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Wiliam Willson and Charlotte Ward on the insolvency implications of "double dip" transactions

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SOUTH SQUARE

Designed and produced by Creative Interpartners, London

From the editors

Marcus Haywood and William Willson

Welcome to the August 2025 edition of the South Square Digest

As we draw to the end of the summer term, Chambers continues to be involved in diverse and high-profile litigation, with the recent and very significant decisions in *Petrofac* and *Thames Water* being but two.

These two decisions feature prominently and we lead with a case note on the *Petrofac* case, in which 7 members of Chambers were involved. Leading on from this, Mark Phillips KC argues for the need to reform the binary approach to creditors that has characterised the approach to restructuring plans over the last five years in *Restructuring Plans: A 5 Year Re-set.*

William Willson and Charlotte Ward then focus on the insolvency implications of "double dip" transactions in *You can dip twice, but can you only prove once?*

In *Waving not drowning,* Georgina Peters and Lindsay Hingston (Freshfields, London) discuss the Court of Appeal's decision in *Thames Water* and how it clarifies the approach to out of the money creditors.

Then, Jamie Leader of Enyo Law LLP reviews the decision of the Supreme Court earlier this year in *Bilta v Tradition Financial Services* with an emphasis on section 213 and fraudulent trading in his article *No break with Tradition.*

Chambers has undertaken a number of foreign trips of late to meet up with clients and friends around the world and we have been delighted to visit the UAE, Cayman Islands and BVI recently.

Following on from this we are delighted to have contributions from Nicola Reader and Ben Alexander of Clifford Chance, Abu Dhabi *(The UAE's New Bankruptcy Law: A Modern Framework for Restructuring and Insolvency)*, and from Julie Engwirda and Joyce Yuen of Harneys, Hong Kong *(Unrecognised foreign judgments as the basis of a winding up petition).*

Sandwiched between these articles are the case digests, with Mark Arnold KC providing an overview of what has been a busy few months

in the courts. Chambers Associate Professor Christoph Paulus is back with another erudite and entertaining Euroland. Three new books have been added to the Chambers publishing library and throughout this issue you will find some generous discount codes. As ever, we end with snippets of legal news and our faithful South Square Challenge.

We do hope you enjoy this edition of the Digest (and preferably that you do so somewhere nice, on your summer holiday). If you find yourself reading someone else's copy and wish to be added to the circulation lit, please send an e-mail to kirstendent@southsquare.com or sign up on our website, and we will do our best to ensure you receive the next and all future editions.

It goes without saying that if you have any feedback to give us in relation to the Digest – positive or negative – we would be delighted to hear from you. Many thanks to all for their contributions. As always, the views expressed by individual authors and contributors are theirs alone.

Marcus Haywood & William Willson

Case Note: *Saipem S.P.A & Ors v Petrofac Limited & Anor* [2025] EWCA Civ 821

On 1 July 2025, the Court of Appeal handed down a significant judgment in *Re Petrofac* [2025] EWCA Civ 821 and allowed an appeal brought by two opposing creditors (Saipem and Samsung) against the sanctioning of two restructuring plans ("the Plans"). The Plans concerned the Petrofac group, an engineering, procurement and construction company specialising in the energy industry. The group is in financial distress. The Plans were launched with the intention of reducing the group's debt burden and facilitating the introduction of new money.

Despite Saipem and Samsung's opposition, the Plans were sanctioned by Marcus Smith J by an order dated 20 May 2025. Saipem and Samsung appealed on two grounds. On the first ground, Saipem and Samsung contended that Petrofac could not satisfy the *"no worse off"* test because, in the relevant alternative of liquidation, they would obtain competitive advantages as Petrofac (a competitor) would leave the market. The Court of Appeal rejected this argument – holding that the *"no worse off"* test involves looking at the value of the creditor's rights that are being compromised rather than the value of their broader interests (such as the loss of a competitive advantage).

The Court of Appeal did, however, allow the appeal on Saipem and Samsung's second ground, which was that the benefits of the restructuring had not been fairly shared with them.

As a starting point, the Court rejected the proposition that an out of the money creditor was not entitled to share in the benefits created by the Plan. The principal point of fairness then addressed by the Court of Appeal was the contention that a disproportionate amount of value had been given to the providers of the new money, rather than the creditors whose claims were to be compromised.

