SOUTH SQUARE

Digest

Law at the Cutting Edge

Essays in Honour of Professor Dame Sarah Worthington, Associate Member of South Square

In this issue we carry three chapters selected from the book of essays celebrating the contribution that Sarah has made to the field of private law

Limitation and Unfair Prejudice: David Alexander KC considers the recent decision of the Court of Appeal in *THG v Zedra Trust Co*

Company Directors: Duties, Liabilities, and Remedies: Mark Arnold KC on the comprehensively updated 4th edition

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

www.southsquare.com

SOUTH SQUARE | *Commercial barristers*

‘The set is highly regarded internationally, with barristers regularly appearing in courts around the world.’

CHAMBERS UK

Company / Insolvency Set of the Year 2021, 2022 & 2023

CHAMBERS BAR AWARDS

+44 (0)20 7696 9900 | practicemanagers@southsquare.com | www.southsquare.com

In this issue

The Importance of Classes in Insolvency and Restructuring:
Sir Antony Zacaroli

Cultural Property and the 'Dark Side' of the Rule of Law:
Sir Marcus Smith considers the interplay of, and conflict between, the arguments arising in relation to return of cultural property

Insolvency and Economic Disaster:
Sir William Trower, Mark Phillips KC and Madeleine Jones examine the development of English company, insolvency and banking law in the context of past financial and economic crises

Articles

Regulars

Case Digests

SOUTH SQUARE

Designed and produced by Creative Interpartners, London

From the editors

Marcus Haywood and William Willson

Welcome to this early Spring edition of the South Square Digest.

As this issue was being prepared, Adam Al-Attar was appointed King's Counsel: Congratulations, Adam, on this hugely well-deserved honour.

In further Chambers news, we welcome Kira King as a new Member. As well as being a well known insolvency litigator, Kira has a strong commercial chancery practice and considerable experience of contentious trusts matters. A profile of Kira appears in this edition.

In wider news, the UK economy picked up slightly in January, raising hopes it could be on its way out of recession. Accordingly to the Office for National Statistics, the economy grew by 0.2%, boosted by sales in shops and online and more construction activity.

Against this backdrop, in the hope of slightly more prosperous times for the UK economy ahead, in this edition of the Digest we feature a series of articles which honour the work of Professor Dame Sarah Worthington, DBE, KC (Hon), FBA who has contributed so much to field of company and commercial law. In addition to her very many other accolades, Professor Worthington is an associate member of Chambers.

Our leading article in this edition is an interview of Professor Worthington with Mark Phillips KC and Felicity Toube KC who find out more about her, her career and views on questions that are perhaps not asked often enough.

We then carry three chapters from a book of essays entitled *Law at the Cutting Edge*, compiled by eminent authors to celebrate the contribution to the field of private law that Sarah has made. See page 31 for details of the book and a 20% discount.

Sir Marcus Smith's chapter *Cultural Property and the 'Dark Side' of the Rule of Law* considers the interplay of, and conflict between, the arguments arising in relation to return of cultural property.

In *Insolvency and Economic Disaster*, Sir William Trower, Mark Phillips KC and Madeleine Jones examine the development of English company, insolvency and banking law in the context of past financial and economic crises.

Then Sir Antony Zacaroli considers the idea of classes and the increasing role the courts have to play in a chapter entitled *The Importance of Classes in Insolvency and Restructuring*.

In addition to our usual case digests (with an overview by Henry Phillips) we have a review of the important recent judgment by the Court of Appeal in *THG*

v Zedra Trust Co by David Alexander KC – Does a Limitation Period Apply to Unfair Prejudice Petitions?

A comprehensively updated 4th edition of *Company Directors: Duties, Liabilities, and Remedies* was published earlier this year, and its Editor, Mark Arnold KC notes what can be expected from the volume. We also delighted to carry a discount offer of 30% – see page 91.

Finally, we have News in Brief and the South Square Challenge, the prizes for which are doubled in this edition so get your thinking caps on to be the lucky recipient of two South Square umbrellas (and two magnums of champagne) to fend off any spring rains.

Many thanks to all our authors for their contributions, and to Hart Publishing for allowing us to pre-publish the extracts from *Law at the Cutting Edge*. As always, views expressed by individuals and contributors are theirs alone.

If you find yourself reading someone else's copy 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 ensure you receive future editions.

Marcus Haywood and William Willson

In Conversation with Sarah Worthington

MARK PHILIPS KC & FELICITY TOUBE KC

Image: University of Cambridge

South Square's Mark Phillips KC and Felicity Toube KC sat down with Sarah Worthington to learn more about her, her career, and her views on some questions that perhaps aren't asked often enough.

MP: Can we start with your early career. You are known to us as a property and insolvency lawyer, an academic, and Deputy High Court Judge, but that wasn't how it all started.

SW: No, far from it. I went to university set on a career in cancer research. That meant an undergraduate degree in the 'hard sciences' – maths, physics and chemistry – an honours year on NMR technology, and the beginnings of a PhD in biochemistry in a research lab focused on melanoma. It all sounds so plausible, but it was not a good fit for me: the people were fun, but I didn't enjoy lab work, and there were few avenues for creativity in those early training stages. So I left, although I took my time getting there.

MP: When did your path change?

SW: In one sense it changed almost as soon as I arrived at university. In my first year, I met law students. I'd never thought of that as an option, and was fascinated by the special logic of legal rules: they had to be general, designed to enable people to live together more easily, yet they also had to be sufficiently nuanced to accommodate a world full of people with vastly different individual quirks and aspirations. There are some similarities with medical research, but legal method is vastly different from scientific method, and it sounded like it might be fun.

Nevertheless, I kept on with science. This might look like the fallacy of sunk costs in action … but perhaps not. In my second year I met my now-husband, and in my fourth year I had to teach. The teaching side doesn't sound especially important, but I was never going to teach, and would not have tried it if the choice had been mine. As luck had it, there was no choice, and I discovered I loved it. So my delays in science provided at least two passions that have, in different ways, defined the decades that followed.

FT: After your change to Law, and out of the lab, how did you find the early years, studying, starting out in practice, finding a work/life balance?

SW: I did my law degree part-time, initially combining it with teaching science, and later with children. Since the Australian degree is 4 years (3½ years for graduates), I began the journey feeling it might never end. However, I loved almost every subject, and from the outset knew I'd found my happy place. I had some fabulous teachers, made some new friends, and had time to do other things: family, friends, home renovations (lots of), playgroups and book clubs, walking in the mountains, time on the beach. There's much less beach these days, but the rest in still there in one form or other. My academic career also provided space for lots of variety, so it's odd that I realised only quite recently that this is the defining element in my happy work-life balance. My research ranges across commercial, corporate, property and insolvency law; I've taught lots of different subjects here and overseas; and I've done an unusual amount of university administration and board and committee work for someone who remains to my core an academic. Along the way, rather late in the day, I also qualified as a barrister – I know you'll come to that later – and that too brought its own new adventures. So I suppose my own balance comes from lots of oars in the water, and feeling that things in different areas are moving usefully. I don't know if it's a proper work-life balance, but it's fun. Sometimes a bit too much for the hours in the day, but usually fine … or the not-fine times are easily forgotten!

MP: What aspects of the study and practice of law are of central importance to you?

SW: I like writing, and I like explaining things so that they make sense (at least to me!). A lot of my research is typified by looking across fairly broad areas of law, seeking out inconsistencies and oddities, and then trying to persuade others – academics and judges – of what (in my opinion) would be a more rigorous and principled way, or a more coherent way, of thinking about the troublesome issues.

With students, I want them to experience the thrill of doing this too: I want them to think – to *really* think – about what they are reading, and exactly why it does, or doesn't, make logical sense. I think it's the same in practice. Many disputes concern how a legal rule works in a slightly novel context: does the rule apply at all, does it apply unchanged, or must it be described more precisely to reflect the necessary nuance that is now made apparent?

In short, I like analysing knotty legal problems, and I like getting people to think differently about the rules that apply, and exactly how and when and why they apply. The joy of being an academic is that you're free to do precisely that in whatever areas you please.

FT: What would you say are the key skills to being an academic lawyer?

SW: Academic lawyers are not just legal researchers; they also teach and play a role in the life of the 'university enterprise', whether in its internal or external activities. The research side requires intellectual capacity, being a self-starter, and being instinctively inquisitive; and the teaching and admin sides require that, plus a good dash of contagious enthusiasm for your subject and a fair degree of organisational skill. It's the same for every job, isn't it? – some basic skills, plus excitement, passion and interest in the subject-matter at hand.

FT: Where do you find that excitement, passion, and interest in the field of insolvency?

SW: Insolvency law is special because it provides the toughest testing ground for our basic legal rules. Generally the law is concerned with win/lose problems – 'goodies' and 'baddies' – think of most contract and tort cases, or criminal law. If the law is working properly, then the goodies win and the baddies lose. However, insolvency and property problems are rarely so simple: the disputes are typically between several innocent parties, some of whom will lose because there are insufficient assets to meet claims, or because priority must be accorded to one person over another. These cases require more nuanced rules, rules which Parliament and the courts have wrestled to refine and improve for three hundred years. I like these hard problems. I'm sure it's why I'm drawn to everything about equity, not just its role in property and insolvency.

FT: What brought you to South Square?

SW: I was lucky to be taken on as a pupil by South Square in 2005. That opportunity enabled me later on to act as a barrister and to be employed as a Deputy High Court Judge in Chancery, both of which were unbelievable privileges and fascinating experiences. I hadn't applied to South Square because of its stellar insolvency ranking, impressive though that was, but because I'd met so many South Square barristers at conferences over the years: they were not only good in debates on what the law was, but also on what it should be and where improvements were needed. I thought that would suit me. Once I'd completed pupillage, South Square took me on as an academic member, and I've stayed in that role ever since, happily doing the odd bit of opinion work or joining teams working on Court of Appeal or Supreme Court appeals in areas which overlap my research.

MP: If you could see one change in insolvency or property law, what would it be?

SW: I left myself open to that! It's a hard question, and I'm probably biased in answering it. My current research is focused on abuse of power in private law – put more pragmatically, what legal constraints exist on exercises of power or discretion in private law? The current rules we have for restructuring companies are draining a good deal of solicitor, barrister and court time in determining appropriate means of cramming down creditors. I'm sure we could do better. The point of the insolvency system is to minimise losses to creditors and maximise the claims they can make, and do so as simply and cheaply as possible. Ever more prescriptive legislation rarely works, and in this area perhaps what we need is an appeal case where the Court of Appeal casts some light on the *purpose* of these restructuring rules, because once the purpose is clear, the permissible and impermissible uses of the discretion will have clearer limits.

MP: What do you think is the most important judicial decision in our field and why?

SW: Most barristers would probably choose a relatively modern case, but I don't. The trajectory of cases that gave us trusts, charges and floating charges strikes me as delivering a paradigm shift in insolvency law. The judges who moved the law from contractual rights to property interests showed remarkable acuity. Those concepts have had a major impact on commercial law, led to priority rights, and then to receivership, which in turn led ultimately to administration.

MP: If you could see one big change in legal education, what would you like to see and why?

SW: I don't understand the current move to get rid of the requirement for a compulsory qualifying law degree. As the law becomes increasingly complex, and legal disputes do too, it seems bizarre for a profession to decide its professionals

no longer need a university training in the basics. Secure knowledge foundations matter more, not less, and I don't see any other professions adopting the same approach as us. And if I could wave my magic wand even further afield, I'd also endorse the need for a broader school curriculum up to 18 years. Students now spend so long in education, and breadth matters in developing more flexible and sophisticated thinking and analytical skills.

FT: Have you experienced any particular challenges and changes as a woman in the legal profession? What additional hurdles do you think women face in our area, and is it getting better?

SW: Things are certainly getting better. There are roughly equal numbers of keen young women and men from all sorts of backgrounds embarking on law degrees, winning prizes, and entering practice; there are increasing numbers of women partners in law firms and KCs at the Bar (but not enough of either); there are more women judges at every level (but ditto); and the new Lord Chief Justice is a woman. That means there are more role models and more sources of support. But in other ways things are just the same. When Dame Sue Carr's appointment as Lord Chief Justice was first announced, one of the newspapers noted her remarkable historic first, adding that she was "*a mother of three*". It remains true that this *does* make her achievement all the more remarkable, much as we might have though this would no longer be the case. And we can't make real life go away, nor ensure that the playing field is perfectly even for everyone. What might help? Superb childcare at affordable prices would certainly assist, but so too would a conscious effort to help and encourage each other. Imposter syndrome no doubt hits us all, but an encouraging push or a pat on the back can be career-defining. That's true for everyone, not just women, but since there are fewer senior women in the profession, more rests on each of us to look out for the next generation, and try to make a real difference especially when career or life stress points arrive.

FT: Which academic do you most admire?

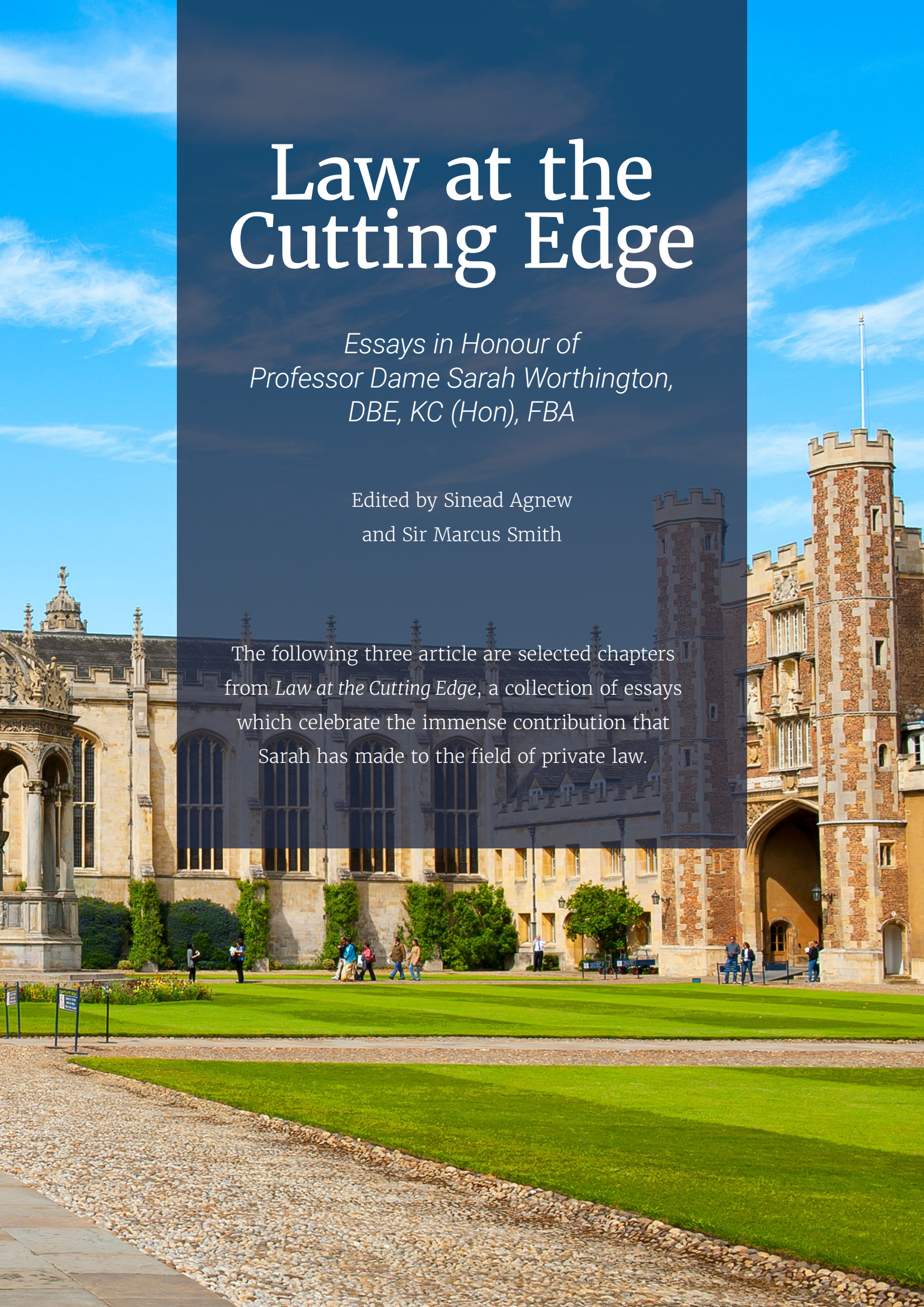
SW: Even if you let me choose more than one, there'd be too many to name, and far too many reasons for naming them, and anyway I'd be sure to leave someone out and never forgive myself. But if I relate this to the previous question, four academics have been career-defining for me as mentors and role models: Ross Cranston, Paul Davies, Roy Goode and Len Sealy. Their long-term and central role warrants naming names (alphabetically!), even though I've had the benefit of many other encouraging pushes from many places.

MP: Which Judge do you most admire and why?

SW: If I must choose one, and only one, then it would be Sir Anthony Mason, a long-term Chief Justice of the Australian High Court. As Justice and then Chief Justice, he led the Court in a series of pioneering decisions on fiduciaries. These cases still serve to set out the proper foundations for many aspects of this area of the law, and have been adopted by much of the common law world, including England and Wales. Added to that, the judgments are short, sharp and persuasively on point.

FT: What one piece of advice would you give to your younger self, the person working in the lab in Australia?

SW: May I have two? The first is obvious, since you mention the person working in the lab – no decision needs to be forever, and *whatever* you decide is likely to have its own important rewards. I think I realised that relatively early on. But the more important advice I'd now give is that you can only make proper choices if you really know yourself: there are usually lots of exciting things you *can* do, and lots of useful things people think you *should* do, but you can't do everything, so work out where you can make *your best* contribution, and get on with it; leave the rest for others. (Of course, it's not all roses – you must also do your fair share of all the things that simply must be done but *no one* wants to do!) ■



Law at the Cutting Edge

Essays in Honour of Professor Dame Sarah Worthington, DBE, KC (Hon), FBA

Edited by Sinead Agnew and Sir Marcus Smith

The following three article are selected chapters from *Law at the Cutting Edge*, a collection of essays which celebrate the immense contribution that Sarah has made to the field of private law.

Chapter

2

Cultural Property and the ‘Dark Side’ of the Rule of Law

SIR MARCUS SMITH

I. INTRODUCTION

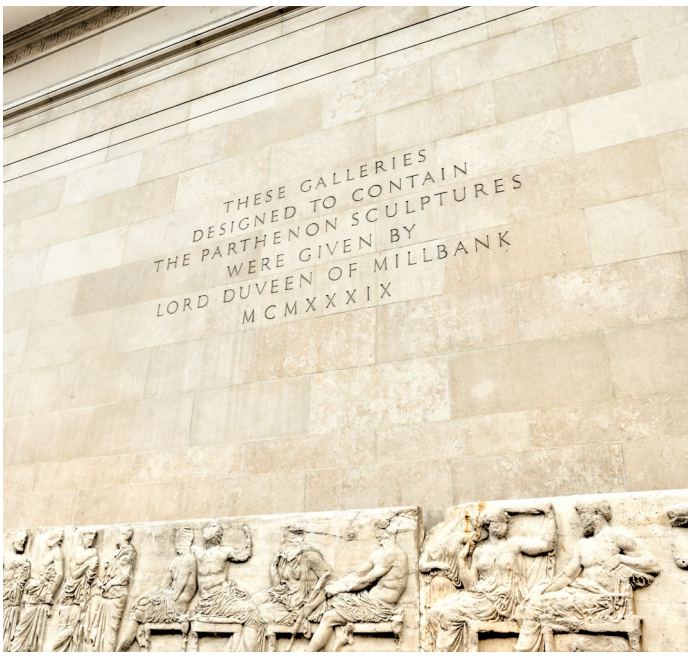
THIS CHAPTER BEGAN as an attempt to understand the different arguments that arise in relation to the return of cultural property. I should state, at the outset, that I have no ambition to try to resolve these arguments. My conclusion, which also formed my starting point, and which has been amply justified by the work done between starting point and conclusion, is that resolution of these arguments involves the consideration and balancing of non-legal judgemental factors that have no place in an essay such as this, written by a judge.

Accordingly, they find no place here.

But that does not mean that an attempt to understand why these arguments are so difficult to resolve is not worthwhile. My conclusion is that the reason these arguments are so difficult is because they involve the interplay of, and conflict between, two sets of values which lie in opposition to one another. The first is the desire to return cultural property to its place of origin (a value I am going to *assume* as valid[1]); the second is the rule of law (a value whose relevance I *am* going to try to explain and unpack).

I am going to suggest that the reason these questions are so fraught – when, on their face, they really should not be – is because the values in play are to a very considerable extent operating on different planes, which makes even agreement of common terms of reference hard.

So much by way of 'content warning'. I will begin with the relatively safe ground of how, as a matter of law, disputes concerning moveable property are resolved.



II. RESOLVING DISPUTES ABOUT MOVEABLE PROPERTY

A. The 'Domestic' Case

Laying on one side, for a moment, international questions,[2] even a *domestic* dispute (by which I mean a case where all disputants and the property in question are, and at all material times were, in the same jurisdiction) regarding moveable property can give rise to difficult questions of fact and law. The problem with moveable property is that it is intrinsically transferable[3] and so – if there is a dispute about ownership – typically a series of transactions transferring the moveable in question, going back in time (sometimes quite far back), will have to be examined. Title is tricky, even in the domestic case: but we have rules (albeit rules that are too perhaps complex) to resolve such cases in a prospective and (ideally) clear and predictable manner. I am not going to go into such rules any further.[4]

B. The 'International' Case

The international case is even more problematic. Two complications arise: (i) Which courts have jurisdiction? (ii) What law or laws do they apply, where the court does have jurisdiction?

Jurisdiction is the more straightforward case. The basic rule is that the courts where the property in question is located have primary – and sometimes exclusive – jurisdiction. There are good reasons for such a rule. It is consistent with the general rule that a claimant should seek out their defendant and sue in the defendant's courts. The defendant is involuntarily a party to the suit, and ought (*prima facie*, at least) to have the home advantage. Litigating where the property is situated also pays due regard to the importance of property rights being protected locally. That is particularly important in the case of immovable property, but remains important in cases of other types of property, including moveable and intangible property.[5] Finally, litigating abroad in relation to domestic property carries with it a dash of interference with rights that ought to be protected or abrogated by the domestic courts; and more than a hint of an affront to international comity between jurisdictions. why should a domestic jurisdiction enforce a foreign judgment depriving a defendant of property they hold within that very jurisdiction?

The jurisdictional question thus resolves itself relatively straightforwardly. Matters are very different when choice of law questions arise. A choice of law rule indicates the legal system that is to supply the answer to a particular legal question. There is an immediate tension between the framing of the question and the resultant answer. That is because the question or issue can often be framed in different ways, and not necessarily in accordance with 'objective' factors.

[1] I am, therefore, not going to justify it. That is for others. This means that I spend more time on the areas that I *am* qualified to consider, which are the legal questions. That means that this essay is inevitably somewhat one-sided in terms of words devoted to cultural property as opposed to the rule of law. I hope that any reader will appreciate that that is *not* because I am discounting the importance of the return of cultural property: I am merely discounting my ability to comment meaningfully on this value.

[2] By which I mean questions of private international law or the conflict of laws. Issues relating to public international law are considered later in this chapter.

[3] That is one of the 'bundle of rights' that the owner of property has by virtue of his or her ownership. In an essay published in 1961, Honoré sought to enumerate the various rights that might comprise the highest possible interest in a thing – ie the 'bundle' of rights in a thing or in property that represents the highest level of interest that can be. This was an interest that he termed 'ownership': A Honoré in A Guest (ed), *Oxford Essays in Jurisprudence*, (Oxford, Oxford University Press, 1961) ch V; M Smith and N Leslie, *The Law of Assignment*, 3rd edn (Oxford, Oxford University Press, 2018) paras 2.39 and 2.41.

[4] But see, generally, Smith and Leslie (n 3).

[5] Thus, intellectual property rights tend to be locally protected (see *Lucasfilm Limited v Ainsworth* [2011] UKSC 39), but also moveable property, as we shall see.

The way in which the question is framed may well suggest the answer, which is never satisfactory. This is the problem or 'art' of characterisation, which involves working out whether an issue in dispute is – or is not – subsumed within the abstract proposition that is the particular choice of law rule.

Assuming that an English court properly has jurisdiction, the law that will be chosen to determine, for example, the lawfulness of any transfer, is the law of the country where the moveables are situated at the time of the transfer in question (ie the applicable law is the *lex situs*).[6] This reflects the important fact that moveable property is … moveable. Why should the law of the jurisdiction where the moveable thing is presently held determine the validity of a transaction that took place previously in another jurisdiction, where that thing was then located? A choice of law rule indicating the applicable law as the law of present location would be a bad rule.[7] A rule based on present location would impose on the parties to the foreign transaction a law that they cannot have expected to have applied, in place of the law that (probably) they did expect to apply, namely the *lex situs*. A rule based on present location would also be open to abuse: it is possible, in the case of moveable property (as opposed to immovable property), for the party holding the property to relocate it to a jurisdiction favourable to them.

Whilst the rule that the applicable law is the *lex situs* might be hard to apply – and less easy to justify – in the case of intangible property, I venture to suggest that it makes good sense in the case of moveable (tangible) property. But let us not fool ourselves that the rule is easy to apply. Any rule that can be so shortly stated inevitably has hidden complexities. In this case, difficulties are likely to arise on the following points: (i) Whether the property in question is, in fact, moveable property at all;[8] (ii) Whether the property, albeit moveable, is inalienable by its nature;[9] (iii) Whether questions of capacity to transfer are governed by an altogether different law;[10] and (iv) Which law applies in the case of successive transfers where there are competing claims of different priority.[11]

All of these points may suggest different applicable laws. The subjective or policy problems that 'characterisation' must deal with are evident. Even if the *lex situs* rule were monolithic, which it is not,[12] and even if it were of straightforward application, which it is also not,[13] these problems would continue to bedevil lawyers.

It is clear that international cases concerning moveable property are going to be hard to resolve, even at the legal, conflict of laws, level, and leaving out of account the resolution of the difficult factual q uestions that will likely arise where ownership is contested, and application of the substantive rules of whichever jurisdiction is found to apply.

I am not going to go further into the detail of the law. Time and space do not permit, and an exposition of the detail is not the point of this essay. Rather, my point is that we have evolved sophisticated rules for dealing with disputes as regards property, including where the interests of foreign nations and persons of foreign nationality or domicile are engaged. By 'we' I include the courts of this jurisdiction but also those of many other jurisdictions, who apply similar (although not identical) rules and principles. These courts and jurisdictions are all seeking to resolve, in accordance with prospective and (ideally[14]) clear and predictable rules, difficult legal questions.

[6] J Carruthers, *The Transfer of Property in the Conflict of Laws*, (Oxford, Oxford University Press, 2010) para 3.07. Prior to the decision in *Cammell v Sewell* (1858) 3 H&N 617, 157 ER 615 and (1860) 5 H&N 728, 157 ER 1371, there are a number of rival choice of law rules: see, further, Carruthers, ibid, ch 3.

[7] In contrast to the determining of jurisdiction, which turns on the present location of the thing.

[8] There may be an issue as to whether the property is, in fact, immovable (eg a fixture) or indeed intangible (eg as in the case of documentary intangibles).

[9] As, under some rules, is the case with objects of cultural significance: Carruthers (n 6) paras 3.13–3.18.

[10] ibid paras 3.17–3.18.

[11] ibid para 3.22.

[12] Carruthers (n 6) lists various exceptions to the rule at paras 3.23ff.

[13] As Curruthers, ibid, notes at para 3.07 fn 14: 'Inherent in the deceptively simple *situs* rule are complex questions of definition and interpretation: what is the *situs*, and in turn, what is meant by the law of the *situs*? By whom, and according to what law, is the connecting factor to be defined?'.

[14] I appreciate that the preceding paragraphs indicate how far short of the ideal our

III. CLAIMS TO PROPERTY NOT LEGALLY RECOGNISED AND THE RULE OF LAW

A. The Framing of the Claim: Difficulties

So far as I am aware, no proceedings have been brought before the English courts seeking the return to Greece of the Elgin Marbles aka the Parthenon Stones.[15,16] That is entirely unsurprising, given the formidable legal difficulties that lie in the path of succeeding, which may be set out (on a non-exclusive basis) as follows:[17]

1. *Standing*. There is a question of standing or the identity of the true claimant. The Marbles were acquired (I am attempting to use a neutral term: others, depending on their views, might use the term 'stolen'; or insert before 'acquired' the word 'lawfully' or 'unlawfully') in 1801[18] at a time when the relevant government of the relevant territory was the Ottoman Empire. It was only decades later, after the Greek wars of Independence, that Greece was recognised as an independent nation.[19] Who, now, is the appropriate claimant?

2. *Authority to take*. Assuming that the Marbles were state property and that acts by the relevant officials of the Ottoman Empire were valid (themselves open questions that would have to be determined), the question arises as to whether Lord Elgin had any authority physically to remove the Marbles. Initially, the thinking appears to have been simply to access the site and draw the artefacts there, rather than take them. Two firmans (a form of authority) were granted, but there are questions as to whether they are lawful and – even if they are lawful – whether they permitted Lord Elgin to remove sculptures from the site.[20]

rules are. But that is more a reflection of the complexity of the interests involved than any suggestion that we are not, *bona fide*, trying to grapple with these issues.

[15] Even the terms 'Elgin Marbles' versus 'Parthenon Stones' show the controversies into which I am quite deliberately *not* trying to wade. I shall generally use the term 'Marbles'.

[16] There was an attempt in the European Court of Human Rights, ***Syllogos Ton Athinaion v The United Kingdom***, Case No 48259/15 (31 May 2016) but the Court held that it lacked temporal jurisdiction (ie the Convention rights relied upon were not retrospective in effect).

[17] Jenkins notes that '[f]ew doubt the legal right of the British Museum to keep the Elgin Marbles. Many, however, openly and vocally dispute the moral right': T Jenkins, *Keeping Their Marbles*, (Oxford, Oxford University Press, 2016) 2. I shall return to both the question of the extent to which the legal rights of the British Museum are questioned and to the question of morality in due course. For the present, I simply seek to articulate (some of) the legal difficulties that arise.

[18] ibid 93, 94.

[19] ibid 99–100.

[20] ibid 94–95.

3. *Subsequent transfer, free of prior claim*. The journey of both the Marbles and Lord Elgin to England was fraught. Lord Elgin was taken prisoner by the French (he was released in 1806), and the sculptures arrived over the course of a decade or so in London.[21] They went on show in 1807.[22] It was at this point that controversy regarding their legal status and their acquisition ignited, never to be put out between then and now.[23] Lord Elgin – now broke and also wanting rid of a controversial acquisition – 'petitioned the House of Commons to appoint a Select Committee to investigate the circumstances of acquisition and to recommend on what terms, if any, they should be sold to the government'.[24] The matter was debated over the years, and the question of Lord Elgin's title was squarely raised, as well as the question of their acquisition for the nation.[25] On 25 March 1816, the Select Committee recommended purchase;[26] the matter was then debated in Parliament and it was resolved (82 for, 30 against) to purchase the Marbles for £35,000 (rather less than Lord Elgin was hoping to get).[27] An Act of Parliament, which I shall refer to as the 'Elgin Marbles Act 1816',[28] was passed to sanction the purchase. The Act provides:

> That the Lord High Treasurer of Great Britain, or the Lords Commissioners of His Majesty's Treasury, or any Three or more of them, shall and he or they is and are hereby authorised and empowered, out of any of the Aids or Supplies granted in this Session of Parliament for the Service of Great Britain for the Year one thousand eight hundred and sixteen, immediately after the passing of this Act, to issue and advance the Sum of thirty five thousand pounds to the Trustees of the British Museum, or any person to be appointed by the said Trustees to receive the same, which Money shall be paid without any Fee or other Deduction whatever, and shall be applied in the Purchase of the said Collection; and that the Trustees of the British Museum shall, on or before the First Day of September one thousand eight hundred and sixteen, require the Delivery of the said Collection; and if the same shall be then delivered to them, and they shall be satisfied that the several Statues and other Articles forming the said Collection are then conformable to the Catalogue thereof delivered in to a Committee of the House of Commons, they the said Trustees shall, on delivery of the same into their Custody, pay the said sum of thirty five thousand pounds to the said Thomas Earl of Elgin, his Executors, Administrators and Assigns.

So there has been a transfer of title from Lord Elgin to the trustees of the British Museum. The question arises as to whether, as a result, the British Museum takes free of any taints or deficiencies (to the extent that any exist, again an open question[29]) in Lord Elgin's title. One interesting question – not, as far as I know, resolved – is whether the Elgin Marbles Act 1816 removes the application of the *nemo dat quod non habet* rule. Normally, as regards legal property,[30] no one can give better title than they have. The original owner, having better title, can reclaim from a later holder, even if that later holder acquired for value and in good faith.[31] The question is whether the statutory transfer of property contained in the Elgin Marbles Act 1816 has abrogated this rule. The Act seems to have been very carefully drafted to say nothing about this, which may, in itself, speak volumes.[32]

4. *Limitation*. Finally, there would – if an action were commenced now – be a question of limitation.

B. The Marbles as a Good (if Dangerous[33]) Example to Debate

I have selected the Marbles as the case to discuss because there is a considerable body of opinion today advocating for the return of the Marbles to Greece. Such opinions are not merely held by the Greek state, but by many others with no particular links with Greece or to the Marbles. what such persons share is an acute moral sense that the Marbles are not where they belong. As I have already indicated, it is no

[21] ibid 102.

[22] ibid 102.

[23] ibid 102–05.

[24] ibid 105.

[25] ibid 105.

[26] ibid 107.

[27] ibid 109. Lord Elgin wanted £73,600: ibid 105.

[28] This was before the introduction of short titles to Acts of Parliament. The name of the Act is 'An Act to vest the Elgin Collection of ancient Marbles and Sculpture in the Trustees of the British Museum for the Use of the Public'.

[29] By which I mean a question as yet undetermined by a court of competent jurisdiction.

[30] In contradistinction to equitable property, where altogether different questions arise: the various rules regarding priority are comprehensively set out in Smith and Leslie (n 3) ch 27.

[31] In the case of legal property – which this is – equity's darling is not protected. Where equitable rules of priority are in play, the *bona fide* purchaser for value without notice of the prior claim will take free of that prior claim. But this only applies in the case of equitable title and property.

[32] I have not, to be clear, considered the legislative history of the 1816 Act.

[33] The controversy surrounding the Marbles makes them both a good and dangerous example.

[34] As I have noted (n 16), there was an attempt, in 2016, to engage the jurisdiction of the European Court of Human Rights. This failed.

[35] For instance: https://reuniteparthenon.org/the-legal-case/ (accessed 24 June 2022); Z Small, *'Prominent Lawyer Suggests that Officials Committed Fraud to Keep Elgin Marbles in England During 19th Century'*, ARTn*ews*, 26 February 2020, available at www.artnews.com/news/david-rudenstine-elgin-marbles-fraud- claims-1202679058/ (accessed 24 June 2022); G Robertson, *Who Owns History: Elgin's Loot and the Case for Returning Plundered Treasure*, (London, Biteback Publishing, 2019) xviii–xix, ch 6.

[36] Robertson (n 35).

[37] ibid, ch 6 is, indeed, entitled *'International Law to the Rescue?'*.

[38] As Robertson himself notes: ibid 137.

[39] The main sources of public international law – there are others – are

part of this chapter to debate the moral rights and wrongs of Lord Elgin's acquisition. Any view that I might express (and I am seeking to express no view) is no better than anybody else's. Judges have no more finely tuned moral compass than any other right-minded person, and it would be both presumptuous and wrong to seek to foist any views I might have on an innocent readership looking for legal, and not moral, elucidation.

C. Putting a Moral Case in Legal Terms: The Problems

My interest is engaged because a number of advocates favouring the return of the Marbles to their place of origin put their case in legal terms.[34] Often, this is no more than the moral case dressed up to look like a legal case, but from time to time a legal argument is sought to be made.[35] It is at this point that my interest becomes engaged, because these arguments tend to have a number of characteristics which differentiate them from the normal process of vindicating a legal right. Specifically:

1. *Polemic, not analysis*. They are long on polemic, and short on analysis. Geoffrey Robertson's interesting and entertaining book,[36] for instance, has a 'puff' from Stephen Fry:

> A book that proves beyond any reasonable doubt that the Parthenon Marbles belong back in Athens.

I appreciate that this is a 'mere puff' to sell the book, but the 'puff' betrays a mind-set, and in this case it begs a serious question. There are, as I have described, ways of vindicating a right to ownership – and those rights are vindicated in this jurisdiction not by proving a fact 'beyond reasonable doubt' but on the 'balance of probabilities'. What one really needs to do, before questions of standard of proof become engaged, is state the legal remedy that is being (or is sought to be) enforced. Then, perhaps, in considering these questions, one can say that something is proved or established to the requisite standard.

2. *Deployment of international law*. International law is usually deployed to 'come to the rescue'.[37] That is convenient, because international law is, inherently, much more vague than municipal or national law.[38] Even here, there are stark – and probably impossible to overcome – problems. Thus, public international law, as I am going to call it, is (generally speaking) not retrospective.[39] Of course, it is possible to circumvent these problems by asserting that there is a prospective right to have returned previously acquired objects of cultural heritage.[40] But that is simply sleight of hand and does not diminish the retrospectivity of what is being contended for.

3. *Use of 'jury' points*. 'Jury' points are prevalent. Self-evidently, the manner in which Lord Elgin acquired title will be of enormous significance in any attempt, by a prior owner, to assert priority of title. But it is not the only significant point. In the case of the Marbles, the subsequent transfer to the British Museum by Act of Parliament is obviously key,[41] as are other points standing in the way of a claimant (as described above). There is no point in an advocate of a prior legal claim highlighting one aspect of that claim (where particular strength may be shown), without also at least mentioning, and dealing with, the weak points that may serve to defeat the claim.

Undoubtedly, there are points that can be made about Lord Elgin's acquisition of the Marbles. Put more objectively, the point is this:

> In removing the Marbles from the Acropolis, Lord Elgin did not act, as is often forgotten, entirely without official sanction; the antiquities were removed only after the issue of a 'firman', a formal grant of authority, from the Ottoman authorities in Constantinople to the Ottoman authorities in Athens. Lord Elgin's displacement of the Marbles bore a stamp of local assent. Quite legitimately, therefore, it was asserted during United Kingdom parliamentary proceedings in 1984 that 'The collection secured by Lord Elgin, as a result of the transactions conducted withy the recognised legitimate authorities of the time, was subsequently purchased from him and vested by an Act of Parliament in the trustees of the British Museum in perpetuity'. The United Kingdom has maintained this stance since 1816 when Lord Elgin was exonerated by the House of Commons Select Committee responsible for investigating his acquisition of the collection and subsequent sale therefore to the British Government for a sum of £35,000.[42]

Of course, fragilities in Lord Elgin's claim to title appear to exist. The facts (hard to ascertain after all these years), the documents (many have disappeared, if they ever existed) and the relevant law (see above) are all not straightforward. They

'international custom' and 'treaties'. Neither is retrospective in operation. On international custom, see J Crawford, *Brownlie's Principles of International Law*, 9th edn (Oxford, Oxford University Press, 2019) 21–22, 26 (where the concept of the 'persistent objector' makes the point clearly). On treaties, see A McNair, *The Law of Treaties*, (Oxford, Oxford University Press, 1961) ch XI. A possible exception is the concept of international human rights. That depends on whether one adopts a 'natural law analysis' (these were always rights, always effective and in force) or 'retrospective analysis' (even though the law not always been thus, these rights are so important that they should, in breach of the norm, be given retrospective effect).

[40] That is the approach of Robertson (n 35) 162–63:

> The sources of international law that have been surveyed in this chapter indicate that a norm requiring the restitution of wrongfully extracted high-value cultural heritage to states of origin has by now crystallised: analogous conventions, state practice, principles shared by civilised nations and decisions of domestic courts cohere to a point in that direction.

Yet the UNESCO Convention 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (relied upon by Robertson (n 35) 141, 143) is *expressly* prospective in effect. See, for instance, Art 3, which provides: 'The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention … shall be illicit.' The United Kingdom acceded to the UNESCO Convention 1970 on 31 October 2002. Quite how the UNESCO Convention can affect the acquisition of the Elgin Marbles in the early 1800s and their transfer to the British Museum in 1816 is not understood. The law on the treatment of cultural property is helpfully described in Carruthers (n 6) ch 5. At no point is it asserted that any of the law there set out is of retrospective effect and – given the general dislike of retrospectivity – a presumption of retrospectivity could not properly be asserted. (And, to be clear, Carruthers does not assert this.)

[41] An advocate for the return of the Elgin Marbles might, properly, ask why an Act of Parliament at all? Was it because of concern about the manner of Lord Elgin's acquisition and potential effect of the *nemo dat quod non habet* rule. I am not sufficiently versed in the history to even venture a view, even as to whether this was an unusual way of doing things. But the point is certainly one of interest.

[42] Carruthers (n 6) para 5.05.

are all illustrative of a 'weak' case, for the burden will rest on the claimant, the party seeking to remove the Marbles from the British Museum's grasp. Clearly, weaknesses in the British Museum's case should be articulated. But they must be relevantly articulated and articulated in context if a legal argument is properly to be made. It is one thing to say: 'There is a strong moral obligation on the British Museum to return the Marbles because the person they were purchased from acquired them in circumstances tantamount to (or actually amounting to) theft and fraud.' It is quite another thing to say that there is a legal obligation to return the Marbles, because that proposition requires an impartial evaluation of and adjudiciation upon all material points that go to establishing that claim (here, of prior title).

The problem with the debate is that there is a 'cherry-picking' approach, intended not to make a *legal* argument but to advance a point of prejudice under the guise of a legal argument. Robertson, for example, correctly says that '[t]he lawfulness of Elgin's behaviour must be judged by the rules that applied in Athens in 1801',[43] and that is a (broadly correct) formulation of the rules of applicable law under the English conflict of law rules articulated above. And I fully respect the argument that if Lord Elgin were to be categorised as either 'thief or saviour',[44] the former may well be more probable than the latter. But simply establishing the fact that Lord Elgin's title may be invalid – which may be difficult enough – does not establish the other elements of a sustainable claim.

4. 'Play the man, not the ball'. The proponents 'play the man, not the ball'. *Ad hominem* attacks are made, which have no relevance to the point, but which are deployed as part of a non-legal argument. Thus, in referring to the Natural History Museum's proposed retention and analysis of certain Aboriginal skulls and bones from Tasmania, and of the Museum's resistance to returning them, Robertson says:

> That did not, at first, attract the museum, whose scientists held the view (as did Dr Mengele) that the pursuit of knowledge is an overriding good in itself.[45]

Mr Jeremy Wright – sometime Attorney General and sometime Culture Secretary – is described as 'a nondescript criminal barrister', and his expressed opposition to the Marbles as 'incoherent'.[46] Lord Elgin is 'an under-bright but over ambitious Tory', amongst other attributes, none of them good.[47]

My reason in raising criticisms of this sort of analysis is not to prevent them from being made – arguments can and should be made, and in the appropriate context, anything goes. Arguments, however framed, should not be thrown out without being heard. In short, arguments are better for being heard, and then rejected as bad, rather than dismissed out of hand.

D. Why Frame a Moral Case in Legal Terms? Enter the Rule of Law

The arguments I am talking about and have described are not 'just' arguments, they are moral arguments framed as *legal* claims, suggesting that a claimant can vindicate a legal right. The question immediately arises: why frame these matters as a legal claim at all, when – in order to make that legal argument – irrelevant, bad and/or meretricious points end up having to be taken? Why not simply assert a moral claim, without 'dressing it up'?

The answer to this question – why frame moral arguments as legal claims? – I am going to suggest, is that we regard legal arguments as being of peculiar force and so better capable of justifying certain conduct or outcomes. It is better – in the sense that the assertion has more force – to frame something as 'lawful' than to frame something as 'I have a moral right' or 'This is something I think should be done' or even 'I want to do this'. It is far more powerful to say, not 'I want to do this', but 'This must be done, for various reasons, and the law allows me to do so'. That is why – from Hitler to Putin – the indefensible is wrapped up in legal justification. That is particularly the case in Western democracies, with their (broadly speaking) common understanding of the rule of law.

In short, there is particular force in advancing a *legal* justification for a claim, and that is the *moral* force arising out of the rule of law.

Lord Bingham, in his book on the rule of law, sought to define the rule of law as follows:

> The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts … generally speaking and departure from the rule I have stated calls for close consideration and clear justification. My formulation owes much to Dicey, but I think it also captures the fundamental truth propounded by the great English philosopher John Locke in 1690 that 'Wherever law ends, tyranny begins'. The same point was made by Tom Paine in 1776 when he stated 'that in America THE LAW IS KING. For as in absolute government the King is law, so in free countries the law ought to be King; and there ought to be no other.'[48]

I appreciate that the 'rule of law', whilst containing a core where there is broad agreement as to its content, is murky or penumbral around the fringes. In particular, there is a dispute as to whether basic human rights fall within or without the rule of law.[49] The wider one draws the content of the rule of law, the greater the fragmentation of acceptance[50] and the greater the risk of internal inconsistency. For the purposes of this chapter, and without prejudice to any wider formulation that I might attempt on another occasions, I am going to concentrate on the *procedural* side of the rule of law.

[43] Robertson (n 35) 63.

[44] The title of ch 3 in Robertson (n 35).

[45] ibid xix. Unpacking it, the analogy to Dr Mengele is regrettable.

[46] ibid 21.

[47] ibid 59.

[48] T Bingham, *The Rule of Law*, (London, Allen Lane, 2010) 8.

[49] A debate described by Bingham, ibid 66–68. At one extreme lies Professor Raz, who sees the rule of law as a more or less technical doctrine concerned with effectiveness more than anything else. Thus, Professor Raz says: '[C]onformity to the rule of law is one among many moral virtues which the law should possess. The present consideration shows that the rule of law is not merely a moral virtue – it is a necessary condition for the law to be serving directly any good purpose at all. Of course, conformity to the rule of law also enables the law to serve bad purposes …': J Raz, *The Authority of Law: Essays on Law and Morality*, 1st (paperback) edn (Oxford, Oxford University Press, 1983) 225. Lord Bingham himself is a proponent of a wider view of the rule of law, but see also: F Neumann, *The Rule of Law: Political Theory and the Legal System*

I doubt if it could be contended that the right to the return of cultural property forms a part of the rule of law, and (given my thesis that this undoubted value stands in opposition to the rule of law) adopting a really wide definition of the rule of law runs the risk of making this chapter incoherent. So the version of the rule of law that I propose to adopt for the purposes of this essay is a hard, 'due process', formulation, that bears some resemblance to the hard procedural due process protection espoused by Justice Jackson in the US Supreme Court's decision in *Shaughnessy v United States ex rel Mezei*:

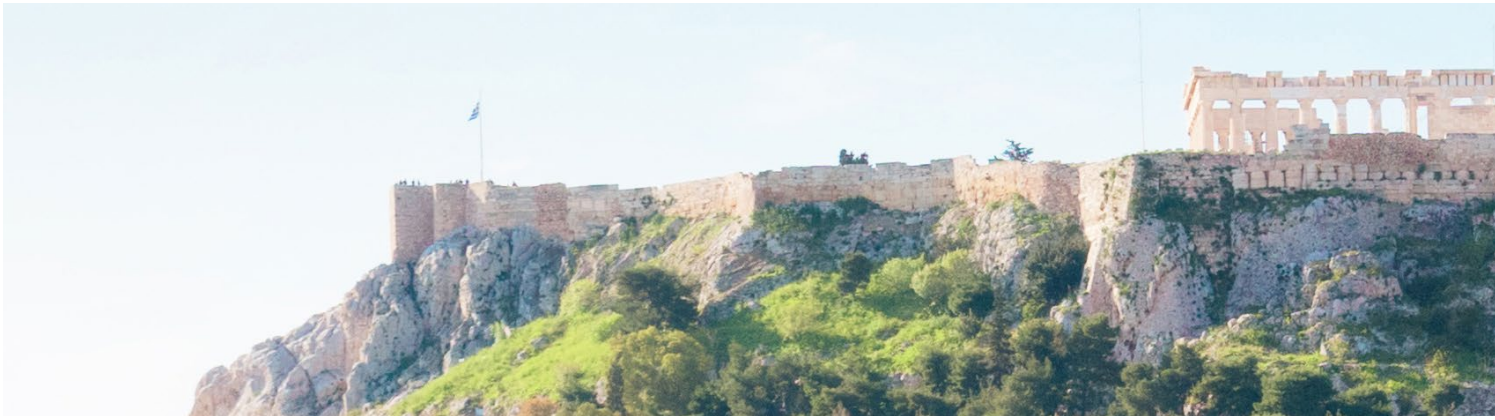
> Procedural fairness, if not all that originally was meant by due process, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. Insofar as it is a technical law, it must be a specialised responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which comprise substantive law. If it be conceded that in some way [the agency in the case could act as it did], does it matter what the procedure is? Only the untaught layman or the charlatan lawyer can answer that procedure matters not. Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures, than under our substantive law enforced by Soviet procedural practices. Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* consideration.[51]

This formulation – to the extent it is a formulation of the rule of law at all – captures the essence of what I, at least, am talking about in this chapter. I am not denying the existence of other values, but I am framing the peculiar value of the rule of law in a relatively narrow way, because it is thus that the opposition of the rule of law to other values (such as the restoration of cultural property) can best be understood.

in Modern Society, (Leamington Spa, Berg, 1986); A Babington, *The Rule of Law in Britain*, (Chichester, Barry Rose, 1985); F Pirie, *The Rule of Laws*, (London, Profile Books, 2021).

