

Digest



The Restructuring Plan

Stefanie Wilkins and Alison Goldthorp (Norton Rose) consider recent developments in relation to restructuring plans and ask 'Is it becoming a workable restructuring option for all companies in financial distress?'

Chancery Guide 2022

David Alexander KC and Rabin Kok summarise the major changes in the substantially overhauled guide to Chancery procedure

A Shareholders' Dispute: *Kathryn Ma Wai Fong v Wong Kie Yik & Ors*

David Alexander KC reviews the Privy Council's decision



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Cover: Queen Elizabeth II greets High Court judges as she officially opens the Rolls Building in December 2011, the latest addition to the Royal Courts of Justice in central London.

From the editors



Marcus Haywood and William Willson

Welcome to the new legal year, and to this edition of the Digest.

As we go to print, the United Kingdom has experienced a momentous week which none of us will ever forget. On Tuesday 6 September, the UK was handed its third Prime Minister in three years – Liz Truss. Then, on Thursday 8 September, just as Parliament was debating the new Prime Minister’s proposal to spend £150 billion to rescue businesses and families from spiralling energy prices – and with many ministerial positions still vacant – news came from Balmoral that Her Majesty the Queen was seriously ill. By the end of the day the Queen had passed away, the second Elizabethan era was over, and we had a new sovereign, King Charles III.

First and foremost, our thoughts are with the Royal Family at that this very sad and difficult time. Second, we celebrate the Queen, and her 70-year reign of service and dedication to the United Kingdom. The only monarch most of us have ever

known, she remained a constant through a period of unprecedented change, from the birth of the TV era and the loss of the empire, through to a new millennium and the age of the internet.

These are extraordinary times. It has been suggested that Ms Truss is walking into the most challenging in-box of any UK Prime Minister since Winston Churchill. The Russian invasion of Ukraine continues, exacerbating the ongoing fuel and cost of living crises. The pound has sunk to its lowest levels since 1985. A recession is now looking almost inevitable. And having only recently come out of a pandemic, the world seems to be a lurching inexorably from one set of problems to another.

The key point, perhaps, made during our incoming Prime Minister’s acceptance speech was that ‘Deliver’ is going to be her watchword, so let us take a look at what this Digest delivers.

Firstly, Chambers is delighted to welcome Aidan Casey KC as a new Member. Aidan, a highly regarded commercial and chancery silk, joins us from 3 Hare Court. Aidan’s specialisms in civil fraud, chancery

commercial and insolvency work, amongst other practice areas, compliment South Square's skill set. We have a short profile of his career to date from page 14.

Earlier this year Sir Edward Evans-Lombe passed away, at the age of 85. Well-known as a High Court Judge, Sir Edward was a Member of Chambers when Chambers premises were at 3 Paper Buildings (see previous editions of the South Square Story). Associate Member Simon Mortimore KC remembers 'A Life in the Law' of this remarkable man.

Our leading article for this edition is 'The Restructuring Plan' by Alison Goldthorp (of Norton Rose) and Stefanie Wilkins. Introduced into the Companies Act 2006 in June 2020 in a new Part 26A, Alison and Stefanie consider recent developments in relation to restructuring plans and ask 'Is it becoming a workable restructuring option for all companies in financial distress?'

Over the summer period an updated Chancery Guide came into force. Whilst previous versions have been updated, this evolution is the first complete overhaul in six years and,

as well as being the first digital edition of the Guide (fully hyperlinked internally as well as to relevant provisions elsewhere) contains several features of note. Whilst it will pay all practitioners to peruse the guide thoroughly, David Alexander KC and Rabin Kok (who has successfully completed pupillage here at South Square and joins us as a new Member in November 2022) have helpfully outlined five notable areas of change.

David Alexander KC also reviews the Privy Council's decision in *Kathryn Ma Wai Fong v Wong Kie Yik & Ors*, a family shareholders dispute concerning a BVI company and Malaysian Company. In our regular features we have the case digests, the editorial for this edition being provided by Madeleine Jones. Associate Member, Professor Christoph G Paulus once again takes on a canter through the activities of the CJEU and Daniel Judd provides another erudite 'Legal Eye' – this time on the pitfalls of amphibiology in legal documents.

Finally, as with the country, there is a change of leadership at South Square. At the end of September current Heads of Chambers David Alexander KC and Mark Arnold KC will be stepping down

and handing over the reins to Tom Smith KC, who will continue to take South Square forward in the coming years.

We express, on behalf of all Members and Associate Members of Chambers, enormous thanks to David and Mark for their tireless work.

Many thanks to all our authors, as always, for their contributions: views expressed by individuals and contributors are theirs alone.

We hope you enjoy this edition of the Digest. If you find yourself reading someone else's copy, or indeed have come across the Digest for the first time and wish to be added to the circulation list, please send an e-mail to kirstendent@southsquare.com, and we will do our best to make sure you get the next and future editions.

It goes without saying that if you have any feedback to give us in relation to the Digest – positive or negative – we would be delighted to hear from you. ■

**William Willson and
Marcus Haywood**





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The Restructuring Plan: Is it becoming a workable restructuring option for all companies in financial distress?

The Restructuring Plan was introduced into the Companies Act 2006 in June 2020 in a new Part 26A, supplementing the Court's existing power under Part 26 to approve a Scheme of Arrangement. The principal difference is the introduction of the new concept of "cross-class cram down" which allows the Court to sanction an arrangement in which one or more classes have not voted in the requisite majority to approve the Restructuring Plan, provided that certain conditions are satisfied, and that the court is satisfied that it should exercise its discretion to sanction the plan.

Since then, there have been a number of applications to court using Part 26A, the most recent of which is *Re Houst*¹, where the cross-class cram down power was used for the first time to cram down HMRC (a preferential creditor which had voted against the Plan) the secured creditor having voted in favour of the Plan.

The Plans to date have been used for a variety of purposes including the amendment of loan agreements, shareholding structures, and Articles of the company and of course for compromises with creditors.

The judgments to date from the convening hearings and the sanction hearings have provided helpful guidance on the correct approach to various key issues including the threshold conditions, the notice requirements, the information to be supplied to creditors, the conditions for the exercise of cross-class cram down, and the court's approach to the exercise of its discretion to sanction. Several of the cases have involved challenges by interested parties, and a number of them have involved a request by the company to the court to sanction using its power to apply cross-class cram down.

The initial cases involved large enterprises, but the recent decisions in *Re Houst* and *Re Amicus Finance*² have seen smaller enterprises using the new procedure and successfully obtaining the court's sanction to their Restructuring Plans, after exercise of cross-class cram down.

Unsurprisingly (having regard to the many similarities between the two processes), the Court has drawn heavily upon Scheme jurisprudence in the cases dealing with Restructuring Plans. There are, however, important differences: in particular, where the court considers the fairness test, and the court's approach to the views of creditors expressed by the votes at the class meetings, which is different in Part 26A "where the court is required to override the wishes of one or more groups of creditors"³

This article summarises some of the key developments in the law, and identifies some new areas to consider when proposing a restructuring plan which are emerging from the recent cases.

"Financial difficulties"

Section 901A identifies the threshold conditions that must be present before a Restructuring Plan can be proposed by a company. The first is Condition A (section 901A(2)), which is that "the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern." The term "financial difficulties" was not defined in the legislation.

To date, "financial difficulties" has been interpreted broadly. In *Re Gategroup Guarantee Ltd*⁴, the company proposing the Restructuring Plan had no assets or business, but voluntarily assumed liabilities via a deed poll two days after its incorporation. It was said by an opposing creditor that those circumstances could not satisfy Condition A, which required there to be financial difficulties of a kind which threatened the ability of the company to continue as a going concern. Zacaroli J dismissed this objection by observing that, as a matter of law, the company had become insolvent (by entering the deed poll), so it was clearly in financial difficulties. Moreover, whilst the company had no pre-existing business, it did have a role in enabling the restructuring of the corporate group to take place⁵.

In *Re Hurricane Energy Plc*, in the face of the objecting shareholders being "highly suspicious of the financial information provided by the Company", Zacaroli J nevertheless observed that the threshold for Condition A was "relatively low" – it was sufficient that the company was "likely to encounter financial difficulties that may affect its ability to carry on business as a going concern"⁶.

It therefore seems that Condition A in section 901 will be interpreted in a relatively flexible way. Specifically, it will be no objection that the company proposing the Restructuring Plan has voluntarily assumed the debts that are the cause of their "financial difficulties". Moreover, it now seems clear that the reference in Condition A to "financial difficulties ... affecting ... its ability to carry on business as a going concern" does not require that the company proposing the plan have an independent existence pre-restructuring.

However, fulfilling the entry condition is no guarantee that the "financial difficulties" will support the sanction of the Plan by the court, because the financial position of the company will also be relevant to identifying the relevant alternative.

In *Re Hurricane Energy* notwithstanding the lower entry threshold, the court refused to sanction the cross-class cram down which would have had a draconian impact on the rights of the shareholders.

The court found that there was time for the company to restructure its liabilities as it had enough cash to continue trading for 12 months and the court was not satisfied that the company would be placed into liquidation in the short to medium term if the Restructuring Plan was not sanctioned.

"No worse off" than in the relevant alternative test

The most significant feature of the Restructuring Plan is the Court's power to approve a Plan, notwithstanding that one or more classes of creditor has not voted in favour of it by the requisite majority – the cross-class cram down power. Specifically, where the Restructuring Plan is not approved by at least 75% in value of one or more classes, the Court is nevertheless empowered (pursuant to section 901G) to approve the Restructuring Plan provided that two conditions are satisfied:



1. *Re Houst Limited* [2022] EWHC 1941 (Ch) (sanction) and *Re Houst Limited* [2022] EWHC 1765 (Ch) (convening judgement).

2. *Re Amicus Finance plc* [2021] EWHC 2245 (Ch).

3. *Re Houst* [2022] EWHC 1941 (Ch) (sanction) at paragraph 26 per Zacaroli J.

4. [2021] EWHC 304 (Ch) (convening judgment).

5. Paragraphs 177 to 179 of the judgment.

6. *Re Hurricane Energy Plc* [2021] EWHC 1418 (Ch) (at paragraphs 20 to 22).

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

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

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

Judgments to date have identified what is necessary to satisfy the “no worse off” test. It requires an assessment of the effect 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”.⁷

The Court will consider, first, what is most likely to occur in the absence of sanction; secondly, what will be the outcome for the dissenting classes in that alternative; and thirdly, will compare that outcome to the outcome for the dissenting classes if the Restructuring Plan were to be sanctioned. In answering the first question, it is not necessary for the Court to be satisfied that a particular outcome would be more likely than not to occur – rather, it is to identify the outcome that is most likely.⁸ It is necessary only for the Court to be satisfied on the balance of probabilities.⁹

Class composition

The Court has accepted that the same general principles of class composition will apply to Restructuring Plans as have been applied to Schemes of Arrangement. However, it has also been recognised that the availability of the cross-class cram down power provides an incentive to a Plan company to increase the number of classes, to ensure that the requisite majority will be achieved in at least

one class. By contrast, in a Scheme, where every class must vote in favour, there is potentially greater incentive to decrease the number of classes. This was explained by Snowden J in the following terms in *Re Virgin Active Holdings Limited* [2021] EWHC 814 (Ch) (convening hearing) (at paragraph 62):

... a rigid application of the approach under Part 26 may not always be appropriate in the different context of a Part 26A plan. ... whilst in relation to a Part 26 scheme it is necessary to take care about placing creditors into the same class when they have materially different rights, in relation to a Part 26A plan it may be necessary to take care not to place creditors into an artificially large number of classes in order to provide a basis for invoking the cram down power.

Class composition was not at issue at the sanction hearing in that case. It therefore remains to be seen whether, and how, the Court might develop its approach to class composition if faced with a submission that a Plan company has proposed an “artificially large number of classes”.

There is the potential for other novel issues to arise in relation to class composition. In *Re Virgin Atlantic Airways Limited*¹⁰, 100% of the members of three of the four classes had already agreed to support the recapitalisation at the time that the convening order was made. Snowden J noted that the Court would not usually sanction a Part 26 Scheme where it was known in advance that all creditors would consent. His Lordship left open the question whether it would be relevant to the Court’s jurisdiction, or to its discretion, if a company were to ‘activate’ the cram down power by including a class who would agree to a consensual restructuring in any event. Such a situation might conceivably arise where, for example, the terms of the deal have been agreed in advance with a small group of creditors (who are in the same class), but it is to apply to a wider range of creditors.

There was further consideration of this issue in *Re Houst*¹¹ where Zacaroli J was concerned to understand whether the Bank as secured creditor (which



7. *Re DeepOcean* [2021] EWHC 138 (Ch) at paragraph 39 per Trower J.

8. *Re Virgin Active Holdings* [2021] EWHC 1246 (Ch) at paragraphs 106–108 per Snowden J.

9. At paragraphs 56–57.

10. *Re Virgin Airways* [2020] EWHC 2376 (Ch) (sanction judgment) at paragraphs 47 to 50 per Snowden J.

11. *Re Houst* [2022] EWHC 1941 (Ch) (sanction) at paragraph 21 per Zacaroli J



will need to find a balance acceptable to the court with regard to the sharing of financial information, for example with their landlord creditors in connection with turnover rent, or with all creditors when financial information and projections contain commercially sensitive information relating to the business.

Re Virgin Active indicates a further potential route by which creditors may obtain information for the purpose of considering – and if appropriate, proceeding with – a challenge. In that case, certain financial information, which was too detailed for inclusion in the Explanatory Statement, and/or was commercially confidential, was ordered to be disclosed to creditors upon their giving an undertaking to preserve confidentiality. This included, for example, the analysis of the financial information that underpinned the class allocation. Nevertheless, there is potentially a tension here – as the Judge observed, this raises the undesirable spectre of unequal provision of information.¹⁶

Snowden J also observed that if a creditor wanted to say that it did not have sufficient information with which to challenge the company’s evidence, it would be relevant to consider whether the creditor had applied under the CPR – prior to the sanction hearing – to obtain what was required.¹⁷

However, the Court has made clear that there is a tension between this objective, and the need to ensure that the utility of the Restructuring Plan is not “*undermined by lengthy valuation disputes*”, particularly in circumstances of urgency.¹⁸ An application under CPR 31.12 was refused in *Re Amicus Finance plc*¹⁹ in circumstances where the company had already provided substantial documentation, there was insufficient time or money to conduct the searches requested by the creditor (which were in the form of keyword searches, rather than requests for specific documents), and the documents in question would have had relatively

had approved the plan at the meeting) had agreed to the plan in advance of the meeting. It was confirmed to the court that there was no certainty as to the Bank’s position prior to the application to court to convene meetings of creditors and it had not signed a lock up agreement. This was important as the agreement of the class of secured creditors was being used in that case to “*cram down*” the preferential creditor class who had voted against the plan.

Out of the money creditors can also be excluded from the meetings of classes to consider the Plan using section 901(C) and the first order under this section was made in *Re Smile Telecom*.¹²

The provision of information to creditors

There have been a number of cases dealing with the company’s obligation to provide information to creditors (and, in particular, to opposing creditors). In all cases, there is a minimum threshold of sufficiency and accuracy that must be reached. Obtaining information from the company is a critical step for a creditor wishing to oppose a

restructuring plan: if a creditor wishes to challenge valuation evidence, then they must “*stop shouting from the spectators’ seats and step up to the plate*”, by seeking information, filing their own evidence, and addressing the Court at the appropriate stage in the process.¹³

If the creditors have not been properly informed – in other words, if they have been provided with “*materially inaccurate, incomplete or otherwise inadequate information*”, then the Court may not be able to place substantial weight on the fact that a majority has voted in its favour. This may, of itself, be a ground for challenge.¹⁴ In *Re Virgin Active*, Snowden J suggested that as a general matter of practice, the court was entitled to expect and require companies to be forthcoming with information.¹⁵ So there appears to be an expectation that the company should look to provide additional information in order to address concerns of creditors, if it is proportionate and reasonable, to enable all creditors to formulate a challenge to the application for sanction if they wish. The company proposing the Restructuring Plan

12. *Re Smile Telecoms Holdings Limited* [2022] EWHC 740 (Ch).

13. *Re Smile Telecoms Holdings Limited* [2022] EWHC 740 (Ch) at paragraph 53 per Snowden LJ.

14. *Re Sunbird Business Services Limited* [2020] EWHC 2493 (Ch) (a judgment concerning a Scheme of Arrangement under Part 26).

15. *Re Virgin Active Holdings Limited* [2021] EWHC 1246 (Ch) at paragraph 131.

16. *Re Virgin Active Holdings Limited* [2021] EWHC 814 (Ch) at paragraph 130.

17. Paragraph 132 of the judgment.

18. *Re Amicus Finance* [2021] EWHC 2245 (Ch) at paragraph 12; *Re Virgin Active Holdings Limited* [2021] EWHC 1246 (Ch) at paragraphs 129–130; *Re Hurricane Energy PLC* [2021] EWHC 1759 (Ch) at paragraph 49.

19. [2021] EWHC 2245 (Ch).

little utility to the questions for the sanction hearing.

Mr Justice Zacaroli explained that on such an application, the test to be applied was whether the disclosure sought was proportionate in all the circumstances, including the urgency of the case, the utility of the documents sought, the expense and time that would be incurred, and whether the application had been made in a timely manner.²⁰

Notice

Linked to the provision of information is the question of the requirement of sufficient notice being given to creditors of the Restructuring Plan prior to the application to court for the convening of the meetings of creditors. This again goes to the fairness of the procedure. This was most recently considered in *Re Houst*²¹ at the convening hearing. In that case the Practice Statement Letter was sent to creditors 75 days before the hearing directing creditors to a “*plan website*” to be used to host documents relating to the plan. That letter was updated 3 weeks before the hearing and the key document, the Explanatory Statement, was uploaded to a website set up to host documents relating to the plan 8 days before the convening hearing. The meetings of creditors and members were proposed to take place 14 days after the convening hearing. The Judge was happy with that timetable in that case, which was relatively short period for creditors to absorb the financial information related to the plan prior to the convening hearing.

Challenges by creditors to the use of cross-class cram down, and treatment of creditors in the “relevant alternative”

The decisions in the sanction hearings of *Re Smile Telecom* and *Re Houst* make clear that if a creditor or class has voted against the Restructuring Plan at the meetings held following the convening hearing, it needs to “step up to the plate” and challenge the sanction application in court. In *Re Houst*, HMRC as the secondary preferential creditor voted against the Restructuring Plan at the meeting, but did not appear in court at the sanction hearing or engage in discussions with the company about what proposal it would agree to. The court was satisfied that HMRC was “no worse off” than the relevant



alternative, which was the sale of the business in an accelerated M&A process followed by an administration. The court did however also review carefully whether the discretion to sanction should be exercised in light of the fact that HMRC as a preferential creditor would get a smaller share of the distributions to creditors than it would in the “*relevant alternative*”. This was because the Bank as the secured creditor was getting an enhanced distribution as “*that is the least it [the Bank] is prepared to accept in order to support the restructuring*”,²² and unsecured creditors were given a small dividend, to secure their support to continued trading which the company said was essential to the success of the Plan, even though on the valuation evidence before the court they were “*out of the money*”. The judge noted that “*The court will look to see whether the priority, as among different creditor groups, applicable in the relevant alternative, is reflected in the distributions under the plan. A departure from that priority is not in itself, unlike the position*

in ... the Chapter 11 plan, fatal to the success of the plan”.²³

The views of “*out of the money*” creditors, however will not be taken into account by the court when considering the exercise of the discretion. This has been made clear in *Re Virgin Active*, in *Re Smile Telecom* and in *Re Houst*.²⁴

The use of the Restructuring Plan in the mid market

There has been much debate on whether Part 26A is an option only for large enterprises, which has centred on the initial use of the procedure by large entities and the costs of the procedure in relation to those applications with voluminous documentation to support the Plan and the valuation evidence required. This was commented on in the recent review of the use of the procedure (and the other measures introduced by the Corporate Insolvency and Governance Act 2020) by the Insolvency Service published on 21 June 2022.²⁵ Looking at the statute, there

20. Paragraph 15 of the judgment.

21. *Re Houst* [2022] EWHC 1765 (Ch) (convening judgement) paragraph 45–47 per Adam Johnson J.

22. *Re Houst* [2022] EWHC 1941 (Ch) (sanction) at paragraph 37 per Zacaroli J.

23. *Re Houst* [2022] EWHC 1941 (Ch) (sanction) at paragraph 30 per Zacaroli J.

24. *Re Houst* [2022] EWHC 1941 (Ch) (sanction) at paragraph 27 per Zacaroli J.

is nothing in the procedure to prohibit any company falling within the entry criteria to use the procedure, in the same way as a company voluntary arrangement is available to all sizes of companies. So as the case law establishes principles which can be applied by all companies, it will inevitably become more available to companies which would not otherwise have the funds to make a lengthy and potentially complex application to court. The recent applications in *Re Amicus Finance* and *Re Houst* demonstrate this, where smaller companies have successfully used the procedure. Norris J made clear in *Re Amicus Finance* at the sanction hearing that the approach of the court to the disclosure of information and the length of the Explanatory Statement should be to ascertain whether what was provided was sufficient to enable the creditors to make an informed decision whether to accept the risks inherent in the scheme in place of the risks in the relevant alternative, which in that case was liquidation.

The court found that the Explanatory Statement there was adequate for its purpose.²⁶

Re Houst also involved a smaller enterprise, with a straightforward debt structure, and as a result the valuation evidence on the “relevant alternative”

was provided by Begbies Traynor who set out the estimated outcome in a sale by an administrator following an accelerated M&A procedure. The valuation evidence in such cases will be more straightforward than in relation to large enterprises such as Virgin Atlantic and Virgin Active, where complex evidence is needed to establish where the “value breaks” in assets covered by security granted to different groups of secured creditors. With a smaller enterprise the valuation evidence will be able to be provided by an insolvency practitioner setting out the estimated outcome in administration or liquidation, with supporting evidence on the likely sales proceeds from the assets. As a result the likely costs of the Part 26A application will be significantly reduced.

Interestingly in *Re Houst* and *Re Amicus Finance*, the court asked whether consideration had been given to potentially increasing the assets of the estate in the relevant alternative by clawback actions or claims.²⁷ This is an area where the court is expecting the insolvency practitioner advising the company to have formed a view to share with the court, in the same way that directors confirm to the court and the creditors in a company voluntary arrangement that there are no disposals of assets in the period prior to the arrangement which the creditors

should be aware of.

The costs could be further reduced if there were to be a streamlined process for the hearing of applications by smaller and mid-market enterprises. Speed is also of the essence if the company is to survive as a going concern whilst the application for the Plan goes through the courts. Possibilities include hearings before the ICC Judges, and perhaps the convening hearing to be on paper unless a number of creditors request a hearing in the same way as creditors can requisition an actual creditors meeting to consider a decision rather than the use of a “deemed consent” procedure.

Given the flexibility of the Restructuring Plan, and its emergence as an effective new tool in the restructuring toolbox as a result of the cross-class cram down option, (or indeed “cross-class cram up” which appears to have been alluded to by Zacaroli J in *Re Houst*²⁸), it is to be hoped that a Practice Direction to streamline the procedure for smaller enterprises can be introduced to support the rescue of more businesses in the turbulent economic period to come. ■



25. Corporate Insolvency and Governance Act 2020 – Interim report March 2022 – GOV.UK (www.gov.uk).

26. *Re Amicus Finance* [2021] EWHC 3036 Sir Alastair Norris.

27. *Re Houst* [2022] EWHC 1941 (Ch) (sanction) at paragraph 4 per Zacaroli J.

28. *Re Houst* [2022] EWHC 1941 (Ch) (sanction) at paragraph 38 per Zacaroli J.

Aidan Casey KC

We are delighted to announce that Aidan Casey KC, a highly regarded commercial and chancery silk, joined South Square in June. Aidan took silk in 2016. Prior to joining South Square, his career since pupillage was spent at 3 Hare Court.



Aidan's practice is focussed on heavyweight litigation and arbitration, mostly in international and cross-border cases. In his UK court work he spends most of his time in the commercial court and in the chancery division; in arbitration work he has appeared in arbitrations under the rules of many of the international arbitral institutions, and in numerous arbitration claims in the commercial court.

He specialises in particular in civil fraud, chancery commercial and insolvency, offshore and Privy Council work, and general commercial dispute resolution. He also practises in banking and financial disputes, and has significant experience in sports law (particularly football). Most of his work is cross-border in nature, and he has recent experience in disputes involving Russia/the CIS, the UAE, Mauritius, Cyprus, Sweden, the BVI, Malta, Switzerland, Liechtenstein, Bermuda, and the Bahamas.