The new money equity was being provided on a notional equity valuation of $351m in circumstances where the expert valuation evidence indicated a post-restructuring equity valuation of $1.5bn-$1.85bn. This raised the question of whether the new money terms fairly reflected the cost at which funding could be obtained by the post-restructured group in the market. The Court of Appeal considered that the plan companies' evidence did not grapple sufficiently with that issue. The Court therefore considered that the plan companies had failed to justify the returns on the new money, and the Judge was therefore wrong to hold that the new money was being provided on *"competitive"* terms. The court was not in a position to consider whether the proposed allocation of the benefits of the restructuring was fair. The Court considered that the proper use of the cross-class cram down power was to enable a plan to be sanctioned against the opposition of those unreasonably holding out for a better deal following a genuine attempt to formulate and negotiate a reasonable compromise – but, because of the new money pricing issue, the negotiations had been conducted on a false premise in this case. The Court of Appeal therefore overturned the sanction order.

The judgment is a significant one for Part 26A restructuring plans. It is likely to lead to a much greater focus on new money terms (by reference to market rates available to companies post-restructuring) and the fairness of the proposed allocation of benefits (including to *"out of the money"* creditors). ■


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SOUTH SQUARE

Restructuring Plans A 5 Year Re-Set

Something was wrong

In the first five years of Restructuring Plans ("RPs") under part 26A Companies Act 2006[2] there have been around 50 RPs. However, they were expensive, elaborate and the procedure adopted had twice been criticised by the Court of Appeal, first in Re AGPS Bondco Plc (***"Adler"***)[3] and then in *Thames Water Utilities Holdings Ltd* (***"Thames"***)[4]. RPs were used by companies that had run up deficiencies that had wiped out junior debt and equity entirely. On the basis that creditors and shareholders who were *"out of the money"* in a liquidation would receive nothing, the position taken by plan companies and senior secured creditors was that they could be crammed down for nothing or a *de minimis* return. Moreover, as they were *"out of the money"* their say could be ignored or given little weight and they were kept out of discussions. The effect was that, so long as companies kept the senior creditors onside, they could write down or write off entirely, and the junior debt would often first learn of the plan by the Practice Statement Letter.

The consequences of companies focussing entirely on senior *"in the money"* creditors was that those creditors would approve an RP, and the junior debt could be crammed down with nothing.[5] The senior creditors were considered to be the only class of creditors the company needed to deal with because their assent enabled a cram down of other classes. As Robin Dicker QC said: *'if you are not sitting at the table, that is because you are lunch.'*[6]

The in or out of the money approach gave too much weight to priorities in structured debt stacks. The process had become a creditor driven enforcement process by which senior creditors were taking for themselves the additional returns resulting from a restructuring plan. Senior debt would always

1. I am grateful to Dr Riz Mokal for his comments on a draft of this article. I am also grateful to my juniors on *Thames*, Matthew Abraham, Jamil Mustafa and Imogen Beltrami. The errors and the views expressed are mine.

2. Introduced by Schedule 9 to the Corporate Governance and Insolvency Act 2020 (***"CIGA"***).

3. [2024] EWCA Civ 24.

4. [2025] EWCA Civ 475. Considered in more detail in relation to the ***DRPS*** below.

5. Often by transactions that would amend and extend the senior debt.

6. *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch), [2022] 2 BCLC 62 at paragraph 112 (***"Virgin Active"***).

7. It is noteworthy the often junior '*out of the money*' debt is given a value in the market.

8. Debt that did not need to be restructured should either fall outwith section 901C(3) or within 901C(4) if it has no genuine economic value, as to which see below.

9. See Mokal on UK courts' cram down discretion Butterworths Journal of International Banking and Financial Law January 2021 page 12. At page 13: *"Consider the situation in which each of three conditions is met: (i) the plan affects the rights of the members of a class in which the plan has not received the requisite support and the court was not persuaded either to; (ii) exclude the class from the meeting; or to (iii) discount the votes of its members, in each case on the basis that such members lacked a genuine economic interest in the company. It appears to me to follow ineluctably that the creation of any restructuring surplus depends, at least pro tanto, on affecting the rights of the members of the dissenting class. It follows in turn that such members are entitled to a "just and equitable" (or, if you prefer, a "fair and equitable") share of the surplus to reflect the imposition upon them of some of the costs incurred in order to create the surplus. So, we return to the question how the court should assess whether the plan proposes a due allocation to dissentients of the restructuring surplus."*

10. Usually resulting from plan companies informing the court that they had a *"burning platform"*.

11. Consolidating the Insolvency Act 1985.

12. [1990] EWCA Civ 20, para 22.

"scoop the pool". Junior debt would be wiped out in a plan approved by the senior creditors. The courts have now made it clear that that is not a fair distribution of the benefits of the restructuring.