[50] Taking the approach of Professor Raz is likely to engender the greatest common ground. On this basis, where effectiveness is essentially the essence of the rule, one might be able to achieve a formulation accept- able on a worldwide basis. See eg Y Wang, *Tying the Autocrat's Hands: The Rise of the Rule of Law in China*, (Cambridge, Cambridge University Press, 2015).

[51] *Shaughnessy v United States ex rel Mezei* 345 US 206 (1953), 224–25. On the extent to which procedural due process can appropriate soften substantive evil, see D Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy*, (Oxford, Oxford University Press, 1991).



I hope that what I mean by the rule of law will become clearer in what follows.

My point, for the present, is that, at least and particularly in western democracies, deployment of *legal* argument adds lustre to what would otherwise be a purely moral argument precisely *because* of the rule of law. The pseudo-legal arguments that I have been describing regarding the Marbles – and other points to which I will come – seek to appropriate that lustre and deploy it, illegitimately, to advance what are otherwise perfectly proper moral arguments, deserving of respect and attention on that basis (but not any other).

In doing so, those advancing such moral claims or values do themselves – and, more particularly, their cause – no service at all. Instead of articulating what is on the face of it a legal claim in support of a particular cause – for instance, the return of the Marbles to Greece – thereby impliedly appropriating the moral force of the rule of law, it needs to be recognised, in order to understand the implications of the assertion of such moral values, that what is being proposed actually goes *against* the rule of law, but is (in the particular case) nevertheless justified.

In other words, persons advancing a moral claim of this sort are endorsing a breach or infringement of the rule of law when they advocate for the enactment of a new law (here, enforcing the return of the Marbles) in place of the old (whereby the present holder is justified in retaining the Marbles). It is necessary to expand upon this proposition:

1. ***A competition between two moral values***. What we are confronted with is a competition between two moral values. No one – least of all Bingham – is suggesting that the rule of law *is* a rule of law. It is an ideal, a value, to which we all – and particularly legislators, judges and the legal profession – should aspire to and seek to promulgate. As such, it is a value that is opposed to the return (to stick to the Marbles) of past-acquired objects of cultural significance. The rule of law, in short, stands in opposition to and seeks to prevent such return. Recognition of this fact is critical to understanding some of the reluctance to accede to what might otherwise be a far less controversial assertion of moral rightness.

2. ***The rule of law is not an absolute value***. When I say that the rule of law stands in opposition to other values, I am not saying that the rule of law is an absolute 'road block'. To assume the rule of law exists as an absolute would be wrong. For example, in breach of the rule of law, retrospective legislation is quite often enacted in this jurisdiction and others, and the courts will (through slightly to moderately gritted teeth) uphold such legislation, although they may construe such legislation narrowly. Thus, in *Lauri v Renad*, Lindley LJ stated:

> It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction. And the same rule involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.[52]

This, then, is the accommodation English law has reached with the values contained within the rule of law. Not no retrospective legislation, but a presumption against such legislation, capable of being overridden.

Whether the rule of law should be overridden is left to our legislators, not to the courts.[53] A complex balancing exercise is thus undertaken: it is for the legislator to determine what the substance of the law should be, including as to where it should be retrospective or backward looking. When the law has been enacted by our legislators, there will be no judicial quibbles as to its substantive content. The law, properly construed, will be applied.[54] This is as it should be in our constitutional settlement.[55] If the decision to enact a retrospective law is made, then – provided it is clearly enough expressed – the courts will give force to it. But the legislators will, themselves, have regard to the rule of law, and will or ought to appreciate that (because of that rule) there are prudential or moral fetters not on what they can do, but on what they should do. That involves balancing the values of the rule of law against the interests (whatever they may be) that actuate the need for the legislation in question.

[52] *Lauri v Renad* [1892] 3 Ch 402 (CA) 421.

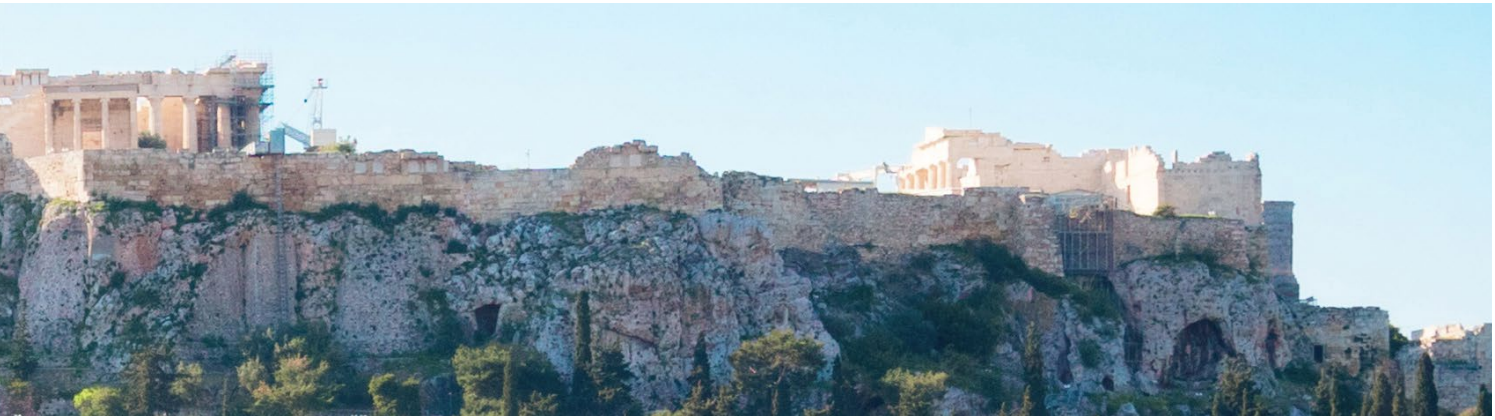
[53] As to the law in this area, see D Greenberg (ed), *Craies on Legislation*, 11th edn (London, Sweet & Maxwell, 2017) paras 10.3.1ff.

[54] As to this, see Lord Burrows, 'Statutory Interpretation in the Courts Today', Sir Christopher Staughton Memorial Lecture 2022 (University of Hertfordshire, 24 March 2022), published at https://www.supreme- courtuk/docs/sir-christopher-staughton-memorial-lecture-2022.pdf (accessed 12 November 2022).

[55] We do not, in this jurisdiction, since departing the European Union, and subject to an unarticulated reservation to act *in extremis*, have any kind of entrenched higher law whereby a judge can strike down primary legislation.

[56] ie, someone who – but for the moral force they attribute to the rule of law – would rather the Marbles be returned than remain with the British Museum.

[57] Thanks are due to Lionel Smith and Simone Degeling for coming up with this idea, which I have adopted. I am formulating both sides of the debate, which inevitably means a high level of subjectivity in the points taken and not taken. I hope I have captured both sides' best points but am well aware that I may not have done.



3. *The 'dark side' of the rule of law.* That is why I am calling this conflict between moral values the 'dark side' of the rule of law. Not because the rule of law is 'dark' – it has enormous positive value – but because it acts as a restraint and constraint in relation to other things which, for perfectly sound (and usually moral) reasons, we would like to do but which the rule of law may prevent or obstruct us from doing.

IV. A DIALOGUE BETWEEN HERITAGE AND LAW

So, to return to the Marbles, the question for debate becomes: does the moral force impelling the return of the Marbles outweigh the moral force, embodied by the rule of law, in preventing or inhibiting that very outcome? I cannot possibly answer that question in this chapter or at all; and I am not even going to begin to try for reasons that I have given. What I *am* going to do is imagine the sort of dialogue that might arise between a well-informed proponent of the Marbles' return, a person open to other values and a person not-unsympathetic to that position,[56] but also a robust respecter of the rule of law (understood as I have described it), is a fruitful dialogue worth imagining.[57] I call the protagonists 'Heritage' and 'Law' for obvious reasons, and I extend my apologies to Andrew Marvell:[58]

[1] Heritage: Okay, let me accept (without prejudice to making any such point in the future) that I don't have a legal leg to stand on.

You surely would accept – for your part – *first*, that the return of objects of cultural heritage is a good thing to do; and, *secondly*, that there is no absolute reason why the Marbles can't be returned?

[2] Law: I'll make a lawyer out of you yet, Heritage! And yes, I will stipulate that the return of objects of cultural heritage is a worthy thing to do; and that – provided an appropriately framed Act of Parliament was passed – there is no lawful reason why the Marbles could not be returned to Greece.

But you do understand why an Act of Parliament is required? The Marbles vested in the British Museum by virtue of the 1816 Act,[59] now repealed.[60] In place of the various obligations imposed on the Trustees of the British Museum by that Act, we now have a statutory obligation to keep the British Museum's collection whole.[61]

[3] Heritage: Fine, let's get the Act passed, repealing this obligation, and obliging the Trustees to return the Marbles. I know you're going to say this is retrospective legislation, but is it? Really? All it's doing is saying prospectively that the British Museum should divest itself? (See, the lawyer stuff isn't that hard!)

[4] Law: You're right! Retrospectivity is really tricky.

Of course, you are right: telling the Trustees to return the Marbles to Greece is in that sense purely prospective. Even Parliament cannot turn back the clock, and wish Lord Elgin had never been. The transfer back has to take place in the future.

But the point is that since 1816, the Trustees have been obliged – under a statutory duty – to preserve the Marbles for the British people. You are varying a regime that has operated for a long time, by telling the Trustees to do something different; you are thereby depriving future viewers of the Marbles of that opportunity; and you are *expropriating* the 'true' owner of the Marbles, the Trustees of the Museum, who hold these artefacts on terms.

However you dress it up, you are changing past-created and presently subsisting rights and obligations.

[5] Heritage: Hang on a minute. what do you mean by expropriation?

During the conference at which an earlier version of this chapter was presented, it was suggested that I have given Law the best lines. I fear that may be right, largely because I have assumed and not advocated for the value of the return of cultural property. I can only stress that I have tried to give Heritage a fair shake of the dice. Nevertheless, my dialogue betrays where my true interests lie, which is in understanding the role of the rule of law. I have numbered the dialogue ('[X]') to facilitate later reference.

[58] See, for something sublime rather than pedestrian, A Marvell, 'A Dialogue Between the Soul and Body' (1681).

[59] The terms of which were described above.

[60] But the transfer would remain effective. Repeals of Acts are prospective in effect only. This is not a point I am going to develop. It may very well be that Heritage – if it came to litigation – could make all kinds of points in relation to the legislative history that I do not anticipate.

[61] See British Museum Act 1963, s3.

[6] Law: Well, what I will call the 'ownership question' is disguised by the fact that the British Museum is a public body. Suppose, though, Lord Elgin had sold the Marbles to a very rich private individual instead, who had kept the Marbles on their property and bequeathed them, over the generations, to other private individuals.

And I'll make it easy for you – let's suppose this individual is quite selfish (and their predecessors in title were also), so that no one ever even got to look at the Marbles. The fact is that this inheritor, the present holder – I'll call them X – would 'own' the Marbles. And the right to property is an important right – protected by the European Convention on Human Rights (ECHR), no less.[62]

I'm not saying that property rights are part of the rule of law. But taking away property rights without a hearing *is* an affront to the rule of law; and doing so by changing the existing legal rules of ownership is expropriation – which is another way of saying that existing legal rights are retrospectively overridden.

So there are two (linked) infringements of the rule of law that you are contemplating when returning the Marbles: retrospective legislation *and* doing something nasty to someone without a proper hearing. And, of course, a hearing can only really be proper when you've framed – in advance – what you are arguing about.[63]

Even if you are going to deprive X of their rights retrospectively, you've got to articulate the (retrospective) basis on which you're doing that.

So – on what basis are you going to deprive X of their property rights? Are you going to give X compensation? And if you are, how much is that going to be? I'm not sure what the going rate for the Marbles is …

I'm not even going to go into the importance of stable property rights for ongoing economic prosperity![64]

[7] Heritage: Hmmm … I think there is some sleight of hand going on here. The point is that X doesn't own the Marbles – the British Museum does.

[8] Law: So you're saying that a body that is preserving an object for the nation should be treated *less well* than selfish old X? That can't be right! Even if the British Museum isn't a private body with public functions, why should a public body that can hold private property be treated any differently from a private body holding private property? Tell me that!

[9] Heritage: Well, don't you think that public bodies ought to be held to a higher standard? And do the right thing? Look at the Holocaust (Return of Cultural Objects) Act 2009.[65] That

[62] Art 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

This protection is a part of English law as a result of the Human Rights Act 1998. To be clear, Law is neither saying that this right is absolute (it clearly is not) nor that it forms part of the rule of law (which is consistent with the definition I have articulated). However, the rule of law does require existing rights to be regarded and only abrogated under specific conditions.

[63] On retrospectivity, see Bingham (n 48) ch 3 (which ranges rather more widely than simply retrospectivity, but includes it). This chapter also deals with the broader, but no less important, point concerning the proper framing of laws, so that those subject to them know what is expected of them. On the right to a fair hearing, see Bingham (n 48) ch 8.

[64] Although Law does not go into detail, this is a reference to Hernando de Soto's work: H De Soto, *The Mystery of Capital*, (Cambridge, Black Swan, 2000). De Soto's thesis is that one needs respect for property rights in order to build wealth for everyone. By way of example, if a bank considers that it will not safely be able to secure its loan over a borrower's property, it will likely not lend at all, depriving the borrower of immediate capital necessary to develop their business.

[65] This Act establishes a spoliation advisory panel (s 3) which can help resolve claims in respect of cultural objects looted during the Nazi era (1933–45) (s 2). Although 'advisory', provided the Secretary of State approves the panel's advice, the museum in question (which includes the British Museum) will return the object in question, and the panel will consider not merely questions of law, but also moral values. That is important, because one of the hallmarks of the Nazi regime was the fact that it did awful things under the cloak of legality. In short, the rule of law (in the Raz sense) *was not very much disregarded*. Bad things were written into horribly effective law. It would do no credit to our society to have arguments about the validity of horrible laws debated in our courts in an effort to resist the return of a looted artefact. But, equally significantly, the binding nature of the regime does not extent to private persons. As to this regime generally, see Carruthers (n 6) paras 5.35ff.

obliges public bodies to look at the moral case for the return of looted property, not the legal case you are advocating.

[10] Law: I think you are making my point for me. The 2009 Act and the advisory body it establishes is an exception to the norm, and one can see why. Let me give you four reasons.

First, the return of such objects ***is*** morally imperative,[66] because of the awfulness of the Nazi regime.

Secondly, the events are in the relatively recent past, so one can identify the persons who have been wronged or their immediate descendants/successors in title, and so right an *individual* wrong.

Thirdly, the chain of title by way of which the museums may have got such objects may be such that no right-thinking person would want to rely on it; and no person not sharing this thinking ought not to be entitled to rely on this 'legal' chain of title.[67]

Fourthly, this is a case where we would be prepared to treat like cases alike. In short, every case falling within defined parameters would be treated similarly.

And that brings me back, in a different way, to a key question here. Supposing I agree that public bodies are different from private bodies: is whatever principle that you are framing for the Marbles one you are prepared to apply generally, to like cases? Or is your position on the Marbles that they are unique – and, if so, why is that?[68]

[11] Heritage: Why does that matter? I'm not interested in anything but the return of the Marbles! Everything else can stay where presently located in England.

[12] Law: How can that be right? You haven't – yet – framed the justification for the return of the Marbles, but (basically) it involves the return of objects of cultural significance to their 'true origin' by whoever now holds that object (even if there has been a subsequent transfer or transfers after the original acquisition), when the original acquisition was somehow 'tainted'.

If I've got that right, then surely you've got to treat all similar cases in the same way? You can't discriminate between similarly placed claimants, and you can't – without being arbitrary – impose the outcome on a single special case.

Let's take it as a fact that most museums – including those in the UK – obtained their collections from private collectors, who gifted them, or obtained them in purchase from what appeared to be respectable third parties.[69] I suspect that

[66] Although even here not everyone agrees. See N O'Donnell, ***A Tragic Fate***, (Chicago, Ankerwycke, 2017) on the private law battles regarding Nazi-looted art. His book begins with this example (at ix):

> ***Rue Saint-Honoré, apres-midi, effet de pluie (Rue St Honoré, Afternoon, Rain Effect)*** was painted by Camille Pissarro in 1892.
>
> It shows the new Paris of Georges-Eugène Haussmann's design, with a sharp angular perspective rushing to the top left. The soft focus and muted colours mirror the subject: the wide boulevards on a rainy day. Carriages and pedestrians tread the cobblestones amidst leafless trees. It is a depicition of an ordinary day that would normally merit no commemoration. In this way, Pissarro's technique also reflects the history of the painting since World War II. On the surface, the dispute is similar to many others, but digging deeper one finds a multi-layered puzzle that embodies the competing narratives often at play in restitution cases: persecution, obfuscation, the murky environment of the art market after the war, and the basic tension between legal systems and those who bear the burden of resolving the competing claims. The painting once belonged to Fritz and Lilly Cassirer, members of a family that achieved monetary success in electrical component manufacturing and later in the collection and sale of art. The Cassirers were second-generation Jews, integrated members of the Germany of which they were citizens and supporters. They assembled a collection including numerous great works of Western art. However, the Pissarro is no longer in their collection. Lilly Cassirer was targeted by a Nazi opportunist, and she sold the painting for a fraction of its value before escaping her home country. After a series of sales and donations, the painting hangs today in the Thyssen-Bornemisza Museum in Madrid, a state-run institution that exhibits a world-class collection.

Go to the Museum's website, and one can find a note describing the state of play of proceedings in the United States regarding the ownership of this picture, where the Museum expresses confidence that the position of the 'Fundacion' as the legitimate owner will in due course be affirmed: www.museothyssen.org/ sites/default/files document/2022-04/Nota_Pissarro_22.04.22_ING.pdf (accessed 4 July 2022).[67] The Nazi regime was and is famous for doing awful things lawfully, and a right-thinking society might not even want to sully itself considering the technical validity of immoral laws.

[68] The importance of general propositions of law being made legislatively and (in the specific case) then being applied by a court underlies most of the rule-of-law doctrine I am considering. See, generally, Bingham (n 48).

[69] Jenkins (n 17) ch 1 – but the whole of part I of the book pays reading on this point, which includes discussion of looted property.

many of these were acquired in 'tainted' circum- stances. Are you going to reverse all of these dealings, and strip our museums bare?[70]

[13] Heritage: Well, I think – and most people in this country think – the Marbles should go back. Are you really saying that is wrong?

[14] Law: No, I'm not. But I do think you need to understand the price you are paying – or the price you are asking other people to pay. Basically:

(1) If this was a private person, you would be expropriating them (without compensation) for a reason that you have not precisely framed. Inevitably that involves a degree of *retrospectivity.*

(2) You consider that a public body should be in a different position, and I am sure that a case could be made out for that. But you need to articulate the basis upon which something set up for the public good should now be lost. In other words, the principle on which you are operating by repurposing public property needs to be stated as a *general precept.*

(3) You need to be willing – or explain why that is unnecessary – *to apply that general precept to like cases.*

So, I'm not even saying there should be compensation for the loss of the Marbles – although that would be a point to discuss, it doesn't arise out of (my formulation of) the rule of law. What I am saying is that what you are proposing looks pretty arbitrary to me – and the only way to overcome that, is to ensure proper (by which I think I mean voluntary) consent (informed by the appropriate values).

I know that begs an awful lot of questions…

V. SYNTHESIS

A. The Starting Point

Taking the Marbles as an appropriate – if controversial – example of why the debate between Law and Heritage is so difficult, the starting point to understanding the difficulty (without resolving it: that is beyond this paper) is to recognize that: (i) there is no rule of law mandating the return of the Marbles (ie no right to insist on their return); but that (ii) there is no absolute bar to a law, mandating their return, from being enacted. In a different state, with entrenched constitutional rights, there might be such a bar, but not in this jurisdiction.[71] At most, in the United Kingdom, one could say that such a law might infringe the ECHR (ie the right to property, described above) but – to be clear – I do not regard that right as an element of the rule of law, and I will proceed on the basis (as I think must be right) that it could be overridden. Since this chapter is interested in the interplay between the demands of morality (in the shape of the moral desirability to make cultural restitution) and the moral quality of the rule of law, I am going to take the ECHR out of the equation.

B. The Value of the Rule of Law

I have been speaking a great deal about the intrinsic *moral* value of the rule of law, and do not propose to say more than has already been said. The rule of law's great virtue embraces Raz's point that law is a tool which, in order to be effective, must have certain attributes. Like most commentators, I consider that the rule of law goes well beyond this, to embrace the sort of hard-edged procedural due process enunciated by Justice Jackson. Almost certainly, this is also too limited a formulation, and I suspect that the rule of law goes beyond even this. The problem with wider formulations is that the essence of the value of the rule of law merges into other (also extremely important) values, resulting in confusion, and not analytical clarity. As Professor Raz puts it:

> If the rule of law is the rule of the good law, then to explain its nature is to propound a complete social philosophy. But if so, the term lacks any useful function.[72]

Lord Bingham agreed with this, but considered the effort worth the while, even at the price of controversy and disagreement:

> [T]his is a difficult area since there is no universal consensus on the rights and freedoms which are fundamental, even among civilised nations. In some developing countries a higher premium is put on economic growth than on protection of individual rights, and in some Islamic countries little or no protection is given to some rights that are cherished elsewhere. It must be accepted that the outer edges of some fundamental human rights are not clear-cut. But within a given society there is ordinarily a large measure of agreement on where the lines are to be drawn at any particular time, even though standards change over time, and in the last resort the courts are there to draw them. It is, I think, possible to identify the rights and freedoms which, in the UK and developed western or westernised countries elsewhere, are seen as fundamental, and the rule of law requires that those rights should be protected.[73]

It may be that the time has come to separate out the procedural aspects of the rule of law from its substantive aspects. There is insufficient room even to begin to address this question in this chapter. However, simply for clarity, my principal concern is with the procedural aspects of the rule of law – whatever else the rule of law may embrace – and the very specific virtues that these aspects have.

The point can be made more pragmatically. As I have described, the municipal laws of states have evolved extremely sophisticated rules, including as to the ownership of property.

[70] Robertson (n 35) considers this to be a terrible point, for (I think) two reasons. First, that not as many objects would affected as might be thought (120–21), but secondly because the proposition that museums should show original artefacts to the world, away from their cultural origin, is flawed (8–11). He may well be right on both points, and he makes the argument with verve and force. The point Law is making is that the debate needs to be articulated and set against other (countervailing) values (which also need to be defined).

[71] The United Kingdom famously has 'no constitution'. That is incorrect: the United Kingdom has no ***codified*** constitution, and that is because of our doctrine of parliamentary sovereignty. The will of Parliament, expressed in an Act of Parliament, is supreme and that is in essence inconsistent with a codified constitution, which tends to place itself at the apex with the courts and judges as 'gatekeepers' or protectors

Those rules incorporate due regard for the laws of other states, where there is an 'international' element. we change these laws – even prospectively – at our peril. As Hernando de Soto has made clear,[74] one of the key factors in enabling economic development is the stability and predictability of property rights. If I am going to invest in a given state or advance money on a security in a given state, I am going to want to be assured that the rules of the game are not going to change, and that if my investment fails, it will not be because the rules that informed my expectations and judgement *at the time of the investment* have changed. This is, of course, a kind of argument against retrospectivity, but in fact underlines just how slippery the question of retrospectivity is. what I am focusing on here is the need for prospective stability, and I am underlining the seriously adverse consequences of not having a stable legal base in which or on which to transact.

Take, for example, entrepreneur A who structures their business on the basis of hiring extremely capable employees in a particular field. Suppose the rules change (either the tax system changes prospectively, rendering A's offers of work less attractive; or the rules for the hiring of foreign nationals change, so that it is harder to hire new workers). Neither of these instances is a retrospective change; but they both go to the viability of A's *established* business, and – if there are frequent such changes – the effect will be to make A and entrepreneurs like A much more cautious in the *future* about investing.

Put in the context of museums, if we want to continue to augment our collections through the gifts of donors or the deployment of public/privately gifted funds in the augmentation of collections, we need to protect past acquisitions, and divest with care. Preserving or not preserving the past has an effect on future conduct, whether we like it or not.

C. The Irrelevance, in this Case at Least, of Public International Law

For the reasons given, this chapter proceeds on the basis that there is no *existing* claim in law mandating the return of the Marbles. The arguments for their return involve not the formulation of an existing rule of law that has hitherto been overlooked or not understood, but the creation of a new rule. There is nothing wrong with this. Indeed, it is entirely right to say that the law in this area has been and is developing, both domestically (eg the Ancient Monuments Protection Act 1882; the Dealing in Cultural Objects (Offences) Act 2003) and internationally (eg the 1970 UNESCO Convention). If the proposition is that the direction of travel of the law in this area is changing, then that is clearly right. If Lord Elgin were to try to do today what he did do in the late 1700s and early 1800s, he would not get away with it, and would prob- ably commit a whole series of legal violations.

But this evolution of legal norms to a different and better goal is, of course, prospective. That is the nature of moral evolution: society begins to understand better that certain values matter more, and the law, ever behind the curve in responding to change, in due course follows.

International law is often deployed as a means of advancing the arguments in favour of developing moral values, and is a useful tool for this purpose. That is because – unlike a municipal legal system, where it is easy to separate what *is* law from what the law *should* be – the 'is' and the 'should' are much less distinguishable on the international plane. For this reason – because the rule of law is essentially concerned

of the constitutions. where the codified constitution is at the apex, someone has to decide what is constitutional and what is not, and that (usually) is the judiciary, which immediately changes the power balance between the three functions of the state that are defined by the separation of powers (ie the legislature, the judiciary and the executive).

[72] Raz (n 49) 211.

[73] Bingham (n 48) 68.

[74] De Soto (n 64).

with the 'is' and its proper application – it is important to stress the fundamental irrelevance of public international in cases such as the present. Although the role of international agencies as actors on the stage of public international law and the increased importance of human rights law have both served to erode the distinction between public international law as the law that regulates relations between nations, and municipal law, which concerns the relationship between state and persons (natural or legal) and between persons *inter se*, that distinction still matters.

The fate of the Marbles depends in the first and last instance on the private law, because the rights of individual persons are engaged, and such persons have no standing on the international stage. Of course, international law may – often does – cause consequential changes to municipal law. But it is trite that the mere entry, by the Government of the United Kingdom, into an international treaty affects no municipal rights at all.

The short point is that international law is not a law higher than private law, but a *different* law regulating different entities. It should not be deployed in what is a question of private law.

D. Aspects of the Rule of Law that are Engaged

The dialogue between Heritage and Law identified a number of facets of the rule of law that are engaged by the case of the Marbles. In particular, these are the need to avoid retrospective laws; the importance of treating like cases alike, and avoiding arbitrariness and discretion; and the importance of individual adjudication, with due process, according to a general rule of law that has already been promulgated.

1. *Retrospection*. I am only going to touch lightly upon this aspect of the rule of law, because I am conscious that a great deal has already been written on the subject, and what I say is going to add little, if anything. Clearly, the creation of a new rule regarding cultural property only assists the repatriation of the Marbles if it is made retrospective.[75] The law frowns upon retrospectivity, but does not preclude it. In fact, I would suggest that the presumption against retrospectivity is a relatively light one, particularly in the case of evolving moral norms. How, one might ask rhetorically, can one right a past wrong without retrospection?

2. *Treating like cases alike*. One of the points that arose out of the dialogue between Heritage and Law was the extent to which there exists a distinction between public bodies (or private bodies exercising public functions) and private bodies *stricto sensu*.[76]

In the latter case, the interests are quite clear: there is a vested property interest. In the former case, there may be higher values in play, as reflected (in this jurisdiction at least) in the spoliation rules that I have described.[77] There may even be a worthwhile distinction to be drawn between the natural person (who was only born and so came on the scene after the events in question) and the legal person that has always been in place. In a sense, this continuous presence dulls still further the objection to retrospectivity. Suppose Corporation X had obtained the Marbles (through the agency of Lord Elgin) and remained in being, and in ownership of the Marbles, to this day? My sense is that this might very well make a difference, although I confess to finding it difficult to articulate that difference.[78]

Interesting though these distinctions are, and important though it might be that they be drawn, these specific questions are nothing to do with the rule of law. These are matters of policy for legislators to consider. The rule of law, I suggest, is not concerned with these policy questions, but with the manner in which they are framed. The rule of law

[75] See the dialogue between Heritage and Law ('Dialogue') at [3]–[4].

[76] See Dialogue at [6]–[9].

[77] See Dialogue at [9].

[78] The point emerges most clearly in D de Jong, *Nazi Billionaires*, (London, William Collins, 2022), which describes the enrichment (during the Nazi era) of various companies, still in being today, and still very wealthy. Of course, on one level, retrospectively expropriating these corporations damages the interests of the shareholders, who may very well have come on the scene later. So it may be that the distinction between natural and legal persons is, ultimately, not a good one. But it is certainly one worth very careful consideration (not undertaken here).

[79] Bingham (n 48) ch 10.

[80] See A Dismore, ***The Parthenon Sculptures: A Legal Perspective***, published online only at www. andrewdismore.org.uk/home/2012/06/25/the-parthenon-sculptures-legal-perspective-by-andrew-dismore/ (accessed 30 September 2023). The "Parthenon Sculptures" are, of course, the Elgin Marbles by another name, and Mr Dismore says this about the general and the specific:

> If a Bill is seen to be very specific and referring only to a particular private interest, for example refer- ring only to the [Parthenon Sculptures] and their repatriation, there is a risk the Bill could be deemed to be hybrid.
>
> A hybrid bill is a public Bill which affects the private interests of a particular person or organisation. It is generally initiated by the Government on behalf of non-Parliamentary bodies such as local authorities and is treated like a private Bill for the beginning of its passage through Parliament. This gives individuals and bodies an opportunity to oppose the bill or seek its amendment before a

does not care, when it comes to cultural heritage, whether the regime for restoration proposed applies differently to public bodies, legal persons or natural persons provided that an arbitrary regime is avoided. The rule of law opposes the arbitrary, where things are done inconsistently, with like cases not treated alike, and different cases not treated appropriately differently, according to general precepts. The passage of legislation involves the articulation of a general norm by the legislature, which norm is then applied, with all due process, by the courts in the specific case.

In the first instance, that involves the framing of general propositions. I do not say that those general propositions need to be 'just' or 'right' or 'in accordance with some higher law'. I am a legal positivist (with perhaps a hint of natural law in the most extreme of cases[79]). So the rule of law says nothing about the *content* of these propositions. But I do say they need to be generally framed, and that what goes for the Marbles ought also to go for, for example, the Benin Bronzes. In this regard, it is interesting to note that our parliamentary processes recognise this. Acts of Parliament ought not, without more, be deployed in the specific case. It is the role of the legislature to frame general propositions (ie laws), which are then applied in the specific case by courts.[80]

So it seems to me that the advocate for the Marbles' return needs to have answers to at least the following questions: (i) How do you define an object of cultural heritage? (ii) In the case of a past acquired object, are there any limits on how far back you go when making restitution? (iii) To whom is restitution to be made, and are there any obligations on the claimant as to public display of the object and the costs of removal? (iv) Does the rule apply to private owners? (v) Is there to be any compensation to the present owner of the object?

3. ***A fair hearing***. This is a flip side to the point just discussed. Lawmakers make the laws, in accordance with established procedures – hopefully reflecting the democratic will of the people electing the legislature.[81] Once general propositions have been made into law, any dispute about their specific application falls to the courts. But the law, articulated as a general proposition, needs to be stated before the specific act of adjudication can take place.[82]

4. ***'Stare decisis'***. 'To stand by things decided' is the foundation of our law of precedent, but here I am referring to matters that have not, quite, been decided, and certainly cannot be regarded as precedent in any legal sense. Instead, I am asking what we are to make of matters that have been debated in the past, and decided, seemingly on a 'once and for all' basis. For instance, in the case of the Marbles, it is quite clear that there was a great deal of debate about the propriety of Lord Elgin's conduct, the lawfulness of his title and the strength of the claims of the country from which the Marbles had been taken.[83] Similarly, in the case of Nazi looting, and Nazi wrongdoing generally, when one reads the history, it is clear that the questions of enrichment and restitution have been dealt with, time and again, as a final resolution sought to be achieved.[84]

Although predictability – and so a respect for precedent – is an important part of the rule of law, the notion of constraining the repeated raising of the same question must, surely, be inimical to the rule of law. The point is that we, as a society, evolve in our values, and the repeated putting of the same question should not be suppressed, but encouraged. Our progression to newer, and hope- fully better, values is not a matter that the rule of law ought to constrain, and is perhaps a good indicator that the rule of law is more important as a rule of process than as a rule of substance.

select committee in either or in both Houses. This procedure is long drawn out and very problematic, so it is important that any Bill cannot be seen as hybrid, so it needs to be as broadly drawn as possible, and certainly not just referring to the [Parthenon Sculptures] alone.

This then creates a political problem: the 'floodgates' argument. One of the main arguments deployed against the [Parthenon Sculptures'] return is that if the [Parthenon Sculptures] are returned, this will feed demands for other cultural objects to be repatriated too. The most obvious case is that of the Benin Bronzes, but no doubt we can all think of others.

[81] Again, although a trite part of the thinking of Western democracies, this is not (as I see it) a part of the rule of law.

[82] That gives rise to another interesting question – also not addressed here – as to the role of the common law and its interplay with the rule of law. Long gone are the days when the theory was that judges did no more than articulate or find law already laid down. Judges do make law, but they do so without framing general propositions and retrospectively. See eg J Stapleton, ***Three Essays on Torts***, (Oxford, Oxford University Press, 2021) 4ff.

[83] I refer to the debates that lead to the Elgin Marbles Act 1816.

[84] See, generally, de Jong (n 78). The question really, boils down to 'was what was done in the past enough? Should a prior settlement, reached after due consideration, be revised after the event?'.

VI. THE 'DARK SIDE' OF THE RULE OF LAW

A. The Problem of Inertia

I have mentioned the 'dark side' of the rule of law already, but it is now possible to be a little clearer about the nature of this 'darkness'. It is, obviously, a provocative term, and not one that I really mean. The rule of law is an ideal – of uncertain ambit, admittedly – but which, at least on its procedural side, contains real merit.

But the concomitant of a system compliant with the rule of law is a system that inevitably contains within it a high degree of inertia or preservation of the status quo. This is the perhaps inevitable consequence of the virtues or precepts of the rule of law. General laws must be passed, and they must be applied in impartial courts, where reasons must be given. Like cases must be treated alike. There is a view that discretion is a 'bad' thing. All of this has an inhibitory effect on change.

This may explain some of the bitterness and violence of words between – to continue using the Marbles as an example – advocates of return and advocates of retention. I am sure that in many cases, battle is joined on the simple issue of 'return' or 'retention', and here the issues, although not simple, are at least qualitatively the same. One side will value cultural heritage over retention and display; and the other side will have the opposite view. But the debate, at least, is one of equivalent arguments – 'apples and apples', if you like, not 'apples and oranges'.

The values of the rule of law have nothing to do with this debate: they lie on a different plane and engage different interests. But those values nevertheless frame the debate, and should at least give it structure. It is, or at least ought to be, quite possible for a person entirely neutral on the question of return – or even for someone in principle favouring return on the basis that they wish that the expropriation had never taken place[85] – to be against return for no other reason than because of the rule of law. The rule of law – because of the inertia it creates – results in opposition to an otherwise sound moral proposal created not out any disagreement with the moral value that is under discussion, but by reason of the manner in which the change by way of which the moral value is to be brought about is being effected.

Put another way, a one-line Act of Parliament saying 'The British Museum shall facilitate the return to Greece of the artifacts known by it as the Elgin Marbles' contains within it sufficient problems – viewed purely from the rule of law point of view – as to at least make the lawyer subscribing to the rule of law uneasy. I am not saying that such a law would be unlawful, and that this could not be done.[86] what I *am* saying

is that I would very much hope that there would be debate not merely about the substantive question of return (about which I have nothing to say in this chapter at all) but also the process by which such a rule is put into law and thereafter applied and (as appropriate) challenged by any interested person affected.

Interestingly, it is precisely this unease about process – and so this inertia – that provokes the most heated debate, because the side that does not get what it wants substantively

[85] I have in mind a kind of wishful thinker who ducks the questions the rule of law gives rise to by wishing the problem had never occurred – wishing, in this case, Lord Elgin away.

[86] We are so far away from the notion that an Act of Parliament can be set aside for breach of some fundamental rule that I am not going to even discuss this. But this is where 'natural law' fits – for me – as a legal positivist.

[87] The means to resolving competing values in the public arena are almost always laid down in advance in general terms, obliging the court to determine – according to the applicable test – the outcome. Simply wanting something to happen – even if there is good reason – will rarely be enough. Take, for example, the removal of the memorial of Tobias Rustat from the chapel in Jesus College, Cambridge. It will be recalled that Mr Rustat was said to have such involvement in the slave trade that the removal of the memorial was sought by a number of persons. In *Re The Rustat Memorial* [2022] ECC Ely 2, the Deputy Chancellor (David Hodge, QC) ruled that the memorial could not be removed. In reaching this conclusion, he was – to the doubtless dismay of those petitioning – simply applying the rule of law. As he noted at [5]:

> Those coming to this petition with no knowledge of planning and ecclesiastical law may wonder why the College itself cannot simply implement the decision its governing body has already made and remove the memorial to a safe, secular space elsewhere within the College itself. The answer is that the chapel is a Grade I listed building, which means that the chapel is of exceptional interest in a national context. That listing extends to any object or structure fixed to the building, and that includes the Rustat memorial. If the Rustat memorial were within a secular space, its removal would require listed building consent from the local authority or the Secretary of State. Because the chapel is included in the list of places maintained by

ends up saying 'I don't care about the law'. The problem is that that is – I think – a profoundly immoral response in its own right, and a threat to the rule of law. we should always know the price we are paying for end we want to achieve, before we pay it. So, it seems to me that the advocate of the return of cultural property needs to recognise two things: first, that it is important to make the case for the return of such property – the positive case, as it were. But secondly, to recognise, respect and seek to minimise the damage done to the values of the rule of law, even if those values inhibit what is sought, for good reason, to be achieved.

As I have stressed, the rule of law is neither an absolute value nor is it a rule of law. It is perfectly possible, lawfully, to achieve the return of the Marbles, but unless and until the competing values for and against this outcome are untangled, there will be debate that creates more heat than light.[87]

> the Church Buildings Council …, it is subject to the faculty jurisdiction of the diocese of Ely, exercised through its consistory court. It therefore benefits from the 'ecclesiastical exemption' from the need for listed building consent This means that a faculty (or permission) from the consistory court of the diocese takes the place of listed building consent. But it is important to understand that it only does so because the state regards the faculty jurisdiction as equivalent to secular listed building consent, in terms of due process, rigour, consultation, openness, transparency and accountability; although this does not mean that the consistory court is required to apply precisely the same approach to listed buildings as is followed in the secular system.
>
> I am not going to unpack the value that Mr Hodge applied, nor seek to approve or defend his conclusion. The point I am making is that Mr Hodge was applying the rule of law, in that he was looking not just to the 'right' outcome in the given case (although that is, clearly, important) but to the 'right' outcome given all of the procedural values inherent in the rule of law, including the law laid down as regards listed building consent. That is not because listed building consent is part of the rule of law: it is because the law laid down needs to be applied in accordance with the rule of law. The danger is that when faced with an apparently righteous claim, the rule of law's inevitably conservative stance runs the danger of sounding like the Little Britain comedic catchphrase 'Computer says no'. Of course, when it is the state seeking to enforce unjust laws (as in Nazi Germany or apartheid South Africa), 'Computer says no' becomes rather important as a bulwark. See, further, Dyzenhaus (n 51).

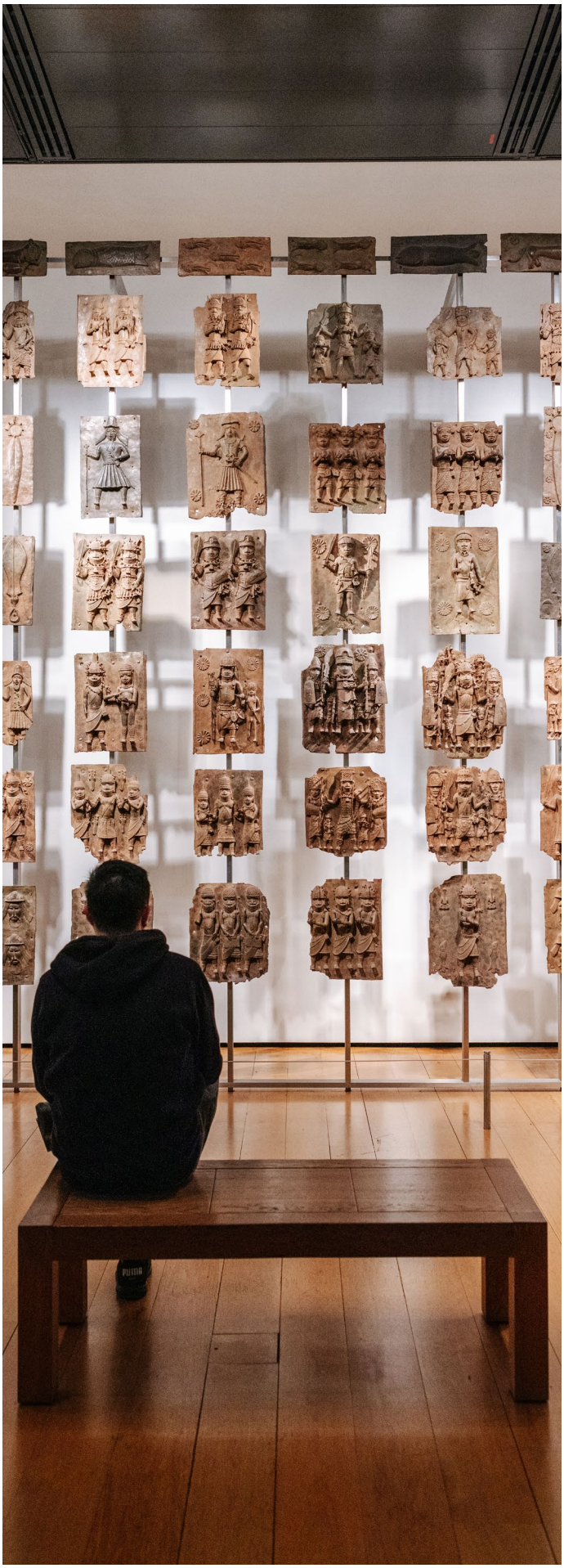
B. Moving Forward

The nature of the debate that I have been considering sheds valuable light on aspects of the rule of law that have either not sufficiently been articulated or else have been hidden by the more prominent features of the rule of law that are more often discussed. There are three aspects that I want to touch upon, less as a conclusion, and more an invitation for further consideration and debate in addition to this principal point:

1. *The danger of inertia*. The inertia inherent within the rule of law is undoubtedly a problem. The law needs to be appropriately responsive to changing values in society. This is not – at any level – a question for the judiciary. It is a question for our legislators and politicians. One can see – in the debates that surrounded the Marbles themselves – how Parliament acted as a sounding board for a debate that continues to this day; and polemicists such as Geoffrey Robertson perform a critical function in informing and stirring such debate. But one does wonder, in this age of the digital platform and information exchange, whether more cannot be done to ensure that the competing values that our society holds continue to be reflected in the laws that the courts enforce. I suspect that this is not, actually, a facet of the rule of law: but it is a critical determinant of the extent to which the rule of law actually serves its true purpose.[88] If the laws do not appropriately keep up with society, then the rule of law serves as the protector of interests that have passed their day, and a mismatch arises between substantive content and enforcement.

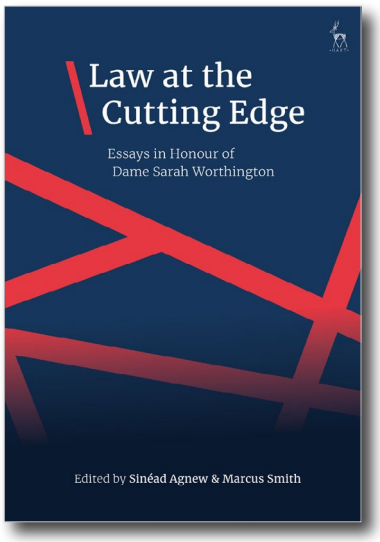
2. *Does discretion have too much of a bad name?* In a society as complex as ours, where legislative time (and I include in relation to delegated legislation) is so limited, I wonder whether the dangers of overregulation and the virtues of discretion are not being overlooked. There are two issues here: first, the extent to which discretion is actually a 'bad thing'. And secondly, if discretion is a 'bad thing', how one can constrain the excesses of overregulation.

3. *To what extent is there a proper correlation between law and its enforcement?* Professor Raz identifies a number of principles that can be derived from his – admittedly very narrow – conception of the rule of law.[89] One attribute missing from his list is the (to my mind) important attribute that law needs to be effective in the sense that the rights it confers and the obligations it imposes are easily capable of enforcement, so that there is a correlation between, let us say, entitlement (as in a state benefit) or infringed right (as in a breach of contract or tort) and the receipt of that entitlement or the effective enforcement of the infringed right. It may be that this is less an attribute of the rule of law and more a measure of how far a given society is compliant with the ideal that is the rule of law. ■



[88] Take, for instance, the damage inflicted on the Colston statue in Bristol. Leaving entirely on one side the lawfulness of such conduct (a matter that certainly troubled the courts), it is on any view undesirable for a large and heavy statue to be forcibly taken down in an unplanned way, by unskilled actors. The risk of injury is too great, and perils of self-help are obvious. what is troubling about the case is less whether a criminal offence had been committed, but more why – over the years – articulated concerns about what the statue stood for were sidelined and disregarded.

[89] Raz (n 49) 214ff.



Law at the Cutting Edge

20% discount with this flyer

Essays in Honour of Dame Sarah Worthington, DBE, KC (Hon), FBA

Edited by Sinéad Agnew and Sir Marcus Smith

Apr 2024 | 320pp | Hbk | 9781509965151 | RRP: ~~£100~~
20% DISCOUNT PRICE: £80 (+ POSTAGE)

Celebrating the immense contribution of Dame Professor Worthington to the field of private law, this collection asks difficult questions and provides innovative and insightful solutions.

Defining the subject broadly, experts from the world of the judiciary and the academy look at challenges in the field of restitution, company law, money and securities and contract law. The breadth of expertise, willingness to engage in difficult problems, and thought-provoking/original contributions of the essays in the collection, perfectly mirror the immeasurable impact of Dame Professor Worthington on the field of private law.

