Digest

SOUTH SQUARE

The Mountaineer's Knee:

Mark Arnold QC revisits the scope of the professional adviser's duty of care

Restructuring Plans and Relevant Alternatives: Charlotte Cooke, together with Camilla Fawkner and Andrew Charters of Grant Thornton, examine the current landscape and considerations for future cases

Losing a Cow for the Sake of a Cat: Alex Potts QC, Richard Evans and Jonathan Milne of Conyers, review litigation in Bermuda, the BVI and Cayman post COVID-19

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SOUTH SQUARE

From the editors

MARCUS HAYWOOD AND WILLIAM WILLSON

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

Since the last edition of the Digest was published in July, there have been a number of significant national and international developments. In August, the Taliban carried out a sweeping offensive through Afghanistan leading to the collapse of the Afghan government on 15 August 2021. Meanwhile, during September much of the United Kingdom saw panic-buying of fuel as a shortage of tanker drivers led to disruption of supplies. In October, a consistent rise in gas prices since the beginning of the year came to a head with the collapse of a number of smaller energy firms and demands that the government support struggling utilities and energy-intensive industries. And most recently, Sir David Amess MP sadly died after being stabbed at his Essex constituency surgery, in what police are treating as a terrorist incident.

In more heartening news, late July and August saw Team GB's athletes bringing home a healthy haul of 65 medals, the same amount as London 2012, with 22 golds. And at the end of October the UK hosted the 26th UN Climate Change Conference (COP26) in Glasgow. It remains to be seen what agreements will be reached to keep the hope of holding global temperature rises to 1.5 degrees alive.

Meanwhile, as the thirteenth anniversary of the collapse of Lehman Brothers' passes, the potential fallout following the failure of a single corporate group is again under the spotlight as concerns rise as to the future of China's Evergrande group. As the world emerges from the pandemic, the ramifications of such corporate failures are likely to remain high on political and business agendas.

Members of South Square remain at the heart of commercial and financial legal developments arising from such events. This edition of the Digest contains a number of articles and features reflecting the breadth of members' expertise.

In our lead article, Mark Arnold QC revisits the scope of the professional adviser's duty of care following the Supreme Court's recent reconsideration of the scope of duty or *SAAMCO* principle in two cases heard together by the same seven-Justice panel: the Mountaineer's knee revisited.

Charlotte Cooke, together with Camila Fawkner and Andrew Charters of Grant Thornton consider "*Restructuring Plans and Relevant Alternatives*" in an article which discusses recent case law guidance together with some practical insights as to how identifying and evidencing the relevant alternative can be approached.

In our regular offshore piece, Alex Potts QC, Richard Evans and Jonathan Milne of Conyers, review litigation in Bermuda, the BVI and Cayman post COVID-19. In the words of Mark Twain, they ask whether "going to law" might be "losing cow for the sake of a cat".

In one of two fascinating articles by our associate members, the Hon Frank Newbould, QC gives us an insight into a dispute arising out of the Nortel Networks Corporation saga in which he presided (as Head of the Commercial List of the Ontario Superior Court of Justice in Toronto) in a joint trial with Judge Gross of the U.S. Bankruptcy Court in Delaware, the first such trial of its kind. Meanwhile, the Hon Paul Heath QC of Bankside Chambers, Auckland, New Zealand and Singapore considers the use of mediation as a tool to assist in the resolution of cross-border insolvency disputes.

On 9 September 2021, the government announced that restrictions on statutory demands and winding up petitions brought in under the Corporate Insolvency and Governance Act 2020 ("**CIGA**") that are due to expire on 30 September 2021 would be replaced with more limited restrictions.

The changes have since been formulated in amendments to Schedule 10 to CIGA brought into force by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) Regulations 2021. These changes are considered in an article by Mark Phillips QC and Clara Johnson, "*Restrictions on winding up: phase II*".

In "*Dovetailing between the Judgments Regulation and the Insolvency Regulation*" William Willson and Annabelle Wang consider the dovetailing principle which dictates that there should be no gap between matters covered by the Judgments Regulation and the Insolvency Regulation.

Meanwhile, in one of our regular pieces Roseanna Darcy turns her Legal Eye to Charles Dickens' view of the law: "*The Law is a ass*".

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 *Primeo Fund v Bank of Bermuda (Cayman) Ltd* [2021] UKPC 22 (in which Tom Smith QC, Richard Fisher QC, William Willson, Toby Brown and Robert Amey appeared) where the Privy Council has provided further guidance on the operation of the reflective loss rule, following its decision in *Sevilleja v Marex* last year. A summary of this decision, along with other cases of note, many involving members of Chambers, appear as always in the Case Digests, with many thanks to Riz Mokal for his Case Digest editorial.

With thanks to all those who were able to attend, we also have pieces celebrating the Mourant/South Square Annual Litigation Forum which took place both virtually and physically at Landing Forty-Two on 16 September 2021 and the South Square Annual Reception which took place an Spencer House on 23 September 2021.

Finally, we welcome our newest members – Annabelle Wang and Peter Burgess, after the successful completion of their pupillage. A biography of Annabelle and Peter appears later in the Digest.

And as 2021 draws to a close, our South Square Challenge this time around sees a welcome return to the picture quiz. With no winners to the last edition's Challenge, this time it is a roll-over with two magnums of champagne and two South Square umbrellas up for grabs.

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. 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. ■

Marcus Haywood and William Willson

The mountaineer's knee: scope of the professional adviser's duty of care explored

MARK ARNOLD QC

The Supreme Court has recently reconsidered the scope of duty or *SAAMCO* principle in two cases heard together by the same seven-Justice panel. The judgments are intended to be read together. This article seeks to summarise where, as professional advisers, we stand now.

Khan v Meadows[1]

A patient approaches her doctor to see whether she is a carrier of a hereditary disease, haemophilia. She does not want to have a child with that condition. The doctor arranges for certain blood tests to be carried out which merely establish whether the patient has haemophilia; she does not. What the doctor does not do, but should have done, is to refer the patient to a haematologist for a genetic test to determine whether she has the haemophilia gene. Several years later, the patient gives birth to a child who suffers not only from haemophilia but also autism. The haemophilia did not cause the autism or make it more likely. But it was reasonably foreseeable that, as a result of the advice given by the doctor, the patient could give birth to a child who suffered from autism as well as haemophilia, and the autism has made management of the child's treatment for haemophilia more complicated.

These were the facts in *Khan v Meadows*. The doctor admitted negligence and liability for the additional costs associated with the child's haemophilia. The question for the Supreme Court was whether the doctor was also liable in respect of the additional costs associated with the child's autism, in respect of which the doctor denied responsibility. The Supreme Court unanimously decided that the doctor was not.

Manchester Building Society v Grant Thornton UK LLP [2]

At the same time, the same panel had to consider the extent of liability of an accountancy firm which in 2006 had advised its client, a building society, as to its ability to use the "hedge accounting" convention in drawing up its accounts, matching swaps with the society's mortgage book, thereby reducing the appearance of volatility in its profits and greatly reducing the level of capital it would be required to maintain to meet regulatory capital requirements. The firm advised that the society could use hedge accounting, and subsequently repeated that advice. Relying on that advice, the society did not unwind existing swap agreements and entered into new ones as part of its business model.

As it transpired, however, the advice was wrong and negligently so. The society incurred losses when compelled to break the swaps early once the true accounting position was appreciated, in 2013. The firm denied liability for those losses on the basis that they were not caused by its negligence and/or that they were not losses from which the firm owed the society a duty to protect it. By the time the case reached the Supreme Court, the only head of claim still in issue was whether the firm was liable for the amount needed to close out the swaps in 2013. The Supreme Court decided, again unanimously, that the firm was liable.

The reasons why the Supreme Court reached the decisions it did were that the additional costs associated with the child's autism in *Khan* did not fall within the scope of the doctor's duty of care whereas the costs incurred by the society in closing out the swaps in *Manchester Building Society* did fall within the scope of the firm's duty of care.

The Supreme Court took the opportunity when deciding both cases to clarify the approach to be adopted when determining the scope of duty and the extent of liability of professional advisers in the tort of negligence. Whether the case is one involving clinical negligence or auditors' negligence or negligence in respect of advice given by any other professional, the approach will be the same.[3]

The scope of duty or SAAMCO principle: What is it?

Lord Hoffmann famously spoke[4] of the mountaineer about to undertake a difficult climb. Being concerned about the fitness of his knee, he goes to a doctor. The doctor negligently pronounces the knee fit after a superficial inspection. The mountaineer goes on the expedition. He would not have done so if the doctor had told him the true state of his knee.

1. [2021] UKSC 21.

2. [2021] UKSC 20.

3. While unanimous as to the results, the majority (Lords Hodge and Sales, with whom Lord Reed, Lady Black and Lord Kitchin agreed) considered that their approach to the scope of duty principle differed from that of Lords Leggatt and Burrows. This article is concerned primarily with the approach of the majority. It does not attempt to analyse the differences of approach, real or apparent, favoured by Lord Leggatt or Lord Burrows.

4. *Banque Bruxelles SA v Eagle Star* [1997] AC 191, commonly known as *South Australia Asset Management Corpn v York Montague Ltd*, or *SAAMCO*.

He suffers an injury which is an entirely foreseeable consequence of mountaineering; but it has nothing to do with his knee.

The doctor would be responsible for the consequences of his advice about the knee being wrong. But he would not be liable for the injury suffered by the mountaineer. That was a consequence of his going on the expedition and, as Lord Hoffmann explained, the mountaineer would have suffered it even if the advice that his knee was fit had been correct.

Lord Hoffmann gave this example to illustrate the scope of duty principle which applies to determine the professional adviser's liability for negligent advice. It came to be known as the *SAAMCO* principle.

As Lord Reid said: "*The ground of any action based on negligence is the concurrence of breach of duty and damage.*"[5] There must be a breach of duty owed to the claimant, but there can be no liability until the damage has been done. Lord Hoffmann again: "[A] *claim in tort based on negligence is incomplete without proof of damage. Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy.*"[6]

It is necessary for the claimant to prove that his loss was factually caused by the adviser's negligent advice. But the fact that the loss would not have occurred but for the negligent advice will not by itself suffice to establish liability. The mere fact that the mountaineer would not have gone on the expedition but for the doctor's advice does not render him liable for the mountaineer's injury which had nothing to do with the knee.

The claimant must prove that his loss was the reasonably foreseeable consequence of the advice. But this will not be enough to establish liability either. The fact that the injury was a reasonably foreseeable consequence of mountaineering was nothing to do with the doctor if it had nothing to do with the knee.

The crucial element that must be demonstrated in every case is that the damage suffered by the claimant falls within the scope of the adviser's duty, being damage the adviser was obliged to take care to prevent. The adviser is not liable in damages in respect of losses of a kind which fall outside the scope of his duty of care. As Lord Hoffmann put it in his seminal judgment in *SAAMCO*: "[The claimant] *must show that the duty was owed to him* ***and that it was a duty in respect of the kind of loss which he has suffered.***"[7]

This is the so-called scope of duty or *SAAMCO* principle. The principle was developed by the House of Lords in *SAAMCO*, *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd*[8] and *Platform Home Loans Ltd v Oyston Shipways Ltd*.[9]

Lord Hoffmann: the Case of the Mountaineer's Knee

But it did not miraculously appear in *SAAMCO*. As Viscount Simonds said some 35 years earlier in *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound)*:[10]

"*It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded … It is vain to isolate the liability from its context and to say that B is or is not liable, and then to ask for what damage he is liable.* ***For his liability is in respect of that damage and no other.***" (emphasis added)

Or as Brennan J stated in *Sutherland Shire Council v Heyman*:[11]

"*The question is always whether the defendant was under a duty to avoid or prevent* [the damage suffered], *but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it.*"

And as Lord Bridge put it in *Caparo Industries plc v Dickman*:[12]

"*It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless.*"

5. *Watson v Fram Reinforced Concrete Co (Scotland) Ltd* (1960) SC HL 92, at 109.

6. *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39; [2008] AC 281.

7. [1997] AC 191, at 211H.

8. [1997] 1 WLR 1627

9. [2000] 2 AC 190

10. [1961] AC 388

11. (1985) 157 CLR 424, 487

12. [1990] 2 AC 605

The Supreme Court has now re-affirmed this approach, and asks: "*What, if any, risks of harm did the defendant owe a duty of care to protect the claimant against?*" (*Khan* at [38]). In the case of negligent advice given by a professional adviser "*one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk*" (*Manchester Building Society* at [17]).

How is the scope of the duty determined?

Lord Hoffmann asked the question in *SAAMCO* and looked for guidance to *Caparo*, in which Lord Roskill stated (at 629B):

"*I think that before the existence and scope of any liability can be determined, it is necessary first to determine for what purposes and in what circumstances the information in question is to be given.*"

On the authority of *Caparo*, Lord Hoffmann himself was in no doubt that in the case of a statutory duty the question was to be answered by deducing the *purpose* of the duty from the language and context of the statute. In the case of tort, it would similarly depend upon the *purpose* of the rule imposing the duty: *SAAMCO* at 212C-D.

Thus, in *Caparo* itself, the purpose of the auditor's report was to be ascertained by examining the relevant provisions of the companies' legislation. As that purpose was limited to enabling shareholders to make informed decisions about the exercise of their rights under the constitution of the company, it followed that they owed no duty to non-shareholders (deciding whether to buy shares in the company), and that their responsibility to shareholders themselves did not extend to investment decisions (deciding whether to buy more shares).

SAAMCO was concerned with the scope of the valuer's duty in the context of the negligent valuation of property for security purposes before the property crash in the early 1990s. In that context, the purpose of the valuation was to form part of the material on which the lender was to decide whether, and if so how much, he would lend. The valuation would tell the lender how much he was likely to recover, at current values, if forced to resort to his security. That being so, it would enable him to decide what margin (if any) would sufficiently allow for foreseeable valuation errors or a future fall in the market, accidental damage to the property and any other contingencies that might happen. The valuer would know that if he overestimated the value of the property, the lender's margin for all these purposes would be correspondingly less.

But, as Lord Hoffmann explained, that did not mean that the valuer would be responsible for the lender's decision to lend in its entirety. There would be many factors of which the valuer would not be aware (including strength of the borrower's covenant, attraction of the rate of interest and other personal or commercial considerations which might induce the lender to lend). That being so, the valuer was responsible only for the valuation being (negligently) wrong, rather than all the consequences of the lender's decision to lend.

What was necessary in the valuers' negligence cases, therefore, was to determine what loss was caused by the valuation being wrong. As Lord Hoffmann subsequently explained in *Nykredit* (at 1638), it was insufficient for the lender to prove that he was worse off than he would have been if he had not lent the money at all. What he had to do instead was to show that he was worse off as a lender than he would have been if the security had been worth what the valuer said it was worth, i.e. that his loss was attributable to the overvaluation. This gives rise to the so-called *SAAMCO* counterfactual, discussed further below.

So too in *Hughes-Holland v BPE Solicitors*,[13] the solicitors' instructions were to draw up the facility agreement and a charge, nothing more, the client having already agreed to lend £200,000 secured by a charge. They thereby took on responsibility for a particular task having a particular purpose. They performed that task negligently because they overlooked language in the letter, based on a template used in a previous abortive transaction, which confirmed the client's mistaken understanding of the borrower's building plans. But they did not assume responsibility for their client's decision to lend money which was then lost. They were not asked to advise on the viability of the transaction. On the facts, none of the loss suffered by the lender was within the scope of the solicitors' duty but arose instead from commercial misjudgments on the part of their client, which were no concern of theirs: see Lord Sumption's speech at [54]-[55].

The Supreme Court has now confirmed that the scope of the duty of care assumed by a professional adviser is governed by the ***purpose of the duty, judged on an objective basis by reference to the reason why the advice is being given***: *Manchester Building Society* at [13]-[17]; *Khan* at [41].

The scope of duty principle's place in the tort of negligence

The majority made clear that the scope of the duty of care was to be determined by reference to its purpose and (together with Lord Burrows) distanced themselves from the causation-based analysis proposed by Lord Leggatt.

Going forward, the majority suggested that it may be helpful to analyse the place of the scope of duty principle in the tort of negligence by asking six questions in sequence:

13. [2018] AC 599.

(1) The actionability question: is the harm suffered actionable in negligence?

(2) The scope of duty question: what are the risks of harm to the claimant against which the law imposes on the defendant a duty of care?

(3) The breach question: did the defendant breach their duty by their act or omission?

(4) The factual causation question: is the loss for which the claimant seeks damages the consequence of the defendant's act or omission?

(5) The duty nexus question: is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage (2)?

(6) The legal responsibility question: is the particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause in relation to it or because the claimant has mitigated their loss or has failed to avoid loss they could reasonably have been expected to avoid?

That said, the majority emphasised that such analysis was neither exclusive nor comprehensive, and that it is quite possible to consider these matters in a different order and to address more than one question at the same time, noting that in many cases (2) and (5) can readily be analysed together: *Khan* at [28]-[29]. Space precludes detailed discussion of each question in this article. It will be interesting to see how helpful the suggested approach will be in practice.

The distinction between "information" and "advice" cases

In *SAAMCO*, Lord Hoffmann disapproved of the Court of Appeal's distinction between "no-transaction" and "successful transaction" cases but drew his own distinction between "information" and "advice" cases.[14]

In the former, the adviser provides information for the purpose of enabling someone else to decide upon a course of action and must take reasonable care to ensure the information is correct. If he is negligent, he is responsible for the foreseeable consequences of the information being wrong.

In the latter, the adviser advises whether or not a course of action should be taken and must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he is responsible for all the foreseeable loss which is a consequence of that course of action having been taken.

The mere fact that the information provided by the adviser is known to be critical to the claimant's decision whether to enter into a particular transaction or embark on a particular course of action, however, does not itself turn it into an "advice" case.

In *Hughes-Holland*,[15] Lord Sumption noted that, while the last of these points was (and, it is suggested, remains) clear, the distinction between "Information" and "advice" had given rise to confusion "*largely because of the descriptive inadequacy of these labels*", neither of which "*really corresponds to the contents of the bottle*". They are neither distinct nor mutually exclusive categories. In reality, while some cases might be easily identifiable as being at one extreme or the other, most would fall within the spectrum in between and would depend on the range of matters for which the defendant assumed responsibility in the particular case and no more exact rule can be stated.[16]

In *Manchester Building Society*, the majority agreed with Lord Leggatt's proposal ([92]) that the labels be dispensed with as terms of art. They considered that, rather than trying to "shoe-horn" a particular case into one or other of the categories, the focus should instead be on identifying the purpose to be served by the duty of care assumed by the defendant ([19]). In the context of the provision of advice or information, the court seeks to identify the purpose for which that advice or information was given (*Khan* at [41]).

It is suggested that Lord Leggatt's formulation ([92]) is helpful in this context. He emphasised that the focus should be on "*the need to identify with precision in any given case the matters on which the professional person has undertaken responsibility to advise and, in the light of those matters, the risks associated with the transaction which the adviser may fairly be taken to owe a duty of care to protect the client against*". He went on:

"*What determines whether the adviser has a duty to protect the client against the full range of risks associated with a potential transaction, or only against some of those risks, is whether or not the adviser's contribution to the decision-making process is limited.*"

He emphasised (at [94]) that "*whether … the defendant is liable for all foreseeable loss flowing from the transaction depends not on the gravity or causative potency of the defendant's error or omission but on the scope of the matters for which the defendant undertook responsibility*".

The *SAAMCO* counter-factual

The majority distinguished between the *SAAMCO* principle and the *SAAMCO* counterfactual: *Khan* at [36]. The latter they identified (at [53]) as the mechanism or analytical tool by which the duty nexus question (5) is addressed in the valuers' negligence cases, namely by asking the counterfactual question: What would the claimant's loss have been if the information which the defendant in fact gave had been correct?

14. [1997] AC 191, at 214E-F.

15. [2018] AC 599 at [39].

16. [2018] AC 599 at [44].

As they explained, the question is not whether the claimant would have behaved differently if the advice provided by the defendant had been correct. Rather it assumes that the claimant would behave as he did in fact behave and asks whether, if the advice had been correct, the claimant's actions would have resulted in the same loss. That enables the court to ascertain the loss which is properly attributable to the information being wrong.

So explained, the *SAAMCO* counterfactual is recognised as an appropriate and useful tool in some cases (as in valuers' negligence cases), but perhaps less so in others. The message seems to be that, as such, it should not be assumed that it will be appropriate in every case but that, where it is appropriate, it is not to be criticised merely on account of its imprecision (*Khan* at [54]).

The scope of duty principle in action

Just as the doctor was not liable for the mountaineer's injury so, in the more distressing circumstances in *Khan v Meadows*, the doctor was not liable for the additional costs associated with the child's autism. That was notwithstanding the fact that the patient would not have had the child but for the doctor's negligent advice, and that the possibility of the child being born with a disability such as autism was a reasonably foreseeable consequence. The doctor was not liable because the purpose of the patient's visit, and the doctor's advice, was to see whether she was a carrier of the haemophilia gene so as to enable her to make an informed decision in respect of any child which she conceived who was subsequently discovered to be carrying the haemophilia gene. The visit was thus concerned with a specific risk, namely the risk of haemophilia; not the risk of autism. Even if the doctor's advice had been right and the patient had not been a carrier of the haemophilia gene, the child would still have been born with autism. The risk of autism, therefore, was not within the scope of the doctor's duty of care.

Conversely, in *Manchester Building Society*, the firm was liable for the society's loss because the purpose of its advice was to deal with the issue of hedge accounting in the context of its implications for the society's regulatory capital, and the resulting loss thus fell within the scope of its duty of care. As the majority explained at [38], use of hedge accounting allowed the society to make the assessment that, in terms of the constraints imposed by regulatory capital requirements to which it was subject, it had the capacity to proceed with the business of matching swaps and mortgages whereas otherwise it did not. That was the commercial reason why the society sought the advice, and why the advice was fundamental to the society's decision to engage in that business, as the firm knew. However, the society's damages were reduced by 50% reflecting its own contributory negligence in mismatching the mortgages and swaps in what was found to be an overly ambitious application of the business model by the society's management. ■

Restructuring Plans and Relevant Alternatives

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*The most notable feature of a restructuring plan under Part 26A of the Companies Act 2006 (the "**Act**") is that a restructuring plan can be sanctioned by the court notwithstanding that it is not approved by at least 75% by value of those present and voting either in person or by proxy of each class of creditors or members (as the case may be), provided that certain conditions, set out in section 901G of the Act, are met:*

(1) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative; and

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

The concept of the relevant alternative is therefore of fundamental importance to the court's consideration of whether a restructuring plan should be sanctioned where it is necessary to invoke the cross class cramdown mechanism. The relevant alternative is defined by section 901G of the Act as whatever the court considers to be most likely to occur in relation to a company if a restructuring plan is not sanctioned.

Already some helpful guidance has emerged from the case law as to how the court will consider various issues around the relevant alternative. This article discusses that guidance, together with some practical insights as to how identifying and evidencing the relevant alternative can be approached.

Concept of the relevant alternative

As noted by Trower J (at [29]-[30]) in *DeepOcean* [2021] EWHC 138 (Ch), the first case in which the cross class cramdown mechanism was used, identifying what would be most likely to occur in relation to the company if the plan were not to be sanctioned is similar to the identification of the appropriate comparator for class purposes in the context of a Part 26 scheme of arrangement: see, for example, *Re Telewest Telecommunications Plc* [2004] BCC 342; *Re ColourOz Investment 2 LLC* [2020] EWHC 1864 (Ch) at [74]. The court is also familiar with the exercise it is required to undertake from unfair prejudice challenges to a company voluntary arrangement under section 6 of the Insolvency Act 1986, in which context the court makes a so-called "vertical" comparison, i.e. compares the projected outcome of the CVA with the project outcome of a "realistically available alternative": see Norris J in *Discovery (Northampton) Limited v Debenhams Retail Limited* [2020] BCC 9 at [12].