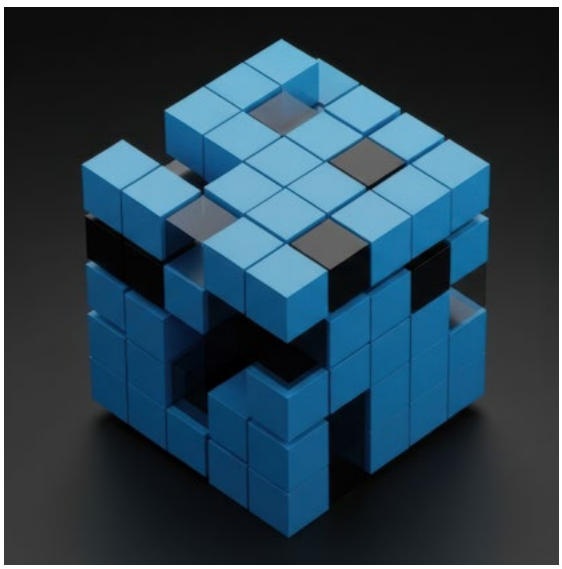
This approach misunderstood the nature and value of junior debt. At its most fundamental level, if the junior debt was worthless, there wouldn't be any need for it to be restructured . If it needed to be restructured, it had value. There are several ways in which an *"out of the money"* creditor's debt could be compromised. The junior creditors might be prepared to defer their maturity dates in the hope that the company would return to profitability by the deferred time; they might exchange their debt for a future contractual right contingent on the company's future performance, they might subordinate their debt or exchange all or part of it for equity, in each case taking the risk that the company might not return to profitability against the potential benefits to them if it did. The fact that the junior creditor might receive nothing in an immediate liquidation does not determine what might be a fair compromise for their debt. The *"out of the money"* answer was a simple answer to a more nuanced question; it looked at the starting point of the analysis, i.e. what would they get in an insolvent distribution absent a restructuring, and made it the end point. That was misconceived.

The significance of whether a creditor was in or out of the money also had consequences for the court process. Treating that question as a binary hair trigger that determined whether or not a class had an interest, and a voice, resulted in major battles over valuation. The court soon discovered that such battles could not properly be dealt with in part 8 proceedings in short time frames. That was often because companies left the proceedings too late, communicated with the *"out of the money"* creditors late, leaving them having to advance arguments and put in evidence in timetables that left little, if any, time to consider the position. Leaving the hearings late also resulted in courts often being faced with a *"burning platform"* giving the court a choice between a sudden collapse of the plan company or the senior debt doing better than the relevant alternative and the junior debt being no worse off, but critically, no better off.

The Rescue Culture forgotten

Not only did the in or out of the money approach ignore the value of junior debt that plan companies needed to restructure, but it disregarded entirely the move from creditor enforcement to a rescue culture that was started with the Cork Committee of 1982. The Insolvency Act 1986[11] moved the dial in English insolvency law from creditor driven processes to a more debtor friendly approach. It was described as the new 'rescue culture'. This was captured by Nicholls LJ in ***AIB Capital Markets Plc and another v Atlantic Computer Systems Plc***:[12]

"....we turn to consider the position of administrators appointed under the 1986 Act. Part 2 of this Act represents a major reform in the law relating to companies which are insolvent or likely to become so. The statute enables the court to appoint an administrator to manage the affairs, business and property of a company with a view to achieving one or other of the statutory objectives set out in section 8(3). This reform was introduced by the Insolvency Act 1985 following proposals on insolvency law and practice made in June 1982 by a committee under the chairmanship of Sir Kenneth Cork. The committee considered that the power, contained in any well-drawn floating charge, to appoint a receiver and manager of the property and undertaking of a company had been of outstanding public benefit. A significant number of companies had been forced into liquidation, and potentially viable businesses capable of being rescued had been closed down, for want of such a floating charge. The committee proposed that statutory provision should be made enabling an administrator to be appointed in appropriate circumstances, with all the powers normally conferred upon a receiver and manager appointed under a floating charge."



Prior to the ***Enterprise Act 2002*** creditors with a floating charge over the whole or substantially the whole of the company's property remained able to appoint administrative receivers who would act primarily in the interests of the secured creditor. This was changed by the ***Enterprise Act 2002*** which abolished administrative receivership and replaced it with the power of secured creditors

to appoint administrators.[13] Performance by an administrator of their functions was then governed by paragraph 3 of schedule B1:

"(1) The administrator of a company must perform his functions with the objective of-

(a) rescuing the company as a going concern, or

(b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration)

(c) realising property in order to make a distribution to one of more secured or preferential creditors.

(2) Subject to sub-paragraph (4), the administrator of a company must perform his functions in the interests of the company's creditors as a whole.