Sinéad Agnew *is Catherine Seville Lecturer in Law and Fellow of Newnham College at Cambridge University, UK.*
Sir Marcus Smith *is the President of the Competition Appeal Tribunal, UK.*

TO ORDER THIS TITLE GO TO WWW.BLOOMSBURY.COM
To receive your 20% discount use code **GLR AT5** at the checkout
Why not join our mailing list? Be the first to hear about new books in your areas of interest as well as offers and exclusive discounts. Visit **https://www.bloomsbury.com/uk/newsletters/law/** to sign up.
@hartpublishing HartPublishing2 Hart Publishing
HART

Chapter

3

Insolvency and Economic Disaster

SIR WILLIAM TROWER, MARK PHILLIPS KC AND MADELEINE JONES

I. INTRODUCTION

Insolvency law has developed to deal with crises – at least in the sense that insolvency is a crisis in the life of a company or individual. As befits a form of crisis management, in the extraordinary circumstances of an insolvency, extraordinary rules apply: property rights, contractual rights, even (to some extent) human rights are suspended and varied. Certain insolvencies are not only a crisis for the debtor and its creditors, but may give rise to aftershocks that ripple far outside this immediate context. A bank failure is the paradigm of such a crisis. The banking system depends on credit, both in the technical meaning of moneylending and in the more fundamental sense of trust. when a bank defaults on a liability, financiers fear that the sudden loss of liquidity will cause knock-on defaults in other entities (a failure of the system of credit in the technical sense); they also fear that consumers and market players alike will lose confidence – credit – in the bank (or perhaps in the banking sector in general) and withdraw funds *en masse* out of fear there will be insufficient funds for future withdrawals, thereby precipitating the catastrophe they fear.[1]

This chapter examines the development of English company, insolvency and banking law in the context of past financial and economic crises. We suggest that, whereas in the nineteenth and into the twentieth century such crises were treated as commercial issues to be solved in the marketplace rather than the courts, over time the law has developed principles and tools to handle insolvencies and economic disasters.

II. COMPANY LAW BEFORE THE NINETEENTH CENTURY[2]

Although there are earlier antecedents, modern company law has its origins in the seventeenth century. From this period, merchant adventurers engaged in overseas trade formed companies under royal charter (the East India Company is the best-known example). By the end of the seventeenth century, companies in something closer to their modern sense had emerged: joint stock companies, operating a joint account, sometimes with transferable shares, established and governed by statutory or royal charter, and enjoying legal personality at least in the sense that they might sue and be sued.

The Bank of England was one such company, incorporated by statute in 1694[3] as a lender to the government, to finance the Nine Years war against France. On its incorporation it was not a state body but a deposit-taking commercial enterprise. However, it was able to leverage its closeness to government into a series of statutory privileges which gave it a superior position in the English financial system.

Before the nineteenth century there was no developed company law to govern these new legal entities. The courts applied partnership law as modified by the provisions of the particular company's charter. Although joint stock companies had legal personality, their charters tended to empower them to make calls on their members. Such calls may have been possible even in the absence of an express power.[4] As members' liability was unlimited, there was no pressing need for a corporate insolvency regime to wind up companies' affairs.

III. EARLY SPECULATION IN COMPANIES

At the start of the eighteenth century the company appeared a novel and exciting prospect – a model under which ordinary people could share in the returns of overseas trade or burgeoning domestic industries by an investment as large or modest as their means allowed. Companies advertised investment opportunities in handbills and as the country was swept up in the excitement, investment schemes became more and more ambitious, until one enterprise, the South Sea Company,[5] proposed to buy up the country's entire national debt in the hope of raising vast sums to expand its activities – principally slave trading in South America. In fact, the South Sea Company's trade was nowhere near developed enough to produce a return on the vast sums that flowed into its accounts. It was reduced to using investors' funds to bribe officials to allow it to acquire national debt, which it purchased at unfavourable prices compared to its competitor, the Bank of England. In 1720 the South Sea Company's share price collapsed when these shortcomings became apparent.[6] Many of its investors were ruined and the magnitude of the failure combined with the involvement of public funds caused a national scandal.

[1] Recent examples of the impact of loss of confidence in banks include Silicon Valley Bank and Credit Suisse. In the age of smartphones one concern is that a run on a bank can now occur almost instantly. It does not depend on customers queuing to recover their funds.

[2] For the development of company law, see LCB Gower, ***Principles of Modern Company Law***, 6th edn (London, Sweet & Maxwell, 1997), chs 2 and 3 (the historical material is omitted from later editions).

[3] The Bank of England Act 1694.

[4] Direct liability for contributories, independent of any provision in the corporate charter, was upheld in the seventeenth century: *Edmunds v Brown & Tilliard* (1667) 1 Lev 237, 83 ER 385 and *Salmon v Hamborough Co* (1671) 1 Ch Cas 204, 22 ER 763. By the nineteenth century, deeds of settlement included express provisions for liability of members where this was intended.

[5] Incorporated by Act of Parliament in 1711.

[6] On the South Sea Bubble, see eg H Paul *The South Sea Bubble: An Economic History of its Origins and Consequences* (Abingdon, Routledge, 2013) and w Quinn and JD Turner, *Boom and Bust: A Global History of Financial Bubbles* (Cambridge, Cambridge University Press, 2020).

IV. THE FALLOUT FROM THE SOUTH SEA BUBBLE

The South Sea Bubble was the first major financial crisis in England. It arose due to rising demand for investment opportunities. This demand, and the fact that the South Sea Company's collapse discredited stocks and shares in investors' eyes, impacted the development of company law and the finance industry over the rest of the eighteenth century. The South Sea Bubble and the associated overhyping and subsequent collapse of various other dubious share offerings in the same period[7] became indelibly associated with the notion of a company itself. It was clear that investors needed protection that they did not then have.

In response to the crisis, Parliament passed the Bubble Act 1720.[8] This rambling piece of legislation, which Maitland said 'seems to scream at us from the Statute Book',[9] banned unincorporated companies (formed otherwise than by Royal Charter or Private Act of Parliament), though specifying that this should do nothing 'to prohibit or restrain the carrying on of any home or foreign trade in partnership in such manner as hath hitherto usually and may be lawfully done according to the Laws of this Realm now in force'.[10] This proved an unhelpful provision, given the contemporary lack of legal clarity as to the difference between a partnership and an unincorporated company. The Bubble Act distorted the development of the company as a vehicle for business for a hundred years. The Act attempted to deal with the perceived cause of the financial disaster but did little to assist in developing structures responsive to the growing demand for investment opportunities.

The South Sea Bubble also bolstered the Bank of England's position by warning officials off from placing government funds in private investment vehicles, securing the Bank's place as a quasi-official body tasked with keeping and lending government money. Amidst the furore surrounding share investment, even before the final crash, the Bank was appointed by the government to manage its debts.[11] Over the next hundred years, its bills became the dominant form of currency and it emerged as the central bank in England and Wales, with which other banks placed their surplus funds and from whom they took loans.

By the nineteenth century, England had a strong central bank, but a financial market populated by a mixture of partnerships, unincorporated associations (held together by partnership agreements and/or trust deeds) and companies established by Act of Parliament and Royal Charter, with no coherent legal regime and no certainty as to what would happen if these entities failed.

V. BANKRUPTCY UP TO THE START OF THE NINETEENTH CENTURY

Corporate insolvency developed initially in the nineteenth century by reference to bankruptcy law. Bankruptcy was first formally regulated by the Statute of Bankrupts 1542 – 'An Acte against suche persones as doo make Bankrupte'. Its preamble paints a vivid picture of the main preoccupation of the draftsman (absconding debtors) but also introduces the legal concept of ***pari passu*** distribution, which remains one of the principles fundamental to insolvency law to this day.[12]

A 1571 Act[13] limited the bankruptcy procedure to 'any Merchant or other Person, using or exercising the Trade of Merchandise by way of Bargaining, Exchange, Recharge, Bartry, Chevisance, or otherwise in Gross or by Retail, … or seeking his or her Trade by buying or selling'.[14] Until the nineteenth century, debts incurred otherwise did not fall within the bankruptcy regime.[15] This restriction gave rise to a body of case law on whether various moneymaking activities counted as 'trades' so that attendant debts fell within the bankruptcy process upon an 'act of bankruptcy' (another concept introduced by this Act, which persisted until the Insolvency Act 1985). This made the bankruptcy process particularly arbitrary: if a man lost money through 'trade' he could surrender his estate to creditors and make a fresh start, his debts discharged. If he lost it through some other endeavour, he could lose everything to one creditor by enforcement, and not be free of the others, whose only recompense would be the vindictive satisfaction (to modern eyes) of having him consigned to debtor's prison.

The bankruptcy regime was only tangentially relevant to financial services at the beginning of the nineteenth century, in that if an entity failed, creditors might seek to make the individuals behind it liable. Even in the case of companies this was generally possible due to the near ubiquity of terms in companies' charters providing for members' liability.

Discharge for bankrupts was introduced by the Bankruptcy Act 1705.[16] This Act incentivised cooperation by allowing bankrupts a 5 percent share of their estate (capped at £200) where realisations exceeded 8 shillings. Discharge encouraged enterprise by enabling tradesmen to continue in business free from historic trading debt. On one view the 1705 Act reflected a crude and embryonic form of the 'rescue culture'.

[7] See J Hoppit, *A Land of Liberty? England 1689–1727* (Oxford, Oxford University Press, 2000).

[8] This ill-thought-out legislation was passed before the Bubble reached its peak to stop capital being attracted away from the South Sea Company and was apparently supported by the South Sea Company's directors: see R Harris, '*The Bubble Act: Its Passage and its Effects on Business Organization*' (1994) 54(3) Journal of Economic History.

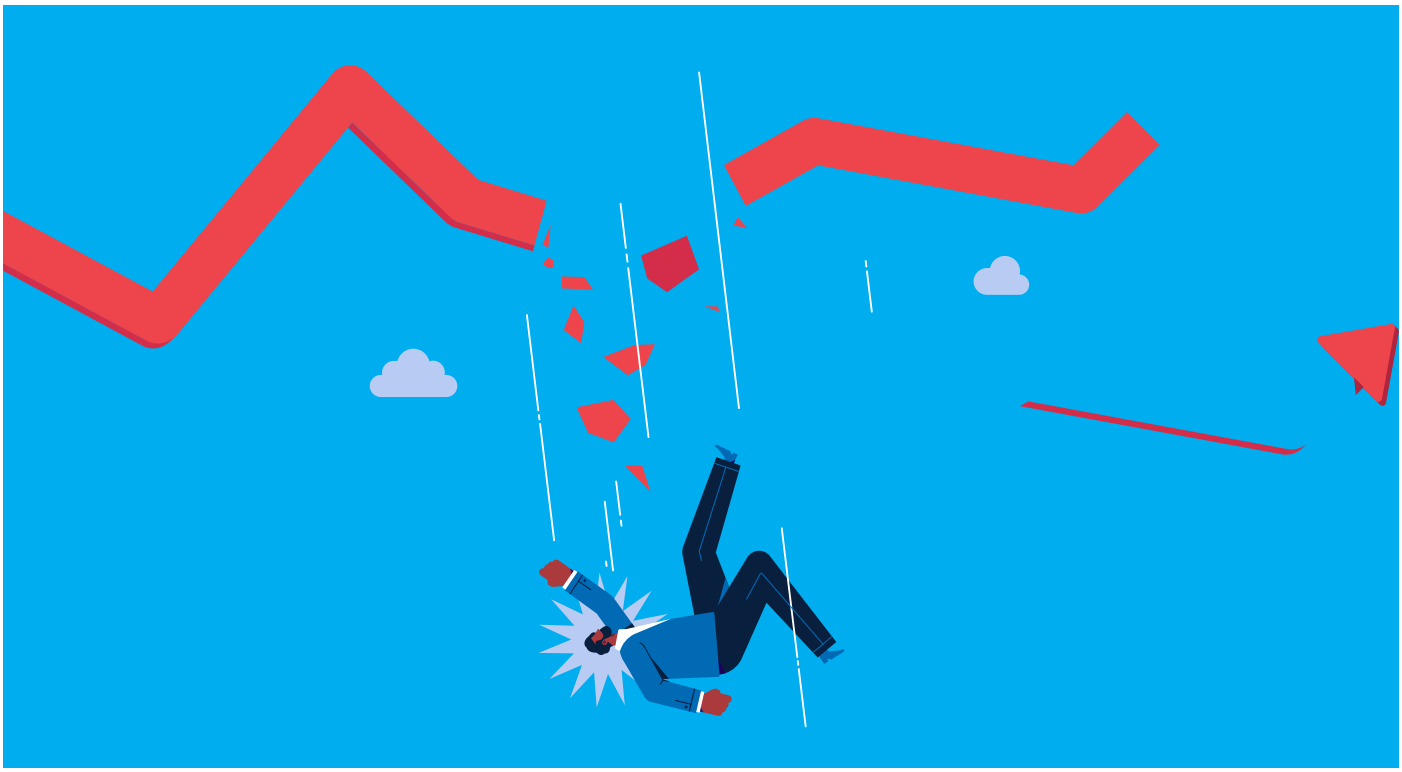
[9] FW Maitland, 'Trust and Corporation' in *The Collected Papers of Frederic William Maitland*, vol 3 (Cambridge, Cambridge University Press, 2013) 390.

[10] s 25.

[11] Under the National Debt Act 1715 (1 Geo I Stat 2, c19).

[12] The Preamble concludes that the property of the bankrupt (referred to as the 'Offender') should be granted to pay his creditors, 'That is to say, to every of the said Creditors, a Portion Rate and Rate like, according to the Quantity of their Debts.'

[13] 13 Eliz I, c 7.



VI. MODERNISATION OF THE LAW IN THE NINETEENTH CENTURY

Over the eighteenth century, neither company nor bankruptcy law kept pace with the increasing sophistication of the business community and money markets. The concept of incorporation was still relatively undeveloped (companies could still only be incorporated by Royal Charter or by Private Act of Parliament); incorporation with limited liability was effectively unavailable. However, there was an increasing appetite for risk and demand for different forms of corporate trading vehicle. The Bubble Act, outlawing unincorporated companies save as allowed by partnership law, was in force but widely disregarded. Common law had developed such that in practice unincorporated companies were permissible (as a form of partnership) so long as their shares were not freely transferrable, though participating tradesmen remained personally liable for the debts of the unincorporated entity, and subject to bankruptcy law, in the event of failure.

In the second quarter of the nineteenth century a flurry of legislation dramatically modernised English corporate, insolvency and banking law. The Bankruptcy Act 1831[17] brought administration of a bankrupt's estate under the control of the courts rather than the creditors' assignees, and established a specialist Bankruptcy Court in London. This would later result in trustees, liquidators and other officeholders being officers of the court.

The money markets were by this time populated by dozens of banking 'companies' – unregistered and operating (so far as legal analysis of their activity was undertaken) under partnership law.[18] The Country Bankers Act 1826[19] and the Bank of England Act 1833[20] provided that banking companies could sue or be sued in the names of their officers and required them to register certain particulars. The Duties of Offices Act 1825[21] repealed the Bubble Act and enabled corporations to declare the extent of members' liability in their charters. In 1845 the courts confirmed that companies with shares freely transferable at the will of the holder were legal at common law, even if unincorporated.[22] In 1834, the Trading Companies Act empowered the crown to confer the privileges of incorporation by letters patent without granting a charter.

The Chartered Companies Act of 1837 provided that members' personal liability might be limited by letters patent and therefore incentivised enforcement against an insolvent company. This in turn necessitated a winding-up regime – instituted for joint stock companies seven years later. The Joint Stock Companies Act 1844[23] provided for the registration (by the Registrar of Companies, a newly created post) of all new associations with more than twenty-five members or shares transferable without members' consent. For the first time, incorporation was available by registration, as opposed to by Private Act, charter or letters patent. Existing unincorporated companies could obtain the benefits of incorporation by registration. Under the first Companies winding Up Act 1844[24]

[14] It also introduced commissioners for the administration of bankrupts, replacing members of the judiciary.

[15] M Lester, *Victorian Insolvency* (Oxford, Clarendon Press, 1995) 15–17, 88–89.

[16] 4 Anne c 17.

[17] 1 & 2 Will 4, c 56.

[18] Their numbers had been dramatically reduced by a crash in December 1825 when forty-three country banks failed on the collapse of Pole, Thornton & Co, with eighty more failing during the early months of 1826. See B Hilton, *A Mad, Bad, Dangerous People? England 1783–1846* (Oxford, Oxford University Press, 2006) 300ff.

[19] 7 Geo 4, c 46.

[20] 3 & 4 Wm 4, c 98.

[21] 6 Geo 4, c 9.

[22] *Harrison v Heathorn* (1843) 6 Man & G 81, 134 ER 817.

[23] 7 & 8 Vict c 110.

[24] 7 & 8 Vict c 111.

companies were made subject to bankruptcy law with the proviso that the company's insolvency did not entail the insolvency of its shareholders. Corporate insolvency law was born. The 1844 legislation left members liable for corporate losses (normally by an express provision to this effect in the company's charter). This changed with the enactment of the Limited Liability Act of 1855,[25] subsequently repealed and incorporated into the Joint Stock Companies Act 1856,[26] which finally introduced the defining feature of modern company law and business practice – limited liability – and for the first time introduced detailed provisions on winding up. It also included several safeguards to protect creditors. The Companies Act 1862 removed many of these, although not the mandatory inclusion of the word 'Limited' in the company's name, which continues to this day.

As for banks, the Joint Stock Banks Act 1844[27] provided for registration of all joint enterprises engaged in banking with more than six members and introduced requirements for minimum nominal and paid-up capital. Limited liability for banks (like insurers, initially excluded from the scope of the 1855 and 1856 Acts) was introduced by the Joint Stock Banks Act 1858,[28] three years after it had been introduced for companies. By the mid-nineteenth century, a legal framework for incorporation, insolvency and the financial sector was in place. Companies, including banks, could incorporate with limited liability and be subject to the newly established corporate insolvency regime. The model was not universally adopted, however, as the collapse of City of Glasgow Bank in 1878 bears witness. This caused the bankruptcy of several hundred of its contributories and had a major adverse impact on the Scottish economy.[29] It was the last nail in the coffin of banks with unlimited liability, at least those with shares held by members of the public. However, there have remained certain tax and other advantages for banks to trade with unlimited liability and some have continued to do so with protection higher up the corporate chain (the English Lehman entity, Lehman

[25] 18 & 19 Vict c 133.

[26] 19 & 20 Vict c 47.

[27] 7 & 8 Vict c 113.

[28] 21 & 22 Vict c 91.

[29] *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317 (HL) is the best-known example of the widespread litigation that ensued.

[30] This provision was suspended in 1847, a year of financial crisis precipitated by a major harvest failure in Ireland and England in 1846 and the 'railway mania' which commenced in 1845. See R Dornbusch and JA Frenkel, *'The Gold Standard and the Bank of England in the Crisis of 1847'* in MD Bordo and AJ Schwartz (eds), *A Retrospective on the Classical Gold Standard, 1821–1931* (Chicago, University of Chicago Press, 1984).

[31] In the conclusion (chapter 13) of *Lombard Street: A Description of the Money Market*, 6th edn (London, HS King, 1875), Walter Bagehot argued against the introduction of a law requiring the Bank to keep a reserve fixed in proportion to its liabilities, on the basis that this would give the Bank's directors insufficient flexibility having regard to the nature of the Bank's liabilities from time to time. In 1891, following the Barings crisis, the Chancellor of the Exchequer argued for more robust reserve requirements, but no legislation followed: see D Kynaston *Till Time's Last Sand: A History of the Bank of England 1694–2013* (London, Bloomsbury,

VII. NINETEENTH-CENTURY BOOMS AND BUSTS

Brothers International (Europe), is one modern example). Also in the mid-nineteenth century came a recognition that the loss of one cog in the City of London's financial machinery could cause a breakdown of the entire engine. The money markets were jittery, with panics in 1825, 1837–39, 1847 and 1857. Each time the Bank of England stepped in to provide liquidity to the market, its role as the custodian of the markets became entrenched. It continued to be a privately owned customer bank, although in recognition of the potential conflict between its roles as central bank and market participant, restraints were placed on its activities. The Bank Charter Act 1844 limited the value of Bank notes in issuance to the value of its gold reserves,[30] but did not prescribe any particular level of reserve; there were no capital or liquidity requirements for any bank until the twentieth century.[31]

The reality of systemic risk was highlighted in 1865 by the failure of Overend, Gurney and Company, a 'discount house', or trader in discounted bills of exchange, the sort of securities trading that is still carried out by investment banks and hedge funds. By 1850, Overend Gurney was larger than the next three bill brokers combined and turning over bills equal to half the national debt each year. In 1856, Overend Gurney changed its investment model by taking long-term as well as short-term positions, tying up its funds in illiquid positions. In 1857, there was a panic when it – and other financial houses – could not honour their obligations. The Bank, as was by this time expected of it, assisted by purchasing distressed lenders' debt-based assets in exchange for Bank notes and deposits. The 'bail-out' gave rise to concern among the Bank's governors that the availability of emergency liquidity disincentivised discount houses from keeping their own reserves. Therefore, in 1858 the Bank restricted brokers' access to its discount window (the framework for providing emergency liquidity).[32] In 1860, a peevish consortium of bill brokers, including Overend Gurney, organised a mass withdrawal of deposits from the Bank apparently to bring home their power over it in protest at these restrictions.[33] The Bank's reserve was about £7.7 million at the time.[34] The Bank won the power struggle with the brokers, who realised that they would indeed need to hold higher levels of (unprofitable) reserves to weather storms without access to the Bank's discount window. when this dawned on Overend Gurney, it redeposited its funds and apologised. It also sought to protect its profits by continuing its expansion into higher-risk investments outside its core business – *inter alia* in railways and foreign plantations.

In 1865, Overend Gurney transferred its business to a new joint stock company with limited liability. It thereby became – unintentionally – a test for the robustness of the corporate model for banks in insolvency. Already at the time of its incorporation, the house was hopelessly mired in difficulty. It had been losing an average £0.5 million per year for five years. It was later established that at the time of the equity fundraising, Overend Gurney had a shortfall of £4–5 million against assets of £20 million.

In 1866, rumours about the company's liabilities came to a head when the Court of Common Pleas ruled that the Mid-Wales Railway Company's acceptance of bills of exchange by the company and others as indorsees was unenforceable.[35] This sparked a run on its deposits as the market correctly surmised that many other of the company's debts would suffer from the same defect. The Bank of England, on inspecting the company's books, refused to intervene: it was hopelessly insolvent. Overend Gurney suspended payment and on the following day, 11 May 1866, called by *The Times* 'Black Friday', panic set in as depositors withdrew funds from banks across England. The Governor of the Bank wrote to the Chancellor of the Exchequer explaining that the Bank started the day with a reserve of £5.7 million and, under a policy of not refusing 'any legitimate application for assistance', expected to end it with less than £3 million. The Chancellor responded to what he called – with a shade of reproach – 'the liberal answer of the Bank to the demands of commerce' by suggesting that such assistance should be provided at an interest rate of not less than 10 percent.

Walter Bagehot gave a description of the Bank of England's operations as lender of last resort and a manifesto for its role in future in his essay *Lombard Street*, first published in 1873 and revised several times in new editions. On last-resort lending, which he regarded as crucial to the successful functioning of the City, Bagehot set out two rules: first, that loans should be made to distressed institutions at a very high interest rate; and secondly, that these loans should be available to all comers, to ensure continued public confidence in the banking system.[36]

Bagehot was less interested in the legal mechanisms by which banks operated than the macroeconomic environment they inhabited. He argued that the Bank's position as lender of last resort should be acknowledged to increase public confidence in the financial system and decrease the likelihood of panics. It is today clear that market confidence is also assured by predictability as to how creditors will fare in an insolvency, something which has only been achieved by the introduction of a coherent corporate insolvency regime.

The interplay of pragmatic reaction and legalistic response is illustrated by the responses to Overend Gurney's collapse: the immediate making available of cash to the market by the Bank and the orderly treatment of creditors in due course in the house's liquidation, which vindicated the limited liability corporation as a vehicle for business. Despite criticism in the press of the principle of limited liability given the company's conduct,[37] there was no legislative initiative or demand from

2020) 233–36.

[32] See R Sowerbutts, M Schneebalg and F Hubert, 'The Demise of Overend Gurney' [2016] Q2 *Bank of England Quarterly Bulletin* and Kynaston (n 31) 168–72.

[33] The Governor of the Bank found an anonymous note on his desk one morning: 'Overends can pull out every note you have, from actual knowledge the writer can inform you that with their own family assistance they can nurse seven millions!!': Kynaston (n 31) 169.

[34] A Hauser, Head of Sterling Markets Division, Bank of England, *'The Five Ages of (Sterling) Man: Prospects for the UK Money Market'*, speech given to the London Money Market Association, 13 June 2013; available at www.bankofengland.co.uk/-/media/boe/files/speech/2013/the-five-ages-of-sterling-man- prospects-for-the-uk-money-market.pdf (accessed 3 October 2023).

[35] *Bateman v The Mid Wales Railway Company* (1865–66) LR 1 CP 499 (CP).

[36] Bagehot (n 31) 197.

[37] C Hunt, *The Development of the Business Corporation in England 1800–1862* (Cambridge, MA, Harvard University Press, 1936), 153.

business to cement prudential requirements for banks or roll back limited liability.

The outline of the Bank's response to banking crises was set. As Bagehot had recommended, the Bank would facilitate funding to banks in a crisis. when Barings Bank reached the brink of collapse in 1890, a consortium of investors assembled by the Bank's Governor created a fund to guarantee its debts and avert systemic crisis. Barings' salvageable business was hived off as a 'good bank' (Baring Brothers Ltd) and its toxic assets taken over by the Bank in return for a loan, backed by a 'Guarantee Fund' raised from market participants and repayable by Baring Brothers Ltd. The restructuring was successful. Panic on the market was contained and Baring Brothers Ltd survived until 1995.

By the end of the nineteenth century, when the House of Lords in *Salomon v Salomon*[38] unanimously held that even the shareholder-director of a one-man company was not liable for company debts, company law and insolvency law were a sophisticated and reliable system. However, there was no understanding of the law as a tool in managing financial crises. Insolvency law facilitated distribution of available assets: it was a terminal procedure.[39] Bank insolvency was still considered a business matter, to be managed by the Bank of England, whose dual role as market participant and central bank masked the fact that the conditions for its assistance were the start of a *de facto* system of bank regulation.

VIII. BANKS IN THE EARLY PART OF THE TWENTIETH CENTURY

After the First World War, with a growing trend towards state oversight of public life, the Bank of England was subordinated to the Government in setting monetary policy.[40] However, there was no formalisation of its role as protector of the banking system or move towards bank regulation. This lack of barriers to institutions behaving like banks left the financial sector vulnerable. The only legislation akin to banking regulation was the Moneylenders Act 1900. This required the registration of moneylenders, but expressly made exempt from its provisions 'any person bona fide carrying on the business of banking'. The 1900 Act did not explain the meaning of this exemption, and there were several cases dealing with its interpretation,[41] until section 123 of the Companies Act 1967 empowered the Board of Trade to grant certificates providing that a company was 'carrying on the business of banking' for the purpose of the 1900 Act.

In the 1940s, Parliament showed more interest in bank regulation. Section 4 of the Bank of England Act 1946 enabled the Bank to 'request information from and make recommendations to bankers' and made provision for the Treasury to direct the Bank to 'issue directions to any banker for the purpose of securing that effect is given to any such request or recommendation'. However, the definition of banker in the section was 'any such person carrying on a banking undertaking as may be declared by order of the Treasury to be a banker for the purposes of this section'. As

the Treasury never made any such order, the Bank could never exercise these powers. Further authorisations for banks were established for narrow purposes. The Exchange Control Act 1947 required the Treasury and the Bank of England to establish a list of banks authorised to deal in foreign exchange and exercise delegated powers under the Act ('authorised banks'). The Companies Act 1948, and later section 127 of the Companies Act 1967, required the Board of Trade and the Bank to establish a list of banks which were permitted accounting privileges relating to their maintenance of inner reserves. Failures of non-bank deposit-taking institutions[42] inspired the Protection of Depositors Act 1963, which required institutions to make available certain information if they advertised to take deposits. However, these initiatives did nothing more than generate official lists of banking or banking-adjacent institutions. It did not grant any body oversight over them.

The banking industry grew up with the Bank of England at its centre. The trust placed in Bank of England bills, its unrivalled ability routinely to provide high levels of liquidity through the discount window and the sophistication of its clearing house system meant that, at the turn of the twentieth century, there were almost no participants in the banking sector which did not keep their reserves at the Bank and make use of its clearing house. However, over the mid-twentieth century, the financial services industry changed. Institutions no longer depended on the discount market and could operate without regular dealings with the Bank, and therefore

[38] *Salomon v Salomon* [1897] AC 22 (HL).

[39] Although see Sir Antony Zacaroli on schemes in '*The Importance of Classes in Insolvency and Restructuring*' in this volume.

[40] See CAE Goodheart, 'Bank of England' in SN Durlauf and LE Blume (eds), *The New Palgrave Dictionary of Economics*, 2nd edn (London, Palgrave Macmillan, 2008).

[41] See eg *Litchfield v Dreyfus* [1906] 1 KB 584 (KB) and Edgelow v *Macelwee* [1918] 1 KB 205 (KB).

[42] An example is Mortgage Investment (Albert Square) Ltd, a property investment company reputed to have attracted deposits of over £750,000 from

without the development of personal relationships with Bank personnel and *de facto* daily provision of information. The informality of the Bank of England's role fitted the market in which it had developed but was not sufficiently flexible to deal with changes in that market.

IX. THE SECONDARY BANKING CRISIS 1973–1975[43]

In the 1950s and 1960s London was regaining its role as an international financial centre, which had fallen away during the war years. The City's financial ecosystem became increasingly complex and was no longer concentrated on a single discount market. New, so-called secondary, markets were established – the Local Authority Market, the Certificate of Deposit Market, the Corporate Debt Market and the Inter-Bank Market to name a few. On these markets, particularly the Inter-Bank Market, institutions could access short-term funding limited only by their market standing. There was a growth in lending by small fringe banks, which held deposits from players on the money markets, to property developers in the booming UK residential market. These banks tended to offer slightly better rates than mainstream banks.

These secondary banks were able to obtain certificates from the Board of Trade under section 123 of the Companies Act 1967, providing that they were carrying on the business of banking for the purpose of the Moneylenders Act 1900 and therefore exempt from the registration requirements in that Act. This may have given the impression that they had a more general 'official' recognition as banks, though no such formal recognition existed.

In the early 1970s, the country experienced a storm of economic disasters: inflation was high, the pound weakened severely, the oil price soared and at the end of 1973 and into 1974 the stock market crashed. In 1973, the Bank of England raised its lending rate to an unprecedented 13 percent. A fall in house prices in 1973 was the final straw for several secondary banks. The first to find itself in difficulties was London and County Securities Group – a well-known entity on whose board the then-Liberal Party leader Jeremy Thorpe sat. London and Counties was unable to renew deposits taken through the money markets. It later emerged that it was beset by fraud. The Bank of England mounted a hasty rescue operation. However, problems spread to similar banks, as depositors lost confidence. Three weeks after the collapse of London and Counties, the Bank of England also had to rescue Cedar Holdings.

In response, in the last days of 1973 the Bank established the Control Committee of the Bank of England and English and Scottish Clearing Banks, or the 'Lifeboat'. This was tasked with identifying fringe banks in difficulty and – where appropriate – providing support. The conventional bank with the closest connection to each struggling institution was appointed its 'related bank'. The related bank reviewed the struggling institution's affairs and reported back to the committee. The committee then decided whether to offer support in the form of secured lending. The banks all shared risk in relation to these funds (the Bank itself put forward 10 percent), but support was coordinated by the related bank. Twenty-six companies were given Lifeboat support. Eight were subsequently placed in receivership or liquidation.[44] The Bank also supported two institutions on its own account: Slater walker Limited and Edward Bates & Sons Limited. Although these institutions were not banks in the traditional sense, the Bank recognised that their collapse would have 'threatened the well-being of some recognised banks'.[45] The total support committed by the Lifeboat approached £1,200 million by August 1974, about 40 percent of the estimated aggregate capital reserves of English and Scottish banks.[46]

The Lifeboat's modus operandi was essentially what Bagehot had proposed in *Lombard Street*: the extension of credit to struggling institutions to protect confidence in the system as a whole. Bagehot had not anticipated the scrutiny which the Lifeboat committee gave to institutions before handing over cash. Recognising that pouring money into an institution beyond rescue was not proportionate or necessary, the Lifeboat exercised an analytical role in deciding which institutions should be funded and directing how funds should be used. The Bank's essentially improvised reaction led to it adopting a proactive supervisory role over banks (considering their balance sheets and recommending interventions accordingly)

small-scale investors. See JS Fforde, *The Bank of England and Public Policy, 1941–1958* (Cambridge, Cambridge University Press, 1992) 761–71.

[43] The fullest account of the crisis is given in M Reid *The Secondary Banking Crisis, 1973–1975* (London, Hindsight Books, 2003).

[44] DS Trust, 'The Secondary Banking Crisis and the Bank of England's Support Operations' [1978] Q2 *Bank of England Quarterly Bulletin*.

[45] ibid.

[46] ibid para 38.

[47] ibid.

X. THE BANKING ACTS 1979 AND 1987

which laid out a blueprint for what more formal bank regulation might look like.[47]

The Banking Act 1979 was a direct response to the secondary banking crisis and an attempt to formalise the ersatz supervisory position adopted by the Bank during the crisis. The 1979 Act required the Bank of England to issue licences to banks and deposit-takers, following an assessment of their capital adequacy. The Bank was also required to monitor and supervise institutions, controlling and where appropriate withdrawing authorisation.[48] The Act focused solely on microprudential supervision – supervision of individual entities – and did not require the Bank to take a macro-prudential view of the systemic health of the banking system. It also introduced the Deposit Protection Scheme.

After the enactment of the 1979 Act, several years passed without any bank failures. Then, in 1984, auditors of Johnson Matthey Bankers, the banking subsidiary of Johnson Matthey PLC, identified that a number of its commercial borrowers were likely to default and that this would wipe out the bank's capital. Johnson Matthey was a leading gold trader and one of five London Gold Market members which provided daily price fixings. The bad debts were unrelated to its role in the gold market, but its failure would disrupt this internationally important exchange. The Bank of England intervened with a rescue package – the bank's parent agreed to inject $62 million into the bank and to sell it to the Bank for a nominal sum. Other banks were found to take stakes and a separate consortium of banks and members of the gold market provided it with credit lines.[49] The Bank undertook this rescue not in a supervisory capacity but in its traditional, non-statutory role as central bank, to prevent disruption to the gold market and the banking system.

The Banking Act 1987 established the Bank of England's Board of Banking Supervision, strengthening the Bank's supervisory function.[50] The Act restricted deposit-taking to authorised institutions and required authorised institutions to report 'large exposures' to the Bank,[51] in an acknowledgement that systemic risk was greater the greater the degree of exposure a particular institution had. The 1987 Act also expanded the Bank's supervisory powers: it could require an authorised institution to provide information or documents or to commission a report by an accountant[52] and appoint persons to investigate the authorised institution.[53] It relaxed the duty of confidentiality of auditors so that this was not contravened by a report to the Bank in good faith on any matter relevant to the Bank's supervisory function.[54] These enhanced powers made banking regulation more of a force to be reckoned with.

XI. THE INSOLVENCY ACT 1986

In 1977 the Labour government commissioned a review into insolvency law and practice, chaired by Kenneth Cork, head of a well-known firm of insolvency practitioners, Cork Gully, and a key figure in the meetings at the Bank of England during the secondary banking crisis. In 1982, the committee published its Report of the Review Committee on Insolvency Law and Practice,[55] known as the Cork Report. Following the Cork Report's recommendations, insolvency statute was completely overhauled in the Insolvency Act 1985, which was consolidated into the Insolvency Act 1986.

The 1986 Act represented a sea change in English insolvency law. For the first time, a rescue culture – the potential for insolvency law to act not only to sweep up the remains of failed businesses but to promote salvage and regeneration – was formally recognised in English law. This philosophy had been adopted elsewhere, notably with the introduction of Chapter 11 in the US Bankruptcy Code in 1979

In the context of corporate insolvency, the 1986 Act introduced administration.[56] This introduced rescue culture into English law, despite having been loosely based on receivership, a form of secured creditor enforcement.[57] The company could be protected from its creditors while the administrator sought to achieve one of four purposes: the survival of the company, the approval of a creditors' voluntary arrangement, the approval of a scheme of arrangement, or a better realisation of the company's assets than would be achieved in liquidation.[58] Administration proved an effective tool. In the first decade after its introduction, Canary Wharf was restructured through administration,[59] the Daily Mirror was saved, administration was used to rescue what was viable in the Maxwell Group,[60] and both Drexel Burnham Lambert and Barings Bank were sold through administration.[61] Under the Enterprise Act 2002, the appointment of an administrative receiver by the holder of a floating charge created on or after 15 September 2003 was prohibited, eliminating the anomaly of administrative receivership as a non-collective insolvency procedure. It also became possible to file for administration on paper without a court hearing,[62] a development that facilitated the rise of the pre-pack administration sale.[63] The Insolvency Act 1986 also introduced individual and company voluntary arrangements – which enabled creditors to enter into a compact with a debtor in what was intended to be a more straightforward and affordable procedure.

[48] Banking Act 1979, s 3 and see the criteria for authorisation in part 2 of schedule 2. Licensed deposit- taker status was intended to catch the secondary banks.

[49] See the Bank of England's Annual Report for 1985 at 33ff, available at www.bankofengland.co.uk/-/ media/boe/files/annual-report/1985/boe-1985.pdf (accessed 3 October 2023).

[50] Banking Act 1987, ss 1 and 2.

[51] ibid s 38.

[52] ibid s 39.

[53] ibid s 41.

[54] ibid s 48.

[55] Department of Trade and Industry, *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558 (Cork Report).

[56] See *Bristol Airport Plc v Powdrill* [1990] Ch 744 (Ch) 756–57 (Sir Nicolas Browne-Wilkinson V-C) for a classic description of the procedure.

[57] Receivership is unusual among insolvency procedures in that it derives from the bipartisan relationship between a secured creditor and debtor created and governed by contract. Administration is notable as a *collective* process, introduced by Parliament, although it derived from the *bipartisan* relationship which enabled receivership.

[58] Insolvency Act 1986 s 8, as enacted. Section 8 as amended implements Schedule B1 to the 1986 Act. Paragraph 3(1) of Schedule B1 lists the following purposes of administration: (a) rescuing the company as a going concern, (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or (c) realising property in order to make a distribution to one or more secured or preferential creditors.

[59] The administration of its holding company, Olympia and York (Canary wharf) Ltd, produced several reported judgments: [1993] BCC 154 (Ch), [1993] BCC

XII. BANK FAILURES IN THE 1990s

The financial system's continued stability after the enactment of the Banking Act 1987 may be partly attributable to the relatively favourable economic conditions that prevailed after the difficulties of the 1970s. However, it is likely that the regulatory regime introduced by the 1979 Act and strengthened in the 1989 Act also played its part. The period of stability was interrupted in the 1990s – Bank of Credit and Commerce International (BCCI) collapsed in 1991, as did Barings Bank in 1995. Both collapses were precipitated by fraud: in BCCI's case, money laundering and other financial crimes had been committed on a massive scale across many jurisdictions and executives had covered up the fact that the bank had been insolvent since the 1970s; in Barings' case, fraudulent gambling by the head derivatives trader in Singapore brought down the whole bank. The collapses did not cause any larger systemic shock but did highlight flaws in the regulatory regime. BCCI's collapse demonstrated the challenge that the cross-border nature of modern banking and finance poses to effective regulation. No single regulator took responsibility for cross-border transactions and conduct by BCCI which should have raised red flags.

Both BCCI and Barings were dealt with under existing insolvency procedures, stretched to their limits by the complexity of modern cross-border banking. On the first hearing of the Bank of England's petition to wind up BCCI,[64] Sir Nicolas Browne-Wilkinson V-C, lamented that, in considering a creditor's application for an adjournment, he had to choose between the interests of depositors, whose accounts were frozen while the petition was ongoing, and the possibility of negotiating a rescue plan which might provide a better outcome for stakeholders, but which would take time. He stood over the petition, unhappy with the compromise. The court was confronted with the fact that, with limited cross-border recognition, an international entity had to be wound up in each of the countries it operated in. The judge could not see a 'better way' without statutory reform.

Following BCCI's collapse, Lord Justice Bingham (as he then was) chaired an inquiry into its failure. The subsequent Report[65] focused on the Bank of England's supervision of BCCI and largely endorsed the current regulatory systems[66] and the EC Regime.[67] It recommended that the Bank should have the power to refuse or revoke authorisation on the basis that an entity cannot be supervised, whether on structural or other grounds,[68] where an entity's business comprises 'a tangled web of domestic companies', 'a complex and fragmented group such as BCCI', 'the involvement of any centre where secrecy or commercial practice precludes a clear view of a

group's affairs' or 'a structure which makes a group incapable of being effectively supervised'.[69] These proposals were reflected in the renewed regulatory regime implemented under the Financial Services and Markets Act 2000 (FSMA 2000) (the ability of the Financial Conduct Authority (FCA) or the Prudential Regulation Authority (PRA) to be able to 'effectively supervise' a person is a threshold condition for authorisation under amendments to Schedule 6 to FSMA[70]). The Report also recommended that administration under the 1986 Act should be extended to UK branches of over- seas banks.[71] Several UK branches have indeed been subject to the 1986 Act in this way, eg Iraq's Rafidain Bank.

The move to international recognition of insolvency procedures has gained traction with the UNCITRAL Model Law on Cross-Border Insolvency, which was published in 1995 and has the force of law in England and Wales pursuant to the Cross-Border Insolvency Regulations 2006,[72] and the EU Insolvency Regulation, which was introduced in 2000, recast in 2015 and which is retained (for the time being) in amended form post-Brexit.[73] Both the UNCITRAL Model Law and the EU Insolvency Regulation aim to deal with the territoriality of national insolvency laws and pre-empt the consequences of financial crisis in a globalised world.

Insolvency practitioners and their advisers have played a role in brokering arrangements that go beyond what was

159 (Ch), (1994) 68 P&CR 451 (Ch), [1993] BCC 866 (Ch), [1995] 69 P&CR 43 (CA).

[60] See eg *Re Maxwell Communications Corp plc* [1992] BCC 372 (Ch) (appointment of administrators), *Re Maxwell Communications Corp plc* [1993] BCC 369 (Ch) (an important case which established the validity in principle of debt subordination agreements in insolvency).

[61] See eg *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32 (Ch), an application by DBL's administrators which produced a significant judgment on trustees' duties and powers. Barings was sold to ING for £1 in administration.

[62] See paras 22–34 of Schedule B1 to the Insolvency Act 1986.

[63] This has not been without its problems, some of which are sought to be dealt with by the Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021/47, in force since 30 April 2021.

[64] *Re BCCI (Bank of Credit and Commerce International)* [1991] Lexis Citation 2512 (Ch).

[65] The Right Honourable Lord Justice Bingham, *Inquiry into the Supervision of the Bank of Credit and Commerce International* (HC 1992, 198) (Bingham Report); available at https://assets.publish- ing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/235718/0198.pdf (accessed 3 October 2023).

[66] ibid paras 3.1–3.10.

[67] ibid paras 3.19–24.

[68] ibid paras 3.14–16.

[69] ibid para 3.23.

[70] Financial Services and Markets 2000 (Threshold Conditions) Order, SI 2013/555 paras 2C, 3B, 4F and 5F.

[71] The Bingham Report (n 65) para 3.58.

[72] SI 2006/1030.

[73] Pursuant to the Insolvency (Amendment) EU Exit Regulations 2019 and 2020, SI 2019/146, SI 2020/647.

anticipated by existing insolvency procedures. They are pragmatic responses to the difficult problems arising. Examples include a scheme by the liquidators of BCCI for the pooling of the assets and liabilities of two companies within the BCCI group rather than dealing with these in separate liquidations,[74] and an incident in the insolvency of Maxwell Communication Corporation (MCC), which collapsed the same year as BCCI. MCC was subject to insolvency proceedings in both the Southern District of New York and London. Hoffmann J in England and Judge Tina Brosman in New York discussed by telephone how to deal with the joint estate, an innovative approach to cross-border judicial cooperation necessitated by the absence of legislation equipped to deal with the increasingly complex demands of major cross-border insolvencies. This led to the American Law Institute's Guidelines Applicable to Court-to-Court Communications in Cross-Border cases, adopted and promulgated on 16 May 2000.[75]

XIII. FINANCIAL SERVICES AND MARKETS ACT 2000

The recommendations of the Bingham Report and other lessons from BCCI provided impetus for the enactment of FSMA 2000. This overhaul of financial services regulation replaced the FSA 1986. It reconciled the regulation of banks and other financial service providers in a single regime, so that regulation focused on the nature of the activity undertaken rather than of the institution undertaking it. This purposive approach was designed to avoid a repeat of crises like the secondary banking crisis, when fringe entities were able to undertake bank-like activities free of scrutiny. Initially, FSMA 2000 installed the Financial Services Authority (FSA) as the main regulator, with certain functions in relation to banks retained by the Bank of England and the Treasury. Subsequently, responsibility for bank regulation was transferred to the PRA and conduct of business regulation to the FCA (replacing the FSA).[76] FSMA 2000 is extremely broad. At its heart is the 'general prohibition' under section 19, which prohibits persons from carrying out regulated activities (defined in the Act) unless they are authorised or exempt from the need to obtain authorisation. The Act also sets out powers of investigation and enforcement and grants express powers to the FCA and the PRA to initiate and participate in insolvency proceedings of regulated entities (under Part 24 of the Act), further cementing the insolvency regime as a tool in the service of maintaining the health of the financial system.

XIV. THE 2007-2009 FINANCIAL CRISIS

In 2007 the finance system suffered a global crisis. Like the secondary banking crisis, the 2007 crash was rooted in overexposure to the property market. This time, investments were made via sophisticated financial products that appear not to have been fully understood by some bankers who used them. The popularity of bonds backed by pooled residential and commercial mortgage liabilities meant that lenders, overenthused by the secondary market value of their debts, made risky loans to customers whose situations would formerly have been undesirable. Inevitably, many of these 'subprime' loans defaulted, and the knock-on defaults on the corresponding mortgage-backed securities – and the attendant massive loss of investor confidence – caused huge losses on the part of financial institutions. The secondary banking crises was managed outside the statutory framework because winding up was the only available option. By 2007 the Insolvency Act 1986 had been in force for twenty years

Although preceded by the collapse of Northern Rock in the United Kingdom and a bail-out of Bear Stearns in the United States, the largest and best-known bank collapse of this era was Lehman Brothers, the venerable US investment bank. The bank's UK subsidiary, Lehman Brothers International (Europe), an unlimited liability company, was placed in administration in England before the start of business on Monday 15 September 2008, after the collapse of the US business made clear that it would be unable to settle its obligations that day. However, once amounts due to the bank were netted off, it was left with a surplus of several billion US dollars as regards unsecured creditors and has now even paid much of its subordinated debt in full. Over the administration, the courts were faced with a number of applications raising novel points and they responded by a combination of pragmatic responses and adapting established principles and applying them to the novel situation. An example is the application of the long-established contributory rule, first applied in a corporate insolvency in *Re Overend, Gurney and Co; Grissell's Case*,[77] to a distributing administration by the Supreme Court in *Re Lehman Bros International (Europe) (No 4)*.[78]

The Lehman administration also threw up a series of cases, the waterfall applications, in which the ranking of creditor claims and issues of priority fell to be decided. Their resolution, together with a large number of other disputes which arose (for example, on the construction of the ISDA (International Swaps and Derivatives Association) master agreement and on the close-out of derivative positions) led to a number of innovative solutions and procedures for the resolution and efficient management of those disputes, including the use of position papers,[79] which proved invaluable for narrowing the issues and ensuring that the many disputes were triable. Although the courts were proactive and imaginative, the management of the administration would not have been possible if it had not been combined with deal- making by the administrators. Its apogee was the court's approval of a remarkable settlement between the English and US insolvent estates, which reflected a commercial compromise reached within the parameters of a formal insolvency process.[80]

In 2010, UK financial regulation was again overhauled, in response to the financial crisis. Under the Financial Services Act 2010 oversight is split between the FCA, PRA (a subsidiary organisation of the Bank of England) and the Treasury. while the FCA and PRA retain a focus on microprudential supervision (the activities and risk of individual institutions), a newly created Financial Policy Committee (another Bank of England body) is now obliged to report to the PRA on macroprudential matters (assessment and limitation of risk on a systemic level), and the PRA is obliged to act on its concerns.

