SOUTH SQUARE

Digest

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

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SOUTH SQUARE

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From the editors

Marcus Haywood and William Willson

Welcome to this summer edition of the South Square Digest.

Readers can be assured they are in good company as one of the major national newspapers picked up on the article written by Mark Phillips KC on reforming club football governance (see The Digest, April 2023, page 44 (*see right*)).

In other good news for Chambers, we are delighted to be shortlisted for this year's Legal 500 Bar Awards, shortlisted across five categories. As a set we have been shortlisted for both Chancery set of the year, and Financial Services and Insurance set of the year. Adam Al-Attar and Charlotte Cooke have both been individually nominated for Chancery Junior of the year; Georgina Peters has been nominated as Financial Services and Insurance junior of the year; and Mark Phillips KC is nominated as Chancery Silk of the year. Our thanks to the Legal 500 for their continued support and we wish our fellow nominees good luck.

We have plenty of reading matter in this Digest ready for you to take on holiday, whether home or away, in this continent-hopping issue.

Starting at home, Tom Smith KC and Edoardo Lupi discuss the recent decision in *Re Avanti Communications Limited* in their article '*The Spectrum of Control*'.

In the first of our two articles from the Cayman Islands, Appleby's Andrew Jackson and Damon Booth, together with Barry Isaacs KC and Toby Brown, consider the use of the merger price to establish fair value in appraisal proceedings: '*Reliance on the Merger Price in Cayman Appraisal Actions*'. Staying in the Greater Antilles, Rupert Bell and Chaowei Fan of Walkers, consider the use of the new Cayman Islands restructuring officer regime in the restructuring of Rockley Photonics in their article '*Emergence*'.

We then island hop to Jersey, from where Edward Drummond of Bedell Cristin Jersey Partnership brings us an update on a range of legal issues on-island. Back across the Channel to the UK, Peter Burgess provides a summary of the Insolvency Service's recently released 'Post Implementation Review' in '*CIGA 2020 – Three Years On*'. We also have a

Case Note on *Denaxe v Cooper*, provided by Mark Phillips KC and Andrew Shaw, a case involving (in one form or another) a number of members of Chambers.

Roseanna Darcy takes us back over to North America for Legal Eye, in '*Look Up*', the legacy of the law on the Manhattan skyline.

One of our regular features, Simon Mortimore KC's '*Chambers History*', proves that whilst London may not have the sunny allure of the Caribbean or the glamour of New York, legal London can certainly be eccentric!

It was with sadness that Chambers learned of the death of former member David Marks KC and we have a tribute to him.

As ever, we have our usual Case Digests, with the foreword this time from Mark Phillips KC and, of course, our South Square Challenge where you can win, *inter alia*, a South Square umbrella to combat the summer rains.

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.

We wish all our readers a pleasant summer and a well-earned break.

Marcus Haywood and William Willson

TOM SMITH KC

EDOARDO LUPI

The spectrum of control: the decision in *Re Avanti Communications Limited*

Introduction

A number of years ago the question of whether a charge (usually over book debts) was a fixed or floating charge was a staple of the diet of insolvency and restructuring lawyers. Subsequently, that issue tended to recede somewhat into the background. However, more recently it has again started to rear its head, often in the context of financing structures involving English law security in combination with notes under which the issuer group is allowed various permissions and exceptions in relation to the use of assets. In *Re Avanti Communications Limited* [2023] EWHC 940 (Ch) ("***Avanti***"), Edwin Johnson J considered whether a charge granted by Avanti Communications Limited (in administration) (the "**Company**") as part of a security package shared amongst its lenders was properly characterised as fixed or floating. The Company's principal activity had consisted in the operation of satellites, and the sale of satellite broadband and connectivity services.[1]

The characterisation issue centred on the question of control over the charged assets. The contractual documentation did not create a total prohibition on disposals of the charged assets by the Company nor, however, did it confer a general permission on the Company to dispose of them in the ordinary course of business. Accordingly, the key question of law for the Court was whether, on a proper construction, the degree of control conferred by the charge over the relevant assets sufficed to create a fixed charge. The question as to the requisite degree of control for these purposes had not arisen for determination since the seminal judgment of the House of Lords in *Re Spectrum* [2005] 2 AC 680 ("***Spectrum***"). Perhaps because of the relative infrequency with which characterisation disputes have reached the courts since *Spectrum*, as well as the potentially significant ramifications for standard security documentation in similar terms,[2] the decision in *Avanti* has elicited significant market interest.

1. The authors acted for the joint administrators of the Company. A group of lead secured lenders were represented by David Allison KC and Rabin Kok, both also of South Square.

2. The lead secured creditors submitted that the contractual documentation in *Avanti* was substantially modelled on precedents created by the Loan Market Association.

3. *Spectrum* at [95].

4. See *In re Colonial Trusts Corpn, Ex p Bradshaw* (1879) 15 Ch D 465, 468, 469 and *Moor v Anglo-Italian Bank* (1879) 10 Ch D 681, 687.

5. *Illingworth v Houldsworth* [1904] AC 355.

6. *See Tailby v Official Receiver* 13 App Cas 523, 545.

7. See s.175(2)(b) IA1986.

8. Since 6 April 2020, pursuant to the Insolvency Act 1986 (Prescribed Part) (Amendment) Order 2020.

9. Since 1 December 2020 pursuant to the Finance Act 2020, s. 98 and The Insolvency Act 1986 (HMRC Debts: Priority on Insolvency) Regulations 2020.

Why does fixed/floating characterisation matter?

The concept of floating security was an innovation of equity lawyers and judges in the 19th Century responding to the increasing demand for loan capital in the context of industrial and commercial expansion.[3] In the 1870s, the term 'floating charge' gained currency in contradistinction to what was then often referred to as a 'specific' or fixed charge.[4] In essence, a floating charge is a form of security which is "*ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect*" until the occurrence of some crystallising event.[5]

Whilst the floating charge initially received enthusiastic judicial support,[6] concerns soon developed. In *Salomon v A Salomon & Co Ltd* [1897] AC 22 53, Lord Macnaghten complained, "*everybody knows that when there is a winding-up debenture-holders generally step in and sweep off everything; and a great scandal it is.*" The floating charge holder not only enjoyed priority over the unsecured creditors in the event of a winding-up, but also over the company's employees.

Legislative intervention swiftly followed. By the Preferential Payments in Bankruptcy Amendment Act of 1897, in the event of winding-up, preferential creditors (including employees), were given priority over the floating charge holder. Materially similar provisions continue to exist under the Insolvency Act 1986 ("**IA1986**").[7] Since the late 1800s, further inroads have been made to the priority status of the floating charge holder: it now ranks below officeholders' expenses, as well as the prescribed part set aside for unsecured creditors (now up to a maximum of £800,000).[8] Recent legislative developments have meant that certain debts owed to HMRC now also take priority over it as secondary preferential claims.[9]

Conversely, the fixed charge holder takes the enforcement proceeds from the charged assets without those deductions. The balance for banks and other commercial lenders to strike has been between seeking to create fixed charges to enjoy these advantages and, at the same time, not imposing such restrictions on the chargor's assets as to paralyse its business.

The factual circumstances in *Avanti*

In *Avanti*, the joint administrators applied for directions under paragraph 63 of Schedule B1 to the IA1986, seeking a determination as to whether some or all the relevant charged assets were secured by fixed or floating charges. All the relevant assets had already been disposed of prior to the hearing of the joint administrators' application, and distributions had been made to the secured lenders on the footing that the charge was fixed, which it was stated as being on its face.

Funding arrangements had, however, been put in place with the secured lenders to ensure that in the event that the charge was re-characterised as floating by the Court, funds would be available to the joint administrators to pay the preferential creditors and the unsecured creditors (in respect of the prescribed part) in the amounts they would have been entitled to. This allowed the sale of the Company's assets to proceed swiftly without affecting the assets' value, while at the same time protecting the position of stakeholders in the event that the charge was re-characterised as floating.

The Relevant Assets

The charged assets in question were made up of four categories: (a) a satellite known as 'HYLAS 3'; (b) certain equipment used in the operation of network and ground station facilities which, in broad terms, supported the operation of the group's satellites; (c) so-called 'satellite network filings' which entitled the Company to use particular orbital slots in relation to its satellites;[10] and (d) certain licenses issued by Ofcom entitling the group to operate the network and ground station facilities (together, the "**Relevant Assets**"). Edwin Johnson J held that, on their face, all the Relevant Assets fell within the scope of the fixed charge created under the relevant debenture. However, that was not the end of the matter. Whilst the labels the parties use may be taken into account for certain purposes as part of the two-stage exercise described below, they are not by any means dispositive.

The contractual provisions

The contractual documentation in *Avanti* included three different facility agreements, an intercreditor agreement governing the priority of the indebtedness under those facilities, and a shared security package. As the judge put it,[11] the documentation was "*complex and detailed*" and "*not easily summarised*". In short, the scheme thereunder operated in such a way as to (a) prohibit any 'Asset Sales' by the chargor, unless the chargor received fair market value for the charged assets and applied the proceeds of the sale if equal to or in excess of $1 million to discharge the outstanding indebtedness owed to the chargee; but (b) permit disposals, where they fell within the express carve-outs to the definition of 'Asset Sale'. There were four potentially relevant carve-outs to the Asset Sale definition. They permitted disposals by the chargor where: (i) the sale involved assets with a maximum fair value of $2 million; (ii) the charged asset had become "*damaged, worn-out or obsolete*"; (iii) the charged asset was not "*useful*" to the conduct of the Avanti group's broader business in the judgment of the Company's parent; or (iv) the disposal involved the sale of satellite capacity in the ordinary course of business.

As to the observance by the chargor of these contractual restrictions in practice, whilst the role of post-contractual conduct remains somewhat unclear following Lord Millett's comments on the subject in *Agnew v Comr of Inland Revenue* [2001] 2 AC 710,[11] the evidence before the Court in *Avanti* was that the contractual restrictions had in fact been observed by the chargor. Thus, the Company had in fact sought the chargee's consent when it wished to make any disposal of assets with a fair market value exceeding $2 million.[13]

Spectrum

The question as to the requisite level of control to create a fixed charge required the judge to consider and apply the House of Lords' decision in *Spectrum*. That case was the culmination of a line of cases

10. The juridical nature of satellite network filings was discussed in *Avanti* at [9].

11. *Avanti* at [52].

12. See *Agnew* at [48]; *Spectrum* at [160]; and *Avanti* at [38].

13. *Avanti* at [106].

which considered the controversial question of whether certain standard form documentation created a fixed or floating charge over book debts.[14] Save for one notable exception,[15] the majority of the leading cases in this area have concerned book debts, as opposed to the sort of asset classes in issue in *Avanti*. The particular legal nature of book debts, which prevents them being enjoyed *in specie* and makes it commercially nonsensical to distinguish the debts from their collected proceeds,[16] meant that the focus in *Spectrum* was on the arrangements governing the bank's control of the collections.

The contractual arrangements in *Spectrum* prevented all dealings with the book debts other than their collection and required the collected proceeds to be paid into a designated account with the chargee bank. The key questions for decision were: (a) whether, as a matter of construction, the arrangements in respect of the account meant that it was 'blocked' or not, and (b) if the chargor could freely draw on the account into which it had paid collections, whether this was capable in law of being a fixed charge.[17]

As to question (a), their lordships held that the account was not blocked. Slade J had misconstrued the effect of the arrangements in relation to the designated account in the earlier case of *Siebe Gorman*, which involved materially the same contractual wording as that in issue in *Spectrum*.[18] On a proper construction, the bank's debenture placed "*no restrictions*"[19] on the use that the chargor could make of the balance in the designated account. As to (b), the hallmark of a floating charge, and a characteristic inconsistent with a fixed charge, is that the chargor is left to use the assets subject to the charge and withdraw them from the security. Accordingly, the chargor's ability to draw freely from the designated account was inconsistent with the charge in *Spectrum* being fixed. *Siebe Gorman* was overruled and Hoffmann J's decision in *In re Brightlife Ltd* [1987] Ch 200 was confirmed.

Whilst the above holdings were sufficient to dispose of the appeal, various *dicta* in *Spectrum*[20] were interpreted by a number of leading academics as supporting a view that "*only total prohibition of all dealings and withdrawal without permission is enough to create a fixed charge*" (Goode & Gullifer, *Legal Problems of Credit and Security* (7th ed.), at para 4-023). Similar statements are to be found in a number of other textbooks.[21] That view was not, however, shared universally. For example, the editors of *Lightman & Moss, the Law of Administrators and Receivers of Companies* (6th ed.), at para 3-021,[22] envisaged a lower threshold of control as being sufficient: "*Any unfettered or significant commercial freedom in the chargor to deal with a fluctuating class of assets without the consent of the chargee will be inconsistent with the existence of a fixed charge over those assets*".

In *Avanti*, faced with these rival interpretations of the decision in *Spectrum*, Edwin Johnson J ultimately rejected the binary approach to the question of control described by the first set of academics. He did not agree that *Spectrum* could be so interpreted ("*The speeches of their Lordships in Re Spectrum do not seem to me to support an absolute approach to this question*"). Instead, the judge favoured an approach which had regard to a 'spectrum' of possibilities as to control "*with total freedom of management at one end of the spectrum, and a total prohibition on dealings of any kind at the other end of the spectrum*".[23] As a matter of law, the judge held that he could not see that a charge will only be fixed if it is located at the total prohibition end of the spectrum.

Whilst the judge declined to identify the point on the spectrum of control where a floating charge gives way to a fixed charge, or *vice versa*, he held that the case law supported a more nuanced approach requiring a number of factors to be taken into account.[24] He was clear, however, that a permission to deal with a charged asset in the ordinary course of business – often identified as the hallmark of a floating charge[25] – was inconsistent with a charge being fixed in law.

The Two-Stage Enquiry

The judge proceeded to consider the two-stage enquiry described by Lord Millett in *Agnew* to determine the characterisation issue.

At the first stage, which requires the court to construe the charge and contractual documentation to ascertain the nature of the rights and obligations the parties granted each other in respect of the charged assets, the principal issue of construction was as to the scope of the carve-outs to the Asset Sale definition, and their applicability to the Relevant Assets.

Taking them in turn, the judge held that: (a) the fair value carve-out would not have permitted the Company to dispose of the Relevant Assets free of the restrictions, in light of the relatively high value of the same, as evidenced by the price they were

14. See *Siebe Gorman*. [1979] 2 Lloyd's Rep 142; *In re Brightlife Ltd* [1987] Ch 200; *In re New Bullas Trading Ltd* [1994] 1 BCLC 485, and *Agnew v Comr of Inland Revenue* [2001] 2 AC 710, 722.

15. *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2001] UKHL 58, which concerned two very large coal washing plants.

16. *Agnew* at [46].

17. *Spectrum* at [83] (per Lord Scott).

18. *Spectrum* at [142] (per Lord Walker) and at [61] (per Lord Hope).

19. *Spectrum* at [117] (per Lord Scott).

20. See, for example, the references to assets under a fixed charge being "finally appropriated" (at [111]) or "permanently appropriated" (at [138]) as security for the payment of the debt.

21. See also *The Law of Security and Title Based Financing* (3rd ed.) para 6.129; and Professor Sarah Worthington and Ina Mitchkovska, *'Floating charges: the current state of play'* 9 JIBFL 467, which stated: "*The charge is fixed if and only if the chargor is required to preserve the charged assets, or their permitted substitutes, for the benefit of the charge. Without this requirement, the charge is floating*".

22. Cited with approval by the judge in *Avanti* at [28] and [117].

23. *Avanti* at [118].

24. *Avanti* at [119].

25. See Re *Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284, 295; *Agnew* at [13].

ultimately sold for; (b) the obsolescence carve-out was of limited reach as regards the Relevant Assets, particularly given that some of those assets were intangibles, like the satellite network filings; (c) the circumstances in which the usefulness carve-out might be engaged were relatively limited; and (d) the capacity carve-out permitted the group to deal in the sale of satellite capacity in the ordinary course of business, as opposed to the assets required to generate that capacity; accordingly, the capacity exception did not lead to the conclusion that the underlying charged assets could themselves be disposed of without restriction.

At the second stage, which requires the court to embark on the characterisation exercise in view of the rights and obligations ascertained at the first stage, the judge applied his conclusions as regards the spectrum of control described above. The judge noted that if the statements in the academic commentaries as to the need for a total prohibition were correct, then the charge in *Avanti* could not have been fixed as the contracts *did* permit "*certain dealings with the Relevant Assets*".[26] The question was thus one of degree.

Having regard to his findings at the first stage, the judge reasoned that, whilst not constituting a total prohibition, the contractual framework nevertheless left the Company's ability to deal with the Relevant Assets "*materially and significantly limited*"[27] and that all the Relevant Assets were subject to "*considerable restrictions*".[28] In particular, the judge emphasised that the exceptions to the Asset Sale definition provided no opportunity for disposal in the ordinary course of business of the Relevant Assets themselves.[29]

Accordingly, when answering the overarching question as to "*whether the chargee is in control of the charged assets*" *(Re Cosslett (Contractors) Ltd* [1998] Ch 495, 510 per Millett LJ), the judge held that the chargee in *Avanti* was in control to the requisite extent.

26. *Avanti* at [108].
27. *Avanti* at [125].
28. *Avanti* at [89(1)].
29. *Avanti* at [123].

30. *Avanti* at [121].

The future

At what point on the spectrum a fixed charge becomes floating is a question that may require further elaboration from the courts in the future. The judge in *Avanti* declined to express a definite view. As a matter of law, however, Edwin Johnson J considered that where a chargor's control was "*materially and significantly limited*" that would suffice. Put another way, "*some ability*"[30] to deal on the chargor's part was not incompatible with fixed security on the facts in *Avanti*. It is unclear, however, whether the judge was prepared to go quite so far as the editors of *Lightman & Moss* and accept that the tipping point for characterisation purposes is where the chargor has "*significant commercial freedom*" to deal with the charged assets.

The more "*nuanced*" approach favoured in *Avanti*, which rejects a binary approach to the question of control and requires the Court to have regard to a number of relevant factors, is perhaps not as surprising as has been suggested in some market commentary on the decision. In one of the earliest cases on floating charges, *In re Florence Land and Public Works Co, Ex p Moor* (1878) 10 Ch D 530, 537, Sir George Jessel MR observed: "*The question we have to decide must be decided, like all other questions of the kind, having regard to the surrounding circumstances under which the instrument was executed, and especially the respective positions of the parties who were the contracting parties, to carry out whose agreement that instrument was executed.*"

Following the decision in *Avanti*, it seems probable that this area will see an uptick in litigation. Where there is not a total prohibition on disposals on the one hand, nor an ordinary course of business permission on the other, the courts may well find themselves being asked to consider cases on the margins and to scrutinise the scope of contractual permissions to determine where the case falls on the spectrum of control.




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Reliance On The Merger Price In Cayman Appraisal Actions

Andrew Jackson, Damon Booth, Barry Isaacs KC and Toby Brown consider the use of the merger price to establish fair value in appraisal proceedings in the Cayman Islands, together with the issue of burden of proof. Amongst other cases they highlight the decisions handed down in May and June 2023 in *Re Trina Solar Limited* and *Re iKang Healthcare*.

Introduction

In recent years, much use has been made of the regime which the Cayman Islands' Companies Act provides to facilitate corporate mergers. Often the purpose of the merger is to cash out minority shareholders, commonly to enable a publicly-listed company to be taken private. Where minority shareholders are faced with that prospect, section 238 of the Act entitles them to dissent from the merger and to pursue proceedings (an "**appraisal action**") to have the fair value of their shares determined and awarded by the Court.

There have been a large number of cases where minority shareholders have considered the price offered for their shares (the "**merger price**") to be materially unfair, and where the Cayman courts have dealt with appraisal actions. Seven have proceeded to trial on the question of fair value,[1] appeals against two fair value orders have been decided by the Cayman Islands Court of Appeal ("**CICA**"),[2] and one has been the subject of a further decision of the Privy Council.[3]

In some of these cases the Court has been invited to place reliance on the merger price (also known as the "**transaction price**") either as a measure of fair value, or as a cross-check against other valuation methods. This article examines the bases on which the merger price has either been

1. These are *Re Integra Group* [2016] 1 CILR 192, *Re Shanda Games Ltd* (unrep. 25 April 2017), *Re Qunar Cayman Islands Ltd* [2019] 1 CILR 611, *Re Nord Anglia Education Inc* (unrep. 17 March 2020), *Re Trina Solar Limited* (unrep. 23 September 2020), *Re FGL Holdings* (unrep. 20 September 2022) and *Re iKang Healthcare Group* (unrep. 21 June 2023).

given weight in the determination of fair value or held to be unreliable. We start by providing a brief overview of the approach to evidencing fair value, including the question of the burden of proof. We then analyse four decisions where the merger price was relied upon, starting with *Re Nord Anglia Education Inc* (unrep. 17 March 2020) and *Re FGL Holdings* (unrep. 20 September 2022), before moving to the recent judgments *Re Trina Solar Limited* (unrep. 4 May 2023), and *Re iKang Healthcare Group* (unrep. 21 June 2023).

Evidencing fair value

In the CICA's judgment in *Trina Solar*, Birt JA cited with approval Segal J's two-fold exposition at first instance of the meaning of "*fair value*".[4] First, the Court is seeking to assess the monetary amount which in the circumstances represents its best estimate of "*the true worth of the dissenting shareholders' shares (true worth meaning the actual value to the shareholder of the financial benefits derived and available to him from his shares and by being a shareholder)*". Second, the reference to "*fair*" requires that the method of assessment is fair to the dissenting shareholder by "*ensuring that all relevant facts and matters are considered and that the sums selected properly reflects the true monetary worth to the shareholder of what he has lost, undistorted by the limitations and flaws of particular valuation methodologies and fairly balancing, where appropriate, the competing, reasonably reliable alternative approaches to valuation relied on by the parties*".

As this *dicta* highlights, parties to appraisal proceedings often advance different methodologies to establish the fair value of the shares at the relevant valuation date. In addition to the merger price, these are principally: (a) adjusted trading or market price, (b) comparable companies' analysis, and (c) discounted cashflow forecast ("**DCF**") valuation. Recent case law has confirmed methodologies can be "*blended*", by applying a percentage weighting to two or more of the valuations to produce a composite sum that reflects the fair value.

As Parker J stated in *FGL Holdings* at [269], Cayman law creates no presumption as to which methodology will be suitable in any particular appraisal. Accordingly, contested proceedings involve the parties adducing complex and competing expert valuation evidence. In analysing the expert (and factual) evidence, the Court is required to apply the principle that each party bears the burden of proving its case on fair value. As Segal J recently explained in *iKang Healthcare* at [36]:

"*The Court will consider detailed expert valuation evidence in making its determination of fair value.* **In assessing such expert evidence, as I explained in Re Shanda Games at [84] (unrep. 25 April 2017) (Shanda GC) "...the Court should approach the disputed issues on the basis that it is for [the Company] and the Dissenting Shareholders to establish, on the balance of probabilities, that the valuations their experts have presented on the issue in question are reasonable and reliable**. *If only one is reasonable and reliable then the Court should (absent some other reason for not doing so) follow and apply that approach. If both appear to be reasonable and reliable, the Court must decide which is to be preferred. If neither is reasonable and reliable, the Court must make its own determination. The Court, in a petition under section 238, is not able simply to treat fair value as not being established...*" (emphasis added).

In the same judgment, Segal J made clear that this approach extends well beyond asking whether an expert has, on the factual evidence available, essentially done the maths correctly: the reasonableness and reliability of any valuation will largely depend on the availability of the factual evidence on which it needs to be based. At [35], the Judge added:

"*Where a company contends that the merger consideration is indicative of fair value sufficient evidence of "market efficiency, fair play, low barriers to entry, outreach to all logical buyers and a well-designed sales process" must be adduced (see Trina at [156]). Where relevant documentary or witness evidence is not available, the Company "risks failing to satisfy the evidential burden" in respect of that aspect of its case on fair value" (see Trina at [156]). Where a company contends that the market trading price is indicative of fair value, it needs to demonstrate both that there was no material non-public information and that the market for the relevant shares at the relevant time was semi-strong efficient (see Trina at [128]).*"

2. *Re Shanda Games Ltd* [2018] 1 CILR 352 and *Re Trina Solar Limited* (unrep. 4 May 2023).

3. *Re Shanda Games Ltd* [2020] UKPC 2.

4. Segal J at first instance [91]; Birt JA on appeal at [34].

Re Nord Anglia Education Inc.

Nord Anglia was the first case in which substantial reliance was placed on the merger price in the determination of fair value, with the Court giving it a 60% weighting, and the remaining 40% given to a DCF analysis.

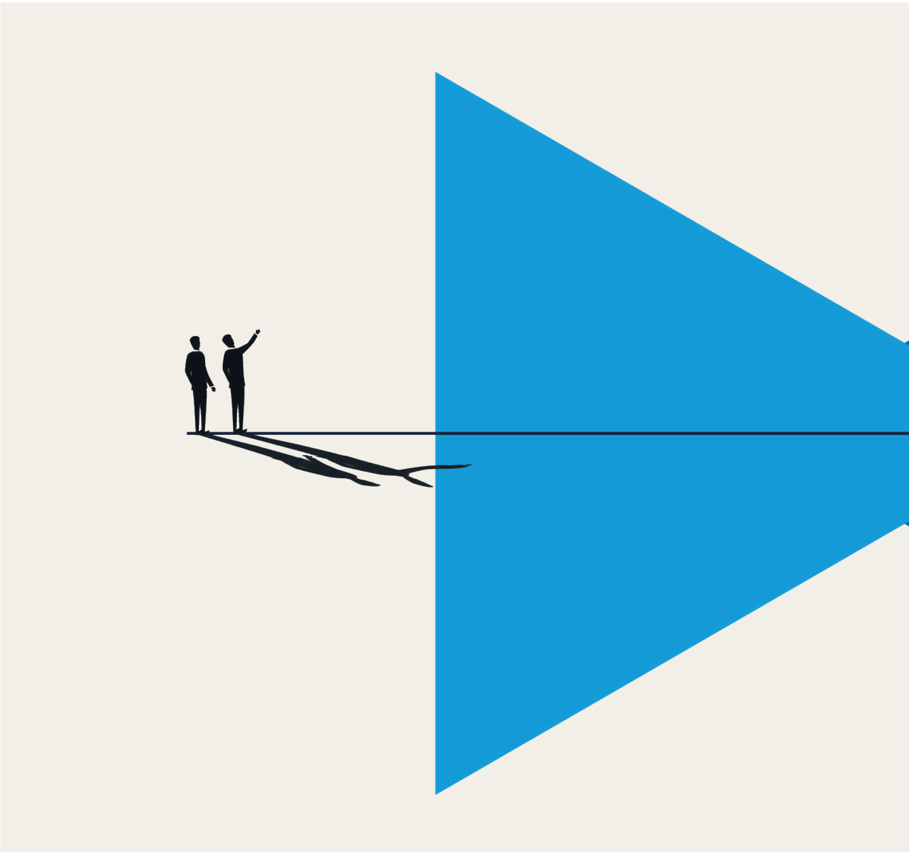
The company contended that the merger price was the product of a genuinely arm's length and fair process which generated the highest price available in the market. This position was challenged by dissenting minority shareholders *inter alia* on the bases that investment funds managed by Baring Private Equity Asia were on both sides of the transaction and that the sale process had been designed to dissuade interested third parties from participating.

Kawaley J referred to the Delaware Supreme Court's decision in *Dell lnc v. Magnetar Global Event Driven Master Fund Limited* 177A.3d I (2017) ("**Dell**"), where Valihura J warned that in cases where there has been "***a robust sale process** involving willing buyers with thorough information and the time to make a bid…the Court of Chancery should be chary about imposing the hazards that always come when a law-trained judge is forced to make a point estimate of fair value based on widely divergent partisan expert testimony.*" (emphasis added).

On the facts, Kawaley J considered that there had been an arm's length transaction but that it was not robust in the sense described in Dell. Nonetheless the Judge decided that reliance could be placed upon the merger price. He observed that Baring had a fiduciary duty to the beneficial owners of the selling funds to maximise the sale price (and it is implicit that no breach of fiduciary duty had been established).[5] The Judge was also satisfied that there was no significant overlap of beneficial interests in the funds on each side of the transaction, and that the potential conflict of interest by virtue of Baring being on both sides of the transaction had been addressed through the establishment of a special committee of the company's board of directors. The Judge further observed that the merger price had been approved by that special committee based on credible independent financial advice, and was higher than any price at which the shares had traded in the preceding year. Turning to the robustness of the sale process, the Judge found that there was at least some attempt to find other bidders and none came forward in a serious way, and he considered that there was no credible evidence that any seriously interested bidders willing to pay a substantially higher price had been rebuffed (including because a dissenter which had been a longstanding shareholder of the company had declined to make a topping bid).

The Court did, however, refer to numerous factors which might have been taken to undermine the reliability of the merger price as a measure of fair value. These included that the selling funds were under the control of a Baring entity which held sufficient voting power to approve the merger on its own and which had already agreed to sell to the affiliated bidder. The Baring-owned controlling shareholder had also obtained a "*force the vote*" clause in the merger agreement, entitling it to require an extraordinary general meeting to vote on the proposed merger even if the board changed its recommendation regarding the merger, save in very limited circumstances. The buying side also had unlimited matching rights under the merger agreement, and were thus entitled repeatedly to outbid any other superior bidder for the company; the largest single investor on the buying side was admittedly a client of Baring; and Baring personnel who generally worked as part of the same team were on both sides of the negotiating table. The go-shop period, throughout which the fairness advisor was expected to solicit third-party interest in acquiring the company, was also limited to a brief 30 days, and the go-shop mechanism made it difficult for competing bids to be made. The Court further recognised that any potential third-party bidder would have been at an informational disadvantage to the buying side.

