SOUTH SQUARE

Digest

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Managing Cram Down Risks and Costs:
New ADR Associate Member, Hon James M. Peck, makes the case for introducing US-style mediation in UK restructurings

Magnum Opus on Wrongful Trading and Misfeasance:
David Alexander KC, Hilary Stonefrost and William Willson examine the recent judgment in the *BHS* case

***Sian Participation Corp v Halimeda International Ltd*:**
Paul Fradley and a team from Harneys BVI (Phillip Kite, Andre McKenzie and Jhneil Stewart) review the guidance from the Privy Council that an arbitration clause does not affect the Court's approach to a winding-up petition

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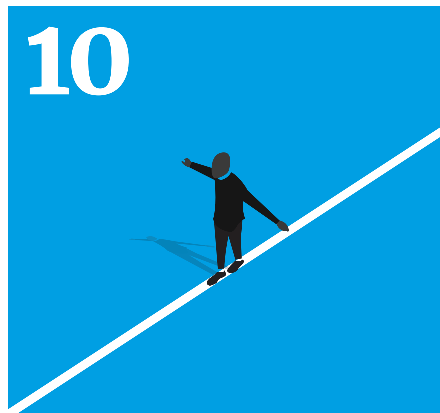

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From the editors

Marcus Haywood and William Willson

Welcome to the Summer 2024 edition of the South Square Digest.

We are entering a new, if not brave, world. Here in the UK, 5 July 2024 saw Sir Keir Starmer lead the Labour Party to a sweeping general-election victory after 14 years in opposition. We may feel thankful that the UK saw a mere six weeks of electioneering. Across the pond the presidential campaigns are well under way. What was already a fairly heated and polarising race has only become more incendiary after former President Trump survived what is being treated as an assassination attempt at a rally in P) Pennsylvania, with some Republicans now accusing the Democratic party of *'inciting an assassination'*.

In lighter (if not brighter) news, here in the UK we are mid-way through a rather damp summer of sport. On the day that England were defeated by Spain in the Euros, Wimbledon witnessed the changing of the guard as the 21 year old Carlos Alcaraz convincingly defeated Novak Djokovic (a comparatively elderly 37) for the second year running. The women's tournament, however, saw Barbora Krejčíková become the 8th different woman in 8 years to win. As we go to press, athletes are arriving in Paris for the start of the Paris 2025 Olympics and Paralympics.

Here in Chambers we have exciting changes afoot. We are thrilled to announce that hugely respected barristers Joseph Curl KC and Rory Brown have joined South Square. Dhananjay Kumar, veteran commercial lawyer from Cyril Amarchand Mangaldas, India, has also become a tenant. The Hon James M. Peck joins as an ADR associate member and we welcome Michael Lok, of Des Voeux Chambers in Hong Kong as an overseas associate member of chambers. We also delighted to welcome Professor Andrew Keay and Professor Peter Walton as academic members, and Louis Doyle KC as an associate.

Members of South Square have been busy over the past months visiting various jurisdictions around the world and closer to home, catching up with colleagues, clients and

friends: see pages 68 and 69 for a glimpse at what some have been up to. We thoroughly enjoy meeting you all at these events and look forward to more in the near future.

In keeping with this globetrotting, our articles in this issue encompass varied topics from many jurisdictions.

In our first article for this edition new ADR Associate and International Judge Jim Peck makes the case for introducing US-style mediation in UK restructurings in *'Managing Cram Down Risks and Costs'*.

Next, David Alexander KC, Hilary Stonefrost and William Willson helpful condense the key points from the 533 page judgment of Leech J of 11 June 2024 In the Matter of BHS Group Limited, in their article *'Magnum Opus on Wrongful Trading and Misfeasance'*.

Another very significant judgment, this time from the Privy Council and relating to the BVI, was delivered on 19 June 2024 in *Sian Participation Corp v Halimeda International Ltd.* Paul Fradley and a team from Harneys BVI (Phillip Kite, André McKenzie and Jhneil Stewart) consider the Privy Council decision that an arbitration clause does not affect the Court's approach to a winding-up petition. *Salford Estates* is no more.

In *'Change in Lifestyle?'* Jeremy Goldring KC provides a route map through the *Lifestyle Equities* judgment where the Supreme Court restates the principles of tortious accessory liability.

Across to Singapore, and new overseas associate member of chambers Michael Lok, together with Jose-Antonio Maurellet SC of Des Voeux Chambers discuss how the decision from the Singapore Court of Appeal in *Foo Kian Beng v OP3 International Ptd Ltd* clarified the nature and content of the creditor duty.

A short flight to Hong Kong and Valerie Kwok, pupil barrister at Des Voeux Chambers, reviews the Hong Kong Court of Appeal decision in Re Peking University Founder Group Company Limited, dealing with breach of keepwell deeds, in which Mark Phillips KC and Tom Smith KC appeared.

We return to the UK for our final articles. In *'Voting Issues'* Robert Amey discusses the rights of sub-participants in debtor schemes of arrangement and restructuring plans and Jon Colclough considers the judgments in *Adler, McDermott* and *Aggregate* as he asks *'Restructuring Plans: where next?'*

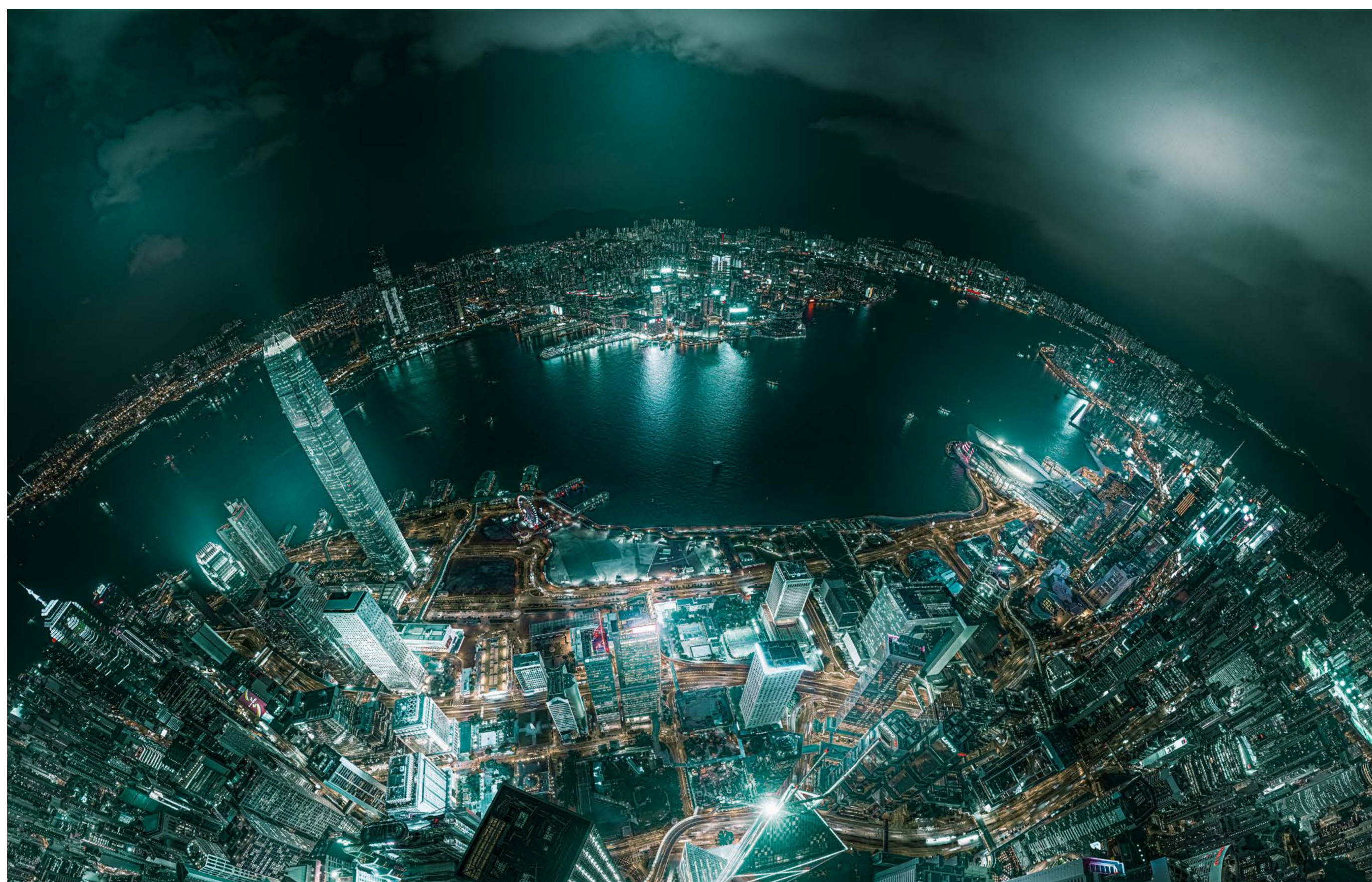
As always, we have the regular News in Brief and the South Square Challenge but we also shine a light on the Twinning Project, a charity partnership between HM Prison and Probation Service and professional football clubs. Mark Phillips KC is a trustee and South Square is proud to support the charity.

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

Should you find yourself reading someone else's copy of the Digest 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.

With best wishes for a relaxing summer (with, hopefully, at least **some** sun),

Marcus Haywood & William Willson.



HON. JAMES MICHAEL PECK
ADR MEMBER SOUTH SQUARE
JUSTICE OF THE SINGAPORE INTERNATIONAL COMMERCIAL COURT

Managing Cram Down Risks and Costs: A Proposal to Introduce U.S. Style Mediation in UK Restructurings

This article is my pitch for mediation to be taken up seriously by the restructuring community in the UK, notably in contentious disputes under the newly enacted Part 26A. To do so, I submit, would help mitigate some of the burdens and costs inherent in cross class cram down disputes and might improve outcomes under this evolving restructuring regime.

Mediation is used frequently and works well in restructurings and bankruptcy court litigation in the U.S, and I am also aware of its successful use in resolving commercial disputes in the UK. Mediation within a restructuring is a natural application of a tested ADR tool that can promote the resolution of contentious disputes, allowing parties to be heard in an informal, actively managed setting overseen by a trusted neutral facilitator. Cram down controversies over valuation and claim treatment can be intense and costly, making them naturally well suited to intervention by a skilled mediator.

Mediation is a widely accepted and now routine feature of business bankruptcy cases in the United States where it has been used with great success in negotiating restructuring plans, both in and out of court, and in resolving burdensome and uncertain litigation claims. Mediation has proven itself to be an effective way to align interests, resolve conflicts and settle disputes for the benefit of stakeholders while at the same time minimizing demands placed on the judicial system.

In large U.S. bankruptcy cases, the mediator is selected by the parties or named by the court and appointed by court order. He or she typically will be an experienced individual with a reputation for having good judgment, keen commercial instincts, and integrity. On occasion, sitting judges will take on the role. Once appointed, the mediator will learn about the central issues in dispute and will become familiar with the private aims and expectations of the company, its equity holders, and creditors. The process enables the mediator to

establish a confidential counseling relationship with each of the key parties. I often think of it as a beneficial form of therapy for the deal in which parties focus their attention on risk and reward and the benefits of compromise and may even gain a valuable insight or two.

The mediator functions as a trusted intermediary in negotiations, evaluating legal uncertainty and the relative strength of arguments from an authoritative neutral point of view and encouraging (and occasionally even recommending) potential ways forward that the parties themselves may be reluctant to propose or incapable of achieving on their own. It is more art than science, but with persistence and patience it often works and leads to successful outcomes. And when that happens it is tremendously rewarding. Importantly, it is a process that promotes settlements and reduces the frequency of contested confirmation hearings. Similar benefits might be achieved if a mediation alternative were to be adopted as a generally accepted restructuring tool in UK restructurings.

I am a retired U.S. Bankruptcy Judge from New York now involved in private alternative dispute resolution, and I know that mediation can resolve cram down disputes effectively. As a mediator and former judge, my experience tells me that courts and market participants in UK restructurings should give serious consideration to utilizing mediation as a means to (i) minimize costs and delay, (ii) direct and regulate the flow of relevant information to parties, (iii) enable parties to better understand and evaluate risk and the foreseeable burdens and consequences of ongoing litigation (iv) facilitate good faith and realistic bargaining that can lead to settlements and substantially consensual restructurings and (v) learn and react to independent recommendations of a neutral intermediary.

Perhaps most importantly, the process (as it has evolved in the U.S.) has the potential to enable parties to save time and expense, manage risk and achieve compromises that reflect probability weighted outcomes. I believe it is an alternative that can work well in future UK restructurings.

In my opinion, introducing mediation to UK restructurings has the potential to expedite the development of a less confrontational practice under Part 26A in which the prospect of cram down becomes a catalyst to negotiation, with or without a formal mediation process. My recent exposure to Part 26 A as an expert witness in a contentious cram down situation persuades me that the restructuring community in the UK should consider turning to mediation to promote consensus.

This article approaches the subject from the point of view of more than a dozen years of pragmatic mediation experience. But my proposal also has been influenced by observing proceedings in relation to the *McDermott* restructuring plan and reacting to the judgment recently handed down by the High Court in that case. Since I necessarily tend to see things through an ADR lens, here are my thoughts on possible ways that mediation could be useful in a future case like McDermott:

The McDermott Precedent Shows How a Neutral Restructuring Intermediary Can Promote Consensus

McDermott International Inc. is a Texas-based multi-national enterprise group in the energy sector operating globally through its affiliates. The group went through a pre-negotiated chapter 11 case about three years before determining that it needed to do it again, but this time by employing parallel restructuring proceedings in London and Amsterdam coupled with a related chapter 15 case in the Houston bankruptcy court. The story is a complicated one to be sure, but focusing on the essentials, the restructuring sought to amend and extend credit facilities and keep in place equity interests that had been issued during the earlier chapter 11 case while at the same time substantially eliminating through a Part 26A cram down process a massively large ($1.3 billion with interest) unsecured arbitration award in favour of a separately classified unsecured creditor known as Reficar, an oil refinery business located in Cartagena, Colombia that is indirectly owned by the Columbian government.

McDermott was attempting to discharge and eliminate most of the Reficar claim, predictably leading to strenuous protests by Reficar that the proposed treatment of its claim was manifestly inappropriate and unfair. The ensuing legal battles were waged with great intensity in New York, London, Amsterdam and Houston and ultimately were settled in a manner consistent with recommendations made by the debt restructuring expert appointed

by the court in Amsterdam. Notably, the debt restructuring expert as a matter of Dutch law is an individual obligated to perform duties of the office impartially and independently. To me that sounds quite like what a mediator might do when making a settlement recommendation, and that thought is followed up later in this discussion in proposing that mediation would be an advantageous procedure to employ in prosecuting English restructuring plans.

In McDermott, the Dutch restructuring expert concluded that very substantial improvements in Reficar's proposed plan treatment were required, and that expert determination ended up becoming the foundation for the eventual agreed settlement. However, the settlement did not come together until after a major investment of time and resources in contested cram down litigation scheduled for hearing in the High Court. The settlement that reportedly is valued at about $900 million was not reached until after the conclusion of six full days of trial. That is quite a lot of court time for a result that was essentially preordained by determinations made by an independent individual in a parallel restructuring regime. Mr. Justice Michael Green's judgment was handed down on February 27, 2024 and, to my eyes, reflects the court's evident frustration with a lengthy and burdensome court process that might have been avoided altogether if only it had been possible to achieve a settlement earlier.

What if there had been no parallel proceeding in Amsterdam with a restructuring expert who was able to fashion a proposal leading ultimately to consensual dispute resolution? The neutral recommendation was pivotal to the result achieved. The High Court's judgment included multiple references to plan negotiations directly influenced by the Dutch expert. If this restructuring had occurred without the parallel proceeding purely as a cram down under English law, it becomes hard to imagine what the outcome would have been. It almost certainly would have been different, with the potential for continuing conflict.

While I had a role in the case and am somewhat familiar with the situation I am describing, I am a stranger to the details of the negotiations that produced the settlement. Nonetheless, my impression is that the restructuring expert established the quantum of the settlement that was reached and that drove the outcome, leading to the inference that much of what transpired in the High Court litigation was time not particularly well spent and perhaps even unnecessary had it been possible to reach a settlement earlier in the process.

I am not suggesting that independent restructuring experts are needed in London restructurings, but it cannot be disregarded that the expert in McDermott was critical to effective dispute resolution and fulfilled a role comparable to that of an authoritative plan mediator in the United States. The neutral intermediary, whether as court appointed expert or mediator, can add value and build consensus. And that leads naturally to my proposal set forth below.

Mediation Can be Used in the UK to Manage and Expedite Negotiations Related to Cram Down

Given this prominent example pointing to inefficiencies in the current approach to formulating and sanctioning restructuring plans, I have a proposal based on my U.S. mediation experience: mediation might be a discretionary means to encourage consensus and reduce the potential for full-blown contested cram down hearings. Parties can choose to mediate disputes by agreement before the court is involved or can discuss the option with the court later as an element of case management. Regardless of the timing, mediation has the virtue of involving a neutral expert in dispute resolution.

The procedures to be followed can be *ad hoc* in nature and adopted on a case-by-case basis or can be set forth more generally within broad administrative guidelines. Many courts in the United States have enacted local rules and standardized orders governing mediation, with language covering such things as length of the process, discovery, confidentiality and sharing of costs. Lists of qualified mediators also have been developed.

Even more importantly, a mediation culture has flourished in chapter 11 practice in the United States. Parties and the courts understand that mediation can be enormously helpful in managing complex and contentious negotiations and in encouraging settlements. Not every case will benefit from mediation, but it is a tool that has worked well in many of the most challenging cases and seems to be well suited to the process of formulating largely consensual restructuring plans under Part 26A. It is a way to manage risk and improve the efficiency of outcomes in cases involving contested cross class cram downs, and I strongly recommend it.

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Magnum Opus on Wrongful Trading and Misfeasance in Relation to the BHS Group

Introduction

In November and December 2023, a trial took place in the Business and Property Courts of England and Wales, Insolvency and Companies List before Mr Justice Leech ("the Judge") in relation to wrongful trading and misfeasance claims against directors of the BHS Group ("the BHS Case"). The Judge gave judgment on 11 June 2024 (the "Judgment"). The reference is [2024] EWHC 1417 (Ch). The Judgment is very long (no criticism of the Judge intended given the length of the trial and the number of issues raised), hence the phrase "*magnum opus*" in the title of this article, running to 1160 paragraphs spread over 533 pages. In the Judgment, the Judge carries out an extensive review of the law in relation to wrongful trading and misfeasance. It is obviously impossible in an article to report on everything the Judge said in such a lengthy judgment but so that Digest readers can get the thrust of what the Judge said without having to read the whole of the Judgment (or even just the long section on the law), a summary of the law regarding wrongful trading and misfeasance claims as per the Judge is set out in this article. For those who cannot wait to know the results of each of the various claims made they are set out towards the end of the article.

Background

On 11 March 2015 the entire issued share capital of the holding company to the British Homes Group was sold to Retail Acquisitions Ltd and on the same date Mr Dominic Chappell and Mr Lennart Henningson were appointed directors of each of the four companies in the group. On various dates in March and April 2015 Mr Dominic Chandler was also appointed as a director to each of the four companies. In April 2016 the board resolved to put the companies into administration and each of the companies subsequently went into creditors' voluntary liquidation.

The joint liquidators (the "Liquidators") brought proceedings against the three directors for wrongful trading under s. 214 of the Insolvency Act 1986 ("IA 86") and for misfeasance under s.212 of IA86. The trial and judgment concern Mr Henningson and Mr Chandler (the

"Participating Directors"). The trial against Mr Chappell was postponed. However, judgment was entered against him at a hearing on 25 June 2024.

Wrongful Trading
The Basics: Judgment, [461]-[466]

The current wrongful trading provision, which came into force on 29 December 1986, is set out in s.214 of IA 1986. To satisfy it a liquidator has to establish three things: (1) the company has gone into insolvent liquidation, (2) the respondent to an application was a director of the company when the third condition is satisfied and (3) the director *"knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation or entering insolvent administration"* ("the Knowledge Condition").

As regards the Knowledge Condition, the Judge said that the director in question must either have had actual knowledge (i.e. they actually concluded that the company had no real prospect of avoiding insolvent liquidation or insolvent administration) or should have concluded that this was the case after an objective evaluation of the facts which they knew or the information which was provided to them by the relevant knowledge date ("the Knowledge Date"). In deciding the latter, the Court is required to apply the standard of the reasonably diligent person having both the general knowledge, skill and experience of the director in question (so, of the so-called "Notional Director").

Undisputed Propositions: Judgment, [466](1)-(11)

Next, the Judge recorded a number of propositions which were not in dispute in the BHS Case.

1. The Notional Director test is to be applied to each individual director and not the board of directors as a whole: *Re Continental Assurance plc* [2007] 2 BCLC 287 at 385-386.

2. The Court's enquiry into the functions performed by each director will go beyond consideration of their title and will examine the substance of what they actually do or did: *Re Langreen Ltd (in liquidation)*, unreported, 21 October 2011 at [92].

3. The standard to be expected of each Notional Director will also depend on the size and sophistication of the company: In *Re Produce Marketing Consortium Ltd* [1990] BCC 569 at 594G-595A.

4. In determining what a director ought to have known, the Court is not limited to consideration of the material available to the director during the relevant period. The Court's consideration may extend to material to which the director could with reasonable diligence have had access: *Re Produce Marketing Consortium Ltd [1990] BCC 569 at 595D-E.*

5. A director is supposed to obtain sufficient financial information to monitor a company's solvency: *Re Nine Miles Down UK Ltd* [2010] BCC 674 at [15].

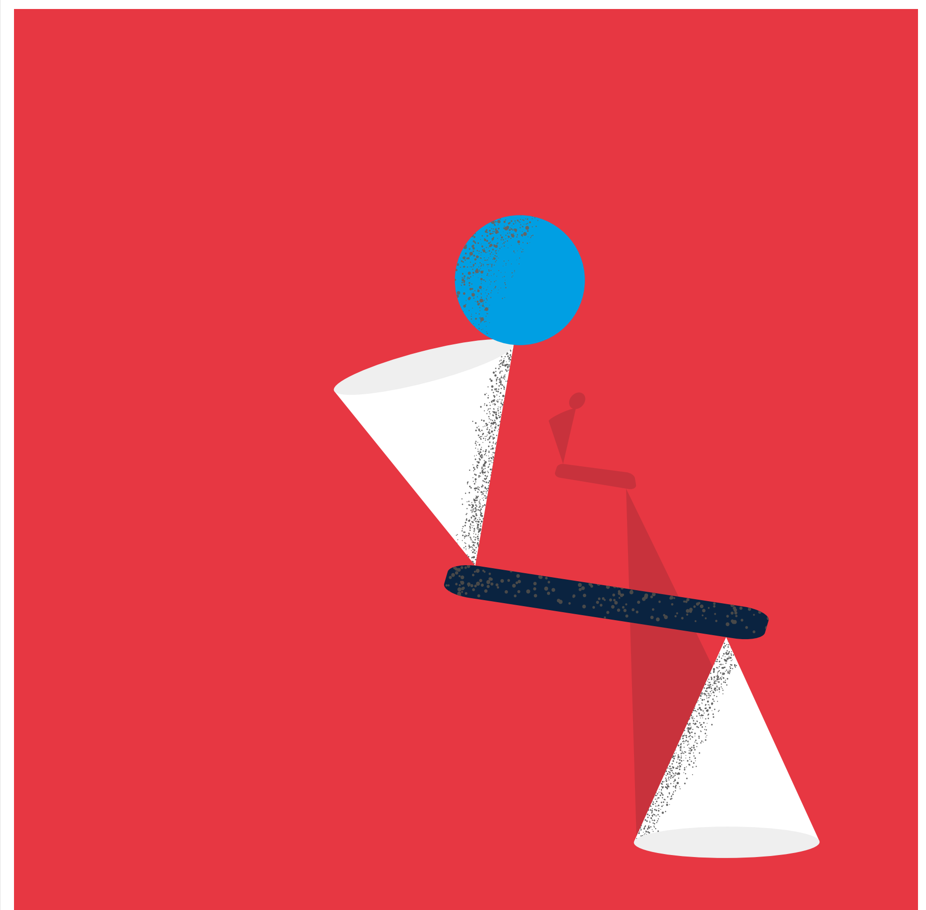
6. A director is not liable simply for permitting a company to trade at a time when they know that the company is insolvent either on a balance sheet test or a cashflow test: *Re Hawkes Hill Publishing Co Ltd* [2007] BCC 937 at [28]. The question is whether they knew or ought to conclude that there was no reasonable prospect of avoiding insolvent liquidation.

7. The principle that directors may properly take the view that the company should continue to trade at a loss has been accepted many times: see, e.g. *Re Ralls Builders Ltd (in liquidation)* [2016] EWHC 243 (Ch).

8. The decision to put a company into liquidation is a difficult one and the Court should be slow to encourage directors to put a company into liquidation or administration at the first sign of trouble: *Re Continental Assurance plc* [2007] 2 BCLC 287.

9. For this reason, if no other, the Court should be very careful to avoid hindsight in scrutinising directors' decisions: *Re Hawkes Hill Publishing Co Ltd* [2007] BCC 937 at [41] and [47]

10. If directors appreciate that the company is insolvent but reach the conclusion that they can trade out of insolvency, there must be a rational basis for that conclusion: *Re Kudos Business Solutions Ltd* [2012] 2 BCLC 65. There must be something more than blind optimism or Micawberism (i.e. the unfounded and naïve belief that something will turn up in the future to conquer financial adversity): *Roberts v Frohlich* [2011] 2 BCLC 625 at [112].



No Reasonable Prospect of Avoiding Insolvent Liquidation/ Administration: Judgment, [469]-[473]

The Judge in the BHS Case was required to decide how the Court should interpret and apply the Knowledge Condition. He held that the Court must apply the statutory test and not substitute its own form of words. However, he said that in the light of the Supreme Court's decision in *BT1 2014 LLC v Sequana* [2024] AC 211, the bar is a "*very high one*" and a liquidator has "*to demonstrate that*" the director in question "*knew or ought to have known that an insolvent liquidation or administration*" was inevitable. He added five further points.

First, he said that s.214(3) is framed in negative terms and, in his view, this was no accident. He added that where a company is cashflow or balance sheet insolvent, the usual question for the Court is whether the directors honestly and reasonably believed that there was a prospect that they could trade out of insolvency and, given time, avoid liquidation or administration altogether.

Second, he said that the critical question, therefore, is whether there was "*light at the end of the tunnel*" and that, as the authorities emphasised, directors are not liable for wrongful trading because the company was insolvent but only if they either knew or ought to have known that insolvent liquidation or administration could not be avoided and was now inevitable.

Third, he said that, nevertheless, the Court must be satisfied that the prospect of trading out of insolvency and avoiding liquidation or administration was more than fanciful and was a reasonable one. The authorities emphasise that a directors' belief that they could trade out of insolvency must have been a rational one and blind optimism or Micawberism is not sufficient to defeat liability.

Fourth, he said that s.214 must be applied as a whole. The effect of the section is to impose on directors a duty to take every step with a view to minimising the loss to the company's creditors: *BT1 2014 LLC v Sequana* [2024] AC 211 at [231].

Fifth, he said that it is important to approach the formulations in *Sequana* in this context. The Supreme Court were comparing and contrasting a director's modified duty to promote the success of the company with s.214 and considering in general terms when s.214 was engaged. It is engaged, the Judge said, when directors have no rational basis for continuing to trade and they are only liable for continuing to trade if at that point they fail to take steps to minimise the loss to creditors.

The Knowledge Date: [474]-[477]

The Judge then turned to consider whether the Court could properly find that the directors in a case were guilty of wrongful trading if the Knowledge Date was months or even years before the onset of insolvency. It was submitted on behalf of the Participating Directors that (a) the Court had to be satisfied that at each Knowledge Date the directors knew or ought to have known that the companies could not avoid insolvent liquidation or administration either by a specified date or within a short period of time; and that, (b) it was not enough to find that they must have known the companies would go into liquidation or administration at some vague point in the future. The Judge refused to accept this as a point of law because, he said, s.214 does not impose a time limit or limitation period. Instead, he said that each case depended on its own facts and that it would create real difficulty if the Court laid down a time limit or bracket, even as a rule of thumb (by reference to what David Richards LJ (as he then was) said in the Court of Appeal in *Sequana* about it often being difficult to pinpoint the precise moment at which a company becomes insolvent [2019] Bus LR 2178 at [218]-[219]).

The Notional Director: Judgment, [478]-[479]

Next the Judge considered whether s.214(4)(a) imposed a minimum objective standard and not a subjective one. He held that a minimum objective standard was imposed.