[74] See the Court of Appeal's ruling in *Re Bank of Credit and Commerce International SA (No 3)* [1993] BCLC 1490 (CA), affirming the decision at first instance of Sir Donald Nicholls V-C [1993] BCLC 106 (Ch).[75] The use in England of court-to-court communication was considered by David Richards J in *Re T&N Ltd and others* [2004] All ER (D) 146 (Dec) (Ch) [29].

[76] Pursuant to the Financial Services Act 2012.

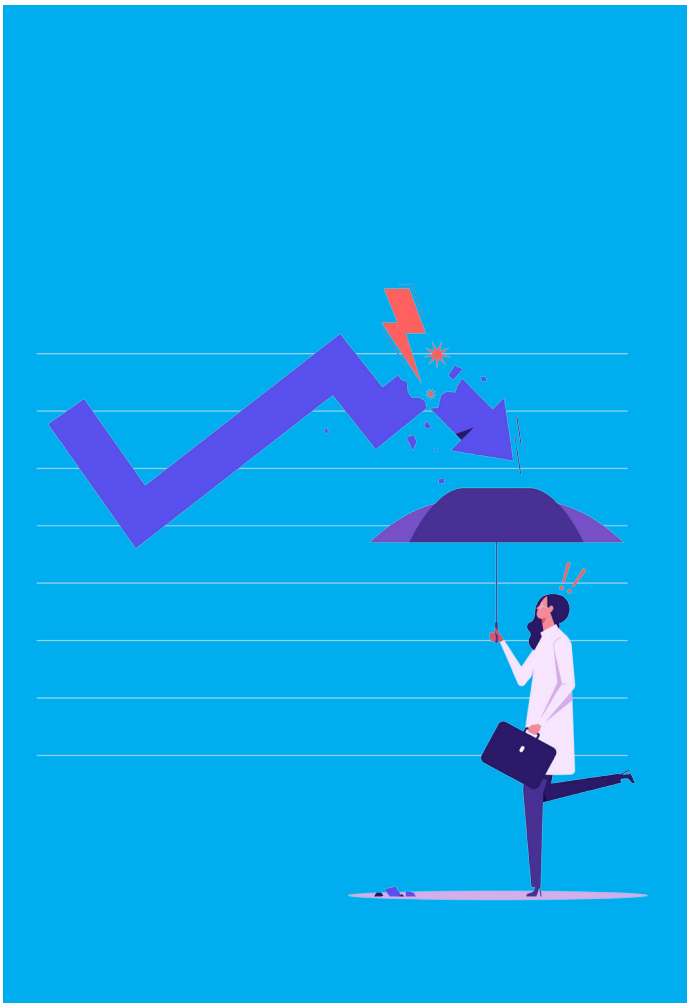
[77] *Re Overend, Gurney and Co; Grissell's Case (1865-66)* LR 1 Ch App 528 (CA).

[78] *Re Lehman Bros International (Europe)* (No 4) [2017] UKSC 38, [2018] AC 465.

This focus on macroprudential risk was adopted pursuant to the review into the causes of the financial crisis conducted by Lord Turner, who took over as chairman of the FSA as Lehman went into administration. The Turner Review concluded that macroprudential oversight 'fell between the gaps in the UK supervisory system' (with the Bank of England focusing on monetary policy analysis, and its macroprudential analysis not resulting in policy, and the FSA focusing on individual institutions in isolation) and that this 'was one of the crucial failures of the years running up to the crisis'.[81]

XV. THE BANKING ACT 2009

A major legislative response to the Lehman insolvency came with the Banking (Special Provisions) Act 2008, the Banking Act 2009 and the Investment Bank Special Administration Regulations 2011. Like the Acts of 1979 and 1989, the 2008 Act (a piece of emergency legislation with a sunset clause after one year) and the 2009 Act updated the banking regulatory regime in the wake of a specific financial crisis. For the first time, a full statutory framework was provided for managing bank failures. Administration was a significant step forward compared to the *ad hoc* rescue mission of the Lifeboat Committee in the 1970s, but Lehman demonstrated that provisions intended to make administration available to all companies could not deal comprehensively with a bank administration. The post-Lehman legislative approach was in part due to the renewed confidence in the insolvency profession which the 1986 Act had brought about Insolvency practitioners, previously seen in some quarters as cowboys, were now respected as professionals, capable of dealing with the intricacies of a major bank insolvency.



The shift in approach also resulted from a changed political climate. The rescues of Slater Gordon and Johnson Matthey were arranged by the Bank of England in late-night meetings behind closed doors with figures from the British finance industry. This was typical of a time when the Governor's eyebrows carried great significance, but also reflected the lack of a statutory framework for bank rescue. In 1991, and certainly by 2007, such an approach would not have been publicly acceptable. The failure of a bank was recognised as a national problem, its solution would need to be subject to scrutiny and those involved in its implementation would have to be accountable for it. This is illustrated by the failures of Northern Rock and Bradford & Bingley, both of which were dealt with in economic terms in broadly the same way as previous bank failures – with an influx of public funds to cover short-term liabilities and avert shock to the banking system, while for the long-term their profitable assets were sold off and their toxic liabilities assumed by the state. However, decisions in respect of the future of these institutions were not made in the depths of the Bank of England but by the legislature.

The Banking (Special Provisions) Act 2008 (BSPA) was produced in very short order after the failure of Northern Rock. The government announced it had acquired all the shares in Northern Rock the day after the BSPA received Royal Assent (under the Northern Rock plc Transfer Order 2008). Later in 2008, the FSA determined that the Bradford & Bingley building society no longer met the threshold conditions to operate as a deposit-taker under FSMA 2000. Again, the government acquired its shares under secondary legislation enacted under the BSPA (in this case the Bradford & Bingley plc Compensation Scheme Order 2008). Following these initiatives, the Banking Act 2009 received Royal Assent on 12 February 2009, shortly before the temporary provisions under the BSPA ceased to have effect. Its main provisions are as follows. Part 1 gives the regulatory authorities tools to deal with banking institutions in financial difficulties and replaces the regime under the BSPA with a permanent Special Resolution Regime (SRR) for banks. Part 2 introduces the Bank Insolvency Procedure (BIP) – a winding-up procedure tailored to failed or failing banks. Part 3 introduces a Bank Administration Procedure for use where part of a failing bank's business has been transferred, by means of the SRR, to a private or bridge bank.

The BSPA and the 2009 Act are the first legislation to deal specifically with bank failure. They constitute a recognition that the collapse of a bank requires a discrete set of tools – ones which allow those in charge of a failed bank to act very quickly to shore up its position, protect depositors and provide certainty to counterparties, to prevent repercussions from rippling across the market. However, both Acts rely on other market players coming forward to acquire failed banks'

[79] Introduced by Briggs J in his role as judge supervising the administration.

[80] See the comments of David Richards J in a judgment delivered after direct communication with Judge Peck in the US Bankruptcy Court: *Re Lehman Brothers International Europe* [2013] EWHC 1664 (Ch), [2014] BCC 132 [14]–[15].

[81] FSA, *The Turner Review: A Regulatory Response to the Global Banking Crisis* (London, 2009) 84.

salvageable assets, implementing a practical rather than legalistic strategy developed within the banking industry and familiar from nineteenth-century rescues, such as that of Barings Bank in 1890, and from the secondary banking crisis. The willingness of Parliament, the courts and practitioners to adopt a practical approach has been key to the successful containment of crises over the years. However, a legislative response was required to deal with the complexity of twenty-first-century bank restructurings. Absent the 1986 Act, it would have been impossible to mitigate market disruption and to avoid systemic collapse in 2007–2009. Although the courts can be flexible, there are limitations set by the available statutory framework.

XVI. THE INVESTMENT BANK SPECIAL ADMINISTRATION REGULATIONS 2011

The Investment Bank Special Administration Regulations 2011 is an industry-specific special administration procedure. An investment bank enters special administration by court order[82] and the administrator is to pursue the special administration objectives, which differ from the purposes in schedule B1.[83] Those objectives, which do not stand in a fixed hierarchy,[84] are: the return of client assets, to ensure timely engagement with market infrastructure bodies and relevant Authorities, and to either rescue the investment bank as a going concern or to wind it up in the interests of the creditors.[85] One reason for the introduction of special administration was to avoid market disruption and speed up the administration of a bank's insolvency. Those were lessons learnt from the collapse of Lehman Brothers. MF Global was the first institution placed in special administration, in 2011.[86]

XVII. THE RESPONSE TO THE CORONAVIRUS PANDEMIC

COVID-19 resulted in another unexpected financial challenge (which coincided in the United Kingdom with Brexit). This crisis is unlike the others discussed in this chapter in that it was a major economic shock which did not originate in the financial system. To combat the effects of the pandemic, many countries, including the United Kingdom, imposed lockdowns that caused large parts of the economy to be shut down or severely curtailed. Many perfectly healthy businesses, especially in the retail and leisure sectors, suffered sudden and unexpected cashflow insolvency, caused simply by being forced to shut their doors, while still accruing liabilities on rent, utilities and other fixed costs. The response to the pandemic was unprecedented. Parliament, the courts and the insolvency profession reacted quickly to help businesses across all sectors of the economy affected. One of the first responses came from the insolvency profession. In March 2020 the Insolvency Lawyers Association published a 'Consent Protocol' to facilitate so-called 'light touch' administrations.[87] Paragraph 64 of Schedule B1 to the Insolvency Act 1986 prohibits a company in administration or its directors from exercising management powers without the administrators' consent. In the pandemic, administrators used the Consent Protocol to grant permission to directors to continue their management in 'light touch' administrations, similar to US Chapter 11 bankruptcy proceedings. Given that the issues suffered by many companies were not their directors' fault, this sharing of responsibility was appropriate. It also kept the costs of administrations to a minimum.

The government's legislative response fell into two parts. First, there were the government's initial pragmatic responses, such as the furlough scheme and the temporary moratoria relating to winding-up petitions and landlords' ability to evict for breach of a covenant to pay rent. Secondly, the opportunity was seized to introduce permanent innovations that had been under discussion built on insolvency principles. In this category we may now count many provisions in the Corporate Governance and Insolvency Act 2020 (CIGA 2020).

The furlough scheme, introduced in March 2020, enabled employers to reclaim from HMRC up to 80 percent of the salaries of employees who were not working due to the restrictions placed on businesses by coronavirus legislation. The scheme's guidance made clear it was intended to be available to administrators as well as solvent employers, although no guidance was given as to how this would work under existing insolvency legislation. In *Re Carluccio's Limited (in administration)*[88] and *Re Debenhams Retail Limited (in administration)*,[89] the courts set out a practical way forward for administrators to make furlough payments to company employees: by adopting the employment contract (in the meaning of paragraph 99(5) of Schedule B1 to the 1986 Act) or making a payment otherwise than in accordance with the statutory payment waterfall on the grounds the administrator thinks it likely to assist achievement of the purpose of administration (under paragraph 66 of Schedule B1). The courts were willing to work with administrators to achieve an outcome in the public interest and in the spirit of the scheme.

As to CIGA 2020, this introduced both provisions that had been under discussion for some time and temporary measures to combat the financial impact of the pandemic. Among the latter was a moratorium on winding-up petitions where the company would not be insolvent but for the financial effect of the pandemic.[90] CIGA 2020 also suspended a director's potential liability for wrongful trading during the coronavirus period[91] and landlords' ability to evict tenants who fell into

[82] Investment Bank Special Administration Regulations 2011, SI 2011/245, reg3(2)(a).

[83] ibid reg 3(2)(c).

[84] ibid regs 10–13; for the lack of hierarchy see reg 10(3), although the appropriate regulator can direct prioritisation (reg 19).

[85] ibid reg 10(1).

[86] *Re MF Global Overseas Ltd (in administration)* [2012] EWHC 1091 (Ch), [2012] BCC 490.

[87] Available at www.ilauk.com/docs/ILA.consent__.protocol__.17.April__.2020.V2__.pdf (accessed 3 October 2023).

[88] *Re Carluccio's Limited (in administration)* [2020] EWHC 886 (Ch), [2020] 3 All ER 291.

[89] *Re Debenhams Retail Limited (in administration)* [2020] EWHC 921 (Ch), [2020] 3 All ER 319; [2020] EWCA Civ 600; [2020] 3 All ER 319.

[90] See CIGA 2020, sch 10, para 2. This provision was given effect by the court even before CIGA 2020 had passed into law: see *Re A Company* [2020] EWHC 1406 (Ch), [2021] 1 All ER (Comm) 181 and *Re A Company* [2020] EWHC 1551 (Ch), [2020] BCC 773, where injunctions restraining advertisement of petitions were granted on the strength of the likelihood that the CIGA Bill, as it was at the time, would pass into law and prevent the relevant companies being wound up.

[91] CIGA 2020, s 12.

[92] ibid s 82.

arrears on rent falling due during the coronavirus crisis.[92] These measures dealt with the immediate risk to businesses, but more permanent solutions were needed to restructure their liabilities. Two new procedures were introduced: the moratorium[93] and the restructuring plan.[94] Under the first, the company is given a temporary moratorium intended to enable it to reach agreement with its creditors, with oversight by a monitor. CIGA 2020 introduced temporary provisions intended to make the moratorium more widely available.[95] Whilst evidence is limited, anecdotally the moratorium has not been used as much as had been hoped.[96] The second new procedure, the restructuring plan, had been under discussion before COVID-19. Unlike in schemes under Part 26 of the Companies Act 2006, the court in the new restructuring plan may grant a cross-class cramdown, provided one class of creditors with an interest in the outcome votes in favour of the plan and that other classes are not worse off than they would have been in the relevant alternative.[97] Several companies in various sectors had restructuring plans sanctioned during pandemic.[98] It is noteworthy that these were largely companies which would otherwise have used the Part 26 scheme process (which is comparable in complexity and cost to the restructuring plan) and few, if any, were small to medium-sized firms.

Notwithstanding CIGA 2020, thousands of businesses remained unable to pay their rent. Meanwhile, landlords were prevented from enforcing their rights. There was a political and social imperative to achieve a compromise between the upholding of landlords' rights and the avoidance of the mass insolvency of otherwise viable businesses that were unable to pay lockdown rent arrears. Parliament's attempt at a solution to this dilemma came in the form of the Commercial Rent (Coronavirus) Act 2022 (CRCA 2022).[99] This introduced an arbitration procedure, under which the arbitrator determines not legal rights, but which of the competing proposals from landlord and tenant should be implemented having regard to their impact on the viability and solvency of the landlord and tenant.[100] This unique approach stands apart from other insolvency procedures in that it is not a collective process, although it does incorporate principles familiar from a post-1986 insolvency context, notably the aim of saving viable businesses and the idea that discharge from debt is a tool which may be used to achieve this. Anecdotally, however, this

[93] ibid ss 1–3 and schs 1–3.

[94] ibid s 7 and schedule 9 that introduced Part 26A to the Companies Act 2006.

[95] ibid sch 4; the moratorium rules expired on 30 September 2021.

[96] The moratorium regime was considered by Norris J in *Re Corbin & King Holdings Ltd* [2022] EWHC 340 (Ch), [2023] 1 All ER (Comm) 51.

[97] 'Condition A' under Companies Act 2006, s 901G.

[98] eg *Re Virgin Active Holdings Ltd* [2021] EWHC 814 (Ch) and [2021] EWHC 911 (Ch); *Re Amicus Finance plc* [2021] EWHC 2340 (Ch) and [2021] EWHC 3036 (Ch), [2022] Bus LR 86; *Re DeepOcean 1 UK Ltd* [2020] EWHC 3549 (Ch), [2021] Bus LR 632 and [2021] EWHC 138 (Ch), [2021] BCC 483; *Virgin Active* [2021] EWHC 814 (Ch), [2021] EWHC 911 (Ch) and [2021] EWHC 1246 (Ch), [2022] 1 All ER (Comm) 1023. The court refused sanction of Hurricane Energy plc's Part 26A scheme: *Re Hurricane Energy plc* [2021] EWHC 1759 (Ch), [2021] BCC 989.

[99] The Act applies to Protected Rent Debt as defined in CRCA 2022, s 3. CRCA 2022, ss 11 and 12 provide that each party produces one or two proposals and written statements.

[100] The principles by which he does that are set out in CRCA 2022, s 15.

procedure has not been much used, and instead the post-pandemic moratorium period has seen a significant increase in winding-up petitions.

The final initiative was a pragmatic response of the insolvency profession to deal with the consequences of the pandemic. In June 2021, the trade body for insolvency professionals, R3, launched its 'Back to Business' initiative,[101] an information service for businesses about the options available to them to deal with coronavirus debt. The Back to Business website also lists insolvency practitioners who will give free initial consultation.[102] The initiative has been rolled out in over fifty-two countries in which businesses are receiving advice and help (usually free).

XVIII. THE INVASION OF UKRAINE AND SANCTIONS

Russia's invasion of Ukraine in February 2022 disrupted global economic stability, largely because of disruption to energy and food supplies, but also through the impact of sanctions, including against financial institutions and the Russian Central Bank, and Russian countermeasures against 'hostile countries' of which the United Kingdom is one. The problem for the insolvency profession was exacerbated by the concern that professionals advising entities that were, or might be sanctioned, might themselves breach sanctions.

The flexibility of the United Kingdom's insolvency processes meant entities that were, or were likely to become, insolvent as a result of sanctions could be placed under the control of a special manager or special administrator, under Schedule B1 or (in the case of banks) under the Investment Bank Special Administration Regulations 2011. As Michael Green J commented on an application by a sanctioned bank, Sberbank CIB (UK) Ltd, for the appointment of special administrators, this special administration regime provides a prudent and practical way forward.[103] This is an example of existing statutory provisions being used to deal with financial distress caused by circumstances not contemplated by the drafters of the legislation. Insolvency practitioners were faced with unprecedented problems. Following directions from the court they were able to effect novel solutions. First, in *Re Petropavlovsk plc* the court directed that the administrators were able to effect the sale of three Russian goldmines in circumstances where there were Russian countermeasures that restricted the persons to whom such strategic assets could be sold.[104] In *Re Sova Capital Ltd*, the estate held assets tradable by Russians on the Moscow stock exchange, but not tradable by the administrators. A Russian creditor took assignments of four claims and then bid those unsecured claims to purchase the shares. In exchange for the shares the creditor waived their unsecured claim.[105] These responses to unprecedented circumstances were both pragmatic and based upon fundamental insolvency principles.

[101] Available at www.r3.org.uk/press-policy-and-research/r3-blog/more/29932/back-to-business-campaign- preparing-directors-for-the-future/ (accessed 3 October 2023).

[102] At the time of writing over 230,000 companies have made use of this resource.

[103] *Re Sberbank CIB (UK) Ltd* [2022] EWHC 1059 (Ch), [2022] All ER (D) 108 [29].

[104] *Re Petropavlovsk plc* [2022] EWHC 3448 (Ch).

[105] *Re Sova Capital Ltd (in special administration)* [2023] EWHC 452 (Ch), [2023] Bus LR 779. Miles J held that this was neither a breach of the *pari passu* rule, nor was it a distribution *in specie*. The administrators had power to sell the assets and

XIX. CONCLUDING THOUGHTS

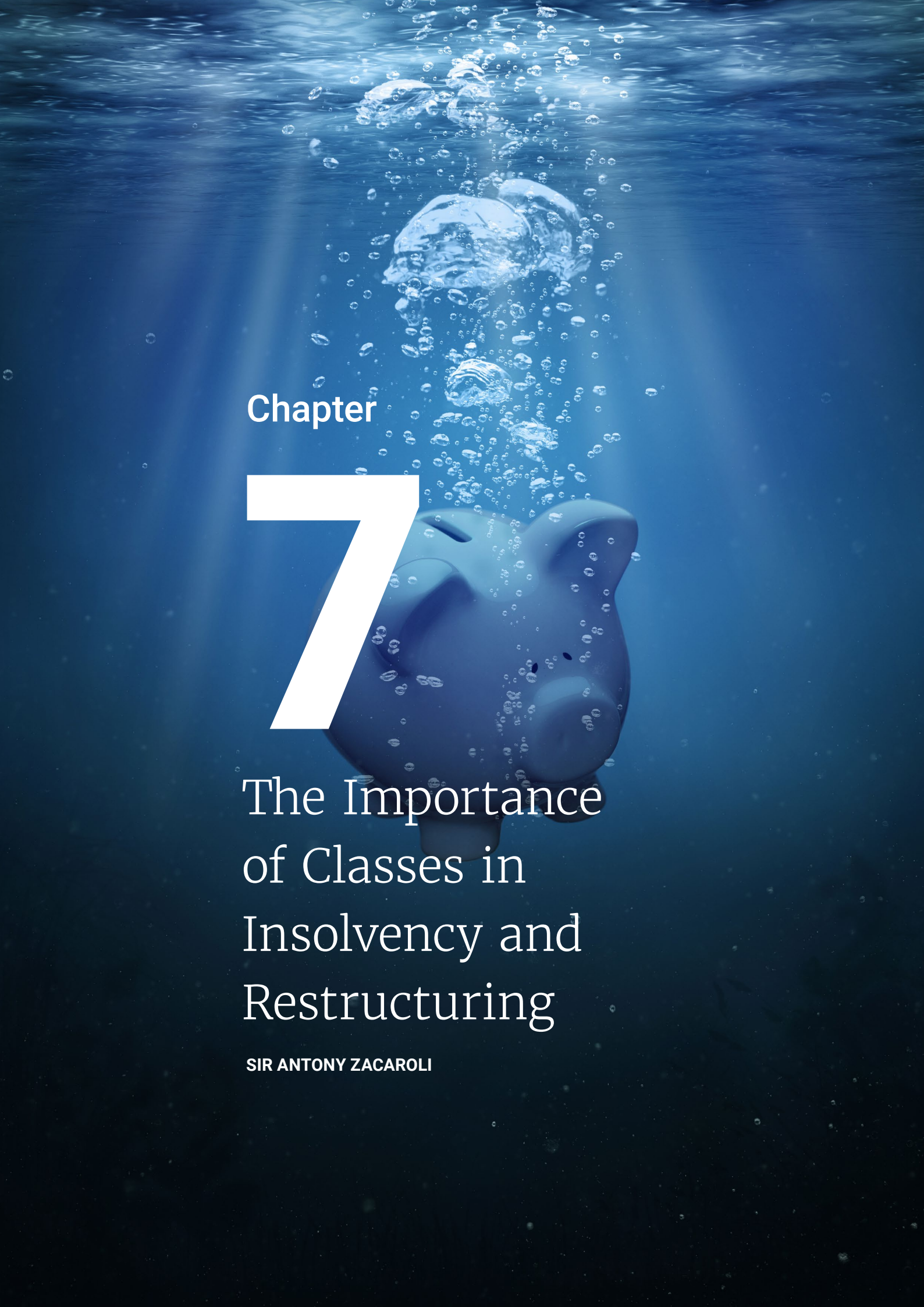
History shows that most, if not all, major insolvency crises give rise to problems that were not predicted (and often not predictable). The question then arising is whether the responses to those crises are pragmatic or principled. The answer is that they are both. The courts and practitioners have responded to the different crises over time with pragmatic responses but those responses have always been grounded in, and applications of, the core principles of insolvency law. Often, after a particular problem has emerged, Parliament has then made changes to insolvency law to better facilitate dealing with the new scenario (perhaps by introducing a tailor-made type of administration).

Insolvency law derives its force from statute, but the principles running through it are not ahistorical. Insolvency proceedings are a collective process that responds to financial distress by recognising existing rights but restricting their enforcement and exercise. As Professor Goode has pointed out, the principles underpinning this procedure derive from equity, in particular the maxim that 'equality is equity'.[106] These principles have been developed by a series of legislative and judicial responses to distinct historical circumstances and often in response to an economic catastrophe.

Although the balance between jurisprudential principle and statute is delicate, the law's success in dealing with recent crises – the collapses which ushered in the 2007–8 financial crisis, the coronavirus crisis and the failure of sanctioned Russian financial institutions – shows that English insolvency law is well placed to see institutions and society through economic storms. However, the key role that well-framed statute plays in any novel situation means it would be foolhardy to be complacent about the law's ability to deal with new kinds of crisis. While practitioners and judges will continue to adapt existing procedures to unforeseen circumstances, it is to be hoped that academics will continue to set out forward-looking proposals for reform to mitigate the consequences of the next financial crisis for the economy and for society as a whole.■

the sale was for the best price reasonably obtainable in the circumstances.

[106] R Goode *Principles of Corporate Insolvency Law*, 5th edn (London, Sweet & Maxwell, 2018) ch 3.



Chapter

7

The Importance of Classes in Insolvency and Restructuring

SIR ANTONY ZACAROLI

I. INTRODUCTION

The technique of dividing creditors into classes for the purposes of considering a proposal by a debtor, for example to restructure its debt arrangements, has been around since the introduction of the scheme of arrangement for companies in the mid-nineteenth century (now governed by Part 26 of the Companies Act 2006).

Broader recourse to the idea of a class – the interests of which must be considered when considering the entitlement of those within it to vote on a proposed action or arrangement concerning an individual or company – has been around for considerably longer. In addition to schemes of arrangements for companies, the concept of class in this sense has arisen in the following contexts: compositions and arrangements in bankruptcy; meetings of shareholders of companies; meetings of holders of debt governed by multilateral contracts, such as deeds of indenture or debentures; voluntary arrangements between a company (or individual debtor) and its creditors (under Parts I or VII of the Insolvency Act 1986); and restructuring plans under Part 26A of the Companies Act 2006.

The common feature in all such cases is that the decision of the class is reflected in the decision of the majority within it. In other words, the decision of the majority is imposed on the minority. Whenever a court is required to consider the validity of a decision reached in these circumstances, it is alive to the risk that the decision, purportedly reached by the class, is not a fair and true reflection of the class as a whole. That has led to the development of principles designed to protect a minority within a class from the wrongful exercise of a power by the majority. These principles are of ancient origin, traceable back (according to Page-Wood V-C in *Blisset v Daniel*[1]) to Justinian's Institutes.

The type of questions that arise in each of the circumstances in which a statutory or contractual framework expressly empowers a majority of the relevant class to bind the whole class, include: when may a court override the wishes of the majority? What principles should a court apply in considering when to do so? To what extent should differences in the rights and interests of different stakeholders, or different groups of stakeholders, enable the court to interfere with the wishes of the majority? To what extent should connections between one or more of the members of the class and the company or individual to whom the decision relates be taken into account? Is it open to the court to ignore the wishes of the majority by reference to its own perception of the fairness or otherwise of the decision?

This chapter draws together, and traces the development of, the tests formulated by courts in considering the power of a majority within a class to bind the minority, in each of the different contexts referred to above. It will consider the difficulties that arise when creditors with different rights or interests are considered to be part of the same class, and the benefits of subdividing them into separate classes.

II. COMPOSITIONS AND ARRANGEMENTS IN NINETEENTH-CENTURY BANKRUPTCY LAW

In bankruptcy, the relevant 'class' has generally comprised the whole body of unsecured creditors. The power of a majority of creditors of a bankrupt debtor to approve an arrangement so as to be binding on the whole class of unsecured creditors has a long pedigree. From the earliest days, the courts have been astute to prevent abuse, developing principles of good faith and equality among members of the class.

Many of the cases arose in the context of secret inducements to one or other of the creditors in order to achieve the necessary majority in favour of the arrangement. For example, in one of the earliest cases, *Cockshott v Bennett*,[2] where creditors subscribed to a deed accepting 11s in the pound in satisfaction of their debts, one creditor was induced to agree by being provided by the debtor with a promissory note for the remainder of his debt. The rationale for preventing that creditor from recovering on the note was that all creditors mutually contracted with each other that the defendants should be discharged from their debts, and it was a fraud on the other creditors for one of them to obtain a benefit from the debtor not available to others.[3] The same rationale applied where the additional inducement came not from the debtor, but from a third party, as in *Knight v Hunt*.[4]

The deceit on other creditors in most of these cases consisted of a *secret* inducement to one, or a few only, of the debtor's creditors. The courts' refusal to permit such behaviour was underpinned by principles of good faith,[5] and secret inducements to one or more creditors were clearly contrary to 'the ordinary principles of morality recognised by all mankind'.[6] The courts recognised that creditors may not be capable of deciding for themselves whether to accept an arrangement, but 'would rather trust to the judgment of a body of creditors than to his own'.[7]

The principle was extended to cases where the court inferred that one or other creditor had an ulterior motive for voting in favour of an arrangement, even without a secret side deal. In *Re Cowen*[8] (a case decided under section 192 of the Bankruptcy Act 1861), for example, an arrangement provided for a payment of 2s 6d in the pound, whereas the evidence indicated that the assets were sufficient to pay a dividend of 10s in the pound. The Court of Appeal rejected an argument that wherever a court finds a deed to be unreasonable, for example because of the amount of composition is not in fair proportion to what the debtor can afford to pay, it may strike it down. Nevertheless, such a state of affairs is obvious cause for enquiry as to the *bona fides* of the majority. The arrangement was in fact struck down because a majority of the creditors was connected to the debtor, either through family connection or friendship, and in that capacity expected to be paid in full, although there was no agreement to that effect. Turner LJ identified the underlying principle as being that the

[1] *Blisset v Daniel* (1853) 10 Hare 493, 68 ER 1022. See also *Assenagon Asset Management SA v Irish Bank Resolution Corp Ltd* [2013] EWHC 2090 (Ch), [2014] 2 BCLC 116 [41].

[2] *Cockshott v Bennett* (1788) 2 Term Rep 763, 100 ER 411.

[3] ibid 765; 100 ER 411, 412–13 (Lord Kenyon).

[4] *Knight v Hunt* (1829) 5 Bing 432, 130 ER 1127.

[5] ibid 433–34; 130 ER 1128.

[6] *Mare v Sandford* (1859) 1 Giff 288, 294–95; 65 ER 923, 926 (Stuart-VC). This was another case concerned with a private agreement between the debtor and a creditor, inducing the creditor to support an arrangement with all creditors.

[7] *Dauglish v Tennent* (1866–67) LR 2 QB 49 (QB) 53–54 (Cockburn CJ).

[8] *Re Cowan* (1867) LR 2 Ch App 563 (CA).

arrangement must be free from all taint of fraud, and must be made and entered into *bona fide* with a view to the benefit of all the creditors.[9] Lord Cairns LJ agreed:

> [E]ven without any ingredient of fraud, if the creditors, from motives of charity and benevolence, which might be highly honourable to them, were willing to give the debtor a discharge on payment of a composition wholly disproportioned to his assets, that would not be such a bargain as the Act requires, and would not bind the non-assenting minority.[10]

In another case, *Re Page*,[11] it appears from the short report that the inference that the creditors had voted for an improper (albeit benevolent) reason was inferred simply from the miserable amount offered by way of composition, compared with what the debtor could actually afford.

Other cases stressed the importance of equal treatment – for example, *Mare v Sandford*,[12] *McKewan v Sanderson*[13] and *Re Milner*.[14] In the last case, the agreement of certain creditors to a composition, which was not made under the applicable provisions of the Bankruptcy Acts, was procured by an inducement from a third party. Brett MR held that the very essence of such a composition was that all creditors were obliged to participate on a 'footing of equality', implied by law from the very nature of the transaction.[15]

In most of the cases, the problem stemmed either from attempts to garner support by secret deals, or from the ulterior motives of certain of the creditors. It seems to have been uncommon for an arrangement to provide, openly and transparently, for differential treatment of different creditors *within* an arrangement. where that did occur, however, as in *Thompson v Knight*,[16] the court was strongly opposed to it. In that case, relying on the basic proposition that bankruptcy required all creditors to be treated equally, an arrangement that did provide – even only potentially – for such differential treatment was struck down altogether. The arrangement (entered into under section 192 of the Bankruptcy Act 1861) provided that creditors' debts would be compromised by a payment of 10s in the pound, payable in instalments, but where the trustee administering the arrangement was given a discretion to pay any creditor whose debt was less than £20 the full amount of its composition at such time as he thought fit. In finding that the arrangement was invalid, Kelly CB said it was 'only when the provisions of the deed are just and equal that the deed ought to be held binding upon all'.[17]

III. VOTING UNDER MULTILATERAL CONTRACTS; COMPANY GENERAL MEETINGS

The starting point in considering the exercise of a power given to a majority by contract is the contract itself. In one case,[18] this was also seen as the end point: any limitation on the contractual power could only exist as a matter of construction or implication of terms, and a term could only be implied if it was required for business efficacy purposes, or was a matter of obvious inference, or was necessary to give effect to the reasonable expectations of the parties.[19] In *Assenagon*, however, Briggs J preferred the view that 'an additional basis for the implication of this principle into provisions conferring powers on majorities to bind minorities' was that such a term is generally implied by the law in contracts or arrangements of particular types,[20] albeit that it would still be regulated by any contrary intention demonstrated by the parties' agreement.[21] This reflects the approach taken in, for example, *British America Nickel Corpn Ltd v O'Brien Ltd*,[22] a case concerned with the power of a majority of debenture holders to modify the terms of the debenture so as to bind the minority: such

[9] ibid 567–68.

[10] ibid 570.

[11] *Re Page* (1876) 2 Ch D 323 (CA).

[12] ibid 294–95: 'the object of the bankrupt laws is to secure an equal distribution of property among the creditors, so that none shall have any advantage over another'.

[13] *McKewan v Sanderson* (1875) LR 20 Eq 65, 72–73 (Malins V-C): 'Now I take it to be thoroughly settled, both in Court of Law and Equity, that where there is a bankruptcy, or an arrangement with creditors by composition or insolvency, when insolvency exists as contradistinguished from bankruptcy, it is the duty of all creditors who have once taken part in the proceedings of bankruptcy or composition to stand and share and share alike.'

[14] *Re Milner* (1885) 15 QBD 605 (CA).

[15] ibid 612.

[16] *Thompson v Knight* (1866–67) LR 2 Ex 42 (Ex).

[17] ibid 44.

[18] Redwood Master Fund Ltd v TD Bank Europe Ltd [2002] EWHC 2073 (Ch) [2006] 1 BCLC 149.

[19] ibid [92] (Rimer J).

[20] See *Liverpool City Council v Irwin* [1977] AC 239 (HL) 253–55 (Lord Wilberforce).

[21] *Assenagon* (n 1) [46] (Briggs J). It may also be possible to read down an apparently wide power through a process of purpose construction, as in *Mercantile Investment and General Trust Co v International Company of Mexico* [1893] 1 Ch 484 (Note) (CA), where a power to modify the rights of debenture holders against the

a power 'must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities, namely that the power given must be exercised for the purpose of benefitting the class as a whole, and not merely individual members only'.

As to the content of the principle, Briggs J in *Assenagon* considered that it was best reflected in the judgment of Lord Evershed MR in *Greenhalgh v Arderne Cinemas Ltd*,[23] a case concerned with the power of shareholders by special resolution to amend the articles of association of the company. He held that 'bona fide for the benefit of the company as a whole' meant two things: the shareholder must proceed upon what, in his honest opinion, is for the benefit of the company as a whole; and 'the company as a whole' meant the corporators as a general body. He paraphrased the test as follows: 'a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders, so as to give to the former an advantage of which the latter were deprived'.

On the facts in *Assenagon* the court found[24] that the majority had acted unlawfully in voting for a resolution to approve the bank's offer to exchange €0.20 new notes for each €1 of existing subordinated notes, but on terms that the noteholders were required to commit themselves at a noteholders' meeting to vote for a resolution introducing an amendment allowing the bank to redeem all outstanding notes for a nominal price of €0.01 per €1,000 face value. Briggs J concluded that the only function of the resolution was the intimidation of a potential minority, based upon the fear of any individual member of the class that, by rejecting the exchange and voting against the resolution, it would left out in the cold. That form of coercion was 'entirely at variance' with the purposes for which power was given to majorities to bind minorities.[25]

The restriction on the power of a majority of shareholders to bind the minority is itself derived from the limitation on the power of a majority of partners to expel a partner: see *British America Nickel Corp Ltd v O'Brien Ltd*,[26] *Re Westbourne Galleries Ltd*[27] and *O'Neill v Phillips*.[28] In *Blisset v Daniel*,[29] the principle was applied to a power given to a majority of partners to expel one of their number. Page-Wood V-C said, of this power, that it was inserted 'not for the benefit of any particular parties holding two-thirds of the shares, but for the benefit of the whole society and partnership'.[30]

IV. COMPANY SCHEMES OF ARRANGEMENT

The earliest provisions permitting arrangements between creditors and a company to be made binding on all, if approved by a majority, were in the Companies Act 1862, sections 136, 159 and 160. These provisions were, however, restrictively interpreted.[31] Once enlarged (by section 2 of the Joint Stock Companies Arrangement Act 1870) extended to arrangements with members (by section 24 of the Companies Act 1900), and applied to companies not in the course of being wound up (by section 38 of the Companies Act 1907), the statutory provision became that which in materially the same form exists today in Part 26 of the Companies Act 2006. This provides that an arrangement or compromise between a company and its creditors, or members, or a class of creditors or members, is binding on all creditors, or members, if approved by a majority in number representing three-fourths in value of the creditors, or members, or any class of them, and if sanctioned by the court.

The most important innovation introduced by these provisions was the possibility of subdividing the creditors into separate classes, so enabling an arrangement to be made with a class, or two or more classes, of them. As Chadwick LJ put it a century later in *Re Hawk Insurance*,[32] it enabled a company to enter into a series of linked arrangements with different classes of creditors.

company was construed as not extending to a power to relinquish all their rights.

[22] *British America Nickel Corpn Ltd v O'Brien Ltd* [1927] AC 369 (PC) 371 (Viscount Haldane).

[23] *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 (CA) 291.

[24] This conclusion was obiter because the court had concluded that the notes held by the majority were, by the time of the meeting, held for the benefit of the bank, and thus were to be excluded by contract from voting at the meeting.

[25] *Assenagon* (n 1) [84]–[86].

[26] *British America Nickel Corp* (n 22) 371 (Viscount Haldane).

[27] *In re Westbourne Galleries* [1973] AC 360 (HL) 381 (Lord Wilberforce).

[28] *O'Neill v Phillips* [1999] 1 WLR 1092 (HL) 1098–1101 (Lord Hoffmann).

[29] *Blisset v Daniel* (1853) 10 Hare 493, 68 ER 1022.

[30] ibid 523–24; 68 ER 1035.

[31] Section 136, which applied only to a company about to be, or in the course of being, wound up, was held not to apply to an arrangement that was intended to return the company to solvency, and was rarely used: In *Re Contal Radio Ltd* [1932] 2 Ch 66 (Ch) (see the judgment of Maugham J); ss 159 and 160 were held to include limited, if any, power to bind minorities: In *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch 213 (CA) 235 (Lindley LJ).

[32] *Re Hawk Insurance* [2001] EWCA Civ 241, [2001] 2 BCLC 480.

Before getting to that, however, in the earliest cases under these new provisions the courts followed the earlier bankruptcy authorities in protecting minorities against majorities influenced by special interests. In *Re Wedgwood Coal and Iron Company*,[33] for example, a reconstruction scheme was resolved upon, by the requisite majority, at a meeting of debenture holders. The vote was carried by debenture holders who were also shareholders with substantial liabilities to the company, of which they were relieved by virtue of the scheme. Although the case was decided on the narrow ground that the holders of debentures passing by delivery were not eligible to vote, Malins V-C also rejected the resolutions on the basis of the principle derived from *Re Cowen* and *Re Page* (above): wherever there is a power in a majority to bind a minority, that power must be exercised *bona fide* 'by persons who really have regard to the interests of the company'. That did not include those who voted merely for the purposes of getting out of a liability.

That was an extreme case, but in *Re Alabama, New Orleans, Texas* and *Pacific Junction Railway Co*[34] the circumstances were more familiar to those involved in modern schemes of arrangement. There were three classes of debt (first and second debenture holders and unsecured creditors). The restructuring involved an exchange of existing debt for new debentures, with a view to returning the company to solvency. There was no question that the majority was acting in good faith, but – with four class meetings – it raised the question of how to assess votes of creditors in one class who held debt or shares in another class (eg debenture holders who also held shares). Lindley LJ formulated the following test, which has largely been applied ever since:[35] is the majority acting *bona fide*? Is the minority being overridden by a majority 'having interests of its own clashing with those of the minority whom they seek to coerce'? Is the scheme one that persons acting honestly, and viewing the scheme in the interests of those whom they represent, take a view that can reasonably be taken by business men?[36] Bowen LJ also addressed[37] the issue of cross-class holdings. He concluded that, while it was open to each member of a class 'to do that which is best for himself', it was for the court to see what was just and reasonable for the whole class, and it would no doubt be influenced if it turned out that the majority 'was composed of persons who had not really the interests of the class at stake'. The following year, in *Sovereign Life Assurance Company v Dodd*,[38] the Court of Appeal turned its mind to the question of what was meant by 'class' in the statutory provisions. The statute did not define the term. Bowen LJ, describing it as 'vague', said that to find out what it meant it was necessary to look at the scope of the section, concluding:

> [I]t seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.[39]

This is the test that has been applied ever since, reiterated in more recent times by the Court of Appeal in *Re Hawk Insurance*.[40] As applied recently, the test has been interpreted as going to jurisdiction: if creditors are wrongly placed into the same class, then that deprives the court of the ability to sanction the scheme. Case law has developed subtle distinctions between, on the one hand, the rights of creditors and, on the other hand, interests held by creditors falling short of rights.

The rights in question are either existing rights against the company, or the rights to be conferred under the scheme.[41] The former are the rights the creditors would have against the company in the event that the scheme was not sanctioned, ie the relevant 'comparator'. where, for example, creditors' claims carry different interest rates, those differences will not be relevant if the comparator is an insolvent liquidation, because unless and until there is a surplus in such liquidation, no interest is payable on proved debts – see, for example, ***Re** ED&F Man Treasury Management plc*.[42]

The strictness of this rule, and the trap for the unwary that it creates, is mitigated to some extent by the inherent flexibility in the test. A class is not split merely because it contains creditors with different rights; it is split only if the differences in rights are such that the creditors cannot consult together with a view to their common interest. As Hildyard J put it in *Re Apcoa Parking Holdings GMBH*,[43] if there are differences in rights, then the court is required to go on to 'postulate, by reference to the alternative if the scheme were to fail, whether objectively there would be more to unite than divide the creditors in the proposed class, ignoring for that purpose any personal or extraneous interest or subjective motivation operating in the case of any particular creditor(s)'.

Where there is a minority of creditors who either do not support, or actively oppose, a scheme, therefore, there are two important layers of protection: the division of creditors into classes at the stage of convening meetings of creditors, which ensures that creditors with similar rights are not outvoted by others with materially different rights; and the broad discretion applied at the stage of sanctioning the scheme, including the principles borrowed from the bankruptcy arrangements in the nineteenth century, and applied in multilateral contracts, of good faith and equal treatment.

The precise content of the broad discretion exercised at the sanction stage is harder to define, but is often encapsulated (picking up the threads identified in *Re Alabama, New Orleans, Texas* and *Pacific Junction Railway Co* (above)) in the following points: was the class fairly represented at the meeting or meetings? Was there any coercion of the minority by the majority in order to promote an interest adverse to those of the class which they represent? Was the scheme one that an intelligent and honest person, a member of the class concerned, acting in respect of their own interest could reasonably approve? Is there any 'blot' or defect in the scheme that would make it unlawful or inoperative?[44]

[33] *Re Wedgwood Coal and Iron Company* [1877] 6 Ch D 627 (CA).

[34] *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch 213 (CA).

[35] ibid 239 (Lindley LJ).

[36] At 247 Fry LJ expressed this last question in oft-quoted language: '[The court] must be satisfied that the proposal was at least so far fair and reasonable, as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interests as such a member, might approve it.'

[37] ibid 244.

[38] *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573 (CA) 583 (Bowen LJ).

[39] ibid.

[40] ibid [26] (Chadwick LJ).

[41] See eg *Re UDL Holdings Ltd* [2001] HKCFA 19, [2002] 1 HKC 172 [27] (Lord Millett).

[42] *Re ED&F Man Treasury Management plc* [2020] EWHC 2290 (Ch) [11]; *Re Obrascon Huarte Lain SA* [2021] EWHC 859 (Ch).

[43] *Re Apcoa Parking Holdings GmbH* [2014] EWHC 3849 (Ch), [2015] 4 All ER 572 [52].

It is in fact a rare event that an English court has exercised its discretion by declining to sanction a scheme of arrangement. The fact that groups of creditors have special interests not shared with the class (eg by reason of cross-holdings of different classes of debt, or of shares) has rarely been considered a reason to refuse to sanction the scheme. A recent example is *Re ALL Scheme Limited*,[45] but the reason for refusing to sanction the scheme was that the court was not satisfied that the vote at the single meeting of creditors was representative of the class, in circumstances where the turnout was extremely low (9 percent of the creditors by number) and there had been insufficient explanation of the proposal and its consequences to enable creditors to make an informed decision.[46]

It is less common to find a subgroup of creditors within a voting class with a special interest that is not shared by the other members of the class (but which does not amount to a difference in rights so as to fracture the class), where that subgroup are motivated to approve the scheme by reason of that special interest and their vote is material in obtaining the requisite majority in the class.

The problems to which that can give rise were grappled with by Hildyard J in *Re Lehman Brothers International (Europe) (No 10)*.[47] The possible approaches were either (i) to discount the weight to be given to the majority vote, and consider the fairness of the scheme without adopting any presumption in favour of the majority, or (ii) to disregard altogether the votes of the 'special interest' creditors, so that they did not count at all towards the statutory majority. The latter approach – if applied strictly – would seem to cut across the rules for class composition. Creditors are only placed in the same class if their rights are not so dissimilar as to make it impossible for them to consult together. The corollary is that if they are in the same class they should be permitted to vote. Hildyard J concluded that the question was one of discretion,[48] to be exercised according to all the circumstances of the case. An important factor, in his view, was that the court has always been especially disposed to guard against coercion of a minority by a self-interested majority. In light of that, the most important circumstances would often be the level of support from creditors who did not share the special interest and the court's own views on the balance of the benefit offered by the scheme. As will be seen, this notion of 'balancing the benefit' offered by the scheme echoes the approach taken in the remaining two contexts: voluntary arrangements and Part 26A restructuring plans.

[44] *Re Telewest Communications* [2004] EWHC 1466 (Ch), [2005] BCC 36 [20]–[22] (David Richards J); *Re TDG plc* [2008] EWHC 2334 (Ch), [2009] 1 BCLC 445 [29] (Morgan J).

[45] *Re ALL Scheme Limited* [2021] EWHC 1401 (Ch).

[46] ibid [138]–[139] (Miles J).

[47] *Re Lehman Brothers International* (Europe) (No 10) [2018] EWHC 1980 (Ch), [2019] Bus LR 1012 [107]–[111].

[48] The same judge had noted, in *Apcoa Parking* (n 43) [54], that the approach advocated by Bowen LJ in *Re Alabama*, 'chimes … with the inclination of judges to prefer the more flexible tool of discretion and an overall appreciation of fairness tested by reference to real alternatives rather than the straight-jacket [sic] of jurisdiction, especially where rigidity may result in fragmentation of classes to avoid jurisdictional issues, but at the cost of enabling a small group to hold out unfairly against a majority'.

V. VOLUNTARY ARRANGEMENTS

Voluntary arrangements owe far more to the nineteenth-century arrangements and compositions in bankruptcy than they do to schemes of arrangement. The legislation provides for a single arrangement between the debtor and all of its creditors. In both the corporate and individual versions, 'voluntary arrangement' is defined as the proposal made by the debtor to 'its creditors' for a composition in satisfaction of its debts or a scheme of arrangement of its affairs. Notice of the 'qualifying decision procedure' (which may, but need not be, a meeting) must be given to *all* of the debtor's creditors of whom the nominee is aware,[49] and all creditors who are given notice are entitled to vote in respect of the arrangement.[50] There is no provision, therefore, for an arrangement with a class of creditors, or for linked arrangements with multiple classes.