Kawaley J ultimately acknowledged that a number of those factors might have discouraged potential third-party bidders, but considered that any seriously interested party would nonetheless have come forward, thus disregarding the potential effect of the winner's curse. Treating the merger price as the starting point, as already stated, the Judge decided to give it more weight at 60%, against 40% for the DCF valuation advanced by one of the experts.



5. Although note that an appraisal action is concerned only with the issues of fair value and a fair rate of interest, not claims for breaches of fiduciary or any other duty, which a minority shareholder that has dissented from a merger will have lost the right to pursue derivatively on behalf of the company.

Nord Anglia was cited by the CICA in *Trina Solar* without apparent criticism. However, in light of their judgment as to the importance of a robust sales process to justify reliance on the merger price, and the decision in *iKang* (both discussed below), we question whether a case on similar facts would now be decided in the same way.

Re FGL Holdings

In *Re FGL Holdings* the Court determined that the merger price equated to the fair value of the shares, and thus declined to give weight to other valuation methodologies put forward in the expert evidence.[6] Notably, however, the facts of that case were strikingly different from almost all other appraisal actions which have been commenced in the Cayman courts to date, which typically arise from take-private transactions driven by a controlling shareholder which can approve the merger on its own and is a member of the buyer group acquiring the business.

FGL was a US insurance company which was the subject of an unsolicited bid by another US insurance business (called FNF) which had been one of its minority shareholders (with 17% voting power) for the few years preceding the transaction.

Parker J acknowledged that fair value and merger price are not the same. Nonetheless, he held (in effect echoing the *dicta* in *Dell* cited above) that merger price can be evidence of fair value “*where the transaction process was properly conducted so as to ensure that the market was adequately tested and there is sufficient evidence that market conditions were such as to facilitate an arm’s length transaction with all potentially interested parties*”.[7] Furthermore, applying Segal J’s *dicta* at first instance in *Trina Solar*, he cited the need for sufficient evidence of “‘*market efficiency, fair play, low barriers to entry, outreach to all logical buyers’ and a well-designed sales process*”. The Judge added that the precise weight to be given to the merger price depended upon the assessment of the process and whether it achieved these objectives, as well as the reliability of other methods.

On the evidence, Parker J concluded that the merger price provided a sound indicator of fair value because the sales process was well designed, at arm’s length and represented a transaction between a willing buyer and seller.

More specifically, the proposed merger was not a management or controlling shareholder buyout (FNF having been incapable of forcing it through on its own), and it received an overwhelming level of shareholder approval, by more than 99% of the shareholders unaffiliated with FNF which were present and voting (being 78% of all unaffiliated shareholders). In addition, the company’s co-chairman, who led negotiations on behalf of the special committee, was best placed to pursue the best price that could be obtained, and his interests were substantially aligned with those of the unaffiliated minority shareholders by virtue of the relatively substantial minority shareholding in FGL which he too would be selling in the transaction. Furthermore, FNF had confirmed that it was also willing to sell its minority shareholding in the company if a superior bid emerged, and the go-shop process was sufficiently open, notwithstanding that only one potential acquirer (a competitor of the company) came forward, and entered into an NDA and then failed to put forward any credible indicative bid.

In addition to those facts relating to the merger process itself, it is apparent from the judgment that little effort was made to quantify the value of the synergies arising from the transaction, which would in principle fall to be excluded from an award of fair value.[8] Had there been engagement with that issue, the Court may well have concluded that the merger consideration actually somewhat exceeded the fair value of the shares. Furthermore, no reliable income-based valuation was put before the Court, and the market trading price had also been rendered wholly unreliable because of the impact of the COVID-19 pandemic on the market at the relevant time,[9] so the Court was unable to weigh either of those possible indicators of fair value in the balance.

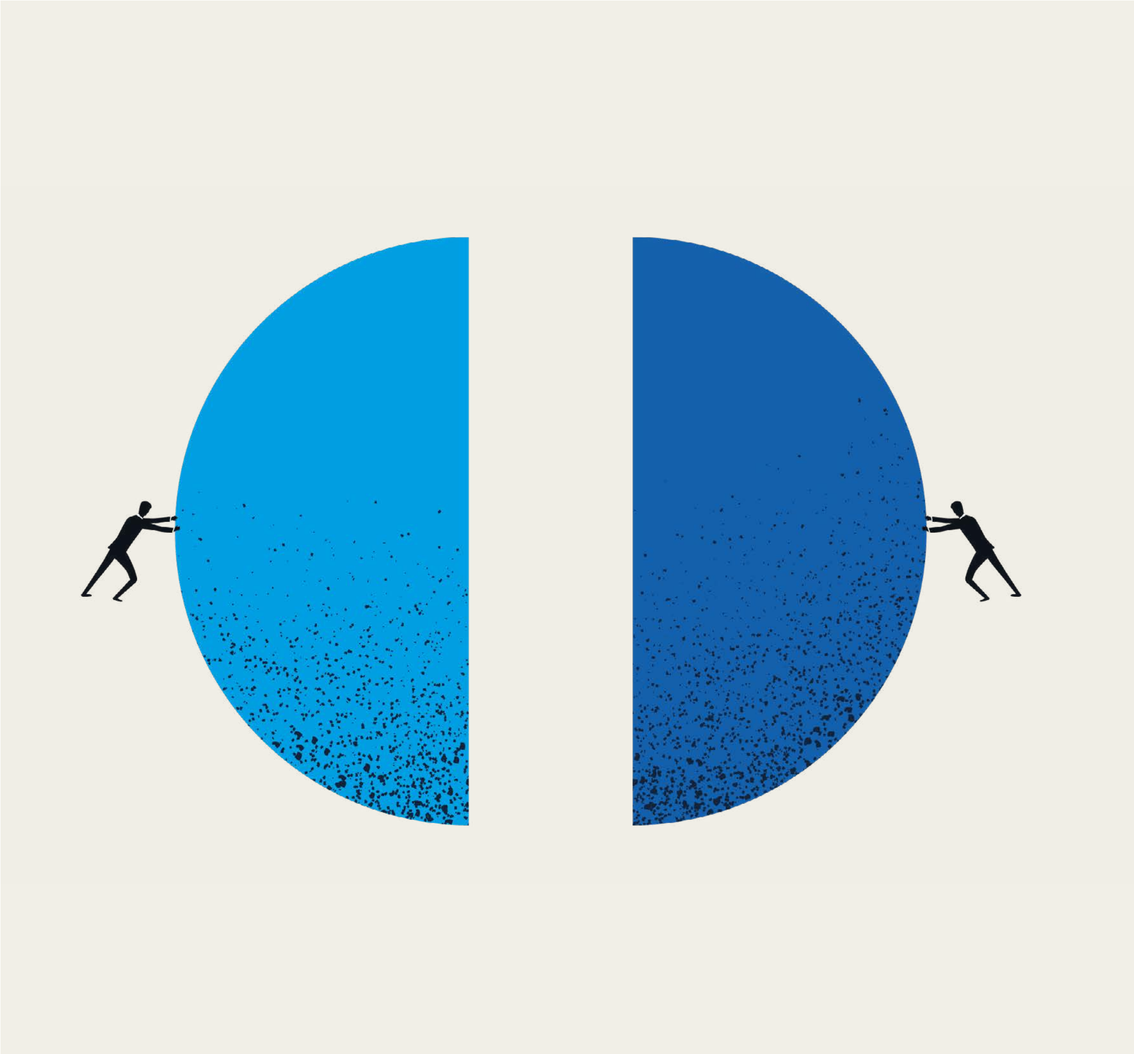
The decision in *FGL Holdings* to rely entirely on the merger price to ascertain fair value remains unusual, though it is an unsurprising conclusion on the facts.

6. Although it is possible that weight may have been given to an appropriate income-based valuation methodology, if one had been adduced. The dissenting shareholders’ expert in that case had produced a dividend discount model, which the Court held was unreliable for valuing an insurance business such as FGL.

7. See at [570]-[571].

8. Since fair value does not include any value particularly arising from the accomplishment or expectation of the merger.

9. Notwithstanding that the Court found that the market for the company’s shares was informationally efficient, and that there was no material non-public information.



Re Trina Solar Limited (CICA)

In *Trina Solar*, when determining fair value at first instance, Segal J had given the merger price a 45% weighting, with 30% being given to the adjusted trading price of the shares, and 25% to a DCF valuation. The dissenting shareholders appealed against various aspects of the first instance determination, including the decision to place any weight on the merger price, a position which the CICA ultimately accepted. In the CICA's judgment at [139], Birt JA (with whom Beatson and Field JJA agreed) cited with approval the summary by the Delaware Court of Chancery in *Re Solera Holdings Inc* of the features which ordinarily justify reliance on the merger price:[10]

"...deal price is "the best evidence of fair value" when there was an "open process," meaning that the process is characterised by "objective indicia of reliability." Such "indicia" include but, consistent with the mandate of the appraisal statute to consider "all relevant factors," are not limited to:

- *"[R]obust public information," comprised of the stock price of a company with "a deep base of public shareholders, and highly active trading," and the views of "equity analysts, equity buyers, debt analysts, debt providers and others."*

- *"[E]asy access to deeper, non-public information" where there is no discrimination between potential buyers and cooperation from management helps address any information asymmetries between potential buyers.*

- *"[M]any parties with an incentive to make a profit had a chance to bid," meaning that there was a "robust market check" with "outreach to all logical buyers" and a go-shop characterised by "low barriers to entry" such that there is a realistic possibility of a topping bid.*

- *[A] special committee "composed of independent, experienced directors and armed with that (sic) power to say 'no'," which is advised by competent legal and financial advisors.*

However, Birt JA rejected the submission that no or minimal weight must be given to a merger price which is the product of a process which failed to exhibit all such features. He explained (agreeing with the trial Judge) that: *"The mere fact that there are flaws in the deal process does not of itself mean that the merger price cannot be given weight. It all depends on the gravity and nature of the flaws, although clearly the existence of any flaws raises a serious issue as to whether weight can still be placed on the merger price."*[11]

10. [2018] WL 3625644 (30 July 2018), at p.17 per Bouchard C.

11. See at [136], [142].

12. See at [146].

13. See at [146(iv)(a)]

As already noted, the CICA cited the decision in *Nord Anglia* as an example of a sale process, although at arm's length, which was not as robust as it might have been but where the merger price still provided a reasonable indicator of fair value. In contrast, if the breaches are substantial, the merger price is unlikely to be a reliable indicator of fair value, and accordingly little or no weight should be given to it.

On the facts, the gravity, nature and indeed the number of the flaws in the *Trina Solar* merger process were significant. The CICA held that it was not reasonably open to the trial Judge to give any weight to the merger price in the determination of fair value, including in light of the defects which the Judge himself had found in the merger process.[12] Birt JA referred to various aspects in the merger process which undermined the Judge's conclusion, including that:

- The company failed to provide a witness who could explain the actions of the special committee. The committee member who gave evidence at trial had been an unsatisfactory witness, for example, he could not explain satisfactorily why the committee had positively decided to exclude the company's four largest main competitors from the market check.

- Very few documents in relation to the sale process were available, with significant gaps in the information needed to explain the actions of the special committee, for example as to their selection of potential bidders for the market check or why the company's main competitors were not included.

- There were serious defects in the market check carried out by the special committee. Although the Judge did not conclude that the committee's exclusion of the company's major competitors was deliberate, Birt JA stated that it was the "*effect of the decision…which is important …[which] would be to reduce the chances of an alternative bid. The Special Committee clearly failed the requirement in Dell (as adopted by the judge) that there be 'outreach to all logical buyers'*".[13]

- The company failed to put the various potential bidders in touch with each other, despite a specific request from one potential bidder interested in forming a consortium. This had the effect of reducing the chances of a competing bid. In addition, the NDA was so tight it prevented any interested party from making a bid unless invited to do so by the special committee.

- The Judge had accepted that the influence and position of the chairman in having dual roles in both the company and the buyer group created a material risk that the merger process would fail to produce an independent competing bid. Birt JA stated that the important point was this material risk existed, which was not addressed by the special committee, and was clearly relevant to whether weight could be placed on the merger price.

- The connections between the special committee members and the chairman raised concerns about their independence. Referring to the *dicta* from *Solera* quoted above, Birt JA said that "*it is an important indicia of reliability that a special committee be composed of independent experienced directors*". On the Judge's own findings there were concerns about this aspect.

- Finally, Birt JA considered the dissenting shareholders' criticisms of the fairness opinion on which the special committee had relied. He observed that the fairness advisor had, without explanation, taken a cost of debt figure of 13%, which was very high when compared to the two experts' figures of 4.9% and 5.5%. Had the fairness advisor used a figure of 4.9% this would have yielded a valuation that was more than double the merger price. This was therefore a significant error. Birt JA concluded it was another matter which questioned the reliability of using the merger price, given the likelihood of some shareholders voting differently if the fairness opinion had reflected a justifiable cost of debt figure and therefore produced a DCF valuation well in excess of the merger price.

The CICA criticised the Judge for effectively shifting the burden on to the dissenting shareholders, contrary to the principles summarised at the start of this article. In particular:

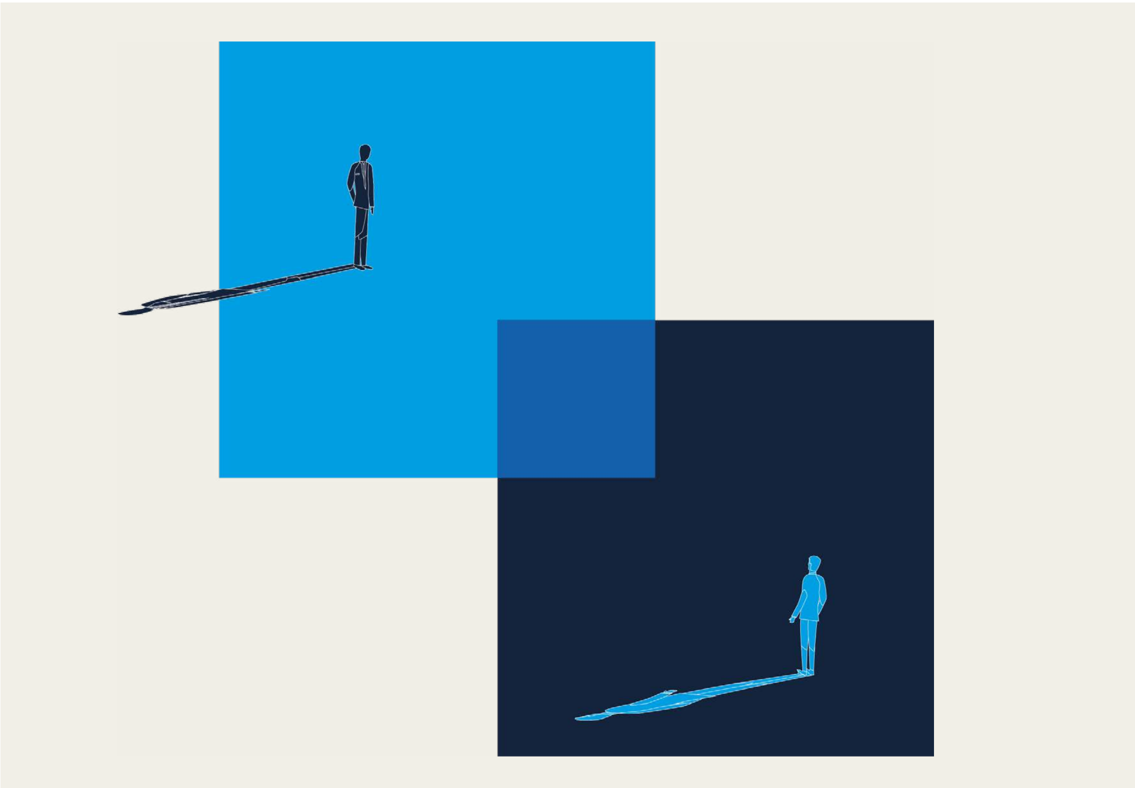
- On the fairness opinion, it was the company that was seeking to rely upon the opinion to support the merger price as indicating fair value. It therefore had the burden of producing any necessary evidence in support of the fairness opinion.

- On the documentary evidence to explain the actions of the special committee, the correct target for criticism and for the potential drawing of adverse inferences was the company, not the dissenting shareholders.

- On the market check carried out by the special committee, it was for the company to show that this was adequate to ensure all potential bidders had been approached, but the Judge had in effect placed the burden on the dissenting shareholders to show that potential bidders were prevented from coming forward.

Given the preponderance of factors which demonstrated the unreliability of the merger price, Birt JA held that no reliance at all could safely be placed on the merger price. It bears noting that this was a case where the merger had been approved by 97.8% of the shares voted or deemed to have been voted in favour.

Having made clear that "*heightened scrutiny*" is required where the merger transaction is effectively a management buyout, Birt JA concluded by emphasising the protections developed in Delaware jurisprudence and adopted in the Cayman Islands to provide comfort that the merger price can be probative of fair value.[14] The importance of this point was underscored by his warning that "*if despite the deficiencies identified and the failure of the Company to engage properly in the process by producing suitable evidence in the form of witnesses and documents, weight can still be placed on the Merger Price, there is a substantial risk that companies in future will behave in a similar manner and not be open and transparent about all relevant evidence*".



14. See at [140] and [148].

15. See at [451]

16. See at [470]

Re iKang Healthcare

The judgment in *Re iKang Healthcare* was delivered shortly after the judgment in the *Trina Solar* appeal. This was not a case in which either expert contended that the Court should give weight to the merger price, but the company's expert sought to put it forward as a cross-check for the valuation methodologies on which he did rely, effectively inviting the Court to regard it as a ceiling on fair value. Segal J rejected that proposition, finding that the merger price did not assist in reaching a fair value determination in this case.

The Judge did not accept the company's argument that the merger price was insufficiently reliable to be given any independent weight in the fair value determination, but was sufficiently reliable to be considered when deciding between other competing valuations and determining fair value in light of them. Fundamentally, if the merger price could not properly be given weight in determining fair value, then neither could it serve as a useful cross-check of other valuations.

In any event, the Judge preferred the dissenting shareholders' expert evidence on this issue, finding *inter alia* that the chairman's ability to veto any competing transaction, together with his significant informational advantage, created a fundamental (and structural) difficulty for the merger process. In particular, the market checks and the process as a whole were limited. Further, the chairman showed no signs that he was prepared to "*release his grip on [the Company]*",[15] and thus there was never a realistic prospect of an outright buyer being found, such that the exercise was confined to seeking out new partners for the chairman (and his syndicate). Moreover, a poison pill Rights Agreement which had been implemented reinforced management's and the chairman's control over the merger process. The Judge considered that those circumstances had "*a substantial chilling and complicating effect that reduced the pool of interested parties*",[16] gave ultimate control of the process to the chairman, and resulted in a price (paid by his new partners) that was likely to be below what would be paid by an arm's length buyer in a competitive bidding process.

Having reminded himself of the evidential burden, Segal J held that the company had failed, without adequate explanation, to secure and produce important documentary evidence from its special committee's fairness advisor regarding its work in relation to the market check process. This further weakened its case for (indirect) reliance on the merger price in determining fair value. The Judge proceeded to warn at [474] that:

"in future cases companies in section 238 proceedings should be prepared to make available a proper documentary record relating to the work of financial advisers to a special committee and as to the conduct of a market-check and sales process and need properly to justify why documents have not been retained or are not available."

Conclusion

The CICA in *Trina Solar* and the Grand Court in *iKang Healthcare* have reaffirmed the principle as to the burden of proof in Cayman appraisal actions, and the evidence which companies involved in such actions will need to adduce where they seek to contend that reliance should be placed upon the merger price as an indicator of fair value. The CICA's decision in *Trina Solar* is also notable for emphasising the principles from the Delaware jurisprudence relating to a robust sales process, both to justify weight being placed on the merger price, and to prevent abuse of the statutory merger regime, not least where it is being used to facilitate management or controlling shareholder buyouts. These judgments should focus the minds of those involved in such merger processes, since it is likely that companies involved in appraisal actions will need to take more of an "*open book*" approach to documentary disclosure and proffering witness evidence in respect of the process which led to the relevant merger, in addition to that which may have a bearing on any other appropriate valuation methodology.

Barry Isaacs KC appeared *in Re iKang Healthcare*, instructed by Andrew Jackson and colleagues from Appleby. Both acted for different groups of dissenting shareholders in *Re Nord Anglia.*

MARK PHILLIPS KC

ANDREW SHAW

Denaxe Ltd v Paul Cooper and David Rubin: Immunity From Suit Upheld

The Facts

Denaxe, formerly known as Blackpool Football Club (Properties) Limited ("**BFCL**") owned a majority of the shares in Blackpool FC Limited which operated the Blackpool football club business. Denaxe separately also owned the football stadium at which the Club played its home games. Denaxe and Mr Oyston, Denaxe's owner and controller, were ordered to buy out the minority shareholding owned by VB Football Assets ("**VB**"). VB secured the appointment of Mr Cooper and Mr Rubin as Receivers by way of equitable execution over various categories of assets owned by Mr Oyston and Denaxe.

Following a marketing exercise, the Receivers applied for an order permitting them to sell the Football Club together with the stadium and VB's minority shareholding in BFCL as part of one transaction. Approval by the court was a condition of the sale. Mr Oyston opposed the application, arguing that the Receivers were seeking protection against any allegation of professional negligence. Marcus Smith J held that the sale of the Club was a matter requiring court scrutiny and that it was a momentous decision.[1] Further, he held that it was unnecessary for him to decide the degree of immunity that follows from court sanction. Noting that Mr Oyston had had "*every opportunity to take points in relation to the proposed sale*" but that he "*had raised no substantive point against the transaction*" Marcus Smith J concluded that the exercise of the power proposed by the Receivers was a lawful one, within the scope of the powers conferred on them by my order, that the Receivers acted as ordinary, prudent and reasonable receivers, and that the sale of the Club was a proper transaction in all the circumstances. Marcus Smith J sanctioned the sale.

Denaxe sued the Receivers claiming that they had breached their duties of care and sold the footballing

1. See at [2021] EWHC 1120 (Ch). See at [2022] EWHC 764 (Ch).

2. See at [2022] EWHC 764 (Ch).

3. The case is at [2023] EWCA Civ 752.

assets at an undervalue. Fancourt J struck out the claim[2] on the grounds that (a) the order of Marcus Smith J gave the Receivers immunity from the claim and (b) the claim was a *Henderson v Henderson* abuse of process. Mr Oyston appealed. The Court of Appeal rejected the appeal.

The Court of Appeal

This was the first case[3] to consider the effect of a direction approving a sale in a subsequent claim that the sale had been entered into in breach of duty.

On the question of the jurisdiction exercised, the Receivers did not surrender their discretion to the court, but sought approval of the court to a transaction that they had already decided upon. Marcus Smith J was merely considering whether to approve the sale proposed by the Receivers. Snowden LJ said:

"It is all the more difficult to imagine circumstances in which the court would think it appropriate to accept a surrender of discretion in relation to a proposed sale of assets by professional office-holders who had been appointed for their expertise in taking commercial decisions in relation to the realisation of assets, and who were being remunerated to do that job."

Snowden LJ explained that in *Nortel* [2016] EWHC 2769 (Ch) ("***Nortel***") his role had been to concern himself "*with limits of rationality and honesty*" and he had not satisfied himself on the facts that no better deal might have been possible or that the administrators had discharged their duty of care.

Further, on the question of immunity flowing from a decision to sanction a transaction, the judgment underlines that it is judicial shorthand for the bar on subsequent proceedings that results from an issue estoppel. In short, if the judge hearing the approval application determines a particular issue as a step in deciding to give his approval, that will operate as a bar to a party to the application (or one of their privies) seeking to relitigate that issue in subsequent proceedings against the trustees or office-holder. Snowden LJ said that this question does not permit a "*one-size fits all*" answer. It will depend on the scope of the questions asked and on the parties to the application. If intention to seek approval for a momentous decision is advertised, so that creditors have the opportunity to attend and be heard the office-holders have a better prospect of persuading a court that a subsequent claim by a creditor would be an abuse of process.

The Court of Appeal agreed with the decision on the extent of any 'immunity' of Miles J in *Re Sova Capital Limited* [2023] EWHC 452 (Ch). Snowden LJ agreed with the following passage in the judgment:

"182. It appears to me that the scope of any subsequent immunity where the court is asked for directions from an office-holder must be sensitive to the particular facts: it depends on the specific nature of the question(s) before the court on the application and of any answer(s) given by the court. I do not think there can be a blanket rule of law that the court's approval of a transaction automatically generates full immunity in all respects concerning the transaction. It depends on the issues raised and the court's answers."

Snowden LJ also repeated and agreed with the 8 propositions and in particular agreed with Miles J's proposition that the scope of any immunity depends on precisely what the court decides. Accordingly, a direction that an administrator could dispose of a company's assets does not insulate the administrator from a claim that the decision to make the disposal had been made negligently. The Court of Appeal rejected the proposition that if the court approved a specific transaction with a specific third party at a specific price, that necessarily conferred a wide immunity in respect of all subsequent claims. ■

Mark Phillips KC and Andrew Shaw appeared at first instance before Marcus Smith J.

Mark Phillips KC, Stephen Robins KC, William Willson, Charlotte Cooke and Riz Mokal appeared before Miles J in *Re Sova Capital*

Stephen Robins KC

William Willson

Charlotte Cooke

Riz Mokal

Diary Dates

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

11-15 September 2023

INSOL Tokyo

Palace Hotel, Tokyo

5 October 2023

Mourant/South Square Litigation Forum

London

6 October 2023

The R3 Business Lunch

The Lancaster Hotel, London

11 October 2023

Global Restructuring Review: Restructuring in Asia 2023

The offices of Clifford Chance, Hong Kong

8 November 2023

IWIRC London Conference

London

12-14 November 2023

Thought Leaders 4 FIRE Middle East

The Shangri-La Hotel, Dubai

23 November 2023

ILA Annual Dinner

Further details to follow

29 February 2024

R3: The Fraud Conference 2024

Royal College Of Physicians, 11 St Andrews Place, Regents Park, London NW1 4LE

1 – 3 May 2024

R3: Annual Conference

Fairmont Hotel, San Diego

2 – 24 May 2024

INSOL San Diego

Further details to follow

South Square also runs a programme of in-house talks and seminars – both in Chambers and on-site at our clients premises – covering important recent decisions in our specialist areas of practice, as well as topcis specifically requested by clients.

For more information contact: *events@southsquare.com*

Case Digest Editorial

Mark Phillips KC

Schemes and restructuring plans have been considered by several different judges. We will leave the reader to decide whether that is a good or a bad thing. It can be argued that the materials produced are too lengthy and difficult to follow, the complexity of the debates, the evidence involved and the length of the hearings which in some cases have lasted for days, are not what Parliament intended.

In *Re Lamo Holding BV* [2023] EWHC 1558 (Ch) (Leech J) the court sanctioned a scheme that was part of a Dutch restructuring plan. That is likely to become more commonplace. The company had been negotiating for 7 years and the court was persuaded that insolvent liquidation was the relevant comparator. Whether it is right that the court is presented with narrow choices of relevant comparator (usually an insolvency process rather than an alternative deal as is often presented in US Ch11 hearings) is an area for development in future.

In *Re EPC UK Limited* [2023] EWHC 550 (Ch) it was held, provisionally, that for voting purposes account should be taken of the nominal value of shares as opposed to their market value.

In *Re AGPS BondCo Plc* [2023] EWHC 415 (Ch) the court crammed down the one objecting class, a series of Notes payable in 2029, rejecting objections that the noteholders were worse off, that the changes to maturity dates offended the *pari passu* principle, that the allocation of benefits was unfair and that a substitution clause was ineffective in Germany. The Court of Appeal has given leave to appeal.

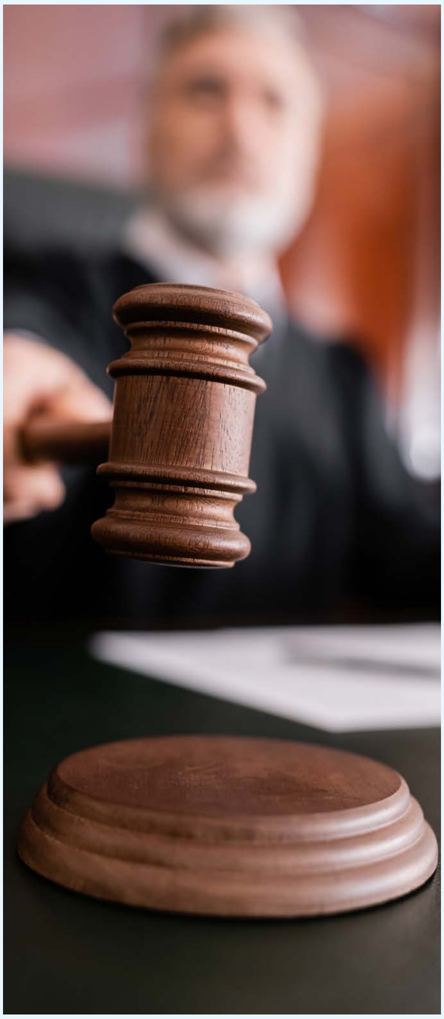
HMRC has successfully objected to two restructuring plans. *Re Great Annual Savings Company Limited* [2023] EWHC 1141 (Ch) is a restructuring plan that failed in the face of opposition from HMRC. The fairness of the distribution of benefits to shareholders and connected creditors will be an area of focus going forward. *Re Nasmyth Group Limited* [2023] EWHC 988 (Ch) the court held that it would exercise extreme caution before doing so and would require good reasons to cram down HMRC. The failure to agree arrangements with HMRC was key.