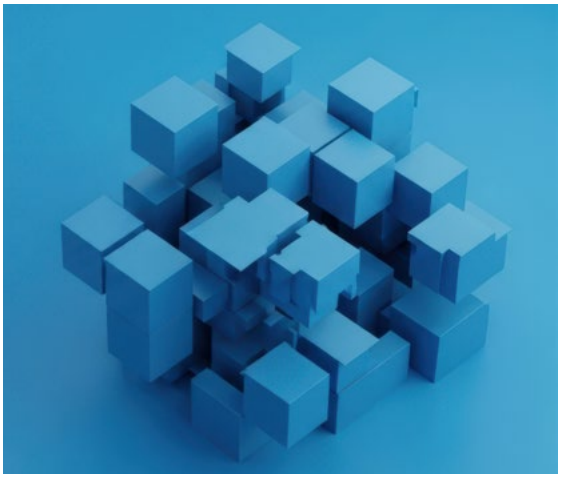
...

(4) The administrator may perform his functions with the objective specified in sub paragraph 1(c) only if-

(a) he thinks it is not reasonably practicable to achieve either of the objectives specified in sub-paragraph 1(a) and (b), and

(b) he does not unnecessarily harm the interests of the company as a whole."

The changes in the ***Enterprise Act 2002*** moved the dial further away from creditor enforcement and towards debtor rehabilitation. Critically, administrators appointed by secured creditors[15] (a) had to perform their functions in the interests of the company's creditors as a whole, (b) could only perform their functions with the objective of realising property in order to make a distribution to one of more secured creditors if they satisfied the conditions of sub-paragraph (4) and (c) in doing so they could not unnecessarily harm the interests of the company as a whole. Secured creditors could no longer enforce their security as they had done prior to 1986. This means that the idea that *"in the money"* secured creditors always have the option of 'scooping the pool' on enforcement is not right.[16]



The need for changes

There had to be changes. Two recent developments indicate that there will now be significant changes in how RPs should be managed in the future. First, the Court of Appeal in ***Thames*** and in ***Saipem S.P.A v Petrofac Ltd*** (***"Petrofac"***) has finally dispelled the *"out of the money"* myth. The test on sanction is more nuanced and turns on whether what a creditor is getting is fair, having regard to what they put in and what they get out, having regard to the risks they take and their position in the relevant alternative. Second, the Draft Revised Practice Statement (the ***"DRPS"***) sets out changes intended to involve all creditors from an earlier stage and proper case management of the sort indicated by the Court of Appeal in ***Adler*** and ***Thames.***

This article considers both of those changes and how they should alter how RPs are negotiated, managed and proposed in court.

(1) The Court of Appeal decision in Thames: The end of the binary "out of the money" approach

Section 901A(3)(b) ***CIGA*** provides that:

"the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties mentioned in subsection (2)."

The financial difficulties identified in sub-section (2) are financial difficulties that *"are affecting, or will or may affect, its ability to carry on business as a going concern."* In the context of a distressed company with structured debt, the unpaid junior debt may affect the company's ability to carry on business as a going concern and will often need to be compromised. The question is whether the compromise of the junior debt contributes benefit to the restructuring so that it is fair that it should receive a benefit in return.

It is possible to identify two broad types of restructuring. The first is a 'distributive' restructuring in which the financial difficulties are mitigated by increasing the amount of money that can be distributed to creditors on a distribution. This is relatively simple because what falls to be considered is immediate payments to the creditors. In such a scenario, the benchmark is the amount that creditors would receive in a distribution in an insolvency, as was the case in ***Adler.*** The second broad type of restructuring is a balance sheet restructuring where the company's balance sheet is restructured so that it can trade into the future.[17] A balance sheet restructuring requires the company's debt, and often its shares, to be restructured.[18] The question then is what share of the upside, or benefits of the restructuring, should go to each class of creditor. Creditors who would receive an immediate payment in a distribution should receive at least that value, or they would be worse off. *'Out of the money'* creditors should receive value that reflects their contribution to the chance that the newly restructured company will one day make returns consequent on the restructuring.[19]

13. Paragraph 14 of Schedule B1 Insolvency Act 1986.

14. Which might be achieved by a Restructuring Plan. The express purpose that referred to schemes of arrangement was removed, but that did not mean administrators could no longer promote CVAs, schemes or plans.

15. Or by the directors or the company.

16. I have been told anecdotally that senior secured creditors are moving to 'enforcement of their debt'. Administrators appointed cannot disregard the wider interests in the company. Moreover, companies or directors might themselves appoint administrators. This should be factored into discussions between stakeholders. The insolvency process is no longer entirely creditor driven.

