SOUTH SQUARE

Digest

Taking Flight:

How Foreign Law Restructuring Proceedings have the Potential to Compromise English Law Governed Debt

Stefanie Wilkins, together with William Greensmyth and Keith Hyland of Walkers Ireland, and Fiona Macadam and Siobhan Sheridan of Walkers Cayman, consider the Norwegian Air examinership proceedings

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

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From the editors

Marcus Haywood and William Willson

Welcome to the Spring 2023 edition of the South Square Digest. Since the last edition of the Digest was published, over the course of five days in March 2023, three small- to mid-size U.S. banks failed, triggering a sharp decline in global bank stock prices and swift response by regulators to prevent potential global contagion. Silvergate Bank and Signature Bank, both with significant exposure to cryptocurrency, failed in the midst of turbulence in that market. Silicon Valley Bank failed when a bank run was triggered after it sold its Treasury bond portfolio at a large loss, causing depositor concerns about the bank's liquidity. A note on the SVB failure can be found at page 19.

By mid-March, concerns about the banking sector internationally had increased. Credit Suisse announced its largest annual loss since the 2008 financial crisis and on 19 March, UBS Group AG bought Credit Suisse in an emergency arrangement brokered by the Swiss government.

Whilst concerns in relation to an international banking crisis have calmed, the IMF continues to predict that the UK will be on course for the worst economic performance of any country in the G7, with a contraction in the growth forecast of -0.3% for 2023 (albeit an improvement on previous forecasts that the UK economy would contract by 0.6% this year).

Chancellor Jeremy Hunt's Spring Budget in March placed emphasis on encouraging more people back into work by reforming Universal Credit and, in a move to slow the trend for early retirement, abolishing the cap on pension savings and raising the tax-free yearly allowance for pension pots from £40,000 to £60,000. In acknowledgement of the continuing cost of living crisis the energy price guarantee was extended until June 2023. Keen to make the UK 'the most pre-business tax regime in the world', even after the rise in corporation tax to 25%, the Chancellor also introduced measures to allow companies to deduct all of their spend on IT equipment, plant and machinery from their tax bills.

As we head on into 2023, the Russia/Ukraine war has been ongoing for over a year. April saw a major US document leak from The Pentagon and various nations have reported a flurry of Chinese spy/weather balloons.

In lighter news, however, we have the forthcoming Coronation of King Charles III on 6 May. Accompanying that comes a further May bank holiday. With that potential spare time in mind, we also have much of interest for readers of the Digest to look forward to in this edition.

In *Taking Flight*, a team from Walkers, both in Cayman and Ireland, together with Chambers' Stefanie Wilkins, examine the conclusions that the Irish Court reached in Norwegian Air concerning how Irish insolvency proceedings might be recognised in England and Wales under section 426 of the Insolvency Act. The article considers how this approach might potentially be adopted to allow a Cayman Islands scheme of arrangement within the new restructuring officer regime to be recognised and enforced in England and Wales pursuant to section 426.

William Willson and Rabin Kok, in their article *Cryptocurrency and the Claim in Debt,* consider whether a claim for payment in cryptocurrency can be brought as a claim in debt and the implications of that in the insolvency context.

Meanwhile, taking the decision of the Supreme Court of Canada in *Peace River Hydro Partners v. Petrowest Corp.* as his starting point, Associate Member of Chambers, The Hon Frank Newbould KC gives us a Canadian Perspective on arbitration and insolvency in *Arbitrating Insolvency Issues*.

Moving into the sporting arena, Mark Phillips KC reports on the UK Government's recently-released White Paper *'A Sustainable Future – Reforming Club Football Governance'.* According to former member of Chambers, Lucy Fraser KC MP, now Secretary of State for Digital, Culture, Media and Sport *"This White Paper represents the most radical overhaul of football governance since the rules were first invented over a century ago".*

In *'Evaluation of the UK's CIGA Reforms: A Best Practice Model for Other Jurisdictions?*', Felicity Toube KC, Hilary Stonefrost, Scott Atkins (Norton Rose) and Professor Peter Walton (University of Wolverhampton, and INSOL) consider whether the UK CIGA reforms have been beneficial and whether they offer a model for other jurisdictions.

And, in our first article from Mauritius, Yahia Nazroo of Appleby looks at the mechanism by which a creditor may attempt to secure debts owed to it in *Provisional Attachment.*

Five Members of Chambers (Mark Phillips KC, Stephen Robins KC, William Willson, Charlotte Cooke and Riz Mokal) appeared in Sova Capital. In a note on the case, Charlotte Cooke analyses the English Court's approval of the first "unsecured credit bid".

As ever, we have our usual Case Digests, with a foreword from Aidan Casey KC. And Associate Member, Professor Christoph Paulus makes a welcome return with his roundup of insolvency related events in Europe in our Euroland section. Daniel Judd then takes us on a light-touch tour of some Western composers who interacted with legal study at some point in their lifetimes (with varying degrees of success) in Legal Eye. And of course, we have our South Square Challenge to keep you entertained over the coming bank holidays.

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

If you find yourself reading some 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.

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Taking Flight: How Foreign Law Restructuring Proceedings have the Potential to Compromise English Law Governed Debt

Introduction

The Cayman Islands restructuring officer regime came into force in August 2022 by way of legislative amendments to Part V of the Cayman Islands Companies Act (as amended) (the **"Cayman Islands Companies Act"**).

It is anticipated that the new scheme of arrangement provisions that were expressly included within the new restructuring officer regime may potentially unlock an opportunity to compromise English law governed debt obligations under Cayman Islands law (which has previously not been possible as a result of the rule in *Gibbs*[1]). Support for this argument comes from the Irish case of *Norwegian Air*[2].

In *Norwegian Air*, the Irish High Court (the **"Irish Court"**) exercised its jurisdiction to sanction an Irish scheme of arrangement (**"Irish Scheme"**) within Irish examinership proceedings. Certain English law-governed claims were to be compromised by the Irish Scheme. The Irish Court relied on expert opinions provided by Daniel Bayfield KC as to whether the English Court would recognise the Irish examinership and Irish Scheme, and would give the assistance requested by the Irish Court, pursuant to section 426 of the English Insolvency Act 1986 (**"Section 426"**) (**"English Insolvency Act"**) (notwithstanding the rule in *Gibbs*).

1. *Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399.

2. *Artic Aviation Assets DAC & Ors v Companies Act* [2021] IEHC 268.

3. Arctic Aviation Assets DAC, Norwegian Air International Limited, Drammensfjorden Limited, Torskefjorden Limited and Lysakerfjorden Limited.

This article examines the conclusions that the Irish Court reached in *Norwegian Air* concerning how Irish insolvency proceedings might be recognised in England and Wales under Section 426. It then explains how this approach might potentially be adopted to allow a Cayman Islands scheme of arrangement (**"Cayman Scheme"**) within the new restructuring officer regime to be recognised and enforced in England and Wales pursuant to Section 426.

Norwegian Air – Irish Examinership

Irish Examinership

Examinership is a corporate rescue procedure available under Irish law for insolvent companies which is analogous to chapter 11 bankruptcy in the United States and administration in the United Kingdom.

The key features of examinership are that for a period of 70 days (with a possible extension of 30 days) a moratorium on certain creditor action applies. During such time, an examiner (being an independent officer of the Irish Court) examines the relevant company's affairs with the aim of, if possible, formulating proposals for the compromise and/or restructuring of the relevant company's liabilities (by way of a scheme of arrangement), with a view to rescuing a company and for such company to continue as a going concern. These proposals are put before meetings of the members and/or creditors of the relevant company and, if approved, confirmation of the proposals is sought from the Irish Court.

Norwegian Air

In late 2020, five companies in the Norwegian Air group, incorporated in Ireland, petitioned for the appointment of an examiner pursuant to Section 509 of the Irish Companies Act 2014[3] (the **"Irish Companies Act"**), as well as the appointment of an examiner to a related company, Norwegian Air Shuttle ASA, a company incorporated in Norway (being the parent and main operating company of the group) (**"Norwegian Air Shuttle"** and together, the **"Companies"**).

The Irish Court appointed Mr Kieran Wallace of KPMG as examiner to the Companies on 7 December 2020 (the **"Examiner"**). During the course of the examinership, Norwegian Air announced its business plan for its future operations. The essential elements of that business plan were that:

(1) the group would focus on its core business in the Nordic countries, operating a short haul network with narrow body aircraft;

(2) the group would cease to operate long haul routes;

(3) the group would initially operate up to 50 Boeing 737 aircraft, operating within Norway and other Nordic countries and between those countries and the rest of Europe;

(4) the group would significantly reduce the number of aircraft assets leased; and

(5) the group would reduce the volume of services procured.

Repudiation of contracts

Under Irish examinership law, pursuant to Section 537(1) of the Irish Companies Act, the company 'in protection' has the power to apply to the Irish Court to repudiate onerous contracts that involve the performance of obligations (other than the payment of money) if the examiner believes this is necessary for the survival of the company as a going concern.

Based on the business plan put forward in respect of the Companies, the Examiner considered that in order to effectively implement the proposals and to ensure the continued viability of the Companies, it was necessary to repudiate some 425 contracts with 68 counterparties. The Examiner proposed to address the liabilities arising pursuant to such contracts by way of Irish Scheme.

One of the key issues which arose in the context of certain of the disputed repudiation applications was the issue of jurisdiction. Specifically, the Irish Court was asked to consider whether orders made by the Irish Court approving the repudiation of certain guarantees governed by English law and subject to the exclusive jurisdiction of the Courts of England and Wales could be found ultimately to have been made in vain (that is, because such orders might not be recognised outside Ireland).

Effectiveness of repudiation orders outside of Ireland

Rule in Gibbs

One potential obstacle to recognition in England was the rule in *Gibbs*, which provides that English law-governed debt obligations are not capable of being compromised by a foreign insolvency process and, conversely, foreign law debt is not capable of being discharged or varied by an English law insolvency process, unless such discharge or variation would be effective in accordance with that foreign law (that is, the law which constitutes the proper law of the debt in question).

Section 426 of the English Insolvency Act

In Norwegian Air, the Companies contended that the Irish examinership and Irish Scheme would be recognised in England, because of the operation of Section 426. Section 426(4) of the English Insolvency Act provides that:

"(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory."

The relevant countries or territories for the purpose of Section 426(4) are identified in the Cooperation of Insolvency Courts (designation of relevant countries and territories) Order 1986 (the **"Designation of Countries and Territories Order"**) – and Ireland is one of the countries designated.

The jurisdiction of the English Court to extend assistance to other countries and territories may be triggered by a letter of request from the other court. Once a request is made, then Section 426(5) provides that the English Court may apply the law of the other jurisdiction, or English law, in the following terms:

> *"(5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law."*

Section 426(10) then defines "insolvency law" to include, in England, provision made under the English Insolvency Act (amongst other things). In relation to relevant countries and territories, "insolvency law" includes the law that corresponds to the English law provisions in the English Insolvency Act.

In England, a scheme of arrangement is a procedure that is available under the Companies Act 2006 (the **"English Companies Act"**), and is not, therefore, within the scope of "insolvency law". However, in Norwegian Air, what was proposed was an examinership, within which an Irish Scheme was to be promoted. There was some previous authority, which pre-dated the original European Insolvency Regulation[4]: in *Re Business City Express Ltd [1997] 2 BCLC 510*, Rattee J had granted an application for recognition of a scheme of arrangement proposed by an Irish examiner, concluding that the examiner was *"…roughly (but only roughly) equivalent to an English administrator…"*: referred to in Norwegian Air at [2020] IEHC 664, paragraph 117.

Dicey, Morris & Collins on the Conflict of Laws (15th edition) states that at [30-115]:

> *"Issues may arise as to when a rule of foreign insolvency law "corresponds" to a relevant provision of English insolvency law. In Re Business City Express Ltd, a request for assistance was received from an Irish court in which the English court was asked to make a scheme of arrangement, entered into in Ireland after a company had gone into examinership there, binding upon English creditors. There was no provision of English law by which this could be done. The [English] court applied Irish law to the English creditors without discussing the question of whether Irish law corresponded to any provision made by or under the [English] Insolvency Act 1986.*

4. *Re Business City Express Ltd* deals with Section 426 prior to both the European Insolvency Regulation and the Recast European Insolvency Regulation. The significance of this is that post-Brexit, the position as between Ireland and England essentially reverted to the pre-European Insolvency Regulation position: see Norwegian Air at paragraphs 275-6.

It is not the case that the foreign insolvency law needs to be the same as English insolvency law for if this were the case (and it is in any event contradicted by the decision in Re Business City Express Ltd) the notion of applying foreign law would be redundant…"

Mr Justice Quinn, sitting in the Irish Court, was aided in his analysis by two opinions provided by Daniel Bayfield KC, who had been instructed by the Companies to consider the scope and effect of Section 426.

Mr Justice Quinn recorded that Mr Bayfield's opinion, which drew on *Re Business City Express Ltd*, had been that Section 426(10) ought to be broadly interpreted in identifying what would be 'insolvency law' for the purpose of Section 426 ([2021] IEHC 268, at paragraph 277; see also [2020] IEHC 664 at paragraph 113). Specifically, the Judge recorded that Mr Bayfield's opinion had been that:

> *"The authorities suggest that a broad approach should be taken to the meaning of 'corresponds' and that it is not necessary that the foreign law be the same as the 1986 Act provisions, or, at least, to involve the same approach or procedure. I say 'suggest' because little judicial consideration appears to have been given to the meaning of 'corresponds to' within the meaning of s. 426 (10)(d). Nevertheless, the authorities do tend to contain detailed comparative analysis of the relevant provisions".*

Mr Justice Quinn also went on to explain that, adopting this approach, the expert evidence of Mr Bayfield had been that the Irish examinership – and the Irish Scheme imposed as part of it – would be likely to be recognised by the English Court, if a request to that effect was made. Specifically, the Judge recounted ([2020] IEHC 664 at paragraphs 114 and 115):

> *"Mr. Bayfield examines Parts 9 and 10 of the Companies Act 2014. He says that examinership under Part 10 can only be commenced where the company is unable to pay its debts or is likely to become unable to pay its debts, and therefore:*

> *"…carries the hallmark of an insolvency proceeding and the insolvency proceeding which most closely resembles examinership in England and Wales is the administration regime under Part II of the Insolvency Act, 1986, which can only be commenced if a near identical insolvency is satisfied."*

He concludes that: -

> *"…the English Court would be likely (if requested to do so) to recognise the examinership and any scheme confirmed by the High Court as part of the examinership, impose a stay corresponding to the stay under s. 520(4) of the Act of 2014 and order that creditors be bound by and take no steps inconsistent with the terms of the scheme of arrangement."*

Thus, the effect of Section 426 was to create a statutory inroad into the rule in *Gibbs*.

In his judgment, Mr Justice Quinn therefore concluded that: *"…[t]he opinion of Mr. Bayfield [KC] is more than credible evidence as to the prospect of recognition of orders made or repudiations effected pursuant to an approval granted under s. 537 [of the Irish Companies Act]. This taken together with the authority of Re Business City Express Limited is good reason for the court to be satisfied that orders made as sought in these applications would not be made in vain":* [2021] IEHC 268, at paragraph 280.

Accordingly, the Irish Court was comfortable that as a matter of English law the repudiation of the guarantees pursuant to an Order of the Irish Court would be recognised and given substantive legal effect in the Courts of England and Wales.

Cayman Islands – New Restructuring Officer Regime

The much-anticipated reforms to the insolvency and restructuring legislation in the Cayman Islands came into force in August 2022. The amendments to Part V of the Cayman Islands Companies Act have introduced, amongst other things, a new restructuring officer regime available to companies in financial distress, which can be accessed without the need to present a winding up petition, thereby providing practitioners and their clients with an alternative restructuring tool. A number of petitions have now been presented by companies seeking the appointment of restructuring officers: Walkers acted as Cayman Islands legal counsel to Oriente Group Limited and Rockley Photonics Holdings Limited in respect of the first two successful petitions for the appointment of restructurings (appointed by the Grand Court of the Cayman Islands (the **"Grand Court"**) in November 2022 and in February 2023, respectively)[5].

Upon filing the application seeking the appointment of restructuring officers, an automatic and standalone restructuring moratorium will immediately arise which will have extraterritorial effect (as a matter of Cayman Islands law[6]),

5. *Re Oriente Group Limited.* 11 November 2022 (Unreported; Grand Court; Cause No. FSD 231 of 2022 (IKJ)). *Re Rockley Photonics Holdings Limited.* 14 February 2023 (Unreported; Grand Court; Cause No. FSD 16 of 2023 (MRHCJ)).

6. The moratorium is intended to have an automatic extraterritorial effect, subject to recognition and enforcement in the relevant local territories.

similar to United States Chapter 11, Irish examinership or English administration, within which a restructuring may be proposed and implemented (by way of a Cayman Scheme, a restructuring process in a foreign jurisdiction or consensually, as between affected stakeholders).

The Cayman Islands legislation for schemes of arrangement is derived from 19th century English legislation. The concept of the scheme of arrangement (together with the requisite approval thresholds to be attained) was first introduced into the Cayman Islands by the Companies Law in 1961 (replicating Section 206 of the English Companies Act 1948).

The recent amendments to Part V of the Cayman Islands Companies Act also included provisions for compromises with creditors and members within the new restructuring officer regime. The current legislation governing schemes of arrangement, as set out in sections 86 and 87 of the Cayman Islands Companies Act, have in essence been duplicated and replicated into the restructuring officer regime (noting that only a restructuring officer under the new sections 91I and 91J of the Cayman Islands Companies Act is able to promote a scheme of arrangement within the restructuring officer regime).[7]

Recognition of Cayman Schemes promoted by restructuring officers

There have always been legal challenges in compromising English law governed debt obligations by way of a Cayman Scheme as a result of the English law rule in *Gibbs* applying as a matter of Cayman Islands law (if not technically binding, then certainly having significant precedential value). However, the rationale for the legislative draftsmen in replicating the Cayman Scheme provisions into the new restructuring officer regime appears to enable counsel to potentially put forward the proposition that a Cayman Scheme can successfully and validly compromise and/or discharge English law governed debt obligations (notwithstanding the rule in *Gibbs*), following the decision in *Norwegian Air*. This is because, like Ireland, the Cayman Islands is identified in the Designation of Countries and Territories Order.

The inclusion of the ability for a restructuring officer to promote a Cayman Scheme within the new restructuring office regime may have the potential of enabling a Cayman Scheme proposed by a restructuring officer under sections 91I and/or 91J of the Cayman Islands Companies Act to obtain recognition and enforcement in England and Wales under Section 426.

Under section 91B of the Cayman Islands Companies Act, companies may now present a petition to the Grand Court seeking the appointment of restructuring officers on the grounds that the company: (a) is or is likely to become unable to pay its debts; and (b) intends to present a compromise or arrangement to its creditors (or classes thereof), either pursuant to the Cayman Islands Companies Act, or a foreign law or by way of a consensual restructuring.

In light of the fact that English administration: (a) is only available where the company is unable to pay its debts or likely to become unable to pay its debts (that is, insolvent or likely to become insolvent); (b) results in a moratorium on certain creditor action; and (c) the objective of the proceedings is to pursue company rescue, it seems that it could be successfully argued that the restructuring officer regime (including the restructuring officer Cayman Scheme that can be promoted within such insolvency proceeding), is akin and analogous to English administration proceedings under the English Insolvency Act.

Pursuant to sections 91I and/or 91IJ of the Cayman Islands Companies Act, where a restructuring officer pursues and promotes a Cayman Scheme within the new restructuring officer regime (that is, a Cayman Islands insolvency proceeding which is similar to an insolvency proceeding under the English Insolvency Act), the terms of the compromise under such Cayman Scheme may be able to be recognised and enforced in England and Wales pursuant to Section 426.

7. Another important legislative reform is the removal of the "majority in number" or head-count" test for shareholder schemes of arrangement (for both a corporate shareholder scheme of arrangement (under sections 86 and 87 of the Cayman Islands Companies Act) and a shareholder scheme of arrangement promoted by a restructuring officer (under sections 91I and 91J of the Cayman Islands Companies Act)) such that only the "majority in value" test must be satisfied to approve a proposed shareholder scheme of arrangement at the relevantschememeetings.

It follows therefore that if statutory recognition of such Cayman Scheme is obtained under Section 426, then there is a good argument that, as a matter of English law, this would result in the Cayman Scheme achieving an effective (or substantially effective) and valid compromise or discharge of the English law governed debt obligations, notwithstanding the rule in *Gibbs*.

Furthermore, the ability for a restructuring officer to be able to promote a Cayman Scheme via two different avenues under the Cayman Islands Companies Act (that is, pursuant to either sections 86 and 87 or sections 91I and 91J of the Cayman Islands Companies Act) was specifically permitted for two reasons: (i) to mirror the position in Ireland that is, that there are two types of schemes of arrangement (an examinership scheme and a corporate scheme); and (ii) to adopt the somewhat analogous position in England whereby there are two mechanisms to compromise debt (a corporate scheme under the English Companies Act, or a company voluntary arrangement under the English Insolvency Act).

Conclusion

The key significance of the *Norwegian Air* examinership proceedings may well be the recognition of a statutory inroad into the well-established common law principle of the rule in *Gibbs* which may now provide an opportunity for foreign insolvency proceedings such as Irish and potentially Cayman Islands insolvency proceedings to compromise English law governed debt in certain circumstances.

Norwegian Air – Walkers acted as Irish legal counsel for a syndicate of lenders to certain entities in the Norwegian Air Group.

Oriente Group Limited – Walkers acted as Cayman Islands legal counsel to Oriente Group Limited in respect of the first petition for the appointment of restructuring officers in the Cayman Islands pursuant to Section 91B of the Cayman Islands Companies Act.

Rockley Photonics Holdings Limited – Walkers acted as Cayman Islands legal counsel to Rockley Photonics Holdings Limited in respect of the second successful petition for the appointment of restructuring officers in the Cayman Islands pursuant to Section 91B of the Cayman Islands Companies Act.

Cryptocurrency and the Claim in Debt

WILLIAM WILLSON

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Key Points:

- Widely-used cryptocurrencies such as Bitcoin and ETH may qualify as 'money' and be recoverable as debt if the English court adopts the FMLC's definition of 'money', or something similar.
- A purposive construction of Insolvency (England and Wales) Rules 2016 r.14.21 arguably requires that it apply to proofs of debt based on payments in cryptocurrency – which benefits a crypto-creditor if the crypto-asset falls in value after the date of commencement of insolvency and there is sufficient value in the estate.

Abstract:

This article considers, briefly, whether a claim for payment in cryptocurrency can (arguably) be brought as a claim in debt.

1. *International Minerals and Chemical Corp v Karl O Helm AG* [1986] 1 Lloyd's Rep 81, 101 (Hobhouse J).

2. *Sempra Metals v IRC* [2008] 1 AC 561.

3. See, e.g. https://www.ft.com/content/dcea81b9-70c3-486d-9622-b9cdd84da3fc> (accessed 9 November 2022).

4. See the UKJT's *Legal Statement on Cryptoassets and Smart Contracts* (November 2019); *AA v Persons Unknown* [2020] 4 WLR 35; *Kardachi v Torque Group Holdings Ltd* (BVIHC(COM) 31 of 2021); *CLM v CLN* [2022] SGHC 46.

5. See, however, Mr Justice Zacaroli's speech to the Insolvency Lawyers' Association (17 October 2019), and Riddiford, "Cryptoassets, Cryptoliabilities" (South Square Digest, Nov 2019), which touch on the issue.

6. *R (Kemp) v Denbighshire Local Health Board* [2007] 1 WLR 639 at [86].

7. *President of India v Lips Maritime Corp* [1988] AC 395.

It also considers the implications of such a characterisation in two specific areas of insolvency law – petitions for bankruptcy, and whether a proof of debt based on a cryptocurrency payment obligation can benefit from the Insolvency (England and Wales) Rules 2016 (**"IR 2016"**) r.14.21, which values the claim in sterling by reference to the exchange rate at the commencement of insolvency.

These issues are likely to interest lenders under crypto-loans(which we shall call 'crypto-lenders'), insolvency practitioners, and others in the crypto space.

A. The claim in debt and the cryptosphere

Lawyers, bankers and insolvency practitioners will be familiar with the 'claim in debt'. Simply speaking, this is a claim for a sum owed under a contract, or other obligation. It differs from a claim in damages, which is a claim for loss measured in monetary terms. In legal terms, a claim in debt enforces a primary, not a secondary, obligation.

Common examples of claims in debt are a customer's claim against their bank, or a bank's claim for payment due under a loan.

Among other advantages:

(1) A claimant in debt need not prove loss, and has no duty to mitigate;

(2) Claims in debt are freely assignable, and can therefore be factored easily, but claims for damages can often only be assigned subject to onerous restrictions;

(3) A debt claimant will usually be granted summary judgment;

(4) A separate claim in damages representing the devaluation of an unpaid, or delayed, debt can be brought if the creditor can show that they would quickly have converted the payment currency into another currency.[1] The creditor can also claim for loss resulting from being kept out of their money;[2] and

(5) Finally, the court can order a debt owed by A to B, to be paid to C, using a third-party debt order under CPR 72.2. A is usually a financial institution, B a judgment debtor, and C a judgment creditor. The third-party debt order is the functional equivalent of the garnishee order still in use in various offshore and Commonwealth jurisdictions.

Cryptocurrency often serves as the economic equivalent of money in the US$1tn digital asset market.[3] Countless crypto-loans are now denominated in Bitcoin or Ethereum. Contracts for the sale of cryptoassets such as NFTs, as well as physical assets and services, are also denominated in cryptocurrency.

Naturally, market participants may wonder if a claim for repayment of a loan denominated in cryptocurrency, can be cast as claim in debt. A crypto-creditor may wish to petition for bankruptcy based on a crypto-loan or crypto-guarantee.

Civil fraud practitioners may wish to attach crypto-debts owed to fraudsters. And one may wish to use the IR 2016, 14.21 to preserve the value of one's crypto-debt in a falling market, assuming there is value in the estate. Is any of this possible?

It is now fairly widely accepted that cryptocurrencies are property in the eyes of the common law, although the reasons remain uncertain.[4] We will not dwell on these issues. The nature of a claim for payment in cryptocurrency, and whether it is 'in debt', has received less attention.[5] In *Ion Science v Persons Unknown* (Unreported, 28 January 2022), the English High Court made a third-party debt order over an account in a crypto-exchange containing both cash and cryptocurrency, but it is unclear if the order was to pay the judgment creditor the cash alone, or the cash and the crypto.

We, therefore, briefly consider whether the English courts or other common law courts might allow a claim for payment in cryptocurrency to be brought as a claim in debt.

B. Are cryptocurrencies 'money' which can be claimed in debt at common law?

The action in debt has ancient roots. It is available when money is due pursuant to an obligation, however arising, to pay or repay the money.[6] The obligation may be one to pay money under a loan or contract for sale, or other obligation. However, neither a claim to pay damages, nor even one for liquidated damages, can be brought in 'debt'.[7]

The right to sue for the debt, without further notice, generally arises once the obligation to pay is enlivened under the contract, or other obligation.[8] In the case of a loan or sum payable on demand, the right to sue arises once the defendant has had a reasonable chance to make payment arrangements.[9]

Most importantly, a claim in debt must be for a definite sum of ***money***.[10] It is this that poses the greatest challenge to crypto-creditors. If cryptocurrency is not money, but a commodity, a claim for 'payment' is simply a form of claim for non-delivery that can only sound in damages.

An obligation to pay in a foreign currency can be enforced by a claim in debt, and the debtor will have to pay the debt in that currency regardless of any exchange rate fluctuations.[11] However, this principle is drawn from a line of cases involving fiat currencies issued by states.[12] Bitcoin, ETH, Tether, Solana and other cryptocurrencies are not state-issued fiat. The question of whether cryptocurrency is 'money' for these purposes is a novel question which the courts have not yet answered.

This issue must, therefore, be considered from first principles.

Neither English law nor (it seems) the common law as it applies in other Commonwealth states has a single, unifying theory of what 'money' is.[13] Most legal systems have, historically, assumed that currency is 'money if issued and backed by a state (the 'state theory'). A different way of formulating this theory is that 'money' must be backed by ***some*** country.

For example, under English law, the law of the country in whose currency a contractual debt is expressed will determine what legal tender can be used to discharge it, regardless of the governing law of the debt itself.[14] That seems to assume that the currency is issued by a country.

There is good reason to believe that English law is not so limited. The 'state theory' does not fit easily with the fact that credits in bank accounts – which are a claim against a private entity and not themselves issued by a country – are 'money' under English law. It would be absurd to argue otherwise.

An alternative theory of 'money' is that money is to be treated by the law as such if it is widely accepted as a means of exchange (for goods and services) and a store of value, whether or not it is also a unit of sovereign currency.[15]

Building on this view, the UK's Financial Markets Law Committee (**FMLC**) has since concluded, after exhaustively considering both sociological and economic theories of money, that *"virtual currencies which have achieved status as a medium of exchange within a significant user committee have a good claim to be regarded as money."*[16]

That conclusion, however, did not put these questions to rest. The UK Cryptoassets Taskforce concluded, in 2018, that cryptocurrency should not be considered 'money' because they are too volatile to be a good store of value, are not widely-accepted as means of exchange, and not used as units of account (that can be used to value goods and services, record debts and make calculations).[17]

There are good reasons to prefer the FMLC's conclusion, at least in this context. First, at least some cryptocurrencies are widely used as units of account. They may not be ***universally*** accepted – but no foreign currency is. All foreign currencies are accepted as means of exchange within significant user communities, which community may span one or several countries. Second, volatility cannot be a ground to exclude something from the definition of money. If it was, the Italian lire (in the past) and the Turkish lira (today) would not be 'money'. That would be absurd. Finally, and fundamentally, the genius of the common law is its ability to adapt and responds to society's needs and how society uses technology. It can – up to a point – do the same for crypto.[18]

Thus, cryptocurrencies, in principle, may well be 'money', at least for the purposes of a claim in debt at common law.

Not all cryptocurrencies will be able to claim that title.

8. *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, 848.

9. *Bank of Baroda v Panessar* [1987] Ch 335.

10. *International Minerals and Chemical Corp v Karl O Helm AG* [1986] 1 Lloyd's Rep 81, 101 (Hobhouse J).

11. *Sempra Metals v IRC* [2008] 1 AC 561.

12. See, e.g. <https://www.ft.com/content/dcea81b9-70c3-486d-9622-b9cdd84da3fc> (accessed 9 November 2022).

13. See the UKJT's *Legal Statement on Cryptoassets and Smart Contracts* (November 2019); *AA v Persons Unknown* [2020] 4 WLR 35; *Kardachi v Torque Group Holdings Ltd* (BVIHC(COM) 31 of 2021); *CLM v CLN* [2022] SGHC 46.