Aidan's specialist civil fraud practice commenced many years ago, with a substantial amount of work for NHS primary care trusts and for the NHS Counter Fraud and Security Management Service. This honed his forensic and trial skills in fraud claims, and led in turn to more commercially-oriented work, and to cross border work, such as *Aeroflot v Berezovsky*. In that case Aidan acted for some 8 1/2 years for Aeroflot in very substantial fraud claims, brought under Russian

“extremely thorough and diligent and able to get to grips with extremely complex matters very quickly”

LEGAL 500

law, against Boris Berezovsky and others. The case gave rise to a host of challenging and interesting issues, including when Aeroflot successfully secured the appointment of insolvency practitioners from Grant Thornton as administrators of Mr Berezovsky’s estate following his sudden and untimely death.

More recently, another good example of Aidan’s fraud practice is *Kingdom of Sweden v Serwin and others*, in which Aidan is currently acting for the Kingdom of Sweden. The case involves a ca. €120m fraud claim, brought under Swedish and Maltese law, arising out of a sophisticated fraud on the Swedish pension system using UCITS funds and SICAVs set up in Sweden and Malta. Aside from forensic complexity, it raises interesting issues as to the conflict of laws in the arena of reflective loss (which may find their way into a future article in the Digest...).

Aidan has a wealth of experience in Russian/CIS cases. In late 2021 he acted for the then largest shareholder in Petropavlovsk Plc in applications for urgent relief to restrain a threatened disposal of a majority holding in a Hong Kong listed iron ore company. Over recent years he has acted in a series of linked LCIA arbitrations concerning a bitter and hard fought shareholder battle over control of a large Russian retail bank (a case described in *The Moscow Times* as a “high-profile case which rocked Russia’s business community and spooked both foreign

and Russian investors alike” and as “the most high-profile business dispute of recent years”) and in another set of linked arbitrations about a similarly hard fought shareholder dispute over the control and management of one of the largest open cast coal mines in Siberia. Hot off the press in his Russian/CIS arbitration practice is *NDK Ltd v HVO Holding Ltd* [2022] EWHC 1682 (Comm), an interesting and important judgment of Foxton J dealing with the arbitrability of disputes about the validity of share transfers, and with some interesting Singapore authorities on that topic.

Aidan has appeared in numerous Privy Council appeals, and is regularly instructed by the government of Mauritius and by Mauritian litigants in the Privy Council and on occasion in the courts below.

He is currently acting in a number of Mauritian appeals and also in interesting appeals from Caribbean jurisdictions concerning amongst other things security for costs in cases of public importance, and the correct approach to be taken to the freezing of assets caught by MLAT requests from the US DoJ.

The Legal 500 describes him as “an all-round excellent barrister, a first choice on almost every fraud case” and “extremely thorough and diligent and able to get to grips with extremely complex matters very quickly”. Aidan is rated by The Legal 500 and Chambers and Partners as a leading silk in: Commercial Dispute Resolution, Offshore, and Civil Fraud. ■





The Chancery Guide 2022

“Jarndyce and Jarndyce has passed into a joke. That is the only good that has ever come of it. It has been death to many, but it is a joke in the profession. Every master in Chancery has had a reference out of it. Every Chancellor was “in it,” for somebody or other, when he was counsel at the bar. Good things have been said about it by blue-nosed, bulbous-shoed old benchers in select port-wine committee after dinner in hall. Articled clerks have been in the habit of fleshing their legal wit upon it. The last Lord Chancellor handled it neatly, when, correcting Mr. Blowers, the eminent silk gown who said that such a thing might happen when the sky rained potatoes, he observed, “or when we get through Jarndyce and Jarndyce, Mr. Blowers”—a pleasantry that particularly tickled the maces, bags, and purses” **CHARLES DICKENS, BLEAK HOUSE**



DAVID ALEXANDER KC



RABIN KOK (PUPIL)

A. Introduction

Say the word ‘chancery’ and the action in *Jarndyce v Jarndyce* is the first thing that comes to mind of many a member of the public, and perhaps many an English, Welsh, offshore or Commonwealth lawyer. Thankfully, ‘the modern Chancery Division’ is no longer an oxymoron. The Chancery Division is now part of the Business and Property Courts and is a vitally important national institution, as well as an international commercial court in which businessmen from all over the world plead their case.

Chancery procedure was modernised, in recent times, by the Civil Procedure Rules 1999, in 2016 by the creation of the last version of the Chancery Guide tailored to the needs of chancery judges and litigants. In 2019, the Disclosure Pilot was introduced in the Business & Property Courts to reduce the cost of and time taken in standard disclosure. The Pilot, whose rules are contained in CPR 51U, were extended to the Insolvency and Companies Court (**ICC**) in February 2019 and will be made permanent in the Business and Property Courts (**BP&Cs**) from 1 October 2022 as PD 57AD.

The Chancery Guide 2022 is the latest evolution of Chancery procedure. The Chancery Guide 2016 was amended several times since being issued, but the 2022 Guide is the first complete re-write in six years. It is a re-write that rises to meet the challenges of a world that is all too different from Dickens' world, and from the world that all of us thought that we knew.

The 2022 Guide contains several features of note that are aimed at these challenges and the significant changes in English & Welsh civil procedure since 2016. It is the first digital edition of the Guide, in the sense that it is fully hyperlinked – it is hyperlinked internally as well as to relevant provisions of the CPR, Practice Directions, District Registry Guidance and to legislation. It introduces a brand-new Protocol governing remote hearings in Appendix Z. It is updated with references to the relevant provisions of the Disclosure Pilot. It provides guidance on electronic bundles. These are to be the only type of bundle filed going forward, unless the judge requests otherwise, as paragraph 1 of Appendix X states. Finally, the procedural and case management guidance in the 2022 Guide has been significantly rewritten to be brought in line with the provisions of the Commercial Court Guide and the TCC Guide, in an effort to streamline and unite practice across the BP&Cs.

We could not possibly cover in this short briefing all of the changes, or even all of the important changes in the 2022 Guide, which is over 130 pages longer than the 2016 Guide. However, it touches on five notable areas of change in the 2022 Guide that might be of interest to practitioners, with a spotlight on any changes to procedure in the Insolvency and Companies Court (**ICC**) and to procedure in the District Registries where appropriate:

1. **Section B** discusses the Remote and Hybrid Hearings Protocol, which provides clear guidance on an issue that has become a staple of practice since the Covid-19 pandemic;
2. **Section C** addresses the changes to Chancery business in the District Registries of the BP&Cs, to which the 2022 Guide now applies;

3. **Section D** explores the reformed rules relating to Chancery and ICC applications – an issue of significant importance in Chancery practice;
4. **Section E** takes a look at the changes to the guidance on the format and content of statements of case; and
5. **Section F** considers, last but certainly not least, the new provisions on the format and content of skeleton arguments.

B. The Remote and Hybrid Hearings Protocol

A striking new feature of the 2022 Guide is the Remote and Hybrid Hearings Protocol contained in Appendix Z. The Protocol supplements the existing guidance in Annex 3 of CPR PD 32, centralises the guidance on such hearings in a single Appendix, and is a major step towards the efficient conduct of litigation in the post-Covid world. The creation of the Protocol also boosts the Chancery Division's standing as an international court for business, enabling it to compete even more effectively with the many overseas commercial courts which now have detailed remote hearing protocols.

The Protocol's function is to provide guidance on how to prepare for and conduct remote hearings, rather than set out the situations in which remote hearings will be ordered. That is done elsewhere in the guide. This section considers several of the Protocol's key features.

The first, and overarching, principle is that the Protocol should be applied flexibly: paragraph 2. This is, of course, not new. Judges have long had the power to order remote or hybrid hearings in the interests of justice and in accordance with the CPR. But it is helpful that the Guide places this beyond doubt. In the spirit of flexibility, paragraph 23 helpfully clarifies that the court may use any appropriate platform to conduct a remote hearing, including Teams, court video link and zoom. It further provides that “*any communication method available to the Participants can be considered if appropriate*”.

The second principle of note, in paragraph 2, is that remote and hybrid hearings are still hearings conducted in accordance with the CPR. That means that:

1. They remain public hearings (paragraph 4) and the courts will take appropriate steps to uphold the open justice principle. This might mean relaying a live-stream video of the hearing to an open courtroom, or allowing media representatives access.
2. Conversely, the provisions in the CPR allowing (and in some cases requiring) hearings to proceed in private, continue to apply.

3. In all cases, no person is allowed to access a remote or hybrid hearing without court permission, and doing so may be a contempt of court (paragraph 13). There is no absolute right to attend a remote or hybrid hearing (paragraph 19). The parties and their representatives should provide the court with the details of each person in attendance before the hearing (paragraph 16), as is current practice.

Thirdly, the Protocol provides some procedural guidance on seeking a remote hearing from the court. The Protocol does not set out the situations in which the Court will normally order a remote or hybrid hearing – these are set out elsewhere. For instance, Chapter 14 provides that ‘ordinary’ Chancery applications will normally be heard remotely, while ‘heavy’ applications will be listed in person (see Section D of this article).

Similarly, paragraph 6.44 provides that CMCs/CCMCs with a time limit of half a day or less and pre-reading of 90mins or less, will take place remotely. Still, a party might wish to request a remote or hybrid hearing in other situations, such as for ‘heavy’ applications, PTRs or even final hearings and trials.

Paragraph 8 provides that the parties should first discuss and seek to agree whether a remote or hybrid hearing is appropriate. The issue should then be raised, as appropriate:

1. At or in advance of the CCMC/CMC/directions hearing;
2. When an application is issued and/or in advance of listing;
3. When a remote hearing is sought at trial, at or in advance of the PTR (if there is one); or
4. If there is no PTR, the issue should be raised in correspondence in good time before the final hearing or trial.

When making the request, the parties should discuss, seek agreement and inform the court of any required support or adjustments for hearing participants, or of any proposal to instruct third party providers to facilitate the hearing.

The court will then consider the issue. It may order a remote or hybrid hearing at any appropriate time or in any appropriate format, including at a PTR, on paper, or even in a short CMC convened just for the purpose of considering the hearing format (paragraph 10). Once the question is decided, the parties and their representatives should liaise with the court to sort out logistics, including whether any extra equipment or preparation is required (paragraph 11). They should also provide hearing participants’ names and details to the court at this stage.



Fourthly, the Protocol sets out procedures to mitigate the inevitable failings of modern technology:

1. The parties and their representatives can arrange a test call with the court prior to the hearing, and should make any technological issues known to the court (paragraphs 24 and 25).
2. Paragraphs 17 and 30 introduce a 'lost connection procedure'. Each party should nominate one of their proposed attendees as the 'Primary Contact' for that party when providing details of participants to the court. If the internet or phone line disconnects or degrades to an unusable degree during the hearing, the court will contact the Primary Contact to discuss whether continuation is possible, or whether an adjournment is required. The Primary Contact therefore has a relatively significant responsibility. So, while the Guide does not say so expressly, it is probably desirable that the Primary Contact be a member of the counsel team, or the solicitor with overall responsibility for the case or for the hearing at hand.

Finally, the 2022 Guide gives some guidance on witnesses giving evidence by video link. Most of the guidance on this issue is in Annex 3 of PD32, to which paragraph 32 of the Guide refers the reader. However, the 2022 Guide adds several points which bear noting. For instance:

1. Where a party's witness is giving evidence remotely, paragraph 34 provides that the other parties should be allowed to send a representative to accompany that witness. The representative will ensure the witness is not impermissibly communicating with others or making notes. Arrangements should be made to allow the court to ascertain that such a representative is present. This paragraph recognises what is existing practice.
2. In some circumstances, it might be appropriate to have more than one camera in the location where a witness is giving evidence, to monitor the witness from all angles (paragraph 35).
3. Electronic bundles can disorientate both judges and witnesses. Paragraph 37 therefore provides that witnesses who only have access to electronic bundles must be given a chance to orientate or familiarise themselves with the document they are being cross-examined on. For instance, they might be shown the pages before and after the page which the witness is being questioned on or the front page of that document.

Practitioners should also keep the Chancellor's Practice Note on Witnesses Giving Evidence Remotely (11 May 2021) well in mind, as this

Note is expressly preserved by the Practice Note accompanying the 2022 Guide.

C. Chancery Business in the District Registries of the BP&Cs

The 2016 Guide did not expressly apply to business in the District Registries of the BP&Cs in Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester and Newcastle: see Chapter 30 of that Guide, which directed the reader to local guidance.

The 2022 Guide breaks with this approach. It now applies to business in both London and the District Registries, subject to some exceptions. See paragraph 1.17 of the 2022 Guide, and the Chancellor's Practice Note accompanying the 2022 Guide. Three principles are useful to keep in mind when considering if a specific part of the Guide applies to District Registry business:

1. The 2022 Guide applies to Chancery business in Leeds, Liverpool, Manchester and Newcastle unless local practice is different: see paragraph 3 of the Vice Chancellor's Practice Note on BP&C work in the North and North East, 26 July 2022.
2. The 2022 Guide does not expressly give precedence to local guidance in Birmingham, Bristol and Cardiff. Rather, paragraph 1.16 states that local guidance applies only where a section of the Guide is specific to the BP&Cs in London. However, there are individual sections of the 2022 Guide which only apply '*subject to any local guidance*', such as the substantially reformed provisions relating to applications: paragraph 14.2 of the Guide.
3. When there is no specific local guidance, parties should apply the 2022 Guide in an analogous way that serves the overriding objective. They can and should also consult the local court. See paragraph 1.18 of the 2022 Guide.

The Vice Chancellor's Practice Note mentioned above is a key piece of guidance for practitioners in the Leeds, Liverpool, Manchester and Newcastle registries. It consolidates local procedural practice which differs from the 2022 Guide. These are too varied to be covered comprehensively here, but broadly speaking the Note covers differences in case management, hearings and applications procedure and practice, as well as the working of the Friday Applications List in Manchester and Leeds.

Finally, insolvency lawyers who work in the District Registries might be particularly interested in the following points:

1. The Insolvency PD, paragraphs 3.1ff continues to govern the distribution of insolvency business between the London ICC and District Registries.

2. Chapters 3–6 of the Chancery Guide (commencement, statements of case, judgment in default and case & costs management) do not apply at all in the London ICC. These paragraphs do however apply to Part 7 claims in District Registry Insolvency and Companies Lists (ICLs), and to Part 8 claims which proceed as Part 7 claims in these lists. See paragraphs 21.4–21.5.
3. Paragraphs 37–44 of the Practice Note consolidate and clarify some distinctive features of ICL case management in the Leeds, Liverpool, Manchester and Newcastle Registries, especially in relation to the hearing of winding up petitions.
4. Paragraph 32 of the Practice Note also usefully clarifies that the practice of listing insolvency and companies’ applications in the Manchester and Leeds Friday Applications List will continue in future.

D. Chancery and ICC Applications

Chancery business is application-heavy. Clear procedural guidance on this issue is therefore essential. The 2022 Guide revamps the structure of the guidance relating to applications. Chapter 14 now covers rules relating to applications generally, while Chapter 15 covers applications without notice and urgent applications. Some key features of the new regime are discussed below.

‘Ordinary’ and ‘heavy’ applications

There are now two types of applications, which are case managed differently: ‘ordinary’ and ‘heavy’ applications:

1. **Ordinary applications** are those which should be listed for half a day (2.5 hours) or less, with that time to include argument, judgment, consequentials and permission to appeal. Pre-reading time should not exceed 90 minutes. See paragraph 14.26.
2. **Heavy applications** are those to be listed for half a day or more or with pre-reading time exceeding 90 minutes. See paragraph 14.44.

This concept was absent from the 2016 Guide, and is drawn from the Commercial Court Guide (see F.6 – F.7 of that Guide).

The 2022 Guide directs the parties not to list or treat an application as ‘ordinary’ unless both parties reasonably expect to require no more than 1.5 hours – 1.75 hours for argument alone (paragraph 14.27). Paragraphs 14.29 and 14.47 further direct the parties to agree on a realistic time estimate for both hearing and pre-reading before issue, as well as to agree on dates to avoid – before issue if possible.

Paragraphs 14.32 and 14.49 state that the parties should file all applications with a note to the comment box on CE-File stating:

1. Whether the application is ‘ordinary’ or ‘heavy’;
2. The agreed time estimates and dates to avoid, if these have been agreed; and
3. If these have not been agreed, the applicant should also set out the date by which the agreed dates to avoid and agreed time estimates will be provided to the court by letter.

The Guide warns that failure to state this information will make it more difficult for court staff to process the application, and may delay the processing of the application.

When filing the application, the applicant must also file any request for the application to be heard by a High Court Judge. More on this in the next subsection.

Once the ‘due date’ for time estimates and blocked out dates is reached, the parties must:

1. Provide the relevant dates to the court by letter; or
2. File a letter on CE-File (adding a note to the comment box) which sets out neutrally and briefly why agreement has proved impossible. See paragraphs 14.34 and 14.51.

This is a crucial procedural step, because the application will not be referred to a Master for review nor be listed for hearing until either the agreed dates/time estimate or letter has been received (paragraphs 14.35 and 14.52).

Once this step is taken, the court will review all applications and give directions before listing, in particular for heavy applications: paragraph 14.7.

Ordinary applications will be listed as remote hearings (paragraph 14.28) and heavy applications will be listed in-person (paragraph 14.45) unless the court orders otherwise. If one or both parties consider an alternative format more appropriate, the applicant (in the case of agreement) or the relevant party must state why. They must do so in the same letter which provides the court with dates to avoid or, presumably, in the alternative letter stating that no agreement is possible.

The 2022 Guide also sets out detailed rules relating to ‘successive applications’, which is where a further application follows the initial ‘ordinary’ or ‘heavy’ application after the first application has already been listed for hearing. This situation arises fairly often in practice. One example is where a claimant applies for summary judgment against a defendant, who counters with an application for reverse summary judgment and to strike out the claim.



The new rules are:

1. Where a successive application is brought, a Master's approval or the approval of the docketed High Court Judge must be obtained if the parties wish the second application to be heard with the first (see paragraph 14.39).
2. The parties must agree on appropriate time estimates, whether the second application will affect the time estimate and format for the hearing, and write to the court accordingly (paragraph 14.40).
3. These rules apply regardless of whether the initial application was 'ordinary' or 'heavy' (paragraph 14.56).

PD23A, paragraph 9, provides that the court may give directions for the service of evidence in applications. The 2022 Guide sets out usual timetables for service in 'ordinary' and 'heavy' applications:

1. **In ordinary applications:** Evidence will be filed and served with the application, with evidence in response filed and served 14 days thereafter, and any evidence in reply filed and served as soon as possible and in any event within 7 days of service of evidence in response. See paragraph 14.46.

2. **In heavy applications:** Evidence will be filed and served with the application, with evidence in response filed and served 28 days thereafter, and any evidence in reply filed and served as soon as possible and in any event within 14 days of service of evidence in response. See paragraph 14.46.

There are different page limits for skeleton arguments in 'ordinary' and 'heavy' applications. We consider these limits under the next main heading.

Hearing by Master or High Court Judge?

Heavy applications will be referred to Masters, and so will not be heard by deputy masters: paragraph 14.7.

Where an application is not docketed to a High Court Judge, is not an urgent application in the Applications List and is not made directly to a HCJ, an applicant wishing an application to be heard by a HCJ should normally specifically apply for this when issuing the application. The application must be made by letter, filed on CE-File with the application notice and copied to the Respondent: paragraph 14.20.

Paragraph 14.21 sets out the criteria which point towards a HCJ hearing an application instead of a Master:



1. Complex legal issues, in particular involving conflicting authorities;
2. Complex issues of construction;
3. Substantial media interest;
4. Claims requiring specialist knowledge (for instance, securitisation, sophisticated commercial instruments, and complex trust claims);
5. Difficult cases involving litigants in person; and
6. Particularly lengthy applications of 2 days or more.

The 2016 Guide used these criteria to determine when a summary judgment or strike-out application would be heard by a HCJ instead of a Master – paragraph 13.3 of that Guide. But the 2022 Guide now applies these criteria to all applications.

Urgent and without notice applications

The guidance relating to urgent and without notice applications is now consolidated in Chapter 15, and is much more detailed than the 2016 Guidance. A full list of changes would be too lengthy for this article, but we explore some important changes here.

Firstly, there is new guidance on the procedure for bringing urgent applications:

1. As before, urgent applications which can or should only be dealt with by a High Court Judge (such as applications for freezing orders) must be certified as urgent and arrangements made with the Chancery Judges' Listing Office for an urgent listing before a Judge (paragraph 15.8).
2. As before, urgent applications should be made in the High Court Judges' Interim Applications List if lasting less than 2 hours (paragraph 15.9).
3. However, longer applications which can be heard by a Master must now be made to a Master (paragraph 15.11), where they will essentially be 'triaged'. This is a change from the 2016 Guide, under which arrangements for listing of urgent applications exceeding 2 hours were made directly with Chancery Listings (see 2016 Guide, paragraph 16.3).
4. A detailed procedure, set out in paragraph 15.12, sets out the procedure that will be followed when urgent applications are made to a Master. The essence of the guidance is that the Master will first consider whether the application is truly urgent. If it is not, it will be listed as a regular ordinary or heavy application.



If it is, the Master can take one of several courses, including listing it for an urgent hearing before a Master, redirecting it to the Judges' Applications List, or releasing the application to a HCJ to be listed by Chancery Listings.

5. When issuing an urgent application, the applicant should add 'Urgent Application' to the comment box on CE-File, including for urgent applications before trial (paragraph 15.11).
6. If the application is genuinely urgent and the applicant does not consider the 'triage' procedure practicable, paragraph 15.13 requires the applicant must file a letter with the court explaining why. The letter must be filed via CE-File and copied to the respondent. The ball is then with the court, who may list the application in the Judges' Applications List, refer it to a HCJ or a Master.

The guidance on 'ordinary' and 'heavy' applications does not automatically apply to urgent applications, but the other guidance on format and procedure in Chapter 14 will apply: paragraph 15.10.

There is also revised guidance relating to specific types of applications. First, the 2022 Guide's provisions on freezing orders have been expanded.

These are now largely found at paragraph 15.42ff. The following points are noteworthy:

1. The 2022 Guide now expressly recognises that filing the application notice and draft order on CE-file may frustrate the application for a freezing order by revealing its existence. Paragraph 15.44 therefore directs the applicant to send both documents to the relevant Judge's clerk and Judges' Listing by email only. CE-file may be used if steps to protect confidentiality have been taken, or if confidentiality is not an issue.
2. A standard form of wording for a freezing order is now provided in Appendix M. Standard forms of wording for delivery up and non-disclosure orders are set out in Appendix N and Appendix P, while a standard form of imaging order is found in PD25A Annex B.
3. The standard wording can be modified appropriately. But, importantly, any modification must be made in tracked changes on the standard form, identified in the advocates' skeletons, and explained at the hearing: paragraph 15.49.



1. *Zenith Insurance plc v LPS Solicitors Ltd* [2020] EWHC 1260 (QB) at [49] – considering the Chancery Guide.
2. *Pharmacy2ULtd v The National Pharmacy Association* [2018] EWHC 3408 (Ch) at [34]–[35].
3. *Towergate Underwriting Group Ltd v Albaco Insurance Brokers Lt* [2015] EWHC 2874 (Ch) at [25]–[27] (the current position in the Chancery Guide is a direct result of Master Matthews’ ruling in this case). See recently *Harrington & Charles Trading Co Ltd v Mehta* [2022] EWHC 1810 (Ch) at [10].

4. The court will carefully scrutinise the need to freeze interests under trusts, or of assets controlled by the respondent’s subsidiaries. ‘Expansion’ of freezing orders in this way must be specifically explained: paragraph 15.50. If appropriate, a cross-undertaking must be given in favour of non-parties to the application: paragraph 15.54.
5. An order continuing an earlier injunction can either replicate the terms of the earlier order with new dates inserted, or cross-reference paragraphs in the earlier order. The 2022 Guide exhorts practitioners to take the first course to make the respondent’s rights clear to it. See paragraph 15.58–15.59.
6. A penal notice is not required in an order that simply records an undertaking given by a person to the court. Although CPR 81 no longer says so expressly, the 2022 Guide states that the revised CPR 81 has not changed the procedural requirements in this respect, at least in the view of the drafters: paragraph 16.30.

Norwich Pharmacal relief is another type of relief that is sometimes sought urgently or without notice. The 2022 Guide retains the 2016 Guide’s provision that *Norwich Pharmacal* applications should be made by Part 8 claim form, not application notice, and that *Norwich Pharmacal* relief sought by Part 23 application notice is likely to be rejected: paragraph 14.81. This remains a trap for the unwary. It is true that at least one case suggests that a claim for *Norwich Pharmacal* relief must always be brought by Part 8 claim form, even in cases where an alternative Part 23 application for pre-action disclosure is brought,¹ while at least one other case has ruled that this is wasteful and disproportionate.² It seems clearer, however that *Norwich Pharmacal* claims should be brought via Part 23 when made in existing proceedings, despite contrary statements in both the 2022 and 2016 Chancery Guide.³ Unfortunately, the 2022 Guide seems to have overlooked all of these issues.

4. *Tchengiz v Grant Thornton UK LLP* [2015] EWHC 405 (Comm) (Leggatt J).

5. *Ventra Investments Ltd v Bank of Scotland plc* [2017] EWHC 199 (Comm) (Sara Cockerill KC) at [22]–[23].

