilities and a scheme of arrangement. The Landlords challenged the CVA on numerous grounds, falling under three heads: jurisdiction, unfair prejudice, and material irregularity.

The first ground was jurisdiction. The Landlords claimed that a CVA could not be used to effect two or more substantively different groups of terms with different groups of creditors, arguing that the CVA component was not an 'arrangement' of the company's affairs. That argument was rejected. A CVA was not for this reason outside the scope of section 1(1) of the Insolvency Act 1986, and under this section, there was no requirement for there to be an arrangement between a company and a class or classes of creditors. The Judge also found that the CVA involved sufficient 'give and take': giving creditors new rights under the CVA, with a return at least as good as in the relevant comparator, satisfied this relatively low jurisdictional hurdle.

A second group of challenges was made on the basis of unfair prejudice. It was argued that the CVA was inherently unfairly prejudicial by reason of the different terms reached with groups of creditors. That was rejected: a CVA may provide for differential treatment, but the question was always whether the nature and extent of the difference in treatment is justified. The Judge noted that an important consideration was whether there was a 'fair allocation' of the assets available between sub-groups of creditors within the CVA. The Judge also found that the fact that a statutory majority for a CVA is achieved by the votes of unimpaired or differently treated creditors will be an important consideration in determining whether unfair prejudice exists. However, principles of good faith and equality between creditors did not necessarily mean that this led to a finding that a CVA approved in those circumstances was unfairly prejudicial.

A further unfair prejudice argument was that it was unfair in principle to modify the Landlords' leases in various respects, said to deprive the Landlords of their commercial bargain, and the Landlords also sought to argue that a CVA could not compromise future rent (held to be permissible in *Re Debenhams Retail Ltd* [2019] EWHC 2441 (Ch)). Those arguments were both rejected. In particular, it was not unfair to offer Landlords the choice between terminating their leases and accepting a return better than in the likely alternative, and continuing their leases on reduced rent. In this context, the Judge rejected the Landlords' submission that the returns under the CVA could be compared with full payment of rent as an expense in an insolvency process, in circumstances where the company was in no financial position to meet these payments whether or not it went into administration, and where the return to Landlords depended on the outcome of the administration (such as whether a purchaser was found).

The CVA was also challenged on a third ground of material irregularity. The Landlords challenged the valuation methodology for calculating their claims as irregular, and in particular, the adoption of a 25% discount to the claims of Landlords. This was rejected, and the discount was found to be an appropriate proxy for identifying the estimated minimum value of the claim, it was applied equally to Landlords voting for and against the CVA, and did not fetter the Chair's discretion. There was no irregularity in not applying the discount to the claims of senior secured noteholders.

The Landlords also argued that the likely value of the equity interests to be received by the senior secured noteholders in the CVA, and the management incentive plan, was relevant information which should have been disclosed. The Judge agreed. However, on the facts, he did not consider that this information was likely to make any difference to the assessment or votes cast by creditors in respect of the CVA, and did not amount to a material irregularity.

[Tom Smith QC, Adam Al- Attar]

Corporate Insolvency

Re Virgin Active Holdings Ltd

[2021] EWHC 1246 (Ch) (Snowden J) (sanction hearing) 12 May 2021

Restructuring plans – Sanction – Cross-class cram-down – Valuation evidence

Three companies in the Virgin Active Group launched restructuring plans (the "**Plans**") to restructure their liabilities to seven classes of creditors: secured creditors, five classes of landlords (in classes A– E), and general property creditors. The Plans categorised landlord liabilities into classes, based largely on the profitability of the relevant lease, with each class then being subject to different treatment. At the plan meetings a number of classes of landlord voted against the Plans or failed to vote in favour by the requisite majority. As a result, the plan companies sought to use the "*cross-class cram-down*" jurisdiction in section 901G of the Companies Act 2006. The hearing before Snowden J was the first fully opposed Part 26A restructuring plan, and the sanction hearing was heard over 5 days. The landlords relied on two main arguments. The first was that the 'no worse off' test, Condition A under section 901(G), was not satisfied. The second was that the Court should decline to exercise its discretion to sanction the Plan.

On the first argument, the Judge considered that the 'no worse off' test required him to consider what the most likely outcome would be if the Plans were not sanctioned, determine what that outcome would mean for the dissenting classes, and then compare that to the outcome for the dissenting classes under the Plans. There was no need for the court to satisfy itself that a particular alternative would definitely occur, but only to identify the "*most likely*" of the available alternatives. The Judge accepted that the relevant alternative in this case was administration, and rejected the submission that he should (at this stage) consider whether the Plan Companies might have acted differently.

The Judge emphasised that "*it is obviously important that the potential utility of Part 26A is not undermined by lengthy valuation disputes, but that the protection for dissenting creditors given by the 'no worse off' test (and the Court's general discretion) must be preserved.*" The Judge considered that there was no absolute obligation to conduct market testing, and the question was whether it is necessary or practicable to do so in the particular circumstances. The Judge held that a market testing process was not necessary or practicable on the facts. The Judge considered that, notwithstanding uncertainty and disclaimers, the valuation evidence was reasonable and capable of being relied on. The Judge was satisfied that each dissenting class of creditors would be no worse off under the Plans than in the relevant alternative of a pre-packaged administration.

On the second issue, the Judge considered the decision of Trower J in *Deep Ocean*, the first case to utilise the cross-class cram-down. The Judge held that it was not the case that, provided conditions A and B in section 901G were satisfied, a Plan should be sanctioned unless it was not just and equitable. A test of 'just and equitable' without a frame of reference would be meaningless. It was therefore appropriate for the Judge to consider a number of factors which were relevant to the discretion to sanction the Plans.

The landlords observed that the existing shareholders would retain their shares under the Plans, and objected to the potential benefit to them if the companies continued to trade with the prospect that the share price increased (the so-called "*restructuring surplus*"). However, the Judge concluded that on the facts value broke in the event of an administration in the class of secured creditors. The Judge held that where a class of creditors would be "*out of the money*" in the relevant alternative, their opposition would "*not weigh heavily or at all in the decision of the court as to whether to exercise the power to sanction the plan and cram them down*". Snowden J considered that it was in general for creditors who were "*in the money*" to decide how the restructuring surplus should be allocated. In the present case, the Judge noted that the "*in the money*" creditors – the secured creditors – had voted in favour of the Plans.

The Judge considered whether the Plans should be sanctioned having regard to horizontal comparisons, putting aside the fact that the landlord were "*out of the money*". The Judge concluded that he would still have sanctioned the plan. In particular, the retention of equity by the shareholders under the Plans was justified by reference to the evidence that the plan companies needed new money, and that the shareholders were providing new money on terms which were the best reasonably available. ■

[Robin Dicker QC, David Allison QC, Tom Smith QC, Georgina Peters, Ryan Perkins, Lottie Pyper]






Manolete Partners plc v Hayward and Barrett Holdings Ltd

[2021] EWHC 1481 (Ch) (Chief ICC Judge Briggs) 2 June 2021

Insolvency procedure – Part 7 claim form – Insolvency application notice – Misfeasance

The joint liquidators of a company assigned to the applicant in their own capacity causes of action within section 246ZD of the Insolvency Act 1986 – including preferences and wrongful trading – and claims on behalf of the company for breach of the directors' duties and other common law actions, including under section 212 of the 1986 Act. The applicant then brought a misfeasance claim under section 212 by an insolvency application notice using form IAA, provided for by rule 1.35 of the Insolvency Rules 2016.

The Judge held that the proceedings should have been commenced by way of Part 7 claim form under the CPR. The Judge noted that the cases did not establish a practice that all claims arising from an insolvency could be made by an insolvency application. The issue, however, was about standing. Turning to section 246ZD of the 1986 Act, a distinction should be drawn between the assets of the company that may be sold, and the rights conferred by statute on a liquidator. Section 246ZD did not include claims vested in the insolvent company actionable under section 212. Other than the Official Receiver or a liquidator, section 212 referred to an application brought by a creditor or contributory – and the applicant was neither. The company's claims might be assigned, but the office of liquidator could not be sold and was not capable of assignment. As a matter of standing, therefore, section 212 did not permit an insolvency act application to be made by the applicant assignee of the claims.

The Judge also noted that unless the court ordered otherwise, a claim made by insolvency application notice (rather than by Part 7 claim form) would not invalidate the proceeding, and the court may make such order as it thinks fit. Where a claim should have been commenced by Part 7 claim form, the court had the discretion to permit it to continue as an insolvency application where it was made in consequence of the liquidation. This discretion existed because it was procedurally convenient, sensible or economical to do so, though the court was likely to exercise its discretion against the continuation of the proceedings as an insolvency application where there was evidence of an abuse of process. The court could also impose conditions on allowing the claim to continue even where it should have been commenced as a Part 7 claim, a likely condition being the payment of the appropriate court fee.

As a result, the claims that represented the company's property could be assigned to the applicant, but the applicant (not being a creditor or contributory) was not entitled to bring section 212 misfeasance claims by insolvency application notice. In the circumstances, the Judge allowed the proceeding to continue, provided the applicant paid the prevailing court fee for issuing a Part 7 claim form within 7 days of judgment. ■

Corporate Insolvency

DTEK Energy BV

[2021] EWHC 1551 (Ch) (Sir Alastair Norris) 8 June 2021

Schemes of arrangement – Insolvency comparator – International effectiveness

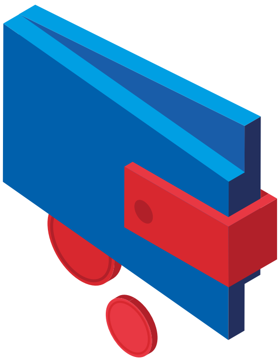
DTEK Energy BV and DTEK Finance Plc sought sanction of two inter-conditional schemes of arrangement. The Judge considered that the statutory requirements were satisfied, and that there was no reason to revisit the conclusions on jurisdiction and class composition reached at the convening hearing. One creditor, Gazprombank, opposed both schemes.

The first challenge, to the DTEK Energy BV scheme, was on fairness grounds, having regard to its own rights against other guarantors or sureties of the scheme companies. It submitted that it was unreasonably required to compromise its loan where there was no specific evidence that, but for the scheme, the obligors would not be able to make full payment or would enter formal insolvency proceedings.

The Judge considered that this was not sufficient to withhold sanction of the scheme. The scheme companies had put forward evidence that a series of "*domino*" insolvencies would take place across the group where the schemes were not sanctioned, and addressed the wider balance sheet position of the group which showed it to be significantly insolvent. The Judge noted that Gazprombank had failed to identify which obligors might be insulated from a series of "*domino*" insolvencies of the group, and that, since Gazprombank was claiming that the scheme was so unfair that it should not be sanctioned, it was for Gazprombank to make out its case in this regard. On the evidence, the Judge held that it did not appear as though Gazprombank was in a significantly stronger position than any other Bank Scheme Creditor, and so the scheme did not operate unfairly by compelling Gazprombank to compromise recovery rights which were materially better than those of other creditors. There was no other reason not to sanction the scheme, and the Judge did so.

A second challenge, to the DTEK Finance Plc scheme, was based on international effectiveness. Gazprombank claimed that the Court could not be satisfied as to the international effectiveness of the scheme in the EU and Singapore, owing to Brexit. The Judge described the standard as a modest one, and rejected this argument. The Judge noted that the scheme had very substantial support among scheme creditors. He also observed that the scheme would be recognised in certain key jurisdictions as to which there was no dispute. The Judge then turned to jurisdictions in which rival expert opinions addressed whether the scheme would be recognised (such as the Netherlands and Cyprus). It was not for the Judge to decide between these positions, but he nevertheless considered that the arguments in favour of recognition was in each case coherent and could not simply be dismissed, and so there was a reasonable prospect of the scheme having substantial effect in those jurisdictions. The Judge concluded that the Court would clearly not be acting in vain, and granted sanction of the DTEK Finance Plc scheme as well.

[David Allison QC, Tom Smith QC, Hilary Stonefrost, Georgina Peters]



Personal Insolvency

Lottie Pyper

Joanna Lemos v Church Bay Trust Company Limited, Roderick Forrest, Kalliopi Lemos

[2021] EWHC 1173 (Ch) (ICC Judge Barber) 10 March 2021

Trustees in bankruptcy – Joinder of additional parties – Transactions defrauding creditors

The claimant ("**C**") issued proceedings against the bankrupt ("**B**") under section 423 of the Insolvency Act 1986 ("**IA 1986**") but subsequently ceased pursuing the claim. Meanwhile, the joint trustees of B's bankruptcy estate ("**JTs**") had obtained funding to bring a claim under section 423 IA 1986 themselves. Rather than commencing a new set of proceedings under section 423 IA 1986, the JTs sought to be joined as an additional party to C's claim under CPR 19.2(2)(a) and/or (b). C supported the JTs' application. B opposed it.

The court held that the JTs passed the threshold test under CPR 19.2(2)(a). The test was not limited to what is necessary to ensure the proceedings are properly constituted, and it was plainly desirable to add the JTs in order to resolve all matters in dispute. The JTs had an economic interest in the outcome, and a duty to recover B's assets for the benefit of his creditors as a whole. It was also relevant that C was a relative of B and therefore less objective than the JTs, and that she has already ceased taking active steps in the proceedings. The court was also satisfied that it would be appropriate to add the JTs as a matter of discretion. There was no suggestion that adding the JTs would be unfair or disproportionate for B, and C had agreed for the JTs to have sole conduct of the proceedings. In light of these conclusions, the court did not need to go on to consider whether the test under CPR 19.2(2)(b) was also met. ■

[Stephen Robins]

Michael Wilson and Partners Ltd v Sinclair

[2021] EWCA Civ 505 (David Richards, Simler, Nugee LJJ) 16 April 2021

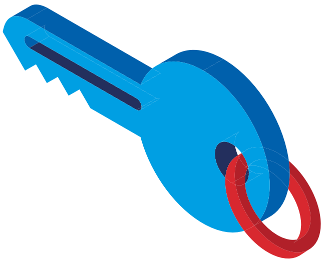
Bankruptcy – Third-party debt orders – Appeals

The Court of Appeal declined to hear an appeal against a refusal to make final an interim third-party debt order obtained by the appellant ("**A**").

The appellant ("**A**") obtained a in interim third-party debt order ("**TPDO**") in respect of a debt owed by the first and second respondents ("**R1**" and "**R2**"). Both Master Kay and, on appeal, HHJ Pelling QC refused to make the interim TPDO final. The third party successfully argued that, in the absence of any relevant demand for repayment by them, there was no debt "due and owing" to him from R1, since the terms of their agreement provided that the debt would only be repayable 30 days after a demand was made. Popplewell LJ granted permission for a second appeal on the basis that A's arguments that the lower courts were wrong had a real prospect of success and raised an important point of principle. Shortly before the appeal was heard, R1 was made bankrupt.

After the making of a bankruptcy order, no creditor of the bankruptcy shall have any remedy against the property of the bankrupt in respect of a provable debt: section 285(3)(a) of the Insolvency Act 1986 ("**IA 1986**"). In addition, a creditor cannot retain the benefit of an attachment as against the official receiver or trustee unless the attachment was completed before the commencement of the bankruptcy: section 346(1) IA 1986.

In those circumstances, the Court of Appeal declined to hear A's appeal. Sections 285(3)(a) and 346(1) made it impossible for the appeal to continue, and that there was no real prospect of A obtaining an order under section 346(6) (which enables the court to disapply the rule under section 346(1) in certain circumstances). Section 285(3) was in mandatory terms, and obtaining a final TPDO against the third party constituted a remedy against R1. An order under section 346(6) will only be granted with great caution and in exceptional circumstances. In this case, there were not sufficiently exceptional circumstances, and to grant such an order would simply contravene the *pari passu* principle. ■



Property And Trusts

Digested by Madeleine Jones

Petrosaudi Oil Services (Venezuela) Ltd v Clyde and Co LLP

[2021] EWHC 444 (Ch) (Miles J) 26 February 2021

Trusts – Termination of trusts

A defendant firm of solicitors held certain funds on trust subject to an escrow agreement, subject to the order of an arbitration tribunal. The claimant, the defendant's former client, benefited from an order from the arbitration tribunal requiring the defendant to pay the funds to it. However, the US Department of Justice had obtained a warrant from the court in California requiring US law enforcement officers to seize the funds, on the basis they were liable to forfeiture under a federal forfeiture statute; no application had, however, been made to enforce this warrant in England.

The claimant asked the Court to order that the trust to which the funds were subject to be brought to an end and for the funds be paid into court.

The Judge found that the defendant was subject to a real risk of prosecution by the US authorities if it released the funds, even pursuant to an order of the English court. At the same time, the claimant had unpaid creditors, and unless funds were released it would be unable to pay these and would be prevented from defending itself in various legal proceedings in which it was engaged. Further, he held that the defendant had the benefit of the contractual terms of the escrow agreement, and this conditioned its rights as a trustee. These rights included a right of retention which did not dissolve on the making of the final award. Having regard to these rights and the rights of a trustee at common law, as well as to the facts that the defendant's situation was not of its own making, and the claimant had not taken all the steps open to it to procure payment of its expenses and legal fees from the Californian court, the court did not exercise its discretion to bring the trust to an end. ■

Foglia v Family Officer Ltd

[2021] EWHC 650 (Comm) (Cockerill J) 22 March 2021

Fraud – Summary judgment

The claimant claimed in knowing receipt, dishonest assistance and unjust enrichment where €15 million had been withdrawn from her Cayman Island bank account and transferred to the defendant's account. The defendant argued he had thought that the €15 million had come from a client of his. The Judge granted summary judgment in favour of the claimant on the basis that the claimant's evidence showed that any innocent explanation by the defendant was fanciful: phone calls to the bank authorising the transfer had been made from a mobile phone purchased by an employee of the defendant within 100 metres of the defendant's office. E–mails relied on by the defendant had been faked. The funds transferred to the defendant had been used for the defendant's own benefit, which was inconsistent with the defendant's argument that it had received these as client investments (unless it was supposed that it had spent these in breach of trust in respect of that other client). Although considerable caution had to be given to giving judgment on a fraud claim on the merits, that was justified in this case. ■

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

[2021] EWCA Civ 680 (Asplin, Andrews and Justice Birss LJJ) 10 May 2021

Dishonest assistance – State of mind – Delay

The Court of Appeal overturned a first instance judgment handed down 19 months after the trial of a claim for dishonest assistance. The claim was brought by insolvent companies which had been used as vehicles for fraud against an investment bank. The judge found that the bank's traders had turned a blind eye to the fact that the respondents were participating in carbon emissions trading with the bank as part of a VAT fraud, and that the bank was vicariously liable for their actions.

The appellant bank argued that the finding on the traders' dishonesty was wrong because the Judge had failed to take into account certain contemporaneous material which was inconsistent with this conclusion.

The Court of Appeal held that although generally deference was shown to a trial judge's findings of fact based on the evidence, the trial judge's advantage was diminished when there was a considerable delay in handing down judgment, notwithstanding that he could consult the hearing transcripts: "*If the reviewing court finds that the judge's recollection of the evidence is at fault on any material point, then (unless the error could not be due to the delay in the delivery of judgment) it will order a retrial if, having regard to the diminished importance in those circumstances of the special advantage of the trial judge in the interpretation of evidence, it cannot be satisfied that the judge came to the right conclusion*" (see *Bond v Dunster Properties Ltd* [2011] EWCA Civ 455). Normally the fact that some evidence militates against a finding of fact is not important, as a judge is assumed to have taken it into account. However, this assumption cannot be made where there is a considerable delay between trial and judgment. However, the Judge's discussion of vicarious liability had some flaws in its reasoning but his conclusions were correct.

The Judge had also erred in his approach to the state of mind that had to be proved for there to be a finding of dishonest assistance. It was wrong to say that it was necessary for the claimants to establish that the traders suspected VAT fraud and deliberately turned a blind eye to it. The tribunal must consider (i) the defendant's actual state of knowledge or belief as to the facts and (ii) whether, in the light of that state of mind, their conduct was honest or dishonest applying the objective standards of ordinary decent people. In stage 1 of the test "*knowledge*" includes blind–eye knowledge, but in principle "*belief*" may include suspicion which in and of itself falls short of blind–eye knowledge.

The matter was remitted to be heard by a different High Court judge. ■

Property And Trusts

Rittson–Thomas and others v Oxfordshire County Council

[2021] UKSC 13 (Lord Lloyd-Jones, Lady Arden, Lord Sales, Lord Burrows, Lord Stephens) 23 April 2021

Statutory trusts – School Sites Act 1841

A local authority had sold land which had been granted to it under section 2 of the Schools Sites Act 1841 (the "**Act**") which creates a statutory charitable trust, with the land to revert to the grantor if it ceased to be used for the purposes of the trust.

Section 14 of the Act allows the trustees to sell or exchange the land for a more convenient site, and apply the money arising from any such sale or exchange to purchase another site or improve other premises used or to be used for the purposes of the trust.

A school had been established on the granted land for many years, but the local authority ("**LA**") decided to move it to a new site. The LA borrowed money to develop the new site, moved the school to that new site and sold the granted site the following year, intending to use the proceeds to pay back the development loan. However, the heirs to the grantor claimed that section 14 only allowed the land to be sold while it was still being used for the purpose of the trust; if the land ceased so to be used, it reverted to the grantor under section 2. The heirs argued that because the school had been moved a year before the sale, a section 2 reversion had been triggered.