Delegation by Directors: Judgment, [480]-[482]

The Judge then looked at the question of delegation by directors. He said that it is trite law that the duties and responsibilities of a director are personal and that a director cannot delegate them to a fellow director or a non-board employee. The board of directors may delegate management functions to each other or to employees who were not directors: *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 40 at 426-427, but even if directors delegated a number of functions to individual directors or employees, it remained their duty to monitor and supervise the discharge of those functions: *Re Barings plc* (No 5) [1999] 1 BCLC 433 at 489; *Re Continental Assurance plc* [2007] 2 BCLC 287 at 399; *Brumder v Motornet Service & Repairs Ltd* [2013] 1 WLR 2783 at [55]. See also *Madoff Securities International Ltd (in liquidation) v Raven* [2014] Lloyds Rep F.C. 95 at [191]-[194]. Even where a director's responsibilities are limited to particular areas of expertise, the Judge said that it is not open to that director to leave decisions which were required to be made by the board to their fellow directors: *Re Landhurst Leasing plc* [1999] 1 BCLC 286 at 346e-h.

Professional Advice: Judgment, [483]-[486]

In relation to professional advice, the Judge accepted that, where directors relied on the advice of reputable professionals, then they will *prima facie* have fulfilled their duties: *Green v Walkling* [2008] BCC 256 at [34]-[38]; *Burnden Holdings (UK) Ltd v Fielding* [2019] EWHC 1566 (Ch) at [158]; *Pro4Sport Ltd (in liquidation) v Adams* [2016] 1 BCLC 257 at [45]-[46]; *Re Ralls Builders Ltd (in liquidation)* [2016] EWHC 243 (Ch) at [176]. The Judge said that the weight to be attached to professional advice would depend on the scope of the engagement, the instructions to the adviser, the knowledge they had or assumptions they were asked to make, the advice they gave (or did not give) and the extent to which the directors relied on the advice (or not). Where a professional adviser did not advise the board that they should put the company into administration, the weight to be attributed to the absence of that advice depended on a detailed assessment of the facts.

The s.214(3) Defence: Judgment, [487]-[490]

As regards the s.214(3) defence, the Judge said that the burden to demonstrate that a director took every step with a view to minimising potential loss to a company's creditors as they ought to have taken was on a director: *Re Idessa (UK) Ltd (in liquidation)* [2012] BCC 315 at [113]; *Brooks v Armstrong* [2016] BCC 661 at [5]-[7] (a case successfully appealed on a different point). Section 214(3) imposed a high hurdle to overcome. It was not enough for directors to prove that they continued trading with the intention of reducing the net deficit of the company. They must show that it was designed to minimise the risk of loss to individual creditors: *Re Ralls Builders Ltd (in liquidation)* [2016] EWHC 243 (Ch) at [243]-[246]. What "*every step*" will be must depend on the facts and, a director may be able to rely on s.214(3) even if they do not take insolvency advice or consider whether to put the company into insolvency proceedings (although if they do not take advice or consider insolvency proceedings it will be more difficult for them to demonstrate that they properly considered whether continuing to trade would reduce the deficiency and what the risks were to individual creditors).

Causation: Judgment, [492]-[498]

Turning to causation, the Judge recorded that it was common ground that it is necessary for a liquidator to prove causation in the sense that there must be a causal connection between the relevant wrongful conduct and the losses suffered by the company: *Re Continental Assurance plc* [2007] 2 BCLC 287 at [378]; *Re Ralls Builders Ltd (in liquidation)* [2016] EWHC 243 (Ch) at [241]-[242]; *Re Chandler v Wright* [2022] EWHC 2205 (Ch) at [22](4). In this respect, however, the Judge said that it was not necessary to prove that this conduct was the sole cause of the losses suffered: *Briscoe v Milner* [2002] 1 BCLC 368 at [262]-[264].

Court's Discretion: Judgment, [510]-[518]

Section 214(1) confers a discretion on the Court to declare that a director is liable to make such contribution (if any) to the company's assets as it considers proper. The discretion, the Judge indicated, is not a wide one but enables the court to adjust the remedy to the circumstances of the particular case: *Commissioners for HM Revenue & Customs v Holland* [2010] 1 WLR 2793 at [124]. *See also Liquidator of West Mercia Safetyware Ltd v Dodd* [1988] BCLC 250 at 253c-e.

Quantum: Judgment, [511]-[512]

The Judge said that it was common ground that the maximum amount which the Court could declare directors liable to contribute was the increase in net deficiency in the assets of the company. The Judge also recorded that this was treated as the starting point in *Re Ralls Builders Ltd (in liquidation)* [2016] EWHC 243 (Ch) at [241] and *Brooks v Armstrong* [2016] BCC 661at [63]-[74].

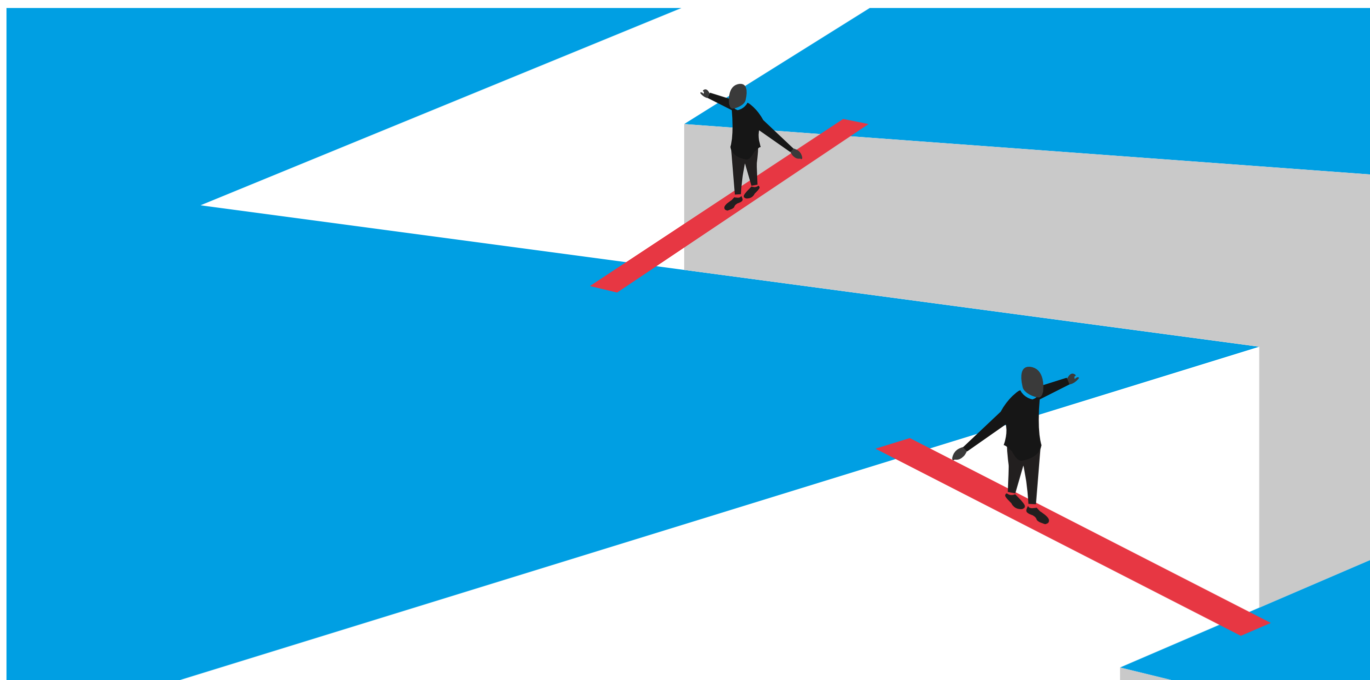
Misfeasance

The Basics: Judgment [519]-[520]

S. 212 IA 1986 provides a procedure for recovery of property or compensation by a liquidator against, among others, an officer of a company. S.212 does not create a new cause of action or new substantive rights. However, it permits a liquidator to enforce an existing cause of action which a company has against a director.

In particular, s.212 IA 1986 enables a liquidator to bring claims against directors for breach of their duties under the Companies Act 2006 ("CA 2006"). So a liquidator can use it to bring claims against directors for breach of their duty (1) to act within their powers (s.171 CA 2006), (2) to promote the success of the company (s.172 CA 2006), (3) to exercise independent judgment (s.173 CA 2006), (4) to exercise reasonable care, skill and diligence (s.174 CA 2006) (5) to avoid conflicts of interest (s. 175 CA 2006).(6) not to accept benefits from third parties (s. 176 CA 2006) and (7) in relation to proposed transactions or arrangements (s. 177 CA 2006). The Judge addressed each of these to the extent he considered necessary for the purpose of the BHS Case.

The Liquidators in the BHS Case alleged that the directors had breached their duties under ss. 171 to 177 CA 2006.



Duty to Act within Powers: Judgment, [521]-[532]

S. 171 provides that "*A director of a company must – (a) act in accordance with the company's constitution, and (b) only exercise powers for the purposes for which they are conferred*"

The Judge accepted that a director who enters into a transaction knowing that it has not been authorised by the board acts in breach of s.171(a) (assuming the transaction is not ratified).
The Judge declined to accept that the failure to call a meeting or to minute a meeting properly was a breach of s.171(a).

As regards s.171(b) the Judge held that the test was objective in the sense that it its unnecessary to demonstrate that a director knew or believed that they were acting for a collateral or improper purpose. However, the Judge also said that the test was subjective in the sense that the Court is required to examine the purpose or motive for which the power exercised and decide whether it was a proper purpose.

In addition to the above, the Judge said that he saw no reason why a director should not be held to have committed a breach of s.171(b) if they act for the purpose of benefitting a third party at the expense of the company even though the director receives no personal benefit and acts out of friendship or to please a third party out of a mistaken case of loyalty.

Duty to Promote the Success of the Company: Judgment, [533]-[546]

S.172 CA 2006 provides for a director to act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so, having regard, among other things, to six matters specified in section 172(1)(a) to (f).

The Judge said that the test was subjective: *Re Regentcrest plc v Cohen* [2001] 2 BCLC 80 at [80]. He also said there were exceptions to the rule that it was a subjective test. It is well established that the Court should apply an objective test where the director did not consider whether their act or omission was in the interests of the company: *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62 at 74E-F; *Extrasure Travel Insurance Ltd v Scattergood* [2003] 1 BCLC 598 at [138]; *Re HLC Environmental Projects Ltd* [2014] BCC 337 at [92](b). Equally, where a very material interest, such as that of a large creditor (in a company of doubtful solvency, where creditors' interests must be taken into account) is unreasonably overlooked and not taken into account, the objective test should be applied: *HLC Environmental Projects Ltd* at [92](c). The Judge then referred to *BT1 2014 LLC v Sequana* [2024] AC 211 and what the various members of the Supreme Court (Lord Reed, Lord Hodge, Lord Briggs, Lady Arden and Lord Kitchin) had said about the duty of directors in certain circumstances to have regard to the interests of creditors.

Duty to Exercise Independent Judgment; Judgment, [547]-[548]

S.173 CA 2006 provides that a director of a company must exercise independent judgment.

The Judge said that a director may not defer to the wishes of a shareholder, another director or another personality without bringing their own independent judgment to bear on the issue: *Bishopsgate Management Ltd v Maxwell Ltd (No 2)* [1993] BCC 120; *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62; *Lonhro Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627 at 643E-G.

Duty to Exercise Reasonable Care, Skill and Diligence: Judgment, [549]-[551]

S.174 CA 2006 provides that a director must exercise reasonable care, skill and diligence. This means the care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company and the general knowledge, skill and experience that the director has.

The Judge said that directors are under a duty to inform themselves about the company's affairs on appointment: *Sequana* at [90], per Lord Reed. He also said that the Court must be satisfied that the individual decision which is the subject matter of the claim went beyond an error of commercial judgment and

was one which no reasonable director would have reached applying the Notional Director standard: *Optaglio Lt v Tethal* [2015] EWCA Civ 1002 at [23]; *Sharp v Blank* [2020] EWHC 1870 at [627].

Duty to Avoid Conflicts of Interest: Judgment, [552]-[553]

Ss.175 to 177 codify the no conflicts rule for fiduciaries as it applies to directors. Whether a director's direct or indirect interest conflicts (or may conflict) with the interest of the company is to be ascertained by asking whether a reasonable man, looking at the relevant facts, would think that there was a real, sensible possibility of conflict: *Breitenfeld UK Ltd v Harrison* [2015] EWHC 399 at [60](e) and (f). Conflicts of interest are identified not by shoe-horning the facts of a given case into various pre-determined categories of relationship but by application of the general principle: *Breitenfeld* at [67].

Duty Not to Accept Benefits from Third Parties: Judgment, [554]-[564]

S.176 CA 2006 codifies the element of the conflict rule which prohibits a fiduciary from exploiting his or her engagement for personal benefits (including the acceptance of secret commissions or bribes) without full disclosure of all material circumstances.

The Judge said that law was particularly stringent in relation to claims against an agent who has received a bribe or secret commission: *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] AC 250 at [42]. The stringency, he said, is reflected by the fact that an agent who accepts a bribe will hold it on trust for his or her principal even when there is no specific transaction in view: *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119; *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 at [73]. It is also unnecessary for the principal to prove the secret commission was paid or received dishonestly or that either party realised that it was unlawful or wrong to give or take a secret commission: *Re a Debtor (No 229 of 1927)* [1927] 2 Ch 367 at 376.

In addition, the Judge said that it is not a defence for the agent or fiduciary to prove that the secret commission was received by a connected or associated company: *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256; *Shell International Trading & Shipping Co Ltd v Tikhonov* [2010] EWHC 1399; *Shetty v Al Rushaid Petroleum Investment Co* [2013] EWHC 1152 (Ch). He also said that it may be appropriate to draw the inference that the agent knew that the conduct was unlawful or wrong from the use of an offshore company and attempts by the agent to distance themselves from the bribe or secret commission.

Causation: Judgment, [492]-[498]

In deciding whether a breach of duty by directors causes loss, the Judge said that the Court must consider what would have happened if the directors had complied with the relevant duties and ask the counter-factual question whether the company would have suffered loss: *Lexi Holdings plc v Luqman (No 2)* [2008] 2 BCLC 725. In answer to that question the Court must assume that the directors would have complied with all their duties in the relevant counter-factual situation: *Lexi Holdings plc v Luqman (No 2)* [2009] 2 BCLC 1, CA.

For the purpose of the misfeasance claims the Judge said that he had to apply *Lexi Holdings (No 2)* and ask himself whether the company in question would have continued trading and suffered the other losses if the directors had not committed any breaches of duty which he may have found against them. He said that this was particularly important in relation to the Trading Misfeasance Claim (described below) where it was alleged that if the directors had complied with their duties the relevant companies would have gone into administration or insolvent liquidation at an earlier date.

Ratification: Judgment, [565]-[567]

In relation to ratification, the Judge said that shareholders cannot authorise or ratify a breach of duty once the modified duty to act in good faith in the interests of creditors arises: *Sequana* at [91], per Lord Reed.

The Decision on the Wrongful Trading Claim

There was no dispute that the four BHS companies involved in the BHS Case had gone into insolvent liquidation or that the Participating Directors were both directors on each of the alleged Knowledge Dates. The central issue was whether these directors had the requisite knowledge as to the companies' financial positions on any of the Knowledge Dates.

The Liquidators' case was brought by reference to six alleged Knowledge Dates: 17 April 2015, 6 May 2015, 26 June 2015, 13 July 2015, 26 August 2015 and 8 September 2015. The Judge dismissed the wrongful trading claim in relation to the first five dates and held that it was not until 8 September 2015 that the Participating Directors ought to have concluded that insolvency was inevitable. The Participating Directors were held to be liable for the increase in the net deficiency in companies' financial position from that date and the Judge ordered each of them to contribute, on a several basis, £6.5 million to the assets of the companies. This compares with the Liquidators' claim for wrongful trading of well in excess of £100 million.

The directors had taken professional advice. The Judge decided that the question whether the companies had a reasonable prospect of avoiding insolvent liquidation or administration was not one on which the advisers could or should have been expected to express an opinion; it was a question for the directors. The advisers could not have been expected to do more than identify the legal issues to be considered by the directors and the severity of the financial problems.

The Decision on section 172 CA 2006: "The Trading Misfeasance Claim"

The Liquidators argued that had the directors complied with their duty to take into account the interests of creditors they would have concluded that the companies should not have continued trading after specified dates,

which were the same as the Knowledge Dates. This breach of duty claim is referred to in the Judgment as "*the Trading Misfeasance Claim*".

The Judge, having dismissed the Liquidators' wrongful trading claim based on the Knowledge Date of 17 June 2015 on the grounds that "*there was some light at the end of the tunnel*" and the directors were entitled to rely on an assessment that the turnaround plan could be achieved, decided that the Participating Directors' duty to consider the interests of creditors existed at that date and the companies should have ceased to trade.

The Judge dismissed the trading misfeasance claim in relation to 17 April 2015, 6 May 2015, 13 July 2015 and 26 August 2015. The Judge, having dismissed the Liquidators' wrongful trading claim based on the Knowledge Date of 17 June 2015, decided that the directors' duty to consider the interests of creditors arose by that date and that the directors had breached this duty.

The Judge held that if the Participating Directors had complied with their duties on or before 26 June 2015 and on or before 8 September 2015 the companies would not have continued to trade but would have gone into insolvent administration immediately.

The Judge did not make any findings in relation to the appropriate measure of damage and said that he would give the parties the opportunity to make further submissions on that issue. The hearing on this issue took place on 24 June 2024.

The Decisions on the Other Breach of Duty Claims

Of the eight transactions challenged by the Liquidators on the grounds that other statutory directors' duties had been breached, the Judge found in favour of the Liquidators on three of them.

The Judge held that one of the Participating Directors was liable for other individual breach of duty claims for £300,000, £521,976, £1,500,000 and £1,671,236.70.

The Judge held that the other one of the Participating Directors was liable for £1,671,236.70.

Directors' Insurance Cover

The Participating Directors had insurance cover. It was limited to £20 million. The judgment, together with interest and costs (and defence costs), will be more than that. Notwithstanding this, the Judge refused to reduce the Participating Directors' liability. The Judge said that it had been submitted to him that "*that to do so would be to send the wrong message to risk-taking directors that they could escape liability if they did not obtain adequate cover to indemnify themselves against wrongful trading*". The Judge agreed with that submission.

Consequentials Hearing

The Judge held a consequentials hearing on 24 June 2024 on equitable compensation in respect of the "Trading Misfeasance Claim" and whether the directors are jointly and severally liable under s.172(3) CA 2006 to pay equitable compensation equal to the increase in net deficit from 26 June 2015. The Judge reserved judgment. The Digest will report further on this when the result is known. At the same hearing, on 25 June 2024, judgment was entered against Dominic Chappell for about £50 million.

Comment

The Judge's judgment in the BHS Case, which came some eight years after BHS collapsed with debts of more than £1 billion and with the loss of some 11,000 jobs, is an important one for all directors and for those who practice restructuring and insolvency law and/or company law (whether advising directors or insolvency practitioners). Not only is there a substantial award against the directors – it has been said to be the largest ever wrongful trading award – which should be a warning to all directors and those advising them, but it also contains valuable guidance as to what directors can and cannot do to avoid breach of duty claims as well as a wrongful trading claim in circumstances where a company is required to take the interests of its creditors into account.

The Judgment also raises serious issues on the extent to which directors can protect themselves by reliance on professional advice.

Perhaps the most intriguing aspect of this judgment, however, is the Judge's decision that the Liquidators have a claim for breach of section 172 on the grounds that there was a breach of duty to take into account the interest of creditors from 16 June 2015 (a date the Judge decided the Knowledge Condition for a wrongful trading claim was not satisfied, having decided it was not satisfied until September 2015). From the analysis in the BHS Case, a liquidator may be able to make the date from which a director is liable earlier with a trading misfeasance claim than is possible with a wrongful trading claim with a potentially significant increase in the amount of a directors' liability.

Some may say that this is wrong, unfair or artificial and that the only potential liability in this regard should be as Parliament set it, namely for wrongful trading under s.214, in circumstances where the provisions of the statute are satisfied. But for that we shall have to wait and see if there is an appeal, and if so what the Court of Appeal say, or whether other judges at first instance follow it. In the meantime, directors should be aware that all liquidators, and those who advise them, will have noticed this judgment and the potential additional recoveries it may afford to insolvent estates.

Furthermore, those advising directors might like to suggest to their client directors that they increase their insurance cover to protect against the sort of liabilities that arose for the Participating Directors in the BHS Case (and doubtless, in the case of many other companies, potentially much greater liabilities). ■

Ryan Perkins from South Square appeared for the successful Liquidators.

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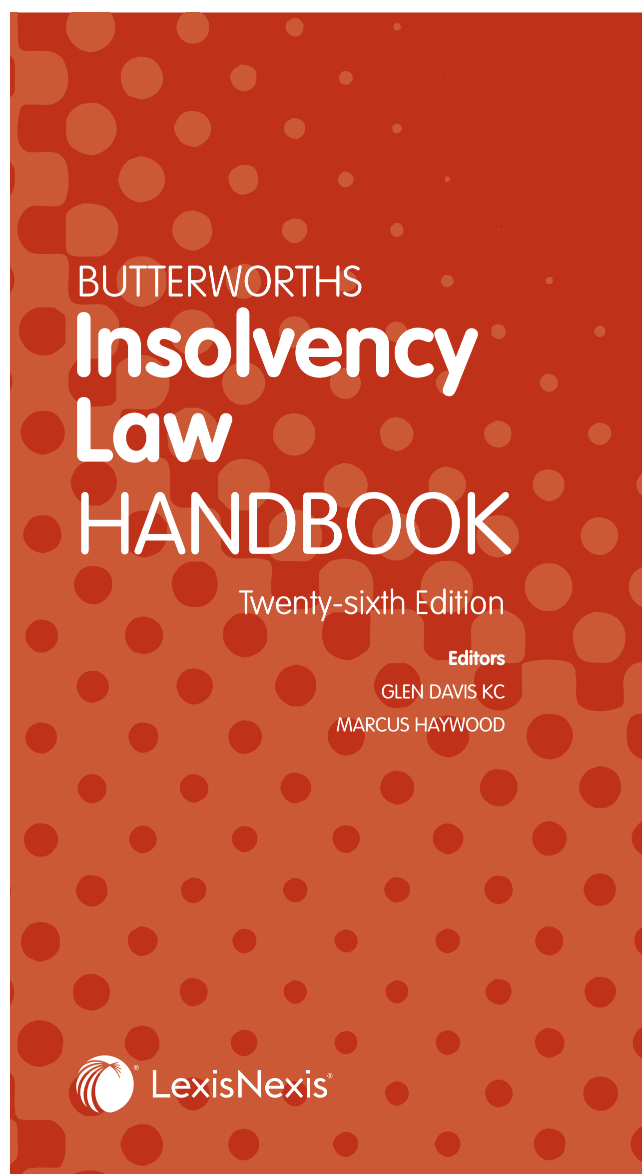

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Sian Participation Corp v Halimeda International Ltd: the Privy Council holds that an arbitration clause does not affect the Court's approach to a winding-up petition

Introduction

How should the court approach an alleged dispute on a winding-up petition where the debt is subject to an arbitration clause? This simple question has received radically different answers across the common law world. The Privy Council in *Sian Participation Corp v Halimeda International Ltd* [2024] UKPC 16[1] settled the law of England and Wales and the BVI on the subject. The Board concluded that where the debt on which a liquidation application or winding up petition is based is subject to an arbitration agreement or an exclusive jurisdiction clause and is said to be disputed the correct test for the Court to apply is whether the debt is disputed on genuine and substantial grounds.[2] In other words, no different test applies to liquidation applications where there is an arbitration clause (or exclusive jurisdiction clause) involving the debt and where there is not.

The Board expressly overruled the decision of the English Court of Appeal in *Salford Estates v Altomart* [2015] Ch 589 (CA), the leading decision in English law. In what may be the first direction of its kind, the Board directed the English Courts not to follow *Salford Estates* and instead to follow the Board's decision in *Sian*.[3] In doing so, Lords Briggs and Hamblen (giving the judgment of the Board) directed the Companies Court to abandon its current practice of staying or dismissing a winding-up petition where the debt was subject to an arbitration clause provided there was a dispute.[4]

The Facts

The Respondent, Halimeda, is a wholly owned subsidiary of Far-Eastern Shipping Co PJSC ("FESCO"). FESCO is the parent company of a very substantial Russian transportation and logistics group with operations in ports, rail, logistics, and shipping. The Appellant, Sian, is part of the corporate group through which just shy of 50% of the shares in FESCO were held for the ultimate beneficial owner Mr Ziyavudin Magomedov ("Mr Magomedov").

Under a facility agreement (dated 7 December 2012) Halimeda advanced a term loan to Sian of USD 140m. The facility contained an arbitration clause in the following terms: "*any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement*" shall be referred to arbitration at the London Court of International Arbitration or LCIA. In February 2020, Halimeda served a demand for repayment on Sian and by 15 December 2020, claimed that the sum of approximately USD 226m was outstanding as at that date.

Halimeda issued a liquidation application on 29 September 2020. In its defence to the application, Sian asserted that it had a crossclaim and/or right of set-off against the debt. Sian alleged that in late 2019 or early 2020, a *"corporate raid"* backed and

instigated by the Russian State has been mounted against Mr Magomedov's interests targeting his shareholding in FESCO.

On 19 May 2021, Wallbank J delivered an *ex tempore* judgment appointing liquidators over Sian. The Judge held that Sian had failed to show that the debt was disputed on genuine and substantial grounds or that there were other reasons why the liquidation application ought to be dismissed or stayed. Sian's appeal against Wallbank J's order was dismissed by the Court of Appeal (Periera CJ, Webster and Henry JJA) on 11 November 2022.

Sian applied for leave to appeal to the Privy Council which was dismissed by the Court of Appeal (Michel, Price-Findlay and Farara JJA) on 24 April 2023. However, on 15 November 2023, Sian obtained permission to appeal from the Board on the basis that the case raised an arguable point of law of great general or public importance.

The Pre-*Sian* Authorities

The starting point in the pre-*Sian* authorities is the English Court of Appeal's decision in *Salford Estates*. In that case, the Court of Appeal held that a winding-up petition did not attract an automatic stay under section 9 of the English Arbitration Act 1996.[5] However, the Chancellor held that this was not the end of the matter. The Chancellor held that "*the court should, save in wholly exceptional circumstances which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 Act*".[6]

1. James Morgan KC (of Radcliffe Chambers) and Paul Fradley appeared together with Harney Westwood & Riegels LLP (London) for the Appellant, Sian Participation Corp.
2. [122(1)].
3. A direction under the jurisdiction recognised in *Willers v Joyce (No 2)* [2018] AC 843 (SC). See [124].
4. [125].
5. *Salford Estates*, [38].
6. *Salford Estates*, [39].

The policy behind the Arbitration Act 1996 was to exclude a summary judgment analysis on matters falling within the scope of an arbitration clause. It was therefore "*right for the court either to dismiss or stay the Petition as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether the debt is bona fide disputed on substantial grounds*".[7] That was a position which had been followed at first instance in England.[8]

The BVI Court of Appeal, however, refused to follow *Salford Estates* in *Jinpeng Group Limited v Peak Hotels and Resorts Limited*.[9] Webster JA held that a creditor does not have to prove exceptional circumstances, but instead had to show the debt was disputed on genuine and substantial grounds.[10] This was because the genuine and substantial test was too firmly part of the law of the BVI to require a different approach to be adopted.[11]

The Singapore Court of Appeal has adopted an approach along similar lines to *Salford Estates* in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] SGCA 33. In Singapore the court will stay a winding-up petition in the face of a valid arbitration agreement between the parties unless the application for a stay amounts to an abuse of process.[12] Non-exhaustive examples of such abuse which included: (a) past admission of the debt as to liability and quantum; (b) waiver or estoppel from enforcing right to insist on arbitration; or (c) "*where the debtor-company is seeking to stave off substantiated concerns which justify the invocation of the insolvency regime*".[13]

The position in Hong Kong was originally more convoluted and uncertain,[14] however, two recent decisions of the Hong Kong Court of Appeal had brought clarity to the law. In *Re Simplicity & Vogue Retailing (HK) Co Ltd* [2024] HKCA 299 and *Re Shandong Chenming Paper Holdings Ltd* [2024] HKCA 352, the Court held that there should generally be a stay or dismissal of a winding-up petition if there was evidence of an intention to commence arbitration proceedings unless there was a risk of prejudice to other creditors or where the supposed dispute about the debt bordered on the frivolous or abusive. In doing so it followed the decision of the Hong Kong Court of Final Appeal in *Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP* [2023] HKCFA 9 which had applied that approach to exclusive jurisdiction clauses.

The decision in *Guy Lam* injected some uncertainty into English law as regards the position where the debt was subject to an exclusive jurisdiction clause.[15] The Board took the opportunity to resolve that issue also.

The Board's Decision

Lords Briggs and Hamblen started their analysis by rejecting the suggestion from Halimeda that BVI law was different to English law, they were clear that the Board has to consider head-on whether *Salford Estates* was wrongly decided.[16]

Their Lordships noted that it was common ground that a creditor's winding-up petition was not an "*action*" within the meaning of section 18 of the BVI Insolvency Act 2013 or a "*claim*" within the

7. *Salford Estates*, [41].

8. *Re Telnic Limited* [2020] BPIR 1517 (Ch); *Fieldfisher LLP v Pennyfeathers LLP* [2016] BCC 697 (Ch); *Eco Measure Market Exchange Ltd v Quantum Climate Services Ltd* [2015] BCC 877 (Ch).