Specifically in the restructuring plan context, in *Virgin Active* [2021] EWHC 1246 (Ch) Snowden J at [106] explained that Condition A involves three steps, namely: (1) identifying what would most likely occur in relation to the company if the restructuring plan is not sanctioned; (2) determining what would be the outcome or consequences of that for the creditors or shareholders (as the case may be); and (3) comparing that outcome with the outcome and consequences if the restructuring plan is sanctioned.

Considering, in particular, the second of those steps, the outcome or consequences for the creditors/shareholders is to be assessed primarily, but not exclusively, in terms of the anticipated returns on their claims: see *DeepOcean* where Trower J (at [35]) said of the phrase "*any worse off*" that it is "*...a broad concept and appears to contemplate the need to take into account the impact of the restructuring plan on all incidents of the liability to the creditor concerned, including matters such as timing and the security of any covenant to pay.*"

As Snowden J noted in *Virgin Active* at [108] the exercise is inherently uncertain "*because it involves the Court in considering a hypothetical counterfactual which may be subject to contingencies and which will, inevitably, be based upon assumptions which are themselves uncertain.*"

The court's approach to evidence: immediate insolvency vs continued trading

In *DeepOcean* and *Virgin Active* (amongst other restructuring plan cases) the evidence clearly showed that the relevant alternative was a more or less immediate formal insolvency process.

Where that is the case (and it is fair to say that it often it will be where a restructuring is proposed), the focus of any dispute is likely to concern the value given to assets and/or liabilities in that insolvency process.

Further considerations, however, come into play where the relevant alternative

involves the (relatively speaking) longer term continuation of trading by the company, as was the case in *Hurricane Energy* [2021] EWHC 1759 (Ch), the first case in which the court declined to sanction a restructuring plan.

Hurricane Energy concerned some US$230 million unsecured notes with a maturity date in July 2022, which the company said it would be unable to repay and proposed a restructuring plan to implement a debt-for-equity swap. At the convening hearing directions were given for meetings of two classes, namely noteholders and shareholders. Although the plan was approved by the requisite majority of the noteholder class, over 90% of shareholders voted against the plan, with a number going on to oppose sanction.

As to the relevant alternative, if the plan was not sanctioned, the company would most likely continue trading profitably for at least a further year. The key issue was therefore whether, if the restructuring plan was not sanctioned, the company's shareholders would be better off than they would be with the 5% equity stake that they would have if the restructuring plan was sanctioned (and which would result in no meaningful return to shareholders).

Having considered, and critically assessed, the evidence in detail (demonstrating that sanction is not just a rubber stamp), Zacaroli J at [125] concluded that by virtue of a range of options being available, including the refinancing of any shortfall, there was a "*realistic prospect…that the Company will be able to discharge its obligations to the Bondholders, leaving assets with at least potential for exploitation, is enough to refute the contention that the shareholders will be no better off under the relevant alternative than under the Plan.*"

At [126], he went on to say that "*to retain 100% of the equity in Company that is continuing to trade, with a realistic prospect of being able to repay the Bonds in due course, is to my mind a better position than immediately giving up 95% of the equity with a prospect of a less than meaningful return as to the remaining 5%.*"

He therefore held that Condition A was not satisfied.

It is also interesting to note that Zacaroli J, considering the matter from the perspective of what might constitute a fair allocation of value between bondholders and shareholders, indicated that he would not in any event have been willing to exercise his discretion to sanction the restructuring plan. Depriving the company's shareholders of any potential upside to be generated by future profitable trading, together with steps that might be taken to deal with the repayment of the bonds, could not be justified, particularly in circumstances where, if the financial position did not improve, a restructuring plan could be implemented at a later date.

It therefore potentially looks to be more difficult to get a restructuring plan sanctioned where the liquidity need is not immediate. That said, when considering when to propose a restructuring plan, this needs to be weighed against leaving it to the last minute, which will also not impress the court.

An advisors' perspective: further considerations for future cases

Identifying the relevant alternative

Given that insolvency can no longer be assumed to be the relevant alternative, greater thought is required to determine what the relevant alternative is. This gives rise to the possibility of needing to consider and model a range of outcomes.

Collaborative working in a timely fashion with the other advisors on the team and the company to best explore the range of possible scenarios is important. No one person will have access to all the

> *Restructuring plans and schemes are currently tools generally used by larger firms...*

necessary information, experience, or awareness of the potential reactions of different stakeholders.

Furthermore, with a wide range of alternative outcomes possible, it is increasingly important to choose an advisor who has a track record in the relevant sector, who can rely on their experience and data as to what any run off or insolvency might look like for a particular business. This is heightened where overseas jurisdictions are involved, and the advisor may well need to draw on international colleagues to assist in a way not necessarily seen previously.

The increased potential for challenge (which may well apply equally to schemes of arrangement now as a result of the developments in the restructuring plan context) also means advisors need to be prepared to submit witness statements and be subject to cross-examination. Whilst not totally unheard of for insolvency practitioners to have to do that, it is a departure from the norm and requires different skill sets, risk appetite and an awareness of court processes from a litigation angle. Advisors need to be comfortable with this type of environment and aware of issues such as legal privilege in a way they might not have been previously.

Evidence

The availability of good evidence to substantiate a particular scenario is increasingly important. In *Virgin Active*, for example, there was a debate about whether the company's case was weakened by not having run a marketing campaign (ultimately it was held not be).

Detailed consideration needs to be given to modelling and stress testing the liquidity position and forecasts in scenarios both with and without the sanction of any proposed restructuring plan. Any assumptions that underpin those forecasts need to be clearly thought through and should be supported by reference to other data points, prior period trading or other factors an advisor can point to. Regularly updating stress tests and forecasts can be helpful to keep all stakeholders informed of their position throughout the process.

Independent valuation support to existing advisors is likely to continue to be considered helpful.

The likely attitude of stakeholders needs to be examined and that, as we know, is not easy. Even when a stakeholder states a position, the judge may not agree (see *Hurricane Energy*). There is, therefore, a need to consider the interest of creditors in negotiations, including maturity dates, creditor (or other stakeholder) action to date and so on.

Costs

Restructuring plans and schemes are currently tools generally used by larger firms as the costs can be significant given court hearings and the advisor time required. Although we have now seen the restructuring plan sanctioned in the case of *Amicus Finance plc* [2021] EWHC 2340 (Ch), the extent to which these restructuring tools could be used in the mid-market remain unclear.

Whatever the scale of the business considering a restructuring plan, costs will be a concern, especially when considering the points made above. Advisors therefore need to think carefully about how to keep costs proportionate so that the restructuring plan continues to be an attractive tool.

Losing a Cow for the Sake of a Cat:

Litigation in Bermuda, the British Virgin Islands and the Cayman Islands post COVID-19

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International businesses established in the jurisdictions of Bermuda, the British Virgin Islands, and the Cayman Islands, have generated a substantial number of legal disputes, and reported judgments, in 2021, and the year is not yet behind us. Many of these disputes are related to COVID-19, but there are other commercial trends at play, including an increase in the number of disputes relating to financially distressed, or allegedly mismanaged, businesses in the PRC or Hong Kong, in the context of a slowing Chinese economy.

Corporate insolvency and restructuring

In a series of recent judgments, the Hong Kong Court, and the courts of Bermuda and the Cayman Islands, have developed the case law of each jurisdiction as to how best to address the insolvency, and potential debt restructuring, of corporate entities incorporated in Bermuda or the Cayman Islands, whose shares may be publicly listed in Hong Kong, and whose business interests, operating subsidiaries, assets, and management might be in the PRC or Hong Kong, with debt obligations spread across the USA, the PRC, and Hong Kong.

It is not uncommon in such cases for the relevant companies to be the subject of creditor winding up petitions in either or both of Hong Kong and the Cayman Islands or Bermuda, or for the relevant debts to be the subject of both litigation and arbitration proceedings, resulting in considerable scope for argument on issues of jurisdiction, forum, timing, and case management.

There have also been an increasing number of first-instance judgments dealing with contested creditors' winding up petitions, in which the Cayman Islands and Bermuda courts have had to assess, on the evidence presented in each case, whether the petition debts are disputed *bona fide* on substantial grounds, and the true nature of the legal test and evidential threshold in this respect[1].

Despite the law in this area being relatively well-settled, it is likely that this topic will be the subject of further appellate review in due course[2], given the unusual facts and circumstances of many of these cases.

It is also not uncommon, in insolvency scenarios, for the companies and creditors concerned to explore the possibility of a debt restructuring by way of Scheme of Arrangement, under the supervision of 'light touch' provisional liquidators appointed by the Bermuda court or the Cayman Islands court, subject to sanction and approval by the appropriate Courts.

This practice, in turn, has generated considerable debate as to the circumstances in which winding up petitions should be adjourned to enable debt restructurings to take place (and if so, for how long), the potential abuse of the practice, as well as the circumstances in which parallel Schemes of Arrangement are necessary in multiple jurisdictions, having regard to legal certainty, costs, and commercial efficiencies[3].

The recent decisions out of the Hong Kong and Bermuda Courts have suggested, at least anecdotally, that the Courts' pragmatic willingness to approach corporate insolvencies in a patient, debtor-friendly manner has worn somewhat thin over the past twelve months.

Corporate governance, shareholder and partnership disputes

Corporate governance, shareholder, and partnership disputes have also kept the Courts busy, with a number of legal topics attracting the attention of the Courts in the case of otherwise profitable and successful businesses.

Minority oppression proceedings: The BVI, Cayman and Bermuda Courts continue to deal with 'just and equitable' winding up petitions or 'minority oppression' claims on a fairly frequent basis, having regard to the recent BVI Privy Council decisions of *Chu v Lau* [2020] UKPC 24 and *Hung v Ming* [2021] UKPC 1, in the context of the different legislative provisions of each jurisdiction.

1. See, for example, the Cayman cases of *Re Sky Solar Holdings Ltd*, 12 October 2020, *Re Adenium Energy Capital Ltd*, 29 July 2020, *Re Diversified Settlements Fund*, 15 October 2020, *Re Green Dragon Gas Limited*, 7 April 2021, *Re Altair Asia Investments Ltd*, 28 July 2020 and 11 September 2020, *Re Primus Investments Fund LP*, 16 June 2020, *Re Grand State Investments Limited*, 28 April 2021, and the Bermuda case of *Re Titan Petrochemicals Group Limited* [2021] SC Bda 63 Civ.

2. Notwithstanding English appellate decisions, as well as decisions of the Eastern Caribbean Court of Appeal such as *Jinpeng Group Limited v Peak Hotels and Resorts Limited*, unreported, 8 December 2015, the Cayman Islands Court of Appeal, including *Re GFN Corporation Limited* [2009] CILR 650, and the Privy Council decision in *Parmalat Capital Finance Ltd v Food Holdings Ltd* [2008] UKPC 23.

3. Some of the recent Hong Kong Court decisions in this respect, which have generated considerable debate amongst lawyers and insolvency practitioners, include *Re China Silver Asset Management (Hong Kong) Ltd* [2020] HKCFI 406, *Re Ping An Securities Group (Holdings) Limited* [2021] HKCFI 651, *Re Lamtex Holdings Ltd* [2021] HKCFI 622, *China Bozza Development Holdings Limited* [2021] HKCFI 1235, *Re Victory City International Holdings Ltd* [2021] HKCFI 1370, *Re China Oil Gangran Energy Group Holdings Ltd* [2021] HKCFI 1592, *Re China Creative Global Holdings Ltd* [2021] HKCFI 1565, *Re China Greenfish Group Co Ltd* [2021] HKCFI 1182, *Re Trinity (Management Services) Ltd* [2021] HKCFI 2207, *Re Grand Peace Group Holdings Ltd* [2021] HKCFI 2361, *Re Evergreen International Holdings Ltd* [2021] HKCFI 2694, and *Re Up Energy Development Group Ltd* [2021] HKCFI 2595.

Chairman's decisions in General Meeting: The conduct, and voting outcome, of General Meetings is often the subject of scrutiny and legal challenges by disgruntled minority shareholders. Ordinarily, however, the Chairman's decision on such matters is "final and conclusive", absent exceptional circumstances.

In *Re Convoy Global Holdings Limited* [2021] HKCA 1145, the Hong Kong Court of Appeal has recently given leave to appeal to the Hong Kong Court of Final Appeal on the question of whether, in the context of a Cayman Islands company, the decision of the Chairman of a Company's general meeting on an objection raised to the qualification of any voter may be challenged in court on the ground that it was manifestly wrong or *Wednesbury* unreasonable, notwithstanding a provision in the Articles of Association that the Chairman's decision on such a matter shall be "final and conclusive".

Both the High Court and the Court of Appeal of Hong Kong had concluded that, on the wording of the Articles of Association, the Chairman's decision can only be overturned by the Court if it can be shown to have been made 'fraudulently or 'in bad faith'. Those decisions are consistent with a line of English case law (which have also been followed in the Cayman Islands[4]), but at odds with a line of Australian and New Zealand case law.

In its judgment granting leave to appeal, the Hong Kong Court of Appeal noted that, as of 2019, of a total of 2071 publicly listed companies in Hong Kong, 1,084 were incorporated in the Cayman Islands, the majority of which had the same, or similar, provisions in their Articles of Association regarding the status of a Chairman's decision at general meeting. As the Hong Kong Court of Appeal also noted, the decision of the Hong Kong Court of Final Appeal on an issue of Cayman Islands law will not be binding as a matter of Cayman Islands law and precedent, but it is likely to have persuasive (and commercial) value. As such, the final determination of the issue is likely to have a wide impact on the corporate governance of Cayman Islands companies, as well as companies in other similar jurisdictions such as Bermuda and the BVI.

Corporate mergers and share appraisal proceedings: Section 238 of the Cayman Islands' Companies Act has generated a considerable volume of share appraisal litigation brought by dissenting shareholders, in the context of corporate mergers.

In addition to the trial judgments, and appellate judgments, dealing with substantive valuation and accounting issues, there is now a substantial body of case law dealing with procedural issues relating to discovery, witness evidence, expert opinion evidence, interest and costs. In *Xiaodu Life Technology Limited*, 27 April 2021, for example, the Grand Court of the Cayman Islands issued a Letter of Request to the High Court of Hong Kong for the examination and production of documents by various officers of the company, as well as ordering specific discovery of documents.

In *Re Changyou.com Limited*, 28 January 2021, the Grand Court of the Cayman Islands considered a novel point regarding the applicability of the section 238 appraisal regime to 'short-form' mergers between parent companies and their 90% controlled subsidiaries, where no shareholder vote is required. Despite the literal wording of the Companies Act, Smellie CJ held that the section 238 appraisal regime should be made available to minority shareholders in a 'short-form' merger. The decision is the subject of a pending appeal to the Cayman Islands Court of Appeal, scheduled for hearing in November 2021.

Fraud and asset recovery litigation

There continues to be a steady flow of fraud and asset recovery litigation, including applications

4. See, for example, *Re China Agrotech Holdings Limited* [2019] (2) CILR 302.

> *At the risk of tempting fate, the courts of Bermuda, the British Virgin Islands and the Cayman Islands will remain busy over the next 24 months*

for interim relief in the form of freezing injunctions, preservation orders, disclosure orders, receivership orders, and the appointment of provisional liquidators.

Earlier this year, the Cayman Islands Court of Appeal confirmed that *Norwich Pharmacal* orders for third party disclosure are available in support of foreign proceedings[5], distinguishing English authorities that were said to support the contrary view[6]. This is slightly different to the position in the BVI where, despite earlier judgments[7] in line with the Cayman Islands approach, legislation[8] has now been enacted to introduce a specific regime relating to evidence in foreign proceedings.

The BVI Commercial Court recently granted a free-standing proprietary injunction and ancillary disclosure orders in support of foreign proceedings[9]. The Cayman Islands and BVI now have similar legislation[10] dealing with ancillary relief in support of foreign proceedings.

The Cayman Islands courts have provided helpful guidance on the information rights which limited partners have against the general partner of a Cayman Islands exempted limited partnership[11]. In essence, it has been confirmed that limited partners have an entitlement, rooted in statute[12], to request and receive true and full information regarding the business and financial affairs of the relevant partnership as partners in the business whose financial affairs are managed on their behalf.

It is worth noting, however, that there have been a number of recent cases in which ambitious applications for interim relief have been refused by the Bermuda[13] or Cayman Islands courts[14], with adverse costs consequences. Various judges have stressed, in their recent judgments, that they will give careful consideration to the propriety of dealing with applications on an *ex parte* basis, and any asserted justifications for doing so[15]. These judgments serve as a stark reminder that the merits of any interim application, and allegations of fraud, should be carefully considered and assessed, given the inherent risk, as Mark Twain once noted, that "*going to law*" might be "*losing a cow for the sake of a cat*".

What do we predict for the next 24 months?

At the risk of tempting fate, the courts of Bermuda, the British Virgin Islands and the Cayman Islands will remain busy over the next 24 months, with corporate shareholder and insolvency disputes, insurance disputes, asset recovery and fraud, and trusts disputes, remaining the most common areas of work. Various other factors are likely to encourage parties to resort to the offshore Courts, however, over and above the financial fall-out of COVID-19:

- The Cayman Islands' Private Funding of Legal Services Act 2020 now offers a broader range of litigation funding options for litigants and lawyers than ever before.
- Ever-increasing levels of regulatory compliance, and COVID-related restrictions, are likely to generate an increasing number of judicial review and Constitutional claims.
- Liability claims against professional service providers, directors, and trustees (and their insurers, in turn) are likely to be asserted with increasing frequency, having regard to legal developments in cases such as *Primeo Fund (in Official Liquidation) v Bank of Bermuda (Cayman) Ltd* [2021] UKPC 22, and commercial developments such as the increased use of Special Purpose Acquisition Companies (SPACs) for high-profile mergers and acquisitions; and
- There will be an increasing number of applications to enforce foreign judgments and foreign arbitration awards, as international debtors default on their financial obligations. In this context, we anticipate that issues of sovereign immunity, and the scope of the Revenue Rule (preventing the enforcement of foreign tax liabilities), will be hotly contested, given the state of public finances internationally, post COVID-19. ■

5. *Essar Global Fund Ltd and Essar Capital Limited v Arcelormittal USA LLC* (CICA, unreported, 3 May 2021).

6. *R (Omar) v Secretary of State for Foreign Affairs* [2014] QB 112 and *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175.

7. See, for example, *UVW v XYZ* BVI HC (Com) 108 of 2016 and *K&S v Z&Z* BVIHCM (COM) 2020/20016.

8. Eastern Caribbean Supreme Court (Virgin Islands) (Amendment) Act 2020, s 3(5).

9. *Claimant X v A TVI Company* 2021/0037

10. In the BVI: section 24A of the Eastern Caribbean Supreme Court (Virgin Islands) Act; and in the Cayman Islands: section 10A of the Grand Court Act

11. See, for example, *Dorsey Ventures v XiO GP* 2019 (1) CILR 249 and *Gulf Investment Corporation et al v The Port Fund LP et al*, 16 June 2020.

12. Section 22 of the Exempted Limited Partnership Act.

13. See, for example, *Noesis Consulting Ltd v Saturn Solar Developments Ltd* [2021] SC Bda 50 Com.

14. See, for example, *Linden Capital LP v Luckin Coffee et al*, 4 June 2020 and 3 August 2020, *Hudson Capital Solar Infrastructure v Sky Solar Holdings Ltd*, 27 August 2020.

15. See, for example, *Cathay Capital Holdings III, LP v Osiris International Cayman Limited*, 30 August 2021.

The Nortel Saga – A Tale of Two Cities[1]

The Honourable Frank J.C. Newbould, Q.C.[2]

THE HON FRANK JC NEWBOULD

1. The joint trial was held simultaneously in Toronto, Ontario and Wilmington, Delaware. It was a joint trial of the Ontario Superior Court of Justice (Commercial List) and the U.S. Bankruptcy Court for the District of Delaware.

2. Counsel to Thornton Grout Finnigan LLP in Toronto, Canada and Associate Member of South Square in London, UK.

The Nortel Networks Corporation saga was unique for the parties, the lawyers and the judges. Judge Gross of the U.S. Bankruptcy Court in Delaware and I presided over the case in a joint trial that had never occurred before[3].

Nortel Networks Corporation ("**NNC**") was a publicly-traded Canadian company and the direct or indirect parent of more than 140 subsidiaries located in more than 100 countries, collectively known as Nortel, which operated a global networking solutions and telecommunications business. It carried on business in Canada, where the head office was located, and through subsidiaries in the United State, the EMEA region, as well as the Caribbean and Latin America and Asia.

On January 14, 2009, the Canadian companies filed in Toronto under the *Companies' Creditors Arrangement Act* ("**CCAA**"). In the United States, most of the U.S. incorporated entities filed in Wilmington, Delaware under chapter 11 of the *U.S. Bankruptcy Code*. On the same day the principal UK subsidiary of Nortel, and certain of their EMEA subsidiaries save the French subsidiary Nortel Networks S.A. ("**NNSA**"), were granted administration orders under the UK *Insolvency Act, 1986*. Neither the Canadian nor the US debtors sough recognition orders in the UK. On the following day, a liquidator of NNSA was appointed in France pursuant to Article 27 of the European Union's Council Regulation (EC) No 1346/2000 on Insolvency Proceedings in the Republic of France.

At the outset of the insolvency, the Nortel debtors had hoped to restructure their profitable lines of business, but by June, 2009 it was determined that this would not be possible. Steps were taken to sell the assets, which consisted of a number of profitable lines of business and residual intellectual property consisting primarily of patents and patent applications. Nortel sold its business lines, including the IP needed for each business line, for approximately US$3.285 from mid-2009 through to March 2011. In April 2011 it entered into a stalking horse bid agreement with Google for US$900 million, but an auction in June, 2011 sold the residual patent portfolio to an entity aptly named Rockstar (Apple, Microsoft, Ericsson, Blackberry, Sony and EMC) for US$4.5 billion. From these sales, US$7.3 billion was escrowed and available for the creditors of the Nortel debtors.

The joint trial was before the days of Zoom. The court rooms in Toronto and Wilmington were set up electronically. Each day of the trial there were 30 to 40 lawyers in each courtroom. The lawyers and witnesses could and did appear in either courtroom and communicate with a lawyer, witness, or the judge in the other courtroom through state-of-the-art telecommunications services that were created for the trial at great expense. On some occasions a lawyer in one courtroom cross-examined a witness in the other courtroom. It worked seamlessly and well. The trial ran intermittently from May 12 to September 23, 2014.

The issue for the joint trial was how the escrowed sales proceeds from the sale of the Nortel assets of US$7.3 billion were to be allocated amongst the Nortel debtors. The represented parties included the Canadian debtors, the US debtors, the UK Pension Claimants, the EMEA debtors, bondholders and various creditor committees.

One may well ask how it was that these different creditor groups came to be parties to a procedure that required a Canadian and US judge decide for all the Nortel debtors that participated. The answer goes back to early days in the insolvency process. When the decision to sell Nortel assets was made in June, 2009, the parties realized that a large portion of the assets to be sold consisted of intellectual property that would decline in value with age. If determining the allocation of proceeds from Nortel's assets were a precondition to their sale, sales would be substantially delayed, and the value of the assets would depreciate, resulting in less money for all creditors. Avoiding a dispute during the sale process about how to allocate the proceeds allowed the parties to obtain the highest monetary value for the assets being sold. It was a wise decision, as once the sales concluded, there was no agreement of the parties and it took several years until 2017 to reach a final conclusion.

Accordingly, in June, 2009 an agreement called an Interim Funding and Settlement Agreement (IFSA)

3. At the time I was the Head (team lead) of the Commercial List of the Ontario Superior Court of Justice in Toronto.

was signed by 38 Nortel debtor entities in Canada, the U.S. and EMEA. It provided for certain funding for the Canadian debtors by the US debtors. It also provided that the Nortel assets would be sold and the proceeds put into escrow. The parties agreed to negotiate in good faith and attempt to reach agreement on a timely basis on a protocol for resolving disputes concerning the allocation of the sale proceeds. However, the parties could not agree on an allocation process and the issue went to both courts.