The removal of liquidators was considered in two cases. In the first it was refused, in the second it was ordered. *Chu Kong v Ocean Sino Limited* (in liquidation) & Ors is a decision of the Eastern Caribbean Court of Appeal rejecting Mr Chu's application to remove the liquidators in the long running Ocean Sino Ltd saga. *Re C.C.T. Logistics Limited (in liquidation)* [2023] EWHC 1548 (Ch) considers the voting rights of creditors arising out of voluntary payments made in order to discharge a company's debts. The liquidator had wrongly admitted the debt and was replaced by the court.

Ukraine sanctions continue to pose issues. *Fortenova Group D.D. v LLC Shushary Holding* [2023] EWHC 1165 (Ch) is another case in which the court has given a pragmatic solution to the problems resulting from Ukrainian related sanctions. The court directed that monies for early redemption of loan notes could be paid into court and that default interest would not be payable.

We report on two cases that consider derivative actions, *Ryan v HSBC UK Bank Plc* [2023] EWHC 1066 (Ch) and *Kuwait Ports Authority and others v Port Link GP Ltd and others CICA* (Civil Appeal) Nos. 002 & 003 of 2022. In *Kuwait Ports*, receivers were appointed and the General Partner put into voluntary liquidation.

We also report on two personal insolvency cases, *Lyons v Bridging Finance Inc* [2023] EWHC 1233 (Ch) and *HRH Prince Hussam Bin Saud Bin Abulaziz Al Saud v Mobile Telecommunications Co KSCP* [2023] EWHC 1144 (Ch).



Case Digests

Banking and Finance

DIGESTED BY STEFANIE WILKINS

Ryan v HSBC UK Bank Plc

[2023] EWHC 1066 (Ch) (HHJ Parfitt, sitting as a Judge of the High Court)
5 May 2023

Derivative claim – Shadow director

The claimants were former company directors and shareholders of MCPLC, who had applied under section 261 of the Companies Act 2006 for permission to bring a derivative claim against the defendant, "HSBC", which had been a lender to MCPLC. Under section 263(2)(a) of the Companies Act 2006, the Court was required to refuse permission if the Court was satisfied that a person acting in accordance with their duty to promote the success of the company would not seek to continue the claim.

In summary, the claimants asserted that HSBC had promised to support the business of MCPLC, but had instead transferred the management of the loan to its loan management unit (the "LMU"). The claimants' case was that HSBC had thereafter acted as a shadow director of MCPLC, and in that capacity had run down the business of MCPLC for its own interests. The judge identified that Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 set out the circumstances in which a bank might be regarded as having become a shadow director (rather than merely acting in its own interests as lender).

As a preliminary point, the Judge found that section 263(2)(a) would not be satisfied merely because the claimant had nothing to lose in bringing the proceedings (the claimants had said that they would meet the cost of the claim); rather, it required that there be positive reasons for continuing the claim. There were no such reasons in the present case. Instead, in assessing the proposed claim, it was inherently more likely that the bank wanted to support the business (whilst protecting its own interests) rather than engaging in an "*overarching conspiracy*" to "*kill-off the business in favour of asset realisations for its own purpose*". The claimants' position was also undermined by the actual outcome, which was that HSBC was ultimately "*the last creditor standing*", with substantial irrecoverable debts; this was inconsistent with a case theory that it had taken over the running of MCPLC (via the LMU) for its own financial benefit.

The Judge concluded that although it might be rare for the test set out by section 263(2)(a) to be satisfied, this was such a case. The claim against HSBC was inherently speculative and required additional matters to emerge later (for example through disclosure). Moreover, the claim was not one which lent itself to resolution through ADR, in circumstances where HSBC was the only substantial creditor, and the quantum would be difficult to assess.

Civil Procedure

DIGESTED BY ANNABELLE WANG

CNM Estates (Tolworth Tower) Ltd v Carvill-Biggs & Anor

[2023] EWCA Civ 480 (Sir Geoffrey Vos M.R., Lord Justice Newey and Lord Justice Males)
5 May 2023
Unless orders – Relief from sanction

The claimant company had defaulted on its loan repayments, following which its lender appointed receivers pursuant to a mortgage and debenture which formed part of the security for the loan. The claimant company brought a claim against the receivers for breach of their equitable duties in respect of the sale of its primary asset, being a development site.

At the trial of a preliminary issue, the Judge held that the receivers could only be liable for breach of their equitable duties where the liability in question was caused by the receivers' gross negligence or wilful misconduct. As no gross negligence or wilful misconduct had been pleaded, the claimant's pleaded claim was bound to fail. The receivers therefore invited the claimant to discontinue its claim or provide draft amended particulars of claim for its consideration. The claimant failed to take either course and the receivers applied for directions. The Court ordered the claimant to file and serve draft amended particulars, or its claim would be struck out.

The claimant served a draft pleading advancing a case of wilful misconduct but did not make an application to amend at that stage. The receivers indicated that a formal application to amend would be necessary, which the claimant duly made, appending further amended particulars which also advanced a case of gross negligence. The Judge hearing the application refused permission to advance the case of gross negligence and held that the claimant would require relief from sanctions, on the basis that the claimant had breached the unless order by serving draft amendments advancing one case but seeking permission to advance a further case.

The Court of Appeal held that the Judge's approach was incorrect. The claimant had complied with the unless order and no question of relief from sanctions arose. There was no scope for the "*halfway house*" adopted by the Judge, which construed the unless order as preventing the claimant from pursuing a claim which was not included in a draft amendment served in time, but permitting the claim it had pleaded in time to continue.

Free Leisure Ltd (t/a "Cirque Le Soir") v Peidl And Company Ltd & Anor

[2023] EWHC 792 (Comm) (Charles Hollander KC sitting as a High Court Judge)
3 April 2023

Claim forms - Strike out

The claimant purported to bring a claim against the first defendant and its insurer in respect of certain works carried out to a nightclub operated by the claimant. The claimant's solicitors had sent various pieces of pre-action correspondence to the defendants. However, the claim form was not issued until over five years later, some weeks before expiry of the six-year limitation period. The claim form was not served until after expiry of the limitation period and did not provide any details of the claim, merely identifying "*a claim arising out of breach of contract and/or negligence*".

The second defendant applied to strike out the claim form on several bases including that it disclosed no reasonable grounds for the claim against the defendants, did not comply with the Civil Procedure Rules, and that the service of the bare claim form to attempt to stop the limitation period running amounted to an abuse of process.

The claimant accepted that the claim form was defective. However, it contended that the essence of the claim had been identified in the pre-action correspondence sent by the claimant's solicitors five years prior. The claimant contended that the claim form ought to be construed in light of a letter of claim which had been sent to the defendants at the time of serving the claim form and the particulars of claim, which had been served several months after the claim form.

The Judge struck out the claim. He held that both the particulars of claim and letter of claim could not be used to interpret or explain the claim form, as both had been served after the limitation period had expired. Furthermore, the particulars pleaded causes of action not identified in the claim form and there was no jurisdiction to permit amendments to the claim form due to the expiry of limitation and the fact that it would be necessary for the claimant to rely on facts not included in the unamended claim form.

Stubbins Marketing Ltd & Ors v Rayner Essex LLP & Anor

[2023] EWHC 515 (Ch) (Deputy Master Nurse)
16 March 2023

Letters of claim – Discontinuance – Indemnity costs

Prior to bringing proceedings, the claimants had sent a detailed letter of claim to the defendants making numerous allegations and asserting their intention to make claims in *inter alia* deceit, dishonest assistance in breach of fiduciary duty and unlawful means conspiracy. However, those heads of claim were removed from the claim form after issuance but prior to service on the defendants.

The first defendant sought indemnity costs against the claimant in respect of the allegations made in the letter of claim but removed from the claim form on the basis that those allegations were baseless and abandoned or the alternative basis that those claims had been discontinued. The claimant argued that the claims were precluded from being treated as discontinued because the claim form had not been served.

The Master held that the removal of the heads of claim from the claim form prior to service was capable of amounting to discontinuance, as proceedings are held to have commenced once the claim form has been issued. Parties to proceedings therefore become potentially liable to pay the costs of other parties to the proceedings, whether or not those proceedings are actually served. The Master held that the amendment of the unserved claim form should be treated as discontinuance, and that it was appropriate to approach her discretion as to costs in the same manner as if there had been a formal notice of discontinuance.

Commercial Litigation

DIGESTED BY JAMIL MUSTAFA

Fortenova Group D.D. v LLC Shushary Holding

[2023] EWHC 1165 (Ch) (Michael Green J)
12 May 2023

Contracts—Licences—Loan Notes—Refinancing—Sanctions

A company (the "Company") successfully obtained an order for payment into Court of the monies necessary to redeem certain loan notes which it had issued and wanted to redeem before their maturity date in order to progress a refinancing.

The company had issued loan notes with a face value of €1.157 billion (the "Loan Notes"), €400 million of which were held by the first defendant ("Shushary") which was a subsidiary of the Russian bank, VTB Bank PJSC (VTB) and was subject to sanctions promulgated by the UK, US and EU. The Loan Notes were designated to mature in September 2023, but the Company wished to redeem the Loan Notes before their maturity date to effect a proposed refinancing. The Company had also granted security in respect of the Loan Notes of which it sought the release for same purpose. The Company could not, however, pay the sums required to redeem the Loan Notes to Shushary because of the sanctions against VTB and Shushary, and, therefore, sought an order to pay the relevant sums into Court. The Company also sought a declaration that it was not liable for any default interest on the Loan Notes, payable on the face of the subscription agreement, which it could not pay to Shushary while the sanctions were in force.

The Company had the benefit of various licences from the relevant authorities and submitted that the combination of those licences and a Court order would enable the Company to redeem the Loan Notes by paying the moneys due to Shushary into Court. Shushary did not dispute that the Company had a right to redeem the Loan Notes and obtain a release of its security but suggested that the moneys could be paid into an alternative account. The Court, however, rejected that suggestion as unviable and concluded that payment into Court was the only option. The Court also agreed with the Company that, on the proper construction of the subscription agreement, the Company could not be said to have failed to pay the sums due to Shushary (triggering the obligation to pay default interest) in circumstances in which the Company was willing to pay those sums but could not do because of international sanctions that prevented it from doing. Accordingly, the Court did not have to consider the Company's alternative submission that the payment of default interest would constitute an unenforceable penalty in the circumstances, but noted that the argument was compelling and added to the argument on construction.

Stephen Robins KC

Ryan Perkins

Yieldpoint Stable Value Fund LP v Kimura Commodity Trade Finance Fund Limited

[2023] EWHC 1212 (Comm) (Stephen Houseman KC, sitting as a High Court Judge)
22 May 2023

Contracts—Corporate Finance—Sub-participation agreements

This case concerned the nature and extent of a sub-participation taken by the Claimant ("Yieldpoint") in the Defendant's ("Kimura") share under a facility agreement. Yieldpoint claimed that the US$5m it had provided under the arrangement was a fixed term loan with a maturity date of 31 March 2022 (and was therefore not at risk), whereas Kimura contended that the transaction was a capital at risk investment whereby Yieldpoint's capital was exposed to underlying default risk in the nature of a sub-participation arrangement.

The relevant participation which was at issue (the "MTV Participation") was a contract executed on 30 March 2021 under the rubric of a master participation agreement and provided funding in relation to a pre-existing commodity finance facility in the amount of US$45m (the "MTV Facility") under which Kimura and another entity were joint senior lenders to MTV a copper-mining and cathode-producing company incorporated and based in Chile, and further under which the repayment date for the first tranche of the principal advanced to MTV was also 31 March 2022. Yieldpoint transferred the US$5m to Kimura the same day and the MTV Participation commenced on 1 April 2021. Kimura remitted interest payments and price participation instalments between 27 March and 31 December 2021, but made no further payments after that. Kimura failed to pay any of the US$5m to Yieldpoint on or after 30 March 2022. MTV also defaulted on its obligation to repay the first tranche of principal under the MTV Facility on the same date and was then declared bankrupt in Chile in February 2023.

The standard concept of a sub-participation was reflected in the terms of the master participation agreement, involved a proportionate sharing of both risk and reward in relation to the underlying financing (ie, both capital and the income stream were exposed to primary default risk). Against this backdrop, the Judge noted that the master participation agreement, which gave rise to the MTV Participation, contemplated such an arrangement and clear words would be required for the MTV Participation to not conform with that structure. Yieldpoint contended for a radical departure from the conventional model of a sub-participation agreement arguing for a hybrid model that insulated and protected capital (subject to only default risk from Kimura) whilst sharing risk and reward on a *pari passu* basis in respect of income earned on the capital during the fixed term.

Notwithstanding the *prima facie* difficulty of such a submission, the Judge held that the MTV Participation did give effect to such a hybrid model and accepted Yieldpoint's interpretation that the MTV Participation constituted an unsecured loan repayable on 30 March 2022. Amongst other things the Judge concluded that the provision for a maturity date was a sufficiently strong indication of the parties' intention to depart from the general sub-participation structure.

Company Law

DIGESTED BY PETER BURGESS

Re Lamo Holding

[2023] EWHC 1558 (Ch) (Leech J)
26 June 2023

Schemes of arrangement – Shareholder standing – Challenges

The Court sanctioned a scheme of arrangement relating to the Dutch holding company of a large international shipping group.

The group's debt had previously been spread out among numerous individual facility agreements secured over individual ships which give the lender independent enforcement rights in relation to the ship, the income derived from it and the shares in the individual company which owned the ship. In 2018, to harmonise and align the group's financial arrangements, the group had entered into a framework agreement with the lenders of 33 separate facility agreements under which the company guaranteed the obligations of the individual group companies which owned the vessels.

However, despite the framework agreement, the group continued to experience financial difficulties and in late 2022 the threat of enforcement action prompted it to start Dutch proceedings for the confirmation of a private restructuring plan.

The English scheme formed part of the Dutch plan. The scheme sought to modify and vary certain rights of creditors against the company and to confer on the scheme company a power of attorney to execute on behalf of the creditors any necessary documents to implement certain steps under the Dutch restructuring.

The shareholders of the group sought to object to the scheme and cross-examine the company's witnesses. A threshold question arose whether they could do so, despite not being a party to the proposed scheme and not voting at the scheme meetings. The Judge decided to hear their opposition on the basis that if an objector has raised issues which arguably have a bearing on the question of the fairness of the scheme before it, the Court should consider those issues in determining whether to sanction the scheme or not. The Court cannot decline to deal with one part of the overall inquiry it is bound to undertake.

The company had put forward evidence to support its case that the relevant comparator was insolvent liquidation of the group either under Dutch legislation or similar processes in other jurisdictions. The shareholders sought to convince the Court to reject the witness evidence put forward by the scheme company, cross-examining the witnesses, and putting forward ten propositions to support their position.

The Judge found that the witnesses were honest and straightforward. None of the points made by the shareholders caused him to doubt they were expressing their honestly held views.

The Judge was therefore satisfied that the relevant comparator was insolvent liquidation. Even if he had concluded otherwise, he would still have sanctioned the scheme. The shareholders' case was that the Court should refuse to sanction the scheme so that the scheme creditors and other lenders could negotiate an orderly wind down of the group. However, the Judge considered that it was not a legitimate or sensible use of the Court's powers to force the parties to enter into further negotiations, especially after they had been negotiating for seven years. The function of the Court is to assess the scheme on the merits. The Court sanctioned the scheme.

Jeremy Goldring KC

David Allison KC

Daniel Bayfield KC

Georgina Peters

Matthew Abraham

Ryan Perkins

Stefanie Wilkins

Re EPC UK Limited

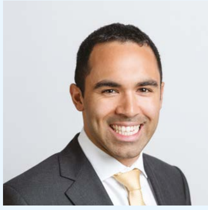
[2023] EWHC 550 (Ch) (Trower J) and 906 (Ch) (Richard Smith J)
7 February and 21 March 2023

Schemes of arrangement – Classes – Shareholders

The court sanctioned a scheme of arrangement under which the majority shareholder of the company, EPC United Kingdom Ltd, would acquire all of the shares held by the minority shareholder for cash consideration with a significant uplift on their market value.

In the convening judgment, the Court considered whether holders of ordinary and deferred shares could vote together in the same class. Trower J held that two separate classes of shareholder were to be treated as a single class for the purposes of a scheme of arrangement. Though their rights (and the financial value of those rights) were different, each shareholder was being offered the same percentage uplift, and accordingly "*all scheme shareholders have to consider what are essentially the same questions and they affect their common interests in essentially the same way*".

In the sanction judgment, Richard Smith J considered how votes should be counted where shares with different nominal and market values are voted in a single meeting. Though it was unnecessary to decide the point (because the statutory majorities were reached on any view) the Judge expressed a provisional view that "*value*" in the Companies Act 2006 was a reference to the voting rights attached to each share under the articles, rather than nominal or market value of the shares themselves. Accordingly, each share was worth one vote at the meeting, despite the ordinary shares being more valuable than the deferred shares.



Robert Amey

Re DnaNudge Limited; Ventura Capital v DnaNudge Limited

[2023] EWHC 437 (Ch) (HHJ Hodge KC)
8 March 2023

Articles – Preference shares – Interpretation – Extrinsic evidence – Inconsistency

The company, DnaNudge Limited, was a medical and health technology company that had sought to raise funds in from investors. The claimant had acquired preferred shares in the company. Prior to investing, the claimant had negotiated certain preferential rights that were recorded in amended articles of association.

One article of the company's articles provided that the preferred shares would automatically convert into ordinary shares upon notice in writing from an investor majority (the "*conversion article*"). Another article provided that the special rights attached to a particular class of shares could only be varied or abrogated with the written consent of the holders of over 75% in nominal value of the issued shares of that class (the "*protective article*").

In 2022, ordinary shareholders constituting an investor majority had issued a letter to the company purporting to give notice under the conversion article and thereby converted the preferred shares into ordinary shares. The company had written to the claimant informing it of the conversion notice and that their shares had been converted into ordinary shares, with the register of members amended accordingly.

Claimants challenged the purported conversion on the basis that the conversion article had to be read subject to the protective article.

The Judge held that in construing the rights attached to the preference shares, the admissible extrinsic evidence is restricted to what any reader of the articles could reasonably be supposed to know from the articles themselves and the information on the public register maintained by Companies House. The nominal value and price paid for the ordinary and preferred shares set out in returns made it apparent to any person inspecting the publicly filed documents that the holders of the preferred shares had paid a substantial premium for the special rights attached to those shares.

There was a clear tension between the two articles. The Judge concluded that no reasonable person reading the company's articles, with knowledge of the substantial premium paid for the preferred rights, would regard the conversion article as being capable of enabling a qualifying majority of ordinary shareholders to abrogate the special rights enjoyed by the preferred shareholders. The only way to give business efficacy to the articles as a whole was to construe the conversion article as being subject to the protection article.

Accordingly, the Court made a declaration that the conversion of the preferred shares into ordinary shares was invalid, void and of no effect.


Corporate Insolvency

DIGESTED BY DANIEL JUDD AND PAUL FRADLEY

Chu Kong v Ocean Sino Limited (in liquidation) & Ors

BVIHCMAP2021/10048
3 July 2023

Removal of Liquidators – role of liquidators of holding companies - delay and cause shown

The Court of Appeal of the Eastern Caribbean Supreme Court dismissed Mr Chu's appeal and affirmed the judgment and order of the court below that no due cause had been shown for the removal of the liquidators of Ocean Sino Limited ("OSL").

OSL is an asset holding company incorporated in the BVI which holds 100% of the shares in a Hong Kong company, PBM Management Limited, which itself is an asset holding company with a 49% stake in another Hong Kong company, BGAH Holdings Limited. Mr Chu, with Mr Lau, were shareholders and directors of OSL. Mr Lau initiated the winding up proceedings. Initially, Mr Chu and Mr Lau each chose one liquidator from Hong Kong and one from the BVI. The Hong Kong Liquidators resigned in January 2021, leaving Mr Bailey and Mr Greenwood as the joint liquidators (the "BVI Liquidators").

At the heart of the appeal was a challenge to the Judge's finding that Mr Chu had failed to show due cause for the removal of the BVI Liquidators. In addition, the appeal raised a few points of more general interest. Firstly whether, as Mr Chu argued, the role and function of liquidators of solvent companies, in particular the duty to investigate, were different from those required of liquidators of insolvent companies. They are not. The Court of Appeal agreed with the Judge's decision that whether the liquidator proceeds on a solvent or insolvent basis the liquidator has an obligation thoroughly to investigate and take such steps as are reasonable and necessary to ensure the maximisation of the value of the company's assets. Second, whether a distinction is to be made between the liquidation of a pure holding company and the affairs of its subsidiaries. The Court of Appeal held that when realising the value of shares held by a company in liquidation, a liquidator is not precluded from using those shares to procure action to be taken by the subsidiary company in which the shares are held.

Finally, the Court considered the relevance of delay in the administration of a liquidation to due cause shown for removal. It quoted, with approval, the passage in the Judge's judgment that referred to Neuberger J's statement that criticism that things could have been done better or earlier can "*almost always*" be levelled at officeholders. The Judge, with whom the Court of Appeal agreed, had formed the view that the delay in completing the liquidation was consequential on the need for the Liquidators to take proportionate steps to recover assets that had possibly been wrongfully removed from the corporate structure before liquidating and distributing OSL's directly held asset. Further, the Court of Appeal agreed with counsel for the Liquidators that the contention that delay alone can justify removing a liquidator whose conduct cannot otherwise be impeached, thereby necessitating the appointment of other liquidators, with the consequences of further delay and further costs "*is simply not maintainable*".

Richard Hacker KC

Mark Phillips KC

Hilary Stonefrost

Re C.C.T. Logistics Limited (in liquidation)

[2023] EWHC 1548 (Ch) (ICC Judge Barber)
30 June 2023

Voting rights – meeting of creditors – voluntary payments to company

This application concerned a creditor's challenge to votes cast at a meeting of creditors. The applicant was a firm of accountants previously engaged by the company, which had entered liquidation. The liquidator had allowed another creditor ("CCI") to vote at the meeting in the sum of £51,412.83, based on its proof of debt, which comprised five elements. The applicant contested this and claimed that CCI had no such entitlement to vote.

That issue depended on whether CCI was a creditor of the company. This, in turn, required the Court to determine whether various payments made by CCI, apparently in respect of debts owed by the company, rendered the CCI a creditor of the company. The Court held that the majority of the payments made by CCI into the company's bank account were voluntary payments. The mere fact that CCI had made a payment to the company, for the purpose of discharging a debt owed by the company (such as to the company's bank), did not make CCI a creditor. The payment instead needed to be made at the request of the company. The court held, after the benefit of cross-examination, that no such request had been made, and also found that the company had not authorised the payment. The Court went on to find that no claim in unjust enrichment would lie in favour of CCI, including because there was no unjust factor. However, in relation to one payment (in the sum of £5,212), the Court considered on the balance of probabilities that payment was made by CCI way of a loan to the company. The Court therefore reversed the liquidator's decision on CCI's proof of debt, save to this extent.

The Court then adopted the applicant's suggested course of ordering that the liquidator be replaced, rather than dispense with a meeting of creditors. In doing so, the Court had regard to the issue considered at the meeting of creditors (which was the identity of the liquidator), the outcome of the meeting based on the parties' true voting rights, the impact of further cost and delay, and the lack of progress in the insolvent estate to date.

Hilary Stonefrost

Re AGPS BondCo Plc

[2023] EWHC 415 (Ch) (Mann J) 27 February 2023 (convening); (Leech J)
21 April 2023 (sanction)

Restructuring plans – "no worse off" test – Cross-class cram down

The Adler real estate group, based in Germany, was in financial difficulty. In the absence of a restructuring process, it was likely to enter into a formal insolvency process in Germany. In order to seek to redress its financial difficulties, the group proposed a restructuring plan in England and Wales by which the affairs of the company would be wound down in an orderly manner, avoiding a formal liquidation.

The group owed a number of debts to noteholders. These included notes with differing maturity dates, which would fall due in 2024, 2025, 2026, 2027, and 2029 (the "SUNs"), which the parent company had guaranteed. The SUNs were governed by German law and totalled approximately €6 billion. The company which proposed the restructuring plan, AGPS BondCo PLC (the "Plan Company"), was an English subsidiary, and had become "*substituted*" as the issuer of the SUNs in place of the parent company. Other companies in the group also owed liabilities to noteholders, and did so in excess of a further €1 billion. In the event of a liquidation, the notes would be accelerated, such that they would all become due immediately due regardless of maturity date.

The terms of the restructuring plan envisaged a wind-down scenario by which real estate assets were realised over time. Among other things, it was proposed that the pre-liquidation maturity dates of the SUNs would be preserved following sanction of the plan. It was also proposed that the maturity date of the 2024 notes would be extended by one year to 2025, and those noteholders would be given priority over other creditors. The plan also proposed that the shareholders of the company would retain the majority of the equity in the company, although it was not proposed that they would contribute any new funding. The company adduced evidence to explain that, under the proposed restructuring plan, all creditors would end up being paid in full over the life of the plan, and would be better off than in a liquidation scenario. The plan was supported by a steering committee of creditors.

The plan was contested by an *ad hoc* group of creditors whose debts would not all due under the plan until 2029. In summary, they raised four objections. The first was that the "*no worse off*" test was not satisfied on the evidence, which depended on the value of property in the period to 2029, and adduced their own valuation evidence. The second was that they objected to the maturity dates under the plan on fairness grounds: they stood at the back of the queue under the plan, and would only be paid after creditors with shorter maturity dates had received payment, even though all creditors would be treated equally in a liquidation regardless of maturity date. The third point was that the challenging creditors objected to the fairness of the "*allocation of benefits*" under plan, namely, the retention of most of the equity by the shareholders, in circumstances where they were not putting in new money. The fourth point was that the substitution of the plan company for the parent company's liabilities was alleged to be invalid under German law.

Following the convening hearing, the company did not reach the necessary voting thresholds for all classes of creditor, and therefore invited the court to exercise the cross-class cram down power under Part 26A in order to sanction the plan.

Leech J was ultimately prepared to sanction the restructuring plan, following a contested sanction hearing over the course of three days, which included cross-examination of expert witnesses. The Judge pointed to the high level of overall support for the plan from creditors and rejected the challenges identified above.

On the "*no worse off*" objection, Leech J held that, while it was ambitious that the 2029 noteholders would be paid in full, he was satisfied that they were better off under the plan when compared to the relevant alternative. This followed a detailed assessment by the Court of the considerable volume of expert evidence put forward by the plan company and the 2029 noteholders, including the methodology and assumptions supporting that evidence. He also found that, of the various outcomes, the most likely outcome was that the 2029 noteholders would be paid in full, and that the plan company would not miss the relevant alternative by much on worst case scenario in any event.

On the maturity date objection, the Court held that this did not prevent sanction of the plan. The Court considered that there was no departure from the *pari passu* principle, because of the likelihood that all the creditors would be paid in full under the plan regardless of maturity date. He also held that, even if there were a shortfall in expected realisations under the plan, there was no divergence from the *pari passu* principle, because the remaining debts under the plan would be accelerated and would be subject to *pari passu* treatment. The Court did accept, however, that the plan involved greater risk for 2029 noteholders. The Court nevertheless sanctioned the plan in the circumstances, holding that the longer maturity date reflected a commercial risk assumed by the 2029 noteholders, that the no worse off test would be satisfied in any event, and that most creditors voted in support of the plan (including 62% in the dissenting class).

On the "*allocation of benefits*" objection, the Court considered that there was no obvious reason why the shareholders who provided no new money for the plan should be entitled to retain their equity and benefit from the upside following the restructuring. Ultimately, however, the Court concluded that this aspect of the plan was not so unfair that it should lead the Court to refuse to sanction the plan, and that the Court should not deprive creditors of the benefits of the plan which a majority of them had voted for.

On the "*substitution clause*" objection, the Court held on the evidence of German law, the substitution clause would be valid and effective in Germany.

Leech J exercised his discretion to sanction the plan. Leech J refused permission to appeal. On 29 June 2023, the Court of Appeal granted permission to appeal.


Felicity Toube KC


Tom Smith KC


Daniel Bayfield KC


David Allison KC


Adam Al-Attar


Henry Phillips


Ryan Perkins


Anabelle Wang

Re Great Annual Savings Company Limited

[2023] EWHC 1141 (Ch) (Adam Johnson J)
16 May 2023

Challenge to restructuring plan - HMRC - No worse off

Following a three-day hearing, Mr Justice Adam Johnson ("the Judge") dismissed an application to sanction a restructuring plan ("the Plan") proposed under Part 26A of the Companies Act 2006 by The Great Annual Savings Company Ltd ("the Company"), upholding the challenge to the Plan by His Majesty's Revenue and Customs ("HMRC"). At the time of the hearing, the Plan was the first challenge of its kind by HMRC to a Part 26A restructuring plan.

In his conclusions, the Judge dismissed the Company's application on the basis that (1) the Company had not discharged the evidential burden of showing that HMRC would be no worse off under the Plan and (2) even if it had discharged the burden, he would have dismissed the Plan in any event in the exercise of his discretion.