The report of the Cork committee, which preceded the 1986 Insolvency Act, focused mostly on voluntary arrangements for individuals: the extension to companies was dealt with in just a few paragraphs. It was the expectation of the Cork committee that company voluntary arrangements would be used only in relatively simple cases, for example where the company's debt profile resembled that of a sole trader, and where there were not substantially different rights and interests among creditor groups.[51]

There are, however, two significant developments compared to the nineteenth-century bankruptcy arrangements. First, the problem of creditors being motivated to approve an arrangement by reason of family or other close connections with the debtor is addressed head-on in the rules. while the overall majority required to approve a voluntary arrangement is 75 percent by value, a decision otherwise approving an arrangement is deemed not to be made if more than half of the total value of unconnected creditors vote against it.[52]

Second, court involvement in the approval of an arrangement is removed: an arrangement is brought into effect solely as a consequence of its approval by the requisite majority of creditors. The court is involved only if there is an appeal relating to voting rights, or an objecting creditor applies to revoke the approval of the arrangement on one of two grounds: material irregularity or unfair prejudice.[53]

In recognition of the fact that the rights of secured creditors to enforce their security are retained in the case of their debtor's bankruptcy or winding-up, the legislation provides special treatment for them. Although they are included within 'all creditors' entitled to be given notice of, and to vote in respect of, a proposal, the proposal cannot modify their security rights without their consent,[54] and they are only entitled to vote in respect of the unsecured portion (if any) of their debt.[55]

In interpreting and developing the first ground of challenge (material irregularity) the courts have continued

to apply the principles of good faith and equality from the nineteenth-century cases referred to above.[56]

For example, in *Somji v Cadbury Schweppes plc*[57] the Court of Appeal concluded that a secret inducement to a creditor to vote in favour of the arrangement constituted a material irregularity. Robert Walker LJ[58] considered that the intellectual freight of the pre-1986 insolvency law that was least likely to have been jettisoned by the Insolvency Act 1986 were the basic doctrines – such as proportionate treatment of unsecured creditors – which were features of bankruptcy law from its earliest days.

A further example is *National Westminster Bank plc v Kapoor*,[59] where an assignment from a connected creditor to one who was unconnected with the debtor (so as to avoid the arrangement failing under Rule 15.34(4)) was held to be a material irregularity, on the basis that 'material irregularity' was coloured by the principles of good faith and equal treatment laid down in, for example, *Dauglish v Tennent* and *Mare v Sandford*.[60] In *Gertner v CFL Finance Ltd*,[61] the Court of Appeal applied the same principles in the context of a separate deal with one creditor, notwithstanding that it was not kept secret from others. In that case, an arrangement under which creditors would receive 0.07p in the pound was approved by a meeting of creditors at which the largest creditor, Kaupthing Bank hf, voted in favour. Kaupthing, however, had the benefit of a settlement agreement with the debtor under which it received considerable benefits that were not made available to other creditors. This was held to constitute a material irregularity, as it breached the good-faith principle.

[49] Insolvency Act 1986, ss 3(4), 257(2B).

[50] Insolvency (England and Wales) Rules 2016, SI 2016/1024, r 15.28(5).

[51] See Department of Trade and Industry, *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) (Cork Report) para 430.

[52] Insolvency Rules 2016 (n 51), r 15.34(4).

[53] Insolvency Act 1986, ss 6, 262.

[54] ibid s 4(3) and s 258(4).

[55] Insolvency Rules 2016 (n 51), r 15.31(4) and (5).

[56] See, for a fuller treatment of the case law, *Lazari Properties 2 Ltd v New Look Retailers and others* [2021] EWHC 1209 (Ch), [2021] Bus LR 915 (*New Look*) [86]–[105].

[57] *Cadbury Schweppes plc v Somji* [2001] 1 WLR 615 (CA).

[58] ibid [24].

[59] *National Westminster Bank plc v Kapoor* [2011] EWCA Civ 1083, [2012] 1 All ER 1201.

[60] See above, nn 6, 7.

[61] *Gertner v CFL Finance Ltd* [2018] EWCA Civ 1781, [2018] BPIR 1605.

[62] ibid [63] and [80] (Patten LJ).

[63] *Re a Debtor* (No 259 of 1990) [1992] 1 WLR 226 (Ch) 228 (Hoffmann J).

[64] *Doorbar v Alltime Securities Ltd* (No 2) [1995] 2 BCLC 513 (Ch) 518 (Knox J). *See also Re a Debtor (No 222 of 1990), ex p the Bank of Ireland* [1992] BCLC 137 (Ch) 145D–E

Importantly, although there was a complaint of inadequate disclosure, Patten LJ's reasoning did not depend upon non-disclosure of the settlement agreement. Thus, it was not merely a lack of good faith by reason of a secret inducement (as in most of the nineteenth-century bankruptcy cases) that caused the arrangement to fail. It was the fact that the side-deal offered to Kaupthing alone meant that the creditors were not on an equal footing in considering the merits of the proposal, and put Kaupthing in a position of conflict with other creditors.[62]

Each of these cases involved something more than merely differential treatment of creditors: either a secret side deal, an arrangement (the assignment in *Kapoor*) whose purpose was found to be to subvert the statutory policy relating to connected creditors, or – while falling short of 'vote-buying' – an arrangement intended to provide a significant inducement to a creditor to vote in favour. Moreover, these cases all involved a transaction outside the terms of the arrangement.

More difficult is where the arrangement transparently provides for differential treatment. This is made more complicated by the fact that, contrary to the expectation of the Cork committee, company voluntary arrangements have in recent years been used for companies with ever-more complex debt profiles and in order to effect materially different out comes for different groups of creditors. Cases, that is, in which the creditors would be placed into different classes if the restructuring were effected via a scheme of arrangement. Without the concept of class to fall back on, this places particular stress on the concept of 'unfair prejudice'.

Soon after the introduction of voluntary arrangements, it was established that unfair prejudice meant that which stemmed from the terms of the arrangement itself:[63] it referred to a degree of prejudice to one creditor or class of creditors as compared with other creditors, or classes of creditors.[64]

Latterly, the courts have developed two 'useful heuristics'[65] for assessing whether an arrangement is unfairly prejudicial. The first (the vertical comparator) compares the outcome for each creditor in the arrangement with the outcome that they would have achieved in the event that the arrangement had not been approved, typically a liquidation. The return that a creditor would have received in a liquidation or bankruptcy has been described as 'the irreducible minimum' below which an arrangement cannot go.[66] It is difficult to envisage a court not interfering with an arrangement that was 'likely to result in creditors, or some of them, receiving less than they would in a winding up of the company, assuming that the return in a winding up would in reality be achieved and within an acceptable time-scale'.[67]

The second (the horizontal comparator) compares the outcome as between different creditors or groups of creditors. The mere fact that differences exist between creditors – either in their existing rights or in the rights conferred by the arrangement – does not in itself constitute unfair prejudice. It will give cause for inquiry, but may turn out to be justified.[68] In some cases, differential treatment is essential to *ensure* fairness. For example, if in the absence of the arrangement the debtor company would go into liquidation where a group of creditors would be entitled to special treatment, then fairness requires that treatment to be replicated in the arrangement.[69]

The most oft-cited justification for giving preferential treatment to some creditors is that it is necessary to ensure the continuation of the debtor's business *and* that the continuation of the business is essential to the success of the arrangement.[70] Beyond that, however, there is little guidance as to the principles to apply in determining when differential treatment may be justified. The cases where arrangements have been struck down as being unfairly prejudicial are often ones where the treatment of the objecting creditor was such that it was worse off than in the event of the company's liquidation. In *Prudential Assurance Co Ltd v PRG Powerhouse Ltd*,[71] for example, the arrangement purported to deprive landlords of their valuable rights of guarantee against third parties (which would have survived the company's liquidation) in return for a relatively small dividend in the arrangement. Similarly, in *Mourant & Co Trustees Ltd v Sixty UK Ltd*[72] the treatment of landlords was held to be worse than they would have received in a winding-up of the debtor company.

It is for those proposing a voluntary arrangement to justify the differential treatment of 'critical' creditors. Failure to provide a robust explanation for why they should be paid in full, or at a higher rate of dividend than others, may well lead to the failure of the arrangement. That was one of the reasons advanced for revoking the arrangement in *Mourant & Co v Sixty*,[73] and was critical to the court's conclusion in *Carraway Guildford (Nominee A) Limited v Regis UK Limited ('Regis')*.[74] In that case, a debt of nearly £600,000 owed to the immediate parent company of the debtor was left unimpaired by the arrangement. The arrangement was expected to generate, from trading, approximately the same sum, to be made available to all impaired creditors so that, over time, they would receive 7p in the pound. Although that was likely to be higher than they would recover in the event of the company's liquidation, the absence of a proper explanation for leaving the shareholder's debt wholly unimpaired led the court to conclude that this was unfair prejudice.

The real difficulty with differential treatment of creditors within a voluntary arrangement is the fact that, irrespective of their treatment, all creditors are entitled to vote in the qualifying decision procedure. In the simpler cases, and in the case of the most often cited reason for preferential treatment – ie that payment of certain creditors is critical to the continuation of the debtor's trading – the number of creditors and volume of debt involved are unlikely to be significant. They are unlikely, in other words, to have a material impact on the outcome of the vote.

(Harman J).

[65] *Discovery (Northampton) Limited v Debenhams Retail Limited* [2019] EWHC 2441 (Ch), [2020] BCC 9 [12] (Norris J).

[66] *Mourant & Co Trustees Ltd v Sixty UK Ltd* [2010] EWHC 1890, [2011] 1 BCLC 383 (Ch) [67] (Henderson J).

[67] *Re T&N Ltd* [2004] EWHC 2361 (Ch), [2005] 2 BCLC 488 [82] (David Richards J).

[68] *Re a Debtor (No 101 of 1999)* [2001] 1 BCLC 54 [63] (Ferris J,).

[69] *Sea Voyage Maritime Inc v Bielecki* [1999] 1 All ER 628 (Ch), where certain creditors would have had the right, in the winding-up of the debtor, to be indemnified by the debtor's insurer under the Third Party (Rights Against Insurers) Act 1930. This approach mirrors that taken in schemes of arrangement (see above), where the differences in the rights of creditors are measured against the rights that they would have in the relevant alternative.

[70] *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] EWHC 1002, [2007] BCC 500 [90] (*Powerhouse*) (Etherton J) and the cases there cited.

[71] ibid.

[72] *Mourant & Co Trustees Ltd v Sixty UK Ltd* (n 66).

[73] ibid.

[74] *Carraway Guildford (Nominee A) Limited v Regis UK Limited* [2021] EWHC 1294 (Ch), [2022] 1 BCLC 709.

In recent years, however, with the use of company voluntary arrangements in ever- more complex cases, there has been a tendency to treat large numbers of creditors as critical, and thus unimpaired by the arrangement (or at least afforded substantially better treatment), where the combined voting power of such creditors is sufficient to swing the vote in favour of the arrangement. Given that there is no provision for placing creditors into different classes for voting purposes, this has created a clear tension with the principles established in the nineteenth-century cases on compositions and arrangements. According to these principles, a majority of creditors should only bind the minority where they are treated equally (or at least sufficiently similarly) with the minority.[75]

The problem arises most acutely where the differential treatment can be justified on the basis that payment of the relevant creditor is critical to ensure the success of the arrangement, and where the arrangement enables all of the unimpaired creditors to obtain a better return than if the company went into liquidation, but where unimpaired creditors as a group do not approve the arrangement by the requisite majority. That issue potentially arose in *Regis*, but as a result of the court's refusal on case management grounds to permit amendments to the pleadings, this was not a point that it was open to the objecting landlords to take.

Such a restructuring could not be achieved via a scheme of arrangement, because the impaired creditors would clearly be entitled to form a separate class, and their negative vote would deprive the court of jurisdiction to sanction the scheme. One possible answer to this problem is that a voluntary arrangement cannot, as a matter of jurisdiction, be used to implement separate deals with different creditor groups. That argument was, however, rejected in *New Look*, as was the contention that this would necessarily amount to unfair prejudice.[76]

The fact that a voluntary arrangement could *not* be achieved via a scheme of arrangement is nevertheless a powerful factor in considering whether unfair prejudice exists.[77] In *Powerhouse*,[78] Etherton J noted that not only would the impaired landlords have formed a separate class in a scheme, but a scheme would not have needed to include, and would not have included, the unimpaired creditors. An arrangement whereby the vote of the impaired landlords was 'swamped' by the vote of those who were to receive payment in full was one that it was 'obvious' was outside the contemplation of the Cork committee. The facts were extreme, as noted above, because the impaired landlords stood to lose least (if anything) upon liquidation of the debtor, but stood to lose the most of all creditors in the company voluntary arrangement.

It is, however, not in itself determinative: see *SISU Capital Fund Ltd v Tucker*.[79]

In *Re Portsmouth City Football Club*,[80] the arrangement was voted through by virtue of the votes of a group of creditors who had no real interest in its outcome, because they would be paid in full. These were 'football creditors' who under Football League rules would be paid in full by the Football

[75] As noted above in section II, the nineteenth-century cases were mostly concerned with precluding secret side-deals, but where there was differential treatment under the arrangement (as in *Thompson v Knight* (n16), the lack of equal treatment was in itself sufficient to invalidate the arrangement.

[76] *New Look* (n 56) paras 156–86.

[77] As David Richards J pointed out in *Re T&N Ltd* (n 67) [81], the crucial difference between a scheme and a voluntary arrangement is that in a voluntary arrangement there is just one meeting, so that necessarily means that there may be subgroups who would constitute a separate class for a scheme: 'in considering unfair prejudice, the court will have regard to the different position of different groups of creditors'.

[78] *Powerhouse* (n 70) [108].

League (by way of deduction from amounts that would otherwise be paid by the League to the club). The proposal offered ordinary unsecured creditors 20p in the pound. Mann J rejected the argument that the ordinary unsecured creditors (predominantly HMRC) were unfairly prejudiced. The differential treatment of the football creditors (assuming that the arrangement provided for them to be paid in full, rather than merely acknowledging they would be paid in full elsewhere) was objectively justifiable because they were to be paid out of assets that would not otherwise have been available to the company in the voluntary arrangement. They were not being paid, therefore, at the expense of other creditors of the company. Two points were made in answer to the objection that the compromise was being forced on creditors by the vote of those who were unaffected by the arrangement: first, the unsecured creditors were better off under the arrangement than in the company's liquidation (ie the vertical comparator test was satisfied); and, second, the football creditors were sufficiently *interested* in the arrangement by virtue of the fact that their contracts would be honoured if the arrangement was approved, whereas in a liquidation their employment would cease.

In *New Look*, the company contended that it was sufficient to answer a charge of unfair prejudice that any differential treatment could be objectively justified, and that the impaired creditors would achieve a better outcome than in the relevant alternative. The court rejected that argument, which failed to pay sufficient regard to the horizontal comparator. In that case, one group of creditors consisted of compromised landlords of numerous retail premises occupied by the company. Their claims were substantially impaired by the arrangement. There were two other groups of creditors who received materially different treatment, but whose votes counted towards the statutory majority in approving the arrangement: secured noteholders were unaffected by the arrangement, but were compromised by a separate scheme of arrangement; and the ordinary unsecured creditors and landlords of premises deemed necessary for the success of the business were unimpaired by the arrangement.

It was accepted by the objecting landlords that the preferential treatment of the second group of creditors was justified on the grounds that they were critical creditors. As their combined vote was insufficient to have made a material difference to the outcome of the meeting, the fact that they had preferential treatment was held not to be unfairly prejudicial.

As to the first group, the Court reasoned as follows: their right to enforce their security could not be impaired by the arrangement without their consent; consent of all noteholders could not in practice be obtained, so the scheme of arrangement was best analysed as a mechanism for achieving the consent of all noteholders to the impairment of their security (by exchanging their existing rights for new security rights); it was a statutory requirement that the unsecured portion of their claim be admitted to vote; in relation to that unsecured portion they in fact received nothing, so their treatment was significantly *worse* than that of the impaired landlords; and the fact that they may nevertheless have been incentivised to vote in favour of the arrangement because their treatment under the scheme may have ensured a better outcome than in the relevant alternative was not sufficient to constitute unfair prejudice.

The court identified the following as factors relevant in considering whether it was unfairly prejudicial that the vote of unimpaired, or lesser impaired, creditors influenced the vote to approve a voluntary arrangement. First, has there been a fair allocation of the assets available within the arrangement between the compromised creditors and other groups? That might involve considering the source of the assets from which the treatment of the different subgroups derives, and whether they would or could have been made available to all creditors in the relevant alternative. This necessarily contemplates the court considering whether a different allocation to that proposed by those who formulated the arrangement would have been possible.[81] Second, what is the nature and extent of the different treatment, the justification for that treatment, and its impact on the outcome of the qualifying decision procedure? Unfair prejudice might more readily be found where an arrangement that compromised the claims of a subgroup of creditors was achieved only because of the votes of a large swathe of creditors who are unaffected by it, even if there was an objective justification for those creditors being unaffected by the company voluntary arrangement.[82] Third, was there a significant body of creditors, in the same position as those objecting to the arrangement, who approved it?[83]

[79] *SISU Capital Fund Ltd v Tucker* [2005] EWHC 2170 (Ch), [2006] BCC 463 [133]–[134] (warren J).

[80] *Re Portsmouth City Football* [2010] EWHC 2013, [2011] BCC 149.

[81] Contrast the position in relation to schemes of arrangement under Part 26 of the Companies Act 2006, where the court is not concerned to see whether another arrangement might be fairer for one or other group of creditors: see for example In re Co-operative Bank plc [2017] EWHC 2269 (Ch) [37] (Snowden J).

[82] See for example Powerhouse (n 70).

[83] Compare Lehman Brothers (n 47) [129–30], in the case of a scheme of arrangement; and Re DeepOcean 1 UK Ltd [2021] EwHC 138 (Ch), [2021] BCC 483 [59], in the case of a Part 26A restructuring plan.

VI. RESTRUCTURING PLANS

By reference to the restructuring toolkit in English law, the restructuring plan under Part 26A of the Companies Act 2006 is clearly the offspring of the scheme of arrangement.[84] Like the scheme, it divides creditors into classes for the purposes of voting and requires court involvement both at the stage of defining the classes and at the stage of sanction. Its major innovation, however – the cross-class cram-down power[85] – makes it particularly suited as a replacement for the voluntary arrangement in those complex cases where substantively different deals are sought to be imposed on different groups of creditors.

As noted above, the question of particular difficulty that arises in relation to voluntary arrangements is how to determine whether an arrangement that gives preferential treatment to one or more subgroups of creditors is unfairly prejudicial, where the disadvantaged subgroups will obtain under the arrangement at least as good an outcome as they would achieve in the relevant alternative.

Under Part 26A, it appears that the mere fact that creditors in the dissenting classes will be no worse off under the plan than in the relevant alternative is not sufficient to justify the sanction of the plan. That is because the requirement of 'no worse-off treatment' is a condition for the cross-class cram-down power to be exercised, not a reason – in itself – for exercising it. Two early cases on the new regime provided preliminary guidance on the operation of the cross-class cram-down: *Re DeepOcean 1 UK Ltd*[86] and *Re Virgin Active Holdings Ltd*.[87]

In *DeepOcean*, Trower J identified the following as relevant to the exercise of the cram-down power.[88] First, no plan creditor objected that the plan was unfair. Second, creditors in the dissenting class would not merely be no worse off than in the relevant alternative (which was held to be a formal insolvency process of some kind): they would have received nothing in the relevant alternative, but stood to receive a dividend of approximately 4 percent on their claims under the plan. Third, the approach adopted by the court in deciding whether to sanction a scheme of arrangement was an appropriate starting point, but with the important difference that the court's reluctance to differ from the meeting (in a scheme context) did not have the same place in the court's approach to sanctioning a plan to which section 910G applies. That is because by its very nature the power under that section contemplates the court overriding the wishes of a class meeting. Fourth, where the evidence is that members of the dissenting class are out of the money in the relevant alternative, such that they could have been excluded from a Part 26 scheme by virtue of the principle in *Re Tea Corp*,[89] their receipt of any benefits under the plan means that they are unlikely to have been treated in a manner that was not just and equitable.[90] Fifth, the fact that the benefits under the plan were to be provided by a group company other than DSC, combined with the fact that the creditors in the dissenting

class were out of the money in the relevant alternative, was a powerful pointer towards exercising the cross-class cram-down power. Sixth, it was also relevant to take into account the overall support for the three companies' proposals taken as a whole and the extent to which the plan creditors were fairly represented at their respective meetings.

Finally, it was appropriate to have regard to the 'horizontal comparison' test usually carried out when considering a challenge to a voluntary arrangement on the basis of unfair prejudice (as in the *Debenhams* case). The court would be particularly concerned to ascertain whether there had been a fair distribution of the benefits of the restructuring[91] between

[84] Although the cross-class cram-down is derived from the plan of reorganisation under Chapter 11 of the US Bankruptcy Code.

[85] The court may sanction a restructuring plan, under Companies Act 2006, s 901G, even if the requisite majority is not obtained at one or more of the class meetings (of creditors or shareholders), provided that:

(1) none of the members of the dissenting class or classes would be any worse off under the plan than they would be in the event of the relevant alternative; and (2) the plan has been agreed by the requisite majority of at least one class of creditors who would receive a payment, or have a genuine economic interest in the company, in the relevant alternative.

[86] *DeepOcean* (n 83).

[87] *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch), [2022] 1 All ER (Comm) 1023. It is interesting to compare and contrast this case with *New Look*. Both cases involved a restructuring of a retail business conducted over numerous premises, the creditors of which therefore included a large number of landlords. One was restructured via a company voluntary arrangement, the other via the new Part

those classes who had agreed the restructuring plan and those that had not. As to this, (i) the difference between the treatment of the secured creditors and those in the dissenting class was readily explained because of the secured nature of the former's claims; (ii) the horizontal comparison test was less significant where the benefits under the plan are derived from sources other than the plan company and the dissenting class would be out of the money in the relevant comparator; and (iii) so far as some creditors had been excluded altogether from the plan, that was justified on commercial grounds

In *Virgin Active*, one of the issues was that the shareholders of a company which, in the relevant alternative, was insolvent were nevertheless provided with benefits under the restructuring plan. Snowden J considered this to be a fair allocation of the benefits arising in the plan in circumstances where the shareholders had committed under the plan to introduce new monies into the group.

Since this chapter was first presented, there has been a run of cases in which the discretion to exercise the cram-down power has been examined, and the limits of the exercise of that power have begun to emerge. A consideration of these is beyond the scope of this chapter, but a helpful analysis of some of the issues arising can be found in Sarah Paterson and Adrian Walters's article, 'Selective Corporate Restructuring Strategy'.[92]

26A procedure.

[88] *DeepOcean* (n 83) [34]–[66].

[89] *Re Tea Corp* [1904] 1 Ch 12 (CA).

[90] In this regard it was relevant to note that under s 901C(4) it may not have been necessary for such creditors to be summoned to a meeting at all.

[91] Referred to by some commentators as the 'restructuring surplus': see, for an illuminating discussion of this concept, two articles by Professor Riz Mokal: 'The Two Conditions for the Pt 26A Cram Down' (2020) 35(11) *Butterworths Journal of International Banking and Financial Law* 730; and 'The Court's Discretion in Relation to the Pt 26A Cram Down' (2021) 36(1) *Butterworths Journal of International Banking and Financial Law* 12.

[92] S Paterson and A Walters, 'Selective Corporate Restructuring Strategy' (2023) 86(2) *MLR* 436.

VII. CONCLUSION

In most of the contexts, historically, in which creditors have been called on to vote as a class, or in classes, to consider a compromise or arrangement involving their debtor, the court's role has been – at least ostensibly – relatively limited. It has been concerned to ensure that the arrangement complies with principles of good faith and equality; in particular, to ensure that no one is induced to vote in favour by special treatment. Even with the greater complexity of restructuring deals under the scheme-of-arrangement regime, the court's role was generally limited to ensuring that creditors were placed into the appropriate classes, and that those within the classes were voting in the interests of the class and not motivated by some special interest. When it came to considering the 'fairness' of the arrangement in a broader manner, the limit of the court's role was generally to ensure that a reasonable and honest person, being a member of the relevant class, could reasonably approve it. It was not for the court to consider whether some other arrangement might have been fairer to one or other group of creditors.

In recent years, however, the ingenuity of those promoting restructuring schemes has begun to push the envelope, in two ways in particular: by exploring the limits of what amounts to a sufficient similarity in rights, as opposed to interests, so as not to give power to minorities in the context of schemes; and by moulding considerably more complex arrangements within the framework of company voluntary arrangements. One result of this is that it subtly changes the nature of the question the court is required to ask. In the schemes context, as Hildyard J put it in *Lehman Brothers*,[93] the court may be required to consider, among other things, the balance of the benefit offered by the scheme to creditors within a class. In the voluntary arrangement context, as well as ensuring that no creditor is worse off than in the relevant alternative (the vertical comparator) the court is required to consider the fairness of the arrangement as between different subgroups of creditors (the horizontal comparator).

This is essentially the same question facing the court in a Part 26A restructuring plan. While the Part 26A procedure has to some extent reduced the significance of the class test, as compared to schemes of arrangements, it is a confirmation of the relevance and importance of dividing creditors into classes for the purposes of considering arrangements that impact on creditors' rights.

There are important advantages, both to those promoting a scheme and to the court, in using the Part 26A structure (where creditors are divided into classes) as opposed to a voluntary arrangement (where they are not) or a scheme (where they are, but there is an incentive to ensure that as many creditors as possible are included within a class so as avoid giving a power of veto to a minority).

First, by ensuring that creditors with the same or substantially similar rights against the debtor are divided into groups at the outset of the process, there is much better scope for creditors to consult with each other than there is in a voluntary arrangement. That will facilitate coordination of responses from creditor groups, improving their negotiating position and potentially leading to improved outcomes.

Second, when the court is called upon to consider the fairness of the arrangement (at the sanction of a scheme, or upon a challenge to a voluntary arrangement), it is better informed in the scheme context, because it can see the voting pattern among each group of creditors. That will assist in determining to what extent it can be said that a person within a dissenting class could reasonably approve the scheme.

Third, with the benefit of that information, the court (and the parties) can focus directly on the extent to which the scheme provides a fair distribution of value, including such value as is generated by reason of the restructuring. while that is essentially similar to the exercise when considering the horizontal comparator test in voluntary arrangements, it is better carried out with a clear picture of the groups into which creditors are to be divided, and voting patterns among those groups.

Fourth, when these issues are considered in relation to a voluntary arrangement, it is often against the backdrop that a successful objection to the arrangement will result in the loss of any chance to restructure the company and save the business. The arrangement is a *fait accompli*, and it is often too late to go back to the drawing board. If these issues are faced, with full transparency for creditors, before the scheme becomes effective, then (while it has to be acknowledged that the company's dire financial position in reality may often provide only a short window in which to achieve a restructuring) there is at least more prospect of the proposed scheme being remodelled – before it is too late – to take account of the court's conclusions on the objections raised.

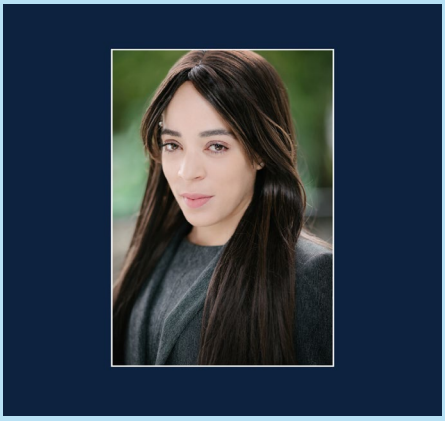
Fifth, the court has much greater control over the information the debtor should provide to creditors in the context of a restructuring plan. As noted above, there is no court involvement in the preparation of a voluntary arrangement. Moreover, the time periods for the provision of information to creditors are significantly shorter in a voluntary arrangement. One of the common complaints, therefore, is that creditors were given insufficient information, and given insufficient time to consider it. Under the scheme procedure, the court can tailor the quantity, quality and timing of dissemination of information to suit the case. ■

[93] *Lehman Brothers* (n 47).

New Tenant at South Square

We are delighted to welcome Kira King, a top commercial barrister, as a new Member of Chambers.

Kira King



Joining South Square from XXIV Old Buildings, Kira has established a commercial chancery practice with an emphasis on civil fraud (including cryptocurrency fraud), insolvency, company and commercial litigation. In addition, Kira has over fifteen years' experience of both onshore and offshore contentious trusts matters, which she combines with her commercial chancery expertise.

She is an experienced advocate who frequently appears in the High Court and has experience of both trial and appellate advocacy. Kira has appeared courts of all levels, including the Supreme Court (with a leader).

Kira is particularly experienced in applications for pre-emptive and interim relief and, both as a sole advocate and led, has successfully obtained and responded to high-value freezing orders both within the jurisdiction and offshore.

A significant proportion of Kira's practice is insolvency focused and she is frequently instructed by Liquidators and Trustees in Bankruptcy in contested applications under the Insolvency Act/Rules.

She also has substantial offshore experience, having been called to Bar of the Eastern Caribbean Supreme Court (BVI) and the Gibraltar Bar (on an *ad-hoc* basis) and has been instructed on cases in the Cayman Islands, Dubai, Gibraltar, Guernsey, Jersey and the BVI. Kira was the Chair of Junior COMBAR between 2018 – 2023 and a committee member of ConTrA (Contentious Trusts Associates) between 2016- 2023.

Her recent experience includes representing the Claimant in a multimillion pound breach of contract dispute arising out of a consultancy agreement in the energy sector in the Commercial Division (*Exporien Mining v Aggreko International Projects Limited*), representing the Claimant in respect of a dispute concerning a £15 million loan facility in which she was instructed to obtain an interim prohibitory injunction against the Defendants to prevent enforcement of their security under the loan facility (*Orex Consultancy Limited v WSL-Cyan Limited*), representing the majority shareholder in a six-day unfair prejudice trial in respect of four companies in the Chancery Division (*GO DPO EU Compliance Limited [2021] EWHC 1765 (Ch)*), and being instructed with Michael Black KC (in the DIFC Court) on a claim for in excess of £100 million in respect of liability under multiple personal guarantees in respect of the trade financing liabilities of Gulf Petroleum FZC (*Credit Suisse (Switzerland) Limited v Ashok Kumar Goel & Ors*).

Leaving Oxford University with a Double First in Law, followed by Distinction in the Bachelor of Civil Law graduate course, before coming to the Bar, Kira trained and qualified as a solicitor at Baker & McKenzie LLP, where she gained experience in contentious trusts, international fraud and general commercial litigation. She subsequently worked for the offshore law firm Forbes Hare in the British Virgin Islands, where she became known for insolvency, civil fraud and distressed investment fund litigation.

Her experience included being instructed on the restitutionary claims brought by the liquidators of Fairfield Sentry Limited, the largest of the feeder funds into Bernard L. Madoff Investment Securities LLC.

In addition to her legal practice, Kira is an editor of the 2018 edition of the '*Encyclopaedia of Forms and Precedents (Company)*'. She is also fluent in Spanish (bilingual) and has a working knowledge of German.

Case Digest Editorial

Henry Phillips

On 23 January 2024, the Court of Appeal unanimously overturned Mr Justice Leech's sanction of the restructuring plan in *Re AGPS BondCo* ("Adler"). It is now beyond doubt that satisfying the "no worse off test" is not a panacea, and that any departure from the principle of *pari passu* distribution of assets must be justified by a good reason or a proper basis. The seminal judgment of Snowden LJ clarifies existing case law and sets a framework for the exercise of the court's discretion in binding dissenting classes to restructuring plans. It is essential reading for anyone practising in the restructuring field.

Over the past two decades, this jurisdiction has established itself as a global centre for debt restructurings. Its reputation has been secured by the willingness of the court service and the judiciary to act quickly and to resolve difficult and increasingly hard-fought issues on an expedited basis. However, the strain this can place on court staff and individual judges should not be underestimated. The Court of Appeal in *Adler* rightly warned against abusing the Court's preparedness to move heaven and earth to accommodate urgent restructurings. This is not a new issue – over five years ago in *Noble Group Limited* [2018] EWHC 2911(Ch), Snowden J (as he then was) expressed concerns about parties involved in restructuring discussions running things down to the wire until the Court is presented with a metaphorical "gun against its head". Since then, the issue has been exacerbated by increasingly complex valuation disputes under Part 26A plans together with the absence of a generally available moratorium process.

The guidance from the Court of Appeal in *Adler* is clear: where negotiations are underway for a restructuring to deal with the foreseeable maturity of financial instruments, sufficient time for the proper conduct of a contested Part 26A process to be factored into the timetable. If this is not done: *"the parties can have no complaint if the court decides to adjourn hearings and to take whatever time it requires to give its decision".*

Two contested restructuring plans have followed hot on the tail of *Adler*. In *Re Project Litezenburger* Richards J refused to sanction a restructuring plan which released the claims of an "out of the money" class of creditors for no consideration. Richards J confirmed the "provisional view" of Snowden LJ in *Adler* that the Court had no jurisdiction to sanction a plan of that nature since it did not constitute a "compromise or arrangement" with the dissenting class. He also held that the Court has no inherent jurisdiction to remedy, by way of amendment, jurisdictional blots on a restructuring plan or scheme of arrangement. Following a six-day trial in *CB&I UK Ltd*, Michael Green J sanctioned a restructuring plan which all but extinguished a US$1.3 billion arbitration award but not before remarking that he was *"horrified"* to discover that the Plan Company had spent around US$150 million on professional fees!

The saga of Italian local authorities seeking restitution of payments made under English law governed swap transactions continues to play out before the Commercial Court, with the Court of Appeal reversing the decision of Foxton J in *Banca Intesa Sanpaolo SPA v Comune Di Venezia*. That saga had been reinvigorated by a decision of the Italian Supreme Court of Cassation in *Banca Naziona del Lavora v Commune di Cattolica* (May 2020) which held that Italian local authorities had capacity to enter into "hedging" derivatives but did not have capacity to enter into "speculative"

derivatives. Regrettably, the Supreme Court of Cassation did not state a test for what constitutes "speculation" or "hedging" in Italian law, leaving the English Court to grapple with that distinction. The Court of Appeal's judgment contains helpful reminder of the standard of review by an appellate court of a judge's conclusions of foreign law (it depends on the extent to which the judge brought his own skill and understanding to the issue). It also raises (without answering) the tantalising question of whether, as a matter of English conflicts of laws, a decision of a foreign court concerning the capacity of a foreign entity to enter into an English law governed contract should be given retrospective effect.

The ramifications of the Supreme Court's decision in *FII Group v HMRC [2020] UKSC 47* were on display in BAT Industries v HMRC. In *FII* the Supreme Court held that the six-year limitation period for a restitutionary claim based on a mistake of law under s.32(1)(c) Limitation Act 1980 runs from the date on which the paying party ought through reasonable diligence have appreciated that it had a worthwhile claim. As a consequence, to determine the limitation issues in *BAT Industries* Richards J had to ascertain the state of legal thinking on the compatibility of the UK tax regime with EU law as it stood some twenty years ago, without being affected by knowledge of the ultimate outcome of litigation. An unenviable task for any judge!

More than ten years have passed since Primeo Fund issued its claim against Bank of Bermuda and HSBC for breach of their fund administration and custodian duties. That litigation has now come to an end with the Privy Council dismissing the claim in *Primeo Fund v Bank of Bermuda (Cayman) and Ors*. The decision serves as a useful reminder of when an appellate court will permit new arguments to be raised on appeal. While there is no absolute bar to doing so – particularly where the argument raises a point of pure law – the courts will exercise "great caution" and will only permit a new point to be raised on appeal if satisfied that it causes no conceivable prejudice and would not have caused the parties to have conducted the trial differently.

Finally, of real interest in this issue's case digest is the decision of the Supreme Court in *Byers v Saudi National Bank*. The case is one of the leading authorities on claims in knowing receipt. The Supreme Court confirmed that a claim in knowing receipt will be defeated where a defendant receives trust property clean of any equitable proprietary interest. Of particular note is the difference in reasoning between Lord Briggs and Lod Burrows JJSC, with the former analysing a claim in knowing receipt as ancillary to a proprietary claim and the latter categorising it as an "equitable proprietary wrong", analogous to the tort of conversion.

Case Digests

Banking and Finance

DIGESTED BY PAUL FRADLEY

Banca Intesa Sanpaolo SPA, Dexia Credit Local SA v Comune Di Venezia

[2023] EWCA Civ 1482 (Sir Julian Flaux, Males LJ and Falk LJ)
13 December 2023

Swaps — Capacity — Unjust enrichment

An Italian local authority entered into swaps transactions with the claimant bank. The swap was originally entered into in 2002 as a hedge of the local authority's exposure under a bond. The bond was restructured in 2007 and the swap was no longer aligned to it. The original counterparty to the swap refused to restructure it, as a result the local authority arranged with the bank for the notional amount of the swap to be novated to the bank and the original swap was then restructured to re-align it with the bond.

In 2019, the bank brought proceedings in England for declarations that the transactions were valid and binding. In 2020, the Italian Supreme Court held in the *Cattolica* case that local authorities did not have the power to enter into speculative derivative contracts and that certain swaps were transactions forbidden by the Italian constitution. The local authority therefore considered that the swaps were void for lack of capacity.

At first instance Foxton J held that the swaps were void because they were speculative and involved indebtedness with the result that the local authority lacked capacity to enter into them. Foxton J held that the local authority could seek restitution of sums paid over but that the bank would be able to rely on the defence of change of position.

The Court of Appeal overturned Foxton J's finding that the swaps were void. The Judge's conclusions were not based on the Italian law expert evidence but instead on his own evaluation of whether the Italian court would have found the transactions to be speculative. In his assessment, the Judge had made errors of principle, in particular he had not accounted for the fact that the swap originally amounted to hedging when it was entered into and was accepted to be valid. The fact that the original swap was replaced with a new one did not make it speculative because the exposure of the local authority was an existing one.

If the local authority had been able to restructure the original swap it would have been absurd to suggest that Italian law would have prohibited that.

Obiter the Court of Appeal held that the limits on indebtedness affected the local authorities' power to enter into the swaps and therefore their capacity. The Court also agreed with the Judge that the applicable law to any unjust enrichment claim would have been English law and that there was no public policy reason why the change of position defence should not have been available to the bank. However, the Judge had been wrong to consider that the local authority could not with reasonable diligence have discovered its claim prior to the Italian Supreme Court's decision in *Cattolica*.

Primeo Fund v Bank of Bermuda (Cayman) Ltd

[2023] 3 WLR 1007; [2023] UKPC 40 (Lords Reed, Hodge, Lloyd-Jones, Sales and Kitchin)
15 November 2023

Ponzi scheme — Causation — Loss — Limitation — Gross negligence — Contributory negligence — Finality of litigation — New points on appeal

Primeo had made direct investments with BLMIS (which operated a Ponzi scheme) for a period of time before its investments were restructured into an indirect investment in BLMIS via a fund called Herald. Following the collapse of the Ponzi scheme, Primeo was unable to recover the funds it had invested and brought a contractual claim against their administrator and custodian. It was alleged that the administrator had breached its duties under the administration agreement and that the custodian was liable for breach of duty under its custodian agreement and was strictly liable for the negligence or wilful breach of duty of BLMIS as sub-custodian.

The first issue for the Board was whether, in relation to the strict liability claim, Primeo had suffered the loss for which the custodian was liable. The Board held that Primeo had suffered a loss each time it invested in BLMIS and BLMIS misappropriated the money. It was clear this loss had been suffered on each occasion despite the fact that it might be difficult to quantify what that loss was at each point that money was invested.

The second issue was whether the administrator was guilty of gross negligence. The Board held that the Judge had been entitled to find gross negligence on the facts. Gross negligence embraced conduct undertaken with a serious disregard of or indifference to an obvious risk and was not limited to conduct undertaken with an actual appreciation of the risks involved. The assessment would depend on all the circumstances of the case.

The third issue was whether raising new claims or defences for the first time before the Cayman Court of Appeal or the Board was contrary to the principle of finality in litigation. The Board emphasised the importance of the finality principle. It could be departed from where there was a pure point of law (and the proceedings below would not have been conducted differently) or in group litigation where a point of legal principle that would affect many parties was in issue. The Court of Appeal was wrong to allow Primeo to argue new points on appeal.

The fourth issue was whether limitation was postponed by virtue of deliberate concealment by BLMIS or deliberate commission of a breach of duty by the custodian and administrator. The Board held that deliberate concealment required the defendant to have intended to commit, or have knowledge that they were committing, a breach of duty. It was not enough for the defendant to be reckless as to the possibility they were breaching their duty. On the facts because the custodian and administrator had not known they were breaching their duties, Primeo could not rely on the postponement of the limitation period for fault-based claims. However, BLMIS had deliberately concealed facts relevant to Primeo's strict liability claim and was the custodian's agent, so the limitation period was postponed for the strict liability claim.

The final issue was whether damages could be reduced by reason of contributory negligence. The Board held that contributory negligence would be available where a cause of action was not in tort but was founded on an act or omission that gave rise to liability in tort. This was because "fault" in the statute focused not on the cause of action on which the claim was based but on the conduct which gave rise to the cause of action.

Tom Smith KC

Richard Fisher KC

William Wilson

Toby Brown

Robert Amey

Civil Procedure

DIGESTED BY ANNABELLE WANG

Al Sadeq v Dechert LLP

[2024] EWCA Civ 28 (Popplewell, Males and Underhill LJJ)
24 January 2024

Legal professional privilege — Legal advice privilege — Litigation privilege — Iniquity exception

The Court of Appeal clarified the applicable test for the iniquity exception to legal professional privilege.

The defendants' solicitors had conducted a disclosure review exercise to determine whether documents fell within the iniquity exception to legal professional privilege. The threshold test which had been applied to determine whether any relevant iniquities existed was whether there was a strong *prima facie* case. The test to determine whether documents fell within the exception was whether those documents were brought into existence for the purpose of furthering the iniquity. No documents were held to fall within the exception.

The claimant contended that the wrong test had been applied at both stages. At first instance, the Judge had found that the correct approach had been adopted by applying the "*in furtherance test*". Although he did not need to determine the evidential burden point, he stated he would have applied the threshold of "*at least a strong prima facie case, if not a very strong prima facie case*".

On appeal, the Court confirmed that the merits threshold for the existence of an iniquity was a balance of probabilities test. The existence of the iniquity must be more likely than not on the material available to the decision maker, whether that be the party or legal adviser determining whether to give or withhold disclosure, or the Court. That is what was meant by a prima facie case. Where an iniquity had been established to the relevant standard so as to engage the exception, there was no privilege in documents and communications brought into existence "*as part of*" or "*in furtherance of*" *the iniquity*".

The Court also held that the principle in *Three Rivers DC v Bank of England* [2003] EWCA Civ 474, [2003] Q.B. 1556, [2003] 4 WLUK 119, that only communications with employees and representatives of a client who were specifically authorised to seek and receive legal advice attract legal advice privilege, did not extend to litigation privilege. Litigation privilege extends to communications with third parties.

Potanina v Potanin

[2024] UKSC 3 (Lords Lloyd-Jones, Briggs, Leggatt, Stephens and Lady Rose)
31 January 2024

Setting aside orders obtained without notice — Procedural fairness

The Judge at first instance had made an order in the applicant's favour on an application made without notice after a one-day hearing in which he had only heard the applicant. The respondent had subsequently been notified of the order and informed that he had the right to apply to set it aside, which he did. The order was set aside.

The Court of Appeal held that the Judge should not have set the order aside as the respondent was required to show that the Judge had been materially misled in the initial hearing held in his absence, which he could not do.

At the outset of his judgment, Lord Leggatt (with whom Lord Lloyd-Jones and Lady Rose agreed) reminded judges that, before making an order requested by one party, they must give the other party a chance to object. Where a decision is required to be made before it is practicable to do this, then the next best thing is for the Court to make the order sought if appropriate and give the other party the opportunity to argue that the order should be set aside or varied. This is a fundamental principle of procedural fairness.

The Court of Appeal had been wrong to find that the Court may only set aside an order where there is "*some compelling reason to do so*" or where the party applying to have the order set aside can demonstrate that a decisive authority was overlooked or that the Court was materially misled. The rules do not say or imply that the Court may not set aside the order unless the applicant can deliver a "*knock-out blow*" to this effect and there is no justification for reading down such restrictions into the rules.

On an application to set aside an order made without notice, the Court is required to decide afresh, after hearing argument from both sides, whether the order should be made or not.

Guy & Ors v Brake & Ors

(Re Moratorium Cancellation Costs) [2023] EWHC 3179 (Ch) (HHJ Paul Matthews)
14 December 2023

Costs — No order as to costs

This case involved large-scale litigation following the breakdown of an employment relationship between the applicants and the first respondent and her husband. The first respondent had entered a debt respite moratorium which, in the event, was due to end in advance of a court hearing due to be held about whether to make an order cancelling it.

The Judge vacated the hearing and stated that it should be possible to deal with any outstanding issues on paper. The parties could not agree appropriate directions and filed written submissions. The applicants sought their costs of the application made in respect of the moratorium. The second respondent submitted that the Court should make no order as to costs, as the substantive basis for the application had been superseded by the automatic end of the moratorium.

The Court held that it was not in a position to make an order as to costs, as it had no basis on which to say who, if anyone, was the successful party, as the substantive application had not been addressed. The Court held that it was entitled to conclude, in a case where it is pointless to continue to pursue the substantive relief sought, that the interests of justice do not require the further investment of legal and judicial resources in determining the factual basis upon which a costs order could properly be made, and that, instead, the right answer is to make no order as to costs.

Commercial Litigation

DIGESTED BY JAMIL MUSTAFA

Uzbekov v Revolut Ltd

[2024] EWHC 98 (Admin) (Mr Justice Chamberlain)
25 January 2024

Abuse of process — Breach of contract — Declarations — Nominal damages

The Claimant (U) opened an account with the Defendant (Revolut) in 2018. Revolut's terms allowed it to suspend or close a customer's account with immediate effect if it had good reason to suspect that the relevant customer was acting fraudulently or if their continued use of their account could damage Revolut's reputation or goodwill.

In March-April 2020, Revolut blocked and then closed U's account as it was concerned that U was involved in money laundering and the funds in his account represented criminal property, and also returned approximately £11,000 to a car dealer to whom U had sold a car. U accepted the £11,000 and that Revolut's decision to close his account had caused him no compensable loss. But U claimed he had suffered embarrassment and distress from the account closure and brought proceedings against Revolut alleging breach of contract in respect of the account closure and seeking nominal damages and declarations. Revolut accepted that the breach of contract claim raised triable issues of fact but argued that a declaration would serve no useful purpose and the proceedings constituted wasteful and disproportionate litigation. Revolut applied for summary judgment / strike-out on the claim. The application was granted.

Chamberlain J held that under the CPR it is no longer correct to say that a claimant alleging a wrong where damage does not form part of the cause of action is entitled to have their claim heard as of right. This is because the Court is concerned to ensure that judicial resources are used appropriately and proportionately in accordance with the requirements of justice. The Court was therefore entitled to ask: "*is the game worth the candle*". If not, the Court could protect the defendant from having to incur disproportionate costs and the judicial system from having to deploy disproportionate judicial resources by striking out the claim as an abuse of process.

Chamberlain J stated that these principles of abuse of process applied both to claims for nominal damages and declarations but that the same considerations featured, in any event, as part of the Court's consideration of the exercise of its discretion to grant declaratory relief. Chamberlain J explained that, as a matter of principle, it was unlikely that justice to the claimant would favour the grant of a declaration which served no useful purpose. He therefore accepted that whether or not a useful purpose would be served by granting declaratory relief was of prime importance in determining how the discretion should be exercised. Whether a declaration serves a useful purpose must be judged objectively. Chamberlain J concluded that, objectively, any declaration granted would be of limited practical utility. He therefore struck out U's claims as an abuse of process.

BAT Industries Plc v HMRC

[2024] EWHC 195 (Ch) (Mr Justice Richards)
5 February 2024

Limitation — Mistake of law — Unjust enrichment

The Claimants were members of the FII Group Litigation Order (the 'FII GLO') which was established on 8 October 2003 and had demonstrated that they had paid tax to HMRC on the mistaken basis that the UK tax regime applicable to overseas dividends was compatible with EU law. The members of the FII GLO were therefore entitled to recover sums from HMRC on the basis that they were paid under a mistake of law. The question remained, however, whether and to what extent certain of their claims had been brought within the applicable limitation period.