9. BVIHCMAP2014/0025 (8 December 2015).

10. *Jinpeng*, [49].

11. *Jinpeng*, [47]. Referring to an earlier decision of the BVI Court of Appeal in *C-Mobile Services Limited Huawei Technologies Co Limited* BVIHCMAP2014/0017 (15 September 2013).

12. *AnAn*, [97].

13. *AnAn*, [99].

14. See *Re Southwest Pacific Bauxite (HK) Ltd* [2018] HKCFI 426 (commonly known as *Lasmos*) and *Ka Chon v Interactive Brokers LLC* [2019] HKCA 873.

15. In *Al Kuwari v Cantervale Ltd* [2022] EWHC 3490 (Ch) the Court held that it should not consider the merits of any dispute falling within an exclusive jurisdiction clause. However, in *Hex Technologies Ltd v DCBX Ltd* [2023] EWHC 537 (Ch) the Court declined to follow this and instead held that it was bound by the decision of the Court of Appeal in *BST Properties Ltd v Reorg-Apport Penzugyi RT* [2001] EWCA Civ 1997, and thus to consider the merits of the dispute. The Court recognised that this position was pending further consideration of the issue by the Court of Appeal: [68]. The Court also considered it was bound by *BST* in *City Gardens Limited v Dok82 Limited* [2023] EWHC 1149 (Ch).

16. [8].

meaning of section 9 of the English Arbitration Act 1996.[17] The key to identifying when arbitration law policy was engaged was the identification of a "*matter*" in respect of which legal proceedings are brought.[18] If there is no "*matter*" then the mandatory stay provisions do not apply and the policy underpinning them does not apply.[19] Their Lordships held that it was no part of the policy of arbitration law to fetter the rights of parties in respect of matters which fall outside the scope of the arbitration agreement.[20]

A winding-up petition is not caught by the mandatory stay "*because such a petition or application does not seek to, and does not, resolve or determine anything about the petitioner's claim to be owed money by the company*".[21] The negative obligation inherent in an arbitration clause is not to have a dispute resolved by any court process, Lords Briggs and Hamblen held that this does not extend to the presentation of a winding-up petition.[22] Their Lordships also considered that the policies underpinning arbitration law are not offended because insolvency law's policy is that the liquidation route should not be pursued if there is a substantial dispute.[23] The Board also held that none of the objectives of arbitration law (efficiency, party autonomy, *pacta sunt servanda* and non-interference by the courts) were offended by the application of a genuine and substantial dispute test.[24] In particular, they felt that requiring the creditor to go to arbitration *"just adds delay, trouble and expense for no good purpose"*.[25]

Lords Briggs and Hamblen held that the Chancellor had gone wrong in *Salford Estates* to consider that the legislative policy behind the Arbitration Act applied and prohibited winding up proceedings.[26] Their Lordships also did not consider that it would be anomalous to conduct a summary judgment type analysis because no summary judgment is being conducted – "*the light touch used by the Companies Court resolves nothing either way, and does not lead to a judgment or anything similar*".[27]

The Board therefore held that the genuine and substantial dispute test should apply where the debt on which the application is based is subject to an arbitration agreement or an exclusive jurisdiction clause.[28] Their Lordships noted that this "*conclusion applies to a generally worded arbitration agreement or exclusive jurisdiction clause*" and "[d]*ifferent considerations would arise if the agreement or clause was framed in terms which applied to such a liquidation application*".[29]

Lords Briggs and Hamblen considered it was appropriate to issue a direction to the English courts not to follow *Salford Estates* and instead to follow their decision in *Sian*.[30] The Board directed the English courts to cease their practice of staying or dismissing a creditors' winding up petition on the ground that the petitioner's debt is covered by an arbitration clause, without being shown to be genuinely disputed on substantial grounds.[31] They also indicated that their direction also resolves the uncertainty about the position in relation to exclusive jurisdiction clauses.[32] Of particular note is that their Lordships issued this direction of their own motion, whilst Halimeda had indicated that *Salford Estates* should not be followed, they did not ask the Court to make a direction in relation to English law.

The Implications of *Sian*

The first, and most obvious, implication of *Sian* is that the law of the BVI and England and Wales is now to be regarded as settled. The court will apply the same test to determine whether a company should be wound-up regardless of whether the debt is covered by an arbitration clause or an exclusive jurisdiction clause. The change in relation to English law is dramatic. The Companies Court will abandon the practice it has adopted for the last decade of staying or dismissing winding-up petitions when the debt is subject to an arbitration clause. This will radically change the calculus for those advising clients whether pursuing the liquidation route is viable on the facts of their case. The approach in *Salford Estates* made it relatively unviable to pursue a winding-up petition where the debt was subject to an arbitration clause regardless of the merits of it.

In relation to the BVI, the decision will retain the active stream of applications to appoint liquidators. The approach of the BVI courts had been to regard the arbitration clause as a matter which went to the exercise of its discretion as to whether to make an order. In other words, the arbitration clause was regarded as relevant to whether the court would make a liquidation order even though no exceptional circumstances test applied.[33] A very recent example is the decision of Mangatal J in *Waterfront Property Investments Limited v Arius Litigation Funding Limited*[34] where the Judge set aside a statutory demand on the grounds there was an ongoing arbitration. The clear indication from Lords Briggs and Hamblen is that they do not consider arbitration policy to be relevant to winding-up petitions. The implications of that will need to be worked out at first instance, but the Board's judgment would suggest that the court should not be placing weight on the existence of a generally worded arbitration clause.

A particular question that arises is whether the court should take a different approach when an arbitration is actually on foot. Lords Briggs and Hamblen rejected the concern that there would be a "*temptation to bypass an applicable arbitration agreement*".[35] They held that such a concern did not "*bridge in the reasoning about the supposed extent of the legislative policy*" and that the Companies Court was already accustomed to preventing an abuse of process by bypassing the need for litigation.[36] In the context of ordinary court proceedings, it is for the court hearing the winding-up petition to make its own assessment of the substantiality of the dispute, despite the fact that proceedings are

17. [53].
18. [58].
19. [61].
20. [62].
21. [88].
22. [89].
23. [90].
24. [92].
25. [92]
26. [94].
27. [96].
28. [99].
29. [99].
30. [125].
31. [125].
32. [126].
33. See e.g. *Rangecroft Ltd v Lennox International Holdings Limited* (6 July 2020); *IS Investment Fund v Fair Cheerful* (16 July 2020); and *A Creditor v Anonymous Company* (28 January 2021).
34. BVIHCM2023/0192 (27 March 2024).
35. [97].
36. [97].

on foot.[37] The implication of the Board's decision, therefore, is that the existence of ongoing arbitration proceedings does not absolve the court hearing the winding-up petition of considering the substantiality of the dispute.

Lords Briggs and Hamblen also make clear (twice) that their decision applies only to a "*generally worded arbitration agreement or exclusive jurisdiction clause*" and that "[d]*ifferent considerations would arise if the agreement or clause was framed in terms which applied to such a liquidation application*".[38] Their Lordships considered that arbitration policy was not relevant because there was no arbitrable matter which was being resolved. The implication of their comments will need to be worked out in subsequent cases, in particular whether they extend beyond a clause which simply prevents a creditor from presenting a petition.

Postscript: Appeals as of Right

The Board also asked the parties to address them on the issue of how the value threshold in section 3(1)(a) of the Virgin Islands (Appeals to the Privy Council) Order 1967 applies to winding-up petitions.[39] In particular, whether the appeal involves "*directly or indirectly*" a "*a claim to or question respecting property or a right of the value of £300 sterling or upwards*". The Board's conclusion was that an appeal against a winding-up order would not satisfy that threshold.[40]

The Board placed particular weight on the fact that on a winding-up petition the Court is not making any determination of either the duty to pay a debt or the right to be paid it.[41] They noted that "*if the appellant's case was accepted it would mean that there would be an appeal as of right in virtually every creditor's petition for winding up or appointment of a liquidator since the evidence will almost invariably involve debts of at least £300*".[42] The Board's conclusion provides a clear answer to the question, namely that leave will always be required to appeal a creditor's winding-up petition to the Privy Council.

37. French, 'Applications to Wind-up Companies, (4th ed), 7.636; *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.

38. [99] and [127].

39. [21].

40. [114].

41. [115]-[117].

42. [120].

Diary Dates

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

11 September 2024

INSOL Channel Islands Seminar

South Square is proud to be a gold sponsor of this event, held at the Duke of Richmond Hotel, Guernsey

18 September 2024

Mourant/SSQ Annual Conference

ETC Venues Monument, London, EC3

2 – 3 October 2024

INSOL Europe Academic Conference

Sorrento, Italy

4 October 2024

R3 Business Lunch

Royal Lancaster London, Lancaster Terrace, London W2

15 October 2024

GRR Live: Restructuring in the Americas

New York, USA

7 November 2024

IWIRC Conference London

One Moorgate Place, London, EC2

13 – 15 November 2024

ABA International Law Section 2024 Conference

Celebrating 100 years of ABA in the UK: Middle Temple and Inner Temple, London

14 November 2024

Chambers Bar Awards

Old Billingsgate, London, EC3

20 November 2024

South Square/RISA Cayman Conference

Ritz Carlton, Seven Mile Beach, Grand Cayman

17-19 March 2025

INSOL Hong Kong

Rosewood Hotel, Hong Kong

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JEREMY GOLDRING KC
SOUTH SQUARE

Change in Lifestyle? The Supreme Court restates the principles of tortious accessory liability

A company commits a tort of strict liability. The claimant, in addition to its primary tortious claim against the corporate entity, pursues a director as an accessory. What must the claimant prove? This was the main issue, addressed at length by the Supreme Court (in a single judgment by Lord Leggatt) in *Lifestyle Equities v Ahmed* [2024] UKSC 17. More specifically (at [1]): "*When are directors of a company liable as accessories for causing the company to commit a tort of strict liability – in this case trademark infringement? In particular, is such liability also strict or does it depend on knowledge (or some other mental element)?*" In answering these seemingly short questions, the Supreme Court undertook a detailed, clear and wide-ranging analysis of the principles of tortious accessory liability more broadly, including extensive reference to numerous authorities. The judgment becomes a leading source of English common law about such questions, required reading for commercial and company lawyers.

The Court's conclusion (at [137]): "*considerations of principle, authority and analogy with principles of accessory liability in other areas of private law all support the conclusion that knowledge of the essential features of the tort is necessary to justify imposing joint liability on someone who is not actually committed the tort. This is so even where, as in the case of infringement of intellectual property rights, the tort does not itself require such knowledge.*" The defendant directors had no such knowledge and therefore, contrary to the conclusion of the courts below, were not liable as accessories to the company's wrongdoing.

Given the judgment's scale, a brief route map through its reasoning and conclusions may assist. It is vital to distinguish primary from accessory liability at all stages.

Primary liability

First, therefore, it was necessary to analyse the factual and legal basis of the primary claim namely, in this case, trade mark infringement. On the facts, the directors were not directly liable on the proper interpretation of the applicable trademark legislation.

Accessory liability

Directors might potentially be jointly liable applying the general principles operating in relation to common law torts under the principles of accessory liability.

There were two relevant general principles of common law, which may both be engaged on the facts of a particular case.

Procuring a tort

The first such principle (procuring) is that a person who knowingly procures another to commit an actionable wrong will be jointly liable with that other person for the wrong committed.

• Where the primary wrong is a breach of contract then the relevant tort is inducing breach of contract. This includes the well-established restriction on the scope of liability illustrated by *Said v Butt*: an agent who acts within the scope of its authority will not be liable to compensate the counterparty for inducing breach of contract (at [54]).

• Where the primary wrong is a tort rather than a breach of contract, there is no distinct tort of procuring, nor any question of *Said v Butt* being applicable.

Common design

The second general principle of accessory liability (common design) is that a person who assists another to commit a tort is jointly liable for the tort committed by that person if the assistance is more than trivial and is given pursuant to a common design between the parties. ■

Two sculptures on the London's supreme Court facade depicting two angels guarding the symbols of justice

Case Digest Editorial

Marcus Haywood

This edition's Case Digest contains a number of decisions of interest, many with an international flavour.

In *Project Lietzenburger Straße Holdco S.à.r.l*, in which no less than eight member of chambers appeared, Richards J considered a restructuring plan in relation to Luxembourg entity which was part of a group that owned a development site on the "Ku'Damm", a well-known shopping boulevard in Berlin. The decision is an important example of the "working through" of issues arising out of the Court of Appeal's decision in *Re AGPS Bondco Plc* (judgment in respect of which had handed down after the plan meetings had been held). One particular issue was that the plan, as proposed and voted upon, contained a provision under which certain subordinated debt was to be cancelled for no consideration, giving rise to the issue of whether the plan constituted a "compromise or arrangement".

The Judge refused to sanction the plan as it had been proposed and voted upon and refused to make amendments that the plan company sought to the plan on the basis that a "compromise or arrangement" does not include a confiscation or expropriation of rights. However, as a result of his judgment, a hearing that had initially started as a sanction hearing become a convening hearing to convene a further plan meeting to consider an amended plan on short notice (which was subsequently sanctioned).

In a reflection of the activity that continues in this area of our practice we also have digests of interesting decisions in relation to domestic and international schemes and plans in *Re People's Energy (Supply) Ltd* (a scheme in relation to retail energy supplier which suffered a data breach affecting accounts relating to approximately

300,000 customers), *Re PlusHolding GmbH* (sanction of a modified scheme in relation to a German holding company) and *Re Tele Columbus* (convening of a single meeting of scheme creditors in relation to a German entity with no business or operations in the UK). The breadth and flexibility of the scheme and plan jurisdiction and its application to varied entities, including those incorporated abroad, will be apparent from each of these decisions (in which members of chambers appeared in each).

Meanwhile, in the personal insolvency context, we have digests of decisions involving bankruptcies giving rise to conflicts of laws issues. In *Kireeva v Zolotova* (in which William Willson and Roseanna Darcy appeared), the Court considered issues arises out of the recognition of a Russian bankruptcy and in *Drelle v Servis-Terminal LLC* (in which Mark Phillips KC and Clara Johnson appeared) the Court considered that foreign judgment debt could constitute a debt for the purpose of section 267(2)(b) of the Insolvency Act 1986, whether it was recognised or not.

Articles relating to the important decisions of Leech J in *BHS* and the Privy Council in *Sian Participation Corp* appear elsewhere in this edition.

Happy summer reading! There is lots of new law to consider from wherever you may be...

Case Digests

Banking and Finance

DIGESTED BY PAUL FRADLEY

Afan Valley Ltd v Lupton Fawcett (A Firm)

[2024] EWHC 909 (KB) (Sheldon J)
Investment schemes – Causation – Loss – Illegality
23 April 2024

The Claimants were companies in liquidation who described themselves as the vehicles for, and thereby the victims of, a Ponzi fraud. They had run investment schemes. The Claimants sued their former solicitors, Lupton Fawcett and Metis, alleging that if the Claimants had been properly advised they would not have promoted various investment schemes, accepted investment monies and taken out loans, and would not have suffered substantial losses as a result. The Claimants owed money to their investors under s26 of the Financial Services and Markets Act 2000 because the investment agreements became unenforceable.

Sheldon J held that the claim against Lupton Fawcett should be struck out for failing to establish loss. The allegation against Lupton Fawcett was that they had failed to advise the investment schemes were collective investment schemes. The monies which were owed to investors had to be offset against investment monies received. The Court drew a distinction between the receipt of the monies (the investment receipts and the loan monies) and the use to which they had been put. It was the use that was the cause of the losses, not the receipt. At the point the investment or loan monies were received they had a zero effect on the Claimants. The breach of duty alleged against Lupton Fawcett was failing to advise that the schemes were collective investment schemes, it did not extend to advising as to the way in which the investment or loan monies could be used. At most therefore any breach by Lupton Fawcett had not caused the loss suffered but had merely given an opportunity for it to occur.

Sheldon J would not in the alternative have dismissed the claim on the basis of illegality. The purpose of requiring authorisation for collective investment schemes was to protect investors and to ensure that those who unlawfully promoted the scheme did not gain. As the Claimants were now in liquidation, the purpose of the prohibition would not be served by denying a claim. In fact denying the claim would undermine public policy.

One Savings Bank Plc v Waller-Edwards

[2024] EWCA Civ 302 (Sir Geoffrey Vos MR, Jackson LJ, and Falk LJ)
Security – Undue influence – Hybrid cases
28 March 2024

The appeal raised a question of law on the proper approach to undue influence. The trial judge and the appeal judge had decided that the bank was not put on inquiry of the undue influence which had been exerted over Ms Waller-Edwards by her then partner Mr Bishop. The undue influence had led to Ms Waller-Edwards remortgaging a property she owned jointly with Mr Bishop. The property was owned 1% for Mr Bishop and 99% for Ms Waller-Edwards pursuant to a declaration of trust. The proceeds of the loan were used to pay off a previous mortgage, to pay off Mr Bishop's debts and to fund the purchase of another property. From the bank's perspective 90% of the loan was used for joint purposes and 10% to pay off Mr Bishop's debts.

The case raised the issue of borrowers who sought a loan partly for their joint non-commercial purposes and partly for the benefit of one borrower only. The Court held that the question of whether a bank is put on inquiry is to be ascertained through the lens of the lender. There are some cases with one or more red flags which ought to alert a lender to circumstances which require further inquiry, but that was not the case here. The effect of the decision in Etridge was to lower the threshold for the risk that was required before a bank was put on inquiry because in every

non-commercial case where a borrower stood surety for the debts of their partner, the bank was put on inquiry.

The court needs to look at the transaction as a whole and decide whether (as a matter of fact and degree) the loan was being made for the borrower with debts rather than for a joint purpose. It was not the law that a lender was put on inquiry unless the element of the transaction that is for the sole benefit of one of the borrowers is trivial. The courts below had applied the correct test.

Civil Procedure

DIGESTED BY ANNABELLE WANG

GFH Capital Ltd v Haigh

[2024] EWCA Civ 65 (Peter Jackson, Arnold, Phillips LJJ)

Freezing injunctions – Orders without notice – Foreign proceedings

5 February 2024

A company incorporated in the Dubai International Financial Centre (DIFC) appealed against a decision that a freezing injunction granted under section 25 of the Civil Jurisdiction and Judgments Act 1982 against the first respondent had expired.

The DIFC had granted a worldwide freezing injunction against a former employee accused of embezzling funds from a company in breach of his employment contract and fiduciary duties. The freezing injunction was to continue until further order of the DIFC court. The company had later issued a claim in England seeking a section 25 injunction. The injunction was granted in a order made without notice which provided that the respondent was restrained from dealing with his assets *"until the disposal of the Claim or further order"*.

The DIFC court subsequently gave judgment in the company's favour. The respondent applied to set aside the section 25 injunction. The court held that *"the Claim"* referred to the DIFC claim, and the injunction had therefore expired on its own terms when those proceedings where determined.

The decision was upheld on appeal by a majority of the Court of Appeal. The Court clarified that the principle of certainty, which has particular importance in the context of freezing orders, entailed that an order came to an end immediately on the occurrence of the event specified therein. The fact that there may be further proceedings or an appeal by either party, does not alter that effect. The injunction does not continue in a form of limbo until appeal rights are exhausted.

Justice Investments Ltd v Visalia Enegia SL (t/a Nace) & Ors

[2024] EWHC 815 (KB) (Master Dagnall)

Default judgment – Multiple defendants – CPR Rule 12.9

19 February 2024

The claimant brought a claim against a number of defendants in respect of a purported agreement to loan certain monies to be used for an investment and repay the loan alongside a profit share. The claimant alleged that the defendants altered or failed to implement what had been agreed, with the result that the loan repayment and profit share had not been paid.

The court considered an application for default judgment against three defendants who had not filed acknowledgements of service or defences. The first and second defendants were actively defending the proceedings. The court considered whether it was appropriate to give judgment in default on the basis of particular financial figures against the inactive defendants and whether the claim against the remaining defendants could be dealt with separately, as required under CPR Part 12.9.

The judge found that granting default judgment would not necessarily imply any wrongs as having been committed by the active defendants. However, he considered it necessary to protect the interests of the active defendants by including a provision that the default judgment would not be binding on them, would not affect any defences which they sought to advance and would not give rise to any finding or determination of fact or law binding on or against them.

Taylor v Savik & Anor

[2024] EW Misc 15 (CC) (HHJ Paul Matthews)
Application for jury trial
5 April 2024

The applicant was bankrupted on his own application and was subsequently arrested and imprisoned after pleading guilty to defrauding HMRC. The applicant's trustee in bankruptcy made an application claiming inter alia that certain property which was registered in the name of the applicant's wife was beneficially owned by the applicant, having been purchased and maintained with money provided by him.

The court considered an application made by the applicant as a litigant in person that the trial of the trustee's application in the county court be held with a jury. The applicant's evidence was that his status as a convicted criminal caused him to question whether he could be dealt with even-handedly by a single judge, and that he considered he would be dealt with more fairly by a jury of his peers.

The judge drew the parties' attention to section 66 of the County Courts Act 1984, which provides that in all other proceedings except those specified in section 66(1) shall be without a jury unless the court orders otherwise on an application made by any party to the proceedings. The action shall be tried with a jury on such application where the court is satisfied inter alia that there is an issue a *"charge of fraud"* against the party making the application, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.

The judge, having considered the relevant authorities, held that a *"charge of fraud"* was not merely one of the making of a false statement, but instead one of the complete tort of deceit, including the allegation of loss suffered by the victim as a result. The court held that there was a relevant *"charge of fraud"* against the applicant in the trustee's application. However, the court considered that the case could not be conveniently heard by a jury, as it would involve the consideration of bank statements and detailed financial documents. The judge therefore had no discretion to exercise.

However, the judge noted that if he was wrong on discretion, he was not convinced that it would not be right to refuse a jury trial simply on the basis that it would take longer or cost more. The judge also noted that there was no reason to suppose that a professional judge would be less sympathetic to a convicted criminal than a popular jury, and rejected the suggestion that a non-lawyer, or non-judge, was more likely to pay attention to purely human considerations.

Commercial Litigation

DIGESTED BY JAMIL MUSTAFA

RTI Ltd v MUR Shipping BV

[2024] UKSC 18 (Lord Hodge, DP, Lords Lloyd-Jones, Hamblen, Burrows and Richards)
Contracts—Force Majeure—Reasonable Endeavours
15 May 2024

The issue on this appeal to the Supreme Court was whether a party could rely on a force majeure clause, which was subject to a reasonable endeavours proviso, in circumstances in which the party affected had refused an offer of non-contractual performance from their counterparty to overcome the state affairs alleged to constitute a force majeure event.

On 9 June 2016, MUR Shipping BV (MUR) and RTI Ltd (RTI) entered into a contract of affreightment. MUR was the shipowner and RTI was the charterer. Under the contract, MUR agreed to ship bauxite from Conakry, Guinea, to Dneprobugsky, Ukraine, on a monthly basis, from 1 July 2016 to 30 June 2018. In return, RTI agreed to make freight payments to MUR each month in USD. The contract contained a force majeure clause, a proviso of which was that a specified event would only be a *force majeure* event if *"it cannot be overcome by reasonable endeavours from the Party affected."*

On 6 April 2018, the parent company of RTI was sanctioned by the US Department of the Treasury's Office of Foreign Assets Control ('OFAC'). As a majority-owned subsidiary of the parent, RTI was subject to the same restrictions as its parent company. MUR claimed that sanctions amounted to a force majeure event because RTI could

not make freight payments in USD as required under the contract (although, by the time of the appeal to the Supreme Court, it was common ground that the sanctions did not prevent payment in USD, but rather would have delayed the monthly freight payments). RTI contested this and offered to pay MUR in EUR, which MUR's bank could convert to USD, and further offered to indemnity MUR for any loss resulting from that conversion. MUR refused the offer.

Consequently, RTI commenced arbitration proceedings against MUR, claiming breach of contract. MUR denied the allegation of breach of contract on the basis that it was entitled to suspend performance in reliance on the *force majeure* clause. In response, RTI alleged that MUR could not rely on the force majeure clause because it had not complied with the reasonable endeavours proviso to that clause. The arbitrators found in favour of RTI. MUR appealed to the High Court. The High Court allowed MUR's appeal, but the Court of Appeal then, by a majority, allowed a further appeal by RTI. MUR appealed to the Supreme Court.

The Supreme Court allowed MUR's appeal. The Supreme Court held that, in the absence of express wording, a reasonable endeavours proviso did not require a party to accept an offer of non-contractual performance (in the present case, payment in EUR). There were several reasons why the Court reached this conclusion.

The purpose of a reasonable endeavours proviso was to maintain, not change, contractual performance. A reasonable endeavours proviso was concerned with the steps that the affected party could take to secure contractual performance, not some other performance. A failure to accept non-contractual performance did not cause non-performance of the contract. Furthermore, under the principle of freedom of contract, a party was entitled to not accept performance other than in accordance with the contract. In addition, under longstanding principle, the Court would not conclude that a party had, by contract, agreed to forego valuable rights unless there were clear words that showed that was their intention. In the present case, however, there was no doubt that, under the contract, MUR was entitled to insist on payment in USD and RTI's contention to the contrary was inconsistent with that principle.

The Court also considered that MUR's case that absent clear wording, a reasonable endeavours clause did not require acceptance of non-contractual performance, had the benefit of certainty and predictability, which was important within the context of English commercial law. Conversely, RTI's case, which required consideration of whether non-contractual performance would cause prejudice to the affected party and achieve the same result as contractual performance, gave rise to significant legal and factual uncertainty, and there was no good reason to create that uncertainty by departing from the performance provided for by the contract.

Celestial Aviation Services Ltd v UniCredit Bank GmbH

[2024] EWCA Civ 628 (Males, Snowden, Falk LJJ)
Contracts—Sanctions—Illegality—Letters of Credit
11 June 2024

Two sets of proceedings were brought in relation to letters of credit ('LCs') which related to the leases of aircraft to Russian companies. The relevant letters of credit related to leases which had been granted before the Russian Federation invaded Ukraine. The imposition of sanctions following the Russian invasion Ukraine triggered events of default under the leases which were terminated in March 2022. The defendant bank, however, refused to pay out under the letters of credit because of UK and US sanctions. The defendant bank subsequently obtained a licence to make payments to the claimants and reached an agreement in respect of the payment of the principal amounts under the letters of credit. The question remained, however, whether the bank was required to make payment of costs and interest.

At first instance, the Judge (Christopher Hancock KC (sitting as a High Court Judge) found in favour of the claimants. The Russia (Sanctions) (EU Exit) Regulations 2019 as amended by the Russia (Sanctions) (EU Exit) (Amendment) (No.3) Regulations 2022 (the 'Regulations') did not prevent payment under the letters of credit and that payment was also not prohibited under the rule in Ralli Brothers. At a further consequentials hearing, the Judge held that the defendant bank could not rely on section 44 of the Sanctions and Anti-Money Laundering Act 2018 (SAMLA) to refuse to pay out under the letters of credit.

The Court of Appeal allowed the defendant bank's appeal in part. The Court of Appeal reversed the decision at first instance that the Regulations did not prevent payment under the letters of credit. In particular, the Court of Appeal held that payment was prohibited by Regulation 28(3)(c) of the Regulations, which provides that:

"(3) A person must not directly or indirectly provide financial services or funds in pursuance of or in connection with an arrangement whose object or effect is— … (c) directly or indirectly making restricted goods or restricted technology available— (i) to a person connected with Russia, or (ii) for use in Russia…"

The Court of Appeal concluded that payment under the LCs would be *"in connection with"* the leases, for which the LCs stood as security. The words *"in connection with"* did not require any causal or legal dependence. The question was simply one of factual connection. The LCs were only issued because of the leases and triggered by an assertion of default under the leases. Consequently, although when originally issued, the LCs were not caught by Regulation 28(3), paying out under them was clearly a provision of funds in connection with the leases. It was also immaterial that the leases had been terminated by the time that the demands were made for payment under the LCs. The purpose of the leases was to make aircraft available for Russian use or for use by a person

connected with Russia. The purpose of the Regulations, set out in Regulation 4, was to put pressure on Russia. In turn, the purpose of Regulation 28 was not simply to stop any further aircraft going to Russia by precluding financing arrangements that facilitated the supply of aircraft. Regulation 28 was a *"relatively blunt instrument"* that was intended to capture all objectionable arrangements to achieve the overall purpose of putting pressure on Russia. The bluntness of the Regulation's operation was tempered by the licensing regime and other legislative exceptions. Regulation 28(3) applied and payment under the LCs was prohibited.