The UK Administrator and the EMEA debtors argued that the parties had agreed in the IFSA to an enforceable arbitration clause that did not permit the Canadian and US courts to decide on the allocation of the sale proceeds for entities outside of Canada and the US. Both courts held that there was no enforceable arbitration agreement as the obligation to negotiate a protocol was at best an unenforceable agreement to agree. It was also held that in the IFSA, it had been agreed that any proceeding seeking any relief must be commenced in the US and Canadian courts in a joint hearing of both courts under a cross-border protocol, if such proceeding would affect the Canadian, US or EMEA debtors. It was held that the UK Administrator and the EMEA debtors had attorned in the IFSA to the jurisdiction of the US and Canadian courts. Thus the outcome was that the UK Administrator and the EMEA debtors were required to litigate their claims to the escrow funds in the US and Canadian courts in a joint hearing.

Concurrently with the negotiation of the IFSA, the Canadian and US Debtors and certain committees negotiated a Cross-border Insolvency Protocol that received approval of the Canadian and US courts in June 2009. It contained unique provisions that have become commonplace in cross-border protocols involving Canada and US insolvency proceedings. The Protocol contained a number of provisions regarding the independence of the Canadian and US Courts and the exclusive jurisdiction of each Court to determine matters arising in the Canadian and US proceedings respectively. Included in the Protocol were the following provisions:

- The approval and implementation of this Protocol shall not divest nor diminish the U.S. Court's and the Canadian Court's respective independent jurisdiction over the subject matter of the U.S. Proceedings and the Canadian Proceedings, respectively.
- The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct of the U.S. Proceedings and the hearing and determination of matters arising in the U.S. Proceedings. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct of the Canadian Proceedings and the hearing and determination of matters arising in the Canadian Proceedings.

While each court had sole jurisdiction over its proceedings, the Protocol contained a unique provision regarding discussion between the two judges. Included were the following:

- The U.S. Court and the Canadian Court may communicate with one another, with or without counsel present, with respect to any procedural matter relating to the Insolvency Proceedings...

- The U.S. Court and the Canadian Court may conduct joint hearings (each a "**Joint Hearing**") with respect to any cross-border matter …where both the U.S. Court and the Canadian Court consider such a Joint Hearing to be necessary or advisable, or as otherwise provided herein, to, among other things, facilitate or coordinate proper and efficient conduct of the Insolvency Proceedings or the resolution of any particular issue in the Insolvency Proceedings. With respect to any Joint Hearing, unless otherwise ordered, the following procedures will be followed:

    The Judge of the U.S. Court and the Justice of the Canadian Court, shall be entitled to communicate with each other during or after any joint hearing, with or without counsel present, for the purposes of (1) determining whether consistent rulings can be made by both Courts; (2) coordinating the terms upon of the Courts' respective rulings; and (3) addressing any other procedural or administrative matters.

This latter provision was instrumental in Judge Gross and I each being able to come to the same decision on the allocation of the US$7.3 billion[4]. It was recognized by all parties that if Judge Gross and I came to different conclusions, it would not be helpful to a successful resolution for the benefit of all parties. In my decision I stated:

"Judge Gross in Wilmington and I have communicated with each other in accordance with the Protocol with a view to determining whether consistent rulings can be made by both Courts. We have come to the conclusion that a consistent ruling can and should be made by both Courts. We have come to this conclusion in the exercise of our independent and exclusive jurisdiction in each of our jurisdictions. These insolvency proceedings have now lasted over six years at unimaginable expense and they should if at all possible come to a final resolution. It is in all of the parties' interests for that to occur. Consistent decisions that we both agree with will facilitate such a resolution."

Judge Gross made similar statements in his decision.

The decision to be made involved a very complex business model that provided great scope to the parties to make drastically different submissions.

The Nortel business was not carried out on jurisdictional lines. Nortel operated along business lines as a highly integrated multinational enterprise with a matrix structure that transcended geographic boundaries and legal entities organized around the world. No single Nortel entity, either the Canadian debtors in Canada, the US debtors in the US or NNUK or any of the other EMEA debtors, was able to provide the full line of Nortel products and services, including R&D capabilities, on a stand-alone basis. R&D was the primary driver of Nortel's value and profit and it was performed at labs around the world and shared throughout Nortel.

There was no settled law to determine how the sale proceeds should be allocated. The parties differed widely as to the approach to be taken.

The dilemma facing the two Courts was put well by Judge Gross who stated:

"There is nothing in the law or facts of this case which weighs in favor of adopting one of the wide ranging approaches of the Debtors. There is no uniform code or international treaty or binding agreement which governs how Nortel is to allocate the Sales Proceeds between the various insolvency estates or subsidiaries spread across the globe."

The main argument of all parties centered on a transfer pricing agreement made by the Nortel entities named Master Research and Development Agreement ("**MRDA**"). Much time was taken by expert and lay evidence regarding the MRDA and in closing arguments. In the end, it was held to be irrelevant.

Under the MRDA, the parent Canadian company NNL was the legal owner of the Nortel intellectual property and other Nortel entities were granted an exclusive license by NNL to make and sell Nortel products in their territory using or embodying Nortel intellectual property developed by Nortel companies anywhere in the world and a non-exclusive license to do so in territories that were not exclusive to them. What the ownership rights of NNL were and what the license rights were that were granted in the MRDA were highly contested.

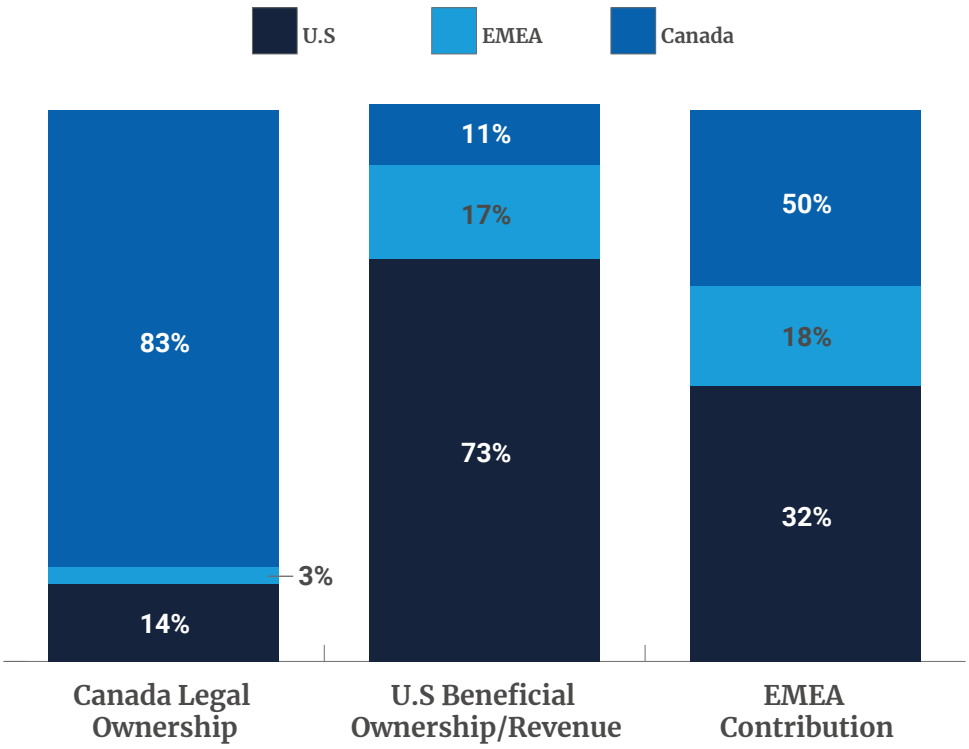
The Canadian debtors argued that under the MRDA, the Canadian parent NNL owned the IP and the interests of the US debtors and the other participants to the MRDA were restricted to certain exclusive and non-exclusive license rights granted to them by NNL that were limited for several reasons in their use and value. They contended for an allocation of US$6.034 billion to the Canadian debtors, US$1.001 billion to the US debtors and US$300.7 million to the EMEA debtors.

The US was the largest market for Nortel products. The US debtors and other US interests argued that they held all of the rights and all of the value in the IP in their respective exclusive territories and that the license rights they held were not subject to the restriction or limitations that the Canadian debtors asserted. They contended that all of the economic value in the IP in the exclusive territory belonged to the licensee and that the legal title held by the Canadian parent NNL in the IP under the MRDA was a purely "bare" legal title with no monetary value. They contended for an allocation of US$.77 billion to the Canadian debtors, US$5.3 billion to the US debtors and US$1.23 billion to the EMEA debtors.

The EMEA debtors had provided substantial funds for R&D and argued that each of the parties to the MRDA jointly owned all of the IP in proportion

4. See Nortel Networks Corporation (Re) 2015 ONSC 2987; 2016 ONCA 332; 532 B.R. 494 (U.S. Bankr. D. Del. 2015).

The extreme allocation proposals were contained in a chart filed in argument:



to their financial contributions to R&D, and that all states should share in the sale proceeds attributable to IP in those same proportions. The joint ownership was said to arise independently of, but recognized in, the MRDA. They contended for an allocation of US$2.32 billion to the Canadian debtors, US$3.636 billion to the US debtors and US$1.325 billion to the EMEA debtors.

These extreme allocation proposals were contained in a chart filed in argument, shown above.

Judge Gross and I differed on the interpretation of the rights of the parties under the MRDA, I essentially agreeing with the Canadian debtors' position and he agreeing with the US debtors' position. I held that under the MRDA, the Canadian parent NNL had all ownership interests in the Nortel IP subject to non-exclusive licenses to the other parties to make and sell Nortel products, which no buyer of the IP would pay for. Judge Gross held that NNL had no rights to exploit Nortel IP in the US and that the US debtors had the exclusive economic and beneficial ownership pf the Nortel IP in the US. We both held that the MRDA did not provide joint ownership of the IP as contended by the EMEA debtors.

However, we both decided that the MRDA was not applicable to the allocation issue.

We both held that the MRDA was an operating agreement and was not intended to, nor did it, deal with the disposal of all of Nortel's assets in a situation in which no revenue was being earned and no profit or losses were occurring as a result of the insolvency of Nortel. The MDRA was a transfer pricing agreement to deal with the allocation of profits while Nortel operated as a going concern business.

The allocation method each of us chose was a *pro rata* allocation which we referred to as a modified *pro rata* allocation. The jurisdiction to do that in Canada was under the CCAA provision in section 11(1) that "a court may make any order it considers appropriate in the circumstances" and common law that as a superior court of general jurisdiction, the Superior Court of Justice has all of the powers that are necessary to do justice between the parties. Except where provided specifically to the contrary, the Court's jurisdiction is unlimited and unrestricted in substantive law in civil matters. The jurisdiction to decide that in the US was similar. The Bankruptcy Code in section 105(a) permits courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code]". The Third Circuit has construed this provision to give bankruptcy courts "broad authority" to provide appropriate equitable relief to assure the orderly conduct of reorganization proceedings.

"The allocation method each of us chose we referred to as a modified pro rata allocation"

What drove this approach was the fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment. The task was to determine the amount to be allocated to each of the Canadian, U.S. and EMEA debtors' estates. We each held that directing a *pro rata* allocation would constitute an allocation as required and could be achieved by directing an allocation of the escrowed funds to each debtor estate based on the percentage that the claims against that estate bore to the total claims against all of the debtor estates. In simple terms, if for example the Canadian debtor estates had recognized claims that were 10% of all recognized claims for all of the debtor estates in issue, the Canadian estates would receive 10% of the escrowed funds. Once the escrowed funds were allocated, it was up to each Nortel estate acting under the supervision of its presiding court to administer claims in accordance with its applicable law.

It was a modified *pro rata* allocation as the decisions recognized the rights of each debtor estate to its cash-on-hand, settlements and intercompany claims, one of which resulted in an allowed $2 billion claim of the US subsidiary NNI against the Canadian parent NNL.

It was argued by the US interests that a *pro rata* allocation constituted an impermissible substantive consolidation not permitted by *Owens Corning*, 419 F. 3d 195 (3d Cir. 2005). However, the funds from the sale of the assets did not belong to any one estate and it could not be said that they constituted separate assets of two or more estates that would be combined. Thus there was no substantive consolidation.

Appeals were taken. In Ontario, leave to appeal was sought from the Ontario Court of Appeal. Leave was denied. In the US, an appeal was taken to the US District Court, and mediation was ordered by District Court Judge Stark. Shortly after the Ontario Court of Appeal refused leave in Ontario, Judge Stark referred the case to the 3rd Circuit Court of Appeals, which had several years earlier been very critical that the case had yet not settled[5]. Shortly after that referral, the case was settled by mediation in 2017[6].

The result was an allocation as follows:

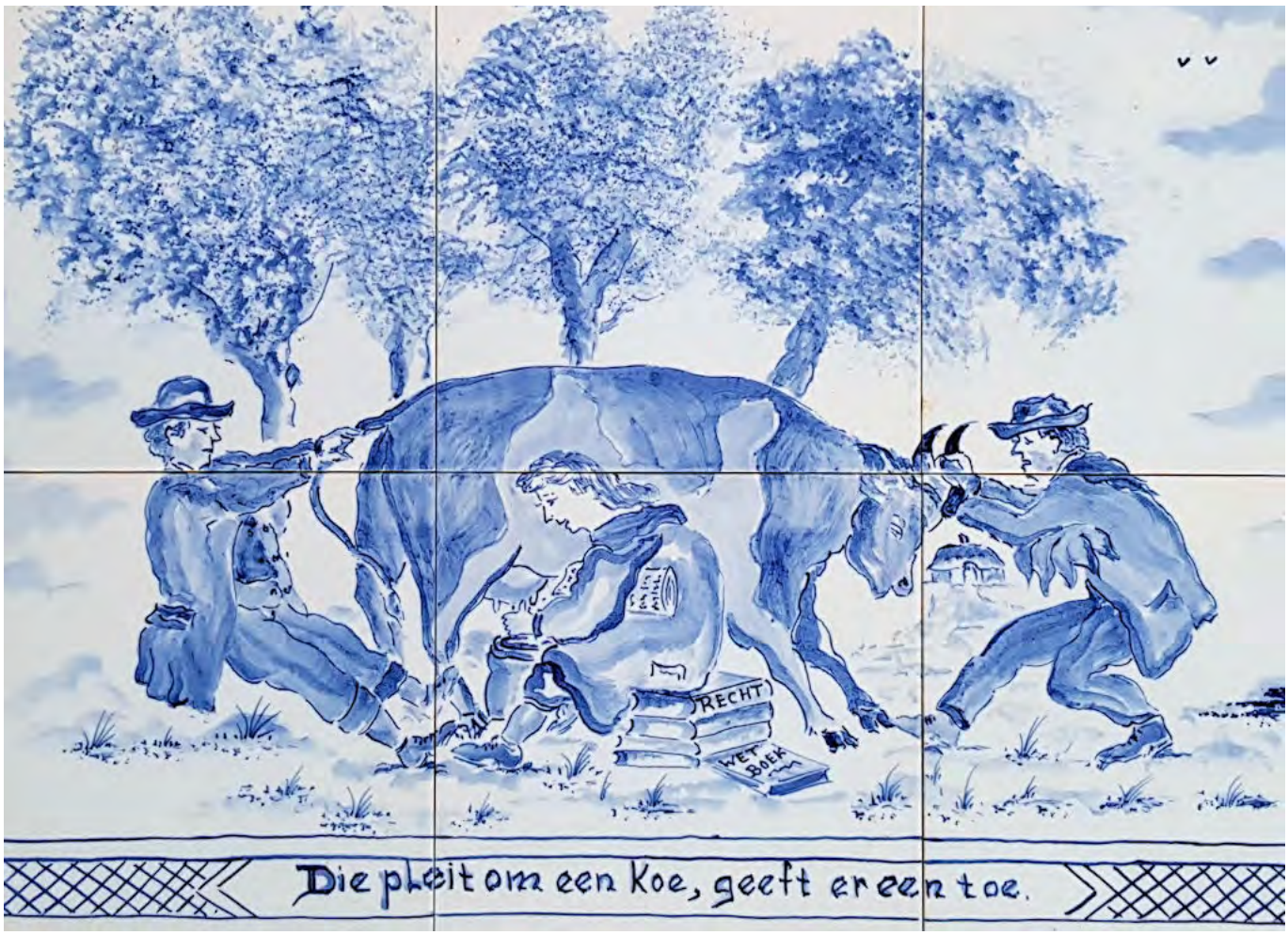
> Canada- 57.10% or US$4.1 billion (had claimed US$6.1 billion) US-24.35% or US$1.8 billion (had claimed US$5.3 billion) EMEA-18.55% or US$1.3 billion (had claimed US$1.325 billion)

The total costs of the Nortel saga exceeded US$2 billion. The picture that follows is apt.

How creditors fight over the cow and the professionals milk it! ■

5. 5 669 F.3d 128 at 143-44 (3rd Cir. 2011).

6. There had been three different mediations prior to the joint trial, none of which were successful.



Case Digest Editorial

Riz Mokal

Welcome to the November edition of the Case Digests.

Like only the most rocking of Case Digest editions, this one features the Sex Pistols. It also features safety deposit boxes, twice. There is the curious bank seeking permission to look inside unloved boxes, and there is the thief who, as befits that characterisation, did not bother with permissions. Amongst other highlights is the Supreme Court's confirmation of the existence of the lawful act economic duress doctrine.

R v Seed, digested by Madeleine Jones, concerns the infamous Hatton Gardens burglary in 2015, in which gold, jewellery, and other precious items worth up to £25 million were stolen from safety deposit boxes. The Court of Appeal held that since a thief has a possessory title in the stolen property which is good against the world except the rightful owner (who could not be located), the thief was to be credited with the value of that property for the purposes of a confiscation order even though the property was temporarily in the police's possession.

In *Credit Agricole Corporate and Investment Bank v Persons Unknown*, the Bank sought permission to inspect 115 items deposited with it between 1900 and 1994, most of which were held in safety deposit boxes. The Bank had unsuccessfully attempted to identify those currently entitled to the items and now wished to examine the items. You can read Stefanie Wilkins's summary of Morgan J's judgment to find out more.

Jamil Mustafa's summary of *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* draws out the distinction between Lord Burrows' analysis in the Supreme Court of the basis of the doctrine of lawful act duress, and that of Lord Hodge for all the other Justices.

For the Sex Pistols, turn to *Jones v Lydon (No 2)*, digested by Roseanna Darcy. ■


SEX PISTOLS
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Case Digests

Banking and Finance

Digested by Stefanie Wilkins

Ipagoo LLP (In Administration)

[2021] EWHC 2163 (Ch) (David Halpern QC) 30 July and 10 September 2021

Electronic money institution – Safeguarding of client assets – Distribution

The applicants were administrators of ipagoo LLP, and sought directions as to the distribution of its assets. The Financial Conduct Authority ("**FCA**") intervened as amicus curiae at the administrators' invitation. ipagoo was an electronic money institution ("**EMI**"), which was authorized by the FCA to issue electronic money and provide certain other services. As a matter of EU law, EMIs and payment institutions are treated differently to banks and other credit institutions; relevantly, EMIs and payment institutions are not permitted to take deposits, and are also obliged to safeguard "relevant funds" (in relation to EMIs, being sums paid by electronic money holders for the issuance of electronic money).

The questions for the Court were whether the Electronic Money Regulations created a statutory trust of the asset pool for the benefit of the electronic money holders, and whether relevant funds which should have been dealt with under the regulations formed part of the asset pool.

Mr David Halpern QC, sitting as a Deputy High Court Judge, observed initially that the Electronic Money Regulations had been intended to implement the corresponding EU directive and, accordingly, were to be interpreted so far as possible to give effect to that directive, notwithstanding the occurrence of Brexit.

After considering the principal features of the Electronic Money Regulations, Mr Halpern QC found that although there were certain features of the regulations that were consistent with the existence of a statutory trust, there were others which were not; moreover, there was nothing which pointed unequivocally to the existence of a trust. There was no basis to imply a trust, which would at best duplicate some aspects of the regulations, and at worst be inconsistent. (The consequence of this was that electronic money holders had only rights as creditors in respect of the asset pool, rather than a proprietary interest).

In respect of the second question, Mr Halpern QC found that, consistently with the intention of the directive, it was necessary to treat the asset pool as including all relevant funds which ought to have been safeguarded. Accordingly, if the EMI received any funds which should have been, but were not, safeguarded such that there is a shortfall in the asset pool, a sum must be added to the asset pool from the EMI's general estate to make good on the shortfall and distributed to customers in priority to any other distributions.

At the hearing of consequential matters, Mr Halpern QC gave the FCA permission to appeal. Newey LJ subsequently ordered that the appeal be heard on an expedited basis. ■

[Riz Mokal]

Credit Agricole Corporate and Investment Bank v Persons Unknown

[2021] EWHC 1679 (Ch) (Morgan J)
21 June 2021

Unclaimed safety deposit boxes – Order for permission to inspect

The applicant was a bank which was in possession of 115 items which had been stored in safety deposit boxes at one of its branches. The items in question had been deposited by various depositors between 1900 and 1994. In each case, the bank was unable to locate the depositor or any representative or person interested in the contents.

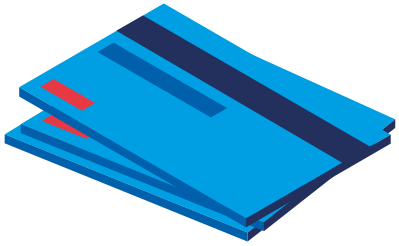
The bank wished to open each of the safety deposit boxes, for the purpose of discovering further information that might enable it to trace the owner, or alternatively, to dispose of the contents, if possible by sale following a further application to court.

The bank wished to avoid any suggestion that the act of opening the boxes was a technical conversion of the contents, and accordingly applied to the court for an order empowering it to do so. The initial question was whether such an order could be made in the absence of a respondent.

The Torts (Interference with Goods) Act 1977 applied to goods deposited on or after 1 January 1978. Section 13 of that Act empowered the court to authorise a sale by a bailee, but did not set down any procedure for such an application. Morgan J found that the Court could make an order for sale in the absence of a respondent, and it was for the Court "to evolve the most suitable procedure". The Judge held that it was open to the bank in principle to make an application for an inspection order (which might later form the basis of a section 13 application) in the absence of a respondent.

In respect of goods deposited prior to 1 January 1978, there was no statutory jurisdiction to authorise the sale, and so any application to sell the contents of the boxes would be made at common law. Morgan J found that in order to obtain a declaration which would be binding on a defendant, there must be a defendant. His Lordship found that the defendants might be identified by description, that notice of the proceedings be posted in the room where the safety deposit boxes were stored, and that service be effected on any person who contacted the bank in relation to the boxes.

Morgan J also considered that the Court had jurisdiction under section 33 of the Senior Courts Act and CPR 25.1(1)(c)(ii) and 25.1(1)(i) to permit the bank to inspect the contents of the boxes. The application for inspection could be dealt with in the absence of any respondent. It was unnecessary for the bank to advertise the proceedings in light of the attempts that had already been made to trace the owners of the contents.



Civil Procedure

Digested by Roseanna Darcy

Axiom Stone (London) Ltd v Heathfield International LLC

[2021] EWCA Civ 1242 (Ch) (Bean LJ, Nugee LJ, Sir Stephen Irwin) 16 August 2021

Security for Costs

This was an appeal against the refusal of an application for security of costs against the respondent. In the underlying claim, the claimant "Heathfield", a Delaware company, claimed various sums said to be due from the respondents for the provision of medical reports to use in litigation. The first defendant "Axiom" defended the claim on the basis that it was the second defendant "Medecall" that was the relevant contracting party. Axiom sought security for costs against Heathfield, largely on the basis that it was a Delaware company with no financial information about it available. The application was refused at first instance on the basis the Judge did not understand how or why Axiom's defence was being funded. It was a dormant company with negligible assets and it was not apparent who would be getting the benefit of the security. Permission to appeal was granted on one ground, that the Judge had erred in taking into account the funding position of Axiom.