14. See, however, Mr Justice Zacaroli's speech to the Insolvency Lawyers' Association (17 October 2019), and Riddiford, "Cryptoassets, Cryptoliabilities" (South Square Digest, Nov 2019), which touch on the issue.

15. *R (Kemp) v Denbighshire Local Health Board* [2007] 1 WLR 639 at [86].

16. *President of India v Lips Maritime Corp* [1988] AC 395.

Widely-used cryptocurrencies such as Bitcoin and ETH will almost certainly qualify as money if the English court adopts the FMLC's definition of 'money', or something similar. A claim for payment in the most prolific cryptocurrencies could, therefore, be enforced by an action in debt.

It is less certain if more exotic coins (say, Axie Infinity), or coins issued by particular exchanges (think Binance USD, or FTX Token) or 'memecoins' (think Shiba Inu), will be 'money'. Many of these are in practice traded as commodities and not widely used as a medium of exchange or store of value. That is not to say that only Bitcoin and Ethereum will ever qualify as 'money' under this definition. Some lesser-known but widely used coins (such as Solana) may arguably have a claim to being 'money' for these purposes.

The upshot is that, assuming cryptocurrency is 'money' in the first place, a claimant seeking to recover all but the most widespread cryptocurrencies will probably have to establish that that particular cryptocurrency is 'money' in the law's eyes. That might require expert evidence of some kind. In practice there is thus likely to be some uncertainty for those seeking to bring debt actions to enforce payment in all but the most widely-used tokens.

C. Insolvency

The nature of a claim in cryptocurrency also has implications in insolvency. We examine two areas of interest below.

Bankruptcy

Under the Insolvency Act 1986, s.267(2)(b), a creditors' bankruptcy petition must be based on a debt for a liquidated sum. So must the statutory demand that typically precedes the petition.[19] A petition debt need not be a specific sum of money *per se*, but can be a *"pre-ascertained liability"* under an agreement, including a *"contractual liability where the amount due is to be ascertained in accordance with a contractual formula or contractual machinery to produce a figure."* [20] So, a statutory provision allowing the Law Society to recover any costs incurred by the Society created a pre-ascertained liability, though the paying solicitor had a statutory right to an assessment.[21]

This seems to create wiggle room for an interesting argument. A petitioning crypto-creditor may wish to avoid the uncertainty of arguing that his claim to payment in crypto-currency is a claim to payment in money. That creditor may instead say that a liability to pay cryptocurrency is a debt for a liquidated sum because it can be easily ascertained by reference to the prevailing exchange rate.

This argument is, in our view, unlikely to succeed. In *McGuinness* and *Blavo* the relevant contract and statute each gave the petitioning creditor a ***right*** to a specific sum of money.

On the other hand, the holder of cryptocurrency simply has a ***power*** to exchange their crypto for fiat.[22]

Therefore, assuming that cryptocurrency is not characterised as 'money' in the first place – though we have argued that the most widely used forms of crypto should be – it is unlikely that an obligation to pay in cryptocurrency alone can be a petition debt. Indeed, were the position otherwise, anyone owed delivery of any widely-traded commodity would, in principle, be able to bankrupt the other party simply for failure to deliver.

Of course, the position may be different if the crypto-loan, or perhaps its master agreement or other agreement incorporated by reference,[23] contains some contractual mechanism for converting the cryptocurrency owed to a fiat currency sum payable to the petitioner.

Proving a crypto-debt

A wide range of claims are provable in a liquidation, administration or bankruptcy, including debt claims, certain or contingent claims, or claims sounding in damages alone.[24] Therefore, a crypto-creditor is unlikely to face any issue with proving in insolvency – whether their claim for non-payment is characterised as one for debt or damages.

A more interesting question is whether a crypto-creditor can benefit from IR 2016, r.14.21. Under this rule, a proof of debt in *"foreign currency"*

17. *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, 848.

18. *Bank of Baroda v Panessar* [1987] Ch 335.

19. *Jervis v Harris* [1996] Ch 195, 202; *Standard Chartered Bank v Dorchester LNG* [2016] QB 1 at [38].

20. *Camdex International Ltd v Bank of Zambia* [1997] CLC 714, 733.

21. See *Chitty on Contracts* (34th Ed. 2021) at 33-302.

22. Financial Markets Law Committee, *Issues of Legal Uncertainty Arising in the Context of Virtual Currencies* (July 2016).

23. See e.g. *Re Chesterman's Trusts* [1923] 2 Ch 466, 483.

24. Proctor, *Mann on the Legal Aspect of Money* (7th Ed 2012) at 1.29.

is converted to sterling by reference to the exchange rate at the date of commencement of a liquidation or administration.[25] This benefits the proving creditor if that currency later depreciates against sterling.

On the face of it, cryptocurrency is not *"foreign"* currency. R.14.21 was introduced in the Insolvency Rules 1986 alongside the 1986 Act. Cryptocurrency did not exist then.

However, the principle underpinning r.14.21 is that the company's liabilities should be distributed to creditors ***as if*** the distribution occurred at the commencement of the insolvency. This is done to reduce arbitrariness and ensure equality among creditors.[26] This also appears to be part of the reason why, if the foreign currency *strengthens*, the proving creditor's loss cannot be claimed as a non-provable debt.[27]

It is, therefore, at least arguable that a purposive construction of r.14.21 requires that it apply to proofs of debt based on payments in cryptocurrency – perhaps even if cryptocurrency is not 'money' for other purposes.[28] Like foreign currency debts, converting proofs based on non-payment of cryptocurrency to sterling at the date of proof or at some other date would inflate or deflate those claims arbitrarily. This would run counter to the need to treat creditors equally, and the *pari passu* distribution scheme.

Thus, these claims should fall within r.14.21 and be converted at the date of commencement of a liquidation or administration.

This conclusion is practically important. A series of liquidity crunches, insolvencies, hacks and regulatory moves have recently caused the prices of most crypto-assets to fall sharply. Bitcoin is a case in point. The value of 1 BTC has declined from over £45,000 in November 2021, to under £15,000 at the date of writing. Therefore, a crypto-creditor whose debtor went insolvent some time ago may gain, rather than lose, from these market fluctuations – if that creditor relies on r.14.21.

D. Conclusion

The 'crypto winter' shows no sign of thaw. However, cryptocurrencies are likely to remain a permanent feature of our lives for years to come. While many cryptocurrencies will continue to be traded mainly as commodities, the most popular – such as BTC and ETH – may well be increasingly used as money. The common law, and the creative practitioner, will respond accordingly.

This article first appeared in the January 2023 edition of Butterworths Journal of International Banking and Financial Law.

25. Financial Markets Law Committee, *Issues of Legal Uncertainty Arising in the Context of Virtual Currencies* (July 2016), p.23.

26. Cryptoassets Taskforce – Final Report (October 2018) at 2.13.

27. See Justice Phillip Jeyaretnam's Keynote Address at the Singapore Trustees' Association Conference 2022 (7 November 2022).

28. *Orrick, Herrington & Sutcliffe (Europe) LLP v Frohlich* [2012] BPIR 169 at [23].

29. *McGuinness v Norwich and Peterborough Building Society* [2012] 2 All ER (Comm) 265 at [36].

30. *Blavo v Law Society* [2019] 1 WLR 1977 at [195]–[196].

31. Fox and Green, *Cryptocurrencies in Public and Private Law* (2019), 2.31–2.33.

32. See *Ex parte Ward* (1882) 22 Ch D 132.

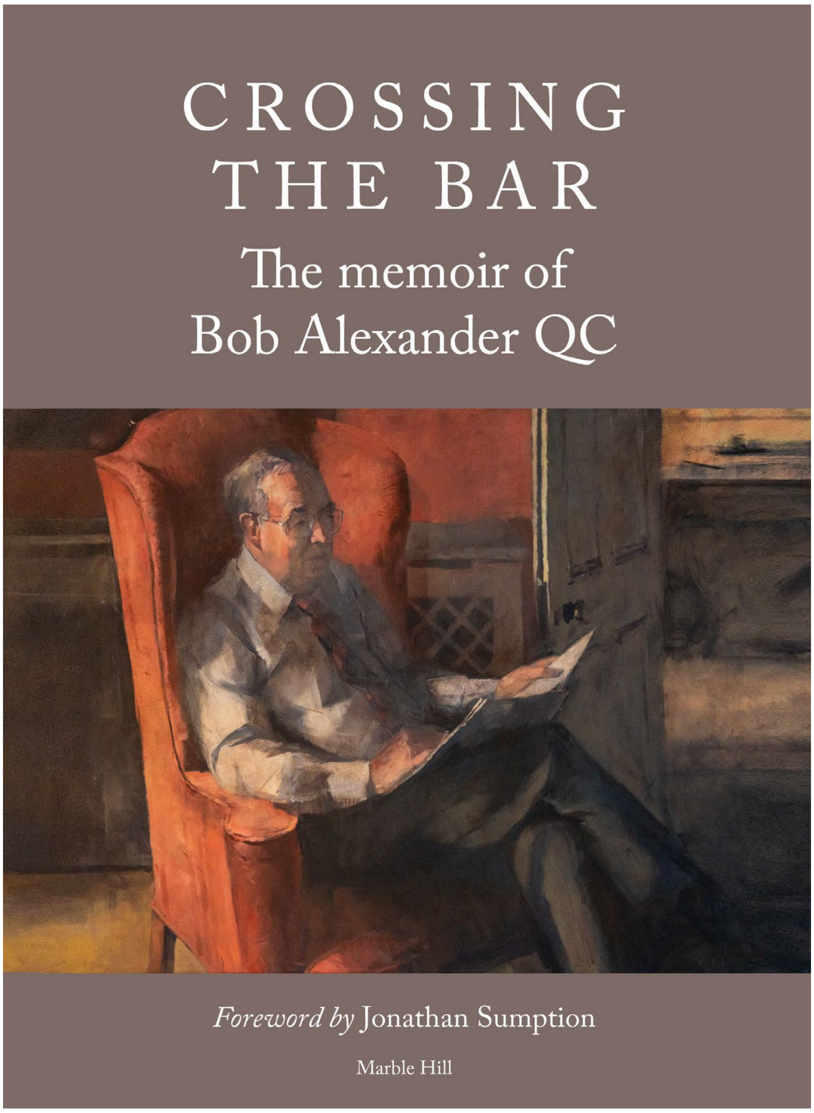
33. IR 2016, r.14.2(1).

34. IR 2016, r.14.21.

35. Report of the Cork Committee (1982 Cmnd 8558), para 1308-1309; *see also Re Dynamics Corporation of America* [1976] 1 WLR 757 at 763-765.

36. *Re Lehman Brothers International* [2018] AC 465, especially [91].

37. See Mr Justice Zacaroli's brief comments in his speech to the Insolvency Lawyers' Association (17 October 2019).



The memoirs of Lord Alexander of Weedon QC were released by Marble Hill in January 2023.

Bob Alexander, a former joint Head of Chambers at South Square, was described by Lord Denning as "the best barrister of his generation". A self-made man from the Potteries, Bob's career spanned over a quarter of a century at the Bar, during which time he acted for Kerry Packer against the Test and County Cricket Board, for Geoffrey Collier, the City of London's first convicted insider trader, and for Ian Botham, whom he represented in fighting a suspension from Somerset for bringing cricket into disrepute. Perhaps his most famous case was representing Jeffrey Archer in one of the most sensational libel cases of the last quarter of the 20th century.

But Bob Alexander's life also took him from the law to being chairman of the Takeover Panel and NatWest Bank at a critical time when the impact of 'Big Bang' demanded huge changes from many staid financial institutions. Add to that his passion for cricket, his appointment as chairman and then president of the MCC, his chairmanship of the Royal Shakespeare Company, together with his elevation to the peerage, and you have the extraordinarily full life of a man who rose to the very top of the British establishment.

To purchase your copy for £25, head to www.marblehillpublishers.co.uk

THE HON FRANK J C NEWBOULD KC

Arbitrating insolvency issues – *a Canadian Perspective*

In Canada, a number of lower court decisions had dealt with the issue of permitting arbitration clauses made in pre-filing agreements to be used to determine issues arising in insolvency cases.

On November 10, 2020, the Supreme Court of Canada delivered its much-anticipated decision in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 dealing with the issue in a receivership. In a five to four decision, it laid down guidelines to be used in deciding whether to permit arbitration in an insolvency. Whether these guidelines lead to an increased permission to use arbitration in an insolvency context remains to be seen.

Peace River was a partnership formed to build a hydroelectric dam in British Columbia. It subcontracted work to Petrowest, an Alberta-based construction company, and its affiliates. The parties made several agreements governing their relationship which contained arbitration provisions. Each applied to a different set of potential disputes and provided for different arbitration procedures. Some of the purchase orders did not contain arbitration clauses.

Petrowest and its affiliates encountered financial difficulties and were placed into receivership in Alberta under section 243(1) of the Bankruptcy and Insolvency Act (BIA), a federal statute applicable throughout Canada. Ernst & Young was appointed Receiver of Petrowest under a typical order that gave it the powers to take action on behalf of Petrowest.

The Receiver brought a civil claim in the Supreme Court of British Columbia against Peace River seeking to collect accounts receivable allegedly owed to Petrowest and the Petrowest affiliates by Peace River.

In Canada, arbitration statutes provide for litigation in the courts to be stayed if the dispute is the subject of an arbitration agreement. This is the same with the UNCITRAL Model Law governing international arbitration.

Peace River applied to stay the civil proceedings under s. 15 of the British Columbia Arbitration Act on the grounds that the arbitration agreements governed the dispute. The Receiver opposed the stay application, arguing that the BIA authorized the court to assert centralized judicial control over the matter rather than send the Receiver to multiple arbitral forums.

The judge at first instance stayed the arbitrations and the BC Court of Appeal dismissed the appeal. The Supreme Court also dismissed the appeal. Justice Côté for the majority held that arbitration was permissible in a receivership but in this case it should not be allowed. Justice Jamal for the minority held that the Receiver had disclaimed the arbitration agreements by suing Peace River in the court to recover the amounts owed so that the Arbitration Act was not engaged.

The B.C. *Arbitration Act* provided:

> 15 (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings. (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

Justice Côté held that the way to resolve differences in the bankruptcy and arbitration regimes was to consider if the arbitration provision would be "inoperative" in the circumstances of any particular case.

> *"[126] The final interpretive issue lies at the heart of this appeal. It boils down to the following question: Where the technical prerequisites in s. 15(1) of the Arbitration Act are met, does s. 15(2) give a court the power to refuse a stay under s. 15(2) by finding that an arbitration agreement has become "inoperative" or "incapable of being performed" because of court-ordered receivership proceedings?"*

Justice Côté stated that the BIA was remedial legislation and to be given a liberal interpretation in order to achieve its objectives. She stated that under s. 243(1)(c) of the BIA, a court may appoint a receiver to, among other things, "*take any... action that the court considers advisable*" if the court considers it "*just or convenient to do so*". She held that this very expansive wording gives judges the "*broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise*" in relation to court-ordered receiverships. Her conclusion on the power of a court was succinct:

> *"In my view, practicality demands that a court have the ability, in limited circumstances, to decline to enforce an arbitration agreement following a commercial insolvency. Said differently, ss. 243(1)(c) and 183(1) provide a statutory basis on which a court may, in certain circumstances, find an arbitration agreement inoperative within the meaning of s. 15(2) of the Arbitration Act."*

Justice Côté provided a non-exhaustive list of factors that may be relevant in determining whether a particular arbitration agreement was inoperative.

(a) The effect of arbitration on the integrity of the insolvency proceedings. Party autonomy and freedom of contract must be balanced with the need for an orderly and equitable distribution of the debtor's assets to creditors. An arbitration agreement may therefore be inoperative if it would lead to an arbitral process that would compromise the objective of the insolvency proceedings, namely the orderly and expeditious administration of the debtor's property. The court should have regard to the role and expertise of the court-appointed creditor representative, if any, in managing the insolvency proceedings.

(b) The relative prejudice to the parties from the referral of the dispute to arbitration. The court should override the parties' agreement to arbitrate their dispute only where the benefit of doing so outweighs the prejudice to them.

(c) The urgency of resolving the dispute. The court should generally prefer the more expeditious procedure. If the effect of a stay in favour of arbitration would be to postpone the resolution of the dispute and hinder the insolvency proceedings, this militates in favour of a finding of inoperability.

(d) The applicability of a stay of proceedings under bankruptcy or insolvency law. Bankruptcy or insolvency legislation may impose a stay that precludes any proceedings, including arbitral proceedings, against the debtor. If such a stay applies, the debtor cannot rely on an arbitration agreement to avoid the bankruptcy or insolvency; the agreement becomes inoperative.

(e) Any other factor the court considers material in the circumstances.

Justice Côté decided that the arbitrations in the case should be stayed, concluding that the inexpediency of the multiple overlapping arbitral proceedings contemplated in the arbitration agreements, as compared to a single judicial process, was the determinative factor in this case.

Some of the claims involved entities not subject to any of the arbitration agreements. Facts and argument would be repeated in different forums, before different decision makers, creating piecemeal decisions and a serious risk of conflicting outcomes.

Justice Jamal for the minority, who held that the Receiver had disclaimed the arbitration agreements by suing in court, agreed with Justice Côté that requiring arbitration of the collection actions would compromise the orderly and efficient resolution of the receivership.

It was understandable in this case on its facts that the Court thought that arbitration should be stayed. Those facts to some extent were extreme and in a simpler case with one arbitration provision agreed by the relevant parties, one may ponder what the result would be, taken the nature of the factors discussed by Justice Côté.

Peace River involved a bankruptcy under the BIA. In Canada, a restructuring of an enterprise is usually undertaken under the Companies Creditors' Arrangement Act, a federal statute applicable throughout Canada with designs similar to a chapter 11 proceeding in the U.S. under the U.S. Bankruptcy Code.

> "Facts and argument would be repeated in different forums, before different decision makers, creating piecemeal decisions and a serious risk of conflicting outcomes."

There is little doubt that the principles in *Peace River* would be applicable to arbitration issues under the CCAA. Under the CCAA, section 11 permits a judge to stay *"an action, suit or proceeding"* and courts at the appellate level have held that the word "proceeding" is broad enough to include arbitration proceedings. The jurisdiction of a judge under the CCAA is very broad. Under section 11 a court may make any order it considers appropriate, and this has been interpreted to give courts wide discretion as part of the remedial purpose of the CCAA. See *Ted Leroy Trucking [Century Services] Ltd., Re.* 2010 SCC 60. This discretion is as broad as under the BIA which was held in *Peace River* to be the basis for a court to deal with arbitration issues.

Counsel should bear in mind that in order to succeed in maintaining an arbitration, it will be important to convince a court that it need not control the particular case by having centralized judicial oversight. Factors to consider –

Cost and potential delay will be important factors.

Query whether in overburdened courts, delays of an arbitration will be no greater than in the courts and be less an important factor.

Appeal times from an arbitration decision, which are prescribed by legislation and often in the arbitration agreements, may be no longer than appeal times in the courts.

There are types of disputes that would lend themselves well to arbitration, assuming an arbitration agreement.

Inter-creditor disputes involving priority disputes between secured creditors.

Creditor valuation claims.
In *Peace River*, Justice Côté stated:

> *"This is not to say that a court must decline a stay in favour of arbitration based on inoperability in these circumstances. As Casey notes, it 'may well be that the bankruptcy judge will refer the matter to arbitration as the most expeditious way to prove the creditor's claim'."*

Unfair preference claims, likely under a post-filing *ad hoc* arbitration agreement either agreed or imposed by a court that has such powers.

Time will tell whether arbitrations in insolvency cases will make headway and what the effect of *Peace River* will be. ■

SVB Summary

Silicon Valley Bank, the eighteenth largest bank in the US, saw receivers appointed by the California Department of Financial Protection and Innovation on Friday 10 March, citing inadequate liquidity and insolvency. It was the largest US bank failure since 2008.

Unsurprisingly, customers of the US firm's wholly owned UK subsidiary, Silicon Valley Bank UK Limited ("SVB UK"), then sought to withdraw their deposits and, that same evening, the Bank of England issued a statement to the effect that it intended to put the UK firm into a Bank Insolvency Procedure under Part 2 of the Banking Act 2009. In the interim, the bank stopped accepting deposits and making payments.

There were fears that the companies banking with SVB UK would be unable to meet costs, including payroll, as they could not access their money, as well as concerns as to what the failure of the bank might mean for the UK's tech sector and beyond. Ultimately, that outcome was averted. On Monday 13 March, the Bank of England announced that SVBUK was being sold to HSBC UK Bank plc, with all depositors' money "safe and secure" as a result of the transaction and the business continuing to operate normally.

Diary Dates

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

21 April 2023

ILA Annual Conference

Offices of Linklaters, 1 Silk Street, London EC2Y

23 - 25 April 2023

OffshoreAlert Miami Conference

The Offshore Alert conference is taking place at the Ritz Carlton, South Beach, Miami, USA

11 May 2023

South Square Spring Reception

Spencer House, St James's Place, London, SW1A

10 – 12 May 2023

R3 Annual Conference

Molino Stucky, Venice, Italy

7 June 2023

Moss Fletcher Lecture, with Prof. Jay L. Westbrook

6.00 p.m. Middle Temple Hall, Middle Temple Lane, London EC4Y

10 – 11 June 2023

International Insolvency Institute 23rd Annual Conference

Oudemanhuispoort 4 – 6, Amsterdam, Netherlands

15 June 2023

RISA BVI Conference

Tortola, British Virgin Islands

20 June 2023

INSOL Channel Islands Seminar

Radisson Blu Waterfront Hotel, St Helier, Jersey

17 – 19 May 2023

ThoughtLeaders4: FIRE International

Anantara Hotel, Vilamoura, Portugal

15 November 2023

INSOL Cayman Seminar

11 – 15 September 2023

INSOL Tokyo

Palace Hotel, Tokyo

12 -14 November 2023

Thought Leaders 4 FIRE Middle East

The Shangri-La Hotel, Dubai

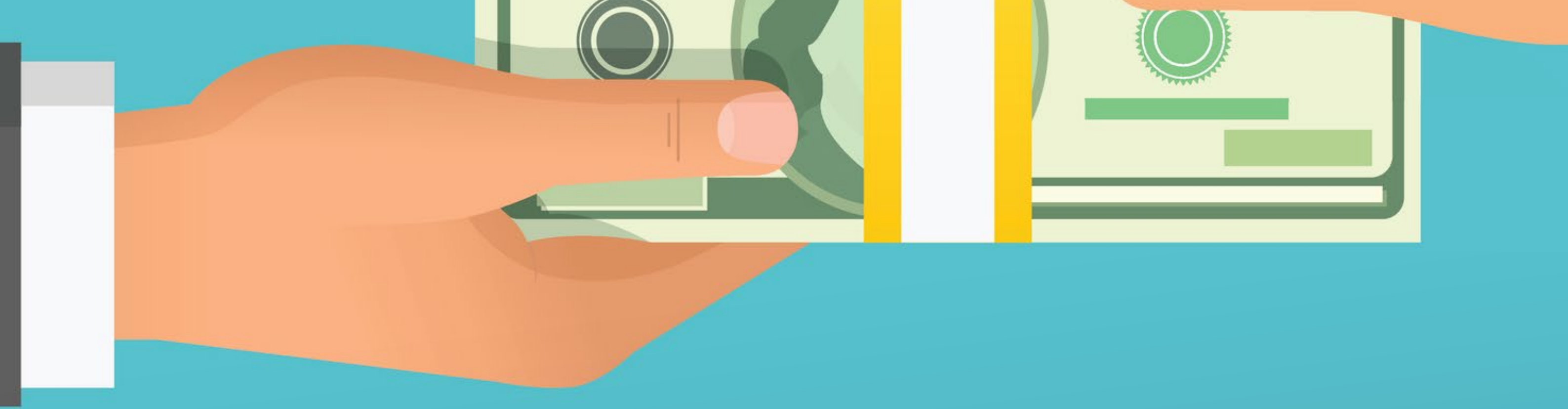
11 October 2023

Global Restructuring Review
Hong Kong Conference

14 November 2023

South Square/RISA Annual
Cayman Conference

CHARLOTTE COOKE
SOUTH SQUARE



Re Sova Capital – Court approves an unsecured credit bid for the first time

In *Re Sova Capital Limited (in special administration)* [2023] EWHC 452 (Ch) the High Court approved the sale of a portfolio of securities held by a company in administration to an unsecured creditor in exchange for the waiver of the creditor's claim. In his judgment Miles J emphasised that the case raised *"novel issues"* which had not previously been decided by the courts (at [193]). Although he did not in his judgment use the term, this was the first time the Court has approved an unsecured *"credit bid"* for the assets of a company in administration.

Sova Capital Limited (**"Sova"**) went into special administration under the Investment Bank Special Administration Regulations 2011 on 3 March 2022. Around 87% of its assets comprised Russian securities which, as a result of various sanctions regimes, would be difficult to realise.

Of the offers that were received, Sova's special administrators (the **"Special Administrators"**) considered an offer for the bulk of the Russian securities by one of Sova's largest unsecured creditors (**"Dominanta"**) to be the most advantageous. Notably, in consideration for those securities, Dominanta would waive its £233 million claim in Sova's special administration (the **"Transaction"**).

By their application to the court, the Special Administrators sought the Court's approval of the Transaction. Another of Sova's unsecured creditors (**"BZ"**), who had also made a bid for the assets, opposed the Special Administrators' application for approval.

BZ's position was, in short, that the Transaction amounted to a distribution in specie to Dominanta and, as such, would be contrary to the *pari passu* principle. The *pari passu* principle is, of course, a fundamental principle of insolvency law and requires the equal distribution among unsecured creditors of available assets. On BZ's behalf it was submitted that, as a consequence of the Transaction, Dominanta would end up with Russian securities which could be worth more to it than the predicted dividends payable to Sova's other unsecured creditors and therefore that the *pari passu* principle was infringed.

In order for the *pari passu* principle to be engaged, however, the Transaction would need to be a distribution. The *pari passu* principle does not apply in the context of a sale. Crucially Miles J took the view that it did not amount to a distribution, but was properly characterised as a sale.

Characterisation of the Transaction required a focus on substance over form. Moreover, insofar as assessing substance is concerned, it is legal rather than economic substance that matters.

Looking at the terms of the Transaction, the Court concluded that it was a sale of certain assets in return for the waiver of Dominanta's claim in Sova's administration. In this regard Miles J noted, in particular, the fact that the value put on Dominanta's offer for the purpose of the Transaction was not its full value, but rather the value of the dividend which it would have received in the event the Transaction did not go ahead.

In contrast, to characterise the Transaction as BZ had done – focusing on the possibility that Dominanta would end up with Russian securities which could be worth more to it than the predicted dividends payable to Sova's other unsecured creditors – was to place too much emphasis on the economic outcome of the Transaction. It was the legal steps by which that economic outcome would be brought about that mattered for the purpose of characterisation. Looking at those steps, the Transaction was properly characterised as a sale, not a distribution and, as such, did not contravene the *pari passu* principle.

The Transaction, characterised as a sale of assets in consideration for the waiver of Dominanta's claim in the special administration, the Transaction can therefore be seen as an unsecured *"credit bid"*. Whilst the concept of a credit bid is familiar in the context of bids for assets by secured creditors (i.e. where a secured creditor bids the value of its secured debt in order to acquire the asset in respect of which it holds security), in the context of unsecured creditors this was unprecedented.

The opportunity for use of this novel mechanism arose in this case because of the difficulties faced by the Special Administrators in realising the Russian securities because of the impact of sanctions (which the court ultimately concluded the Transaction would not breach). The Transaction provided a way for the Special Administrators to unlock the value of the Russian securities.

The concept of an unsecured bid may, however, be utilised in other cases in the future (provided of course that it represents the best price for the assets reasonably obtainable). Should other opportunities for the use of the unsecured credit bid mechanism arise, this case provides helpful guidance as to the appropriate methodology for valuing such a bid. Crucially, the valuation is to be based on the dividend that the buyer would have received in the administration in the event that the proposed transaction does not take place. The value of the bid is not the full value of the buyer's claim.

[Mark Phillips KC, William Willson and Riz Mokal acted for the Special Administrators. Stephen Robins KC and Charlotte Cooke acted for BZ, the opposing creditor]

Case Digest Editorial

Aidan Casey KC

"I don't know much about Art, but I know what I like". In his 1906 essay *"Are you a Bromide?"*, the American author, poet and humorist Frank Gelett Burgess placed this at the top of his list of platitudes characteristically used by *"Bromides"* – essentially, unoriginal thinkers[1].

This thought may have been going through the minds of some of the many thousands of annual visitors to the viewing gallery on the top floor of the Tate Modern's Blavatnik Building, after it opened in 2016. However, the problem seems to have been that whether or not they knew much about art, many of them certainly liked peering intently into the living areas of the claimants' flats in *Fearn & others v Board of Trustees of the Tate Gallery.* The flats had floor to ceiling windows which apparently afforded such interesting views of the interiors and their occupants that many

1. Who he contrasted with the *"Sulphites"*, dynamic independent thinkers. If he were writing today he would no doubt include readers of the Digest in the Sulphite class.

users of the viewing gallery were to be found staring into them, taking photos of them, and posting the photos on social media. The Supreme Court majority judgment allowing the claimants' appeal was delivered by Lord Leggatt, and as Rabin Kok explains in his digest it contains a masterful analysis and brings great clarity and structure to this area of the law. It is also, like all good judgments, highly readable. Interestingly though, the Supreme Court remitted the question of the appropriate remedy to the first instance judge, and noted that questions of the public interest or public utility – whilst not relevant to the question of liability – may be relevant to the question of whether to grant an injunction or to award damages.

Cricket fans will remember the sight of Allen Stanford landing at Lord's on 11 June 2008 with what appeared to be a helicopter full of cash, to publicise the launch of the Stanford 20/20. However, one payment that the Supreme Court did not have to deal with in *Stanford International Bank Ltd (in liquidation) v HSBC Bank plc* was a £2.4m payment HSBC had made on SIB's instructions to the English and Welsh Cricket Board. As Stefanie Wilkins notes, continuing her digests of the recent burgeoning *Quincecare* jurisprudence, what was in issue in that case was the question of whether SIB had suffered any loss when HSBC – SIB's correspondent bank – had obeyed payment orders purportedly given on SIB's behalf resulting in some £116m being paid out to certain "early" depositors, who had made felicitously timed redemption requests prior to SIB's insolvency. The early depositors were as a result of those payments left in a much better position than the "late" depositors who only stood to receive distributions in the insolvency. For the purposes of the appeal it was assumed that HSBC owed and had breached a *Quincecare* duty, and ingeniously SIB's liquidators argued that as a result of the payments it had lost the chance of discharging the relevant depositors' debts for a few pence in the pound, and the chance of acting fairly as between its depositors. The majority of the Supreme Court took the view that loss of a chance to act fairly was not a pecuniary loss, and that any loss of a chance to discharge the debts of the early depositors cheaply was matched by an equal and opposite risk that, in the counterfactual, an amount precisely equal to the sum so saved would have to be paid out to the late depositors.