Applications in the ICC

The rules in Chapter 14 apply to Insolvency Act Applications, whether these commence proceedings or are of an interim nature: paragraph 21.4.2. There are, however, a few major qualifications:

1. The Insolvency (England and Wales) Rules 2016 and the Insolvency Practice Direction prevail over the Chancery Guide in the event of inconsistency. The Chancery Guide highlights allocation of cases to different judges and notice periods as two areas where inconsistencies might arise.
2. There is no pre-listing review by the court, as paragraph 14.7 does not apply. Instead, applications will be listed for an initial hearing of 15 minutes before an ICC Judge unless the applicant asks for a longer hearing, directions have been agreed and filed with the application, the case is appropriate for release to a HCJ or the court directs otherwise. The parties should also try to agree directions before issue.
3. The rules on ‘heavy’ applications and ‘ordinary’ applications do not apply, because paragraphs 14.27, 14.44 and 14.76 (which classify applications into these categories) do not apply. All applications are dealt with in the way set out above.

On the other hand, interim applications in Companies Act proceedings remain subject to all of Chapter 14 except paragraph 14.7 (pre-listing review). So, it appears that the case management and other provisions relating to ‘ordinary’ and ‘heavy’ applications continue to apply.

The ICC Judges’ Applications List (and the BP&C District Registries) remain the places in which to bring urgent ICC applications, although there are some changes to procedure. For instance, the 2022 Guide provides specific wording for certificates of urgency: paragraph 21.4.9.

E. Statements of Case

The 2022 Guide contains major changes to the guidance on statements of case that were absent from the 2016 Guide. In this area, the drafters have once again deliberately aligned the 2022 Guide with the Commercial Court Guide. This is clear from paragraph 4.7 of the 2022 Guide, which incorporates Cockerill J’s guidance on the purposes of statements of case in *King v Stiefel* [2021] EWHC 1045 (Comm):

1. A statement of case enables the other side to know the case it has to meet;
2. A statement of case ensures that the parties can properly prepare for trial – and that unnecessary costs are not expended and court time chasing points which are not in issue or lead nowhere;

3. The process of preparing the statement of case operates (or should operate) as a critical audit for the claimant or defendant and its legal team that it has a complete cause of action or a complete defence.

Page limits

Paragraph 4.4 of the 2022 Guide now provides that Chancery statements of case should not be longer than 25 pages. Even in exceptional situations a statement of case should not go over 40 pages. This replicates the guidance in C1.2(a) of the Commercial Court Guide. The 2022 Guide allows a statement of case to be filed and served if it exceeds 40 pages. But paragraphs 4.4 and 4.5 require the filing party to justify this in a brief accompanying note appended to the statement of case.

This departs from the practice in the Commercial Court, where a without notice application on the papers must first be made to obtain permission to serve a statement of case which runs over 40 pages (Commercial Court Guide, C1.2(d)). However, Chancery practitioners would still do well to ensure that the reasons in the brief note accompanying a statement of case exceeding 40 pages are adequate. If the practice of the Commercial Court is anything to go by, non-compliant pleadings which cannot be justified may well result in criticism and adverse cost orders. In addition, a pleading exceeding 40 pages may be struck out under CPR 3.4(2)(c),⁴ although orders striking out a pleading for excessive length alone are likely to be rare.⁵

A summary of no more than 5 pages must accompany a statement of case that exceeds 40 pages. The summary must be concise, and exclude matters not in the statement of case (paragraph 4.4).

Finally, points of claim, points of defence and points of reply used in Insolvency Act applications and ICC proceedings are statements of case for the purposes of Chapter 4 of the 2022 Guide – see paragraph 21.5. They must comply with the rules in that chapter.

The content of statements of case

Paragraph 4.2 of the 2022 Guide virtually replicates paragraph C1.1 of the Commercial Court Guide. Both set out detailed rules governing the contents of statements of case. For example:

1. Statements of case must be as concise as possible;
2. They must contain no more than one allegation in each paragraph or sub-paragraph, insofar as this is possible;
3. A party wishing to advance a positive case must set that case out; and reasons must be set out for any denial of an allegation;

4. Contentious headings, abbreviations and paraphrasing should be avoided; and
5. In rare cases where it is necessary to give lengthy particulars of an allegation, these should be set out in schedules or appendices.

These are well-known principles of pleading that most practitioners already follow. Many of these principles were already contained in paragraphs 10.4 – 10.17 of the 2016 Guide. However, their inclusion in the 2022 Guide is a timely and useful reminder.

Whose signature?

Paragraph 4.2(o) of the 2022 Guide requires a statement of case to be signed by the individual person or persons who drafted it, which will normally be the case where the statement is drafted by counsel. However, statements of case which are drafted by a solicitor must be signed in the firm's name, in accordance with PD 5A 2.1.

It is worth keeping in mind that this differs slightly from the practice in the Commercial Court, where solicitors who draft statements of case must sign the pleading in their own name (paragraph C1.1(o)).

E. Skeleton Arguments

The 2022 Guide is much more prescriptive than the 2016 Guide about the format and content of skeleton arguments. It, accordingly, demands a much greater level of discipline from practitioners. Some of the key changes to the rules are discussed below.

Page limits

The 2016 Guide set no page limits for skeleton arguments, but the 2022 Guide has several:

1. Skeleton arguments for ordinary applications should not exceed 15 pages (paragraph 14.43).
2. Skeleton arguments for heavy applications should not exceed 25 pages (paragraph 14.58).
3. Skeleton arguments for Part 7 CMCs/CCMCs should not exceed 25 pages, (paragraph 6.57).
4. Trial skeleton arguments should be no longer than 50 pages (paragraph 12.51).

In all cases the page limit includes appendices and schedules. The skeleton arguments should be written in minimum font size 12 and with 1.5 line spacing.

If a longer skeleton argument is needed for applications or for a CMC/CCMC, the advocates who sign the skeleton argument must file an accompanying letter explaining why it was 'necessary' for the skeleton argument to be as long as it was. On the other hand, a trial skeleton argument which is longer than 50 pages may be filed if the

advocates consider that it is '*not reasonably possible*' to comply with the page limit in light of the claim's complexity. They must certify this in the skeleton, or ask for permission to file a longer skeleton at the PTR.

The content of skeleton arguments

The guidance on the content and drafting of skeleton arguments beginning in the 2016 Guide (found at paragraph 21.73 onwards) has largely been retained and recast in Appendix Y of the 2022 Guide. Much of this guidance will be familiar. Skeleton arguments must, for instance, not be a substitute for oral argument, must be drafted concisely, and avoid lengthy quotation from authorities.

However, paragraph 1 of Appendix Y now states that the court may disallow the costs of preparing the skeleton where Appendix Y is not followed. The court has, of course, always been able to punish non-compliant skeleton arguments with an adverse costs order. However, the new reminder in Appendix Y suggests that the courts are ready and willing to sanction rambling and prolix skeletons. Paragraph 1 is, therefore, an important new addition.

G. Conclusion

The 2022 Guide makes significant changes to practice and case management in the Chancery Division. It warrants careful reading by both insolvency lawyers and Chancery practitioners more generally – to escape procedural pitfalls, avoid unwanted criticism in court and ensure that Chancery cases are litigated smoothly.

Nonetheless, the changes are for the best. They unify, where appropriate, the procedures that apply in the London and Regional District Registries of the BP&Cs, and align case management in the Chancery Division with case management in the Commercial Court and TCC. Finally, the 2022 Guide adopts and adapts global best practice in relation to remote hearings. All of these steps streamline the administration of justice in the BP&Cs, and in so doing help practitioners, individual litigants, as well as the businesses who trust the English courts to administer justice efficiently and fairly. ■

Diary Dates

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

8 November 2022

South Square/RISA Cayman Conference

 **Kimpton Seafire Resort & Spa,**
60 Tanager Way, Grand Cayman

13-15 November 2022

FIRE Middle East 2022

 **Shangri-La Dubai,**
Sheikh Zayed Road, Dubai

17 November 2022

INSOL BVI

 **BVI International Arbitration Centre,**
Ritter House, Wickham's Cay II,
Tortola, BVI

23 – 26 November 2022

Annual Bar and Young Bar Conference

This will be a hybrid event with both online and in person sessions.

 **In Person sessions at Grand Connaught Rooms, 61-65 Great Queen Street,**
London, WC2B 5DA


22 – 24 February 2023

FIRE Starters Global Summit: Dublin

 **Conrad Hotel, Earlsfort Terrace,**
Saint Kevin's, Dublin 2, Ireland

8 June 2023

Moss Fletcher Lecture

 **Details to be confirmed**

Case Digest Editorial



by Madeleine Jones

Banking and Finance

In Banking and Finance Stefanie Wilkins has digested two interesting cases relating to the scope of a bank's *Quincecare* duty – a special duty of care not to execute a customer's direction to make a payment in circumstances where the bank has been (or ought to have been) "put on inquiry" in relation to whether the direction is part of a fraud on the customer. The existence of this duty was established in a 1992 decision of Mr Justice Steyn (*Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363) but it has received renewed attention in recent years, firstly in a 2019 Supreme Court decision, *Singularis Holdings Limited (in liquidation) v Daiwa Capital Markets Europe Limited* [2019] UKSC 50 (the first English case in which a bank was held liable to a customer for breach of its *Quincecare* duty), and now with the two further appellate decisions selected by Stefanie.

In *Royal Bank of Scotland International Ltd v JP SPC 4* [2022] UKPC 18 is a Privy Council judgment on an appeal from the Isle of Man. The Privy Council (Lord Hamblen and Lord Burrows giving the judgment of the Board) held that the *Quincecare* duty is owed only to the customer and cannot be extended to others by a *Hedley Byrne*-type "assumption of responsibility" to any third party.

In *Philipp v Barclays Bank UK Plc* [2022] EWCA Civ 318 Birss LJ (the Chancellor and Coulson LJ agreeing) gave a very interesting judgment holding that the

In a period when a few high profile legal cases have dominated the headlines (if authority were needed for the proposition that a Court is unlikely to be impressed by the suggestion that key evidence has been "lost at sea" following an order for disclosure, now we have it: *Vardy v Rooney* [2022] EWHC 2017 (QB)), our members have been scouring the law reports for other judgments of interest which the tabloids may have missed.

Quincecare duty could apply not only where the impugned direction to make payment comes from a dishonest agent of the customer (who will necessarily be acting outside the scope of their agency so that the payment instruction is not, at least as between the customer and its agent, truly authorised) but in principle it may also arise where a customer has been tricked into making the payment by a fraudster (so that the customer has undoubtedly authorised the payment albeit under a misapprehension as to what this will achieve).

Civil Procedure

A company's articles of association are rarely a riveting read, but a recent Civil Procedure case digested by Annabelle Wang is a reminder that they are nonetheless important – particularly to lawyers being asked to act on behalf of a company. In *Rushbrooke UK Ltd v 4 Design Concepts Ltd* [2022] EWHC 1110 (Ch) HHJ Paul Matthews confirmed that where a company's articles state that a company can only instruct lawyers following a decision of the board of directors, this means that ... the company can only instruct lawyers following a decision of the board of directors. The Judge struck out an action purportedly brought by the company where this was commenced by solicitors instructed by just one director, acting without board approval, and the solicitors themselves were subject to a wasted costs order. This case comes hot on the heels of a similar judgment in *Hashmi v Lorimer-Wing* [2022] EWHC 191 (Ch), in which Richard Farnhill (sitting as a deputy

Judge of the Chancery Division) held that where a private company has adopted the Model Articles and failed to amend Article 11(2), which fixes the quorum of board meetings at no less than two, decisions by a sole director. The message is clear: the Courts will not overlook technicalities in determining what is and is not an act of a company.

Commercial Litigation

Few members of the English legal profession can be unaware of *Eurasian Natural Resources Corp Ltd v Dechert LLP* [2022] EWHC 1138 (Comm) – a reminder to lawyers (hopefully unnecessary in the vast majority of cases) that our principal duty is do the best for our clients, within the law and subject to our duty to the court, and not to bill as much as we can. Jamil Mustafa has also digested an interesting case on fraudulent misrepresentation, in which, thanks to a complex fact pattern (set out by Mr Justice Henshaw in an epic 200-page judgment), a principal was made liable for his agent's precontractual misrepresentations – even though the principal was not actually a party to the contract which eventuated, and the agent was a party to this: *Ivy Technology Ltd v Martin* [2022] EWHC 1218 (Comm).

Company law

In Company Law Peter Burgess looks at two cases relating to unfair prejudice petitions. Firstly, the Privy Council decision in *Ma v Wong & Ors* [2022] UKPC 14 (in which David Alexander KC, Adam Goodison and Ryan Perkins all appeared) wherein the Board confirmed,

in the context of an allegation of unfair prejudice on the basis that the majority had exercised their powers as directors for an improper purpose, the core fiduciary duty of a director to act honestly and in good faith, is “largely, though by no means entirely, a subjective one and that the courts have adopted a non-interventionist attitude when reviewing business decisions” but that where “there has been a failure by a director to consider the separate interests of their company, the test then becomes an objective one” (para 106). See also the article on this case at page [46].

The second unfair prejudice decision examined is *Re Cherry Hill Skip Hire Limited* [2022] EWCA Civ 531, an important decision regarding when delay and acquiescence will bar a remedy. In this case, a delay of 17 years was not fatal, for reasons given by Andrews LJ at paragraph 46 of the judgment:

“It seems to me that, where delay is concerned, there is a distinction to be drawn between a shareholder who knows he has been excluded from active involvement in the company’s affairs and fails to complain about that for many years, and a passive shareholder who knows he is not getting the company’s accounts or an invitation to the AGM and is not receiving dividends and does nothing about any of those matters, but then discovers years later that money or corporate opportunities have been diverted from the company for the benefit of its directors, and moreover, that his shareholding was apparently expropriated in 2007. The distinction lies in the fact that in the absence of evidence to the contrary, a shareholder is entitled to assume that the company is being managed properly by its directors in accordance with their fiduciary and statutory duties, and that its constitution has been followed.”

Corporate Insolvency

Paul Fradley and Daniel Judd have identified a fascinating mix of decisions in Corporate Insolvency. All are worthy of note but I will draw attention to a couple.

In *Re Baglan Operations Ltd* [2022] EWHC 647 (Ch), two members of chambers – Dan Bayfield KC and Rose Darcy – acted for the Official Receiver in its capacity as liquidator of the company, which operated a gas turbine plant in Port Talbert. The Court held that the OR was able to keep power running for various public services in South Wales for another month after its liquidation,

on the basis that it was entitled to take into account environmental concerns in determining what was “necessary” for the purpose of the exercise of its power as liquidator (contained in Schedule 4 to the 1986 Act) “to carry on the business of the company so far as may be necessary for its beneficial winding up”.

In *Re Caversham Finance Ltd* [2022] EWHC 789 (Ch) Matthew Abraham appeared in a case of which practitioners dealing with administrations should take note: where a notice to creditors seeking approval for a consensual extension of an administration under paragraph 76(2) (b) of Schedule B1 to the 1986 Act does not include the particulars required by the Rules to be included in such notice, any purported extension will not be valid.

Personal Insolvency

In Personal Insolvency, Lottie Pyper discusses a case on jurisdiction for the purpose of bankruptcy petitions which demonstrates the flexibility in the test under s. 265(b)(i) of the 1986 Act – which provides that a petition may be presented in this jurisdiction for the bankruptcy of a debtor who in the last three years the debtor “has been ordinarily resident, or has had a place of residence, in England and Wales”: *HRH Prince Hussam Bin Saud Bin Abdulaziz Al Saud v Mobile Telecommunications Company* KSCP [2022] EWHC 744 (Ch).

Property and Trusts

In Property and Trusts Roseanna Darcy highlights a Privy Council case (*Enal v Singh* [2022] UKPC 13) which discusses some fundamental features of trust law: the presumption of advancement (the rebuttable presumption that gifts from husband to wife or parent to child are intended as such so that the recipient does not hold the property on constructive trust for the donor unless there is evidence to rebut the presumption) – which the Board held does apply to commercial property, no less than any other form of property – and undue influence – which the Board held did apply here due to the relationship of trust and confidence between donor and donee, notwithstanding that there had been no evidence to rebut the presumption of advancement.

Sport

Finally, in Sports Law, Edoardo Lupi looks at an appeal before Mr Justice Lane against the decision of a Recorder, which was set aside on the basis that the lower court had wrongly conflated the rules of association football with the standard of care relevant to establishing negligence: breach of the former does not automatically equate to breach of the latter: *Fulham Football Club v Mr Jordan Levi Jones* [2022] EWHC 1108 (QB).



Case Digests



Banking and Finance

DIGESTED BY STEFANIE WILKINS



Royal Bank of Scotland International Ltd v JP SPC 4

[2022] UKPC 18 (Lord Briggs, Lord Kitchin, Lord Hamblen, Lord Burrows, Lady Rose JJSC)
12 May 2022

[Bank's duty of care in negligence](#) · [Quincecare duty](#)

The question for the Privy Council was whether a bank owes a duty of care to the beneficial owner of moneys held in a customer's account, where the beneficial owner has been defrauded by the customer.

The first claimant (the appellant) was a Cayman-based investment fund (the "**Fund**"). It alleged that it had advanced funds to the bank's customer – SIOM – for deployment in an investment scheme (and that it was beneficially entitled to those funds). However, it alleged that the moneys were paid out of SIOM's account for the benefit of fraudsters associated with SIOM, rather than for the purpose of the investment scheme.

The Fund commenced proceedings against the Bank, alleging that the Bank owed it a duty of care in tort to exercise reasonable care and skill.

More specifically, the Fund asserted that if a reasonable banker had grounds for considering that there was a real possibility that the Fund was being defrauded, then the Bank was obliged not to honour instructions in relation to the accounts without further enquiry.

The appeal was dismissed. First, the Board concluded that the bank's *Quincecare* duty did not extend beyond the duty to their customer, to third parties. Although the duty may protect innocent third parties against fraud, it is owed only to the customer.

Secondly, in the circumstances of the case, there had been no assumption of responsibility by the bank. Accordingly, no duty of care could be established in reliance on the *Hedley Byrne v Heller* line of authority.

Finally, the Fund had submitted that even if a duty of care did not arise on the existing case law, the Board ought to recognise such a duty as an "*incremental development*" in the law. The Board rejected this contention; an expansion of the duty along these lines would place an unacceptable burden on banks, and there was no legal lacuna that required such a development.

Philipp v Barclays Bank UK Plc

2022] EWCA Civ 318 (the Chancellor, Coulson LJ, Birss LJ)
14 March 2022

Quincecare duty · Authorised push payment fraud

The claimant, Mrs Philipp, had been a victim of “*authorised push payment fraud*” (“**APP fraud**”), in that, at the behest of a fraudster, she had instructed her bank to transfer funds from her account to an account in the UAE. In doing so, Mrs Philipp had believed that she was transferring funds in order to protect them from fraud; the fraudster had persuaded her that they were cooperating with the FCA and the NCA.

Mrs Philipp claimed that the bank owed her a duty of care to exercise reasonable care and skill in executing her instructions, and specifically that the bank ought to have had in place policies and procedures for the purpose of detecting and preventing APP fraud (and reversing transactions if necessary). She pleaded that there were features of the payments which ought to have alerted an ordinary prudent bank to the problem. At first instance, the bank had successfully applied for the claim to be struck out on the ground that it did not owe a duty of care.

The appeal was allowed. The Court accepted that in most cases concerning the *Quincecare* duty, there had been fraud

“the bank had successfully applied for the claim to be struck out ”

by an agent of the customer (such that, as the respondent contended, there was no true authorisation from the customer to make the payment). However, the Court considered that the existence of a *Quincecare* duty did not depend on whether the instructions had been given by an agent of the customer. Rather, it might also exist where the customer was a victim of APP fraud, provided that the circumstances were such that the bank was on inquiry that the execution of the order would lead to the misappropriation of the customer’s funds. Moreover, the judge at first instance ought not to have concluded that such a duty would be onerous in the absence of a trial.



Civil Procedure

DIGESTED BY ANNABELLE WANG



Rushbrooke UK Ltd v 4 Design Concepts Ltd

[2022] EWHC 1110 (Ch) (HHJ Paul Matthews, sitting as a Judge of the High Court)
13 May 2022

[Company law](#) · [Civil procedure](#) · [Wasted Costs](#)

The applicant company applied for an injunction restraining the presentation of a winding-up petition against it following a statutory demand by the respondent company.

The respondent had issued a statutory demand against the respondent on the basis of several invoices which it had issued to the applicant for the provision of architectural services, which had not been paid. One of the directors of the applicant had passed on the statutory demand to a firm of solicitors, who wrote to the respondent stating that they had been instructed by the director “*in his capacity as director*” of the applicant.

The solicitors issued an application for an injunction, stating that they were instructed by the applicant. The co-director of the applicant contacted the solicitors stating that he wished to dis-instruct them.

The issue was whether the application should be struck out on the basis that the solicitors had not been authorised by the applicant to act for it.

The application was struck out as the company’s articles provided that it could only instruct lawyers to commence proceedings by decision of the directors. There was no evidence of any agreement to instruct the solicitors by the directors, and the application notice unequivocally stated that the applicant was the solicitors’ client. Accordingly, the application was struck out and the court made a wasted costs order against the solicitors as they did not have authority to act for the applicant.

Park v Hadi and Another

[2022] EWCA Civ 581 (Holroyde, Stuart-Smith, Warby LJJ)
29 April 2022

Non-compliance · Unless Orders · Relief from Sanctions

The claimant had claimed damages for breach of contract and the defendants had applied to strike out his claim. The judge had adjourned the strike-out application and made an unless order requiring the claimant to take various procedural steps by a fixed date. The claimant emailed the court with the required documents by the fixed date. However, the court was unable to open one of the email attachments and, as a result, did not forward the documents to the defendant's solicitors until several days later.

The defendants claimed that service of the documents was defective as they had not received the court's email until after the date specified in the unless order. At the hearing of the adjourned application, the claimant made an informal application for relief from sanctions, explaining that he had been working from home without appropriate office equipment and could not afford legal representation.

The judge granted the application and dismissed the defendants' strike-out application, indicating that he

would dispense with the need for a formal application for relief from sanctions because the claimant had taken substantial steps to comply with the order, despite errors. The defendants appealed the judge's order granting relief from sanctions to the claimant.

The Court of Appeal reaffirmed the principle that, whilst an application for relief from sanctions was usually made by an application notice with a supporting witness statement, a judge may grant relief from sanctions without formal notice or without any application, at their discretion. The Court of Appeal went on to set out that the discretion would only be exercised sparingly, but where it was initially considered that relief might justly be granted, the court would go on to consider the three-stage Denton test.

In the circumstances, it was held that the failure to a formal application notice did not cause any real prejudice to the defendants in opposing the application, and the judge had been entitled to find that the Denton test was satisfied.

AIC Ltd v Federal Airports Authority of Nigeria

[2022] UKSC 16 (Lord Hodge, Lord Briggs, Lord Sales, Lord Hamblen, Lord Leggatt JJSC)
15 June 2022

Civil Procedure · Judgments and orders · Relief from sanctions

The respondent had applied to the English court to enforce a Nigerian arbitration award against the appellant. The appellant had applied to adjourn the application as there were ongoing proceedings in Nigeria regarding the award.

The English court adjourned the proceedings but ordered the appellant to provide security of \$24million by a fixed date, which order the appellant failed to comply with. The court subsequently granted the respondent permission to enforce the award. However, before the order had been sealed, the appellant received a guarantee sufficient to cover the required security, which it subsequently paid to the respondent, and applied to reopen the matter.

The judge had granted the appellant's application and rescinded the respondent's right to enforce the award on the basis that there had been a significant change in circumstances. The Court of Appeal had overturned the decision, holding that the judge should have conducted

a two-stage analysis, asking first whether it was right in principle to entertain the reconsideration application and, if so, then considering the application on its merits. The Court considered that the late provision of a guarantee did not amount to a sufficient change in circumstances.

On appeal, the Supreme Court determined that the correct approach to a reconsideration application was to act to do justice in accordance with the overriding objective, which affirmed and reinforced the principle of finality. Accordingly, the judge should not start from a position anything like neutrality. However, it was not feasible to formulate a bright line test as to the exercise of the discretion.



Commercial Litigation

DIGESTED BY JAMIL MUSTAFA



Eurasian Natural Resources Corp Ltd v Dechert LLP

[2022] EWHC 1138 (Comm) (Waksman J)
16 May 2022

Tort · Contracts · Legal Profession · Negligence

The claimant company retained the defendant law firm (“D”), primarily acting through a partner, G (also a defendant to the claim), to lead an internal investigation into a subsidiary of the claimant which operated in Kazakhstan. The claimant desired to avoid any criminal investigation by the Serious Fraud Office (“SFO”) and to obtain a civil settlement with the SFO in the event of any engagement.