The Supreme Court rejected this argument on the basis that the granted land had not ceased to be used for the purposes of the statutory trust after the school had moved because the LA's intention had been to sell it to fund the new development. Section 14 here permitted the site to be sold with vacant possession and the proceeds to be used to pay off the costs of developing the new site. No section 2 reversion was triggered. ■

Dhir v Flutter Entertainment Plc

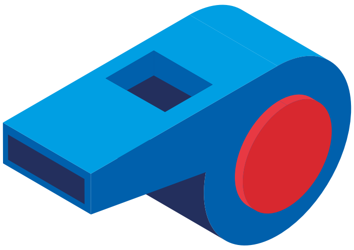
[2021] EWHC 1510 (QB) (Griffiths J) 4 June 2021

Unjust enrichment – Knowing receipt

C, a businessman living in Dubai, lent money to an individual, P, to enable P to purchase a property, on terms that the funds be repaid in three months with a fixed "profit" for C. However, P was a gambling addict, and he lost the money to D in the course of online gambling. P repaid the profit but not the principal to C. P was introduced to D by his former account manager at another bookmakers, who had moved to work for D. This former account manager received a commission of 25% of D's net revenue from P's gambling. P subsequently left Dubai.

C argued that P had used the money for gambling in breach of trust or fiduciary duty, and that the funds could be traced into the hands of D.

The Judge dismissed the claim. The loan agreement had not included a term that the funds were only to be used for property investment, and the implication of such a term was precluded by an entire agreement clause. The loan agreement was expressly made subject to the law of Dubai (rather than the Dubai International Finance Centre); under Dubai law the entire agreement clause precluded the possibility of any collateral agreement. P was not subject to any trust or fiduciary obligations to P. The loan agreement provided that the monies were lent for the purpose of P's business activities – use of the funds by P for his business activities was incompatible with the existence of a trust in favour of C. A provision in the agreement that use of the funds for any other purpose would be a breach of trust as well as a breach of the contract was not sufficient to create a trust. In any event, Dubai law did not recognise trusts; under the Dubai Civil Code there should be trust and confidence between parties to a contract, but this did not create a fiduciary relationship. On the facts there was no *Quistclose* trust. The contract simply created a loan. The tracing claim and the knowing receipt and unjust enrichment claims therefore failed because C did not have a proprietary interest in the funds. Additionally the evidence was not sufficient to show that the funds D had received were the same as those C had lent. ■



Sport

Digested by Riz Mokal

London Borough of Merton v Nuffield Health

[2021] EWCA Civ 826 (David Richards, Peter Jackson, Nugee, LJJ), 28 May 2021

Non–domestic rates — Mandatory relief —Public Benefit

The Respondent ("**Nuffield**") is a registered charity whose object is "*to advance, promote and maintain health and healthcare of all descriptions and to prevent, relieve and cure sickness and ill health of every kind, all for the public benefit*". In pursuit of this object, Nuffield runs hospitals, medical centres, gyms, and "*fitness centres*" which combine gym, personal training, exercise classes, health checks and screening, and similar facilities. The appellant local authority ("**Merton**") appealed from the judgment of Mr Stuart Isaacs QC (sitting as a Deputy Judge of the High Court) that Nuffield was entitled to mandatory relief from non– domestic rates in respect of its occupation of a fitness centre at Merton Abbey (the "**Premises**").

Pursuant to section 43(6)(a) of the Local Government Finance Act 1988 "'the 1988 Act"), mandatory relief is available "*if the ratepayer is a charity... and the hereditament is wholly or mainly used for charitable purposes (whether of that charity or of that and other charities)*". Section 2(1)(b) of the Charities Act 2011 (the "**2011 Act**") provided (relevantly) that "*a charitable purpose is a purpose which...is for the public benefit*".

It was common ground that Nuffield's overall purpose is the advancement of health and that is overall purpose is for the public benefit. The key issue in the appeal was whether Nuffield had to show that *the Premises themselves* were used for the public benefit as an aspect of showing that they were used wholly or mainly for charitable purposes. Merton argued for a positive response to this question, and argued that the Premises would not qualify since the fitness centre there charged rates for membership fees.

Nugee LJ (with whose analysis on this issue Peter Jackson LJ agreed) identified three principles which were common ground or were otherwise relatively straightforward. Firstly, the unit of analysis for the purpose of section 43(1) of the 1988 Act is the particular hereditament in question. Secondly, the Court must consider the use to which that hereditament is being put. A charity may lawfully occupy and use premises for a purpose which is not one of its charitable purposes, such as fundraising, to support its charitable work. Thirdly, an institution registered with the Charity Commission is by section 37 of the 2011 Act conclusively presumed to be a "*charity*", in the sense that it was established for charitable purposes *only*, from which it follows that all its purposes are presumed to be charitable, *and to be for the public benefit*. Against this background Nugee LJ considered the correct question to be whether the charity is using the hereditament in question for a purpose which is one of its charitable purpose (and not whether the purpose, taken by itself, is a charitable purpose). He concluded that nothing in the legal context or the practicalities of the application of the statutory test prevented Nuffield from asserting that since it is a registered charity and the Premises were being used for its purposes, they qualified for mandatory relief.

David Richards LJ, dissenting on this point, would have held that Nuffield had to establish that the Premises themselves were being used for a charitable purpose and that they were being used for the public benefit, and that it had failed to show that the public benefit requirement was met. ■

Pre-Packs:
The New Regulations

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Pre-packaged administration sales, or "pre-packs", remain a widely used and useful tool in restructuring, helping to preserve businesses as a going concern. However, their benefits are to be balanced with the need for transparency and the interests of creditors as a whole.

In response to criticism of pre-packs, and following a recent review of existing industry measures, the Government has introduced the Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021 (the "**Regulations**") which aim to provide creditors with reassurance that pre-pack sales to connected parties are fair, appropriate and transparent.

The Regulations came into force on 30 April 2021. In this article we consider the background to the enactment of the Regulations, the Regulations themselves, recent guidance issued in relation to the Regulations by the Insolvency Service and issues that might arise in the future in relation to the application of the Regulations.

The use of pre-pack sales in administration

A pre-pack sale occurs when the sale of all or a substantial part of a company's business is arranged *prior to* that company's entry into administration. The sale is then formally executed shortly after an administrator is appointed.[1]

Pre-pack sales are not expressly provided for, nor defined, in the Insolvency Act 1986 (the "**IA 1986**"). However, it is well-established that an administrator may exercise all of his or her statutory powers – including the power to sell the property of the company – without the leave of the Court, or the approval of creditors.[2] Indeed, on an application for directions by administrators, the Court will be reluctant to endorse decisions which are simply of a commercial nature (although on an application for an administration order the Court may expressly give an administrator leave to enter into a pre-packaged sale of the company's business).

There are, potentially, very great advantages to pursuing a pre-pack sale. In particular, the use of a pre-pack may facilitate the rescue of the business, by effecting a swift and smooth transition of ownership to a solvent entity, without the uncertainty (and potential stigma) of remaining in an insolvency process.[3] It avoids the cost of trading in administration.[4] Further, the process is cheaper than pre-insolvency procedures, such as schemes of arrangement.[5] It does not require the leave of the Court, or the approval or involvement of creditors. As such, pre-pack sales are an important aspect of the rescue culture that administration promotes. Finally, there is empirical evidence that pre-packed businesses are more likely to succeed than business sales that occur in the context of a trading administration.[6]

However, critics of pre-pack sales point to numerous potential risks of the process.[7] In short, the very features which are pointed to as a strength of pre-packs may also ground criticisms. The absence of any court or creditor involvement has meant that concerns have been raised about the absence of any transparency in the process. Creditors are not informed of the sale, until it is presented to them as a *fait accompli*.[8] Particular concerns arise where – as is commonly the case – the business and assets are sold to a person who is connected to the insolvent company, such as a director. There is some evidence to indicate that pre-pack sales to connected parties are less likely to lead to a successful ongoing business.[9]

Past reviews of pre-pack sales

Concern about the use of pre-packs led to a 2010 consultation by the Government which sought to improve the transparency of pre-pack sales. The outcome of this consultation was a proposal that creditors of an insolvent company ought to be given a period of notice before any pre-pack sale was effected. However, this proposal was not given effect.[10]

In 2014, Dame Teresa Graham conducted a wide-ranging review of pre-pack sales, and their

1. See the definition in the *Graham Report*, [5.15].

2. *Re T & D Industries plc* [2000] 1 WLR 646.

3. See Trower et al, *Corporate Administrations and Rescue Procedures* (4th ed, 2017) [10.4].

4. The Insolvency Service, Pre-pack sales in administration report, 8 October 2020, Executive Summary

5. *Graham Report*, [3.5].

6. *Graham Report*, [6.1].

7. Explanatory Memorandum, [7.1]; *Graham Report*, [3.8].

8. *Graham Report*, [7.25].

9. *Graham Report*, [9.3].

10. *Graham Report*, [5.1].

economic impact. The Graham Report concluded that whilst there were substantial benefits to pre-pack sales, there were, nevertheless, improvements that ought to be made to the manner in which they were administered. Dame Teresa made various recommendations, many of which were directed at improving the transparency of the process and/or ensuring that the optimum sale price was achieved.

One such recommendation was the establishment of a "*pre-pack pool*". This initiative was limited to situations in which the sale was made to a "*connected party*" – which was defined in broad terms. In short, where a director, shadow director or officer of the insolvent company (or an associate thereof) took on one of those roles in the new company, or exercised control over the new company, the connected person would have the "*opportunity*"[11] to refer a proposed sale to the pre-pack pool.

The members of the pre-pack pool were business people. Upon a referral to the pool, one member would assess the proposed sale, and would issue a statement. The purpose of the pre-pack pool was to "*create independent scrutiny of the deal yet retain overall secrecy before the event*".[12]

Any referral by a connected person was purely voluntary. Moreover, if the pool member issued a negative statement, there was no obstacle to the sale proceeding; rather, the fact of the negative statement would be referred to in the SIP16 statement.

All of the recommendations made by Dame Teresa were voluntary measures, and all were implemented by the industry in 2015. None required legislation. However, the Small Business Enterprise and Employment Act 2015 created, in section 129, a reserve power for the Secretary of State to legislate in respect of pre-packs – but subject to a sunset provision, which (after extension) was due to expire in June 2021. The purpose of the reserve power was to enable the Government to take legislative steps if voluntary measures proved ineffective.

The 2020 Report, and the background to the Regulations

In October 2020, the Insolvency Service published a Report reviewing the effectiveness of the measures that had been introduced in 2015 as a result of the Graham review. It was noted that although there had been improvements in the marketing of businesses that were to be the subject of a pre-pack sale, there was nevertheless ongoing concern about the transparency of pre-packs, and "*whether they are always in the best interests of creditors*".[13] Again, it was observed that concerns were particularly acute in respect of sales to connected parties, which were noted to be about half of all pre-pack sales. The report also observed that there was a particular need to protect creditors because of the foreshadowed increase in company insolvencies as a result of the COVID-19 pandemic.

The Explanatory Memorandum to the Regulations noted that the use of the pre-pack pool was disappointingly low – in 2019, there were 260 pre-pack sales to connected parties, but only 23 referrals were made to the pre-pack pool.[14] Further "*non-legislative measures*" were considered to be inappropriate, because referral to the pre-pack pool was already available on a voluntary basis.[15]

The October 2020 Report[16], which included the results of a survey of insolvency practitioners, indicated that the most commonly cited reason for not using the pool was that the purchaser of the business saw no benefit in making a referral to the pool. The cost was also cited as a factor – which was £950 plus VAT. However, it was generally agreed that the pool functioned well. Moreover, various stakeholders expressed disappointment that it was not more frequently used.

As consequence of these ongoing concerns the Regulations (drafts of which were published with the October 2020 Report) were enacted on 29 March 2021 and came into force on 30 April 2021.

We summarise the Regulations below.

The Regulations

Overview

The Regulations provide (regulation 3) that an administrator cannot execute a "*substantial disposal*" with a "*connected person*" during the period of 8 weeks beginning with the day on which the company enters into administration unless either one of the following two conditions is met:

(a) the prior approval of the company's creditors has been obtained; or

(b) a "*qualifying report*" in respect of that disposal has been obtained (i.e. a report from an "*evaluator*", as described further below).

The Regulations operate only in relation to administrations which commence on or after 30 April 2021.

What is a substantial disposal?

Regulation 3(3)(a) defines the term "*substantial disposal*" as "*the disposal, hiring out or sale to one or more connected persons, during the period of 8 weeks beginning with the day on which the company enters administration, of what is, in the administrator's opinion, all or a substantial part of the company's business or assets*".

As the Regulations are engaged in relation any substantial disposals made to a connected person within the period of 8 weeks of commencement of the administrations, they will catch not only

> *although there had been improvements in the marketing of businesses that were to be the subject of a pre-pack sale, there was nevertheless ongoing concern about the transparency of pre-packs*

11. *Graham Report*, [9.7].

12. *Graham Report*, [9.7].

13. The Insolvency Service, Pre-pack sales in administration report, 8 October 2020.

14. Explanatory Memorandum, [7.4].

15. Explanatory Memorandum, [7.4].

16. The Insolvency Service, Pre-pack sales in administration report, 8 October 2020.

17. Paragraph 4 of the Insolvency Services' Guidance in relation to the Regulations.

18. Paragraph 4 of the Insolvency Services' Guidance in relation to the Regulations.

19. Both SIP 16 (Pre-packaged Sales in Administrations) and SIP 13 (Disposals of Assets to Connected Parties in an Insolvency Process) have been updated as of 30 April 2021 to take into account the changes made by the Regulations.

traditional pre-packs negotiated and arranged before the company goes into administration but also disposals to a connected person arranged after the commencement of the administration and effected within 8 weeks.

The Regulations do not define the term "*disposal*" other than by referring to "*a disposal, hiring out or sale*" (regulation 3). The term is likely to be interpreted broadly. It will include, for example, a situation where a connected person holding security over the company's assets purchases the business or assets to reduce their level of debt in the administration.[17]

Whilst yet untested, an attempt to flout the Regulations by agreeing a sale but deferring completion to beyond the expiry of the eight week period within which disposals are caught by the Regulations appears unlikely to be successful because the contract will likely give rise to the creation of an equitable interest sufficient to constitute a "*disposal*".

To fall within the scope of the Regulations, the disposal must be a disposal of what, in the administrator's opinion, is all or a substantial part of the company's business or assets. Establishing whether a disposal is substantial will, therefore, likely include the administrator considering but is not limited to: (i) the value of either the business, assets or both involved in the disposal; (ii) how much of the business is being disposed of; and (iii) whether the trading style and good will of the business forms part of the disposal.[18]

The expression "*all or a substantial part of the company's business or assets*" is not defined but is similar to the term used (and equally not defined) in relation to the definition of the holder of a qualifying floating charge in paragraph 14 of Schedule B1 to the IA 1986 ("**Schedule B1**").

Where there is doubt as to whether a disposal involves "*all or a substantial part of the company's business or assets*" it seems likely the Court will give an administrator some latitude (the Regulations leaving it up to the administrator's "*opinion*" whether the disposal involves such a part of the company's assets).

A disposal can only be a substantial disposal, and so within the scope of the Regulations, if it is a disposal to one or more "*connected persons*" and takes place during the period of 8 weeks from the date the company enters into administration.

A series of connected transactions may constitute a substantial disposal (regulation 3(3)(b)).

Who is a connected person?

The Regulations are only engaged where the disposal is to "*one or more connected persons*". For these purposes, the definition of "*connected person*" used in paragraph 60A(3) of Schedule B1 is adopted.

The analysis of connectedness under paragraph 60A(3) of Schedule B1 (which relies to some extent on section 435 of the IA 1986) in any given case may be complex. It is the responsibility of the administrator to establish if a party is connected to the company.

Connected persons include: (a) a director or other officer of the company; (b) a shadow director of the company; (c) a "*non-employee associate*" (being an associate as defined in section 435 of the IA 1986, but excluding someone who is an associate only by reason of an employment relationship) of a director, other officer or shadow director; and (d) companies connected with such persons.

The full definition is set out in paragraphs 60A(3) to (6) of Schedule B1 and will require careful consideration in particular cases.

The obligations imposed on an administrator under the Regulations apply irrespective of the administrator's knowledge of whether the buyer is, in fact, a connected person. Where there is any doubt as whether or not a person is connected it is likely to be necessary, therefore, for an administrator to conduct appropriate investigations and/or to obtain legal advice.

Permitted Disposals

The Regulations allow a disposal that would otherwise be prohibited in two circumstances. First, a substantial disposal to a connected person is permitted where the approval of the company's creditors is obtained before the disposal is made. Secondly, such a disposal is permitted where the administrator has obtained a "*qualifying report*" and complies with the relevant notification requirements. Each of these two categories of permitted disposal are considered below.

Approval of the company's creditors

This option requires the administrator to (regulation 4):

- Include proposals for making the disposal ("disposal proposals") in the statement of the administrator's proposals for achieving the purpose of the administration under paragraph 49 of Schedule B1; and
- Seek the creditors' approval of the disposal proposals before the disposal occurs.

The administrator may only proceed with the disposal once the creditors have approved the disposal proposals, either as initially proposed or as modified with the administrator's consent.

The Regulations are silent as to the details of the disposal required to be included in the disposal proposals. However, it seems likely that the information requirements set out in SIP 16 will provide a useful reference point as to the detail to be provided.[19]

Approval of the disposal proposals will be decided by creditors at the same time as they decide on whether to approve the administrator's proposals under paragraph 51 of Schedule B1. Given this, the option of obtaining creditors' approval is likely to prove impractical in many cases in which pre-packs would traditionally be carried out, because of the delay that would be associated with obtaining such approval.

The creditors' decision is made in accordance with section 246ZE of the IA 1986. It appears that the decision can be made using them deemed consent procedure under section 246ZF. There are circumstances in which approval of the administrator's proposals is not required under paragraph 51 of Schedule B1 to the IA 1986 – namely, where the administrator has made a statement under paragraph 52(1). However, in these circumstances, approval of the disposal proposals is nevertheless still required, and accordingly a decision procedure (which may include deemed consent) must still be undertaken in relation to the disposal proposals.

Obtaining a qualifying report

If the administrator proceeds on the basis of an evaluator's report (rather than creditor approval), the administrator must obtain a copy of the report, which is commissioned and paid for by the connected person, before effecting the disposal. The administrator must also comply with notification requirements in relation to the report. An evaluator's report will be a "*qualifying report*" if the statutory requirements around both its process and content are met.

Critically the qualifying report must contain a statement, with reasons, that either: (i) the evaluator is satisfied that the consideration to be provided for the relevant property and the grounds for the substantial disposal are reasonable in the circumstances; or (ii) the evaluator is not satisfied that the consideration to be provided for the relevant property and the grounds for the substantial disposal are reasonable in the circumstances (a "*case not made opinion*") (regulation 7(h)).

In addition, the report must contain:

- A statement as to what relevant knowledge and experience the evaluator has to make the report.
- Details of the professional indemnity insurance that the evaluator carries.
- Details as to any previous report that the connected person has obtained, where known to the evaluator.
- Identification of the property being disposed of and the consideration for the disposal.
- Identification of the connected person and a statement as to their connection to the company.

The connected person is responsible for providing information to an evaluator to complete their report. The connected person should obviously expect to be asked for information about the company entering administration, the recipient of the assets and the substantial disposal. A viability statement or business plan (or both) may well be requested where a disposal involves deferred consideration.[20]

In order for a report to constitute a "*qualifying report*" its contents must have been considered by the administrator (regulation 5(a)). The report must be obtained by a connected person and given to the administrator. The report must be in writing, dated and authenticated by the evaluator (regulation 6).

An administrator does not have to be appointed at the time the report is obtained. For obvious reasons it would not be possible to carry out a pre-pack sale in many cases were that not the case. Instead, the report may be obtained before the company enters administration so that the sale can be finalised as soon as possible by the administrator following appointment.[21]

Who can act as evaluator?

In order for a person to be able to act an evaluator, the administrator must be satisfied that the person has sufficient relevant knowledge and experience to make the report (regulation 6(1)(a)(ii) and 6(2)). The evaluator must be satisfied that their own relevant knowledge and experience is sufficient for the purposes of making a qualifying report (regulation 10(a)).

As described in the Insolvency Service's Guidance in relation to the Regulations,[22] there are certain professions that are more likely to have the relevant knowledge and skills required to act as an evaluator. These include accountants, surveyors, lawyers with a corporate background and insolvency practitioners. However, it is not necessary for an evaluator to have insolvency experience. The selection of an evaluator may depend on the nature of the business for sale and someone with specialist knowledge of the business may be more suitable.

In addition, the evaluator:

- Must have professional indemnity insurance in place to cover possible liabilities to the administrator, the connected person, creditors or any other person (regulation 11).
- Must be independent.