17. In argument in ***Petrofac*** Snowden LJ described it as a *'shiny new ship'* sailing into the future.

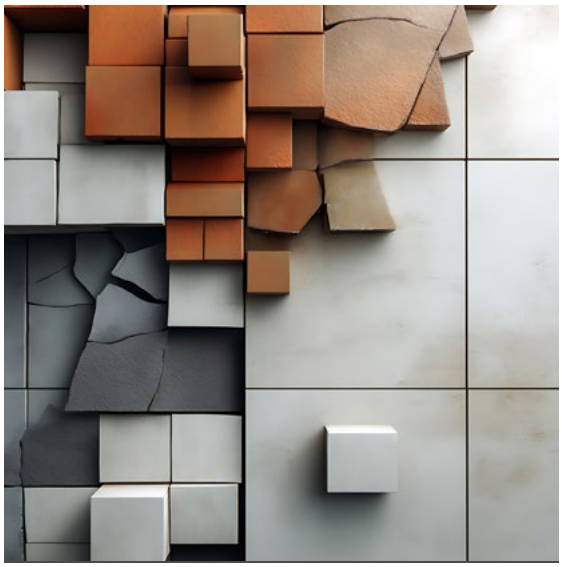
18. Unless it is being left out of the RP, for example because performance of the debt is critical to the ongoing business, as for example was the case in *Sea Assets Ltd v PT Garuda Indonesia* [2001] EWCA Civ 1696 (***"Garuda"***).

19. This should be the subject matter of the negotiations between the company, *'in the money'* creditors and *'out of the money'* creditors. In paragraph 130 of ***Petrofac*** the Court of Appeal identified the negotiations that might be necessary absent a RP and which should be reflected in the context of an RP: *"...absent recourse to Part 26 or Part 26A, if a class of creditors who would expect to receive a distribution from the realisation of assets in the liquidation wished to obtain the additional benefit of the preservation of the company itself and the value of its business as a going concern, free of the claims of the other creditors, they would have to negotiate with the company and with the classes of out of the money creditors for the latter to give up their claims. That would inevitably require a genuine commercial compromise by all parties."*

The root of the *"out of the money"* misunderstanding

The phrase *"out of the money"* appears in only one place in all of the material concerning RPs, namely, the Explanatory Notes to section 901C ***CIGA***. Paragraph 188 of the Explanatory Notes to ***CIGA*** provides that if the court is satisfied that a class of creditors has no genuine economic interest in the company (an 'out of the money' class), the court may order for that class of creditors or members to be excluded from meeting. It is not necessary for a company to consult any class of creditors who are not affected by a RP either because their rights are untouched[20], or they have no economic interest in the company.[21] Section 901C(4) ***CIGA*** provides:

"...subsection (3) does not apply in relation to a class of creditors or members of the company if, on an application under this subsection, the court is satisfied that none of the members of that class has a genuine economic interest in the company."



The test in 901C(4) ***CIGA*** is different from, and broader than, the only other test that refers to *"genuine economic interest"*, namely, section 901G(5) ***CIGA*** which requires the members of the assenting class either to have received a payment or to have *"a genuine economic interest"* in the company, in the event of *'the relevant alternative'*. The tests are different. Section 901G ***CIGA*** only applies to a class of creditors who have a genuine economic interest in the relevant alternative. The question whether the interest in the company in 901C(4) ***CIGA*** can include an interest in the relevant alternative remains undecided. In paragraph 156 of the Court of Appeal's judgment in ***Thames*** said:[22]

"Before turning to consider the substance of the objections to the Class A Control Terms, we note that one of the arguments advanced by Mr Phillips was that under s.901C(4) a 'genuine economic interest in the company' does not mean an interest in the company in the relevant alternative. We do not need to determine that issue. It does not arise in this case because there was no attempt to disenfranchise any class of creditors under s.901C. Its determination is better left to a case where it arises on the facts. The question is a binary one: a creditor either does or does not have a genuine economic interest in the company. In contrast, the exercise of discretion whether to sanction a plan involves wider considerations and the fact that a creditor would be out of the money in the relevant alternative is not in itself a reason to exclude that creditor from the consideration of whether the benefits preserved or generated by the restructuring are fairly allocated among all creditors whose rights are compromised under the plan."

To fall within section 901C(4) the creditor must have no *"genuine economic interest"* which might be in the relevant alternative or it might not. In the case of an *'out of the money'* creditor with debt that needs to be restructured in a balance sheet restructuring, it has a genuine economic interest. In that scenario the fact that the *"out of the money"* creditor would not receive a payment in an immediate distribution should not be determinative.