In August 2011, an article appeared in *The Times* newspaper which was highly damaging to the claimant and which was based on leaked documents, some of which were privileged. Following the article, G advised that the claimant engage with the SFO, which substantially increased the scope of the investigatory work to be completed by D under its retainer, which then encompassed not just the claimant’s subsidiary in Kazakhstan but also its activities in Africa. Between October 2011 and March 2013, there were eight formal meetings between the SFO, the claimant and G. There were also thirty separate contacts between G and officers at the SFO, either by telephone or at meetings. Further damaging articles based on confidential information appeared in the press in December 2011 and March 2013.

In March 2013, D provided a substantial report to the SFO regarding the operations of the claimant’s subsidiary in Kazakhstan. However, the investigation into the operations in Africa was ongoing. Nevertheless, the claimant terminated its retainer with D on 27 March 2013. Then, on 25 April 2013, the SFO launched a criminal investigation into the Claimant alleging fraud, bribery and corruption against it or its subsidiaries. Following the commencement of that investigation, further confidential and in some cases privileged information was anonymously sent to the SFO in a brown envelope.

The claimant brought proceedings claiming that, while retained by the claimant, G had acted in breach of his duties

as a solicitor by disclosing confidential and/or privileged information to the SFO and leaking information to the press, his primary motive for doing so being to expand the scope of the investigatory work to generate further fees for D. The claimant subsequently alleged in separate proceedings (which were case managed and tried together with the proceedings against D and G) that the SFO’s officers had been complicit in certain of G’s breaches of duty to the extent they induced breach of contract and/or fiduciary duty. The claimant further alleged the tort of misfeasance in public office against the SFO’s officers.

The judge found that G (and so D) had been in at least reckless breach of contract, breach of his duty of care in tort, and breach of fiduciary duty having leaked confidential information and having attended several unauthorised meetings with the SFO and made statements contrary to the claimant’s interests. The judge further found that G and so D’s conduct of the investigation on behalf of the claimant had been in reckless or negligent breach of duty (in contract, tort and equity) in numerous respects, including by failing to record his own advice in writing (in view of the seriousness and complexity of the matter), by giving incorrect advice in relation to the Claimant’s potential criminal liability and by unnecessarily expanding the scope of the investigation.

Further, the judge found that the SFO was in breach of its own duties with respect to 15 out of 30 of the separate contacts with G, where G was clearly acting without authorisation from the claimant and contrary to the claimant’s interests. He also found that the tort of inducement to breach of contract as regards G had been made out, however, he conversely held that there was no clear basis in the authorities for the tort of inducement to apply to breach of fiduciary duty.

JSC Commercial Bank Privatbank v Kolomoisky

[2022] EWHC 755 (Ch) (Trower J)

14 June 2022

Fraud · Civil Procedure · Adjudgments · War · Ukraine

The claimant Ukrainian bank brought claims against the defendant Ukrainian oligarchs—Mr Igor Kolomoisky and Mr Gennadiy Bogolyubov— and various corporate defendants who the claimant alleged participated in the fraudulent misappropriation of in excess of US\$1.9 billion through a series of loans to Cypriot borrowers who then entered sham supply agreements for the supply commodities and industrial equipment. The claimant further alleged that the misappropriation was concealed by the grant of sham security for the loans and the entry into further sham supply agreements, of which Mr Kolomoisky and Mr Bogolyubov had never explained the commercial rationale.

A trial was fixed in the proceedings to begin in June 2022. Mr Kolomoisky and Mr Bogolyubov, and all but one of the corporate defendants, sought an adjournment of the trial following the Russian invasion of Ukraine in February 2022. The adjournment was sought on the basis that the invasion meant that a fair trial would not be possible in June

2022, because they could not give proper instructions to, or receive advice from, their English lawyers, while the invasion had further interrupted the provision of services from their assistants and lawyers in Ukraine and there were real and substantial difficulties in giving evidence whether in person in England or from Ukraine.

The judge granted 12-month adjournment. He did not consider it could be suggested that there could be a fair trial in June 2022 given the interruption of the free flow of instructions defendants and their English lawyers. In this regard, he noted it was not just the defendants who were affected by the invasion, but also their assistants and lawyers who had been assisting in the conduct of the proceedings and had been affected in their ability to further assist in preparation for trial. The judge did not think that the claimant gave sufficient weight to the impact of the war on the defendants' ability to prepare for trial.

He further stated that the English court should tread very carefully before concluding that devoting substantial time to litigation in England should take priority over the desire of Ukrainian citizens to assist in the war effort (which Mr Kolomoisky maintained he was fully engaged in). While a less immediate obstacle to preparation for trial, although of greater significance for its conduct, the judge noted that Mr Kolomoisky and Mr Bogolyubov would not be able to leave Ukraine because of martial law and the foreign travel restrictions imposed on males between the age of 18 and 60. Thus, unless the situation improved, evidence would have to be given remotely, which, although feasible in theory, would likely produce significant practical difficulties. The judge acknowledged that, if the claimant were entitled to interest under Ukrainian law, there was a risk of prejudice to the claimant as a result of delay to their potential recovery as regards that asserted entitlement but did not consider it of such an extent to warrant the refusal of an adjournment.

Ivy Technology Ltd v Martin

[2022] EWHC 1218 (Comm) (Henshaw J)
20 May 2022

Agency · Authority · Fraudulent Misrepresentation

The claimant entered into a sale and purchase agreement ('SPA') with the first defendant pursuant to which the claimant purchased shares in five companies which made up an online gambling business. The second defendant was not a party to the SPA but had a 50% beneficial interest in the gambling business. The claimant alleged that the second defendant had authorised the first defendant to act as his agent in relation to the negotiation and sale of his share of the business. The claimant brought proceedings against the defendants, *inter alia*, alleging deceit and conspiracy to make fraudulent misrepresentations. The claimant alleged that first defendant falsely represented that the companies' EBITDA was £1.6m in the year during which the negotiations took place and that the business was profitable and/or self-sustaining from its revenue. The first and second defendant were further alleged to have falsely represented that the business was profitable and had an existing EBITDA of £1.6m at a meeting in Prague.

The judge found that the elements of the tort of deceit were made out. However, he found that the first defendant had not concluded the SPA as agent for the second defendant notwithstanding that the claimant knew that the second defendant owned 50% of the shares. This is because the SPA stated in the recitals that the first defendant was the 100% owner of the shares. The judge held that this amounted to an agreed basis of contracting that the first defendant was the

sole owner of the shares, which was reinforced by the absence of any reference to the second defendant within the definition of 'shareholder' and also the exclusion of third-party rights in the SPA. Henshaw J viewed it as an example of parties agreeing to contract on a particular basis whether it was true or not. The second defendant was therefore not party to the SPA.

Henshaw J did, however, find that the second defendant had given the first defendant his express authority to act on his behalf in the negotiations for the SPA which concerned the sale of shares in which he was beneficially interested. The second defendant was therefore jointly liable as principal for the representations that the first defendant made to the claimant as well as the representations that he made to the claimant himself which were fraudulently made. Henshaw J considered that the circumstances as a whole gave rise to an inference that the first and second defendant agreed that the first defendant would make representations to the claimant that the business was profitable in order to sell the shares, which both defendants knew was false. This amounted to a conspiracy to persuade the claimant to buy the business for a substantial sum on the back of false representations as to its profitability which the defendants knew would injure the claimant. As the conspiracy was causative of the misrepresentations, the measure of damages for conspiracy and deceit were the same.



Company Law

DIGESTED BY PETER BURGESS



Ma v Wong & Ors

[2022] UKPC 14 (Lady Rose on behalf of the Privy Council)
9 May 2022

British Virgin Islands · Unfairly prejudicial conduct · Equitable constraints on shareholders · Family company

The widow, M, of N, a brother of the two respondents, Y and C, brought proceedings under section 184I of the Business Companies Act 2004 (British Virgin Islands) alleging unfairly prejudicial conduct to her as the minority shareholder in the third respondent, the Company, the BVI holding company of WTK Group, a Malaysian forestry and agriculture conglomerate founded by the father of N, Y, and C. Each of M, Y, and C held one share in the Company.

Shortly after N's death, Y and C had caused the Company to convert its preference shares in the principal company in the WTK Group, called WTK Realty, into ordinary voting shares. The effect of the conversion was to change the balance of voting power in WTK Realty in favour of Y and C, who were able to outvote M and her son at any shareholder meeting of WTK Realty.

M claimed that the power to approve the conversion conferred by the Company's constitution on Y and C as majority shareholders was subject to equitable constraints which prevented them from approving any resolution to convert unless the shareholders were unanimous, and it had been unfairly prejudicial to M for Y and C to ignore

those equitable constraints and effecting the conversion. M also claimed that the conversion was instigated by Y and C as *de facto* directors of the Company and a breach of their fiduciary duties because the conversion was carried out for an improper purpose to deprive her of voting control of WTK Realty.

At first instance, the High Court of Justice of the Virgin Islands dismissed all aspects of M's claim and ordered that Y and C buy M's single share in the Company at a price to be determined at a trial on quantum. The Court of Appeal dismissed M's appeal and upheld the order in the terms made by the judge. M appealed to the Privy Council.

The Privy Council dismissed M's appeal. There was no basis for criticising the first-instance judge's finding that there were no agreements giving rise to any equitable constraints on Y and C's abilities as majority shareholders in the Company to cause the conversion to occur. There was, in essence, no equitable principle that a family company had to be wound up when there was a breakdown in trust and confidence between the family members. Further, the Privy Council considered there

were no grounds for impugning the judge's factual finding as to the primary purpose of the conversion.



David Alexander KC



Adam Goodison



Ryan Perkins

Re Cherry Hill Skip Hire Limited; Bailey v Cherry Hill Skip Hire Limited & Ors

[2022] EWCA Civ 531 (Andrews LJ, Snowden LJ and Lewison LJ)
27 April 2022

[Unfair prejudice petitions](#) · [Limitation](#) · [Delay](#) · [Acquiescence](#)

A family-owned business was established in 1982 by N and her son A, who owned the shares in the Company 51% and 49% respectively and were both directors. Shortly after the Company's establishment, there was a falling out between A and N. By 1985, A was excluded from any involvement in the management of the business. He was removed as a director by a resolution in 1999, and replaced by his daughter, J. By then, J and A had also fallen out.

Between May 2001 and March 2003, A's solicitors complained of a lack of information and threatened proceedings under section 994 of the Companies Act 2006 (then section 459 of the Companies Act 1985). The petition was not issued by A until 2020, 17 years later. N and J sought to strike out the petition primarily on the basis that A's petition should be dismissed on the grounds of delay and/or acquiescence. The Company was also dissolved and struck off the register following the petition.

At first instance, the judge found that by 2003, at the latest, A knew enough to have been able to take legal proceedings in respect of his complaints and that the petition should be dismissed on the grounds of delay and acquiescence. A appealed on the basis that the judge was wrong to dismiss the petition at this early stage, and that the delay in bringing the petition should be considered after a trial when a judge considered relief.

The Court of Appeal considered the test applicable to limitation for unfair prejudice petitions to be the approach adopted by Fancourt J in *Re Edwardian Group Ltd, Esera Trust (Jersey) Ltd and another v Singh and others* [2018] EWHC 1715 (Ch), [2019] 1 BCLC 171 at [571], namely whether, in view of the delay and the reasons for the delay, it is unfair or inappropriate in all the circumstances for the petitioners to obtain the relief that they seek, in which case the Court will exercise its discretion to refuse it.

The Court of Appeal drew a distinction between two types of shareholders. On the one hand is a shareholder who has been excluded from active involvement in the company and fails to complain about that for many years. On the other is a passive shareholder, who knows he is not getting the company's accounts or an invitation to the annual general meeting and is not receiving dividends and does nothing about any of those matters, but then discovers wrongdoing years later. In the case of the passive shareholder, in the absence of evidence to the contrary, the shareholder is entitled to have assumed that the company is being managed properly by its directors in accordance with their fiduciary and statutory duties, and that its constitution has been followed. Such a shareholder does not therefore acquiesce in the relevant wrongdoing by failing to bring a petition. Accordingly, the Court of Appeal allowed the appeal, staying the proceedings pending the necessary steps being taken to restore the Company to the register.

Re All Scheme Ltd

[2022] EWHC 1318 (Ch) (Trower J)
30 May 2022

Scheme of arrangement · Sanction · Consumer-creditor schemes

A, a guarantor loan company, sought the sanction of two alternative schemes of arrangement. A had encountered financial difficulties primarily because of mis-selling claims brought against it by customers seeking redress by way of compensation.

In a previous sanction judgment, Miles J had refused to sanction the then proposed scheme primarily because it had envisaged that the ultimate shareholders of A's group would keep their entire shareholdings while the redress creditors were to take a 90% haircut on their claims, and the FCA had opposed the sanction of the scheme. At the previous creditor meeting, the scheme had been approved by 95% of the creditors attending and voting, but these represented only 10% of the class by value and Miles J considered they had not been given the requisite information to properly understand the scheme or alternatives.

A formulated two alternative revised schemes, one that would allow the group to resume its lending business subject to FCA approval and recapitalisation by share dilution,

and the other that would wind down the existing business. Snowden LJ had ordered that creditor meetings be convened for these alternative schemes.

The judge approved the scheme involving the resumption of A's lending business. The issue of the preservation of the shareholders' interests had been addressed by their dilution to around 5% of the new share capital. The FCA had not opposed the new schemes, and the creditors had been assisted by a customer advocate and the creation of an independent creditors' committee.



Barry Isaacs KC and Adam Al-Attar

Re Houst Limited

[2022] EWHC 1941 (Ch) (Zacaroli J)
22 July 2022

The Court sanctioned a restructuring plan in respect of the applicant company, an "SME" (small/medium size enterprise), the business of which was the provision of property management services for short term/holiday lets. The company's business had been severely affected by the pandemic and, as a consequence, was insolvent.

The Restructuring Plan proposed by the company was relatively straightforward. It involved: (i) a minimum of £500,000 being advanced by certain members to the company in exchange for the issue of new preference shares; (ii) a reduction in the sum outstanding to the company's bank to a total of £750,000 to be repaid over 3 years; and (iii) the Company making monthly contributions to make payments to plan creditors (excluding the bank) in sums expected to be significantly higher than if the Company were to go into administration (which was the relevant alternative).

Following an Order made by Adam Johnson J convening five meetings of creditors and one meeting of members, all classes of plan creditors and members voted in favour of the Restructuring Plan, save for the Secondary Preferential Creditor Plan Meeting, which comprised of HMRC only.

The Court sanctioned the restructuring plan by using the cross-class cram-down power under section 901G of the Companies Act 2006. Conditions A and B of section 901G were satisfied. As to the Court's discretion, it was appropriate to exercise the power to cram-down in circumstances where, amongst other things, HMRC stood to receive a better outcome if the plan was sanctioned than in the relevant alternative and had not attended to oppose the sanction of the plan. This was so notwithstanding that that plan involved a departure from the order of priority between the distributions that would be paid to creditors in the relevant alternative.

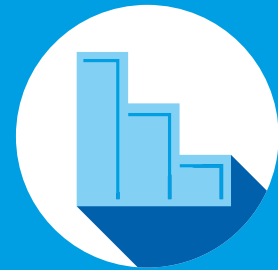


Marcus Haywood



Corporate Insolvency

DIGESTED BY DANIEL JUDD
AND PAUL FRADLEY



Re Ipagoo LLP (in administration)

[2022] EWCA Civ 302 (Asplin LJ, Popplewell LJ, William Davis LJ)
9 March 2022

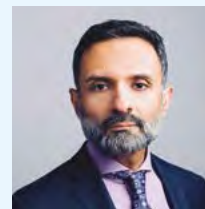
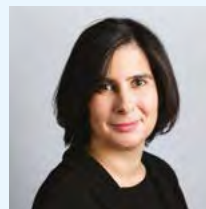
[Electronic Money Regulations 2011](#) · [Trusts](#) · [Rights of electronic money holders](#)

The administrators of Ipagoo LLP sought directions on how funds paid to it, by holders of electronic money, were held. While the company was not permitted to take deposits, it was required to safeguard “*relevant funds*” under the Electronic Money Regulations 2011. In particular, the administrators sought a direction as to whether those funds were held on trust for the holders of electronic money. The FCA intervened on the issue. At first instance, the court concluded that the regulations did not give rise to a trust, but that regulation 24 overrode the rules ordinarily applying upon the company’s insolvency.

The FCA appealed. It submitted that the “*relevant funds*” were subject to a statutory trust, that the safeguarding requirements in the Payment Services Directive (2015/2366) and the Electronic Money Directive (2009/110/EC) could not be given effect without a trust, and that the regime did not override those aspects of insolvency and property law which would otherwise apply. The administrators cross-appealed against the finding that the protection afforded by regulation 24 extended to funds which should have been (but were not) safeguarded in accordance with the regulations.

The judgment below was upheld and the appeal was dismissed. It was not necessary to achieve the Directive’s purpose that “*an appropriate level of consumer protection*” gave rise to a statutory trust. In particular, the provisions of article 10(a), which only required segregation of the net sum which had

not been used in transactions by the electronic money holder, and article 10(b), which permitted the issue of an insurance policy or guarantee equivalent to the amount which should have been segregated, were inimical to the need to impose a trust in order to fulfil the purposes of the Directive made clear that there was no need for segregation of the relevant funds under a statutory trust. There were numerous other indications in the drafting of the regulations that no statutory trust was intended, and if a trust were intended, a number of provisions would have been drafted differently. The final issue was whether regulation 24 overrode the normal insolvency regime. The answer was that it did: regulation 24 gave rise to a bespoke regime, designed to operate in priority to rules which would otherwise apply, and was effective as a consequence of section 2 of the European Communities Act 1972. Once the bespoke process under regulation 24 has taken place, the statutory regime under the Insolvency Act 1986 would apply.



Felicity Toubé KC and Dr Riz Mokal

Re Baglan Operations Ltd

[2022] EWHC 647 (Ch) (Sir Alastair Norris)
21 March 2022

Liquidation · Persons aggrieved · Beneficial winding up · Environmental risks

The company, Baglan Operations Limited, operated a large gas turbine plant in Port Talbot. It supplied customers with electricity. The company then entered into compulsory liquidation. The Official Receiver then began to wind down the company's affairs. Under paragraph 5 to Schedule 4, of the Insolvency Act 1986, the Official Receiver only had power to carry on the business of a company so far as necessary for its beneficial winding up.

In this case, a number of the company's customers complained that, if the Official Receiver decided to cease supplying them with electricity, the company would create environmental hazards and risks to the general public. However, the Official Receiver had considered that its jurisdiction to continue the business of the company did not permit it to supply customers with electricity for that purpose. Those customers applied as "persons aggrieved" in order to review the Official Receiver's decision to cease trading, and to prevent the special managers of the company from completing the company's winding up, until an alternative source of electricity had been secured.

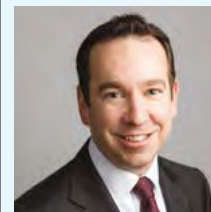
The standing of the applicants, which included the Welsh Government, was not disputed. The court considered that the applicants did have standing under section 168(5) of the Insolvency Act 1986 to apply as a person "aggrieved", being directly affected by the actions of the Official Receiver. It was not necessary to challenge the decision

of the Official Receiver as "perverse", and the perversity test did not apply to all decisions made by a liquidator. This was not necessary for decisions made by a liquidator which are not "commercial" (such as legal questions).

The question then turned to whether the Official Receiver had power to continue the winding up. The court noted that the power to carry on the business of a company in liquidation must have as its ultimate object the winding up of the company, and no other purpose. The second point was that the word "beneficial" did not necessarily connote a "financial" benefit, but meant "of advantage to the persons in whose interests the liquidation process is being undertaken". The third point was that, even if realisation and distribution is the ultimate purpose, the way in which the purpose is achieved may involve the exercise of a power to continue the business.

Applying those principles to the facts, the court held that the Official Receiver did have the power to continue supplying the applicants with electricity. The Official Receiver was appointed not solely for the purpose of gathering in, realising, and distributing the company's assets, since in this case, the aim was ultimately to disclaim the assets. The Official Receiver was appointed so that health and safety, and environmental concerns relating to the Baglan plant could be addressed, for the wellbeing of those in the locality exposed to the environmental hazards.

This unquestionably permitted the continuation of business in respect of which the company might be civilly or criminally liable. However, the judge concluded that power extended where the environmental hazards may not result in liability of the company. The Official Receiver was entitled, on the facts of this case, to take into account concerns which had been raised regarding environmental risk in the context of the exercise of the power to continue or discontinue business. Since the Official Receiver had taken an incorrect view of its powers, the court substituted its own decision for that of the Official Receiver such that the company should continue to operate for a further month. The court confirmed the decision of the Official Receiver to disconnect a merely commercial customer.



Daniel Bayfield KC



Roseanna Darcy

Re Caversham Finance Ltd

[2022] EWHC 789 (Ch) (Michael Green J)
28 February 2022

Administration · Extension by consent · Defects

This was an application for declaration that the terms of office of the administrators of two companies (“**the Administrators**”) had been validly extended by consent in March 2022. There were two potential errors in the extension, neither of which the court held affected the validity of the appointment.

First, the notice seeking consent did not state the reasons why the extension was sought as required by rule 3.54(2) of the Insolvency Rules 2016 (“**the Rules**”). The Judge did not consider that an incidental reference to the progress report (where the reasons for an extension were explained) in the covering letter was sufficient to satisfy rule 3.54(2). However, the Judge held that rule 12.64 (“**formal defects or irregularities**”) applied on the facts. The Judge held that the case law on defective appointments was equally applicable to consensual extensions. The Judge considered that the defect was “*of the procedural variety and therefore within Rule 12.64*”. By contrast, “[i]f that consent had not been obtained then clearly the extension would be a nullity, whereas the failure to give reasons does not, in my view, have the same consequences, nor could it have been intended by Parliament to have the same consequences.”

Secondly, the notice seeking consent did not include the statements required by rules 15.8(3)(f)–(g) relating to creditors with small debts and those who had opted out from receiving notices. On the facts there were no creditors in those categories. The Judge held that “Parliament cannot have intended that redundant information should be included on the notice” and as a result “the notice should not be rendered defective by the omission of a statement that could only apply to such a non-existent category”. Had it been necessary, the Judge would have applied rule 12.64 to this defect.



Matthew Abraham

Re Changtel Solutions UK Ltd

[2022] EWHC 694 (Ch) (ICC Judge Barber)
1 April 2022

Post-petition dispositions · Limitation · Change of position

In this case, the liquidators of the company brought proceedings to recover payments on the basis that they were void as post-petition dispositions under section 127 of the Insolvency Act 1986. Of particular interest are the judge’s decisions on the limitation period and the availability of “*change of position*” as a defence.

The judge held that the limitation period for claim under section 127 arose from the date of the winding-up order, not the earlier date of the payment. She noted that the purpose of section 127 was to preserve the *pari passu* distribution principle in a liquidation, and considered that it was only once a winding-up order had been made that this principle was brought into operation. Section 127 did not have the effect of finally avoiding a disposition unless and until a winding-up order was made. As a result, “[t]he winding up order is an essential ingredient of the cause of action” and limitation did not start to run until the order.

Turning to change of position, the judge considered there was a conflict between *Rose v AIB Group (UK) plc* [2003] 1 WLR 2791 and *Re MKG Convenience Ltd* [2019] BCC 1070. The former proceeded on the basis that change of position could be available in a section 127 context even where a validation order was not, whereas the latter proceeded on the basis that the change of position defence would be constrained in the

same way and for the same reasons as the exercise of the court’s discretion to validate a disposition. The judge noted that “[w]here there are two conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred, provided that it was reached after consideration of the earlier decision, unless the third judge is convinced that the second was wrong in not following the first”. The judge was not convinced that HHJ Cooke was wrong not to follow *Rose* in *MKG*, and noted that *Rose* had been subject to “*significant criticism*”. The judge therefore held that the circumstances in which a change of position defence can succeed are constrained in the same way as, and for the same reasons as, the exercise of the court’s discretion to validate a disposition. It was not therefore enough for the respondent to show it had acted in good faith, without notice of the petition, in the ordinary course of business, and had given valuable consideration for the payments.



Stephen Robins KC

Re Edengate Homes (Butley Hall) Ltd

[2022] EWCA Civ 626 (Asplin, Males, and Stuart-Smith LJJ)
9 May 2022

Assignment · Challenge to liquidator's decision · Standing · Legitimate interest

This was an appeal from a decision of HHJ Halliwell that dismissed a creditor's challenge to a liquidator's decision to assign a claim to a litigation funder. The liquidator of the company had assigned claims vested in the company, as well as statutory claims vested in him as officeholder, to a litigation funder. Mrs Lock, a creditor, member and director of Edengate, brought an application to challenge the assignment. The claims which had been assigned by the liquidator were against Mrs Lock, her husband, and her parents, and the litigation funder commenced proceedings against those persons. Mrs Lock applied to have the assignment set aside under section 168(5) of the Insolvency Act 1986.