As to independence, an individual will meet this requirement unless they (regulation 12):

20. Paragraph 7 of the Insolvency Services' Guidance in relation to the Regulations.

21. Paragraph 6 of the Insolvency Services' Guidance in relation to the Regulations.

22. At paragraph 7.

- are connected (within the meaning of section 249 of the IA 1986) with the company in administration or the connected person;
- are an associate (within the meaning of section 435 of the IA 1986) of the connected person;
- know or have reason to believe that they have a conflict of interest (being a financial or other interest which is likely to affect prejudicially their independence in providing a qualifying report); or
- have within the previous 12 months, provided advice to, and in respect of, the company (i) in connection with, or in anticipation of, the commencement of an insolvency procedure or (ii) in relation to corporate rescue or restructuring.

In addition, Regulation 13 excludes a number of persons for acting as an evaluator including:

- the administrator, any associate of the administrator and any person connected with a company with which the administrator is connected;
- persons with unspent convictions for offences involving dishonesty or deception; and
- persons who are subject to insolvency proceedings or are disqualified under the Company Directors Disqualification Act 1986.

What happens if the report states a case not made opinion?

Where the evaluator produces a case not made opinion, an administrator will still be able to proceed with the sale to the connected person but will need to provide an explanation to creditors of why the administrator has proceeded nevertheless (regulation 9). The administrator is, therefore, obliged to consider the evaluator's report but is not required to follow it.

Accordingly, an administrator can proceed with a disposal even where an evaluator has stated they are not satisfied that the disposal is reasonable. For example, if the evaluator's report contains a case not made opinion, but no other potential purchasers are found following a properly run sales process, the administrator may well be justified in allowing the sale to take place in any event.

> *the ways in which connected persons may attempt to circumvent the disclosure requirements, remain problematic*

However, good reasons as to why it said that the administrator considers that it would be in the best interests of creditors to enter into the disposal (notwithstanding the evaluator's view) are likely to be required. If an administrator simply states that the disposal is justified without any sufficient explanation, then it may be difficult for them to show that they have complied with the requirements under the Regulations to consider the contents of the report and/or their fiduciary and other duties to the company.

Notification Requirements

The administrator must provide a copy of the report, and where applicable, a statement of reasons for proceeding with the disposal, to creditors and to Companies House at the same time as sending them a copy of his or her statement of proposals for the administration under paragraph 49 of Schedule B1 (that is, as soon as reasonably practicable and in any event within eight weeks of the start of the administration) (regulation 9(5)).

There are two circumstances in which an administrator must do more than merely send a copy of the report to creditors and Companies House. In each such case, the administrator must provide a statement of reasons for proceeding with the disposal. The circumstances are: (i) where the evaluator has given a case not made opinion; and (ii) where the evaluator has included in the qualifying report details of any previous report where the person making that earlier report was satisfied that the grounds for the disposal were not reasonable in the circumstances or the consideration to be provided for the disposal was not reasonable in the circumstances.

The administrator may, in providing a copy of the qualifying report, exclude any information that, in the administrator's opinion, is confidential or commercially sensitive.

The administrator is not required to fulfil the notification requirements before proceedingwith the disposal.

Issues for the future

Whilst the Regulations represent an important development in the regulation of pre-pack sales they are likely to engender issues which will require careful consideration, including by the court.

We highlight three such issues below.

Opinion shopping

There is nothing to prevent a connected person from obtaining more than one report if it does not like what arises from the first one. If an evaluator becomes aware that a previous report has been obtained, the evaluator's qualifying report must include a copy or details of it, if they are available to the evaluator. Alternatively, the qualifying report must state that that report or details of it have not been made available to the evaluator, and provide details of why the evaluator did not obtain it, and any steps that they took to obtain it (regulation 8).

The ability of the connected person to "*opinion shop*" has been the subject of criticism by commentators, and the extent to which evaluators must investigate, and the ways in which connected persons may attempt to circumvent the disclosure requirements, remain problematic. There is plainly scope for mischief.

Sanctions for non-compliance

The Regulations are silent on any consequences of non-compliance. There is no suggestion in the Regulations that the disposal itself could be undone. Instead, it seems likely that a failure by an administrator to comply with the Regulations may constitute a matter relevant to a court in determining whether the actions of the administrator are open to challenge under paragraph 74 of Schedule B1 (unfair harm), or whether the administrator has been guilty of misfeasance under paragraph 75 of Schedule B1. By contrast, where an administrator has complied with the Regulations and a positive evaluator's report has been obtained, that may well make a claim against an administrator in respect of pre-pack sale more difficult.

The duties owed by the evaluator to other parties

It is also not clear in what circumstances the creditors, the administrator or the connected party might have some form of recourse against the evaluator in the event that there is some shortcoming in the report. The regulations provide that the evaluator must have professional indemnity insurance to meet potential liabilities to "*the administrator, the connected person, creditors or any other person*" (regulation 11). However, the regulations identify only the requisite content of the qualifying report (regulation 7); they do not identify what investigation (if any) the evaluator must undertake of the circumstances of the disposal, or the process by which the

report ought to be prepared. Moreover, as noted above, the evaluator will usually be commissioned and paid by the connected person, but their report must be considered by the administrator (regulation 5) and provided to creditors (regulation 9(5)). If there is some dispute as to the accuracy or reliability of the evaluator's conclusions, then it is uncertain (1) to whom the evaluator would owe a duty, and (2) the scope of any such duty.

Conclusion

The Regulations represent an important development in the regulation of pre-pack sales. However, political interest in pre-pack sales will remain high. It remains to be seen whether the Regulations will quell the calls for further transparency in relation to pre-packs and whether further legislative intervention will be necessary in the future.

When are members of companies fiduciaries?

TOBY BROWN

Toby Brown discusses the Supreme Court's decision in *Lehtimaki v Cooper [2020] UKSC 33* that members of charitable companies owe fiduciary duties, at least in the unusual circumstances of the case, which required the Court to consider the law relating to companies, trusts, charities and fiduciaries.

Overview

Shareholders are generally free to exercise their rights having regard only to their personal interests, whether it is in the interests of their fellow shareholders or even the company. But the concept sits uneasily with charitable companies (i.e. companies limited by guarantee with charitable objectives), where the members are not shareholders, and the company exists solely for a specified public benefit. Yet in deciding how to vote on whether a transaction is in the interests of a charity, a member can reasonably and in good faith come to a different view from the trustees, or indeed the court. Should the member be treated as a fiduciary and moreover be directed by the court on how they must vote? 300 years of charity law did not provide an answer, and the leading charity texts doubted the position was different from normal companies. However, in the circumstances of this case, the Supreme Court answered "yes" in *Lehtimaki v Cooper* [2020] UKSC 33 (also known as *Children's Investment Fund Foundation (UK) v Attorney General).* A member of a charitable company now has a fiduciary duty of loyalty to its charitable purposes, albeit not it appears in all circumstances. The wider implications remain to be seen – for example, could the principle apply to the 6 million members of the National Trust?

The unusual case

The Children's Investment Fund Foundation UK or "CIFF" has over $4 billion in assets with a mission to aid children in developing countries, and must be amongst the largest charities in the world. It was founded by Sir Christopher Hohn and Jamie Cooper, but it became difficult to manage when their marriage broke down. To resolve their differences, they agreed that in exchange for CIFF making a grant of $360 million to a new charity founded by Ms Cooper, she would step down as a trustee and member of CIFF.

As a company limited by guarantee, CIFF had both members and directors (who were trustees under charity law). As Sir Geoffrey Vos C held at first instance, the transaction required the approval of the members of CIFF, because the grant amounted to a "payment for loss of office to a director" under sections 215 and 217 of the Companies Act 2006, given that it related to Ms Cooper's resignation as a trustee. Subject to certain exceptions, the provision applies to all UK companies including charitable companies (for whom the approval of the Charity Commission is also required under section 201 of the Charities Act 2011).

Mr Hohn and Ms Cooper were trustees of CIFF, together with independent trustees. The members were Mr Hohn, Ms Cooper and a Dr Lehtimaki. However, because the making of the grant involved a conflict of interest for Mr Hohn and Ms Cooper, it was proposed that Dr Lehtimaki would be the only member to vote on a resolution under section 217. The trustees applied to the Charity Commission, who unusually, approved the charity in making an application to the court for approval as to whether to make the grant.

On that issue, the Chancellor in his judgment at [2017] EWHC 1379 (Ch) explained that he did not find the decision "*an entirely straightforward one*". It was (perhaps unsurprisingly) not entirely clear that disposing of $360 million of the charity's assets should be regarded as in its best interests. But he decided, counter-intuitively, that it was in its best interests, given the unique circumstances of the "*extremely unusual case*". The reasons included that the trustees had already agreed to the proposal in good faith, and it would bring to a conclusion the "*incredibly hostile dispute and governance problems*". The Chancellor, however, recognised that a reasonable fiduciary could disagree with his view.

This element of the decision was not appealed. But the Chancellor's decision to direct that Dr Lehtimaki as a member had to vote in favour of approving the grant proved more contentious. Unlike the trustees, Dr Lehtimaki had not surrendered his discretion to the court and considered that he would not be told how to vote. However, he was joined to the proceedings at the end of the 3 day hearing against his wishes. On appeal, the Court of Appeal (see [2018] EWCA Civ 1605) held that whilst the members owed fiduciaries duties to act in the charity's best interests, Dr Lehtimaki could not be directed how to vote because he was not breaching or threatening to breach his duties ("the non-intervention principle").

Normal (commercial) companies

Before turning to how the Supreme Court considered this difficult issue, it is useful to remind ourselves of the position for non-charitable companies. Shareholders when exercising their rights (such as voting in a general meeting) are exercising a right of property, and are generally free to do so as they see fit, according to their own personal interests. This is whether it is in the interests of the other shareholders or even the company. This is not a controversial proposition, as can be seen in the various texts on company law or shareholder rights (see for example "principle 9" in *Hollington on Shareholder Rights*).

The principle is, however, subject to certain qualifications, for example that shareholders have to act in accordance with provisions in the articles of association and any shareholders' agreement. Another key exception is the equitable doctrine of "fraud on the minority". In general, therefore, shareholders of companies are not considered to be trustees of their shares for the company or the other shareholders, nor to owe any fiduciary duties in exercising their powers as shareholders. The position is obviously different for directors of companies, who as with trustees, will owe duties under statute and common law.

The leading texts on charity law considered it doubtful, or an open question, whether the position of members of charitable companies was any different. Although there was some support for the contrary position (including the Charity Commission's guidance), the proposition was questionable given that Parliament in various provisions imposed the same powers on members of charitable companies as any ordinary company, for example under section 217 to approve payments for loss of office to directors/trustees.

The Supreme Court's judgment

Whilst the Supreme Court was unanimous in the result, namely to allow the appeal and direct Dr Lehtimaki to vote in favour of the grant, the Justices differed in some of their reasoning. Lady Arden gave a near-50 page judgment, comprehensively reviewing the case law. In an 8 page judgment (and with whom Lord Kitchen and Lord Wilson concurred), Lord Briggs agreed with some of Lady Arden's conclusions, but disagreed on the basis for being able to direct Dr Lehtimaki to vote, and ultimately restored the Chancellor's order for "*essentially for the reasons he gave*". The President Lord Reed found the Court of Appeal's judgment more persuasive but "*with some reluctance*" concurred with the order in deference to the unanimity of the court.

Are members fiduciaries?

Lord Briggs and Lady Arden agreed that members of a charitable company owe fiduciary duties in certain situations. They considered that the duties are narrower than those formulated by the Court of Appeal, so do not apply in every instance where a member has a power to act (unlike members of charitable incorporated organisations by virtue of section 220 of the Charities Act 2011). Rather, the Supreme Court held that members owes fiduciary duties in relation to the passing of a resolution under section 217, which would make possible a disposition of assets which would otherwise have been applicable for those purposes. However, when else the duty would be imposed was expressly left unresolved.

Lady Arden started her analysis by considering the nature of a "fiduciary", a topic which has been subject to considerable debate. Historically, equity imposed stringent duties on persons who were appointed trustees of trusts: Lord Eldon LC said that such duties were imposed with "*relentless jealousy*" in order to ensure that trustees fulfilled their duties, and that trustees had to be "*watched with infinite and the most guarded jealousy*" (*Ex p Lacey* (1802) 6 Ves 625). It is generally accepted today, however, that the "distinguishing feature" of a fiduciary is that they must act only for the benefit of the other party (in matters covered by their duty). See for example, *Bristol and West Building Society v Mothew* [1998] Ch 1 (Millett LJ). Accordingly, Lady Arden stated, there are two core features of the fiduciary's responsibility, namely the "no-conflict principle" (not to put themselves in a position where their interest and the beneficiary's interest conflict) and the "no-profit principle" (not to make a profit out of the trust).

Should these principles be applied to members of a charitable company? Despite a large number of charitable companies having existed for some time, the point had never been determined. Nor indeed, unlike charitable incorporated organisations, did statute provide that members of charitable companies owed fiduciary duties. Lady Arden therefore turned to what she described as three "signposts" to guide the decision.

First, the case law shows that courts have taken a liberal approach to charities. Lord Macnaghten stated in *Comrs for Special Purposes of Income Tax v Pemsel* [1891] AC 531 that "*The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the court derived from the piety of early times, are considered to be charitable.*" So for example, if a bequest would fail because the named purpose was against public policy, this was disregarded if a general charitable intention could be shown and instead it could be "*cy-près*" (i.e. applied to another charitable purposes).

Second, Parliament recognised charitable companies, but the law applied to them is, as Lady Arden described it, "*a mosaic*". Charitable companies are incorporated under the Companies Act 2006 and subject to its provisions, but then the Charities Act 2011 makes further or different provisions. For example, section 198 of the 2011 Act restricts amendments to the charity's articles to amend the company's objects without the consent of the Charity Commission.

Third, Lady Arden considered the decision in *Liverpool and District Hospital for Diseases of the Heart v Attorney General* [1981] Ch 193, where the relationship between charity law and company law first came to a head. Slade J held that the charitable company was in an analogous position to a trustee, and under its constitution there was a legally binding obligation to apply its assets for exclusively charitable purposes. As a result the "*cy-près*" principle should apply, so its assets could not be distributed to its members, but rather to other similar charities. Members of the charity could not disregard their contractual obligations under the memorandum and articles of association. This decision showed to Lady Arden that the courts will apply their liberal attitude to charities under the general law "*to making the mosaic work in places where there are evident difficulties not foreseen by the legislature*".

Finally, Lady Arden considered a number of arguments and practical problems relevant to whether members of charitable companies are fiduciaries. Building on the above three "signposts", she decided that the question should be answered in the affirmative, for a number of reasons including:

- The law allows duties of a fiduciary to be fashioned to a certain extent by the arrangements between the parties, in this case tailored to the memorandum and articles. A member such as Dr Lehtimaki could still therefore be a fiduciary even if he is not able to obtain information relevant to the exercise of his powers any more than a normal company member could, a restriction which will limit his role.
- Whilst there must be some fiduciary duty enforceable by the court, it need not extend to the full range of duties which a fiduciary might owe (see for example the decision regarding the limited role of the trustee of notes in *Citibank NA v QVT Financial LP* [2007] EWCA Civ 11).
- Whilst (as set out above) members of companies are not normally fiduciaries in relation to their powers, there are limits imposed by law and equity, such as to be exercised bona fide for the benefit of the company as a whole (e.g. *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656).
- Imposing a fiduciary duty will make it easier for the court to exercise its inherent jurisdiction over charities, and for charity law to be more internally coherent.

Accordingly, the member will owe a fiduciary duty to the charitable purposes, being a duty of single-minded loyalty, which in the present case will require him to consider whether the grant should be approved only by reference to the best interests of the objects of the charity (i.e. irrespective of any personal interest). However, the duty will not apply in every instance where a member has a power to act, with Lady Arden saying that "*Those circumstances must be worked out as and when they arise*".

The non-intervention principle

Having decided that the member owes fiduciary duties, the question arose as to whether and if so the court may intervene. Lady Arden and Lord Briggs referred to the well-established "non-intervention" principle, that the court will generally not interfere with the performance by fiduciaries of their duties, unless they are acting (or threatening to act) in breach of duty, or where they have surrendered their discretion to the court (see *Pitt v Holt* [2013] 2 AC 108). The fundamental principle is that the court does not seek to substitute its judgment for that of a fiduciary. It was for this reason that the Court of Appeal decided that it would be wrong to direct Dr Lehtimaki how to vote.

Lady Arden was of the view that this case was a rare exception to that principle, albeit one based on little authority. The court has the jurisdiction which it would normally have over trusts, and additionally, the wider, special jurisdiction in respect of charities. This was ancient in origin and is the way that the Crown (with the Attorney General, and the Charity Commission) exercises its prerogative over charities as "*parens patriae*" i.e. parent or protector. See *Attorney General v Brown* (1818) 1 Swans 265.

The court could intervene where necessary or expedient to see that charity trusts are performed, by issuing directions, rather than having to use a scheme. Here, the trustees of CIFF had surrendered their discretion to the court and the court's priority is to see that fiduciaries of charities perform their duties in a way most likely to achieve its continued existence where there had been an existential threat to its proper governance. Here, an impasse was threatened if Dr Lehtimaki decided not to vote in accordance with the court's decision, but this did not require that the court conclude he was threatening to breach his duty.

Threatened breach of duty

Lord Briggs agreed that if Dr Lehtimaki was neither committing or threatening a breach of duty (by declining to vote in accordance with the court's decision on whether the grant furthered the charity's purpose) then he would have agreed with Lady Arden's analysis just summarised. However, once the court has ruled on the underlying question of whether the transaction is in the best interests of the charity, in which the company and members are joined, the position fundamentally alters.

Whilst the fiduciary's duty is ordinarily a subjective one (namely to exercise the member's powers in the way that he decides, in good faith, would be most likely to further the purposes of the charity), this must "*give way*" when the court has reached a final decision on the very question in issue. At this point, Lord Briggs held, the fiduciary's duty (whether or not joined to the proceedings) is to use their powers to give effect to the court's decision about what is in the company's best interests. It would be a plain breach of duty for a fiduciary to do otherwise. This did not mean that the court was disapplying the statutory requirement for the vote under section 217 of the Companies Act.

Therefore, as the Chancellor had found, Dr Lehtimaki did not have a free vote because he was bound by the fiduciary duty, and the court had decided that the grant was in the best interests of the charity, thus to vote against it would be to gainsay the court's decision. Accordingly, Lord Briggs considered that Dr Lehtimaki's view that he was not bound by the court's approval of the grant amounted to a threatened breach of duty, and he could be directed how to vote accordingly.

Lady Arden (being the dissenting view on this point) disagreed, and considered that Lord Briggs' judgment made "*a significant inroad into the subjective duty*" of fiduciaries. She and Lord Briggs added multiple pages of responses and counter-responses to each others' draft judgments, exposing a sharp disagreement about the basis for being able to direct Dr Lehtimaki how to vote. Ultimately, Lord Briggs conceded that the Chancellor's "*principled basis*" for directing Dr Lehtimaki how to vote did involve some limited departure from the subjective nature of a fiduciary

duty. However, Lord Briggs concluded that the test for breach of fiduciary duty has never been purely subjective: "*the fiduciary's belief has to be both bona fide and reasonable, if he or she is to act upon it without risking breach of duty*".

Comments: the unresolved questions

This was a rare opportunity for the Supreme Court to consider a question of charity law, and in doing so, they further separated the differences between a charitable company limited by guarantee and a normal limited company, even in regards to the application of statutory provisions such as section 217 of the Companies Act which applies to both types of company.

The objective behind the Supreme Court's decision that members owe a fiduciary duty of loyalty to the company's charitable purposes (at least for voting on the type of transaction arising in the CIFF case) accords with the long history of the courts striving to support the proper administration of charitable trusts.

But it cannot be denied it was an innovation, or as some would say, judge made law, to impose a fiduciary obligation on members in relation to exercising a function bestowed upon them by Parliament under the Companies Act. Yet the Supreme Court did not go quite as far as the Court of Appeal in applying to charitable companies by analogy the statutory provision in section 220 of the Charities Act 2011 (which imposes a duty on members of incorporated charitable organisations in respect of **every** exercise of their powers).

As a result, the extent of the (new) fiduciary duty as it applies to members of charitable companies is, as yet, unclear. As already stated, it has not been determined that members owe fiduciary duties in respect of all decisions made in that capacity. Furthermore, Lord Briggs and Lady Arden expressly left open the question of whether members of mass membership charities such as the National Trust are fiduciaries, and if not, why not. They appear to have had in mind that such charities often provide benefits to their members, albeit that is not a hallmark of all "mass membership charities", for example the RSPB has 1 million members. It is also unclear whether the principle would apply to those charities such as the National Trust which are subject to separate acts of Parliament and schemes.

> *"...it is difficult to see how any charity which grants more than incidental benefits to members can expect them to vote without having regard to their own private, or selfish, reasons"*

In any event, it is difficult to see how any charity which grants more than incidental benefits to members can expect them to vote without having regard to their own private, or selfish, reasons. Many members of the National Trust for example will have joined to obtain the benefit of free access to historical houses and landscaped gardens. What if a vote was put to members to curtail those rights, would equity really expect those members to disregard their own interests?