As regards reading the test across to section 901G ***CIGA***, the question whether the creditor has a *"genuine economic interest in the company"* is a different question to the question whether the creditor has a *"genuine economic interest"* in the company *"in the relevant alternative"*. If that is right, the test in section 901C(4) ***CIGA*** cannot be read across to section 901G ***CIGA***.

One point the argument fails to recognise is that, in the cases which had excluded creditors from participating in schemes because they were *"out of the money"*, the creditors retained their interests against the company; their rights were not discharged. In those cases, meetings of the *"out of the money"* class were not called, and their rights against the company were not compromised; they were outwith the scheme.[23] Their interests against the company, usually in an insolvency proceeding, survived. An RP restructuring all a company's debt is fundamentally different because the company is the only entity against which creditors have rights, and an RP compromising those rights for nothing on the basis that they were *"out of the money"* would simply take away their economic interest. However, it is only classes of creditor with no genuine economic interest in the company (in whatever circumstance is considered) that fall within section 901C(4) ***CIGA***. That may include creditors who are *"out of the money"* but that is not the determinative question.

The argument that section 901C(4) ***CIGA*** provides that little or no attention should be paid to *"out of the money"* creditors starts with a misunderstanding of old cases in which some creditors were *"out of the money"*. The first case is *Re Tea Corporation Limited,*[24] a decision of the Court of Appeal in 1902. The company was in liquidation, but in 1902 distributions could only be made through a scheme. The scheme provided that a new company would take over and discharge all the liabilities

20. Section 901C(3) CIGA only requires meetings to be held of creditors whose *"rights are affected by the compromise or arrangement."* If not affected a creditor need not be permitted to participate. This reflects the Court of Appeal decision in ***Garuda***.

21. Section 901C(4) ***CIGA***.

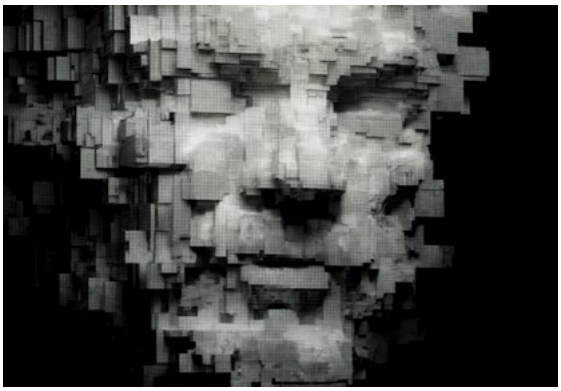
22. The Court of Appeal noted that the question arising under section 901C ***CIGA***. is binary and the exercise of discretion whether to sanction a plan involves wider considerations.

23. In a similar way to creditors whose rights were not being compromised could be left out of the scheme following ***Garuda***.

24. [1904] 1 Ch 12.

of the old company, pay the costs, and distribute the balance to creditors. The shareholders were excluded from the scheme because there was a deficiency to the creditors. The Court of Appeal held that the arrangement was between the company and their creditors, and the votes of shareholders, who had no interest in the distribution, ought not to be considered. The shareholders were *"out of the money"* and their claims were not transferred to the company making distributions. However, neither were their claims against the company discharged. The second case relied upon is *Re Oceanic Steam Navigation Company Limited*.[25] A scheme was proposed by which the company's undertaking was transferred to a new company in consideration of shares issued in the new company in exchange for debt due from the old company. The scheme proposed that the old company would be dissolved without being wound up. Whilst the scheme was not unfair to shareholders, because their interests were of no value, Simonds J refused to sanction the scheme because it avoided a winding up. The significance of that was that the shareholders' rights against the company could not be avoided; if there was some value in a winding up, that potential value should be protected.

Re Tea Corporation Limited and *Re Oceanic Steam Navigation Company Limited* were referred to in two administration cases in the early 1990s when there was a similar need for a scheme in order to make distributions. In *British & Commonwealth Holdings Plc (No.3)*[26] the company was in administration.[27] In 1991 there was no mechanism to make distributions in an administration. The administrators proposed a scheme and sought directions that a meeting of scheme creditors (who were the senior creditors) alone should be called excluding subordinated creditors. There were therefore two questions, first whether the subordination deed was effective (it was) and second whether a scheme could be sanctioned to effect distributions to senior creditors alone. On the important second question, it was held that since the only interests of subordinated creditors arose in a liquidation in which there would be no funds for them, their debt was unaffected by distributions to senior creditors. The rights of the subordinated creditors were not discharged by the scheme and remained against the company in administration.[28] In *Re Maxwell Communications Corporation Plc*[29] the company was again in administration. In a distributing scheme the claims of subordinated creditors were excluded. In both cases the fact that the creditors were *"out of the money"* meant that they had no interest in the distribution, but if that proved to be wrong, their claims against the company in a subsequent liquidation remained.[30] The decision was that they were unaffected by, and fell outwith, the scheme because their rights were unaffected by it,[31] not that their rights could be written off by a scheme because they were *"out of the money"*.