The appeal was dismissed. Whilst the relevant gateways of CPR r 25.13 were satisfied, granting security was still a matter for the Court's discretion. The Court of Appeal could only, therefore, disturb the judgment at first instance if the Judge had erred in principle. The Court of Appeal held that he had not. The Judge had been entitled to reach the decision that he had. He had not set out a general principle that a defendant who could not fund their own defence would be refused security on that ground alone, as suggested by the appellant. Instead, he had taken all the circumstances of the case into consideration, including the lack of explanation as to why the litigation was being pursued and defended given Axiom's dormant state with limited assets. There did not appear any benefit to the litigation and so the real question was not simply how Axiom was funding its defence, but why either side was litigating at all. ■

Jones v Lydon (No 2)

[2021] EWHC 2322 (Ch) (Sir Anthony Mann) 23 August 2021

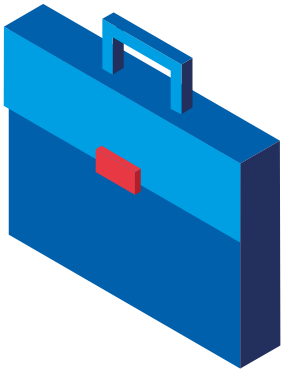
Without prejudice – Admissibility – Estoppel

In a much-publicised dispute between the members of the Sex Pistols, the Court was required to determine whether a chain of letters and emails could be relied on to demonstrate estoppel within a claim centred on whether an agreement between the band members to accept a majority vote was valid and applied. The contents of the letters and emails had all been marked "without prejudice" save for the last document in the chain.

The chain of communication relied on related to a 2014 dispute between the band members regarding the division of money arising from an advert. The defendant sought to rely on the letters to demonstrate the need for unanimity in decision-making between the band members.

In finding that the entire chain of letters was privileged and so could not be relied on, the Judge held that even though the last communication was not marked "without prejudice" it was clearly part of the same chain of negotiations and the privilege attached to it. In order for privilege to be departed from, and to make the negotiations "open", this intention needed to be clearly marked. Simply not labelling a communication "without prejudice" was not sufficient without more. In order to succeed, the defendant needed a clear and unambiguous indication on behalf of the claimants that a without prejudice document can be relied on, with an intention for it to be relied on. Silence was not an unambiguous statement.

Without prejudice material should not readily and without a special reason be dissected into privileged and non-privileged parts. ■



Commercial Litigation

Digested by Jamil Mustafa

Times Travel (UK) Ltd v Pakistan International Airlines Corporation

[2021] UKSC 40 (Lord Reed, P, Lord Reed, Lord Hodge, DP, Lord Lloyd-Jones, Lord Kitchin, Lord Burrows) 18 August 2021

Contracts – Validity – Economic duress

The Supreme Court affirmed the existence of a doctrine of lawful act duress in English law as a basis for rescission of a contract or restitution of an extra-contractual payment.

The claimant was a UK-based travel agency whose primary business was the sale of airplane tickets to and from Pakistan. The defendant airline was the only airline operating direct flights between Pakistan and the UK. A number of UK travel agents brought claims against the defendant airlines to recover sums said to be due in respect of a commission. The defendant applied pressure on the claimant to dissuade it from bringing such claims itself by, in particular, cutting the claimant's ordinary ticket allocation from 300 to 60 tickets, and giving notice that it was terminating existing agency contracts. These were all lawful acts. But the threat of the defendant not continuing a contractual relationship with the claimant caused the claimant to accept new contract with the defendant which included an onerous waiver clause , extending to any claim for unpaid commission under their previous contract. The claimant accepted those terms. It then brought proceedings seeking to recover the commission and other sums due under the previous contract. The first instance judge found in favour of the claimant that the new contract had been procured by economic duress. That decision was overturned by the Court of Appeal.

The Supreme Court dismissed the claimant's appeal from the decision of the Court of Appeal. The Supreme Court held that lawful act duress existed in English law where: (i) there was an illegitimate threat; (ii) which caused the claimant to enter the contract; and (iii) the threatened party had no reasonable alternative than to give into the threat. The legitimacy of the threat was assessed by reference to the nature and justification of the demand made by the threatening party.

Lord Hodge, who gave the leading judgment, emphasised that whilst the boundaries of the doctrine of economic duress were not fixed, the Court should view any extension of the doctrine with caution. There is no general doctrine of good faith in contracting or doctrine of imbalance of bargaining power in English law. Equally, English law did not regard self-interest commercial dealing as unjustified. Something more was required to engage the doctrine of lawful act duress.

In this respect, Lord Hodge held that there had to be morally reprehensible or unconscionable conduct on the part of the threatening party to engage the doctrine of lawful act duress. Lord Hodge therefore dismissed the appeal, as it had been found at first instance that the claimant believed in good faith that it was not liable for breach of contract for failing to pay past commissions and the pressure it applied was a mere assertion of its power as a monopoly supplier, which, although hard-nosed, did not amount to reprehensible means giving rise to lawful act duress. Whilst largely in agreement, and concurring in dismissal of the appeal, Lord Burrows adopted a different touchstone, at the very least in cases of waiver and alleged lawful act duress. Lord Burrows considered that the doctrine was engaged where the demand of waiver made by the threatening party was made (subjectively) in bad faith, i.e., where the threatening party did not genuinely believe that they were entitled to make the demand, and there was an existing legal right and duty between the parties (contractual or otherwise) by reference to which the bad faith could be assessed. On the facts, Lord Burrows regarded it as critical to the decision of the Court of Appeal, and his dismissal of the claimant's appeal that it was found that the defendant had not acted in bad faith. In contrast to Lord Hodge, Lord Burrows would have allowed the appeal had there been such a finding. ■

Commercial Litigation

Heritage Travel and Tourism Limited & Anor v Lars Windhorst & Ors

[2021] EWHC 2380 (Comm) (Richard Salter QC) 27 August 2021

Settlement agreements – Tomlin orders – Summary judgment– Lawful act duress

The High Court granted summary judgment in respect of a debt claim for €172 million arising in respect of a settlement agreement, applying the principles set out by the Supreme Court in *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2021] UKSC 40 (digested above).

The claimant and defendants had purported to compromise various claims arising in respect of repo transactions by means of a settlement agreement in February 2020 (the 'February Settlement'). The defendants, however, failed to abide by the terms of that settlement, and so the claimant commenced proceedings which were then stayed by a Tomlin order in June 2020. Scheduled to that Tomlin order was a settlement agreement that required various payments to be made by the defendants (the 'June Settlement'), which the defendants failed to make, prompting the claimant's application for summary judgment.

The defendants advanced various defences to resist summary judgment, including a defence based on economic duress. The defendants submitted that the claimant knew that their only realistic prospect of raising the funds necessary to meet their obligations under the February Settlement was by means of a proposed third-party securitisation transaction (the 'Evergreen Transaction'), and the claimants threatened to derail that transaction unless the defendants entered into the June Settlement by disclosing, in breach of contract/confidence, the confidential terms of the prior repo transactions to dissuade third-parties from investing in the Evergreen Transaction.

The Court found that such disclosure would not amount to a breach of contract or confidence, and that the only possibility open to the defendants on this ground was a defence of lawful act duress. The Court rejected that such a defence was made out, expressing the view that the claimants' conduct amounted to no more than a lawful threat coupled with a demand rooted in commercial self-interest, and there was nothing reprehensible or improper in such conduct. In those circumstances, no defence of lawful act duress arose. ■

Maranello Rosso Limited v Lohomij BV & Ors

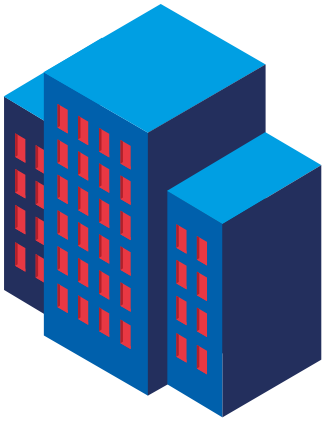
[2021] EWHC 2452 (Ch) (HHJ Keyser QC) 6 September 2021

Settlement agreements – Contractual releases – 'Sharp practice' – Fraud

Upon strike out/summary judgment applications brought by the defendants to a claim for, inter alia, unlawful means conspiracy and breach of fiduciary duty, the Court gave guidance as to correct approach to the construction of contractual release clauses (i.e., clauses releasing claims) and the doctrine of 'sharp practice'.

In giving judgment, the Court confirmed that no special rules of construction applied in respect of contractual release clauses, and consequently, the ordinary principles of contractual construction applied. As to the relevance of fraud, the Court considered that an expectation that the parties dealt honestly with one another did not give rise to an additional principle of construction but might be a factor to be considered as part of the context against which the contact was to be construed. The Court did, however, consider it arguable that there was an equitable 'sharp practice' principle that would prevent a party, in appropriate circumstances, from relying on a general release where they knew the other party had a claim of which they were unaware.

On the facts, the release clause in the settlement agreement was broadly drafted and released all claims, including unknown claims, save for those arising after the date of the agreement, including claims based on fraud and dishonesty. ■



Company Law

Digested by Edoardo Lupi

Primeo Fund (in Official Liquidation) v Bank of Bermuda (Cayman) Ltd and another (Cayman Islands)

[2021] UKPC 22 (Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Kitchin, Lord Sales JJSC) 9 August 2021

Reflective loss – Cayman Islands – Shareholders

The Privy Council has provided further guidance on the operation of the reflective loss rule, following its decision in *Sevilleja v Marex* last year. The principal issue in this case was the time at which the reflective loss rule falls to be applied. The Privy Council reiterated that the reflective loss rule is a substantive rule of law, and not a rule of procedure.

Primeo had made direct investments with BLMIS (which operated a Ponzi scheme) for a period of time before its investments were restructured into an indirect investment in BLMIS via a fund called Herald. The lower courts had accepted that the time at which to consider the reflective loss rule was the time at which the claim was brought. By that time, Primeo had become a shareholder in Herald (which had its own claims against the respondents). Rejecting that view, the Privy Council concluded that the applicability of the reflective loss rule needs to be considered at the time the loss is suffered. Based on assumptions the Board was asked to make, Primeo's loss was suffered in a personal capacity at an earlier stage and had nothing to do with Herald, such that it could not be said to be loss suffered "in its capacity as shareholder" (a requirement emphasised in *Marex*). At the time Primeo suffered loss it was not subject to any agreement to "follow the fortunes" of any company, which is the foundation and justification for the reflective loss rule.

Primeo also submitted that the reflective loss rule could not apply because Herald had no claim of its own against one of the respondents, such that that respondent could not be regarded as a common wrongdoer in the requisite sense of the rule. The Court of Appeal had rejected that submission based on a reading of inter-locking contracts which the respondents were party to. The Privy Council overturned the Court of Appeal and accepted Primeo's argument. It was an inherent part of the reflective loss rule that it only applies to exclude a claim by a shareholder where what is in issue is a wrong committed by a person who is a wrongdoer both as against the shareholder and as against the company. ■

[Tom Smith QC, Richard Fisher QC, William Willson, Toby Brown, Robert Amey]





Company Law

Taylor Goodchild Ltd v Taylor

[2021] EWCA Civ 1135 (Newey and Moylan LJJ, Sir Nigel Davis) 23 July 2021

Unfair prejudice – Abuse of process – Henderson v Henderson

A shareholder, G, had obtained an order in unfair prejudice proceedings against another shareholder, T, pursuant to which he was able to buy T's shares. The company subsequently sought relief against T in respect of matters which were relied on in support of the unfair prejudice petition. Snowden J agreed to strike out the application as an abuse of process.

At the trial of the unfair prejudice petition, the Judge (Barling J) found that the affairs of the company had been conducted in a way which unfairly prejudiced G, and that T's actions represented clear breaches of fiduciary and statutory duties. Subsequently, the company (now wholly owned by G) made claims against T, and against a vehicle set up by T ("**STL**"), which had not been a party to the unfair prejudice proceedings. The company's claims sought, among other matters, relief against STL in respect of sums received for work which the company had undertaken on files taken by T, and an account of profits on work carried out by STL when T was still a director of the company.

Having considered the authorities, Newey LJ noted that it had previously been doubted whether it was appropriate to seek an order for payment or restitution to the company on an unfair prejudice petition, if the essence of the complaint was not a mismanagement of the company but of misconduct by the director. It could therefore not be suggested that a petitioner on an unfair prejudice petition normally includes in the relief he seeks an order compensating the company for the relevant misconduct. It was also not fatal that G had failed to comply with the guidelines in *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260, [2008] 1 WLR 748, in relation to the company's claim. The appeal was allowed, on condition that the company amended its particulars to limit its claims to 50% of their value, to reflect that previously T had a 50% interest in the company, and the valuation that had formed the basis of the buyout order did not include a valuation of the diverted business. ■

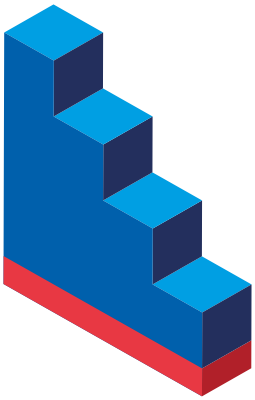
Goknur Gida Maddeleri Enerji Imalet Ithalat Ihracat Tiracet ve Sanayi AS v Aytacli

[2021] EWCA Civ 1037 (Lewison, Coulson, Dingemans LJJ) 13 July 2021

Third party costs orders – Company directors

The question of law in this case concerned the circumstances in which a director and shareholder of an insolvent company may be personally liable for some or all of the company's costs liabilities incurred in litigation pursuant to section 51 of the Senior Courts Act 1981.

Having considered the authorities in some detail, Coulson LJ concluded (without wishing to detract from the broad discretionary nature of the question that the courts must consider) that in order to persuade a court to make a non-party costs order against a controlling/funding director, the applicant will usually need to establish, either that the director was seeking to benefit personally from the company's pursuit of or stance in the litigation, or that he or she was guilty of impropriety or bad faith. Without one or the other in a case involving a director, it will be very difficult to persuade the Court that a section 51 order is just. There was no authority or principle, however, which supported the need for both of the above factors to be present in order to justify a non-party costs order. The Judge had rightly held that the director did not stand to benefit personally from the litigation, and that the allegations of impropriety or bad faith had not been made out against him. The appeal was therefore dismissed.■



Corporate Insolvency

Digested by Daniel Judd and Paul Fradley


Re Provident SPV Ltd

[2021] EWHC 2217 (Ch) (Sir Anthony Mann) 4 August 2021

Schemes of arrangement – Sanction hearing – Special purpose vehicles

A special purpose vehicle company which was set up to assume liability for the debts of two lenders in the Provident Group applied for sanction of a scheme of arrangement with certain of its creditors. The debts arose from alleged mis-selling of consumer loans. The Court held that there had been compliance with the statutory requirements; the single class of creditors had been fairly represented and the majority had acted in a bona fide manner and for proper purposes when voting at the class meeting; the scheme was one that an intelligent and honest man, acting in respect of his interests, might reasonably approve; and there was no other blot or defect in the scheme.

The Court distinguished the recent decision in *Re ALL Scheme Ltd* [2021] EWHC 1401 (Ch), in which Miles J had refused to sanction a scheme of arrangement proposed by a special purpose vehicle which was set up to assume liability for debts arising from mis-selling of consumer loans. The Court held that in *ALL Scheme* there was no intention to wind down the relevant business following the scheme, so it would remain something in which shareholders would retain a potentially valuable interest. In contrast, in the present case, the relevant businesses would be wound down, and any unexpected surplus which did arise would accrue to the benefit of scheme creditors. ■

[Barry Isaacs QC, Adam Goodison, Ryan Perkins]



Re Provident SPV Ltd

[2021] EWHC 1341 (Ch) (Sir Alastair Norris) 22 April 2021

Schemes of arrangement – Convening hearing – Notice

The applicant company applied to convene a single meeting of creditors to consider a proposed scheme of arrangement. The group of which the applicant was part provided short-term credit to individuals. The lenders faced a number of redress claims and absent the scheme the lenders were likely to enter insolvency proceedings. The applicant had been incorporated with the object of promoting the scheme.

The Court held that sending the practice statement letter to creditors and posting it on a dedicated website five weeks before the convening hearing was adequate notice. Every creditor would be offered the same commercial deal; surrender of their claim in return for a right to a share in the compensation fund. There was no reason to treat borrowers and guarantors differently in principle, with guarantors comprising only 0.024% of potential claims. It would be inappropriate to constitute so small a class with a potential power of veto. A single class meeting could be convened. The explanatory statement contained an accessible summary and information would be available on social media and through the company website. The proposal to hold the scheme meeting nine weeks after circulation of scheme documents by email, post and advertisement in three newspapers was adequate. The method for voting at the scheme meeting, which would be assessed by reference to the likelihood and size of a creditor's claim, was sufficient. ■

[Barry Isaacs QC, Tom Smith QC, Adam Goodison, Ryan Perkins]




Corporate Insolvency

Re Hurricane Energy plc

[2021] EWHC 1759 (Ch)
(Zacaroli J) 28 June 2021

[2021] EWHC 1759 (Ch)
(Zacaroli J) 28 June 2021

Hurricane Energy is the first example of the English Court refusing to sanction a restructuring plan under Part 26A of the Companies Act 2006. The Company proposed a plan which would extend the maturity of US$230 million of unsecured bonds and issue the bondholders with new shares giving them 95% of the equity in the Company. The existing shareholders would, therefore, be diluted from 100% to 5%.

At the class meetings, 100% of the attending bondholders voted in favour of the plan, while 92.34% of the shareholders voted against. The Company therefore needed to use the cross-class cram-down mechanism in Part 26A to secure the sanctioning of the plan. It was accepted that condition B was satisfied, namely that the bondholders would receive a return in the 'relevant alternative'.

The issue was whether condition A was satisfied, namely whether the shareholders would not be any worse off under the plan than in the 'relevant alternative'. The Court concluded that condition A was not satisfied. The Judge considered that the 'relevant alternative' had to be identified by reference to that which is most likely to happen if the plan was not sanctioned, but once that has been identified, the question is whether the Court is satisfied that none of the shareholders would in that event be any better off. The Judge held it was necessary to take a "broad approach" to determining whether a shareholder is any worse off as a result of the plan taking into account all incidents of their rights as a shareholder.

It was common ground that in the short to medium term, if the plan was not sanctioned, the Company would continue to trade profitably. The Company's case was that the most likely alternative to the plan was a controlled wind-down of the Company. However, the Judge concluded that while there would likely be a shortfall on the maturity of the bonds, this would be less than the Company's evidence indicated. He considered that the most likely outcome from the 'relevant alternative' was that there would be a return to the shareholders at some point in the future. If the Company could fund the shortfall, there was a realistic prospect that the Company would be able to discharge its obligations to the bondholders, leaving assets with at least potential for exploitation. This was sufficient to defeat the contention that the shareholders would be no worse off in the relevant alternative than under the plan.

While the issue did not arise for determination, the Judge also noted that had it been necessary to exercise the Court's discretion to sanction the plan, he would have refused to do so. The Company was profitable and was anticipated to remain profitable for at least a year. Notwithstanding the projected shortfall on the maturity of the bonds, the size of that shortfall meant there was reasonable possibility that measures (such as refinancing) could be taken to bridge that gap. The plan would have immediately removed all but a fraction of the shareholder's equity, and would deprive them of any potential upside which could be generated from future trading combined with steps the new board might legitimately take to address the repayment of the bonds on maturity. If actual performance and steps taken by the board to improve the financial outlook did not improve matters, there was a reasonable basis to believe that a restructuring could be undertaken at a later date. ■

[Tom Smith QC, Stephen Robins, Matthew Abraham, and Ryan Perkins]




Emerald Pasture Designated Activity Co v Cassini SAS

[2021] EWHC 2443 (Ch)
(HHJ Kramer) 27 August 2021

Creditor rights to information – Foreign insolvency processes – Declaratory relief

The Court had previously determined that the English courts had jurisdiction to hear the claimant's claim for declaratory relief regarding the obligations of a debtor, in French "Sauvegarde" ('safeguarding') insolvency proceedings, to provide information to the claimant under a senior facility agreement. At trial, the Court considered two questions. First of all, what was the French law as to the enforceability of information provisions in a loan contract where safeguarding proceedings were commenced after the creditor had paid over the loan monies? Secondly, and if the provisions of the senior facility agreement continued to be enforceable in France, should the Court exercise its discretion to grant declaratory relief?

The opening of French safeguarding proceedings stayed or prevented legal action seeking payment of sums of money, rescission for non-payment, enforcement over the debtor's assets, and payment of debts prior to the safeguarding proceedings. However, the French law experts disagreed as to whether contractual rights requiring provision of information were captured by this prohibition and survived into the safeguarding proceedings. This, in turn, required the Court to consider as a matter of French law whether the consequences of safeguarding proceedings on French contractual obligations in the Commercial Code represented the exception or the rule, whether or not obligations to provide information were 'ongoing' or 'non-going' obligations, and whether the safeguarding proceedings operated to terminate automatically (or, at least to suspend the enforceability of) a 'non-ongoing' contract.

After considering the expert evidence, and following cross-examination, the Court resolved that the authorities and academic writings clearly pointed to the conclusion that obligations to provide information were not excepted by the French law provisions addressing the consequences of safeguarding proceedings. The provisions continued to be enforceable in France to that end. The Commercial Code was intended to be a clear statement of the rules regarding safeguarding, and no clear derogation existed from the principle that promises ought to be kept. Nor was there evidence that demonstrated that the principle was displaced in the case of non-ongoing contracts. The result was that the information provisions in the senior facility agreement continued.

The remaining issue was then whether the Court should exercise its discretion to grant the declaratory relief sought as to the obligations of the debtor. There was a real and present dispute, and the arguments had been fully and properly put (including at an adversarial hearing lasting four days). The senior facility agreement was governed by an English jurisdiction clause, meaning that a ruling of the English Court was appropriate, particularly following the prior decision that English Courts had jurisdiction. The Court rejected suggestions that information had already provided to the claimant, that other parties should have been joined to the claim, that a declaration would not have substantial effect, that a declaration as to foreign law should not be made following an expedited trial in England and Wales, or that a declaration would interfere with the French safeguarding proceedings. The Court granted the relief sought. ■

[David Allison QC, Daniel Bayfield QC, Matthew Abraham, Ryan Perkins]




Corporate Insolvency

Emerald Pasture Designated Activity Co v Cassini SAS

[2021] EWHC 2010 (Ch) (Zacaroli J) 16 July 2021

Conflict of laws – EU Insolvency Regulation – Insolvency related actions

The claimant lender applied for declarations concerning the first defendant borrower's obligations to provide information to the lender's agent under a senior facility agreement. The senior facility agreement was governed by English law and contained an English exclusive jurisdiction clause. The borrower had entered into insolvency proceedings ("**Sauvegarde**") in France, which were main proceedings under the Recast EU Insolvency Regulation. The borrower responded that the effect of the French insolvency proceedings was to render its obligations under the senior facility agreement unenforceable and sought a declaration that the English Court lacked jurisdiction because the claim was an insolvency related action within Article 6(1) of the Recast EU Insolvency Regulation, with the effect being that the French courts had jurisdiction.