Related to this, Lady Arden suggested that under charity law there was no prohibition on a member receiving an incidental benefit if authorised by the memorandum and articles, thus releasing him from the "no-profit principle". That said, she had earlier indicated the "no-profit principle" was part of the core responsibilities of a fiduciary, thus showing the extent to which this new form of fiduciary duty can indeed be altered and limited by a charity's constitution.

But Lady Arden went onto suggest that "*without more*" a member would not be released from any obligation of disclosure, nor be entitled to vote on any resolution allowing him a benefit, even one authorised by the memorandum or articles of association. But as she recognised, there is no organ of the company which has the express function of receiving conflicts of interest from members, nor any means of obtaining fully informed consent. Practical issues therefore may well arise, particularly for larger member charities.

The Supreme Court's decision also raises questions regarding the very nature of a fiduciary duty. Unlike normal fiduciaries who owe their duties to a legal entity or person (or persons plural, such as a trustee to the beneficiaries), this new fiduciary duty on members is owed to the charitable purposes of the company. Since the company to which they have subscribed is established for particular charitable purposes this makes sense conceptually even if novel. But on the other hand, it raises the question as to who can enforce the duty.

Finally, equally important are the inroads made by Lord Briggs into the subjective nature of the fiduciary duty, given he effectively decided that the test is objective in the circumstances of this case. The issue clearly vexed Lady Arden, who considered that the court had removed a fiduciary's discretion by binding them to how the court decided that the trustees had to act. Lord Briggs and Lady Arden disagreed on whether this would tip the balance of power away from members (who can play an important role in holding trustees to account) in favour of the trustees and the court.

By way of conclusion, it seems to the author that Lady Arden was indeed right to consider that the Supreme Court's decision "*may have consequences which stretch beyond the very exceptional nature of this particular case*". ■

Euroland

PROFESSOR CHRISTOPH G PAULUS

It is certainly not surprising to learn that in "Euroland" insolvency law still plays a central role. This is true even though in most, if not all, member states the once-predicted "'*insolvency wave*'" as consequence of the pandemic has not yet reached mainland. However, it is interesting to observe how the focus of previous primarily liquidation law shifts gradually towards restructuring and insolvency avoidance law.

This is certainly the effect of the Directive EU 1023/2019 on preventive restructuring frameworks[1] which has to be converted into national law by summer next year at the latest. However, this first edition of Euroland for 2021 focuses on two decisions of the CJEU, both issues resulting from the European Insolvency Regulation (EIR). One a reference to it by the German Supreme Court in Private Law Matters, and the other demonstrating new efforts of the Commission in Brussels to get insolvency laws harmonised throughout Europe.

A. CJEU, decision from 12 November 2020 – C-427/19 (Bulstrad Vienna Insurance Group)

This was a request for a preliminary ruling concerning the interpretation of Article 274 of Directive 2009/138/EC from 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II). The referring court was the Sofiyski rayonen sad (District Court, Sofia, Bulgaria) which had before it a dispute between the Bulgarian insurance company Bulstrad as plaintiff and Olympic – a Cypriot insurance company – as defendant. The dispute concerned a claim for just under €4000, plus liquidation costs of €13 which Bulstrad had paid in insurance compensation to the driver of a car covered by its insurance, which Bulstrad submitted was damaged by the driver of a vehicle with 'civil liability' insurance provided by Olympic and which Bulstrad wished to recoup by means of a subrogation.

In the course of the proceedings, the judges learned that the competent Cypriot authorities had withdrawn Olympic's authority to operate as an insurance undertaking for failure to comply with prudential requirements, and that they had appointed a provisional liquidator who assumed and controlled all economic and legal rights of the defendant company. The court in Sofia considered that this action constituted a "*decision to open winding-up proceedings with regard to an insurance undertaking*" pursuant to the respective Bulgarian law, which is the transposition of the aforementioned Directive art. 274. Because of the automatic and mutual recognition of such decision, the court proceedings were brought to a halt in order to wait for further information about what to do according to Cypriot law.

Bulstrad, however, requested the resumption of the proceedings on the grounds that the court erred in staying the proceedings instead relying upon the interpretation of the relevant provisions by the Supreme Court of Cassation, Bulgaria, according to which the actions of the Cypriot authorities could be regarded as constituting a '*decision to open winding-up proceedings with regard to an insurance undertaking*'. They argued therefore that Bulgarian law should still to be applied in its entirety and the proceedings thus continue.

To overcome this impasse the Bulgarian Financial Supervision Commission was asked to state whether it had received any information about the opening of such winding-up proceedings. Irrespective of the negative answer the court further investigated on its own motion and checked the Cypriot law; it came to the conclusion that a winding-up proceeding had been commenced so that Cypriot law was to be applied and the proceedings stayed pending further advice from the Cypriot authorities. But at the same time, the court decided to refer to the CJEU the following questions:

(1) *When interpreting (the respective norm of the Bulgarian law) in the light of Article 274 of Directive 2009/138, is it to be assumed that the decision of an authority of a Member State to withdraw authorisation from an insurer and appoint a provisional liquidator for it without court-ordered winding-up proceedings having been opened constitutes a "decision to open winding-up proceedings"?*

1. On this, cf. Paulus/Dammann (eds.), European Preventive Restructuring – An Article-by-Article Commentary, 2021.

(2) *If the law of the Member State in which an insurer the authorisation of which has been withdrawn has its head office and in respect of which a provisional liquidator has been appointed, provides that, in the event that a provisional liquidator has been appointed, all court proceedings against that company must be stayed, must that legislation be applied by the courts of the other Member States, even if this is not expressly provided for in their national law, pursuant to Article 274 of Directive 2009/138?*

The CJEU answered the first question in the negative: a winding-up proceeding in the meaning of art. 274 of Directive 2009/138 is not given when the authorisation of the insurance undertaking is withdrawn by the competent authority and when a provisional liquidator is appointed. Additionally, either the provisional liquidator must be proven to be empowered to realise the insurance undertaking's assets and to distribute the proceeds among its creditors, or that the authorisation withdrawal has the effect of an automatic commencement of a winding-up proceedings without any further intervention from any other authority.

The reasoning is straightforward: Art. 268 of Directive 2009/138 has under par. 1(d) a definition of a winding-up proceedings pursuant to which two cumulative conditions are to be met; firstly, they must concern the realisation of the assets of an insurance undertaking and the distribution of the proceeds among, as appropriate, the creditors, shareholders or members of that undertaking, and, secondly, must necessarily involve the intervention of the administrative or judicial authorities of the Member States which are competent for the purposes of adopting reorganisation measures or conducting winding-up proceedings.

The CJEU concluded that it was up to the referring court in Sofia to ascertain whether the Cypriot decision to withdraw authorisation is something different (a minus, as it were) from a decision to sell Olympic's assets and to distribute subsequently the proceeds among the creditors, etc. – or whether the given decision leads automatically to such winding-up as described in the first condition. In sum, when and if liquidation is not the consequence of a decision to withdraw authorisation, there is no winding-up proceedings pursuant to art. 274 of Directive 2009/138 and the corresponding Bulgarian norm.

> *"For those familiar with European insolvency law, this mechanism is far from surprising"*

In light of this answer – reading the definition of "*winding-up proceedings*" and subsume it to the facts at hand – it is somewhat sobering to see how deplorable current communication between European institutions is! At the very least, the Bulgarian Supervisory Commission could and should have clarified the issue with just one phone call – of course, after having had a look into the text of the Directive.

The second question refered to whether art. 274 of Directive 2009/138 must be interpreted as meaning that the law of the home Member State of an insurance undertaking (in this case Cypriot) which provides that all court proceedings against that insurance undertaking are to be stayed in the event of the withdrawal of its authorisation and the appointment of a provisional liquidator, must be applied by the courts of the other Member States (in this case Bulgarian), even if the legislation of those Member States does not provide for such a rule. Here again, a careful reading of the legislative text could have helped decisively.

Art. 274(2)(e) of Directive 2009/138 states that the *lex liquidationis* (here Cypriot law) determines the effects on law suits brought be individual creditors, unless the exception of art. 292 of that Directive applies(though the Luxembourg Court did not go so far to assist the Sofia court in this task, too!) Thus, Olympic was to be seen as an insurance company in a winding-up proceedings pursuant to the definition in art. 268 of the Directive, and if the pending law suit did not fall under the exception of art. 292, the Cypriot law stay has to be complied with in Bulgaria as well, even though that law does not have such a rule.

For those familiar with European insolvency law, this mechanism is far from surprising; after all, this is precisely what automatic recognition is all about when – similarly art. 7 EIR Recast – the general applicability of the lex concursus is to be applied all over the territories of the member states.

B. CJEU, decision from 22 April 2021 – C-73/20 (Oeltrans Befrachtungsgesellschaft)

This case was brought by the insolvency administrator of German company Oeltrans Befrachtungsgesellschaft and concerned the repayment of a pre-insolvency payment made by Oeltrans to a Dutch entity on behalf of a sister company in the same Oeltrans group.

The German Supreme Court in Private Law Matters (Bundesgerichtshof) asked whether the Dutch defendant was entitled to defend himself on the basis of art. 13 EIR 2000 (which is practically identical with art. 16 EIR Recast so that this case also gives guidance for the new Recast Regulation): whether "the law applicable to a contract under the Rome I-Regulation (EU 593/2008) also governs the payment made by a third party in performance of a contracting party's contractual payment obligation?"

The facts in the case are likely to happen more or less every day – particularly in a group context. There it is supposedly sort of standard that contract partner and payer are two different entities within the same group. And yet, this is the first time that the European Court had to deal with it. It is probably not by happenstance that it was a German court referring this question to the Luxembourg Court. Not only is it a peculiarity of the German private law that a rigid separation must be made between a contract and its fulfillment - this is the notorious Abstraktionsprinzip which *von Savigny* distilled some 200 years ago from Roman law dogmatics and which treats *causa* and satisfaction as entirely distinct - but additionally, German law is somewhat excessive in its elaboration of the insolvency claw-back rules. This field of law is manageable only by experts as the subtleties in interpretation have become so finely chiseled that the Bundesgerichtshof's decisions occasionally bring to mind ancient Roman times in which priests in their divine inspiration were in charge of jurisdiction. Accordingly, under this doctrine such a third-party fulfillment is to be interpreted as a gratuitous performance when and if the claim was at the time of the fulfillment of no value because the debtor could not perform (e.g. because of its insolvency).

Unfortunately, neither the referring decision of the Bundesgerichtshof nor that of the CJEU say a word on the contract partner's financial situation. But be that as it may, the latter court answers the question in the affirmative: a third-party payment is to be interpreted as falling under both art. 12 Rome I-Regulation and art. 13 EIR 2000 (now: 16 EIR Recast) so that the Dutch defendant is free to defend himself before the German courts on the basis of that art. 13 EIR 2000. The result is probably the only reasonable one and the court reaches it on its usual somewhat winding paths of argumentation.

It begins with a reference to recital 24 which, indeed, classifies i.a. art. 13 EIR 2000 as an exception to the general rule of art. 4 designed to protect legitimate expectations and the certainty of transactions. However, it does not say a single word about the methodological rule according to which exceptions are to be interpreted narrowly; that's rather the court's somewhat traditional understanding and it is difficult to see why this rule is mentioned here at all as it is no less difficult with regard to what is subsequently said: in mar. 26, the court states that it has already decided that artt. 4 and 13 EIR 2000 constitute *leges speciales* to the Rome I-Regulation and that they are to "be interpreted in the light of the objectives pursued by Regulation No 1346/2000". The latter is such a matter of course that it is hard to see more in this argument(?) than a banal statement. After all, all rules of a given legislative act are to be interpreted in the light of the objectives of that very legislative act.

More substance is to be found in mar. 30 ff. By referring to recital 23, which declares it indispensable to have uniform rules on conflict of law replacing their respective national counterparts, the court concludes that the protected expectation refers not just to the contractual obligation but also to the fulfillment of such obligation – in the present case, to the payment. The expectation extends to a third-party payment when it is clear, as in the present case, that that third party pays in order to fulfill someone else's obligation. This makes certainly sense and it sounds here as if the court narrows its answer to such obvious cases.

But this is most likely not the case. Since subsequently this conclusion is generalized to a rule pursuant to which all and every third-party payment is protected under art. 13 EIR 2000.

- Argument no. 1 is that it is unforeseeable for a contract partner, whether or not a third party, will pay and in which jurisdiction it might become insolvent
- Argument no. 2 is that any contrary result would be that all third-party payments would be governed by the *lex concursus*, art. 4 EIR 2000, what certainly runs counter the intention and purpose of art. 13 EIR 2000;
- Argument no. 3, art. 12(1)(b) Rome I-Regulation extends the applicable law of a contract to the performance of obligations arising from that contract. Since the conflict of law rules of the Rome I-Regulation are intended to provide for foreseeable results and legal certainty in the European judicial area, this rule is to be understood as also including third-party performances.

Accordingly, the CJEU concludes that the referring court's question is answered thus: "that the law applicable to the contract under the (Rome I-) regulation also governs the payment made by a third party in performance of a contracting party's contractual payment obligation where, in insolvency proceedings, that payment is challenged as an act detrimental to all the creditors."

C. BGH, decision from 17.12.2020 – IX ZB 72/19

As a kind of "*save the date*" for a later analysis of the future CJEU judgment, I shall briefly mention a (further) referral of the Bundesgerichtshof to the Luxembourg Court. The case deals, once again, with the notorious forum shopping and its implications on the interpretation of art. 3 I EIR Recast. One novelty in this intricate case is the question whether or not previous CJEU decisions ("Staubitz-Schreiber" and "Interedil") still claim validity under the Recast Regulation.

The debtor in the case is a holding company without employees, founded in 2014 and had its seat in Luxembourg. In June 2019 it was decided to move the seat to Fareham in England where the newly established directors filed a petition to open an insolvency proceeding at the High Court (ChD). On the next day, a group of creditors (share pledge holders) had the directors replaced and a new director mandated to establish an office in Düsseldorf/ Germany. He ordered the English counsel of the company to withdraw the petition at the High Court. But there was no withdrawal. Instead, another group of creditors stepped in and filed for (now) an involuntary proceeding. Strangely enough, in late August, the company filed a petition to commence an insolvency proceeding at the Düsseldorf insolvency court. The court started the usual procedural steps but revoked its opening decision only two weeks later upon appeal by creditors; the German court decided that it lacked international competence to open that proceeding. However, on this very same day – 6 September 2019 – still other creditors filed a petition at the Düsseldorf insolvency court which led to the commencement of the current insolvency proceedings but which are contested by a subsidiary (and creditor) of the debtor. The Bundesgerichtshof now submits the following questions to the CJEU:

(1) *Is art. 3 par. 1 EIR Recast to be interpreted so that a debtor company with a registered seat in one member state does not have its centre of main interests (COMI) in a second member*

state in which the administrative headquarter is situated as ascertainable by third parties on the basis of objective criteria when and if under circumstances like the one given in the present case the administrative headquarter was relocated from a third member state to the second one while in the third member state a decision on the application to open an insolvency proceeding was not yet rendered?

(2) *If the first question is answered in the negative, is art. 3 par. 1 EIR Recast to be interpreted so*

a) that the courts of the member state in which the debtor has its COMI at the time of the petition remain internationally competent when after filing but before rendering a decision the COMI is shifted by the debtor to another member state? and

b) that such ongoing competence exludes the courts' competence of another member state to decide on petitions on opening a main proceeding which were submitted after the debtor has shifted its COMI to that member state?

The circumstances of the facts give reason to various suspicions; it seems as if the company has become the victim of a battle among creditor groups which, *i.a.*, used credit bidding and forum shopping to achieve their goals.

D. Efforts to harmonize insolvency laws

Sometime around early April 2021, "*Global Insolvency*" published the following information:

"Euro zone finance ministers are discussing on Friday how to improve and possibly unify insolvency laws across the 19-nation bloc, to better prepare for a wave of bankruptcies expected when companies are weaned off government emergency pandemic support, Reuters reported. The expected surge in EU corporate bankruptcies will have a knock-on effect on the number of bad loans banks have to handle as the post-pandemic economic recovery starts to take hold and governments begin withdrawing state schemes that are now keeping many non-viable companies on life support. But insolvency laws differ from country to country, making it more difficult for the euro zone to deal with the problem. The issue threatens to hamper economic growth as assets of insolvent companies are frozen during lengthy legal processes rather being quickly re-deployed in the economy. "National insolvency regimes across the EU differ in their design and in their practical implementation," the European Commission said in a paper for the ministers' discussions. "(They) embody choices made regarding the appropriate balance between creditor and debtor interests ... the priority enjoyed by employees, public utilities and tax authorities in the process," the paper said. It said euro zone countries should, for instance, agree on a definition of insolvency and when a company should be obliged to undergo formal insolvency

proceedings. It would also help if there was a common view on actions to replenish the insolvency estate in case of fraud, on asset tracing, the ranking of claims, including the position of secured creditors in insolvency and on court capacity, it said."[2]

As a matter of fact, the Commission has already invited a group of experts from various member states[3] which convenes once almost every month from April to November 2021. All the abovementioned issues are to be discussed at length within this expert group and should lead to a paper to form the starting point for the more politically motivated transformation of the ideas into legislation.

It should be noted that the idea of harmonization of the member states' insolvency laws is far from being a novelty.[4] Obviously, it is the capital market (whoever that might be) that acts as a driving force[5] and which seems to find a compliant supporter in the Commission. This is understandable when remembering the difficulties for any investor tackling the challenge of more than two dozen different and differing insolvency laws. Given the centrality of insolvency law and its impact on secured transaction law, business law, etc. the difficulties multiply accordingly, and constitute a considerable impediment for foreign investment. The degree to which governments have supported the domestic business world by means of loans or other re-payable grants leads to fears that the volume of NPLs will steadily grow over the next years. After all, paying back all those loans does require (one way or another) double income; since the current obligations are to be fulfilled as well. ■

2. Cf. https://globalinsolvency.com/headlines/eu-mulls-more-unified-insolvency-laws-wave-bankruptcies-approaches.

3. For the English reader it might be of interest to learn that one expert from England is participating in theses discussions: Dr. Paul Omar from Gray's Inn. He is invited and admitted as a representative of Insol Europe.

4. Cf., for instance, Paulus, Europeanisation of the Member States' Insolvency Laws, Nottingham Insolvency and Business Law e-Journal Vol. 3 (Special Edition in honor of Prof. Ian Fletcher), 2015, p. 301 ff., available at: http://www.ntu.ac.uk/nls/document_uploads/174832.pdf; ; Mears/Pandya, Convergence in National and international Insolvency Law Since 2002, Insolvency and Restructuring international 7.1, April 2013, 12 ff.; Laukemann, Structural aspects of harmonization in European Insolvency Law, in: Vandrooghenbroeck (ed.), Hommage au Professeur Closset-Marschal, Louvain-la-Neuve 2013/4, p. 347 ff.

5. Action plan to tackle non-performing loans in Europe, available at: https://www.consilium.europa.eu/en/press/press-releases/2017/07/11/conclusions-non-performing-loans/; Mission letter von U.v.d.Leyen an M. McGuinness from 13 Sept. 2020; Report of the FSC Subgroup on Non-Performing Loans, mar. 162, available at: https://data.consilium.europa.eu/doc/document/ST-9854-2017-INIT/en/pdf; Final report of the High Level Forum on the Capital Markets Union - A new vision for Europe's capital markets from 10 June 2020, p. 23.

LEGAL EYE:

Law, Literature, and Lifeboats: *A Coincidence*

DANIEL JUDD

> *If there were no coincidence, it would be the greatest coincidence of all.*
>
> G.K. Chesterton

THE YEAR IS 1884, and somewhere off the Cape of Good Hope, the yacht *Mignonette* faces imminent shipwreck on its voyage from Southampton to Sydney. The four crew members quickly lower themselves into the one small lifeboat to escape their sinking vessel, and push out into the gale. They manage to collect only a few nautical instruments – no fresh water – and two tins of turnips. The seas soon calm, and time begins to pass. What happens next is the stuff of legend. It is familiar to us as 'the lifeboat case', and known to the law reports as *The Queen v Dudley and Stephens* (1884) QBD 723 (DC).[1] Perhaps most remarkable of all, more so than the case itself, is the striking similarity it bears to a story told half a century earlier, whose seafaring characters reckoned with a similar fate.

The occupants of that small lifeboat, formerly of the *Mignonette*, were three crew members – Tom Dudley, Edwin Stephens, and Edmund Brooks – and a cabin boy of seventeen years old, by the name of Richard Parker. The crew members appreciated that there was little hope of rescue. They were far from land, and the little dinghy was distant from regular shipping routes.

Food and water were scarce. The turnips were soon eaten. On the fourth day, the quartet managed to catch a turtle, which they then ate. The turtle lasted them until the twelfth day.

After seven further days without any food, the suggestion was raised that one of them might be sacrificed in order to sustain the rest. Brooks understood them to be referring to young Richard Parker, who was not consulted on the matter, and dissented. Dudley then proposed to the others that lots be drawn. This was the custom of the sea. And after all, they – the crew members – had families. Would it not be better that one be sacrificed for the good of the others? Again, Brooks dissented.