The court noted that in everyday language a defendant to a proposed claim might be "aggrieved" that they had not been given an opportunity to acquire a claim, but held that this did not give them standing for the purpose of section 168(5). After reviewing the authorities, the court held that it was not sufficient simply to ask whether an applicant was a creditor of the company; the creditor must also have a legitimate interest in obtaining the relief sought.

An applicant would not have such a legitimate interest if their interests were adverse to the liquidation or the interests of creditors generally, such as where the relief sought would result in a lower recovery for creditors. The judge had been correct to consider that Mrs Lock's challenge was not made for the benefit of creditors generally and her interests were not aligned to those of the class of creditors. The court accepted that a defendant to a claim could have a legitimate interest in acquiring the claim, for example, where the creditor was prepared to outbid the putative assignee. However, there was no suggestion that this was the case on the facts.

The Court considered that it could be good practice to give a defendant to a claim the opportunity to purchase it or settle it before assigning to a litigation funder. However, a failure to do so was not necessarily perverse, and whether it was perverse depended on scrutiny of all the facts. In the court's view, the facts justified the Judge's conclusion that the decision was not perverse. Mrs Lock had not followed up on the suggestion she might buy the claims, and the liquidator had no reason to think that she would offer a better deal than the litigation funder.

Re Safari Holding Verwaltungs GmbH

[2022] EWHC 1156 (Ch) (Adam Johnson J)
5 May 2022

Schemes of arrangement · German gaming companies

A company incorporated in Germany applied for sanction of a scheme of arrangement under section 899 of the Companies Act 2006 ("CA06"). The company operated a gaming arcade business in Germany and the Netherlands. It was indebted as the issuer of fixed rate senior secured notes which benefited from English law guarantees. The notes were issued pursuant to an indenture, which was the debt sought to be compromised by the proposed scheme. In a convening judgment - [2022] EWHC 781 (Ch) - the required documents were made available to the scheme creditors and the judge concluded that a single meeting of creditors was appropriate.

The judge granted the application to sanction the scheme. There was a "sufficient connection" with England and Wales to enable the court to exercise its power to sanction, by virtue of the choice of English law to govern certain key documents and the inclusion of an amended jurisdiction clause conferring jurisdiction on the courts of England and Wales.

Next, applying the four-part template identified in *Re KCA Deutag UK Finance Plc* [2020] EWHC 2977 (Ch), all the conditions were satisfied. The overall turnout represented 98.01% of the total scheme creditors by value; therefore, the class was fairly represented. The scheme was one which an intelligent and honest creditor, acting in their own interests, might reasonably approve.

The intended commercial logic of the scheme formed part of a larger restructuring aimed at enabling the company to make payment in full under the scheme securities. The alternative scenario was insolvency, in which the recovery for scheme creditors would range between 48.5% and 63.7%. The scheme would become fully effective only on satisfaction of certain conditions, including the approval of the German tax authorities. However, there was nothing to suggest that such approval would not be forthcoming, and the current uncertainty was not of such a nature as to represent a "blot" on the scheme (*Lombard Medical Technologies Plc, Re* [2014] EWHC 2457 (Ch), [2015] 1 BCLC 656, applied). There was also a prospect of the long-stop date for fulfilment of the conditions to be extended, *KCA Deutag* applied.



Tom Smith KC and William Willson



Personal Insolvency

DIGESTED BY LOTTIE PYPER



HRH Prince Hussam Bin Saud Bin Abdulaziz Al Saud v Mobile Telecommunications Company KSCP

[2022] EWHC 744 (Ch) (Roth J)
31 March 2022

Bankruptcy · Service out

The debtor, a member of the Saudi royal family, appealed against an order granting the petitioning creditor permission to serve its bankruptcy petition out of the jurisdiction. The creditor relied on section 265(b)(i) of the Insolvency Act 1986, which permits service out of the jurisdiction where, within the three years before the petition is presented (the “*relevant period*”), the debtor “*has been ordinarily resident, or has had a place of residence, in England and Wales*”. The alleged place of residence was a property in London owned by the debtor’s family. The judge held that, to satisfy this limb of the test, there was

no requirement for the debtor to have any ownership stake in their place of residence, nor that the debtor needed to have any de facto control over property. In this case, the debtor had not visited the relevant property in London during the relevant period, and contended that, for all but the first two months of the relevant period, he could not have stayed at the property because it was not large enough to accommodate his professional *entourage*. However, he had previously resided there as a student and had continued to stay with his family in the years to follow. He also continued to pay the council tax for the property

for the majority of the relevant period. In those circumstances, the judge was satisfied that, at least for the purposes of granting permission to serve out of the jurisdiction, the jurisdictional gateway in section 365(b)(i) was satisfied. The appeal was accordingly dismissed.



Andrew Shaw

Kireeva v Bedzhamov

[2022] EWHC 1047 (Ch) (Falk J)
28 April 2022

Bankruptcy · Security for costs · Russia

A Russian national had been made bankrupt in Russia. The Russian trustee in bankruptcy sought recognition in England and Wales of the Russian bankruptcy. That issue had been considered by the Court of Appeal, which remitted the application for recognition. In doing so, the Court of Appeal had set aside the recognition of the Russian trustee in bankruptcy.

The Russian national concerned, Mr Bedzhamov, applied for security for costs against the Russian trustee in bankruptcy, on the basis that (if he succeeded) he would not have a fair opportunity of enforcing an English costs judgment in Russia, or of obtaining a fair hearing, and referred in particular to the Russian invasion of Ukraine and resulting sanctions. The Russian trustee resisted the application on the basis that it was exceptional to make an order for

security for costs against a trustee in bankruptcy.

The judge concluded that an order for security for costs against the Russian trustee in bankruptcy was just in all the circumstances. It was clear that the Russian trustee in bankruptcy had no assets in England and Wales against which an order for costs could be enforced, and there was a real risk that enforcement would not be possible. The judge noted that there was evidence that if Mr Bedzhamov were extradited to Russia he would be at real risk of treatment in breach of the European Convention on Human Rights, the risk of sanctions could not be discounted in a fast-developing situation, and there was evidence that the litigation funder of the Russian trustee in bankruptcy was (until March 2022) controlled by certain sanctioned individuals.

The Russian trustee in bankruptcy was also dependent on those controlling it for the purpose of meeting the costs of any adverse costs order. The Russian trustee in bankruptcy had not clearly demonstrated that Mr Bedzhamov's opposition to recognition would fail, and the fact that arguments had been raised late did not require the refusal of security for costs. While it was exceptional to make an order for security for costs against a trustee in bankruptcy, this was an exceptional case, and the court ordered security for costs.



William Wilson



Property and Trusts

DIGESTED BY ROSEANNA DARCY



Enal v Singh

[2022] UKPC 13 (Lord Briggs, Lord Kitchin, Lord Hamblen, Lady Rose, Sir Nicholas Patten)
11 April 2022

[Beneficial Ownership](#) · [Resulting Trusts](#) · [Undue Influence](#)

The Privy Council were required to consider issues concerning beneficial ownership and undue influence in this appeal from the Court of Appeal of the Republic of Trinidad and Tobago.

The underlying issue concerned a parcel of land (the “**Property**”) which had been acquired by a brother and sister (“**R**” and “**S**”) as joint tenants under a deed of conveyance at the request of their father, Mr Maharaj who had purchased the Property in their name (the “**Deed**”). R and S had later divided their interest in the Property. R had also executed a power of attorney in favour of Mr Maharaj (the “**POA**”). The POA gave Mr Maharaj the power to sell, charge and dispose of property. Accordingly Mr Maharaj sold the entire Property to S and her son for a reduced value, without discussing this with R or accounting any of the proceeds to him. After R’s death, his widow commenced proceedings asserting that the sale was a breach of Mr Maharaj’s fiduciary duties under the POA and was the product of the defendants’ undue influence.

At first instance, the judge had to decide whether the Deed operated as a gift of the entire legal and beneficial interest in the Property to R and S, or whether they held the legal estate as trustees for their father. He decided that Mr Maharaj remained the beneficial owner of the Property and was entitled to dispose of the Property as he wanted even at an undervalue. He rejected the claim of undue influence. The Court of Appeal overturned this decision, which the Privy Council upheld.

On beneficial ownership, the starting point was that where property had been transferred to the name of a child of the payer, there would be a presumption of advancement in favour of the child which, unless rebutted, would displace the presumption of a resulting trust. Here, there was no evidence to rebut that presumption and the Court of Appeal were correct to consider that beneficial ownership had not been retained by Mr Maharaj and by selling the Property at an undervalue, this breached his fiduciary duties under the POA.

On undue influence, the issue was whether the Court of Appeal had been entitled to set aside the judge’s conclusion that the claimant had not established a relationship of dependence or trust and confidence between the defendants and Mr Maharaj. In confirming that it was so entitled, the Privy Council explained that where a transaction of the kind which occurred in this case (i.e. where the defendants had obtained title to the property at a fraction of its true value as a result of a transaction which was concealed from the original owner despite promises to consult him and to account for the purchase price) and which concerns those who are in a relationship of trust and confidence, this calls for an explanation and for the court to infer that, absent a satisfactory explanation, the transaction can only have been produced by undue influence (applying *RBS v Etridge (No 2)* [2001] UKHL 44; [2002] 2 AC 773).

Re Majeed (A Bankrupt)

[2022] EWHC 1080 (Ch) (ICC Judge Barber)
16 May 2022

Bankruptcy Estate · Constructive Trusts · Informal Mortgage

This was an application by the trustees in bankruptcy of Mr Majeed seeking declarations and relief in respect of a freehold property (the “**Property**”). The Respondents were the registered proprietors of the Property. The trustees contended that Mr Majeed owned 50% of the equitable interest in the Property at the time of his bankruptcy, meaning that 50% now vested in the trustees. Mr Majeed had provided £125,000 to the Second Respondent representing his 50% interest in the Property after a confiscation order was made against him. There was little documentation to record the transaction although the Second Respondent’s witness statement with regards to the confiscation order stated he had transferred his beneficial interest in the Property to Mr Majeed in return for the £125,000. However, the Respondents contend that the £125,000 was subsequently repaid in cash in Dubai.

The trustees disputed the repayment ever took place. They argued that the arrangements made between Mr Majeed and the Second Respondent gave rise to a constructive trust. The Respondents disagreed and asserted the monies were advanced by way of a loan which was informally secured against the Property i.e. an informal mortgage.

The judge considered that the application was an ambitious one. It was accepted that the trustees could only succeed if the court rejected the evidence of the Respondents. On that evidence, Judge Barber was satisfied that the monies were repaid such that Mr Majeed had no beneficial interest in the Property and the £125,000 represented a loan which was informally secured and had not formed a constructive trust.



Sport

DIGESTED BY EDOARDO LUPI



Fulham Football Club v Mr Jordan Levi Jones

[2022] EWHC 1108 (QB) (Lane J)
18 May 2022

Association football · Negligence · Vicarious liability

The claim related to a tackle during an under-18 game of association football by H, a player for Fulham F.C., against J, a player for Swansea City Football Club, who suffered a career-ending injury as a result of the tackle. The referee, with a clear view, had not awarded a foul at the time. J sued Fulham F.C. on the basis that they were vicariously liable for H’s actions, on the grounds that the tackle amounted to an assault or, alternatively, negligence.

At first instance, the recorder dismissed the claim for assault but held that Fulham F.C. was vicariously liable

for what he found to be the negligent act of H in tackling J as he did.

On appeal, Lane J held that all grounds of appeal succeeded, and directed a new trial. In particular, Lane J held that the recorder had misdirected himself by treating certain breaches of the rules of association football as being “very likely” to amount to negligence. However, the rules had not been drafted with civil liability in mind. The drafters had not been concerned with whether there was a correlation with the laws of negligence. Further, the recorder’s approach purported to set a standard

for reckless or quasi-reckless behaviour in the context of professional football which was far below what was needed to establish such liability. Finally, the recorder erred in law in affording no weight at all to the fact that the referee did not award a foul at the time, in circumstances where in cases of this kind proper regard should be had to the decisions of the officials tasked with administering the rules of the game.



DAVID ALEXANDER KC



Kathryn Ma Wai Fong v Wong Kie Yik & Ors

This was a shareholders' dispute concerning STIC, a BVI company, and WTK Realty, a Malaysian company. The Appellant was the personal representative, executrix and trustee of the estate of her late husband ("H"). H and his two brothers – the First and Second Respondents – each had a one-third beneficial interest in STIC. STIC held 55 million non-voting convertible preference shares ("CPS") in WTK Realty. When H died, he and his son were the registered holders of 54% of WTK Realty's ordinary voting shares and his two brothers held the remaining

46% (although the First and Second Respondents disputed that H and his son legitimately held 54% of the shares contending that they should only hold a minority interest in the shares with the First and Second Respondents holding a majority interest).

Shortly after H died in March 2013, STIC, at the suggestion of the First and Second Respondents, elected to convert the CPS into ordinary shares in WTK Realty (the "**Conversion**") which thereupon comprised 14.4% of WTK Realty's ordinary share capital.

As the First and Second Respondents had voting control over STIC, they acquired voting control of WTK Realty. The reason they gave for the Conversion, which both the Judge and the Court of Appeal accepted, was that it was required for financing purposes. The Appellant claimed that the Conversion was, among other things, instigated for the primary purpose of diluting the rights of H's estate in STIC, which was an improper purpose contrary to BVI company law. The Appellant brought a claim under Section 184I of the BVI Companies Act 2004 ("**the BCA**"), the BVI unfair

prejudice provision, and sought, among other things, (i) a winding up order against STIC, (ii) an order setting aside the Conversion and/or (iii) further or other relief, alleging that the affairs of STIC were conducted in a manner that was unfairly prejudicial, unfairly discriminatory, and/or oppressive to her in her capacity as a member.

The Judge found that there had been no unfair prejudice and dismissed the claim. However, despite dismissing the claim, the Judge also made an Order requiring the First and Second Respondents to acquire the Appellant's shares in STIC at a price to be determined at a trial on quantum. The Court of Appeal dismissed the Appellant's appeal. The Appellant appealed to Her Majesty in Council.

In the Judgment ([2022] UKPC 14), given by Lady Rose on behalf of the Board (the other members were Lord Briggs, Lady Arden, Lord Burrows and Lord Stephens), the Board dismissed the appeal. In doing so, the Board said that, while there were 10 grounds of appeal, they could be grouped under six headings: (1) equitable considerations constraining the decision to convert the CPS, (2) the primary purpose of the Conversion of the CPS, (3) s.59 of the Malaysian Companies Act 1965, (4) s.175 of the BCA, (5) loss of substratum and (6) provision of information and non-payment of dividends (Judgment at [35]).

As regards heading (1) above, namely equitable considerations constraining the decision to convert the CPS, the Board held (Judgment at [36]-[70]) that:

1. There was no basis for criticising the Judge's finding that there was no Shareholders or Family Agreement which gave rise to any

equitable constraint on the First and Second Respondents' ability as majority shareholders of STIC to cause the Conversion to take place (Judgment at [37]-[49]);

2. Whilst the categories of cases in which equitable considerations arise are not closed, and although equitable considerations are not just limited to situations of quasi-partnership (per Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at pp.374-375), both as a matter of fact and of law no equitable considerations arose in the case of STIC from the nature of the business being a family or dynastic company (Judgment at [50]-[63]);
3. The decision of McMahon J in the Alberta Court Queen's Bench Division in *Gallelli Estate v Bill Gallelli Investments Ltd* (11 Feb 1994 Doc Calgary 9301-14042) was a useful illustration of the kinds of equitable considerations that might well arise in a family company, whether or not it could be described as a quasi-partnership (Judgment at [58]-[61]);
4. Where, with the knowledge and consent of all shareholders, a practice grows up of family members making drawings on the company in amounts that do not reflect their shareholdings or their work for the business, it may well be that that practice constrains the majority from reverting on the death of that member to the strict entitlements provided for in the company's constitution (Judgment at [61]);

5. As a matter of principle, the head of the family may set up a family business in the hope and expectation that the business will provide some form of work and income for later family members whatever their level of competence or lack of it (within reason). That does not mean that a family member with no experience or proven aptitude is entitled as a matter of equity to step straight into a role vacated by their spouse or parent and assert that they can effectively exercise a veto over the company's important decisions (Judgment at [62]); and
6. The irretrievable breakdown of a family relationship is not sufficient to justify the grant of relief. Cases about family companies do not establish an equitable principle that such a company must be wound up when there is a breakdown in trust and confidence between family members (Judgment at [64]-[68]).

As regards heading (2) above, although the Appellant said that the Conversion was for an improper purpose (i.e to dilute the combined shareholding of the Appellant and her son: *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 281), the Board held that there were no grounds for impugning the Judge's factual finding as to the primary purpose of the Conversion (Judgment at [71]-[104]). In this context, the Board reiterated that:

1. A judge is not expected to comment in his judgment on each and every submission made by Counsel: *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, para 19 (Judgment at [81]); and
2. The practice of the Board is not to interfere with concurrent findings of pure fact unless there has been some miscarriage of justice or violation of some principle of law or procedure: *Devi v Roy* [1946] AC 508; *Allen v The Quebec Warehouse Co* (1886) 12 App Case 101 at 104; *Robins v National Trust Co* [1927] AC 515 at 518; *Central Bank of Ecuador v Conticorp SA (Bahamas)* [2015] UK PC 11; [2016] 1 BCLC 26. The *Bank of Ecuador* case should not be regarded by prospective appellants as watering down the principles in *Devi v Roy*, as confirmed in many later cases (Judgment at [84]-[90]).



However, the Board said that the Judge's factual finding as to the primary purpose of the Conversion did not dispose of the allegation that the First and Second Respondents were in breach of duty to act in the best interests of STIC. The Board said that the Judge had made no finding as to whether the First and Second Respondents gave any separate consideration as to whether it was in STIC's interests to co-operate by means of the Conversion in increasing the share capital of WTK Realty in order to secure refinancing for WTK Realty (Judgment at [105]).

The Board said that the test to be applied where directors had failed to turn their minds to whether a proposed transaction is in the best interests of the company had been considered by the BVI Court of Appeal in *Antow Holdings Ltd v Best Nation Investments & Ors* (unreported BVICMAP2017/0010). Where there had been a failure by a director to consider the separate interests of their company, the test then becomes an objective one. Citing *Charterbridge Corpn Ltd v Lloyds Bank Ltd* [1970] Ch 62, the BVI Court of Appeal had described the test as whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company (Judgment at [106]).

The Board said that in *Antow* and *Charterbridge* the facts were similar to those pertaining to STIC and WTK Realty in that the directors had looked to the benefit of the group as a whole without giving separate consideration to the benefit of the particular company within the group. As had been emphasised in *Charterbridge*, each company within the corporate group is a separate legal entity and the directors are not entitled to sacrifice the interests of that company for the benefit of the group. But it does not follow that the absence of separate consideration *ipso facto* means that the directors were in breach of their duty (Judgment at [106]).

In the Board's view, the *Charterbridge* and *Antow* test was the correct test to apply in the present case: the court should have examined the decision to convert the CPS objectively and decided whether the First and Second Respondents, acting honestly, could reasonably have believed that the

Conversion was in the best interests of STIC in all the circumstances. The Board said that the Judge was entitled to conclude on the facts that STIC's interests were objectively aligned with WTK Realty's interests and that the First and Second Respondents were acting reasonably in causing STIC to convert the CPS. The Board held that there was, therefore, no breach of fiduciary duty by the First and Second Respondents to STIC (Judgment at [107]–[109]).

As regards heading (3) above, the Board held that whether the payments of RM 550,000 and RM 2.2 million had been paid (the Appellant said that they had not been) were precisely the kind of question which fell within the category of concurrent findings of fact with which the Board should not interfere (Judgment at [114] and [120]). The Board also held that the Court of Appeal were right to say that even if there was a breach of s.59 of the Malaysian Companies Act 1965, that would not amount to unfairly prejudicial conduct to the Appellant in her capacity as a shareholder of STIC (Judgment at [122]).

In relation to heading (4) above, the Board held that there was no unfairly prejudicial conduct where the First and Second Respondents, who comprised the majority shareholders of STIC, had approved the Conversion and that the fact that they failed to put in place a formal resolution of the members at

a general shareholders meeting of STIC did not amount to unfairly prejudicial conduct regardless of whether it was a breach of s.175 of the BCA (Judgment at [126]).

As regards heading (5) above, the Board said that the Judge and the Court of Appeal were right to reject the argument that STIC had lost its substratum once the CPS had been converted. There was no justification for limiting STIC's substratum to holding the CPS (Judgment at [128]).

As regards heading (6) above, the Board said that given its finding that there were no equitable considerations modifying the legal requirements for the provision of information and the payment of dividends, this complaint had to be rejected. The evidence showed that the Appellant had been supplied with the information required by law. Furthermore, the estate's share of the value of dividends received by STIC was too small for any withholding to amount to unfairly prejudicial conduct (Judgment at [130]). ■

David Alexander KC and Ryan Perkins of South Square, together with Aisling Dwyer, Scott Tolliss and Aline Mooney of Maples, acted for the First and Second Respondents. Adam Goodison of South Square, together with Oliver Clifton, Stuart D'Addona and Robert Gregory of Walkers, acted for STIC.



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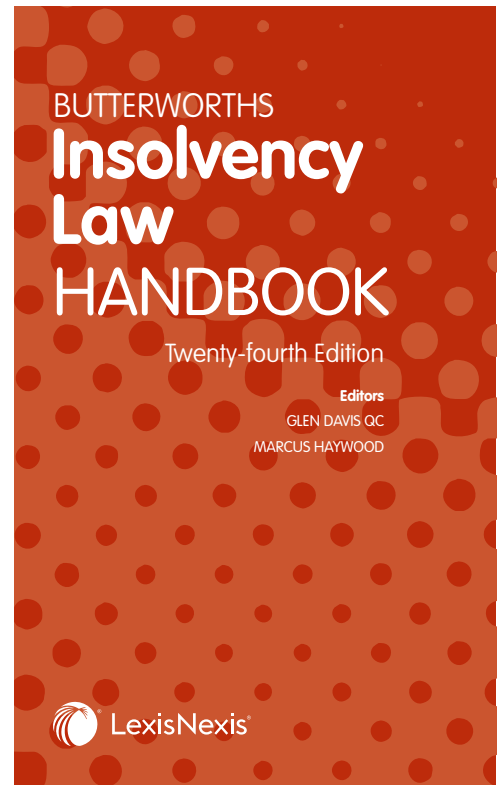
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Euroland

Since the last “Euroland” report in March 2021, the CJEU has been quite active. Four decisions are interesting enough for presentation here. One of them – possibly the last one – deals with English legislation (cf. sub B).

A. CJEU, decision from 29 April 2021 – C-504/19 – Banco de Portugal and others

In this case, the main issue was whether it had any effect on the final decision of a law suit among a bank and its customer when, due to reorganisation measures, the standing of that bank was withdrawn while the case is still pending. Because the customer in question, VR, a Spanish citizen who initiated the law suit in Spain, and since the respective bank is Banco Espírito Santo, Sucursal en España, a branch of the Portuguese Banco Espírito Santo which had undergone a resolution under the EU Directive 2001/24, the case falls into the CJEU’s jurisdiction.

The details are a bit complicated: In 2008 VR purchased preference shares in the Icelandic Kaupthing Bank from the Spanish branch of the Portuguese Banco Espírito Santo (BES). In 2014 that Bank instituted resolution measures under the said Directive by deciding to set up a bridge bank (called Novo Banco SA) to which a number of assets, liabilities and other items were transferred as listed in Annex 2 to the Bank’s decision.

What was not on that list remained part of the assets of BES. To these not-transferred liabilities belonged ‘any liability or contingency, in particular those arising from fraud or infringement of regulatory, penal or administrative provisions or decisions’.

As a consequence of this transfer, Novo Banco Spain (ie the branch of the new Portuguese Bank) maintained the commercial relationship with VR as they were originally instituted by the old Spanish branch. On 4 February 2015, VR brought an action to the Court of first instance in Vitoria, Spain, against Novo Banco Spain, seeking, *inter alia*, a declaration that the Sales Agreement from 2008 was null and void, or alternatively that it became terminated. Novo Banco Spain defended itself by stating that it lacked capacity to be sued because, pursuant to the aforementioned Annex 2 of the 2014 decision, the alleged liability had not been transferred. The Vitoria court rejected this argument and decided in favor of VR because she had not been sufficiently been informed at the time of the purchase.

Novo Banco Spain appealed against that judgment stating that in the meantime (December 2015), the Novo Banco Portugal adopted two further decisions pursuant to which it was retroactively clarified that claims like that in dispute in this case (“*the following liabilities of BES have not been transferred to Novo Banco:... (iii) all indemnities related to contractual breaches (real estate and other asset purchases) signed and concluded before 20:00 on 3 August 2014 etc*”) had not been transferred by the 2014 decisions.

The court of appeal in Álava dismissed the appeal so that the case went up to the Spanish Tribunal Supremo. There Novo Banco Spain argued that pursuant to art. 3(2) of the Directive 2001/24, all decisions of the Portuguese mother institution have effect in all other member states without any further formalities.