Finally, and staying in the rarefied atmosphere of the Supreme Court, as explained by Jamil Mustafa in his digest, in *Ukraine v Law Debenture Trust Corp Plc* the court dealt with a number of issues of real importance and interest in the fields of international law, ostensible authority as applied to a state entity, and duress in cases where a state or government entity is the victim.

NOTICE

HOW TO READ A BOOK

LIE on your back, on a table or smooth surface. Place your feet on the chandelier, then, holding the Book in one hand, look it over with the other. Begin at the Back, cursing the pictures gently. This should be done two or three times. Never buy a book when you can look it over and suck its blood from the book-stalls, or get it from the library. It is liable to make the Author and the Book-Seller too conceited and Affluent.

Case Digests

Banking and Finance

DIGESTED BY STEFANIE WILKINS

Stanford International Bank Limited (In Liquidation) v HSBC Bank Plc (Supreme Court)

21 December 2022

Quincecare duty · Insolvency · Loss

The proceedings arose out of the collapse of Stanford International Bank ("SIB"), which (prior to its liquidation) had purported to sell investment products, but was in fact operated as a giant Ponzi scheme by Mr Stanford and others.

SIB had several bank accounts with HSBC. Those accounts were frozen by HSBC after the US securities and exchange commission had taken action against Mr Stanford. But in the six months prior to that date, Mr Stanford had caused payments to be made out of the account, some of which were made to customers of SIB.

The appeal to the Supreme Court concerned the liquidators' claims against HSBC for breach of the *Quincecare* duty (i.e. the duty imposed on a bank to refrain from carrying out a customer's apparent instructions, if it is put on inquiry that those instructions may in fact be an attempt to misappropriate the customer's funds). HSBC sought to strike out the claims insofar as they had been made to genuine customers, because – it said – those were payments that were made in discharge of genuine debts. The question was whether these payments caused any recoverable loss to SIB.

The majority of the Supreme Court held that there had been no loss to SIB. They accepted that, if the payments out of the account had not been made by HSBC, then SIB would have retained those monies. The funds would have been available for distribution in the liquidation, and all customers would have received an equal dividend.

Instead, some customers (i.e. those who had received payment prior to the liquidation of SIB) were paid in full, and others received a reduced dividend (because the payments out of the HSBC account reduced the amount for distribution amongst the remaining creditors).

However, this was not a loss that had been suffered by SIB. Moreover, the fairness of some customers having been paid, and others not, was not something that the Court could assess.

Civil Procedure

DIGESTED BY ANNABELLE WANG

Fawcett & Ors v TUI UK Ltd

[2023] EWHC 400 (KB) (Mr Dexter Dias KC, sitting as a Deputy High Court Judge)
15 December 2022

Interim applications to exclude expert evidence

Following the death of her husband on holiday in the Dominican Republic, the claimant brought a fatal accident action. The parties were both granted permission to rely on expert evidence as to local applicable standards and Dominican public law.

Upon receipt of the defendant's expert evidence, the claimant made an interim application to exclude the evidence on the grounds that the expert lacked expertise in the relevant area, had expressed opinions outside of his actual area of expertise, and bias. The Court refused the application.

In his judgment, the Judge cited paragraph 35.2.1 of the White Book, which provides that a party seeking to adduce expert evidence on a particular issue must ensure that the proposed expert has the necessary expertise to be regarded as an expert in that issue to advise the court. He set out that whether the expert has acquired the requisite expertise is necessarily fact-specific and found that there was *"clear evidence"* indicating that the expert possessed sufficient relevant expertise, although this would not prejudice the trial judge finding differently at a later stage.

The Judge also held that whether the expert had expressed matters outside of his expertise was not a basis for the exclusion of the expert's evidence, but was instead a matter for the trial judge's judgment and discretion upon the evidence before them.

Ellison Road Ltd v Mian (t/a HKH Kenwright & Cox Solicitors) & Anor

[2023] EWHC 375 (Ch) (Master Brightwell)
28 February 2023

Service of a claim form · Last known place of business

The claimant brought a claim for professional negligence against two defendants, one of whom was a solicitor who had previously advised the claimant in respect of certain loan agreements. The claimant sued the solicitor in his own name, trading as the full business name under which he formerly carried on business as a sole practitioner.

The claimant served the solicitor defendant with the claim form at what it understood to be his current place of business, being the address of another firm of solicitors, wherein the solicitor defendant was described on the Solicitors Regulation Authority website as the *"head of legal practice"*. The defendant made an application for a declaration that service had not been effective as the address was not at the time of service his place of business, or his *"last known"* place of business.

The Judge rejected the defendant's argument that the relevant place of business was where he traded under his trading business name, rather than as an individual. Pursuant to CPR r.6.9(2), the relevant place for service is the principal or last known place of business of the individual who is being sued in the name of a business. The Judge found that the relevant address was the defendant's current place of business, and that the claimant had taken reasonable steps to ascertain his current business address.

Paper Mache Tiger Ltd v Lee Mathews Workroom PTY Ltd

[2023] EWHC 338 (Comm) (John Kimbell KC, sitting as a High Court Judge)
24 January 2023

Non-party costs orders · Directors

The claimant obtained judgment in an action against the defendant company. Prior to bringing the action, the claimant had been informed that the company had no assets, and the company had been put into liquidation during the course of the action. Following judgment, the claimant made an application seeking its costs against the sole director and shareholder of the company.

The Judge rejected the application. He applied the relevant principles as summarised by the Court of Appeal in *Goknur v Aytacli* [2021] EWCA Civ 1037 and in particular, the key principle for applications of this nature that in order to be liable for a company's costs, a director must be capable of being fairly described as *"the real party to the litigation"*.

Although it was common ground that the director controlled the company and had been funding defence of the claim, the Judge was not persuaded she was the real party to the litigation. He found that it was not surprising that the director was funding the company's defence, in circumstances where the company had ceased trading and only had limited assets. The Judge observed that benefit *"can come in all sorts and forms"*. However, he accepted the director's evidence that she had never derived any personal benefit from the litigation, and the applicants had failed to put forward any cogent evidence of what personal benefit she could be said to have derived.

Commercial Litigation

DIGESTED BY JAMIL MUSTAFA

Ukraine v Law Debenture Trust Corp Plc

[2023] UKSC 11 (Lord Reed, P, Lord Hodge, DP, Lord Lloyd-Jones, Lord Kitchin, Lord Carnwath)
15 March 2023

Contracts · Capacity · Duress · Illegitimate Pressure · Loan Notes

Upon the instruction of the Cabinet of Ministers of Ukraine, the Ukrainian minister of finance issued loan notes with a nominal value of US$3 billion in 2013. The loan notes were constituted by a trust deed between the claimant trustee and Ukraine. The trust deed was governed by English law and subject to the exclusive jurisdiction of the English courts. The sole subscriber of the loan notes was the Russian Federation. Ukraine made three interest payments in respect of the loan notes before putting in place a moratorium preventing the notes from being repaid on their due date (21 December 2015). The claimant trustee then brought a claim against Ukraine seeking repayment of the loan notes at the direction of the Russian Federation and sought summary judgment. Ukraine resisted the summary judgment application on four grounds: (i) that it lacked capacity to issue the loan notes which were, therefore, void; (ii) the Cabinet and minister of finance lacked the authority to agree to the issue of the loan notes on Ukraine's behalf; (iii) the loan notes were voidable for duress having been procured by threats to Ukraine's territorial integrity and economic pressure; and (iv) Ukraine had an arguable defence under the international law doctrine of countermeasures to refuse payment as a countermeasure to Russia's invasion of Crimea and military intervention in eastern Ukraine in the period between the issue of the loan notes and the due date. All four of Ukraine's grounds were rejected at first instance. The Court of Appeal allowed Ukraine's appeal on the ground of duress but rejected the appeal on the other grounds.

The majority of the Supreme Court upheld the Court of Appeal's decision (i.e., rejecting grounds (i)-(iii) but upholding ground (iv)), albeit for different reasons. The Supreme Court held that a foreign state which was recognised by the UK's executive was, for the purposes of municipal law within the UK, a legal person with full capacity. Ukraine, therefore, had capacity to issue the loan notes. In turn, it held that the minister of finance had the ostensible authority of the Cabinet to issue the loan notes and that the Cabinet had the ostensible authority to pass the relevant resolution authorising the minister of finance to issue the loan notes. The majority of the Supreme Court also rejected Ukraine's defence of countermeasures. The principles of international law governing the rights of states to take countermeasures were addressed to the conduct of states amongst themselves and were not generally justiciable because English law did not recognise a defence of countermeasures and the subject-matter of interstate disputes was inherently unsuitable for adjudication by the English courts.

The majority of the Supreme Court, however, held that Ukraine had an arguable defence of duress. The majority of the Supreme considered that Ukraine's defence of duress comprise two distinct defences; one of economic duress and another of duress against the person.

The majority of the Court rejected Ukraine's case that the economic pressure alleged established an arguable defence of (economic) duress but held that Ukraine had an arguable defence of duress based on the threats to its security and territorial integrity. In particular, Ukraine alleged that an adviser to the President of the Russian Federation had allegedly stated that if Ukraine signed an association agreement with the EU (which, in the event, it did not), Russia could no longer guarantee Ukraine's status as a state and could intervene if pro-Russian groups appealed to Moscow, that Russia would support a partitioning of Ukraine and that Russia would support Ukraine's Russian speaking-minority if they sought to break up the country in response to Ukraine signing the association agreement with the EU. The majority of the Supreme Court held that these statements were capable of amounting to a threat of the use of force, which could support a defence of duress to the person and of goods, and whether they in fact did would best be determined at trial. The majority further held that this issue was not rendered non-justiciable under the foreign act of state doctrine because the pleaded defence did not contest the validity of a foreign sovereign act. The majority of the Supreme Court did, however, hold that Ukraine would have to amend its pleadings to focus more squarely on its case of duress of the person and of goods based on Russia's alleged threats of the use of force (although to which the alleged economic pressure provided some context), and also that its allegations of breaches of international law should be removed as they were unnecessary and inappropriate for the Court to determine.

Lord Carnwath, in the minority, disagreed with the majority's division of Ukraine's defence of duress between economic and physical threats when they were pleaded as a cohesive whole. Lord Carnwath further considered that it was not justifiable to exclude any alleged breaches by the Russian Federation of international law from the analysis of duress. Lord Carnwath would have also allowed Ukraine's defence based on countermeasures.

Celesetial Aviation Services Ltd v UniCredit Bank AG

[2023] EWHC 663 (Comm) (Christopher Hancock KC, sitting as a High Court Judge)
23 March 2023

Contracts · Letters of Credit · Sanctions

Two sets of proceedings were brought in relation to letters of credit which related to the leases of aircraft to Russian companies. The relevant letters of credit related to leases which had been granted before the Russian Federation invaded Ukraine. The imposition of sanctions following the Russian invasion Ukraine triggered events of default under the leases. The defendant bank, however, refused to pay out under the letters of credit because of UK and US sanctions. The defendant bank subsequently obtained a licence to make payments to the claimants and reached an agreement in respect of the payment of the principal amounts under the letters of credit. The question remained, however, whether the bank was required to make payment of costs and interest.

The Judge held in favour of the claimants. The Judge held that the relevant UK sanctions regulations did not prevent payment under the letters of credit. The relevant UK sanctions at issue were regulations 28, 11 and 13 of the Russia (Sanctions) (EU Exit) Regulations 2019 as amended by the Russia (Sanctions) (EU Exit) (Amendment) (No.3) Regulations 2022. The Judge held that a purposive approach had to be taken to the interpretation of the Regulations. In this respect, the purpose of Regulation 28, which came into force on 1 March 2022, was to prevent the prospective supply of restricted goods, such as aircraft to Russia. All the relevant lease agreements and letters of credit were, however, entered into well before Regulation 28 came into effect. Accordingly, payment by the defendant bank would not contravene Regulation 28 because it would not facilitate the supply of aircraft to the Russian companies as they had already been supplied while furthermore the leases had been terminated by the time of the hearing. The Judge also considered that the autonomy principle under letters of credit was important; the obligation of the defendant bank to pay under the letters of credit was an independent contractual obligation from the underlying transaction. The Judge similarly held that Regulations 11 and 13 did not prevent payment under the letters of credit, since these Regulations came into force after the defendant bank's obligations to make payment under the letters of credit matured and could not affect that obligation.

The Judge also rejected the defendant bank's argument that payment was prohibited by US sanctions. The defendant bank argued that notwithstanding that the letters of credit were governed by English law they had to be paid in US dollars and that payment via a US correspondent bank would be prohibited under the rule in *Ralli Brothers*. The Judge held that the claimants were entitled to demand payment in cash, notwithstanding that the letters of credit anticipated payment via a correspondent bank. The defendant bank was subject to a fundamental obligation to make payment and if it could do so was required to do so. Payment under the letters of credit was, therefore not prohibited under the rule in *Ralli Brothers*. The Judge also (obiter) rejected a further defence advanced by the bank based on particular provisions of the US sanctions regime on the basis that the defendant bank had failed to discharge its burden of making good its defence based on those provisions.

Lonestar Communications Corporation LLC v Kaye and Ors

[2023] EWHC 421 (Comm) (Foxton J)
28 February 2023

Cyber-attacks · Exemplary damages · Foreign law · Unlawful means conspiracy · Vicarious liability

Between 2015 and 2017, the claimant, which provided cellular communication and internet services in Liberia suffered a number of cyber-attacks. The claimant alleged that these were orchestrated by the first defendant with the financial and technical support of the second and fourth defendants. The first defendant was convicted of orchestrating the cyber-attacks on the claimant at Blackfriars Crown Court and sentenced to 32 months' imprisonment. The second defendant was the CEO of Cellcom Liberia from 2009 to 2013 and again from 2014, which from April 2016 was known as Orange Liberia (the fifth defendant) when Cellcom Liberia was acquired by the Orange Group from Cellcom BVI, which was the third defendant. The second defendant was also group chief executive of the third defendant from November 2013, while the fourth defendant was employed by the third defendant from October 2010.

The issues for the Court to determine were whether the first, second and fourth defendants were liable in tort for the cyber-attacks, if so, whether and to what extent the third and fifth defendants were vicariously liable for their actions, and the damages (if any) to which the claimant was entitled. The claims were governed by Liberian law.

Foxton J held that the first, second and fourth defendants were liable under Liberian law for *'damages for a wrong'* and the fifth defendant was vicariously liable for the wrongdoing of the second and fourth defendants, while the third defendant was vicariously liable for that of the second. Foxton J held that the claimant was entitled to damages of US$3.6m for loss of profit and US$707,000 for wasted expenditure and also exemplary damages from the second defendant (who was the prime mover behind the cyber-attacks).

Foxton J rejected expert evidence that Liberian law only recognised specific torts dealing with a specific set of wrongs and concluded that Liberian law did not comprise a closed list of specific torts and retained a cause of action of damages for a wrong falling outside the recognised categories of torts. Foxton J then considered the 'wrongs' relied upon, namely breaches of provisions of UK and Liberian statutes. Foxton J concluded that breach of the UK statute would not suffice for the cause of action. Conversely, the breach of the Liberian statute did, and Foxton J held that the first, second and fourth defendants were (subject to any time bar defence) liable for damages for a wrong for loss caused by the cyber-attacks.

Company Law

DIGESTED BY PETER BURGESS

Tradition Financial Services Ltd v Bilta (UK) Ltd

[2023] EWCA Civ 112 (Lewison, Stuart-Smith, Falk LLJ)
10 February 2023

Directors · Companies · Section 213 Insolvency Act 1986 · Dissolution · Restoration

The Court of Appeal considered an appeal that raised the issues of the class of persons liable under section 213 of the Insolvency Act 1986 (the "1986 Act") where the business of a company in liquidation has been carried on for fraudulent purposes and the scope of the deeming provisions in section 1032 of the Companies Act 2006 (the "2006 Act") that apply when a dissolved company is restored to the register.

The underlying facts involved claims by liquidators of five claimant companies against defendants based on missing trader intra-community fraud. This type of fraud exploits the fact that imports from one EU country into another are VAT-free. The most basic form involves traders importing goods VAT-free from elsewhere in the EU, selling them within an EU country with VAT added to the sale price and running up large liabilities to account for the VAT to national revenue authorities. These importers then default on their liabilities to account for VAT, instead paying their VAT receipts away to third parties and going into insolvent liquidation.

The first issue related to claims under section 213 of the 1986 Act, brought by the liquidators of all five companies. Section 213 allows liquidators to apply for a declaration that *"any persons who were knowingly parties to the carrying on of the business"* with the intent to defraud creditors of the company or for any fraudulent purpose are liable to contribute to the company's assets.

Lewison LJ delivered the judgment of the Court. On the first issue, the focus of the appeal was on the scope of the words *"any persons who were knowingly parties to the carrying on of the business"*. He considered that the purpose of section 213, as it has evolved, is not limited to veil-piercing and is to secure compensation for those who have suffered loss as a result of the fraudulent trading. It was more consonant with the purpose of section 213 to interpret the phrase *"party to"* widely rather than narrowly. He considered that the phrase is not restricted to persons exercising management or control over the company.

On the second issue, the Court had to consider the position in relation to two claimant companies that had been dissolved before being restored to the register. Section 1032 of the 2006 Act provides that the general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register. The thrust of the claimants' argument was that the relevant companies are deemed to have continued in existence with the same directors who were in office at the date of dissolution. Lewison LJ considered that the effect of the restoration of a company was not that the directors who were in office at the date of the dissolution were deemed to have continued in office during the period of dissolution. Any potential injustice arising from this conclusion could be remedied by an application under section 1032(3) of the 2006 Act.

Re VEON Holdings BV

[2023] EWHC 219 (Ch) (Roth J)
30 January 2023

Schemes of arrangement · Russian sanctions · Enforcement

The Court sanctioned a scheme of arrangement of a Dutch intermediate holding company of a group that provides connectively and internet services. The company acted as a holding company and a treasury company within the group that raised funds on international capital markets, including two series of notes governed by English law that were the subject of the scheme.

The scheme was straightforward. It first imposed a standstill to enable approvals, from various authorities in jurisdictions that have imposed sanctions, to amendments sought to be made to the notes. Its principal purpose was to amend the notes by extending the existing maturity dates and the provision of an amendment fee.

The scheme was not designed to reduce the Company's indebtedness or implement any restructuring. Rather, it was designed to deal with the particular difficulties that the company faced as a result of sanctions imposed as a result of the Russian invasion of Ukraine. Up to 60% of the notes by value were held through the National Settlement Depository of the Russian Federation (the "NSD"), a sanctioned entity. Some but not all of the NSD account holders were themselves also sanctioned entities. The clearing systems were unable to remit any payments through the NSD. If the company was required to pay the Notes on maturity, then up to 60% of the repaid cash risked being trapped in the clearing systems.

Though not all the noteholders holding notes through the NSD were themselves sanctioned persons, not an insignificant number were. The judge considered it notable that the meeting was attended by 16 non-sanctioned NSD noteholders, who all voted in favour.

In the circumstances, the Court considered it appropriate to sanction the scheme.

David Allison KC

Ryan Perkins

Re Coinomi Ltd; Ntzegkoutanis v Kimionis

[2022] EWHC 3178 (Ch) (HHJ Klein sitting as a High Court Judge)
21 December 2022

International jurisdiction · Sufficient connection · Parallel schemes

This was an application by the first respondent to strike out certain paragraphs of the petitioner's unfair prejudice petition, which had been presented on the ground that the affairs of the second respondent, the company, had been conducted by the first respondent in a manner that was unfairly prejudicial to the petitioner's interests.

The question of principle that arose was whether the petitioner should have been permitted to proceed to trial on the petition in respect of matters which could have been litigated against the respondent, a Cyprus company and a BVI company by way of a derivative claim.

The petitioner's case was that the company had been a joint venture for a cryptocurrency wallet application, conceived and developed by the petitioner. The respondent had business experience to market the product. The respondent was a director of the company since its incorporation so owed duties under the Companies Act 2006 to the company. The petitioner accused the respondent of mismanagement and misappropriation or the transfer of the company's business and assets for no consideration to the Cyprus and BVI companies.

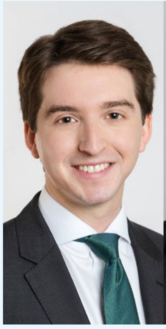
By the petition, the petitioner sought, among other relief, an order for damages and/or compensation from the respondents in respect of their gains and the company's losses, and for declarations of constructive trust in favour of the company in respect of the allegedly misappropriated property.

The respondent's case was that he conceived the product and the petitioner was an employee. The business had belonged to him and now belongs to the Cyprus and BVI companies. He denied the mismanagement allegations.

The Judge reviewed the authorities and concluded that the approach of the Hong Kong court in *Re Chime Corpn Ltd* [2004] 3 HKLRD 922 should be adopted (subject to qualifications for exceptional cases). The principle that applied is that it is a rare and exceptional case which the court will permit to proceed by way of an unfair prejudice petition when it would otherwise be brought by way of a derivative claim, because to permit the case to proceed by way of an unfair prejudice petition subverts the statutory regime which imposes limitations on making derivative claims. In deciding whether the case before it is exceptional, the court will focus on the relief claimed and ought only to permit the case for that relief to proceed by way of an unfair prejudice petition if, at the earliest stage of the proceedings, the court is satisfied at least that that relief can be conveniently adjudicated on as part of the unfair prejudice petition proceedings. If the court is not so satisfied, to the extent of the relief in issue, the case will be an abuse of process and ought not to be permitted to proceed.

In the present case, the Judge was satisfied that the compensation claim and the constructive trust claim, but for the petition, would have been pursued by way of a derivative claim, where they would have been more fully pleaded. They could not be conveniently adjudicated on as part of the petition. He therefore struck out the relevant paragraphs as an abuse of process.

Stephen Robins KC




Corporate Insolvency

DIGESTED BY DANIEL JUDD AND PAUL FRADLEY

Re Dolfin Financial (UK) Ltd

[2023] EWHC 123 (Ch) (Chief ICC Judge Briggs)
26 January 2023

Special administration · Further information · Remuneration

The Court was required to interpret the Investment Bank Special Administration (England and Wales) Rules 2011 (the 'Rules'). The Applicant sought to compel the respondent, Joint Special Administrators of an investment bank ('JSAs') to provide information in relation to their post-administration remuneration. The Applicant was a client of the bank and had submitted claims in the special administration. They requested further information about the JSAs' fees, including a line-by-line breakdown in fees.

The Court held it had no jurisdiction to make an order under rule 201 of the Rules. The right of a creditor or client to request further information pursuant to rule 201 applied only to a statement or remuneration provided under rule 122(1)(f). Rule 122(1)(f) required the JSAs to provide a statement of the remuneration charged by the administrator during the period of the report only *"if the basis of remuneration has been fixed"*. Rule 201 did not impose a free-floating obligation to provide a remuneration statement if rule 122(1)(f) did not apply; it is an obligation to provide *"for further information about remuneration or expenses… set out in a statement required by rule 122(1)(g) or (h)"*. There was no jurisdiction on the facts because the basis of remuneration had not been fixed.

In any event, the JSAs were entitled to rely on the grounds in rule 202(2)(b) to refuse to provide the information. The Rules required the JSAs only to *"consider"* that one of the grounds applied. Applying Davey v Money [2018] Bus LR 1903, the JSAs' determination could not be interfered with unless it was made otherwise than in good faith or was irrational.

The Court had to lend reasonable weight to the exercise of any discretion and/or decision made by the JSAs. On the facts, the refusal was not irrational or perverse (and was not said to have been made in bad faith) – given the basis of remuneration had not been fixed and there was no obligation to provide further details, and the time and costs of preparing further details would be excessive.

Jamil Mustafa

Re Listrac Midco and others

[2023] EWHC 78 (Ch) (convening) (Trower J) 23 January 2033 and
[2023] EWHC 460 (Ch) (sanction) (Adam Johnson J) 3 March 2023

Restructuring plans · Persons affected · Cross-class cram-down · Requirements of a 'meeting'

Seven plan companies promoted restructuring plans under Part 26A of the Companies Act 2006. The group was experiencing financial difficulties due to under-performing leases as well as pressures caused by the pandemic. The group proposed a restructuring whereby the group's secured lenders would acquire ownership of the group in return for a reduction in their secured debt and the advancement of new monies. The restructuring was conditional on the plan companies dealing with certain underperforming leases and other onerous liabilities by way of a restructuring plan.

Trower J convened separate meetings of: (a) the secured lenders; (b) landlord creditors, who were in turn split into three classes depending on the proposed treatment of their leases; and (c) other unsecured creditors. In doing so, Trower J dealt with the objections raised by Mr Justin Tydeman, the Group's former CEO. Under the terms of Midco's articles, class B shareholders had a put option which entitled them to require Midco's parent company, Listrac Intermediate Holdings, to purchase their B shares if an 'Exit' occurs. The value of the option was dependent on the level of repayment of the group's secured indebtedness which occurred in connection with an 'Exit'. It was agreed that the restructuring constituted an 'Exit' and that the value of the put option in those circumstances was £1.

Trower J rejected Mr Tydeman's arguments that he was a person *"affected by"* the plan within section 901(C)(3), which relied on the decision of Zacaroli J in *Re Hurricane Energy Plc* [2021] EWHC 1418 (Ch). The Judge held that there was no evidence that the put option had any value in the relevant alternative. The evidence in fact established that in the relevant alternative the secured lenders would likely purchase the relevant companies by 'credit bidding' a substantial portion of their outstanding debt, which would similarly trigger the put option for nominal value.

The plans came for sanctioning before Adam Johnson J. The Judge utilised the cross-class cram-down power under section 901G in respect of three of the plan companies. The Judge noted that a number of dissenting classes had low turnouts or no attendance: some of the classes had only one attendee (in circumstances where there was more than one member of the class) and one class had no attendees.

This raised an issue as to whether there had been valid meetings in accordance with *Altitude Scaffolding* [2006] BCC 904. The Judge rejected this objection. He held that there was no requirement in section 901G for meetings of a dissenting class to have taken place. All the statute required was that the plan was not agreed by the requisite majority; it was irrelevant how the failure to reach the trigger came about. The Judge also considered that this conclusion was consistent with the policy and logic of cross-class cram-down. The alternative was that a dissenting class could disable the operation of the cross-class cram-down simply by deciding not to attend and vote.

Tom Smith KC

Paul Fradley

Annabelle Wang

Re Hawkwing plc

[2023] EWHC 407 (Ch) (ICC Judge Barber)
28 February 2023

Administration application · Inability to pay debts · Discretion

ICC Judge Barber appointed administrators to Hawkwing plc following an application by a noteholder, Hanover. In doing so, the Judge provided a helpful summary of the approach of the Courts. Hanover contended that the Company was unable to pay its debts because it had failed to pay sums due after the service of a redemption notice. The Company's position was that there had already been a waiver by the time of the redemption notice, and that the redemption notice was invalid because it was undated.

The Judge held that on the facts the questions were whether there was an event of default, whether this had been remedied, and (if not) whether it had been waived. The Judge rejected a submission that a redemption notice could not be served while a voting process by noteholders was under way. The Judge considered that two events of default had occurred under the notes, namely, a loan to a company which was not a member of the IFG Group, and the failure to obtain shareholder approval for the issue of ordinary shares in conversion of all notes by 31 March 2022. The Judge was satisfied that the events of default has not been remedied and were not capable of remedy.

The Judge rejected evidence that there had been a waiver of the events of default before the redemption notice was served. In addition, any waiver by a noteholder had to be in writing. Even if they were valid, the oral waivers would not have constituted a noteholder majority before the redemption notice was served. The Judge also rejected the contention that the redemption notice was invalid; the date of the notice could be taken from the email by which it was sent and in any event a follow-up email had put matters beyond doubt.

The Judge was satisfied on the evidence that, on the balance of probabilities, the Company was balance sheet insolvent. The Judge held that there was a real prospect that the statutory purposes of administration would be achieved. There were matters which in the Court's judgment required immediate investigation by independent officeholders. Turning to discretion, the Judge noted that no creditor actively opposed the application. The views expressed by certain creditors were of limited weight given their connections with the Company and in any event their concerns were not commercially well-founded.

Stephen Robins KC

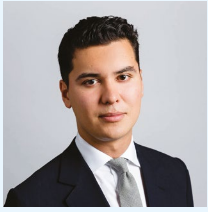
Re Angelic Interiors Limited (in administration)

[2022] EWHC 2974 (Ch) (Deputy ICC Judge Frith)
29 November 2022

Administration · Dissolution · Investigation of claims

Administrators of a company disagreed over appropriate next steps. The Teneo Administrators applied for directions as to whether they should seek to dissolve the Company and for an order that the administration of the Company be brought to an end. The Teneo Administrators considered that the purpose of the administration had been achieved and there was no further property to be realised. The Quantuma Administrators, who had been appointed in respect of the same Company to investigate potential claims against the interested party bank (which was the principal secured creditor), instead considered that potential claims against the bank could be realised.

The Court held that the statute imported a good faith and rationality standard of review. On the facts, the pursuit by the Quantuma Administrators of their investigations might be ambitious but it was not irrational. It was in the interests of justice to allow the investigations to continue, rather than to proceed to dissolution. Given that the administration had achieved objective (c) of Schedule B1, and the only pending matter in the estate was that of conducting investigations, the company should be placed into liquidation. The Court held that the views of the secured creditor were entitled to considerable weight. The bank had a strong desire that both the Teneo Administrators and the Quantuma Administrators be appointed as liquidators, and the Court made an order to that effect.



Robert Amey **Edoardo Lupi**

Chandrasekaran v Fisher & Ors

[2023] EWHC 522 (Ch) (Richard Smith J)
27 February 2023

Administrators · Out-of-court appointments · Contractual interpretation · Notices of appointment · Formal defects

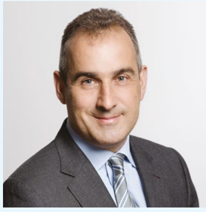
A director and shareholder (the 'Applicant') of a pre-revenue intellectual property company ('Scentrics') challenged the appointment of administrators under a qualifying floating charge ('QFC'). In 2012, the company's largest shareholder and trustee of the Applicant's family trust ('Epona') made a loan to Scentrics (the '2012 Loan') secured by, *inter alia*, a QFC over substantially all of the Scentrics' business, property and undertaking. The 2012 Loan was due for repayment 12 months from the date of the agreement and the QFC was enforceable in the event of a default in repayment of the 2012 Loan.