By this time, Richard Parker, the cabin boy, had become extremely weak, and had fallen ill on account of drinking seawater. He lay helpless at the bottom of the lifeboat, likely to perish before the others in any event. Dudley suggested that unless a ship appeared the next morning, the boy should be killed. Brooks dissented once again. But Stephens agreed.

The next morning, on 25 July 1884, no ship came. Dudley offered a prayer that their souls be saved, and with the assent of Stephens, despatched Richard Parker with a penknife. Brooks abstained from the act. But all three of the surviving crew members would be maintained by the boy until, four days later, they were rescued by a passing ship.

Back on land, the seamen were open about the events that had unfolded, believing maritime code and custom justified their conduct. The proceedings themselves became a cause célèbre of late Victorian society. The Times of London demanded their conviction. Public opinion would rally behind the two defendants, and indeed the seafaring community contributed to funding their defence in court.[2]

The prosecution alleged that Dudley and Stephens murdered Richard Parker, and sought a ruling to this effect despite broader public opinion. (Brooks was spared charge, and was called as a witness for the Crown.) Murder carried the mandatory death sentence. Still, it was largely accepted that the death sentence would not ultimately apply to the two unfortunate seamen. It was widely expected that such a sentence would instead be commuted by the Crown on request of the Home Secretary.

When the case came before the Exeter assizes, the point of principle on which the case depended could be stated shortly: is '*necessity*' a general defence to murder? Indeed, perhaps the point

1. *The Queen v Dudley and Stephens* (1884) QBD 723 (DC) ("*R v Dudley and Stephens*").

2. Andrea Hibbard, '*Cannibalism and the Late-Victorian Adventure Novel: The Queen v. Dudley and Stephens*' (2019) 62:3 English Literature in Transition, 1880–1920, at 306.

could be stated rather too shortly. A. W. Brian Simpson gives an extended and enlightening treatment of the lifeboat case, its protagonists, nautical custom in the face of peril, and the growing interest of the common law in what transpired on the high seas. In doing so, he unearths the enthusiasm of the judge, Huddleston B., to have the higher courts determine this very question.[3] A verdict of manslaughter was withheld from the jury, who were instead offered the choice between returning a murder conviction, and a special verdict. A special verdict was returned, based on a statement of facts the judge had himself prepared, and Huddleston B. referred the question to his fellow judges in the High Court in London.

In London, the court considered authorities ranging from Bracton to Blackstone, testing how far a person may go in order to preserve their own life at the expense of others. None could persuade Lord Coleridge, who found Dudley and Stephens guilty of murder. He rejected the existence of a principle of necessity, stating loftily that

3. *Cannibalism and the Common Law* (University of Chicago Press, 1984), at 209 ff.

"*[t]o preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it*",[4] meaning it was "*not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life*".[5] He expressed the practical concern, true of many a legal test, that "*the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own*",[6] but that "*a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime*",[7] no matter "*how hard in such trials to keep the judgment straight and the conduct pure*".[8]

4. *R v Dudley and Stephens*, at 287.

5. *R v Dudley and Stephens*, at 287.

6. *R v Dudley and Stephens*, at 287.

7. *R v Dudley and Stephens*, at 288.

8. *R v Dudley and Stephens*, at 288.

9. *R v Howe* [1987] AC 417, at 430–1; *R (Nicklinson) v Ministry of Justice* [2015] 1 AC 657, at [25].

Dudley and Stephens were guilty of murder upon a special verdict, and sentenced to death, but with a recommendation of mercy. The sentence was commuted to six months' imprisonment. Nonetheless, *R v Dudley and Stephens* casts a long shadow in our jurisdiction, and to this day it remains the law that there is no general defence of necessity.[9]

Understandably, the case has joined the ranks of cases and popular thought experiments for use in exploring in even the most desperate circumstances the law's commitment to the prohibition of taking the life of another.

Many have a maritime hue. There is the Plank of Carneades, in which one shipwrecked sailor wrests an available plank from another, leaving them to drown instead. There is *United States v Holmes*, the older American cousin of *R v Dudley and Stephens*, and which was decided a few decades earlier. Members of an overcrowded lifeboat were thrown overboard by crewmen in order to prevent everyone from sinking. The defendant was eventually convicted of manslaughter, receiving the same sentence of six months' imprisonment as Dudley and Stephens (alongside a $20 fine). American legal philosopher Lon Fuller drew inspiration from *R v Dudley and Stephens* in formulating a thought experiment of his own, involving cave dwellers, in his celebrated essay 'The Case of the Speluncean Explorers'. The response to the dilemma by each of the five hypothetical judges represents a different approach to judicial decision-making.

The lifeboat case also makes its mark in less esoteric circles. Monty Python parodied it in 1970 with their 'Lifeboat Sketch', in an episode of *Monty Python's Flying Circus*. A characteristically lighter tone is adopted as the predicament of the sailors ("*Still no sign of land. How long is it?*", "*That's a rather personal question, sir*") and the prospect of cannibalism on the high seas ("*Why don't you want to eat me?*", "*I'd rather eat Johnson, sir*", "*So would I, sir*") is brought to life.

Fifty years before Dudley and Stephens' eponymous case entered the legal canon, in 1838, Edgar Allen Poe released his only complete novel. The book, entitled *The Narrative of Arthur Gordon Pym of Nantucket*, recounts the adventures and misadventures of young Mr Pym on the open

The Monty Python 'Lifeboat Sketch'

seas, having stowed himself away aboard the ship *Grampus*. The story prefigures the lifeboat case in startling fashion.

Following a mutiny, by which Pym and his friends seize control of the ship, a storm destroys the mast of their boat, tears the sails, and leaves the group of four to drift slowly in their vessel. They were without food or drink, except a little wine. Days went by, and their hunger grew only more intense.

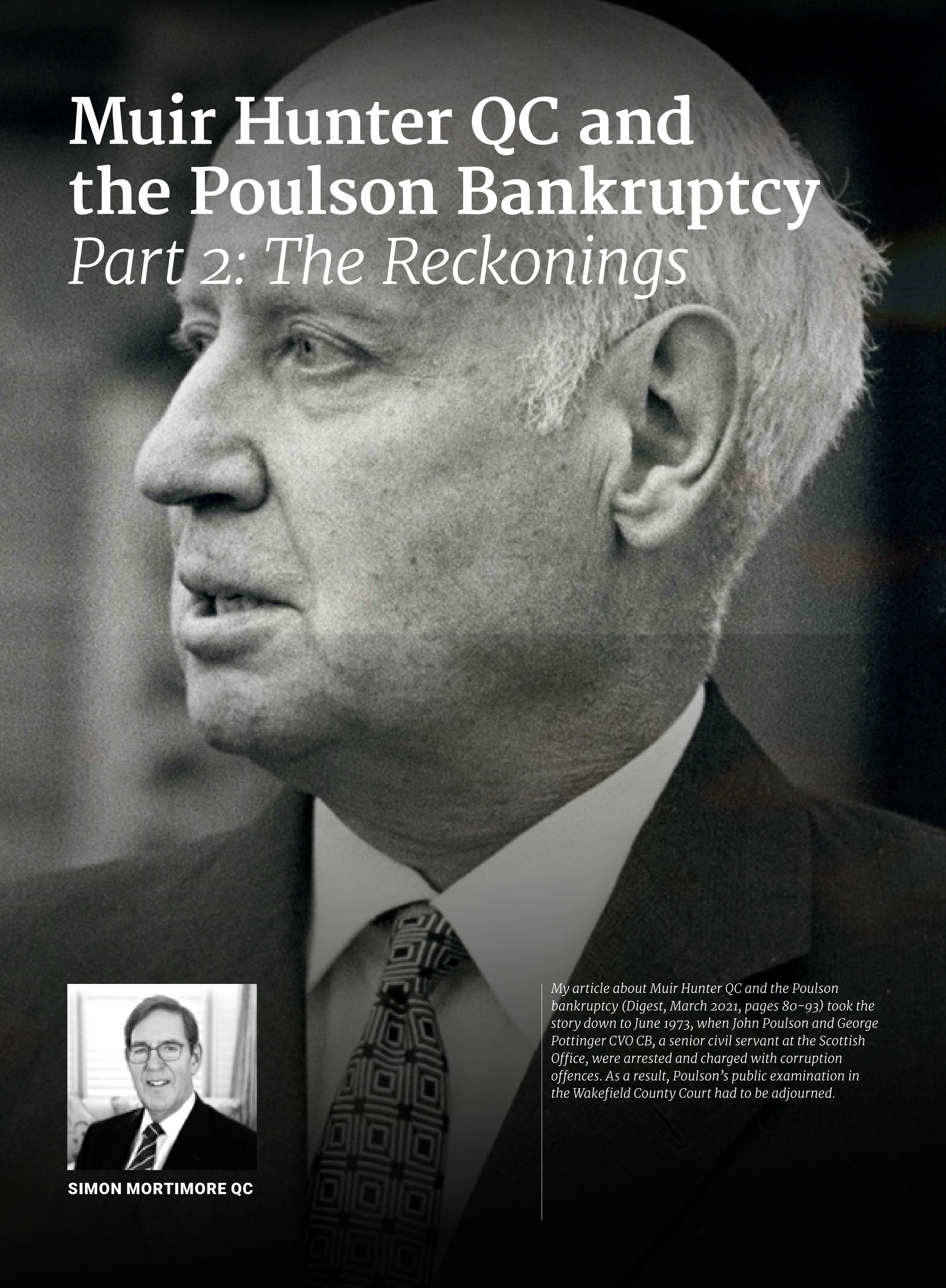
One of their number then floated a suggestion: one of them should die to preserve the existence of the others. Pym initially dissented from the proposition, but ultimately he submitted. The four drew lots. The straws were made from four small splinters of wood. Our protagonist explains the "*bitterest anxiety*" of the "*fearful drama*" as the lots were arranged, imploring the reader that "*[b]efore any one condemn me for this apparent heartlessness, let him be placed in a situation precisely similar to my own.*"

The lots were drawn. One of their number had to draw the shortest straw. The victim accepted his fate, was killed swiftly with a knife and was consumed in order that the others might be preserved, as they subsequently were – long enough, at least, to be rescued by a passing ship. The victim's name was nothing other than Richard Parker.

The coincidence is an arresting and macabre one, fitting for an author of Poe's renown. With time, the coincidence has developed a life of its own, and has itself been the subject of literary allusion.

We close with one particular allusion, which stands out in modern times. Yann Martel's *The Life of Pi*, published in 2001, and adapted into a successful film in 2012, centres on the reflections of Pi, a boy who survives a shipwreck, and is stranded on a lifeboat with a large Bengal tiger. The presence of a tiger at all is itself a nod to Poe, for 'Tiger' was the name of Pym's dog.

Yet the book's author goes on to make the connection to both Poe and the lifeboat case unmistakeable, suggesting to us that one of the law's great coincidences is alive and well, even outside of legal circles. The name Martel gives to Pi's animal companion is Richard Parker. ■



Muir Hunter QC and the Poulson Bankruptcy

Part 2: The Reckonings

SIMON MORTIMORE QC

My article about Muir Hunter QC and the Poulson bankruptcy (Digest, March 2021, pages 80-93) took the story down to June 1973, when John Poulson and George Pottinger CVO CB, a senior civil servant at the Scottish Office, were arrested and charged with corruption offences. As a result, Poulson's public examination in the Wakefield County Court had to be adjourned.

A little more than one hour of questioning by Muir on the second day of Poulson's public examination on 3 July 1972 had sparked the resignation of the Home Secretary and a fraud squad investigation, which would be followed by a series of prosecutions for corruption, two public inquiries, a parliamentary investigation into misconduct by three MPs and the enforced resignation of one of them. This article describes those events and the concluding stages of Poulson's bankruptcy.

The search for Poulson's assets

From an early stage in the bankruptcy, Poulson's trustee and his lawyers had been aware of rumours that very large secret commissions, perhaps in the range of £300,000 - £800,000, might have been paid by contractors who had been introduced to Poulson projects in the Middle East, but had not been accounted for. In January 1973, the trustee and the official receiver removed from Poulson's old offices a mass of previously undisclosed documents, including Poulson's Beirut file. This file contained documents which referred to commissions; but there was no evidence of receipt by Poulson or his companies. Muir asked Poulson about commissions at the public examination on 5 March 1973 but failed to obtain any useful answers.

The person most likely to know about these commissions and where they were held was Costa Nasser, a Jordanian Christian engineer, based in Beirut, who had been Poulson's agent in the Middle East. He had the day-to-day running of the Middle Eastern operations of Poulson's company International Technical and Constructional Services Ltd (ITCS) and was the person who would have organised any commissions. With the help of one of the suppliers, the trustee had been able to trace one small commission payment into a Swiss bank account held in the name of an arms dealer. It was obvious that the trustee would have to tread carefully as most of Poulson's projects, or intended projects, in the Middle East had been for rulers or their families and they would be unlikely to welcome the trustee's inquiries.

On 6 July, Muir and the trustee's lawyers went to the Foreign Office for advice on how best to investigate the missing commissions. While being scrupulously polite and apparently constructive, the Foreign Office avoided giving the trustee any positive assistance, beyond explaining that it would be highly undesirable for them to meet Nasser in Beirut. On 16 July, Antony Parsons, then under-secretary of the Foreign and Commonwealth Office,[1] noted on an internal report: "*my strong feeling is that we must disengage from this whole affair as much as possible, volunteer as little as possible, certainly nothing in writing. Mr M.H. is a dangerous man...Pl. keep me informed if we are asked for anything else.*"

The day after their visit to the Foreign Office, Muir and the trustee's lawyers met Camille Chamoun, a leader of the Lebanese Christian community and former President of Lebanon, to find out whether he might encourage Nasser to cooperate with the trustee's investigations. As Muir reported to the Foreign Office, Chamoun "*seemed genuinely interested in the trustee's problems and anxious to help, and called for and perused some of the documents. He concluded by offering to send for Mr Nasser, on his return to Beirut, and to ask him for explanations, and to seek to persuade him to agree to meet us for questioning somewhere outside Lebanon.*" It was perhaps too much to hope that anything would come this meeting; and nothing did.

With no prospect of engaging with Nasser in Lebanon, the only step the trustee could take was speculative one of applying to the Wakefield County Court for an order that Nasser attend that court for a private examination. The Registrar made an order for Nasser to be examined on 6 September. Not surprisingly, Nasser was not tempted by the prospect of a visit to Wakefield and ignored the order.

On the other hand, the trustee did manage to persuade the Right Honourable Reginald Maudling MP PC to submit to an order for his examination in the Barnsley County Court on 19 July 1973. The trustee's solicitors agreed with Maudling's solicitors, Allen & Overy, that this court should

1. Knighted 1975, Ambassador to Iran 1974-79, UK Permanent Representative to the UN 1979-82.

be the venue, rather than the Wakefield County Court, in the hope that reporters would be confused and go to the wrong court. This cunning scheme failed, and reporters turned up in force in Barnsley to witness the former Home Secretary attending a bankruptcy court for a private examination under oath.

Mr Maudling had been chairman of ITCS, which was the corporate vehicle created by Poulson to seek overseas work for his practice, and so might be able to shed some light on the commissionsand other aspects of Poulson's overseas work. He had also been a director of Open System Building Ltd (OSB), another Poulson company, which built houses, mainly for local authorities. OSB was heavily in debt to Ropergate Services Ltd, Poulson's service company, and thence to him. The trustee wanted to find out what Maudling knew about the amounts totally about £400,000 paid to or expended on behalf of OSB.

Maudling's primary concern was to protect his own reputation, which was badly tarnished by his association with Poulson. As he went into court, Maudling told the reporters that he had come voluntarily and that "*I'll help all I can*". Inside the courtroom, which was barricaded with chairs and matting, the trustee's legal team, led by Muir, soon discovered that Maudling did indeed possess the first-class brain he was reputed to have and that he was well-prepared. He understood that the examination concerned the affairs of the bankrupt Poulson and not those of ITCS and OSB and was able to head off some awkward questions about his remuneration as a director of ITCS. He knew nothing about any commission arrangements relating to construction projects in the Middle East and helpfully suggested that the trustee should speak to Mr Nasser. He was anxious to protect his business associates in the region and persuaded the Registrar to put a "*stop order*" on the transcript to protect the name of the UAE Ambassador in London. Nor could he be expected to know about money paid to or for OSB. He was merely a non-executive director who left the financial arrangements to others.

Maudling's thorough preparation for the hearing extended to the luncheon arrangements. While office girls brought beer and sandwiches for everyone else, Maudling and his son, Martin, tucked into their own hamper of delicacies from London. They politely declined the offer of a Barnsley chop from trustee's team. After the end of the afternoon session, Maudling made a statement to make it clear that he was not involved in Poulson's architectural practice and had no knowledge of his personal finances. Whether the trustee learnt anything useful from the examination is doubtful. Maudling was well-able to cope with Muir's questioning. As David Graham recalled, this was "*the only time Muir Hunter met his match*".

On 28 August 1973, ITCS went into creditors' voluntary liquidation with Ronald Frederick Bendall being appointed liquidator. He was a partner of the trustee and the liquidator of both Ropergate Services and OSB. Between them, the trustee and the liquidator had control of all the constituents of Poulson's former organisation. By 1976 they had recovered more than £300,000, including the return of many of Poulson's bribes: £13,000 from Pottinger, £6,000 from Braithwaite, £30,000 from Sales and the cost of all Alderman Cunningham's holidays. They were unable to trace any commissions in the Middle East and fared little better in pursuing Mr Maudling.

During the three or four years when he was involved with Poulson's organisation, Reginald Maudling had received cash or benefits worth about £30,000. These included the covenanted payments to the Adeline Genée Theatre Trust, remuneration, a tropical suit, some suitcases and a purple kidney-shaped swimming pool, with changing pavilion at Maudling's country home, Bedwell Lodge in Hertfordshire, which Poulson had designed and built for him. On top of that Poulson gave Maudling's son Martin a salaried job as a director of OSB. The only claim pursued against Maudling was for the cost of the swimming pool. After protracted arbitration proceedings, Maudling settled the claim in October 1974 by paying the trustee £250. It looks as though the trustee recovered a further £500 from either Reginald or Martin Maudling "*under statutory provisions*", but the reasons for the payment are unknown. The only certainty is that the Maudlings would not have paid anything unless convinced they had to.

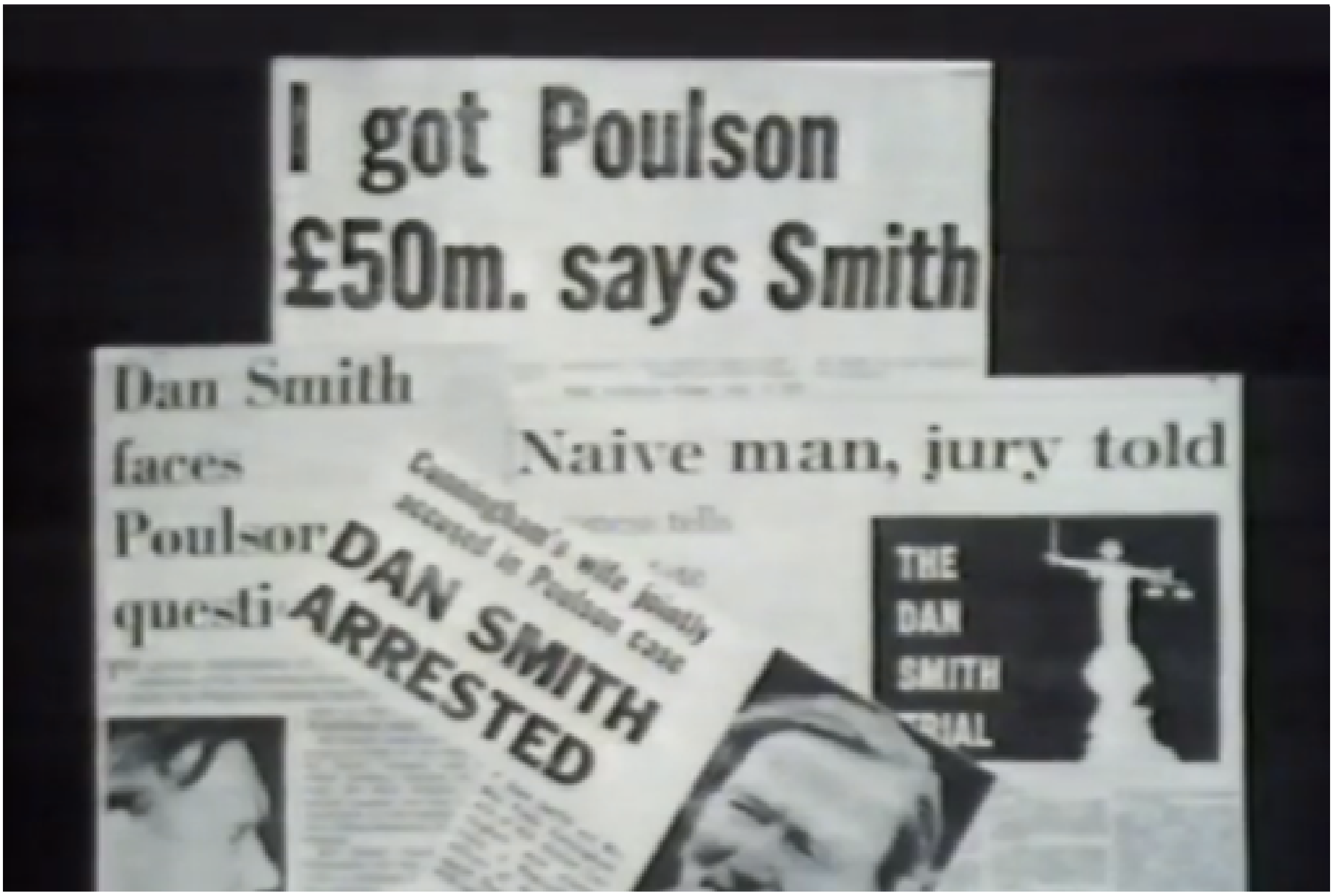
Corruption offences revealed by the bankruptcy proceedings

In broad terms an offence of corruption may be committed by a person who gives a bribe or by the person who receives it. Two elements need to be established: the making or receiving of the bribe and the corrupt intent.[2] Corruption is one of the most difficult offences to prove, because bribes are usually concealed and the parties do their best to cover their tracks. Moreover, the parties invariably convince themselves they have done nothing wrong. The donor puts the gift down to his generous spirit and believes that he is just doing what everyone else does. The recipient is convinced that his judgment is unaffected by the gift and that he continues to act in the best interests of the organisation for which he works.