The Supreme Court had previously held that section 32(1)(c) of the Limitation Act 1980 applied to claims for restitution of unjust enrichment based on a mistake of law. It, however, remitted the question of whether the Claimants could, with reasonable diligence, discovered their mistake to first instance.

Richards J held that Section 32 displaced the ordinary 6-year limitation period after the accrual of the cause of action for mistake of law to the point at which the Claimants could, with reasonable diligence, have discovered the mistake. The burden was on the Claimant to show when that was, however, the standard of reasonable diligence was objective. Richards J stated that two questions arose in the case: (a) first, when, having exercised reasonable diligence, would the claimants have had sufficient confidence to justify taking preliminary steps to issue proceedings (such as submitting a claim to HMRC, taking advice and collecting evidence); and (b) second, when, having exercised reasonable diligence, would the Claimants have discovered that they had a 'worthwhile claim'? The overarching question was whether the mistake could have been discovered with reasonable diligence not whether it should have been.

The challenges to the UK tax regime fell into three categories, two of which were relevant in the case: (a) the 'DV Challenge' sought to challenge the difference in corporation tax treatment between non-UK dividends and UK dividends; and (b) the 'ACT Challenge' sought to challenge the notion that overseas dividends were incapable of constituting FII. HMRC contended that the limitation period for both the DV and ACT Challenges started to run, at the latest, on 11 July 1996 which was the date that fell 6 years and one day after the first claim in the FII GLO was made. The Claimants argued that the limitation period applicable to the DV Challenge begam to run on 6 June 2000, which was the date of the CJEU's decision in *Verkooijen*, while the limitation period in respect of the ACT Challenge started to run later.

In addressing the limitation issues raised, Richards J considered what steps a well-advised multinational group in the UK, exercising reasonable diligence, would have taken to discover whether the aspects of the UK tax regime subject to the DV and ACT Challenges were compatible with EU law, and to what extent that would have involved consulting with an appropriately qualified adviser/s (with expertise in respect of the UK tax system, regarding domestic and overseas dividends, and relevant EU law). He was satisfied that they would. The next question was what that adviser/s would have believed throughout the relevant period and whether they would have advised about the possibility that the relevant UK law was incompatible with EU law.

Richards J concluded that an appropriately qualified adviser/s would not have concluded that there was any worthwhile claim of the kind pleaded by the Claimants in July 1996.

Consequently, Richards J concluded that there was no constructive discovery by July 1996. He concluded that there was constructive discovery in relation to a DV Challenge on 6 June 2000, the date of the *Verkooijen* decision.

Stephen Robins KC

Mahtani & Ors v Atlas Mara Ltd & anor

[2024] EWHC 218 (Comm) (The Hon Mr Justice Butcher)
7 February 2024

Banking and finance — Company law — Contracts

The first claimant ('Dr Mathani') established a Zambian bank ('FBZ') and other associated corporate vehicles, which were the second and third claimants, through which Dr Mathani had held shares in FBZ. The remaining claimants were either the other shareholders of FBZ at the time of the SPA (defined below) or successors in title to the owners of shares in FBZ at that time.

The parties entered into a share sale and purchase agreement (the 'SPA') for the sale of FBZ to the defendants. The claimants then brought proceedings against the defendants alleging various breaches of the SPA, including that the defendants had unreasonably objected to a fundraising agent nominated by the first claimant for the subsidiaries of the bank pursuant to the terms of the SPA. The relevant clause of the SPA provided that the claimants were to help FBZ's subsidiaries to raise funding by 31 December 2016 and Dr Mathani agreed to do so by appointing a fundraising agent acceptable to him and the first defendant "*acting reasonably*". The first defendant rejected the claimants' nominated fundraising agent due to an alleged conflict of interest, and ultimately no funding was raised for the subsidiaries. The claimants alleged that the first defendant had acted in breach of the SPA having unreasonably rejected Dr Mathani's nominated fundraising agent, alternatively, having delayed, obstructed and/or prevent the appointment of their nominated fundraising agent, or in the further alternative having failed to stake the steps required to make the appointment effective within a reasonable time.

Butcher J held that the first defendant was under a narrow obligation to accept or reject the fundraising agent nominated by Dr Mathani and to act reasonably in doing so. He further held that it was implicit within the SPA that the defendants should not delay, obstruct or prevent the appointment of the fundraising agent save insofar as the first defendant, acted reasonably, was entitled to reject the nominated fundraising agent. Butcher held: (a) it was for the claimants to show that the first defendant did not act reasonably in agreeing / failing to agree to the fundraising agent nominated by Dr Mathani; (b) the first defendant would not have acted reasonably if it had no reasons for its position or reasons which had nothing to do with the role that the fundraising agent was to fulfil; (c) the first defendant only had to show that its refusal to accept the nominated agent was reasonable, and it would have been reasonable if it fell within the range of responses which a reasonable person in the first defendant's position might have adopted; and (d) the first defendant was entitled to have regard to its own interests in considering its responses and did not have to balance those with the interests of the claimants.

Applying those principles, on the facts, Butcher J held that the first defendant had acted reasonably in rejecting the nominated fundraising agent in circumstances in which that agent was engaged in another role which gave rise to a conflict of interest or at least the very real prospect of such a conflict: it was not outside the reasonable range of responses. Butcher J also rejected the alternative bases upon which the claimants put this claim for various reasons, including that the defendants did not have certain alleged wider obligations in respect of the nomination of the fundraising agent for which the claimants contended and which the defendants therefore could not and did not breach. Accordingly, Butcher J held that the first defendant had not acted in breach of its obligation to act reasonably in relation to accepting the nominated fundraising agent (and also rejected the other claims for breach of the SPA brought by the claimants).

Company Law

DIGESTED BY PETER BURGESS

Ntzegkoutanis v Kimionis

[2023] EWCA Civ 1480; [2024] BCC 68 (Newey, Snowden, Whipple LJJ)
12 December 2023

Derivative claims — Unfairly prejudicial conduct — Abuse of process

This appeal raised issues as to when it is legitimate for an unfair prejudice petition brought under the Companies Act 2006 (the "Act") to claim relief in favour of the company to which the petition relates.

The parties were the equal shareholders in a company. The claimant, N, contended the company had been formed as the vehicle for a joint venture involving the exploitation of a cryptocurrency wallet application that he had devised, that he had been excluded from management of the company and that the defendant, K, misappropriated the company's business and assets. K contended that he had devised the application and a different company had been set up to own and carry on the business. N was a contractor.

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

N appealed on the basis that the so-called *Chime* approach does not form part of English law. The Court of Appeal agreed. The Court has power to grant relief in favour of the company on an unfair prejudice petition. It can potentially be an abuse of process for a petitioner to claim relief in favour of the company by way of unfair prejudice petition, particularly if the petition claims only that relief. Where an unfair prejudice petition seeks both relief in favour of the company and relief that would not be available in a pure derivative claim, and the petitioner appears to be genuinely interested in obtaining the latter, it would not ordinarily be appropriate to strike out either the petition or any part of the relief sought. The *Chime* approach did not represent the law in this jurisdiction. It was not only in a rare and exceptional case that the Court would permit a claim to proceed by way of an unfair prejudice petition when it would otherwise be brought by way of a derivative claim. The Court of Appeal therefore allowed the appeal.

Stephen Robins KC

Re Aubit International FSD 240 of 2023

(Doyle J) (Cayman Islands)
4 October 2023

Restructuring officers — Cayman Islands — Evidence of a restructuring plan — Purpose of the restructuring officer regime — Investigation not the purpose of the restructuring officer regime

The Grand Court of the Cayman Islands dismissed a petition for the appointment of restructuring officers and reviewed the applicable authorities.

The company had established brokerage accounts with a third-party broker and suffered significant losses. It sought the appointment of restructuring officers to undertake a forensic investigation into the activities relating to the company's accounts with the broker and report to the Court. It also claimed that it was working with advisors to formulate the potential terms of a restructuring with the intention of presenting a compromise or arrangement to its creditors. It was apparently common ground between the company and creditors who appeared that restructuring officers should be appointed.

The Court reviewed the new provisions setting out the restructuring officer regime in the Companies Act (2023 Revision) and the rules in the Companies Winding Up Rules (2023 Consolidation).

The Court also reviewed earlier cases on Cayman corporate restructurings under the previous versions of the legislation. It considered that the previous authorities in respect of the appointment of restructuring or "*light touch*" provisional liquidators are likely to be both relevant and persuasive. These established that the discretionary power vested in the Court is wide but is subject to the Court being satisfied that the appointment would be for the benefit of those having the financial interests in the company to be rescued.

A core requirement is that there needs to be a real prospect of a restructuring being effected for the benefit of the general body of the creditors. There is no need for a detailed pre-formulated or finalised restructuring plan. Entirely abstract or hypothetical restructurings are not however sufficient. There must normally be tangible restructuring proposals with support from at least some unconnected creditors.

The Court would normally benefit from some independent evidence on the benefits of a restructuring compared to a winding-up order and may be sceptical about the views of management in this respect where if a winding-up order was made management's conduct would come under close scrutiny.

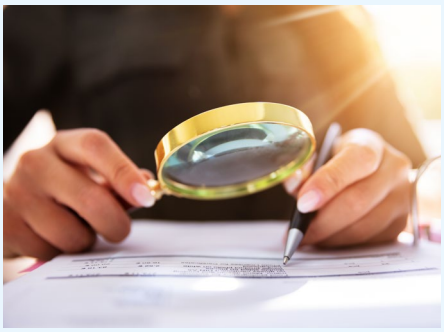
There is a need to guard against potential abuse of the new restructuring regime, which seeks to strike the appropriate balance between relevant stakeholders including the management of the relevant company, its shareholders and creditors. In addition to the protections in the new statutory provisions, the Court has an important role to continue to ensure that the new regime is not abused and that the relevant competing interests are duly balanced. The need to guard against potential abuse is particularly acute given the scope of the statutory moratorium.

In the present case, though there was inadequate evidence as to the financial position of the Company was provided, since the Company conceded that it was unable to pay its debts within the meaning of section 93, section 91B(1)(a) of the of the Companies Act was duly satisfied.

However, the proposed restructuring plan was extremely limited and devoid of any meaningful detail. It was difficult to come to the conclusion that there was a genuine intention to present, at least in the near future, a meaningful restructuring plan which would have reasonable prospects of success. It seemed that the Company wanted the appointment of an officer of the court to assist it in continuing forensic investigations, commencing legal proceedings and obtaining assets, documentation and information and to add respectability and credibility to the management of the Company. This is not a proper use of the restructuring regime.

Great care must be taken to ensure that the recently introduced restructuring officer regime is not abused. It should only be used for proper purpose, namely to provide a regime whereby restructuring officers may be appointed to facilitate and finalise a financial restructuring. It is not intended to provide a mechanism whereby the restructuring officers' main role is to recover assets, data, documentation and records of the company (if need be by commencing legal proceedings) and to undertake a forensic investigation into the affairs of the company.

The Court dismissed the petition, considering that its presentation was seriously premature.



Corporate Insolvency

DIGESTED BY RABIN KOK AND IMOGEN BELTRAMI

Re CB&I UK Limited

[2024] EWHC 398 (Ch) (Mr Justice Mchael Green)
27 February 2024

Corporate insolvency — Restructuring plans

CB&I UK Limited (the "Plan Company"), which is an entity within the McDermott Group (the "Group"), a large international provider of engineering, procurement and construction ("EPC") services to the oil, gas and energy sector, sought the Court's sanction of a restructuring plan under Part 26A of the Companies Act 2006 (the "Plan"). The ultimate parent of the Group is McDermott International Ltd ("MIL"), a Bermudan entity. The Plan primarily involved the amendment and extension of the Group's secured credit facilities and the release and discharge of certain Group entities, including the Plan Company, from litigation liabilities. It was inter-conditional with a parallel restructuring of two other Group entities, Lealand Finance Company B.V. and McDermott International Holdings B.V. ("MIH") in the Netherlands (the "WHOA Plans"). The Plan was preceded by an earlier reorganisation of the Group's financial indebtedness pursuant to Chapter 11 of the US Bankruptcy Code in 2020 (the "Ch 11 Process). During the Ch 11 Process, the primary equity interests in the Group were transferred to the Group's financial creditors who were the lenders under the secured credit facilities which the Plan sought to amend and extend, and which were entered into pursuant to the Ch 11 Process.

One of the litigation liabilities which the Plan Company sought to release through the Plan was owed to Refinería de Cartagena S.A.S ("Reficar") which is 88.49% owned by the Republic of Colombia. Reficar was established in 2007 to pursue the modernisation and expansion of the Cartagena oil refinery in Cartagena, Colombia, which was one of the largest construction projects within the energy sector in the history of Colombia (the "Project"). Reficar engaged the Plan Company, MIH and another (now dissolved) entity within the Group in connection with the Project. Reficar was displeased with the Group's performance on the Project. On 8 March 2016, Reficar commenced an ICC arbitration against the Plan Company and MIH (and the now dissolved entity). On 7 June 2023, the ICC Tribunal notified the parties that it had found in Reficar's favour and awarded it net damages of US$937,495,061 with interest on that amount at the rate of 6-month LIBOR+2 compounded daily from 31 December 2015 to the date of payment. Reficar was also awarded net costs of US$58,676,023. The other unsecured creditor whose claim the Plan sought to release was Contraloría General de la República ("Contraloría"), an administrative agency of the Republic of Colombia, which fined the Plan Company (amongst others) c.2.95 trillion Colombian pesos (US$718,400,000) in connection with the Project.

Under the Plan, the Plan Company proposes to release Reficar and Contraloría's claims for the greater of: (a) the amount they would each receive in a liquidation of the Plan Company, namely their share of the prescribed part; or (b) a *pro rata* share of a variable contingent cash payment calculated by reference to the Group's financial performance in its financial years ending 2023 an 2024, capped at a maximum aggregate amount of US$ 2 million per year and only payable 10 business days following the latest amended maturity date of the secured credit facilities under the Plan (being 31 December 2027).

Reficar and Contraloría formed their own class for the purpose of voting on the Plan and unanimously voted against the Plan. Other contingent creditors, who may have had contribution claims against Group entities, including the Plan Company, in the event they were required to pay amounts to either Reficar or Contraloría, formed a further class who voted against the Plan (although not unanimously). The Plan as unanimously approved by the other classes of creditor voting, which comprised of the lenders under the secured credit facilities. The Plan Company therefore had to persuade the Court to exercise its cross-class cramdown power to cramdown these classes of creditor to obtain sanction of the Plan. The sanction hearing was originally listed for November 2023, but was adjourned to February 2024 following a successful application by Reficar to extend the time estimate from four days to six days plus judicial pre-reading. The sanction hearing was longest in the history of the Part 26A jurisdiction.

Reficar appeared at the sanction hearing to oppose the Plan. Alongside the Plan Company, an *ad hoc* group of secured creditors (the "AHG") and Crédit Agricole Corporate and Investment Bank ("Crédit Agricole), a

lender and issuer of letters of credit under the Group's secured credit facilities, appeared in support of the Plan. The primary basis upon which Reficar originally opposed the Plan was that that the Plan Company had failed to establish that Reficar was no worse-off under the Plan than under the relevant alternative to the Plan. The Plan Company contended that the relevant alternative was a worldwide liquidation of the Group in which Reficar would recover nothing (beyond its share of the prescribed part) as an unsecured creditor. Reficar, however, contended that if the Plan were not sanctioned the parties would agree a deal whereby Reficar was provided with a fair value by way of an equity or subordinated debt instrument and the same Plan relaunched. Amongst other things, Reficar also contended that the Court should not exercise its discretion to sanction the Plan, which was unfair because the equity in the Group remained whole while Reficar, which was an unsecured creditor, and ranked above the equity in the Plan Company's relevant alternative, was having its claim released for a de minimis amount.

During the course of the hearing, however, the state of without prejudice negotiations between the Plan Company and Reficar were revealed to the Judge, Mr Justice Michael Green. It became apparent that, in the Netherlands, the Restructuring Expert, who had been appointed in connection with the WHOA Plans by the Dutch Court, had formulated a proposal whereby Reficar would be allocated US$75 million of preference shares in MIL, convertible into ordinary shares representing 19.9% of the ordinary share capital of MIL. The Plan Company made Reficar an offer along the lines proposed by the Restructuring Expert over the weekend during the trial, which it then revised following Reficar raising a concern regarding protection from future dilution. In response to that revised offer, Reficar sent a holding response to the Plan Company explaining that the Reficar board had certain public duties in Colombia to carry out due diligence. On the final day of the trial, the Restructuring Expert sent a letter to the Court explaining that he would be putting forward a proposal in relation to one of the WHOA Plans (the "MIH WHOA Plan") tracking the proposal he had previously formulated, whereby Reficar would receive preferred shares, convertible into non-voting ordinary shares equivalent to 19.9% if MIL's ordinary share capital if it accepted the proposal, whereas if Reficar continued to oppose the Plan and the MIH WHOA Plan, it would receive 10.9% of MIL's ordinary share capital. In light of this development, Reficar sought an adjournment of the balance of its closing submissions to await the outcome of the WHOA Plan, which Mr Justice Michael Green refused.

In these circumstances, Mr Justice Michael Green rejected that the original relevant alternative put forward by Reficar (*i.e.*, a deal with Reficar followed by a relaunch of the Plan) was the relevant alternative in light of Reficar' s failure to accept the offer approved by the Restructuring Expert and concluded that there was little prospect of a new deal being down with Reficar in short order if he were to refuse to sanction the Plan. Mr Justice Michael Green also rejected two further relevant alternatives that Reficar put forward during the course of its closing submissions that had emerged during cross-examination at trial, which, according to Reficar, posited different liquidation processes to that put forward to the Plan Company as the relevant alternative to the Plan, and in relation to which there was no valuation evidence before the Court as to whether there would be a surplus for unsecured creditors, including Reficar, as part of those liquidation processes. Mr Justice Michael Green considered the prospect that these more orderly liquidation processes would generate returns sufficient to make up the massive shortfall in the formal insolvency scenario put forward by the Plan Company as the relevant alternative was fanciful. Reficar also acknowledged that, in light of the offer approved by the Restructuring Expert in connection with the MIH WHOA Plan, it could no longer credibly contend that the Plan was unfair, when Reficar was going to be receive either 19.9% or 10.9% of the equity in MIL in the MIH WHOA Plan.

Mr Justice Michael Green therefore sanctioned the Plan. He noted in a postscript to his judgment that he had received a letter from Reficar's solicitors after circulating his draft judgment, which stated that Reficar's board had accepted the offer proposed by the Restructuring Expert but had decided to abstain from voting on the MIH WHOA Plan. He, however, refused to withdraw the criticisms he had made of Reficar regarding its approach to the negotiations with the Plan Company.

Felicity Toube KC

Mark Arnold KC

David Allison KC

Daniel Bayfield KC

Clara Johnson

Charlotte Cooke

Matthew Abraham

Ryan Perkins

Jon Colclough

Stefanie Wilkins

Jamil Mustafa

Re Link Fund Solutions Limited

[2024] EWHC 250 (Ch) (Mr Justice Richards)
9 February 2024

[2023] EWHC 2641 (Ch) (Mrs Justice Bacon)
12 October 2023

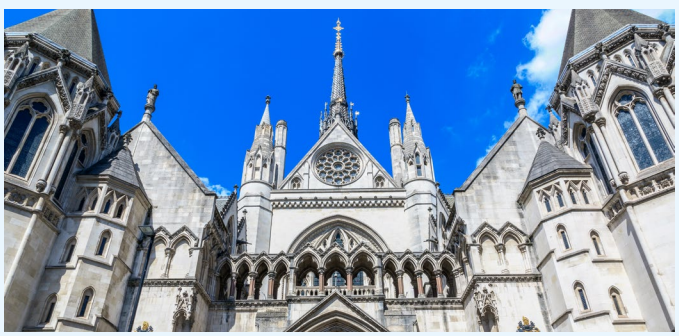
Scheme of arrangement — Contribution — Relevant alternative

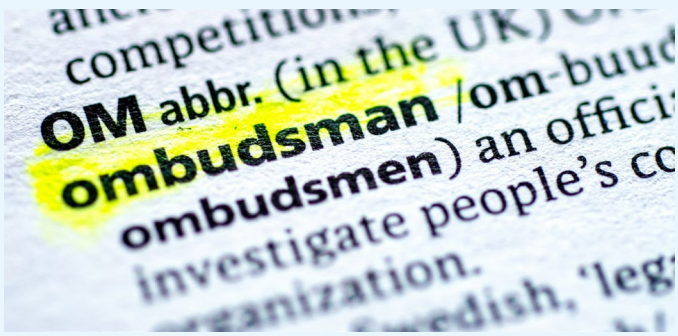
On 9 February 2024, Mr Justice Richards sanctioned the scheme of arrangement (the "Scheme") proposed by Link Fund Solutions Limited (the "Company") to settle potential claims held by those who were investors in the LF Equity Income Fund (the "WEIF") at the time of its suspension on 3 June 2019 (the "Scheme Creditors"). The Company acted as the authorised corporate director of the WEIF. Via the Scheme, Scheme Creditors will receive a distribution proportionate to their respective holdings in the WEIF (the "Scheme Compensation"), in return for which the Company, its parent (and subsidiaries) and advisers will be released from any claims that such Scheme Creditors may have in respect of the WEIF. The Scheme as proposed was support by the Financial Conduct Authority (the "FCA").

In her "Convening Judgment" Mrs Justice Bacon had directed that a single meeting of creditors be convened to consider the Scheme, rejecting two grounds of opposition raised by certain investors of the WEIF (appearing both represented and unrepresented). As to these objections, Bacon J firstly rejected the suggestion that a difference in the quality of potential claims held by investors constituted a sufficient ground to fracture the proposed single class, endorsing existing authority. She also refused to accept the submission that because some Scheme Creditors (in essence, private investors) could potentially have recourse to compensation provided by the Financial Services Compensation Scheme (the "FSCS") absent the Scheme that others would not be able to access, this variance required two separate classes. Bacon J confirmed that the distinctions in compensation eligibility did not arise out of differences in the existing rights of Scheme Creditors against the Company, or rights in the Scheme, but instead arose from an extraneous right of recourse to a third party. As such, the availability of such recourse had no impact on the question of class composition for the purposes of the Scheme.

In sanctioning the Scheme, Richards J rejected opposition raised against it by a number of parties including (i) a group of investors collectively represented by Harcus Parker; (ii) the Transparency Task Force Limited, a social enterprise seeking reform of the financial sector (the "TTF"); and (iii) individual investors, including those who appeared unrepresented at the sanction hearing. This opposition centred upon two main themes. The first was that the Explanatory Statement was misleading and inadequate. The second was that the loss of access to the FSCS and the Financial Ombudsman Scheme (the "FOS") resulting from the operation of the Scheme rendered it unfair.

As to the first area of objection, Richards J rejected various criticisms of the Explanatory Statement including the explanations of how much Scheme Compensation Scheme Creditors could expect to receive, and how the alternative to the Scheme had been explained. Richards J also considered that suggestions that a better scheme was possible were "largely un-evidenced" and actually "contrary to the evidence…filed", endorsing the relevant alternative identified and described in the Explanatory Statement as the eventual insolvency of the Company. Richards J ultimately concluded that the Explanatory Statement gave Scheme Creditors sufficient information to exercise reasonable judgment on how to exercise their vote in respect of the Scheme.





As to the second area of objection, the loss of access to the FSCS and the FOS for Scheme Creditors was the result of the releases effected by the Scheme as described above. Richards J rejected the suggestion that this constituted an impermissible stripping of inviolable statutory protections as submitted by the TTF, holding that such a premise was incorrect. Rather than stripping investors of statutory protections, the Scheme effected a permissible release of the Company from potential claims against it. The cessation of rights under the FOS and FSCS was a consequence of these releases given in exchange for the Scheme Compensation, a compromise approved by the overwhelming majority of Scheme Creditors who voted at the Scheme Meeting.

It was also held that even if this conclusion was incorrect, that the potential rights of recourse held by investors to the FOS and FSCS absent the Scheme held no special protection precluding their release. Further, Richards J considered that there was nothing irrational in compromising disputed claims, and considered the Scheme to be one that an intelligent and honest investor could rationally vote in favour of (as indeed, a substantial majority of Scheme Creditors had).

Finally, Richards J held that there were no blots on the Scheme. This conclusion included approval of the "Contribution Reduction Mechanism" introduced by the Scheme, pursuant to which the rights of Scheme Creditors to recover on any potential claims made against third parties (such as those platforms through which they invested in the WEIF) will be reduced to the extent that the Company would be liable to pay any consequent contribution claim by such third parties. This protective mechanism was necessary to insulate the Company from the effects of such ricochet claims, but also ensured that no bar was placed on the ability of investors to make any third party claims as a result of the Scheme. Richards J considered this mechanism to represent "*nothing more than a set of covenants and promises*" made as part of the overall compromise effected by the Scheme.

Felicity Toube KC

Tom Smith KC

Marcus Haywood

Adam Al-Attar

Charlotte Cooke

Imogen Beltrami

Re Lehman Brothers Holdings plc

[2023] EWHC 3056 (Ch) (Hildyard J)
29 November 2023

Statutory interest — Priorities — Insolvency rules — Res judicata

Hildyard J's latest Lehman decision, sometimes called "ECAPS II", concerns a set of securities known as 'Enhanced Capital Advantaged Preferred Securities', or ECAPS. The decision follows the earlier decisions of the Supreme Court in "Waterfall I" (which considered the relative ranking of subordinated and unsubordinated debt), and the Court of Appeal's 2021 decision (sometimes called "ECAPS I").

The question for Hildyard J in ECAPS II was whether rule 14.23(7)(a) of the Insolvency (England and Wales) Rules 2016 required principal sums due to a lower-ranking subordinated creditor B to be paid in preference to statutory interest due to a higher-ranking creditor A, even though A had a contractual right to be paid ahead of B?

The Judge answered the question in the negative. The provisions of r 14.23(7)(a) did not displace any contractually agreed priority. Properly construed, the relevant agreements did require A to be paid both principal and interest ahead of B.

David Allison KC

Richard Fisher KC

Adam Al-Attar

Edoardo Lupi

Re Lehman Brothers (PTG) Ltd

[2023] EWHC 3084 (Ch) (Hildyard J)
16 November 2023

Administration — Administration extensions — Distributing administrations

Lehman PTG's administration was extended for two years by this decision of Hildyard J. In coming to this decision, Hildyard J emphasised that, whilst it is well established that where an administration has become a distributing one the Court is less likely to force the estate to incur the costs ending administration and placing the company into liquidation, this assumption has its limits. In the future, it would be desirable for a range of outcomes to be presented to the Court and for the costs of a move into liquidation to be specifically quantified.

Oliver Hyams

Re Lyhfl Limited

[2023] EWHC 2585 (Ch) (David Halpern KC)
(19 October 2023)

Administration — Directors — Boards — Administration applications

Paragraph 12(1)(b) of Schedule B1 to the Insolvency Act 1986 allows the "*directors of the company*" to apply for an administration order. Does this mean that the board of directors as a whole must agree, by a valid resolution, to place the company into administration? Or does a lone director have standing to apply, despite opposition from the rest of the board?

As the Judge observed, if the answer were the latter an administration application would frequently turn into a battle between directors in a deadlocked board.

However, there exists a line of cases (e.g. *Re Brickvest* and *Re Nationwide Accident Services*) which suggest that one director can make an administration application without the concurrence of the rest of the Board or without a valid resolution.

The Judge distinguished these previous decisions, and held that they were inconsistent with para 12(1), read with para 105 of Sch 104. Together, those provisions require the majority of the Board to authorise an administration application. The Court had no jurisdiction to make an order on the application of one of two directors without any proper Board resolution.

Kuwait Ports Authority & others v Port Link GP Ltd

(in voluntary liquidation and receivership) and others (The Honourable Raj Parker)
6 October 2023

Cayman Islands — Voluntary liquidation — Section 124(1) petitions — Receivership — Supervision application

---

When a company incorporated in the Cayman Islands is placed into voluntary liquidation, and the directors of that company do not produce a declaration of solvency within 28 days, the voluntary liquidators are required to make an application for the liquidation to be supervised by the Court pursuant to section 124(1) of the Cayman Companies Act (a "Section 124(1) Petition").

That is what happened here, save that the voluntary liquidation was commenced in highly unusual circumstances. Upon incorporation, the function of Port Link GP Ltd (the "GP") was to be the general partner of The Port Fund LP ("TPF"), a Cayman-based exempted limited partnership. The GP was placed into voluntary liquidation by its shareholder in circumstances where (i) it had no directors, (ii) it was involved in ongoing litigation with certain limited partners of TPF, including the Kuwait Ports Authority and the Public Institution for Social Security (the "Plaintiffs") and (iii) receivers (the "Receivers") had already been appointed over the GP to manage the litigation.

Parker J held that, whilst it was mandatory for the joint voluntary liquidators (the "JVLs") to present a Section 124(1) Petition, the Court retained a discretion as to whether and how to determine the petition. He further held that the purpose of a Section 124(1) Petition was "*for all intents and purposes the same as a winding up petition*" (paragraph 33) and that the Court therefore has analogous powers on the hearing of such an application as those that it has on an ordinary winding up petition, including to dismiss, adjourn or stay the petition. Parker J therefore rejected the submission that the Court was bound to grant the application simply because the GP had not provided a declaration of solvency. In fact, there was no cogent evidence regarding the GP's financial position, and it would change depending on the outcome of the litigation to which the GP was a party. That being so, the Court considered that it would be "*inappropriate and premature*" to grant the Section 124(1) Petition and place the GP into Court supervised liquidation at this stage (paragraph 41).

In addition to this, the Court took various factors into account when exercising its discretion, including the fact that placing the GP into liquidation was not reversible; that a liquidation would result of an automatic stay of litigation, which would be a barrier to the progress of the ongoing claims; that the Receivers were already in place, and they had undertaken a substantial amount of work; and the fact that the Plaintiffs were willing to fund the Receivers but not the JVLs.

Accordingly, the Section 124(1) Petition was dismissed and the Receivers remained in office.

David Allison KC

Daniel Bayfield KC

Lottie Pyper

Re AGPS Bondco Plc [2024] EWCA Civ 24

(Lord Justice Nugee, Lord Justice Snowden and Sir Nicholas Patten)
23 January 2024

Pari passu principle — Cross-class cram down — Rationality test

On 23 January 2024 the Court of Appeal (comprising Lord Justice Nugee, Lord Justice Snowden and Sir Nicholas Patten) overturned the sanction order made by Mr Justice Leech in relation to the restructuring plan (the "Plan") proposed by AGPS BondCo plc (the "Company"), a subsidiary of the "Adler Group".

The Plan was sanctioned by Leech J in April 2023 and related to the holdings of six classes of creditors (the "Plan Creditors"). The classes of Plan Creditors comprised holders of certain of the Adler Group's senior unsecured notes (the "SUNs") with differing maturity dates; namely those maturing in (i) 2024; (ii) 2025; (iii) January 2026; (iv); November 2026; (v) 2027; and (vi) 2029 respectively. Absent the Plan, and in the event of a formal insolvency of the issuer (which constituted the relevant alternative to the Plan), the obligations under all categories of SUNs would rank equally as unsecured debts, regardless of their staggered maturity dates.

The Plan as proposed provided the Adler Group with (i) new short-term liquidity to pay certain of its debts; (ii) a one year extension to the maturity date of the 2024 SUNs (whilst the staggered maturity dates of the other classes of SUNs remained unchanged); and (iii) modifications to the terms of the SUNs. These modifications included changes to the negative pledge clauses to permit the grant of new security by the Adler Group in respect of the new funding generated by the Plan and the SUNs, under which the proceeds of enforcement of the security would be applied in accordance with a set waterfall (pursuant to which the new funding introduced by the Plan ranked first in priority, followed by the 2024 SUNs, and finally the remaining SUN classes, which would rank equally as between themselves).

The class of Plan Creditors comprising the 2029 SUNs failed to achieve the required 75% majority for approval of the Plan. In sanctioning the Plan at first instance, Leech J therefore exercised the cross-class cram down power. His decision was then appealed, providing the Court of Appeal with its first opportunity to review the restructuring plan jurisdiction.

The key grounds of appeal against this first instance decision were (i) the failure of Leech J to consider the *pari passu* principle and the unjustified failure of the Plan to make proper provision for that principle given its application in the relevant alternative; (ii) the improper application of the rationality test derived from the scheme of arrangement jurisdiction; and (iii) an erroneous exercise of the cross-class cram down power.

The Court of Appeal overturned the sanction decision of Leech J. The critical flaw in the Plan that founded this decision was its failure to harmonise the staggered maturity dates of each series of SUNs in order to properly reflect the *pari passu* treatment that would be afforded to all Plan Creditors in the relevant alternative of a formal insolvency. This departure was unjustified and could not be sanctioned. The Court of Appeal considered that by preserving the staggered maturity dates of the SUNs, those Plan Creditors holding the 2029 SUNs bore the greatest risk of suffering a shortfall should the Adler Group fail to realise full projected

value via the sale of its real estate assets. Such a result was untenable given the rationality of the *pari passu* principle as ensuring that the losses in an insolvency are borne equally. The submission that there would "*likely*" be payment in full of all Plan Creditors in the future was also rejected, with the Court of Appeal considering that any finding about the likelihood of such payment was uncertain.

The Court of Appeal acknowledged that there could be circumstances in which departing from the pari passu principle would be justifiable (for example, where creditors or new parties provided an additional benefit to support the relevant plan company such as new funding). However, there was no appropriate justification in this case, meaning that the Plan consequentially suffered from "*fundamental unfairness*". As such, it was held that the Plan could not be forcibly imposed on the holders of the 2029 SUNs via the cross-class cram down power.

The cross-class cram down power and its use at first instance were analysed in depth, with guidance provided as to its proper application. Snowden LJ clarified (amongst other matters) that whilst it was possible for the court to apply the rationality test derived from the scheme of arrangement jurisdiction (used to confirm whether a scheme should be imposed upon a dissenting minority within a creditor class) in relation to an assenting class, that such application had to be re-evaluated in relation to (i) votes within a dissenting class; and (ii) the overall voting across the different classes.

As to (i) Snowden LJ held that the court could not simply defer to a majority vote that failed to meet the statutory voting threshold for approval of 75%. Whilst the court may pay some regard to such a majority vote, further considerations such as the commercial reasons why the plan could be considered to be in the interests of the dissenting class will apply. As to (ii) it was held that the court's approach to levels of voting across all the classes must be "*very different*". Specifically, the rationality test is wholly inappropriate to apply due to the dissimilarity of rights between dissenting and assenting creditor classes (as opposed to one class alone in which there will be a "*commonality of commercial interests based upon a sufficient similarity*" of rights). Contrary interpretations of *ED&F Man Holdings Limited* [2022] EWHC 687 (Ch) and *Re DeepOcean 1 UK Limited* [2021] EWHC 138 (Ch) were held to be erroneous and not to be followed.

Snowden LJ also considered that the "*horizontal comparator*" (as developed in CVA jurisprudence), has utility when applying the cross-class cram down power. The horizontal comparison compares the position of the relevant class with that of other creditors or classes of creditors should the restructuring as proposed proceed. Where a plan differs in its treatment of some creditors relative to the treatment of others (having regard to their respective rights in the applicable relevant alternative), that treatment must be properly justified. Additionally, in considering the fair distribution of the benefits of the relevant restructuring, Snowden LJ also considered that the court was not precluded from inquiring as to whether a better or fairer plan could have been available when looking to exercise the cross-class cram down power.

The Court also examined established jurisprudence in addition to a number of recently decided authorities. Of note was the ("*provisional*") view expressed by Snowden LJ that the court does not have the power to sanction the compromise rights held by out of the money creditors for no consideration (a proposition recently decided in *Re Prezzo Investco Ltd* [2023] EWHC 1679 (Ch)).

Finally, the criticism levelled at the increasing trend of judges being forced to consider complex valuation disputes in the restructuring context under "*considerable time pressure*" is notable. Snowden LJ considered that any developing practice pursuant to which jurisdictional issues to be properly considered at the convening hearing are postponed to the sanction stage due to such time pressure is "*to be deprecated*".

Tom Smith KC

Daniel Bayfield KC

Adam Al-Attar

Ryan Perkins

Annabelle Wang

Re Project Lietzenburger

[2023] EWHC 2849 (Ch) (Mr Justice Miles)
1 November 2023

Notice — Jurisdiction — Class composition

On 1 November 2023 Mr Justice Miles approved an application by Project Lietzenburger Strasse HoldCo S.à.r.l. (the "Company") to convene three meetings of its creditors to consider and, if thought fit, approve a proposed restructuring plan (the "Plan"). The Company had moved its centre of main interests ("COMI") to England for the purpose of proposing the Plan.

The Company was part of a wider group of companies incorporated in Luxembourg and Germany (the "Group"). The Group held secured debt consisting of both loans and notes governed by German law and exceeding a total of €1 billion comprising three tranches of senior, tier 2 and junior debt. The holders of this debt comprised the proposed "Plan Creditors".

The key asset owned by the Group was a "Development" in Berlin, one of the largest uncompleted commercial real estate projects in Germany. The Development suffered from significant cost overruns and construction halted in May 2023. All three tranches of secured debt held by the Group fell for repayment on 28 November 2023, which the Group had insufficient cash to meet. As such, the relevant alternative to the Plan was formal insolvency proceedings for the Group.

Pursuant to the terms of the Plan, the maturity of the senior debt would be extended by two years, and the tier 2 and junior debt would be released in their entirety. In addition, the Plan facilitated the introduction of €190 million of funding through a new super-senior financing which all senior creditor were entitled to participate in. This financing would subsequently rank in priority to the existing senior debt.

Miles J considered that both Conditions A and B of the jurisdictional requirements of section 901A(3) of Part 26A of the Companies Act 2006 were satisfied. As to potential jurisdictional roadblocks to the Plan, Miles J flagged the possible issue of whether the Company had successfully moved its COMI to England in order to establish a sufficient connection with this jurisdiction.

In relation to the question of class composition, Miles J approved the proposed separation of the tranches of secured debt into three separate classes for the purposes of considering the Plan. In doing so he confirmed that various kinds of fee arrangement and the provision of interim facilities to the Group by a committee of senior creditors failed to fracture the classes.

Finally, Miles J noted "*real concerns*" about the length of notice given to Plan Creditors of the convening hearing. Specifically, Miles J considered that both the Company and its senior creditors had been aware of the possibility of a restructuring for months as well as the "*crunch date*" for repayment in November. He stated that a practice appeared to be developing in the restructuring context of convening hearings being brought at relatively short notice, causing plan company's representatives to suggest that issues should therefore be pushed for consideration to the sanction stage in order to permit creditor a sufficient amount of time to consider the proposed plan. Miles J deprecated such a practice and noted that other than in cases of "*extreme urgency and where there is a good reason*", the court should be able to decide all relevant jurisdictional matters at the convening stage.

Miles J ultimately declined to adjourn the hearing on the basis that (i) there would be little purpose in doing so given the improbability that there would be a "*sufficiently crystallised issue*" at a reconvened hearing that could lead to the Plan not progressing; and (ii) the Company was not requesting an extremely truncated timetable for a sanction hearing. As such it was not a case where the Company was "*using the urgency of the matter to seek to railroad the other parties or the court into an unduly compressed timetable*". The decision of Richards J in connection with the sanction hearing of this scheme of arrangement is considered overleaf.

Tom Smith KC

Georgina Peters

Ryan Perkins

Edoardo Lupi

Re Project Lietzenburger Strasse HoldCo Sarl

[2024] EWHC 468 (Ch) (Mr Justice Richards)
4 March 2024

Part 26A restructuring plans — Meaning of compromise or arrangement — Forum shopping

This case was the first Part 26A restructuring plan sanction application to come before the Courts after the hand-down of the Court of Appeal's judgment in *Adler* (Re AGPS Bondco Plc [2024] EWCA Civ 24). In this case – widely referred to as "*Aggregate*", after the ultimate holding company of the Plan Company – the Plan Company was a Luxembourg incorporated company whose major asset is shares in the owner of a major German property development on the Ku'damm, a major upscale shopping street in Berlin. The development had gone overbudget and was incomplete with the result that the Plan Company was unable to repay its creditors, who fell into three tiers, Senior, Senior Tier Two ("ST2") and Junior, and needed a further injection of funds to complete the development and thereby raise its value to maximise returns.

In order to facilitate this, the Plan Company had proposed a Part 26A restructuring plan (the "Plan"), under which participating Senior Creditors would provide new money to complete the development, and under which ST2 and Junior Creditors would have their claims extinguished.

Certain ST2 Creditors, represented by Bank J Safra Sarasin ("Safra") and a Junior Creditor, Chapelgate Credit Opportunity Master Fund Limited ("Chapelgate") opposed the Plan. A Senior Creditors' Committee ("SCC") also appeared, supporting the Plan.

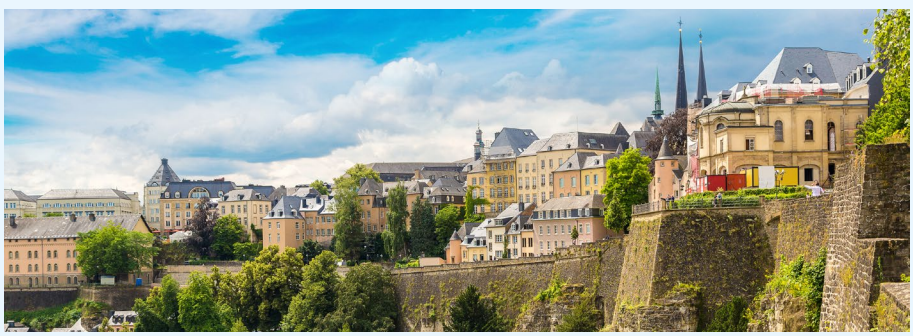
At the meetings, the Plan had been approved by the Senior Creditors. No Junior Creditors voted. The Plan was technically approved by the ST2 Creditors, but only one ST2 Creditor (which had a cross-holding in Senior debt) voted. The Plan Company accepted at the sanction hearing that the two subordinated classes had not been fairly represented at the meetings and that the Plan Company was in effect inviting the Court to exercise its power to cram down dissenting classes.

Shortly prior to the hearing the Court of Appeal's judgment in *Adler* was handed down. In this judgment Snowden LJ held, albeit *obiter*, that contrary to a previous Part 26A first instance authority (*In Re Prezzo Investco Ltd* [2023] EWHC 1679 (Ch)), in order for a Part 26A plan to satisfy the statutory definition of a "*compromise or arrangement*" (and therefore in order for such a plan to be capable of sanction by the Court) creditors could not be expropriated without receiving any compensating advantage. This brings the meaning of "*compromise or arrangement*" in Part 26A into line with the sense of that term in Part 26 of CA06.

Upon the handdown of *Adler* the Plan Company proposed an amendment to the Plan on which creditors had voted, pursuant to which Junior and ST2 Creditors' claims would receive modest monetary compensation (equivalent to about 0.17% of the ST2 Creditors' claims and 0.05% of the Junior Creditors' claims) for the extinction of their claims (the "Modified Plan"). The Plan Company therefore invited the Court to sanction the Modified Plan.

Mr Justice Richards held that there was no jurisdiction for the Court to sanction the unmodified Plan because it was not, following *Adler*, a "*compromise or arrangement*". He further held that he would not sanction the Modified Plan. This was because although meetings had been validly convened (since any order of the court is valid unless set aside or varied), the Court did not have jurisdiction to sanction the Modified Plan. Section 901A CA06 requires that Conditions A and B as set out in that section be satisfied in order for Part 26A to be invoked. Condition B is (so far as relevant) that a compromise or arrangement is proposed between the company "*and its creditors, or any class of them*". Following *Re Hawk Insurance Co Ltd* [2002] BCC 300, the proposal that is put forward must constitute a "compromise or arrangement" for every class of creditor or member to whom it is directed. In this case, the Plan voted on did not, therefore the provisions of Part 26A could not be invoked. An amendment provision within the Plan did not assist the Plan Company since this provision would only come into effect on sanction.

Richards J went on to considered whether he would have sanctioned the Modified Plan if there had been jurisdiction to do so. He concluded that he would have done. The relatively low amounts to be paid to the ST2s and Junior Creditors under the Modified Plan were sufficient to render it a



"*compromise or arrangement*". The Judge also considered a number of objections which Safra had raised:

(1) The Plan Company had successfully shifted its COMI to England, in circumstances where its sole director was based in England, it occupied premises in England and conducted its affairs from there. The COMI shift was effective from the date on which the change of address and shift of COMI were announced to creditors. The Court rejected any suggestion that matters undertaken by the Plan Company as part of this shift were "*window dressing*" which meant that the shift was in fact not permanent.

(2) Although the expert evidence was finely balanced, the Court was satisfied that there was a reasonable prospect that the Modified Plan would be effective in both Luxembourg and Germany. In particular, the Court found in relation to Luxembourgish law that the better view was that the shift was not prohibited by the Plan Company's articles, nor did it offend Luxembourgish public policy As to the latter point, Safra's expert's view had been that the Modified Plan did offended Luxembourgish public policy because the COMI shift had been undertaken to allow the Plan Company to take advantage of the Part 26A regime and it was possible that Luxembourg's restructuring jurisdiction would not have allowed the ST2 and Junior debt to be cancelled (even for consideration) without the consent of all creditors in those classes. As there were equally respectable arguments in favour of this interpretation of the law and against it, it was hard to see how this provision could set out a public policy capable of being breached by the Plan so that a Luxembourgish court would fail to recognise the Modified Plan. It was also the better view that the Luxembourgish courts did not retain exclusive bankruptcy jurisdiction over the Plan Company. Although there was bankruptcy application outstanding in Luxembourg in respect of the Plan Company, the better view was that the Luxembourgish courts would recognise any order arising from the English proceedings because COMI was in England, and there was in any event at least a prospect that the conditions for bankruptcy on the outstanding application were not paid out.

(3) As to whether the Modified Plan would be recognised in Germany, there were two equally respectable expert opinions as to whether it (or any Part 26A plan) was or alternatively was not capable of recognition. The Court did not prefer either view, but found that given those circumstances there was a "*reasonable prospect*" of recognition in Germany.

(4) The "*relevant alternative*" which would occur if the Modified Plan were not approved was liquidation (as the Plan Company) had contended, not an alternative restructuring plan drafted by Safra (or a plan negotiated by stakeholders based on this) to be proposed in Luxembourg. This was because there was insufficient support among Senior Creditors for Safra's proposal – particularly in circumstances where it appeared to the Court that 100% creditor approval for the proposal would be required under the Luxembourgish restructuring regime, but also if 100% support was not required. The Court also found that Safra's proposal did not demonstrate that it had sufficient committed funding to finish the development and that it did not explain in sufficient detail how Senior Creditors would be repaid. Senior Creditors' continued support would be required to provide interim funding for the development, prior to the implementation of any new restructuring plan, and the Court found this would not be supplied. The Senior Creditors would prefer liquidation if the Amended Restructuring Plan failed.

(5) The Safra represented ST2 Creditors were out of the money in the relevant alternative. This being so, Safra's objections about the fairness of the Modified Plan carried little to no weight.

(6) The COMI shift was sufficient as a matter of law to establish a connection to the jurisdiction sufficient to enable the Plan Company to take advantage of the Part 26A jurisdiction. This was largely because the COMI shift was likely to be ground recognition of any sanction in Luxembourg and Germany.

(7) Although the COMI shift had been undertaken to enable the Plan Company to escape debts which arguably could not have been escaped under the equivalent Luxembourgish restructuring regime, this was not a case of "*bad forum shopping*". Cases which refer or allude to "*bad forum shopping*" do not set out a test to establish what this is. The question of forum shopping is related to the question of sufficient connection. Since there was a sufficient prospect of recognition in Luxembourg and Germany to establish a sufficient connection with the jurisdiction and neither jurisdiction would decline to recognise the Modified Plan on public policy grounds, and also since the Modified Plan offered a better outcome for creditors than the relevant alternative, there was no "*bad forum shopping*" in this case.

The Court therefore did not sanction the Plan, but did make an order convening meetings to enable creditors to vote on the Modified Plan. This was an order under s. 901C(4), providing that ST2 and Junior Creditors be disenfranchised from participation at any such meeting.