Subsequently, in 2014, the 2012 Loanand the QFC were assigned to Mr Ian Roper Taylor, the chairman and CEO of the Vitol Group, as security for a loan to Epona to enable the Applicant to discharge a judgment debt against him (the '2014 Loan'). In connection with the 2014 Loan, Scentrics and Mr Taylor entered into a negative pledge agreement (the 'NPA'), under which Scentrics agreed it would not repay or prepay the 2012Loan until Epona had repaid the 2014 Loan. The NPA also provided that no waiver by Mr Taylor of any of his rights under the NPA would be effective unless given in writing. Mr Taylor passed away in June 2020.

Epona failed to repay the 2014 Loan by its due date. This constituted an event of default under the security assignment agreement which entitled Mr Taylor (or his successors) to enforce the security assigned thereunder. Mr Taylor's executors accordingly demanded repayment of the 2012 Loan from Scentrics. Scentrics failed to repay the 2012 Loan and the executors appointed administrators to Scentrics under the QFC.

The Applicant applied for a declaration that the appointment of the administrators to Scentrics was null and void on two grounds. First, on the ground that the QFC was not enforceable at the time the administrators were appointed to Scentrics, because the executors had not validly waived in writing the provision of the NPA that the 2012 Loan was not repayable until the 2014 Loan was repaid, with the consequence that no sums were due in respect of the 2012 Loan and the QFC could not be enforced. Secondly, the Applicant submitted that the notice of appointment of the administrators to Scentrics was fundamentally defective because the notice of appointment erroneously identified the appointer as Mr Taylor acting by his executors, rather than the executors in their own right (in whom any right to appoint administrators to Scentrics had vested as part of Mr Taylor's estate), such that the appointment could not have taken effect in accordance with paragraph 19 of Schedule B1 to the Insolvency Act 1986.

Mr Justice Richard Smith rejected the applicant's arguments and declared that the administrators had been validly appointed. The Judge found that QFC was enforceable. The 2012 Loan was in default at the time the 2014 Loan was agreed, and the purpose of the restriction on repayment of the 2012 Loan in the NPA was to preserve that default to allow Mr Taylor to immediately demand repayment of the 2012 Loan and enforce the QFC in the event of a default in repayment of the 2014 Loan. It did not prevent Mr Taylor (or his successors) from demanding repayment of the 2012 Loan and enforcing the QFC. The Judge also rejected the applicant's submission that the notice of appointment was defective, notwithstanding that he did observe that there were errors on the face of the notice, because a reasonable reader of the notice of appointment would have known that it was the executors who had the right to appoint the administrators and were exercising that right and making the appointment. The Judge further held that even if the notice of appointment was defective, it was not fundamentally defective and the defects on the face of the notice of appointment were capable of waiver as procedural irregularities falling within rule 12.64 of the Insolvency (England and Wales) Rules 2016 and he would have waived them.



Barry Isaacs KC

Daniel Bayfield KC (at an earlier stage)

Jamil Mustafa

Re Bulb Energy Ltd

[2022] EWHC 3105 (Ch) (Zacaroli J)
30 November 2022

Energy Administrators · Energy transfer schemes · Effective time · Court's discretion

This was an application by the administrators of Bulb Energy Ltd (the 'Administrators') under the Energy Act 2004 to appoint an *'effective time'* for the purposes of an energy transfer scheme within the Energy Act 2011. The purpose of the transfer scheme was to ensure that all existing energy supply customers would continue to receive energy supplies in accordance with their existing agreements, albeit from a new energy supplier. A number of other energy suppliers raised concerns about the process followed by the administrators and the Secretary of State, and commenced judicial review proceedings in order to challenge the lawfulness of the Secretary of State's decision to approve the scheme.

The question arising in this application was a preliminary issue concerning the nature of the court's role on an application of this kind. The Administrators contended that the court's role was principally concerned with determining whether the relevant jurisdictional requirements (of Schedule 21 to the Energy Act 2004) were satisfied, following which the court's discretion was limited in nature. Against that, the opposing energy suppliers contended that the court's jurisdiction was broader, and that the court had a broad discretion to determine whether it would be appropriate to appoint an 'effective time', and that for this purpose the court should consider the impact of delay on the Administrator's duties to creditors, as well as consistency with the statutory objective of securing the continuation of energy supplies at the lowest cost was it was reasonably practicable to incur. The opposing suppliers claimed that no *'effective time'* should be appointed until the Administrators had re-run a marketing process for the sale of the company's business.

The Judge concluded that the role of the court was limited in nature. The court did not have a substantive and evaluative discretion regarding whether to approve the scheme. It was not possible to construe section 95(3) of the Energy Act 2011 as providing for such a discretion, or as imposing a requirement on the court or the Administrators that the scheme would achieve the statutory objective. Parliament had vested responsibility for the merits in the Secretary of State. The court noted that the Secretary of State was able to agree potentially extensive modifications after the effective time, without any requirement that they be also approved by the court, which pointed strongly against the court having an overlapping review function.

In considering whether the effective time ought to be delayed in view of pending judicial review proceedings, the court again identified the limited nature of its role in this context. Since the court had decided the matter which was for it (namely the scope of its role), the remaining matter was in substance a request for interim relief in the context of the judicial review of the Secretary of State's decision.

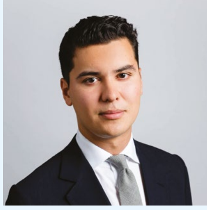
The Judge found that the appropriate forum for considering that interim relief was instead the Administrative Court.

Richard Fisher KC

Stephen Robins KC

Henry Phillips

Ryan Perkins



Edoardo Lupi

Re Sova Capital Limited (in special administration)

[2023] EWHC 452 (Ch) (Miles J)
2 March 2023

Pari passu principle · Distribution to creditors · Unsecured credit bid · Sanctions

Sova Capital Limited ('Sova') was in special administration, and its joint special administrators ('JSAs') applied for a direction that they be at liberty to enter into two transactions concerning its assets and liabilities.

The difficulty was that a large part of Sova's estate consisted of financial assets held in depositaries in Russia. As a result of sanctions imposed following Russia's invasion of Ukraine, the joint administrators were unable to realise the securities by normal means for the benefit of Sova's estate. The only practical option was an over-the-counter ('OTC') sale.

Against that background, the JSAs sought the court's approval to enter into two transactions, called the 'Dominanta Transaction' and the 'Further Dominanta Transaction'. Dominanta was one of Sova's largest unsecured creditors. The JSAs had established that Dominanta was not owned or controlled any persons subject to UK, EU or US sanctions. The proposal was that the JSAs would transfer a large bulk of its Russian securities to Dominanta, in return for which Dominanta would waive its admitted claim in the administration, which was in the sum of £233,261.442.85. For this purpose, the JSAs had calculated the cash equivalent value to Sova of the transaction. This was calculated, in essence, by working out the benefit in cash terms which the transaction would have on Sova's estate and on the dividend which would be paid to Sova's creditors.

The JSAs maintained that the proposed transactions were not *"distributions"* which engaged the *pari passu* principle, a principle which applied also to distributions *in specie*. They were instead a *"sale"* in substance, and this was permitted by the powers afforded administrators by paragraph 2 of Schedule 1 to the Insolvency Act 1986 to *"sell or otherwise dispose"* of the company's property.

The two transactions above were opposed by Boris Zilbermints ('BZ'), also a creditor of Sova, and who was part of a consortium that wished to acquire the same Russian securities held by Sova. BZ opposed the transactions above, including on the basis that they were contrary to public policy, because they infringed the pari passu principle.It would result in one creditor (Dominanta) benefitting at the expense of others, and infringe the principle of equal treatment. It was not permissible to go further than the prescribed circumstances in which an in specie distribution could be permitted.

Miles J held that the proposed transactions would not infringe the *pari passu* principle. He considered that the JSAs' power to sell or otherwise dispose of the company's property was broad enough to cover a transaction whereby the creditor waives its claim against the company, and could not see any reason to read the power down to exclude such a transaction. The Judge then considered that a sale of assets (unlike a distribution) fell outside the scope of the *pari passu* principle. The legal substance of the transactions was that they were sales, and the court was not concerned with the economic substance of the transaction. Dominanta would receive the securities in its capacity as buyer, and not in its capacity as creditor, because by waiving its claim Dominanta would cease to be a creditor. Miles J also noted that if a distribution was dressed up as a sale, then the rule would continue to apply. That was not, however, an issue here.

As far as the value of the securities was concerned, Miles J noted that, for the JSAs, the only question was the realisable value of the assets by Sova. If Dominanta should end up doing better economically than other creditors, this was not because of a distribution of assets of the estate, but a collateral consequence of legal restrictions on Sova's ability to obtain the full value for its assets. Miles J went on to hold that the proposed transaction JSAs represented a rational and honest decision, which fell within the scope of their powers, and that it would not infringe applicable sanctions. He therefore permitted the JSAs to enter into the proposed transactions.

Mark Phillips KC

Stephen Robins KC

William Willson

Charlotte Cooke

Dr Riz Mokal

Personal Insolvency

DIGESTED BY LOTTIE PYPER

Lyubov Kireeva (as bankruptcy trustee of Georgy Bedzhamov) v Georgy Ivanovich Bedzhamov

[2023] EWHC 348 (Ch) (Lady Justice Falk, Master Kaye)
14 February 2023

Interim payment · Enforcement · Sanctions · Freezing injunctions · Case management

Both the claimant, the trustee in Russian bankruptcy proceedings ("K"), and the defendant, the bankrupt ("B") sought to vary the terms of order for interim payments. K sought to vary the order to require the interim payments to be made within 7 days. B sought to maintain the original requirement for payment to be made within 14 days of the sale of a property in Belgrave Square, and to require the matter to be restored if the property was not sold by 30 April 2023. The court noted that what B requested would be an *"exceptional course"*, because the starting point in most cases is that a litigant in whose favour a costs order has been made should not ordinarily be kept out of the money. In normal circumstances, the obvious order to make would be that sought by K. However, granting B's application was in the circumstances likely to produce the least irremediable prejudice. Allowing K to enforce its costs order at this stage was unlikely to result in payment, but would rather risk endangering the sale of the property. There were various complexities with the sale, including that the proceeds would fall within the scope of a freezing order and B was subject to ongoing sanctions. The court therefore adjourned the matter to be heard after 31 March 2023.

William Willson

Servis-Terminal Limited Liability Company v Mr Valeriy Ernestovich Drelle

[2023] EWHC 506 (Ch)
(ICC Judge Burton)
9 March 2023

Bankruptcy · Genuine and substantial dispute · Foreign judgments · Sanctions

This case concerned an unpaid judgment debt of RUB 2 billion (approximately £22 million) obtained in Russia, arising from certain judgments in Russia (the "Russian Judgments"). The debtor, Mr Drelle ("D"), sought to impugn the Russian Judgments on the grounds of state interference, and that it therefore arose from a miscarriage of justice. The petitioner ("P") had not applied for the applicable Russian Judgment to be recognised in England before presenting the petition and, therefore, the applicable test was whether there was a bona fide dispute on substantial grounds that the Russian Judgments may be impeached. In practice, this meant assessing if there was as substantial dispute as to whether (i) the Russian Judgments were deliberately wrong; (ii) the decision was so wrong as to be evidence of bias or such that no court acting in good faith could have arrived at it; and/or (iii) the judgment was impeachable by fraud or opposed to natural justice. The court held that this test was not met, both considering the alleged defects in the Russian Judgments separately and cumulatively, and therefore there was no genuine and substantial dispute in relation to the petition debt. Although the P's largest creditor was a sanctioned entity under the Russian (Sanctions) (EU Exit) Regulations 2019, neither P nor D were subject to sanctions, and there was no apparent impediment to making a bankruptcy order in those circumstances.


Mark Phillips KC


Clara Johnson

Mohammed Kamal Ahmed v Elias Hussain, Christopher William Parkman (As Trustee in Bankruptcy of Mohammed Kamal Ahmed)

[2023] EWHC 593 (Ch) (ICC Judge Barber)
21 March 2023

Bankruptcy · Rescission · Totally without merits

The bankrupt sought to rescind the bankruptcy order made against him pursuant to section 375(1) of the Insolvency Act, on the grounds that the court was misled at the final hearing of the petition as to the existence and/or extent of security offered to the petitioning creditor. Having found that the court was not deliberately misled as to the position on security, and that in any event there would have been a shortfall of unsecured debt, the court dismissed the application as totally without merits.


Daniel Judd

Property and Trusts

DIGESTED BY RABIN KOK

Fearn v Board of Trustees of the Tate Gallery

[2023] UKSC 4 (Lord Reed, P, Lord Lloyd-Jones, Lord Kitchin, Lord Sales, Lord Leggatt)
1 February 2023

Private nuisance · Right to a view · Common and ordinary use

Lord Leggatt described this case as a *"straightforward case of nuisance"*. It was a dispute between the Tate Modern Museum ("the Tate") and the tenants of flats on four floors of the nearby NEO Bankside building. The flats were around 34 metres from the Tate, and because the flats had large glass windows visitors to the date using the Tate's viewing gallery were able to look right into the flats. It transpired that this caused the flat owners some distress, especially since Tate visitors sometimes photographed their occupiers.

The tenants sued the Tate in the tort of private nuisance. Mann J dismissed the claim, and the CA dismissed the appeal, on the grounds that 'mere overlooking' from one property to another was not capable of giving rise to a private law claim in the tort of nuisance. This was the issue faced by the Supreme Court, which allowed the appeal.

The core of the Supreme Court's decision was this: nuisance protects the ordinary use and enjoyment of the claimant's land, and activity which substantially interferes with this ordinary use is actionable.

The use of the viewing gallery to look into the flats was not ordinary, but exceptional, having regard to how the flats were used (for living), the nature and locality of the flats, and all the circumstances. A further, unanswered question was whether an injunction or some other remedy should be granted – this was remitted to the High Court.

MARK PHILLIPS KC [1]
SOUTH SQUARE

White Paper On “A Sustainable Future – *Reforming Club Football Governance*”

Introduction

In February 2023 the Government published its White Paper: “A Sustainable Future – Reforming Club Football Governance”. It was presented to Parliament by the Secretary of State for Culture, Media and Sport.[2] It was the next step on the journey towards reform that started with Tracey Crouch CBE MP’s Fan-Led Review of Football Governance. In her Ministerial Foreward, Lucy Frazer says:

> *“This White Paper represents the most radical overhaul of football governance since the rules were first invented over a century ago.*
>
> *It commits to an independent regulator backed by legislation, and sets out the technical details of how that will work in practice – including the licensing regime the regulator will operate....*
>
> *It is about protecting the Premier League’s position as the strongest league in the world, and, in turn, safeguarding clubs across the entire football pyramid.”*

In this article I will examine what is being proposed and consider whether those proposals are likely to achieve their stated aims. As someone who has been involved both in football governance and financial regulation, I can say that if the various entrenched interests adopt what is proposed, from clubs, to leagues, the FA and lawyers (who will have an important role to play), it should work. If it does work the Regulator will be able to monitor clubs to ensure that owners and directors are fit and proper and that clubs are financially sound. It will also contribute towards ensuring that fans have a say in their club’s heritage (badge, kit and stadium).

Why Football is Endangered

The Executive Summary describes the problem in stark terms.

> *“English football is currently endangered by the* ***high and growing risk of financial failure among clubs across its top five tiers****. There exist fundamental problems of perverse incentives, poor governance, and defective industry self-regulation. These, along with the risk of breakaway competitions, threaten the stability of the football pyramid as a whole and risk leaving fans alienated and powerless.”*

1. Mark Phillips KC represented UEFA on its prosecution of Manchester City FC for alleged breaches of the Financial Fair Play Rules and represented the EFL in its prosecution of Sheffield Wednesday FC and Derby County FC for breaches of the Profitability and Sustainability Rules. He advised the ‘big 5’ clubs on setting up the Premier League in 1992. He appeared for the EFL on the Football Creditors Rule case: Her Majesty’s Revenue and Customs v The Football League Limited [2012] EWHC 1372 (the football creditors rule is referred to in paragraph 2.16 of the White Paper). In the field of financial regulation he was counsel to the Bank of England in the claim brought by the liquidators of BCCI against the Governor and Company of the Bank of England arising out of the Bank of England’s supervision of BCCI.

It records the loss of historic clubs that have gone into administration or liquidation, and that have fallen down the pyramid as a result of penalties imposed in response to steps taken by owners and directors in order to survive in the short t erm (such as stadium sales). It rightly describes the impact this failure a club can have on its fans and local community as "*catastrophic*". The Government believes there is an unacceptably high and growing risk of financial failure among football clubs throughout English men's professional football. Three points are noted: (1) the significant reliance on owner funding, (2) high spending on transfers and wages and (3) a steady rise in borrowing. Failure of a financial business is the acceptable 'natural selection' of the free market. However, Football clubs are more community and heritage assets than typical businesses, with fans rather than consumers, and as such, should not be left to fail.[3]

The fragility of English football is to some extent disguised by the huge revenues received at the top of the pyramid and the emergence of very wealthy owners. However, that makes it more difficult for clubs lower down the pyramid. The White Paper notes: "*the incentive to take reckless decisions, poor management, opaque governance structures, and ineffective industry self-regulation*".[4]

The Regulator's Primary Strategic Purpose

The Regulator's primary strategic purpose will be to ensure that English football is sustainable and resilient, for the benefit of fans and the local communities football clubs serve. The Regulator will have three specific primary duties:

(1) Club sustainability – the financial sustainability of individual clubs;

(2) Systemic stability – the overall stability of the football pyramid; and

(3) Cultural heritage – protecting the heritage of football clubs that matter most to fans.

The Regulator will require clubs to demonstrate good basic financial practices, have appropriate financial resources or buffers to meet cash flows and financial shocks, and protect the core assets of the club from harm. The Regulator will also establish new tests for prospective owners and directors of football clubs.

It is important to bear in mind that the Regulator will have nothing to do with sporting regulation. Issues surrounding the rules of competition, dealing with players, academies and the panoply of issues dealt with by the FA and the leagues (aside from the three matters identified as primary duties), remain under the control of those sporting bodies.

Having set out its intention to reform football regulation, the government throws down a gauntlet to the FA and the Leagues. It says that reform is also the responsibility of the industry. Football can act now to address the issues of sustainability, and the government would encourage the industry's existing bodies to continue to bring in change in the interim, before the Regulator is operational. That is an important point on two levels. First, the Football bodies should continue to regulate and to reform their regulation.[5] Second, establishing the Regulator is going to take time. There is no simple off-the-shelf solution, and, as we will see below, the government has in mind setting up a shadow Regulator that will put in place the rules, systems and guidance it will need before the system becomes wholly effective.

Secondary duties

When acting in a way that advances its primary duties, the Regulator must also have regard to three secondary duties: (a) Domestic competition;[6] (b) International competitiveness;[7] and (c) Investment.[8] Applying the first duty in the context of maintaining financial sustainability will give rise to some interesting issues. One of the problems faced further down the Football pyramid is the need to compete in order to secure promotion. However, the costs of competing could be the very thing that undermines financial stability. The Regulator will have to have regard to the effect on a club's finances of competing so as to move up the pyramid. International competitiveness gives rise to further difficulties. Having a concentration of top players at a few clubs improves international competitiveness. Having England players play in Europe also improves international competitiveness. However, the costs of those advantages is that financial and playing power should be held by a few top clubs and that is inconsistent with the need to maintain a healthy pyramid. Likewise, issues arise out of the need to maintain sustainable investment; top clubs attract investors whereas clubs lower down the pyramid don't. These tensions will need to be worked through by the Regulator. The White paper recognises these tensions and concludes:[9]

> *"The Regulator would not pursue the secondary duties in their own right, but would balance these other important policy objectives when striving for sustainability, and attempt to minimise any negative impacts on them where possible."*

Licensing

At the heart of the system is the requirement that clubs will need a licence to compete. This will not only be sea change in the governance of football, it will also be an essential one. It is a change I welcome. At present Football Clubs are entitled to play in the competitions for which they have qualified competitively. If they break the financial fair play rules, proceedings have to be brought against the club and sanctions imposed.

2. Rt Hon Lucy Frazer KC MP, formerly of South Square Chambers.

3. This proposition is made in paragraph 2.17 of the White Paper. It could never be the case that no football club could ever fail, and no system of regulation could ever achieve that, but the social and political imperative is identified. In paragraph 3.8 (Box 4) the White Paper states that "there may be exceptional circumstances in which a club should be allowed to fail," and it acknowledges that a zero failure system would introduce perverse incentives for owners and directors to take more risks.

4. Paragraph 2.2.

5. That should be contrasted with the blunt statement made in paragraph 3.16: "Football has shown itself incapable of sufficient reform and of taking the necessary decisions for the good of the whole pyramid."

6. The competitive sporting balance of the English football pyramid, where there is dynamic competition within leagues and a genuine chance/risk of moving between leagues.

7. The competitive advantage of English football clubs including in international markets for talent.

8. The benefits of sustainable investment from new and existing investors both domestically and from abroad.

9. Paragraph 3.8.

10. Paragraph 4.2.

The sanctions are often sporting sanctions, for example, a points deduction or expulsion from a particular competition. The process is almost always contested, often on procedural rather than substantive grounds. In the meantime, the club continues to play in the competitions for which it qualified competitively. Often, by the time a matter has concluded to 'sentence' it is a subsequent season. Clubs affected by the initial wrongdoing may have missed promotion or relegation (ie had the penalty been imposed in the season the prosecution started, different clubs may have been affected by the sanction perhaps by being promoted or relegated). The process is unnecessarily time consuming and unnecessarily expensive. Moreover, the penalties are not directed to the financial or governance wrong and will do little, if anything, to help a club remedy the defects that have resulted in financial and governance issues. What it often does is punish the football club, and therefore its fans. In this context, licensing will be hugely beneficial to football.

The Executive Summary states:

> *"The Regulator will operate a licensing system, where clubs will need a licence to operate as professional football clubs. Legislation will establish four Threshold Conditions of the licence and the Regulator will set the detailed requirements under each. The Regulator will have a tightly defined scope and could not act outside of these four Threshold Conditions. It will not intervene in, for example, on-pitch rules of the game or ticket prices."*

The licence will be ongoing and clubs will have to satisfy the licensing conditions on an ongoing basis in order to compete in the following year's competitions. The White Paper says that the licensing system would provide the basis for enforcement action.[10] However, proper regulation against a backdrop of clubs needing a license in order to compete should mean that enforcement action is needed less often. One reason licensing is significant is that it reverses the burden. At present, the burden is on the FA, Premier League or EFL to establish a breach of a rule before a club can be sanctioned. This has often resulted in clubs taking any and every point, often procedural and unmeritorious, to delay the inevitable day of reckoning. As a consequence, hearings can take place months, or even years after the relevant events and they are often followed by equally unmeritorious appeals that drag the process out further. This is not in the interests of football, the fans, or even the clubs. What we have seen is that by the time a club is sanctioned things have moved on so that the main losers are the fans, not only of the club, but of other affected clubs. A licensing system with ongoing supervision will mean that clubs will have to satisfy the Regulator that they should be licensed for the following season. There will be decisions and potential appeals on sanction, but it can be hoped that the clubs aren't able to continue to stall the process.

The licensing system will also be at the heart of preventing breakaway leagues. That is because the licence will only permit clubs to be able to compete in approved competitions. As this will be a statutory requirement of playing football in England, a breakaway league could only happen if clubs did not play in England.

The Regulator

The FA and the Premier League advocated non-statutory industry led reform. The government is not convinced that such models would be independent of influence from the clubs or that such reforms would be guaranteed long-term. That is right. Any system that depends upon rules that would be introduced by clubs, and capable of being amended by clubs, would not be robust enough to tackle the issues. Moreover, history has shown that some clubs have operated at the extremes, and sometimes beyond the extremes, of the rules. In addition, many rules introduced to deal with particular issues could also have unintended consequences.[11] The White Paper concludes:

> *"Football needs a strong centre to take regulatory decisions away from clubs, put fans back at the forefront, and ensure a stable pyramid all the way down to the grassroots game."*

In many ways this is similar to the debates in the banking sector leading up to the Banking Act 1979. History has proved the decision to have an independent regulator of banks was the right one. The difficulties with banking regulation have centred around ensuring the regulator has the tools to regulate effectively and the flexibility to respond to new challenges. The same will be true in football. The money flowing into the top of the Football pyramid and the emergence of wealthy owners (and even state owners) presents regulatory issues that could not have been imagined 10 to 15 years ago.

The Regulator will be a specialist regulator with precise focus on the issues of financial sustainability. The Regulator will not be housed in an industry body such as the FA. That is because of the possible impact on independence, effectiveness and the need for independent accountability.[12]

The Regulator will regulate clubs in the top five tiers of English Football. All 116 clubs in the top five tiers of the English Football pyramid will require a licence from the Regulator to operate as professional men's football clubs.

Funding

It is recognised that the Regulator will need to be sufficiently resourced. The Government believes the cost or regulation should be covered by the industry. Given that Football's aggregate annual revenue is £5.7 billion, the costs of regulation will be small, particularly to the top Premier League clubs.

11. The White Paper gives the example of salary caps. The problem with one dimensional solutions is that they then distort other aspects of competitiveness. Historically, rules have often been introduced because of short term influences.

12. The Government is considering establishing a new body, housing the regulator within an existing government arm's length body, and attaching the Regulator to an existing arm's length body as a subsidiary (para 3.14). The factors being considered include: independence; accountability; implementation and strategic coherence.

13. It is clear from the four proposed Threshold Conditions that this includes suitable directors.

14. The club must have adequate financial and non-financial resources and controls in place, to meet committed spending and foreseeable risks.

15. Persons at a club deemed to exercise significant decision-making influence must be fit and proper custodians.

16. The club must have appropriate provisions for considering the interests of fans on key decisions, and issues of club heritage, on an ongoing basis.

17. The club must agree to only compete in leagues and competitions that are approved by the Regulator based on predetermined criteria.

18. Paragraph 4.5.

19. This can be contrasted to the position of banks and licensed deposit takers under the Banking Act 1979. In 1979 there was a process of 'grandfathering' which meant that compliance with the criteria was less immediate. The proposals in the White Paper are preferable.

20. Paragraph 4.3.

The White Paper proposes introducing a levy-funded model. Clubs will pay an annual fee related to their income. This is sensible because the burden of the costs will fall on the wealthiest clubs and the wealthiest clubs are likely to throw up many complex financial issues.

The Threshold Conditions

These are the conditions against which Football clubs will be monitored. The legislation will establish four Threshold Conditions of the licence: (1) appropriate financial resources, (2) suitable owners,[13] (3) fan interests and (4) approved competitions. The starting point is for the Regulator to assess:

> *"…whether clubs were ready, willing and able to comply with the Threshold Conditions in principle upon application, and then monitor compliance with the detailed Specific Licence Conditions on an ongoing basis."*

That is important because the starting point is not that the clubs presently satisfy the Threshold Conditions, but whether they are ready, willing and able to comply with the Threshold Conditions.

The Licence Conditions, which might be imposed, will be risk based, which appears to mean that the regulation required will be proportionate to a club's circumstances. They might vary depending on the league, club size, financial health or riskiness.

There are four proposed Threshold Conditions: (1) Appropriate resources;[14] (2) Fit and proper custodians;[15] (3) Fan interests;[16] and (4) Approved Competitions.[17]

Each of these Threshold Conditions will be underpinned in the legislation by detailed requirements, called Specific Licence Conditions. These will be determined by the Regulator which suggests that they need to be formulated during the Shadow Regulator period (considered below). The Regulator will have to consult on and publish new types of rules.[18]

The new Licensing Process

The exact process for licensing is under consideration, but what is suggested is that each club would apply to the Regulator to be licensed. The Regulator would determine whether the club was ready, willing, and able to meet four Threshold Conditions in principle. The club would declare that it considered it was able to comply with these Threshold Conditions and the Regulator would make a preliminary assessment of its ability to do so prior to granting the licence.[19] The club would also commit to becoming compliant with the detailed requirements the Regulator will impose. Guidance published by the Regulator would help parties understand what these requirements are likely to entail.[20] Initially the Regulator is assessing a clubs ability to become compliant.

Monitoring and supervision

As the White Paper puts it: "*On an ongoing basis, the Regulator would operate a monitoring and supervision system. This would entail more real-time monitoring of clubs, engaging and steering them to ensure continued compliance with Specific Licence Conditions. This ongoing approach means licences would not need to be periodically reassessed and renewed.*"

This is significant. As with financial regulation the Threshold Conditions, or criteria, should be satisfied on an ongoing basis. Review of a licence will not be done periodically, but continuously. As this is a new concept it is proposed that there will be a transition period for all clubs to become licensed and compliant. This fits in with the forward nature of the initial assessment; the club committing to becoming compliant and the Regulator assessing the clubs ability to become compliant.

Financial Regulation

The White Paper makes clear that financial sustainability regulation would be the Regulator's core focus, delivered through the first licence condition 'Appropriate resources'. It would be based on improving financial resilience, to protect the long-term sustainability of clubs for the benefit of their fans and communities.[21] Given the history of financial failure in football, and the magnitude of the problem revealed from analysis of Football Clubs' accounts, this focus is commendable. The White Paper says of the financial issues:[22]

> *"The financial issues across the pyramid are due to several reasons, including: poor financial planning; over-reliance on owner funds; unsustainable levels of loss and debt; high costs; and a lack of resilience to shocks and changes of financial circumstance. When clubs overspend, experience a shock – such as withdrawal of owner funding – and lack a financial buffer, they find themselves distressed. The lack of resilience means they struggle to carry themselves over until they can return to a sustainable state – increasing income or safely downsizing financially. Instead, clubs may sell off assets hoping to make a quick return, further devaluing the club and ultimately making it hard to sell."*

Against that background it cannot sensibly be argued that the regulatory landscape to date has been adequate. One of the primary tools used in football, the football creditors rule, serves only to mitigate the losses of creditors in the football industry. Third party creditors have been left to bear the brunt of the losses. The rules that result in the deduction of points when a club goes into administration compound the losses. It is far harder to realise value from the assets of a football club, when a points deduction is as likely as not to result in lower future revenues and the club being less attractive to buyers. The rules on financial fair play have often made it difficult for under resourced clubs to compete, which has in turn contributed to 'creative' accounting with stadia and players contracts to try to compete at the same level, let alone a higher level. The clubs that can afford to deal with these difficulties are the successful clubs or clubs with wealthy owners. I agree with the conclusion in paragraph 5.5 of the White Paper:

> *"Improving financial regulation, and in turn the financial situations of clubs throughout the pyramid, has the ability to make the biggest positive impact to the sustainability of clubs for the benefit of fans, clubs and local communities."*

The solution is proper regulation focussed on ensuring the long-term financial sustainability of all clubs in the professional game. To do this the Regulator would place requirements on clubs to ensure good basic financial practices, to have appropriate financial resources and to protect key assets for the long-term.