Usually the corruption remains secret unless a whistle-blower comes forward. Here, the Poulson bankruptcy acted as whistle-blower in alerting the prosecuting authorities to Poulson's network of corruption. Moreover, it gave the Fraud Squad documentary evidence of the bribes: invoices, cheques, bank statements, accounting entries and

2. At the time there was a common law offence of corruption in relation to a person performing a public duty and statutory offences under the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Acts 1906 and 1916.

A still from the 1986 BBC2 documentary called *T. Dan Smith* in which he talks publicly for the first time about his conviction and jail sentence for corruption



correspondence. Confronted by that evidence, Poulson and his confederates would struggle to resist the inference of corruption. Poulson's position was even more challenging, because he had already answered on oath at his public examination questions about the corrupt transactions for which he would be charged. A similar challenge faced T Dan Smith, Alderman Andrew Cunningham and Bill Sales since they had been privately examined by Muir or David Graham.

A remarkable feature of Poulson's corruption was how little he had to pay public sector officials and members of local authorities to obtain lucrative appointments for the design of prestigious buildings, such as hospitals, schools, high rise flats and shopping centres. At a time when there were very high marginal rates of tax on Poulson's professional profits, the cost of the bribes to him was minimal, as he cheated the Inland Revenue by recording them in his accounting records as business expenses. On the other hand, for relatively poorly paid public sector officers or unpaid members of local authority committees, Poulson's bribes made a real difference to their standard of living; giving them homes, cars, holidays, and other pleasures they could not otherwise afford.

The Fraud Squad began their investigations in July 1972, with exceptional police resources committed to the task. In April 1973, the Director of Public Prosecutions obtained an order to inspect Poulson's bankruptcy file at the Wakefield County Court. Leaving nothing to chance, the prosecuting authorities instructed two of the most highly regarded criminal law silks on the North-Eastern Circuit, John Cobb QC (later a High Court judge) and Peter Taylor QC (the future Lord Chief Justice), to lead the prosecutions and be committed to the cases on a full-time basis.

The police began by charging and arresting the key players: Poulson, Pottinger, T Dan Smith and Alderman Cunningham. In the first wave of arrests, they also arrested two of the first people to be corrupted by Poulson: Graham Tunbridge, the British Railways surveyor, and Ernest George Braithwaite, the secretary of the South-Western Metropolitan Board. Mrs Cunningham was also arrested because corrupt payments for her husband had been disguised as consultancy fees paid to her. These arrests began at the end of June, with the arrests of Poulson and Pottinger, and concluded at the beginning of October 1973 with the arrests of T Dan Smith and Mrs Cunningham.

The prosecution decided that the corruption charges against Poulson and Pottinger would be brought to trial first. The other prosecutions would follow swiftly after that. One point that troubled the prosecution was the tactics that T Dan Smith might deploy to escape conviction. In 1970 Smith had been acquitted of corruption after a trial at the Old Bailey lasting four weeks. His counsel, Jeremy Hutchinson QC (generally regarded as the most effective criminal silk of his generation), had persuaded the judge that Smith should be tried separately from the Wandsworth

William Pottinger, the 'elegant cad'

councillor, Sidney Sporle, he was alleged to have corrupted and who was duly convicted at the first trial.[3] For these Poulson corruption charges, the prosecution would insist that Smith should be tried with Poulson and Mr and Mrs Cunningham.

The trial of Poulson and Pottinger: the toppled giant and the elegant cad

The trial of Poulson and Pottinger at Leeds Crown Court began on 19 November 1973. The defendants admitted that gifts worth about £30,000 had been given. These included payments for building Pottinger's house overlooking Muirfield golf course, cash, holidays, a Rover car, and a suit and overcoat made for Pottinger by Huntsman of Saville Row. As Mr Justice Waller explained to the jury, the nub of the case was whether the gifts were made corruptly to Pottinger, as an agent of the Crown, as an inducement or reward for showing favour; and whether they were made and received knowing it was the wrong thing to do.

The defence case was that the gifts simply reflected the great friendship between the two men; there was no corrupt motive and Poulson got nothing in return for his gifts. The highlights of the trial were the cross-examinations of Poulson and Pottinger and the closing speech of Peter Taylor QC or the prosecution.

Both defendants had difficulty in explaining away the favours that Pottinger conferred on Poulson. Pottinger had told officials that Poulson was as "*an architect of high quality*", he tried to get Poulson a knighthood and he drafted Poulson's speeches and letters for Poulson to send to people involved in the Aviemore ski resort project on which Poulson was engaged. Poulson was forced to admit that he had defrauded the Inland Revenue by accounting for the gifts as business expenses. He tried to explain away answers he had given at his public examination by saying that the bankruptcy court was "*a Nazi Court*" and that he was "*in a complete daze*" there. Pottinger could not explain satisfactorily why he had not made a complete disclosure of the gifts when his immediate superior asked for an explanation of his relationship with Poulson. He denied that he was a kept man or that he favoured Poulson. He said it was possible to separate his work from private life: "*one does not wear civil service pyjamas*".

John Cobb QC's cross-examination of Poulson cruelly exposed the hollowness of the defence case that the explanation for the gifts was the deep friendship between the two men; one a brash Yorkshire architect and the other a Cambridge educated senior civil servant who was a member of two of Scotland's most exclusive clubs, the New Club and the Honourable Company of

3. T Dan Smith failed to pay Jeremy Hutchinson QC's fee; the only time that happened to Hutchinson in his long career.

Edinburgh Golfers at Muirfield. Poulson had paid for the Pottinger family to have a holiday in Italy, apparently so that Pottinger's son could study Palladian architecture. Cobb asked Poulson: "*Where are examples of Palladian architecture to be found in Italy*?" Poulson hesitantly replied: "*Siena … Rome …*" Cobb enlightened him: "*There are two places. Vicenza and Venice, and nowhere else.*" Poulson said he did not know that, nor whether the Pottinger family had gone to those cities.[4]

On 1 February, Peter Taylor QC began the closing speech for the Crown. After the many days of hearing witnesses and the sometimes confusing and contradictory nature of the evidence, Peter Taylor distilled the prosecution case to devastating effect. He said that this was not a trial about buying a favour. It involved "*a more all-embracing and insidious process*" of buying a man. It involved putting a man under an obligation, so that when the opportunity arose, or a request was made, favours would be given. Poulson did not think he would get something if he sent a gift. It was "*a more general softening up process, putting George Pottinger, a civil servant, so much in his debt, so much under an obligation, that any favours required might be done.*" He would look for something he could do to give the donor something for "*this cascade of gifts being lavished on him*". What matters is not whether any favour was shown but the state of mind in which the money was given and accepted. Poulson knew he had no business making gifts to a civil servant. The gift of a house is not the currency of friendship. Some gifts were too large; some, such as a rail ticket, too trivial, but "*the nature of the gifts was to take responsibility for the man's whole living*". Pottinger was living in a Poulson house, driving a Poulson car, wearing Poulson suits, and travelling at Poulson's expense. The corrupt intent was implicit and did not have to be spelt out between two intelligent sophisticated men. It is no answer to say: "*I scrupulously refrained from doing anything.*" The fact he did not do anything added the "*rather odious and repellent feature*" of swindling Poulson. Poulson's admission that he was swindling the Inland Revenue went to his credit as a witness; but it also showed that the gifts were not gifts of friendship but of business. It also meant the taxpayer was providing the high life. To demonstrate that Pottinger was a kept man, a factotum or Figaro figure who would go round doing Poulson's chores, Taylor pointed to the contemptuous way in which Poulson's staff wrote to him as "George"; not the normal way to address a senior civil servant in a business letter. More woundingly, with reference to the Huntsman overcoat, Taylor compared Pottinger with Malvolio: "*Some are born to greatcoats, some achieve greatcoats, and some have greatcoats thrust upon them*".[5]

Roy Herrod QC, for Poulson, admitted that both accused had given pathetically dishonest answers in cross-examination. The prosecution may have proved overwhelming greed and lack of integrity, but they had not proved corruption. He added some Churchillian rhetoric: "*Never in the field of commercial relations has so much been paid for so long for so little*." There was no business he said, it was all friendship. Wilfred Steer QC, for Pottinger, accepted that his client was a sponger who had broken the civil service code, but he was not corrupt or prepared to be corrupt.

The judge's lengthy summing up to the jury concluded on the morning of Monday, 8 February; the 51st day of the trial. It took the jury only 4 hours 3 minutes to return unanimous verdicts of guilty on all charges.

Mr Justice Waller sentenced both men to 5 years in prison. He said that Poulson's corrupt gifts struck at the very foundations of our government system. It was a betrayal of trust for Pottinger to have accepted them. The Daily Mirror celebrated the outcome with the headline: "*The toppled giant and the elegant cad*".

The punishment of Poulson and Pottinger

Pottinger could never accept that he had been corrupt. He appealed against his conviction and sentence. In July 1974, the Court of Criminal Appeal dismissed the appeal against conviction but reduced the term of imprisonment to 4 years. Pottinger spent most of his sentence in Ford Open Prison. He was released on parole in April 1976.

Meanwhile, in civil service disciplinary proceedings, Pottinger was dismissed from the Scottish Office and stripped of the pension rights to which he would have been entitled on reaching the age of 60 in 1976 (although Mrs Pottinger's pension of £1,650 pa was not affected). In May 1975, the Queen withdrew the honours she had given to Pottinger: Commander of the Royal Victorian Order, given as a Coronation honour in June 1953, and Companion of the Civil Order of the Bath, given in June 1972, the month when Poulson's pubic examination began and Pottinger's comfortable world started to unravel so dramatically.

After three days of reflection, Poulson realised that resisting the other corruption charges would be pointless. He decided to make a complete and all-embracing confession and plead guilty to everything. On 15 March 1974, Poulson appeared before Mr Justice Waller to plead guilty and face his punishment for all the other corruption offences. In sentencing Poulson to a total of 7 years imprisonment, to run concurrently with the 5-years sentence he was already serving, Mr Justice Waller told Poulson: "*The evil that you spread is incalculable, and it is in my view very difficult to impose any sentence commensurate with the gravity of the offences.*"

4. Fitzwalter and Taylor: Web of Corruption, page 229.

5. Article on Lord Taylor of Gosforth by Michael Beloff in Oxford Dictionary of Biography.

Poulson spent most of his sentence in Wakefield gaol, the only redeeming feature of which was that it was convenient for Mrs Poulson to visit her husband. In November 1975, Poulson applied to the Court of Criminal Appeal for an extension of time to appeal against the length of his sentence, but this was refused. Next, in June 1976, Poulson applied for parole as his health was deteriorating, but again this was refused. In a letter to The Times, Lord Longford called the refusal "*an indefensible piece of cruelty.*" As some consolation, Poulson was moved to Ashwell Open Prison in Leicestershire. There his declining health worried the prison authorities. In April 1977, they decided that he should be moved to Lincoln prison for observation. Poulson resisted the move, as he was horrified by the threatened loss of the freedom of movement that he enjoyed in an open prison. A month later, the authorities decided to release Poulson on parole.

After just over three years in prison, Poulson returned home to the bungalow in Pontefract. He was crippled with arthritis and had lost 4 stone in weight. He said that he looked forward to telling his own story and getting his own back on the people who had let him down. One of these (almost certainly Reginald Maudling) he called "*a Judas*".

T Dan Smith and Alderman Cunningham

T Dan Smith and Andrew Cunningham had been two of the most powerful and influential people in the North-East over the preceding twenty years. Smith had been chairman of the Newcastle Labour Party for 12 years, a Newcastle City Councillor for many years and leader of the Council for six years, chairman of Peterlee and Aycliffe Development Corporation, and chairman of the Northern Economic Planning Council. He had the reputation of being the saviour of the North-East.

Cunningham was secretary of the General and Municipal Workers Union's Northern Division. He was a prominent member of the Labour Party, as a member of its National Executive Committee and chairman of its Chester-le-Street and Northern Region Executive. He also held several influential public offices in the North-East: chairman of the Durham Police Authority and the Newcastle Airport

> *"They treated the country like a Monopoly board on which to build houses"*

Consultative Committee; member of the Northumbrian River Authority, Peterlee New Town Development Corporation, Tyneside Passenger Transport Authority and Chester-le-Street town council; and alderman of Durham County Council. When he was arrested on 9 July 1973, Cunningham stood down from all his public and political offices and his Union gave him paid leave of absence.

On 25 April 1974, T Dan Smith and Alderman Cunningham pleaded guilty to all charges before Mr Justice Waller in Leeds Crown Court. Smith asked for three other offences to be taken into consideration when he was sentenced. In return, the prosecution agreed not to pursue the charges against Mrs Cunningham. Peter Taylor QC explained the nature of the charges.

Smith infiltrated a fifth column into local authorities in the North-East, while scrupulously avoided corruption in Newcastle. Behind the veneer of running a public relations business, he and Poulson were conspirators with a strategy for obtaining development work throughout Britain for the Poulson organisation, which at one point was worth £21 million. They treated the country like a Monopoly board on which to build houses. Of the £155,000 he received from Poulson, Smith kept £30,000 for himself and distributed the rest in furtherance of their corrupt purpose.

Cunningham was charged with receiving corrupt gifts between 1963 and 1969 in relation to the public offices he held in Durham and Tyneside. The corrupt gifts were nine holidays, which cost about £4,000, and about £3,5000 in consultancy fees paid to Mrs Cunningham. Peter Taylor said that one ugly feature of the case was that Cunningham was prepared to embroil his wife, a local magistrate, in his dishonest scheme. In return for these favours, Cunningham bulldozed Poulson into appointment as architect for Northumbrian River Authority. Poulson received £40,000 for drawings before any work was done. He also helped to secure Poulson's appointment to design blocks of high-rise flats at Felling for which Poulson got £250,000 in fees. As chairman of Durham Police Authority, Cunningham got Poulson the job of designing Sunderland police headquarters for which Poulson earned fees of £36,000.

Lord George-Brown, as he had become, made a dramatic appearance at the trial to inform the judge of the outstanding personal qualities of the two defendants. In 1965, when he was First Secretary of State and in charge of the newly created Department for Economic Affairs, George Brown had appointed Smith as chairman of the Northern Economic Planning Council, an advisory body which was intended to revive the ailing northern economies. He commended Smith's outstanding performance in that role. As for Cunningham, he was "*one of the most outstandingly forthright, courageous, solid and loyal men I have met throughout my political life.*"

This eulogy seems to have had no effect on the view the judge took of the two defendants. In sentencing Smith and Cunningham to six and five years in prison respectively, Mr Justice Waller referred to their great betrayal. They had deliberately spread the disease of corruption and were responsible for people now coupling corruption in local government with the North-East. He was scathing in his condemnation of Cunningham, who had demanded the gifts and concealed the bribes as fictitious payments to his wife, so that no one would know about them. "*The very serious aspect of this case is that this corruption was done so discreetly. If Poulson had not gone bankrupt, none of this would have come out. This is the evil of the situation.*"

On the night the trial was completed, the BBC's *The Money Programme* aired interviews with Smith and Cunningham, which had been conducted just before the trial. Smith said this was not "*a sordid little affair*"; the practices revealed by the Poulson case were endemic in the construction industry. He added that in the mid-1960s, he paid £500 to Ted Short MP, the Deputy Leader of the Labour Party, which Short had asked should be confidential. (Short survived this deeply embarrassing revelation, by explaining that the money was reimbursement of expenses.) While Smith accepted that he deserved to go to prison, Cunningham did not think he was corrupt. He struggled with what he described as the very grave question of when public relations work stops, and corruption begins.

Cunningham's prison sentence was reduced on appeal to four years. He served it in Ford Open Prison, where he met George Pottinger and the two of them engaged in regular putting matches. In January 1976, Cunningham was chauffeured to Newcastle Crown Court for another corruption trial which lasted 50 days and was prosecuted by Peter Taylor QC. The accused were Sidney McCullough, a Durham builder, and four Durham councillors, including Cunningham, who were alleged to have received gifts from McCullough in return for planning favours. McCullough sold the best bungalow on an estate he was developing to Cunningham for the advantageous price of £3,695. When he moved in, Cunningham insured it for £7,500. In the witness box, Cunningham said that he had never given any planning favours to McCullough and that the only person who had ever succeeded in corrupting him was John Poulson. The jury evidently believed him, because Cunningham was the only one of the accused to be acquitted.

In June 1976, Cunningham was released on parole. A few weeks later he received an honour not normally bestowed on recently released prisoners. He had tea with the Prime Minister, James Callaghan, at the home of his son Dr John Cunningham MP, who was the Prime Minister's Parliamentary private secretary.

Poulson's broken army

The convictions obtained at the Poulson and Pottinger trial and the severe sentences handed out discouraged most of the other accused from contesting the charges. Over two years following the end of that trial, an unimpressive group of 16 middle aged or elderly men and one woman appeared in Crown Courts to be punished for taking or spreading Poulson's corrupt gifts.

On 4 March 1974, Ernest George Braithwaite pleaded guilty to six charges of corruption involving cash and gifts worth about £9,500. As secretary of the South-West Metropolitan Board, he had helped to secure design work for Poulson on three of the Board's 150 hospitals, for which Poulson earned fees of over £80,000. Braithwaite was sentenced to three years in prison. But for Poulson's bankruptcy, Braithwaite would have escaped prosecution. After he had been named in a Private Eye article in 1970, the Hospital Board instructed a senior barrister to investigate Braithwaite, but he found no evidence of impropriety.

Later in March, Graham Tunbridge, a former estates and rating surveyor for the Southern Region of British Railways, pleaded guilty to corruption charges involving cash and benefits worth nearly £8,000 received between 1949 and 1964 and his help in securing Poulson's appointment as architect of offices at Cannon Street and Waterloo stations. He received a suspended prison sentence and was fined £4,000 and ordered to pay £1,000 towards the prosecution's costs.

On 24 April 1974, Maurice Kelly, pleaded guilty to corruption offences. He was given a suspended 12 months prison sentence and fined £2,000. As the National Coal Board's chief engineer in Yorkshire, he had supervised the Board's architectural projects in that region. Poulson put him up at the Dorchester, took him to livery dinners, gave him holidays in France and Spain, provided him with free use of a Rover car and gave him Christmas presents of cases of gin and whiskey. The gifts were worth about £2,750. In return, Poulson gained contracts which earned fees of over £50,000.

A month later, Bill Sales, the former chairman of the NCB's Yorkshire Division, pleaded guilty to corruption offences relating to gifts worth about £2,500, including carpets paid for by Poulson, nights at the Dorchester, and gifts of port and champagne each Christmas. Sales had used his position to help secure Poulson's appointment as architect of Coal House Doncaster, from which Poulson earned fees of over £150,000. Sales pleaded not guilty to charges concerning Poulson's help in the purchase of his house from the NCB, which remained on the file. Mr Justice Waller told Sales that but for his health, he would have sent him to prison. Instead, he received a suspended 12 months prison sentence and a £5,000 fine.

In May 1974 the Attorney-General, Sam Silkin QC, and the DPP reviewed the state of the Poulson prosecutions. Faced with about 300 targets for investigation, they instructed the police to concentrate on evidence of corruption and not to divert scarce resources into

"*Over two years following the end of that trial, an unimpressive group of 16 middle aged or elderly men and one woman appeared in Crown Courts to be punished for taking or spreading Poulson's corrupt gifts*"

inquiring into other possible offences committed by people in subordinate positions whose involvement was relatively trivial.