Tom Smith KC

Daniel Bayfield KC

Georgina Peters

Adam Al-Attar

Charlotte Cooke

Ryan Perkins

Madeleine Jones

Edoardo Lupi

Personal Insolvency

DIGESTED BY LOTTIE PYPER

Mohammad Razi Khan v Arvinder Singh-Sall (trustee in bankruptcy of Mohammed Razi Khan) and Habib Bank AG Zurich

[2023] EWCA Civ 1119 (Lewis, Nugee and Snowden LJJ)
6 October 2023

Bankruptcy orders — Annulment — Jurisdiction — Court's powers and duties

This case concerned the Court's power to annul a bankruptcy order under section 282(1)(a) of the Insolvency Act 1986.

The bankrupt ("B") was made bankrupt in January 2018 upon a petition presented by Habib Bank AG Zurich. He applied to annul the bankruptcy in July 2018. The County Court Judge held that, although the bankruptcy order should not have been made because the petition was disputed and factually inaccurate, B was plainly insolvent. She therefore declined to annul the bankruptcy order. B's appeal of that decision was dismissed by both the High Court and the Court of Appeal.

The Court of Appeal held that, although the Court must annul a bankruptcy order that subsequently transpires to have been made without jurisdiction (for example because the debtor did not have their COMI in England on the relevant date), the Court did not lack jurisdiction in this case. The fact that a petition was genuinely disputed on substantial grounds or made a factually inaccurate statement did not go to the jurisdiction of the Court, and so the Court retained a discretion to entertain the petition. It was not necessary to show that there were exceptional circumstances in order to dismiss the annulment application. In this case B was clearly insolvent and so there would be little point in granting the annulment application.

Eternity Sky Investments Ltd v Zhenxin's Estate

[2023] EWHC 2744 (Ch) (Chief ICC Judge Briggs)
3 November 2023

Deceased estates — Insolvent administration orders — Appointment of interim receivers

In this case, Chief ICC Judge Briggs appointed an interim receiver to the estate of Zhang Zhenxin pending the hearing of an application for an insolvency administration order. This is a rare example of an application under section 286 of the Insolvency Act 1986 and the Administration of Insolvent Estates Deceased Persons Order 1986. In the course of ordering the appointment of an interim receiver, the Judge discussed the proper approach to appointing an interim receiver in the absence of any prior authorities.

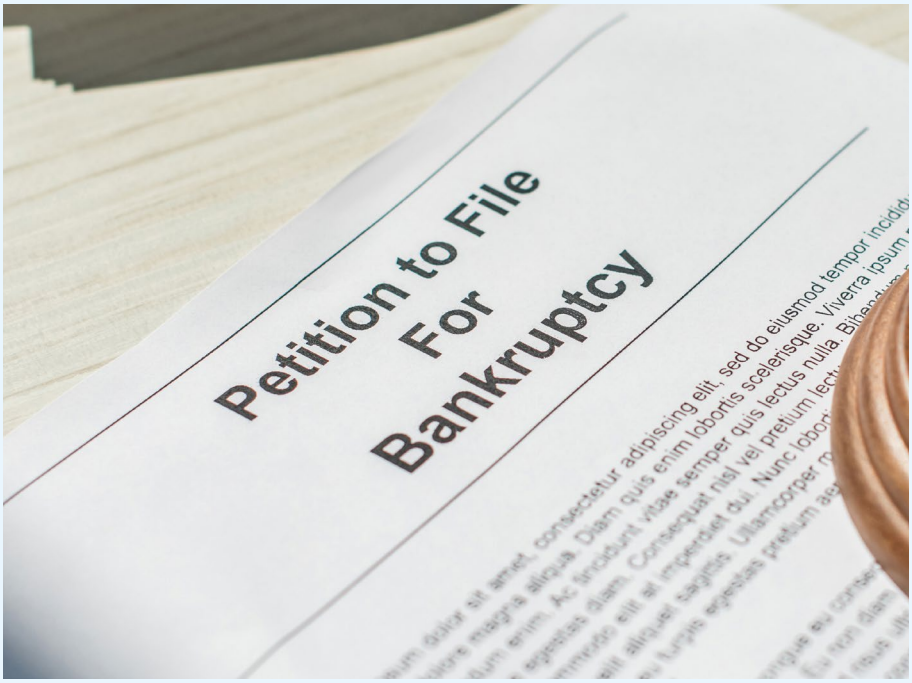
The Petition for an insolvency administration order was opposed by Mr Zhang's widow, Mrs Zhang, on the grounds of fraud and illegality. In October 2023, the Petitioner issued an application for the appointment of an interim receiver pending the substantive hearing of the Petition. This was on the basis that Mr Zhang's estate has been unrepresented since his death and that the Petitioner had learnt of two major asset disposals by companies in which the estate had shares. Mrs Zhang opposed the application on the grounds, *inter alia*, that it was not necessary to appoint receivers, there was no urgency, and the appointment would cause significant harm.

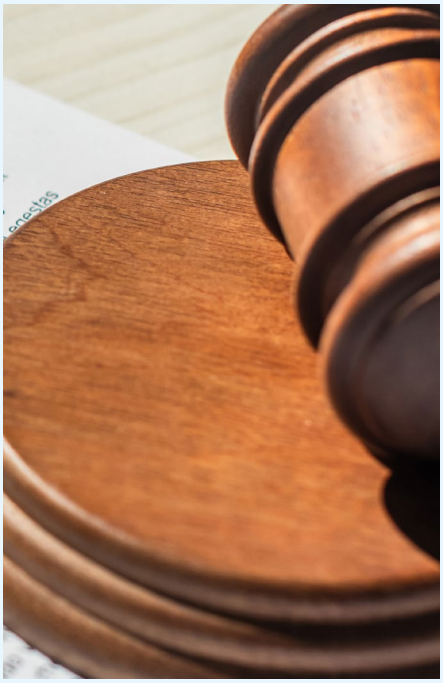
The Judge held that, apart from guidance which could be gleaned from the Court's approach to the appointment of provisional liquidators, the test was supplied by an objective reading of the legislation and rules. The Court must be satisfied, on an application to appoint an interim receiver that: the debtor is unable to pay the debtor's debt, security is provided, as required, and that that an appointment is "*necessary for the protection of the debtor's property*". If a Court is satisfied of these matters, the Court can exercise its discretion, asking, whether in the circumstances of the case it is right make an appointment.

On the facts, the Judge considered it was necessary to appoint receivers due to a lack of visibility about the estate, the failure to provide information and undertakings when requested, various dealings which had taken place and an expressed desire on Mrs Zhang's part to continue to deal with the assets of the estate. The Judge also considered Mrs Zhang's substantive defence to the Petition. The Judge emphasised that evidence of fraud needs to be genuine. The Judge formed the provisional view that "*although a defence has been raised it fails to meet the threshold of serious and genuine*" and the Petitioner was therefore likely to succeed.

The Judge also rejected Mrs Zhang's arguments that the prejudice to the estate from the appointment would outweigh the potential prejudice in not appointing a receiver. He contrasted the prejudice from the appointment of an interim receiver with that which would result from the appointment of a provisional liquidator.

Paul Fradley





Property and Trusts

DIGESTED BY DANIEL JUDD

Byers v Saudi National Bank

[2023] UKSC 51 (Lord Briggs and Lord Burrows JJSC)
20 December 2023

Knowing receipt — Trust property — Conflicts of law

Mr Maan Al-Sanea was a trustee. He owned shares in a number of Saudi Arabian companies, and he held them on trust for Saad Investments Company Ltd ("SICL"). Mr Al-Sanea transferred those shares to a Saudi Arabian bank, in breach of trust. He did so in order to discharge personal debts which he owed to the bank. When the bank received the shares from Mr Al-Sanea, it knew that Mr Al-Sanea was holding the shares on trust for SICL. SICL (by its liquidators) claimed against the bank in knowing receipt, on that basis that the bank was a knowing recipient of trust property.

The bank objected on the basis that it did not receive "*trust property*". The transfer of the shares from Mr Al-Sanea to the bank was governed by Saudi Arabian law. Saudi Arabian law did not recognise the distinction known to English law between legal and equitable interests. Rather, the effect of Saudi Arabian law was that, following the transfer to the bank, SICL did not have a continuing proprietary interest in the shares. The bank claimed that it did not receive "*trust property*", and therefore could not be liable for knowingly receiving "*trust property*".

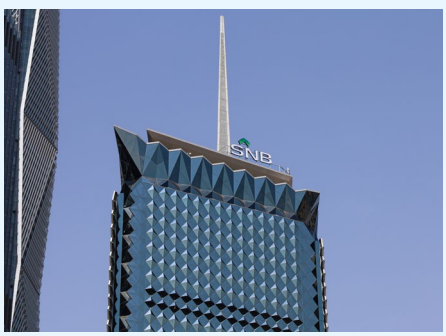
Whether the bank's analysis was correct depended on whether an action in knowing receipt required a continuing equitable proprietary interest in the trust property.

The Supreme Court's decision confirms that a continuing equitable proprietary interest is required. A number of previous leading authorities did not provide a definitive answer. The matter had to be decided as a matter of principle. Lord Briggs and Lord Burrows each gave reasoned judgments on this point.

Lord Briggs considered that there was no principled answer to the question why a claim in knowing receipt should survive any process by which the recipient has a clean title, and that there were good reasons to the contrary. In particular, there was a contradiction between having a clean title on the one hand, and being subject to an obligation to restore the property to someone else on the other. He also indicated that the position may differ where a recipient has a "*pre-existing relationship with the claimant capable of giving rise to an equity between them*".

Lord Burrows' analysis characterised a claim in knowing receipt as an equitable proprietary wrong. He considered that the nature of the wrong was an interference with equitable proprietary rights, in which the claimant has a proprietary interest. It followed that conferral of an unencumbered title on the recipient would defeat the claim.

The majority of the Supreme Court, therefore, dismissed the appeal on the basis of the reasons common to both judgments. Accordingly, as a general rule, a continuing equitable interest in the relevant trust property is necessary in order to maintain a personal claim for knowing receipt.



Diary Dates

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

11 April 2024

TL4 FIRE & South Square Fraud Conference

More details to folllow

1 – 3 May 2024

R3 Annual Conference

Fairmont Hotel, St Andrews

9 May 2024

South Square Spring Reception

Spencer House, London

10 May 2024

ILA Conference

Eversheds Sutherland, 1 Wood St, London EC2V 7WS

15 – 17 May 2024

TL4: FIRE International

Anantara Hotel, Vilamoura, Portugal

22 – 24 May 2024

INSOL International Annual Conference: San Diego 2024

Manchester Grand Hyatt, San Diego, California

5 June 2024

TL4 FIRE Americas

Westin Hotel, Grand Cayman

3 – 7 June 2024

London International Disputes Week

10 – 11 June 2024

International Insolvency Institute 24th Annual Conference

Marina Bay Sands, Singapore

11 September 2024

INSOL Channel Islands Seminar

Radisson Blu Waterfront Hotel, St Helier, Jersey

18 September 2024

Mourant South Square Annual Conference

etc.venues Monument, London

2 – 3 October 2024

INSOL Europe Academic Conference

Sorrento, Italy

4 October 2024

R3 Business Lunch

Royal Lancaster London, Lancaster Terrace, London W2 2TY

20 November 2024

INSOL South Square Cayman Islands Seminar Cayman Trip

Ritz Carlton, Grand Cayman

DAVID ALEXANDER KC

Does A Limitation Period Apply to Unfair Prejudice Petitions?

David Alexander KC considers the recent Court of Appeal decision in *THG v Zedra Trust Co.*

The received wisdom of the last 40 years is that no limitation period applies to unfair prejudice petitions, being petitions which are now presented under s.994 of the Companies Act 2006 ("the 2006 Act") .

This view has been heavily supported by commentators on unfair prejudice petitions. The current edition of Palmers Company law at para 8.3822 says that "*there is no formal limitation period for the bringing of an unfair prejudice petition*". Similarly in Buckley on the Companies Act it is said in the annotations to s.994 para [31] that "*there is no limitation period*". Gore-Browne on Companies agrees at chapter 19, para [2] stating that "*no specific statutory limitation period applies to unfair prejudice petitions*". In Hollington on Shareholders' Rights, the most recent edition of which (10th) was published in 2024, it is said that "*There is no statutory period of limitation available to unfair prejudice petitions*". The current edition (7th) of Victor Joffe KC's Minority Shareholders; Law Practice and Procedure which was available for purchase in March 2024 but states the law as at 31 August 2023 says that "*There are no statutory limitation periods directly applicable to claims under*" s.994 of the 2006 Act.

This view to the effect that there is no limitation period in relation to unfair prejudice petitions has also been supported in the authorities. See, for example, *DR Chemicals Ltd* (1989) 5 BCC 39, *Re Grandactual Ltd* [2006] BCC 73 (in which Sir Donald Rattee indicated that he understood "*that* [s 994] *is not subject to any limitation period …*"), *CF Booth Ltd* [2017] EWHC 457 (Ch) in which the Deputy-Judge

1. The unfair prejudice remedy was introduced by the Companies Act 1948, although at this stage it was based on "oppression". The Companies Act 1980 recast the remedy as one based on unfair prejudice.

said that "*There is no limitation period under section 994 …*" , *Re Edwardian Group Ltd* (where Fancourt J said that "*There is no statutory time limit for issuing a petition …*"), *Routledge v Skerritt* [2019] EWHC 573 (Ch), [2019] BCC 812 (where the Deputy Judge said "*There is no time limit for issuing a petition …*") and *Bailey v Cherry Hill Skip Hire Ltd* [2022] EWCA Civ 531, [2023] Bus LR 14 (where Andrew LJ, with whom Lewison and Snowden agreed, said that "*There is no statutory period of limitation applicable to unfair prejudice petitions*"). It should also be noted that *Cherry Hill Skip Hire* was itself cited with approval (albeit *obiter*) by the Supreme Court in *Smith v Royal Bank of Scotland plc* [2023] UKSC 34, [2023] 3 WLR 551 where Lord Leggatt (with whom Lords Briggs, Hamblen and Kitchen agreed) said this:

"*There are some types of claim which are not subject to any statutory period of limitation at all. One example is a claim for specific performance … Another example is a petition for relief under sections 994 to 996 of the Companies Act 2006 on the ground of unfair prejudice in the conduct of the company's affairs …*"

This view as to the legal position was, furthermore, taken by the Law Commission in two reports. First in Shareholder Remedies (LC 246 para 4.16). Second in Limitation of Actions (LC 270 para 4.211).

On 18 March 2023, Fancourt J issued his judgment in *THG Plc & Ors v Zedra Trust Company (Jersey) Ltd* [2023] EWHC 65 (Ch). In that judgment, in-line with all the commentators and authorities referred to above, Fancourt J decided that there was no limitation period applicable to a petition under s.994 of the 2006 Act. His main reason for doing so was that he considered himself bound by a decision of the Court of Appeal in *Bailey v Cherry Hill Skip Hire Ltd* [2022] EWCA Civ 531, [2023] Bus LR 14.

On 23 February 2024, judgment was handed down by the Court of Appeal (Lewison, Arnold and Snowden LJJ) on the appeal from Fancourt J's judgment in *THG Plc & Ors v Zedra Trust Company (Jersey) Ltd*. The Court of Appeal reference is [2024] EWCA Civ 158. The Court of Appeal decision is of great importance for all who practice in the field of unfair prejudice. In it, the Court of Appeal:

1. Addressed head-on whether there is a limitation period applicable to a petition under s.994 of the 2006 Act and, if so, what it is.

2. Remarked that they had not been referred to any case in which the question whether a limitation period applied to a petition under s.994 of the 2006 Act had actually been argued and decided.

3. Stated that, with the possible exception of *Bailey v Cherry Hill Skip Hire*, none of the materials to which it had been referred was binding on it.

4. Decided that *Bailey v Cherry Hill Skip Hire* did no more than to decide the case in accordance with the received wisdom, without questioning whether that received wisdom was correct.

5. Determined that *Bailey v Cherry Hill Skip Hire* was not binding on the Court of Appeal and that it therefore had to consider the question afresh.

6. Considered the question afresh and ruled that, in principle, it was possible for a petition presented under section 994 to fall within the scope of the Limitation Act 1980 (because a petition initiating proceedings fell within the definition of "*action*" in s.38 of the 1980 Act, the definition of "action" being "any proceedings in a court of law").

7. Concluded that, in principle, a petition seeking relief under s.994 is subject to the 12-year limitation period laid down in s.8 of the 1980 Act (because the right to go to court was purely statutory) unless the claim is one for compensation or monetary relief where the limitation period is 6 years under s.9 of the 1980 Act.

Therefore, in a highly significant decision which upends the received wisdom of the last 40 years in relation to whether the 1980 Act applies to unfair prejudice petitions, the Court of Appeal have very recently decided in *THG Plc & Ors v Zedra Trust Company (Jersey) Ltd* [2024] EWCA Civ 158, that the limitation provisions prescribed by the 1980 Act do indeed apply to unfair prejudice petitions under s.994 of the 2006 Act. The relevant limitation period in relation to an unfair prejudice petition under s.994 of the 2006 Act will, as a result, be 12 years, unless the claim is for compensation or monetary relief, in which case the relevant limitation period will be the shorter period of only 6 years.

It is yet not known whether the Court of Appeal's decision will be appealed to the Supreme Court. ■

Company Directors: Duties, Liabilities, and Remedies (4th edn, 2024)

Conceived by Simon Mortimore KC when the Companies Act 2006 was making its way on to the statute book, *Company Directors: Duties, Liabilities and Remedies* is now in its fourth edition, published by OUP in late January. It has been comprehensively updated since the last edition, which appeared in 2017: this branch of the law does not stand still and much has happened in the meantime.

Gone is the EU Insolvency Regulation in all but name. New restructuring tools have been introduced by CIGA 2020, including the Part 26A restructuring plan and the new moratorium. New measures to combat tax avoidance and evasion have been introduced by the Finance Act 2020. New information-gathering powers and to impose financial penalties on a person, including directors, are to be introduced by the Pension Schemes Act 2021.

And while forced to sit remotely during the pandemic, the courts have certainly not been idle. There are too many highlights and too little space to do justice to any of them here. It will hopefully suffice to say that, whatever aspect of the law relating to directors you may be concerned with, the aim of this book is to provide you with helpful and insightful analysis from experienced practitioners, all in their respective fields leaders of today and tomorrow.

The greatest privilege of working on such an enterprise has been the opportunity to work with enthusiastic and gifted colleagues, from outside South Square as well as within. Of the former, Stephen Donnelly has contributed a chapter on appointment of directors; Edward Brown KC on their terms of service and termination of appointment; Thomas Chacko on taxation; Ben Valentin KC on the company's remedies for directors' breach of their general duties; Blair Leahy KC, Andrew Feld and Courtney Grafton on exemption from liability, indemnification and ratification; Stuart Hill of Wynterhill LLP on insurance; Lexa Hilliard KC on liabilities to third parties; Henry Legge KC and Thomas Robertson on pension schemes; Austin Stoton on regulatory liability; and Clare Sibson KC on criminal liability.

Colleagues from South Square have provided the remainder: Adam Goodison on directors' powers and responsibilities; William Willson on decision-making and delegation; Marcus Haywood provided the lion's share of the work on directors' duties; Stefanie Wilkins on transactions requiring the approval of members; Georgina Peters on members' personal and derivative claims; David Alexander KC and Daniel Judd on unfair prejudice claims and just and equitable winding up petitions; Hannah Thornley and Roseanna Darcy on decision-making by members; Stephen Robins KC and Peter Burgess on accounting and disclosure requirements as well as capital and distributions; Tom Smith KC and Paul Fradley on reorganisations and takeovers (including Part 26A restructuring plans) as well as duties and liabilities of directors of foreign companies; Robert Amey on disqualification and also civil penalties for market abuse; Hilary Stonefrost on directors' functions and duties in insolvency proceedings; and Richard Fisher KC on directors' liabilities in insolvency proceeding.

A series of seminars highlighting developments in these areas is being arranged for the Spring and Summer, details of which will be announced shortly.

Mark Arnold KC
Editor

Simon Mortimore
Consultant editor

Tom Smith KC

David Alexander KC

Richard Fisher KC

Stephen Robins KC

Adam Goodison

Hilary Stonefrost

Marcus Haywood

Hannah Thornley

William Willson

Georgina Peters

Robert Amey

Roseanna Darcy

Stefanie Wilkins

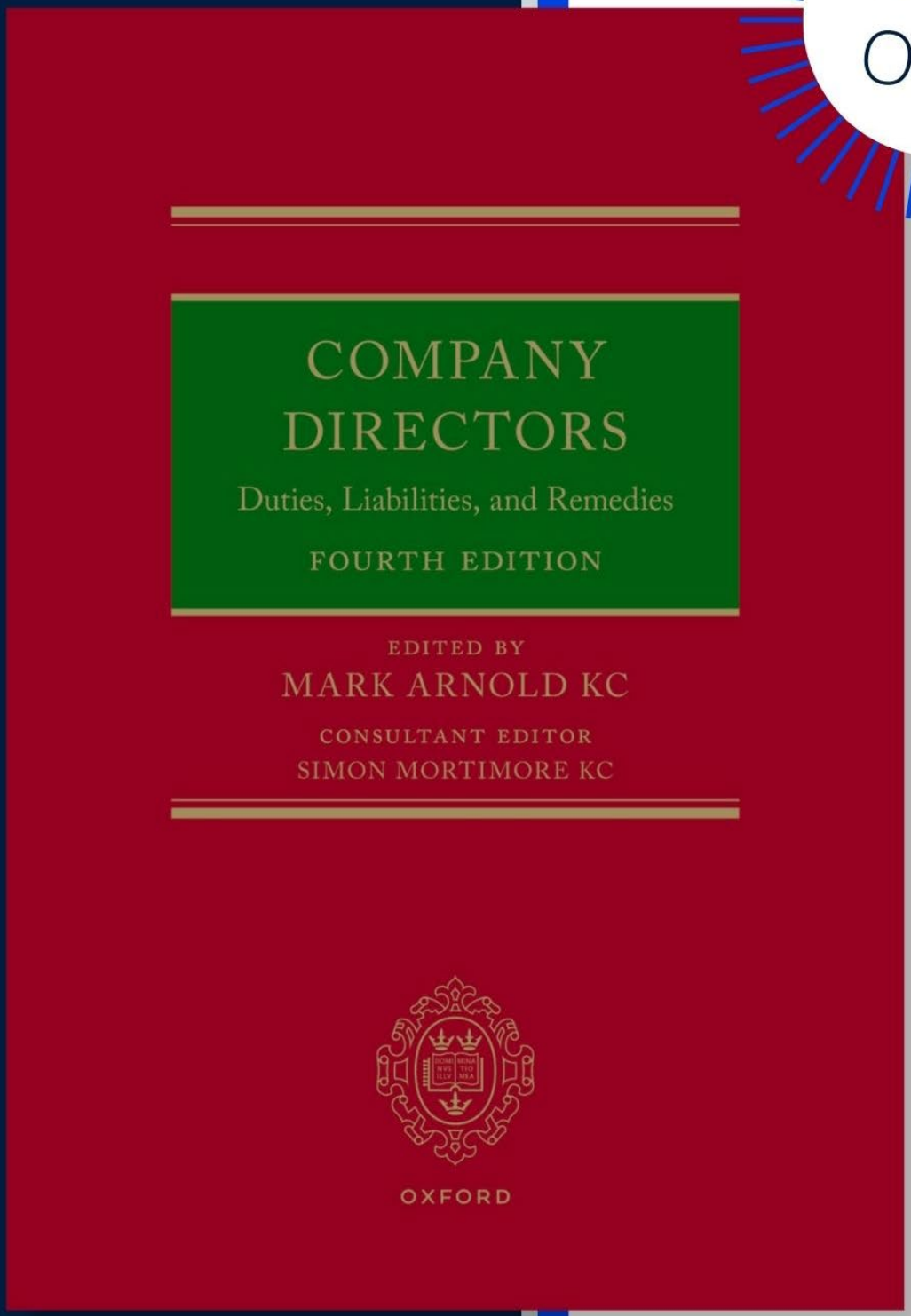
Daniel Judd

Paul Fradley

Peter Burgess

OXFORD UNIVERSITY PRESS

30% OFF!



January 2024
Hardcover
9780192842879
1,456 pages

~~£275.00~~
£192.50 (GBP)

~~$360.00~~
$252.00 (USD)

Mark Arnold KC, Barrister, South Square; **Simon Mortimore KC**, Barrister, South Square

Please note that the currency is in UK sterling and US dollars, and the discount is only valid on orders placed on global.oup.com.

Order online at
global.oup.com/academic
with promotion code
ALAUTHC4 to save 30%!

Muir Hunter QC's Chambers in a Time of Industrial Strife and Economic Turbulence, 1965–1974

SIMON MORTIMORE KC

South Square Story

My last article ended in April 1965 when Muir Hunter, the head of chambers at 3 Paper Buildings, was appointed a Queen's Counsel (Digest, July 2023). This article covers the next nine years; a period which for both the UK and Muir's chambers can be divided into two distinct halves.

At the 1966 general election, the governing Labour Party increased its majority from four to 98, but it did not take long for it to fall from favour with the electorate. There were persistent balance of payments crises which led, in November 1967, to the government devaluing the GB£ against the US$ from $2.80 to $2.40. Industrial unrest increased significantly. The number of days lost from strikes increased from less than 4 million at the beginning of the period to 11 million in 1970. During this time, Muir's chambers grew a little larger, but it remained a small set with just 10 members, who carried on their practices in bankruptcy, common law, and crime much as before.

To the surprise of many, Edward Heath's Conservative Party won the June 1970 election. The new government's industrial policies and wildly fluctuating economic ones led to a period of unprecedented economic turbulence and industrial unrest. In February 1971, Rolls Royce collapsed into receivership and its aircraft engine business had to be taken into state ownership. In 1972, the worst year of the miners' strikes, 23.9 million days were lost to strikes. Industrial action by the National Union of Mineworkers led to electricity rationing and blackouts in the winter of 1972/73 and to the three-day-week at the beginning of 1974. To try to assert control in an increasingly desperate situation, in February 1974, Edward Heath's government called a general election in which it asked the country to decide "*Who governs the country*?". The electorate answered "*No one*" since the outcome was a minority Labour government.

Muir's chambers contributed to the general sense of malaise through the Poulson bankruptcy case which exposed corruption reaching into the heart of local government and implicated the Home Secretary, Reginald Maudling, who was forced to resign (*Digest*, March and July 2021). In chambers, it was a period of change as three members left for judicial appointments, and one established commercial practitioner and four newly qualified barristers joined. Although no one in Muir's chambers realised it at the time, by February 1974, chambers was well-placed to prosper from the legal fall-out from the secondary banking crisis of 1973–75 and the property crash that followed it.

3 Paper Buildings in the second half of the 1960s

In March 1965, the seven members of chambers worked in crowded and spartan conditions. Muir, the only silk was over 50. Arthur Figgis, who replaced Muir as standing counsel to the Department of Trade in bankruptcy matters, Bill Lubbock and Adrian Head were all over 40; Dennis Paiba and David Graham were in their 30s; and Edward Evans-Lombe, who had just been taken on after completing a pupillage with Arthur, was 27. They carried on their practices from three rooms on the ground floor on the south side of 3 Paper Buildings. The fourth room was the clerks' room which was occupied by Tony Allen, the clerk, who was then just 30, a junior clerk and a typist. There was also a small lavatory with a basin with a cold water tap. Heating was provided by gas fires.

In 1966, chambers took a tenancy of the North basement of 3 Paper Buildings, which gave it four more practicing rooms. This enabled the members of chambers to spread out. Muir had sole occupancy of a handsome room with a view over the Inner Temple gardens. Dennis Paiba had the small room next to Muir's room, but, as a criminal practitioner who was in court every day, he rarely used it for work. His room doubled as a place where members of chambers would meet for afternoon tea and, if not so used, where clients could sit when waiting to attend a conference. Arthur Figgis shared with Bill Lubbock the large room next to the clerks' room which overlooked the car park. Adrian Head, David Graham and Edward Evans-Lombe moved downstairs to the basement, which had two rooms with garden views. Adrian took the large room, while David moved into the small one beside a lavatory that was even smaller and less well-appointed than the one on the ground floor. Edward moved into the larger of the two rooms on the carpark side. These had little to commend them; they were below pavement level, which made them dark and gloomy, and they were disturbed by the frequent filling and emptying of the dustbins below the steps to the building.

The new rooms in the basement enabled chambers to take in new members. Peter Milner was the first to join. He had a mixed common law practice with some family work but left in about 1975 to practise as a solicitor with his family firm in Jersey. Peter Beaumont and John Vallat arrived together as pupils in 1968. Peter, Adrian Head's pupil, specialised in crime and built up a very successful practice, mainly prosecuting in Essex and at the Old Bailey. John Vallat came to Arthur Figgis, after doing one pupillage in the leading family law set in Queen Elizabeth Building, where he was required to wear a bowler hat and carry an umbrella, and another pupillage with Neil Elles at 6 King's Bench Walk, who specialised in tax law.

During this pupillage John learnt nothing about tax, as Elles had no court work and was so concerned about client confidentiality that he would not let John attend his conferences. Instead, John spent his time working in a room on his

Dustbins below stairs to 3 Paper Buildings

3 Paper Buildings, showing windows of ground floor left and basement right

own, helping Elles produce a supplement to a textbook on restrictive practices and a new book on European law.[1] John found his pupillage with Arthur rather more edifying. He enjoyed insolvency work, became close friends with Arthur, and joined chambers to do insolvency and common law work. To begin with, that work was in short supply and so John began his career doing criminal work or sitting as a clerk in criminal courts.

Although generally a friendly set with a family atmosphere, in the late 1960s relations in chambers were far from harmonious. After the Battle of Bellador Silk in December 1964 (Digest, July 2023), Muir and Arthur rarely spoke to each other. It was, perhaps, not surprising that they should eventually fall out. They had completely different approaches to their cases. As an Oxford classicist, trained in debates at the Oxford Union and as a member of the Hardwicke Society,[2] Muir's approach was all about language, the construction of an argument, and passion in its delivery. Increasingly, he relied on David Graham, his former pupil and regular junior, to provide the legal and factual material to support the case that he would so vigoro usly pursue. As befits someone who had gone up to Cambridge to read mathematics and obtained a first in law, Arthur applied logic and reason to the resolution of legal problems. He was laconic in his delivery of the solution and quietly effective in persuading clients and judges to accept it.

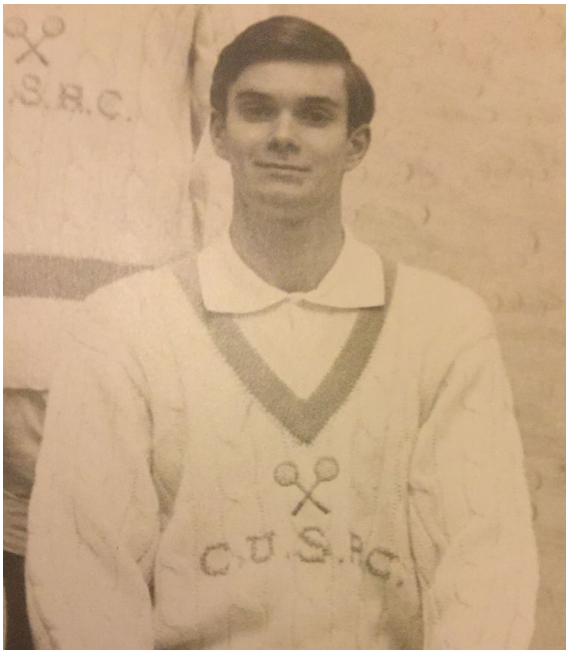
Professional Life in the Temple in the Late 1960s

Professional life in chambers in the late 1960s was much as it had been at the Bar a hundred years earlier. There had been three major changes to chambers in the Temple: the introduction of electricity between 1894 and 1917, the arrival of typewriters and typists in the 1920s, and the installation of small lavatories to replace the communal ones at the bottom of the stairwells. Four features of life in chambers in the late 1960s are worth mentioning, as they show how much has

1. A supplement to Wilberforce on Restrictive Trade Practices and Monopolies, Sweet & Maxwell, 1st ed 1957, 2nd ed 1966, of which Elles was an editor; and *Community Law through the Cases*, Stevens in 1973 (published just after the UK joined the European Community), which credited JH Vallatt (sic) with assisting Neil Elles.

2. A debating society for barristers which used to hold its debates in the Inner Temple.

changed since then. Now, we are used to large sets of chambers, some with more than 100 members; barristers having their own rooms; conferences taking place in conference rooms or at solicitors' offices; competition for pupillages and generous awards for those who get them; and a large administrative staff, with all, including clerks, receiving salaries.[3] Not so then.



John Vallat, Cambridge University Squash Blue, 1966

Size of chambers

The small number of members of Muir's chambers was not unusual and would not have been remarked on by solicitors, whose partnerships were limited to 20 members until the restriction was removed by the Companies Act 1967. The small size of chambers in the 1960s was partly due to physical restrictions in the Temple. An address such as 3 Paper Buildings would house several sets of chambers; each behind a heavy door with the names of the barristers and clerk inscribed on it and usually comprising a suite of four rooms. A set might, like Muir's did, find a nearby annex to house more members. Another factor was the number of barristers the clerk could manage. Although it did not affect Muir's chambers, the Conservative Lord Chancellors Kilmuir and Dilhorne created and enforced a policy that a chambers should not have more than two silks. This policy was supposed to serve the interests of competition, but it certainly deterred expansion.

The policy was exposed in 1961 when John Donaldson and Michael Kerr of 3 Essex Court (now 20 Essex Street) applied for silk. Since there were already two silks in their chambers, they were told that they would only be awarded silk if they agreed to move. They did so and formed a new set of chambers next door at 4 Essex Court (now Essex Court Chambers). The "two silks" policy was quietly dropped by Lord Gardiner, the Labour Lord Chancellor, and in the next decade chambers in the Temple started to grow larger.

Sharing rooms

Muir's chambers, like most in the Temple, did not have enough rooms for each member to have his own room and that remained the case even after the basement rooms were acquired. Sharing rooms had the advantage of keeping costs down and was only occasionally inconvenient. Barristers spent much of the day away from their room – in court or travelling – and when they were there, they would work quietly on their papers. Opinions and pleadings were written in manuscript before being typed by the chambers' typist, signed, and dispatched to the solicitor. In the early 1970s, pressure started to build for barristers to have their own rooms as they made more use of the telephone for professional purposes and began using dictating machines for their paperwork.

Until then, the only inconvenience of sharing rooms occurred when one of the barristers had a conference. A barrister never went to a solicitor's office and advice was rarely, if ever, given over the telephone. Before the conference could begin, the other barristers would leave the room with their papers. Unless there was a vacant room in chambers where they could work, they would go to an Inn library. In the afternoons during term time, the Inn libraries would be full of barristers working on their papers or doing research. When the solicitor and clients arrived at chambers for a conference at 3 Paper Buildings, they would find that there was nowhere to sit while they waited to be taken to the conference, unless Dennis Paiba's room happened to be free. In due course a clerk or the typist would escort them to their barrister's room where they would find chairs to sit on but no table on which to write notes or to place their cup of tea or coffee. Once they had settled into their chairs, they could consider what the room revealed about the barrister: the shelves of law reports, the piles of briefs, and perhaps even a hint of a life outside the law.

Pupillage

Pupillages were invariably based on personal introduction rather than competitive assessment. The pupil was expected to pay his pupil-master a fee of 100 guineas for 12 months (or 50 guineas for six months). This rate had been set in the eighteenth century and, along with the fees charged by the Inns for admission to the Inn and call to the Bar, deterred all but the better-off from contemplating a career at the Bar. By the end of the 1960s, some pupil-masters waived the fee; and, even if they did not, the pupil's Inn would often provide the funds to pay it. Unless the pupil had obtained a scholarship from his Inn that covered his pupillage, he would have to support himself until the second six months of his pupillage when he was allowed to accept briefs and could start to earn a living.

3. On top of salaries, clerks may receive incentive bonuses.

The clerk

The role of the clerk was far more significant to barristers' careers in the late 1960s than it is today. He ran his barrister's practice, leaving the barrister to concentrate on doing the work. The clerk identified with his barrister, using "*we*" to describe their relationship and the cases they did. Even so, to the clerk, the barrister was always "*Sir*". What Edgar Bowker, former clerk to Sir Edward Marshall Hall KC and Norman Birkett KC, wrote in 1947 about the role of the clerk was equally true of Tony Allen at 3 Paper Buildings twenty years later:

> "*For example, the clerk who has under his wing in chambers Mr A.B., Mr C.D., Mr X.Y. and Mr Z. (and maybe several others) is entirely responsible for what work is accepted and where each of 'his' men go each day. The wise young man at the Bar, and the man who is likely to get on in the profession, is he who does not interfere in his clerk's arrangements, but goes where he is sent without question, and does pretty much as he is told.*
> *'You do the work, and I'll decide what you take and where you go,' is the maxim of the barrister's clerk. Fees, too, are entirely a matter for the clerk. No reputable member of the Bar would ever dream of interfering as to the fee that should be marked on his brief.*"

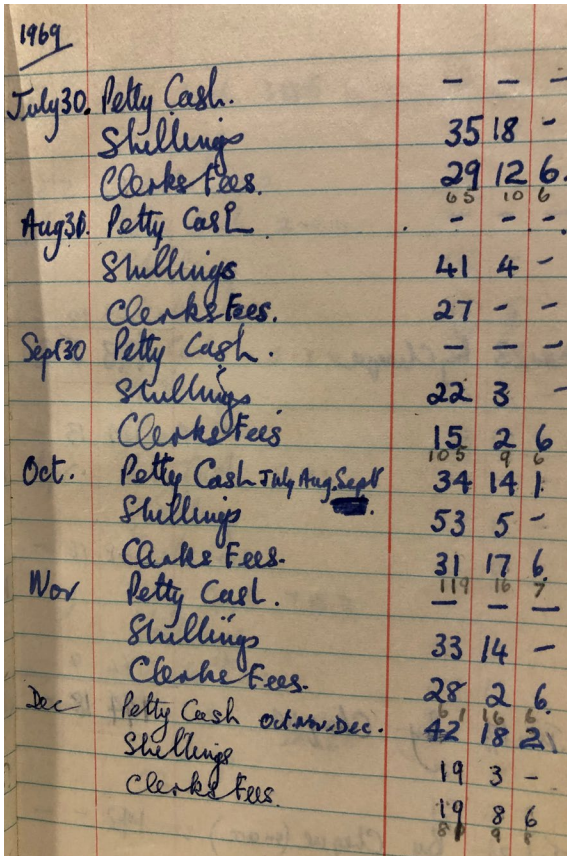
The clerk was not subject to the same restrictions on soliciting work or consorting with solicitors as barristers were. He could encourage solicitors to send work to his chambers, recommend the barrister to instruct, and help young members of chambers build up their practices at the start of their careers.

While a good clerk was vital to a successful career at the Bar, attaching his career to a successful barrister was also of concern to the clerk, since the terms of his remuneration gave him a personal stake in the barrister's career. Barristers' fees were always stated in guineas and those fees were the basis of the two components of the clerk's remuneration. One component was the fee the client paid for the services of the clerk on top of the barrister's fee: 2½ per cent on brief fees (although this might vary with the size of the brief), and 5s or 2s 6d for conferences and consultations. The solicitor would pay the barrister's fee and the clerk's fee to the barrister who would pay the clerk what was due to him for the clerk's fee. The second component, introduced in the 1950s, was "*one shilling in the guinea*"; i.e., the barrister would pay his clerk one shilling for each guinea of the brief fee. Those arrangements applied in Muir's chambers for remunerating Tony. They persisted until 15 February 1971, when decimalisation came into effect and chambers had to make different arrangements with their clerks. Muir's chambers agreed with Tony that he would be paid 8.5% of each barrister's fees, which would give him roughly what he had received under the old system.

The clerk was also responsible for collecting fees owed to his barristers. Tony, like most clerks, was the butt of frequent complaints from his barristers about delay in collection. Often, he was reluctant to press the solicitors for payment and some of them took advantage of the latitude they were given. There was a historic reason why clerks did not press for prompt payment. Until the 1968 budget, post-cessation receipts were free of tax, whether the barrister left the Bar to take up a judicial appointment or to retire. This had been a remarkably generous concession when the top marginal rate of tax was 70% and had been 91% between 1945–63. After the end of that tax concession, there was no reason for not pressing for prompt payment, particularly in times of high inflation; but old habits in the clerks' room proved difficult to change.

Muir as a silk in the late 1960s

The core areas of Muir's practice as a silk were personal and corporate insolvency, moneylending, and shareholder disputes. In these cases, he displayed his deep knowledge of bankruptcy law, his ability to develop and sustain a legal argument however flimsy the factual foundations may have been, and his passionate advocacy of his client's cause. This last feature could lead to extensive and, at times, forceful cross-examination. Towards the end of 1965, Muir was instructed to oppose an application to a Chancery judge to extend time to register a company charge. His, exhaustive but unavailing cross-examination of the applicant's witnesses led to the hearing lasting 13 days.[4]


1969

July 30. Petty Cash. — — —
Shillings 35 18 —
Clerks Fees. 29 12 6
65 10 6
Aug 30. Petty Cash — — —
Shillings 41 4 —
Clerks Fees. 27 — —
Sept 30 Petty Cash. — — —
Shillings 22 3 —
Clerks Fees 15 2 6
105 9 6
Oct. Petty Cash July Aug Sept 34 14 1
Shillings 53 5 —
Clerks Fees. 31 17 6
119 16 7
Nov Petty Cash. — — —
Shillings 33 14 —
Clerks Fees. 28 2 6
Dec Petty Cash Oct Nov Dec. 42 18 2
Shillings 19 3 —
Clerks Fees 19 8 6

A page from a fee book kept by Tony for a member of chambers, 1969

Muir in the Old Bailey

But the length of that hearing was modest compared with the trial at the Old Bailey in which Muir led Dennis Paiba for one of four individual defendants, who were charged, along with their companies, with conspiracy to defraud HM Customs & Excise and with some purchase tax offences, arising from the importation of transistor radios from Hong Kong. The trial began in January 1966 and lasted 81 days, making it the longest trial in British history since the *Tichborne* case in the 1870s which had lasted 188 days.[5] All the defendants were convicted, sent prison, fined, and ordered to contribute to the prosecution costs. The individual defendants and some of the companies appealed against conviction and the allocation of costs. One of the other defendants submitted that his conviction was unsafe because the trial had not been fair due to its excessive length. Although the Court of Appeal rejected this submission, it recorded that the trial had taken twice as long as the prosecution's estimate of 30-40 days because of excessively long cross-examination of prosecution witnesses, often on points not in issue, and lengthy, but sometimes untenable, submissions on admissibility of evidence and no case to answer.

The Court did not identify the counsel responsible, but it was common knowledge in Muir's chambers, that he was the principal culprit. In the Court of Appeal, Muir pursued just one of the points of law that he had made during the trial: that the conspiracy charges were bad because they had been brought too late. Mr Justice Fenton Atkinson, giving the judgment of the Court of Appeal,[6] noted that this point on the time limit had escaped the attention of 5 leading counsel and 7 junior counsel for the defendants until Muir raised it on the 37th day of the trial, having, as Muir explained to the trial judge, "*fallen over it one night in the dark*". He recorded that Muir "*concedes that he can quote no direct authority in support of his submission and was constrained to agree that if he is right, the criminal courts of this country have proceeded on a mistaken view of the law for over 100 years. He has even gone so far as to contend that the statutory form of indictment for this type of offence is based on a complete misunderstanding of the law.*"

Having set out the ambitious nature of Muir's submission, he rejected it as having no substance for two reasons. First, the defendants had not been charged with a statutory offence, to which a time limit applied, but with common law conspiracy to cheat and defraud for which there was no time limit. Second, if there was a time limit for conspiracy charges, Muir's argument that it ran from the moment the conspiracy was first entered into was based on a misconception of the nature of a conspiracy which, as was well understood, continues until its ends are achieved or it is terminated.

Rolls Razor

Muir was back in more familiar territory when he acted with David Graham for Kenneth Cork, the liquidator of Rolls Razor Ltd, one of the most high-profile liquidations of the 1960s. They had formed a good working relationship with Cork, the busiest liquidator of the time, having worked for him on the Livestock Marketing Group liquidation (*Digest*, July 2023) and other insolvencies.

Scales of Justice at the Old Bailey

4. *Re Heathstar Properties Ltd* [1966] 1 WLR 993.

5. *R v Castro* (1874) LR 9 QB 350; affirmed (1880) 5 QBD 490 and (1881) 6 AC 229.

6. *R v Simmonds* [1969] 1 QB 685.

In about 1960, John Bloom, a young washing machine salesman, acquired control of Rolls Razor, then a moribund company which used to manufacture razors for shaving, and transformed it into a dynamic company selling low-cost washing machines and other domestic appliances. Through cost cutting, selling directly to consumers, a heavy advertising campaign, offering attractive hire purchase facilities, and funded by bank borrowing and the proceeds of a public issue of its shares, Rolls Razor expanded rapidly and soon seized a significant share of the market from Hoover and Hotpoint, the market leaders. Rolls Razor also provided Bloom with generous remuneration to support his opulent lifestyle, a flat in Park Lane, a Rolls Royce, and a 150-ft yacht *Ariane*. To complete the picture, the company agreed to buy an executive jet for his use.

The company's apparent success was short-lived. It made profits in 1962 and 1963, but, by the spring of 1964, it was under pressure from a price war launched by its competitors. Its overdraft with Barclays Bank was nearly £500,000, and its share price was in rapid decline. The board responded to the crisis by raising money through selling finance agreements to Capital Finance, cutting directors' pay and dismissing salesmen. But, to maintain credibility, the company had to pay a dividend on its profits earned in 1963. At the AGM held on 2 July 1964, the shareholders approved the dividend. The problem was that the company did not have the £210,000 needed to pay it. Bloom approached a firm of financiers called Quistclose Investments who on 15 July agreed to lend the money provided it was used for the sole purpose of paying the dividend. The company told Barclays of this arrangement and instructed it to pay Quistclose's cheque into a separate account: the No 4 ordinary share dividend account. On 16 July, the cheque was credited to the No 4 account.

The dividend was never paid, because on the following day the directors realised that Rolls Razor was doomed and announced that it would go into liquidation. The company stopped issuing cheques, Barclays combined all the company's bank accounts, other than the credit balance on the No 4 account, and the company stopped trading. A few days later, the board brought in Kenneth Cork, who confirmed that the company should go into liquidation. On 27 August 1964, Rolls Razor went into creditors' voluntary liquidation and Cork was appointed liquidator. It had debts of over £4 million and few assets apart from its stock of unsold washing machines, many of which were in the hands of salesmen who were owed money by the company. Ordinary creditors were unlikely to receive more than a very small dividend.

Muir acted for Kenneth Cork on two important issues. One was a set-off issue with the salesmen and the other was Quistclose's claim to the money in the No 4 account. David Graham was also retained to investigate the deals with Capital Finance.[7]

John Bloom at Rolls Razor trial in London

Rolls Razor Ltd v Cox, decided by the Court of Appeal in December 1966, was one of the first cases of insolvency set-off cases in modern times.[8] Muir acted for Rolls Razor while Arthur Figgis, led by Peter Curry QC, acted for one of the salesmen, Mr Cox. This was a test case in which Rolls Razor claimed from Mr Cox £106, the money he had received from customers, and delivery up of unsold stock, valued at £3 3s, and some tap adapters, used for demonstrations which were not for resale and were of negligible value. The main ground on which Mr Cox defended the claim was that he was entitled to set off the commissions and retention money owed to him which totalled £249 and exceeded the amount owed by him and the value of the goods he held. The most important issue decided by the Court of Appeal was whether insolvency set-off, relied on by Mr Cox, prevailed over his agreement with Rolls Razor which required him to pay over moneys due to Rolls Razor without deduction. The Court of Appeal held that it did with the result that the liquidator's money claim failed.[9]

Sympathy for the plight of the salesmen who were out of pocket and the trivial sums at stake led the Court of Appeal to decide that Mr Cox could also set-off the value of the unsold stock but not the tap adapters (with Winn LJ dissenting on the unsold stock). Lord Justice Danckwerts did not try to disguise his lack of interest in those issues and simply agreed with Lord Denning MR. As Professor Goode has said the case is "*a good illustration of hard cases making bad law*".