21. Examples of Specific Licensing Conditions in respect of the adequate financial and non-financial resources Threshold Condition are given in para 4.9 Table 2: (a) the club must submit multi-year business plans to the Regulator on a regular basis, including scenario planning for key potential risks; (b) the club must have appropriate finances to meet anticipated outgoings, and a financial buffer in preparation for worst-case scenarios; (c) the club must adhere to a specified tier of the Football Club Corporate Governance Code on an 'apply and explain' basis; and (d) any plans to relocate from or sell Club A's registered home stadium must be pre-approved by the Regulator.

22. Paragraph 5.3

This would include realistic contingency and 'wind-back' planning, and multi-year forecasting. Clubs would report their finances and plans to the Regulator on a sufficiently regular basis to ensure it has a comprehensive up to date picture.[23]

Corporate Governance

The problem identified by the Review was that poor internal governance at clubs allowed owners to act unilaterally, pursuing short term interests with little accountability or scrutiny. Poor corporate governance is often a contributing factor in collapses. Amongst the problems identified are non-existent non-executive directors, a lack of AGM's, boards with a sole director and insufficient processes.[24] The government believes that clubs should be run well and act in the interests of fans. The 'duty to act in the interests of fans' probably falls within the scope of the matters directors are already required to consider under the Companies Act 2006.[25] Five areas are identified: (a) structure,[26] (b) people,[27] (c) communication,[28] (d) standards and conduct,[29] and (e) policies and processes.[30]

The White paper proposes that the Regulator would establish a compulsory 'Football Club Corporate Governance Code', to be enforced through the 'Appropriate resources' Threshold Condition. The Football Governance Code will draw upon corporate governance principles already applied in other industries.[31] Clubs will be required to report annually on corporate governance compliance. This can only be a good thing. There are many examples of owners over-leveraging, buying expensive players or selling stadia to meet increasing borrowing costs. The risks are greater up the pyramid and so the White Paper says that the Regulator would apply proportionality with regard to the size, revenue, league and business model of the club and the degree of risk.[32] The Regulator's approach will be to 'apply and explain' with a view to helping clubs become compliant.

Owners' and Directors' tests: Fit and Proper Custodians

Football has failed to grapple with the problems of unsuitable custodians. There are numerous examples of owners and directors becoming involved in football clubs as a 'vanity project', running the club as if running it was for them alone, and leaving the club far worse off than when they took it over. The Fan-led Review found examples of unsuitable custodians, including owners with long histories of business bankruptcies, owners with serious criminal convictions, owners later imprisoned for crimes including money laundering, and directors recruited without a proper, transparent appointment process.

To deal with this problem the White Paper proposes the second important Threshold Condition, the owners' and directors' test.

This will consist of three key elements: a fitness and propriety test for both owners and directors,[33] enhanced due diligence of source of wealth for owners, and a requirement for robust financial plans.[34] The leagues presently have disqualifying conditions,[35] and those would be combined with the new Threshold Requirement. The Regulator would not apply the tests on a self-declaration basis and would be more transparent. The Regulator would conduct fitness and propriety tests for owners and directors, and potentially for other individuals at a club deemed to exercise significant decision-making influence, and clubs would be required to declare their Ultimate Beneficial Owner. This is a welcome extension.[36]

An important development is ongoing oversight. The Regulator should increase oversight of owners and directors, to ensure their suitability on an ongoing basis. Incumbent owners and directors would be required to inform the Regulator of any relevant changes to club or personal circumstances, as part of an annual compliance statement. Changes in circumstances could trigger a retest of relevant owners and/or directors. The Regulator would have the power to retest owners or directors at any given time (or regular interval), such as following an update to the Regulator's rules, or in response to a change in the individual's circumstances.[37] In the event an owner or director was retested and failed to comply the Regulator would work with the leagues who have rules to suspend or disqualify the individual.[38]

An area of particular concern is identification of the Ultimate Beneficial Owner. Clubs often have complicated ownership structures and may be owned by a chain of companies or hedge funds. Requiring clubs to declare their Ultimate Beneficial Owners will identify who ultimately owns and controls clubs, improving transparency and accountability. There are justified concerns about compliance with the requirement in current league rules to declare who owns the club. This is particularly so where clubs are owned by offshore entities, and where the investors in those entities are unknown, or where clubs are controlled by complex company structures. The requirements for an objective and evidence based approach and for ongoing licensing should mean that there is a transparent process. The White Paper says that the Regulator should determine whether a prospective owner or director is a politically-exposed person, i.e. a person entrusted with a prominent function. Applicants would not be approved or rejected on the basis of being a politically-exposed person, but, as political affiliation can expose individuals to bribery, corruption or external influence, such status may be considered as part of an in-the-round assessment. The Regulator may direct a club to manage potential higher risks through corporate governance.[39]

23. Paragraph 5.14. Monitoring and reporting is likely to include budgeted income and expenditure, scenario planning for seasons ahead, longer term financial plans and detail on cash flow.

24. Paragraph 6.3.

25. Section 172(1) Companies Act 1985 requires a director to act in the way he considers would be most likely to promote the success of the company, and he must have regard to, amongst other things: "(c) the need to foster the company's business relationships with suppliers, customers and others" and "(d) the impact of the company's operations on the community…"

26. Clubs shall have a clear, appropriate governance structure with a properly constituted board that makes decisions collectively.

27. Clubs shall recruit and engage people with appropriate skills, knowledge, experience and independence to further the club's goals.

28. Clubs shall be transparent and accountable, engaging effectively with fans and other stakeholders.

29. Clubs shall uphold high standards of integrity, appropriately address breaches of those standards, and engage in regular evaluation to drive continuous improvement.

30. Clubs shall comply with all applicable laws and regulations, undertake responsible financial strategic planning, and have appropriate controls and risk management procedures.

31. The White Paper identifies the UK Corporate Governance Code, the Wates Corporate Governance Principles for Large Private Companies and the Code for Sports Governance: para 6.11.

32. Three tiers are identified with Tier A having more enhanced requirements than Tiers B and then C.

In order to avoid unnecessarily deterring investors, it is proposed that the fit and proper owner tests are considered as quickly as possible. It is proposed that the Regulator be under a statutory deadline in determining the outcome of a test, to provide certainty to clubs, fans and other stakeholders.[40] It is anticipated that the owners' and directors' tests will include a 'pre-notification' option whereby clubs can confidentially inform the Regulator in advance of a proposed takeover.

The purpose of the strengthened owners' and directors' tests is to create a higher standard of stewardship of clubs and reduce the number of harmful risks taken by dishonest, incompetent or nefarious owners. Experience in the financial world would support that argument, although it must always be recognised that no system of regulation can ever guarantee that some individuals will not slip through the net.

Regulation in Practice

Part 4 of the White Paper is concerned with the system of regulation. The starting point is that "*how* the Regulator exercises its functions in pursuit of its objectives, will be as important as the functions and objectives themselves. A clearly defined operating model will ensure that all regulated parties know what to expect."[41]

The Regulator would operate an 'advocacy-first' approach to regulation as the default, but with the power and mandate to intervene swiftly and boldly when necessary, i.e. when the thresholds have been breached in order to minimise harm. What is proposed is a participative approach, aiming to deliver objectives through engaging constructively. That is laudable, but carries significant resource requirements. The Regulator would have a range of powers, including a variety of strong sanctions on clubs and individuals, to deliver its licensing system. It would operate an escalating model of enforcement, using increasingly stronger powers and with greater involvement in club operations if certain thresholds for intervention are met. Its approach would have to be proportionate, transparent and consistent.

Figure 5 in the White Paper sets out the Regulator's escalating approach to supervision. First, there would be monitoring and supervision, the aim of which will be to maintain ongoing compliance using real-time monitoring and club self-reporting. Second, advocacy, if clubs are identified that are at risk of breaching licence conditions the Regulator should work with the clubs and engage with regulatory parties to resolve issues and encourage compliance. Third, enforcement, if a set threshold were met, the Regulator will be able to use powers of direction to compel a club to take more significant action.[42] Fourth, Disqualification, which is described as being "in extremis, for persistent, flagrant and wilful non-compliance with licence conditions despite direction and enforcement action".

The Regulator would look to disqualify those in charge from involvement with the club and/or football. There are two problems with this. First, that is a high threshold and lawyers representing an individual will focus in on that. Second, there should be provision in place that enables the Regulator to remove such a person pending any proceeding to finally establish disqualification. Again, absent that, individuals who have managed a club in the way described will be kept in situ while long drawn out proceedings take place.

The White paper expects compliance to be the norm, and that may be right. However, the Regulator will be given a broad suite of sanctions: Reputational sanctions (i.e. naming and shaming) on both clubs and controlling individuals; Financial penalties on both clubs and controlling individuals; Suspension or disqualification of controlling individuals from involvement in football; and Suspension of clubs via withdrawal of licences. This last sanction should be a last resort. Withdrawing a club's licence will cause the very damage to fans and the community that regulation is intended to avoid. In that context it must be borne in mind that the sanction described immediately before withdrawal of a licence is suspension or disqualification of controlling individuals. It is difficult to imagine an offence that could not be dealt with by removing the controlling individuals as the club will not have done anything those individuals did not cause it to do. This is recognised in para 10.7 which says:

> "*Sanctions would target the culprits (e.g. the decision makers at clubs) in isolation, with minimal undue impact on fans, club staff, and players wherever possible.*"

And para 10.9 which says:

> "*The Regulator would hold a club's senior management accountable for the club's decisions and for compliance with regulation.*"[43]

The government is concerned about the overlap between league regulation and regulation by the Regulator. Given that at least some of the emerging league regulation has been a response to the proposals to set up an independent Regulator, I would favour the Regulator having exclusive jurisdiction over regulation. This appears to be the government's view. The White Paper states that the Regulator should have the ultimate responsibility for ensuring financial sustainability in football, while also consulting with industry and overseeing industry rules within this remit to ensure coherence. As against that, it is anticipated that the Regulator may wish to allow concurrent systems or delegate responsibilities in certain circumstances. In a system of regulation that gives rise to the risk of issues 'falling between two stools.'

Another welcome recognition is that regulatory sanctions should not include sporting sanctions.

33. This test is very familiar in the regulation of the financial sector and is easily adaptable to football. The White Paper says that the fitness and propriety tests would be designed to ensure that prospective owners and directors have sufficient integrity, honesty, financial soundness and competence to be suitable custodians of football clubs. Para 7.18 of the White Paper emphasises that the fitness and propriety test should be objective and evidence based.

34. This is said to apply to owners, but I would suggest that Directors should also be involved in producing financial plans. Financial plans should cover multiple elements including strategy, governance, plans for financial sustainability and corporate structure: para 7.26. Such plans should be agreed collectively by a club's board: para 7.27.

35. These criteria include: (a) past involvement with club bankruptcies; (b) dishonest dealings with the football leagues or FA; (c) control or influence at multiple clubs; (d) specific unspent criminal convictions (primarily involving dishonesty or corruption); (e) personal insolvencies; (f) suspension or ban from another sport; (g) being barred from entry to the UK; and (h) being a football agent.

36. In the context of financial regulation the fitness and properness test considers a person's fitness and properness to carry out the particular role, eg: CEO, CFO, non-executive director. The same approach could be applied in a football context.

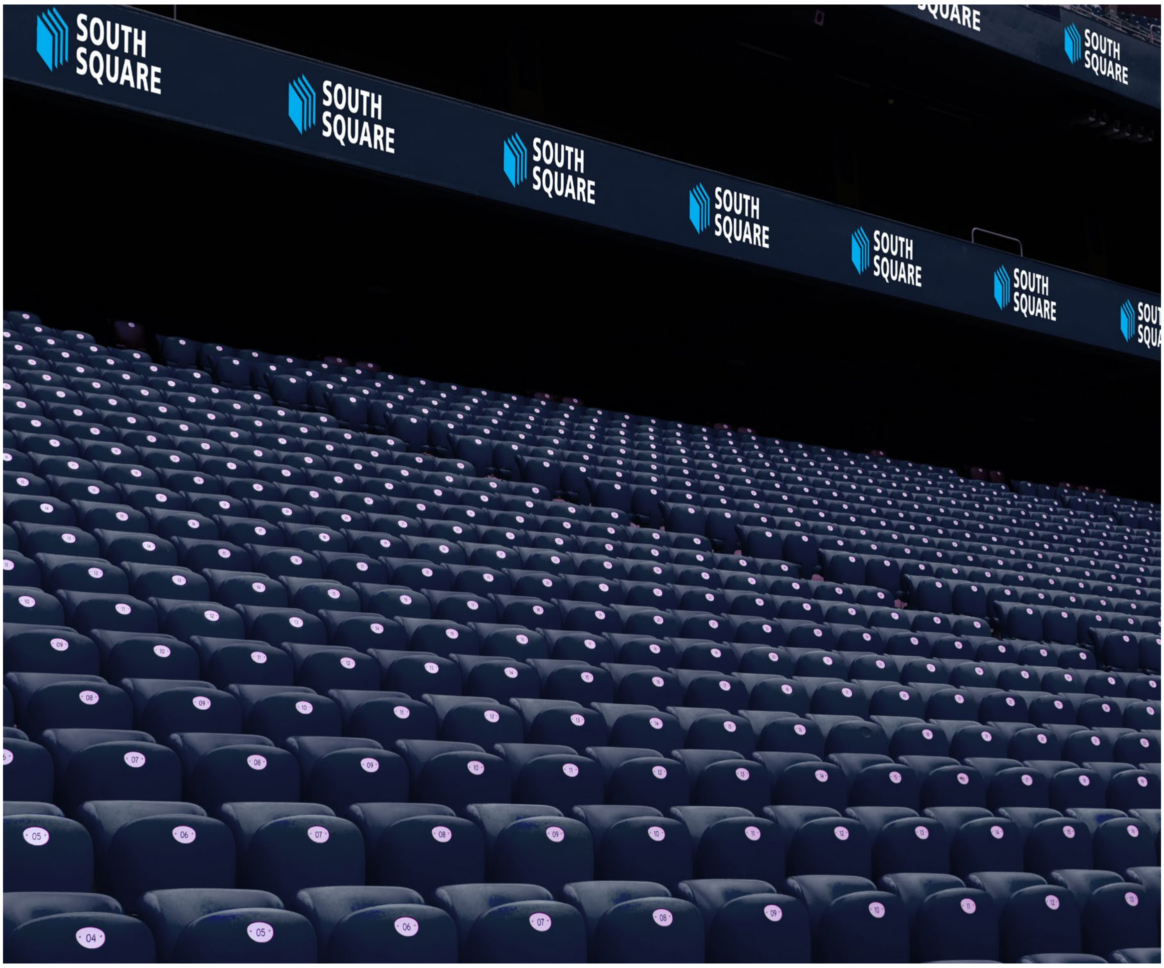
37. Para 7.34.

38. The difficulty this could give rise to is putting the burden back onto the league and giving the owner or director unnecessary challenges to the process.

39. Para 7.22: This mirrors the FCA's guidance on this point.

40. Para 7.32.

41. Para 10.1



The government does not believe the Regulator should have sanction powers directly related to sporting competition, such as points deductions."[44]

The Regulator will be provided with regulatory principles. These are basic and fundamental rules that the Regulator would be obliged to follow when discharging its functions.[45]

Procedural Safeguards

The question of checks and balances is one of the most difficult to grapple with in a sports context. That is largely because in a sporting context what often matters is process as opposed to substance (for example, was a sample properly taken). In a financial regulatory context what matters is substance – are the criteria met or not. Settling on a system that gives clubs, and more particularly their owners and directors, the ability to appeal points of substance while avoiding interminable procedural points is not going to be easy. It is proposed in the White Paper that the majority of appeals would be on judicial review principles. Deciding an appeal by applying judicial review principles is said to mean that the court or tribunal reviewing the decision would focus on how the decision was made – whether the public body acted within its powers, applied proper reasoning having taken into account necessary considerations, and followed due process – rather than hearing the merits of the case again.[46]

The reference to "*how the decision was made*" and the reference in Table 4 to "*a fair process*" rings alarm bells. There is a risk that it could be used to resist every minor procedural point.[47]

In addition to the judicial review type appeal, in certain rare circumstances, there would be a limited right to appeal a decision on the merits. In para 11.18 it is said that a legal challenge would be a remedy of last resort for regulated parties if they considered that alternative complaints procedures were not sufficient. In circumstances where owners or directors have millions at stake and their involvement in football going forward, there is a real risk that appeals will be the remedy of first, rather than last, resort. The risk that every point is appealed and every point taken is recognised in the White Paper:[48]

> "*While it is important that the Regulator's decisions are subject to an appropriate level of scrutiny, this must be balanced against the risk of those decisions being constantly challenged and its system being undermined.*"

What is intended is "*a focused court appeals process, minimising delays to the final resolution of decisions.*"

The White paper states that checks and balances would be embedded in the design of the Regulator

42. One contemplated step is appointing skilled persons to the club to report on and improve a clubs operations. Similar powers have been used in the context of financial regulation.

43. To this end every club will be required to make clear which individuals have significant decision making influence at the club (it is noteworthy that the word used is influence not power).

44. Para 10.8. The para goes on to say that the Regulator would have the ability to recommend that leagues or the FA apply sporting sanctions. I do not think that would be sensible. First, sporting sanctions are outside the remit of a financial regulator. Second, what weight should a league or FA put on such a recommendation?

45. Para 10.11. The government has taken inspiration from the FCA's 'Principles of good regulation' which are designed to ensure the Regulator exercises its functions appropriately. They are set out in Table 3 of the White Paper.

46. Para 11.19.

47. Experience has shown that such points result in unnecessarily long and delayed hearings and are almost never successful. The solutions to this problem are either very short time lines for appeals, or for the individuals, the subject matter of disciplinary action, to be removed pending appeal rather than remaining in situ pending appeal. If it was that way around it would not be in the interests of the appellant to draw out the process.

48. Para 11.20.

and its system to ensure it is using its powers in a fair and appropriate way. Four are identified: (1) the Regulator would be subject to legal processes to govern how it uses its powers, which would include requirements to consult, and to meet set thresholds to intervene; (2) there will be a Regulatory Decisions Committee to advise on certain key regulatory decisions, which would introduce expert scrutiny to ensure a more robust decision-making process; (3) the Regulator would be ultimately accountable to Ministers; and (4) regulated parties would have the right to appeal the Regulator's decisions to a court or tribunal.[49]

As regards process, three points are made. First, the Regulator will have a duty to consult affected stakeholders ahead of taking certain key decisions or actions. Second, in order to take certain actions the Regulator would have to be content that a set threshold for intervention had been met. Third, the Regulator would be subject to statutory deadlines intended to inject expediency into the Regulator's system.

As regard structures, there will be a separation of decision makers. The Regulator would be assisted by a Board that would take strategic decisions. There will be a separate Expert Advisory Panel. The Board could draw on the Expert Advisory Panel when appointing a Regulatory Decisions Committee to advise on certain key or complex regulatory decisions, such as enforcement action.[50] The purpose of separating out decision makers is to have fresh eyes applied to key or complex decisions and to have the correct experts advising on the relevant issues.

Transition and Shadow Regulation

Since the proposed reforms represent a significant change for the industry, it is proposed that the Regulator would need to take steps to ensure a smooth transition to the new system.

The government recognises that the Regulator will need to be resourced and operationally ready, and clubs would need support to become compliant with new rules. One of the first things the Regulator, or Shadow Regulator, will do is undertake a State of Football study, to better understand the market and its individual clubs. It is intended that there will be transitional arrangements such as 'grace periods' and phased-in rules and that the Regulator would work with clubs to minimise early non-compliance. It is proposed that there should be a non-statutory shadow regulator to begin the work of the Regulator in advance of legislation coming into force. This will also give an opportunity for work to be done on the new Football Club Corporate Governance Code and owners' and directors' tests.

Concluding Remarks

The establishment of an independent Regulator for football represents a huge opportunity to put the 'house of football' in order. The focus on financial regulation should result in a system that helps avoid the corporate insolvencies of football clubs of the past 30 years. The Threshold Conditions will go a long way to ensuring that clubs are financially sound and that owners and directors involved in making decisions for those clubs are fit and proper to hold those positions. It will require a sea-change in the thinking of those involved in football and those who advise them. The focus should turn to the substance of how the club's finances are managed and away from how rules are implemented or enforced.

49. Para 11.21.

50. This has some similarities to the system at UEFA where there is an Investigatory Committee and an AdjudicatoryCommittee.

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Evaluation of the UK's CIGA Reforms: A Best Practice Model for Other Jurisdictions?

Introduction

A current policy focus for many governments across the world is to strengthen local insolvency systems – and particularly to introduce more flexible rescue processes to maximise the potential for distressed but viable entities to restructure their affairs.

This serves as an important pillar of economic and financial stability – enhancing efficiency, maximising creditor returns, preserving enterprise value and jobs and limiting 'ripple effects' that can lead to large-scale financial distress.

In the current difficult economic circumstances, the inherent link between flexible restructuring processes and economic and financial viability and sustainability has become more palpable than in previous years when continued growth had become something of an entrenched norm save for the repercussions which followed the global financial crisis.

More flexible local restructuring processes also help to enhance the appeal of a jurisdiction as an optimal restructuring hub of choice. In turn, this incentivises foreign investment in the jurisdiction. The global economy continues to be marked by a high level of convergence and the conduct of substantial business across borders, notwithstanding the slowdown in trade integration and rising protectionism and economic fragmentation (in part fuelled by rising geopolitical tensions) in recent years.

Indeed, flexible restructuring processes are appealing to creditors because they effectively lower creditors' risk of loss, with the knowledge that there is a system in place which supports the efficient resolution of competing and complex claims in the event a debtor encounters financial distress. And for debtors, a jurisdiction which offers maximum flexibility, commerciality and pro-restructuring incentives is an important part of long-term business risk planning and sustainability, as well as accessing more affordable finance and investment options.

The United Kingdom has long been regarded as one of the most attractive restructuring venues in the world – a combination of its effective insolvency laws, its strong and respected legal system and judiciary and its status as a business-friendly economic and financial hub.

The desire to retain this position – in the context of the growing appeal of other jurisdictions such as Singapore, the Netherlands, Ireland, Hong Kong, and the Cayman Islands as regional restructuring centres – was a significant motivation for the reforms introduced by the *Corporate Insolvency and Governance Act 2020* (UK) (**CIGA**) in June 2020.

Two of the primary features of the CIGA – the focus of this article – are the standalone moratorium and the restructuring plan.

Measures similar to these restructuring processes are currently being considered in other jurisdictions, including Australia (where two separate consultations are now being pursued with terms of reference that include whether to legislate for a moratorium and whether 'other improvements to schemes of arrangement could be made'),[1] and have come to be seen by policy makers as integral to the design of a best-practice restructuring and insolvency regime. They are currently being introduced throughout the European Union as EU States implement the 2019 EU Directive on Preventive Restructuring Frameworks.[2]

This article considers whether the United Kingdom reforms have been beneficial, drawing on the March 2022 Interim Evaluation Report (**Interim Report**) and the December 2022 Final Evaluation Report (**Final Report**) commissioned by the United Kingdom Government,[3] and whether any adjustments and improvements may be suitable for other jurisdictions seeking to strengthen their own local insolvency systems.

The article will also outline another critical component of establishing an attractive restructuring hub which has long been a feature of the United Kingdom's insolvency system: progressive and flexible cross-border laws and protocols.

Moratorium

Scope of the moratorium

The CIGA introduced a standalone moratorium in Part A1 of the *Insolvency Act 1986* (UK).

The moratorium is intended to facilitate the rescue and restructure of a company as a going concern. It is designed as a standalone pre-formal insolvency moratorium, and does not itself provide for the development and implementation of a formal restructuring plan.

Rather, the moratorium provides a financially distressed company with breathing room from enforcement action and provides it with a payment holiday in relation to most (but not all, as we shall return to consider below) pre-moratorium debts,[4] as it investigates its future in negotiations with creditors. The negotiations may lead to an informal out of court workout, or the company may enter into the new standalone restructuring plan introduced by the CIGA or a scheme of arrangement under the *Companies Act 2006* (UK) or a formal insolvency process such as a company voluntary arrangement or administration. The moratorium will automatically come to an end if the company enters into any of these processes or goes into liquidation.[5]

The moratorium is available to 'eligible companies',[6] a category that excludes certain entities such as banks, insurance companies, electronic money institutions, operators of payment systems, investment banks and investment firms and parties to capital market arrangements. It is a debtor in possession model, under which the company's directors remain in office and can continue to cause the company to trade, but subject to the oversight of a monitor.

Upon an eligible company's directors filing the relevant documents with the court, the moratorium is available for an initial 20 business day period.[7] This period is then capable of being extended by the company's directors for up to a further 20 business days without creditor consent.[8] The moratorium can also be extended so that it applies for a maximum of 12 months (including the initial 20 business day period) with creditor consent,[9] or indefinitely with a court order.[10]

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

The carve-out for financial services

As is well known, the moratorium is subject to a significant carve-out, so that despite restrictions on the *enforcement* of debts, a monitor has a statutory obligation to bring a moratorium to an end by filing a notice with the court if he or she thinks the company is unable to pay 'pre-moratorium debts for which the company does not have a payment holiday' and which have fallen due for payment during the moratorium.[12]

Among the pre-moratorium debts for which a company does not have a payment holiday are debts and liabilities arising under a contract or other instrument involving financial services,[13] which includes loan agreements.

1. These terms of reference are part of the Australian Treasury's consultation on 'improving schemes of arrangement to better support businesses'. Separately, the Parliamentary Joint Committee on Corporations and Financial Services is conducting an inquiry into the 'effectiveness of Australia's corporate insolvency laws in protecting and maximising value for the benefit of all interested parties', including options with reference to 'international approaches and developments'.

2. Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on Preventive Restructuring Frameworks, on Discharge of Debt and Disqualifications, and on Measures to Increase the Efficiency of Procedures Concerning Restructuring, Insolvency and Discharge of Debt.

3. The Interim Report and the Final Report were authored by Professor Peter Walton and Dr Lezelle Jacobs from the University of Wolverhampton. In completing these reports, Professor Walton and Dr Jacobs conducted independent research using a 'mixed methods approach in two stages'. The Interim Report considered data rising from 'a series of semi-structured interviews of various stakeholders', while the Final Report considered further interviews and 'an online survey of the insolvency practitioner profession'.

4. Insolvency Act, Part A1, s A18.

5. Insolvency Act, Part A1, s A16. In addition, the monitor must bring the moratorium to an end pursuant to s. A38 of the Insolvency Act in specified circumstances by filing notice with the court when the monitor 'thinks' that such circumstances exist. In Re Corbin & King Holding Ltd [2022] EWHC 340 (Ch), Sir Alastair Norris adopted the same approach to the interpretation of the word 'thinks' as Snowden J in Davey v Money [2018] EWHC 766 (Ch); the monitor's decision can only be challenged if it is made in bad faith or no

This effectively means that if substantial financiers do not support the moratorium, it will likely need to be terminated so that in reality directors are unlikely to file for a moratorium without the support of such creditors.[14] This feature of the moratorium has proven to be a significant limitation to the flexibility of the moratorium and its ability to result in an effective workout. That outcome was noted in the Final Report, with stakeholder views expressed that the inability of a moratorium to 'prevent a bank from requiring payment of its debt (including accelerated debt)' is 'a major reason why it may be of limited use in practice'. Particular concerns were expressed in relation to SME entities:

> There is a general perception that the moratorium is more likely to be used by SME companies than large companies, and many companies in the SME sector have a single main financial creditor (or a small number of such creditors), often their bank. As the moratorium will not usually prevent the bank from demanding payment of debts due during the moratorium, it is not seen as an effective rescue tool in such cases.

The carve-out for financial services contracts also plainly affects larger enterprises – with the delayed payment of major creditors in a complex and sophisticated financial structure critical to be able to progress restructuring negotiations with a view to the ultimate compromise of the debt.

In considering a best-practice model for other jurisdictions, this is a feature of the moratorium which warrants revision. Removing the carve-out for financial services contracts is likely to provide greater scope for informal workout negotiations, and it would place a distressed entity in the best possible position to preserve its capital and operational structure pending its entry into a formal process such as a scheme or restructuring plan. The company's inability to meet immediate demands for payment of financial obligations from major financiers in the moratorium could deter the directors from filing for a moratorium in the first place or, if they do so, could cause the early termination of the moratorium and the premature end ofrestructuring negotiations.

Monitor disincentives

The Interim Report and the Final Report also drew attention to disincentives for a monitor to accept an appointment under the new moratorium. A key disincentive arises from provisions in Part A1 of the *Insolvency Act* which state that, if a company fails to pay its moratorium debts and pre-moratorium debts for which it does not have a payment holiday during the moratorium as they fall due, then if the company goes into a subsequent formal insolvency process, the unpaid amounts will have super-priority.

As noted in the Interim Report:

> Real concerns were expressed that it would be rare to advise a company to enter into a moratorium … [T]he alteration of priorities in any subsequent administration or liquidation, if the rescue plan is not successful … may have the effect of a subsequent administrator or liquidator not being paid their own fees and expenses … It is therefore the case that a moratorium may not be advisable unless rescue is extremely likely. If a subsequent administration or liquidation is reasonably likely, the altered change in creditor priorities will act as a significant disincentive to use the moratorium.

Additionally, the Final Report identified that there has been a concern among insolvency practitioners about:

> Onerous burdens placed upon a monitor as well as potential criminal penalties for actions taken whilst acting as a monitor. The risks facing an IP acting as a monitor appear more significant than, for example, when acting as an administrator.

As noted by the authors in a previous article,[15] there is indeed considerable doubt over the extent of investigations expected to be performed by a monitor in coming to the view that a moratorium is likely to result in the rescue of a company as a going concern, and in forming a view about the company's ongoing ability to meet its required payment obligations. The short time period for which the moratorium lasts, and the intention for the moratorium to be used to lower costs and expenses, points against protracted investigations, but this is not made clear in the legislation, or in the United Kingdom Government's issued 'Guidance for Monitors'. With the prospect of personal liability for breach of their duties and responsibilities, the regulatory uncertainty is a deterrent to accepting a monitor appointment.

Eligibility issues

Another significant issue with the moratorium is the eligibility criteria for companies to access the enforcement protections. It was noted in the Interim Report and the Final Report that the current drafting effectively means that the moratorium is not available to mid-market or large companies, as it excludes a company which owes a capital market debt of at least £10 million.