The Court of Appeal also concluded that, if Regulation 28(3) did not apply (which it did), the defendant bank could not rely on section 44 of SAMLA to resist payment out under the LCs. While the Court of Appeal concluded that the defendant bank had formed a reasonable belief that payment under the LCs from March 2022 would be prohibited by Regulation 28(3) and was entitled to refuse to pay out under the LCs until it had obtained relevant licenses, the purpose of section 44 of SAMLA was to prevent a person from being pressurised into doing something that risks breaching sanctions by the fear of being exposed to civil proceedings. In other words, the provision protects against a liability created as a result of an act or omission taken in a reasonable belief that it is in compliance with sanctions legislation. Conversely, section 44 of SAMLA was not designed to protect against pre-existing liabilities. Consequently, it did not relieve a party from paying a debt which, but for the sanctions regime, would be lawfully payable, because exposure to a claim to recover the debt was not a new financial exposure which could pressurise payment. The Judge had awarded interest under section 35A of the Senior Courts Act 1981. The power of the Court to award interest under that provision was not independent of the claim for the underlying debt. Given that the underlying action for recovery of the debt was not barred, it followed that a claim to interest on that debt was also not barred. The same reasoning justified the conclusion that section 44 of SAMLA also did not prevent recovery of any costs in respect of the action to recover the debt.

The Court of Appeal also found against the defendant bank on the application of the *Ralli Bros* principle. Even if the US sanctions were potentially relevant, and so the rule in *Ralli Bros* potentially engaged, the defendant bank had made no reasonable efforts to obtain a licence from OFAC, and so could not rely on the rule in *Ralli Bros* to refuse to pay out under the Regulations.

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

[2024] EWCA Civ 639 (Phillips, Andrews, Falk LJJ)

Contracts—Corporate Finance—Sub-participation agreements

18 June 2024

The Claimant (Yieldpoint) had paid US$5m to the Defendant (Kimura) to participate in Kimura's 50% share of a facility agreement (the Facility). Yieldpoint claimed that the US$5m it had provided was a fixed term loan with a maturity date of 31 March 2022 (and was therefore not at risk), whereas Kimura contended that the transaction was a capital at risk investment whereby Yieldpoint's capital was exposed to underlying default risk in the nature of a sub-participation arrangement.

The relevant participation (the MTV Participation) was executed under the rubric of a master participation agreement (MPA) and provided funding in relation the Facility under which Kimura and another entity were joint senior lenders to MTV, a mining company based in Chile. The repayment date for the first tranche of the principal advanced to MTV was 31 March 2022. MTV defaulted on its obligations under the Facility before that date and was then declared bankrupt in Chile on February 2023.

Yieldpoint then commenced proceedings seeking to recover the US$5m it had paid to Kimura under the MTV Participation, along with unpaid interest and monthly price participations. At first instance, the Judge held in favour of Yieldpoint, and ordered Kimura to pay the principal amount of US$5m, with interest to be determined, to Yieldpoint. This was because the Judge concluded that the MTV Participation amounted to an unsecured fixed term loan and was not a conventional sub-participation in the Facility.

The Court of Appeal disagreed. The Court of Appeal agreed with the Judge that MTV Participation was a single trade made under the umbrella of the MPA and that it was inherently unlikely that the parties would have intended that the MTV Participation should not resemble a conventional sub-participation anticipated in the MPA. But this begged the question why, if the parties intended to undertake a different transaction, such as an unsecured loan, they did not jettison the MPA structure and enter a separate loan agreement. While the Judge recognised that clear language was required to alter the default sub-participation structure in the MPA, he considered that the inclusion of the "Maturity Date of the Participation" was sufficiently clear to warrant a departure from the standard sub-participation structure (the concept of a maturity date being alien to sub-participation).

The Court of Appeal, however, did not consider that those words warranted such a departure and concluded that the MTV Participation was a conventional sub-participation. The Court of Appeal gave several reasons for its view.

First, the Judge construed the words "Maturity Date of Participation" in the context of the parties' negotiations in respect of the MTV Participation. The Court of Appeal doubted the admissibility and relevance of those negotiations. But even if aspects of the negotiations regarding the fixed term nature of the transaction were

admissible, they did not have any real force. There was no discussion about what would happen if there were a default before the maturity date or an agreement that Yieldpoint would be paid in full in the event of such a default.

Second, the Judge's approach to construction erred in principle. The Judge considered whether the problems caused by countervailing provisions in the MPA and MTV Participation could be overcome by the additional weight attributed to the words "Maturity Date of Participation". But the correct approach was to read all of the contractual provisions together, to reach a consistent and coherent interpretation of the contract, and only if that is not possible, to determine which provisions should be given priority. The Court of Appeal concluded that, following this approach, it was very difficult to reach any other conclusion than that the MTV Participation was a conventional sub-participation with early redemption.

Third, the Judge also erred by proceeding on the footing that the MPA did not provide for any circumstances in which the participation agreement would end before the participation transaction, which undermined the conclusion that the inclusion of the maturity date fundamentally changed the nature of the transaction. Finally, the Court of Appeal also concluded that that Judge was wrong to discount the fact that the interpretation put forward by Yieldpoint (i.e., that the MTV Participation was a fixed term loan) was highly uncommercial, which suggested that Kimura would have agreed to transfer most of the benefit of US$5m from its share of the Facility without Yieldpoint having any capital at risk.

Company Law

DIGESTED BY PETER BURGESS

Mitchell v Al Jaber

[2024] EWCA Civ 423 (Newey, Arnold, Snowden LJJ)
Breach of fiduciary duty – Knowing receipt – Equitable compensation - Loss **26 April 2024**

This appeal raised issues regarding the liability of Sheikh Mohamed Al Jaber (the "Sheikh") for breach of fiduciary duty and of JJW Limited ("JJW Guernsey") a Guernsey company, for knowing receipt.

The Sheikh was an international businessman and the founder of companies operating in the commercial property, finance, hospitality and food industries. He was the sole shareholder and a director of MBI International & Partners Inc (the "Company"), a BVI company. The Company was placed into liquidation in 2011, with various appointees since. From 2019, Mr Greig Mitchell and Mr Kenneth Krys had been the appointed liquidators (the "Liquidators").

The Liquidators alleged that, in the period before the Company went into liquidation, the Sheikh and his daughter acted in breach of duty "in denuding the Company of its assets". The judge below did not consider those claims to have been made out, and also rejected allegations in respect of the 129,000 shares in a certain company (JJW Inc) which the Company had acquired by the end of January 2009 and, as regards the Sheikh and his daughter, of unlawful means conspiracy. However, the Judge concluded that the Sheikh had acted in breach of duty in causing the 891,761 shares in JJW Inc to be transferred into JJW Guernsey's name and that JJW Guernsey was liable to account as a constructive trustee as a result of its receipt of those shares. On that basis, the Judge ordered the Sheikh and JJW Guernsey to pay the Liquidators €67,123,403.36 as equitable compensation on a joint and several basis.

There were three issues on the appeal: (a) whether the Sheikh had committed a breach of duty (the "Liability Issue"); (b) whether any equitable compensation should have been awarded even if the Sheikh had committed a breach of duty (the "Compensation Issue"); and (c) whether the 891,761 shares in JJW Inc were subject to an unpaid vendor's lien (the "Lien Issue")?

Newey LJ (with whom Arnold and Snowden LJJ agreed) gave the judgment. On the Liability Issue, he considered that the Judge had been correct to hold that the Sheikh had committed a breach of fiduciary duty in transferring the shares. The Sheikh caused title to the 891,761 shares to be transferred away from the Company through the execution of share transfer forms which he had no right to execute. While the Sheikh was a director of the Company both in 2010, when the share transfer forms were supposedly executed, and in 2016, when they were in truth executed, a stranger who had never been a director of the Company should equally be deemed to have acted wrongfully if he had procured the transfer of shares in the Company by pretending to be a fiduciary (whether a director or a liquidator) with power to do so. On the Compensation Issue,

Newey LJ disagreed with the Judge, holding that the Liquidators had not established any loss. There was no proper evidential basis for a finding that the Liquidators would have been any better off if the share transfer had never happened. They would have retained the shares, but those shares would still have become valueless. On the Lien Issue, Newey LJ agreed with the Judge's reasoning.

As a result of these findings, the Court of Appeal allowed both appeals and set aside the order that the Sheikh and JJW Guernsey pay equitable compensation. However, it considered that, if requested by the Liquidators, it would be appropriate to grant declaratory relief to the effect that the Sheikh did act in breach of fiduciary duty and JJW Guernsey had knowingly received the Company's property.

Jon Colclough

Re Tristan Oil Limited

(BVIHCM 0120 of 2003), Eastern Caribbean Supreme Court, BVI (Paul Webster J)

Schemes of Arrangement - Interested Parties - Applications to Set Aside Sanction Orders

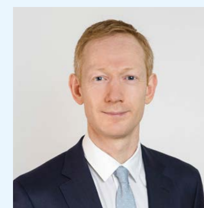
19 March 2024

On 1 November 2023, Mangatal J sanctioned a scheme of arrangement (the "Scheme") advanced between Tristan Oil Ltd (the "Company"), a BVI incorporated entity, and certain of its creditors (the "Scheme Creditors"). The Company then took steps to implement the terms of the Scheme and sought (and obtained) recognition of the Scheme/Sanction Order in the United States. The Scheme operated so as to vary the existing rights of the Scheme Creditors against the Company. By doing so, it enabled the Company to borrow further funding in order to fund the continued efforts of the successful parties to an arbitration award to enforce the award against The Republic of Kazakhstan ("Kazakhstan").

Following sanction, Kazakhstan and The National Bank of Kazakhstan (together the "Applicants"), neither of whom were Scheme Creditors sought, amongst other things, a declaration that they be declared "interested parties" for the purposes of the Scheme in order that they might advance applications to set aside the Sanction Order.

The Court dismissed the Applicants' applications. First, the Applicants were not "interested parties" for the purposes of the Scheme. Neither were creditors of the Company. The fact that the Applicants were resisting enforcement of the arbitration award in various jurisdictions, including on the basis that the award had been obtained by fraud, was not sufficient for these purposes. Second, and in any event, the Sanction Order was a final order, which the Court had no power to now revisit (including under a liberty to apply provision included in the Sanction Order, which was concerned with the implementation of the Scheme only). Third, even if there had been a power, there had been delay on the part of the Applicants in raising its concerns such that the Court would not, in the exercise of any discretion it might have, grant the relief sought.

Richard Fisher KC



Marcus Haywood

In the matter of Project Lietzenburger Straße Holdco S.à.r.l

[2024] EWHC 468 (Ch) and [2024] EWHC 563 (Ch) (Richards J)

Restructuring plan – Sanction – Consideration – Compromise or arrangement – Jurisdiction

4 and 7 March 2024

This was an application by Project Lietzenburger Straße Holdco S.à.r.L (the "Plan Company") for an order sanctioning a restructuring plan (the "Plan") under Part 26A of the Companies Act 2006 (the "CA 2006").

The Plan Company was incorporated in Luxembourg and part of a group (the "Group") that owned a development site on the "Ku'Damm", a well-known shopping boulevard in Berlin (the "Development"). The Development was the key asset of the Group and one of the largest uncompleted commercial real estate projects in Germany. The Development had suffered from substantial cost overruns; construction was substantially halted in January 2023 and came to a complete stop in May 2023. All three tranches of the Group's secured debt fell due for repayment on 28 November 2023. The Group failed to pay and had insufficient cash to do so.

Though the purposes of the Plan were disputed, as was the extent of the court's jurisdiction to sanction it, the Plan Company's position was that the purpose of the Plan was to restore the Group to solvency by: (i) restructuring the Group's secured debt; and (ii) enabling the provision of a substantial amount of new money to allow the completion of the Development.

It argued that the Plan Company had moved its centre of main interests ("COMI") to England and Wales so the court had jurisdiction.

One particular issue was that the Plan, as proposed and voted upon, contained a provision under which certain subordinated debt was to be cancelled for no consideration, giving rise to the issue of whether the Plan in this form constituted a *“compromise or arrangement”* with those creditors thereby engaging the court’s jurisdiction to sanction it. The convening order had been made, and the plan meetings held, before the Court of Appeal gave judgment in Re AGPS Bondco Plc [2024] EWCA Civ 24.

The Judge refused to sanction the Plan as it had been proposed and voted upon and refused to make amendments that the Plan Company sought. On the matter of consideration, he agreed with the *obiter* comments of Snowden LJ in Re AGPS Bondco that a *“compromise or arrangement”* in Part 26A does not include a confiscation or expropriation of rights without compensating advantage and a court has no jurisdiction to sanction a confiscation or expropriation of rights for no compensation under Part 26A. As a result, he held that he had no power to sanction the Plan.

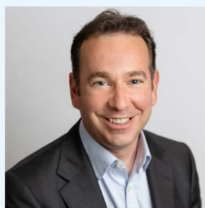
He also considered that he could not at that point sanction an amended plan that gave nominal consideration to the relevant creditors (the “Amended Plan”). While he considered that the convening order remained valid, the scheme of Part 26A required the proposal that must be put forward to constitute a *“compromise or arrangement”* for every class of creditor or member to whom it is directed. Since he had concluded it did not in relation to the subordinated creditors, Condition B of s 901A had not been satisfied and Part 26A had not been engaged. As a result, he had no jurisdiction to sanction the Amended Plan on the basis of the existing convening order and hearing. He did, however, consider that if he had had the power to do so, he would have sanctioned the Amended Plan by effecting a cross-class cramdown.

The Judge also made other factual findings, including concluding that the Plan Company’s COMI had been located in England following the date of a notice to plan creditors.

As a result of his judgment, the hearing that had initially started as a sanction hearing become a convening hearing to convene a further plan meeting to consider the Amended Plan. He was prepared to do so on just three business days’ notice. Further, he considered that since the subordinated creditors did not have any genuine economic interest in the Plan Company, there was no reason for them to be entitled to vote on the amended plan.

Following this order, the amended plan was voted upon at a new plan meeting at which the subordinated creditors were not represented. At a second hearing, the Judge was content that he had jurisdiction and sanctioned the plan.

Tom Smith KC

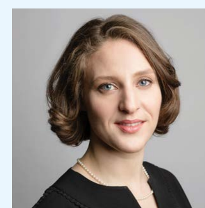

Daniel Bayfield KC

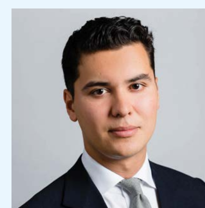
Adam Al-Attar KC

Georgina Peters

Charlotte Cooke

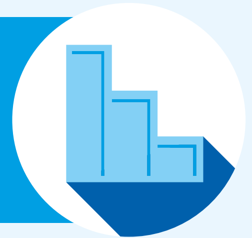
Ryan Perkins


Madeleine Jones


Edoardo Lupi

Corporate Insolvency

DIGESTED BY RABIN KOK AND IMOGEN BELTRAMI



NMC Healthcase Limited & Ors v Bank of Baroda & Ors

[2024] ADGMCFI 0007 (Justice Sir Andrew Smith)

Fraudulent trading – wrongful trading – continuance of companies in Abu Dhabi Global Market (ADGM) – impugned conduct prior to continuance in ADGM – whether statutory discretion to order relief for fraudulent or wrongful trading in respect to such conduct - impugned conduct in part prior to the enactment of statutes themselves – retrospectivity – whether statutory discretion to order relief for fraudulent or wrongful trading based on pre-enactment conduct – sufficient connection – whether it is necessary for there to be a sufficient connection between the respondent and the ADGM for such relief to be granted

8 July 2024

If a company incorporated in a given legal system is operated in a way that amounts to fraudulent or wrongful trading and that company is continued (reincorporated) in a different legal system, can the courts of the latter legal system grant relief for fraudulent or wrongful trading?

The ADGM CFI has answered 'yes' to this question. It has also answered 'yes' to the question of whether relief can be granted in respect of impugned conduct that occurred prior to the enactment of the relevant ADGM statutes that permit an officeholder to apply for such relief. The ADGM CFI also held that it was not necessary for there to be a sufficient connection between the defendant and the ADGM and that other connecting factors might suffice such as other, related claims in the ADGM.

These answers were given by Sir Andrew Smith J after a trial of five preliminary issues heard on 3 and 4 June 2024.

The essential premise of the judge's conclusion is that fraudulent and wrongful trading as enacted in the ADGM (whose legislation on this topic is derived from and materially identical to the UK legislation) are in the nature of statutory discretions, rather than causes of action that vest contemporaneously with the impugned conduct or any resulting loss. The application of that discretion to conduct prior to a company's reincorporation in the ADGM, or even prior to the enactment of the ADGM statutes themselves, did not breach fundamental principles of the conflict of law or territoriality or non-retrospectivity because the court could account for any unfairness that might otherwise result in the exercise of its discretion. As to assertions of inherent unfairness, the court rejected these because most systems of law recognise the duties of directors to consider creditor interests in circumstances of insolvency. The similarity of legal norms is all the more obvious when the impugned conduct is fraudulent.

In so holding, Sir Andrew Smith applied the guidance given by Chadwick J in *Howard Holdings Inc* [1998] BCC 549. In that case, a Panamanian company had been wound up in the UK as an unregistered company. Its business had been carried on from Monaco by its directors. The Panamanian law of incorporation and its application to questions of directors' duties (under English law principles of private international law) was held not bar relief for wrongful trading. Chadwick J held that any differences in the standard of conduct applicable contemporaneously could be account for by the court in the exercise of its discretion under section 214 of the UK Insolvency Act 1986.

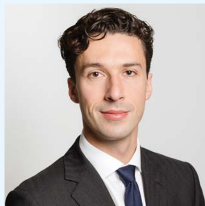
Sir Andrew Smith held that the answer should be no different in the case of a UAE company in 'onshore' Dubai or Abu Dhabi continued in the ADGM. The nature of continuance was to change the law of incorporation, as opposed to winding up the entity in question and transferring its assets to a new entity. There was therefore no strained construction of the ADGM statutes in recognising that *'the Company'* in respect of which relief was ordered was the same company that carried on business pre-continuance in a fraudulent or wrongful manner. This was so even in relation to wrongful trading which could apply to a person who was a director under another system of law and who could not, subjectively, have foreseen an ADGM liquidation or an ADGM administration. The test for wrongful trading was capable of objective application to a defendant in the position of a director of *'the Company'*.

Sir Andrew Smith also held that a sufficient connecting factor between the defendant and the ADGM was not invariably or necessarily a pre-condition to relief and that a connecting factor sufficient for the grant of relief could be found in other, related claims in the ADGM. A feature of the claims in the case before him was that all claims were pleaded on the same facts under multiple systems of law, being the pre-continuance UAE law and ADGM law.

The case also dealt with UAE specific points concerning retrospective law-making within the ambit of the UAE constitution. Sir Andrew Smith held, in reliance on Union Supreme Court and Abu Dhabi cassation decisions, that the UAE constitution permitted

retrospective law-making – for laws to have effect prior to the time of their enactment – in the sphere of public order, and that bankruptcy was characterised in the UAE as an aspect of public order.

Tom Smith KC


Adam Al-Attar KC

Georgina Peters

Re Toogood International Transport Agricultural Services Ltd

[2024] EWHC 1425 (Ch) (HHJ Paul Matthews)
Administration extensions – Creditor consent – Secured creditors
11 June 2024

Toogood entered administration on 21 June 2022, so its administrators' initial year-long term of office expired on 20 June 2023. The administrators sought an extension by the consent of the company's secured creditors and its unsecured creditors pursuant to para 78(1) of Schedule B1. When they applied for a further, court-ordered extension ahead of 21 June 2024, the Court had to examine the validity of the previous, consensual, administration.

Toogood had three secured creditors when administration began. The administrators only sought the express consent of one HSBC UK Bank plc, because the other two secured creditors had been paid during the course of the administration.

The Judge, therefore, had to decide whether the paid secured creditors remained 'secured creditors' or even 'creditors' because they held an unsatisfied charge at the outset of the administration, even though the charge had later been paid off. He held that the paid parties were secured creditors no longer. Following the decision of ICC Judge Prentis in Re Pindar Scarborough Ltd [2024] EWHC 908 (Ch), Judge Matthews held that the definition of 'secured creditor' in section 248 IA 1986 is in the present tense, and refers only to those who are presently secured creditors, not those who have been paid.

The only reason there was uncertainty over this obvious result was because a 2022 Insolvency Service consultation response expressed the government's "longstanding" policy that all creditors who were creditors at the start of the administration should be asked to consent to extensions, even if paid off. But HHJ Matthews, like ICC Judge, held that this policy had no expression in the Act or the Rules and could not override primary legislation.

Taytime v Secretary of State for Levelling Up, Housing and Communities

[2024] EWHC 1053 judge (Mrs Justice Lang DBE)
Liquidators' powers – Agency – Delegation
7 May 2024

A company, Monk Lakes Ltd, entered CVL. Before that, it had launched an appeal against certain decisions to refuse planning permission. Once Monk Lakes entered CVL, its liquidators appointed another company, Taytime, to *"take over full responsibility for the above-listed planning appeal"*.

The planning inspector concluded that it was impermissible for Taytime to pursue the appeal as agent of the liquidators, and refused the appeal. Taytime applied for a review of the inspector's decision under planning legislation, and that review came before Lang J in the Administrative Court.

Para 12, Part III, Schedule 4 of the Insolvency Act 1986 expressly allows a liquidator to *"appoint any business which a liquidator is unable to do himself"*. Having been taken to these authorities, Lang J concluded that what the liquidator's had done was impermissible. A liquidator can legitimately engage agents (such as solicitors) to conduct litigation and thereby exercise discretionary powers conferred on liquidators. However, *"major decisions"* such as the supervision of the litigation itself or the actual decision to sell, had to be taken by the liquidator him or herself.

In the present case, Taytime itself was pursuing the planning appeal as agent. The appeal should have been brought in the liquidators' name, though Taytime could legitimately have been engaged to assist with it.

Smithson v L'Occitaine Ltd

[2024] EWHC 474 judge (Meade J)
Section 234 – Insolvency set-off – Cross-claims **7 February 2024**

Rule 14.25 of the Insolvency (England and Wales) Rules 2016 imposes mandatory and self-executing insolvency set-off. The claims of the Company against any creditor seeking to prove their debt must be set off against claims by that creditor, who can prove for the balance.

In *Stein v Blake* [1996] AC 243, Hoffman LJ explained that this process replaces the right of action owned by the company and the right of action owned by the creditor with a single right of action that represents the result of the set-off. So, if the Company is owed a balance after insolvency set-off, it will own a right in action (a debt) to sue the creditor for that balance. The Company (acting by the office-holders) may then enforce this right of action.

In *Smithson*, the liquidators argued that, as consequence, they could reclaim the debt owed by an action under section 234 of the Insolvency Act 1986 (thereby avoiding debt recovery proceedings outside of the insolvency court process).

Section 234 empowers a liquidator (or administrator) to apply to Court to require a person to pay or deliver up the Company's property.

In *Smithson*, the liquidators argued that the post-set-off balance due to the Company was a form of property held by the creditor capable of recovery under section 234. Meade J disagreed. All the Company had after insolvency set-off had been effected was a chose in action enforceable by action against the creditor in the normal way.

Re KMG SICAV-GB Strategic Land Fund

[2024] EWHC 1069 judge (Deputy ICC Judge Kyriakides)
Unregistered companies – Collective investment schemes – Winding up petitions – SICAVs – Protected cell companies – Variable capital companies – Unincorporated associations **10 May 2024**

The Petitioner, a local council administering a pension fund, sought to wind up a sub-fund of a Luxembourg SICAV that had invested in a large number of UK properties. A SICAV is a collective investment vehicle created by Luxembourg company law. Each SICAV can contain a number of sub-funds. Each sub-fund is a separate pool of assets. Investors who invest in one sub-fund only have rights against that sub-fund. SICAVs therefore allow fund managers to allocate risk by insulating one pool of assets from liabilities incurred in relation to another pool of assets.

Deputy ICC Judge Kyriakides had to decide whether a sub-fund of a SICAV ("the Sub Fund") could be wound up as an unregistered company under section 220 of the Insolvency Act 1986. The primary issue was whether the Sub Fund was a type of entity which qualified as an unregistered company for the purposes of section 220.

The Judge held that the Sub Fund could not be wound up under section 220. Section 220 did not permit the Court to wind up entities which were not "companies" or "associations". The Petitioner accepted that the Sub Fund was neither, and so it could not be wound up under section 220.

The Sub Fund had no contributories and had no directors or even management. The Sub Fund could not itself acquire rights or incur obligations – only the SICAV itself could do that. The Sub Fund's assets were not its own but were assets of the SICAV. The sole function of the Sub Fund mechanism was to segregate and limit liabilities between the SICAV's different pockets of assets.

In these circumstances, the Judge held that the Sub Fund could not be wound up under the Insolvency Act 1986.

Re a Company

[2024] EWHC 1070 (Ch) (Deputy ICC Judge Jones)
Foreign judgments – Winding up petitions – Limitation periods **8 May 2024**

The Petitioner sought to wind up the Company based on a Lebanese judgment for c. US$776,000. The judgment was not registered under any of the statutory enforcement regimes, and no action on the judgment had been brought at common law. The Court was asked to decide whether a petition could be brought on an unregistered foreign judgment, and if so, whether limitation stood in the way of the petition.

Richards J's decision in *Drelle v Servis-Terminal LLC* [2024] EWHC 521 (Ch) was handed down the day before the hearing. In that decision, Richards J found that a bankruptcy petition could be based on an unrecognised foreign judgment: such a judgment is a 'debt' for the purposes of the 1986 Act. Deputy ICC Judge Cheryl Jones agreed

that this was also true in winding-up proceedings and so, she held, the Company could be wound up based on the unrecognised Lebanese judgment.

The Judge then turned to the limitation point. This was more complex. In *Jamal v Christiansen* [2016] EWHC 2261 (Ch), the Court had assumed that the 'simple contract' limitation period of six years applied to actions upon judgments. But in *Tasarruf Mevduati* [2007] EWCA Civ 799, the Court of Appeal had assumed that the 'judgment' limitation period in section 24 of the Limitation Act 1980 applies. Under that section, limitation starts to run when a judgment becomes enforceable. The Judge held that section 24 of the Limitation Act 1980 applied. A foreign judgment was not a 'simple contract' but was sui generis. However, this did not stop the petitioner from applying to wind up the Company – the Limitation Act 1980 did not apply in winding up proceedings.

William Willson

Re People's Energy (Supply) Ltd

[2024] EWHC 1367 (Ch) (Hildyard J)

Scheme of arrangement – Jurisdiction - Class composition

9 May 2024

On 9 May 2024, Mr Justice Hildyard sanctioned a scheme of arrangement proposed by People's Energy (Supply) Limited (the "Company"). The Company is incorporated in England, but its parent is incorporated in Scotland (the "Parent"). Both companies are in administration.

Prior to its administration, the Company was a retail energy supplier and suffered a data breach affecting accounts relating to approximately 300,000 customers (the "Data Breach"). It was therefore possible that some of these customers held data breach claims against the Company and/or the Parent. The Scheme as originally proposed was promoted in order to deal with the data breach claims as well as other creditor claims against the Company.

The Scheme itself set a bar date by which claims could be made against the Company (the "Claims Submission Deadline"). If claims were not made by the Claims Submission Deadline, they would be released against both the Company and the Parent. Claims that were made by this deadline would be subject to an out-of-court adjudication process led by the Scheme Supervisors, with the opportunity for disputed claims to be referred to an independent Scheme Adjudicator. The benefit of this process was a more efficient resolution of claims in comparison to the alternative to the Scheme, which would require claims to be established in a court process. The joint administrators of the Company forecast 100% recovery for all Scheme Creditors following the successful establishment of a claim via this adjudication process.

After the convening hearing, at which Richard Smith J directed that a scheme meeting could be held for a single class of scheme creditors to consider, and if thought fit, approve the scheme, the possibility of a new claim type emerged. Specifically, it was possible that some previous or existing customers of the Company could hold misrepresentation claims against it. In light of this, the Company chose to delay the scheme timetable and push back the scheme meeting by three months in order to give any customers with misrepresentation claims the opportunity to participate and vote on the Scheme.

The effect of the emergence of the possible misrepresentation claims, was that in addition to adjourning the meeting, the Company amended both the Explanatory Statement and Scheme Document before re-circulating the same to all existing Scheme Creditors as well as any customers of the Company who could hold a misrepresentation claim. The Company made significant efforts to ensure that all possible Scheme Creditors were informed of the Scheme, notified about the amended timetable and knew how to vote at the scheme meeting. The court was satisfied that following these efforts, the adjourned scheme meeting once held had been validly convened and that the vote at that meeting was representative of the class.

Hildyard J also held that the emergence of an additional possible claim type failed to fracture the single class of Scheme Creditors. This is because all claims against the Company (including any successfully made out misrepresentation claims) would rank as unsecured claims and all Scheme Creditors would benefit from the same set of post-Scheme rights including earlier payment of claims submitted prior to the Claims Submission Deadline.

The Court also considered that there were no blots on the Scheme. In particular, Hildyard J considered the releases of the Company and the Parent facilitated by the Scheme and held, on the ricochet basis, that it was *"proper and in fact necessary"* if the Scheme was to have proper effect, to include those releases. In addition, it was held that the Scheme would likely be effective in Scotland.