In relation to Condition A (the "*no worse off test*") the Judge agreed with HMRC's submissions in relation to the Company's expert evidence, concluding that it was "*unpersuasive*", not "*subjected to scrutiny*" and therefore had not discharged the necessary burden. In so doing, the Judge held that the comments by Snowden LJ in *Re Smile Telecom Holdings Ltd* [2022] EWHC 740 to the effect that an opposing creditor should file expert valuation evidence did not create an "*invariable rule*"; and he preferred HMRC's submission that it was open to a Court to disregard expert evidence even where the opposing party had not filed expert evidence of its own (see *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442). On that basis – and given the small margin between HMRC's proposed dividend under the Plan and the "*high case*" outcome in the relevant alternative – the Judge held that Condition A had not been satisfied. He also considered (but did not ultimately accept) HMRC's arguments based on the value (in the relevant alternative) of claims against third parties.

In relation to fairness, the Judge concluded that the re-ordering of priorities was "*muddled*" and that the "*scale of the benefits*" conferred was "*not clear*" and "*unconvincing*". Further, he held that the distribution of benefits to existing shareholders and Connected Creditors was "*unfair*".

William Willson

Invest Bank PSC v El-Husseini

[2023] EWCA Civ 555 (Singh, Males and Popplewell LJJ)
19 May 2023

Transactions defrauding creditors – Acts of a company – Meaning of 'transaction'

The bank alleged that D1 was the beneficial owner of various assets which had been transferred by a company (wholly owned or controlled by him) to his sons (D2-D5). The Court of Appeal was required to consider two questions: (a) whether it is possible for a debtor to enter into a transaction with another person within section 423 of the Insolvency Act 1986 if his acts are to be regarded as acts of a company, and (b) whether a transaction can be entered into within the meaning of section 423 if the assets are not beneficially owned by the debtor.

Singh LJ, giving the judgment of the Court of Appeal, held that the court below fell into error by assuming that because a company can only act through human agency, and because in law such acts are treated as acts of the company, those acts could not also have legal significance when it comes to the individual debtor. The correct position was that where a person acts on behalf of a company, it does not follow that the individual has not done anything at all. Those acts may sometimes have legal significance depending on the context. Under section 423 those acts were capable of doing so; the language of the section is very broad, and the alternative view would frustrate the purpose of the section by allowing it to be undermined by the use of a limited company to achieve the purpose of prejudicing the interests of creditors.

Turning to the second issue, it was wrong to read in the word '*property*' to section 423. The definition of a '*transaction*' extended to a '*gift, agreement or arrangement*'; there was no reason to give a restrictive meaning to the broad terms of '*agreement or arrangement*'. Section 423 required a broader interpretation to '*enters into a transaction*' than is the case in the law of preferences and transactions at an undervalue. While section 423 was to be found in the Insolvency Act 1986, it is not confined to insolvency at all, and its scope is wider than preferences or transactions at an undervalue. The Court of Appeal was not bound by the decision in *Clarkson v Clarkson (A Bankrupt)* [1994] BCC 921, which turned on the meaning of '*property*' in the context of a bankrupt's estate.

Re Nasmyth Group Limited

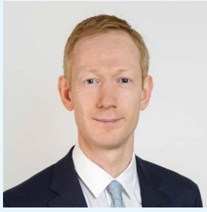
[2023] EWHC 988 (Ch) (Leech J)
28 April 2023

Restructuring plans – HMRC – Cross-class cram down

Following a three-day sanction hearing, Leech J refused to sanction a restructuring plan proposed by Nasmyth Group. Under the terms of the plan: the junior secured creditors would extend the maturity of their debt for five years, the junior secured creditors would make further funding available, claims of HMRC (as secondary preferential creditor) and unsecured creditors would be compromised in full in return for a share of £10,000, and inter-company claims would be compromised in full. The senior secured creditors and 'Critical Supply Creditors' were to be unaffected. The Plan was conditional on the group's subsidiaries being able to negotiate time to pay arrangements with HMRC, but proposals had been rejected by HMRC.

The court was satisfied that preferential creditors and unsecured creditors would be '*no worse off*' in the relevant alternative. None of the creditors had filed expert evidence challenging the valuation evidence. However, the Judge was not satisfied that it was appropriate to exercise his discretion under section 901G to cram down dissenting classes. The Judge was satisfied that HMRC had a genuine economic interest in the company if it went into administration. Snowden J in *Virgin Active* had not laid down a general rule that '*out of the money*' creditors do not have a legitimate interest in opposing a plan. The Court had to take into account all of the legal consequences which the restructuring plan will have on the relevant class of creditors in deciding whether they will be worse off if it is implemented. HMRC would remain a large creditor of the Group and the success of the plan was predicated on them agreeing '*time to pay*' arrangements with subsidiaries.

The Judge held that the court would not refuse to sanction a plan as a matter of principle simply because HMRC was being crammed down, but it would exercise extreme caution before doing so and would require good reasons to cram down HMRC. The court was concerned not to be seen to sanction the non-payment of tax and to be giving a green light to companies using Part 26A to cram down their tax liabilities. For the Judge, the key factor was the company's failure to agree time to pay arrangements with HMRC. HMRC was now a critical creditor for the wider group because it refused to agree such arrangements unless they covered the full amount owed to HMRC by the company. The company and secured creditors appeared to have treated the plan as a convenient opportunity to eliminate HMRC's debts for a nominal figure and pressurise HMRC to agreeing to time to pay arrangements. This was not a purpose for which Part 26A should be used. The Judge also expressed surprise at the directors' sense of priorities, casting doubt on their decision to pay certain creditors as 'critical creditors' ahead of HMRC.


Marcus Haywood


Charlotte Cooke


Stefanie Wilkins

HEX Technologies Limited v DCBX Limited

(Deputy ICC Judge Addy KC)
21 March 2023

Winding up – Exclusive jurisdiction agreements – Arbitration clauses

In *Re DCBX Limited*, three companies in the Hong Kong-based Hex corporate group (the "Petitioners") petitioned for the winding up of an English company, DCBX Limited ("DCBX"). DCBX was an FCA-regulated company which operated an online trading platform enabling its clients to buy and sell digital assets. The Petitioners provided DCBX with various IT infrastructure services relating to DCBX's business pursuant to three contracts, each between DCBX and one Hex entity, and a further set of 19 contracts between DCBX, a Hex entity and various of the Company's own clients. The Petitioners claimed to be owed around £109,000 in principal and interest under these contracts; amounts had been outstanding since October 2019 with only a few small payments having been made since that date, and the Petitioners accordingly petitioned on the basis that DCBX was cash-flow insolvent.

DCBX defended the petition by claiming that the amounts due were disputed. It raised seven grounds of opposition in an attempt to make good this contention. However, the judge held that none of these seven arguments gave any basis for defending the petition.

One of the contracts relied on by the Petitioners gave exclusive jurisdiction for the hearing of disputes to the courts of Singapore. The set of 19 contracts contained a jurisdiction clause which was confused, referring both to the "*exclusive jurisdiction*" of the courts of Hong Kong in respect of any dispute, whilst also being without prejudice to "*the right of any Party to take any proceedings in relation hereto before any other court of competent jurisdiction.*"

The judge considered the decision of ICC Judge Prentis in *Ghanim Saad M Al Saad Al Kuwari v Cantervale Limited* [2022] EWHC 3490 (Ch). In that case, ICC Judge Prentis held that the existence of an exclusive jurisdiction clause in the relevant contractual documents prevented the bankruptcy court from considering the merits of any dispute as the debt. In that regard, ICC Judge Prentis followed *Salford Estates (No 2)* Limited v Altomart Limited (No 2) [2014] EWCA Civ 1575 in relation to arbitration, departing from the decision of the Court of Appeal in the earlier case of *BST Properties Limited v Roerg Apport Penzugyi RT* [2001] EWCA Civ 1997.

In DCBX the Judge disagreed. She held that the outcome in Salford Estates was based upon the court's statement that where a petition debt would in ordinary civil proceedings trigger the automatic stay provision in section 9 of the Arbitration Act 1996, the exercise of the companies' court's discretion "*otherwise than consistently with the policy underlying the 1996 Act would inevitably encourage parties to an arbitration agreement – as a standard tactic – to by-pass the arbitration agreement and the 1996 Act by presenting a winding up petition*", which would be "*entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act*".

The court held that as there was no equivalent legislative policy relating to exclusive foreign jurisdiction clauses, *BST Properties Limited* and *Salford Estates* can presently be distinguished. There is no irreconcilable conflict between BST Properties Limited and Salford Estates such that pending further consideration of the relevant issue by the Court of Appeal the Court was bound to follow *BST Properties Limited.*

Madeleine Jones

Offshore

DIGESTED BY LOTTIE PYPER

Kuwait Ports Authority and others v Port Link GP Ltd and others CICA (Civil Appeal) Nos. 002 & 003 of 2022

(The Hon Sir Richard Field JA, The Hon Sir Michael Birt JA and The Rt Hon Sir Jack Beatson JA)
20 January 2023

Exempted limited partnerships - Direct claims - Derivative claims - Special circumstances - Security for costs

This case primarily concerned the interpretation of section 33(3) of the Exempted Limited Partnership Act (2021 Revision), which permits a limited partner of a Cayman Islands exempted limited partnership ("ELP") to bring a derivative action in the name of the ELP where the general partner has "*without cause, failed or refused to institute proceedings*".

Having lost at first instance the Appellants (i.e. the general partner of the ELP, referred to as the "GP" and the second to fourth defendants, "D2-D4") renewed their attempt to strike out the Respondents' ("Rs") derivative claims on the ground that the test in section 33(3) was not satisfied. The GP also sought to strike out the direct claims brought by the Rs against it, on the grounds that such claims should be pursued by way of a partnership account instead, and also appealed the first instance decision not to order the Rs to provide security for costs.

The Cayman Islands Court of Appeal ("CICA") declined to strike out the direct claims against the GP. In light of the differences between an ordinary partnership (where all partners have joint and several liability for partnership liabilities) and an exempted limited partnership (where there is no such reciprocity of obligations), there was no need for direct claims against the GP to be brought by way of a partnership account.

The CICA's key conclusions on section 33(3) are set out at [140] of the judgment, and can be summarised as follows:

1. There is no requirement for leave to bring derivative proceedings under section 33(3), but the relevant facts should be set out in the pleading, as the burden is on the limited partner to show why the test is met.

2. If the standing of a limited partner to bring derivative proceedings is to be challenged, it should be done by way of a strike-out application or preliminary issue, and will be determined on the basis of the facts at the date of the hearing.

3. In determining whether the test in section 33(3) is met the court may be assisted by consideration of whether there are special circumstances, as developed in analogous cases concerning trusts, limited partnerships and other entities.

4. Even where the requirements of section 33(3) are met, the court has a discretion as to whether or not to permit a derivative claim to continue, including considering whether the plaintiff has an alternative remedy.

In the circumstances, the CICA unanimously declined to strike out the derivative claims against D2-D4, on the basis that there were special circumstances inhibiting the GP from bringing the relevant derivative claims. It did, however strike out the derivative claims against D1 on the basis that the first instance judge held that the ELP had no independent claim against the GP, and the Rs had not sought to appeal this finding and, in any event, the Rs had an adequate alternative remedy in the form of their direct claims against the GP.

Finally, the CICA refused to order the Rs to pay security for costs. Both Rs were emanations of the State of Kuwait. The starting position is that security for costs will not usually be ordered against a state, and there was no reason to depart from this approach in the present case.


David Allison KC


Lottie Pyper

Kuwait Ports Authority and others v Port Link GP Ltd (in voluntary liquidation) and others

(The Hon Raj Parker)
24 April 2023

Exempted limited partnerships – Joinder - Appointment of litigation receivers

This hearing concerned two separate applications by the Plaintiffs ("Ps"): (i) an application to be joined as defendants to a crossclaim advanced by the second to fourth defendants ("D2-D4") against the general partner (the "GP") of The Port Fund LP (the "TPF") and TPF itself and (ii) an application for the appointment of receivers over the GP in order to conduct the litigation brought by the Ps on behalf of the GP.

On the joinder application, Parker J held that the Court had jurisdiction to join Ps as defendants to the crossclaim on the basis that it was in the interests of justice to do so. In particular, since Ps had been granted permission to bring derivative claims on behalf of TPF against D2-D4, it would be "illogical and unfair" if they were prevented from being joined as defendants to a crossclaim in the same action which could stymie the derivative claims altogether. This was particularly so given that, as at the date of the hearing, the GP had no directors and was therefore under the sole control of D3. D3 was, obviously, a defendant to Ps claims and a claimant in the crossclaim against the GP.

On the receiver application, Parker J held that it was just and convenient to appoint receivers to conduct the litigation on behalf of the GP, in order to ensure that independent and impartial officeholders were in place. In reaching this conclusion he held that this case was analogous to previous cases where authority to act was uncertain, and therefore that the central question was simply whether it was "just and convenient" to appoint receivers: there was no need to consider whether the GP's assets were at risk of dissipation (but, in any event, such risk did exist). The only alternative remedy available was the appointment of liquidators, which Parker J accepted was a more invasive remedy than appointing receivers and, indeed, a remedy of last resort. Parker J also held that it was not appropriate for D3 to propose liquidators given that, although he was the sole shareholder, he had no direct financial interest in the GP.

After the hearing of the joinder and receiver applications, D3 placed the GP into voluntary liquidation, apparently due to concerns with the funding agreement between Ps and the proposed receivers. In his judgment Parker J addressed this development and confirmed that, in his view, the present funding agreement did not fetter the discretion of the receivers. He stressed that, if in doubt, the Receivers should apply to the court for directions.


David Allison KC


Lottie Pyper

Personal Insolvency

DIGESTED BY LOTTIE PYPER

Lyons v Bridging Finance Inc

[2023] EWHC 1233 (Ch) (Chief ICC Briggs)
30 January 2023

Statutory demands - Set aside - Jurisdiction

A court considering an individual's application under the Insolvency (England and Wales) Rules 2016 r.10.4 to set aside a statutory demand did not have jurisdiction under r.10.5(5)(d) to set it aside on the ground that England and Wales was not the appropriate forum to make a bankruptcy order. The court restated that r.10.5(5)(d), which stated that an application could be granted if there were "*other grounds*" for setting aside the demand, was not freestanding and had to be read in the context of r.10.5(5)(a) to (c), which concerned and dealt with the integrity of the demand, not where the debt could be enforced.

The court was referred to two judgments in the case of *Re Harfield* [2021] EWHC 713 (ICC Judge Prentis) and *Re Harfield* [2021] EWHC 3299 (ICC Judge Burton) which had concluded that there was a possibility of a challenge to forum falling within ground (d). However, the court declined to follow those judgments.

William Willson

HRH Prince Hussam Bin Saud Bin Abulaziz Al Saud v Mobile Telecommunications Co KSCP

[2023] EWHC 1144 (Ch) (ICC Judge Barber)
11 May 2023

Bankruptcy petitions – Jurisdiction - Place of residence

One of the jurisdictional bases that enables a creditor to present a bankruptcy petition against a debtor in England is that the debtor has had a place of residence in England in the preceding three-year period (section 265(b)(i) of the Insolvency Act 1986). In the instant case the three-year period ran from 1 June 2019 to 1 June 2022, when the petitioner ("P") had presented a bankruptcy petition against the debtor ("D") for debts of approximately USD 885.8 million and £3.3 million, arising out of various arbitration awards. The question was whether a house in London owned by D's mother amounted to a place of residence for D in England. D had lived there as a student in the 1980s, had been registered for council tax at that address from then until December 2019, and continued to use the address as his place of residence when in London. In August 2018 a committal order was made against D in England for breach of an injunction, such that he would have been arrested if he had entered England after that date.

The judge held that the fact that, D did not have control of the house, such that in theory his mother could have prevented D from staying there, did not prevent the finding that it was his place of residence. The fact that D did not stay there during the relevant three-year period did not prevent it from being a place of residence either; rather, the continued registration for council tax until December 2019 was a significant factor. Accordingly, P had established a good arguable case that D had a place of residence in the jurisdiction during the relevant period.

Andrew Shaw

Vneshprombank LLC v Bedzhamov; Kireeva v Bedzhamov

[2023] EWHC 1459 (Ch) (Miles J)
26 June 2023

Freezing injunctions – Applications to vary – Supreme Court

An application by a bankrupt for permission to sell his interest in a London property, which was subject to a worldwide freezing order made in a claim by a Russian bank in bankruptcy, to enable funds to be released to enable him to conduct his defence of legal proceedings, was allowed in circumstances where an order of 9 June 2022, which had approved the principle of the sale of the property, remained effective and the current proposals fell within the scope of that order. There was a substantial risk that if the current proposal did not proceed and the WFO was not varied, there would be a serious loss of value.

However, the Court concluded that the granting of the order for sale of the property would not render nugatory the trustee's appeal to the Supreme Court, which was due to heard in November 2023, and which related to the power of the English court to appoint a receiver of English immovable property in favour of a foreign bankruptcy trustee. First, the appeal to the Supreme Court included the set aside application in respect an order of 5 March 2021 pursuant to which a charge was created in favour of Mischcon de Reya. Second, the decision of the Supreme Court on the question of principle may well have an important bearing on the power of the court to make the proceeds of the sale of the property available to the receiver (and therefore the foreign trustee).

William Willson

Property and Trusts

DIGESTED BY RABIN KOK

Ivanishvili v Credit Suisse Trust Ltd

[2023] SGHC(I) 9 (International Judge Bergin)

Ivanishvili was a decision of the Singapore International Commercial Court (Patricia Bergin IJ). The plaintiff, Mr Ivanishvili, was the former prime minister of Georgia. Credit Suisse Trust Ltd ("CS") advised him to set up a Singapore trust (the "Mandalay Trust") to structure his estate. The trust had three main corporate vehicles – Meadowsweet, Soothsayer and Lynden.

One of CS's bankers was a Mr Patrice Lescaudron ("Mr Lescaudron"). Mr Lescaudron was the Trust's Relationship Manager, and he was a fraudster. He stole millions of dollars from the Mandalay Trust over some 9 years. Mr Ivanishvili sued CS, as trustee, for failing to properly administer the Trust and keep the Trust assets safe. In other words, he said that CS was in breach of trust.

Bergin IJ found that CS had breached its duties to Mr Ivanishvilli. The case ultimately turned on facts which make for very interesting reading, but are perhaps not of general legal interest. But there was one particular point of trust law the Court did decide.

CS argued that the Mandalay Trust was a '*reserved powers trust*' of which it was investment manager, and that its liability was limited by anti-Bartlett clauses (so named after the decision in *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515) in the Trust Deed.

Such clauses are aimed at relieving the trustee for liability to supervise and interfere with the acts of a Trust's portfolio companies, because the settlor of the trust often continues to run his business through those companies. Anti-*Bartlett* clauses therefore relieve the trustee from having to supervise the settlor.

In *Zhang Hong Li v DBS* [2019] HKCFA 45, the Hong Kong Court of Final Appeal held that there was normally no residual and implied duty for trustees to interfere "*where no reasonable trustee could refrain from exercising*" powers excluded by the anti-*Bartlett* clause. As Bergin IJ observed, the authors of *Lewin on Trusts* consider that *Zhang* represents English law.

The gloss added by the SICC in *Ivanishvili*, at [427] was that, if the trust deed of a reserved powers trust permits the trustee to have regard to a beneficiary's (or settlor's) investment recommendations but does not require the trustee to accept them as final, the trustee might well have a residual duty to interfere with the settlor's decisions despite the presence of an anti-*Bartlett* clause. But if the trustee "*should, ought to or event must*" have regard to the recommendations of the beneficiary or settlor, there appears to be no room for the residual duty to operate.

In other words, if a trustee is given the power to manage trust assets, it cannot fully rely on an anti-*Bartlett* clause for protection. In *Ivanishvili*, this fact was fatal to a large part of CS's defence.

David Marks KC

1. Rosencrantz and Guildenstern are Dead, Edinburgh 1966, Theatre, 6 August 2003

2. Unmasked, A Memoir, HarperCollins, 2019

We have heard with sadness that David Marks KC, who was a member of Chambers from 1976 to 2013, has died.

After graduating from Oxford ("*a quiet, agreeable man*" according to his tutor, G. H. Treitel), he worked for a time in Chicago, where he taught law at Northwestern University, worked for a Chicago law firm and qualified for the Illinois Bar. In 1974, he was called to the Bar of England and Wales by Gray's Inn. He joined Chambers, then at 3 Paper Buildings in the Inner Temple and headed by Muir Hunter QC. He was a pupil of Edward Evans-Lombe, who later went to the Bench. Having built up a busy junior practice over many years, David took silk in 2009. He edited and revitalised Rowlatt on Principal and Surety with Gabriel Moss, to whom he was particularly close. He sat as a deputy Registrar in Bankruptcy and latterly as Deputy Chair of the Information Tribunal. On his retirement in 2013, he moved with his wife, Nada, whom he had married earlier that year, to live in her home city, Beirut. We understand that, very sadly, they died within days of each other.

David was a man of great talent and many interests. He was a prize-winning actor while at Oxford and went on to become President of OUDS. He took the role of Rosencrantz in the first production of Rosencrantz and Guildenstern Are Dead by Tom Stoppard, which took place at the Edinburgh Fringe Festival in 1966, directed by Stoppard himself (the other had "*jumped ship*").[1] As history relates, a favourable review in the Observer led to the first professional production at the National Theatre (1967), and Broadway, but by then David had moved on. According to Andrew Lloyd Webber, who met David at Oxford, having first aspired to be an actor he decided against as he found it "*too repetitive*".[2] That was a pity in many ways, but his superb gift for mimicry was frequently deployed, much to the amusement – and often at the expense – of fellow members of Chambers, as well as his own.

His knowledge of opera, as well as the pianists of the last century, was extraordinary. A regular at the opera houses and concert halls of London and far beyond, he had a remarkable ability to distil the essence of a performance and sum up in pithy terms what made it special, or not. But his taste was not by any means confined to the classical. Jazz, he said, spoke to the soul; his collection of jazz records (to the production of some of which he contributed) was vast.

Of wine he was a connoisseur. With his French connection (his mother was French and, unsurprisingly, he was fluent in the language), he was more than closely acquainted with the great wines of Burgundy and Bordeaux. It was an enthusiasm he was keen to share, with many trips to tutored tastings at Sothebys, and numerous joint bids at auction when classed growths (don't touch Burgundy at auction, and claret only in owc, he maintained) were more affordable than they are now. He was generous even with his favourite bottles. For one dinner party in the early '90s, he opened a bottle or two (actually three) of Ch. Ducru Beaucaillou '61, followed by fireworks in his garden in Fulham when other guests had left. A need to "tidy" his cellar led to a series of unforgettable dinners for members of Chambers, each course accompanied by a wine chosen specially. One such bottle was the same '61, fr om the same case opened over fifteen years before. Another was one of David's particular favourites, Vega Sicilia "Unico" 1980, regarded as Spain's first-growth, the product of Ribera del Duero.

David appreciated, too, the generosity of others. From his pupil-master, with whom he played tennis at Queen's for many years, he got to know Clos de la Coulée de Serrant, a delicious dry white from the Loire; knowledge, with a bottle, he was happy to pass on to his own one-time pupil on his retirement. And the wine provided by Lord Lloyd Webber when they met up again, years after their Oxford days? Pétrus '82, David said, with relish. Of course, things did not always go well. Very occasionally, colleagues would converse outside his door in slightly more than hushed tones, or another door might slam. Either would provoke a show a temper which could be fiery. But it is not for that that David will be remembered in Chambers; it will be for his remarkable generosity of spirit.

Plaudite, amici …

RUPERT BELL
PARTNER, WALKERS

CHAOWEI FAN
ASSOCIATE, WALKERS

Emergence: *Restructured Rockley Photonics emerges from US bankruptcy proceedings with the assistance of the new Cayman Islands restructuring officer regime*

Introduction

The Cayman Islands' new restructuring officer regime (the "**Restructuring Officer Regime**") was introduced and came into force in August 2022 by way of the much-anticipated legislative amendments and reforms to Part V of the Cayman Islands Companies Act (as amended) (the "**Cayman Islands Companies Act**").

The Restructuring Officer Regime offers the ability for companies subject to the jurisdiction of the Grand Court of the Cayman Islands (the "**Grand Court**") to appoint restructuring officers to facilitate a compromise or arrangement with its creditors (or classes thereof) either, pursuant to the Cayman Islands Companies Act, the law of a foreign country or by way of a consensual restructuring (see section 91B(1)(b) of the Cayman Islands Companies Act).

This article examines the recent successful restructuring of Rockley Photonics Holdings Limited (Restructuring Officers Appointed) ("**Rockley**"), which was the first company that utilised the Restructuring Officer Regime in support of a parallel Chapter 11 bankruptcy process in the United States. A judgment from the Grand Court in relation to Rockley is still pending. However, the authors of this article acted as Cayman Islands counsel for Rockley and therefore set out some of the key practical learnings that may be useful for practitioners when dealing with future Cayman Islands restructurings.

The restructuring of Rockley Photonics Holdings Limited

Rockley was a Cayman Islands exempted company that was also listed on the New York Stock Exchange. It was a holding company for a global medical technology group of companies (the "**Rockley Group**") that specialises in the research and development of integrated silicon photonics chipsets and the development a unique sensing platform that could have applications in non-invasive, multi-modal biomarker monitoring.

However, Rockley began facing financial difficulties because it had not yet fully developed and commercialised any of its products. These financial difficulties were exacerbated by the poor economic conditions in the electronic device market. In September 2022, Rockley commenced negotiations with its key creditors, being holders of certain note indentures (the "**Noteholders**" and "**Notes**", respectively), to avoid being in default of covenants pursuant to the Notes.

As a result of negotiations, the Noteholders agreed to forbear enforcement of the Notes on the basis that Rockley (*inter alia*):

- engage Alvarez & Marsal to help manage cash flow, support comprehensive business planning and restructuring efforts, and increase financial transparency to stakeholders; and

- retain a financial advisor and a strategic advisor with a mandate to marketing the Company for a potential sale.

Pursuant to that agreement, Rockley appointed Jefferies Group ("**Jefferies**") as financial and strategic advisor to conduct a marketing process for the sale of all or a portion of Rockley's assets. Despite a robust marketing process, Rockley did not receive a satisfactory indication of interest for any form of sale. As a result, the board of directors of Rockley (the "**Board**") was of the view that it was likely Rockley would be unable to pay its debts, absent an imminent sale or additional source of liquidity.

In these circumstances, Rockley evaluated a range of potential restructuring transactions. The Board, together with the Noteholders, ultimately determined that a restructuring process under Chapter 11 ("**Chapter 11**") of the United States Bankruptcy Code (the "**US Bankruptcy Code**") in the United States, alongside the appointment of restructuring officers in the Cayman Islands, could be used to implement the necessary restructuring.

The restructuring process

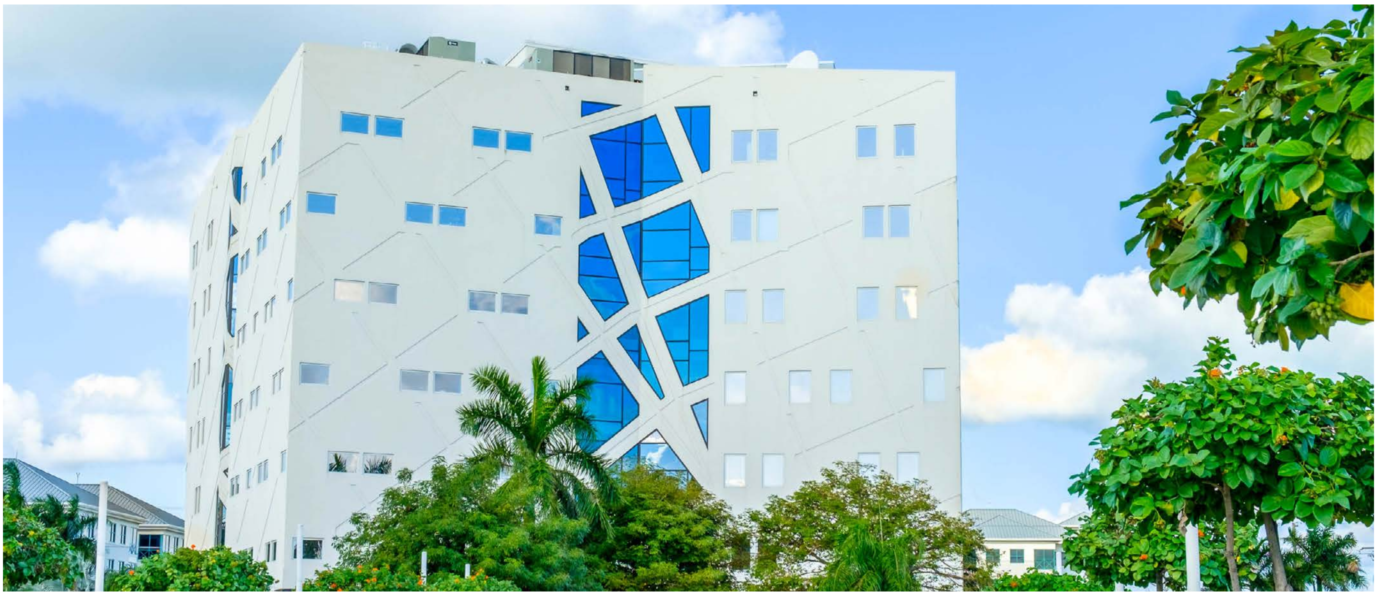
Accordingly, on 23 January 2023, Rockley filed a voluntary petition for Chapter 11 relief in the United States Bankruptcy Court for the Southern District of New York (the "**US Bankruptcy Court**") having the Case No. 23-10081 (the "Chapter 11 Proceedings"). As part of the Chapter 11 Proceedings, Rockley also filed a pre-packaged plan of reorganisation (the "**Plan**") and accompanying disclosure statement. The pre-packaged nature of the Plan meant that it had the support of 100% of the Noteholders prior to filing.