Expanded eligibility seems to be a necessary requirement to enhance the prospect of viable entities being able to restructure their affairs. Excluding a substantial part of the market from accessing the enforcement protections lacks any cogent policy rationale.

reasonable monitor could have made the same decision which provides the monitor with considerable discretion on whether to terminate the moratorium and some protection to the monitor.

6. Insolvency Act, Part A1, s A2 and sch ZA1.

7. Insolvency Act, Part A1, s A9.

8. Insolvency Act, Part A1, s A10.

9. Insolvency Act, Part A1, ss A11–A12.

10. Insolvency Act, Part A1, s A13.

11. Insolvency Act, Part A1, s A21.

12. Insolvency Act, Part A1, s A38(1)(d)(ii).

13. Insolvency Act, Part A1, s A18(3)(f).

14. See also the comment of Sir Alastair Norris in Re Corbin & King Holding Ltd (supra) at [14] that the 'exclusion of finance debts from the "payment holiday" effects of a moratorium is somewhat surprising'. Sir Alastair goes on to explain at [16] that the purpose of the exclusion was to encourage continued lending to companies who were struggling. The inclusion of such debts in the payment holiday might have been thought otherwise to be something capable of having disincentivised lenders from continuing their support.

15. Felicity Toube KC, Hilary Stonefrost, Scott Atkins and Kai Luck, 'The UK Rescue Moratorium and the Australian SBR: Independence and Investigation Difficulties for Practitioners', South Square Digest, July 2021, 6.

16. [2021] EWHC 138 (Ch).

Restructuring plan
Design of the restructuring plan

The CIGA introduced a new standalone restructuring plan formal rescue procedure in Part 26A of the *Companies Act*. Unlike the existing limitations of a company voluntary arrangement, which is not binding on secured creditors without their consent, and a scheme of arrangement, which requires the approval of 75% in value and a majority in number of each class of creditors, the new restructuring plan alternative adopts a 'cross class cram down'. Each class is deemed to have voted in favour of the plan if 75% by value of that class approve the plan. Unlike a scheme of arrangement, there is no requirement for a majority in number to vote in favour. Provided at least one class has voted in favour, the court can order the plan to become binding on all dissenting classes if none of the dissenting classes would be any worse off than under the 'relevant alternative' – being what the court considers would be most likely to occur in relation to the company if theplan was not sanctioned.

Overall effectiveness of the restructuring plan

The Final Report highlighted the success of the restructuring plan since its introduction:

> The restructuring plan's cross-class cram down power has been used successfully in cases where previously a scheme on its own would not have been effective. It is seen as a success as it builds on 150 years of scheme case law and familiarity with that case law breeds confidence in users. The restructuring plan is not seen as a completely new process but is based upon a tried and tested process, with some additional provisions.

DeepOcean[16] provided the first opportunity for the English High Court to consider a restructuring plan where the cross-class cram down was being used to bind dissenting unsecured creditors of one of the United Kingdom subsidiaries of the DeepOcean Group. Trower J made an order effecting the cross-class cram down despite only 64.6% of unsecured creditors voting in favour of the plan, on the basis that the unsecured creditors had not provided evidence they would be 'worse off' in the event of the 'relevant alternative' to the plan – in this case liquidation. There was also no reason for the Court to exercise its discretion to refuse to sanction the restructuring plan on the basis that it was not just and equitable. Relevantly, Trower J identified the material considerations in exercising that discretion, which will be helpful in guiding courts in future cases: the overall support for the restructuring plan across all creditor classes; whether the dissenting class is fairly represented (with a reasonable turnout and no procedural barriers to engagement at a creditors' meeting); the existence of any collateral interests that influenced voting; and the relative treatment of creditors in different classes (giving rise to questions of 'horizontal comparability').

While *DeepOcean* was a straightforward case, and did not need to canvass complex issues involving class composition and contested 'relevant alternative' scenarios, it did still demonstrate the benefit of the new restructuring plan process in the United Kingdom, and the potential for the cross-class cram down to be used to achieve a positive restructuring outcome involving multiple entities within a corporate group in the interests of multiple stakeholders. This outcome would not have been possible prior to the CIGA reforms. There have been a number of cases where the cross-class cram down has been exercised since *DeepOcean*, and even more where the possibility of cross-class cram down has led to compromises.

Broader restructuring ecosystem

In addition to noting the utility of the the substantive cross-class cram down provisions and the confidence engendered by the fact that the restructuring plans were built on 150 years of case law on schemes of arrangement, the Interim Report and the Final Report noted the importance of the 'high quality of United Kingdom judges adjudicating on restructuring plans' as being critical to the success of restructuring plans since their introduction.

This is significant for other jurisdictions considering the adoption of the United Kingdom reforms in an effort to strengthen their own local restructuring processes. Replication of the United Kingdom's success is not a simple matter of implementing identical laws. Rather, there is a need to build a stronger restructuring ecosystem on a broader level, with institutional capability and expertise to interpret, apply and administer complex laws and factual circumstances.

The importance of creating a 'restructuring friendly ecosystem' for a jurisdiction to serve as an attractive restructuring hub was noted in the expert report commissioned by the Singapore Government in 2016 (**Singapore Report**), which served as the basis for Singapore's progressive law reforms in 2017 that have seen Singapore since become one of the world's leading restructuring hubs.

Apart from a skilled judiciary, the Singapore Report also identified the need to focus on 'strengthening the skills of insolvency professionals', which could be effected through 'education, continuing professional development and multi-disciplinary training, to grow this pool and deepen expertise in handling complex cross-border restructuring work'.[17]

As the World Bank has identified, '[e]xpert practitioners, judges and regulators are key to the success of a well-designed insolvency legislation'.[18]

Singapore has had great success in expanding and strengthening its restructuring ecosystem in recent years. A particularly positive recent innovation has been the establishment of the Singapore International Commercial Court (**SICC**), and the commencement of the Amended SICC Rules in September 2022, which enable the SICC to exercise jurisdiction in applications for recognition and ancillary relief under the UNCITRAL Model Law on Cross-Broder Insolvency (**MLCBI**). The Amended Rules also provide for the SICC to make orders for substantive relief where a foreign company has a 'substantial connection' with Singapore, and they empower the SICC to order flexible and wide-ranging relief that will drive proactive restructuring outcomes.

Additionally, Judge Sontchi commenced his term as a Judge of the SICC on 4 July 2022. Bringing 16 years of experience as a Judge (and most recently Chief Judge) of the US Bankruptcy Court for the District of Delaware, Judge Sontchi's appointment strengthens the institutional framework that is the foundation for Singapore's appeal as a practical, forward-thinking restructuring hub.

Institutional capacity and capability of this kind ought to be a key focus point for other jurisdictions in building more flexible restructuring processes that appeal to local and foreign creditors and are capable of sustaining positive restructuring outcomes.

Possible improvements

The Interim Report and the Final Report highlighted concerns among practitioners that restructuring plans are seen as too costly and time-consuming for use in the small and medium sized enterprise (SME) market.

It was only in July 2022 that the first judgment was delivered in the United Kingdom approving a restructuring plan for a SME (*Re Houst Limited*).[19]

The *Houst* decision shows the potential for courts to take a pragmatic view of the valuation evidence required to support a restructuring plan in the case of a small business – so that the detailed evidence required for larger entities may not be required to the same degree for smaller entities, in light of their simpler affairs and limited resources. This opens the door for SMEs to use the restructuring plan as a viable restructuring tool – without the burden of unrealistic costs and delays.

There may also be cost savings as clearer jurisprudence emerges on the cross-class cram down (so that proceedings become less complicated), and via other measures being explored by R3, the UK Association of Business Recovery Professionals, which is seeking to create examples of restructuring plans dealing with smaller businesses. It might even be feasible, in straightforward cases, for the convening stage of

17. Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring, 20 April 2016, 4.

18. World Bank, 'World Development Report 2022 – Chapter 3: Restructuring Firm and Household Debt', 130.

19. [2022] EWCH 1941.

the restructuring plan to be dealt with on papers, therefore avoiding the need for a convening hearing. A court hearing would only then be needed for the sanction stage.

The United Kingdom has a long history of requiring creditors to approve debt arrangements by (at least) a 75% majority in value. Other jurisdictions may see some comparative advantage in reducing such a majority to either a two-thirds or simple majority. Although this issue was touched on in the Interim Report and Final Report, there was no clear consensus for change among the surveyed insolvency profession.

For other jurisdictions, these are important lessons. It is noted that ensuring greater access to flexible restructuring processes for SMEs is a key recommendation of the World Bank in its Principles for Effective Insolvency and Creditor/Debtor Regimes, and UNCITRAL in its Legislative Guide on Insolvency Law for Micro and Small Enterprises. As the World Bank notes:

> SMEs represent over 60% of private sector employment globally and need efficient, cost-effective and nimble [insolvency] systems in order to successfully restructure or exit the market. As SMEs fall into financial difficulty, many face unique challenges dictated by their small size. [Insolvency systems] that do not recognise these challenges, and that are too costly or bureaucratic, make it difficult, if not impossible, for small businesses to use either out of court workouts or more formal tools to reorganise.[20]

Cross-border processes

While flexible substantive restructuring processes are important as a component of a well-functioning economy and financial system, a jurisdiction's appeal as a global restructuring hub also ultimately depends on having in place an effective cross-border insolvency system.

As noted in the MLCBI Guide to Enactment and Interpretation, the absence of a consistent, predictable cross-border insolvency system not only 'results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses' but can also 'impede capital flow and be a disincentive to cross-border investment'.[21]

The United Kingdom implemented the MLCBI in the form of the Cross-Border Insolvency Regulations 2006. The United Kingdom has since become known as one of most forward-thinking jurisdictions in facilitating cross-border cooperation. That said, the United Kingdom continues to apply the so-called rule in *Gibbs*,[22] and this has been argued by some to be capable of undermining the application of modified universalism – the underlying policy aim of modern cross-border insolvency systems.[23]

Under to the rule in *Gibbs*, a foreign insolvency process is unable to extinguish or modify a debt owed by the insolvent debtor to a creditor if the debt is governed by English law, unless the creditor voluntarily submits to the jurisdiction in which the foreign proceeding is taking place. The practical effect of the rule is that a foreign restructuring plan that purports to compromise all debts owed by the debtor on a worldwide basis is incapable of binding creditors whose debts are governed by English law and who do not agree to the restructuring plan. This is not an issue that is dealt with in the MLCBI, which does not expressly require courts to recognise a foreign insolvency *judgment*, as distinct from a foreign insolvency *process*.

Other jurisdictions have taken a more expansive approach. For example, in the United States, Judge Glenn held in *Re Agrokor*:

> The basic rationale... in *Gibbs* – that parties' consensual, contractual decisions should determine the choice of law of all future legal interactions – is inappropriate when applied in the context of insolvency or bankruptcy proceedings, which inherently involve a societal choice to allow collective proceedings to discharge previously existing contractual obligations.[24]

In Singapore, Justice Ramesh in Re Pacific Andes Resources Development Limited concurred, noting:

> [A]s bankruptcy law is not and cannot be a consensual matter, the fact that the parties to a contract did not choose the bankruptcy law of a country to discharge contractual obligations is neither here nor there.[25]

Justice Ramesh proposed an alternative solution so that:

> If one of the parties to the contract is the subject of insolvency proceedings in a jurisdiction with which he has an established connection based on residence or ties of business, it should be recognised that the possibility of such proceedings must enter into the parties' reasonable expectations in entering their relationship, and as such may furnish a ground for the discharge to take effect under the applicable law.[26]

For jurisdictions seeking to enhance their appeal as a restructuring hub, this is something to which it is worth paying close attention. Application of the rule in *Gibbs* might deter a jurisdiction's ability to serve as a 'lead' restructuring centre for multi-jurisdictional matters because it would (or at least might) require the costly use of parallel insolvency processes in several jurisdictions rather than being able to use a single restructuring process capable of being recognised in jurisdictions in which the debtor conducts business or in which creditors are located.[27]

20. World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes', April 2021, Foreword.

21. MLCBI Guide to Enactment and Interpretation, 20-21.

22. Anthony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) 25QBD 399.

23. There have been changes to the cross-border and restructuring regime in the United Kingdom and Europe as a consequence of Brexit, which mean that recognition of United Kingdom proceedings and judgments in the EU is now less straightforward. The impact of Brexit on UK-EU cross-border restructuring is beyond the scope of this article.

24. 591 BR 163 (Bankr SDNY 2018), 195.

25. [2016] SGHC 210, [47], citing with approval Look Chan Ho, Cross-Border Insolvency: Principles and Practice (Sweet & Maxwell, 2016).

26. Idem, [48].

27. The case of *Re Hong Kong Airlines Ltd* [2022] EWHC 3210 (Ch) involved an English restructuring plan which also required a Hong Kong scheme of arrangement as Hong Kong also applies the rule in Gibbs.

The 'next frontiers' in the cross-border insolvency space are now the adoption and implementation of not just the MLCBI, but also the two new Model Laws on the Recognition and Enforcement of Insolvency-Related Judgments (**MLIRJ**) and the Model Law on Enterprise Group Insolvency (**MLEGI**).

If implemented strictly on its terms, the MLIRJ would abrogate the rule in *Gibbs* pursuant to article 13, which requires an insolvency-related judgment to be recognised and enforced in other jurisdictions, subject to a similar public policy exception that applies under the MLCBI.

The MLEGI is also important in dealing with the complex circumstances of corporate group insolvencies involving assets, debtors and creditors in multiple jurisdictions, currently beyond the scope of the MLCBI. The key feature of the MLEGI is the concept of a 'planning proceeding' involving multiple entities under the coordination of a single 'group representative'.

The United Kingdom Government is currently proposing to adopt the MLIRJ and the MLEGI, albeit in a manner which would give courts the ongoing ability to apply the rule in *Gibbs*. It is yet to be seen how this will work out in practice.

Modernising cross-border insolvency regulations and protocols, and being seen as a progressive, collaborative and outward facing jurisdiction in facilitating cross-border recognition and harmonisation, is an important policy focus for jurisdictions seeking to strengthen their restructuring processes and build their capability as regional restructuring hubs – just as much as the implementation of substantive laws such as the CIGA moratorium and restructuring plan.

Concluding remarks

The reform process undertaken by the United Kingdom in 2020 – providing for more flexible restructuring options including a standalone enforcement moratorium and a standalone restructuring plan – was important in strengthening the United Kingdom's broader economic and financial systems, and also in laying the foundation for the United Kingdom to remain as an international restructuring hub of choice.

These reforms serve as a useful model for other jurisdictions currently contemplating improvements to their own restructuring and insolvency processes. Nevertheless, certain modifications could be considered in developing a best practice framework for replication in other jurisdictions.

For the moratorium, these include broader eligibility criteria, so that the moratorium can be used by larger enterprises as well as small to mid-sized entities, as well as removing the carve-out which allows financial creditors to insist on being paid their debts as a condition for the moratorium to continue, and ensuring greater incentives for practitioners to accept appointments as monitors.

For the restructuring plan, streamlined court processes and lesser evidentiary requirements could make a restructuring plan a cost effective and viable option for SMEs as a rescue tool.

At the same time, investing in institutional capacity – with a system of specialised insolvency courts and experienced judges and practitioners – is critical to ensure flexible restructuring processes are capable of interpretation, application and administration in a practical and commercial manner.

Further, while substantive insolvency processes are important, to enhance their appeal as optimal restructuring destinations, jurisdictions need to put in place progressive cross-border insolvency regimes which advance cooperation, coordination, recognition and harmonisation. Particular priority focus points are the adoption and implementation of the MLCBI, the MLIRJ and the MLEGI.

This combination of flexible substantive restructuring processes and progressive cross-border protocols can play a key role in jurisdictions achieving economic and financial stability and long-term investment, innovation, productivity and growth. ■

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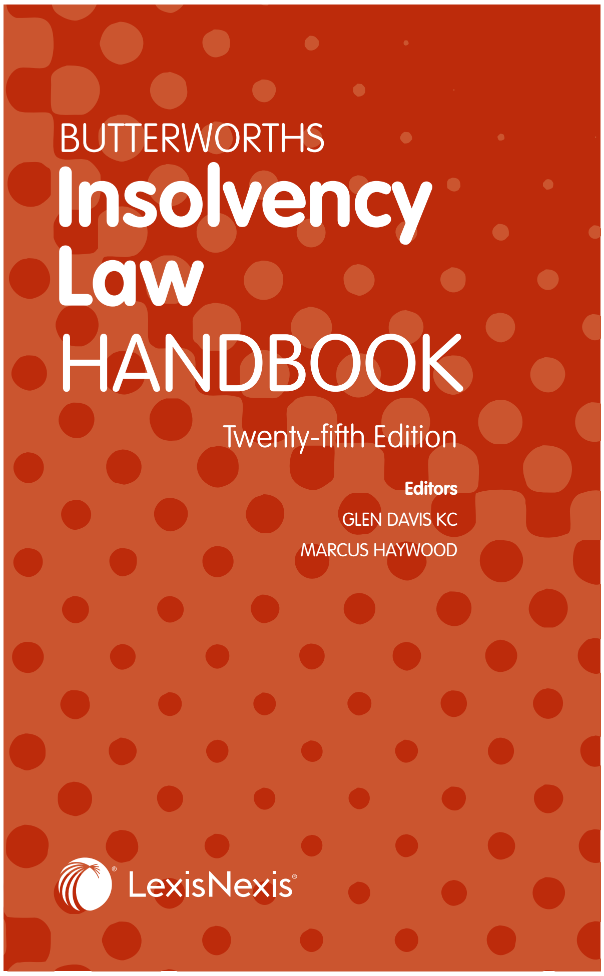

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Provisional Attachment: A useful debt enforcement tool for Creditors

Introduction

One of the unsettling questions that lingers in the minds of creditors is how to secure debts owed to them pending litigation. Mauritian courts have embraced the mechanism of Provisional Attachment[1], also known as "saisie arrêt", which provides the creditor with a tool to secure its assets without the need of protracted court battles. Whilst the traditional procedure to ensure that the creditor recovers his money is by way of a Plaint, which is time consuming, Mauritian courts offer the alternative of recovering those monies more expeditiously by way of an ex parte application for a Provisional Attachment before a Judge in Chambers in some cases.

This article explores the mechanism by which a creditor may attempt to secure debts owed to it through a Provisional Attachment Order in Mauritius.

Attaching an asset in the hands of a third party

An application for a Provisional Attachment is a mechanism established and embraced by the Supreme Court of Mauritius whereby a creditor —the applicant— may have recourse to the intervention of the Judge in Chambers to secure the debt owed to him by a debtor. In effect, the creditor seeks from the Judge in Chambers an order prohibiting a third party, also known as "the garnishee", from disposing of what he owes to the debtor. In simpler terms, if someone (the garnishee) owes the debtor money, a Provisional Attachment will allow the creditor to ask the Judge in Chambers to have it paid to the creditor instead. Therefore, an application for a Provisional Attachment is one where the creditor seeks leave from the Judge in Chamber to attach into the hands of the garnishee all monies or property due, in respect of the rights by the garnishee, to the

1. *Legal professionals often refer to Provisional Attachment as an "Interim Attachment Order". These two terms are used interchangeably but the principles and procedure remain the same.*

debtor or all sums of money which may accrue or thereafter accrue on the account belonging to the debtor.

Note 7 of the Jurisprudence Générale, Tome 39eme defines "saisie arrêt" in the following terms:

"La saisie-arrêt a le caractère d'un acte conservatoire et d'un acte d'exécution. C'est un acte conservatoire, parce que le créancier qui forme une saisie-arrêt met sous la main de la justice les choses arrêtées,et empêche que le saisi et le tiers saisi puissent en disposer à son préjudice. C'est un acte d'exécution, parce que le résultat définitif de la saisie-arrêt, pour le saisissant, c'est d'obtenir, après jugement, d'être rempli de ce qui lui est dû par le versement, entre les mains, des deniers ou du prix de la vente des effets saisie-arrêtés: tel est le caractère mixte de la saisie-arrêt."[2]

2. *As a reminder, Mauritius has a hybrid legal system, with principles from both civil and common law. Its procedural law derives mainly from the English legal system whilst its substantive law derives mostly from the French Napoleonic Code.*

The Note describes a Provisional Attachment Order to be of a mixed nature, since it is a conservative measure, but which can be executed into a final recovery; whilst it is a conservative measure because the garnishee is essentially prevented from disposing of the seized assets, it can be executed because the end result of the order is for the creditor to obtain the debt owed to him by payment or by sale of the seized assets.

It is without doubt that these applications are not granted as a matter of course. The creditor has the duty to ascertain certain essential elements in order to be granted the application, as has been clearly established under a string of authorities, one of which is ***Bomeubles & Cie Ltee v Banks 2015 SCJ 283***, which provides that the creditor must show that the debt ("*créance*") owed:

i. is certain, of a fixed amount, and due ("*certaine, liquide, et exigible*"); or

ii. otherwise appears to be valid in principle ("*parait fondée en son principe*"). The court explained that what the creditor must show is not that the debt is certain in principle, but rather that the debt is valid in principle, i.e., the genuineness of the debt.

Therefore, any creditor contemplating a Provisional Attachment application must ensure that his debt is one which is either certain, of a fixed amount, and due or one which otherwise appears to be valid in principle.

The Procedural Aspect

Article 557 of the Civil Procedure Code empowers a creditor to institute a Provisional Attachment order under the following terms:

"Tout créancier peut, en vertu de titres authentiques ou privés, saisir-arrêter entre les mains d'un tiers les sommes et effets appartenant à son débiteur, ou s'opposer à leur remise."

The above states that any creditor may, by virtue of authentic or private deeds, attach into the hands of the garnishee the sums of money or assets belonging to the debtor or prevent the garnishee from disposing of them.

The procedure to be adopted has been laid down in the leading case of ***MCB v Sibartie Fils et Compagnie & Sibartie 1988 MR 66***, which was recently reaffirmed by the Mauritian Court of Civil Appeal in ***Mauritius Duty Free Paradise Co. Ltd v The Mauritius Commercial Bank Ltd & Anor 2022 SCJ 42***.

The steps involved are:

(a) action to secure the debt in the hands of the garnishee;

(b) action against the debtor;

(c) action against garnishee; and

(d) the final step in the process of a Provisional Attachment ("saisie-arrêt").

STEP A: Action to secure the debt in the hands of the garnishee

The action is made by the seizing creditor and is directed against the garnishee. At this stage, two events may occur –

i. if the debt is based on an executory title, an extra-judicial notice is served on the garnishee prohibiting the latter from disposing of the asset of the debtor which it is holding; or

ii. if the debt is not based on an executory title, an application is made to the Judge in Chambers by way of an *ex parte* application, seeking leave to attach an asset (owed by the debtor to the seizing creditor) in the hands of the garnishee. In these circumstances, the Judge has two options –

(a) granting leave on being satisfied that the debt is certain, fixed and due ("*la créance est certaine, déterminée et exigible*"); or

(b) not granting leave if the debt is not certain, fixed or due ("créance" is not "certaine, déterminée et exigible").

STEP B: Action against the debtor

The second step is between the seizing creditor and the debtor only and is made up of two conditions, namely;

i. attachment process ("instance en validité"); and

ii. validation of the Provisional Attachment order ("assignation en validité") which has to be satisfied within a delay of 8 days from Step A above.

I. Attachment process ("Instance en validité")

(a) Within a delay of 8 days from the service of the notice in Step A (i) above and where the debt is based on an executory title, the seizing creditor causes a notice to be issued that the attachment process, that is, "instance en validité" made on the garnishee, is "dénoncée", i.e, served on the debtor; or

(b) Within a delay of 8 days from the grant of leave by the Judge in Chambers to attach the relevant asset in the hands of the garnishee as referred to in Step A (ii) above, the seizing creditor causes that order to be "dénoncée", i.e, served on the debtor.

II. Validation of the Provisional Attachment order ("Assignation en validité")

Within 8 days of the service of the notice or order of the Judge in Chambers granting leave as referred to in Step A above, the seizing creditor enters an inter partes application before the Judge in Chambers by praecipe and affidavit for an order, summoning the debtor within a delay of 8 days, to show cause why the attachment process ("instance en validité" (Step B (I) above) should not be held good and valid.

The Judge in Chambers has two options –

(a) to validate the said attachment process if the debtor has failed to raise an objection of form or substance ("de forme ou de fond"); or

(b) if the debtor has succeeded in raising an objection of form or substance ("de forme ou de fond"), the Judge may –

i. order a cancellation ("main levée") of the seizure; or

ii. order a reduction of the amount attached, which is known as "cantonnement"; or

iii. refer the parties (i.e. the debtor and the seizing creditor) to the competent Court under section 71(2) of the Courts Act 1945.

If the attachment process ("instance en validité") (Step B(I)) is held good and valid by the Judge in Chambers, the attachment proceedings continue and move to Step C if the event of Step B (II) (a) has occurred.

STEP C: Action against garnishee

The action is directed against the garnishee before the Judge in Chambers. The garnishee is informed of the request made to the Judge in Chambers in Step B above and two events can occur –

(a) if there is an executory title, the seizing creditor asks the Judge in Chambers for an order to summon the garnishee to make a declaration as to what is the sum owed to the debtor; or

(b) if there is no executory title, the seizing creditor must first obtain a "jugement en validité" before the appropriate forum, declaring that the debt is certain, fixed and due, so that the garnishee can be summoned to make a declaration as to what is the sum owed to the debtor.

On the basis of either Step C (a) or Step C (b) occurring, the seizing creditor then applies *ex parte* before the Judge in Chambers against the garnishee for the latter to make an affirmative declaration.

The garnishee will then be ordered by the Judge in Chambers to make the said affirmative declaration at the registry of the Supreme Court within a delay of 8 days as from the date of the order for such affirmative declaration to be made. The affirmative declaration is made by way of an affidavit and documents in support which are deposited at the registry.

STEP D: The final step in the process of a Provisional Attachment ("saisie- arrêt")

i. Where the garnishee makes an affirmative declaration, the seizing creditor may apply *ex parte* to the Judge in Chambers for an order that the asset attached in the hands of the garnishee be vested/paid to him; or

ii. Where the garnishee comes with proof that there is no such asset to satisfy the debt, the whole process of the "saisie arrêt" comes to an end; or

iii. Where the garnishee does not comply with the order for an affirmative declaration or simply makes no affirmative declaration or makes the affirmative declaration without justification, the whole process converts into a legal dispute before a competent Court. The garnishee becomes a defendant in a plaint with summons wherein the seizing creditor will seek a judgment declaring the garnishee to be a "débiteur pur et simple des causes de la saisie" and for a judgment against the garnishee to pay the said sum.

The hurdles that an Applicant ought to be cautious about

1. *Failure to serve the validation of the Provisional Attachment order ("assignation en validité" – Step B (II)) within 8 days*

The prescribed 8 days' delay to serve the validation of the Provisional Attachment order ("assignation en validité") is a mandatory requirement which ought to be complied with, failing which, the attachment proceeding shall be rendered null and void. This has been clearly established under the authority of ***Amanzi Telecommunication Ltd v Generator Logic (Mauritius) Limited 2014 SCJ 248*** where the Learned Judge held that the prescribed delay for service on the respondent should be within the prescribed delay of 8 days from the date of service of the '*exploit*' and that failure to serve the validation of the Provisional Attachment order ("*assignation en validité*") within the 8-day period renders the attachment null and void.

2. *Claim for damages where the debt is uncertain or doubtful ("incertaine ou douteuse")*

As mentioned above, it is a mandatory requirement that the debt be one which is certain, of a fixed amount, and due ("*certaine, liquide et éxigible*"). However, what is of interest here is that where such debt is uncertain or doubtful ("*incertaine ou douteuse*") this may give rise to a claim in damages. This has been made clear in ***Dalloz Repertoire Pratique*** *(supra)* under Note 84 which specifically sets out the above-mentioned principle:

"*La saisie arrêt pratiquée en partie pour une créance contestée est incertaine et nulle, et donne lieu à des dommages intérêts. A plus forte raison ne peut on pas faire une saisie arrêt en vertu d'une créance douteuse, car cette créance est par cela même incertaine. Dans ces circonstances, la saisie arrêt doit être annulée. Une créance contestée ne peut pas faire l'objet d'une saisie valable.*"

3. *Failure to seek leave of the Court where the debt does not rest on an executory title*

By virtue of Article 551 of the Civil Procedure Code, the seizing creditor must hold an executory title ("*titre éxécutoire*") in respect of a debt qualified as being certain, of a fixed amount, and due ("*certaine, liquid et exigible*") or which otherwise appears to be valid in principle ("*parait fondée en son principe*"). Therefore, as rightly pointed out in ***MCB v Sibartie Fils et Compagnie & Sibartie 1988 MR 66***, "*whenever the créance (debt) of a seizing creditor against the saisi (garnishee) does not rest on an executory title, a judge's order must be obtained before the usher can validly effect the attachment.*"

Conclusion

Recently, the Courts have been dealing with an increased number of applications for Provisional Attachment Orders, as creditors seem to have realised that this is a sophisticated tool which allows them to preserve assets pending the determination of their main dispute. An application for a Provisional Attachment is indeed a useful debt enforcement tool, which essentially allows a creditor to bypass the debtor and go to a third party to obtain payment of a debt owed to the creditor. It removes the reliance upon the debtor to pay off the debt.

Although prospective litigants may have recourse to other means of relief, e.g. by way of traditional plaint or a summary remedy such as injunction, these measures do not come without downsides. In that regard, Provisional Attachments seem to yield more comfort to creditors when it comes to securing debts owed to them.

Note: Translations of the material into English are intended solely as a convenience to the non-French- reading public. Appleby has attempted to provide a translation of the original material into English, but due to nuances in translating, slight differences may exist. Always refer to the original texts.

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A. CJEU, decision from 28 April 2022 – C-237/20 – Federatie Nederlandse Vakbeweging (better known as 'Heiploeg')

This case deals with an issue which the European Commission viewed as sufficiently important to propose harmonised rules for all member states (cf. below sub D) – a pre-pack sale of the debtor's undertaking (or its viable parts); i.ethe insolvency of an undertaking is preceded by a preparatory phase during which the detailed negotiations take place for the sale of the undertaking (or parts of it). The Commission could take into account what the CJEU decided in this case, Heiploeg, as well as in a previous one (C-126/16 – 'Smallsteps'); both were governed by Dutch law.

Whilst, from an insolvency law stance, a pre-pack sale may make a great deal of sense due to the higher purchase price for a quick transfer, tensions may emerge with regard to labour law when such sale is combined with a reduction of the work force. In such instances the protective shield of the EU Directive 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses may possibly be infringed. This was precisely the issue in both Smallsteps and Heiploeg.