In sanctioning the Scheme, Hildyard J considered that certain objections raised by an individual at the Sanction Hearing did not have *"sufficient substance in them to destabilise or refuse to sanction the Scheme"*. Some of those concerns related to the administration of the Company rather than the Scheme, and the rest were largely assuaged during the hearing, including in relation to the burden of proving scheme claims and how documents relevant to scheme claims could be accessed

Daniel Bayfield KC

Imogen Beltrami

Re PlusHolding GmbH

[2024] EWHC 828 (Ch) (Rajah J)
Restructuring - Scheme meetings - Modification **21 February 2024**

Mr Justice Rajah sanctioned a Part 26 scheme of arrangement (the "Scheme") proposed by PlusHolding GmbH (the "Company"). The Company is owned by Phoneix BidCo 2 GmbH (the "Parent"), and the Parent itself is owned by PlusInvestment GmbH. These entities all formed part of the "Group".

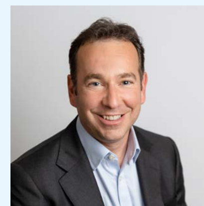
The Group was principally financed by certain borrowings guaranteed by the Parent and with an aggregate amount outstanding of c. EUR 265 million (the "Term Facilities"). The Term Facilities were due to mature on 31 August 2024, and the Company considered itself unlikely to be able to refinance them. As such, the Scheme was proposed, the alternative to which was a highly value destructive distressed sale.

The Scheme was required because approximately 3.88% by value of the "Scheme Creditors" were collateralised loan obligations vehicles (the "Vehicles"), which were unable to actively consent to any maturity extension of the Term Facilities due to either fund constitutional or governance reasons. The Vehicles abstained from voting on the Scheme; all other Scheme Creditors voted in favour.

Following the scheme meeting, it became apparent that the Company would not be able to obtain a ruling from a German tax authority permitting certain aspects of the planned restructuring. This was a condition precedent of the Scheme, which needed to be revised as a result. The revised Scheme included an economic proposal for the Scheme Creditors in commercially identical terms (in all material respects) as that originally considered at the scheme meeting. A revised Explanatory Statement and associated documents were circulated to Scheme Creditors, all of whom consented (or confirmed their non-objection) to the revised Scheme.

The Court accepted that the revised Scheme achieved the same economic outcome for the Scheme Creditors as the original proposal and was satisfied, upon review of the applicable jurisprudence, that the Scheme, as modified, was substantially the same as that voted upon at the scheme meeting. As such, theCcourt was satisfied that the assent of the Scheme Creditors at the scheme meeting was not undermined by the modification.

Finally, Mr Justice Rajah considered that the elements required for sanction of the Scheme were satisfied, and that the Scheme would likely be recognised in Germany (the incorporation location of the Company and other obligors). As such, the Scheme was sanctioned.



Daniel Bayfield KC

Charlotte Cooke

Tele Columbus

[2024] EWHC 181 (Ch) (Hildyard J)
Jurisdiction - Relevant alternative - Foreign entities **1 February 2024**

On 1 February 2024, Hildyard J ordered the convening of a single meeting of creditors of Tele Columbus AG (the "Company") to consider, and if thought fit, approve a scheme of arrangement (the "Scheme").

The Company is a public company with both its incorporation and centre of main interests (or "COMI") in Germany and no business or presence in the UK. The Company and its subsidiaries (the "Group") comprise a leading fibre-optic network operator in Germany. The Company's primary activity is holding the shares in its subsidiary companies including the operational subsidiaries of the Group.

The Company had a number of financial liabilities comprising (i) EUR 650 million of senior secured notes issued pursuant to an indenture (the "Notes"); and (ii) outstanding borrowings totalling EUR 462 million under a facility agreement (the "SFA"). Both the Notes and the SFA were governed by English law and nearing maturity at the time of the hearing. The "Noteholders" and "Lenders" under the SFA comprised the Scheme Creditors.

The Group faced a number of short-term liquidity issues and longer-term commercial challenges which created a need for further equity investment to ensure its continued and successful operation. As such, via the Scheme, the Company proposed to extend the maturity dates of both the Notes and the SFA and execute a number of amendments to the underlying financial documents. Upon those amendments, a third party-funder would provide a capital contribution of EUR 300 million to the Company.

A formal insolvency was identified relevant alternative to the Scheme. Under the Scheme, Scheme Creditors were projected to be repaid in full, whilst in the relevant alternative of a formal insolvency, the Scheme Creditors would recover between 66.7 and 76.5% of their debt. Prior to the convening hearing, over 90% of Scheme Creditors had also acceded to a lock up agreement which bound relevant Scheme Creditors to support the Scheme in advance of the Scheme Meeting in exchange for certain fees.

The Court considered that it was appropriate for the Scheme Creditors to vote in a single class. This was because the *"economics received by each Scheme Creditor [were] as close to identical as possible"* and the lock up agreement itself failed to fracture the class as it neither prevented nor impeded the Scheme Creditors from consulting together with a view to their common interest. All Scheme Creditors were given equal opportunity to accede to the lock up agreement and the Scheme would affect the rights of every Scheme Creditor in the same way. Further, the consent fees were not sufficiently material as to fracture the class.

TheCcourt also considered whether the fact that the Company had no business or operations in the UK constituted a jurisdictional roadblock to the Scheme.

In assessing this factor, Hildyard J noted that the jurisdiction of the English Court to approve a Scheme is broad, and has been held to apply to unregistered companies including foreign entities, if they are liable to be wound up under the Companies Act 2006. The Court confirmed that only a *"sufficient connection"* with the jurisdiction must be demonstrated, and that the requirements necessary to demonstrate when applying to wind up a foreign company need not be satisfied in order to trigger the Scheme jurisdiction. Hildyard J considered the key question to be whether sanction of the Scheme would *"extend the jurisdiction beyond its proper bounds"* given that the only connection was through its borrowing arrangements.

The Court confirmed that the sanction hearing is the proper stage to definitively determine whether there exists a jurisdictional roadblock to the Scheme. However, Hildyard J did not consider it apparent that the Scheme was bound to fail on the jurisdiction ground, particularly given that the lending arrangements were all governed by English law. The Notes were originally governed by New York law, but, in line with prior authority, the Court accepted that a change in jurisdiction clause for the purpose of opening the gateway to the English scheme jurisdiction was appropriate.

Finally, the Court also considered that whilst again not the proper stage to consider the matter, that there was sufficient reason to believe that the Scheme would likely be effective internationally, and that to sanction it would not constitute acting in vain.

Tom Smith KC

Adam Al-Attar KC

Personal Insolvency

DIGESTED BY LOTTIE PYPER

Kireeva v Zolotova

[2024] EWHC 552 (Ch) (ICC Judge Greenwood)

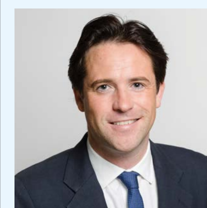
Foreign recognition – Russian trustee in bankruptcy – Sanctions – Bankrupt's estate

13 March 2024

The Claimant ("K") was the Russian Trustee and Bank Manager of Mr Georgy Bedzhamov ("B"), her appointment having been recognised at common law in November 2022 (pursuant to the "Recognition Order"). This was K's application for strike-out or summary judgment in respect of certain paragraphs of a defence filed by the Defendant ("Z") in Part 7 proceedings commenced by K in respect of a share held by Z that K alleged was part of the bankruptcy estate and had therefore vested in her following the Recognition Order.

K was successful in obtaining an order striking out two aspects of Z's defence. First, the Judge held that since the Russian bankruptcy had been recognised by the unchallenged Recognition Order, K's standing could not be challenged in these proceedings, as Z purported to so. This was so even if the original bankruptcy debt had been discharged, as this did not necessarily mean that the Russian bankruptcy proceedings had terminated. Second, the Judge held that Z's defence that the proceedings were being pursued for a collateral purpose had no real prospect of success.

The Judge declined to strike out the parts of Z's defence dealing with (1) the effect of the Recognition Order on B's moveable property, (2) the possibility that the share in dispute was subject to the Sanctions Regulations, and (3) the possibility that the instant proceedings involved an arrangement involving K that comprising maintenance and/or champerty. These issues were not clear-cut and it was appropriate for them to proceed to trial.



William Willson

Roseanna Darcy

Drelle v Servis-Terminal LLC

[2024] B.P.I.R. 496 (Richards J)
Appeal against bankruptcy order – petition debt – Section 267 – Foreign judgments **11 March 2024**

The Appellant ("D") sought to appeal against a bankruptcy order made against him. The bankruptcy petition had been presented by the Respondent ("S") on the basis of a judgment obtained in Russia, which resulted in D owing S a debt of RUB 2 billion (approximately £17.7 million). S had not sought to recognise the judgment in the UK, but simply presented a bankruptcy petition based on the judgment debt. A contended that an unrecognised foreign judgment debt did not satisfy section 267(2)(b) of the Insolvency Act 1986, which requires a petition to be based on a liquidated debt which is "payable… either immediately or at some certain, future time". Agreeing with and applying Sun Legend Investments v Ho [2013] B.P.I.R. 533, where District Judge Musgrave found that an unrecognised Hong Kong judgment satisfied section 267, Richards J dismissed the application on the basis that the foreign judgment debt constituted a debt for the purpose of section 267(2)(b), whether it was recognised or not. The appeal was therefore dismissed.

Mark Phillips KC

Clara Johnson

Boris Franz Becker (a bankrupt) v Mark Christopher Ford and others

[2024] EWHC 1001 (Ch) (Chief ICC Judge Briggs)
Bankruptcy – Suspension of discharge – Lifting of suspension – Cooperation with trustee in bankruptcy **1 May 2024**

On 21 June 2017 the Applicant, the professional sportsman Boris Becker ("B"), was made bankrupt. On 31 May 2017, his trustees in bankruptcy obtained an interim and then final order (the "Suspension Order") suspending the otherwise automatic discharge of his bankruptcy after one year pursuant to section 279(3) of the Insolvency Act 1986. B now sought to lift the Suspension Order.

The Suspension Order was obtained on the basis that B had failed and was failing to comply with his obligations under the Insolvency Act 1986. Since the making of that order, he had been prosecuted on over 25 charges for offenses in the Insolvency Act 1986, found guilty on 4 of them and sentenced to 18 months in prison in April 2022. He was ultimately deported on 15 December 2022 following his early release.

B sought to lift the Suspension Order, contending that he had now complied with his obligations. The Judge noted that B's past conduct "is not a relevant factor to take into account" when deciding if B had indeed complied with his obligations. Save for the provision of certain trophies, which B did not know the location of, there were no other unresolved matters.

The Judge noted, inter alia, that it was sufficient if the debtor had demonstrated that he was cooperating with the officeholders and had done all that they could reasonably be expected to do in the circumstances. In this case, B clearly fell "on the right side of the line" in terms of cooperation. B's application was granted.

Williams v Williams

[2024] EWCA Civ 42 (Nugee LJ)
Trusts – Joint tenancy – Tenancy in common – Survivorship **1 February 2024**

This case provides an important clarification on the circumstances in which equitable interests in shared property will be held by way of tenancies in common rather than as a joint tenancy.

A man called Mr Williams held the tenancy of a farm in South Wales. He worked on the farm all his life. He later worked on the farm in partnership with two others: his wife, Mrs Williams, and his son, Dorian. The three of them later acquired the freehold of the farm, and the freehold title was put into the names of the three of them. However, there was no express declaration as to their beneficial interests in the property.

When Mr Williams died, a dispute arose regarding the beneficial ownership of the freehold of the farm. It was accepted that Mr Williams, Mrs Williams, and Dorian were all co-owners. The dispute turned on whether the beneficial ownership of the freehold title was held subject to a joint tenancy, or as tenants in common, which in turn

determined whether "survivorship" applied following the death of Mr Williams.

Dorian argued that the farm was held subject to a joint tenancy. He relied on the case law concerning cohabiting couples, particularly *Stack v Dowden* and *Jones v Kernott*. He argued that where property was held by two or more persons at law, the starting point was also a joint tenancy in equity.

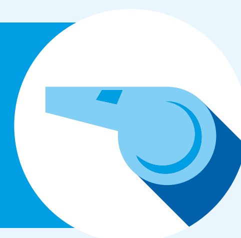
The Court of Appeal held that those principles did not apply: the property was held subject to tenancies in common. It was unexceptionable that the legal owners of property would generally be taken to be the equitable owners, absent a contrary intention. However, it did not follow that the equitable owners held their interests by way of a joint tenancy, rather than tenancies in common.

The critical point of distinction in this case was that the individuals had acquired their interests for business purposes. It was well-established that equity would normally assume that co-owners who acquired property for business purposes did not intend survivorship (and so, did not intend a joint tenancy). The decisions in *Stack v Dowden* and *Jones v Kernott* applied to cases where the context was cohabitation of a family home, and did not undermine this principle.

As a result, in order to determine whether property is held beneficially by way of a joint tenancy or tenancies in common, it is necessary to consider the particular context in which legal title is acquired.

Sport

DIGESTED BY PHILLIP JUDD



CJEU Sports Governance Cases

European Superleague Company (Ref: C-333/21); International Skating Union (Ref: C-124/21 P); and Royal Antwerp Football Club (Ref: C-680/21), Court of Justice of the European Union

At the end of December 2023 the CJEU issued three rulings concerning the power of sport governing bodies. The cases were *European Superleague Company* (Ref: C-333/21), *International Skating Union* (Ref: C-124/21 P), and *Royal Antwerp Football Club* (Ref: C-680/21). In short, the Court determined that such governing bodies must comply with EU competition laws so far as their rules relate to 'economic' activities in sport. The judgments will have wider implications for the authorisation of competitions – such as the breakaway 'Super League' in issue in the first decision.

The facts of the Superleague decision may be familiar. 12 European clubs launched out on their own to form a new 'Super League'. FIFA and UEFA not only refused to recognise the league, but indicated that they would expel the clubs and individuals involved from the World Cup and Champions League. FIFA and UEFA's rules did indeed give them broad discretion to authorise such competitions, but the financial implications are enormous; they also have exclusive rights to commercialise the media associated with any events under their jurisdiction. The Super League brought a challenge in the Madrid Commercial Court which then made a referral.

The International Skating Union case touched upon the same issues. In essence, the International Skating Union's rules gave it power to authorise external competitions and penalise those in breach. The penalties were severe: those participating in unauthorised competitions could be banned for life from the Union's sanctioned competitions. The Commission had found that the Union's rules breached Article 101 TFEU in restricting competition, and the Union appealed the decision of the General Court upholding the Commission's decision.

The facts of the Antwerp Football Club decision differed slightly. The Belgian Football Association had adopted UEFA competition rules which required, for interclub competitions, the presence of eight 'home-grown' players, being players that regardless of their nationality had received training within the same national football association for three years.

The Court's decision in all three matters centred on the interpretation of Articles 101 and 102 TFEU, being provisions concerning anti-competitive agreements restricting competition and the abuse of a dominant position.

In the Superleague decision, the Court found that FIFA and UEFA's rules gave them an unfettered discretion to refuse to authorise external competitions. This power could be backed up by measures to penalise clubs or individuals transgressing that authority, but there was a danger that, in the absence of any framework governing its exercise, the power could be exercised in a discriminatory and disproportionate fashion. The rules making any new interclub football project subject to FIFA and UEFA's prior approval, and prohibiting clubs and players from those competitions, were unlawful as

there is no framework ensuring that they are exercised in a transparent, objective, non-discriminatory and proportionate manner. Similarly, the rules giving FIFA and UEFA exclusive control over the commercial rights acted to restrict competition, given their importance for media and consumers. The lack of framework and attendant concerns as to proportionality could not be justified in pursuit of the legitimate aim of sports regulation, and any framework should not only be publicly available but should not be discriminatory. In practice this means that external competitions should not be subject to more onerous requirements than those to which authorised competitions are subject.

In the International Skating Union, the Court similarly found that Articles 101 and 102 TFEU applied given the economic nature of the Union's rules, and that the Union's rules should be exercised on a non-discriminatory and proportionate manner. The Court in Antwerp Football Club found that the requirement for 'home-grown' players could breach Article 45 TFEU (concerning free movement) as it could indirectly discriminate against players from other Member States, and referred the issue as to whether those rules could restrict competition to the Belgian Court.

The essential relevance of these decisions is to confirm that sport does not sit outside of the EU's competition's rules, despite it receiving particular treatment under Article 165 TFEU (which specifies the objectives assigned to the EU as regards Article 6(e), which gives the EU competence to carry out actions concerning education, vocational training, youth and sport). It will also require governing bodies to formulate clear, objective, non-discriminatory and proportionate frameworks for the exercise of their rules as regards external competitions.

As the furore over the European Super League demonstrated, these competitions are big business. Whilst rules requiring prior approval are not necessarily unlawful, the governing bodies' grip over break-away competitions has been loosened.

New Members at South Square

We are thrilled to announce the arrival of barristers Joseph Curl KC, Rory Brown and Dhananjay Kumar to our practice, as well as the addition of Michael Lok as an Overseas Associate, Louis Doyle KC as an Associate, Hon James M Peck as an ADR Associate member and Professors Andrew Keay and Peter Walton as academic members.

Joseph Curl KC and Rory Brown

Joseph Curl KC and Rory Brown both join from 9 Stone Buildings, where they have spent the last 16 years and 14 years of their careers respectively.

Appointed Queen's Counsel in 2021, Joseph specialises in insolvency litigation. He is currently ranked as a leading silk in both the major legal directories, where he is praised for his *"forensic attention to detail and extensive expertise"* (Chambers and Partners 2024) and his *"tenacious and courteous advocacy style"* (Legal 500 2024).

Immediately before taking silk, Joseph was ranked Band 1 as a junior for Restructuring and Insolvency by Chambers and Partners 2021. He was Company / Insolvency Junior of the Year at the Chambers UK Bar Awards 2019.

Before joining 9 Stone Buildings, Joseph spent several years working in the restructuring department of DLA Piper UK LLP.

A highly experienced litigator, Joseph recently led successfully for the joint liquidators of the BHS Group in *Re BHS Group Limited (in liquidation); Wright v Chappell* [2024] EWHC 1417 (Ch), a five-week trial before Leech J involving complex claims against a number of former directors. The award made in this case is reputed to be the largest ever entered for wrongful trading under s.214 of the Insolvency Act 1986. Other recent work includes two appeals on standing to challenge an office-holder's conduct, which are now the leading authorities on this question in corporate and personal insolvency respectively: in the Court of Appeal in *Re Edengate Homes (Butley Hall) Ltd; Lock v Stanley* [2022] EWCA Civ 626, [2022] 2 BCLC 1; and in the Supreme Court in *Brake v Chedington Court Estate Ltd* [2023] UKSC 29, [2023] 1 WLR 3035, [2023] 4 All ER 1021.

He is one of the General Editors (with Louis Doyle KC and Professor Andrew Keay) of *Doyle, Keay and Curl: Annotated Insolvency Legislation* 2024 (12th edition); and the co-author (with Professor Andrew Keay and Professor Peter Walton) of *Corporate Governance and Insolvency: Accountability and Transparency*, published in 2022.

Joseph was appointed a Deputy Insolvency and Companies Court Judge in 2020.

Rory Brown has a commercial-chancery practice focusing on litigation in the areas of commercial dispute resolution and insolvency and trusts disputes, in particular the removal of trustees and protectors. His practice has a heavy emphasis on civil fraud, in particular investment fraud and asset recovery. He is a sought after trial and appellate advocate.

Rory is ranked as a leading individual in several categories across Chambers and Partners, Legal 500 and Chambers and Partners Global and High Net Worth guides: civil fraud, commercial chancery, insolvency, traditional chancery, and private client: trusts and probate. He is praised in the directories as *"a natural advocate, measured, meticulous and ruthless," "an excellent cross examiner and a persuasive advocate with the rare gift of coupling those skills with the ability to deal with clients and solicitors on the level"*, and *"highly recommended for his handling of insolvencies arising from large-scale frauds and multi-jurisdictional matters".*

His recent work includes *Lifestyle v Ahmed* [2024] UKSC 17 (rules of attribution of liability to directors for company wrongs, accounts of profits); *Armstrong v Carter* [2023] EWHC (18 month sentence for bankrupt's contempt of undertaking given in s236 examination); *Re. Robert Bull* (2023) (bankruptcy of bungalow tycoon with reported wealth of £1.9 billion); *Credico Marketing Ltd v Lambert* [2022] EWCA Civ 864 (utilities agency, non-competition covenants, restraint of trade) and [2022] EWHC 2114 (costs order set aside on successful appeal).

Much of Rory's practice involves giving strategic advice in multi-jurisdictional disputes, or has an international dimension involving difficult questions of the conflict of laws. He has advised and represented clients in respect of litigation at all levels in England and Wales as well as in the courts of the DIFC, and has also advised and assisted in substantial Bermuda, Jersey, and Hong Kong proceedings.

Rory regularly acts for liquidators, administrators, companies, creditors and trustees across multiple industry sectors including commodities, fashion, aviation, oil and gas, reinsurance, football, motor-racing, utilities, energy, banking and financial services. He has already appeared in over 35 reported cases, and has commonly led counsel teams in recent years.

Commenting on his move to South Square, Joseph said: *"No other chambers enjoys quite the same reputation for insolvency as South Square and joining this set feels like a natural fit with my practice.*

It was a difficult decision for us to leave 9 Stone Buildings after so many years and we are both extremely grateful to the staff and our colleagues for their support over the years.”

Rory said: *“The unparalleled knowledge, skills, and resources at South Square in my core practice areas will enable me to deliver an excellent service to my clients. I concur wholeheartedly with Joe’s sentiments about 9 Stone Buildings and its members and staff.”*

Also joining South Square at the same time as Joseph and Rory are new associate member Louis Doyle KC, a practising barrister at Manchester-based Kings Chambers where he will remain in full time practice, and new academic members Andrew Keay, Professor of Corporate and Commercial Law at the University of Leeds, and Peter Walton, Professor of Insolvency Law at Wolverhampton University.

Head of Chambers, Tom Smith KC said: *“We continue to go from strength to strength with this expansion of our membership. Joseph and Rory are both highly skilled and experienced barristers who will make a material difference to the already-excellent service we deliver to our clients.*

I am also delighted to welcome Professor Andrew Keay and Professor Peter Walton and Louis Doyle as associate members.”

Dhananjay Kumar

We are delighted to say that, from 2 July 2024, veteran commercial lawyer Dhananjay Kumar is joining chambers to grow our international presence.

Dhananjay is from the leading Indian law firm Cyril Amarchand Mangaldas (CAM), where he has worked for 17 years and he continues to serve as a partner for the firm’s Insolvency and Restructuring group. He joins chambers as a sole practitioner and his practice will be independent of his continuing practice as a CAM partner.

He has considerable depth and breadth of experience in Indian restructuring and insolvency, including both in-court and out-of-court restructurings, cross-border insolvency, banking and structured finance transactions, and special situations.

Dhananjay also has profound expertise in distressed debt trading and asset reconstruction matters.

Dhananjay’s wide-ranging work experience extends to corporate finance and project finance, focused mainly on the oil and gas, telecom and port sectors where he advises both lenders and developers.

As part of CAM, Dhananjay has:

- represented Indian as well as foreign creditors, acquirers and office-holders in high-stakes insolvency matters such as Essar Steel, Jet Airways, Videocon Group, Ruchi Soya, YES Bank, and Srei Group; and
- acted for many key players in the corporate finance and project finance space.

His pre-eminence in insolvency and restructuring has seen Dhananjay ranked in the leading legal directories, including a Band 2 ranking by Chambers and Partners, where he has been ranked for the past five years.

Dhananjay has the right of audience before all courts and tribunals in India. He was also called to the Bar in England and Wales in March 2022 via Gray’s Inn.

Furthermore, Dhananjay is a registered foreign lawyer with full registration with the Singapore International Commercial Court. He is also a Fellow and Member of INSOL International, Vice President of INSOL India, and a “NextGen” Member of the International Insolvency Institute.

James M. Peck

The Honorable James M. Peck joined South Square in January as an ADR Associate Member, but his longstanding professional connections with this set and our barristers go back decades of working collegially together on shared projects for clients and professional organizations.

Judge Peck is well known around the globe for his judgments on qualified financial contracts while serving as the Lehman judge during the Global Financial Crisis. After a decade in private practice at Morrison & Foerster chairing the firm’s cross border insolvency practice, he resumed his judicial career in January when he was appointed an International Judge on the Singapore International Commercial Court. His private professional focus is cross border insolvency and alternative dispute resolution. Judge Peck is highly regarded as a thought leader and expert in these two areas of practice. On multiple occasions, he has offered expert evidence in the High Court on scheme recognition.

Judge Peck served as a U.S. Bankruptcy Judge for the Southern District of New York from 2006 to 2014, and during that memorably unsettled period in the markets presided over the chapter 11 and SIPA cases of Lehman Brothers and its affiliates and a number of other major chapter 11 and chapter 15 cases. He became quite well known as a result of Lehman experience and was invited to speak on panels at professional conferences and universities all over the world.

By invitation, Judge Peck is a fellow of the American College of Bankruptcy and a member of the Panel of Recognized International Market Experts in Finance. He is a past president of the International Insolvency Institute, served on the board of governors of the National Conference of Bankruptcy Judges, and was judicial chair of the American Bankruptcy Institute's annual New York City Bankruptcy Conference. Judge Peck currently chairs the Business Bankruptcy Advisory Committee for the Southern District of New York and was invited to speak this year at the ILA conference in London and INSOL International in San Diego.

Judge Peck co-chaired the ABI's Advisory Committee on the Safe Harbors. He is a member of the Advisory Committee of the Asian Business Law Institute, is listed as a qualified member of mediation panels maintained by INSOL International, the Singapore Mediation Center, and the Singapore International Mediation Center, and has been included on the Panel of Arbitrators for Financial Services Disputes of the Hong Kong International Arbitration Center and the Panel of Arbitrators of the Singapore International Arbitration Center.

Michael Lok

South Square is delighted to welcome Michael Lok as an overseas Associate Member of Chambers.

Michael practises from Des Voeux Chambers at the Hong Kong Bar. Over the past decade, he has established a busy practice spanning all areas of commercial litigation and arbitration, with particular focus on bankruptcy, company and insolvency.

Over the years, Michael has participated in numerous insolvency and shareholders' disputes, consistently within South Square's major areas of practice. He has appeared in the Judicial Committee of the Privy Council (led by our very own Richard Hacker KC) as well as the Court of Final Appeal in Hong Kong. Michael's recent experience includes major winding-up proceedings in Hong Kong, such as Suning International Group Co., Limited and Fantasia Investment Holdings.

Michael's practice also enjoys an increasingly regional and international dimension. In addition to the Hong Kong Bar, Michael is one of the first batches of Hong Kong barristers to have passed the Greater Bay Area Legal Professional Examination. Michael is also granted rights of audience in the Astana International Financial Centre Court, is a Registered Foreign Lawyer of the Singapore International Commercial Court (SICC), as well as a registered legal practitioner under Part II of the Dubai International Financial Center (DIFC) Court. Michael also sits as an arbitrator, having been appointed to various lists of arbitrators.

Michael has been consistently ranked by various legal directories. According to Chambers and Partners (Global/Greater China, 2024), "*Michael is one of the most sought-after junior barristers in town. He is no doubt a guru of company law matters. On top of his superb legal skills, he always keep the client's commercial objectives in mind and is always able to identify the best possible strategy to serve those objectives*".

In addition to appearing in every level of Court in Hong Kong, Michael has acquired judicial experience, including sitting as a Master of the District Court of Hong Kong. Outside practice, Michael also performs a number of responsibilities. Since 2023, he has served as a Trainer on the Hong Kong Bar's compulsory Advocacy Course for pupils, as well as sitting on the Committee on Arbitration, Committee on Company Law and the Disciplinary Committee. Michael also continues to teach the Law of Business Associations as a Non-Clinical Lecturer of the University of Hong Kong. As a result of his passion in the area of the law, Michael co-founded the Company and Insolvency Law Society (COINS), a non-profit organisation, whose members consist of leading company, restructuring and insolvency professionals in the region. Members meet regularly to discuss pending legislation, law reform, and practice issues.

Joining South Square has been of particular personal significance to Michael, as his connection with Chambers went back to his undergraduate and postgraduate days in the UK. Michael served as Research Assistant to our Academic Member, Professor Sarah Worthington KC (Hon), in relation to two of her seminal Company Law textbooks *(Sealy and Worthington's Text, Cases and Materials in Company Law* and *Gower's Principles of Modern Company Law).* Michael then undertook mini-pupillage with the late Robin Dicker QC in 2013.

Michael is fluent in Chinese (Cantonese and Mandarin), and accepts instructions in connection with the abovementioned jurisdictions as well as arbitration (both as counsel and arbitrator).

MICHAEL LOK
DES VOEUX CHAMBERS, ASSOCIATE MEMBER OF SOUTH SQUARE

JOSÉ-ANTONIO MAURELLET SC
DES VOEUX CHAMBERS

Foo Kian Beng v OP3 International Pte Ltd (in liquidation) [2024] SGCA 10

In the recent decision of *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] SGCA 10 (dated 27 March 2024), the Singapore Court of Appeal upheld a director's breach of duty by authorising the payment of a dividend and the repayment of a loan to himself. The decision, considering *Sequana*, sheds further important light on the directors' duty to consider or act in the interest of the company's creditors, coined as "creditor duty".