The following day, on 24 January 2023, Rockley presented a petition to the Grand Court seeking the appointment of restructuring officers pursuant to section 91B of the Cayman Islands Companies Act (the "**Restructuring Officer Petition**"). By the Restructuring Officer Petition, Rockley sought the appointment of restructuring officers on the grounds that it:

(a) was or was likely (at the time) to become unable to pay its debts and was therefore insolvent within the meaning of section 93 of the Cayman Islands Companies Act; and

(b) intended to present the Plan to its creditors (or classes thereof) for approval pursuant to Chapter 11 of the Bankruptcy Code.

The Restructuring Officer Petition also nominated Messrs Christopher Kennedy and Alexander Lawson of Alvarez & Marsal Cayman Islands Limited as the proposed restructuring officers.



The extra-territorial moratorium of the Restructuring Officer Petition

One of the key features of the Restructuring Officer Regime is the automatic, extra-territorial moratorium that applies to a company upon presentation of a petition to appoint restructuring officers. Section 91G of the Cayman Islands Companies Act provides that:

"*... no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company, no resolution shall be passed for the company to be wound up and no winding up petition may be presented against the company, except with the leave of the Court and subject to such terms as the Court may impose.*"

The jurisdictional scope of section 91G is broader than the provisional liquidation equivalent provision in section 97 of the Cayman Island Companies Act, which:

(a) only applies automatically upon the appointment of provisional liquidators, as opposed to the presentation of the petition itself;[1] and

(b) does not express to have any effect beyond the Cayman Islands.

The moratorium under section 91G of the Cayman Islands Companies Act operates extra-territorially as a matter of Cayman Islands law. In our view, if a foreign court were to reject the enforceability of the moratorium in a foreign proceeding, any adverse judgment arising out of that foreign proceeding would unlikely be enforceable or recognisable in the Cayman Islands on the basis that it would be contrary to Cayman Islands public policy. Accordingly, even though the extra-territorial effect of section 91G has yet to be tested by a foreign court, we consider the protection afforded by the moratorium is still valuable for a Cayman Islands company looking to protect its Cayman Islands assets from potential enforcement action.

The automatic and extra-territorial nature of the moratorium was important for Rockley. Even though the Plan had the support of 100% of the Noteholders (which were the only creditors of Rockley, excluding *de minimis* ordinary trade creditors), certain shareholders of Rockley (the "**Objecting Shareholders**") had retained United States counsel and had indicated their opposition to the Plan. The extra-territorial moratorium therefore provided comfort to Rockley from the risk of any parallel action in the Cayman Islands or elsewhere that may have jeopardised or disrupted the usual objection process in the Chapter 11 Proceedings. This allowed Rockley to focus on obtaining the confirmation of the Plan in the Chapter 11 Proceedings in order to effect the restructuring.

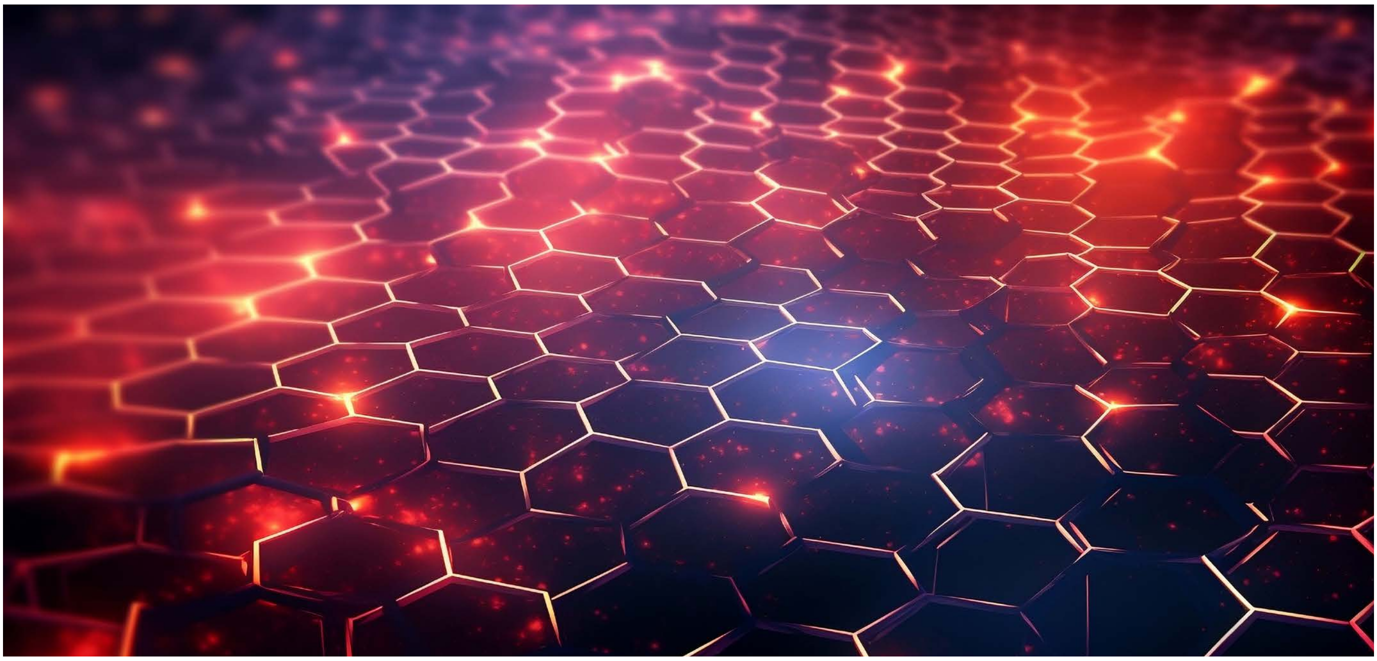
The appointment of the Restructuring Officers

On 14 February 2023, the Honourable Chief Justice Ramsay-Hale of the Grand Court heard the Restructuring Officer Petition and appointed Messrs Christopher Kennedy and Alexander Lawson of Alvarez & Marsal Cayman Islands Limited as joint restructuring officers of Rockley (the "**Restructuring Officers**") noting that there was a Plan already prepared in the course of the Chapter 11 Proceedings. The Restructuring Officers were given broad powers by the Grand Court, including the power, without further sanction by the Grand Court, to:

"*...monitor, oversee and supervise the Board in its management of* [Rockley], *and take all necessary steps to develop and implement a restructuring of* [Rockley's] *financial indebtedness... in consultation with the Board and under the general supervision of* [the Grand Court]..."

The Grand Court authorised the Board to continue to manage Rockley's day-to-day affairs in all respects and exercise the powers conferred to it by Rockley's articles (akin to what would have happened in a

1. Section 96 of the Cayman Islands Companies Act allows a company or any creditor or contributory to apply to stay or restrain proceedings, but this does not happen automatically.



provisional liquidation restructuring), subject (*inter alia*) to:

(a) the Restructuring Officers' oversight and monitoring; and

(b) the Restructuring Officers granting prior approval of the exercise of such powers and to matters outside the ordinary course of business.

The confirmation of the Plan in the Chapter 11 Proceedings

Following their appointment, the Restructuring Officers worked with the Board to develop, finalise and implement the Plan. A number of supplements to the Plan were filed in the Chapter 11 Proceedings prior to the confirmation hearing listed for 8 March 2023 (the "**Confirmation Hearing**"). The Confirmation Hearing spanned over two days of evidence and argument and, on 10 March 2023, the US Bankruptcy Court overruled all the remaining objections (including those of the Objecting Shareholders) and confirmed the Plan.

Grand Court authorisation of the Plan

One of the "*Conditions Precedent to the Effective Date*" of the Plan was for the Grand Court to have issued orders satisfactory to both Rockley and the Noteholders approving the restructuring transactions pursuant to the Plan.

The Restructuring Officers (prior to the Confirmation Hearing) therefore made an application to the Grand Court seeking orders that they be "...*authorised to take all steps they consider necessary or desirable in order to implement the* [Plan] i*n such form approved by the* [US Bankruptcy Court]..." (the "**Authorisation Application**"). The Authorisation Application was listed for hearing on the morning of 10 March 2023 in anticipation of the Confirmation Hearing concluding in advance of the listed hearing. However, the Confirmation Hearing unexpectedly overran, which meant that the Restructuring Officers were unable to file their evidence in support of the Authorisation Application until the morning of the hearing. The Grand Court, appreciating the need for the Authorisation Application to be determined on the same day so as not to delay the effectuation of the Plan, allowed for evidence to be filed in the morning and re-listed the hearing for the afternoon.

At the hearing of the Authorisation Application, the Chief Justice granted the orders sought on the same day. The Chief Justice was satisfied that the US Bankruptcy Court's confirmation of the Plan provided Her Ladyship with sufficient comfort, on the basis of judicial comity, to make the orders sought and that there was no need for Her Ladyship to look behind the US Bankruptcy Court's decision.

The Grand Court's order on the Authorisation Application was sufficient to satisfy the Condition, which allowed the Plan to be effectuated shortly thereafter and successfully completed the restructuring.

Conclusion

The Restructuring Officer Regime provides companies with much-needed protections in order to effect a restructuring, whether within the Cayman Islands, by way of a foreign restructuring process or a consensual restructuring. We expect the law in relation to the Restructuring Officer Regime will continue to develop as more companies seek to utilise the regime. The outcome in Rockley has been welcomed by insolvency practitioners in the Cayman Islands as it showcased the Grand Court's ability and willingness to be flexible in order to facilitate a foreign restructuring process.

EDWARD DRUMMOND
PARTNER, BEDELL CRISTIN
JERSEY PARTNERSHIP

News from Jersey

News from Jersey

Due to their proximity and relationships with the UK, the Channel Islands have experienced the same roller-coaster of inflationary pressures caused by an increase in demand post-pandemic and the war in Ukraine, and (because the Channel Islands are in the sterling zone) interest rates hikes imposed by the Bank of England. The problems are however exacerbated because of the need to import goods and fuel to the islands, and whilst Brexit has not affected trade with the UK, it has not certainly not helped trade with Europe. All these factors have been placing pressure on businesses.

In Jersey, the most high profile collapses have been in the building trade with large Jersey builders Camerons and JP Mauger going into liquidation. Anecdotally the difficulties have been caused by the increase in costs, which have rendered uneconomic fixed price building contracts entered into pre-pandemic. Despite this, the demand for construction continues and St Helier is awash with cranes and hi-viz jackets.

Regulatory pressures

Businesses of all types are also having to contend with a deluge of regulatory changes on many different fronts, many prompted by the upcoming Moneyval visit in September 2023.

For example, in April 2022, Jersey's civil financial penalty regime (imposed for contravention of the regulatory Codes of Practice or the new Anti-Money Laundering / Combatting Terrorist Financing / Countering Proliferation Financing Handbook) was toughened up and the possible penalties increased. In June 2022, a new offence of "*failure to prevent money laundering*" was introduced; a defence exists if the supervised business can show it adequately maintained and applied "*prevention procedures*" in relation to the activities of the "*associated party*" engaged in money laundering, whether or not that person has been convicted of an offence related to that conduct. With effect from 30 January 2023, who is supervised for AML has been completely overhauled by re-casting Schedule 2 of the Proceeds of Crime (Jersey) Law 1999 and all previous scope and registration exemptions have been removed.

Businesses are also having to wrestle with a sanctions regime which has been expanding rapidly since Russia's invasion of Ukraine in February 2022. Jersey implements locally both UN Security Council and autonomous UK sanctions. Since 29 September 2022, all UK sanctions on Russia (and since 10 June 2023, UK sanctions on Belarus) have been automatically implemented in Jersey.

Director disqualification

On 20 September 2022, a director of a Jersey company in bankruptcy (désastre) was disqualified for 10 years under Article 78 of the Companies (Jersey) Law 1991 ("**Companies Law**") (*In the matter of SPARC Group Limited (en désastre)* 2022 (2) JLR 65). It was the first time a director has ever been disqualified following a referral by the Viscount under Article 24(7) of the Bankruptcy (Désastre) (Jersey) Law 1990 ("**Désastre Law**"), and it was the first reported disqualification case in 20 years, since the maximum period for disqualification was increased from 5 years to 15 years in September 2002. The director had flagrantly breached his obligations under the Désastre Law and refused to engage properly with the bankruptcy process. He had misled the Viscount on numerous occasions, which had affected her ability to discharge her functions.

The Viscount is not the only potential applicant for a disqualification. The Chief Minister, the Jersey Financial Services Commission, or the Attorney General, can all apply for a disqualification order if it is expedient in the public interest. The Court will make the order if satisfied that "*the person’s conduct in relation to a body corporate makes the person unfit to be concerned in the management of a body corporate.*"

On 3 March 2023, the Attorney-General issued Guidance on the circumstances in which he will apply under Article 78 for a disqualification order. The Guidance sets out a long (but non-exhaustive) list of factors which may trigger such an application, which include relevant criminal convictions, court orders in respect of their wrongful trading or fraudulent trading, corporate governance breaches, failure to co-operate with any liquidator or the Viscount in a winding up or bankruptcy, and involvement in transactions at an undervalue or preferences.

Bedding in of March 2022 creditor-friendly reforms

It is now over a year since a package of creditor-friendly reforms to Jersey's insolvency regime came into force on 1 March 2022:

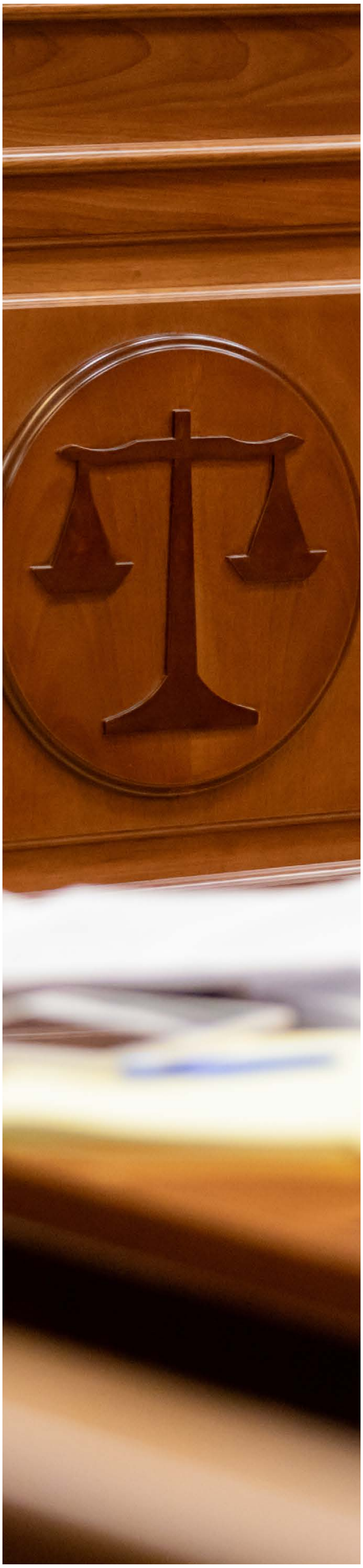
- For the first time, creditors were able to apply to the Jersey court under the new Article 157A of the Companies Law for a Jersey company to be placed into a creditors winding up and have private sector liquidators appointed. Previously creditors had only one domestic option: a désastre (bankruptcy) administered by the Viscount. Article 157A mirrored the long-standing provisions that apply to an application for a désastre by a creditor with a claim of at least £3,000. We have seen several applications made by creditors, including opposed applications, coming before the courts - and one has recently reached the Court of Appeal (described in greater detail below). The use of statutory demands in the prescribed form (as a precursor to such an application), which was also introduced in Jersey in March 2022, has also become widespread, and may even have prompted debtor companies to take the initiative and for their members to resolve to enter into a creditors' winding up, i.e. to jump before they were pushed.

- A provisional liquidator (not previously available in Jersey) could be appointed to preserve the position where there is a real concern that the affairs of the company will be conducted improperly, its books and records will be destroyed or its assets dissipated between the creditor's application to court and the making of a winding up order. There are no reported judgments on this having been used yet.

- A new register of Approved Liquidators was introduced. Only those registered can be appointed as liquidators in a creditors winding up (whether initiated by a creditor application or under the existing regime via a resolution of shareholders) or as liquidators of a Jersey public company (however appointed). As at 28 June 2023, there are currently nine Jersey resident approved liquidators, along with 22 non-Jersey approved liquidators.

Disputed debts under Article 157A

In *Vidya AG v Sumner Group Holdings Limited* 2022 (2) JLR 283, a creditor had served a statutory demand in the sum of $120,000. The debtor company disputed that the debt was due. The Royal Court considered English and Jersey caselaw before concluding that a claim is not "*disputed*" for the purposes of Article 157A(2)(b) "*unless it is the subject of a substantial dispute (as that expression has been interpreted in the English cases and which is essentially to the same effect as the expression 'genuine dispute and arguable defence and counterclaim'*)." In deciding that issue, the Court will consider much the same matters as it



would do on an application for summary judgment. On the facts, the Royal Court found that although there was a dispute about $20,000, the sum of $100,000 was not the subject of a substantial dispute, and accordingly found that the debtor company was unable to pay its debts and ordered the winding up of the company. The Royal Court also confirmed that the creditor's reasonable costs of the application would be costs of the winding up (as it was brought, and has effect, for the benefit of all creditors) and would rank in priority to general creditor claims in the winding up; this resolves an issue which is not entirely clear in the legislation. It also suggested that any applicant under Article 157A should come, on first appearance of the Representation, armed with draft directions to ensure such applications are dealt with in a reasonably prompt timescale.

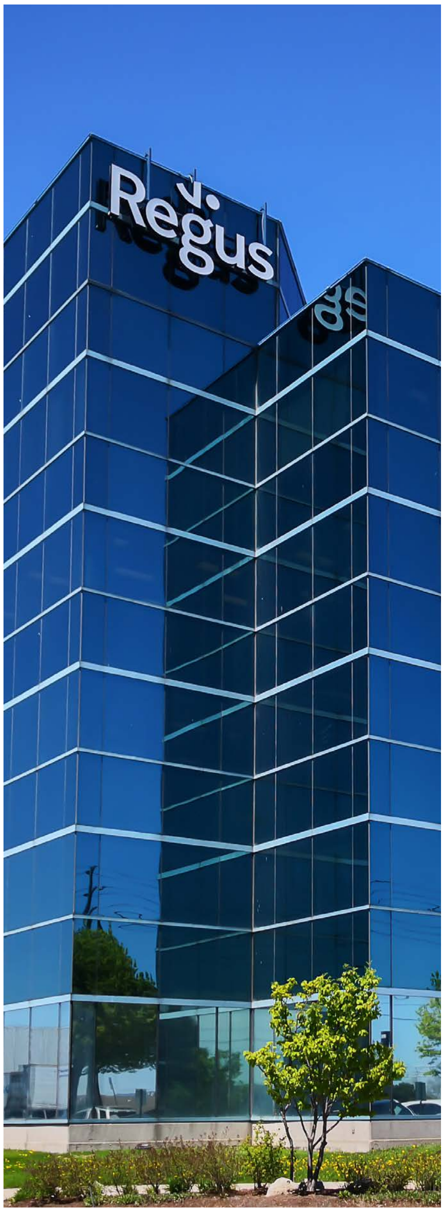
Do you need a liquidated claim?

Interestingly, the Royal Court in *Vidya* said "*the reference in Article 157A(1) to the need for a creditor to have a claim for a liquidated sum and the reference in Article 157A(2)(b) to the company not disputing the debt are two sides of the same coin and addressing essentially the same issue.*"

That a creditor needs to have a liquidated claim was based on the statutory language of Article 157A, the accompanying Practice Direction RC 22/01 (which requires the creditor to have "a claim for a liquidated sum"), and Jersey caselaw in relation to the equivalent requirement under the Désastre Law. This also reflects the customary law position in Jersey for over 125 years, the Désastre Rules which have applied since 1968, at least three Court of Appeal decisions, a series of Royal Court decisions and the leading Jersey textbook on this subject.

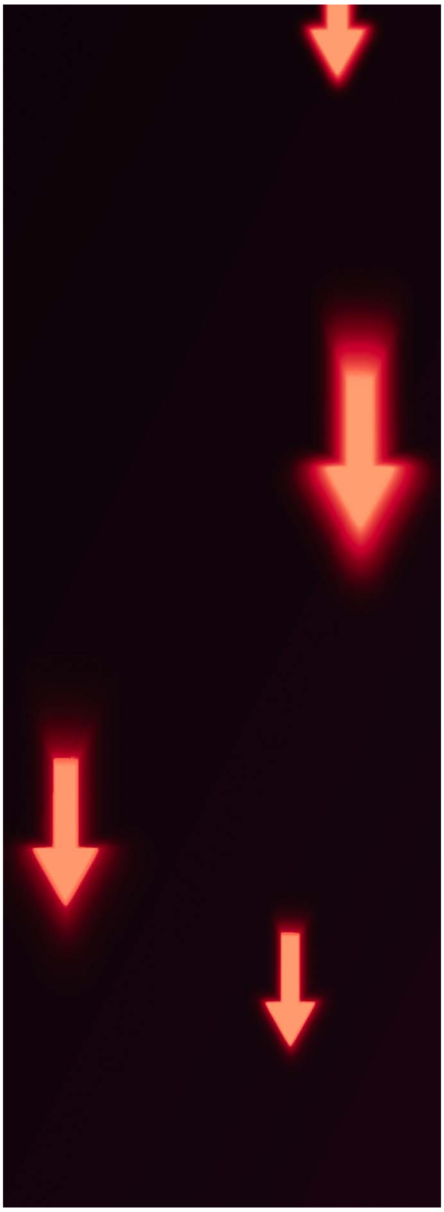
Undeterred by this weight of precedent, the Court of Appeal held in *HWA 555 LLC v Redox PLC SA (formerly Regus PLC)* [2023] JCA 085 that a creditor does not need a liquidated claim at all. Regus PLC ("**Regus**") was an unusual "*dual hatted*" company, incorporated in Jersey but also registered in Luxembourg where it was tax resident. Its role was to guarantee the rent payments of over 600 tenant SPVs to their landlords around the world. It had a potentially huge exposure but very few claims had actually been made on the guarantees. The pandemic disrupted Regus' business model, and it anticipated that the guarantees would be called upon and it would become insolvent. In September 2020, it applied to the Royal Court for a letter of request to be sent to the Luxembourg Court to put Regus into a Luxembourg bankruptcy process. The Royal Court noted that a huge distribution had been made to its parent company (now thought to have exceeded £3.3 billion) in January 2019, which could potentially be clawed back in a Jersey winding up as a transaction at an undervalue (the lookback period for which is 5 years) but not in Luxembourg (where the equivalent period was 6 months and 10 days). It nevertheless issued the letter of request. Regus was shortly afterwards placed into Luxembourg bankruptcy.

HWA 555 LLC had a large, unliquidated damages claim (for more than $90m) for breach of contract against Regus under a guarantee and once the new



regime came into force in March 2022, it applied for Regus to be wound up in Jersey (by this point, it was common ground Regus was insolvent). The Royal Court declined to wind up Regus in Jersey, so HWA appealed.

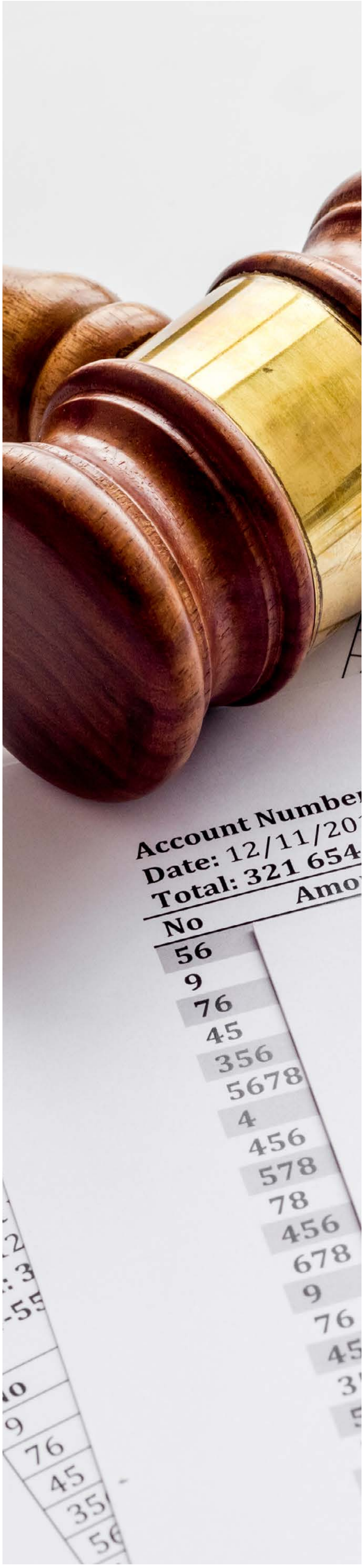
1. **Standing to apply**.
The Court of Appeal was split on the issue of whether or not a creditor with an unliquidated claim could apply under Article 157A. The first judgment was given by Matthews JA. In very short precis, he held that the statutory requirement that a creditor "*has a claim against the company for not less than the prescribed minimum liquidated sum*" does not require the creditor to have a "*liquidated claim*" - the word "*liquidated*" is in the wrong place and merely refers to the prescribed minimum sum (currently £3,000). He bolstered his argument by reference to the fact that a creditor with an unliquidated claim can prove in a liquidation, just as it can in a désastre, which provision was clarified in 2006: he concluded the legislature must have intended in 2006 to give the Royal Court a wider discretion than had hitherto been the case. Wolffe JA disagreed with that interpretation of the wording, noting the weight of precedent to the contrary referred to above, the fact that no mention was made of this significant change in any of the legislative papers from 2006 - and there was even a contrary Court of Appeal decision on this topic in 2011. He also noted that in Jersey customary law (as in England and Wales and under Scots law) there is no necessary identity between those with standing to initiate an insolvency process and those with a right to prove their debts. The casting vote fell to Sir William Bailhache KC sitting as President of the Court of Appeal. He decided that the Court could develop the customary law and "*it would be convenient on policy grounds to adopt the construction of the legislation as adumbrated by Matthews JA.*" He went on to say that when considering an application by a creditor with an unliquidated claim "[t]he Royal Court can be trusted to reach a sound conclusion."



2. **Discretion**.
All the Court of Appeal judges agreed that if a creditor could jump through the statutory hoops, a winding up order should be made "*unless there is a sufficiently good reason not to do so*".

3. **A fresh exercise**.
Finally, the Court of Appeal found that the Royal Court had erred in its exercise of discretion, not least in failing to consider the advantages of a Jersey liquidation (one being the longer "*lookback*" period in Jersey). The Court of Appeal exercised the discretion afresh and reached the conclusion that Regus PLC should be wound up in Jersey.

An oddity about the decision on standing is that HWA had a separate liquidated claim for c.$100,000 arising from a costs order in earlier US proceedings – so the lengthy debate about unliquidated claims, whilst not technically obiter, was perhaps unnecessary (Wolffe JA would have wound up Regus on this narrower basis). An irony also arises because, for a decision on the law so clearly driven by justice and policy reasons, in fact no winding up order was ultimately made: after the hearing but before the Court of Appeal's judgment was handed down, the parties agreed to settle.



Assignment of claims in a désastre

Spot the difference:

1. Mr Alan Booth was declared bankrupt in October 2015. Prior to his bankruptcy he had commenced three sets of legal proceedings. During his bankruptcy, he sought an assignment of the claims to him; the Viscount refused. He applied to the Royal Court to challenge those decisions; the Royal Court dismissed that challenge in April 2016. The Court of Appeal overturned the Royal Court's decision in November 2016, and the Viscount thereafter assigned the claims to him (apparently unconditionally). Two claims settled and one was unsuccessful following trial. On 3 January 2020 he was discharged from bankruptcy.

2. On 20 November 2020 Mr Booth sent a letter before action to a surveyor – its lawyers responded that the claim pre-dated the bankruptcy and had vested in the Viscount. Mr Booth asked the Viscount to assign the claim to him; she refused. Mr Booth challenged the Viscount's decision; the Royal Court dismissed his challenge, distinguishing the earlier Court of Appeal decision. Mr Booth appealed. This time the Court of Appeal dismissed his appeal (*Booth v Viscount and Reynolds Chartered Surveyors* [2022] JCA 200): it held that it was "*inherent in the logic of the November 2016 Judgment that the merits of any claim would be a relevant consideration in the context of a proposed assignment*" and that "*the Viscount is not only entitled but positively required to consider the merits of a claim when deciding whether to assign it.*" As such, the Viscount was entitled to decide not to assign a claim which she thought was frivolous and to some extent vexatious.

3. A month after the Court of Appeal's decision, Mr Booth asked the Viscount to release to him a further claim against the surveyor. The Viscount refused. Mr Booth issued proceedings against the Viscount in respect of that refusal on the basis it breached his human rights. On 12 April 2023, the Master of the Royal Court declined to strike out that claim. Perhaps this will make it to the Court of Appeal for a third time?