The Directive addresses this tension and provides for it in art. 5 in the following way:

1. *Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency practitioner authorised by a competent public authority). ….*

Accordingly, the working place protection is suspended when and if the said requirements are fulfilled. The decision in *Smallsteps* rejected the applicability of the exception because the debtor undertaking was not supposed to undergo a liquidation but rather a reorganisation. In Heiploeg, the the issues which arose were whether (1) Dutch law complies with the requirements of an instituted bankruptcy (or analogous) proceeding and (2) whether it has been performed under the supervision of a competent public authority?

The facts of the case are the following:[1] The Heiploeg group ('Heiploeg-former') consisted of several companies engaged in the wholesale trade in fish and seafood. In 2011 and 2012, Heiploeg-former suffered significant financial losses and, in 2013, a fine of EUR 27 million was imposed on four companies in that group for having participated in a cartel. Since no bank agreed to finance the payment of that fine, a *pre-pack* procedure was initiated.

In Dutch law, the pre-pack is a practice derived from case-law which is intended to enable, in the insolvency proceedings, a liquidation of the undertaking as a going concern which satisfies to the greatest extent possible the claims of all the creditors and preserves employment as far as possible. The sales transactions organised in the context of that procedure, in respect of all or part of the undertaking, are prepared by a 'prospective insolvency administrator', whose tasks are determined by the competent court which appoints him or her and by the instructions given by that court or by the 'prospective supervisory judge' appointed by that court for that purpose and who supervises the 'prospective insolvency administrator'. In the event of subsequent insolvency proceedings, that court reviews whether those persons followed all of the instructions given to them and, if not, appoints other persons as 'insolvency administrator' and 'supervisory judge' when the insolvency is declared.

In that context, in January 2014, in response to a request from Heiploeg-former, the competent court appointed two 'prospective insolvency administrators' and a 'prospective supervisory judge'. In the same month, Heiploeg-former was declared insolvent and those same persons were appointed as insolvency administrators and supervisory judge, respectively.

Two Netherlands companies ('Heiploeg-new'), which had been identified before commencement and with whom negotiations had taken place entered in the commercial register on 21 January 2014, took over most of Heiploeg-former's business on the basis of an asset transfer agreement. In accordance with that agreement, Heiploeg-new took over the contracts of employment of approximately two-thirds of Heiploeg-former's employees for the purpose of carrying out the same work, but under less favourable employment conditions.

The Federatie Nederlandse Vakbeweging (Netherlands Federation of Trade Unions; 'the FNV') lodged an appeal against the judgment declaring Heiploeg-former insolvent. That appeal was dismissed on the ground that that insolvency had become inevitable and therefore a derogation from the safeguarding of employees' rights in the event of transfers of undertakings was applicable in the present case. Consequently, Heiploeg-new was not bound by the working and employment conditions applicable before the transfer.

In accordance with Directive 2001/23, which is aimed at protecting employees, in particular by ensuring that their rights are safeguarded in the event of a transfer of an undertaking, three conditions must be satisfied in order for that derogation to be applicable:

- the transferor must be the subject of bankruptcy proceedings or any analogous insolvency proceedings;
- those proceedings must have been instituted with a view to the liquidation of the assets of the transferor; and
- they must be under the supervision of a competent public authority (or an insolvency practitioner authorised by a competent public authority).

The FNV brought an appeal on a point of law before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), submitting that, on the contrary, derogation was not applicable in the case of a pre-pack procedure and that, accordingly, the employment conditions of the staff which were taken over should be maintained.

Ruling on a request for a preliminary ruling from that court, the Luxembourg Court of Justice held that, in the event of a transfer prepared in a pre-pack procedure, such as that at issue in the main proceedings, and provided that that procedure is governed by statutory or regulatory provisions, the transferee is – in principle – entitled to derogate from the obligation to safeguard employees' rights. That "in principle" indicates that the FNV was successful with its claim to have the work force protection applied in the *Heiploeg* case.

In more detail:

The Court noted, first, as regards the condition concerning the institution of bankruptcy proceedings or any analogous insolvency proceedings with a view to the liquidation of the assets of the transferor, that, in the present case (and unlike the facts of the *Smallsteps* decision), the insolvency of the transferor was inevitable and both the insolvency proceedings and the preceding pre-pack procedure were aimed at liquidating the assets of the transferor, which was declared insolvent.

1. Mostly taken from https://curia.europa.eu/juris/document/document

Moreover, the transfer of the undertaking was carried out during those insolvency proceedings.

The objective of the derogation from the obligation to safeguard employees' rights is to eliminate the serious risk of a deterioration of the value of the transferred undertaking or in the living and working conditions of workers, whereas the objective of a pre-pack procedure followed by insolvency proceedings is to secure the greatest possible reimbursement of all creditors and to safeguard employment as far as possible. The Court added that the aim of the use of a pre-pack procedure, for the purposes of liquidating a company, is to increase the chances of satisfying the creditors' claims. Consequently, the pre-pack procedure and insolvency proceedings, taken together, may be regarded as being aimed at the liquidation of the undertaking for the purposes of Article 5(1) of Directive 2001/23, provided that that pre-pack procedure is governed by statutory or regulatory provisions in order to meet the requirement of legal certainty.

Secondly, the Court noted that the pre-pack procedure at issue in the main proceedings may be regarded as having been carried out under the supervision of a competent public authority, as required by Article 5 of Directive 2001/23, provided that that procedure is governed by statutory and regulatory provisions. The 'prospective insolvency administrator' and the 'prospective supervisory judge' are appointed by the competent court for the pre-pack procedure, which determines their duties and reviews the exercise of those duties when the insolvency proceedings are subsequently opened, in deciding whether or not to appoint the same persons as insolvency administrator and supervisory judge.

Furthermore, the transfer prepared during the pre-pack procedure is not carried out until after the opening of the insolvency proceedings, since the insolvency administrator and the supervisory judge may refuse to carry out that transfer if they consider that it is contrary to the interests of the transferor's creditors. In addition, the 'prospective insolvency administrator' must not only account for his or her management of the preparatory phase in the insolvency report, he or she may also be held liable under the same conditions as the insolvency administrator.

However, since the rules on the Dutch pre-pack proceeding are so far still formed by case-law and since these rules are therefore not applied uniformly in all Dutch court districts, the CJEU concluded that this kind of shaky ground cannot be regarded as providing a sufficiently predictable legal framework and thus does not fulfill the requirement of legal certainty.

For a reader from the common law-system this reasoning must appear something of a shocker, but also for someone from the continental codification system it is astonishing (to put it mildly) to learn that legal certainty is guaranteed only once the rules have been enshrined in a legislative product such as a statute or codification. It is not only that wide areas of trade, tax, or labour law are based on

2. EU:C:2022:356.

3. Cf. in particular judgment of 5 November 2014, *Tümer*, C 311/13, EU:C:2014:2337.

4. Cf. judgment of 11 September 2003, *Walcher*, C 201/01, EU:C:2003:450.

mere rules and modes of interpretation, but it is also daily experience and practice that even with regard to a statutory provision different applications of the very same rule come to different – more often than not even diametrically opposed – results. It is under these conditions hard to see what idealistic concept of legal certainty the Luxembourg judges might envision.

B. CJEU, decision from 5 May 2022, C-101/21 – HJ

This case from the Czech Republic[2] is about labour law and insolvency and touches accordingly delicate issues in the often vexed interrelationship of both fields of law.

In the case at hand, the applicant, an architect, was hired in 2010 by a trading company 'AA' on basis of an employment contract. Seven year later, in September 2017, he was promoted to the position of chairman of the management board (CEO) of this company. The respective contract contained the clause that the applicant was not entitled to remuneration for the performance of that function. Later on, an addendum to his original contract clarified that, irrespective of the gratuitous work as CEO, his salary as an employee was still to be paid.

AA became insolvent in 2018 and the applicant submitted an application for payment of his remuneration for the months July to September 2018 to the Prague Labour Office. This application was rejected on the ground that under the respective Czech law (No. 118/2000) he did not qualify as employee. The Ministry of Labour and Social Affairs to which the applicant's complaint was lodged confirmed the original decision and added as reason that in the said three months he had performed his duties exclusively in his position as CEO rather than as employee. The Prague City Court dismissed the action on more or less the same reasoning. Upon lodging thereafter an appeal to the Supreme Administrative Court, the issue was referred from there to the Luxembourg CJEU.

The Czech Court saw itself confronted with the following dilemma which is heavily debated – particularly among the Supreme Court and the Constitutional Court. It is accepted that a contract of employment entered into between a trading company and a person, which provides that that person is to perform concurrently the functions of a member of a statutory body and CEO of that company, is valid under Labour Code. The Court wished to know, however, what followed from law No 118/2000 which specifically denies a person in such position the qualification as employee because there is no such thing as a subordination relationship? Since law 118/2000 is the transposing law of Directive 2008/94 on the protection of employees in the event of the insolvency of their employer, the referring Court submitted the following question:

'Does Article 2 of Directive [2008/94], in conjunction with Article 12(a) and (c) thereof, preclude national case-law according to which a CEO of a trading company is not deemed to be an "employee" for the purpose of the satisfaction of pay claims pursuant to Directive [2008/94], for the sole reason that the CEO as an employee is, at the same time, a member of the statutory body of the same trading company?'

The CJEU began its consideration with a reference to art. 1 of the Directive 2008/94 which permits domestic exceptions of this Directive when and if employees are either employed by natural persons or if the respective category of employees is otherwise protected. Neither one of these exceptions are applicable in the case at hand. The Court then turns to art. 2(2) which states with regard to the definition of the term 'employee' that, generally speaking, it shall be left to the national legislator. But –the Court quickly added – this freedom of definition is not without limitation irrespective of the statutory wording. Based on previous decisions,[3] it is above all the social purpose which has to be taken into account and which consists in guaranteeing any employee "*a minimum protection at EU level in the event of the employer's insolvency*". The Court concluded that it is contrary to the social objective to deny the pecuniary protection to a person whom national law qualifies as employer in all other respects but for the payment of the insolvency protection.

Accordingly, the correct understanding of art. 2(2) of the Directive 2008/94 precludes the Czech law approach to deny insolvency protection to an employee who exercises the double function of employee and CEO.

The CJEU did not stop here but continued to discuss the relevance of art. 12 of the Directive. Its first paragraph (a) allows measures against abuse of the particular insolvency protection of this Directive. Establishing an exception, though, it shall be interpreted narrowly and, even then, regard is to be given to the social purpose of the Directive. Moreover, the Court referred to its previous clarification of what should be understood by the term 'abuse':[4] it refers to practices that adversely affect the the guarantee institutions by, for example, artificially giving rise to a salary claim and thereby illegally triggering a payment obligation on the part of that institution. This is the kind of abuse that art. 12(a) has in mind pursuant to the CJEU. It is also said to be in line with the underlying reasoning of the Czech rule in its law No 118/2000 which is designed to prevent employee protection for the very person who might – in his position as CEO – be responsible for the company's failure. However, what the CJEU declares as unacceptable is that the Czech rule is based on a non-rebuttable presumption. A general presumption of abuse "*cannot be permitted*".

The last issue addressed by the Court is connected with art. 12(c) of the Directive.

This paragraph allows for an exception in cases which imply certain personal intermingling or interrelations between employer and employee (where, for example, the employee on their own or together with close relatives, was the owner of an essential part of the employer's undertaking or business and therefore held considerable influence on activities). The CJEU makes clear that the referring Court's reference to this norm is irrelevant in the present case since the applicant does, according to the facts, not own the insolvent employer. The mere fact that this particular exception is based on the assumption that the employee might be responsible for the financial distress of the very company that he owns (and be it just in part) does not dispense from the need that all requirements have to be fulfilled before the legal result can be applied.

The Luxembourg Court concluded that the examined rules of the EU Directive precluded the Czech law pursuant to which an employee in case of his/her employer's cannot benefit from the insolvency benefits guaranteed by EU law when and if this employee is at the same time acting as CEO of the employer. What follows from this ruling for the referring Court in the Czech Republic? First, irrespective of the decisiveness of the national law's interpretation of the term "employee" this law must not disregard the social objective of the Directive EU 2008/94. For the purposes of the protective guarantee payment in cases of the employer's insolvency, every employee is an employee. Second, exceptions from that protection are permissible but only as far as they are complying with those, which are provided for in the European Directive. Even though, generally speaking, the Czech rule is acceptable it disregards the CJEU's aversion to rigid rules such as a non-rebuttable presumption of abuse. This is what the Court has more than once declared as unacceptable.[5] Therefore, the dispute among the parties before the Supreme Administrative Court is most likely about whether the explicit amendment in the applicant's original contract regarding his entitlement to his salary as employee constitutes an abuse or not.

C. CJEU, decision from 13 January 2022, C-724/20 - Paget Approbois and Alpha Insurance

The referring court in this case was the Cour de Cassation in France. The underlying case dealt with questions regarding the interpretation of the Directive EU 2009/138 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)[6] – more precisely with the issue of what precisely is meant when the Directive speaks in its art. 292 of "lawsuits pending". By referring to parallels with the context of the European Insolvency Regulation within its reasoning, the Court itself makes clear that the deliberations here were mostly transferable to that Regulation. Since like in the Solvency II-Directive in its art. 292 has the Insolvency Regulation in its art. 18 a rule about the applicable law in cases in which an insolvency proceeding is commenced over the assets of a person at a time at which this person is party to a lawsuit in another member state. Accordingly, the present decision's relevance reaches beyond the immediate issue at stake.

The facts begin with Paget signing a multi-risk industrial insurance policy which bore the words 'Compagnie: Alpha Insurance' and which was arranged by an insurance broker with the name Depeyre. Roughly a year later, in May 2012, hailstorms caused damage at two sites of Paget who submitted an insurance claim to Depeyre on the following day. The latter responded more than 6 months later (7 January 2013) by mail and informed Paget that the insurance had been managed by a Belgium firm named Albic, and that the actual insurers had been, from 1 January 2012 onwards, an company called 'United, incorporated in the UK and 'Euroins', incorporated in Romania. However since 1 January 2013 those companies had withdrawn their accreditation of Albic.

The next step in this case was that Paget sued Depeyre for damages which, in turn, brought an action to enforce a guarantee against Alpha Insurance, a Danish companysince this Danish company was, pursuant to Depeyre's understanding, the actual insurer at the material time. Thereupon, Paget requested before the cour d'appel Besançon that Depeyre and Alpha Insurance be ordered jointly and severally to compensate the damage. At a hearing on 16 October 2018 (sic!) Alpha Insurance's representative informed the French court that the competent court in København had declared Alpha Insurance to be insolvent as of 8 May 2018. The lawsuit, therefore, should be treated as having been as automatically suspended from that date.

The cour d'appel Besançon rejected this motion with the argument that Alpha insurance had failed to establish that the Danish insolvency proceedings had the same effects as insolvency proceedings under French law. It held therefore in its judgment that the two defendants had to pay a certain amount for material damage. Both, Paget and Alpha Insurance appealed against this judgment to the Cour de cassation in Paris which decided to refer the following questions to the Luxembourg Court:

(1) 'Must Article 292 of Directive [2009/138] be interpreted as meaning that the pending lawsuit brought before the court of a Member State by the creditor of an insurance compensation claim to obtain the settlement of that claim by an insurance undertaking subject to winding-up proceedings pending in another Member State, concerns, within the meaning of that directive, an asset or a right of which the insurance undertaking has been divested?

5. Cf. judgments of 4 March 2004, *Commission v France*, C 334/02, EU:C:2004:129, paragraph 27, and of 25 October 2017, *Polbud – Wykonawstwo*, C 106/16, EU:C:2017:804, paragraph 64, as well as the Opinion of Advocate General Kokott in Grenville Hampshire, C 17/17, EU:C:2018:287, point 65.

6. ECLI:EU:C:2022:9.

(2) If the first question is answered in the affirmative, is the law of the Member State in which the proceedings are pending intended to govern all the effects of the winding-up proceedings on the pending lawsuit?

In particular, should it be applied in so far as it:

- provides that the opening of such proceedings results in the suspension of the pending lawsuit;
- subjects the resumption of the proceedings to the claim for insurance compensation being lodged against the estate of the insurance undertaking by the creditor and to the bodies responsible for the winding-up proceedings being summoned; and
- precludes an order to pay the insurance compensation, since such an order can only be the subject of a judgment relating to the determination and fixing the amount of the compensation?'

The CJEU began its answer to the first question by reference to some fundamentals of the Directive 2009/138. Their main feature is what the Court calls "*need for unity and universality*" which implies that the European law for insolvency cases of insurance companies (like in those of banks) provides a solution with only one proceeding; i.e. secondary proceedings are not foreseen. It is the one and only proceeding which is handling the case and the governing law is the insolvency law of that member state in which the proceeding has been commenced. Based on the mutual trust of all member states, all relevant decision are recognised Union-wide.

The CJEU then turns to art. 274 of the Directive 2009/138, which lists a couple of exceptions from the general applicability of the *lex concursus*. Among them is the effect of a pending lawsuit concerning an asset or right of which the insurance undertaking has been divested: pursuant to art. 292, it is exclusively the law of the member state in which the lawsuit is pending that determines that effect. Three conditions are to be fulfilled for this exception:

(1) There must be a winding-up proceeding pursuant to art. 268(1)(d) Directive 2009/138. The Luxembourg judges agree that the Danish proceeding belongs to this category.

(2) There must be a pending lawsuit. The court clarifies that this must not be an enforcement proceeding but sees no obstacle to qualify the present case as an action that is "*limited to determining the rights and obligations of the insurance undertaking placed in liquidation.*"

(3) This third condition brings us to the Tower of Babel and the potential for confusion caused by multilinguality. Since – in its English version – the pending lawsuit must concern "*an asset or a right of which the insurance undertaking has been divested*" whereas other languages – Danish or German, for instance – refer to a broader concept: it is somewhat like anything with an asset value that belongs to the estate. Whereas Paget's lawsuit does not concern a particular asset of Alpha Insurance it does certainly affect its asset interests. Accordingly, there is ambiguity which needs to be clarified by taking into consideration, in particular, context and purpose of the rule in question – i.e. art. 292 of the Directive 2009/138.

Based primarily on Recitals 124 and 130 the court concluded that both elements hint to the broader understanding so that the final answer to the first question is that the action in the present case brought by Paget for the compensation of his damages falls within the scope *ratione materii* of art. 292 Directive 2009/138.

The second question aims at a clarification of the scope of effect that the governing law under art. 292 Directive 2009/138 shall have on the pending lawsuit. In its answer, the court referred again to Recital 130 as evidence for the exclusivity of the *lex processu* as the governing law regarding the effects. Moreover, there is no limitation to procedural effects recognisable so that both procedural and substantive effects are to be determined pursuant to the law of the member state where the lawsuit is pending. This exclusivity stretches up to the point where those effects would encroach with the general applicability of the *lex concursus*. The CJEU sees this point, however, reached with none of the three submitted effects under French law.

Thus, there is the rule under the French Code of Civil Procedure, art. 369, which provides that a pending lawsuit is to be stayed by the commencement decision for a foreign winding-up proceeding. This is a procedural effect with no collision with the Danish winding-up law for insurance undertakings. Likewise, the requirement under French law that a stayed lawsuit can be resumed only when and if the creditor has orderly lodged its compensation claim in the winding-up proceeding in the other member state is to be understood as a procedural effect with no interference of the powers of the office holders in that winding-up proceeding. Similarly, it is rather a confirmation of than a contradiction to the Danish winding-up powers when French law imposes that a resumed lawsuit in cases like the present one in bound to change its subject matter exclusively to the verification of the claim and the determination of its amount.

In sum, French law determines the fate of the pending lawsuit and how it will continue. In the end of the day, this decision brings no surprises but only some further clarifications for the always somewhat opalescent term of a 'pending lawsuit'. What is helpful, though, is the explicit statement that the results are to be understood as applicable also for the banking winding-up as well as for the European Insolvency Regulation, art. 18.

D. Proposal for a Directive

The capital market is seriously striving for a level playing field in the European insolvency landscape. Its latest progress became public on December 7, 2022, when the European Commission submitted a proposal for a Directive for the harmonisation of certain aspects of insolvency law to the general public.

This kind of pushing has a long tradition. In a letter from 1515, the town fathers of the city of Antwerp asked the then Duke of Brabant (later Emperor Charles V) for the permission to enact a statute as

a protection against the *fugitivi*, i.e. banqueroutiers, or bankrupts. Among those to be protected traveling merchants were explicitly mentioned ; they had been in those days what nowadays constitutes the capital market. The permission was granted.

Even earlier, the *Statutum de Mercatoribus* from 1283 by King Edward I from England, provided a particular support for merchants in order keep England attractive to travelling merchants. Thus, the capital market tends to push for a regulated exit strategy – and a uniform one. In line with this, the present proposal pursues the objective to foster financial and economic integration in the European Union. It is part of the Commission's priority to advance the Capital Market Union.

Pursuant to the Commission's Communication from 24 September, 2020 (COM(2020) 590 final, p. 12) the existent divergences between the member states' insolvency laws are to be regarded as a long-standing structural barrier to cross-border investment. To overcome this barrier, measures need be taken to harmonise those laws, and the proposed Directive is part of those measures. To be based on art. 114 TFEU, the proposed Directive addresses some aspects of insolvency law, the convergence of which have the potential to facilitate cross-border investment. Therefore, consumers are excluded; and instead of full harmonisation, the proposed Directive confines itself to establish minimum requirements. Member statesare therefore free to set stricter rules. Moreover, not all items of the original agenda made it into the proposed Directive; the attempt, for instance, to find common ground with the ranking of claims, turned out to be too ambitious – at least for the time being.

In its harmonising effort, the proposed Directive will be the third instrument after the EU Regulation 2015/848 from 2015 and the Directive 1023 from 2019. However, in its concentration on harmonising efforts particularly of material insolvency law, it could claim to be the first such instrument. It aims primarily at the facilitation of a higher recovery value of the debtor's assets, a shorter duration of the proceedings, and a predictable and fair distribution of recovered value among creditors (COM(2020) 590 final, p. 9). Its main topics are:

- ***Avoidance actions and asset tracing:*** Regarding higher recovery value, the first thing that comes to an insolvency lawyer's mind is the set of rules dealing with claw-back possibilities. These time-honored rules – their alternative name as *actio Pauliana* indicates their age by referring to Iulius Paulus, an eminent lawyer from around 200 AD – allow for an increase the estate in an insolvency proceeding by nullifying preceding transactions or to claw back what had been given away. Even though it is fair to say that the starting point of those avoidance rules is something like the common denominator of more or less all modern insolvency laws, at least of the member states and possibly even the majority of jurisdictions worldwide, it is equally true that the divergence in this field of law is enormous among the member states' laws. The proposed Directive is making use of a previous European project that was chaired by the Professors Reinhard Bork from Hamburg University and Michael Veder from the Nijmegen University. They had already come up with a draft rules for the harmonisation of Transactions avoidance laws[7] and these rules are now more or less absorbed into the proposed Directive. Their quality is undoubtedly high, but the present author of these lines is afraid that structure and content of those rules is too much a copy of the German set of rules which do not always strike the right balance between the wish to, *ex post*, increase a debtor's estate and, *ex ante*, the necessity to not overly interfere with general business transactions.

  Higher recovery would also be facilitated by an improved asset tracing system. This, however, is not meant to introduce completely new instruments or new ways to get access to such modern things as crypto assets[8] but rather to establish more traditional features such as better information about a debtor's bank account, beneficiary ownership, and / or access to certain national asset registers. All these improvements would be governed by the *lex concursus* of the main proceeding.

- ***Pre-Pack procedure:*** The pre-pack procedure has been brought beforethe CJEU twice, both cases dealing with Dutch law (*Smallsteps* and *Heiploeg*, cf. supra sub A). The Commission was, therefore, forewarned about the red lights to be observed when a pre-pack mechanism is introduced for an accelerated sale of the debtor's business (or a part of it) as a going concern. This is precisely the reason why the details of the procedural steps are somewhat complex. The assumption behind this particular procedure is the rule of thumb that a higher price can be achieved with a pre-pack than in case of a piecemeal liquidation. Accordingly, this novelty is also meant to maximise the recovery value of an insolvent debtor's estate. As the name indicates, the pre-pack should allow an expedited insolvency sale by preparing a number of steps such as identifying an interested party, negotiating the contract and drafting it. This is called preparation phase which transits into the liquidation phase right upon commencement of the insolvency proceeding and in which the sale can be concluded immediately. The member states have to ensure that the sales process is competitive, transparent, fair, and meets the market standards.

- ***Simplified winding-up procedure for microenterprises:*** It had already been the goal of the previous Directive EU 2019/1023 on a Preventive Restructuring Framework to reduce

7. Bork / Veder, Harmonisation of Transactions Avoidance Laws, 2022.

8. On the English case *Ion Science Ltd and Duncan Johns v Persons Unknown, Binance Holdings Limited and Payward Limite*d, cf. Carmel King in: 85 Eurofenix, Autumn 2021, p. 16 f.fjsf?docid=258461&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=5755287

the costs of an ordinary insolvency proceeding – at least with regard to smaller enterprises. This intent re-appears in the present proposal in the shape of special rules for small and micro debtors. They are defined as enterprises with less than ten employees whose annual turnover and/or annual balance sheet does not exceed € 2 million. Taking into account that over 90% of all European enterprises do fall into this category it is fair to say that this innovation will have quite an impact on the insolvency legislation landscape of the continent.

The main cost-saving effect of this winding-up procedure results primarily from the absence of a mandatory insolvency practitioner; it remains more or less in the hands of the debtor and the court. In short, the proceeding is commenced by a debtor's application which has to be accompanied by a standard form listing the details of all assets as well as creditors and their claims. The court then sets up the final list of the insolvency estate and invites the creditors to lodge their claims. The liquidation would be done through an electronic auction system of all assets. It deserves mentioning that a respective request shall not be denied on the ground of insufficient means to cover the costs of the proceeding.

- ***As an aside:*** not only was the outcry of the association of the insolvency practitioners predictable in, for instance, Germany – after all, they would be deprived by this novelty of the basis of their income – such a reduction of active participants in the proceeding does also remind those with some ancient Roman law background that here, again, we can observe a step forward by going back into history. In ancient Roman law both, the involuntary proceeding, *concursus creditorum*, as well as its voluntary counterpart, *cession bonorum*, was a business between debtor and his creditors with some official support.

- ***Other features:*** The proposed Directive discovers the stick! More precisely, an obligation to file for the opening of an insolvency proceeding would be imposed on directors of legal entities. Failure to comply would be sanctioned by the directors' civil liability for damages resulting from failure to observe this duty. Moreover, the rights of creditors' committees would become strengthened, for instance by obligatory establishment when and if the general meeting of creditors so decides. Additionally, structure and working method of these committees would become more harmonised. Finally, the member states would be obliged to produce and to keep updated a standard fact sheet with practical information on their insolvency laws' main features.

Helping Small Businesses

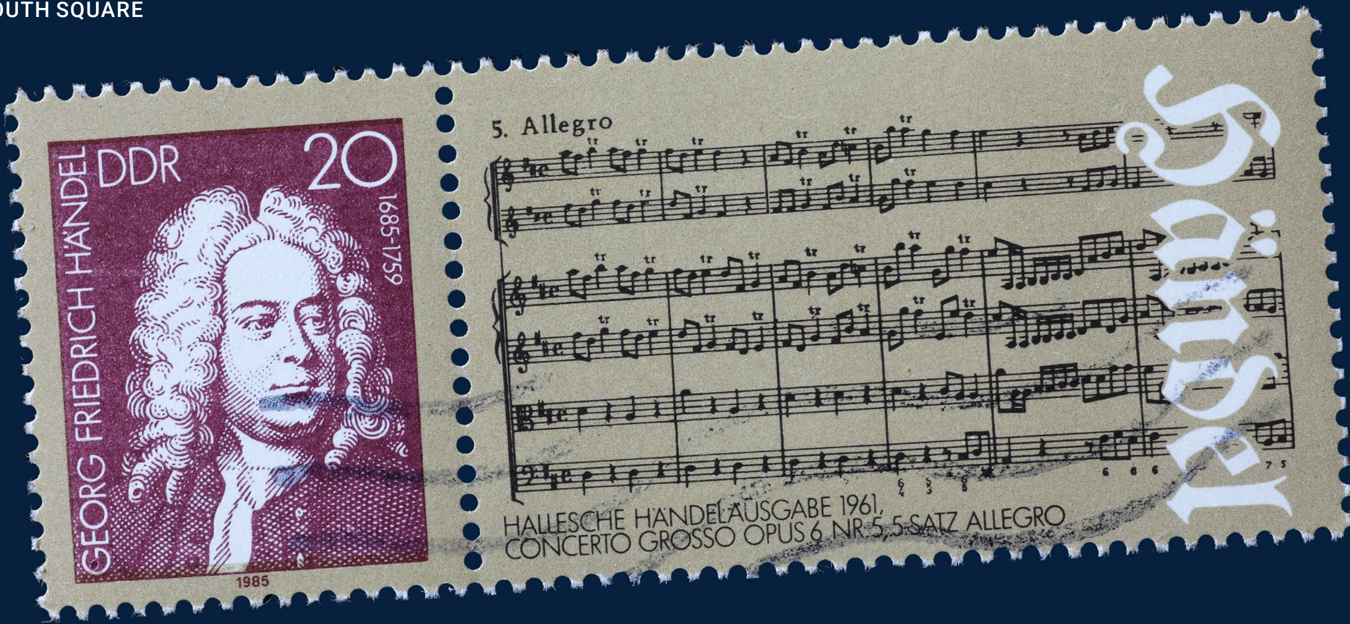
MARK PHILLIPS KC
SOUTH SQUARE

Recent figures confirmed that the number of insolvencies, primarily amongst small and medium sized firms has jumped by 30% in 2022. That is in part due to the end of the covid moratoria but also due to the damage done to so many businesses through the covid period, particularly in the retail and leisure sectors. Furlough payments have long since stopped. Landlords are able to enforce their claims. CBILs loans that were free are now charging interest and as interest rates spike they are exacerbating an existing problem. Despite the Bank of England's recent statement that the recession will be shallow, the reality for small business and for the high street is brutal.

A problem, that all insolvency professionals are familiar with, is that directors are not seeking advice early enough or at all. For small firms most won't know that advice is available and many will assume they can't afford it. To tackle these problems, as we emerged from covid R3 launched the Back to Business initiative. The website www.backtobusinessuk.com gives directors access to informative resources. Critically, there is also a search engine that will identify suitable insolvency practitioners who will give them a first free consultation. This idea came from a comment by a small practitioner during the preparation of the administration consent protocol: *"give me the relevant director and the relevant books for 2 hours and I can tell them what their options are."* The profession has stepped up and is now helping small and medium sized businesses. Over 250,000 businesses have accessed the resources. INSOL learned of the initiative and picked it up, inviting practitioners around the world to offer a first free consultation to small businesses. There are now over 160,000 practitioners signed up around the world and the initiative is in 52 countries.