The Facts – Briefly stated

OP3 International Pte Ltd ("OP3") was ordered to be liquidated on 3 April 2020 arising from its failure to satisfy a judgment sum by which it was ordered to pay in a lawsuit commenced in 2015 ("Lawsuit"). Mr Foo Kian Beng ("Mr Foo"), the sole director and shareholder of OP3, caused the company to pay him dividends and to repay loans that he had earlier extended to the company between 2015 and 2017, when the Lawsuit was ongoing. The liquidators of OP3 brought a claim against Mr Foo, alleging that he breached his duties as a director in authorising the payments to himself, and sought to recover the sums paid to Mr Foo during that period.

At first instance, the High Court found that OP3's potential liability under the Lawsuit was reasonably likely to materialise when the Lawsuit was commenced in 2015. Mr Foo could not reasonably have believed that OP3 would not face any liability. OP3 was in a financially precarious state because of the contingent liability and the director was obligated to consider the interests of the company's creditors. The first instance judge ruled that the director breached his duty by prioritising his own payments over the claims of other creditors. The decision was upheld in the Court of Appeal ([124], [148]). Mr Foo failed to consider the interests of creditors in breach of creditor duty since the payments *"singularly enriched Mr Foo at the expense of OP3's creditors"* ([153]–[154]).

Key takeaway 1: The rationale of the creditor duty is that creditors displaced shareholders as major stakeholders in insolvency

To discharge the duty to act in the best interests of the company, directors always need to have regard to the interests of different stakeholders, including creditors. The rationale underpinning the creditor duty is that whereas shareholders' and creditors' interests are generally aligned when the company is solvent, an insolvent company effectively trades and conducts its business with its creditors' money such that the creditors become the main economic stakeholders (when the shareholders essentially have nothing to lose) while having no control over the company's business. Therefore, the law seeks to respond to the *"misalignment of incentives"* by requiring directors to make corporate decisions with the interests of creditors in mind ([69]-[70], [72]).

Key takeaway 2: The analysis is two-fold: (1) whether the creditor duty has arisen, and (2) whether the creditor duty has been breached

The real question for breach of creditor duty is *"whether the director exercised his discretion in good faith in what he considered to be in the best interests of the company, as understood with reference to the financial state of the company"* ([74]-[75]). The Court will approach the claim by asking two distinct questions i.e. (1) whether the creditor duty was engaged in the first place, and (2) whether the creditor duty has been breached. The former question will help determine the weight a director ought to attribute to the interests of creditors when making decisions for the company ([93]- [95]).

On the first question, the Court objectively determines what was the financial state of the company at the time of the impugned transaction taking into account all surrounding circumstances, including the impugned transaction. This is categorised into three stages: (1) the company was solvent, (2) the company was imminently likely to be unable to discharge its debts, or

(3) where corporate insolvency proceedings were inevitable ([103]-[105]).

On the second question, the Court will examine the subjective *bona fides* of the director ([106]).

- Where the company is solvent, the creditor duty does not arise as a discrete consideration as a director typically does not need to do *"anything more than act in the best interests of the shareholders"* to comply with his fiduciary duty.

- Where in the intermediate zone the company is likely to be unable to discharge its debts, the Court will scrutinise the director's intention *"with reference to the potential benefits and risks that the relevant transaction might bring to the company"*. The Court will be slow to second-guess the honest, good faith commercial decisions made by a director to revitalise the company. However, *"the greater the extent to which the transaction is one which exclusively benefits shareholders or directors (and does not benefit the company as an entity), the more closely a court will scrutinise the decision of the director"*.

- Where corporate insolvency proceedings are inevitable, the creditor duty prohibits directors from authorising corporate transactions that *"have the exclusive effect of benefiting shareholders or themselves at the expense of the company's creditors, such as the payment of dividends"*.

Key takeaway 3: The statutory regime does not affect the company's ability to sue for breach of creditor duty

First, a claim for breach of the creditor duty predicated on the wrongful payment of dividends overlaps to some extent with a claim for statutory breach of s 403(1) of the Singapore Companies Act which provides that dividends are payable from profits of the company only (similar restrictions on distributions can be found in s 297 of Companies Ordinance (Cap.622) for Hong Kong and s 830 of Companies Act 2006 for the United Kingdom). However, the claims are distinct and the fact that the company is not entitled to sue under the Companies Act will not affect the company's standing to pursue a claim for breach of creditor duty ([110]- [114]).

Secondly, the statutory unfair preference regime does not operate as a fetter on a company's ability to bring a claim for breach of the creditor duty, even when the prevailing statutory clawback period has expired. The statutory clawback periods concern the interest of finality of transactions which is not engaged in an action for breach of creditor duty which is brought against a director personally ([116]-[118]).

Comparing with the approach of the UK Supreme Court in *Sequana*

The two apex Courts spoke in one voice on the nature and doctrinal basis of creditor duty ([60], [72], [89]). The objective assessment of the financial state of the company also echoes Lady Arden's approach in *Sequana* of considering whether the directors plan to enter into a transaction which would place the company in a situation where the creditor duty is ordinarily engaged (*Sequana* [279]; *Foo* [103]). The Court of Appeal further agreed with the majority in *Sequana* on circumstances rendering the interests of creditors paramount i.e. *"a clear shift in the economic interests in the company (from the shareholders to the creditors as the main economic stakeholders of the company) would occur where insolvent liquidation or administration... is inevitable"*, ([105(c)]; *Sequana* [86] c.f. Lord Briggs opined that conversion took place only at the *"onset of liquidation itself"*[164]-[165]). Both Courts prefer a flexible assessment of the company's financial state in light of the rationale and context of creditor duty, as opposed to adopting a stringent and technical test of solvency.

Conclusion

This case clarified the nature and content of the creditor duty, and how the Court will go about assessing the weight to be given to creditors' interests, depending on the financial status of the company. This highlights the importance of directors fulfilling their fiduciary duty to act in the best interests of the company, especially in financially precarious situations, which extend to the interests of creditors.■

A copy of this article was first published on the Des Voeux Chambers website.

All's well that ends well for keepwell deeds: successful claims of breach of keepwell deeds in *Re Peking University Founder Group Company Limited [2024] HKCA 445*

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Introduction

Keepwell deeds have been commonly used in financing arrangements entered into by business groups in Mainland China and foreign lenders because of the former limitation on repatriating proceeds raised overseas by Mainland companies, which had necessitated the use of foreign subsidiaries and a security structure.

Following the confirmation of the enforceability of keepwell deeds in its first instance decision ([2023] HKCFI 1350), the Hong Kong Court of Appeal recently discussed *inter alia* the nature of obligations under keepwell deeds, the modes of its performance, as well as the actionability of loss arising from breach of keepwell deeds in *Re Peking University Founder Group Company Limited* [2024] HKCA 445. The first instance decision was overturned on appeal and declarations that the keepwell deeds had been breached were made.

Brief Background

Peking University Founder Group Company Limited ("PUFG") is the holding company for its group company ("PU Group"). The four plaintiffs are all offshore subsidiaries of the PU Group. Two of the plaintiffs ("Issuers") issued bonds ("Bonds") in 2017-2018 respectively, with the other two plaintiffs ("Guarantors") as their respective guarantors. PUFG entered into a total of four keepwell deeds in relation to the Bonds ("Keepwell Deeds") which required PUFG to cause each of the plaintiffs to, *inter alia*, maintain a certain amount of consolidated net equity and aggregate total equity and to have sufficient liquidity to ensure timely payments of their obligations in connection with the Bonds. PUFG, the Issuers and Guarantors, together with the trustees of the Bonds also entered into deeds of equity purchase undertaking ("EIPUs").

PUFG became insolvent and commenced reorganisation proceedings in Mainland China in 2020. The plaintiffs defaulted under the Bonds and were all put in liquidation since 2021. It was therefore claimed that PUFG had defaulted on its obligations under the Keepwell Deeds, giving rise to damages.

The material clauses in the Keepwell Deeds include:-

- Clause 4.1(i) provided for PUFG's undertaking that *"it shall cause…each of the Issue and the Guarantor to have a Consolidated Net Worth of at least US$1.00 at all times"* ("Balance Sheet Obligation").

- Clause 4.1(ii) provided for PUFG's obligation to cause each of the plaintiffs to have sufficient liquidity to ensure timely payment by each of them of any amounts payable under or in respect of the Bonds or the related guarantees or trust deeds ("Liquidity Payment Obligation").

- Clause 2.2 provided that if, and to the extent that PUFG was required to obtain *"necessary approvals, consents, licences, orders, permits and any other authorisations from the relevant Approval Authorities"* ("Relevant Approvals") in order to comply with its obligations under the Keepwell Deeds, the performance of such obligation shall always be qualified by, and subject to, PUFG having obtained such Relevant Approvals. It also included an undertaking on the part of PUFG to use best efforts to obtain the Relevant Approvals.

West gate of Peking University, Beijing, China

In the first instance decision, the learned judge only granted declaratory relief in favour of one of the offshore subsidiaries plaintiffs, finding that one of the pleaded breaches (which was said to have arisen prior to PUFG entering into reorganisation proceedings) was established. In contrast, claims concerning post-reorganisation breaches were dismissed because it was contended that once PUFG was in reorganisation there was no realistic likelihood of regulatory approvals being granted to enable the discharge of obligations under the Keepwell Deeds.

The nature of the Balance Sheet Obligation

It is clear that the nature of the Balance Sheet Obligation is "*not a guarantee but a 'see to it obligation*'" (§§77, 93), nor is it "*a warranty or guarantee as to the existence of a particular state of events*" (§94).

The plaintiffs contended that the learned judge conflated "*the Balance Sheet Obligation with a payment obligation*" in deciding that if the Relevant Approvals could not be obtained, then there was no breach of the Balance Sheet Obligation following the reorganisation of PUFG. The plaintiffs contended that the liability under the Balance Sheet Obligation "*did not need to be established in an action or converted into a judgment debt in order to be provable in an insolvency…The reorganisation did not change the contractual rights of the plaintiffs, it only meant that the plaintiffs had different rights of enforcement*" (§85). That meant that when there may have been a breach was immaterial, be it before or after the commencement of insolvency (§86).

The Court of Appeal disagreed and held that:-

- For a claim to arise under the clause, "*there must be a breach of the 'see to it' obligation*"(§95).

- In construing the obligation, clause 2.2 would potentially apply to the alleged breaches to negate liability if Relevant Approvals were required for PUFG to comply with the Balance Sheet Obligation (§§96-97).

Similarly, the argument that clause 2.2 was not engaged in respect of the Liquidity Payment Obligation once PUFG entered into reorganisation, as the payment obligation was replaced by an obligation to admit debts to

proof and to pay dividends following insolvency, was also rejected by the Court of Appeal. It remains essential for the plaintiffs to demonstrate a breach causing loss (§§104-106, 108-111). This requires consideration being given to the Relevant Approvals.

The modes of performance: the Liquidity Payment Obligation could have been performed without the Relevant Approvals

The plaintiffs' appeal was ultimately allowed despite the shielding effect of clause 2.2 in respect of obligations that could not be fulfilled due to the lack of Relevant Approvals. This is because the obligations could potentially be met without requiring any Relevant Approvals.

On proper construction, "[t]*o perform PUFG's obligations under the Keepwell Deeds, Relevant Approvals might, but not necessarily will, be required*" (§124). The Court of Appeal held that PUFG could not have ruled out modes of performance which would not have required the Relevant Approvals:-

- PUFG had adduced no factual evidence as to how it had intended to finance the plaintiffs' repayment obligation, but the learned judge acknowledged three other possible modes: (i) issuing a new bond to refinance repayment of the existing bond, (ii) repurchase of onshore foreign direct investment, presumably denominated in a foreign currency, and (iii) making use of cash to support overseas investment or moving the fund offshore to support overseas project (§§123,127);

- However, the learned judge did not rule on whether these modes of performance would require Relevant Approvals but simply found that it would be "*highly probable that [PUFG] would have had difficulty in obtaining the necessary approvals*" once it had entered into reorganisation, and the Relevant Approval "*was very unlikely to be obtained*" without administrators' support (§127);

- More fundamentally, the learned judge "*failed to take into account the possibility of other modes of performance canvassed in the evidence and submissions that would not require Relevant Approvals*" when there were other alternatives raised in the trial (§129). Therefore, had the learned judge taken into consideration the other modes of performance, "*he could not have been satisfied that PUFG has established that it would come within the escape clause in clause 2.2*" (§129). PUFG was in breach of its contractual obligation when the trustee of the Bonds issued the written notice referring to events of default to the plaintiffs (§130).

On the other hand, PUFG argued that the learned judge's finding of the impossibility of obtaining regulatory approvals for performance should be affirmed, but such arguments were unsuccessful:-

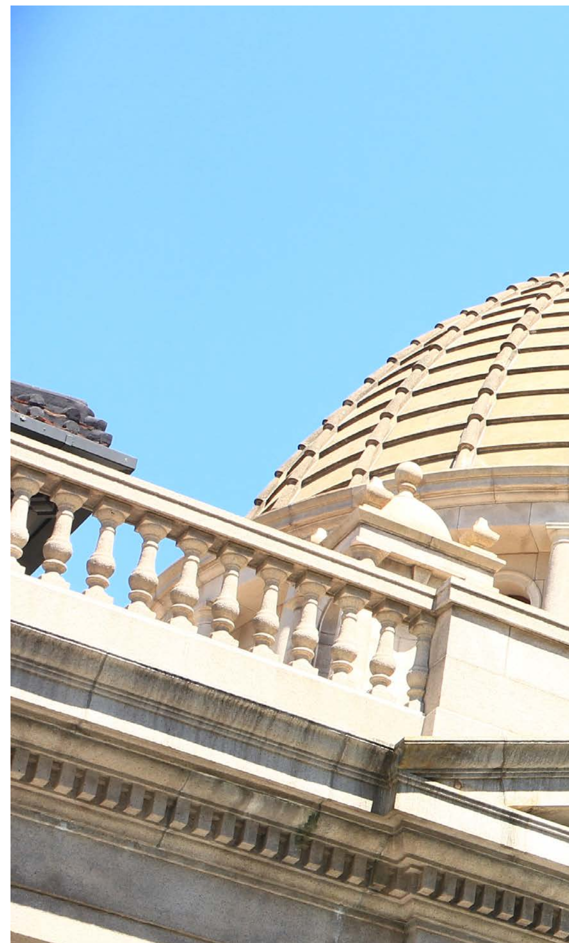
- Regulatory approvals would not have been granted even if PUFG was not insolvent: it was contended that the Relevant Approvals could only be acquired if there was an overseas investment project but the authorities would not treat the repayment of existing Bonds as a genuine overseas investment project (§§175, 177). This was rejected since the learned judge did not make such findings having regard to the totality of evidence (§§178-161).

- Administrator was an approval authority and would not have granted approvals: the Court of Appeal held that "*notwithstanding the breadth of the definition of "Approval Authorities", this term should not include the Administrator and is plainly intended to refer to those governmental authorities in the PRC*". Administrators basically stepped into the shoes of the board of directors at the commencement of reorganisation and were simply making decisions for PUFG instead of acting as approval authorities (§§189-190).

Loss caused by breach of Keepwell Deeds recoverable by Issuers and Guarantors

PUFG further argued that (1) "*any benefit derived by the plaintiffs would have been "clawed back" as a result of PRC insolvency law*" (§207), and (2) "*a failure to inject liquidity into the plaintiffs...could only cause loss to the bondholders ... and not the plaintiffs, because the plaintiffs' own net balance sheet position would not be affected*". In other words, if PUFG "*had transferred monies to an Issuer or Guarantor, it would have been treated as a loan with the consequence that the net balance sheet position would not have improved*" (§§211-212). Therefore, there was no actionable loss in any event.

The Court of Appeal rejected the arguments:-



Court of Final Appeal, Hong Kong

- So far as the *"claw back"* principle under PRC insolvency law is concerned, either it is irrelevant as to whether the plaintiffs had suffered loss and damage under English law, or this is a matter of PRC law best left to be resolved in the Beijing Court in the reorganisation proceedings (§214).

- The second argument is also flawed in that "[i]*f the advance made by PUFG did not improve the net balance sheet position because of the way the advance was treated in the books of the Issuer or the Guarantor, the Consolidated Net Equity would have remained at a deficit*". That would mean the obligations under the Keepwell Deeds were not fulfilled (§§212-213). It might well be that PUFG actually had to make a gift to the Issuers or the Guarantors to discharge the obligations. It therefore means that the Issuers and the Guarantors do have standing to sue without reference to loss suffered by the bondholders (§212).

Other grounds raised by PUFG: purely adjudicatory jurisdiction

PUFG contended that the first instance decision should be affirmed because the plaintiffs' claims have been

discharged by submission of proofs of debt in the reorganisation and their rejection. The crux of the argument is that "*by submitting their proofs of debt in the reorganisation proceedings, the plaintiffs are obliged to "have all questions, of whatever kind, as against the debtor resolved within the insolvency as administered by the court of the jurisdiction of that insolvency*"" such that the plaintiffs are bound by the administrators' determinations (§165). It was vexatious or oppressive to seek a declaratory judgment from the Hong Kong courts when the administrators had already adjudicated on and rejected the proofs of debt (§166).

The Court of Appeal disagreed based on the fact that the plaintiffs are invoking the "*purely adjudicatory jurisdiction*" of the Hong Kong courts and not seeking a judgment which they can enforce outside the reorganisation proceedings. It is not a vexatious or oppressive act since "[n]*otwithstanding the general disclination of the courts to give advisory opinion on issues for the benefit of foreign courts, there are instances where that had been done*" (§§161, 171).

Other grounds raised by the plaintiffs: breach of natural justice and pleadings

For completeness, the Court of Appeal rejected other grounds of appeal on breach of natural justice and the plaintiffs' defective pleadings.

- The ground on natural justice is premised on the learned judge's reliance on the evidence and submissions in a subsequent case brought of another keepwell deed against Tsinghua Unigroup Co Ltd which was heard right after the trial of the PUFG case (§§133-134). In particular, the plaintiffs alleged that they were not afforded a fair or proper opportunity to address the inconsistent and contradictory evidence of an expert witness who gave evidence in both trials (§136).

- The Court of Appeal rejected the argument since in reality, various case management matters that would arise due to the back-to-back trials were discussed at the pre-trial review with appropriate measures adopted to ensure fairness (§145), and the "*inconsistent evidence has just not assumed the kind of importance now sought to be placed by the plaintiffs*" in any event (§148).

- As for the ground on pleadings, the Court of Appeal also upheld the learned judge's ruling that "[t]*he particulars of breaches pleaded by the plaintiffs were all directed at breaches said to have occurred after the commencement of reorganisation*" so it was not open to the plaintiffs to advance a case on breaches occurring prior to that (§§155, 157).

Conclusion

Having established the enforceability of keepwell deeds in the first instance judgment ([2023] HKCFI 1350), the Court of Appeal's judgment likewise shed further light on issues surrounding keepwell deeds, providing welcome clarity on the nature of the obligations, available modes of performance and the approach for assessing loss caused by breaches of keepwell deeds.

This article first appeared on the website of Des Voeux Chambers, Hong Kong.

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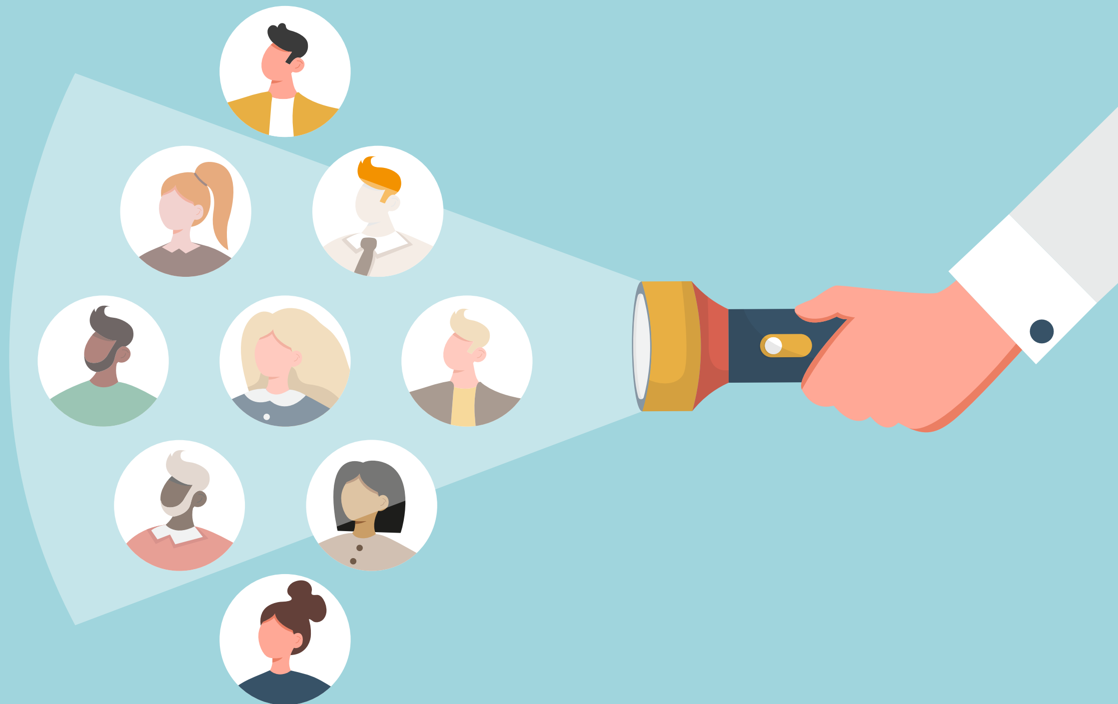


Voting issues in debtor schemes of arrangement and restructuring plans: the rights of sub-participants

Key points

- In order to vote on a creditor scheme of arrangement or restructuring plan, one must first be a "creditor"
- Many debt investors do not, however, have a direct legal relationship with the company, and instead have an economic interest as a beneficial bondholder or as a sub-participant
- In the case of beneficial bondholders, the Companies Court has been content to treat them as contingent creditors entitled to vote on a scheme of arrangement or restructuring plan
- Such an analysis is difficult to reconcile with the definition of "contingent creditor" in other contexts, and the limits of the principle are therefore unclear
- It remains to be seen how the courts will treat sub-participants in respect of lending arrangements where the lender of record no longer has the economic interest in the loan

Introduction

One of the great strengths of the English scheme of arrangement since its introduction in 1862 has been its flexibility. Although the world has changed considerably over the past 160 years, the scheme, and its infant cousin the restructuring plan, remain popular methods of restructuring debt.

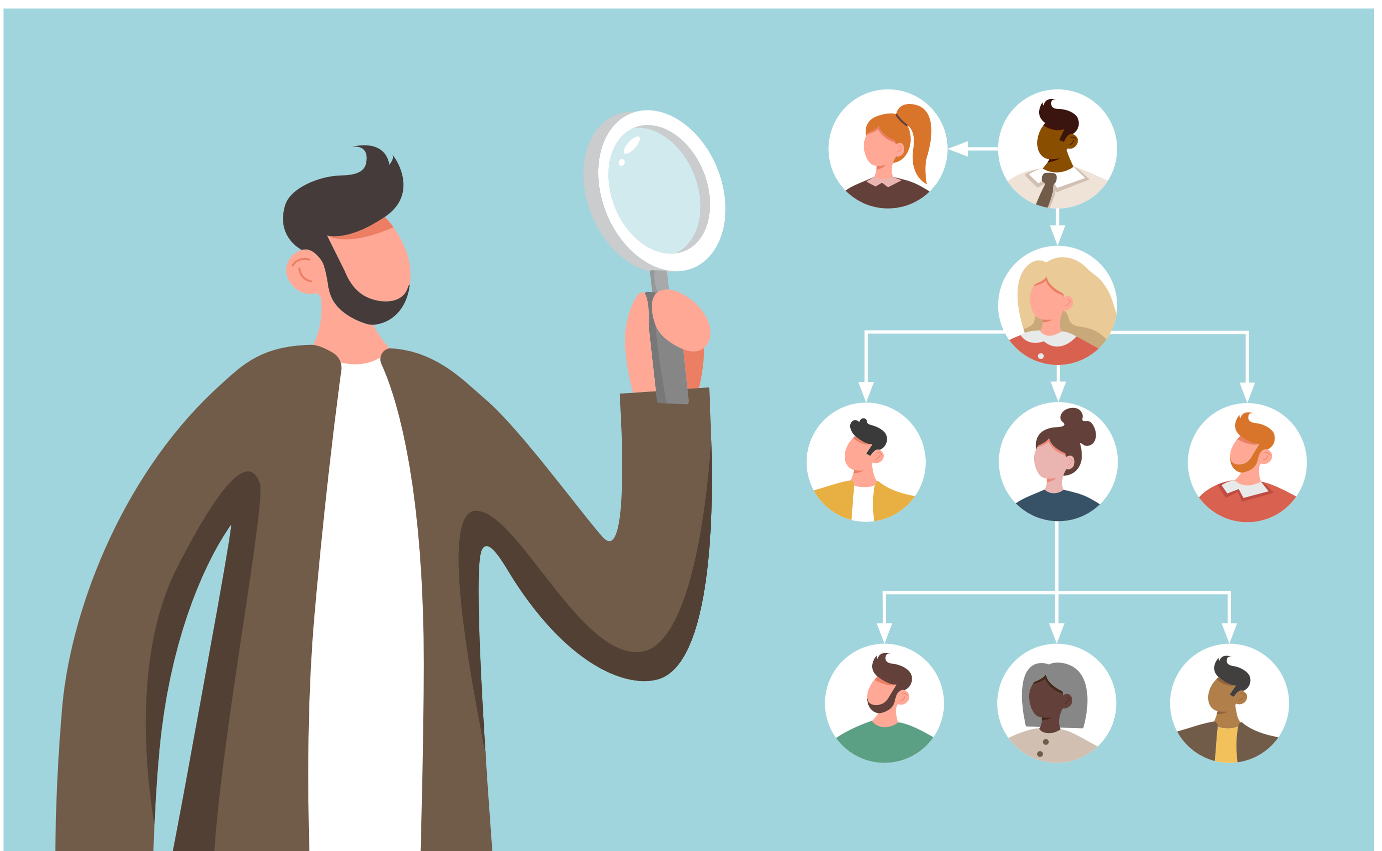
One of the significant changes that has taken place in recent years concerns the manner in which bonds and other debt instruments are typically held. When the scheme of arrangement was first introduced, a bondholder would typically own a physical certificate, and the bondholder's entitlement to vote would (in the case of bearer bonds) depend on physical possession of the certificate. In the case of registered bonds, the legal owner would be named in a register kept by the company. In either case, the person with the economic interest would typically be the person with the legal title, and it was relatively easy for a company proposing a scheme to identify who was entitled to vote.

The same was historically true of lenders who extended a loan to a company. For the first 100 years of the scheme jurisdiction, the person with the economic interest would typically be the person (be it a bank, or some other lender) who had made the loan. In other words, the same person would have both the legal interest and the economic interest, and it was obvious who should be entitled to vote on a scheme of arrangement in respect of the borrower company.

Nowadays, it is entirely normal for the legal and economic interest in a debt investment to be split. Most bonds on the international capital markets are issued in global form. A single global note will be held by a common depositary, while the beneficial interest in individual holdings will be traded in dematerialised form through electronic book entry. In the case of loans, from the 1970s onwards, sub-participation became increasingly common. Nowadays, the bank or syndicate of banks which made the original loan may have no economic interest in the loan, having transferred risk and benefits associated with the loan to sub-participants.

This gives rise to a conundrum when a company proposes a scheme of arrangement: who is entitled to vote? The legal lender/bondholder is the person who has a legal relationship with the company, but they may have no economic stake in the outcome of the vote. On the other hand, the investor with the economic stake in the outcome may have no direct legal relationship with the company, and the company may be completely unaware of their existence or identity.

The approach developed by the English Companies Court has generally been to facilitate voting by the person with the economic interest. This pragmatic approach does, however have limits, and it will not always be the case that the person with the economic interest will be entitled to vote.



Who is entitled to vote? Legal or beneficial owners?

The starting point is that when it comes to voting on a scheme of arrangement or restructuring plan, a person is entitled to vote if they are a creditor.[1] The word 'creditor' is not defined in the Companies Act for the purpose of voting on a scheme or restructuring plan, but the authorities indicate that the word is to be understood widely. For example, a person may be creditor for the purposes of voting on a scheme or plan, even though they would not be entitled to submit a proof of debt in a winding up.[2] It certainly includes contingent and future creditors, and *"all persons having any pecuniary claims against the company"*.[3] It does not, however, include the beneficial owners of property held on trust by the company.[4] Nor, logically, should it include persons who are economically exposed to the company's debt, but who have no direct legal relationship with the company.

Nonetheless, the *Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006)* [2020] 1 W.L.R. 4493 does envisage at [13] that at the convening hearing:

> *"Where interests in the applicant's debt are held indirectly, for example through intermediaries, if it is proposed that the votes to be cast at the meetings should by some method reflect the views of persons holding such indirect interests, the evidence should set out the applicant's proposals in that respect and any facts justifying those proposals."*

Clearly, it is envisaged that although the votes may be cast by the persons who have a direct legal relationship with the company, those votes might nonetheless reflect the views of the persons on whose behalf the legal owners hold their rights.