The Judge rejected the borrower's contention and concluded that the English Court had jurisdiction over the lender's claim for declaratory relief. The decisive criterion was the legal basis of the action, not the procedural context of which it formed part, or the nature of the issue the Court will be required to determine. The Court had to consider whether the "*basis of the action*" found its source in the rules specific to insolvency proceedings. The Judge held that in the instant case it did not. The declarations sought were designed to answer the question of the enforceability of the contractual rights in the senior facility agreement. The claim could not be distinguished from a claim for specific performance of the borrower's obligations to provide information – and both were based on obligations in the senior facility agreement, the source of which were in the ordinary rules of general civil law and not specific rules relating to insolvency. ■

[Daniel Bayfield QC, Matthew Abraham, Ryan Perkins]



Al Jaber v Mitchell

[2021] EWCA Civ 1190 (Asplin, Carr LJJ, Sir Nicholas Patten) 30 July 2021

Private examinations – Immunity from suit

The Court of Appeal was required to determine whether immunity from suit afforded to participants in court proceedings applies to statements made under oath and by witness statement by an examinee in the course of a private examination conducted under section 236 of the Insolvency Act 1986. The examination of the first appellant in the instant case had been conducted by the joint liquidators of a BVI company, who had been recognised as foreign representatives under the Cross-Border Insolvency Regulation 2006. The liquidators had commenced proceedings in England against the appellants on the basis of breaches of statutory and fiduciary duty, breach of trust and negligence in their actions as directors of the BVI company. During the course of the trial of this claim, the first appellant made a number of corrections to statements he made in the examination and in witness statements in the claim. The liquidators then applied to re-re-amend their points of claim.

The Court of Appeal held that statements made during the course of a private examination were protected by immunity from suit. The existence of immunity had to be judged in the context in which it arose. It depended on, amongst others things, the person's role in the proceedings, whether they were exercising that role when the statement was made, the purpose of the statement, the nature of the proceedings in which the statement was made (or to which it was connected) and the extent of the connection between the statement and the proceedings. The Court considered the nature of a private examination conducted under section 236, and concluded that it was *sui generis* – it did not involve the judge being required to determine the outcome of any dispute, and its purpose was to enable the officeholder to obtain information to fulfil their statutory duties. The fact a statement was made in court was not conclusive, but was a relevant factor which militated in favour of immunity.

The private examination had to be considered in the context of the wider liquidation and not as a standalone process; it was part of the wider judicial proceeding. The Court relied on *Mond v Hyde* [1999] QB 1097, in which it was held that a statement made by the official receiver acting in the course of insolvency proceedings, and within the scope of his statutory powers and duties, is covered by the principle of immunity from suit. The approach in *Mond*, while authority only in relation to the immunity of the officeholder, was an important factor in considering the immunity of the examinee because it emphasised the role of examination in the wider court-supervised liquidation. It would be "*very curious*" if the officeholder enjoyed immunity from suit in relation to anything they said in the course of a private examination, but the examinee did not. Moreover, affording immunity to examinees was desirable from a public policy perspective: it may encourage the examinee to speak freely and would not materially undermine the principle that those who suffered a wrong should have a remedy. ■

Re Amicus Finance Plc

[2021] EWHC 2255 (Ch) (Snowden J) 9 August 2021

An order was made convening meetings of creditors to consider the administrators' proposed restructuring plan in respect of a property finance company where the purpose of that plan was to enable the company to exit administration and return to solvency to be operated as a going concern, and the Court was satisfied that there was sufficient information in the accompanying explanatory statement to enable creditors to take a view on the plan's merits.

In relation to class composition, although the same general principles of class composition applied to Pt 26A plans as applied to Pt 26 schemes, a rigid application of those principles might not always be appropriate in the different context of a Pt 26A plan. The starting point was to identify the substance of the relevant rights possessed by creditors; if those rights were very different pre-plan or in the relevant alternative, or if they would fall to be treated very differently pursuant to the terms of the plan, that would tend to point to a conclusion that the creditors could not consult together with a view to their common interest. In the present case.

Applying these principles, the Court ordered that there be five meeting of creditors: (i) expense creditors; (ii) senior secured creditors; (iii) junior secured creditor; (iv) preferential creditors; and (v) unsecured creditors.

The company had two secured creditors ("**C**" and "**H**"). There was an agreement between the those secured creditors as to the ranking of their security, the effect of which was that C and H had a first equal ranking of debt and related security equal to the sum outstanding to C. Thereafter, H's debt and security ranked junior to that of C. The Court held that although C and H stood shoulder-to-shoulder in respect of their senior debt up to the amount owing to C, there was a clear distinction between their rights thereafter. The difference in existing rights and their treatment under the restructuring plan meant that there was little or no commonality of commercial interest as regarded the holders of those different rights in their capacity as such. To focus on the creditor's identity, rather than the rights they possessed, was not the correct approach. It was, therefore, directed that C and H should form a single class in respect of their respective secured claims up to the value of C's senior debt, and that H should form a separate class in respect of the balance of its claim.

Following the meetings of creditors, the restructuring plan was subsequently sanctioned by an Order of Sir Alistair Norris J which effected a "cross-class cram down" of the senior secured creditors pursuant to section 901G of the Companies Act 2006. Sir Alistair Norris' detailed reasons for sanctioning the restructuring plan are awaited. ■

[Marcus Haywood, William Willson]


Re Amicus Finance Plc

[2021] EWHC 2245N (Ch) (Zacaroli J) 2 August 2021

In the context of the restructuring plan digested above, one of the senior secured creditors, C, applied for specific disclosure of documents in advance of the sanction hearing.

The Court held that the approach to a specific disclosure application in the context of a restructuring plan is to be informed by the purposes of the legislation. Restructuring plans are intended to provide a solution for distressed companies, meaning that first, this will often be against a time pressure, and secondly, the company is likely to have limited resources. Given those pressures, reaching a final determination on issues such as the merits of potential claims against third parties so as to bolster recoveries in the relevant alternative (in this case, a liquidation) by a full blown trial process, though clearly of relevance to the outcome in the relevant alternative, is likely in most cases to be incompatible with the legislative aims.

In those circumstances, the Court held that the test to be applied is whether the disclosure sought is, in all the circumstances, proportionate, taking into account factors such as the urgency of the case, the disclosure that has already been provided, the extent to which further disclosure will assist in resolving issues that need to be determined at the sanction hearing, the burden on the company in terms of time and costs of providing that disclosure, and any delay in making the application.

Applying those principles, the Court refused C application for specific disclosure on the basis that, amongst things, it: (i) lacked precision; (ii) would require searches to made of a large number of documents; (iii) had been late in the day; and (iv) was likely to add little value to the issues the Court was required to decide on the sanction hearing. ■

[Marcus Haywood]

Offshore

Convoy Collateral Ltd v Broad Idea International Ltd

[2021] UKPC 24 (Lord Reed, P, Lord Hodge, DP, Lord Briggs, Lord Sales, Lord Hamblen, Lord Leggatt, Sir Geoffrey Vos (Master of the Rolls)) 4 October 2021

Convoy Collateral Limited ("**Convoy**") brought an appeal seeking clarification on the law of freezing injunctions. At issue were two main questions:

- Whether or not the Court has the power to grant injunctive relief in support of foreign proceedings; and
- Whether that power is exercisable against persons not subject to the territorial jurisdiction of the Court.

Convoy had claimed damages in Hong Kong against various defendants, one of whom was Dr Roy Cho (a Hong Kong resident). In support of the Hong Kong proceedings, Convoy had also applied in the BVI for a freezing injunction against (i) Dr Cho and (ii) Broad Idea International Limited ("**Broad Idea**") – a BVI company in which Dr Cho held a majority stake. Broad Idea was not a party to the Hong Kong proceedings.

While Convoy was initially successful in obtaining a freezing injunction against Dr Roy Cho and Broad Idea in the BVI courts, this decision was subsequently overturned. The Court of Appeal of the Eastern Caribbean Supreme Court held that both freezing injunctions should be discharged. In reaching this conclusion, it overruled Bannister J's decision in *Black Swan Investment ISA v Harvest View Ltd* (BVIHCV 2009/399), and found that the BVI court had no power to grant a freezing order absent a substantive cause of action issued in the BVI.

Convoy appealed against the Court of Appeal's decision, arguing that the long held view expressed by the House of Lords in Siskina (Owners of cargo lately laden on board) v Distos Cia Naviera SA [1979] AC 210 was wrongly decided.

The Privy Council unanimously dismissed Convoy's appeal, finding that there was no factual basis for the granting of a freezing injunction against either Dr Roy Cho or Broad Idea. However, the Privy Council went on to consider the extent to which the BVI court has jurisdiction to grant a freezing order against a non-cause of action defendant where no substantive proceedings are pursued, in the BVI or elsewhere.

By split decision (4:3), a seven-member Board of the Privy Council concluded that granting a freezing injunction is *not* dependent on the existence of a locally justiciable cause of action. This conclusion was reached through an examination of the rationale for injunctive relief. Lord Legatt, with whom Lords Briggs, Sales and Hamblen agreed, observed how the essential purpose of a freezing injunction is to facilitate the enforcement of a judgment [90].

While the existence of a cause of action may be relevant for the purpose of showing that there is sufficient basis for anticipating that a judgment will be obtained, it is not a *sine qua non* for the grant of a freezing injunction. In support of this proposition, the majority of the Board drew attention to the fact that freezing injunctions may be granted *after* a judgment has been obtained, by which time the underlying cause of action will have been distinguished by the doctrine of merger [91]. There is therefore no reason in principle why an application for a freezing injunction must be connected to a locally justiciable cause of action for substantive relief.

Lord Leggatt held at [120] "*... it is necessary to dispel the residual uncertainty emanating from The Siskina and to make it clear that the constraints on the power, and the exercise of the power, to grant freezing and other interim injunctions which were articulated in that case are not merely undesirable in modern day international commerce but legally unsound. The shades of The Siskina have haunted this area of the law for far too long and they should now finally be laid to rest.*" He also noted that it was the importance of the appeal that led the Board, exceptionally, to convening a panel of seven.

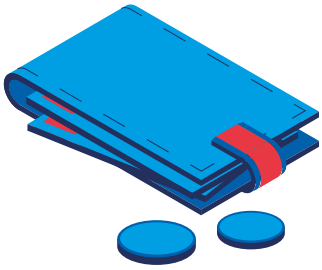
Following an examination of the relevant case law, Lord Legatt concluded (at [101]) that a Court could grant a freezing injunction against a party over whom it has personal jurisdiction provided that:

"*i) the applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;*

ii) the respondent holds assets (or, as discussed below, is liable to take steps other than in the ordinary course of business which will reduce the value of assets) against which such a judgment could be enforced; and

iii) there is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied."

The majority of the Board rejected the need for a domestic cause of action as a prerequisite to the grant of an interim injunction and also made clear that the remedy may be granted in anticipation of a future judgment. ■



Personal Insolvency

Digested by Lottie Pyper

Lyubov Andreevna Kireeva (Trustee and Bankruptcy Manager in Russia of Georgy Ivanovich Bedzhamov) v Georgy Ivanovich Bedzhamov

[2021] EWHC 2281 (Ch) (Snowden J) 13 August 2021

Foreign insolvency proceedings – Common law recognition – Submission to the jurisdiction

The applicant was the Russian trustee in bankruptcy ("**T**") appointed over the estate of Mr Bedzhamov ("**B**"), a former Russian citizen now living and domiciled in England. T was appointed in 2018 in circumstances where B did not have his centre of main interests ("**COMI**") or an establishment in Russia at that time, nor was B present in the jurisdiction at the time. Since B having his COMI or an establishment in Russia were necessary conditions to recognition under the Cross Border Insolvency Regulations 2006 that were not met in this case, T instead sought recognition of the Russian bankruptcy order in England under the common law, together with related relief and an associated application. In the premises, jurisdiction for common law recognition could only be founded if B had submitted to the jurisdiction of the Russian court. Snowden J held that he had, because he had participated in court proceedings in Russian bankruptcy proceedings in such a way that was not limited to simply contesting the jurisdiction of the Russian court. That being so, and there being no grounds to bar the recognition of the Russian bankruptcy order, Snowden J was content to recognise it under common law. However, the effect of this recognition was more limited than T applied for. Snowden J held that there was no support for the proposition that there is a common law power to make an order vesting immovable property in a foreign trustee or authorising them to sell it for the benefit of the foreign insolvency, and accordingly declined to make the associated relief sought. For the same reason, he also dismissed the related application, as it concerned the ability of B to dispose of one of his UK properties. ■

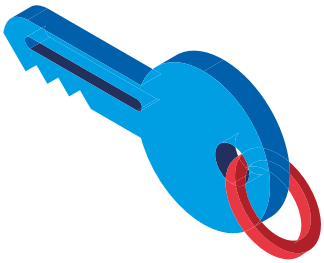
[Stephen Robins; William Willson]

R (on the application of Wajid Hussain) v Kirklees Borough Council

[2021] EWHC 2310 (Admin) (Knowles J) 18 August 2021

Judicial review – EU legislation – Statutory demands

The claimant ("**C**") sought judicial review of the decision of the defendant council ("**D**") refusing C's application for a grant under the Retail, Hospitality and Leisure Grant Fund ("**RHLGF**") on the basis that C was an "undertaking in difficulty." The RHLGF was created in order to support businesses during the Covid-19 pandemic. It is a form of state aid and so was subject to EU law when D's decision was made. The definition of an "undertaking in difficulty" in the relevant EU legislation (in particular Article 2(18) of EU Regulation No 651/2014) included circumstances where "*(c) the undertaking is subject to collective insolvency proceedings or fulfils the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors*". The question was whether C satisfied this definition in circumstances where a statutory demand had been presented against him and had not been set aside, but no bankruptcy proceedings were yet in existence. Knowles J held that the statute was clear that there was no requirement for an entity to actually be in collective insolvency proceedings in order to satisfy the criteria, and therefore the existence of an unsatisfied statutory demand was sufficient to make C an "undertaking in difficulty" for these purposes. C's application was therefore dismissed. ■



Property and Trusts

Digested by Madeleine Jones

Dixon Coles & Gill v Baines

[2021] EWCA Civ 1097 (Asplin, Nicola Davies LJJ, Sir Timothy Lloyd) 20 July 2021

Limitation – Partnership – Breach of trust

The Court of Appeal considered when a trustee was to be considered "party or privy to" co-trustee's fraudulent breaches of trust for the purpose of section 21(1)(a) of the Limitation Act 1980 (which provides that there is no limitation period under the 1980 Act for an action by a beneficiary under a trust in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy).

The Court of Appeal held that a co-trustee is not to be treated as party or privy to another trustee's fraudulent breaches of trust unless facts are alleged and proved which show the co-trustee to have been implicated in the frauds in some way.

On the facts of this case, although there had been a fraudulent breach of trust by a partner in a law firm for which two innocent co-trustees, also partners in the firm, were jointly and severally liable under the Partnership Act 1890, this in itself did not render the innocent co-trustees "party or privy" to the guilty partner's fraud for the purpose of the 1980 Act, so that the innocent trustees had a limitation defence to the action against them. ■

Atkinson v Varma

[2021] EWHC 2027 (Ch) (Michael Green J) 20 July 2021

Unjust enrichment – Change of position

Michael Green J considered an appeal against a judgment of an Insolvency and Companies Court Judge. The ICC Judge had dismissed the claim of the liquidators of a Company against a number of defendants, the Respondents to this appeal. The Company had been incorporated as a vehicle for a project establishing a new hotel in Bristol, but investors' funds were misappropriated and the hotel never came to be; however, this fraud was not the subject of the instant proceedings.

These proceedings focused on a payment of £2 million by the Company to one Respondent, referred to as SVJ, the son of a de facto director of the Company. The liquidators contended that SVJ had been unjustly enriched by this. The defendants' case was that SVJ's father had received some diamonds as executor of his own mother's will with instructions to sell them and give £2 million of the proceeds to SVJ, that the diamonds were sold to the Company for over £4 million and £2 million of this was paid to SVJ, which he received on the understanding this was an inheritance to which he was entitled.

The Appellant liquidators appealed the Judge's rulings that SVJ was not unjustly enriched by receipt of £2 million from the Company and that SVJ could rely on a change of permission defence.

The first instance Judge accepted that the consideration paid by the Company for the diamonds was the traceable proceeds of misappropriated Company money. He held that SVJ did not have the knowledge that the £2 million was the traceable proceeds of a fraud so no knowing or unconscionable receipt claim was established, but instead accepted that SVJ believed the inheritance explanation. He held that the unjust enrichment claim failed.

Michael Green J allowed the liquidators' appeal on this point. The Judge had not made any factual finding that the story about the sale of the diamonds was in fact true and his finding that the £2 million was misappropriated Company money was incompatible with this money being consideration in the supposed sale. Given this, the Judge had been wrong to say that SVJ had "given something in return" for the £2 million, namely release of his father's obligation to account for his inheritance. It could not have been proved that SVJ had given this if it had not been proved that the diamonds and inheritance really existed. Since there had been no proof or finding of SVJ having "given something in return" for the £2 million, the traceable proceeds were in his hands and the circumstances made it unjust for him to keep them (despite the innocence of his state of knowledge) so that the unjust enrichment claim had to succeed.

However, Michael Green J rejected the liquidator's contention that the Judge had been wrong to find that SVJ could rely on a change of position defence (having lost the £2 million in failed investments which he would not have made had he not received the £2 million). Since the Judge had found that SVJ received the funds innocently, it did not assist the liquidators to try to argue that the Company's creditors were somehow "more innocent". ■

School Facility Management Ltd v Governing Body of Christ the King College

[2021] EWCA Civ 1053 (Nicola Davies, Popplewell, Dingemans LJJ) 12 July 2021

Restitution – Counter-restitution – Change of position

The Appellant school had entered into a hire contract for the construction and hire of a modular building to act as the school's sixth form. The lease was assigned from the Second to the First to the Third Respondent. The Appellant failed to make certain payments under the lease, but used the building for several years.

The Respondents claimed against the Appellant for payments due under the contract. The Appellant argued that the contract had breached a statutory requirement for the consent of the secretary of state to be obtained for borrowing for the purposes of the Education Act 2002, so that it was ultra vires and void. The Court accepted this argument, but held that the Appellant had been unjustly enriched since it had occupied the building for some years without paying rent. The Appellant counter-claimed in unjust enrichment for the return of payments made under the contract. At first instance, the Court agreed with the Appellant that the contract was ultra vires and void, but accepted the Respondents' defence to the counter-claim of change of position, since the funds had been spent on the acquisition and construction of the building.

The Court at first instance held that the Appellant was liable to pay the Respondent a sum equal to the market value of its occupation of the premises in the period during which it did not pay rent. The Respondent did not have to give credit for the sums paid by the Appellant under the contract because these were met by the change of position defence.

The appeal concerned whether the principle of counter-restitution (also known as restitutio in integrum – the principle which requires a party seeking restitution for unjust enrichment to give credit for benefits received) meant that the Respondent should give credit for the sums paid by the Appellant under the contract when assessing the sum due from the Appellant.

The analysis to be performed in unjust enrichment was set out by Lord Steyn in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1991] 1 AC 221, 227. It comprises four questions: (1) Has the defendant benefited in the sense of being enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences?

The Appellant argued that these four questions must be taken in order, and that the principle of counter-restitution falls to be applied at the outset of the unjust enrichment analysis under the first question, and the defence of change of position only at the end. If this were right, the benefit received by the Appellant (occupation of the premises without paying rent) is to be valued at the outset taking into account any benefits received by the Respondent (payments by the Appellant under the contract), so that the Appellant's benefit is net of the Respondent's benefits. The Respondent's change of position defence would then fall away on the facts of this case because this net sum is a sum due from the Appellant to the Respondent.

The Court of Appeal rejected the Appellant's analysis. Lord Steyn's analysis was not intended to be rigidly imposed in the manner proposed by the Appellant, and counter-restitution does automatically 'trump' change of position.

As to what test is to be applied in determining whether particular benefits enjoyed by the claimant must be taken into account in its claim against a defendant under the counter-restitution principle, the Court of Appeal held that it was too simplistic to say that all benefits provided in each direction under a void contract must generally be taken into account. Benefits passing in one direction under a contract do not necessarily have any relevant connection with particular benefits passing in the other direction. Conversely, benefits under separate transactions may engage the principle of counter-restitution. Where equitable set-off would apply to separate transactions, the principle of counter-restitution will also apply. ■

Property & Trusts

Dargamo Holdings Ltd v Avonwick Holdings Ltd

[2021] EWCA Civ 1149 (Asplin, Carr LJJ, Sir Timothy Lloyd) 28 July 2021

Unjust enrichment - Contract

The Court of Appeal dismissed an appeal against Picken J's dismissal of an unjust enrichment claim.

The Appellants had paid over $950 million under an SPA. The SPA document itself identified the basis for the payment as the transfer of certain shares, which had been transferred. However, the Appellants claimed in unjust enrichment for the return of $82.5 million on the ground of failure of basis, since they had understood this portion of the consideration to be referable to the transfer of other assets, not identified in the written contract, and these assets had never passed.

The Court of Appeal held that the parties had identified their bargain in the SPA, which made clear that all that had to be transferred in return for the $950 million was the shares. There was simply no obligation for the Respondents to have transferred any other assets. The contract's validity could not be and had not been impugned.

"In such circumstances, there is no scope for the law of unjust enrichment to intervene by reference to a basis which is not only alternative and extraneous, but which also directly contradicts the express contractual terms." ■

R v Seed

[2021] EWCA Crim 1198 (Dingemans LJ, Soole J, Judge Michael Chambers QC) 30 July 2021

Stolen goods – Thief's possessory interest

In this criminal appeal, the Court of Appeal considered a thief's proprietary interest in stolen goods in the police's possession. Sections 6 and, 7 of the Proceeds of Crime Act 2002 ("**POCA**") enable a court to make a confiscation order against a defendant who has benefitted from particular criminal conduct; the amount the defendant will be required to pay under the order (the "recoverable amount") is the total value of the defendant's benefit from his criminal lifestyle or conduct unless the "available amount" calculated pursuant to s. 9 of POCA is less than this. Section 9 provides the "available amount" is "*the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority [as defined]*" and the total of the values of any tainted gifts.

The Appellant in this case argued that where the property he had stolen was in the hands of the police it was not part of the "*free property then held by the defendant*" for the purpose of calculating the "available amount" under s. 9.

The Court of Appeal rejected this argument. Section 84 of POCA provides that property is held by the person if they have an interest in it, including a right to possession. At common law a thief has a possessory title to stolen property which is good against the world (including the police) save for its rightful owner. The police were exercising a power to seize and retain the jewellery under the Police and Criminal Evidence Act 1984 ("**PACE**") – this was a temporary right to retain property for a specified statutory property, which suspended the Appellant's possessory right to the jewellery but did not give the police a better title to it than the Appellant. At common law the Appellant could call for the return of any unclaimed stolen jewellery once the police no longer required it under PACE. This gave the Appellant a contingent right to possession which satisfied s. 84 of POCA. The value of the jewellery in the police's hands was therefore to be taken into account when calculating the "available amount" for the confiscatory award to be made against the Appellant. ■

‘An unrivalled collection of the best talents currently at the Bar’

LEGAL 500

Mediation in the Context of Cross Border Insolvency Disputes

As part of the Singapore Convention Week from 6-10 September 2021, INSOL International organised an event entitled "The UNCITRAL Cross Border Model Law and Mediation: Panaceas for International Restructurings?" Organised by the Singapore Ministry of Law, the Singapore Convention Week brought together top practitioners and headline makers in the international dispute resolution scene. Across the week-long series of activities, legal practitioners, business executives and government officials from around the world had the opportunity to hear from thought leaders in the field of dispute resolution, and glean practical insights on the latest innovations and trends in alternative dispute resolution to serve the fast evolving needs of businesses.

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Introduction

The focus of this paper is the use of mediation as a tool to assist in the resolution of cross-border insolvency disputes. In particular, reference will be made to the use of legislation enacted by various States that has adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (the Model Law).

Problems have always arisen when a debtor has assets or liabilities in two or more different States, particularly if it has been placed in a collective insolvency regime in at least one of them. In such circumstances, there are strong policy reasons to co-ordinate the efficient realisation of assets for the benefit of all creditors, wherever they may be.