7. *Re Rolls-Razor Ltd (No 2)* [1970] Ch 576.

8. [1967] 1 QB 552. Set-off was under s 31 of the Bankruptcy Act 1914, which applied to the liquidation of companies by s 317 of the Companies Act 1948.

Muir in Salisbury, Rhodesia for the Sithole trial, February 1969

Quistclose's claim against Rolls Razor and Barclays to the return of the £210,000 in the No 4 account failed before the judge but it succeeded in the Court of Appeal and the House of Lords,[10] because the appellate courts were satisfied that the money had been paid to Rolls Razor on the understanding, of which Barclays was aware, that it was not at Roll Razors' free disposal and could only be used to pay the dividend, a purpose which had failed. Thus, was born the Quistclose trust, which is much discussed in textbooks and by academics. Muir and David appeared for Rolls Razor before the judge and in the Court of Appeal. They argued that the facts did not support a trust in favour of Quistclose, but not even Muir could devise an argument that, if he was right on that, the money should be paid to the liquidator and not applied by Barclays in reduction of the overdraft. Barclays alone took the fight to the House of Lords where they lost.

John Bloom was prosecuted for fraud. Rather than contesting all the charges brought against him, at the start of his trial at the Old Bailey in October 1969 he pleaded guilty to two of the charges on the basis that the prosecution accepted not guilty pleas to the other charges which were later dropped. The judge fined Bloom £30,000 and disqualified him from acting as a company director for 5 years. This was not the retribution that the media had been expecting. Similarly, a civil claim brought by the liquidator against Bloom ended in a compromise which left Bloom free to move on to new business ventures.

Muir and Justice for All

Sithole

Muir's work for Justice and interest in justice in Africa and possible abuse of the law against political opponents took him to Rhodesia in February 1969 to watch and report on the trial of the Reverend Ndabaningi Sithole, who was charged with inciting the murder of the Prime Minister (Ian Smith) and two of his ministers; a charge which carried the death penalty.

Sithole and Robert Mugabe were two of the founders of the Zimbabwe African National Union (ZANU), whose aim was to overthrow the white government of Rhodesia, led by Ian Smith, which unilaterally and unlawfully declared independence from the UK in 1965. In November 1968, while he was detained in prison under a detention order, Sithole was charged with instigating the murder plot from his prison cell. The suggested motive was that Sithole feared the British Government was about to sell-out to Smith's government and would only favour the African nationalists if Smith and his ministers were killed. The case against him was based on a letter written with a red biro and addressed to a Mrs Y who was expected to pass it to Mr X. Although Mr X received the letter and replied to it, Mrs Y had shown it to the police. A red biro, whose ink matched that used on the letter, was found in Sithole's cell and traces of his fingerprints were on the letter, along with those of other people. Sithole's defence was that he was framed, that he did not write the letter, that he disapproved of violence for political ends, and that Mrs Y was a police informer.

Muir's trip to Salisbury to observe a criminal trial involving political offences in February 1969, was not like his trip to Burundi in 1962, where the judicial process had been manifestly deficient (*Digest*, July 2023). Sithole's trial took place in a courtroom which looked like an English court; the procedure was modelled on English practice; the judge and barristers wore wigs, gowns, and bands; the judge had been appointed by the Queen and had sworn an oath of allegiance to her; and QCs appeared for the prosecution and the defence. The one difference was that there was no jury; instead, the judge sat with two assessors who were white farmers.

Muir discussed the case with the defence counsel, no doubt suggesting lines of defence, and took a full note of the proceedings, which lasted five days. Mr X, Mrs Y and Sithole all gave evidence. After considering their verdict for a few days, the judge and the assessors found Sithole guilty of incitement to murder. They found Mrs Y an unreliable witness, who lied in many respects, but were satisfied that the forensic evidence showed that Sithole had written the letter. The judge considered there were extenuating circumstances, due to Sithole's detention and the fact that his letter was not acted upon. He therefore imposed what he considered to be the relatively merciful

9. This decision was confirmed by the House of Lords in *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd* [1972] AC 785.

10. *Quistclose Ltd v Rolls Razor Ltd* [1967] Ch 910 (Plowman J); [1968] Ch 540, CA; [1970] AC 567, HL.

sentence of six years imprisonment with hard labour. Muir's obituary in The Times states that Sithole was spared the death sentence after an impassioned speech from Muir. There is no record of such a speech in The Times report of the trial or in Muir's notes and report to Justice, which criticised aspects of the trial and defence counsel for not being sufficiently rigorous but concluded that the outcome was not unjust. Anyway, Muir would have had no right to address the court on behalf of a defendant who was represented by a QC, who spoke on his behalf. Sithole was given permission to appeal but did not pursue it.

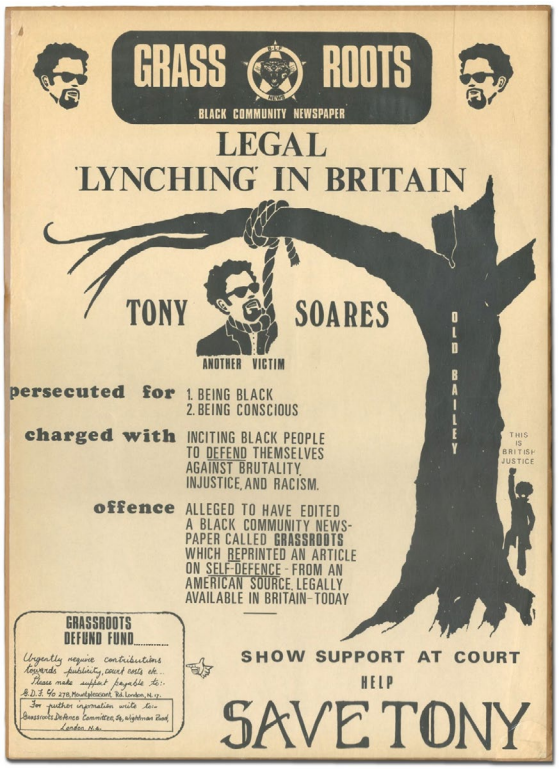
Sithole was released from prison in 1974. He fell out with Robert Mugabe, who became leader of ZANU PF, and served in Bishop Abel Muzorewa's transitional government. Mugabe's party won Zimbabwe's first general election in 1980 and he ruled Zimbabwe for the next 37 years.

Notting Hill Neighbourhood Law Centre

Muir was not like Mrs Jellyby in Charles Dicken's *Bleak House* who devoted herself to charitable works in Africa (principally establishing a coffee plantation on the banks of the Niger), while disregarding the unfortunate people near her home in Holborn and the chaos in her own household. Muir was deeply aware that justice did not reach the less well-off in English society and found an opportunity to do something about it. In 1968, the Society of Labour Lawyers, of which Muir was a member, published a paper by Anthony Lester and others, which suggested that England should follow the United States in setting up neighbourhood law centres. Although the Labour government considered the paper, nothing happened. Instead, Muir joined with three other lawyers to found the North Kensington Law Centre in a former butcher's shop at 74 Golborne Road, London W10. The other lawyers were the Sixth Baron Tony Gifford, then a young radical barrister; Peter Kandler, a solicitor who gave up private practice to manage the Centre; and Charles Wegg-Prosser, another solicitor, whose involvement with the Law Society helped the Centre obtain a waiver so that it could claim legal aid even though it advertised its services. As a QC with a house in one of the more desirable streets in Kensington, Muir provided the new Centre with an aura of respectability. He gave the address at the opening ceremony on 17 July 1970 in the presence of the Lord Mayor of Kensington, Sir Elwyn Jones (the former attorney-general and future Lord Chancellor), and the local MP. Muir called the Centre "*a new type of animal, whose aim was to provide inhabitants of a heavily populated area which had special problems with a first-class legal service*". Forty solicitors from the West London Law Society would provide free advice in the evenings and at weekends on a wide range of legal problems. The success of the Centre led to the establishment of other neighbourhood law centres in London and the major cities. The North Kensington Law Centre has celebrated into 50th anniversary and continues to operate today.

While being one of the founders of the North Kensington Law Centre represents one of Muir's most durable achievements, his involvement with the Centre was short-lived. In November 1971, Muir wrote to Tony Gifford to resign because, without his consent, Gifford had employed a receptionist whose activities had attracted the attention of Special Branch which, as a result, had interviewed Muir. It is not surprising that the receptionist, a Goan called Tony Soaries, was of interest to Special Branch or that Muir should have been indignant that he had not been told about his employment. Soaries, a leading figure in the Black Liberation Front, had included in the October 1971 edition of the Front's *Grass Roots* newspaper a helpful recipe for making Molotov cocktails. For this, Soaries was

North Kensington Neighbourhood Law Centre



Grassroots poster for the trial of Tony Soares (Soaries) in 1972

charged with incitement and other offences. At his trial at the Old Bailey, he was acquitted of the most serious offences but found guilty of a lesser one and sentenced to 200 hours of community service and bound over for 7 years.

Torture and drugs in Turkey

In March 1971, the Turkish military imposed a form of martial law behind the veneer of a constitutional government. It was not long before there began to emerge reports of mass trials, harassment of defence lawyers, executions, and torture of opponents of the regime, intellectuals, and artists. It was also a time when drug dealers received rough treatment in Turkish jails, as depicted in the 1978 film *Midnight Express*. In February 1972, Muir went to Turkey on behalf of Amnesty International to investigate and try to encourage the Turkish ministers to respect the rule of law and end torture. After meeting Turkish lawyers, he met the Minister of Information and the Minister of Justice who promised to investigate the cases he brought to their attention.

One of the cases Muir raised with the Turkish authorities was that of Timothy Davey, a 14-year-old English schoolboy who was in Turkish custody, charged with drug dealing offences. In August 1971, Jill Davey – a 32-year-old mother from Hextable in Kent – was returning by bus through Turkey from a life-enhancing visit to India and Afghanistan, with Timothy, her five other children, and her boyfriend. By the time they reached Istanbul, they had run out of money. They naturally turned to drug-dealing. Jill's boyfriend was caught smoking hashish and sentenced to two and a half years in prison. Two days later, Timothy was arrested with three older students and charged with conspiring to deal with about 28 kg of hashish. They had made the mistake of trying to sell the drugs to two men who turned out to be narcotics agents.

The case first came to court in Istanbul in October 1971, but kept on being adjourned. Meanwhile, Timothy was kept in custody in an adult prison. The case was eventually tried before a panel of three judges on 1 March 1972. Timothy admitted that he knew that dealing in drugs was wrong but had done it because his family had run out of money, were starving and could not get home. The judges sentenced Timothy to six years and three months in prison and fined him TL 151,000 (about $4,190). As he was under 15, Timothy's prison sentence was half the length of the older students' sentences.

The British response to the sentence was one of outrage. The Daily Mirror called the sentence "*monstrous and brutal*". Although the offence was serious, he was only a 14-year-old boy and the six months he had endured in a Turkish prison was punishment enough. On behalf of Amnesty International, Muir called on the British government to intervene to protect Timothy and perhaps pay the fine and costs. He also took part in a Thames Television programme about the case and tried to calm the situation by explaining that Turkey had reform schools to which Timothy could be sent. Even so, the British reaction upset the Turkish authorities. The Turkish Prime Minister abandoned a planned stop-over visit to London on his way to the US. In June 1972, Timothy's appeal was dismissed, and he was sent to a reform school near Ankara. With the help of his mother, he escaped; but was recaptured and sentenced to an additional six months and 21 days in prison. In 1974, he was released under an amnesty.

Muir completed his report, *An Examination of the Allegations of Torture of Prisoners in Turkey* in May 1972, the month when the Poulson public examinations began. Amnesty International sent the report, along with additional evidence to the Turkish authorities via the Turkish Embassy in London. The following month Muir spoke on torture in Turkey at a colloquium in Paris. The Turkish authorities rejected criticism, saying that torture was the only way to deal with those they regarded as "*hardened criminals*". Amnesty International decided to send another group to Turkey to investigate, but Muir did not participate as, by this stage, he was fully committed to the Poulson case.

Law Reform

Muir was involved in three law reform projects, one of which, about bankruptcy law, influenced major changes in the law. In December 1971 Justice established a committee under the chairmanship of Allan Heyman QC to report on the reform of bankruptcy law. Muir and David Graham were members of the committee, David was responsible

3-35

Daily Mirror

BRITAIN'S BIGGEST DAILY SALE

3p Thursday, March 2, 1972 No. 21,194

Turks' sentence on Timothy Davey

AT 14— JAILED FOR 6 YEARS

Timothy Davey bows his head as he is sentenced to six years in a Turkish prison.

GOT HIM!

How Michael X was trapped in the jungle

UP on the first floor of Guyana's police headquarters, the CID office was in chaos yesterday.

Pretty dark-skinned secretaries brushed me aside, squeezed past the beefy sergeant toting a machine gun, and yelled: "Out of de way man, out of de way. "Let me get a good look at dat boy."

In the centre of the jostling, laughing throng was Michael X — handcuffed, gloomy and surrounded by proud riot-squad police carrying ancient Lee Enfield ·303 rifles.

Even veteran officers struggled to catch a glimpse of the most celebrated fugitive in the history of this small former British colony.

From JOHN SMITH in Georgetown, Guyana

Michael X, wanted in connection with the murder of British divorcee Gale Benson in Trinidad, had been captured.

He was asleep alongside a charcoal pit seventy miles from Georgetown when twelve armed policemen pounced on him at dawn yesterday.

Last night the 38-year-old Black Power leader—known by the Muslim name of Abdul Malik—was awaiting extradition to Trinidad.

He will be charged there with murdering Mrs. Benson, 27, and 25-year-old barber Joseph Skerritt. They were found buried in the garden of Malik's Trinidad home last week.

Michael X, the ambitious Black Power politician who always seemed to know where he was going, was caught yesterday because he lost his way.

After vanishing from his

Continued on Page Two

By HOWARD JOHNSON and ALAN GORDON

FOURTEEN-YEAR-OLD Timothy Davey was led from a court in handcuffs yesterday to serve a sentence of six years and three months in a Turkish jail.

Timothy—called a "brave little chap" by a British consul in Istanbul—had just been convicted of drug smuggling.

Even with full remission for good conduct, Timothy will have to serve four years if an appeal fails.

He was accused of conspiring with two young Frenchmen and a 17-year-old Austrian youth to smuggle 57lb. of hashish into Turkey.

The Frenchmen were each jailed for twelve years and the youth for eight years and four months.

Mrs. Davey is helped from the courtroom as the trial ends.

Massive

All four were ordered to pay massive fines. Timothy has to pay £4,200 and the others a total of £226,000 between them.

Their sentences could be increased if the fines are not paid.

Timothy's 32-year-old mother, Mrs. Jill Davey, of Ladbrokegrove, Notting Hill, London, was helped shocked from the court.

She described the sentence as "savage" and said that she had no money to pay the fine. But she would try to raise it wherever she could."

Britain's vice-consul in Istanbul, Mr. Brancaleone, said that Timothy looked "awful" when the sentence was passed.

The consul-general, Mr. Alan Horn said: "He's a brave little chap, and we hope he will get through his jail ordeal reasonably unscathed."

He appealed for pen-pals to write to Timothy through the British consulate in Istanbul.

The boy had already been held in jail, waiting for his trial, since he was arrested last August near the end of an overland trip from India with his family.

Yesterday's hearing was held behind closed doors because of Timothy's age.

But he was reported to have told the judge: "I did it because my family did not have any money."

Mr. Paul Rose, Labour MP for Manchester Blackley, will raise Timothy's case with Foreign Secretary Sir Alec Douglas-Home

Continued on Page Two

Brave little chap, says Our Man in Istanbul

Image © Reach PLC. Image created courtesy of THE BRITISH LIBRARY BOARD

Daily Mirror front page, Timothy Davey, March 1972

for drafting the report and Michael Crystal (see below) was appointed secretary. The government's somewhat complacent view, expressed by Lord Elwyn-Jones, Lord Chancellor, in July 1974, was that "*the basic structure of bankruptcy law, apart from that relating to discharge, was sound and well-suited to its purpose*". The Justice Report, published in 1975, revealed that it was not just the law about discharge from bankruptcy that needed reforming. There was ample scope for making a system of bankruptcy law established almost one hundred years earlier better suited to modern conditions. Although the changes to bankruptcy law recommended in the Report were modest, it led the government some two years later to establish a Review Committee on Insolvency Law and Practice under Sir Kenneth Cork, whose report, published in 1982, was so influential on the reforms made in the Insolvency Acts 1985 and 1986.

Muir's other two law reform projects were not so consequential. In 1970, Muir chaired a Justice committee to review the law of perjury, which was at the time being considered by the Law Commission. Muir's committee's report (published in 1973) recommended changes to the offence of

Sir Kenneth Cork's Clues to Spotting who is Going Bust

perjury, steps to prevent and discourage perjury, and, most controversially, remedies for victims of perjury. No reforms of any significance followed the Law Commission's work. Shortly after the UK joined the European Community on 1 January 1973, Muir was appointed to the EEC Bankruptcy Convention Advisory Committee, chaired by Kenneth Cork, which reviewed the then draft EEC Bankruptcy Convention. This Committee sat until 1976, but it was not until 2002 that a European Community Regulation on Insolvency Proceedings came into effect.

Work in Chambers 1970 – 1974

The two most newsworthy cases engaged in by members of chambers during the period 1970–74 were Ralph Stolkin's "*The £250,000 Kiss-Off*" case in the autumn of 1971 in which Edward Evans-Lombe was instructed (Digest, September 2022) and the Poulson bankruptcy case, where the public and private examinations ran from May 1972 to the autumn of 1973 (*Digest*, March and July 2021). Behind the scenes, members of chambers were involved in celebrity bankruptcy cases, including Diana Dors (*Digest*, September 2022) and Lionel Bart, the writer and composer of *Oliver!* (1960), who became bankrupt in February 1972 with a deficiency of nearly £100,000, following the failure of his musical *Twang!* (1965) and a life of drink, drugs, and extravagance. There were two important cases, described below, that began during the period and worked their way to final decisions in the House of Lords.

The negligent expert valuer: Muir's only case in the House of Lords

At the beginning of 1972, shortly before he was instructed in the Poulson bankruptcy case, Muir was presented with an opportunity to challenge the rule, established by nineteenth century cases, that an expert valuer was not liable to those who relied on his valuation even if it had been made negligently and had caused significant loss. The catalyst for change on which Muir relied was the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners*,[11] which established the cause of action for negligent misstatement.

Muir was instructed by Ivor Arenson who had been employed by a furniture manufacturing company, of which his uncle was the majority shareholder on terms that if Ivor left employment, he should sell his shares to his uncle at fair value fixed by the auditor who would act as an expert not as an arbitrator. In April 1970, Ivor left the company, and the auditor valued his shares at just under £5,000. Shortly afterwards the company was acquired by a holding company which "went public" at a share price that reflected a value for Ivor's shares six times higher than the price he had received.

He claimed that the auditor had valued his shares negligently in that he had based their value on an old balance sheet and so had failed to take account of the company's profits earned between the date of the balance sheet and his departure, he had taken a value for goodwill that was 10 years old rather than an up to date one, and he had failed to take account of the likelihood that the company would go public. When Ivor sued his uncle and the auditor's firm, the firm immediately applied to strike out the claim, relying on the immunity of an expert valuer,

11. [1964] AC 465.

recognised by old cases and based on the theory that an expert valuer was performing a quasi-judicial function and the parties had agreed to accept his decision. Muir's argument that the court should look afresh at those cases in light of *Hedley Byrne* did not impress Mr Justice Brightman, who struck out the claim against the firm.[12]

In the Court of Appeal, Muir persuaded Lord Denning MR that the firm could be liable for giving a negligent valuation, but Lord Justice Buckley and Sir Seymour Karminski followed the old cases.[13] About a year later, in a building contract case, the House of Lords held that an architect could be liable for negligently issuing an interim certificate as to the value of work done under the contract and two of the Law Lords specifically criticised Lord Justice Buckley's reasoning in the *Arenson* case.[14] Muir then obtained permission to appeal to the House of Lords which reversed the decision of the Court of Appeal and confirmed that Muir's client could sue the auditor for negligence.[15]

British Eagle

British Eagle, the second largest independent airline in the UK, went into creditors voluntary liquidation on 8 November 1968. It had fallen victim to increased fuel costs caused by devaluation the previous year, increased landing charges at British airports, and the collapse that summer of the package holiday market which had been badly affected by the continuation of the £50 limit on foreign travel money. The end of British Eagle came so suddenly that no one dealing with it had time to order their affairs to minimise their exposure to loss. Other airlines thought they were protected because all their dealings with British Eagle were resolved through the IATA clearing house for settlement of debts. At the creditors' meeting, the liquidator, FS McWhirter of Peat, Marwick, Mitchell & Co, reported that British Eagle had liabilities of about £6.1 million and assets valued at about £5.95 million, but warned that the deficiency could be as much as £6 million.

The last settlement under the IATA clearing system had covered dealings in September. Between 1 October and 8 November, when it went into liquidation, British Eagle had dealt with other airlines, giving rise to debts and credits, which, under the clearing system resulted in British Eagle being a net debtor to IATA.

David Graham, led by Allan Heyman QC of 1 New Square, challenged that outcome on behalf of the liquidator. They contended that when British Eagle went into liquidation, the IATA clearing system had to give way to the fundamental principle of insolvency law, embodied in s 302 of the Companies Act 1948, that the company's property at the date of liquidation must be shared pari passu among all creditors. The clearing system offended that principle because it applied debts owed to British Eagle by some airlines only towards satisfaction of debts owed by it to other airlines. Accordingly, in October 1969, British Eagle sued Air France in the Chancery Division to recover £7,925, the amount owed at the date of liquidation which had not by that date been settled through the clearing system. If the liquidator's argument was correct, British Eagle could claim similar debts from other airlines.

The liquidator's claim against Air France failed at the trial before Mr Justice Templeman in October 1972 and again in the Court of Appeal. Those judges found that, because of the rules of the clearing system, there was no debt owed to British Eagle by Air France. The liquidator obtained permission to appeal to the House of Lords, where Allan Heyman QC and David Graham persuaded three of the judges (Lord Cross, Lord Diplock and Lord Edmund-Davies) they were right. Lord Morris and Lord Simon gave powerful dissenting speeches, which meant that a 6:3 majority of judges who heard the case were against the liquidator. Lord Cross gave the only speech for the majority. The argument that persuaded him was that the IATA clearing system was simply a mechanism for effecting payments between airlines. It was not intended to give airlines any proprietary right or charge over debts and therefore could not prevail over the statutory rule for distribution in a winding up. Had the system been intended to create a charge it would have been invalid against the liquidator

12. *Arenson v Arenson and Casson Beckman Rutley & Co* [1972] 1 WLR 1196.

13. [1973] Ch 346, CA.

14. *Sutcliffe v Thackrah* [1974] AC 727, HL.

15. [1977] AC 405.

16. *British Eagle International Airlines v Compagnie Nationale Air France* [1973] 1 Lloyd's Rep 414, Templeman J; [1974] 1 Lloyd's Rep 429, CA; [1975] 1 WLR 758 HL.

for failure to register under the Companies Act 1948.[16] Although not without its critics, *British Eagle* remains a landmark and often cited case supporting the primacy of insolvency law over non-proprietary contractual arrangements.

Changing of the Guard at 3 Paper Buildings

In the two years, 1970-72, the three senior juniors in Muir's chambers left to take up judicial appointments. Bill Lubbock became a Queen's Bench Master in 1970, an appointment he held for twenty years. He was a charming and fair tribunal, but as the Daily Telegraph obituary put it: "*His mannerisms often seemed better suited to the Edwardian era than to modern times. He drove his car so slowly that he claimed to have once been overtaken by a combine harvester.*" In March 1971, Arthur Figgis became a county court (later circuit) judge, mainly sitting in Kingston or Guildford which were near where he lived. Edward Evans-Lombe replaced him as standing counsel to the Department of Trade in bankruptcy matters. It was probably just as well that Arthur moved to the bench when he did. He was troubled by a proposal to provide hot water in the chambers' lavatories. Shortly before he left, he balefully predicted that such pandering to comfort would lead to women joining chambers. In 1972, Adrian Head also became a circuit judge, usually sitting in King's Lynn near his Norfolk home, his lavender farm, and his sea-going boat. These departures meant there was room for new tenants.

In 1971, Laurence Libbert joined and eventually moved into Adrian Head's large room in the basement overlooking the Inner Temple gardens. Laurence had been called to the Bar in 1955. Possessed of an incisive legal brain, he built up a substantial commercial practice in chambers at 13 King's Bench Walk.

His practice continued along commercial lines after he joined Muir's chambers. He often worked with leading commercial silks of the day such as Leonard Caplan, Norman Tapp, and Robert Goff but few of his cases reached court.

Christopher Brougham, who was called to the Bar in 1969, came to chambers as Edward Evans-Lombe's first pupil in September 1970 thanks to an introduction from John Vallat who had been at Radley College with him. Christopher had been offered a tenancy in common law chambers at 1 Paper Buildings, where he did his first pupillage, but was reluctant to accept the offer as he thought the chambers were overcrowded. Christopher became a tenant at 3 Paper Buildings in May 1971, just after Arthur Figgis had moved to the county court bench. Christopher's practice combined bankruptcy cases with common law and family cases.

When Michael Crystal told his second cousin, David Graham, that he wanted to become a barrister, David offered to take him as a pupil; but only if Michael got a first in law at London University or went to Oxbridge. Michael achieved both targets;

Christopher and Mary Brougham at their wedding in 1974

he achieved a first at Queen Mary College and completed a BCL at Magdalen College, Oxford, which was then a two-year course. One of the fellows at Magdalen, Guenter Treitel (also a Fellow of All Souls and future Vinerian Professor of English Law), recommended Michael for a lectureship at Pembroke College. Michael held that post until 1975, which meant that, while he was starting his career at the Bar, he would travel to Oxford to give tutorials on Friday evenings and Saturdays.

Michael was called to the Bar in 1970. His first pupillage in the second half of 1971 was with John Monroe, a specialist in stamp duty law, at 13 Old Square, Lincoln's Inn. After that, Michael moved to 3 Paper Buildings where he spent the first six months of 1972 as David's pupil. As this pupillage drew to an end, Michael was offered a tenancy in three chambers: one in 3 Paper Buildings, another with John Monroe, and a third at 1 New Square with John Arnold QC and Allan Heyman QC. Michael chose 3 Paper Buildings as he thought it would be most fun. His choice was not surprising as the Poulson case was beginning, and Michael was briefed as second junior behind Muir and David, helping them uncover the corrupt dealings that made the national headlines.

Within two years of Arthur Figgis's prediction about the consequences of installing hot water, chambers acquired its first female tenant, Joanna Greenberg. She was called to the Bar in 1972 and became Dennis Paiba's pupil through a personal

introduction. On completing her pupillage, she became a member of chambers, joining Dennis and Peter Beaumont in pursuing a practice devoted to criminal cases.

The writer's path to 3 Paper Buildings was circuitous. Simon was called to the Bar in July 1972 and, through an introduction, immediately began a pupillage for six months with Tommy Stockdale, a company law specialist at the chambers now called Erskine Chambers and then at 24 Old Buildings, Lincoln's Inn. At tea one afternoon, Simon found members of the chambers discussing, not wholly favourably, a photograph in a newspaper of Muir, David Graham, and Michael Crystal in Wakefield for the Poulson public examination. It was this photograph that brought insolvency law to Simon's notice as an interesting area of practice at the Bar. However, through another introduction, Simon's next six months were spent with John GC Phillips, a busy junior at 1 Brick Court (now Brick Court Chambers), with a practice that combined commercial and common law cases. One evening, over a game of bridge, Edward Evans-Lombe told John Phillips that there was a vacancy in chambers. His last pupil, Jeremy Hargrove, shortly after becoming a member of chambers, had decided to move to Newcastle so that he could practise near his home. John suggested that Simon might be a suitable candidate to fill the gap. After a few months learning bankruptcy law as Edward's pupil, in February 1974, Simon became a member of chambers. He had managed to get a foothold on a career at the Bar in a chambers with congenial colleagues, a friendly clerk, and offering the prospect of doing the insolvency and company law cases that appealed to him without anyone asking where he went to university or what class of degree he had achieved (which was a good thing).

Loom in the Gloom

Conversation in Edward Evans-Lombe's subterranean room over the winter of 1973-74 was dominated by discussion of industrial unrest, the disruption of the three-day week which began on 1 January 1974, and the parlous situation of Edward Heath's government as it headed to defeat at the February 1974 general election. The background to these events were adverse changes to the country's economic situation: the rate of inflation increasing from 10% pa in 1971 to over 25% in August 1975; property price inflation increasing from 11% pa in 1971 to 26% in 1973; bank base rate increasing from 5% pa in 1970 to 13% in 1975; the quadrupling of the price of oil in the last quarter of 1973, following OPEC's oil embargo on countries that supported Israel in the Yom Kippur War; and by the end of January 1974 the FT 30-Share Index had fallen 44.5% from its peak in May 1972.

Such changes in the economic landscape would have consequences for members of Muir's chambers, as what was bad for the country and its commercial community tended to be good for professionals doing insolvency work, whether they were accountants, solicitors, or barristers. One consequence was already apparent: Edward Evans-Lombe received an ever-increasing flow of instructions to settle proceedings to obtain orders for possession of bankrupts' homes and to resolve disputes about beneficial ownership with bankrupts' wives. The extraordinary house price inflation since 1970 had resulted in the bankrupt's home, even if mortgaged, becoming the best means of paying his debts.

Another consequence was the first signs of trouble among the secondary banks that had funded the property developers whose activities had contributed to those dramatic increases in property values. The London and County Securities Group had to be rescued at the beginning of the December 1973. At the end of that month the Bank of England, with Kenneth Cork playing a prominent part, set up the lifeboat support operation to rescue the ailing Cedar Holdings, a large secondary bank, and which could be used to rescue other banks facing insolvency but worth saving. It would not be long before the effects of those secondary bank failures would be felt by the larger banks that had made loans to them and by the property companies that were their customers. The world of insolvency, both individual and corporate, was about to be transformed.

© Simon Mortimore

Acknowledgements

Grateful thanks to:

I am very grateful to Sylvia Allen, Tony's widow, for her reminiscences and for providing me with Tony's photographs and clerk's books; to Dr John Tribe for giving me access to Muir Hunter's archive, which he maintains at Liverpool University; to the late Sir Edward Evans-Lombe and HH Peter Beaumont for discussing their time in Muir's chambers; to John Vallat, Christopher Brougham KC, Michael Crystal KC, and John Briggs for their recollections of chambers and commenting on a draft of this article; and to John Vallat for spending so much time reviewing his accounts to help me understand the arrangements for remunerating clerks in the 1960s.

Sources

Richard Abel: *The Making of the English Legal System 1800 - 1988* (Beard Books, 1988)

Brian Abel-Smith and Robert Stevens: *Lawyers and the Courts* (Heinemann, 1967)

Hugh Hale Leigh Bellot: *The Temple* (5th ed) Methuen, 1930
AE Bowker, *Behind the Bar* (Staples Press, 1947, popular ed 1951)

Kenneth Cork: *Cork on Cork* (Macmillan, 1988)

Goode: *Principles of Corporate Insolvency Law* (5th ed), paras 9-14, 9-15, 9-27 (Sweet & Maxwell, 2018)

Michael Kerr: *As Far as I Remember* (Hart 2002)

David Kynaston: *The City of London*, Vol IV, A Club No More 1945-2000 (Pimlico, 2002)

Margaret Reid: *The Secondary Banking Crisis 1973-75*, Macmillan, 1982 (Hindsight Books 2003)

Dominic Sandbrook, *State of Emergency: Britain 1970-1974*, Allen Lane 2010 (Penguin Books 2011)

North Kensington Neighbourhood Law Centre and Young Historians Project (Black Liberation Front) websites

A Report by Justice, *False Witness: The Problem of Perjury* (Stevens, 1973)

A Report by Justice, *Bankruptcy* (Stevens, 1975)

Obituary of Christopher "Bill" Lubbock (Daily Telegraph, 22 June 2000)

Obituary of Muir Hunter QC, The Times 27 October 2008.

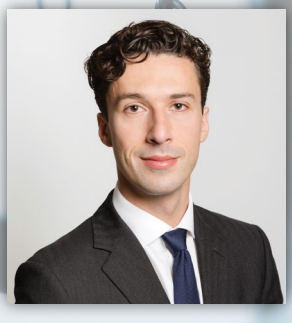
The Times Archive, The British Newspaper Archive, Wikipedia

News in Brief

Adam Al-Attar Appointed King's Counsel

We are thrilled to congratulate Adam Al-Attar on his appointment to King's Counsel, and his elevation took place at a formal ceremony on 18 March 2024. This is a most well-deserved honour, with Adam having achieved a star practitioner ranking for his insolvency and restructuring work and being twice awarded insolvency restructuring junior of the year (2014, 2021).

Adam has a broader practice in financial services, trusts and commercial litigation and has enjoyed consistent rankings in the directories for his commercial litigation and offshore work.



Bradford or Bust?

The latest council to be suffering serious financial woes, Bradford, brought in Steven Mair as interim director of finance in January 2024. Mr Mair has previously worked with councils in Essex and Berkshire to manage their financial distress. In addition to £140 million from the UK Government for its annual 2024-2025 spending, Bradford Council has asked for a loan of £80 million to plug a growing black hole in its finances.

The Government has made additional funding available to all local authorities since the original funding settlement in December 2023 after concerns that a wave of councils were following in the footsteps of Birmingham, Nottingham and Woking, all of which went bust last year. Southampton City Council has declared it will be effectively bankrupt if its application for the emergency government funding is declined. Meanwhile, Middlesbrough Council has voted to borrow £13.4m on the government's exceptional financial support, impose the maximum increase in council tax rise and a charge for green waste collection in a bid to make ends meet.

Is The Body Shop all Washed Up?

On 13 February 2024, The Body Shop's UK business was put into administration by private equity firm Aurelius who had acquired for £207 million in November 2023. This could see the loss of 199 shops across the UK and an uncertain future for nearly 2,000 employees. Poor sales over the all-important Christmas and New Year period have been blamed and it is rumoured that working capital was less healthy than initially thought. The retailer has appointed FRP Advisory as administrators and will continue to trade as normal whilst a solution is found.

Founded in 1976 by the late Anita Roddick, The Body Shop was one of the first companies to promote '*ethical consumerism*' using all-natural ingredients not tested on animals, and was one of the first brands to promote recycling of its containers.

No Win – Big Fee

The collapse of Sheffield-based SSB Law has left somewhere in the region of 1,400 people, many of whom are elderly or non-English speaking, facing unexpected legal bills.

SSB Law had taken on compensation claims, on what they assured customers was a no-win no-fee basis, against a cavity wall insulation company. However, when SSB Law went into administration the insulation firm's insurance company issued legal bills – some up to £40,000 – to those customers whose cases had lost or been dismissed at court. Some have now been issued with interim charging orders on their homes, and others have had visits from bailiffs.

The matter has been raised in Parliament and Solicitors Regulation Authority is investigating.

Candy Fraud

Cynthia Kelly has brought a class action lawsuit against the confectionery company Hershey in the Middle District of Florida "*on behalf of herself and all other similarly situated individuals who purchased a Reese's Peanut Butter Product based on false and deceptive advertising*".

Ms Kelly claims that a number of Reese's products (including the aforementioned Pumpkins in both milk chocolate and white chocolate flavour, Reese's White Ghost and Reese's Peanut Butter Bats) have advertising showing intricate cut-outs in the chocolate coating to depict eyes and mouths. However, in a monumental fraud there are in fact no carvings on the actual product!

The 21-page document submitted to the Court at the end of December 2023 details a number of YouTube reviewers who were '*flabbergasted*', felt '*lied to*' and were otherwise '*disappointed*' on unwrapping the candy to find there was no face as '*promised on the packaging*'.

Ms Kelly is seeking redress in the form of compensatory damages for all members of the Class, and Order that Hersey '*correct the deceptive behaviour*' and that costs are covered.

Hogan Lovells' London Move a Grave Concern?

Archeological work carried out by the Museum of London Archaeology unit ('MOLA') has found the first complete Roman funerary bed to be found in Britain at the site of Hogan Lovell's new London office on Holborn Viaduct. Made of oak, preserved by damp mud on the banks of the River Fleet, the bed has carved feet and joints fixed with wooden pegs. Taken apart before being placed within the grave, MOLA believe it was used to carry the individual to the burial and intended to be useful in the afterlife. Along with skeletal remains, personal objects such as high-status jewellery with jet and amber beads and a decorated lamp have been unearthed.

The site, MOLA says, was used as a cemetery between 43 and 410 AD, and then again in the 16th Century.

It is unknown if these discoveries will push back the law firm's planned move-in date of 2026.

Swings and Roundabouts

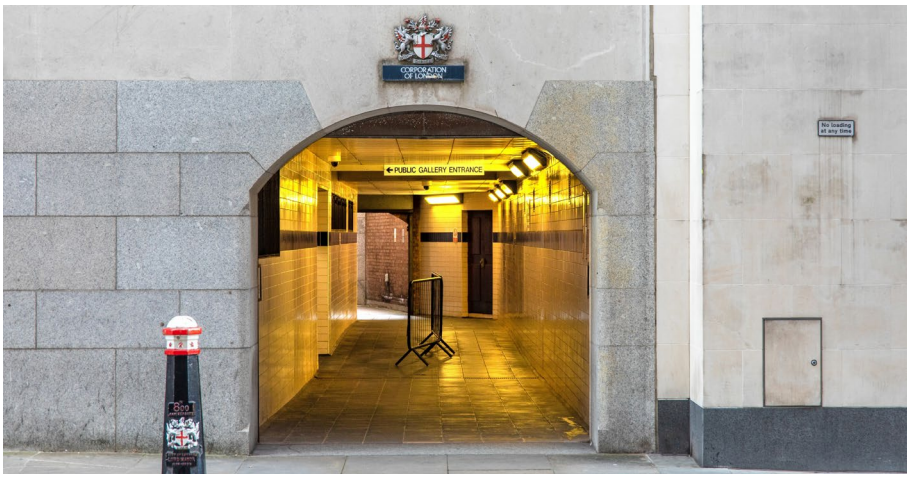
With the publication of the insolvency figures for the last quarter of 2023, the annual total of business failures in England and Wales was over 25,000: this is twice the number that we saw at the most recent low-point of 2020 and the highest number overall for 30 years. Overall, it is the construction sector that has experienced the highest number of insolvencies of any industry in the UK over the last three years.

Commentators have been swift to point out, however, that many insolvencies are coming from an artificially low base as a result of extensive government support during the pandemic, and also pointing to the size of the businesses that are going under. Insolvencies have been heavily concentrated among small and medium-sized firms, with large business failures relatively few in number.

News in Brief *(cont.)*

Fire! Fire!

The Old Bailey, Central Criminal Court, was evacuated after a fire broke out in an electrical substation housed in an adjacent building on Warwick Lane, London, close to midday on 7 February 2024. By-standers were treated to views of Judges, barristers, court staff and juries waiting on the pavement for status updates before it became clear that the building would not re-open on the same day. Defendants were first evacuated to a Serco van under the watchful eye of security and the City of London police before being returned to prison.



More Televised Courts on the Cards?

The Lady Chief Justice, Baroness Carr, spoke of being "*really interested*" in extending filming in a wider range of courts that currently occurs as part of her desire to promote open justice. This could include cases of significant public interest (Duke of Sussex, anyone?), judicial reviews and immigration tribunals.

Supreme Court and Court of Appeal hearings which rule on major cases with points of law of public importance are already televised.

Insolvency Service bid to disqualify Lex Greensill

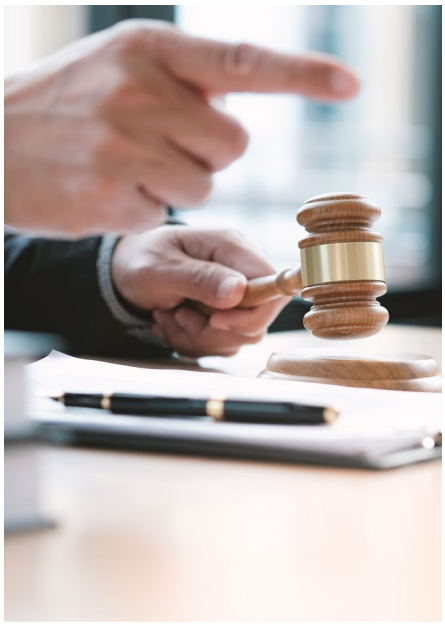
The Insolvency Service confirmed in early March 2024 that it had commenced director disqualification proceedings against Alexander (Lex) Greensill in a bid to disqualify him from running or controlling companies for up to 15 years.

In addition to the UK elements to the Greensill Capital Pty Limited group of companies, the Court can take account of a director's overseas activity under the Company Directors Disqualification Act 1986: as such the administration and subsequent liquidation of Greensill Capital Pty Limited in Australia in March and April of 2021 will be considered.

Amanda Staveley

Lawyers acting for co-owner of Newcastle United, Amanda Staveley, have asked the High Court to "set aside" a bankruptcy petition made against her made by Greek shipping tycoon Victor Restis. Restis claims that Staveley failed to replay a loan of over £35 million dating back more than a decade. The hearing took place on 13 March at the Insolvencies and Companies Court in London.

Restis also issued a winding-up petition to PCP Capital Partners LLP, a dormant company which has apparently not traded for five years, listing Staveley as a director.

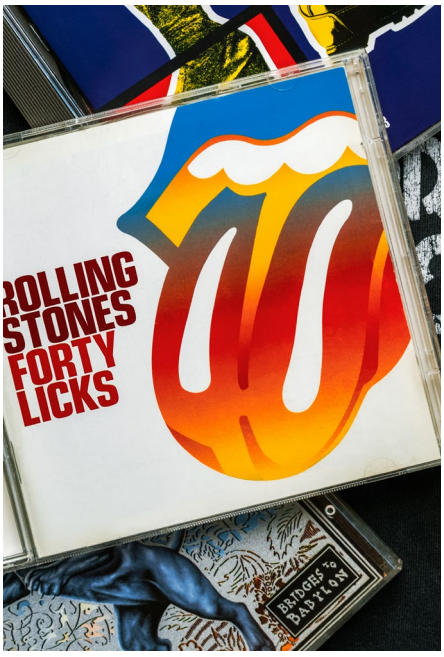


Who Breaks a Butterfly on a Wheel?

After two decades of talks a film about the late Michael Havers QC's legendary defence of the Rolling Stones following their drugs bust is set to start production this summer. The actor Nigel Havers, son of Michael, says he is now too old to play his father who was 43 at the time. Michael Havers QC later became the Attorney-General.

The production was initially given the working title 'A Butterfly on a Wheel' after the title of one of the most famous editorials in the history of British newspapers written by William Rees-Mogg, then editor of The Times. In it, Rees-Mogg asked "*Has Mr Jagger received the same treatment that he would have received if he had not been a famous figure, with all the criticism and resentment his celebrity has aroused?*"

The film will cover the infamous 1967 police raid at Redlands, the home of guitarist Keith Richards where an LSD-influenced party attended by Mick Jagger and his then-girlfriend Marianne Faithfull was in full swing. Both Jagger and Richards were later convicted on drugs charges: Jagger for possession of four amphetamine tablets (three months imprisonment), Richards (sentenced to one year) for allowing cannabis to be smoked on his property. After the first hearing, the pair spent a night in jail until being released pending appeal. The Court of Appeal overruled the original punishment and imposed a non-custodial sentence.



Horizon Legislation

On 13 March 2024 the government introduced a bill to parliament to exonerate victims of the Post Office Horizon scandal. The proposed legislation, for which the government aim to receive Royal Assent before July, would automatically quash all convictions that meet the following criteria:

- Were prosecuted by the Post Office or Crown Prosecution Service (CPS).
- Were for offences carried out in connection with Post Office business between 1996 and 2018.
- Were for relevant offences such as theft, fraud and false accounting.
- Were against sub-postmasters, their employees, officers, family members or direct employees of the Post Office working in a Post Office that used the Horizon system software.

However, 13 cases have been excluded from the legislation because their convictions were upheld by the appeal courts or they were refused permission to appeal. The legislation would also only applies to England and Wales, excluding Scotland and Northern Ireland.

Critics of the legislation (including senior members of the judiciary, who put forward and alternative proposal to overturn convictions through the courts) note that the quashing of convictions by statute sets a dangerous precedent in allowing parliament and politicians to overturn the decisions of courts, and that the genuinely guilty will also have their convictions overturned.

SOUTH SQUARE CHALLENGE

Welcome to the March 2024 South Square Challenge.

As readers of the Digest will know, a Law degree can open up a world of possibilities! Your task is to identify the famous people in the following images, and then match them to the correct *alma mater.* Not only that, but you must also identify the silhouette of the final famous person and why it is they don't join the group!

1.

2.

3.

4.

5.

6.

7.

8.

9.

10.

11.

Please send your answers to Kirsten either by e-mail to **kirstendent@southsquare.com**, or to the address on the back cover, by Friday, 3 May 2024.

We had no correct answers from the December Challenge and this issue it is a rollover – two magnums of champagne and two highly-sought-after South Square umbrellas for the lucky winner. Good luck.

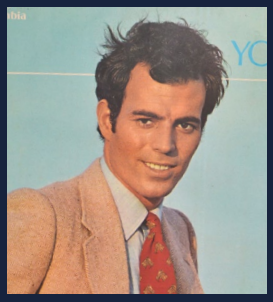
The correct answers to the December 2023 South Square Challenge were:

1. *Great Annual Savings*
2. *Adler*
3. *Three Arrows*
4. *FTX*
5. *Nasmyth*
6. *King Bun*
7. *Blue Ocean*
8. *Comet*
9. *Safe Hands Funeral Plans*
10. *Prezzo*
11. *Cineworld*
12. *Galapagos*

1.

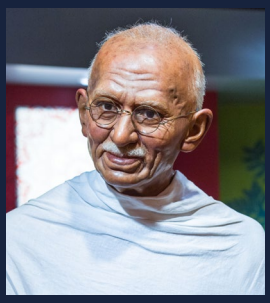
2.

3.

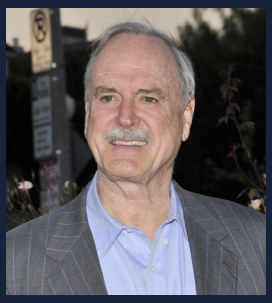


4.

5.



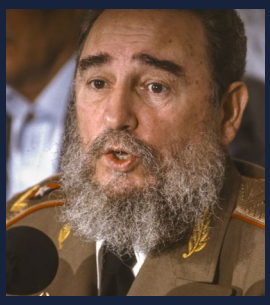
6.



7.

8.

9.



10.

11.

A

B

C

D

E

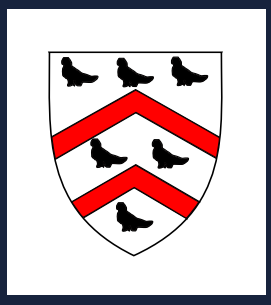
F

G

H

I

J



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
Richard Fisher KC
Stephen Robins KC
Adam Al-Attar KC
Hilary Stonefrost
Lloyd Tamlyn
Marcus Haywood
Hannah Thornley
Clara Johnson
William Willson
Georgina Peters
Henry Phillips
Charlotte Cooke
Kira King
Matthew Abraham
Toby Brown
Robert Amey
Oliver Hyams
Andrew Shaw
Ryan Perkins
Dr. Riz Mokal
Madeleine Jones
Edoardo Lupi
Jon Colclough
Roseanna Darcy
Stefanie Wilkins
Lottie Pyper
Philip Judd
Daniel Judd
Jamil Mustafa
Paul Fradley
Peter Burgess
Annabelle Wang
Rabin Kok
Imogen Beltrami

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
Simon Mortimore KC
Colin Bamford
Seenath Jairam SC
Joanna Perkins
Prof. Peter Ellinger
Barry Mortimore GBS KC
Richard Sheldon KC
Christopher Brougham KC
John Briggs
Adam Goodison

3-4 South Square I Gray's Inn I London WC1R 5HP I UK
Tel. +44(0)20 7696 9900.
Fax. +44(0)20 7696 9911. LDE 338 Chancery Lane.
Email. practicemanagers@southsquare.com
www.southsquare.com