In the Cayman Islands, Practice Direction No.2 of 2010 is even more explicit about the need to involve the persons with the economic interest. For example, at [3.6], when the court is considering whether sufficient notice has been given of the meeting:

> *"The test is whether the parties having the economic interest, which is typically not the registered holder of the shares or debt instruments, will have sufficient time..."*

At [3.7], the applicant is required to show:

> *"that the scheme documentation will provide the shareholder/creditor (which for this purpose means the person having the ultimate economic interest) with all the information reasonably necessary..."*

Section 4 of the Practice Direction refers to the Cayman court's practice of *"looking through the register"*, explaining at [4.2] that *"where the scheme relates to a global note and where the whole of the debt instruments are registered with a single trustee"* the court will *"look through the register for the purpose of determining whether or not the statutory majorities have been achieved"*. At [4.3], it is provided that the court *"may direct that the custodian be permitted to vote both for and against the scheme in accordance with the instructions received from its clients"* and at [4.4] that:

> *"Custodians and clearing houses may be required to specify both the number of clients or members from whom they have received instructions in addition to the number of shares voted. The majority in number will be calculated on the basis of the number of clients or members giving instructions to the custodian or clearing house. The Court understands that both Euroclear and Clearstream Luxembourg are content to proceed in this way..."*

Bondholder voting – analytical issues

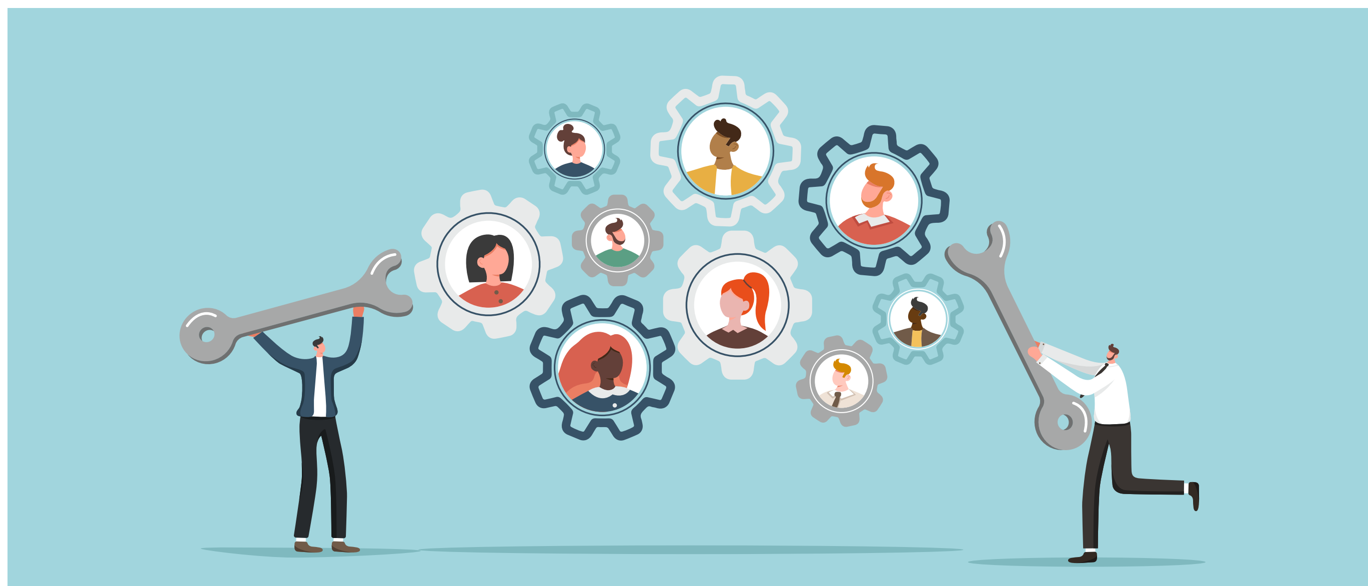
As Norris J stated in *Re Castle Holdco* [22], a scheme of arrangement *"ought obviously to be considered by those who have an economic interest in the debt, that is to say, by the ultimate beneficial owner or*

1. Many schemes of arrangement will also require a vote of members, although the eligibility requirements for voting as a member are outside the scope of this article.

2. See In re *T & N Ltd* [2006] 1 W.L.R. 1728 [36]–[37].

3. *Re Midland Coal, Coke & Iron Co* [1895] 1 Ch 267, 277.

4. *Re Lehman Brothers International (Europe)* [2010] 1 BCLC 496.



principal". However, since only creditors can vote at a meeting, it is necessary to find some analysis which enables the ultimate beneficial owner to be treated as a *"creditor"*. The difficulty is that in many cases (as in *Castle Holdco* itself), the company *"is not generally concerned with who is the ultimate beneficial owner"* and the security documents will often provide that the company *"shall treat the common depository or its nominee as the absolute owner of the global security for all purposes"*. The solution identified in *Castle Holdco* was found in the fact that *"the security documentation does contain a mechanism whereby the beneficial owner can upon request become a direct creditor of Castle Holdco"*. This enabled the court to find that the ultimate beneficial owners were contingent creditors of the company.

Norris J applied a similar analysis in two other cases, *Re Gallery Capital SA* and *Re Gallery Media Group Limited.* This approach is, however, dependent on the relevant finance documents entitling the ultimate beneficial owners to require the company to issue definitive notes to them directly, a point which Hildyard J made clear in *Re Co-Operative Bank plc* [2013] EWHC 4072 (Ch). After observing at [38] that the three decisions of Norris J referred to above were unopposed, Hildyard J considered *"with diffidence"* that the reasoning therein was *"both logical and justified"*. However, at [40], Hildyard J made clear:

> *"I have stressed that my conclusion in that regard is case-specific, it being the case here that the beneficiaries have an absolute right to require the Bank to issue definitive notes directly. It seems to me that since there is such a mechanism to trigger a direct right and therefore obtain control over that contingency, which is defined, they are properly described as contingent creditors and thus as creditors for the purposes of the relevant provision of the Act."*

The contingent creditor analysis is not, however, without difficulty. Outside of the context of schemes and restructuring plans, a contingent debt is a debt which may or may not fall due on the occurrence of a particular event. However, in the context of a bondholder who has the right to require the issuance of a definitive note, there is no doubt that the debt arises, rather, the question is as to the identity of the person who is entitled to payment, ie, whether it is the depositary which holds the global note, or the bondholder who is entitled to call for the issuance of a definitive note.

Indeed, outside of the context of schemes and restructuring plans, it has been expressly held that the beneficial bondholder is not a contingent creditor of the company unless and until it obtains a definitive note. In *Re Shinsun Holdings (Group) Co., Ltd* (Cayman Islands Grand Court, 21 April 2023), Doyle J had to consider whether a beneficial bondholder was a *"contingent creditor"* with standing to present a winding up petition. After referring to *Castle Holdco, Re Co-Operative Bank plc* and other similar cases, at [98] Doyle J said:

> *"These commercially pragmatic judicial decisions at first instance on voting rights and schemes need... to be treated with caution and confined to their context... In these schemes of arrangement cases all parties wished the beneficial owners to be counted and their standing was not contested. I do not think it safe to apply them in the present context..."*

Re Shinsun Holdings was followed by the Hong Kong Court of First Instance in *Re Leading Holdings Group Ltd* [2023] HKCFI 1770. At [80]–[116], Deputy High Court Judge Suen SC went through the authorities from 1862 to the present day (including *Shinsun Holdings*), and concluded that a beneficial bondholder was not a contingent creditor with standing to petition for winding up.

There is, of course, no difficulty with the fact that a person may be a contingent creditor for the purpose of voting on a scheme of arrangement, but not a contingent creditor for the purpose of petitioning for winding up. That a person may be a creditor for the former purpose but not for the latter has been recognised since In *re T & N Ltd* [2006] 1 W.L.R. 1728 [36]-[37] at the latest. The difficulty is that, if the limits on the definition of *"creditor"* which are to be found in the insolvency authorities are not applicable in the context of schemes and restructuring plans, what then are the limits applicable in the latter context?

The existing authorities indicate that the beneficial bondholder's status as contingent creditor is dependent on it having the right to require the issuance of a definitive note. But if one accepts that the definition of *"creditor"* in the scheme/plan context is different to the definition of *"creditor"* in the winding up context, it ought not to be necessary to impose such a condition as a matter of strict legal analysis. And as a matter of commercial commonsense, it is unclear why a bondholder's right to vote on a restructuring should depend on whether there is a right to call for a definitive note (which right is, in practice, hardly ever exercised) in the finance documents.

Sub-participation

Historically, English sub-participation agreements would involve the lender and sub-participant entering into an entirely separate back-to-back contract which, although linked to the underlying loan, did not confer on the sub-participant any legal or beneficial interest in the loan itself. As a consequence, if the lender of record entered insolvency, the sub-participant would have no right in the underlying loan, and would share *pari passu* with all other creditors of the lender of record.[5]

This result was obviously very unsatisfactory for sub-participants, since it exposed them not only to the risk of default by the borrower (which was what they had intended) but also to the risk of default by the lender of record (which was not what they had intended). Moreover, over the past 20 years, the market for distressed loans has become more sophisticated, and specialist debt traders often want to take a more active role by exercising voting rights. It has therefore become more common for sub-participation agreements to confer voting rights on the sub-participant, and to enable elevation of the sub-participant's status to that of lender of record. Some of the conceptual issues this gives rise to are discussed in Professor Penn's article in 2023 JIBFL 507:, *A wolf in sheep's clothing: are transfers of economic interests undermining privity of contract in the medium-term loan market?*

5. *Lloyds TSB Bank plc v Clarke* [2002] 2 All ER (Comm) 992.

The trend towards giving sub-participants greater rights also has consequences for voting on schemes of arrangement and restructuring plans. Adopting the analysis which has been applied to beneficial bondholders, it would appear that a sub-participant may be treated as a contingent creditor for voting purposes if it has a right of elevation, but not otherwise. However, as with the right of a beneficial bondholder to require issuance of a definitive note, it is not altogether clear why (as a matter of either legal analysis or commercial commonsense) the right of elevation should be the determining factor when considering whether a sub-participant is entitled to vote.

Indeed, it is far from clear that the analysis which applies to bondholders should necessarily carry across to the position of sub-participants. In the case of a bond issue, it will be clear from the outset that the common depositary is merely a nominee, and that the real creditors (in the commercial sense) are the beneficial bondholders. It is obvious why the law has strained to find an analysis which justifies enfranchising the bondholders rather than the depositary. The same cannot be said in the case of a loan relationship, where the borrower company may be unaware that a sub-participation has been entered into.

Conclusion

The law concerning the rights of beneficial bondholders to vote on a scheme of arrangement or restructuring plan is currently something of a fudge. Such persons do not fit neatly within the traditional legal definition of *"creditor"*, and yet as a matter of economic reality, they are creditors to a far greater extent than the depositary nominated to hold the global note. The law has therefore fashioned a means by which beneficial bondholders may be treated as creditors of the company for the purpose of voting on a scheme or restructuring plan, even though they would not be treated as creditors for any other purpose.

The limits of this principle are, however, unclear. There was no adversarial argument in the authorities which created it, and it is unclear why the key feature relied upon in these cases (the ability to call for issuance of a definitive note) should be the determining factor. Where, then, does this leave the sub-participant to a loan? The answer is uncertain. If one were to apply the analysis which has so far been applied to beneficial bondholders, then the right of elevation should be sufficient to render the sub-participant a *"creditor"* for the purposes of voting on a scheme or restructuring plan. But it is far from clear that the analysis which is applied to bondholders should necessarily carry across to the very different context of sub-participation in a loan. ■

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Restructuring Plans: where next?

(A) Introduction

Over a six-week period in the first quarter of 2024, the English courts handed down judgments in three restructuring plan cases – *Re AGPS BondCo PLC* [2024] EWCA Civ 24 ("*Adler*"), *Re CB&I UK Ltd* [2024] EWHC 398 (Ch) ("*McDermott*") and *Re Project Lietzenburger Strabe Holdco SARL* [2024] EWHC 468 (Ch), [2024] EWHC 563 (Ch) ("*Aggregate*").

This article considers: (i) the decisions in those cases; (ii) the principles that are now established; and (iii) what issues are still to be resolved.

(B) The cases

Readers may be familiar with the facts of the three cases. For those who are not, here is a summary of what they were about.

(B.1) *Adler*

The Adler plan company was an English company within the broader Adler group – a German real estate business. The group, which had been affected by significant falls in German property prices, had c.€6 billion of debt including c.€3 billion of obligations under unsecured notes payable at various points between 2024 and 2029. In the event of a formal insolvency process (which was the relevant alternative), the obligations under the notes would rank equally.

In broad terms, the restructuring plan was designed to allow the controlled wind down of the group through the introduction of new money and the orderly realisation of its assets.

Save for extending the 2024 notes by one year, the restructuring plan did not seek to alter the maturity dates of the notes. However, the plan did seek to alter the security arrangements/intercreditor position. The new money was to rank first, followed by the 2024 notes and then the remaining notes (equally as between themselves). The

justification for the elevation of the 2024 notes was the one-year maturity extension described above.

The equity in the plan company and the equity in the parent company was, save for some allocation to the new money providers, untouched.

At the sanction hearing, the judge (Leech J) accepted the plan company's valuation evidence that: (i) if the plan were sanctioned, it was more likely than not that there would be sufficient asset disposals to pay the notes in full (at or before the respective maturity dates); and (ii) the relevant alternative was a formal insolvency of the group in which the noteholders would recover 63%. Sufficient majorities were obtained at the plan meetings from all creditor classes save for the 2029 noteholders – where the plan was approved by 62% of noteholders, below the 75% threshold.

The judge sanctioned the plan and (some of) the 2029 noteholders appealed.

As the Court of Appeal explained, the key features of the Adler plan were that: (i) it was a *"wind down"* plan and did not involve continued, long term trading; and (ii) in the relevant alternative of liquidation, all noteholders would rank equally for the purposes of *pari passu* distribution.

The Court of Appeal held that the judge had erred in sanctioning the plan. The plan involved a breach of the *pari passu* principle. The sequential payment of the notes in accordance with their contractual maturity dates exposed the 2029 noteholders to a material risk that they would not be paid (as compared to the relevant alternative of rateable and simultaneous distribution in an insolvency process). As Snowden LJ said at [193]: "*Put shortly, sequential payments to creditors from a potentially inadequate common fund of money are not the same thing as a rateable distribution of that fund*". There was no good reason for the plan's adherence to contractual and sequential maturity dates (as opposed to harmonising the maturity profiles so that, for example, all noteholders were paid at equal points between sanction and 2029).

However, the Court of Appeal did not accept the Appellants' argument that the elevation of the 2024 noteholders' claims under the terms of the new security arrangements was itself sufficient to make the plan unfair. The court found that the continued extension of credit was sufficient justification for preferential treatment and was analogous to the continued supply of good and services by trade creditors who are often given preferential treatment in plans and schemes.

At first glance, this is a curious finding. If the failure to harmonise maturity dates was unfair, it is difficult to see how the limited one-year extension (which was a move towards harmonisation but did not in fact go far enough) could be a justification for elevation.

It is likely that all the Court of Appeal was saying was that, more generally, the elevation of existing creditors is acceptable if justified by, for example, the provision of additional consideration. Nevertheless, it is hard to see how on the facts of Adler it was ever possible to legitimately elevate the 2024 noteholders ahead of other creditors who would be treated identically in the relevant alternative.

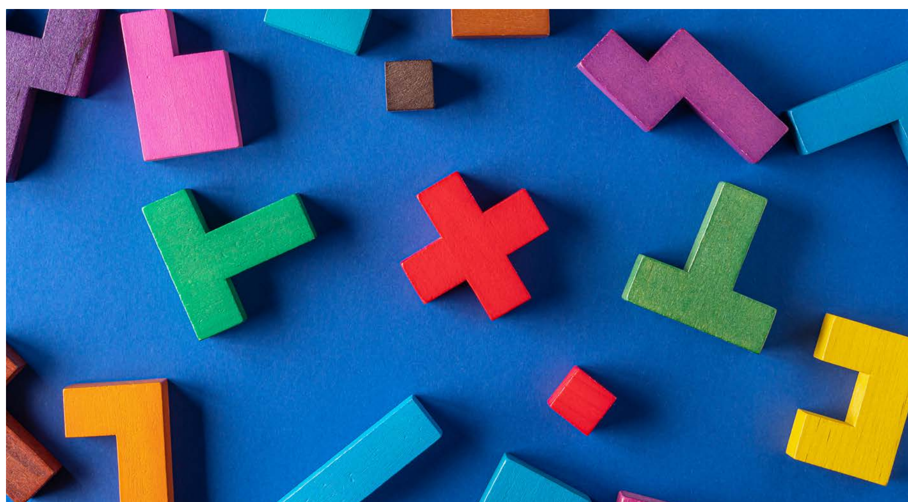
The Court of Appeal also rejected an argument advanced by the Appellants that the plan was unfair because it allowed the shareholders of the parent to retain (most of) the equity in the parent, while the 2029 noteholders were required to bear the risk of non-payment. The Court of Appeal said that:

- There was no infringement of the *pari passu* principle because the shareholders were not entitled to anything until the noteholder creditors were paid their contractual entitlements in full (the same position as in an insolvency process).
- There was no evidence of any mechanism by which an English restructuring plan could effect a compulsory transfer of shares from the Luxembourg-incorporated parent.
- Part 26A retained the principle from scheme cases that the words "*compromise or arrangement*" do not include a confiscation or expropriation of rights. Accordingly, Part 26A does not permit the cancellation or compulsory transfer of the shares in a plan company or the extinction of debts owed to creditors for no consideration.

It is right to say that the plan was not imposing any haircuts on the creditors and there was therefore no infringement of the *pari passu* principle. The appellants' main complaint however was the fact that certain in the money creditors (the 2029 noteholders in particular) were being asked to bear the risk of the group's financial failures while the shareholders, who were not injecting any new money, were taking the potential upside.

Nevertheless, the Court of Appeal was not persuaded that this feature made the plan unfair. It may be that the court had in mind the fact that the in the money creditors were the true economic owners of the business and most of them had voted in favour of the plan.

(B.2) *McDermott*
McDermott is an international engineering group with particular expertise in the energy sector. The plan



company was an English subsidiary and an existing obligor: (i) under various secured finance agreements (mainly letter of credit facilities); and (ii) in respect of two large unsecured debts in the total sum of approximately $2bn.

The letter of credit facilities were due to expire and the group was required, on 27 March 2024, to post cash collateral in respect of the facilities in the sum of c.$2.2bn. Given that it had cash of only about $100m, there was no prospect of the group being able to meet its obligation to cash collateralise ($2.2bn) and/or pay the unsecured creditors ($2bn).

A restructuring plan was proposed. The basic purpose of the plan was to: (i) amend and extend the letter of credit facilities (thus deferring the cash collateralisation deadline); and (ii) release the $2bn of unsecured debts in exchange for a contingent payment of potentially only c.£800,000.

Perhaps unsurprisingly, one of the unsecured creditors, which was owed $1.3bn under an arbitral award, opposed the plan. The creditor raised a number of objections but its main ones were that: (i) the "*no worse off*" test was not satisfied as the relevant alternative was said to be an alternative, consensual restructuring (under which the creditor would get more than its share of c.£800,000); and (ii) the plan was unfair because the equity was left untouched.

The economics in *McDermott* were a little unusual. In the event of the plan being sanctioned, it was estimated that the secured creditors would be paid in full because there would be no or no material calls on the letters of credit. In the relevant alternative of a liquidation, it was estimated that they would recover only 25% and lose somewhere in the region of $2bn. This was largely driven by two things. First, the likelihood of large draws on the letters of credit in an insolvency process. Second, because the group was essentially a project management company with relatively little in the way of tangible assets, there was relatively little to realise in an insolvency process.

This gave the creditor the opportunity to argue that there was no way in which the secured creditors would allow the group to collapse. The creditor argued that the secured creditors would act in an economically rational way and, if the plan failed, would agree to pay more to the creditor to ensure its consent to a new restructuring. Accordingly, so the creditor claimed, it was worse off under the plan – it would get more in due course from a new plan. Whether this is a legitimate argument in respect of the relevant alternative is discussed in D.1 below.

The creditor's argument on the relevant alternative became difficult to maintain because of what the judge (Michael Green J) described as "*extraordinary developments through the course of the trial*". The creditor had, in negotiations with the group, sought a 19.9% equity interest in the Bermudian parent company. The group, with the support of the secured creditors, offered the creditor the 19.9% equity that it wanted. The creditor however had not accepted or rejected the offer and continued to oppose the plan.

Where did this leave the creditor's case? It was compelled to argue that the plan company could not satisfy the "*no worse off*" test because: (i) the creditor would get nothing under the plan; (ii) if the plan failed, the 19.9% equity offer, which the creditor had not accepted, would remain on the table as that was the economically rational thing for the secured creditors to do; (iii) the creditor would accept the offer which it had so far failed to accept; and (iv) the creditor was therefore worse off under the plan – because it would receive nothing as compared to the relevant alternative of it accepting (*ex hypothesi* after the plan failed) the offer of 19.9% equity that had already been made to it but which it had not yet accepted.

The judge rejected the creditor's case on this point. He said that if the creditor had not already accepted the offer on the table, why would it accept it after the plan failed?

Matters developed again on the final day of trial when the Restructuring Expert in a parallel Dutch WHOA wrote to the court explaining that the WHOA would give the creditor an equity interest in the parent of between 10.9% (if the creditor were to refuse to consent to the WHOA) and 19.9% (if the creditor were to consent).

The creditor's position on fairness, which was already difficult, became very difficult indeed. It had already been offered everything that it wanted – 19.9% equity – which it accepted was a fair distribution of the restructuring surplus. The only reason it might not get that was if it failed to consent to the restructuring – and even then it would get 10.9%. The judge found that the creditor was being offered a fair share and he therefore sanctioned the plan.

(B.3) *Aggregate*
The plan company was a company incorporated in Luxembourg and part of a group which owned a large development site in Berlin. The group could not pay its secured debt (of which the plan company was a guarantor), which exceeded €1bn, and construction work in Berlin had stopped.

The plan company executed a successful COMI shift to England and Wales. The purpose of the restructuring plan was to restructure the secured debt (including by, initially at least, extinguishing the junior debt for no consideration) and to enable new money to be introduced to complete the development. The plan had the support of the senior creditors but was opposed (or effectively opposed given the lack of votes at one meeting) by two junior classes.

The junior creditors contended that the relevant alternative was not a liquidation but what was called the "*Safra Proposal*" (Safra being a Swiss bank representing some junior creditors). The Safra Proposal involved a restructuring under Luxembourg law and (in very broad summary): (i) a new money facility open to all creditors (rather than just senior creditors); and (ii) the restructuring of junior debt into equity-like instruments. This was a similar argument to the one that was advanced and rejected on the facts in *McDermott* – that the relevant alternative was a different, better restructuring. Whether this is a legitimate argument in respect of the relevant alternative is discussed in D.1 below.

The judge rejected the Safra Proposal for various reasons including the fact that it lacked sufficient support from the senior creditors, who would not vote in favour in a future hypothetical Luxembourg restructuring process. The relevant alternative was, the judge found, a liquidation in which the junior creditors would receive nothing. The judge also held that, as out of the money creditors, little to no weight should be placed on their complaints about the distribution of the restructuring surplus.

However, that was not the end of matters. As explained above, as originally proposed, the rights of all junior creditors were to be released for no consideration. Following the decision in *Adler* (i.e. that the court has no jurisdiction to sanction a plan under which debts are to be extinguished for no consideration), which was handed down after the plan meetings but before the sanction hearing, the plan company proposed to vary the plan to pay a total of €200,000 to the junior creditors. The judge (Richards J) refused to exercise any discretion he might have to amend the plan and therefore refused to sanction it.

Instead, the judge treated the sanction hearing as a convening hearing in relation to a new restructuring plan (i.e. a plan with consideration, albeit limited, flowing to the junior creditors). A single plan meeting (of the in the money senior creditors) was convened on short notice and the out of the money junior creditors were disenfranchised under section 901C of the 2006 Act.

The senior creditors voted in favour and only three days later, the judge handed down a further judgment ([2024] EWHC 563 (Ch)) sanctioning the amended plan.

(C) Established principles

Where does this leave us? The battlegrounds in contested plans are:
(i) what the relevant alternative is;
(ii) what the position of creditors will be in the relevant alternative (for the purposes of the no worse off test); and
(iii) the fairness of the plan.

Battleground (i) has so far been approached as a question of fact. I discuss at D.1 below the legal question of whether a different restructuring is a legitimate relevant alternative.

Battleground (ii) has become an issue of competing expert evidence in which the parties' respective valuation experts advance competing analyses as to the likely asset realisations in (usually) a liquidation.

As to battleground (iii), practitioners now have a relatively clear conceptual framework to apply.

The starting point is that in respect of an assenting class, the proper approach is the *"rationality test"* that applies in schemes of arrangement – i.e. that the statutory majority are acting *bona fide*, are not coercing the minority and the arrangement is such as an intelligent and honest person might approve.

As to dissenting classes:

When the dissenting class is in the money, what really matters is the horizontal comparator – i.e. the comparative treatment of the dissenting class as compared to the other classes. The appropriate lens for carrying out a horizontal comparison is the relevant alternative. If different creditors would be treated identically in the relevant alternative, they must be treated identically, or near-identically, in the relevant alternative unless there are justifiable grounds for treating them differently. For example, it may well be justifiable to exclude trade creditors from a restructuring plan where those trade creditors are needed to ensure the continued trading of the company for the benefit of all creditors and/or where it would be too administratively costly to bring them within the scope of the plan. It may also be justifiable to

give new money providers preferential treatment, or elevate existing holdings, provided that the preferential treatment is comparable to the value of the new money. In carrying out a horizontal comparison in respect of an in the money dissenting class, it is legitimate to ask (and in fact the court should ask) whether a different allocation of benefit would have been possible.

However, when the dissenting class is out of the money, it appears that the approach remains that little to no weight should be given to those creditors' complaints. The extent to which those out of the money creditors have any right to complain is discussed further in D.2 below.

(D) Future issues

This section considers four issues that are yet to be fully answered by the court and which are likely to be issues in future contested plans.

(D.1) Can the relevant alternative be an alternative restructuring where the dissenting creditor is out of the money in a formal insolvency?

This is a difficult question. Imagine the following example. A company is in severe financial distress. It has two classes of creditors – Class A (senior) and Class B (junior). It is common ground among the creditors that absent a restructuring of some sort, the company will enter liquidation. In liquidation, the value would break in the Class A debt and those creditors would be paid 40p in the £. Class B creditors would receive nothing.

The company promulgates a restructuring plan. The plan involves an unconnected third party injecting new money to save the business. Under the company's business plan, it will be able to trade through and pay Class A creditors in full. However, it needs to partially compromise the Class B debts to fix its balance sheet. It is therefore proposed that they will receive consideration equivalent to 30p in the £. All the creditors are therefore better off compared to liquidation.

However, the Class B creditors are not happy with 30p in the £ and oppose the plan. They say (with some force) that no Class A creditor is going to force the company into liquidation because they are economically rational and know that they would recover only 40p in the £ (as opposed to 100p in the £) in that eventuality. Therefore, so the Class B creditors say: (i) the relevant alternative is an alternative restructuring, in which they are paid *at least* 31p rather than 30p in the £; and (ii) they are therefore worse off under the restructuring plan.

As a matter of pure logic, this is difficult to argue with. If the plan failed, would the Class A creditors really push the company into liquidation and thus worsen their own economic position; rather than giving up the equivalent of an additional 1p in the £ to the Class B creditors? If not, then on the face of it, the relevant alternative would be an alternative restructuring on better terms for the Class B creditors.

Now imagine that between convening and sanction the Class B creditors are offered 31p in the £ in an attempt to compromise the dispute. The Class B creditors say "no", because they now want at least 32p in the £. And so on and so on.

Is this an argument that is available to the Class B creditors? One might think not but it is difficult to explain why on the wording of Part 26A. The relevant alternative is defined straightforwardly – it is what "*would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned*". Condition A in section 901G is also defined straightforwardly as requiring the court to be satisfied that "*none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative*".

This is not a purely theoretical point. In both *McDermott* and *Aggregate,* the opposing creditors opposed the plan on the basis that the relevant alternative was an alternative restructuring in which they would receive more. In both cases, it was common ground that, absent a restructuring of some sort, there would be an insolvency process in which the opposing creditors would be wholly out of the money. The opposing creditors argued the point with rather more sophistication than in the thought experiment above, but the substance was the same.

The opposing creditors failed on the facts in McDermott and Aggregate as the court concluded that no alternative restructuring was possible. But the court did not find that the argument was not open to them despite the submissions of the plan company in *McDermott*.

In that case, the plan company pointed to the scheme cases of *Re MyTravel Group plc* [2005] 1 WLR 2365 (Ch) and *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch), in which a "*ransom value*" was held not to constitute a genuine economic interest. Given the use of the words "*genuine economic interest*" in section 901C(4) (in relation to the power to disenfranchise

out of the money creditors), it was argued that a relevant alternative in which an out of the money creditor can extract a ransom value is not a legitimate relevant alternative for the purposes of section 901G(4).