Cross-border recognition still requires a letter of request

English joint trustees in bankruptcy had their appointment recognised in Jersey under Article 49 of the Désastre Law in *Representation of Wright and Knowles re: Yeowart and Hopkinson* [2022] JRC 242. The Royal Court had received two letters of request from the English High Court, one in respect of each bankrupt, asking for the appointment of the trustees to be recognised and given effect in Jersey and that they be authorised to examine various persons within this jurisdiction with a view to getting in the assets of each of the bankrupts in Jersey.

In contrast, in *Waterfront LC Limited v Cine-UK Limited* [2022] JRC 260, an attempt by the defendant to resist payment of a judgment following Jersey

proceedings by relying on an automatic stay arising following its entry into US Chapter 11 proceedings was refused: the Royal Court held that "*Notwithstanding the purported extra-territorial effect of the order made in the US Court on 8 September 2022, the fact remains that such an order has no direct effect in Jersey. Advocate Harvey-Hills accepted that it would have been appropriate for the US Court to have either issued a letter of request to the Jersey Court seeking recognition of the Chapter 11 Proceedings or for some equivalent application to have been made, or for an application to be made to stay these proceedings. No such approach or application has been made...*"

Winding up on just and equitable grounds is still alive and well

In *Gibbons v Monarch Investments Limited and Gibbons* [2023] JRC 024, two brothers (Robert and Kenneth) were shareholders in a solvent company, but only Robert was a director. Their relationship had broken down and the Royal Court found that Kenneth had justifiably lost confidence in the probity and impartiality of Robert, and the circumstances were sufficient to prompt a just and equitable winding up of the company. Unusually, the order was made without a named liquidator having been proposed or terms agreed - the liquidator's engagement had to be negotiated and agreed with the Court after the event.

In *Representation of Daisy Logistics* [2023] JRC 051, no liquidator was needed at all. Three companies applied to be wound up on just and equitable grounds. They were special purpose companies created for an unsuccessful bid. Unfortunately, their parent entities had been dissolved, and so were unable to pass a resolution for their summary winding up. The companies could have been left to be struck off but "*the companies take the view that they should not be allowed merely to fall away but should be wound up appropriately.*" The Royal Court agreed that they be wound up on just and equitable grounds. Whilst it would be usual to appoint a liquidator to conduct the winding-up, by reason of the complete inactivity of the companies at any stage, their effective dormancy from creation, the absence of any creditors or otherwise, the Court agreed that the companies be dissolved immediately on the registration of the Court's winding up order with the Registrar of Companies.

PETER BURGESS

CIGA 2020: Three Years On

Introduction

When the Corporate Insolvency and Governance Act 2020 (“**CIGA**”) came into force on 26 June 2020, it was the most significant change to the UK’s corporate insolvency regime in 20 years. As well as the temporary measures designed to mitigate the impacts of the Covid-19 pandemic, it introduced three permanent measures: (a) Restructuring Plans (“**RPs**”); (b) the Part A1 moratorium; and (c) the insertion of section 233B and Schedule 4ZZA into the Insolvency Act 1986 (“Suspension of Termination (ipso facto) Clauses” or “**SoTC**”).

During the passage of the bill that became CIGA, the Government committed to review the three permanent measures no later than three years after they came into force. As a result, in June 2023, the Insolvency Service published its “Post Implementation Review” (“**PIR**”) into CIGA.

Summary

The PIR concluded that the permanent CIGA measures had been broadly welcomed and seen as a positive addition to the UK’s rescue framework, although usage had been lower than expected; official statistics indicate that as at 30 September 2022, there had been only 40 moratoria and 12 RPs since the introduction of CIGA on 26 June 2020. The PIR suggested that the Government’s extensive support provided during the pandemic meant that the market has not returned to pre-pandemic levels and that it may take time for industry to adopt new measures.

The PIR was primarily based on an evaluation undertaken by the University of Wolverhampton, which focused on how the measures are working and if they are worked as expected. It also made use of semi-structured interviews with stakeholders, a survey of insolvency practitioners and two case studies. The Insolvency Service also collected data from Companies House filings, international comparisons, and from HM Courts & Tribunals Service (HMCTS).

Restructuring Plans

The RP was introduced as a new restructuring procedure that can be proposed by a company in financial difficulties. It broadly followed the approach applied to schemes of arrangement, but introduced the novel concept of the "*cross-class cram down*", which allows an RP to be sanctioned by the court, despite not all classes voting in favour. This can only take place if at least one "*in the money*" class of creditors has voted in favour and the court is satisfied that no member of a dissenting class is worse off than they would be in the relevant alternative (likely to be an insolvency procedure such as administration or liquidation).

The policy objectives in introducing the RP had been to address the scenario where a secured creditor can block a company rescue, and to enable companies with viable businesses that are struggling to meet debt obligations to restructure with limited disruption to their business.

The PIR emphasised the benefits of the "*cross-class cram down*" provision in section 901G of the Companies Act 2006, the supervisory role of the court (in contrast to a company voluntary arrangement ("**CVA**")), the absence of requirement that a majority in number of creditors vote in favour of the RP (in contrast to a scheme) and the ability of the courts to draw on the existing body of scheme case law as being key advantages of the RP regime.

Two particular issues had been raised by stakeholders: (a) the costs to set up an RP (given the need for two court applications, two hearings, counsel fees and valuation evidence); and (b) the cost of challenging an RP as a creditor. The PIR also noted a perceived problem raised by creditors is that they did not have adequate access information in a timely manner, which impeded their ability to challenge an RP.

As a method to reduce costs, the PIR considered the suggestion that an RP should be sanctioned at a single hearing held before an Insolvency and Companies Court judge, rather than a High Court judge. However, it noted a potential drawback, in that the present similarity with the scheme procedure allows courts to draw upon existing scheme case law. The PIR noted, as a possible alternative, that the first stage of an RP could be dealt with out of court and on paper in the case of SMEs, and recommended consultation on this topic, to explore whether the financial burden on SMEs seeking to restructure could be eased. It also considered that the creation of a standardised form or template for RPs may make the measure more accessible.

The PIR acknowledged proposals that multiple debtor entities should be allowed to be party to the same RP and for greater upside sharing to incentivise creditors to lend their support to an RP. The PIR considered that further consultation in relation to both may be appropriate. It was also supportive about providing for RPs with extraterritorial effect to reduce cost and create more certainty.

Moratoria

The moratorium provides struggling companies a short period of protection, initially 20 business days, from creditor enforcement action, during which they can seek advice and agree plans for their rescue as a going concern. This protected period is designed to give companies a better chance of survival.

The PIR flagged a possible strategic use of the moratorium by directors whose debts fall within the definition of "*financial services*" to the detriment of creditors, as their debts will have equal priority to all other financial creditors, including secured creditors, if the company enters administration or liquidation within 12 weeks of the moratorium terminating. However, even with the exceptions to the moratorium, and the possibility of its abuse, the PIR noted that it can be used effectively to enable a company to enter a CVA or to temporarily hold off an aggressive creditor.

Another concern raised by the PIR was whether the eligibility and qualifying criteria may prevent mid-market or large companies from obtaining a moratorium, particularly given the exclusions include a company which owes a capital market debt of at least £10m.

As any changes to these areas would require legislative amendment, the PIR recommended consultation as to whether further reform is necessary regarding alteration of priority of debts, the definition of financial services and the eligibility criteria.

The PIR also noted that interviews with insolvency practitioners ("**IPs**") suggested that reputational risk should the company not be successfully rescued, the change in priority for their fees in a subsequent insolvency, and potential criminal penalties for actions taken whilst acting as a monitor has meant that IPs acting as monitors face greater risks than those acting as administrations. For this reason, many IPs have recommended administration proceedings instead of the moratorium. The PIR thought that this, and the related issue of a lack of clarity regarding the role of monitor and the process for extending the moratorium, may be addressed through additional guidance.

Suspension of Termination (ipso facto) Clauses

The SoTC prohibits the enforcement of "*termination clauses*" in contracts for the supply of goods and services that engage upon an insolvency event. This means suppliers must continue to fulfil their commitments under contract with the debtor company in the event of it entering a formal insolvency. It was designed to prevent companies in insolvency procedures from being held hostage by suppliers, either by withdrawing supply or seeking "*ransom*" payments.

The PIR considered that, while it was too early to tell whether the SoTC has met its objectives, the early signs were promising. While survey responses suggested that the measures worked reasonably well at ensuring continued supply and providing a valuable tool to support company rescue, the responses were more equivocal in relation to preventing ransom payments. The PIR considered that time will tell whether this objective is met.

The PIR raised concerns that suppliers who continue to supply insolvent companies are not guaranteed payment for continued supply, especially where that was no office holder in place. However, the evaluation concluded that it would be very difficult to ensure an effective personal guarantee in cases where there is no officeholder. Survey responses from IPs also showed virtually no support for a personal guarantee in favour of suppliers. The PIR concluded that if non-payment is a genuine concern and if such non-payment would impact it significantly, the supplier should be able to claim hardship under section 233B(5) of the Insolvency Act 1986.

The PIR also highlighted two unintended consequences of the reform. The first related to difficulties enforcing the requirement to ensure continued supply where a supplier chooses not to comply with section 233B. The second concerned a lack of supplier awareness of the measure.

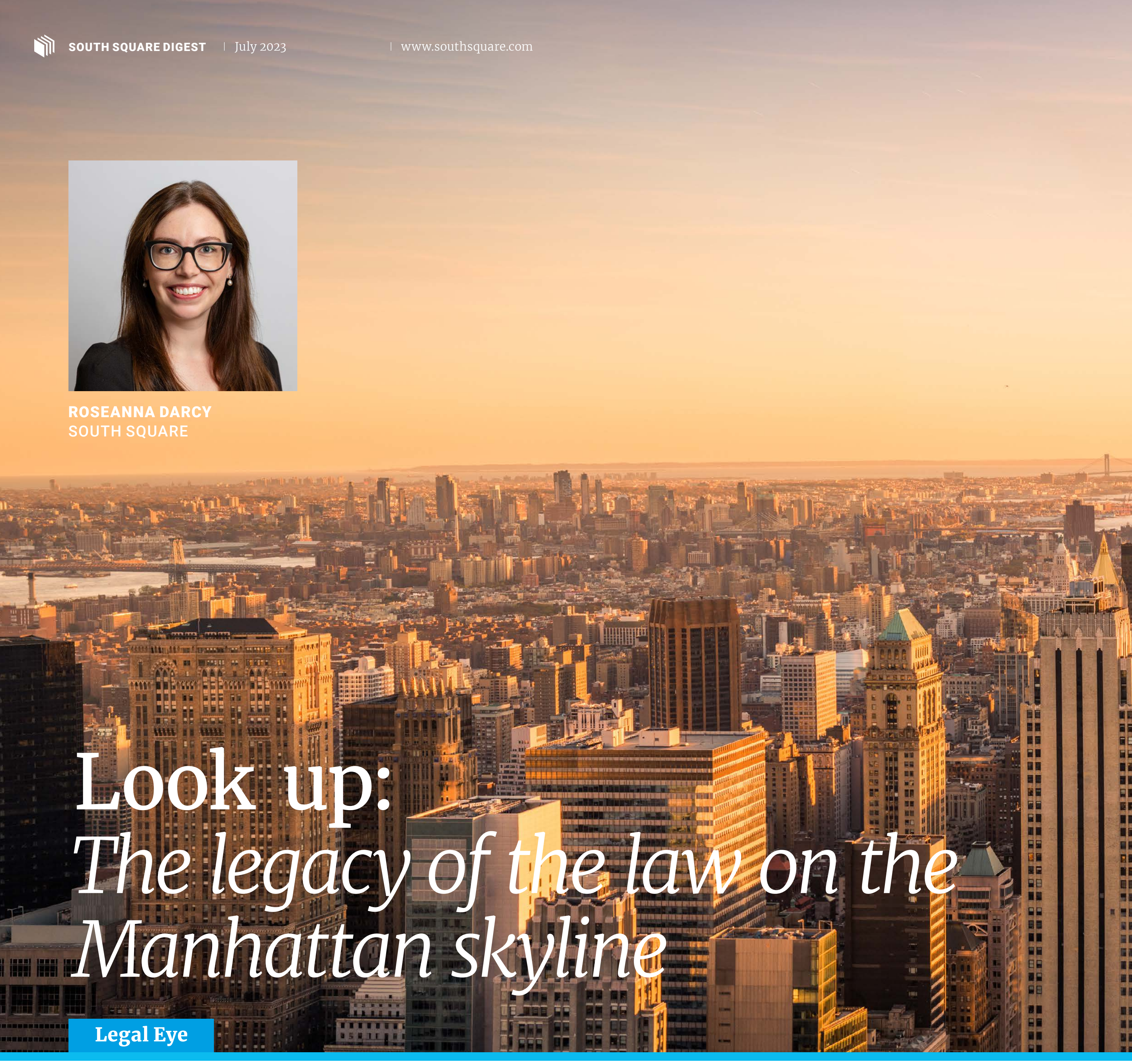
The future

The PIR considered that the permanent measures in CIGA have been generally well received by stakeholders and seen as a good addition. The measures align with best practice and strengthen the insolvency framework. It did, however, consider that certain amendments could be made to help achieve further benefits

and to reduce the burden on business. Since these amendments would require the amendment of primary legislation, the first action recommended was a consultation.

The following table summarises the possible refinements the PIR suggested for the future:

Issue	Action	Brief justification for action
Moratorium		
Alteration of priority of debts, leading to uncertainty as to whether office- holder debts would be paid in subsequent insolvency	Consultation	There is evidence of an unwillingness to recommend an option which would lead to a risk that a subsequent office-holder's fees will not be paid.
Definition of financial services, including a risk of exploitation of definitions in Schedule ZA2		To ensure that it is clear which liabilities are within the definition.
Eligibility criteria		The current eligibility criteria exist to mitigate any risk to financial stability, including appetite for lending. Any change would require full assessment of the wider impacts on lending.
Reputational risk to IPs	Guidance	A new process is by its nature likely to involve a familiarisation period. Many company voluntary arrangements do not continue for their full term, but no evidence has been found to suggest that there is a reputational risk to nominees and supervisors as a result.
Clarity over role of the monitor		Evidence suggested more guidance might help take up of the measure
Current length of the moratorium		Guidance on how the initial period can be extended. Evidence suggests that it is easily extended where needed.
SoTC		
Dealing with less sophisticated suppliers	Guidance	It may be beneficial for IPs to receive guidance as to how to exercise the measure when dealing with less sophisticated suppliers.
Guaranteed payment	Do nothing	The hardship provisions provide a safety net for suppliers. Continued engagement with the sector will be important.
Preventing "ransom" payments		Too early to intervene, but continued engagement with the sector will be important.
Enforcement of the measure		Too early to intervene and may resolve itself over time. Continued engagement with the sector will be important.
Lack of supplier awareness of measure		May solve itself as more companies enter rescue proceedings. Continued engagement with the sector will be important.
RPs		
Costs associated with setting up and challenging a RP	Consultation	It was anticipated that RPs would be more suitable for companies with certain characteristics than others, and the need for two court hearings would not lend itself to this being a cheap process. Exploration of whether the financial burden could be eased may be beneficial.
Multiple debtor entities		Such a change would introduce a lead company concept with jurisdiction extending to affiliated companies. This would go against the established principles of "one entity, one procedure".
Mandatory upside sharing		This could incentivise creditors to lend their support to a RP by providing for creditors to receive a share of future profit should
Information asymmetry	Guidance	Evidence has suggested that professional guidance may help improve trust and transparency with the process.
Standardised RP form	Do nothing	It has been suggested that SMEs may benefit from the guidance developed around that which already exists on SME CVA, rather than documentation for a typical RP which is likely to be overly complex for their purposes.



ROSEANNA DARCY
SOUTH SQUARE

Look up:
The legacy of the law on the Manhattan skyline

Legal Eye

Contrary to the direction of the 2021 apocalyptic satire film "Don't Look Up," the gaze of this Legal Eye edition is in a firmly upward trajectory due to the author's current location in the heart of New York City and the appeal of the surrounding skyscrapers calling to be looked at from far below on the ground.

It is difficult to imagine New York without its mighty and dominating high rises. However, it is largely thanks to the law and specifically the passage of the 1916 Ordinance, the first comprehensive zoning law of the city, that accounts for many of the most iconic silhouettes of the skyline today.

Before that, the race to the top took a laissez-faire attitude, with no restrictions on the height or mass of new structures. These early skyscrapers such as the Park Row Building (386 feet with 31 stories), which became the world's tallest office building in 1889, and the Woolworth Building (792 feet with 55 stories), which took the title in 1913, were primarily located in the Financial District and had the appearance of solid blocks, built straight up from the ground to the top, as modern technology such as elevators and metal-cage skeleton construction enabled towers to stretch beyond the standard 10 or so stories of earlier years.

By 1913 there were already 997 buildings with 11 to 20 stories, and 51 buildings with 21 to 60 stories in Manhattan. The speed and desire to dominate the skyline, especially in prestigious locations like Wall Street and lower Broadway, drove towers higher and higher, often on smaller and smaller sites. The result? Narrow streets such as Exchange Place were suddenly encased by buildings and were cast in perpetual shadow. Such densities and darkness at ground level depressed rents for lower floors and were thought to contribute to conditions which threatened public safety with difficulties for fire control and sunlight and ventilation in offices being inhibited.

One of the last examples of an unregulated development to be built

in New York City is the Equitable Building, completed in 1915. It became the largest office building in the world with 1.2 million square feet of office space, covering its entire block between Broadway, Nassau, Pine and Cedar Streets, an area of just under an acre. However, at 542 feet it cast shadows over various neighbouring buildings with many owners being granted reductions in tax assessments due to the decline in the value of their own properties which became less desirable as a result.

And so, after many years in the making, the 1916 Ordinance passed, helped by the concern of overbuilding in lower Manhattan coupled with increasing vacant office space along with the successful lobbying of the Fifth Avenue Association (a powerful group of business and hotel operators) who represented the interests of the fashionable district north of 34th Street. As per the introductory passage in a handbook to the new law published by the Lawyers' Mortgage Co. of New York, the law was designed:

"*to stabilize and conserve property values, to relieve the rapidly increasing congestion in the streets and in the transit lines, to provide greater safety in building and in the streets, and in general to make the city more beautiful, convenient and agreeable.*"

In reality New York was merely catching up with other cities who had already passed laws restricting the height of buildings. The Report of the Heights of Buildings Commission dated 23 December 1913 records that Boston's height limit stood at 125 feet, Los Angeles's at 125 feet and Chicago's at 200 feet (compare that with London's 80 feet, Paris's 65.6 feet and Zurich's 43 feet).

Although, not everybody was happy with the restrictions imposed across these cities. The 1909 US Supreme Court case of *Welch v Swasey et al., as the board of appeal from the building commissioner of the city of Boston* (214 US 91) is an example of one such dispute pursued by a residential property developer who claimed that in limiting the height of buildings in Boston, and specifically by limiting the height of residential buildings to a greater degree than commercial buildings (100 feet versus 125 feet) this violated the Constitution of the United States. After Welch was denied a permit to construct a residential building of 124 feet he commenced a claim arguing that the "*the purposes of the acts are not such as justify the exercise of what is termed the police power, because, in fact, their real purpose was of an aesthetic nature, designed purely to preserve architectural symmetry and regular skylines*." Whilst the court accepted that there was indeed a distinction between the height restrictions for residential and commercial constructions, Justice Rufus Wheeler Peckham in delivering judgment considered this distinction was justifiable and expressed a reluctance in interfering with a law that was location specific, explaining at pp.105 to 106 of the judgment that:

"*The particular circumstances prevailing at the place or in the State where the law is to become operative…are all matters which the state court is familiar with, but a like familiarly cannot be ascribed to this court…For such reason this court, in cases of this kind, feels the greatest reluctance in interfering with the well-considered judgments of the courts of a State whose people are to be affected by the operation of the law…We do not of course, intend to say that under such circumstances the judgment of the state court upon the question will be regarded as conclusive, but simply that it is entitled to the very greatest respect, and will only be interfered with, in cases of this kind, where the decision is, in our judgment, plainly wrong*."

Whilst the 1916 Ordinance also created different zones for commercial and residential property what is interesting about New York's 1916 Ordinance in comparison to the height restrictions of other cities is that rather than simply setting a maximum height cap, which would result in the same building style of straight up from the ground to top (albeit now with a restriction on tallness), the Ordinance promoted the use of wedding cake or pyramid style constructions through the use of formulas devised by George. B. Ford, an architect and engineer, which prescribed that after so many vertical feet above the ground, a tower had to be 'stepped back'. For example, in what was termed a "*one times district*", the Ordinance stated that "*no building shall be erected to a height*

in excess of the width of the street, but for each one foot that the building or a portion of it sets back from the street line two feet shall be added to the height limit of such building or such portion thereof." In a "*two times district*" buildings could be twice the width of the street with an additional four feet allowed for every one foot that was set back from the street line.

The Ordinance therefore struck a compromise enabling and still encouraging the construction of ever taller skyscrapers whilst ensuring the sidewalk (to use the American term) and lower levels of buildings would now receive air and light. The Empire State Building is a prime example of this new stepped back design which still allowed its 1454 feet and 102 stories to be named the world's tallest building from its construction in 1931 until 1970 (and as of 2022 it is still the 7th tallest building in New York and 54th tallest in the world). Other well-known examples include The Chrysler Building, The Rockefeller Building and the American Radiator Building to name but a few. Indeed in 1929, Ford recalled that in developing the zoning formulas he had sought to achieve a variety of architectural effects that "*would permit all the variety and spontaneity of treatment that we are revelling in today*", a sentiment echoing the New York Times article of 19 April 1923 which asserted "[w]*hat we are getting now is something utterly new and distinctive. And its effect will be felt on the architecture of the whole world.*" Another New York Times article of 26 March 1924 perfectly sums up the impact of the 1916 Ordinance: "*The zoning law, enacted with strictly utilitarian intent, has resulted in an unforeseen revolution in metropolitan architecture.*" And so whilst this article acts as a reminder of the ever prevailing impact of the law on the Manhattan skyline, it also serves to remind readers to always Look Up!

Muir Hunter's Move To 3 Paper Buildings Which Becomes The Leading Bankruptcy Set

SIMON MORTIMORE KC

South Square Story

My last article about the history of the chambers now at South Square (Digest, December 2022) ended in early 1946 with lieutenant-colonel Muir Hunter returning to London from war service in India to resume his career as a barrister specialising in bankruptcy work in chambers at 3 King's Bench Walk, which he had joined in 1939. This article describes Muir's move to Cyril Salmon QC's chambers at 3 Paper Buildings in 1954, and how those chambers, with Muir as head, became the leading set for bankruptcy work. The article ends in 1965 when Muir was appointed a QC.

Return to 3 King's Bench Walk

Muir was 33 years old when he returned to London. The war had disrupted his family life with Dorothea, who he had married in July 1939, and compelled him to relaunch his career as a barrister from scratch, as the goodwill he had built up in his first year or so of practice had evaporated after more than five years' absence from the Bar on military service. He undertook a refresher course at the Council of Legal Education and obtained from Gray's Inn a much-needed second Holker Exhibition. At a time when bankruptcy work was in short supply, this provided a welcome additional source of income to support himself, Dorothea, and their daughter Camilla (born in April 1947).

Muir devoted the years immediately after the end of the war to learning the intricacies of bankruptcy law from Victor Aronson, the head of chambers at 3 King's Bench Walk and standing counsel to the Board of Trade in bankruptcy cases. In 1946, Aronson was 66 years old, had specialised in bankruptcy cases for 40 years, and had been appointed editor of the 16th edition of the authoritative textbook, *Williams on Bankruptcy*. The author of the first edition of the book (1870) was Sir Roland Vaughan Williams,[1] who became a Court of Appeal judge. Aronson saw Muir as his natural successor and so arranged with the publishers for Muir to be appointed joint editor with him of the 16th edition, which was published in 1949. *Williams* was an essential textbook for all lawyers and courts who handled bankruptcy cases and Muir would remain it's editor for thirty years.[2] The book set out all the current legislation and rules and provided a commentary on them, supported by citation of the relevant cases. Being joint editor gave Muir great authority when he appeared in bankruptcy cases and his submissions on bankruptcy law would be treated with a respect not normally shown to submissions from junior counsel.

In 1949, Aronson was appointed King's Counsel and Muir succeeded him as standing counsel to the Board of Trade in bankruptcy cases. From 1949 onwards, Muir began to appear as Aronson's junior or on his own in a steady flow of bankruptcy cases, which raised points of law and were reported in the law reports. In January 1951, Aronson died, but this did not stop Muir's progress towards recognition as the leading expert on bankruptcy law. Muir's bankruptcy cases in the period when he was in chambers at 3 King's Bench Walk have slipped into obscurity; the facts have no continuing interest, and the law has changed. Three of Muir's cases from this period are worth recounting: a common law trial about speedway racing in Hastings, a triumph in the Court of Appeal on behalf of a deserted wife, and an encounter with a very grand serial bankrupt. The first two cases demonstrate Muir's fighting spirit on behalf of clients who Muir saw as the underdog.

1. Vaughan Williams was followed as senior editor by EW Hansell (5th to 11th eds, 1891-1915), WN Stable (12th to 14th eds, 1921-32) and JB Blagden (15th ed, 1937).

2. The 17th ed, 1958, and with David Graham, the 18th ed, 1968 and the 19th and final ed, 1979.


The Pilot Field hosting the Speedway

Speedway in Hastings

The first of Muir's post-war cases to attract the interest of the press gave Muir the opportunity to resist an attempt by better off citizens to prevent ordinary people from enjoying a popular spectator sport.

In 1589, when granting Hastings Corporation its charter, Queen Elizabeth I had decreed that Hastings "*forever shall be and remain a town or port of peace and quiet, to the terror of evil persons, and for the reward of the good*". The councillors evidently forgot about this decree when in 1948 the Corporation granted a 7-year lease of the Pilot Field, in the hills above the town centre, to Hastings Speedway Ltd so that the Hastings Saxons could hold speedway races on a track round the perimeter of the football pitch. Speedway was a relatively new sport to England, but it attracted large crowds, drawn by the thrill of the noise and danger. The motor bikes had only one gear and no brakes or silencers. Riders would reach speeds of up to 70 mph, using their feet to slide the bikes round the bends, as they raced over four anti-clockwise circuits of an oval track made of dirt, shale, or cinders. The meetings, usually held in the evenings, would begin with the triumphal entry of the riders and track attendants accompanied by loud music, cheering and a stirring rendition of the National Anthem. This would be followed by 20 races, known as heats, between two riders from each team. Each heat lasted about 90 seconds.

The Hastings Saxons were soon attracting crowds averaging 8,000, but the meetings were not popular with residents with homes near the Pilot Field. At the end of July 1948, some of these residents banded together to form "Kill Hastings Speedway" and instruct a local solicitor, Percy Idle, to try to persuade the Corporation to stop the meetings. The Corporation refused and, while Hastings Speedway took some steps to reduce noise, nothing could be done about the sound of the bikes as they were revved up at the start of each race and hurtled round the track.

Shortly after the start of the Hastings Saxons' second season, residents issued proceedings in the King's Bench Division for an injunction to stop speedway racing on the grounds that the Corporation had no power to grant the 7-year lease to Hastings Speedway and the noise from the speedway races was a common law nuisance, being an unreasonable intrusion on the quiet enjoyment of their homes.

The action came on for trial at the Lewes Assizes before Mr Justice Humphreys on 4 August 1949. The residents and Hastings Corporation were represented by leading counsel, while Muir, leading a junior from 3 King's Bench Walk, appeared for Hastings Speedway. Mr Justice Humphreys was unlikely to be sympathetically disposed towards speedway racing. He celebrated his eighty-second birthday on the first day of the trial, had been a

High Court judge for more than twenty years, and had forged his career as a barrister in criminal cases in the Victorian and Edwardian eras. His courtroom presence reflected his long experience of criminal, rather than civil, cases; he had a forbidding manner, glaring sternly down from the bench and occasionally sniffing from a green bottle of smelling salts. He thoroughly disliked motorised transport; he had not driven a car since 1905, objected to being driven at more than 25 mph, and once told a court in Stafford that he hoped there would be no motor cars in heaven. Moreover, Humphreys was a keen gardener at his home in Ealing.