The Spanish Supreme Court did not question the possibility to re-transfer liabilities nor that respective measures may be given retroactive effect but it had doubts “*whether the substantive changes made by the adoption of the decisions of 29 December 2015 should be recognized in the pending lawsuit initiated before their adoption.*” It considered this might infringe the principle of legal certainty as protected by art. 47(2) EU-Charter and referred the question to the court in Luxembourg.

Before answering the question, the court began its reasoning with preliminary observations. First it states that it must assume from the decision of the referring court that the Novo Banco decision from December 2015 did modify the decision from August 2014 with retroactive effect – even though Novo Banco Spain challenges this very assumption by stating that the later decision did not modify but only clarify the previous decision. The Luxembourg court refers insofar to the presumption of relevance of the referring court. Moreover, the European court takes the liberty to expand the scope of relevant norms beyond the ones mentioned by the Spanish court in including an examination also of art. 32 of the Directive 2001/24 which deals explicitly with the situation of a pending law suit.

The court then turns to the substance of the question. It begins with summarizing the issue at stake in the usual – for non-layers nightmarish – Luxembourg terminology: “*In the light of those preliminary considerations, the question referred by the national court concerns, in substance, whether Article 3(2) and Article 32 of Directive 2001/24, read in the light of the principle of legal certainty and the first paragraph of Article 47 of the Charter, must be interpreted as precluding recognition, without further conditions, in judicial proceedings on the merits pending in a Member State other than the home Member State, of a liability of which a credit institution had been divested by a first reorganisation measure taken in the latter State, of the effects of a second reorganisation measure designed to transfer back, with retroactive effect, at a date prior to the opening of such proceedings, that liability to that credit institution, where such recognition has the result that the credit institution to which the liability had been transferred by the first measure can no longer be sued, with retroactive effect, for the purposes of those proceedings, thereby calling into question judicial decisions already given in favour of the applicant who is the subject of those proceedings.*”

The starting point of the court’s deliberations is the peculiarity of the reorganisation and winding-

up Directive that it is based on the rather strict principle of a universal and unitary proceeding. Therefore, generally speaking, the *lex concursus* is determinative all over the territory of the EU member states. However, there are a few exceptions, and art. 32 is one of them, pursuant to which the effects of reorganisation measures “on pending lawsuits concerning an asset or right of which the credit institution has been divested shall be governed solely by the law of the Member State in which the law suit is pending.” Therefore, the court examines this norm’s requirements and accepts them all – reorganisation measures, pending lawsuit, relating to an asset or right of which the defendant is divested.

Thus, when art. 32 is applicable in the case at hand, the follow-up question arises whether the effects mentioned in art. 32 are limited to procedural effects or whether they extend also to substantive ones. Here, the argumentation gets a bit vague when emphasising that the exception from the *lex concursus* is limited solely to the effects with regard just to the pending lawsuit and not to the decision from December 2015 in toto. And then comes a “*therefore*” which concludes (a bit out of the blue) that both procedural and substantive effects are meant in art. 32. This is all the more cogent as the principle of legal certainty and the right to effective judicial protection pursuant to art. 47 EU-Charter is at stake. As the court has previously decided, this principle requires clear and precise rules particularly with regard to rules with potential adverse (for instance, financial) consequences for individuals. In present case, VR had all information gathered before the court of first instance in Vitoria regarding whom she had to sue and on the basis of which rules. The court concludes: “*Thus, the recognition, in the main proceedings, of the effects of the decisions of 29 December 2015 in so far as it is capable of calling into question the judicial decisions already taken in favour of VR, which are still the subject of a pending lawsuit, and which has the result, with retroactive effect, that the defendant can no longer be sued for the purposes of the action brought by the applicant, is incompatible with the principle of legal certainty.*”

The court does not stop here. It goes on to add that the result is also mandatory according to art. 47 EU-Charter’s principle of a guaranteed effective judicial protection. It requires, *inter alia*, “*that the person concerned is able to defend his or her rights in the best possible conditions and to decide, in full knowledge of the facts, whether it would be useful to bring an action against a given entity before the competent court.*” Since it follows from the files that at the time when the judgment at first instance was delivered, Novo Banco’s decisions from 29 December 2015 were not yet adopted. Further down in the reasoning, the court gets a bit more explicit by stating that it is noteworthy that those decisions in December 2015 were aimed precisely to render inoperative the judgment of the Vitoria court.



COUR DE JUSTICE DE L'UNION EUROPÉENNE

It is here, towards the end of the decision, that the court seems to say: a bank may decide on resolution measures –even retroactively – if it deems them to be appropriate; it may not, however, pull out the carpet from under the feet of a successful plaintiff by changing the preconditions for that success. This is certainly a reasonable result.

B. CJEU, decision from 11 November 2021 – C-168/20 – MH and ILA

This case might be the last one in which England and her rules play a central role as it was referred to the Luxembourg court shortly before the end of the transition period to a definite Brexit. The case itself is somewhat complicated and confusing so, for present purposes, a brief and drastically shortened outline of the facts and the ruling will have to suffice.

Mr M is an Irish national who worked in Ireland as a property developer. In this capacity he established an occupational pension scheme under Irish law which fulfilled all relevant legal – in particular tax – requirements for being operational. Later he moved to London and engaged in more or less the same professional activity there. Soon after that, on occasion of his 60th birthday, he received a payment from the pension scheme. A year and a half after moving to London he filed for bankruptcy and it was then that the dispute arose as to whether the pension scheme was insolvency-proof under Section 11 of the UK WRPA 1999.

This was dubitable because Mr M had done nothing to get his pension scheme acknowledged by the relevant English tax authorities as an “*approved pension arrangement*”.

In his defence Mr M claimed that pursuant to art. 49 TFEU he had freedom of establishment; The contradicting argument on the side of the suing joint trustees in bankruptcy made reference to Mr M’s COMI in England pursuant art. 3 European Insolvency Regulation (EIR) which has as a consequence the applicability of English law according to art. 4 EIR 2000 – and, thus, also of the rule under Section 11 WRPA 1999.

The CJEU goes a long way to give a consistent and well-founded decision. It elaborates its deliberations in every detail and is eager to build them on solid grounds by citing innumerable case law. It focuses its deliberations on the principle of non-discrimination which has to be respected also by purely national laws and which might even be indirectly violated when and if a general rule is affecting primarily addressees from other countries. All this direct or indirect discriminatory effect is, generally speaking, prohibited, even if it results into just a minor restriction.

Accordingly, Section 11 WRPA 1999 is scrutinized painstakingly whether or not it does comply with that principle and it becomes quite clear that the Luxembourg judges tend to negate this question. But since this is not yet the end of a respective examination, the court instructs the judge in



1. For the first, cf. South Square Digest November 2019, p. 36 ff. on the Riel case.

London to examine whether there is behind Section 11 WRPA 1999 an overriding reason relating to the public interest capable of justifying the restriction on the freedom of establishment – strangely enough, counsels had not addressed this issue in their submissions – and, if so, whether such restriction complies with the proportionality principle.

Thus, the final say, as it were, is left to the English court.

C. CJEU, decision from 25.11.2021 – C-25/20 – Alpine Bau

The case Alpine Bau is so far one of the biggest ever in Austria and had its second appearance before the Luxembourg court.¹ On this occasion a conflict arose from a particular feature of the Slovenian insolvency law where one finds a preclusive period of three months for lodging of claims. If that period is missed, the claim is deemed to be extinguished, and it cannot participate in that insolvency proceeding at all.

The facts of the case are rather simple. The Austrian main proceeding was opened on 19 June 2013, the opening of the Slovenian secondary proceeding just a few weeks later, on 9 August 2013. With the latter opening a notice was published on the website of the Slovenian court that all creditors were asked to lodge their claims at this court and that these claims would be recognised in this proceeding only if lodged before 12 November 2013.

On 30 January 2018, the insolvency administrator asked the Slovenian court for leave to lodge the “*main proceeding claims*” in the secondary proceeding in order to make use of the procedural alleviation granted in art. 32(2) EIR 2000 (45(2) Recast 2015). He argued that he would otherwise be deprived by this particular privilege and that denying him the exercise of this right would be a violation of the principle of equal treatment among the creditors (*par condicio creditorum*). The Slovenian part of Alpine Bau argued against this by emphasising the applicability of the local insolvency law of the secondary proceeding (*lex concursus secundarii*) pursuant to art. 28 EIR 2000 (35 Recast 2015) and that art. 32(2) is not to be understood as granting a special right but as just allowing a representation for the lodging. The Slovenian court decided to refer the case to the CJEU with the question whether art. 32(2) EIR 2000 (45(2) Recast 2015) implicitly derogates a preclusive period of the relevant *lex concursus*.

The court answered in the negative on the following grounds: Generally speaking, art. 32(2) EIR 2000 obliges the insolvency administrator to lodge the insolvency claims also in a secondary proceeding. Since art. 4 EIR 2000 (7 Recast 2015) and other rules do not foresee any particular deadlines for this lodging, the *lex concursus* is insofar relevant; this follows from recital 23 (nowadays 66) with regard to a secondary proceeding, but also, as a general matter, from art. 4(2)(h) EIR 2000 (7 Recast 2015). The underlying rationale is the explicit intent of the European legislator not to harmonise the

member states' insolvency laws in toto but to accept divergences unless explicitly regulated otherwise.

However, the court recognises limits of such divergences which, pursuant to an earlier decision (ENEFI²), result from the principles of equivalence and effectiveness. But these limits are not reached by establishing mere deadlines and the consequences of missing them. Similarly, the principle of loyal cooperation pursuant to art. 3 TEU – as also addressed in another earlier decision (Handlowy³) – might occasionally derogate the *lex concursus*, but not with regard to such minor issues. The CJEU's main argument, however, is the principle of equal treatment of the creditors which is said to be the basis of all insolvency proceedings.⁴ But contrary to plaintiff's reasoning, the court argued that granting a privilege to the late coming insolvency administrator under art. 32(2) EIR 2000 (45(2) Recast 2015) would result in a violation of that principle. Because granting such privilege only to an insolvency administrator would disadvantage all individual creditors who would be precluded from the proceeding when lodging their claims outside the preclusive period. This is according to the CJEU unbearable as the administrator acts only as the creditors' representative when lodging their claims in another proceeding.

Even though applying the old EIR, the decision is good law also for the Recast EIR. The outcome was foreseeable in that the decision was based,

more or less, on an analysis of the law and its recitals' wording, but without really considering the practical implications and circumstances of the case at hand. This is understandable for judges who are dealing with fishery law of Portugal, Estonian tax law or Greek food law; and this approach has the advantage of guaranteeing a certain regularity in and predictability of the court's decision making. However, this methodology does little justice to the practicalities of an insolvency proceeding. In some jurisdictions, the task of supervising the lodging of the creditors' claims is not a mere formalistic affair like getting handed over a sheet of paper; in Austria and in Germany, for instance, a rather time-consuming formal control has to be applied to each and every lodged claim. To be sure, this needs to be done alongside all other tasks that an insolvency administrator has to fulfil – particularly in the beginning of a case. And the larger the case the more tasks are there.

The result of the decision is, thus, that in many cases – particularly the bigger ones – the corresponding right of the insolvency administrator to lodge the claims of "his/her" creditors pursuant to art. 32(2) EIR 2000 (45(2) Recast 2015) is not much more than an empty shell, especially when a secondary proceeding is opened so shortly after the commencement of the main proceeding as in the present case. Accordingly, insolvency administrators should advise "his/her" creditors to do the lodging

2. Cf. CJEU, decision from 9 November 2016, C-212/15 – ENEFI, no 30.

3. CJEU, decision from 22 November 2012, C-116/11 – Handlowy, no. 62.

4. Cf. already CJEU, decision from 6 June 2019, C-250/17, Tarragó de Silveira, no. 31.



themselves in order not to lose the dividend of that proceeding. This is precisely what happened in the Alpine Bau case: for the sake of the *par condicio creditorum* the creditors of the main proceeding had to accept losses which that very principle is meant to avoid.

D. CJEU, decision from 24 March 2022, C-723/20 – Galapagos

In my last Euroland report from March 2021, I mentioned as a kind of “*save the date*” a referral from the German Bundesgerichtshof (Federal Supreme Court in Civil Law Matters) to the CJEU ... and, voilà, here we are: like in the Alpine-case, the Luxembourg answer is predictable in its technicality but rather far from signalling an understanding of the practical implications.

The facts of the case are as follows: the present debtor, a holding company without employees, was founded in 2014 and had its seat in Luxembourg. In June 2019 it was decided to move the seat to Fareham/England where two months later the newly established directors filed a petition to open an insolvency proceeding at the High Court (ChD). This seems to have been against the interests of a group of creditors (share pledge holders) as they had the directors replaced and a new one appointed. This brand-new director thereupon established an office in Düsseldorf, Germany. He immediately ordered the English counsel of the company to withdraw the petition at the High Court and filed a petition of open an insolvency proceeding at the Düsseldorf insolvency court.

But there was no withdrawal in England; another group of creditors stepped in and filed for (now) an involuntary proceeding. The Düsseldorf court started the usual procedural steps under German insolvency law but revoked its opening decision only two weeks later upon an appeal by creditors. The Düsseldorf court came to the conclusion that it lacked competence to open that proceeding.

However, on the very same day – 6 September 2019 – still further creditors filed a petition at the Düsseldorf insolvency court which concluded that the COMI was located in Düsseldorf so that the present insolvency proceeding was commenced. But ... a creditor – who was at the same time a subsidiary of the debtor – contested the opening decision, fought its way through three instances and finally the Bundesgerichtshof turned to the CJEU for instructions as to whether or not the CJEU’s *Staubitz-Schreiber* decision (C-1/04) was to be respected in the case at hand. In that early case, a lady domiciled in Germany had filed a petition to open an insolvency proceeding in Germany, moved then to Spain before the opening decision was rendered, and contested from her new domicile the German court’s international competence to open the proceeding because of her COMI-shift.

The CJEU then decided on the basis of the old procedural principle of *perpetuatio fori*, i.e. once an application has been made the court remains competent no matter which changes the applicant undertakes afterwards.

The case is a bit confusing in several aspects as the affairs of the debtor company seem to be driven heavily by creditors, as the COMI shift can obviously be done within a day without any concern about the presumptions in art. 3 EIR, and as there is a big question mark hanging over the case – namely whether or not the English High Court had commenced the English proceeding before the end of the transition period on 31 December 2020, 11pm, and after the case’s referral to the Luxembourg court which took place on 17 December 2020. One wonders whether all information systems had been blocked in those two weeks or what other obstacles prevented the parties from getting this information!

Whatever happened, the decision gives a twofold answer: (1) the commencement of the English case took place before the end of the transition period, or (2) afterwards. If (2), the court established that post-Brexit, the particular intra-EU rules of the EIR no longer apply with regard to English cases. What these rules are in the case at hand is described in response to the first possible scenario in which the High Court opened the English case before 1 January 2021: The reasoning of the *Staubitz-Schreiber* case is to be applied today irrespective of the changes made by the Recast EIR. The court’s arguments are that (i) those changes do not affect the deliberations of the earlier case, and (ii) that the Regulation’s efficiency would be impaired if there were no *perpetuatio fori*. The first argument is valid the second less so, because it is hard to see which efficiency the CJEU has in mind when a debtor’s COMI is in Düsseldorf but the proceeding takes place in England. The material difference between the *Staubitz-Schreiber* case and the present one is that in the former case the debtor herself commenced the proceeding and then wanted to have it stopped – i.e. she is contradicting her own preceding actions (*protestatio facto contraria*). In contrast, the present case rests on creditors’ petitions; there is no such self-contradiction so that the real purpose of art. 3 EIR should bear full fruit – namely to determine the best and most efficient place to conduct the insolvency proceeding of that particular debtor – i.e. the place where the actual COMI rests.

Again, if the English case had not been commenced before 1 January 2021, all these arguments and deliberations would be of no interest as they would obviously unfold between EU member states. Accordingly, after full Brexit the German court could ignore the English decision and open the insolvency proceeding. For someone who, like the present author, regrets deeply the Brexit this is harsh wording with little attempt to put it more diplomatically. However, in essence, this is in fact the consequence of the separation. ■

Lawyerisms: And/or

Legal Eye

Lord Templeman

“There are two things wrong with almost all legal writing. One is its style. The other is its content.”

FRED RODELL, YALE LAW SCHOOL, 1936

1. *Morgan v Thomas* (1882) 9 QBD 643 at 645.

2. One of the more famous judicial references to spades is Lord Templeman’s statement in *Street v Mountford* [1985] AC 809 that “The manufacture of a five pronged implement for manual digging results

in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.” Curiously, the typical garden fork has four prongs.

Introduction

The man on the Clapham omnibus might generally be expected to settle for “and”, when the aim is to refer to two or more things together, but instead to use “or”, when the intention is to refer to one thing or the other. There are judicial supporters of the same basic approach. Lord Jessel MR explained prosaically that “You will find it said in some cases that ‘or’ means ‘and’; but ‘or’ never does mean ‘and’ unless there is a context in which shews it is used for ‘and’ by mistake.”¹ A spade is a spade, and a fork is a fork.

It seems that many lawyers do not take the Clapham omnibus. “And/or” is one of those expressions associated with legal circles, and in this piece, we shine a brief light on the expression and its place in legal writing.²

English language and legal language

To say A “and/or” B, as a means of expressing the relationship between two or more things, seems to have made its way into common parlance.

But some cases reveal a degree of doubt over whether or not the expression is or should be formally part of the English language at all.

In communicating his displeasure at “*the repeated use of the bastard conjunction*”, Lord Simon feared that the expression had become “*the commercial court’s contribution to basic English*”.⁴ Lord Reid’s subsequent observations on the subject differed. He instead considered that the “*symbol*” in question “*is not yet part of the English language*”.⁵ A third option appears to be that, even if formally part of the English language, the expression has no proper place in it. Hence the concern that “*it is doubtful whether the interloper ‘and/or’ has any appropriate place in the English language*”.⁶

Whether or not part of the language of Shakespeare, it seems clear enough that the expression is part of the language of lawyers, and it is reasonable enough to question whether there is a complete overlap between the two.

One or the other or both

The cases do not receive the term “and/or” with much enthusiasm. In linguistic terms, “and/or” appears to combine “A and B”, alongside “A or B”, at the same time. The basic practical issue to which this gives rise might be expressed in this way. Either both formulations are asserted simultaneously, in which case what is stated is inherently contradictory, or only one of them is intended to be asserted, in which case what is stated is inherently ambiguous.

The difficulties, however, do not stop there. The expression might be used in lists longer than two. A clause, provision or plea might refer to “X, Y, and/or Z”. What does this mean?



The reference appears to be at least to X, Y and Z, where all elements of the set are necessary.

The question then turns to what else is included, and therefore, what difference the “and/or” makes. One approach might be this. The “and/or” appears between the Y and the Z. But it does not appear between the X and the Y. One might then think that this is where the list is to be divided: one can draw a line between “X and Y”, and then, “and/or Z”. On that view, we are then (in substance) back to “A and/or B” as above.

But why not apply the “and/or” to each of X, Y, and Z? If a less grammatically ambiguous conjunction were used, such as “and”, or “or”, many readers would justifiably interpret the list in that manner. That would translate to “X and/or Y and/or Z”. As others have noted, this would seem to result in “X or Y or Z, or any combination of them”.⁷ This broader view is surely more compelling.

Indeed, if the “X” is notionally removed, one is left with “Y and/or Z”: and as above, that surely means (at least) “Y and Z” as well as “Y or Z”. How strange it would be if the meaning of “and/or” varied according to the length of the list in which it appears.

Deliberate amphibology

And yet, the expression is not used in a vacuum, but in real life. What if a trust is declared, or bequest made, in favour of “A and/or B”? What if a person is demanded to render performance defined in the terms “A and/or B”? Judges are tasked with not only strict issues of ambiguity and contradiction, but of context and intention: a person, or the parties, might in reality have meant something else entirely.

Perhaps with problems such as these in mind, judges and others have criticised the expression in a variety of colourful ways.

3. The author is indebted to Sir Robert Megarry’s legal miscellanies – and in particular, R.E Megarry, *Miscellany-at-Law* (Stevens & Sons Limited, 1956), at pp. 28–29, and Sir Robert Megarry (ed. Bryan A Garner), *A New Miscellany-at-Law* (The Lawbook Exchange Ltd, 2005), at ch 14. Many of the quotations which appear in this article are taken from those volumes.

4. *Bonitto v Fuerst Brothers & Co Ltd* [1944] AC 75 at 82.

5. *John G Stein & Co Ltd v O’Hanlon* [1965] AC 890 at 904.

6. *Clay County Abstract Co v McKay*, 147 So. 407, 408 (Ala. 1933).

7. Sir Robert Megarry (ed. Bryan A Garner), *A New Miscellany-at-Law* (The Lawbook Exchange Ltd, 2005), p. 230.

In the United States,⁸ it has been labelled an “accuracy destroying symbol”, an “unsightly hieroglyphic”, a “device for the encouragement of mental laziness”,⁹ one of the “ingenious inventions of scribes to confuse and befuddle”,¹⁰ and a “deliberate amphibology”, whose “sole purpose lies in its self-evident equivocality”.¹¹ These criticisms are perhaps indirectly targeted at those who make use of it.

Other critiques take direct aim at its linguistically contradictory nature. It is “senseless”,¹² “meaningless”,¹³ a “verbal teratism”,¹⁴ a “linguistic abomination”¹⁵ (or, more strikingly, a “monstrous linguistic abomination”¹⁶), a “disingenuous modernistic hybrid”,¹⁷ which is “as devoid of meaning as it is incapable of classification by the rules of grammar and syntax”.¹⁸ It is thus said that function of the “and/or” is to confuse rather than to clarify.

These two forms of criticism above have on occasion been made together. One Wisconsin judge decided to refer to it as “that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of some one too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than to express meaning”.¹⁹

A conclusion: in the alternative

To the lawyer, these criticisms may seem unduly harsh. After all, concerns about contradiction or ambiguity may largely fall away where the very purpose of the communication is to express two potentially contradictory versions of events, such as where one is in the alternative, or where it is not yet possible to commit to one at the expense of the other. In an ideal world, perhaps we would call a spade a spade, and a fork a fork.

Sometimes, however, we are so far away that we cannot tell.

So, at the end of the day, maybe there is still a place for the shorthand “and/or”.

The ultimate culprit may not be the expression itself – but its imprecise and/or unthinking use. ■



1. For the complete list, from which I have made but a small selection, the reader is directed to Sir Robert Megarry (ed. Bryan A Garner), *A New Miscellany-at-Law* (The Lawbook Exchange Ltd, 2005), at ch 14.

2. *Tarjan v National Surety Co*, 268 Ill. App. 232 at 240–242 (1932).

3. *Equitable Life Assur Socy v Hemenover*, 67 P.2d 80, 82 (Colo. 1937).

4. *Bank Bldg & Equip Corp v Georgia St Bank*, 209 S.E.2d 82, 84 (Ga. App. 1974).

5. *Gallopin v Continental Cas Co*, 7 N.E.2d 771, 772 (Ill. App. 1937).

6. *State ex rel. Adler v Douglas*, 95 S.W.2d 1179, 1180 (Mo. 1936).

7. *Gallopin v Continental Cas Co*, 7 N.E.2d 771, 771 (Ill. App. 1937).

8. *State v Smith*, 184 P.2d 301, 303 (N.M. 1947).

9. *Brown v Guaranty Estates Corp*. 80 S.E.2d 645, 653 (N.C. 1954).

10. *Bell v Wayne United Gas Co*, 181 S.E. 609, 618 (W. Va. 1935).

11. *Am. Gen. Ins. Co. v Webster*, 118 S.W.2d 1082, 1084.

12. *Employers Mut. Liab. Ins. Co. v Tollefsen*, 263 N.W. 376, 377 (Wis. 1935).

News in Brief

The London Legal Walk is Back!

South Square once again took part in the London Legal Walk in support of the London Legal Support Trust. The annual event, which took place on 28 June this year, sees thousands of judges, barristers, solicitors, legal staff and students cover 10km routes around London, raising much-needed funds through sponsorship to support free legal advice centres. Now in its 18th year, the walk is the biggest event in

the UK legal calendar, and resumed as an in-person event last October, raising over £640,000 for legal advice charities. The money raised enables the centres to offer help to the homeless, housebound, elderly, victims of domestic violence, people trafficking and many more. Donations can be made through the following website: www.londonlegalsupporttrust.org.uk



Gold miner files for administration

Russian gold miner Petropavlovsk, once the biggest gold miner listed on the London Stock Exchange, has filed for administration. Its future has been in doubt since March when the UK government imposed sanctions on Gazprombank following Russia's invasion of Ukraine. Gazprombank was both Petropavlosk's main lender and the sole buyer of its gold.

The company is in talks to sell its entire asset base but has warned shareholders it is "*highly unlikely that there will be any return ... given the level of the group's indebtedness*".

Petropavlovsk was founded in 1994 by Peter Hambro and Pavel Maslovskiy - Maslovskiy has been detained without charge in a Russian prison since December 2020.