The judge rejected this argument, albeit his reasoning at [96] was that this was "*largely because I considered the scale of the numbers in this Plan to be somewhat exceptional, and that I did not think it would be likely to sound the death knell of Part 26A if I were to conclude that Reficar was correct in its suggested Relevant Alternative*".

It seems likely that opposing creditors will continue to oppose restructuring plans on this basis and it therefore seems likely that the court is going to have to resolve this issue soon.

(D.2) Discretion and out of the money creditors

As explained above, it now appears to be reasonably clear that, where an opposing creditor is out of the money in the relevant alternative, "*little to no weight*" (*Re Virgin Active Holdings* [2021] EWHC 1246 (Ch), *Adler* at [251], *Aggregate* at [214]) will be placed on their objections to the fairness of the plan/distribution of the restructuring surplus. In this regard, it is important to stress that, as described above, the opposing creditors in *Adler* were in the money creditors of a dissenting class – hence the broader considerations that were in play.

The approach of the court to out of the money creditors makes sense. Those with no economic interest in an insolvency process generally have no standing to complain about an officeholder – see the recent Supreme Court decision of *Brake v The Chedington Court Estate Ltd* [2023] UKSC 29, which applied that very principle in the bankruptcy context. It is no surprise that an analogous principle applies in restructurings.

However, as is also clear from the formulation "*little to no weight*", there may be circumstances in which the out of the money opposing creditor is entitled to complain. The real question is: what does "*little weight*" as opposed to "*no weight*" actually mean?

In *McDermott*, the creditor complained that it was unfair that the shareholders in the parent company would retain their shares in circumstances where unsecured creditors with claims of c.$2bn were being (at least until the offer of equity was made to the creditor) all-but wiped out.

The problem for the creditor was that it was, as the judge found, out of the money in the relevant alternative. In light of *Adler*, it might have been thought that this was the end of the argument. However, at [117] the judge hinted at a possible different approach: "*This is not the place to disagree, respectfully, with Snowden J's analysis* [in Virgin Active]; *I will simply say that I can see the force of Ms Toube KC's submission that there should be some scope for making a horizontal comparison between out of the money creditors and shareholders in testing the fairness, as between them, of the proposed distribution of the restructuring surplus under the Plan.*"

Even putting to one side the technical points from *Adler* (there was no mechanism for effecting a compulsory transfer of shares from the Bermudian-incorporated parent; and a confiscation of rights is not permissible) the creditor in *McDermott* was, the judge found, out of the money in the relevant alternative by some considerable margin. If the in the money creditors wished to gift the equity to the shareholders, what right did the creditor have to complain?

It is possible that the judge had in mind the very unusual facts of the *McDermott* plan. The secured creditors (the "LC Lenders") were financial institutions that had agreed to backstop various letter of credit facilities between the group and certain issuing banks. In other words, the LC Lenders were, in effect, guarantors of the group's future obligations, if any.

If a call was made on a letter of credit, the issuing bank would pay the beneficiary and the LC Lenders were required to reimburse the issuing bank. At that point, the group would be required to reimburse the LC Lenders. Prior to that, there was no existing indebtedness between the group and the LC Lenders.

By the time of the sanction hearing, there had only been a limited number of calls on letters of credit. The LC Lenders were therefore largely contingent creditors of the group. It was only if the group fell into liquidation, and all the letters of credit were called, that they would become actual creditors. But as liquidation was the relevant alternative, they were the in the money creditors for the purpose of the plan.

The judge was faced with a dispute between: (i) an unsecured creditor who had obtained a $1.3bn arbitral award because of the group's breaches of contract in relation to an engineering contract; and (ii) the LC Lenders, who were only contingent creditors and, if the plan were sanctioned, would probably never become actual creditors of the group. The judge might have thought that in those somewhat exceptional circumstances fairness demanded that some weight be placed on the unsecured creditor's views.

More generally, the answer to what "*little weight*" means is probably that it depends on the facts of the case and, in particular, the economics of

the restructuring. Take the following example. Imagine a company with one valuable asset. Secured bondholders are owed £100m but are contractually subordinated to the RCF lender who is owed £500m. There are also some unsecured lenders owed a further £100m.

The company proposes a restructuring plan. The relevant alternative is liquidation. The valuation experts agree that the valuable asset is worth, in a distressed sale, £500m with the prospect (but no more than that) of a greater return. At £500m, the bondholders will receive no return and are therefore, on that valuation, wholly out of the money in the relevant alternative.

As a result, the company proposes to pay the bondholders only nominal consideration. However, it proposes to leave the unsecured lenders whole. That seems unfair – every penny of additional value over £500m would, in a liquidation, flow to bondholders. Why is it fair that they lose that prospect while the unsecured lenders are unaffected? It would be surprising if, in those circumstances, the bondholders had no standing to complain about the horizontal comparator.

(D.3) Differential treatment of new money providers

As explained in *Adler* (if it were not clear already), when performing a horizontal comparison, differential treatment is permissible provided there is a good reason for it. As discussed above, common examples include excluding trade creditors from the plan (so as to preserve the company's going concern value) and the provision of new money.

The real issue, and the likely focus of contested plans in the future, is about the scale of benefits flowing to the new money providers. The question for the court will be: are the new money providers being given a fair share of the benefits of the restructuring, or are they being given too much?

Take one particular sort of case. In many restructurings, the new money will be provided by existing creditors on terms that involve the prioritisation of new debt and/or the elevation of existing debt. That is attractive from the company's perspective. The cost of the new money will probably be cheaper than would be available in the market because a significant benefit arises from the elevation process itself – which is done at the expense of other creditors rather than at the expense of the company.

From a fairness perspective, it is important that the opportunity to participate is open to all relevant creditors (which probably means all in the money creditors). There are however two potential issues that might arise.

The first is that certain existing creditors may be unable to participate in the new money for legitimate reasons other than commercial judgment – e.g. constitutional limitations on the ability to lend. Arrangements have to be made to deal with that.

The second is a pricing question. It is relatively straightforward to price a loan. The company will generally be able to benchmark the commercial terms against other transactions involving similarly distressed borrowers. But how to *"price"* an elevation structure? If an existing creditor is providing $10m of new money, what is the appropriate amount of existing debt that should be elevated?

This is, it seems to me, a very likely future battleground. As elevation structures largely arise out of tough negotiations, they are, in general, unlikely to have been the subject of any serious economic analysis as to the *"fairness"* of the terms (by which I mean whether the level of consideration flowing from the elevation is commensurate with the consideration provided under the new money).

Where the two potential issues above collide – i.e. where a particular creditor is constitutionally prohibited from participating in a new money facility that substantially overcompensates the new money providers – that is likely to give rise to a fairness issue. This may well become another area of dispute.

(D.4) Sufficient connection to the jurisdiction

A plan or scheme company needs to show a sufficient connection to the jurisdiction of England and Wales. A comment made by the Court of Appeal in *Adler* has caused some concern as to whether the well-established principles in this area might be open to reconsideration.

In *Adler*, the original issuer of the notes was the Luxembourg parent. The English plan company was substituted as the issuer of the notes pursuant to their contractual provisions. There was an issue at the sanction hearing as to whether this was effective as a matter of German law (the governing law of the notes), which the judge resolved in favour of the plan company.

There was no suggestion by the opposing creditors that what was described as "*the Issuer Substitution*" issue meant that the court ought to have refused to sanction the plan. However, on appeal, the Court of Appeal said the following at [34]:

> "*[34] The Appellants did not oppose the Plan before the Judge on the basis that the Issuer Substitution was an artificial device that could not justify the exercise of discretion to sanction the Plan. The point did not, therefore, arise for consideration on this appeal. For the avoidance of doubt, and without expressing a view one way or the other, I would wish to make it clear that the fact that this judgment does not deal with this issue should not be taken as an endorsement of the technique for future cases.*"

If issuer substitution is a technique, it appears to be a relatively inoffensive one. If the parties to a contract agree that something will happen in the event that a sufficient number vote for it (provided the majority is exercising its power *bona fide* for the benefit of the class as a whole: *Assénagon Asset Management v IBRC* [2012] EWHC 2090 (Ch)), it is hard to see what objection there could be. What conceptual difference is there between an issuer substitution provision and an arrangement whereby a contingent guarantor is to become liable at the election of the principal creditor?

It seems unlikely that [34] of *Adler* will open the door to successful jurisdictional and/or discretionary challenges in cases where companies have adopted other well-known techniques. Considering them in turn:

- COMI shifts are well-established and, indeed, a COMI shift was successfully relied upon in *Aggregate*, which post-dated the *Adler* decision. COMI shifts are notoriously difficult to challenge, at least when the company is a holding company. Generally, the opposing

creditor will be required to put its cards on the table at the convening stage and highlight why the purported COMI shift has failed. What then usually happens is that the plan company uses the opposing creditors' evidence as a sort of aide-memoire to fix the shortcomings in the COMI shift – leasing an office in London, recruiting English employees etc – prior to the sanction hearing. In any event, there is nothing in *Adler* to suggest COMI shifts are objectionable.

- The use of a deed poll. Under this technique, an English company will unilaterally declare itself by way of a deed: (i) liable to creditors of an existing, related obligor; and (ii) liable to contribute to the existing obligor if the existing obligor discharges the principal debt. The latter is necessary to create a *"ricochet"* claim and therefore justify the discharge of the existing obligor under the English plan.

The first problem with this technique is that it is difficult to see how (at least through the eyes of an English lawyer) the directors of a company can unilaterally agree to become liable for another party's debts without acting in breach of their duties as directors. The second problem, and the reason why the deed poll technique probably has a limited shelf-life, is that (subject to any foreign law constraints) a creditor can discharge the plan company by entering into its own deed of release.

- The use of a deed of contribution. This only applies when the plan company is already an obligor in respect of the debt and agrees to contribute to the primary debtor for the purpose of creating the *"ricochet"* claim described above. There is nothing in *Adler* that calls this technique into question.

- The accession of an English company to finance documents. This is what the comment in *Adler* was really aimed at. However, as set out above, it is hard to see what conceptual difficulty there could be with such a technique when it is permissible under the contractual terms. The same surely applies to changing the governing law to English law so as to come within the rule in *Gibbs*.

(E) Conclusion

As set out in section (C), the basic framework to be applied in restructuring plans is now reasonably well-established. Cross-class cram down against an in the money class will focus on a horizontal comparison, with the relevant alternative as the reference point. Differential treatment as compared to the relevant alternative will need to be objectively justified. Cross-class cram down against an out of the money class will involve limited weight being given to the objections of opposing creditors, though the appropriate amount of weight will depend on the facts of the case.

The issues discussed in section (D) are not intended to be a comprehensive overview of what is likely to be in issue in future plans. For example, it does not consider the question of how much consideration is necessary to avoid a plan being labelled as expropriatory. However, it suggests that the likely issues facing the court will continue to relate to the fairness (i.e. the fair distribution of the benefits of the restructuring) of a restructuring plan as between competing, in the money creditors. ■

South Square on the Road...

Members of Chambers have been involved in a number of recent overseas and domestic trips.

In June, David Alexander KC, Adam Al-Attar KC, Kira King, Toby Brown, Paul Fradley and Imogen Beltrami (joined by Dylan Playfoot and Tom Gibbons from our practice manager team) visited the British Virgin Islands for South Square's fourth joint Restructuring and Insolvency conference with RISA BVI, held this year at the BVI International Arbitration Centre.

David Alexander KC – co-chair of the Restructuring and Insolvency Conference with RISA BVI

Imogen Beltrami and Toby Brown at the South Square/RISA BVI Conference

South Square chartered Rebel Yell for a cruise with clients and friends in the beautiful waters of the BVI

Toby Brown, David Alexander KC, Imogen Beltrami, Dylan Playfoot, Kira King and Paul Fradley on board Rebel Yell

Earlier that month a team from South Square, including Tom Smith KC, Robert Amey, Ollie Hyams, Riz Mokal, Philip Judd, Annabelle Wang, Rabin Kok, Dhananjay Kumar (and our CEO, Will Mackinlay) visited Singapore and Hong Kong, including the III 24th Annual Insolvency Conference in Singapore, at which South Square was proud to be a Gold sponsor.

Tom Smith KC (centre) speaking as part of a panel on Valuation in Corporate Reorganizations at the III Conference in Singapore

The team were delighted to meet up with colleagues and clients in Hong Kong

The South Square team award for the best dumplings in Hong Kong goes to Cheung Hing Kee Shanghai Pan-fried Buns

South Square hosted a drinks reception at Altro Zafferano, Singapore, overlooking the majestic Marina Bay

Our next overseas event will be in Cayman for the annual RISA Cayman / South Square Conference which take place at the Ritz Carlton on 20 November 2024.

Meanwhile, closer to home, delegations from South Square have enjoyed visits to Bristol, Reading and Leeds to catch up with our solicitor and insolvency practitioner clients, and we are looking forward to our Manchester on 10 October 2024.

Clifton Suspension Bridge, Bristol

Reading Town Hall and statue of Queen Victoria

Leeds city skyline in Yorkshire

Manchester Cathedral

South Square supports the Twinning Project

The Trustees of the Twinning Project with Dr Martha Newsom (Mark Phillips KC, front centre)

The Twinning Project is a partnership between HM Prison and Probation Service and professional football clubs with the objective of twinning prisons in England and Wales with a local professional football club.

The aim is to engage prisoners in football-based programmes to improve their mental and physical health, wellbeing and obtain a qualification which will help improve their life chances and gain employment on release. In its five years since being set up by David Dein, former Vice Chairman of Arsenal FC and the FA, there have been some notable successes.

In the last year over 2500 individuals have completed the programme, many of them going on to find opportunities upon release in the football supply chain. Football clubs across the country are now engaging with Twinning Project graduates and finding opportunities in catering, hospitality, finance, stewarding, maintenance logistics and coaching.

The Twinning Project is managed by its CEO Hilton Freund. It has been monitored by the University of Oxford and a report is in course of completion. Dr Martha Newson, Associate Professor in Psychology at the University of Greenwich and Leader of the Changing Lives Lab Group at the University of Oxford said:

"Our research demonstrates how sports interventions with strong social allegiances, particularly football, have the potential to reduce disciplinary offences and improve wellbeing within prison. Specifically, Twinning Project participants had 50% fewer adjudications in the 2-months after the programme compared to a control group. Furthermore, participants who identified more strongly with the programme were more likely to reduce their number of adjudications, even after accounting for additional predictors of behaviour, including baseline prison behaviours, age, prison type, criminal career density (copas rate), and time left to serve. These bonds were rooted in quality relationships with programme instructors and feelings of personal transformation. Triangulated with survey data on social bonding experiences and improved optimism, this data suggests that large-scale, socially-informed interventions may also reduce recidivism rates."

Twinning Project is a charity and South Square is pleased to say that Mark Phillips KC is one of its trustees. ■

Ian Wright – Arsenal FC Legend & Football Pundit

News in Brief

Sir Antony Zacaroli elevated to Court of Appeal

All at South Square are immensely proud that His Majesty The King has approved the appointment of Mr Justice Zacaroli, a former member of Chambers, as a Lord Justice of Appeal.

Tony was called to the Bar (Middle Temple) in 1987 and took Silk in 2006. He was a member of Chambers until appointed as a High Court Judge to the Chancery Division in 2017. He was President of the Upper Tribunal, Tax and Chancery chamber between 2018 to 2021 and has been Supervising Judge for the Business and Property Courts, Midlands, West and Wales Circuits, since 2021 and Chair of the Insolvency Rules Committee, since 2018.

Rabin Kok becomes an Advocate & Solicitor of the Singapore Bar

We are delighted to announce that Rabin Kok has been admitted as an Advocate & Solicitor of the Singapore Bar in a ceremony at the Supreme Court. Rabin was also the top scorer in Part A of the Singapore Bar Examinations, obtaining distinctions in Company Law, Evidence and the Singapore Legal System.

Rabin's admission will (pending regulatory approvals) grant him full rights of audience in all courts of law in Singapore, including in the Singapore High Court and Singapore International Commercial Court, which attract complex commercial, chancery and cross-border insolvency work in East Asia. These will complement Rabin's existing admissions in England & Wales and in the British Virgin Islands.

Congratulations Rabin!

Congratulations Mark Phillips KC

Huge congratulations to South Square's Mark Phillips KC who was the runner up, "Highly Commended", for Barrister of the Year at The Lawyer awards, presented on 18 June at the Marriott Grosvenor House Hotel. He was pipped to the post by an extremely worthy winner, Jason Beer KC, who many know from his sterling work as Counsel to the Post Office Horizon IT Inquiry Team, and his persistent questioning of witnesses.

A Statement on Digital Assets

The UK Jurisdiction Taskforce (UKJT) has released its third Legal Statement on digital currencies, this time on Digital Assets and English Insolvency Law. South Square's Ryan Perkins is a part of the Taskforce.

The Statement aims to provide clarification to those already operating in digital assets and reassurance to those who will see such assets in insolvent estates in the future

In his Foreword to the statement, Master of the Rolls Sir Geoffrey Vos wrote that *'Existing English insolvency law is entirely capable of convenient and sensible application to disputes concerning digital assets'*. Whilst conceding that that the issues in such disputes will be technical and fact specific *'they can be resolved by recourse to existing and well-established principles'.*

Whilst the UKJT statements are not legally binding, previous statements have been used the English courts as authoritative guidance to deal with questions of crypto-assets in a legal context.

News in Brief *(cont.)*

First Cross-Border Prepack for SICC

In early June the Singapore International Commercial Court (SICC) issued its reasons for sanctioning its first cross-border prepack scheme for No Va Land, the oral decision being given by International Judge Jim Peck (an Associate Member of South Square) back in April.

Vietnamese property developer No Va Land (a real estate investment holding company with 93 corporate affiliates and the largest of Vietnam's mid-market residential real estate developers) had sought to restructure New York-law governed convertible bonds after it defaulted on them in July 2023. By March 2024, No Va Land had reached an agreement with international bondholders representing 75% of the series, and over 95% of bondholders were in support of the scheme before it went to the SICC for sanction.

Although the application proceeded on an uncontested basis, this was the first ever cross-border pre-pack scheme filed in the SICC and the Court's description of its experience with the application constitutes a useful precedent for the management of similar restructurings that may arise in the future.

Judge Peck found that the Vietnamese developer qualified for relief under Singapore's Insolvency, Restructuring and Dissolution Act, despite being a foreign unregistered company, because of its substantial connection with the city state. This stemmed from the bonds being listed on the SGX, a clause in the indentures directing the parties to resolve any disputes in a Singapore-seated arbitration and the developer and bondholders "*unequivolcally*" submitting to the SICC's jurisdiction. The Judge's grounds also included a detailed analysis of disclosure obligations in relation to pre-packs that will undoubtedly be useful considerations for future pre-pack restructurings.

BitCoin Laundering

A woman accused of converting bitcoin into cash and property to help hide the proceeds of a £5 billion pound fraud has been jailed for nearly seven years for money laundering offences after a trial at Southwark Crown Court. Prosecutors said Wen Jian helped hide the source of money allegedly stolen from nearly 130,000 Chinese investors in fraudulent wealth schemes between 2014 and 2017.

She was not alleged to have been involved in the underlying fraud, which prosecutors said was masterminded by another woman who Wen believed was independently wealthy. Wen's role was to help convert the stolen funds into bitcoin to take it out of China, and then convert it back into cash. As part of their investigation, British police seized wallets holding more than 61,000 bitcoin – making it one of the largest cryptocurrency seizures by law enforcement worldwide – which was worth around £1.4 billion when police gained access in 2021. It is now worth over £3 billion.

A £62 million Fat Finger Fine

Citigroup have agreed to pay U.K. regulators £62 million for a trader's 'fat finger' when typing in an order to sell shares, an episode that caused a brief "flash crash" in European stocks. Regulators say that the incident in question was just one of several over a four-year period during which Citi's trading controls were inadequate.

In May 2022, an unnamed trader in Citigroup's global markets unit was working from home in London on a public holiday. He planned to sell a basket of shares worth $58 million but made an "inputting error" when punching in the order in the bank's computer system, entering the value of the stocks into the wrong field. Instead of $58 million, the basket created had a value of $444 billion. A warning sign popped up on his screen but he manually overrode it. Whilst Citigroup's internal controls kicked-in and blocked the majority of the trade, a big chunk still made it onto the markets - roughly $189 billion of the basket went to an algorithm that then sliced it into portions to be sold throughout the day. As a result, $1.4 billion of equities was sold on European exchanges before the trader managed to cancel the order.

Investigations by the Financial Conduct Authority and by the Prudential Regulation Authority found that whilst parts of Citi's trading control framework worked as expected, some primary controls were absent or lacking which should have prevented such an enormous erroneous basket of shares reaching the market. As a result, the two regulation authorities have imposed fines which together exceed £62 million.

It's not ALL doom and gloom!

Fewer companies went bust in May than the previous month, amid an up-tick in business activity across England and Wales. Data released by the Insolvency Service shows that UK company insolvencies fell 6% month-on-month to 2,006, which is 21% lower than in May 2023. The number of firms going out of business rose steadily during 2021 and 2022, with 2023 seeing the highest annual number of company insolvencies since 1993.

And, in good news for the retail sector UK shoppers returned to retailers in greater numbers than expected in May, with sales recovering from the wet weather in April (the wettest April since 2012 according to the Met Office). Retail sales volumes rose 2.9% on month in May, flipping the 1.8% fall in April, according to the Office for National Statistics. Clothing retailers and furniture stores especially improved sales in the month.

Superdry

Fashion chain Superdry has staved off insolvency, receiving court approval at a sanction hearing on 17 June for its restructuring plans.

Superdry first unveiled its sweeping reforms in April of this year, which included rent reduction on 38 of its stores – with 14 stores switching to nil rent – and delisting on the London stock market. The proposed measures received approval from its creditors on 11 June, with 99% voting in favour. Superdry's shareholders have also backed a £10 million equity raise. Co-founder and chief executive Julian Dunkerton will inject *"a significant amount of his own money"* and underwrite the £10 million equity raise.

Becker's Bankruptcy Discharged

Boris Becker has been a gift that keeps on giving to the NIB section of the Digest!

The professional sportsman was originally declared bankrupt in 2017, after which he served 8 months in a London prison for illicitly transferring large sums of money and hiding £2.5 million of assets after he was bankrupt. Two years ago, he was deported to Germany.

Becker applied to have his bankruptcy discharged. Though he fell far short of repaying his creditors the almost £50 million that he owned, Chief ICC Judge Nicholas Briggs declared it would be 'perverse' not to end the case given the efforts that Becker had made. Demonstrating a little judicial humour, Briggs J said *"On the spectrum of bankrupts who range from 'difficult as possible and doing everything to frustrate the trustee's inquiries' to 'co-operative, providing information and delivering up assets', Mr. Becker clearly falls on the right side of the line"*.

An Ethical Failure

The Bar Standards Board ('BSB') has fined a former pupil barrister £500 for repeatedly swearing during an online ethics exam and at one point 'flipping the bird' to the camera.

Jack Sadler was undertaking a remote professional ethics assessment as part of his mandatory training during his second six as a pupil but did not release that his words and actions were being monitored and recorded. During the exam he made a variety of statements including: *"I'm so f****** bored of this"*, *"This is annoying, oh my god, this is going to really piss me off"*, and *"F****** finally, a criminal question... This civil s***... How can you have any ethics if you're a civil practitioner, honestly."* At the end of the recorded exam he could then be seen holding up his middle finger to the camera.

Perhaps unsurprisingly, the BSB determined that during the exam Mr Sadler had *"acted in a way which was likely to diminish the trust and confidence which the public places in him"*. If that were insufficient, on a second charge the BSB found that Sadler *"failed to keep the affairs of each client confidential and/or failed to protect the confidentiality of each client's affairs"* as he accessed his work email during the recorded exam and clicked on two emails from solicitors' firms containing client information.

In mitigation, Sadler stated that he did not realise his words and actions could be heard and recorded, and that nothing he said or did was directed at any individual, particularly the exam proctor. He also said that he did not realise at the time that accessing his work e-mail during the examination could constitute a breach of GDPR and the action was due to a lack of both knowledge and thought on his part. His then Chambers took steps to address any potential breach.

Mr Sadler has since left the Bar.

Legal 500 Bar Awards

We are delighted to announce that both Chambers as a whole and a number of individual Members have been shortlisted for a multiple Legal 500 Bar Awards this year as follows:

Chancery Silk of the year
Felicity Toube KC

Chancery Junior of the year
William Willson

Financial services and insurance Junior of the year
Georgina Peters

Chancery Set of the year
South Square

Legal500
Bar Awards 2024
SHORT LIST

Congratulations to Felicity, William and Georgina and very many thanks to all our clients and friends who support these nominations.

The awards ceremony will take place on Wednesday 25th September 2024 at the Park Plaza, Westminster Bridge.

SOUTH SQUARE CHALLENGE

Welcome to the July 2024 South Square Challenge.

As it is a summer of sport this year, with the Euros well underway and the Paris Olympics beginning at the end of the month we have a sporting theme to this issue's competition.

Each of the people pictured have represented Team GB at the Olympic Games and each also has at least one law degree.

Your challenge is to name each athlete, the Olympics and the discipline/s at which they **first** represented Great Britain, and the university where they gained their first **law** degree.

Please send your answers to Kirsten either by e-mail to **kirstendent@southsquare.com**, or to the address on the back cover, by Friday, 13 September 2024.

The March 2024 South Square challenge was incredibly popular with the wig tin full to bursting. It was a rollover with two magnums of champagne and two South Square umbrellas being awarded to the winner: on this occasion Matt Henderson, Court of Session Insolvency Reporting Accountant at Johnston Carmichael, Edinburgh.

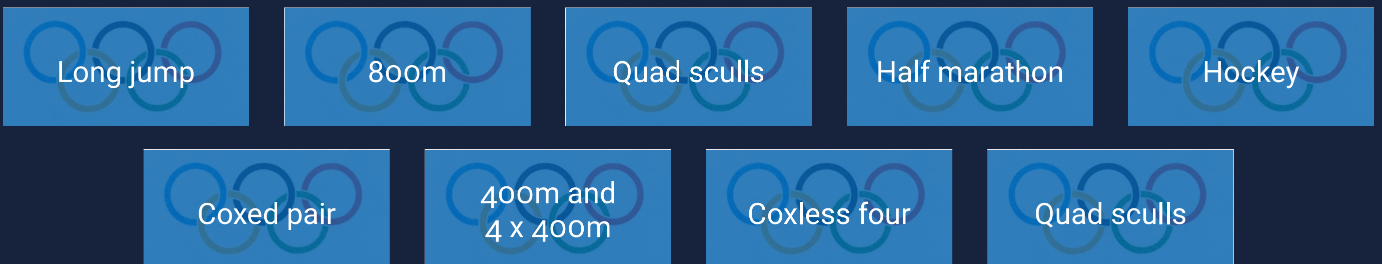
The correct answers to the March 2024 South Square Challenge were:

1. *Gerad Butler – University of Glasgow*
2. *Gemma Chan – Worcester College, Oxford*
3. *Julio Iglesias – CEU San Pablo*
4. *Nelson Mandela – University of South Africa*
5. *Mahatma Ghandi – University College London*
6. *John Cleese – Downing College, Cambridge*
7. *Rebel Wilson – University of New South Wales*
8. *Andrea Bocelli – University of Pisa*
9. *Fidel Castro – University of Havana*
10. *Simon Mignolet – University of Leuven*
11. *Kim Kardashian – the odd one out as she does not have a law degree but has passed the US 'baby bar' on her 4th attempt*

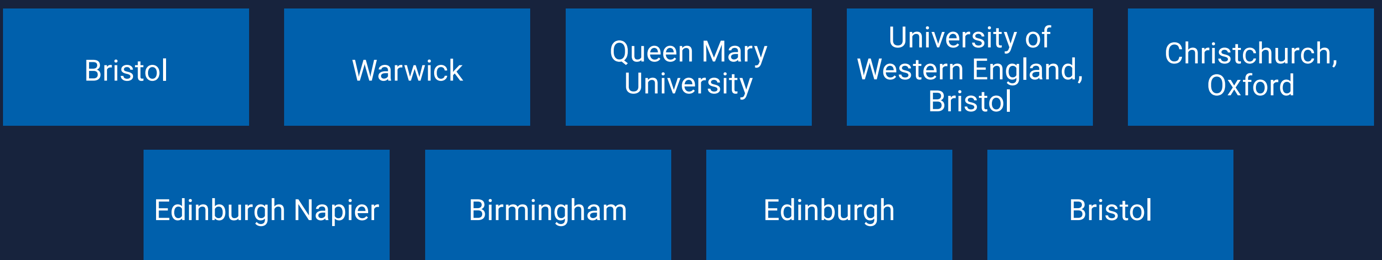
Olympian

First Games

First Discipline



Alma mater of 1st Law Degree



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
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
Joseph Curl 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
Rory Brown
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
Dhananhay Kumar

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Christopher Brougham KC
John Briggs
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