Historically, there have been tensions in identifying applicable law and the circumstances in which the laws of one State will prevail over those of another. Similar problems arose in identifying the most appropriate forum to deal with cross border insolvency issues. While procedures were available to assist in the resolution of such disputes, they were relatively blunt instruments. In the old British Empire days, the order in aid procedure was developed[1]. On a broader basis, the doctrine of comity gained traction[2]. The underlying policy rationale for the procedures was the "equitable, orderly, and systematic" distribution of assets of a debtor in different States. The "haphazard, erratic or piecemeal" realisation and distribution of assets was to be discouraged[3].

Over time, attempts to co-ordinate the realisation of assets and distributions to creditors in different States became more sophisticated. A series of principles were developed and statutory provisions introduced by various States with an intention to simplify the process and to promote predictability of outcome[4]. Some States began to move from a "territorialist" approach to one that has been described as "modified universalism". It is now generally accepted that there is a common law principle of "modified universalism"; at least one which provides a common law power to assist foreign winding up proceedings so far as a domestic court properly can. Recently, the Privy Council has confirmed the principle to be subject to two exceptions: first, it is subject to "local law and local public policy"; second, the court providing assistance "can only ever act within the limits of its own statutory and common law powers"[5].

In the early 1990s, attempts were made to encourage court to court communications to improve the ability to co-ordinate proceedings. The first recorded example of Judges in different States communicating with each other for that purpose seems to be the insolvency of Maxwell Group Ltd. Mr Justice Hoffmann, in London and Judge Tina Broznan, in New York, were able, with the assistance of counsel, to put together a form of protocol under which the courts in New York and London exercised specific jurisdiction. Those initial, yet tentative, steps revealed a need for something more formal to be put in place to deal with what were then large scale insolvencies arising (particularly) out of the 1987 sharemarket crashes and the enhanced ability to transfer money across borders instantaneously through digital means.

This led to work being undertaken by UNCITRAL. Using its well-tested procedures for achieving consensus on international instruments where different States were faced with common legal problems. That led to promulgation of the Model Law.

The Model Law

UNCITRAL's project was initiated in 1995. The goal was to develop a legal instrument relating to cross border insolvency. In the prelude to the first meeting of the Working Group on Insolvency Law (Working Group V), a series of judicial colloquia were held, the first in 1994. The Model Law emerged from that process. It was adopted by the Commission on 30 May 1997. As a Model Law (by contrast with a convention), it was open to States that wished to incorporate the model to adopt it completely, or to modify its terms or by deleting some provisions.

The Model Law is built on four pillars. They are:

(a) **Access**: The right for a foreign insolvency representative to access the courts of a State that provides assistance under its provisions[6].

(b) **Recognition**: Recognition of the foreign proceeding in the State providing assistance[7].

(c) **Relief**: The ability of a court in the State providing assistance to grant relief to the foreign insolvency representative to protect assets of the insolvent entity in that jurisdiction and to facilitate the orderly realisation of those assets and distributions to creditors[8].

(d) **Co-operation**: An express obligation on all insolvency representatives and courts in different States to co-operate with each other to achieve the goals of the Model Law[9].

This paper concentrates on those parts of the Model Law that mandate co-operation between

1. For example, see *Callender Sykes & Co v Colonial Secretary of Lagos* [1891] AC 460 (PC).

2. For example, see *Hilton v Guyot* 59 US 113 (1895) and *Cunard Steamship Co Ltd v Salen Reefer Services* AB 773 F 2d 452 (1985) (2nd Cir).

3. *Cunard Steamship Co Ltd v Salen Reefer Services AB* 773 F 2d 452 (1985) (2nd Cir), at 458.

4. For example, s 304 of the US Bankruptcy Code, before adoption of Part 15 of that enactment.

5. *Singularis Holdings Ltd v PriceWaterhouseCoopers* [2014] UKPC 36 at paras 15–19 (Lord Sumption). See, to similar effect, *Re HIH Casualty and general Insurance Ltd* [2008] 1 WLR 852 (in which Lord Phillips, Lord Hoffmann and Lord Walker accepted the principle) and *Rubin v Eurofinance SA* [2013] 1 AC 236 (UKSC), in which it was accepted by Lord Collins, Lord Walker and Lord Sumption.

6. Model Law, arts 9–14.

7. Ibid, arts 15–18.

8. Ibid, arts 19–24.

9. Ibid, arts 25–27. Articles 28–32 deal with the ancillary questions arising out of concurrent collective insolvency regimes.

the courts of the State that is being asked to provide assistance and foreign courts and representatives. Those obligations are set out in arts 25–27.

Article 25 includes the possibility of direct communication between a court of one State and the court of another. Articles 25 and 26 make it clear that co-operation is to be "the maximum extent possible". Article 27 identifies five (non-exhaustive) means by which co-operation may be implemented; namely,

(a) The appointment of a person or body to act at the direction of the court;

(b) Communication of information by any means considered appropriate by the court;

(c) Co-ordination of the administration and supervision of the debtor's assets and affairs;

(d) Approval or implementation by courts of agreements concerning the co-ordination of proceedings; and

(e) Co-ordination of concurrent proceedings regarding the same debtor.

The UNCITRAL Practice Guide on Cross border Insolvency Co-operation published in 2010, explains the purpose of art 27(a) as follows[10]:

2. Such a person or body may be appointed by a court to facilitate co-ordination of insolvency proceedings taking place in different jurisdictions concerning the same debtor. The person may have a variety of possible functions, including acting as a go-between for the courts involved, especially where issues of language are present; developing an insolvency agreement; and promoting consensual resolution of issues between parties. Where the court appoints such a person, typically the court order will indicate the terms of the appointment and the powers of the appointee. The person may be required to report to the court or courts involved in the proceedings on a regular basis, as well as to the parties.

How can mediation (in the broadest sense of the term) be used in a manner that will promote the goals of co-operation and co-ordination to which the Model Law refers? We consider that question in conjunction with the availability in States that have ratified the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention), approved by the General Assembly of the United Nations on 20 December 2018.

The use of mediation

In an article published in 2017[11], Nina Mocheva and Angana Shah surveyed a growing use of mediation in the context of insolvency proceedings. Among other things, they considered the use of mediation in support of facilitation of a restructuring plan among the debtor and multiple creditors; and to assist resolution of contested issues within a collective insolvency proceeding.

As to the latter, the article drew on examples from well known international insolvencies. Relevantly, examples were provided from the bankruptcies of Lehman Brothers, MF Global, General Motors, and Nortel. The first three demonstrate how the mediation process worked well. Nortel is a salutary reminder of what can happen when the process fails. Gratefully adopting the summaries provided by the authors of the article, the examples given are[12]:

(a) When Lehman Brothers filed for bankruptcy in 2008, there were 1.2 million derivative transactions with 6,500 counterparties. Lehman obtained permission from the US Bankruptcy Court to mediate those disputes. According to a February 2013 report filed with the Court, Lehman was able successfully to reach settlement in 93 of 98 mediated cases.

10. *UNCITRAL Practice Guide on Cross border Insolvency Co-operation* published in 2010 at page 18, para 2.

11. Nina Mocheva and Angana Shah, *Mediation in the Context of (Approaching) Insolvency: A Review on the Global Upswing* (2017) 14 TDM 1.

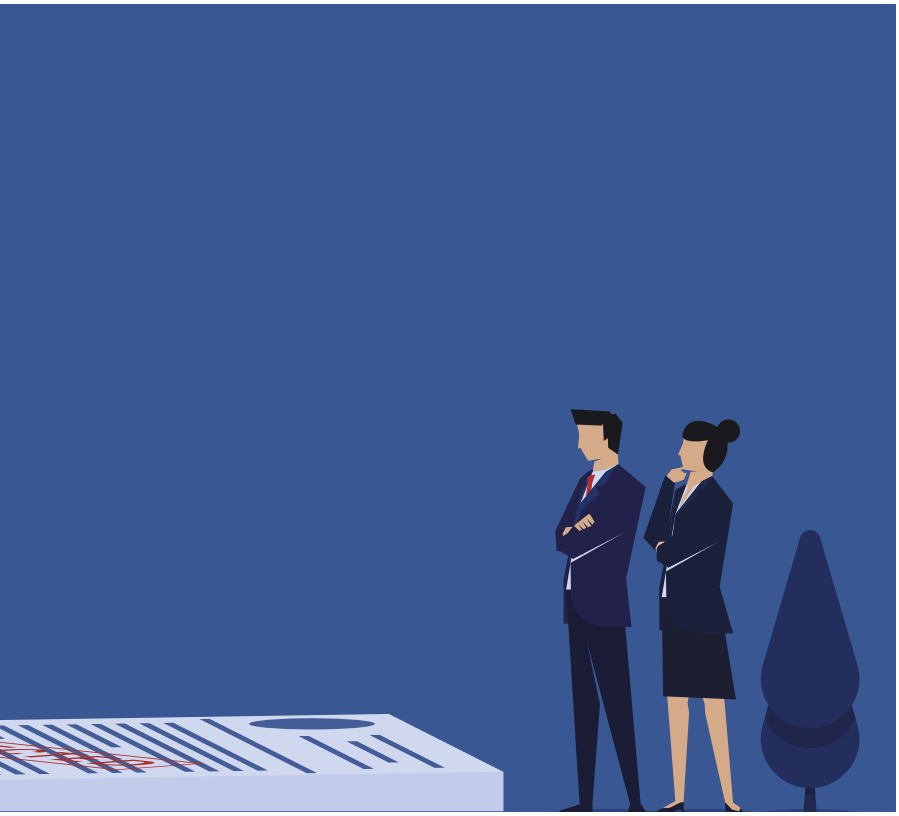
12. Ibid, at 9-10.

That resulted in a sum of $1.39 billion being made available to creditors

(b) The Bankruptcy Court judge for MF Global encouraged mediation in respect of affiliate companies in the United States and the United Kingdom that had cross claimed against each other, with the prospect of protracted litigation. The disputes were resolved following mediation with MF Global's creditors receiving a total of $1 billion in distributions.

(c) A post-bankruptcy claim by a hedge fund in the General Motors bankruptcy threatened to jeopardise an approved restructuring plan. The hedge fund creditors wished to litigate a $3 billion claim, which would have had the effect of unwinding a large transaction that occurred at the time of the bankruptcy filing. The claim was referred to mediation. The plaintiffs agreed to settle for one half of their claim, allowing an increased recovery for other creditors in a sum of about $50 million.

(d) Nortel's assets were sold for $7.5 billion but affiliates in the United States, Canada, United Kingdom and France could not agree on how the realisations should be distributed. Mediation was encouraged. Multiple attempts at mediation failed. In the end, the issues wer determined through litigation; including decisions of the Superior Court of Ontario and Bankruptcy Court for Delaware after a joint hearing had taken place. Sadly, the entire costs of the distribution dispute was something in the vicinity of $1.9 billion.



Although all of those cases involve large enterprises and sophisticated parties, similar issues can also arise in relation to micro, small and medium size enterprises. In those cases, the ability to use mediation to resolve cross-border disputes should be the preferred option. Those involved in deciding what dispute resolution mechanism will be used should always consider the need for proportionality as between the cost of determining a dispute and the amount at stake.

Mediation in aid of a Model Law proceeding

As the examples suggest, there are a number of problems that can arise in international insolvencies which involve numerous parties in many different jurisdictions with contractual arrangements subject to varied governing laws. Some contracts may require arbitration. Others may provide for access to local courts. In circumstances where it is important to corral the disputants and endeavour to achieve prompt outcomes, the appointment of someone, under art 27(a) to facilitate resolution could lead to settlements of the type identified in the Lehman Brothers and MF Global examples. To the extent that not all disputes were resolved, it is possible that issues for resolution could be narrowed and the means by which they could be resolved in court, by arbitration or any other form of binding decision-making process.

The importance of identifying an appropriate mediator or facilitator cannot be overstated. The parties are likely to have an opportunity to make representations on this topic at a hearing convened to determine that question, by reference to art 27(a) of the Model Law. Consideration should be given to the skills of a proposed mediator and whether they should be complemented by specialist knowledge that might be possessed by someone who could act in tandem with the appointee. A court may want to take into account language and cultural considerations. Developing countries may want to encourage the skill to mediate such disputes by pairing a local mediator with an experienced one from another jurisdiction. Sometimes the use of co-mediators will assist, for example, where there are disputes about what law may apply to resolve a substantive dispute (or the forum in which it may be resolved) and appointees from the jurisdictions in question may be able to assist the parties in understanding the risks involved. A slightly more nuanced situation might arise if there were a need to appoint one or more mediators/facilitators (perhaps in different States) to encourage development of an agreed plan that could be put before the Court for approval, subject to any remaining dispute resolution processes.

An unnamed commentator to whom Mocheva and Shah refer in their article put the advantages of consensual forms of dispute resolution in this area as follows[13]:

> In the field of international insolvency is ripe for intervention via mediation. The speed and flexibility of mediation makes it an idea process for multi-national companies who are seeking to avoid the costly and time consuming quagmire of trans-national litigation. Particularly in the current global economic climate [while the article was written in 2017, the point remains important in COVID-19 times], it [is] anticipated that the prominence of international mediation in cross-border insolvency cases is set to increase. It is possible that more alternate dispute resolution institutions may offer specialized rules and panels to administer the mediation of complex cross-border disputes.

The Singapore Convention

Although not yet ratified in many States, the Singapore Convention provides an added incentive to the use of mediation in international insolvencies. A purpose of the Convention is to enable settlements reached through a mediation process (as defined by the Singapore Convention) to be recognised and enforced in another State. If used judiciously, a proceeding under the Singapore Convention could enforce mediated settlement agreements in Convention States in a manner similar to the way in which arbitral awards are enforced under the New York Convention. That would avoid a problematic situation arising in which, for some reason or another, the Court exercising jurisdiction under the Model Law was unable to give effect to the negotiated arrangement.

The term "mediation" is given an extended meaning by art 2(3) of the Singapore Convention:

> … a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("**the mediator**") lacking the authority to impose a solution upon the parties to the dispute.

At the core of the definition is the need for the parties to achieve their own resolution of a dispute, albeit with the assistance of someone who has no power to make a decision. It is the lack of decision-making power that enables a mediator to use flexible processes to achieve resolution – including the ability to talk separately to individual parties or groups with common interests on terms that do not require him or her to disclose what was said to others, at least without approval from that group. This process is often called "caucusing".

Article 1 of the Singapore Convention is directed to the international and commercial elements of a dispute which are central to its scheme and purpose. Article 1(1) states:

> This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("**settlement agreement**") which, at the time of its conclusion, is international in that:
>
> (a) At least two parties to the settlement agreement have their places of businesses in different States; or
>
> (b) The State in which the parties to the settlement agreement have their places of business is different from either
>
> (i) The State in which a substantial part of the obligations under the settlement agreement is performed or
>
> (ii) The state with which the subject matter of the settlement agreement is most closely connected.

Article 1(2) and (3) expressly exclude from the scope of the Convention consumer transactions, disputes relating to family, inheritance or employment law, and settlements that have been approved by a Court that are enforceable as a judgment of the State in which that Court is situated. Further, settlements which have been recorded as consent orders in an arbitral proceeding do not fall within the scope of the Convention.

A way forward

INSOL International's Mediation Colloquium was established in 2019[14]. Although the term "Mediation" is used, the Colloquium extends to all forms of dispute resolution outside of State-established courts. One of the goals of the Colloquium is to encourage the use of mediation and other facilitated dispute resolution mechanisms to enable cross border insolvency disputes to be resolved more efficiently and effectively. That objective takes account of the pressures on State-established courts to deal with a variety of cases and the need to narrow the nature of the disputes that the court must resolve. If that objective were achieved, it is likely that court decisions could be given in a timely and more cost-effective manner.

To encourage the use of mediation (in the broad sense defined by the Singapore Convention), it will be necessary to promote trust and confidence in the process by those stakeholders who will be most affected by it. They include large banks, other finance houses and hedge funds. Without their support, it is doubtful whether a more general use of mediation could be developed.

Ultimately, the goal is to encourage a means by which the courts exercising jurisdiction in collective insolvency proceedings can act more efficiently by using parallel and complementary mediation procedures to achieve resolution of disputes without the need for extensive and costly court involvement. ■

13. Ibid, at 11, with reference to a footnote that refers to an article in the Journal of the American Bankruptcy Institute. Model Law, arts 9–14.

14. References to the Mediation Colloquium should now be to the ADR Colloquium.

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Restrictions on winding up: phase II

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On 9 September 2021, the government announced that restrictions on statutory demands and winding up petitions brought in under the Corporate Insolvency and Governance Act 2020 ("**CIGA**") are due to expire on 30 September 2021 would be replaced with more limited restrictions. The changes have since been formulated in amendments to Schedule 10 to CIGA brought into force by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) Regulations 2021 (SI 2021/1029).

The changes

The new Schedule 10 provides that a creditor may not present a petition during the relevant period unless four conditions, A to D, are met. The 'relevant period' is the six month period from 1 October 2021 to 22 March 2022. The conditions are set out under paragraph 1:

- Condition 'A' is that the creditor is owed a debt (a) whose amount is liquidated, (b) which has fallen due for payment, and (c) which is not an excluded debt. This means that a creditor cannot present a winding up petition in respect of a debt which is unliquidated nor in respect of a future or contingent debt. An 'excluded debt' is a debt in respect of rent, or any sum or other payment that a tenant is liable to pay, under (a) in England and Wales, a relevant business tenancy; or (b) in Scotland, a lease as defined in section 7(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 and which is unpaid by reason of a financial effect of coronavirus.
- Condition 'B' is that the creditor has delivered written notice to the company containing the information prescribed in paragraph 1(4) of Schedule 10, including the statement that if no proposal to the creditor's satisfaction is made within the period of 21 days, the creditor intends to present a winding up petition.
- Condition 'C' is that at the end of the 21-day period, the company has not made a proposal for the payment of the debt to the creditor's satisfaction.
- Condition 'D' is that the debt is £10,000 or more. This limitation applies both to a single creditor presenting a petition and to multiple creditors presenting a petition.

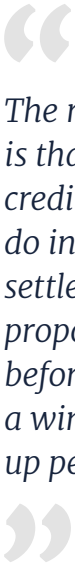
Paragraph 1 (9) makes provision for a creditor to apply to the court for an order (a) disapplying conditions B and C or (b) that the 21-day period in condition C be shortened.

Paragraph 2 prescribes consequential changes to Rule 7.5(1) of the Insolvency (England and Wales) Rules 2016, which require the winding up petition to contain a statement that the requirements under paragraph 1 are met and that no proposals for payment of the debt have been made, or a summary of the reasons why the proposals are not to the creditor's satisfaction.

Comment

As foreshadowed in the announcement, the government has not removed the protections offered to businesses wholesale but has adopted a graduated approach, which aligns with its policy on protecting tenants with rent arrears that have accrued as a result of the pandemic. As set out in the last edition of the Digest, the government extended the moratorium on preventing landlords from forfeiting commercial leases and evicting tenants for non-payment of rent under section 82 of the Coronavirus Act 2020 until 25 March 2022, and the restriction on the use of the Commercial Rent Arrears Recovery scheme until 25 March 2022. The regime for coronavirus related rent arrears is that Landlords and Tenants should agree payment plans, and failing agreement there will be an arbitration procedure. The arbitration provisions have not yet been published, but should focus, not on the right to be paid rent, but what is fair in the circumstances between Landlord and Tenant. The carve out under new Schedule 10 for 'excluded debts' ensures there is consistency in approach.

Another notable feature of the new Schedule 10 is the increase in the debt limit from £750 to £10,000. This is the first increase in the debt limit since the coming into force of the Insolvency Act 1986. This change has not, however, been introduced in relation to statutory demands under section 123(1)(a) of the Insolvency Act 1986.



The reality is that most creditors do invite settlement proposals before issuing a winding up petition...

A creditor may still wish to serve a statutory demand to establish inability to pay, and the requirements of a demand have not changed. However, it is clear from new Schedule 10 that if a creditor is going to serve a statutory demand as a precursor to a winding up petition, it must be for a debt or debts of £10,000 or more or no petition can be presented.

There is now requirement to give the company 21 days' notice of an intention to present a winding up petition. The notice is not simply a demand for payment. The 21 days is for the company to make a proposal for the payment of the debt to the creditor's satisfaction. The language is similar to that used in bankruptcy: under section 271 of the Insolvency Act 1986, a bankruptcy petition may be dismissed if the court is '*satisfied*' that the debtor has made an offer to '*secure or compound for a debt*', the acceptance of which would have required the dismissal of the petition and the offer was unreasonably refused. The key difference under section 271 is that it is the *court* that has to be satisfied the offer was unreasonably refused, whereas under the notice in Condition B, the creditor must be satisfied. This suggests that the test is subjective. There is no mechanism for dealing with a failure to agree, unlike in the case of coronavirus related rent. The absence of any mechanism for dealing with the failure to agree points towards the conclusion that a refusal to accept a settlement proposal is not intended to be a freestanding ground on which the court may dismiss the petition. If the intention was to make the failure to accept a settlement proposal a ground for dismissal of the petition, then one would expect this to have been made clear by express wording, particularly as this would make in-roads into the general principle that a creditor is entitled to a winding up in respect of an undisputed debt. It remains to be seen whether, in a case where the court takes the view that the creditor's refusal of an offer of compromise was unreasonable, it will refuse to wind up in its discretion at an early hearing.

One possibility is that the court may adjourn the petition for a period to give the creditor and the company further time to agree on a compromise.

It appears, therefore, that the provision has been implemented with a view to encouraging the consensual settlement of the debt without the need to issue proceedings. The reality is that most creditors do invite settlement proposals before issuing a winding up petition, so this provision formalises a well-established practice.

Whilst the Government is slowly lifting the moratorium it has not given creditors the right simply to enforce their claims. Lifting the limit to £10,000 means that debtors are only vulnerable to winding up if they owe a relatively significant sum. This will be important for small businesses struggling to refinance Covid period debt. If the threshold is met there is a mechanism, as there is in the case of rent, for compromise between debtor and creditor. Again, this will be important for smaller companies who might be able to reach bilateral compromises, but for whom schemes of arrangement or Part 26A arrangements are unrealistic.

An interesting question is the impact of these provisions on wrongful trading liability. It should follow that directors of companies that might be able to reach compromises, or which do not owe large sums, will not be liable for wrongful trading because there is a prospect that the company will avoid insolvent liquidation[1].

These changes are part of the Government's strategy of easing the moratorium and restoring creditors' rights, but continuing to protect companies hit by debt accumulated over the coronavirus period. It's a difficult balance. On the one hand debtors saddled with coronavirus debt need help managing their way out of the pandemic. On the other, creditors' rights to payment cannot be taken away, and at some point they will need payment to keep their businesses alive. ■

1. The relevant test under section 214(2)(b) of the Insolvency Act 1986 is that *'at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation'*. Further, section 214(3) provides *'The court shall not make a declaration under this section with respect to any person if it is satisfied that after the condition specified in subsection (2)(b) was first satisfied in relation to him that person took every step with a view to minimising the potential loss to the company's creditors as (assuming him to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation) he ought to have taken'*.

Diary Dates

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

28 October 2021

INSOL Asia Masterclass: Torque-in Coins: A look at recent cryptocurrency collapses

Online

11 November 2021

Aspire Sports Quiz Dinner

Lord's Cricket Ground, London

15-16 November 2021

Thought4Leaders: Fire Middle East

Dubai

17-20 November 2021

Annual Bar & Young Bar Conference 2021 Recovery, growth and transformation

In person at the Grand Connaught Rooms, London and online

17 November 2021

South Square / RISA Cayman

Online

18 November 2021

Chambers Bar Awards Dinner

London

24-25 November 2021

Thought4Leaders: Corporate & Commercial Disputes

London

16-17 December 2021

Thought4Leaders: FIRE Elite Circle – Where Insolvency Meets Asset Recovery

Pennyhill Park, Surrey

14-15 November 2022

International Insolvency Institute 22nd Annual Conference

Hong Kong

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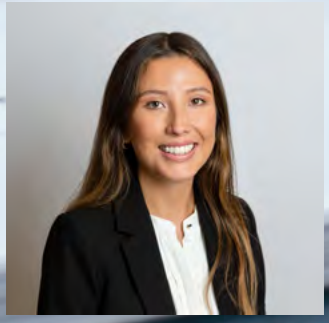
Dovetailing between the Judgments Regulation and the Insolvency Regulation



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Key Points:

- The dovetailing principle dictates that there should be no gap between matters covered by the 1968 Convention on Jurisdiction and the enforcement of Judgments in Civil and Commercial matters and (as recast) in the Recast Brussels Regulation (RBR) – and the Recast Insolvency Regulation (RIR).
- Courts tend to rely on dovetailing to determine that if an action is not within the bankruptcy exception to the RBR, it will be governed by the RIR but this is problematic as in practice the scope of the RIR is uncertain.
- The English scheme of arrangement falls outside the RIR and the RBR.
- Post Brexit, despite the RBR and the RIR no longer having effect in the UK, dovetailing continues to be relevant to understanding the jurisdictional rules applicable to insolvency proceedings.