On the first day of the trial, the judge explained that speedway was not a sport with which he was familiar. "*I am quite ignorant of this sort of thing and have never been to such a place in my life, although I am familiar with other sorts of racing.*" In saying that the judge perhaps recalled pleasant visits to Epsom during Derby week. Unfortunately for the defendants, the judge did not warm to the sport as he learnt more about it. When Muir explained that speedway was a young man's sport and very dangerous, with one of Hastings Saxons' riders having been seriously injured in a race the previous week, the judge observed: "*That will always attract the crowd. The greater the danger the more people will go in the hope or expectation of seeing someone hurt.*" The judge's baleful opinion of human nature was confirmed by one of the plaintiffs' male witnesses who told him that the crowd was largely made up of "*children, adolescents and women*". The judge was shocked to learn that the cinders on the track were watered between races when water rationing prevented him from watering vegetables in his garden in Ealing. On being informed that Hastings had its own reservoir and was not troubled by water shortages, the judge remarked "*what a nice place to live in.*"[3]

The plaintiffs and their witnesses presented a distressing picture of how the lives of residents in the roads near the Pilot Field had been blighted by the speedway races. On barmy summer evenings they wanted to enjoy being in their gardens, tending to their flowers and vegetables, or chatting with friends. Or perhaps, they might be inside with the windows open listening to a radio play. They could not enjoy these quiet pleasures on race nights because of the "*raging tornado*" of "*discordant, penetrating noise*" coming from the Pilot Field. To convey the impact of the noise, the witnesses used wartime metaphors: it sounded as though flying bombs were coming after them, they were being attacked by dive bombers or it felt like they were beside a light machine gun firing range. Residents also had to endure the putrid smell of burnt oil, which left gritty black dust on their plants. Children could not sleep at night. A retired schoolteacher told how his wife had become sick; she was put off her food, had taken to a milk diet and had become utterly helpless. An auctioneer and valuer explained how the value of houses near the Pilot Field had fallen because speedway racing.[4]

The defence witnesses presented a different picture. Speedway was a public benefit. It appealed to young boys and took them off the street. It attracted summer visitors to the town. About half the speedway tracks in England were in urban areas and so having a track at the Pilot Field was not unusual. Property values in the area had been declining before the arrival of speedway. Anyway,

Race Leaders – Hastings Speedway

3. Daily News, 5 August 1949; Hastings and St Leonards Observer, 6, 13 August 1949.

4. Daily News and Coventry Evening Telegraph, 5 August 1959; Daily Herald, 6 August 1949; Hastings and St Leonards Observer, 6 August 1949.

5. Birmingham Daily Gazette, 10 August 1949.

6. Halifax Evening Courier, 11 August 1949.

the plaintiffs' evidence about noise was grossly exaggerated. The roar of the crowd at a football match when a goal was scored was far louder than the sound of the speedway bikes' engines. Several owners of homes near the Pilot Field told the judge they did not find the speedway meetings annoying. Unfortunately, Hastings Speedway's star witness, the owner of a nursing home near the gates to the Pilot Field, wilted under cross-examination. He had to admit that it was in his interests to say that speedway was not a nuisance, since he was trying to sell the home, and that he had signed the anti-speedway petition, complaining that the noise was intolerable. His explanation that he had done so to get rid of the people who were pestering him to sign it did not impress the judge.

The judge indicated that he would prefer to avoid deciding the issue about the Corporation's powers and that the decisive issue was common law nuisance. Hastings argued that speedway would encourage the tourists on whom the town's economy depended, and that the plaintiffs had bought their homes near the Pilot Field, knowing that it was used for spectator sports – football and athletics – and it was their risk that the nature of the sport might change. Muir, representing Hastings Speedway, had the burden of persuading the judge that the noise from speedway racing was not a nuisance. His first line of argument was that speedway was a deservedly popular spectator sport, which could be imperilled if the judge granted an injunction to stop Hastings Speedway from holding races. He suggested that the result of the nuisance claim must be to decide whether speedway is to be permitted at all, since noise was an essential feature of the sport. The judge disagreed and, showing scant regard for the preservation of beauty spots, said: "*Nobody has suggested that speedway in itself is objectionable. If you had a speedway on the top of Exmoor, if it was worth anybody's while to have it, there would not be the slightest objection.*"[5] His second and more pertinent line of argument was that there could be no actionable nuisance if people in the same situation as the plaintiffs and their witnesses did not find the speedway races annoying. To this, the judge observed that he was most interested in the effect of the races on the people with homes nearest the track.

In his judgment, delivered on sixth day of the trial, the judge said: "*I have no doubt at all that speedway racing in this quiet residential neighbourhood is an intolerable nuisance to the nearest neighbours.*" He was not attacking speedway racing in general but was concerned for those who lived near the Pilot Field who had to endure "*an excessive noise of the nature of an explosion, occurring every five minutes and lasting for a minute and a half*".[6] He was impressed by the plaintiffs' witnesses. They were professional men, middle aged or retired persons, who lived in nice houses with large gardens in a high-class residential area very near to but below the Pilot Field. On the other hand, he attached less weight to the views of the defendants' witnesses who lived in smaller houses above and further away from the Pilot Field, and none to the evidence of owner of the nursing home.

As the plaintiffs succeeded in the nuisance claim, the judge granted an injunction but, at Muir's request and in view of the proposed appeal, he suspended it until 6 October to enable the Hastings Saxons to complete their season. He also awarded nominal damages of 40 shillings and costs against each defendant. Hastings Speedway appealed and brought in Sir David Maxwell Fyfe KC, the Nuremburg prosecutor and (as Lord Kilmuir) future Lord Chancellor, to lead Muir but he could not persuade the Court of Appeal that there was anything wrong in the judge's judgment.

Hastings Saxons Race Team

The deserted wife

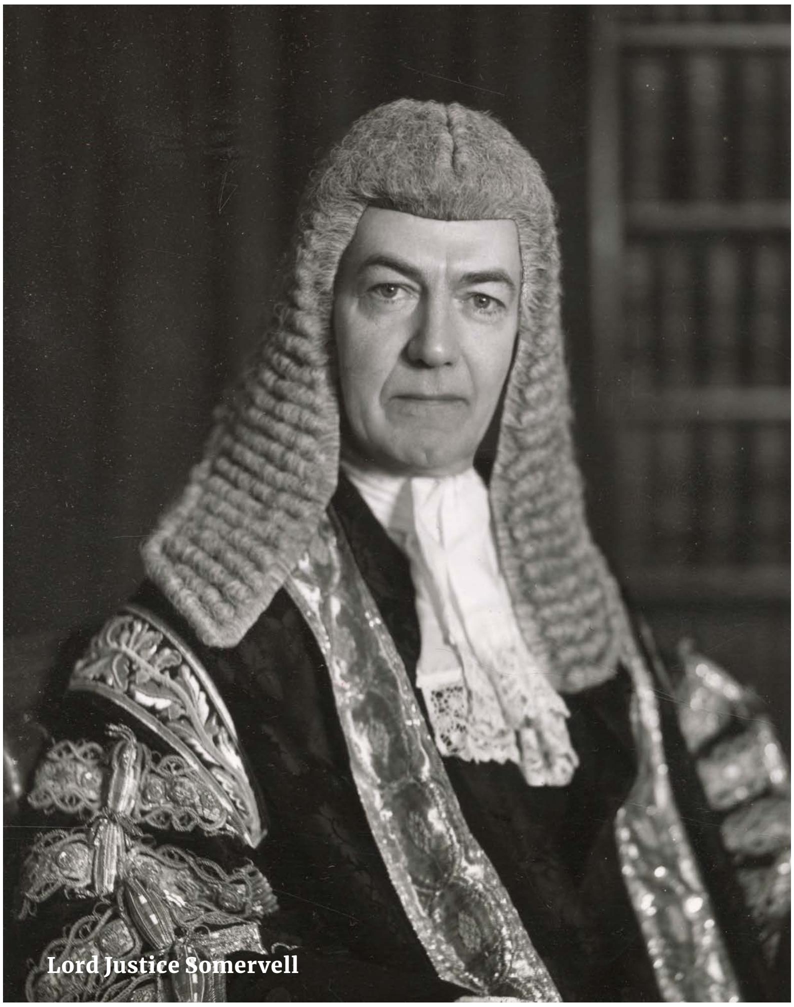
It was not until the end of the 1940s that statutory reforms placed the property rights of a husband and wife on an equal footing. These reforms required the courts to look afresh at the questions of what, if any, financial interest the wife had in the home or other family assets and whether she could remain in the home after her husband had deserted her, failed to pay the mortgage, or become bankrupt. Although most of Muir's bankruptcy work at this time was on behalf of trustees in bankruptcy or the official receiver, he relished the challenge of representing the deserted wife in the case of *Bendall v McWhirter*[7] and persuading the Court of Appeal that she and the children should not be evicted from the matrimonial home so that it could be sold to pay her husband's creditors. This was the case in which, as Lord Denning later put it, Muir "*won his spurs*".[8]


Lord Justice Denning

Before those statutory reforms, the common law had regarded a husband and wife as one person, with the result that on marriage, all her personal property vested in her husband, and she could own nothing. She was subject to his will and could not make a contract without his consent. As Lord Justice Denning explained, at common law a wife was no more than her husband's chattel:[9] "*She was treated by the law more like a piece of his furniture than anything else.... He could bundle his furniture out into the street, and so he could his wife. The law did not say him nay. It merely gave his wife authority to pledge his credit for necessaries.*" The financial interests of a wife from a wealthy family could be protected by settling property on trustees for her separate use and thereby keeping it from the clutches of the husband and beyond the reach of his creditors.

The Married Women's Property Act 1882 gave a married woman the right to make contracts and the right to hold as her separate property any property she had when she got married or acquired afterwards. The 1882 Act's concept of a wife's separate property caused problems and was in some respects unfair to husbands. Further reforming Acts in 1935 and 1949 were required before it could be said that men and married or unmarried women had the same rights and liabilities relating to property, contracts, and torts.[10] Although the law might have changed to the advantage of married women, only those who brought wealth into the marriage or who worked could benefit. In the early 1950s, most wives looked after the family and did not work.

In *Bendall v McWhirter*, Mr McWhirter had bought the family home in Smethwick in his own name with a mortgage from his bank. In April 1950, he left his wife, telling her that she could remain in the house. On that basis she obtained an order that he pay weekly maintenance of £4 10s. In January 1951 he was adjudicated bankrupt, with the consequence that the house passed to his trustee in bankruptcy. The trustee applied for possession so that he could sell the house for the benefit of Mr McWhirter's creditors, and the county court judge ordered Mrs McWhirter to give up possession. The issue on the appeal to the Court of Appeal was


Lord Justice Somervell

7. *Bendall v McWhirter* [1952] 2 QB 466.

8. Lord Denning, The Due Process of Law (Butterworths, 1980), p 211.

9. *Bendall v McWhirter* [1952] 2 QB 466, 475.

10. The Law Reform (Married Women and Tortfeasors) Act 1935; the Married Women (Restraint on Anticipation) Act 1949. But it was not until the enactment of the Law Reform (Husband and Wife) Act 1962 that a husband or wife could sue each other in tort.

whether Mrs McWhirter's right to occupy the house was strong enough to defeat the trustee's claim. The court was not required to weigh the benefit to creditors in receiving a dividend from a sale of the house as against the harm to the wife and children of losing their home. The court would, however, have appreciated that the benefit to unsecured creditors was minimal since the equity in the house, after the mortgage had been paid, was only about £250.

The task facing Muir in the Court of Appeal was a formidable one. There was no doubt that the trustee would have been entitled to possession if the bankrupt was still living in the home with his wife. On the other hand, in recent years, the court had recognised that a deserted wife was entitled to occupy the home in two situations. One was where the husband, as owner of the home, wanted to evict his wife. He could not do so without a court order and the court would not deprive the wife of the home that her husband was obliged to provide. The other situation was where the husband was the tenant of the matrimonial home under a tenancy protected by the Rent Acts. If the deserted wife remained in possession, she was entitled to the same protection as he had, provided she paid the rent and complied with the terms of the tenancy. In the *Bendall v McWhirter* case, one member of the Court of Appeal, Lord Justice Denning, was likely to be sympathetic to Muir's cause, since he had already given judgments supportive of the deserted wife, but the other two judges were much more conservative by inclination. Lord Justice Somervell had been attorney-general for nine years in the Conservative and National governments. Lord Justice Romer had practised in the Chancery Division and would be troubled by recognising a right of a deserted wife that might affect title to land to the prejudice of third parties such as mortgagees or purchasers.

The argument in *Bendall v McWhirter* extended over two days, 2 and 3 April 1952. The report of the case shows that Muir faced a battery of questions and interventions from Lord Justices Somervell and Romer, while Denning was more sympathetic. Muir stuck to his case that a wife had a special right of occupation which her husband could not determine without applying to court under section 17 of the 1882 Act, that the court would not make an order under that section that would leave her homeless, and that the trustee, who succeeded to the husband's property was not in a better position than he had been. The Court of Appeal gave judgment on 4 May. Lord Justice Romer accepted Muir's argument. Lord Justices Somervell and Denning agreed but Denning went further than Muir had argued. He held that the wife's right, which arose on desertion, was an enforceable equity, analogous to a contractual licence, which barred the trustee's claim. To support his analysis, Denning relied on an array of cases going back to the beginning of the seventeenth century, few of which had been cited by or discussed with counsel.

The decision was controversial. Within two months, the leading property lawyer and academic, Robert Megarry, wrote a trenchant criticism of the "*lusty infant*" to which the Court of Appeal had given birth.[11] Among other things, he pointed out the uncertain and limited nature of the deserted wife's right. Since, the right only arose on desertion, she was in a better position as against the trustee than she would have been while she was living with her husband, and she would lose the right if he returned to her (as well as on divorce or his death). She would be vulnerable to a claim for possession by a mortgagee whose mortgage was granted before the desertion. Even so, judges in the Court of Appeal and High Court were bound by precedent to follow the majority judgment in *Bendall v McWhirter* unless they could distinguish it. Twelve years later, the House of Lords held that *Bendall v McWhirter* had been wrongly decided. The true position was that the deserted wife had merely a personal right against her husband to occupy the home, which did not give her a legal or equitable interest in the property, and which did not bind a mortgagee or trustee in bankruptcy.[12] It was left to Parliament to enact the Matrimonial Homes Act 1967 which provided a measure of protection for deserted wives through a system of registration.

Lord Justice Romer

11. *The Deserted Wife's Right to Occupy the Matrimonial Home* (1952) 68 LQR 379.

12. *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175.

A very grand bankrupt: the 7th Duke of Leinster

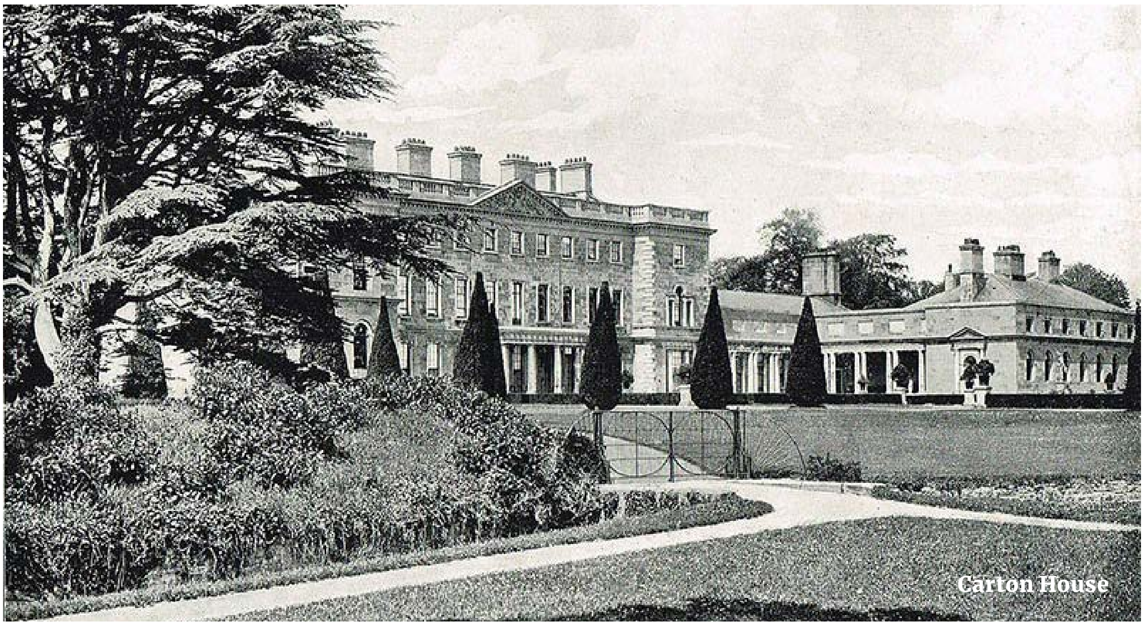
In June 1953, Muir was instructed to obtain discharges from three bankruptcies dating back to 1919, 1923 and 1936 by one of the grandest of bankrupts: Lord Edward FitzGerald, the 7th Duke of Leinster and Ireland's premier duke. It looks as though the indignity of being barred from taking what should have been his rightful place at the coronation of Queen Elizabeth II on 2 June 1953 spurred the Duke into making the applications shortly before the coronation. With characteristic indecision, the Duke's first instructions to Muir were to withdraw the applications, but then, as Muir told Registrar Cunliffe on 25 June, the Duke changed his mind and decided to proceed. The Duke was then aged 61, entirely without means and had nothing to offer his creditors. All he could say was that he had learnt his lesson. This was not enough to sway the Registrar, who, on 16 July made orders discharging the Duke from the 1919 and 1923 bankruptcies but refused to discharge him from the 1936 bankruptcy. There was no point in maintaining the first two bankruptcies since the unpaid debts could be recovered from any assets in the third bankruptcy. The Registrar offered some encouragement, because he told the Duke that if, after two years, he could make an offer to his creditors and had not "*broken out again*",[13] he would gladly consider an application for discharge from the third bankruptcy. Over ten years later, the Duke, who was trying to support himself as a designer and salesman of knitwear, came back before the Registrar who granted his discharge as from 1 May 1964, just before the Duke's 72nd birthday. He had been bankrupt for 45 years and would die in poverty in a bedsit in Pimlico in 1976.

Much more interesting than the rather mundane applications for discharge with which Muir was concerned is the question, which Muir would have explored when he read the bankruptcy files, of how the Duke came to end up in such a pitiful financial position after being born into one of the grandest of families, with stately homes and vast acres of land. By the time he was 30, the Duke had almost singlehandedly destroyed his family's patrimony. Reading these files would have demonstrated to Muir the futility of keeping a debtor bankrupt and subject to bankruptcy restrictions for years after he had accounted for his affairs.

Edward FitzGerald was born in 1892, the third son of Lord Gerald FitzGerald, the 5th Duke of Leinster. The first son, Maurice, was then aged five and the second son, Desmond was three. The Duke's seat was Carton, a magnificent eighteenth-century house in the Palladian style set in a demesne of 1,200 acres of parkland and lakes in County Kildare, some 20 miles west of Dublin. The Duke also owned Kilkea Castle in Ireland, town houses in Dublin and London, and about 45,000 acres of land in Ireland, having recently sold 19,000 acres to pay off mortgages. With three sons and vast assets, the Leinster lineage seemed secure, but a succession of disasters reduced the dukedom to little more than a name.

Before Edward's third birthday, both his parents died, and Maurice had become the 6th Duke at the age of six. The Leinster estates were put in the hands of trustees who sold the 45,000 acres of land outside the Carton demesne for a sum which, after discharging mortgages, costs, and commissions, left them with about £665,000 (perhaps about £400 million today), which imprudently they invested as to about 90% in Irish mortgages and only about 10% in equities. Even so there should have been more than enough to maintain the family, Carton and its demesne, and Kilkea Castle.

The 6th Duke, Maurice, suffered from epilepsy and increasingly frequent nervous breakdowns. In May 1908, a month after Maurice's 21st birthday, the Leinster trustees persuaded him to agree to a resettlement of the Leinster estates, so that the


Carton House

13. The Times, 17 July 1953.

estate's capital remained under their control and, while Maurice was tenant for life of Carton and entitled to all the income from the estates, he could not dispose of the contents of the house without the Leinster trustees' consent. The following year, suffering from what were called "*insane delusions*", Maurice attacked both his doctor and his valet and attempted suicide by slitting his throat. In July 1909, he was committed under the Lunacy Act 1890 to an asylum in Edinburgh, where, accompanied by his valet, he remained for the rest of what was expected to be his short life.

With Maurice locked away in the asylum, the second son, Desmond, was seen as the heir to the dukedom. He had all the qualities that could be wished for, but in March 1916, while serving as an officer in the Irish Guards in France, he was killed in a grenade accident.

To the horror of the Leinster trustees, Edward was now the heir presumptive. When Desmond died, Edward was back enjoying himself in London, having been injured at Gallipoli. Before he had joined the Gallipoli campaign, Edward had demonstrated that he was wholly unsuited to taking on responsibility for running the Leinster estates. The Leinster trustees expected Edward, after leaving Eton, to make his way in the world as an officer in the Irish Guards, living on an allowance of £1,000 p.a. and £20,000 he would receive under his father's will on his 21st birthday. Instead, he had resigned his commission, married a former Gaiety Girl, who had born him a son, had failed to live within his means and been made bankrupt twice with debts of about £15,500, and had abandoned his wife and child. What was left of the £20,000 inheritance was used to pay in full the debts in the first bankruptcy; the Leinster trustees paid off the debts in the second bankruptcy; and members of the FitzGerald family had Edward's son made a ward of court so that he could be brought up at Kilkea Castle by a great-aunt.

As heir-presumptive to the dukedom, Edward found it easy to borrow money as moneylenders could look forward to repayment with interest from the Leinster assets when Maurice died. Edward took advantage of this to such an extent that the moneylenders started to panic. One of them introduced Edward to Harry Mallaby-Deeley MP, who had just made a fortune by buying and selling the Duke of Bedford's Covent Garden Estate. Mallaby-Deeley offered to take an assignment of Edward's interest in the 6th Duke's estate (including income from the Leinster investment fund and the right occupy Carton and Kilkea Castle) in return for a lump sum, eventually agreed at £67,500, which would be used to pay Edward's debts, and annual payments of £1,000 to Edward for the rest of Edward's life. He would give Edward an option, exercisable within 10 years, to buy back the inheritance for £400,000 and he would insure Edward's life for £300,000. Since the Leinster trustees were not willing to help him, and he could not get a better offer from an insurance company, in January 1918, Edward accepted Mallaby-Deeley's offer and made a formal agreement, which withstood an attempt by Edward to have it set aside and was never challenged by Edward's trustee in bankruptcy.

The Mallaby-Deeley agreement did not fully address Edward's financial problems since £67,500 was insufficient to pay all his debts, he knew that he could not live on £1,000 p.a., and there was no realistic prospect that he or the Leinster trustees could raise the £400,000 to buy back the inheritance. The agreement was also disastrous for the FitzGerald family because it severed the assets controlled by the Leinster trustees – Carton, Kilkea Castle and the investment funds – from the assets that would pass to Mallaby-Deeley when Edward inherited the dukedom – the contents of Carton and the income from the investments which was needed to maintain the properties.

In May 1919, Edward was adjudicated bankrupt for the third time. He had unpaid debts of over £68,000 which had been incurred since the second bankruptcy in 1915 and which had not been paid from the £67,500 paid by Mallaby-Deeley. Edward had no prospect of being able to pay these debts and this bankruptcy continued until 1953.

When Maurice died on 4 February 1922, and Edward became the 7th Duke, his prospects were bleak: he was married but separated from his wife and child; he had no home; he was an undischarged bankrupt; he had disposed of his inheritance to Mallaby-Deeley; and the Leinster trustees terminated the £1,000 p.a. allowance, leaving him with just Mallaby-Deeley's £1,000 p.a. to live on.

The steps Edward took to make money only made matters worse. In July 1922 he wagered £3,000 with an unnamed member of another ducal family that he could drive from London to Aberdeen in less than 15 hours. He won the bet, driving a crimson open-top Rolls-Royce in the company of a referee and an Irish wolfhound-Alsatian cross (although it is not clear whether this was a real bet or just a publicity stunt). Next, he challenged an experienced American sailor to a single-handed race across the Atlantic in a ketch. The race never took place and Edward lost the £1,000 deposit he had paid to the builders of his ketch. He lost a further £1,700, which he had borrowed, on an abortive expedition to recover the treasure from a Spanish Armada galleon, sunk off Tobermory on the Isle of Mull. He agreed to become a director of a broking and banking firm in the City for an annual salary of £1,500. Unfortunately, the firm was a disreputable one, and its directors were sent to prison for fraudulent share-pushing. Edward was never formally appointed a director (and so avoided committing a bankruptcy offence), but only received £25 of the promised salary and found himself personally liable on a bond for £10,000. Edward also traded in cars, jewellery, furs, and snuffboxes, usually using money borrowed from moneylenders, who were aware of his bankruptcy. These schemes were rarely profitable, and one led to him being convicted of the offence of obtaining credit for the purchase of two Straker-Squires motor cars without disclosing that he was an undischarged bankrupt.

In January 2023, Edward was made bankrupt for a fourth time with debts of £57,000, including the £10,000 bond and about £35,000 still owed under the third bankruptcy. Edward was still subject to this fourth bankruptcy order in 1953.

In 1924, Edward's trustee in bankruptcy and Mallaby-Deeley agreed to the sale, mainly at auction, of almost all the valuable contents of Carton: paintings, tapestries, furniture, silver, porcelain, and jewellery. William Randolph Hearst, the American newspaper tycoon, bought many of the items to decorate San Simeon, his castle in California. From the proceeds of the sales, the trustee received about £21,000, which he used to pay dividends amounting to 4s 5d in the £1 in the 1923 bankruptcy, some of which benefited creditors in the third bankruptcy. The denuded Carton, still without electricity, was eventually sold to the Brocket family in 1949 and the sale of Kilkea followed in 1960.

Meanwhile Edward came to the realisation that the solution to his financial problems was a rich American wife. But there were two obstacles: he lacked a stately home where he and his bride could live, and he was still married. After several abortive trips to America to find a rich wife and obtaining a divorce from a Scottish court, in 1932, Edward married, Rafaelle Van Neck, an American divorcee, who had "*poise and charm, and dresses and walks, with distinction*"[14] but not much money. Rafaelle soon found that there were pitfalls in being married to an impoverished Duke who was constantly on the run from his creditors.

On 17 March 1936, Edward was adjudicated bankrupt for the fifth time. His debts amounting to about £139,000, including £59,000 from the 1919 and 1923 bankruptcies and £22,000 that he claimed had been incurred in pursuing a widow in New York in 1929. There was no prospect of any dividend being paid to these creditors. Once that was appreciated, Edward could not persuade anyone to give him credit. He never went bankrupt again. He left Rafaelle to live with, and eventually marry, another former Gaiety Girl, who, through propitious marriages, had independent means and could provide him with homes in London and East Sussex, and later, in the South of France, and Jersey. After about nine years, he left her and by 1953, when Muir acted for him, Edward was living alone in a rented flat in a block where he worked as a cleaner.

14. The Bystander, 31 May 1933.

The 7th Duke with his second wife, Rafaelle Van Neck


Paper Buildings

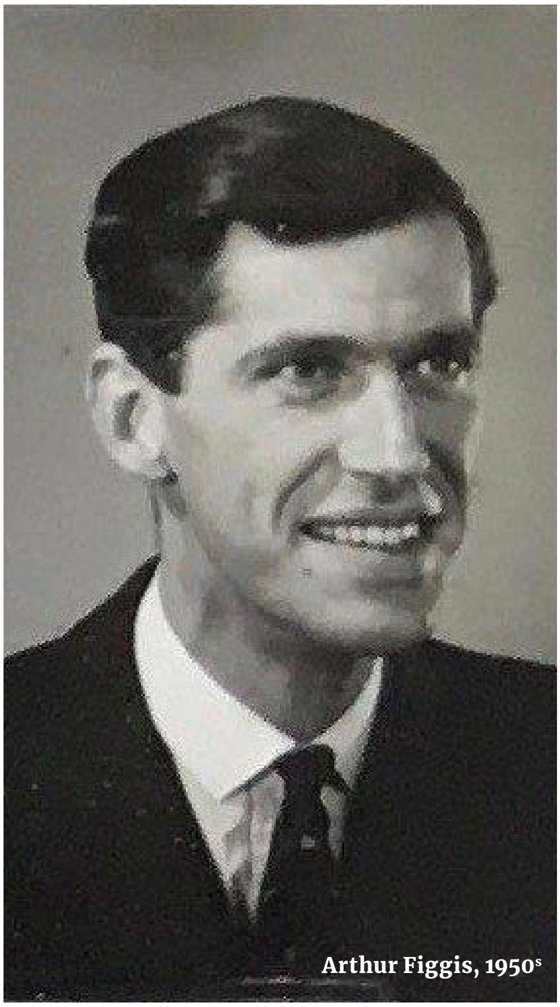
A new regime at 3 Paper Buildings: Muir and Arthur

Muir recognised that he would do better if he moved to another set of chambers with members who also did bankruptcy work. In June 1954, he joined Cyril Salmon's chambers at 3 Paper Buildings, which – through Salmon, Claude Duveen QC, and Arthur Figgis – also had a reputation for bankruptcy work. Muir arrived at 3 Paper Buildings at about the time that Duveen, dissatisfied with the service he received from the clerk, Arthur Gibbon, moved to 2 Hare Court. Duveen maintained close contacts with 3 Paper Buildings, including leading Muir in several cases, and returned in 1957 when Salmon was appointed a High Court judge. Over the next two years, there were more changes at 3 Paper Buildings: Duveen and Douglas Potter became county court judges and Muir, as the most senior member and with the largest practice, became head of chambers. Arthur Figgis, as a member of the Inner Temple, became tenant of the premises to avoid the 10% surcharge that would have been payable if Muir, a member of Gray's Inn, had been the tenant. One of Muir's first acts as head of chambers was to dispense with the services of Arthur Gibbon and appoint Tony Allen, who was still in his twenties, as the chambers' clerk.

With Muir as head of chambers and Tony as clerk, the direction of chambers was set for the next fifteen years or so. There would be three strands of work. The most important strand would be bankruptcy work. Muir and Arthur Figgis specialised in bankruptcy law and developed practices in corporate insolvency and company work, which were areas of law traditionally undertaken by barristers in chambers in Lincoln's Inn. David Graham, an Oxford law graduate with a BCL and a Harmsworth scholarship, became Muir's pupil and joined the chambers in 1959.