More Drama for Court 13?

Court 13 may yet serve up its most sensational witnesses. The court, infamous for being the venue of the Wagatha Christie showdown and *Depp v The Sun*, could see a trial between the Duke of Sussex against the publisher of The Mail on Sunday after Mr Justice Nicklin ruled that parts of an article published by that newspaper in February this year were defamatory.

The article in question concerned the Duke's attempts to seek confidentiality restrictions in his action against the Home Office regarding police protection, and public statements made on the Duke's behalf, immediately the story broke, that he was willing to pay for such protection whilst in the UK.

Nicklin J's ruling following the preliminary hearing in June of this year has fired the starting gun for a defamation trial, with the next step being for The Mail on Sunday to file a defence. If - and it is quite a big 'if' - the mechanism runs to its natural conclusion that would most likely mean witnesses, including the Duke, appearing live and in person.

News in Brief

Blatter and Platini acquitted

Sepp Blatter and Michel Platini, once the two most powerful men in football, have been acquitted of fraud and forgery following a six-year investigation.

Swiss prosecutors had accused the pair of unlawfully arranging a payment of c. £1.6 million in 2011, authorised by Blatter when he was president of Fifa, and made to Platini when he was president of Uefa.

However, Blatter and Platini, who have always denied any wrongdoing, cited a “gentleman’s agreement” made between them in 1998. They claimed that whilst Platini was a technical director for Fifa (a post he held between 1998 and 2002) he was paid c. £118,000 per year. He could not be given more due to financial troubles at Fifa, and so agreed that the remaining salary would be handed over at a later date.



First Four Bounce Back Loan Fraudsters Banned

The Insolvency Service has disqualified the first four directors under the Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act, which came into being in December 2021 and extended the Insolvency Service’s investigatory powers to tackle directors from dissolving companies and walking away without paying their debts. All four were disqualified after they all secured bounce back loans before dissolving their companies to avoid paying back their liabilities.

In the most recent case, Sirfraz Ahmad, from Leeds, was disqualified for 10 years after he exaggerated the turnover of his business, Food Box Leeds Ltd, to secure a higher-value bounce back loan to which he was not entitled. Then, instead of using the government backed loan to support the business, Ahmad used the funds to pay family members.

Ahmad joins Max Hadley, Lewis Wright and Jake Joynt on the

disqualification register under the new powers.

Max Hadley, director of Prestige Building Works, received a 10-year ban after he secured a £20,000 bounce back loan before spending £18,000 on payments not connected to the building firm.

Consultant Lewis Wright received a £50,000 loan in June 2020 despite his company having stopped trading the previous year. Wright received the maximum loan amount after he inflated turnover before paying himself just over £47,000. He is disqualified for 12 years.

Jake Joynt received a 7-year disqualification after he received a £15,000 bounce back loan of which he spent £13,000 for personal use.

The Insolvency Service is considering recovery of the bounce back loan funds by using legal powers to seek Compensation Orders against the directors where appropriate.

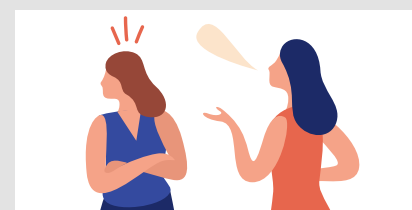
Courty Manners

The Bar Tribunals and Adjudication Service (“BTAS”) has suspended a barrister for four months and fined them £2,000 for being “rude and unprofessional” and “disrespectful” to a judge during a hearing at Snaresbrook Crown Court during February and March 2016.

Ms Vallejo, of Garden Court Chambers, was brought before the Council of the Inns of Court accused of making numerous “disrespectful” comments in front of jurors, as well as being “unduly” argumentative with the judge by both talking over and interrupting her and of having an “unhelpful tone, attitude and approach”. A few of the memorable comments Ms Vallejo made during the hearing in 2016 include “I cannot force my client to provide a defence statement. What part of that does your Honour not understand?”, “Don’t try and make me sound like an idiot” and “Well if your Honour wants to conduct the cross-examination I’ll sit down.”

When the judge asked her to clarify some evidence, she responded that she had “explained it already”, the panel heard. Further, on the judge asking her to sit down, Ms Vallejo rebuked that it was the “fifth time your Honour has asked me to sit down” and went on to tell the judge that she didn’t need to be asked to sit.

Ms Vallejo must pay the £2,000 in the next year after the panel concluded: “[She] failed to observe her duty to the court in the administration of justice in that she behaved in a rude and unprofessional manner.”



The Criminal Bar on Strike

Barristers specialising in criminal court cases in England and Wales staged an all-out strike, starting on Monday 27 June and expected to continue sporadically for a month, in protest against the level of Legal Aid fees and working conditions.

The Criminal Bar Association, which represents 2,400 barristers, organised a ballot on industrial action because those involved in defence work are angry at the government's reform of legal aid fees that are paid to them. In a report commissioned by the government Sir Christopher Bellamy (himself a former judge) concluded that the criminal justice system needed an immediate £135 million a year extra to stem the exodus of younger legal aid barristers, who often earn as little as £12,200 per annum.

Over the past 5 years there has been a steady exodus, with 46% of KCs and 22% of junior barristers giving up criminal work, leaving fewer than 3,000 to handle such cases.

The courts, crumbling and underfunded, have an enormous backlog of cases, exacerbated by the pandemic and the closure of more than 250 courts since 2010.

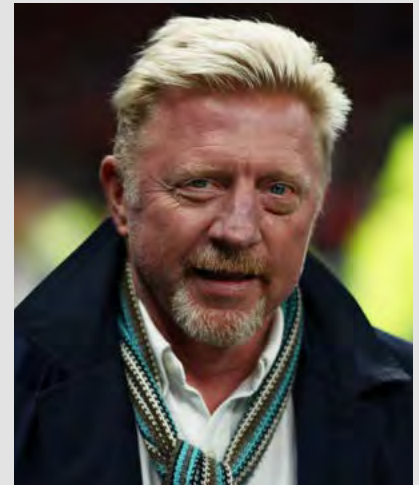
The government has offered a 15% uplift in Legal Aid fees from October 2022 which, it claims, will enable a typical criminal barrister to earn an extra £7,000 a year.

The judiciary has said it will not enter into the dispute. However, an internal note by the Lord Chief Justice for England and Wales was leaked, in which it stated that if barristers do not attend scheduled court hearings after accepting instructions from a client, "this may amount to professional misconduct". A letter to The Times newspaper signed by over 70 KCs said that Burnett's guidance was being seen as being seen "as an attempt to intimidate us".



Pricey Swerves Bankruptcy Again

Katie Price has seemingly swerved bankruptcy proceedings for a third time this year, with her court case reportedly being moved to February 2023. The 43-year-old former glamour model was due to face a judge over the £3.2million bankruptcy debts she has but the hearing, reportedly meant to have taken place at London's Royal Courts of Justice on June 7, has now been pushed back into next year.



Boris' Bankruptcy

On 29 April 2022 Boris Becker received a prison sentence of 2 years and 6 months after he was convicted of bankruptcy offences.

In passing sentence, Her Honour Judge Deborah Taylor commented that Boris Becker had an undue reliance on his advisors and the obligation was on him to disclose his assets to his trustees. The former tennis player, however, failed to disclose, concealed and removed significant assets from the Official Receiver and his Trustee in Bankruptcy. Assets concealed included €4,26,930.90, which was transferred to several third parties, a property in Leiman, Germany, and 75,000 shares in Breaking Data Corp.

The Judge added that it was not Boris Becker's choice of who to pay and a large sum had been lost in the bankruptcy estate, and it was notable that he had not shown remorse or humility.

Becker's failure to disclose all his assets led to his discharge from bankruptcy being suspended indefinitely. He is also subject to a 12-year Bankruptcy Restriction Undertaking, effective from 17 October 2019.

South Square Story

Sir Edward Evans-Lombe,

a Life in the Law



SIMON MORTIMORE KC

Sir Edward Evans-Lombe, who died at the age of 85 on 20 May 2022, was a member of Chambers, then at 3 Paper Buildings in the Temple, for sixteen years from 1965.

After developing a thriving practice as a junior, mainly specialising in bankruptcy work, he took silk in 1978. Three years later, in 1981, he moved to chambers at 4 Stone Buildings in Lincoln's Inn. In 1993 he was appointed a High Court judge in the Chancery Division. He retired in 2008.

It is fair to say that specialising in bankruptcy law was not an obvious career choice for Edward. His appearance and background were about as far removed from the world of bankruptcy as it is possible to imagine. Indeed, he came to 3 Paper Buildings and bankruptcy law in a roundabout way.

The first thing that everyone noticed about Edward was his imposing physique. Standing 6 foot 6 inches tall, strongly built but with a spare athletic frame, Edward towered over his solicitors, clients and, more significantly, the opposition. Edward's sartorial choices made him seem even larger: outdoors he always wore a brown felt hat and, in the winter months, a massive brown herringbone tweed coat. It was not just his size that reassured clients. They would see his engaging smile, sense of fun and open mind; always interested in other people and their problems. They would appreciate how he would apply his deep knowledge of the law and his command

and organisation of the facts to the resolution of their problems; and they would notice how the judge would listen with attention and respect to his submissions.

Above all and despite his privileged background, as the son of a distinguished naval officer whose family had owned large estates in Norfolk for several centuries, Edward was a modest man. His final injunction was that there should be no memorial service. There was just a funeral service at St Mary's Church, Marlingford, near Norwich, the parish church by the gates to the park of Marlingford Hall, Edward's family home.

Edward was born on 10 April 1937, the only son of Edward Malcolm Evans-Lombe, a man of similar stature to Edward, who rose to the rank of Vice-Admiral and was knighted for his services to the Navy. From his father, Edward developed a deep interest in naval history. During World War II, Edward's father captained the cruiser HMS Glasgow, which in April 1943 intercepted and destroyed the German supply ship Regensburg as it tried to break the British blockade. Towards the end of the war, he became Chief of Staff of the British Fleet of the Pacific and, at the end of his career in the Royal Navy, Commander-

in-Chief of the Allied Naval Force in Northern Europe. On retiring to Norfolk, Edward's father was appointed a Deputy Lieutenant of the County and, in 1962, High Sheriff.

During the war, Edward, his mother, and sister were evacuated to the United States but returned to England in the Spring of 1944 on an aircraft carrier, which took seven days to make the crossing as part of a convoy bringing troops to England to prepare for the Normandy landings. After the end of the War, Edward went to prep school and then to Eton College which he left in 1955. In his last year at Eton, Edward took part in a debate in which his life-long friend Charles Goodhart (who became a distinguished economist and adviser to the Bank of England on monetary policy) proposed the motion: "*This House approves of the aims and methods of Senator McCarthy*". Goodhart explained that in 1943 he (then aged 6 or 7) had met the Senator in an Arizona swimming bath, where he had expounded the view that the world was like "*a flower garden in which the weeds of Communism are threatening to choke the blooms of Democracy*", and that, whereas McCarthy was doing something about the Communist threat in America, Britain and other European countries were not. After a spirited debate in which the speakers seemed

more concerned about infiltration by communists than McCarthy's methods, the motion was defeated 34 votes to 14. Edward contributed the sensible point that *"we should not make fools of ourselves by having persecutions like the Russians do"*.¹

Before going to Trinity College, Cambridge, to read economics, Edward undertook two years of national service with the Royal Norfolk Regiment in Cyprus, which was then a Crown Colony. Edward arrived in Cyprus at about the time when the British Governor declared a state of emergency in response to the Greek Cypriots' violent independence campaign. As a member of the British forces on the island, Edward was engaged in the hazardous task of trying to suppress this uprising; a task made more complicated by Turkish Cypriots demanding partition of the island.

After completing his national service, Edward went to Cambridge. At the end of his first year, he switched from economics to law in which, in 1960, he obtained a 2:2 degree. At that stage, he did not intend to pursue a career in law. Instead, he went into the City. After a year there, he decided to try his chances at the Bar and joined the Inner Temple. This was a risky career choice. The 1950s had been a time of shortage of work and low rewards, with many barristers giving up the struggle. But by the early 1960s, things were starting to change as commercial activity increased and legal aid became more widely available to fund litigants in civil as well as criminal litigation.

Edward was called to the Bar in 1963. His first pupillage was in common law chambers at 4 Pump Court in the Temple with James Miskin, the future Recorder of London. After six months there, he moved to a chancery pupillage with David Thomas at 1 New Square, Lincoln's Inn, the chambers of John Arnold QC, then one of the leading chancery silks (and future President of the Family Division). Eben Hamilton, Edward's great friend from Trinity College, had just become the junior tenant after being pupil to Allen



Evans-Lombe with his biggest catch in Norway 1960s

Heyman, who then had one of the largest practices in insolvency law. This was not a sought-after area of specialisation. Until the collapse of Rolls-Royce in 1970, it was shunned by the smarter firms of solicitors and accountants, but it was a subject that appealed to Edward. As there was no vacancy for Edward in 1 New Square, David Thomas arranged for Edward to go to Arthur Figgis, a busy junior practicing in insolvency law at 3 Paper Buildings, for a further pupillage with a view to becoming a tenant. In 1965, the year that Muir Hunter was appointed a QC, Edward became a member of Muir's chambers.

An appreciation of Edward's life that focuses on his career in the law, as this one does, inevitably presents a distorted picture. Much as Edward loved his work in the law, it was only part of his life; something he did to support his family and his role as custodian of the family estate. In 1964, while still a pupil, he married Marilyn Mackenzie. They had four children: Sophy, Nicholas, Sarah, and Harriet. He soon settled into a routine of spending the weekdays in London and weekends and holidays in Norfolk, interspersed with family fishing trips to Norway and Iceland and visits to their house in the South of France. Inevitably, much of the burden of running the estate fell

1. Eton College Chronicle, 14 October 1954.

on Marilyn and it was fitting that, in the 1990s, when Edward was appointed a High Court judge, she should follow his father by being appointed High Sheriff of Norfolk and one of the Deputy Lieutenants of the County. Running the estate enabled Edward to pursue his enthusiasms for cricket, fishing, ornithology, and archaeology. He built two cricket grounds, one at Marlingford and the other at Great Melton, which supports a thriving amateur club of which he was patron. He allowed the commercial extraction of gravel from land near Marlingford Hall to create a large lake with an island to provide a safe resting ground for migrating birds. And he organised archaeological digs on the estate in the unfulfilled hope of discovering the remains of a Roman villa. In retirement, he and Marilyn moved to a new house on the estate, beside Great Melton cricket ground and with a pond to attract birdlife which he could watch from the drawing room window.

Bankruptcy junior

Edward's early years at 3 Paper Buildings were spent doing bankruptcy, moneylending, company, divorce, and general common law cases. In March 1971, Arthur Figgis was appointed a county court judge and soon afterwards, Edward took his place as standing counsel to the Department of Trade in Bankruptcy matters and his practice, conducted from a basement room, known as "*Loom in the Gloom*", expanded rapidly. The early 1970s saw a huge growth in insolvency work. After years of stagnation, property prices increased dramatically. This meant that bankrupts' homes increased in value, often with a substantial equity after paying off the mortgage, which could be used to pay unsecured creditors. It was also a boom time for property developers, who raised funds from secondary banks, who had borrowed from larger banks and who took personal guarantees from the directors of the development companies. The crash inevitably followed in 1974. It was a crash that nearly brought down the banking system and required the close attention of the Bank of England. It also led to record-breaking personal bankruptcies.

Much of the interesting insolvency work on which Edward was engaged never reached public hearings, since bankruptcy and liquidation cases were invariably conducted before registrars

in private, and disputes resolved by negotiation. One of these cases concerned the bankruptcy of Diana Dors, who had reached stardom in the 1950s as "*Britain's answer to Marilyn Monroe*", but who by the early 1970s was in the twilight of her career. In 1968 she had been made bankrupt, owing the Inland Revenue £48,000, but the obligations and disabilities of bankruptcy had no effect on her. She continued to live at Orchard Manor, a large mock-Tudor house in Sunningdale, which had been bought by a trust fund set up for the benefit of the two children of her second marriage, and she continued to earn a living as an actress and entertainer, with none of her earnings passing to her trustee in bankruptcy. Edward was briefed by her trustee to conduct a private examination into her financial affairs.

Unfortunately, these were not matters that had engaged her attention and she was unable to help him. She did however remember going to see Muir Hunter QC for advice on estate duty planning. This was a surprising revelation, since Muir knew a lot more about personal bankruptcy than he did about estate duty.

Consulting an expert in bankruptcy law might have been useful evidence of Ms Dors' awareness of her dire financial position, had the trustee launched proceedings, but, in the event, he left her undisturbed in Orchard Manor.

One of Edward's most interesting briefs was for the liquidator of Castle New Homes Ltd, which had gone into liquidation in October 1974, following the collapse in June of the Guardian Properties group of which it was a member. Guardian Properties invested in property for rent and, through subsidiaries, such as Castle New Homes, acquired other properties for development. Supported by bank loans, the group expanded rapidly and by the end of 1973 it had properties worth £45 million and shareholders' funds of nearly £9 million. But, at the end of that year, the economic situation in the country was bleak: there had been a dramatic increase in oil prices, trade figures were dire, there was a credit squeeze on secondary banks and, in response to a threatened miners' strike, the government had announced the start of a three-day week.



Diana Dors



Evans-Lombe taking silk
with Tony Allen, senior clerk

The Bank of England had set up a lifeboat scheme to support secondary banks and protect the banking system. The adverse impact on property companies was inevitable. In March 1974, Guardian became the first property group to publicly admit its liquidity problems, caused by difficulty in renewing short term loans, but others, including William Stern's empire were also in trouble. The following month the Bank of England announced that it was providing support for property companies, such as Guardian, which had run into liquidity difficulties. Negotiations for support failed and in early June 1974 Barclays Bank appointed receivers of the Guardian group properties under the terms of its debentures. The value of the group's properties had collapsed, and it owed banks over £45 million.

Edward was instructed to advise the liquidator of Castle New Homes whether he had grounds for challenging the guarantees and securities it had given its banks, Barclays and Drayton, between January and May 1974 to support borrowing by other members of the Guardian group. To do this Edward had to review the course of negotiations between Guardian and its bankers and the support arrangements promoted by the Bank of England. From the Bank of England's minutes, Edward gained a

unique insight into a perilous moment in the City's history when banks as large as National Westminster Bank were on the brink of collapse. Even so, this material was not sufficient for Edward's purposes. He advised the liquidator that officers of the banks should be examined and that the banks should produce their documents. The banks refused, mainly on the ground that this would be unfair because they claimed that the liquidator had already decided to sue. Litigation followed and in a judgment which became an important decision in the development of the law about private examinations, Mr Justice Slade confirmed that the examination should proceed, and the documents produced.²

Much of Edward's work as a bankruptcy junior concerned the matrimonial home of the bankrupt and his family. Instructed on behalf of trustees in bankruptcy, he would seek orders for possession and sale of the home so that the creditors could be paid. These applications almost always succeeded, because the court's view was that the interests of creditors prevailed over the interests of the family, but that it might alleviate hardship by postponing sale for a few months. Some bankrupts tried to protect their homes by transferring them to members of their family or friends, but these attempts invariably failed as Edward,

acting for trustees, persuaded the court to set aside the transfers as voluntary settlements or fraudulent conveyances and order the sale of the property³

Among these relatively mundane cases concerning bankrupts' homes was one about a house in Bromley which had been paid for by a bankrupt and which raised an issue of national constitutional importance warranting the intervention of the Attorney-General. The bankrupt, David James, had practiced as a solicitor in Zambia, where he had defrauded his partners of some £160,000. He came to England where he was thought to have spent the money on buying various assets, including the house. He then went to live in Rhodesia (now Zimbabwe). The partners caught up with him and obtained from the Rhodesian court a judgment and a bankruptcy order under which a trustee of James's estate was appointed.

The trustee wanted to find out what had become of the stolen money and obtained from the Rhodesian court a letter of request asking the bankruptcy court in London to make orders under the English Bankruptcy Act to assist him. The London bankruptcy court agreed and, among other things appointed a receiver and ordered the bankrupt's brother to attend for examination and produce documents about the bankrupt's assets in England, including his interest in the Bromley house. The brother was not keen to cooperate, and Edward was instructed to challenge the order for examination. What took this case out of the ordinary was that before the Rhodesian court had made its request for assistance, the country had unilaterally declared independence (UDI) from the United Kingdom and had adopted a new constitution; steps which the British government declared were illegal. The registrar refused to set aside the order for examination and the brother appealed to the Court of Appeal. The Attorney-General learnt of what was going on and joined in the appeal which took up six days of argument in July 1976. The critical point was whether the Rhodesian court was, in the circumstances of the UDI, a "British court" within s 122 of the Bankruptcy Act. On this point, Edward and his leader played a secondary role, allowing the Attorney-General to argue

2. *Re Castle New Homes Ltd* [1979] 1 WLR 1075.

3. *Re McCarthy* [1975] 1 WLR 807; *Re Windle* [1975] 1 WLR 1628; *Re Densham* [1975] 1 WLR 1519.

a point which mattered a great deal to the government and from which the brother would benefit. With Lord Denning MR dissenting, the Court of Appeal (Scarman and Lane, LJJ) held that it was not; the Rhodesian judges, even though they may have been appointed by the Crown, were all in office under the illegal constitution and were not sitting in a British court. Lord Denning considered this a thoroughly unjust result which could be avoided by recognising that the Rhodesian judges were operating under an implied mandate to administer justice despite the illegal constitution.⁴

From Edward's days as a junior barrister three cases stand out. One case attracted the most media interest of any of Edward's cases. The others concern moneylending law and pyramid selling.

Ralph Stolkin: "The £250,000 Kiss-Off"

A trial in a common law case before Mr Justice Melford Stevenson in the late autumn of 1971 left Edward with the most vivid memories. It attracted an extraordinary amount of attention in the national press, dominating the front page of the Daily Mirror on three of the six days of the trial; one day under the banner headline "*The £250,000 Kiss-Off*"⁵ Edward was junior counsel behind Joseph Jackson QC, doyen of the Family Bar, for the plaintiff, Ralph E Stolkin, an American millionaire who sued Mrs Patricia Wolfson (née Rawlings) for the return of jewellery and a flat in Knightsbridge, together worth nearly £250,000. Stolkin's case was that he had showered these gifts on Patricia in anticipation of marriage and that, since she had called it off, he was entitled to have them back. She claimed they were outright gifts and that, anyway, he had misled her into believing he was free to marry, when he had not been able to divorce his wife until she had run out of patience.

To the delight of the media and the packed courtroom, the trial required exploration in graphic detail of Stolkin's business dealings and of his affair with Patricia. As to the former, the judge was informed that in 1969 a book had been

published in America, *The Stockholder* by William Hoffman, which asserted that Stolkin's father-in-law had received a 10-year jail year sentence for fraud "*which certain cynical Chicargoans contended Ralph Stolkin masterminded*". If the judge had been wondering whether to believe Stolkin's testimony, the book helpfully observed that some people would not believe a word he said, "*even if he was standing knee deep in Bibles*". Stolkin had certainly operated on the borderlines of legality. After the war, he had made his first fortune mailing punchboards (a form of lottery) to sell ballpoint pens, coonskin caps, and cheap radios, while his father-in-law had used the same procedure to market insurance. Both operations were closed by the Federal Trade Commission. After that, Stolkin invested in various media, manufacturing, and real estate ventures and claimed to have been worth \$100 million, with all the usual trappings of great wealth: residences, cars, yachts, and objets d'art. Towards the end of the 1960s, cashflow difficulties forced Stolkin to seek protection under the US Bankruptcy Act, from which by 1971 he had emerged with all his creditors paid and a surplus of \$10 million. This material emboldened Leonard Caplan QC, counsel for Patricia, to suggest to Stolkin that he was "*a playboy, a yacht-sailing, jet-setting con man who was lucky not to be in jail*".

Stolkin's affair with Patricia began in the summer of 1966, when he was aged 48 and she was 27. While Stolkin may have had money, lots of it, he did not have Patricia's class. She was the daughter of a textile magnate, had been a debutante, and was a qualified nurse. In 1962 she had married David Wolfson (who became chairman of Great Universal Stores, Chief of Staff at 10 Downing Street when Mrs Thatcher was Prime Minister, and Lord Wolfson of Sunningdale). The marriage did not last. In July 1966, Stolkin entertained Patricia on his yacht, moored off the South of France, and invited her to his house in Palm Springs. The judge wanted to know exactly what happened there: The judge: "*This woman stayed in Palm Springs as your mistress?*" Stolkin: "*As the girl I intended to marry.*" The judge: "*Never mind that. You were sleeping together?*"

Stolkin: "*Yes, I thought we had found that special society and that it would not be a mistake if we got married.*" The judge was not impressed when he was told that Stolkin's business associate Buzz Burke was also staying in the house in the improbable role as chaperone for Patricia. Two months later, Stolkin and Patricia agreed to marry. Over the next few months, he bought her an engagement ring costing \$67,000, more jewellery, and the Knightsbridge flat – all the subject of the proceedings – and 16 March 1967 was set as the date for the wedding. In the meantime, Stolkin and Patricia set about obtaining divorces from their spouses. Patricia soon obtained hers, but Stolkin's marital position was more complicated, and he kept on postponing the wedding. On 27 April 1967, he telephoned Patricia to give her the good news that, after agreeing to pay his wife \$4.5 million, he had obtained his divorce in Mexico. By then, Patricia had had enough and told him that the marriage was off. He had not been truthful about his marital status and had led her to believe that he had been divorced since 1962.