By the end of 1974, Mr Justice Caulfield had replaced Mr Justice Waller as the judge dealing with the Poulson corruption cases. In December, Jack Merritt, the former liaison officer between the Leeds Regional Hospital Board and the Ministry of Health, appeared before him in the Leeds Crown Court to plead guilty to 12 corruption charges. He pleaded not guilty to two other charges which remained on the file. The value of the benefits Merritt received were modest, but the Leeds Hospital Board was one of Poulson's most important sources of work. During the 1960s, he earned fees of over £900,000 from the Board. Mr Justice Caulfield told Merritt that Poulson "*made you a corporal in his fifth column and you tied yourself to the cow's tail*". He gave Merritt a 12-months suspended prison sentence and fined him £2,000. In August 1975, Merritt's Companion of Imperial Service Order was cancelled.

In February 1975, Dr Sydney Hepworth, the former mayor of Southport, pleaded guilty to one charge of conspiracy and six charges of corruptly receiving gifts of money from Poulson totalling £15,000, all relating to a projected redevelopment of the centre of Southport. Mr Justice Caulfield told Hepworth that he had drunk "*corrupt wine*" from Poulson "*that great purveyor of poison*" and sentenced him to three years in prison. Hepworth slumped back in a state of shock. His appeal against sentence was dismissed in November 1975. Later that month the General Medical Council Disciplinary Council suspended Hepworth from practice for six months.

In June 1974, two of T Dan Smith's subordinates, Peter Ward and Roy Hadwin, a former mayor of Newcastle, were charged with conspiring with Smith to corrupt Tommy Roebuck, Mexborough councillor, and Colin Dews, a Castleford councillor. The two councillors were charged with corruptly receiving £4 for each house that their council instructed OBS to build. The trial in Sheffield Crown Court began on 28 January 1975 before Mr Justice Caulfield. By this stage Smith was serving his sentence for these offences and Dews was too ill to stand trial. The case proceeded against Ward, Hadwin and Roebuck. In his opening speech, Peter Taylor QC explained how Hadwin, when mayor of Newcastle, used his official car to travel to meet councillors and tout for business for OSB. Smith, giving evidence for the prosecution, admitted he was a corruptor and said that Ward and Hadwin knew about the payments to councillors. They said that they had not received anything other than their salaries as employees of OSB did not know that the councillors had not disclosed their personal interests at council meetings. There was also evidence that Roebuck had pressured the other Mexborough councillors to give a contract to build 36 houses to OSB. On 25 February, after a trial lasting 21 days, the jury found the defendants guilty on all charges. The judge sentenced Roebuck to 12 months in prison. He gave Ward and Hadwin suspended 9 months prison sentences and fined them each £600.

In November 1976, after a trial before Mr Justice Forbes, three Bradford officials were found guilty of receiving corrupt gifts from Poulson. They were Edward Newby OBE, a textile worker who became Lord Mayor of Bradford and leader of the controlling Labour group on the West Yorkshire Metropolitan County Council; William Brown, the Bradford City architect; and Brown's assistant (and mistress) Mary Fenelon. Between 1964 and 1969, Newby, received £4,300 under an annual retainer to find housing contracts for OSB. Between 1962 and 1967, Brown received eight nights at the Dorchester worth nearly £600. Mary Fenelon received carpets and furniture for her flat worth about £150. They helped Poulson to earn fees of about £100,000 for Bradford work. The three defendants were given suspended prison sentences: 9 months for Newby, 12 months for Brown and 7 months for Fenelon. Mr Justice Forbes told them: "*You are the last pitiful remnants of a broken army.*"

That was not quite true, because the next month Norman Hudson, a retired North-Eastern Gas Board official, appeared in Sheffield Crown Court charged with receiving corrupt gifts from Poulson; namely £420 or more for building works on his home in the 1950s and £35 for a holiday in a hotel in 1956. He was given a 9-months suspended prison sentence and fined £1,000.

Poulson's MPs and the Gozo Hospital

Poulson's public examination had revealed that Reginald Maudling was not the only MP involved in Poulson's organisation. He had retained two other MPs as consultants: the Conservative MP John Cordle and the Labour MP Albert Roberts.

On 2 March 1965, Cordle wrote a long letter to Poulson, angling for a higher consultancy fee, which included this sentence: "*It was largely for the benefit of Construction Promotion that I took part in a debate in the House of Commons on The Gambia and pressed HMG to award contracts to British firms.*" Even Poulson could see that this not the sort of thing that should be said, but he agreed to increase Cordle's annual consultancy fee to £1,000.

The following year, the Maltese Government, then in the hands of the Nationalist Party, announced its plan to build a large new hospital on the island of Gozo to be funded by the British Ministry of Overseas Development in accordance with commitments made when Malta became independent in 1964. This was just the sort of project that appealed to Poulson. He

6. In his evidence to the Select Committee, Roberts claimed authorship of the letter but admitted that Poulson or his secretary had provided the factual information.

would propose a package, with his organisation designing the hospital and Vickers' Medical Division providing the equipment and selecting the building contractor. The already close connection between the two organisations was cemented when in January 1967 Dr Kenneth Williams, the head of Vickers' Medical Division, became a director of Poulson's ITCS. To further his cause, Poulson appointed as his agent in Malta, John Abela, a construction supplies merchant, who already acted for Vickers. The challenge Poulson faced was that the Maltese Government already had a shortlist of British architects recommended by the Crown Agents and RIBA and Poulson was not on it, because, at that stage (the summer of 1966), he had not been commissioned to design any overseas hospitals. Although late into the game, Poulson won the appointment by falsely claiming to have international experience in designing hospitals, judiciously deploying his MPs, and offering a well-directed gift.

Abela suggested to Poulson that a payment to the Nationalist Party's press fund could be helpful. In September 1966, Poulson arranged with Dr Williams for Vickers to transfer £5,000 to Abela, who would release it to the fund if the package deal was accepted.

Albert Roberts was heavily in Poulson's debt. Poulson paid him an annual consultancy fee of £2,500 and had designed and largely paid for Roberts' bungalow in his Normanton constituency. The MP still owed the builder £4,500; a debt which Poulson generously discharged. It was therefore easy for Poulson to persuade Roberts to ask the Crown Agents to recommend his firm for the Gozo contract. This approach rather backfired, as the Crown Agents complained to RIBA about inappropriate lobbying and told the Maltese government what Poulson was up to and that they could not recommend him. Poulson did better by preparing a letter for Roberts to write on House of Commons notepaper to Dr Caruana, the Maltese Minister of Works, to encourage him to appoint Poulson's firm. In his letter, sent in late September 1966, Roberts said that the Poulson organisation had international, as well as national, experience in designing hospitals and was "*invariably recommended*". He attached a list of the UK hospitals designed by Poulson and a fictitious list of Poulson's international commissions.[6] The Minister was impressed, but Maudling's efforts on behalf of Poulson were decisive in securing the appointment.

By early October 1966, Maudling had joined the Poulson organisation as chairman of his overseas company and Poulson had covenanted to pay £5,000 each year for seven years to Mrs Maudling's favourite charity, the Adeline Genée Theatre Trust. The first payment was made on 7 October and three days later Maudling wrote five letters, enthusing about the ability and experience of Poulson, to Dr Caruana and four other Maltese officials. At the beginning of November, Dr Caruana decided that Poulson would be appointed but Vickers would not be involved. This meant that Poulson had to repay Vickers the £5,000, which Abela seems to have spent on himself.

It took nearly one year and more work by Maudling before Poulson received his formal appointment as consultant architect and quantity surveyor. Faced with a grave financial crisis, the British government was anxious to cut back on overseas aid, including its commitment to Malta. In early 1967, Maudling intervened in several debates in the House of Commons, urging the Government to give substantial financial support to Malta without disclosing his interest. Matters concerning the Gozo Hospital came to a head because the

Queen Elizabeth II lays the foundation stone of the Gozo hospital, 16 November 1967

Queen was due to lay the foundation stone on 16 November 1967. In October, Maudling intervened to avoid the embarrassment of the ceremony taking place without an architect having been appointed. He met the Maltese Prime Minister and wrote to him and the British High Commissioner. Eventually, the British Board of Overseas Development approved the plans for the Gozo Hospital and Poulson attended the ceremony as the appointed architect.

The following year, with some more help from Maudling, Poulson collected nearly £100,000 as his fees for the drawings for the Gozo hospital. Since Poulson had recovered what was due to him and the £5,000 gift was lost in Malta, the Gozo affair was not explored in Poulson's public examination. It was however a matter of interest to the Fraud Squad and later to the police in Malta.

In October 1974 the Fraud Squad sent a file on Maudling, Cordle and Roberts to the DPP, who sought advice from John Cobb QC and Peter Taylor QC on the merits of prosecution on corruption charges. On 7 November, the two QCs advised that, although Maudling and Roberts had been guilty of "*reprehensible conduct*" in relation to the Gozo Hospital, and that "*it would be hard to imagine a clearer admission of improper motive on the part of a Member of Parliament*" than Cordle's letter, the three MPs could not be prosecuted. This was because it was generally understood that "*A Member of Parliament using his position to show favour to an individual for private reward commits no criminal offence. This situation might well be thought anomalous.*" The reason for the anomaly is that an MP has no principal unlike a civil servant, minister, public sector officer or member of a local government committee. Parliament could, of course, sanction an MP who abused his position through accepting a corrupt reward.

In a supplementary opinion of 19 November, the two QCs considered it worthwhile investigating whether Maudling was involved in the intended bribe of the Maltese Nationalist Party and the circumstances surrounding the gift of the swimming pool at Bedwell Lodge. However, Cobb advised that "*given the nature of the man*" he would only proceed "*if there is a one hundred per cent, copper-bottomed guarantee of winning*". Although that might have seemed an impossibly high hurdle, the police continued to investigate Maudling's role in Malta. They had, however, decided a couple of months earlier not to take any action in relation to misconduct in the management of Poulson's companies.[7]

By early 1975, it looked as though Maudling's position was safe. In February, Margaret Thatcher, the newly elected leader of the Conservative Party, appointed Maudling as her Shadow Foreign Secretary. Unfortunately for Maudling, later in the year, the Gozo scandal returned to public attention. Several years overdue, in June 1975 the Gozo hospital opened for business and revealed itself to be an enormous, unwanted, and badly designed white elephant. The Maltese authorities, now controlled by a Labour Government, decided to prosecute Abela for bribing or attempting to bribe Dr Caruana. Maudling's correspondence promoting Poulson featured in the criminal proceedings against Abela in Malta, which came to court for a preliminary hearing in October. There seems to have been no appetite in Malta to take those proceedings beyond that preliminary hearing, but news that the Fraud Squad inquiries were continuing and that they had interviewed Maudling at his London flat in July came to the attention of the press. All this prompted Dennis Skinner MP to ask the Sam Silkin A-G whether Maudling was going to be prosecuted. Silkin's cautious reply of 23 October was far from helpful to Maudling. It said that inquiries were continuing and that no assurance had been given to anyone that Maudling would not be prosecuted. Maudling issued a "*put up or shut up*" statement and all went quiet for a year.

Behind the scenes, Maudling's role in the Poulson scandal was being given careful consideration. In a letter dated 23 June 1976, the Treasury Solicitor, Sir Basil Hall, told Sir Patrick Allen, the former Under-Secretary of State at the Home Office, that "*while it may become possible for a statement to be made to the effect that there is no evidence that Mr Maudling had been guilty of any corrupt practice, it would not be possible for it to be said that he had committed no impropriety, or even that he had committed no other offence, as director of companies in the Poulson group*".[8] The following month, the Attorney-General and DPP, fortified by an opinion from David Smout QC, decided that there would be no more Poulson prosecutions.

There was one potential exception to that: Dr Kenneth Williams for his part in the scheme to bribe Dr Caruana. He had been living in Saudi Arabia and the South of France until about 1980, when he decided to retire to Bournemouth. There, he was charged with corruptly offering £5,000 to ensure that the Gozo Hospital contract went to Poulson. At the trial in Winchester Crown Court in October 1982, the case was dismissed on the ground that the Court did not have jurisdiction over events which all took place abroad.

Inquiries

From the moment the Poulson bankruptcy came to public attention, *The Times*, among others, called for an inquiry under the Tribunals of Inquiry (Evidence) Act 1921. The Conservative Government resisted those demands; mainly because the procedure under such an inquiry would gravely inhibit the scope for criminal prosecutions. It preferred to let the criminal law takes its course. Also, since the Poulson case had exposed serious deficiencies in the way local government contracts were awarded, on 3 October 1973, the Prime Minister announced that a Committee on Local Government Rules of Conduct would be established under the chairmanship of Lord Redcliffe-Maud.[9] Muir immediately wrote to 10 Downing Street, offering to assist the Committee by informing it about the Poulson bankruptcy. This Committee was formally established on 23 October. It took evidence from many witnesses, including Muir, and reported on 17 May 1974. Among other things, it recommended improvements to the procedure for oral disclosure of interests, a register of interests, powers for the police to inspect financial records on suspicion of corruption, and a national code of conduct for councillors. In October 1975, such a national code was adopted.

In February 1974, Harold Wilson returned to power as leader of a minority Labour Government. Since in July 1973, he had called for a Royal Commission to inquire into allegations of corruption in public life, he felt he should be as good as his word. Accordingly, on 29 April, he announced that there would be a Royal Commission into "*conflicts*

7. Quotations in this and the preceding paragraph are taken from Bastin: Reggie, pages 460-464

8. Bastin: Reggie, page 478.

9. He was an expert on local government, having chaired a departmental committee investigating the management of local government which reported in 1967 and a Royal Commission on Local Government which reported in 1969.

10. Letter dated 12 June 1974 from The Times to Muir with enclosure in the Cork Archive.

Reginald Maudling leaves his home on his way to the House of Commons.

of public and private interest and the furtherance of private gain against public duty in the nation's pubic and business life". Such a Royal Commission would lack the evidence gathering powers that an inquiry under the 1921 Act would have had and many, including Muir Hunter, doubted that this was the best way to deal with corruption of the sort and scale that had emerged from the Poulson case.

On 3 June, *The Times* published an article "*Why we must have an anti-corruption agency*" by A Special Correspondent (in fact Muir Hunter QC[10]). He thought the power to inspect financial records, recommended by the Redcliffe-Maud Committee did not go far enough. The Poulson case had shown the value the evidence-gathering powers available in a bankruptcy and that vast police resources were needed to mount successful prosecutions in corruption cases. That combination of resources would not always be available, which was why a central anti-corruption agency, with powers to obtain evidence like those available in bankruptcy proceedings, would be the best solution. Muir observed that such an agency would also be a suitable depository for Poulson papers when that bankruptcy was concluded.

On 2 July, the Prime Minister announced that Lord Salmon would chair the Royal Commission and that its terms of reference would be "*To inquire into standards of conduct in central and local government and other public bodies in the United Kingdom in relation to the problems of conflict of interest and the risk of corruption involving treatment from a public body; and to make recommendations as to the further safeguards which may be required to ensure the highest standard of probity in public life.*" The Prime Minister emphasised that the Royal Commission would not investigate individual cases. On 6 December 1974, the Commission was established. It began taking evidence soon afterwards. Among those who gave evidence were Muir Hunter, accompanied by David Graham, Poulson's trustee, the liquidator of the Poulson companies and their solicitor.

The Salmon Commission's lack of investigative powers continued to cause concern. On 30 May 1975, Patrick Marnham wrote an article in The Times in which he called for an inquiry

11. Paragraph 274.

under the 1921 Act to restore faith in public sector contracts. He pointed out that Poulson had done work for the Ministry of Defence, British Gas, and various Water Boards, but the way he obtained those contracts had not been investigated. Moreover, since 1966 there had been several police investigations into corruption in the major cities. Now that the criminal process was nearing its conclusion, the objection to an inquiry under the 1921 Act disappeared. In a letter to The Times on 9 June, Muir expressed his agreement with the Marnham article and reminded readers of his call, as "Special Correspondent", for an anti-corruption agency. These views commanded the support of The Times and several of its readers who wrote letters of support.

On 7 July 1976, the Salmon Report was published. Although its recommendations were politely welcomed in the House of Commons, the report achieved very little. This was mainly because its scope for making worthwhile recommendations was limited. The Redcliffe-Maud Committee had covered the ground regarding local authorities. In June 1975, MPs had voted to introduce a compulsory register of interests; a move which Enoch Powell MP denounced as "*degrading and unlawful*" (and which he ignored with impunity). The Poulson cases had not shown any practical weaknesses in bribery law. At a general level, the Salmon Commission recommended reform and consolidation of the legislation. That turned out to be a much more complex topic than may have been appreciated by the Commission and reforms would not be introduced until the Bribery Act 2010, more than 30 years' later.

As for the anomalous position of MPs in relation to the criminal law of bribery, the Commission could only invite Parliament to consider bringing corruption, bribery and attempted bribery of an MP acting in his Parliamentary capacity within the ambit of the criminal law. This was not an invitation to which MPs were in the least enthusiastic to accept. It would take the "cash for questions" scandal of the early 1990s and the Committee on Standards in Public Life under the chairmanship of Lord Nolan, which presented an initial report in 1995, before anything was done to deal with MPs acting as paid consultants or lobbying for reward. While MPs are potentially subject to the Bribery Act, that Act left unresolved the impact of Parliamentary privilege on obtaining evidence against an MP. Thus, all that was left for the Salmon Commission was to make some practical recommendations to make it easier to identify and investigate corruption and on that the Commission was divided. It considered, but rejected, Muir's suggestion of a new anti-corruption agency.[11]

Mrs Dorothea Hunter and Muir Hunter QC arriving at the author's wedding in 1983

Investigating the MPs

Lord Salmon's report did not mention John Cordle's letter to Poulson, admitting that he had spoken in the House of Commons to further Poulson's commercial projects in The Gambia, because of the sensitive issue of transgressing onto Parliamentary privilege. Somehow, Cordle's letter was leaked to the journalist Adam Raphael, who referred to it in an article entitled "*Corruption - 3 MPs escape prosecution*", which was published in The Observer on 17 October 1976. This led to a furious debate in the House of Commons, after which the Government reluctantly appointed a Select Committee, under the chairmanship of Michael Stewart MP, the former foreign secretary, to sit in private to inquire into the conduct and activities of MPs, including Cordle, Maudling and Roberts, in connection with Poulson's affairs, and to consider whether their conduct or activities was a contempt of the House or was inconsistent with the standards which the House was entitled to expect from its members. In a letter, Lord Salmon told Michael Stewart that Cordle's letter "*made my hair stand on end*". He also mentioned his reaction to Sam Silkin, the Attorney-General.

On 19 November, Mrs Thatcher dispensed with Maudling's services as her Shadow Foreign Secretary. Bitterly, he summed up his political career as "*hired by Winston Churchill, fired by Margaret Thatcher*".

Muir told both James Callaghan, the Prime Minister, and Sam Silkin A-G that he would be willing to give evidence to the Select Committee. He and David Graham prepared a summary of their observations on the Poulson case, entitled

"*Guidelines for dealing with the Select Committee*", which Desmond Simpson, the trustee's solicitor, sent to the Select Committee. The trustee and his legal team also provided the Select Committee with explanations of the Poulson organisation and indexes to their files. On 3 February 1977, Muir wrote to CT Boulton, the clerk to the Select Committee, to repeat his offer of assistance. In response, Boulton said that Michael Stewart thanked Muir for his offer and assured him that the points made in the Guidelines had been discussed with Mr Simpson at a meeting in Leeds and that the Guidelines would be made available to the members of the Select Committee, who would be informed of Muir's offer of assistance. On 23 February, Mr Boulton wrote to Muir asking him to provide a list of all MPs who had a financial relationship with Poulson or his companies while they were MPs. On 4 March, Muir provided a list, which named Maudling, Cordle, Roberts and the late Sir Harold Butcher as persons who had received direct benefits from Poulson while they were MPs. Under the heading "*Unresolved doubt*", Muir named George-Brown. He explained that he did so, not out of a sense of grievance, but because the identity of the beneficiary of the holiday in Majorca had never been disclosed, although the police may have discovered it. On 9 March, Boulton wrote to Muir to say that his letter had helped the Select Committee, which had ascertained from the police that George Brown had not taken the holiday in Majorca.

The Committee issued its report on 14 July 1977. While it was most critical of Cordle, it also criticised Maudling and Roberts for their conduct relating to the Gozo hospital project. The Committee also found that the statement in Maudling's resignation letter that he received no remuneration as a director of ITCS was less than frank. MPs put pressure on Cordle to resign his seat which he did in a tearful speech to an almost empty House of Commons on 22 July. Four days later there was a debate to consider the fate of Maudling and Roberts. While some MPs were in favour of accepting the report, which would have obliged Maudling to resign, there was little enthusiasm for making an example of the two MPs. Instead, a majority supported motions, which emerged by way of amendment during the debate, that the House should simply "*take note*" of the Select Committee's report regarding Maudling and Roberts. Perhaps the House was swayed by a rare display of generosity towards another politician from Edward Heath who described Maudling as an honourable man.

Mr Maudling's reputation

Although Maudling might have been cleared by his fellow MPs so that he could remain one of their number on the backbenches, his reputation was still in issue before the High Court. To defend his good name, he had launched three sets of defamation proceedings. Two were recently issued against The Observer and the Daily Mirror; the former for the Adam Raphael article and the latter for an article published a few days later suggesting that if Maudling had not been an MP, he would have been prosecuted.