David probably had a more profound knowledge of the history and principles of bankruptcy law than any of his contemporaries at the Bar or in academia. For much of his career as a junior barrister David worked as Muir's junior, providing Muir with fully researched legal arguments and exhaustive analyses of the facts. The second strand of work was general civil common law and family work. While most members undertook common law cases, Bill Lubbock, and Adrian Head had mainly general common practices. The third strand of work was crime, which was the specialisation of Dennis Paiba, who joined chambers in 1960.

Muir, known as "*the Rajah*", and Arthur were the two dominant figures in chambers. They had the biggest practices, were older than the other members, and were generous in their support of younger colleagues and the clerks. They enjoyed a keenly contested professional rivalry. Sometimes they worked for the same client, as in the liquidation of the Livestock Marketing group, but frequently they were on opposite sides. Then the contrasts, as they sat in junior counsels' row, were readily apparent. Arthur's submissions were concise, while Muir was more expansive, emotional, and creative in his legal arguments. The contrasts were physical as well: Arthur had a spare frame and gaunt visage with an aquiline nose, while Muir was shorter and more generously proportioned.


Arthur Figgis, 1950s

Muir as bankruptcy junior at 3 Paper Buildings

Through his bankruptcy law expertise, Muir encountered several celebrities. In 1955 he acted for a creditor of Willie Farr, the former British heavy-weight boxing champion who in 1937 had unsuccessfully challenged Joe Louis for the world title. In January 1956 Muir acted for the English film star Robert Newton, who was most famous for his portrayal of Long John Silver. Muir vainly tried to persuade the court that it should restrain two film companies from suing Newton in California, where he lived, on the ground that he was bankrupt in England, having failed to pay his taxes. By this stage Newton was a chronic alcoholic and died two months later. In the same year, Muir obtained the discharge from bankruptcy of Vyvyan Beresford Holland, the author and son of Oscar Wilde. In 1958, he acted for the trustee of the bankrupt television personality Hughie Green, who devised the shows *Opportunity Knocks* and *Double your Money.* Green had sued the BBC and others for conspiring to keep *Opportunity Knocks* off the air to protect a rival show. Green lost the case, was unable to pay the defendants' costs, and was made bankrupt. Green was anxious to resume his career in entertainment unhindered by bankruptcy and offered to arrange for creditors to receive 5 shillings in the pound. They rejected this offer and engaged Muir to investigate transactions on the eve of Green's bankruptcy. This forced Green to increase the offer to an acceptable 10 shillings in the pounds. On 18 June 1958 Hughie Green came to the bankruptcy court with a briefcase containing £6,200 in cash, generously provided by a third party, and was given an immediate discharge from bankruptcy.

Many of the bankruptcy cases in which Muir and Arthur Figgis appeared were leading authorities until the reforms made by the Insolvency Acts 1985 and 1986. One of Muir's cases, *Re a Debtor (No 66 of 1955), The Debtor v The Trustee of the Property of Waite (a Bankrupt)*,[15] survived as a leading but confusing authority about set-off into the twenty-first century. Muir's client, referred to as the debtor, was owed £102 by a trader called Waite who was made bankrupt. Waite had guaranteed the debtor's bank overdraft up to a limit of £200 and had secured his guarantee by the deposit of the title deeds of a property he owned. Waite's trustee paid the debtor's bank £134, the amount then owed by the debtor to his bank with interest so that he could recover the title deeds and sell Waite's property. The trustee sued the debtor and recovered judgment for £134 and £17 costs, a total of £151. Since the debtor did not pay, Waite's trustee presented a bankruptcy petition on which the registrar made a receiving order. On the debtor's appeal, Muir argued that in Waite's bankruptcy there had to be a set off under s 31 Bankruptcy Act 1914 as between the £102 owed by Waite to the debtor and the debtor's contingent liability to indemnify Waite for any amount paid under the guarantee. That amount, with costs, turned out to be £151. On the set off taking place, a balance of £49 was owed by the debtor, which was below the minimum debt of £50 required to support a bankruptcy petition. If Muir's argument was correct, the debtor was in a uniquely favourable position: unlike Waite's other creditors, his debt of £102 would be discharged in full by set-off; he would not have to pay his bank, or his guarantor, the £134 owed on his overdraft; and he could not be made bankrupt.

The Divisional Court rejected Muir's argument for lack of mutuality because when Waite went bankrupt, there was nothing due from the debtor to Waite. The debtor owed the amount of his overdraft to his bank. Subsequently, Waite's trustee paid off the overdraft, and the debtor was liable to indemnify him, Waite's trustee; and he was a different person from Waite who owed money to the debtor. The debtor appealed to Court of Appeal, and it is the judgments of the Court of Appeal, again rejecting Muir's argument, that have caused difficulty. The Court of Appeal held that Muir's argument failed on the broad ground that, for set-off to apply, both demands must be due at the bankruptcy date, and that a surety's right to an indemnity does not give rise to a set-off if the right was merely contingent at that date. In 2004 the issue of whether contingent claims could be subject to set-off reached the House of Lords, where Lord Hoffmann endorsed the Divisional Court's reasoning and held that the Court of Appeal's over-broad reasoning was wrong.[16]

15. [1956] 1 WLR 480, 1226.

16. *Secretary of State for Trade and Industry v Frid* [2004] 2 AC 506 at paras 10, 11, 14-16.

17. Prosecuting counsel at Mascall's trial for fraudulent trading, The Times, 30 September 1966.

18. *Re Southern Livestock Producers Ltd* 1964 1 WLR 24.

Pigs Make Money

In 1958, Norman Mascall returned from working in publishing in America with a plan to make money by exploiting the British public's sentimental attachment to animals through persuading them to invest in pig farming, an activity in which, as a 29-year-old from Essex, he had no experience. Under his "*sow scheme*", investors would buy a sow or sows for £80-95 guineas each, have the pleasure of visiting and bonding with their sows, and receive a share of the proceeds of sale of the litters. He formed the Livestock Marketing group to promote the scheme, own the farms where some of the pigs were kept, and make contracts of agistment with farmers who would look after the other pigs on their own land. To give the Livestock Marketing group respectability, he persuaded a Conservative Party MP, Richard Reader Harris, to become a director. The scheme, launched in 1959 with a nationwide advertising campaign and promoted by salesmen who earned a commission of 25% (later reduced to 2.5%), was a success with the public who invested £730,000. But through "*reckless incompetence and profligate spending*",[17] including Mascall's annual salary of £10,000, the scheme was soon in trouble. By June 1961, Reader Harris had resigned, and Mascall was forced to terminate the scheme. He immediately replaced it with the "*stock scheme*" under which members of the public were induced to invest a further £668,00 buying piglets for £6 each. The piglets would be fattened and slaughtered, producing a dividend for the owners. It was not long before investors in the two schemes started to complain that they were not getting the rights and returns they thought they should receive. In May 1962, the Board of Trade appointed inspectors to investigate the companies. On 2 July, the companies

went into creditors' voluntary liquidation with a deficiency of nearly £1 million and Kenneth Cork was appointed liquidator. He was confronted with a chaotic situation with disputes about ownership of sows and piglets and claims by the farmers who had been looking after the pigs. Worst of all, there was no money to pay £7,000 per week to feed the pigs and the liquidator would have the deaths of thousands of starving pigs on his hands.

On 12 July, Muir, acting for the liquidator, obtained permission from Mr Justice Ungoed-Thomas to sell £15,000 worth of pigs to feed the rest. As that money would run out by the end of the month when the legal term would end, on 23 July Muir applied to Mr Justice Cross for an order fixing a date before the end of the month to hear his application for permission to sell more pigs. Despite recognising the merits of the application, Mr Justice Cross was clear that the application had to be refused for the simple reason that no judge was available to hear it, and he could not produce judges out of a hat. Muir immediately appealed to the Court of Appeal, who heard the appeal on 24 July and ordered the sale of a further 16,000 pigs. Those orders seem to have led to an orderly realisation of the companies' assets.

The following year, Arthur acted for the liquidator of one of the companies in resisting a claim by one of the farmers to a lien on the proceeds of sale of the pigs he had looked after, and which had been sold under the Court of Appeal's order. Mr Justice Pennycuick dismissed the application because the farmer was not entitled to a lien under the general law, since he had not improved them, and his contract did not give him a lien.[18]

The Battle of Bellador Silk

Professional rivalry between Muir and Arthur turned to hostility in what was for many years known in chambers as the Battle of Bellador Silk. They were instructed on opposite sides in a poisonous dispute between the directors of Bellador Silk Ltd,[19] and became infected by the rancour between two of the warring directors: Moss Simmons, the petitioner, for whom Muir acted, and Moss's brother David, who was Arthur's client.

Bellador Silk had been formed to trade in silk under the management of Dr Roland, who lived in the same block of flats as Moss, and with funds loaned by companies owned by the Simmons brothers. Dr Rowland had 50% of the shares and Morris and David had 25% each. Morris fell out with the other two directors, mainly over the terms for repayment of loans amounting to about £36,000 owed to the Simmons companies. David and Dr Roland regarded the loans as working capital, only to repaid if the company could afford it, whereas Moss wanted an agreed repayment schedule. Moss presented a petition for relief under s 210 of the Companies Act 1948, complaining that he was a minority shareholder who was being oppressed by Dr Roland and David. His petition alleged that he was excluded from management, that he was denied access to the company's books, that there was no agreement about remuneration or about the terms for repayment of the loans, and that David and Dr Roland had made unauthorised drawings. Given the parlous financial position of the company, Moss could not ask for the normal relief awarded to a disgruntled shareholder in such circumstances: a winding-up or buy-out order. Instead, he asked the court to remove David and Dr Roland as directors, and appoint a receiver, who should remain in office for a year and be directed to get in the company's debts and make such distributions to shareholders as he thought appropriate.

At the trial, which lasted eight days in December 1964, Moss failed to support the case made in the petition when he went into the witness box. Under cross-examination, he admitted that, of course, he did not want a receiver to be appointed and that he appreciated that if Dr Roland was not allowed to draw money to live on, he would leave, and the company would collapse. He also said that if the loans were not repaid, he would be unable to honour an agreement with the Inland Revenue about arrears of tax and would face financial ruin. In his judgment, given in January 1965, Mr Justice Plowman dismissed the petition as an abuse of process, since Moss was not interested in obtaining the relief he sought, and in a winding-up there would be no surplus for shareholders. Less than six months later, the insolvency of the company was confirmed, and it went into creditors' voluntary liquidation.

A silk at last

By the early 1960s, Muir began to become involved in progressive causes. He was involved in the work of Justice, the UK section of the International Commission of Jurists, which had been founded in 1957, and was a founder member of Amnesty International, which was launched in 1960. Through these organisations, he began to take an interest in justice in Africa. This took him to Northern and Southern Rhodesia and, in 1962, to Burundi, where he observed the trial of defendants charged with plotting the murder the prime minister, who had been shot at a restaurant overlooking Lake Tanganyika. The men were found guilty and sentenced to death by hanging. As Muir reported, execution was delayed for several days, not because of any concerns of the Burundi authorities about justice, but because it was considered bad luck to execute people during the feast of the sowing of the crops.

Although Muir had established a practice large enough to merit being appointed a QC, his involvement in what were seen as left-wing causes was viewed negatively by Lord Dilhorne, the Conservative Lord Chancellor, who rejected his applications. By the end of 1963, the political landscape was beginning to change and there was a good prospect that the next election would return a Labour government, with Gerald Gardiner QC as Lord Chancellor. Several barristers who supported the Labour Party – including Muir, his friend Peter Pain, and John Mortimer – deemed it prudent to become members of the Society of Labour Lawyers, which Gerald Gardiner had founded in 1949, when he had led others in resigning from the more left-wing Haldane Society. With Labour winning the 1964 election, Muir applied again for silk. This time, his name was included in the list of the first QCs appointed by Lord Gardiner which was published on 15 April 1965. ■

Gerald Gardiner QC, founder of the Society of Labour Lawyers

19. [1965] 1 All ER 667.

Muir Hunter QC, second from right, walking to Wakefield County Court for the Poulson trial with a young Michael Crystal, David Graham and Leonard Saffman

Acknowledgements
Grateful thanks to Camilla Reeve, Muir's daughter, and Gay Martin, Muir's niece, for their recollections of Muir's life, character, and views; to Gray's Inn for showing me files about Muir; and to the LSE for giving me access to their files on the Haldane Society and the Society of Labour Lawyers.

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Hastings Saxons Speedway in 1066 Media

Law Reports, British Newspaper Archive, The Times Archive

All images relating to Hastings Speedway & Hastings Saxons credited to Mr Ken Burnett

News in Brief

Debbie Fund Research, *Thank you.*

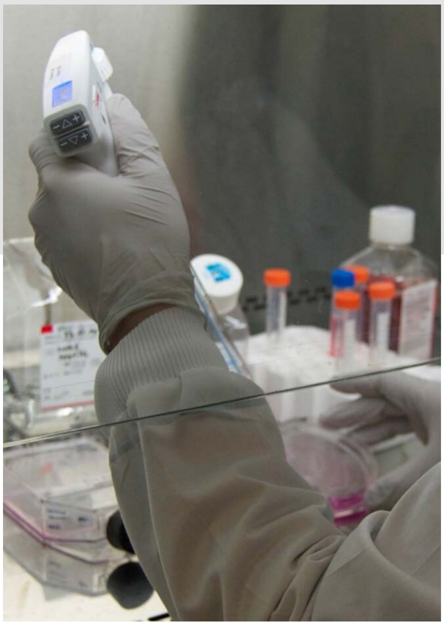
The Debbie Fund was set up in 2010 by Mark Phillips KC in memory of his first wife, Debbie Phillips, who died in February of that year of Cervical Cancer, aged only 48. During the progression of Debbie's disease, her family and friends discovered that, worldwide, there was no dedicated research into a drug treatment specifically for Cervical Cancer.

From the moment Mark set up the Debbie Fund it was always the aim to help find a cure – to find antibodies to target the cancer cells that could then be picked up by a pharmaceutical company to develop it into a treatment. That objective, and more, has been achieved with the generous help and support of the insolvency community, amongst others. £1.5m has been raised, with every single penny going into research.

Dr Magdalena Buschhaus, whose research was entirely funded by the Debbie Fund, succeeded in creating new and unique B7-H3 (a protein present at high density on cervical cancer cells) antibodies that deliver extremely toxic drugs directly to the disease whilst sparing healthy tissue. These have now been taken up by pioneering biotech firm Iksuda Thereaputics for further development, with a view to producing a cure for cervical cancer.

What is more, it has also been discovered that one of the B7-H3 antibodies works for a rare paediatric cancer, and clinical trials in children's brain tumours are now being planned by Great Ormond Street Institute of Child Health.

This is wonderful news. In Mark's own words "*This was achieved through the generosity and help of many in the insolvency world. I discovered that, whilst we may find ourselves on other sides of disputes or transactions, the insolvency profession is full of very good people. Without doubt they have helped save lives of women and children at some point in the future. Thank you.*"



New Lord Chief Justice of England and Wales

Dame Sue Carr has been appointed as the new Lord Chief Justice of England and Wales, following the retirement on 30 September 2023 of The Rt Hon. The Lord Burnett of Maldon. Dame Sue will be the first woman to lead the judiciary in the history of the role, which dates back to the 13th Century. The formal announcement stated that King Charles III had approved her appointment as 'lord chief justice' although there is doubt about what title she will take, given lack of precedent.

Dame Sue was called to the bar in 1987, specialising in commercial law. She was made a QC in 2003 and began her judicial career in 2009 in crime, as a recorder. In 2013 she was appointed to the Queen's Bench division and was the first female High Court Judge to sit in the Technology and Construction Court, and the second to sit in the commercial court. She was appointed as a Lady Justice of Appeal in 2020.

South Square is an offshore Powerhouse

In June 2023 Business Today magazine published an article looking at '*the Exceptional Legal Minds Shaping Offshore Law Practice*'. Of the nine silks profiled, three were from South Square: David Alexander KC, Barry Isaacs KC and David Allison KC. The three were noted for their extensive understanding of offshore jurisdictions, company and commercial law, banking and finance, insolvency and contentious trust litigation.

David Alexander KC

Barry Isaacs KC

David Allison KC

Leeds-based Meatless Farm was saved from falling into administration towards the end of June 2023. The vegan meat alternative brand was rescued by plant-based Chick*n brand VFC Foods, after investors in Meatless Farm pulled out. Meatless Farm would not have been the only casualty of the plant-based meat sector of late. Plant & Bean, which manufactures products for Quorn amongst others, also appointed administrators recently, citing inflationary challenges, whilst sausage-maker Heck cut its vegan range by 80% as the products were not selling.

The London Legal Walk

South Square once again took part in the London Legal Walk in support of the London Legal Support Trust. The annual event, which took place on 13 June this year, sees thousands of judges, barristers, solicitors, legal staff and students cover 10km routes around London, raising much-needed funds through sponsorship to support free legal advice centres. Now in its 19th year, the walk is the biggest event in the UK legal calendar. The money raised enables the centres to offer help to the homeless, housebound, elderly, victims of domestic violence, people trafficking and many more. Donations can be made through the following website: www.londonlegalsupporttrust.org.uk

Toby Brown meets the Pro Bono Pledge

Toby has become the second Member of Chambers to have achieved the Advocate Pro Bono Pledge, completing over 25 hours of pro bono work so far this year.

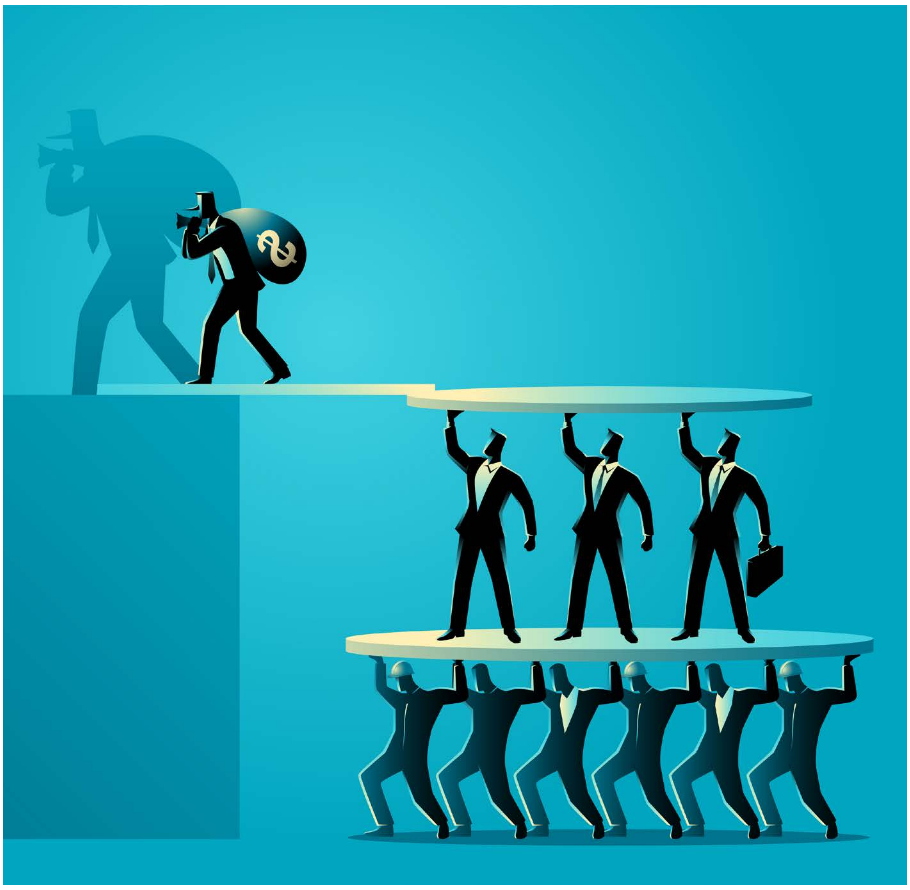
Advocate matches members of the public who need free legal help with barristers who are willing to donate their time and expertise in those deserving cases where people who are unable to obtain legal aid and cannot afford to pay for it.

News in Brief *(cont.)*

Seven years jail for £20 million fraud delays

Leeds-based Liam Wainwright has been found guilty of fraud, forgery, false accounting and breach of directors disqualification following an investigation by the Insolvency Service, and will be imprisoned for seven years.

Wainwright had encouraged new investors into Rawdon Asset Finance, alleging it invested in businesses with security on property, land, plant and equipment. Instead, he was running a classic Ponzi scheme, with Wainwright using new investments to pay other creditors, to fund his own lavish lifestyle, invest in a racehorse syndicate and his own failed private businesses. By the time the company went into liquidation, Rawdon Asset Finance's creditors were owned more than £20 million. Liquidators have so far recovered £750,630.



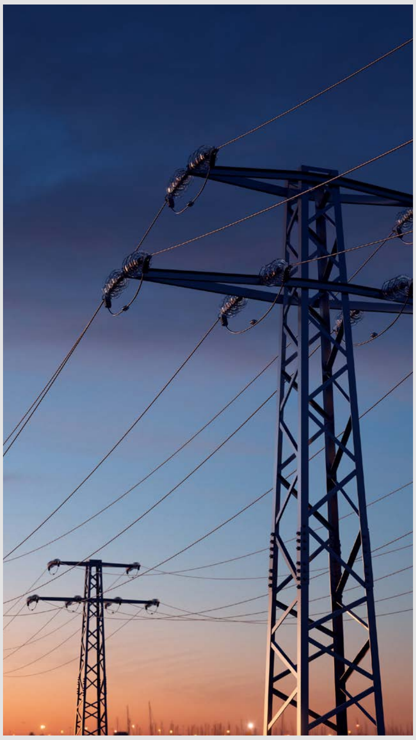
Wagatha Christie and mystery of the £1.8 million legal bill

Rebekah Vardy is allegedly furious following production of Coleen Rooney's legal bill which apparently includes luxury hotel stays for her lawyer, and breakfast costing £225 at Nobu. Following her well-publicized High Court libel loss last year, Vardy was ordered to pay 90 per cent of Rooney's legal bills. At the time the sum was still to be assessed but was estimated to be in the region of £500,000. Vardy's legal team allegedly believe some costs to have been artificially inflated.

Winding-up Energy Record

Energy suppliers are on course to file a record number of winding-up petitions against businesses this year if they continue at the current rate. In the first four months of 2023 British Gas and E.ON alone have filed 30 such petitions, prompting calls from business groups for a moratorium on winding up petitions. Around half such petitions result in the targeted companies being closed down.

The Federation of Small Businesses has warned that more than 90,000 small businesses are at risk after signing up to fixed-rate deals in the second half of 2022 when rates were at their peak. Thousands of business have been struggling with energy costs which spiralled after a surge in wholesale gas and electricity prices sparked by Russia's invasion of Ukraine.



Hong Kong Judge’s lack of judgement causes retrial

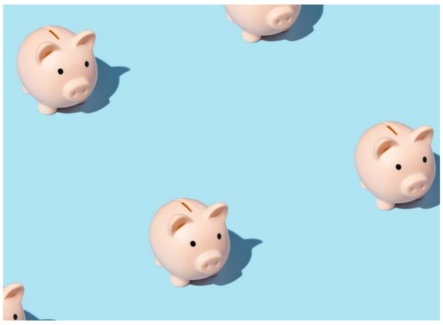
Judge Wilson Chan, ruling in a trademark dispute between a medicinal ointment company against seven defendants approved the claimants submissions so much that he copied ‘*over 98% of the document for his judgment*’ according to the defendants who appealed the decision. They went on to say that ‘*Among the remaining 2% there is not one full sentence written by the trial judge in his own words*’.

The original defendants argued that the main changes between the claimants’ submissions and Chan’s judgment included substituting abbreviationsfor words spelt out in full and the final section containing orders and directions only.

The Court of Appeal agreed this showed that Chan had failed to make an independent judgment, noting that his ruling had failed to mention the defendants’ written submissions at all. It has ordered a retrial under a new judge.

Nasmyth and GAS Restructuring Plans – the ILA inside track

On 27 June, William Willson, Charlotte Cooke and Marcus Haywood participated in a webinar for the Insolvency Lawyers Association on the Nasmyth and GAS restructuring plans (in which they were each involved). Over a 120 people attended from a range of law firms. If you missed it, the session was recorded and is available on the members' section of the ILA website.



Khan’t be a Director

Zafar Khan, former finance director of Carillion, has been banned from holding company directorships for 11 years. Khan had stepped down from his post after just nine months in the job and shortly before the business collapsed in January 2018. The FCA fined three former executives in 2022, including Khan, for ‘*recklessly*’ publishing misleading financial statements. According to the Insolvency Services, Khan voluntarily agreed to the disqualification.

Sales drought for iconic Hunter Wellies

Mere weeks before Glastonbury, festival favourite Hunter Boot Limited fell into administration, owing creditors £112.8 million. It was bought by Authentic Brands group (owner of Ted Baker and Juicy Couture) in a pre-pack administration deal worth almost £100 million.

According to AlixPartners, the administrator, the company had been struggling since 2019 due to a decline in demand, pandemic downturn, supply chain disruption and inflationary pressures.

Hunter was originally established in 1856 as the Northern British Rubber Company and began life manufacturing rubber boots, tyres, conveyor belts, golf balls and hot water bottles. Production received huge boosts during both World Wars, and the famous ‘Original Green Wellington’ was launched in 1955. During the early 1990’s paparazzi photographs of Kate Moss, Alexa Chug and Cara Delevigne wearing the boots propelled the country-life functional footwear into a cool style statement with broad global appeal.

SOUTH SQUARE CHALLENGE

Welcome to the summer South Square Challenge of 2023!

Your challenge, should you choose to accept it, is to identify the people in the images provided and work out what is the link between them all. Be aware that, in true Digest style, a few of the identities are rather tenuous!

As always, in the event of multiple correct answers the winner will be drawn from the wig tin and the prize will be a magnum of champagne and a much-coveted South Square umbrella. Good luck!

1.	2.
3.	4.
5.	6.
7.	8.
9.	10.

Please send your answers to Kirsten either by e-mail to **kirstendent@southsquare.com**, or to the address on the back cover, by Friday 1st September 2023.

The winner, drawn from the wig tin, is Leah Alpren-Waterman of Mishcon, to whom goes our congratulations, a magnum of Champagne and a South Square umbrella!

The correct answers to our April 2023 challenge were:

1. *Miller v Jackson*
2. *Proctor & Gamble v HM Revenue & Customs*
3. *Hollywood Silver Fox Farm v Emmett*
4. *Carlill v Carbolic Smoke Ball Co*
5. *Leonard v Pepsico, Inc*
6. *Fagan v Metropolitan Police Commissioner*
7. *Donoghue v Stevenson*

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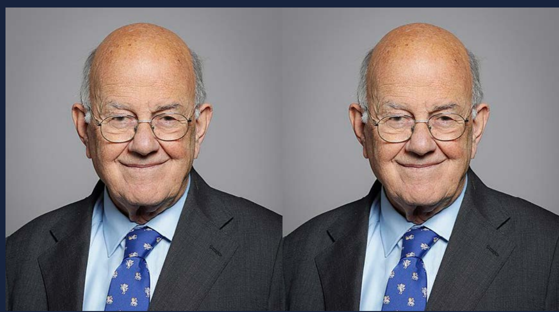
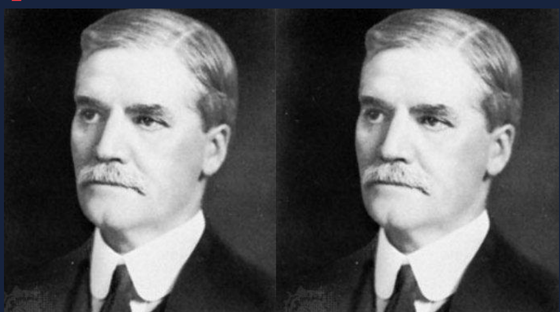


7.



8.

9.

10.

SOUTH SQUARE

"Winner of Company/ Insolvency Set of the Year"

CHAMBERS & PARTNERS

Members

Tom Smith KC - Head of Chambers

Richard Hacker KC
Mark Phillips KC
Martin Pascoe KC
Fidelis Oditah KC
David Alexander KC
Glen Davis KC
Barry Isaacs KC
Felicity Toube KC
Mark Arnold KC
Jeremy Goldring KC
David Allison KC
Aidan Casey KC
Daniel Bayfield KC
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Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn
Marcus Haywood
Hannah Thornley
Clara Johnson
William Willson
Georgina Peters
Adam Al-Attar
Henry Phillips
Charlotte Cooke
Matthew Abraham
Toby Brown
Robert Amey
Andrew Shaw

Ryan Perkins
Dr. Riz Mokal
Madeleine Jones
Edoardo Lupi
Roseanna Darcy
Stefanie Wilkins
Lottie Pyper
Daniel Judd
Jamil Mustafa
Paul Fradley
Peter Burgess
Annabelle Wang
Rabin Kok

Academic and Associate Members

Prof. Dame Sarah Worthington KC (Hon)
Michael Crystal KC
Prof. Christoph G Paulus
Hon Paul Heath KC
Ronald DeKoven
John Sheahan KC
Sandra Bristoll

Roxanne Ismail SC
Sandy Shandro
The Hon Frank J C Newbould KC
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Colin Bamford
Seenath Jairam SC
Joanna Perkins

Prof. Peter Ellinger
Barry Mortimore GBS KC
Richard Sheldon KC

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WINNER
UK BAR AWARDS 2022