A. Introduction/Abstract

1. In recognition of the unique features of insolvency law, the EU developed two distinct jurisdictional and recognition regimes for civil and commercial matters on the one hand, and insolvency on the other. The relationship between the two regimes has been controversial, but it is now widely accepted by national courts and the CJEU that the regimes are intended to dovetail into one another. In theory, dovetailing ensures that the regulations constitute a comprehensive regime for all civil proceedings. In practice, it is often unclear which set of rules applies, and whether particular proceedings are within the scope of both regulations, or neither. This article examines the difficulties of dovetailing, and the continued relevance of dovetailing after the UK's exit from the EU.

B. Dovetailing: an overview

2. The separation of rules relating to bankruptcy and winding up from the jurisdictional rules on civil and commercial matters was first detailed in the Jenard Report on the original 1968 Convention[1]. The Report explained that bankruptcy was to be excluded from the scope of the 1968 Convention by the Article 1(2) bankruptcy exception. The rules relating to bankruptcy were to be contained in a separate Convention (which was never enacted but the plans for which formed the basis of Regulation No 1346/2000 and as recast, the Recast Insolvency Regulation ("**RIR**")), due to the "*peculiarities*" of this branch of law.

3. The principle of dovetailing was first set out in the Schlosser Report on the 1968 Convention[2]. Dr Schlosser states that the 1968 Convention and the contemplated bankruptcy Convention were intended to "*dovetail almost completely with each other*". This principle has been adopted by the CJEU in recent decisions (see e.g. *Nickel & Goeldner*, Case C-157/13 and *F-Tex SIA*, Case C-213/10) and by the English courts.

4. In broad terms, the principle dictates that there should be no gap between matters covered by the 1968 Convention, and as recast in the Recast Brussels Regulation ("**RBR**"), and the RIR. More particularly, dovetailing mandates that jurisdiction over matters excluded from the scope of the RBR by Article 1(2)(b), which provides that the RBR does not apply to "*bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings*", will be governed by the RIR.

5. In *Gourdain v Nadler* (Case 133/78) [1979] ECR 733) the CJEU determined that for decisions to be excluded from the 1968 Convention by the Article 1(2) exception, they must (i) derive directly from the bankruptcy or winding-up and (ii) be closely connected with the relevant insolvency proceedings.

6. The dovetailing principle pervades the drafting of the RIR, as provisions such as Article 6(1) RIR are defined in terms of the *Gourdain* formulation of the bankruptcy exception, granting the courts of the Member State in which insolvency proceedings have been opened jurisdiction over actions which derive directly from insolvency proceedings and are closely linked with them.

C. Dovetailing: recent application

7. The English courts have adopted the dovetailing principle when determining which regulation an action is governed by. The courts' usual approach is to consider firstly whether the action falls within the bankruptcy exception. If it does, the courts then rely on the complementary nature of the regulations to find that the action is governed by the RIR. Notably, the courts do not tend to engage in examinations of the scope of the RIR, which, as detailed below, may prove to

1. Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Mr P. Jenard (OJ 1979 C 59/1).

2. Report on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to that Convention and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C 59, p. 71).

be problematic, and particularly so in a post-Brexit landscape.

8. In the recent High Court case *Emerald v Cassini* [2021] EWHC 2010 (Ch), the lender, Emerald, sought declarations as to the obligations of the borrower, Cassini, pursuant to a senior facilities agreement ("**SFA**"). Cassini was subject to a French Sauvegarde, a form of restructuring tool intended to assist debtors in financial distress. Cassini challenged the jurisdiction of the English court to make the declarations sought, arguing that the claim was directly derived and closely connected to the Sauvegarde as the issue in the action concerned the effects of the French insolvency proceedings on its contractual obligations. Article 6(1) RIR therefore mandated that the action must be brought in France, where the insolvency proceedings had been opened.

9. Emerald contended that the action fell within the scope of the RBR, as the correct question for the court was whether the *action itself* derived from the French insolvency proceedings. As the action sought declaratory relief as to the effect of a contract it was a civil and commercial matter, falling outside the Article 1(2)(b) exception for bankruptcy and winding up proceedings.

10. Zacaroli J adopted the dovetailing principle, and it was agreed between the parties that, insofar as possible, proceedings falling outside the scope of the RBR (being within the bankruptcy exception) would fall within the RIR and vice versa. The scope of the bankruptcy exception was as defined in *Gourdain v Nadler.* The judge agreed with Emerald that it is the legal basis of the action which must directly derive from the insolvency proceedings, not the issue which the court is required to determine. The legal basis of Emerald's claim for declaratory relief was the SFA, which existed independently of and prior to the Sauvegarde. The action therefore did not derive directly from the French insolvency proceedings and fell outside the bankruptcy exception. According to dovetailing, as the action was not within the RIR, it would have fallen within the scope of the RBR had it been commenced prior to 31 December 2020.

11. A similar issue was considered in *ING v Santander* [2020] EWHC 3561 (Comm). In that case Santander applied for a declaration that the English courts did not have jurisdiction to hear a claim brought by ING to retain interest received pursuant to various finance agreements from Marme, during the course of Marme's liquidation in Spain. Santander was not a party to the finance agreements, but

ING claimed that it was liable for Marme's obligations via its subsequently acquired subsidiary, Sorlinda, which had successfully bid to assume Marme's assets and liabilities in the Spanish liquidation.

12. The primary jurisdictional issue was, again, whether the claim fell within the scope of the RIR and was excluded from the RBR pursuant to Article 1(2)(b). ING argued that the claim did not derive directly from and was not closely connected to Marme's liquidation, as it was between two solvent entities in respect of contractual obligations which pre dated the liquidation. Santander contended that the legal basis of the claim was the assumption of Marme's liabilities, the nature of which depended on the effects of the liquidation plan in the Spanish insolvency proceedings.

13. Cockerill J held that the claim derived directly from Marme's insolvency, as ING's action was based on liabilities assumed by Sorlinda, and therefore Santander, in the Spanish insolvency process. The scope of Santander's liabilities, and ING's corresponding rights, formed the legal basis of the claim and these were dependent on the application of provisions of Spanish insolvency law as to the effect of the liquidation plan and the Sorlinda bid. As the action fell within the bankruptcy exception in the RBR, dovetailing dictated that it was governed by the RIR.

14. Importantly, Cockerill J rejected an argument that the applicability of the RIR should be determined on the burden of proof. Although introduction of such a rule may have made the division between the regulations easier to predict, it would plainly threaten to undermine the utility of the RIR. Instead, Cockerill J repeated the dovetailing principle, determining that any case would properly fall into either regulation on application of the *Gourdain* test, although recognising that the test may be difficult to apply.

15. The *ING v Santander* judgment emphasises the importance of developing a clear notion of what dovetailing entails, as the principle itself is of relatively little use without a clear demarcation between the two regulations.

D. Jurisprudential issues

16. Courts have tended to avoid considering the scope of the RIR, relying on dovetailing to determine that if an action is not within the bankruptcy exception, it will be governed by the RIR. This is problematic, as in practice the scope of the RIR is uncertain.

17. Article 1(1) RIR provides that the RIR applies to public collective proceedings which are based on laws relating to insolvency. However, recital 9 provides that the insolvency proceedings covered are listed exhaustively in Annex A, and this scope has been adopted by the CJEU (see e.g. *Bank Handlowy w Warszawie SA*, Case C 116/11). Annex A is comprised of the domestic insolvency proceedings submitted by individual Member States for inclusion. The obvious issue with dovetailing is therefore that the bankruptcy exception is not exactly co-extensive with the scope of the RIR, whether that be as determined broadly in Article 1(1) or narrowly in Annex A.

Schemes of arrangement: Mind the gap

18. On the narrow view that the scope of the RIR is determined by Annex A, dovetailing dictates that any proceedings not within Annex A will fall within the scope of the RBR.

19. The first complication is raised by Recital 7 RIR, which states that the mere fact that a proceeding is not listed in Annex A does not necessitate its being within the scope of the RBR. Accordingly, by the terms of the RIR a proceeding could be outside Annex A and simultaneously fall outside the scope of RBR.

20. A potential solution to this problem may be to read Article 1(1) RIR as defining the substantive scope of the RIR. The broader definition would cover insolvency proceedings not included in Annex A, expanding the scope of the RIR to capture those proceedings falling outside both regulations. However, pre insolvency or "hybrid" proceedings demonstrate why this is far from a perfect solution.

21. The paradigm example is the English scheme of arrangement, which is not included in Annex A and are expressly excluded from the scope of the RIR by Recital 16. However, schemes also appear to fall within the Article 1(2)(b) bankruptcy exception, as a judicial arrangement, composition or analogous proceeding, and fall outside the scope of the RBR. Schemes therefore sit somewhere between the two regulations. The practice of the English courts has been to assume that they have jurisdiction to sanction schemes pursuant to the RBR, without deciding the point[3]. However, as detailed below, the courts have been unable to do the same in respect of restructuring plans after Brexit, and the lack of authority as to how to address this apparent lacuna has mandated a somewhat unwelcome return to first principles in respect of the Lugano Convention.

22. A further issue is presented by the language of the RBR, which describes civil claims concerning claimants suing defendants pursuant to contracts. This jars with the nature of schemes of arrangement or similar proceedings. For example, jurisdiction in respect of a scheme cannot be determined (a) pursuant to Article 4 according to the domicile of the defendant, where there is no defendant, or (b) pursuant to Article 21 as proceedings which concern the dissolution of companies, where the object of a scheme is debt readjustment. The RBR toolkit appears entirely unequipped to deal with the particular nature of schemes or similar proceedings.

E. Post Brexit dovetailing

23. The RBR and the RIR ceased to apply in the same form upon the United Kingdom's exit from the European Union, as although the courts' existing jurisdiction to open insolvency proceedings under the RIR was retained, the remainder of the RIR was repealed. However, the decision of the court in *Re Gategroup Guarantee Limited* [2021] EWHC 304 (Ch) sheds light on how dovetailing may be of continued relevance in the post-Brexit landscape.

24. In *Re Gategroup*, Zacaroli J was asked to consider whether the English courts have jurisdiction under the Lugano Convention to sanction a restructuring plan under Part 26A of the Companies Act 2006. The bankruptcy exception in Article 1(2)(b) of the Lugano Convention is in identical terms to the exception in the RBR. A creditor opposing the Plan argued that the exception fell to be construed in the same way as the RBR provision. The creditor advocated for the "narrow" dovetailing principle, meaning any proceeding not in Annex A would be within the scope of the RBR and therefore similarly within the Lugano Convention.

25. As the Lugano exception mirrors the RBR exception, Zacaroli J examined the underlying rationale as detailed in the accompanying reports to the 1968 Convention, noting that the dovetailing principle was described as applying to the 1968 Convention even though the corresponding bankruptcy Convention had not yet been enacted. Accordingly, dovetailing appears to apply to the Lugano Convention as a standalone provision.

26. However, as the judge noted, the narrow conception of the RIR cannot apply to the Lugano Convention in the same way. For parties to the Lugano Convention that have not also adopted the RIR, such as the UK and Switzerland, it simply does not make sense

3. See e.g. *Re Metinvest BV* [2016] EWHC 79 (Ch), per Proudman J at [31]; *Re Algeco Scotsman PIK SA*, per Hildyard J at [47]; *Re Global Garden Products Italy S.p.A* [2017] B.C.C. 637, per Snowden J at [23]-[33].

to define the Article 1(2)(b) exception in terms of Annex A, as those countries are unable to volunteer their domestic insolvency proceedings for inclusion.

27. Considering the wider conception of the RIR, Zacaroli J held that restructuring plans were within the scope of Article 1(1) as collective proceedings based on laws relating to insolvency, in which the assets and affairs of the debtor are subject to court supervision or control. As restructuring plans fall within the scope of the RIR, as broadly conceived, dovetailing mandates that they are excluded from the scope of the Lugano Convention.

28. Although there is a clear justification for rejecting the Annex A scope of the RIR, the positive justification for adopting the broader Article 1(1) scope is unclear and there is notably little case law supporting this interpretation. Further, the outcome of this approach is somewhat counter-intuitive, asparties' inability to submit insolvency proceedings for inclusion in Annex A enlarges the scope of the RIR and therefore, according to dovetailing, limits the jurisdictional and recognition options available to them under the Lugano Convention. This appears to run counter to the rationale for dovetailing, to provide a comprehensive jurisdictional regime with suitable rules for all types of proceedings and provides a forceful reason for dovetailing to no longer apply in the context of the Lugano Convention.

29. However, at present, despite the RBR and RIR no longer having effect in the UK, dovetailing continues to be relevant to understanding the jurisdictional rules applicable to insolvency proceedings. Assuming that *Re Gategroup* is upheld, the continued acceptance of dovetailing in its wider form nullifies the utility of the Lugano Convention in obtaining cross-border recognition of restructuring plans, in the event that the UK is successful in its accession application.

30. The widened scope of the RIR raises questions as to the applicable rules to schemes of arrangement, as not being listed in Annex A would no longer act as a bar to schemes being covered by the regulation. Dovetailing as applied in *Re Gategroup* may dictate that schemes also fall outside the Lugano Convention, meaning parties would be forced to rely on the Model Law or private international law in order to found jurisdiction and obtain recognition. Whilst this is conjectural at present, it is clear that the wider approach to dovetailing could imply significant limitations on the scope of the UK's cross border recognition toolkit. ■

New Tenants *at South Square*

Peter Burgess

Peter is a former solicitor-advocate with prior experience at a magic circle firm and a US law firm, where he worked on banking and finance matters, insolvency and commercial litigation, and international arbitration. Peter graduated with a first-class degree in Ancient and Modern History from the University of Oxford, where he was first in his year. He also holds a first-class LLB from the University of Law, and an LLM from Harvard Law School, where he was awarded the private international law prize.

Before joining South Square, Peter worked as a Judicial Assistant to Lord Sales, Lord Lloyd-Jones, and Lord Hamblen at the Supreme Court of the United Kingdom and the Judicial Committee of the Privy Council. He assisted the Justices on numerous high-profile cases, including *R (on the application of Miller) v The Prime Minister*, on whether the advice given by the Prime Minister to the Queen that Parliament should be prorogued was lawful, *Micula & Others v Romania*, relating to the attempted enforcement of an investment arbitration award against Romania, and *Sevilleja v Marex Financial Ltd*, on the 'reflective loss' principle.

During pupillage, Peter gained exposure to Chambers' core areas of practice, including insolvency and restructuring cases, banking and finance work, commercial litigation, and company law matters. Peter assisted on a wide variety of cases across these practice areas, including *Primeo Fund v Bank of Bermuda & HSBC* and *Nero Holdings Limited v Frep 3 (Notting Hill Gate 3) Ltd & Others*. He drafted advice on points including private international law issues relating to the beneficial ownership of overseas assets and the interaction between freezing injunctions, proprietary injunctions, and orders for a quick sale. Peter also drafted pleadings in a number of matters including a conspiracy claim in a liquidation, a challenge to a company voluntary arrangement, and a misrepresentation claim. ■

Annabelle Wang

Annabelle Wang graduated with a Double First Class degree in Philosophy, Politics and Economics from the University of Oxford, receiving an academic Exhibition and Scholarship. She subsequently completed the Graduate Diploma in Law (GDL), obtaining a Distinction. She was called to the Bar by the Inner Temple, receiving an Exhibition Award.

As a pupil, Annabelle gained exposure to all of Chambers' core areas of practice, including corporate insolvency and restructuring, bankruptcy, banking and finance, commercial litigation, offshore, company law and trusts. She was supervised by William Willson, Clara Johnson, Henry Phillips, Charlotte Cooke, Hannah Thornley, Adam Al-Attar and Stephen Robins.

During pupillage, Annabelle assisted on a broad variety of matters spanning Chambers' practice areas. These included the subordinated debt litigation arising out the collapse of Lehman Brothers (*Re Lehman Brothers Holdings PLC (in administration)*); several schemes of arrangement and restructuring plans (for example, *Re Smile Telecoms Holdings ltd* and *Re Steinhoff International Holdings NV*) and litigation concerning Ponzi schemes and the reflective loss principle. Annabelle also assisted on a number of offshore matters, including the appointment of provisional liquidators and privilege issues in the British Virgin Islands. ■

LEGAL EYE:

"The Law is a ass": *Charles Dickens and the Law*

ROSEANNA DARCY

> *"If the law supposes that," said Mr Bumble, squeezing his hat emphatically in both hands, "the law is a ass – a idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience – by experience."*

I sit writing this latest edition of Legal Eye in what should be last few glorious days of summer, but what instead feels like the home stretch towards winter, with heavy rain showers, thick cloud and a cold wind whistling outside my windows. And with such weather comes the desire to curl up on the sofa, hot chocolate in one hand and a Dickens' tome in the other.

I am sure readers of this article will be well familiar with the less than complimentary depictions of the law and lawyers which resonate throughout many of Dickens' novels. In fact, lawyers appear in 11 of his 15 novels. The likes of David Copperfield's Uriah Heep is described as a "*red-eyed cadaver*" whose "*lank forefinger*" makes "*clammy tracks along the page…like a snail*" whilst Mr Vholes of Bleak House is "*so eager, so bloodless and gaunt… always looking at the client as he were making a lingering meal of him with his eyes*" with the prospect of bringing a case in the Chancery Court compared to being "*ground to bits in a slow mill… roasted at a slow fire…stung to death by single bees* [and] *being drowned by drops*".

Yet despite such visceral imagery Dickens was well acquainted with the law and the legal profession, counting the then Lord Chancellor, Henry Brougham, amongst his many lawyerly friends. Whilst his first encounter with the law at age 12 was less than positive when his father, a clerk in the Navy Pay Office, was declared bankrupt and sent to the infamous Marshalsea debtor's prison (which would later appear in Little Dorrit), by the age of 15 he was working as a clerk at the legal firm of Ellis and Blackmore. Located at 1 South Square, Gray's Inn, this would today be a neighbour of South Square. According to Edward Blackmore, many of the incidents and characters enshrined within The Pickwick Papers and Nicholas Nickelby took place at the firm (it is unclear if that is a positive or a negative!). A few years later in 1829, having learnt shorthand, Dickens became a court reporter for the Court of Chancery, providing an ideal glimpse into the operation of law, and in 1839 he was admitted to Middle Temple, although rescinded his admittance once his literary career took off.

Whilst Dickens may have retreated from the law as a profession, his dealings with the law remained, not only within the pages of his books. In the late 1850s, Dickens began an adulterous affair with the 18-year-old actress Ellen Lawless Ternan. In the eventual fallout requiring a divorce from his wife Catherine, (who had discovered the affair when a bracelet intended for Ellen was mistakenly delivered to Catherine) it was Dickens' close friend Frederic Ouvry, a member of Messrs. Farrers (Farrers & Co to us today) who arranged the settlement of £600 a year in return for both Catherine and her outspoken relatives to sign the Victorian equivalent of a gagging order, stating: "*We solemnly declare that we now disbelieve such statements…We know that these are not believed by Mrs Dickens and we pledge ourselves on all occasions to contradict them as entirely destitute of foundation*."

Dickens had another brush with the law when in 1844 he successfully obtained an injunction to prevent pirate copies of A Christmas Carol being produced. Despite this (and a risk many of us are familiar with) the defendants subsequently declared themselves bankrupt and unable to pay Dickens' legal fees leading the matter to cost him more than any damages he was able to collect. Dickens later wrote about this experience that "*it is better to suffer a great wrong than to have recourse to the much greater wrong of the law*".

His ongoing battle with pirateer publishers was most notably felt in the US where he made calls for copyright justice after unauthorised editions of his novels were published there. His 1842 tour to America was an opportunity to lobby opinion on supporting copyright protection in the US for foreign authors, yet this view was criticised as a challenge to the freedom of the press. The 1865 case of *Sheldon v Houghton* before the Southern

> *This suit has, in course of time, become so complicated, that . . . no two . . . lawyers can talk about it for five minutes, without coming to a total disagreement...*

District of New York concerned the ownership of Dickens' works following the successful publication of a uniform edition. Yet the case did not involve Dickens himself and was instead a claim between the two partners of the publishing house responsible for the lucrative edition, each wanting to assert their ownership over it. The question was who owned a written work that wasn't protected by copyright? Despite industry custom being that ownership sat with whoever published the work first, Judge William Davis Shipman held this was not "*a solid foundation upon which an inviolable title to property can rest*", concluding that he knew of "*no way in which the* [American] *publishers* [could] *republish the works of a foreign author, and secure to themselves the exclusive rights of publication* [unless it was] *a subject of copyright.*" The realisation amongst the established publishing houses that they were without protection ultimately led to the 1891 passage of the Chase Act which established copyright protections for the first time in the US for works by foreign authors.

The 19th century was therefore a period of much reform, not just in the literary field, but also in the legal industry. The moralistic views of Dickens capturing the pervasive, perplexing and tedious character of the law no doubt had a role in inspiring some of the great Victorian legal reforms such as the passing of the Small Debts Act in 1846 which set up a network of 500 county courts aimed at hearing cases up to a value of £50 and which saw 429,215 claims in 1847 alone, the introduction of the High Court of Justice in 1875 which reformed the civil court and fused tougher both legal and equitable remedies, along with the founding of the Court of Appeal consisting of special appellate judges also in 1875, such measures aimed at improving the efficiency of the courts. Dickens himself was also an influential campaigner calling for the abolition of the death penalty, writing in the Times in 1849 after witnessing the execution of Marie and Frederick Mannings; "*I believe that a sight so inconceivably awful as the wickedness and levity of the immense crowd collected at that execution this morning could be imagined by no man.*"

It is therefore no surprise that the legal profession today holds Dickens up high, not only in England, but worldwide. As Shakespeare and other literary greats have oft been cited in legal judgments, so too has Dickens. In a decision of the Indian Supreme Court in January 2020 concerning communication restrictions imposed by the central government, Justice Raman who gave the leading judgment quoted the famous opening lines from A Tale of Two Cities ("*it was the best of times, it was the worst of times...*") in his introduction to the judgment. Closer to home, in the Court of Appeal's decision in *Booth v Booth* [2010] EWCA Civ 27at [71], Lord Justice Rimer referenced David Copperfield and the principle derived from the character Wilkins Micawber, a legal clerk who is identified with the optimistic belief that "*something will turn up*". In *Booth* the claimed prejudice in the lost opportunity to adduce certain evidence was considered "*little more than Micawberism*", the view of the court being that something would not, in fact, turn up. Just a year later, Chief Justice Roberts of the Supreme Court of the United States began his judgment in the long-running case of *Stern v Marshall* (2011) 564 US, which ultimately found that bankruptcy judges have

CLIENT; FORTITUDE AND IMPATIENCE.

no constitutional authority under Article III to decide common law tort claims, with these famous lines from Bleak House:

"This suit has, in course of time, become so complicated, that . . . no two . . . lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause: innumerable young people have married into it;" and, sadly, the original parties "have died out of it." A "long procession of [judges] has come in and gone out" during that time, and still the suit "drags its weary length before the Court."