Section 901F *CIGA*

Section 901F(1) ***CIGA*** provides:

"If a number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting summoned under section 901C, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement."

The critical word is *"may"*. That gives rise to the discretion considered by the authorities. For the purposes of this article I focus on the discretion in relation to dissenting *"out of the money"* creditors, which was considered by the Court of Appeal in ***Thames*** and ***Petrofac***.

Section 901G *CIGA*

The discretion to sanction a plan under section 901F ***CIGA*** is subject to the provisions of section 901G ***CIGA***. Section 901G ***CIGA*** provides that if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors, if conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F ***CIGA*** (the ***'cross class cramdown'***). Condition A is 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. The test is no worse off, not no economic interest. Condition B, which applies to the assenting 'cramming' class, is that that class would *"receive a payment or have a genuine economic interest in the company in the event of the relevant alternative"*.

25. [1939] Ch 41.

26. [1992] 1 WLR 672. Counsel for the administrators were Gabriel Moss QC and Mark Phillips.

27. That was not introduced until the *Enterprise Act 2002*.

28. This was explained by Vinelott J in his later decision in *Re: Maxwell Communications Corporation Plc* [1993] 1 WLR 1402 at page 1405A-C in which he said: *"...in the very unlikely, indeed merely theoretical possibility, that the realisation of the company's assets would suffice to meet the claims of the scheme creditors, the rights of the holders of the unsecured loan stock would be unaffected by the scheme..."*

29. [1993] 1 WLR 1402. Counsel for the bank were Charles Purle QC and Mark Phillips.

30. In *Thames* the Court of appeal described the practice that had developed in relation to schemes in the following terms: *"a practice had developed under which the assets of the scheme company were transferred to a new company to be owned by those who would have been entitled to share in the distribution of the proceeds of sale of the scheme company's assets in a formal insolvency .... By that route, the creditors and shareholders who would have been out of the money in the formal insolvency of the scheme company would be left behind in its shell, and the benefits of future trading would be enjoyed by those who would have been in the money in the formal insolvency."*

31. As the Court of Appeal pointed out in paragraph 143: *"While it is true that it has been recognised since Tea Corp that a company may (through a two-stage process of a pre-packaged sale in administration and a scheme of arrangement) transfer all of its assets to a new company in which only those with a genuine economic interest in the scheme company may participate, this involves no interference with the rights against the scheme company of the creditors with no such economic interest. Those rights have at least potential value, because the sale would be carried out at a value determined by an independent officer of the Court, and the creditors or shareholders left behind would retain the necessary standing to pursue any remedies available to them in respect of the failure of the scheme company."*

32. One example is a shareholder. Whilst they will not receive a payment in a liquidation they may retain an economic interest in the prospect of future profitable trading.

33. Paragraph 123.

34. Paragraph 124.

35. Paragraph 125.

36. Paragraph 126. In ***Petrofac*** at first instance Marcus Smith J said of the *"out of the money"* approach at paragraph 123: *"the Court of Appeal in Thames Water made clear that this was not the law."*

37. Paragraph 114.

38. Paragraph 128.

39. [2024] EWHC 2475 (Ch), Miles J at paragraphs 67 to 69.

40. [2024] EWHC 468 (Ch) Richards J at paragraph 212.

If the relevant alternative is a distributive process, it will be the receipt of payment aspect of Condition B that is the operative part. As a matter of construction, a *"genuine economic interest"* has to be something other than *"receipt of a payment"* in a distributive process, which means that being *"in the money"* may not answer the *"genuine economic interest"* question.[32] Moreover, the requirement that the assenting class must have a *"genuine economic interest"* falls to be juxtaposed with the requirement that the dissenting class must be *"no worse off"* and indicates that the *"no worse off test"* is not a test of *"no genuine economic interest"*. The *"out of the money"* arguments overlooked these difficulties.