The most serious case was against Granada Television. On 4 May 1974, a few days after the end of the T Dan Smith and Alderman Cunningham trial, Granada transmitted a programme in its *World in Action* series called "*Business in Gozo*", which showed what Maudling had done to help Poulson secure the appointment as architect for the Gozo Hospital and how he had spoken in the House of Commons to encourage the Government to give more financial aid to Malta, without disclosing his interest. The programme raised the very issue of conduct for which Maudling had been criticised by the Select Committee. In September 1974, Maudling sued Granada for damages for libel. His hand had been forced by the Prime Minister, who had called a general election to be held on 10 October. Maudling could hardly contest his seat in the election if he left the Granada programme unchallenged. While Maudling did not display any ambition for an early hearing, Granada busied itself tracing evidence with which to attack Maudling's character. One potential source of such material was the Poulson bankruptcy court file, including the transcript of Maudling's private examination. That court's transcript of that examination was subject to a "stop order" to protect confidential material contained in it (as Maudling had requested) and was kept apart from the rest of the court's Poulson file.

On 26 January 1976, Mr Registrar Garside gave the trustee permission to disclose the papers to Granada's solicitors, except for the transcripts of the private examinations. Granada appealed to the Divisional Court to have the order varied to enable it to see the transcript of Maudling's private examination. and instructed the senior Chancery silk Brian Dillon QC (a future Lord Justice of Appeal), leading Richard Rampton to argue its case. The appeal was opposed by Richard Hartley QC[12] for Maudling and Muir and David Graham for the trustee. While Dillon criticised Maudling for refusing to allow disclosure of the transcript and Hartley retaliated by accusing Granada of having made "*a most shocking and monstrous allegation*" and wishing to make in open court "*a rather cheap and squalid attack on Mr Maudling's character*", the issues for the court were the rather dry ones of the purpose of a private examination in bankruptcy and whether the "stop order" was justified. The Divisional Court held that it was and dismissed the appeal. It found that the purpose of the private examination was to enable the trustee to obtain information leading to the discovery and recovery of assets and that it had been appropriate for the

12. The distinguished libel silk, who often appeared against Private Eye and who inspired the name of the fictitious unscrupulous money-grubbing silk, Sir Hartley Redface (none of whose vices apply to Richard Hartley).

Muir Hunter QC in a summer suit outside Wakefield County Court

registrar to protect the confidentiality of the transcript of Maudling's examination. Further, the Court having read the transcript, could see nothing in it of obvious relevance to the libel proceedings.

In 1978, Granada's search for ammunition was more successful. It obtained copies of the opinions of John Cobb QC and Peter Taylor QC. In the same year The Observer settled the claim against with an apology, and payments of £12,500 in damages and £5,000 in costs. The claims against Granada and the Daily Mirror never came to trial, because on 14 February 1979, Maudling died of cirrhosis of the liver. He was only 61.

Poulson obtains his discharge

Since his release from prison, Poulson had been working hard on his memoirs, which he called *The Price*. The publisher, Michel Joseph Ltd, agreed to pay Poulson an advance of £30,000 for a book of 120,000 words to be delivered within the year. Naturally, Poulson wanted to see some personal benefit from his literary endeavours, rather than having all the author's royalties passing to his creditors. This meant that he could not afford to wait for his automatic discharge on 2 January 1982, the tenth anniversary of his bankruptcy.[13] Instead, Poulson applied to the Wakefield County Court for his discharge from bankruptcy and offered terms as the price of obtaining it.

I was instructed to appear for Poulson on the hearing of his application on 14 January 1980. The application was straightforward, since Poulson's public examination had been concluded and the official receiver and trustee agreed not to oppose on the basis that Poulson would submit to judgment for £2,250, to be paid within 28 days, and pay the trustee for his creditors half the royalties earned from *The Price* (later modified to half the royalties net of tax and expenses). Compared with the photographs of Poulson that I had seen, he seemed a shrunken figure and rather older than someone approaching his 70th birthday. Apart from a white shirt, he was dressed entirely in black: black coat, hat, shoes, suit, and tie. The quality of his outwear did not indicate the hand of Huntsman of Savile Row. As we waited outside the courtroom, Poulson talked openly about his circumstances, his health and plans for the book. I remember asking him what he most missed from the days of his pomp in the 1960s. After a short pause, he replied: "*My suite at the Dorchester and my secretaries; and the two together.*"

We went into court. I explained the application to the judge, including the arrangements with the publisher. The official receiver and Mr Simpson for the trustee did not object. Mr Simpson reported that £311,000 had been recovered to meet debts of about £900,000 and that a dividend of 10p in the £1 had been paid to unsecured creditors. Judge Richard Nevin granted the order of discharge. My advocacy must have had some effect, because, according to The Times, the judge said that he accepted that Poulson was a sick and broken man who had undergone his punishment.

The Price was due to be published on 7 September 1981. In anticipation, on 23 August the Sunday Mirror featured an interview with Mrs Poulson about the forthcoming book, which it described as "*explosive stuff*". Mrs Poulson said that Beryl Maudling would be hurt by Poulson's revelations about Maudling. "*He capitalised and took the rewards. But he chose not to stand by my husband. Now he's dead and sadly it's his widow who will pay the price.*" Five days later Michael Joseph withdrew *The Price* and later pulped all the copies that had been printed. The stated reason for withdrawing the book was a pending prosecution; presumably that of Dr Kenneth Williams. Perhaps more plausible explanations for pulping the book were concerns about the unreliability of Poulson's memory, as exposed in the bankruptcy examinations and criminal trial, the risk of libel actions, and the quality of the Poulson's prose, since he had not had the assistance of Pottinger as amanuensis. Poulson's hopes of making some money were dashed. He died on 31 January 1993, leaving a net estate of £7,000.

13. Automatic discharge after 10 years was introduced by the Insolvency Act 1976, s 7, which came into force on 1 October 1977.

Grateful thanks

Professor David Graham QC and Michael Crystal for their memories of the Poulson case.

Dr John Tribe, senior lecturer in law at the University of Liverpool, for giving me a copy of his article about the Poulson case and for making the Cork Archive available to me.

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News in brief

Lord Millett

Lord Peter Millett died on 27 May 2021, at the age of 88.

Born in Hampstead in 1932, his father's family were behind the army surplus stores that eventually became the camping retailer Millets. Lord Millett was educated at Harrow and, when taking a bus past the Royal Courts of Justice one day in the company of his father, they hopped off on impulse to listen to a case. Millett was apparently so impressed by the courtesy the members of the legal profession showed to each other that he determined then and there to become a barrister.

Called to the Bar by Middle Temple in 1955 he was almost immediately called up to do National Service and joined the RAF. On demobilisation he joined 11 Old Square in Lincoln's Inn as a pupil. Taking silk in 1973 he allegedly purchased the tights a QC wears as part of the formal QC regalia necessary for the occasion from Debenhams rather than the traditional legal outfitters.

During a long and illustrious career he became a judge of the High Court in 1986, was appointed Lord Justice of Appeal and a member of the Privy Council in 1994 and, on 1 October 1998, was appointed a Lord of Appeal in Ordinary. He was a Non-permanent Judge of the Hong Kong Court of Final Appeal between 2000 and 2021 and in 2015 was awarded the Gold Bauhinia Star by the Chief Executive of Hong Kong.

In 2015 Lord Millett published his wry memoir, "*As in Memory Long*", (available from Wildy & Sons and other good booksellers), a frank and revealing account of his life and career, peppered with his insights into the law and its workings.

Shifting Sands: International Insolvency

On 10 May 2021 a panel of experts in cross-border insolvency, including South Square's Richard Fisher QC, provided further detail and insights into the Shifting Sands report that Chambers produced together with Grant Thornton.

Shifting Sands followed a similar paper, Discord to Harmony, that Grant Thornton and South Square produced back in 2015. Given the unprecedented changes the world has seen since then (including Brexit, Covid and the Trump administration) the time is right for further exploration of international jurisdictions in insolvency proceedings. The report and the panel explore questions including:

- What makes a jurisdiction attractive for commencing insolvency proceedings?
- How is the global balance between offshore and onshore jurisdictions changing?
- What challenges remain in pursuing cross-border insolvencies and how can these be overcome?

If you missed the event, watch a full recording here: https://register.gotowebinar.com/register/6672281173939182351

A copy of the report itself is available here: https://www.grantthornton.co.uk/globalassets/1.-member-firms/united-kingdom/pdf/publication/2021/shifting-sands.pdf

The Chambers Formerly known as Hardwicke

London set Hardwicke Chambers announced it will become Gatehouse Chambers from this month after discovering it was named after a legal defender of the Atlantic slave trade.

The set had taken its name from the Hardwicke Building in Lincoln's Inn, which it occupied since 1991. However, bloggers investigating historical legal figures, including Lord Hardwicke (Lord Chancellor in the 18th century) pointed out that he was one of two authors of the 1729 Yorke-Talbot opinion, heavily relied upon by slave owners as a legal justification for slavery. That opinion asserted that slaves continued to be their *'Master's property'* after travelling from plantations in the West Indies to the UK or Ireland, and that baptism did not entitle them to their freedom. The change of name accompanies a move by the set to new lodgings at Lady Hale Gate in Gray's Inn. Brie Stevens-Hoare QC, joint Head of Chambers at Hardwicke, said *"The discovery of the provenance of our business' name did not sit comfortably with our values as an organisation."*

The decision does not appear to have met with universal approval from outside the set, with Lord Wolfson QC taking to social media to ask whether Gray's Inn and Lincoln's Inn should also have their names altered following similar logic. He wrote *"Lincoln's Inn is named for Henry de Lacy, Earl of Lincoln. Gray's Inn is named for Reginald de Grey, 1st Baron Grey of Wilton. Both were confidants of and advisers to Edward I, who expelled the Jews from Britain in 1290. Are they to be renamed too?"*

Barristers' clerk embezzles £130,000 from former employers

Mathew Kesby, a former senior clerk at Great St James Street Chambers, has admitted to siphoning over £130,000 of barristers fees from the designated chambers account into his own over a period from March 2019 to September 2020, when he was dismissed from his post. Following a hearing in June of this year at Highbury Magistrates' Court, his case has been passed to Wood Green Crown Court for sentencing, as a Magistrates' Court only has powers to jail an offender for a maximum of 12 months.

The set was forced to sell its former building near the Old Bailey as a result of the fraud, and subscribe to a virtual office plan at a serviced office building.

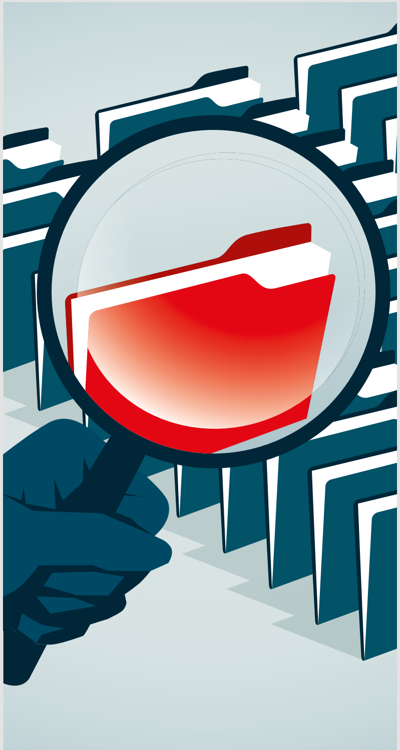
Cab Rank Rule?

The Supreme Court has been criticised for using an un-named private car service, with a minimum fee policy of £48 irrespective of journey length, to chauffeur its Justices around London. Following a freedom of information request, *The Spectator* revealed that Lord Lloyd-Jones, for example, used the car service for a 1.4 mile round trip from the court in Westminster to a Buckingham Palace Garden party in the summer of 2018, and the bill rolled in at £103.80. We make it clear that it is the Supreme Court administration that is responsible for booking the car hire, not the Justices involved.

New powers for the Insolvency Service

The Insolvency Service ('IS') is to be granted extended powers to investigate directors of dissolved companies in a bid to deter misuse of the dissolution process as a method of fraudulently avoiding repayment of Government-backed loans handed out during the COVID-19 pandemic. It is hoped that the measures will also assist in preventing directors of dissolved companies from setting up near-identical companies post-dissolution whilst leaving creditors out of pocket.

The measures included in the Ratings (Coronavirus) and Directors Disqualification (Dissolved Companies) Bill are retrospective and will enable the IS to also investigate directors who are thought to have inappropriately wound-up companies which benefited from Bounce Back Loans.



News in brief

A Right to Crow

A German farmer is defending the right of a cockerel, named Meister Eder – a broad-chested mixed-breed – to crow at dawn. The cockerel's crowing began to annoy a neighbour back in 2018, who demanded the bird be shut into a sound-proofed room overnight. Following non-compliance with this request, the neighbour has now taken Meister Eder's owner to court, claiming that he is entitled to peaceful enjoyment of his property under the Human Rights Act. "*Peaceful enjoyment*" is described as possession of premises in peace, without disturbance by hostile claimants!

Meister Eder's owner has countered the demands to lock the bird away, citing that the soundproofing would make his coop too warm and therefore harm his health.

In 2019 a similar case was heard in France, concerning the cockerel Maurice. Maurice became a symbol of campaigns to preserve the smells and sounds of rural France as heritage, against the complaints of incoming urbanites. The campaigns were successful, with the French parliament enshrining such heritage in a law passed in January. Alas poor Maurice – he had died a few months earlier at the age of six.

Collapse of Stobart Air

On 13 June the Irish airline, Stobart Air, collapsed, grounding its Aer Lingus regional flights and making some 480 staff redundant. The airline has blamed the COVID-19 pandemic, saying it *"virtually halted air travel"*.

The airline began life as Aer Arann in 1970, becoming Stobart Air in 2014. It flew to eight airports around Great Britain and Ireland and had a contract to operate Aer Lingus's regional flights until the end of 2022.

High Court no friend to Amigo

Sub-prime lender, Amigo Loans, faces insolvency without a new plan to cap payouts for mis-sold loans. In early June 2021 the High Court threw out a proposal Amigo made to set aside a pot of money to use for its spiralling compensation claims from customers who believe they were approved for loans which they could never afford to repay. Amigo had argued that it would most likely enter administration and leave 70,000 complainants with no compensation at all unless the company were all to cap compensation payouts. The plan was opposed by the Financial Conduct Authority ('FCA') who said the proposal would unfairly protect shareholders at the expense of those making compensation claims. The FCA has also been investigating the way that Amigo assessed 'creditworthiness'.

Amigo is the biggest operator in its market but its future has been in doubt for some time, with all new lending stopped in November 2020. It has 150,000 current customers and some half a million past customers: all are required to give the name of a guarantor (an 'amigo') who would step in to cover any unpaid repayments.

Latest statistics

The Insolvency Services has published its May 2021 statistics relating to company insolvencies in the UK.

Company and individual insolvencies have remained low since the start of the first UK lockdown in March 2020 when compared to pre-pandemic levels. This is most likely to be the result of measures the Government put in place in response to the coronavirus pandemic, including temporary restrictions placed on the use of statutory demands and certain winding up petitions and enhanced government financial support for companies and individuals.

In May 2021 there was a total of 1,011 registered company insolvencies across England and Wales, further broken down as follows:

- 930 creditors voluntary liquidations – an 18% increase on May 2020, but 3% lower when compared with May 2019
- 43 administrations – 61% down on May 2020 and 55% on May 2019
- 31 compulsory liquidations – 6% lower compared with May 2020 and 89% lower compared with May 2019
- 6 company voluntary arrangements (CVAs) – a drop of 50% compared with May 2020 and 55% down on May 2019
- 1 receivership appointment

These figures are 7% higher than that in the same month the previous year and 25% lower than that in the same month two years before (pre-pandemic).

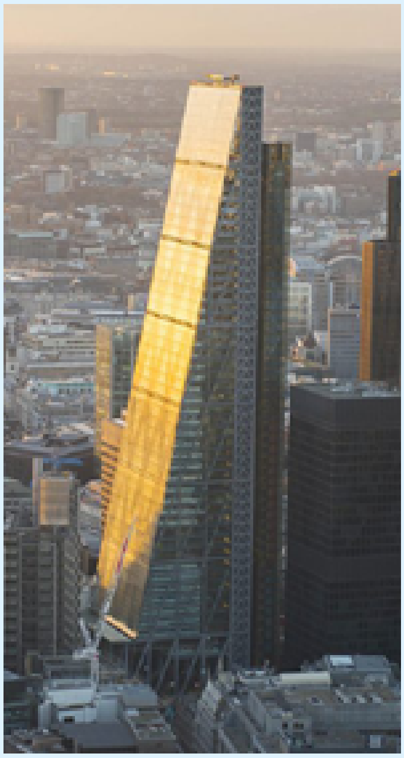
Between 26 June and 31 May 2021, four companies were granted a moratorium and nine had restructuring plans sanctioned by the court. These new procedures were created by the Corporate Insolvency and Governance Act 2020.

Save the Date!

The annual South Square & Mourant Litigation Forum will be held on the **16th September 2021 at Landing 42 in London.** The forum will begin at 13:30 after registration and lunch, and the day will end with drinks and the opportunity to network.

Whilst we hope to be able to meet in person, we will be making the South Square & Mourant Litigation Forum as flexible as possible. The event will include a fully virtual option so that you can choose to attend online, and should circumstances change and we are unable to meet in person, we will still be able to provide our timely and thought provoking agenda to everyone.

Further details about how to register, topics and speakers to follow.



SOUTH SQUARE CHALLENGE

A light-hearted competition for the Great British Summer. Over lockdowns 1, 2 and 3 we have all been spending more time at home, many in the company of beloved pets. If the old chestnut that owners and their pets grow to resemble each other is true, your task this time should be easy: just correctly pair pets with barristers from the menagerie opposite. But beware, some barristers have more than one pet! The results could be pawsitively fascinating…

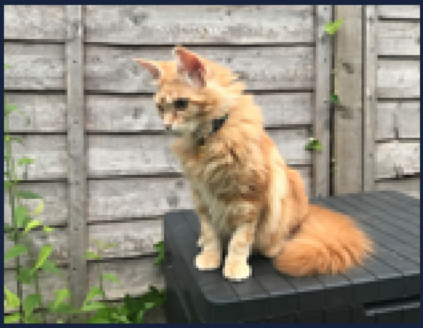
Please send your entries to Kirsten, either to the address on the back cover or via kirstendent@southsquare.com by 1 September 2021. The winner, drawn from the wig tin in the event of a tie, will be the entrant who correctly matches the greatest number of pairs.

As is traditional, the prize is a magnum of champagne and a coveted South Square umbrella. **Good luck!**

The winner of March 2021 Competition is Leah Apren-Waterman of Watson Farley & Williams LLP who correctly paired the following brands and their rescuers:

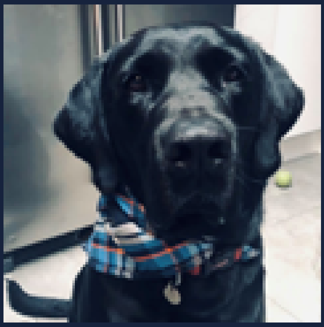
1. Top Shop - ASOS
2. Jaeger – M&S
3. Miss Selfridge - ASOS
4. Debenhams - Boohoo
5. Le Pain Quotidien – BrunchCo21
6. Dorothy Perkins - Boohoo
7. Laura Ashley – Gordon Brothers
8. Hummingbird Bakery – Acropolis Capital
9. Cath Kidston – Baring Private Equity Asia
10. Evans – Chic City Collective


COCO, LEVI AND MOSHE


JUNO


NAPOLEON


HOBBES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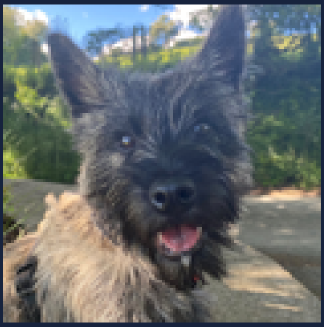
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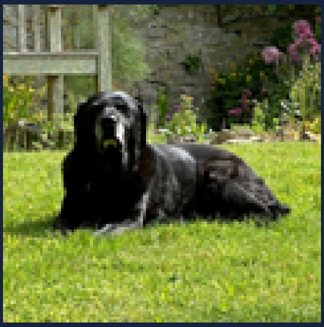
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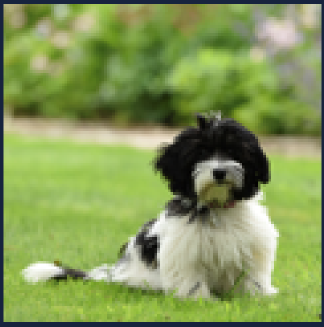
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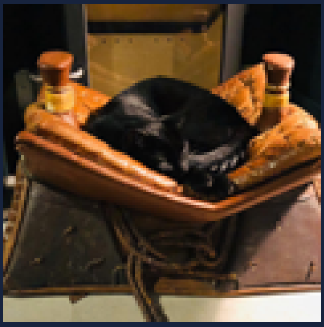
PERRY


MINERVA


SIDNEY


ALEX RIDFORD


RIZ MOKAL


FELICITY TOUBE


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