Although claims today rarely become the intergenerational likes of Bleak House's *Jarndcye v Jarndyce*, I am sure most lawyers can appreciate the sentiment which still rings true today, with many of us embroiled in litigation that has stretched from months to many years (*Waterfall* anyone?).

And so as Dickens continues to resonate with us, some question what Dickens would make of the law today. A recent Times article published on 19 December 2019 suggests he would have been aghast at the likes of Boris Johnsons' proroguing of parliament and the Supreme Court proceedings which followed, as well as deflated by the impact of the legal aid cuts, the latest House of Commons' Justice Committee Report published on 27 July 2021 suggesting the justice system has been "*hollowed out*" by them. Perhaps Dickens' will therefore continue to aspire the ongoing evolution of the law and our profession, and most importantly make sure that our legal eyes are kept well and truly open. ■

Mourant / South Square Litigation Forum 2021

CLARA JOHNSON

DILLY WRIGHT
SENIOR ASSOCIATE,
MOURANT

On 16 September 2021, Mourant and South Square hosted their annual Litigation Forum. This was a particularly happy occasion: as well as being attended remotely, it was attended in person. It was very good to be back in the actual company of so many friends and colleagues.

This was another year of topical, cutting-edge legal discussion both in domestic and offshore restructuring and insolvency, provided by an expert panel of speakers (each of which are summarised in this Article):

- '*Can a Trust be Insolvent?*' by David Alexander QC, Jeremy Wessels and Justin Harvey-Hills of Mourant
- '*The New Restructuring Plan – Some Thoughts From the Front Line*' by Jeremy Goldring QC and Stefanie Wilkins of South Square and Christopher Harlowe of Mourant
- '*Brexit: Full of Sound and Fury?*' by Mark Phillips QC and Professor Riz Mokal of South Square and Professor Christoph Paulus of Humbolt-Universität zu Berlin
- The Keynote Address by Paul Donovan, of UBS Global Wealth Management

Can a Trust be insolvent?

In the first panel session, Justin Harvey-Hills, Jeremy Wessels and David Alexander QC discussed whether a trust can be "insolvent".

An English lawyer would say no. A trustee is personally liable for any liability it incurs in that capacity. If it is unable to meet such liability, it becomes insolvent and its creditors can stand in the shoes of the trustee by subrogation and invoke the trustee's right of indemnity from the trust fund.

Jersey and Guernsey law however limit a trustee's personal liability in certain circumstances. They recognise that a trustee can incur liabilities in two different capacities – personally and as trustee – depending on the capacity in which it is purporting to act and the knowledge of the counterparty. Where a trustee is acting as trustee to the knowledge of the counterparty, the trustee's liability is limited to the trust assets and there is no recourse to the trustee's personal assets.

In the Z Trusts and *Investec v Glenella* litigation, the Jersey and Guernsey courts developed a framework for dealing with a trust that was unable to meet its obligations as they fell due (ie cashflow insolvent), which involved the trustee or an insolvency practitioner administering and winding up the trust under direction from the court. Some of the concepts have been borrowed from corporate insolvency. Key for creditors is that on insolvency (determined on the cash flow basis), a trustee's duties switch from being owed to the beneficiaries to the creditors. In terms of priority, a trustee's right of indemnity is secured as a first charge against the trust fund by an equitable lien, which is a form of equitable security. The current position (as found by the Jersey Court of Appeal in Z Trusts and subject to a pending appeal to the Privy Council) is that the usual first in time rule for equitable security applies. A trustee also ranks ahead of its own creditors.

As a result of these developments, a creditor of a trust is in a potentially vulnerable position – not being able to have recourse to the personal assets of the trustee; its right of subrogation being vulnerable to defeat via the trustee's loss of its right of indemnity; and ranking behind the trustee's personal rights in terms of priority.

The New Restructuring Plan

The second session of the afternoon was a highly topical and informative talk on the Restructuring Plan, introduced under the Corporate Insolvency and Governance Act 2020 ("**CIGA**") and new Part 26A of the Companies Act 2006. There has been an array of high profile first instance decisions, offering guidance on Part 26A, although no decisions from the Court of Appeal yet.

As noted by Jeremy Goldring QC, although there are a number of similarities between Schemes of Arrangement and the Restructuring Plan, there are also key differences, the most important of which being the power to cram down a dissenting class (the 'cross-class cramdown'). Debtors seeking to invoke the power will need to focus on the quality of the evidence demonstrating that the crammed class will be '*no worse off*' under the '*relevant alternative*'.

Stefanie Wilkins explained a further lesson we have learnt from the case law is that creditors must be given access to information. There is a duty on the company to provide information to a creditor for the purposes of understanding the Plan, and failure to do so may itself provide a ground for challenge.

> There is no doubt that the UK has run off the cliff edge, whether there's a soft landing remains to be seen.

Equally, however, there is a duty on a creditor to be proactive and seek information early, and resort to using remedies under the CPR, if necessary.

Finally, Christopher Harlowe reported on developments in relation to schemes in Hong Kong and the increasing reluctance of the Hong Kong court to sanction parallel schemes in two different jurisdictions. A company must now positively persuade the court that a parallel scheme is in the interests of unsecured creditors and would serve a useful purpose.

Brexit: Full of Sound and Fury?

The UK exited the European Union eight months ago and is no longer a member state. In this panel session, Mark Phillips QC, Professor Riz Mokal and Professor Christoph Paulus discussed whether the pre-Brexit doomsaying as to the future of insolvency in the UK has been borne out, or whether it was simply 'full of sound and fury and signifying nothing'.

The effect of hard Brexit, against the hopes of many insolvency practitioners, is that the EU Insolvency Regulation is no longer English law, and English insolvencies, Part 26A arrangements and judgments of the English courts are no longer recognised in the EU.

The system which remains is much more uncertain both in relation to insolvency procedures and restructuring. Now, consideration needs to be given to each EU member state in which recognition of proceedings and decisions might need to be established, necessitating consideration on a jurisdiction by jurisdiction basis.

The full implications of the absence of a regime for recognition between England and the EU have not yet been fully realised as neither the English nor EU courts have yet had to grapple with a challenge to recognition, but there will be hard cases.

Time will show whether the sound and fury has signified nothing. What is clear is that clients are faced with great uncertainty and increased costs, and practitioners with competition from jurisdictions outside the UK/EU. There is no doubt that the UK has run off the cliff edge, whether there's a soft landing remains to be seen.

Keynote Address

The final session was the Keynote Address by Paul Donovan. Delegates were given a compelling account of the fourth industrial revolution and how the world is undergoing the most dramatic period of structural change since the industrial revolution, changes which have been accelerated as a result of the pandemic.

Paul identified three examples of these structural changes, the effects of which cascade through the wider economy. The first, and most familiar, is the increase in working from home. This has impacted upon our demand for transport and office space, our food production and patterns of employment or self-employment, which have become more localised. The second is the change in how we shop: online shopping now accounts for around one-third of retail sales in the UK. This again has had a profound impact on the number of retail outlets on the high street. The third is the change in global trade. With the increased use of robotics in manufacturing, it is now likely to be more efficient to produce goods locally. It is no longer necessary to seek out low-cost labour in Asia. Local manufacturing will in turn disrupt complex supply and distribution chains that have characterised global trade for the last 50 years.

Paul's analysis was simple: these changes are structural and are already underway. Policy makers must avoid resorting to 'scapegoat economics' which blames minority or unrepresented groups and even corporate sectors. Rather, the challenge is to develop policies which are aligned with the processes which characterise the fourth industrial revolution. ■

You can view the top takeaways and event recording here: **www.mourant.com/news-and-views/news/2021/south-square-and-mourant-litigation-forum-2021.aspx**


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South Square reception at Spencer House

Emily Scaife,
Burges Salmon

Daniel Hayward Hughes,
Walkers

Lucinda Orr,
Enyo

Shayan Farooqi, Simpson
Thatcher (centre)

Rosalind Meehan,
Weil

Shan Qureshi,
Reorg Research

Nick Ractliff,
PCB Byrne

Bryan Shacklady,
Forsters

Oliver Rule,
Allen & Overy

Susannah Charlwood,
Allen & Overy

We were delighted to be able once again welcome clients and friends to London's elegant Spencer House for the annual South Square reception

Kofi Mills-Bampoe, Candey (centre)

Aisling Connaughton, Osborne Clarke

James Douglas, Linklaters

Sonya Van de Graaff, Avonhurst

Smeetash Kakkad, Gresham Legal

Jonathan Swil, Shearman & Sterling

Philip Taylor, Alston & Bird

Mark Lawford, Weil

Richard Tett, Freshfields (centre)

Adam Gallagher, Simpson, Thacher & Bartlett

Victoria Williams, Allen & Overy

News in brief

Felicity Toube QC

We are absolutely delighted to announce that South Square's Felicity Toube has been appointed one of the Vice Presidents of the International Insolvency Institute ("**III**").

III is an invitation-only membership of the most senior, experienced and respected practitioners, academics, judges and financial industry professionals in the world, and dedicated to improving international cooperation in the insolvency field, providing solutions to problems in cross-border insolvencies and reorganisations.

Felicity's appointment is very well deserved.

Exit pursued by a Paddleboard

On August 27, 2021 two men tried to rob Hugo's Bar and Grill in Dartmouth, Nova Scotia. They fled the scene by motorcycle, only to collide with a police car a few hundred meters away. One of the suspects was grabbed immediately but the other sought refuge in a nearby Little Albro Lake, 'Little' being the operative word as it only measures about 200m by 100m.

The pursuing police commandeered a canoe (complete with civilian), a pedal boat and a paddleboard and gave chase.

The Halifax Police report says the man swam around for a while but "eventually started to go underwater," as in not voluntarily, and was then rescued and promptly arrested.

© Image credit @timbophoto

Inflation through the Roof

Inflation in the UK rose to 3.2 percent in the 12 months to August 2021, up from 2 percent in July, marking the largest increase seen since the Consumer Prices Index began measuring inflation in 1997. In a report the Office for National Statistics said it was likely to be a temporary change, caused by recovery from the coronavirus pandemic. However, in June Andy Haldane, outgoing chief economist at the Bank of England, said in a speech that he expected inflation to near 4 percent by the end of the year.

Fugitive Businessman Appeals Bankruptcy Decision

Vijay Mallya, an Indian businessman at present fighting extradition from the UK to India, has filed papers in the High Court seeking permission to appeal against the bankruptcy order made against him on 26 July this year by the Insolvency and Companies Court (ICC). Mallya, who owes 17 Indian banks an estimated £1.05 billion, is accused of fraud and money laundering in India.

Of all his businesses, Vijay Mallya's name is most closely associated with now defunct Kingfisher Airlines. The airline, launched in 2005, proved to be his undoing, as its business model floundered in 2008, when a global recession and soaring fuel prices brought it to a grinding halt. Facing heat from lenders following the collapse of the airline, Mallya fled to the UK in 2016. Mallya has publicly offered to make good on his debts and claims he has been doing so since 2016.

Remote Hearings Guidance

At the start of the Michaelmas term, the Business and Property Courts (Chancery Division, Commercial Court and Technology and Construction Court) confirmed that remote hearing measures introduced during the coronavirus pandemic would remain in place until further notice.

For hearings of under half a day, the default position remains that hearings will take place remotely unless the Court considers an in-person hearing to be more appropriate.

For longer application hearings and trials the approach will be a matter for judicial decision, with parties able to submit reasoned preferences to the Listing Office, with the full range of in-person, remote and hybrid options on the menu.

A Winter of Discontent?

The U.K. energy industry is facing a wave of bankruptcies amid a fuel-supply crunch that has sent electricity prices soaring, leaving suppliers vulnerable. Since the start of the year, nine energy suppliers in the country have gone under, affecting 1.7 million consumers. The bankruptcies are a result of failure to hedge against price hikes, and therefore having to sell energy to clients at a lower price than they can buy it – the fastest way to bankruptcy.

Ofgem have appointed advisers at Teneo to act as special administrator in case a leading supplier needs to be rescued. Towards the end of September Avro Energy (the largest firm so far to go bust), Green, Igloo, Eymbio and Enstroga all ceased trading, with customers now being switched over to potentially more expensive providers. If further companies fold (and Bulb Energy, the country's sixth largest supplier is said to be in talks regarding fresh funding) it will be increasingly difficult for Ofgem to pass customers on to other suppliers.

As a result, the industry has called on the government to help with an emergency financing package of several billion, as well as a provision to take on unprofitable clients from bankrupt energy suppliers. They argue that the government has supported CFR Industries (which produce CO2 using in the food industry as a by product) whilst allowing energy firms to fail.

Prime Minister Boris Johnson has called the problem temporary, saying it was the result of recovering economic activity after COVID-19 lockdowns. Until things smooth out, however, British businesses and consumers are facing much higher electricity bills than normal. With the crunch showing no signs of abating anytime soon, temporary might come to mean prolonged. The same is true for much of Europe.

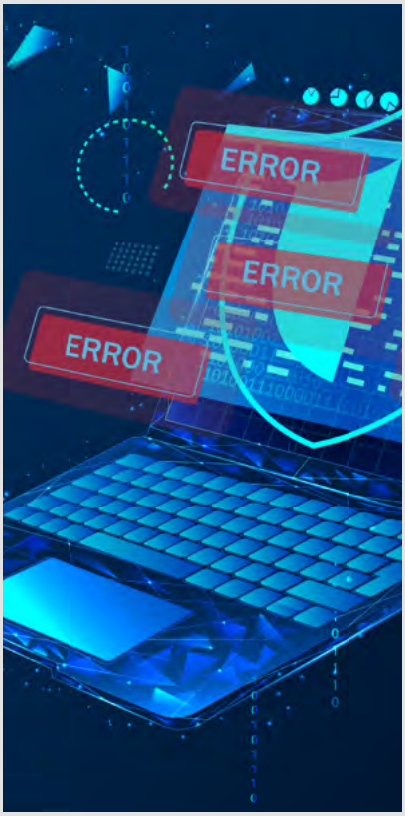
Cyberwarnings from the City

Barristers' chambers are coming under increasing pressure from their client law firms to assess and strengthen security protocols following a series of cyberattacks on commercial sets over the summer of 2021.

Cybercriminals apparently see barristers' chambers as a weak point of entry into law firms' networks and systems, giving access to individual cases that are either particularly sensitive or of high monetary value.

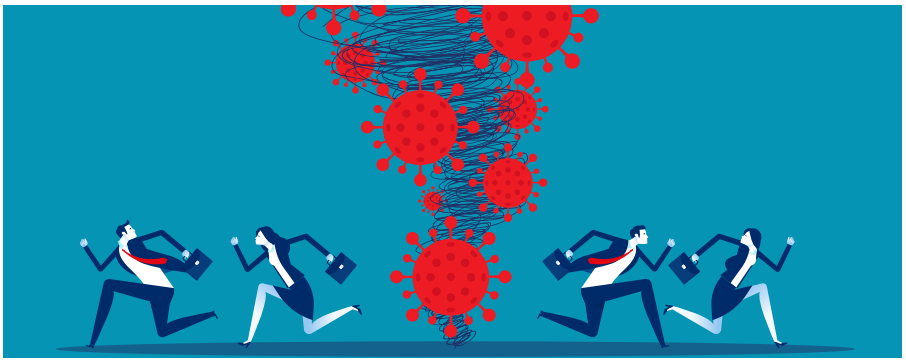
As reported in *The Lawyer* some Top 20 law firms are even sending detailed surveys out to core sets to assess the security landscape at the Bar.

Please be assured that South Square carried out an extensive cyber security audit earlier this year.



News in brief

Is the Wave Coming?



From 1 October 2021 the temporary measures introduced by the UK Government to help viable businesses avoid being forced into unnecessary insolvency during the COVID-19 pandemic began to be phased out.

The end of the previous legislation will occur alongside the introduction of new measures to help businesses recover. The Corporate Insolvency and Governance Act, which came into force in June 2020, introduced several temporary measures designed to help businesses through the COVID-19 crisis. These included temporary changes to prevent statutory demands and winding up petitions, as well as the suspension of wrongful trading provisions. During the COVID-19 pandemic, measures such as the Corporate Insolvency and Governance Act, along with government financial support, caused a sharp decline in administrations and insolvencies. According to one analysis of government figures in *Business Sale Report*, UK corporate insolvencies fell by more than half in the first half of this year (301), compared to the same period in 2020 (655).

While such measures have undoubtedly helped many viable businesses survive the pandemic, they have also led to fears that "zombie" companies are being kept alive solely by government support. This has prompted forecasts that the withdrawal of measures such as government-backed financing and insolvency protection, alongside the debts accrued by businesses from government loans and rent arrears, could cause a huge wave of company insolvencies.

Chambers UK Bar Awards 2021

South Square and two of our members have once again been shortlisted for the UK Bar Awards category of Company/Insolvency.

Chambers is once again in the running for Set of the Year, David Allison QC is one of the three barristers considered for Silk of the Year, and Adam Al-Attar for Junior of the Year.

The shortlists are drawn up following the extensive research by the Chambers UK Bar analysts. Thank you to all our clients and supporters who have made this possible. The awards ceremony will be held on 18 November 2021.

Pro Bono: Celebrating 20 Years of Free Legal Aid

South Square is proud to support Advocate and the Pro Bono Week which, now in its 20th year, will run from 1 to 5 November 2021. Events and campaigns in Pro Bono Week offer an opportunity to celebrate and recognise the voluntary contributions made by lawyers across the four nations of the UK in giving free legal help to those in need.

In this year of continued unprecedented challenges, for both the voluntary and legal sectors, the role of pro bono legal assistance has never been more important. The 20th anniversary of Pro Bono Week will be a pivotal moment to look ahead to the next twenty years of pro bono whilst also shining a spotlight on some of the key moments and cases from the past two decades.

Several Members of Chambers volunteer through Advocate as well as volunteering for CLIPS, the Chancery Bar Litigant in Person Support Scheme.

Record Cover Baby Sues Nirvana

Spencer Elden, who, as a four-month-old baby, appeared swimming naked underwater on the cover of Nirvan's 1991 album 'Nevermind' is, at the age of 30, suing the band and several record companies for damages for sexual exploitation and child pornography.

More than 30 million copies of Nevermind have been sold, and the cover image, which shows a baby swimming toward a fishhook baited with a dollar bill, is one of the most iconic in American pop music.

Spencer, whose parents received US$200 for allowing his picture to be taken for the album, appears to have had mixed feelings about the cover over the years. On the one hand he has 'Nevermind' tattooed across his chest, which probably didn't happen by accident, and has repeatedly recreated the famous pose: most recently in 2016 for the album's 25th anniversary.

Now, however, Elden says that his parents never signed a release authorising the use of his image, nor did Nirvana fulfil a promise that Elden's genitals would be covered by a sticker.

Non-sexualised photos of infants are generally not considered child pornography under US law. However, Elden's lawyer, Robert Y. Lewis, argues that the inclusion of the dollar bill (which was superimposed after the photograph was taken) makes the minor seem "like a sex worker" and claims he "has suffered and will continue to suffer lifelong damages" as a result of the artwork, including "extreme and permanent emotional distress" as well as "interference with his normal development and educational progress" and "medical and psychological treatment".

Elden is asking for damages of at least $150,000 (£109,000) from *each* of the 15 defendants, who include surviving band members Dave Grohl and Krist Novoselic; the managers of Kurt Cobain's estate; Cobain's former wife Courtney Love; and photographer Kirk Weddle.

New Appointments to the Court of Appeal

On 31 August 2021 the Queen approved the appointment of Mrs Justice Whipple as a Lady Justice of Appeal and Mr Justice William Davis and Mr Justice Snowden as Lord Justices of Appeal. Lady Justice Wipple and Lord Justice William Davis have both been elevated from the High Court of the Queen's Bench Division, and Mr Justice Snowden from the Chancery Division.

Lord Justice Snowden was called to the Bar (Lincoln's Inn) in 1986 and took Silk in 2003. He was appointed a Recorder of the Crown Court in 2006, a Deputy High Court Judge in 2008 and a High Court Judge of the Chancery Division in 2015. He has been Vice-Chancellor of the County Palatine of Lancaster and Supervising Judge of the Business and Property Courts for the Northern and North-Eastern Circuits since 2019.

Chillingly close to Insolvency

EVCL Chill, a distributor of chilled foods to UK supermarkets including Sainsbury's and Asda, is allegedly poised to enter insolvency, succumbing to a range of factors, including a shortage of HGV drivers and supply chain challenges and costs.

The business, previously called NFT Distribution, has been a subsidiary of logistics firm EV Cargo since being acquired out of administration in early 2020. That deal was brokered by administrators PwC, with the restructuring firm reportedly also being lined up to handle this process.

EVCL Chill, based in Alfreton, Derbyshire, is said to be in talks with its major customers over contingency plans to help secure supply continuity. The business is described as being a key supplier in the ambient and chilled foods logistics market.

As well as causing growing supply issues for the UK's supermarkets and shoppers, driver shortages and rising supply chain costs are also impacting logistics firms. Earlier this month, another Derbyshire-based firm, haulage company Sprintdeliver, entered administration due to the impact of driver shortages and the pandemic.

SOUTH SQUARE CHALLENGE

As 2021 draws to a close, our competition this time around sees a welcome return to the picture quiz. All you have to do is look at the sets of pictures, work out to what they are clues and then identify the link between all the answers.

As we had absolutely NO correct matches between pets and barristers from our previous edition, this time around it is a roll-over, with the lucky winner receiving not only two magnums of champagne, but two of our South Square umbrellas!

Please send your answers to Kirsten either by e-mail to **Kirstendent@southsquare.com**, or to the address on the back cover, by 7 January 2021.

A

B

C

D

E

F

G

H

I

The following barristers and pets are matches from the July 2021 edition:

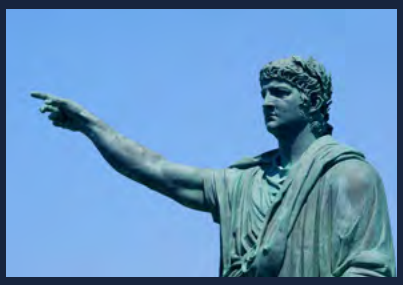
1.	Alex Riddiford	Sidney
2.	Riz Mokal	Padfoot and Minerva
3.	Felicity Toube QC	Hobbes
4.	Madeleine Jones	Juno
5.	Henry Phillips	Perry
6.	Stephen Robins	Monty
7.	David Alexander QC	Napoleon
8.	Mark Arnold QC	Islay
9.	Glen Davis QC	Conchi
10.	Mark Phillips QC	Coco, Levi and Moshe

A

B

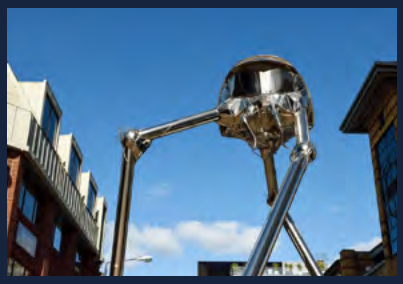
C

D



E

F



G

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I

SOUTH SQUARE

"Quality barristers and an excellent group of QCs that are hands-on and user-friendly"
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Richard Hacker QC
Mark Phillips QC
Robin Dicker QC
Martin Pascoe QC
Fidelis Oditah QC
David Alexander QC
Glen Davis QC
Barry Isaacs QC
Felicity Toube QC
Mark Arnold QC
Jeremy Goldring QC
David Allison QC
Tom Smith QC
Daniel Bayfield QC
Richard Fisher QC

John Briggs
Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn
Stephen Robins
Marcus Haywood
Hannah Thornley
Clara Johnson
William Willson
Georgina Peters
Adam Al-Attar
Henry Phillips
Charlotte Cooke
Alexander Riddiford
Matthew Abraham
Toby Brown

Robert Amey
Andrew Shaw
Ryan Perkins
Riz Mokal
Madeleine Jones
Edoardo Lupi
Roseanna Darcy
Stefanie Wilkins
Lottie Pyper
Daniel Judd
Jamil Mustafa
Paul Fradley
Peter Burgess
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