The gap between available advice and the rising insolvency numbers is a stark reminder that those directors who need to hear this message, the small one shop business on the high street, or the medium sized family firm, still aren't getting it. We can hope that as a profession we work together to get the message out. Otherwise, the recession might be shallow for big quoted companies, but for small businesses it is likely to be so deep that it is terminal.

DANIEL JUDD
SOUTH SQUARE



The composers who studied law

Legal Eye

"My whole life has been a struggle between poetry and prose, or, let us say, music and law."

– Robert Schumann

Introduction

At first blush, there is nothing particularly musical about the law, and there is nothing particularly legal about music. If anything, the law appears decidedly *un*musical. We may think of music as a form of art, involving creativity, expression, and flair, when the law is instead about authority, and concerns itself with rules, analysis, and inflexibility. If in music there are no wrong notes, it is difficult to say that the same goes for the law.

Against that backdrop, it is remarkable that a number of famous composers in the Western musical canon were, at some point, students of the law. In this edition of Legal Eye, we take a short tour of some of the many well-known Western composers who, for better or worse, interacted with legal study at some point in their lifetimes.

1. *The Cambridge Companion to Handel* (1997, Cambridge University Press), at pp. 15, 21–22.

2. Letter of 14 February 1830. See *The Letters of Robert Schumann* (1907, New York: E. P. Dutton) at p. 45.

3. Letter of 1 July 1830. See *The Letters of Robert Schumann* (1907, New York: E. P. Dutton) at pp. 49–50.

4. Letter of 30 July 1830. See *The Letters of Robert Schumann* (1907, New York: E. P. Dutton) at pp. 50–53. The quotations which follow are all taken from this letter.

The Baroque Masters

We begin with one of the most famous composers of all: George Frideric Handel. Handel was born in 1685 in Halle, in modern-day Germany. He would later settle in London and become a naturalised British subject, composing many choral and orchestral works, including his *Messiah*. His naturalisation in 1727 was itself a legal event; it was made possible by an Act of Parliament specifically for the purpose, shortly before the death of King George I. One of Handel's first acts as a British subject was then to compose a series of coronation anthems for the coronation of King George II, including *Zadok the Priest*, which has been performed at the coronation of every British monarch since.

Yet, before all that, Handel was briefly a student at the University of Halle, at which he attended law lectures. Despite his love of music, his father had intended for him to become a lawyer, rather than a musician. Handel's legal career was short and one year of legal study proved quite enough.

During his time in Halle, G. F. Handel became acquainted with another great of the Baroque era: Georg Philipp Telemann.[1] At the time, Telemann, a few years older, was a law student at the nearby University of Leipzig. Telemann had considerable musical talent, and was largely self-taught as a musician and composer. The two would regularly meet, exchange correspondence, and they would become lifelong friends. Telemann composed prolifically and was the German composer of his day, comparable to that of Handel and, indeed, Johann Sebastian Bach.

J. S. Bach did not himself study law. However, many of his children did. A number of them, in turn, became noted composers in their own right. It became something of a family affair to at least enrol as a law student at the University of Leipzig. This was a path walked by (among others) Carl Philipp Emanuel Bach, Johann Christian Bach, and Wilhelm Friedemann Bach. C.P.E. Bach, better known for *Solfeggietto*, would eventually go on to obtain his law degree from the University of Frankfurt.

One doubts that J.S. Bach anticipated that one of his children would become immortalised in English copyright law. In *Bach v Longman* (1777) 2 Cowp 623, an English publisher, Longman, had copied and sold works of J.C. Bach for profit. J.C. Bach, who was living and working in London, sued the publisher. The question was whether the reference in the "Statute of Anne" (i.e. the Copyright Act 1710) to "books and other writings" protected written music. The case came before none other than Lord Mansfield, who held that it did: "*Music is a science; it may be written; and the mode of conveying the ideas, is by signs and marks. A person may use the copy by playing it; but he has no right to rob the author of the profit, by multiplying copies and disposing of them to his own use.*"

One can only speculate as to the role played by J.C. Bach's legal education on his decision to bring the claim.

A struggle between poetry and prose

It was not only Baroque composers who could count a stint as a law student among their experiences of life. In fact, one of the foremost Romantic composers studied law for almost three years, and we can read of his experiences as a law student in his letters.

Robert Schumann, who lived between 1810 and 1856, was a virtuoso pianist and composer. The young Schumann was also a reluctant law student, following encouragement from his mother. He began legal studies at the University of Leipzig in 1828, the same institution as the Bach children. Schumann persuaded his mother that Heidelberg would suit him better, and that Heidelberg was a superior place in which to study law. He had relocated to Heidelberg by the spring of 1829. In Heidelberg he would attend the law lectures of the noted jurist Anton Friedrich Justus Thibault. We can see from Schumann's letters that the professor made an impression on the young composer, and Schumann appreciated Thibault's legal brilliance. Yet music was important to Thibault too, as Schumann notes. In one of his letters from this period, Schumann recounts that his happiest hours were weekly meetings held at Thibault's house every Thursday, in a chorus of over seventy, to practise one of Handel's oratorios.[2]

There is much in Schumann's letters awaiting the interested reader, including occasional reflections on law and lawyers ("*No automatic, machine-made lawyer, therefore, can excel in his profession*"[3]). But it was matters musical which would dominate. In late July 1830, Schumann writes to his mother in order to convince her to permit him to return to Leipzig to take up music.[4] The persuasion employed in his letter offers the suggestion that, in another life, Schumann might have made an able lawyer.

Schumann begins by identifying his predicament as one of conflict ("*Now I stand at the crossroads, trembling before the question. Whither?*"). He takes care to acknowledge the role played by his mother in a positive light ("*I quite see your excellent motherly reasons, known to both of us as 'a precarious future' and 'an uncertain livelihood'*"). But at the same time, he identifies a higher good – happiness and fulfilment – as pointing firmly elsewhere ("*A man can know no greater torment than to look forward to an unhappy, empty, and lifeless future of his own planning; but neither is it easy for him to choose a profession directly opposed to that for which he was destined from his youth*"). What about the concern about a precarious future? Schumann's answer was resolute: whatever path he followed, he would succeed ("*This brings me to the question — which shall I choose? I can only make my mark in one or the other.*

I tell myself that if I give my whole mind to a thing I am bound to succeed, dear Mother, in the end, through steady application"). To reinforce the good sense in moving away from the law, Schumann appeals to the authority of the legal world itself; his aspiration carried the blessing of his law professor, Thibault ("*As for Thibaut, he has long been advising me to take up music. I should be very glad if you would write to him, and I know he would be pleased*"). The young composer concludes with a rhetorical flourish: "*Farewell, my dear Mother, and do not be anxious. It is a clear case of 'Heaven helps those who help themselves', you see.*" He was right.

Here, there, and everywhere

We soon discover that former law students who achieved fame as composers can be found beyond present-day Germany.

A boarding school called the "Imperial School of Jurisprudence" in Saint Petersburg, Russia, was a prestigious institution. It was founded to instruct administrators and civil servants. Between 1850 and 1859, it would accommodate its most famous alumnus. His name? Pyotr Ilyich Tchaikovsky.

Tchaikovsky was 10 years of age when he entered the School at the behest of his parents. (His brother, Modest Ilyich Tchaikovsky, also attended the School, and would graduate with a degree in law.) As a young child, Tchaikovsky had already displayed great musical aptitude, and continued to study music and composition whilst at the School.

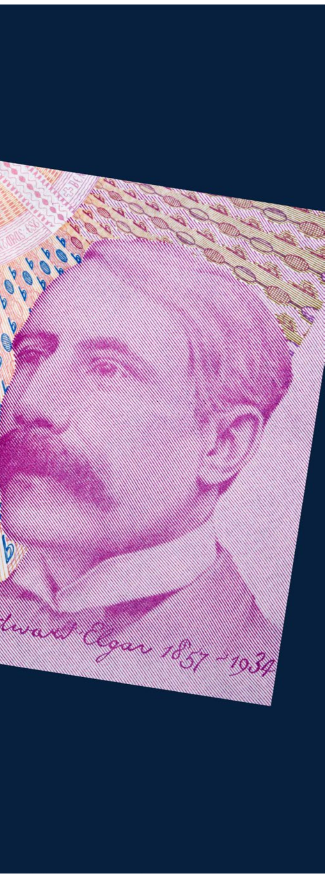
Upon graduation, at the age of nineteen, he obtained employment as a clerk at the Ministry of Justice, which offered a secure income. He resigned after three years, to dedicate himself to music. That was surely for the best; it is to this dedication to music that we owe *The Nutcracker* and *Swan Lake*.

A similar fate befell Igor Stravinsky in the twentieth century, perhaps best known for *The Rite of Spring*. Stravinsky was acclaimed in his lifetime, the second half of which was spent in the United States from 1939 until his death in 1971. But in his youth, Stravinsky's parents had insisted that he study law. In August 1901, Stravinsky began studying law at the University of Saint Petersburg, and would remain there unenthusiastically for around four years, ultimately leaving with a "half-course" diploma. While at university, one of Stravinsky's fellow law students and acquaintances was one Vladimir Rimsky-Korsakov.[5] Vladimir was the youngest son of Nikolai Rimsky-Korsakov, who was one of Russia's noted composers, and who until his death in 1908 would instruct and mentor the young Stravinsky. In Stravinsky's case, law school certainly offered useful connections.

Stravinsky's interaction with the law did not finish there. In the early 1940s, the composer would compose his own, unconventional, harmonisation of "The Star-Spangled Banner", apparently as a means of expressing his gratitude at the prospect of becoming an American citizen.[6] He conducted a performance of it in 1944.

5. Stephen Walsh, *Stravinsky*, A Creative Spring: *Russia and France*, 1882-1935 (2003, University of California Press), at p. 61.

6. These are the words used by Stravinsky in a letter written to President Franklin Roosevelt, dated August 1941. See H Colin Slim, "Stravinsky's Four Star-Spangled Banners and His 1941 Christmas Card" (2006) 89 *The Musical Quarterly* 321, at pp. 334-335.



It was not received well. The story goes that Stravinsky was accosted by the local police, who believed that he had broken a law against tampering with the national anthem. Stravinsky would stick to conducting the established version thereafter. (The author of the words to *"The Star-Spangled Banner"*, Francis Scott Key, was himself a lawyer, as it happens.)

We now move from Russia to Finland, and to Finland's most famous composer: Jean Sibelius. Sibelius remains revered in his native Finland as its national composer, and his music is commonly identified as contributing to the formation of Finnish national identity in the face of Russification. His birthday, 8 December, is celebrated as the Day of Finnish Music. Less widely celebrated than Finlandia or his seven symphonies, however, is Sibelius' very short spell as a law student. In 1885, Sibelius entered the Imperial Alexander University, now the University of Helsinki. Initially, he enrolled in the Physical-Mathematical Faculty, before changing his mind, and matriculating in the Faculty of Law.[7] His legal studies were abandoned promptly as he devoted himself fully to music instead.

My soul, there is a country

It will come as no surprise to the reader that the same trend can be identified among British composers.

We may know Charles Hubert Hastings Parry best for his choral classics: the music to *Jerusalem* and *Dear Lord and Father of Mankind*, and the anthems *I was glad* and *My soul, there is a country*. Yet he too studied law. Parry's father had destined him to work in insurance, and Parry would study History and Law at Exeter College, Oxford. He would then work as an underwriter for around 7 years, during which time Parry would study music and publish his compositions. Eventually, he would be appointed as a professor of composition to the (then) recently established Royal College of Music, in London, in 1883. Parry went on to influence many composers in the next generation, and his pupils included Gustav Holt, John Ireland, and Ralph Vaughan Williams, all of whom become esteemed composers in their own right. For one of them, a musical life might have been a near escape from the allure of insolvency law; R. V. Williams' uncle was Lord Justice Roland Vaughan Williams. Vaughan Williams (the judge) had published a tome called *The Law and Practice of Bankruptcy*, first published in 1870, following the numerous reforms to bankruptcy legislation in 1869.

There also those who did not, technically, study law. Over a century earlier, Thomas Arne (1710–1778), composer of *Rule, Brittania!*, was articled to a solicitor for three years after leaving school. But he would not be the only British composer to work in a solicitor's office.

Between 1872 and 1873, Edward Elgar was employed in the office of William Allen, a local solicitor in Worcester, upon leaving school at approximately 15 years of age.[8] Elgar, already keenly interested in music, would have preferred to attend the Leipzig Conservatory to pursue musical study. His family's relatively modest circumstances would not permit this. His musical ambitions would result in success, and whether we know him for the music to *Land of Hope and Glory* or for his *Cello Concerto* in E minor, he would become a household name.

There is evidence that Elgar was able to internalise something of the legal world during that period. We round off our short tour with some evidence of this which appears in one of his biographies.

In April 1873, while still working at the office of Mr Allen, Elgar's father was due to perform in an orchestra in Hereford. The young Elgar was eager to attend. Elgar's enthusiasm is palpable from the manner in which he decided to record the day's events. Elgar decided to record the entire day's events, from start to finish, as a parody "bill of costs" which he provided to his father, consisting of appropriately caricatured descriptions of travelling to and from a concert.

We can read in Elgar's "bill of costs" entries describing his efforts the previous day to persuade his father to allow him to come along ("*Attending you, conferring as to the desirability of my accompanying you to Hereford on the 18th inst: being the date of the Philharmonic Concert …*"), time spent having a drink whilst waiting for the train ("*Attending you accompanying you to the Station & also to the Refreshment Room – conferring with you and Mr. Henry Brookes as to the rival qualities of draught and Bottled ale when we decided in favour of the latter*"), the train journey from Worcester to Hereford ("*Journey to Hereford*," "*Conferring with you & fellow passengers as to the state of the weather & upon several other topics of general interest, & advising*"), and his attendance at the concert itself ("*Attending you to the Shire Hall where the concert was to take place*," "*Conferring with the ticket taker as to the most desirable place for me to sit and giving the man in attendance instructions to furnish me with a Book of the words*," "*Engaged 2 hours*").

One has to admire the young Elgar's lightness of touch. Still, deep within the practising lawyer, we may notice the very mildest pang of unease. After all, one can only hope that Elgar also knew the implications of charging for attendance at a concert.■

7. Glenda Dawn Goss, *Sibelius: A Composer's Life and the Awakening of Finland* (2009, University of Chicago Press), at p. 64.

8. Jerrold Northrop Moore, *Edward Elgar: A Creative Life* (1999, Oxford University Press), at pp. 55–60.

News in Brief

Tom Smith KC appointed Deputy High Court Judge

South Square is delighted to announce that on 23 January, 2023, The Rt Honourable The Lord Burnett of Maldon, Lord Chief Justice of England and Wales, has appointed Tom Smith KC Deputy Judge of the High Court, sitting in the Chancery Division. Tom has been appointed for a single fixed six-year term.

Woe in Woking

Another year, another borough council appears to be staggering towards bankruptcy. This time it is Woking, Surrey, home to the most famous Pizza Express restaurant in the world.

Liberal Democrat-run Woking borough council said it was "in the territory" of being unable to meet its financial obligations, amid a surge in debt interest costs on its investments, which include a shopping centre, residential skyscrapers and 23-storey Hilton hotel. According to budget papers, the council borrowed about £1.8bn for investment purposes but is only bringing in £38.5m.

Whilst councils cannot technically go bankrupt, they can issue a section 114 notice which effectively signals insolvency and forces central government to step in to ensure that locally-supplied services are sustainable.

Michael Gove's levelling up department has been focussing on local authorities with high levels of debt in recent months, with inspectors reviewing finances, investments and governance, or directly intervening, at several authorities, including Slough in Berkshire, Thurrock in Essex and Warrington in Cheshire in recent months.

Rabin meets the Pro Bono Pledge

Chambers junior member, Rabin Kok, has achieved the Advocate Pro Bono Pledge, completing over 25 hours of pro bono work so far this year.

Advocate caseworker Emily said *"Rabin provided initial advice promptly, and has then, very kindly, offered continued assistance with drafting, and has been an excellent support to Ms Russell. He's great!"*

Advocate matches members of the public who need free legal help with barristers who are willing to donate their time and expertise in those deserving cases where people who are unable to obtain legal aid and cannot afford to pay.

Return of the Disco

Divorce lawyer Ayesha Vardag has featured in News in Brief previously. First for her somewhat 'eyewatering' wedding blog in advance of her 2014 wedding to Stephen Bence where guests were invited to purchase parts of their honeymoon as a gift, and again in 2020 when she instigated a strict dress code for her staff with nary a cardigan in site and strictly 'no brown in town'.

Now, in something of an about-turn, the dress code asks staff to dress as if they were heading to Annabel's nightclub. Business suits, she wrote in a memo to staff, '*are so much the domain of bankers and estate agents*'. Gold leather trousers, Doc Martens and purple velvet jackets are now welcomed – so long as they are '*appropriate to the luxury market with which we engage*'.

In Person in the Islands

At the end of March, The Eastern Caribbean Supreme Court, the superior court of record for the Organisation of Eastern Caribbean States, issued an update directing that in-person hearings for the trial of matters in all High Courts of the Eastern Caribbean Supreme Court shall resume in full by no later than Monday 17th April 2023.

First choose your avatar – a Colombian court makes history

On February 15, 2023, the administrative court of Magdalena - located in the Caribbean city of Santa Marta, in the north of Colombia - conducted a court session from the metaverse to hear a case against the Colombian Ministry of Defence and the National Police. The court magistrate, María Victoria Quiñones, accepted a direct request from the plaintiff to hold the public audience in the metaverse, which was accepted by the defendant.

During the hearing, Quiñones, speaking through her avatar, highlighted that the metaverse allowed for "a real interaction" and the use of the immersive technology aimed to make procedural cases more efficient, "*as it allowed to bring people in the same virtual space, even when they were physically elsewhere - all without leaving aside the procedural guarantees and the principles of digital justice*".

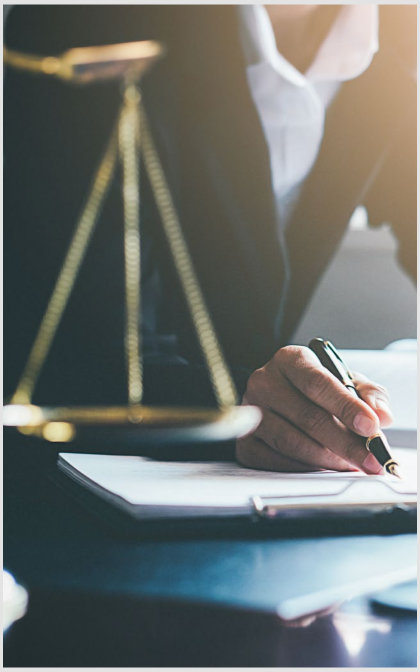
The court also used ChatGPT, an AI chatbot, to explain the concepts of the metaverse to the audience of the hearing, some 68 thousand people, who watched the live stream on YouTube.

Huge variance of Bar course provider pass rates

The Bar Standards Board ('BSB') has analysed the performance of 20 bar education and training centres over a period of two years, focussing on the centralised exams of criminal and civil litigation. The report adjusted data to allow for the fact that some providers had only recently had candidates sitting the exams, and notes that the figures may also include re-sit attempts. Pass rates varied from almost 93% to just 22%, with more than half of the providers failing to score above 50% pass rates.

Leading the pack is the Inns of Court Collect of Advocacy with the highest average pass rate across both litigation assessments and all sittings to date of 92.5%. The Leeds branch of The University of Law placed second, at just over 60%.

Elsewhere, the BSB notes that the average course cost per bar student (adjusted for inflation) was £14,000 in 2022, compared to £18,700 in 2019.



News in Brief

Wizz Air blames the post for delays

The General Counsel for Wizz Air, Nora Rabe, has blamed the post for its giant backlog of unsatisfied County Court Judgments ('CJJs'). As of the end of February 2023, 977 unsatisfied CCJs were registered against Wizz Air UK Ltd and Wizz Air Hungary, with a total value in excess of £1.7 million and ranging in value from under £100 to over £10,000.

In December 2022 the Civil Aviation Authority criticised Wizz Air for the delays in procession and paying claims.

However, Rabe had stated the many of the CCJs had been addressed to the wrong parties and so, therefore, never came to the company's attention and maintained that the airline had only received copies of a small fraction of the CCJs through the post. She also acknowledged the there has never been any decision '*not to satisfy CCJs*'.

And in related news, a family who had their holiday flights cancelled at the last minute got their money back plus expenses – after sending bailiffs to Luton Airport after Wizz Air pulled the family's scheduled trip. After obtaining judgment, the family then applied for bailiffs who attended the Wizz Air desk at Luton Airport – saying they could take goods including chairs, tables, computers or an even aircraft. Wizz Air reportedly then handed over the sums required to satisfy the judgment.

Courtney tours Manchester

The Supreme Court sat in Manchester in early March of this year, marking the first time that the court has sat outside of one of the four UK capital cities. The Justices were accompanied by a Supreme Court branded teddy bear, named Courtney.

In addition to hearings related to sewage discharge, insolvency and the Home Office's vulnerable persons resettlement programme, the Justices judged moots with students from the universities of Bolton and Derby and held an 'Ask and Justice' session with a local sixth form college. They also held a recruitment event at Manchester Law Society to encourage understanding of the role of Judicial Assistants and how to apply.

Barrister admits obtaining drugs from clients

Barrister Henry Hendron has pleaded guilty to encouraging a client he represented to supply him with Class A drugs after police found messages he sent to a suspected dealer on a phone. An investigation also found evidence that he was buying drugs from yet another client he was representing.

Hendron has had a somewhat chequered legal career. Since being called to the Bar in 2006, Hendron has represented several well-known clients, including the Earl of Cardigan and Conservative MP Nadine Dorries in civil matters through an online, direct access portal he established. However, in 2016 he was suspended by the Bar Standards Board ('BSB') for three years after admitting to purchasing £1000 of 'Meow Meow' and GBL from former BBC radio producer Alex Parkin. Henrdron then supplied this to friends 'at cost price' and to his boyfriend who subsequently died in a drug overdose.

Hendron has accumulated fines for driving under the influence of alcohol and from the BSB for contempt of court and for posting on social media that he was lunching at Middle Temple whilst suspended: Hendron appealed against this fine, which was overturned, after which the BSB resubmitted the original complaint to a new panel who promptly doubled the fine to £500! He was declared bankrupt in March 2021 for unpaid income tax.

On a more positive note Hendron, together with his twin brother, Richard, retains the record for the world's longest canoe and kayak race, the 1000 mile 'Yukon 1000'.

Business insolvencies increased by 17% in February 2023

The latest Insolvency Service figures show that the number of business insolvencies in February 2023 increased by 17% to 1,783 when compared with the same month in February 2022. This is also 33% higher than the number registered three years previously – the pre-pandemic February 2020 – of 1,345.

The rise is driven by an increase in the number of compulsory liquidations and Creditors' Voluntary Liquidations. According to R3, the Association of business Recovery Professionals, after nearly three years of lockdowns, supply chain issues, rising costs of energy, fuel, interest rates and wages coupled with falling revenues, many business owners have had enough and are closing down before they are forced to do so. Compulsory liquidations have risen partly as a result of an increase in winding up petitions by HMRC.

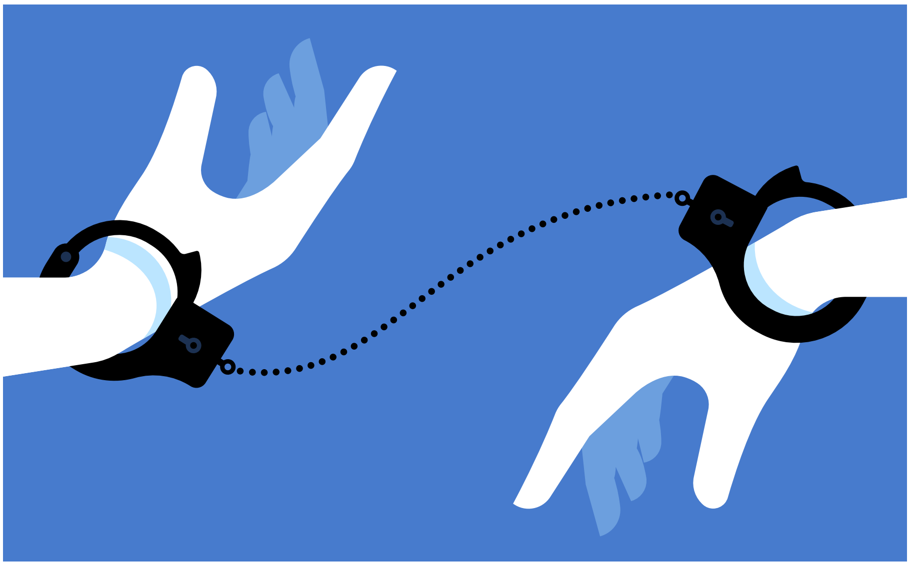
Company Voluntary Arrangements and administrations remain, however, lower than pre-pandemic levels.

Man leaps from dock

On 3 January, 2023, Nicholas Bunclark vaulted the gate out of the unsecured dock at Liverpool Crown Court as he was being led to the cells having been sentenced to a 16 month jail term for assault. Security staff failed to stop him and he remained at large until he handed himself into a police station the following day.

According to Mr Bunclark it was '*a moment of madness*' as he wanted to get in touch with his relatives and thought this was the best way of going about it. Apparently, he was rather surprised to find that no-one followed him, so took off his glasses and calmly exited the Court building.

Mr Bunclark re-appeared at Liverpool Crown Court on 5 January, firmly handcuffed to security guards and pleaded guilty to escape from lawful custody. He was sentenced to a further four months in prison to run consecutively to the 16 month sentence for assault.



Virgin spins out of Orbit

Virgin Orbit filed for bankruptcy protection in the United States in early April of this year, after failing to secure new funding. It was reported to have been drawing up detailed contingency plans for its insolvency days after halting its operations and furloughing its workforce on 19 March 2023.

75%-owned by Sir Richard's holding company, with its shares listed on New York's Nasdaq, Virgin Orbit's troubles began with a failed launch from its Cornwall base in January, which compounded the lack of ready cash: in September 2022 Virgin Orbit reported $72 million on hand, but a burn rate of £43 million every three-month period.

The commercial satellite launch company was formed as port of 'Virgin Galactic' space tourism business which took Branson into a sub-orbital flight in 2021 – nine days earlier than its rival Blue Origin achieved an edge-of-space flight with Jeff Bezos.

SOUTH SQUARE CHALLENGE

Welcome to the first South Square Challenge of 2023!

Anyone familiar with the law can be in no doubt that it provides almost as many weird and wonderful case studies as it does those of greater gravitas. Your challenge on this occasion is to review the following images and work out to which notable cases (perhaps rather tenuously) the image or pair of images refer. As always, in the event of multiple correct answers the winner or winners will be drawn from the wig tin, and the prize will be a magnum of champagne and a much-coveted South Square umbrella.

1.

2.

3.

4.

5.

6.

7.

Please send your answers to Kirsten either by e-mail to **Kirstendent@southsquare.com**, or to the address on the back cover, by Friday 2nd June 2023.

The winner of that roll-over challenge was Tom Withyman, Partner, Pinsent Masons to go our congratulations, two magnums of Champagne and two South Square umbrellas!

The correct answers to our December 2022 challenge were:

A. In the Matter of Seahawk China Dynamic Fund

B. Grant v FR Acquisition Corp (Europe) Ltd

C. BTI 2014 LLC v Sequana SA

D. Hong Kong Airlines Ltd

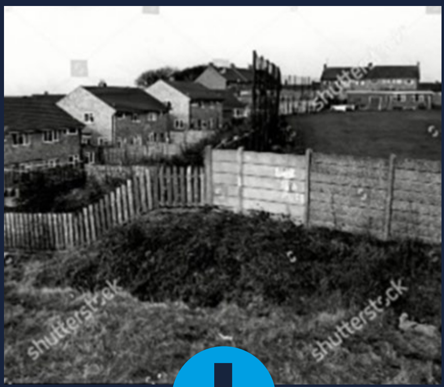
E. Re All Scheme Ltd (the Amigo Loans scheme)

F. JD Classics Ltd (in administration) v Hood & ors

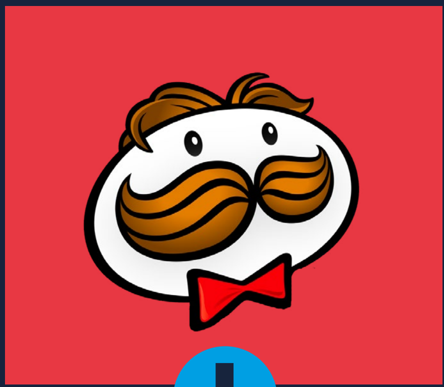
G. Re Bulb Energy Ltd

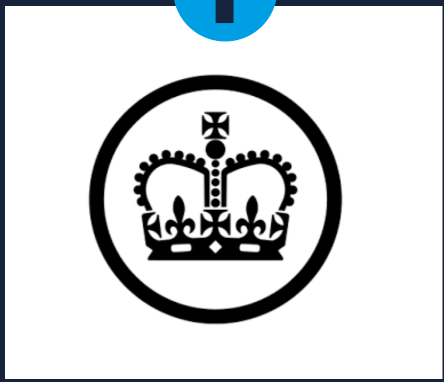
H. Re Galapagos SA

1.



2.





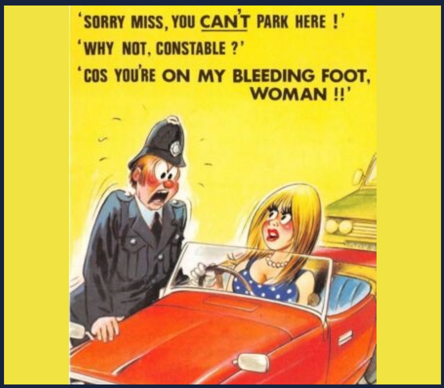
3.

4.


OH
THIS WRETCHED
HAY FEVER,
I MUST
TRY THE

5.

6.


'SORRY MISS, YOU CAN'T PARK HERE !'
'WHY NOT, CONSTABLE ?'
'COS YOU'RE ON MY BLEEDING FOOT, WOMAN !!'

7.

SOUTH SQUARE

"Winner of Company/ Insolvency Set of the Year"

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Mark Phillips KC
Martin Pascoe KC
Fidelis Oditah KC
David Alexander KC
Glen Davis KC
Barry Isaacs KC
Felicity Toube KC
Mark Arnold KC
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Lloyd Tamlyn
Marcus Haywood
Hannah Thornley
Clara Johnson
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Georgina Peters
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Toby Brown
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WINNER
UK BAR AWARDS 2022