Ralph Stolkin

4. *Re James* [1977] Ch 41. Michael Crystal was junior counsel for the trustee and receiver.

5. Quotations from the Stolkin case are from reports in *The Times*.



Stolkin told the judge that the way Patricia broke off the engagement was “*the kindest and most gentle-kiss off he had ever seen*”.

After five days of the trial, Mr Justice Melford Stevenson could not decide which side he disliked most. He thoroughly disapproved of Stolkin’s lifestyle and had reprimanded him for indulging in soliloquies and not answering the question. On the other hand, he disapproved of Patricia’s lawyers’ tactics in ambushing Stolkin with a tape recording of the 27 April telephone call, when the recording should have been disclosed long before the start of the trial. On the sixth day, Joseph Jackson QC informed the judge that the parties had agreed a confidential settlement and the case ended with the judge saying: “*it is fortunate for the parties and their advisers that I am relieved from making any comments about this case.*”

The press soon discovered that the parties had agreed that the Knightsbridge flat and jewellery should be sold, and the proceeds divided equally between Stolkin and Patricia.

The flat was already in course of being sold and in April 1972, the jewellery was sold in Geneva for £117,000. Stolkin died in February 1973. Patricia never remarried; she resumed her maiden name and pursued a career as a Conservative party politician; first as an MEP, then, after being created a baroness, on the front benches of the House of Lords.

Moneylending: “Kill or be killed”

In 1960 Ikechukwu (or Godwin) Ifoloma Orakpo came to England from Nigeria. He joined the Inner Temple but was never called to the Bar. Instead, he turned to investing in semi-derelect properties in South London, which could be let out on a multiple occupancy basis or, if he had the funds, developed. In 1972, Manson Investments Ltd, a reputable firm of licenced moneylenders, agreed to lend Orakpo about £75,000 to enable him to buy two properties and refinance secured lending on five others. As required by the Moneylenders Act 1927,⁶ the parties signed a memorandum of the transaction, recording that the loan would be at 18% p.a., for a term of one year, and would be

secured by mortgages on each of the properties. The transaction was duly completed, but Orakpo soon defaulted. He brought proceedings against Manson, claiming that the loans were unenforceable for non-compliance with the strict requirements of the Moneylenders Act. His stance was “*Kill or be killed*”, in that he would “*refuse to perform his clearly stated and freely entered into obligations to the defendants upon a string of technicalities*”⁷.

Edward, led by Muir Hunter QC, acted for Manson. They appreciated the vulnerability of Manson’s position and so Edward included in the counterclaim a claim that Manson was protected in respect of its loans by being subrogated to the unpaid vendors’ liens and previous lenders’ security on the properties, which Manson’s loans had discharged. At the trial before Mr Justice Walton in 1976, Orakpo was represented by a senior Chancery silk, John Mills QC. The judge was forced to agree with Orakpo that the loan could not be enforced, because the memorandum failed to state two minor matters of which Orakpo was well aware, and that, anyway, Manson’s claim

6. Repealed by the Consumer Credit Act 1974, s 192 and Sch 5.

7. *Orakpo v Manson Investments Ltd* [1977] 1 WLR 347, 362.

was barred by the Moneylenders Act, s 13 since, because of Orakpo's defaults, the loans had become due more than one year before Manson had counterclaimed for their repayment. On the other hand, the judge accepted Manson's subrogation claim, which meant it could recover its loans from the properties.

Orakpo appealed to the Court of Appeal. The Manson team were confident; they had the merits, Orakpo no longer had leading counsel but would argue the appeal himself; and they were unconcerned when Orakpo came into court armed with a vast array of law reports. But this confidence began to evaporate as Orakpo, over an appeal which last seven days, proceeded to present his case "*persuasively and extremely competently, with an obvious understanding of how proceedings in a court of law ought to be conducted*".⁸ With evident reluctance, the Court of Appeal held that Manson could not rely on the equitable doctrine of subrogation to evade the rigours of the Moneylenders Act. Orakpo was entitled to keep the £75,000 he had been loaned and his properties were free of Manson's mortgages.

With permission from the Court of Appeal, Manson appealed to the House of Lords.

This time Edward was led by Brian Dillon QC, then one of the leading silks at the Chancery Bar and a future Lord Justice of Appeal. Over three days, Dillon tried, but failed, to move their Lordships, who did not even call on Orakpo to reply.⁹ While the other four Law Lords explained at length their reasons for denying Manson the benefit of subrogation, Lord Salmon took the simple view that it would be absurd for the equitable doctrine of subrogation to enable Manson to recover their loans from the properties when the Moneylenders Act expressly prevented them from taking such enforcement steps.

Golden Chemicals: pyramid selling

At about the same time as he was being led by Muir in the Orakpo case, Edward, with Muir as his leader, was briefed to resist the winding up of Golden Chemical Products Ltd. The company had been launched in 1971 to market soft biodegradable detergents and washing products. It recruited distributors who would pay for the privilege, buy products to sell to customers, and earn a commission for introducing new distributors. Distributors were assured their lives would be transformed as they could earn £50

to £100 per month, or even as much as £1,000 per month. In other words, it was a classic pyramid selling scheme. The company was much more interested in the fees it collected from new distributors and in the sale of its products to them than it was in the sales to customers. By the end of 1972 it was boasting that its group was selling in 14 different countries and was "*the fastest growing company in the history of the world*".¹⁰ It was not long before the company began to attract bad publicity as distributors lost money, buying product they could not sell. Meanwhile, the company had received more than £1 million from its distributors, much of which was transferred to its offshore owners and associated companies.

By 1973, the climate had turned against the company. It was forced to create a "Buy-back Guarantee Trust Fund" to secure its obligation to pay 90% of the cost price of returned goods its distributors could not sell. It deposited £100,000 in a trust account under the control of two trustees who would arbitrate disputes between the company and its distributors: Ray Mawby MP (Conservative MP for Totnes and former Paymaster-General, who in 2012 was outed as a spy for the communist government of Czechoslovakia) and Gordon Baker (the founder and national organiser of the Consumers' Union). Later that year, the Fair Trading Act 1973 was enacted to curtail pyramid selling and the company had to adopt much less profitable trading methods. By the end of 1974, the two trustees had fallen out and Mawby resigned. He had wanted to transfer £46,000 from the trust account back to the company which needed the money to avoid liquidation. Baker refused to agree to the transfer and demanded a Department of Trade investigation.

In January 1975, the Department of Trade appointed inspectors to investigate the company's affairs. The investigation revealed to the Department that the company had not kept proper books of account, its money had been misapplied, and it was insolvent. In those circumstances, in August 1975, the Secretary of State presented a petition for the company to be wound up in the public interest.



8. *Orakpo v Manson Investments Ltd* [1977] 1 WLR 347, 357.

9. *Orakpo v Manson Investments Ltd* [1978] AC 95.

10. Birmingham Post, 15 January 1973.

Muir Hunter QC and Edward were briefed for the company to oppose the petition. After much debate on tactics between Muir and Edward, they decided to take the battle to the Department. They would challenge the very foundation of the petition, which had been presented at the direction of Mr Gill, the inspector of companies within the Department, not by the Secretary of State himself, who had not personally considered the case. Over six days in March 1976, Muir Hunter tried to persuade Mr Justice Brightman that the legislation did not permit the Secretary of State to delegate this power. The judge disagreed, holding that the Secretary of State could act through one of the Department's officers and did not need to give the petition his personal attention.¹¹

The petition then moved on to a trial before Michael Wheeler QC (a very experienced company law silk), which lasted 36 days between June and October 1976, involved 15 days of oral evidence and 1,100 pages of sworn statements. Edward was fortunate to miss much of this as he was engaged in the Court of Appeal in *Re James*. There were two main issues; whether the court could review the Secretary of State's conclusion that it was in the public interest for the company to be wound up, and whether it was just and equitable for a winding-up order to be made. Muir concentrated his fire on the first issue. He wanted to cross-examine Mr Gill about why he had ordered the inspection of the company, why he had limited its scope, and why he thought it was in the public interest for the company to be wound up. In his reserved judgment of December 1976,¹² Michael Wheeler QC refused to allow Muir to cross-examine, because under the legislation, the view of the Secretary of State, or his officer, was conclusive and could not be inquired into by the court. Cross-examination would be pointless. On the second issue, the evidence presented by the Secretary of State made a compelling case for winding-up the company, but the judge was nevertheless willing to give the company a chance to avoid winding-up by offering undertakings about future trading practices. The company did not respond to this invitation and on



Edward in his traditional brown felt hat

21 December 1976, a winding-up order was made.

Taking Silk and the move to 4 Stone Buildings

Edward took silk in 1978 and was soon busy doing insolvency cases and others covering company law, employment law, agricultural tenancies (in the House of Lords) and one of the most important cases in the development of the law of restitution: *Barclays Bank v Simms*.¹³ By this time the chambers had been transformed from a common law set, with some members specialising in personal bankruptcy and

other in crime, to a set concentrating on corporate and personal insolvency cases and related commercial work. Michael Crystal, then aged 30, had already built up a stellar junior practice in those areas of work and was attracting the leading City firms. The members of chamber practicing in crime had moved to specialist criminal law sets and the chambers had recruited new young members, whose practices would be dedicated to the new direction of work. The recruitment owed much to Edward and his friendships with successful barristers in other sets of chambers, including Tom Bingham QC who introduced him to Gabriel Moss

11. [1976] Ch 300.

12. Times, 10 December 1976.

13. [1980] QB 677, a decision of Robert Goff J.

who made such a successful career as an insolvency lawyer.

Edward, now in his early 40s, wondered what the future held for him. He should have many years of practice ahead of him as a silk and after that there was the possibility of a judicial appointment. Peter Gibson, then Junior Counsel to the Treasury (Chancery), suggested he might do well by moving to Lincoln's Inn and joining the chambers of Peter Curry QC at 4 Stone Buildings. Curry had been a member of the chambers now called Erskine Chambers, had taken silk, and then joined Freshfields to set up its tax department, but had returned to the Bar and been appointed a QC for a second time. Very reluctantly, in 1981, Edward decided that it would be best for him to leave 3 Paper Buildings and move to 4 Stone Buildings.

Edward remained close to his friends at 3 Paper Buildings. During the 1980s he led juniors from 3 Paper Buildings in several cases. Among these was a dispute about the validity of a debenture granted by a furniture company to Byblos Bank, a Lebanese bank, which the bank enforced by appointing a receiver of the company's property. Edward led Gabriel Moss for the bank, and I acted for the receiver. Edward persuaded the Court of Appeal that, despite its manifest shortcomings, the debenture was an effective equitable charge, and the appointment could not be challenged.¹⁴ The Court allowed the bank's appeal from the judgment of Mr Justice Harman, who had been scathing about the deficiencies in the debenture, describing it in argument as *"Nothing more than some loose sheets of paper fit for only one use; and that not in this court."*

Soon after joining 4 Stone Buildings, Edward took steps towards a judicial career. In 1982, he was appointed a recorder so that he could conduct criminal trials, invariably and rather conveniently in Norfolk. The following year, he was appointed Chairman of the Agricultural Land Tribunal for South-Eastern Region and, about the same time, a Deputy High Court judge, sitting in the Chancery Division. In 1985 he was made a Bencher of the Inner Temple.

Meanwhile, he maintained a busy practice, including another appearance in the House of Lords and trips to the courts of Hong Kong. Two cases from this period of Edward's career should be mentioned, one a continuation of his bankruptcy practice and the other for one of his favourite clients.

William Stern: "a very ordinary bankruptcy with noughts on the end"

In June 1974 the Stern property empire collapsed with debts of over £200 million and assets no longer worth enough to pay them in full. Kenneth Cork, the celebrated insolvency accountant, and his firm Cork Gully successfully promoted a scheme of arrangement to deal with the corporate debts, but this did not affect William Stern's personal

position as guarantor of over £100 million of the debts. Eventually, one of the creditors with guarantees obtained judgment against Stern and started bankruptcy proceedings against him. Stern comfortably broke the record for the largest British bankruptcy when he was adjudicated bankrupt on 30 May 1978 with debts of £118 million and assets worth only £20,000. Stern's public examination was concluded in February 1979, leaving him free to apply for his discharge from bankruptcy.

The only matter that had concerned Stern's trustee was the sale of Stern's handsome home in Hampstead to his father-in-law in December 1974, after the collapse of the Stern property group. Although the price of £110,000 was supported by valuations, the trustee challenged the sale.



William Stern

14. *Byblos Bank v Rushingdale* (1986) 2 BCC 99,509.

His proceedings were compromised by a further payment of over £200,000.

Stern launched his discharge application in March 1981, with Edward leading John Vallat, also of 3 Paper Buildings, as counsel for Stern. In return for an immediate discharge, Stern offered his creditors £25,000 from family sources and a further £30,000 to be paid at the rate of £10,000 per year for three years. This might seem a paltry offer to deal with debts of over £100 million, but it was in line with the terms on which registrars in the bankruptcy court had granted discharges to bankrupts who had incurred massive liabilities as guarantors of their companies' debts. In December 1980, the court had granted Leslie Lavy, the former director of the bankrupt secondary bank David Samuel Trust, a discharge, suspended for six months, in return for him paying £10,000 over five years. Lavy had debts of £20 million, almost all under guarantees, and no assets; the house in Finchley and its contents, the flat in the South of France, and the Rolls-Royce all belonged to his wife. Lavy's trustee challenged these arrangements and, before the discharge application, had received a settlement payment of £320,000.

So, Stern was making a seemingly straight-forward application for discharge. It was supported by Kenneth Cork, who said that Stern had been helpful in the winding up of his group, and another witness who said the banks had only taken guarantees to tie Stern to his companies. The official receiver did not object to discharge; on the contrary, he told the registrar: *"This is the story of a company director who has given guarantees and cannot meet them. It is just a very ordinary bankruptcy with noughts on the end"*¹⁵

Three creditors, owed more than £60 million under guarantees, objected. They claimed that Stern's bankruptcy was brought on by rash and hazardous speculation which had contributed to the downfall of his companies. They wanted to cross-examine him and his witnesses. The registrar refused to allow this, and the creditors appealed to the Court of Appeal. That court – manned by Lord Justices Lawton, Templeman, and Brightman – was notably hostile towards



Stern and astonished by the relaxed attitude taken by the bankruptcy court towards his conduct and the scale of his debts.¹⁶ They held that, contrary to what the registrar had thought, he could have permitted the creditors to cross-examine the bankrupt, there was a good case for so doing, since it would be relevant to issues of conduct, and that the discharge application should be remitted to a judge.

The consequence of the Court of Appeal's decision was that the price for Stern's discharge went up. At the resumed hearing before Mr Justice Walton on 28 March 1983, Sterns' family increased the offer to £500,000. The judge accepted that but suspended the discharge until September 1985, saying that he was not persuaded that *"it would be wise to release Mr Stern to the business world yet. He still has the readiness to say anything and do anything that he thinks suits his interests."*¹⁷

Al-Tajir's cook

Edward particularly enjoyed acting for Muhammed Mahdi Al-Tajir in a case which became a leading authority on

diplomatic privilege, and which arose from a spat about a cook. For many years, Al-Tajir had been financial adviser to the rulers of Dubai and Abu Dhabi as they had transformed the economies of their countries as members of the United Arab Emirates. He had taken full advantage of the commercial opportunities that had come his way and, by the early 1980s, was one of the richest men in the world with properties in London and Kent, an estate in Scotland, stunning collections of silver and Persian art, and a cook of exceptional ability. He was also UAE ambassador in London.

Al-Tajir was also a long-standing friend of Mohamed Al-Fayed, the Egyptian businessman who acquired Harrods in controversial circumstances. As a mark of his esteem for Al-Fayed, Al-Tajir provided Al-Fayed with a licence from the UAE embassy to use the VIP lounge and restricted areas for his limousines at Heathrow Airport. Al-Tajir felt utterly betrayed when Al-Fayed lured away his exceptional cook. He retaliated by immediately instructing the counsellor at the embassy to cancel Al-Fayed's licence at Heathrow Airport.

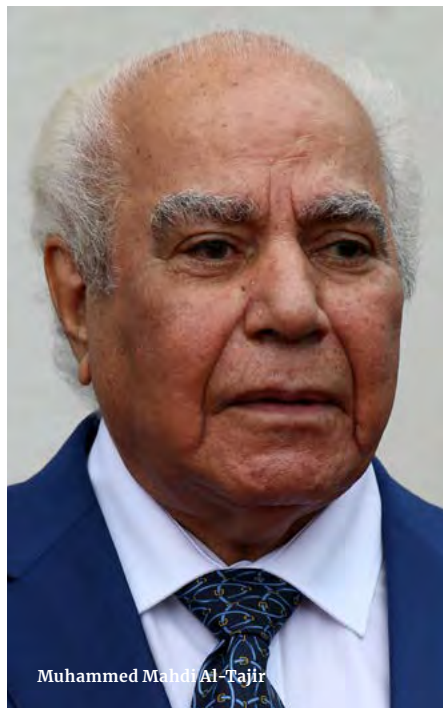
15. *Re Stern* [1982] 1 WLR 860, 864.

16. [1982] 1 WLR 860.

17. Daily Mirror, 29 March 1983.

He was furious when he discovered that the counsellor had ignored this instruction and had renewed the licence. On 7 September 1982 (during a short period when he was not ambassador but acting as head of the mission) Al-Tajir wrote a memorandum to the counsellor, copied to one other embassy official and to the ministry of foreign affairs in Abu Dhabi, in which he insisted that Al-Fayed's licence should be withdrawn. The counsellor showed the memorandum to Al-Fayed who promptly sued Al-Tajir for damages for libel; contending that the memorandum charged him with falsely pretending to use the limousine facilities on behalf of the UAE embassy, impersonating the identity of an adviser to the ruler of Abu Dhabi in the VIP lounge, and using the privileges with a view to unlawfully importing prohibited goods into the country.

Edward was instructed to represent Al-Tajir to defend the claim primarily on the basis that the dispute was not justiciable in the English court since it was founded on a document protected by diplomatic privilege. He had two juniors, one a specialist in defamation law, and the other, Lady Hazel Fox, then the leading expert on the law of sovereign immunity. The defence succeeded at the trial, but Al-Fayed appealed to the Court of Appeal.



Muhammed Mahdi Al-Tajir

The appeal was argued over four days in December 1986, providing Lord Justices Kerr and Mustill with the opportunity to explore, in the unusual circumstances of the case, the law about diplomatic privilege. In the end, they dismissed the appeal. Al-Fayed's right to seek redress for a wrong committed in England had to yield to the need to confine to a minimum meddling by the court in the affairs of the UAE as a foreign sovereign. The principles of comity and the inviolability of diplomatic documents meant that Al-Fayed's claim was not justiciable.¹⁸

Chancery Judge

In 1993 Edward was appointed a judge of the Chancery Division and received the customary knighthood. Edward enjoyed his role as a judge; he was always courteous, efficient in case management, and he worked hard to ensure he was in full command of the legal principles and the facts. His judgments cover the full range of Chancery practice from agriculture to VAT. Several of them concerned important points of law which reached the House of Lords. These included the well-known case on the interpretation of contracts (*Investors Compensation Scheme v West Bromwich BS*), two important insolvency cases about administration and liquidation expenses (*Powdrill v Watson and Re Toshoku Finance UL plc*) and one about transactions at undervalue (*Phillips v Brewin Dolphin*).¹⁹

The largest and most challenging case over which Edward presided concerned the claims brought by liquidators of three Barings companies against Coopers & Lybrand and Deloitte & Touche, their auditors in London and Singapore, for damages for negligence for failing to detect the unauthorised and concealed trades made by Nick Leeson, the Barings manager in Singapore, which caused losses of nearly £800 million and brought down the group in February 1995. The auditors denied liability, asserting that the losses were caused by mismanagement and misfeasance by Baring's own personnel, and claiming that the Barings companies were guilty of contributory negligence. This was hard-fought litigation on a vast scale

during which Edward gave seventeen judgments. Even though the claims against Coopers were settled, and Edward had struck out some claims against Deloitte,²⁰ and dismissed Deloitte's claim that it had been deceived by Barings' finance director,²¹ the trial was a massive affair running between June 2002 and March of the following year. The opening took 30 days, there were 55 days of oral evidence from witnesses and experts, and 5 weeks of closing submissions. On 11 June 2003, Edward handed down a judgment which ran to 1,148 paragraphs, in which he found that Deloitte was liable for part of the claims, but that the damages would be reduced by Barings' contributory negligence.²²

Retirement

After 15 years of judicial service, Edward retired on 29 September 2008. This was a few days after Lehman Brothers had filed insolvency proceedings in London and New York, becoming the largest insolvency in history and starting a financial crash which threatened the world's financial system. Edward could look back and see how the world of insolvency law and practice had changed over the 45 years he had participated in it as a barrister and judge. A comparison between the crashes of 1974 and 2008 demonstrates that insolvency cases have become very much larger, more complex, and more international.

When Edward was at 3 Paper Buildings, he used to say rather gloomily that there was only likely to be enough insolvency work for one or two silks, but then, more reassuringly, that booms in insolvency cases came in waves about ten years apart. At the beginning of the wave, there would be plenty of work concerning the initiation of proceedings (pursuing or resisting bankruptcy and winding-up petitions), after which there would be work on investigating, gathering in and distributing the assets. Just as that stream of work was starting to run dry, the next insolvency wave would start. His observations may have been accurate in the 1960s and 1970, but, fortunately for members of South Square, they are no longer true. There is far more restructuring and insolvency work to

18. [1988] QB 712.

19. [1998] 1 WLR 896; [1995] 2 AC 394; [2002] 1 WLR 671; [2001] 1 WLR 143.

20. [2002] 2 BCLC 364.

21. [2002] EWHC 410 (Ch); [2002] 2 BCLC 410.

22. [2003] EWHC 1319 (Ch); [2003] PNLR 34.

support the practices of silks and juniors specialising in that subject and there are no discernible patterns in the flow of insolvency cases. The causes of financial failures are so varied; they are as likely to be caused by events in other counties, freak events or dishonesty as they are by more predictable events, such as movements in interest rates. ■

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Grateful thanks

I was fortunate to spend a day in May 2019 with Edward and Marilyn discussing his career. Grateful thanks also to Edward's family – Marilyn, Sophy, Nick, Sarah and Harriet – for commenting on a draft of this article and for providing photographs.

Sources

The Times, British Newspaper Archive, Eton College Archive, Trinity College Cambridge Archive, Inner Temple Archive, Who's Who, Wikipedia. For Diana Dors: Hugh Prall: *Passport to Fame, the Diana Dors Story* 2018). For Stolkin: Time Magazine 3 November 1952, 30 August 1954; Vanity Fair 6 April 1997; Re Ralph E Stolkin 422 F 2d 222 (7th Cir 1973).



Edward in his red robes



SOUTH SQUARE CHALLENGE



Welcome to the South Square Challenge to while away a little time this summer.

London’s historic Inns of Court have been widely used as filming locations for many television series and movies. Your challenge this summer is to correctly identify the film or television show and pinpoint the location of the still as accurately as possible!

The winner, drawn from the infamous wig tin in the event of multiple correct answers, will win a magnum of champagne and one of our wonderful South Square Umbrellas. Good luck!

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Please send your answers to Kirsten either by e-mail to Kirstendent@southsquare.com, or to the address on the back cover, by 15 September 2022.

The answers to our April 2022 picture quiz are to the right, and the winner – drawn from a packed wig tin – was Leah Alpren-Waterman of Mishcon de Reya LLP. Our congratulations, the famous South Square umbrella and a magnum of champagne are winging their way to her!

The connection, of course, being that they are all the locations of the previous 13 years of INSOL International Annual Conference.

- | | |
|---------------------------------------|---|
| 1. Big Ben, London (2022) | 8. Equestrian statue of William of Orange, The Hague (2013) |
| 2. Helix Bridge, Singapore (2019) | 9. Venetian Pool, Coral Gables, Miami (2012) |
| 3. Chrysler Building, New York (2018) | 10. Gardens By The Bay, Singapore (2011) |
| 4. Anzac Bridge, Sydney (2017) | 11. Palm Island, Dubai (2010) |
| 5. Burj Khalifa, Dubai (2016) | 12. Digital Orca, Vancouver (2009) |
| 6. 16th Avenue, San Francisco, (2015) | 13. Oriental Pearl Tower, Shanghai (2008) |
| 7. HSBC Building, Hong Kong (2014) | |

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