Rejection of a hard-edged rule

In the Court of Appeal the company agreed that it was putting it too high to say that no issue of fairness can arise because a class of creditors were *"out of the money"*, and they submitted that the correct principle was that, when considering issues of fairness, *"little or no weight"* is to be attached to the views or objections of the *"out of the money"* creditors.[33] Thames nevertheless maintained that a creditor who would be *"out of the money"* in the relevant alternative is not an economic owner of the business, and is for that reason not entitled to any share of the benefits created by the plan. In other words, in considering issues of horizontal fairness, the fact that *"out of the money"* creditors get nothing at all counts for nothing.[34] It was submitted that there had to be some form of consideration given to an out of the money creditor if their claim was released by the plan, but that this need be no more than *de minimis*.[35] Thames' submission is recorded in paragraph 125:

"[Thames] maintained, however, as a hard-edged rule, that in assessing the fairness of a plan, no account could be taken of the fact that an out of the money creditor received nothing more than such de-minimis consideration. [Thames] submitted that we are bound to reach this conclusion because of this Court's approval, in Adler, of Snowden J's decision in Virgin Active."

This submission was rejected in clear terms:[36]

"For the reasons which follow, we do not accept that there is such a hard-edged rule, or that Adler compels us to that conclusion."

In ***Petrofac*** the Court of Appeal said again that Thames' submissions in paragraphs 124 and 125 had been rejected because it was not right as a matter of principle:[37]

"The Court of Appeal in Thames Water squarely rejected that submission. The Court not only held, at §140, that it was no part of the ratio of Adler to endorse the aspects of Virgin Active upon which the plan company had relied, but it also expressly disapproved those aspects and explained why the plan company's argument was not right as a matter of principle."

The Court of Appeal also explained why the proposition that *"in the money"* creditors are the 'economic owners' of the company is wrong:[38]

"To that end, we should explain further why we do not accept the basic premise of the argument, recorded in §124 of Thames Water, and in essence sought to be resurrected by Mr Allison, that "a creditor who would be out of the money in the relevant alternative is not an economic owner of the business and is for that reason not entitled to any share of the benefits created by the plan". That assertion – and its corollary that the creditors who would be "in the money" in the relevant alternative are the economic owners of the business and entitled for that reason alone to all of the benefits created by a plan –contains a non sequitur, the fallacy of which is readily apparent on the facts of the instant case."

Snowden J in Virgin Active

Rejection of a hard-edged rule included rejection of the second central point relied upon to support the argument that the court could pay little attention to the views of an *"out of the money"* dissenting class, namely that that is what Snowden J had said in ***Virgin Active***. However, that is not what Snowden J had said, as has now been made clear by the Court of Appeal in ***Thames*** and ***Petrofac***. The argument relied on paragraph 249 of ***Virgin Active*** in which Snowden J said:

"The logic of this point is that if creditors who would be out of the money in the relevant alternative could be bound to a plan which effects a compromise or arrangement of their claims without even being given the opportunity to vote at a class meeting, the fact that they have participated in a meeting which votes against the plan should not weigh heavily or at all in the decision of the court as to whether to exercise the power to sanction the plan and cram them down. Nor is it easy to see on what basis they could complain that the plan was 'unfair' or 'not just and equitable' to them and should not be sanctioned. That point was made expressly by Trower J at the end of paragraph 51 of his judgment in DeepOcean."

It was also argued that paragraph 249 had been approved by the Court of Appeal in ***Adler*** and followed in *Re Cine-UK Ltd* ; and *Re Project Lietzenburger Strasse Holdco SARL*.[40]

Whilst the Court of Appeal in ***Thames*** agreed with Snowden J that the fact of opposition to a plan by creditors with no genuine economic interest in the company had little or no weight[41] they did not agree that the fact that the relevant landlords were *"out of the money"* provided a reason for discounting altogether their position when considering the allocation of benefits under the plan.[42] The Court of Appeal in ***Thames*** pointed out that this point was made by Snowden J *"only if it had been necessary"* and was not part of the *ratio*. In paragraph 134 the Court of Appeal said:[43]

"If that is taken to mean that the Court cannot take account of the treatment of out of the money creditors in considering the fair distribution of the benefits preserved or generated by a plan, simply because they would be out of the money in the relevant alternative, then – for the reasons developed below – we disagree with it."

The Court of Appeal in ***Petrofac*** agreed:[44]

"That was a clear rejection of the argument based upon Virgin Active. It should also not be read as an indication that in most cases an out of the money class can fairly be excluded from the benefits of a restructuring and need only be given a de minimis amount necessary to satisfy the jurisdictional requirement that the plan should amount to a "compromise or arrangement"

The *"out of the money"* misunderstanding is dispelled

The Court of Appeal in ***Thames*** set out the position in relation to *"out of the money"* creditors in paragraph 149. The previous approach, whereby dissenting creditors' rights could be crammed down for *de minimis* sums with little weight being given to their objections, has not survived the ***Thames*** decision:

"As a matter of principle, we reject the rigid approach suggested by the Plan Company. While it may well be right in some cases to conclude that the fact that a dissenting class would be out of the money in the relevant alternative is a sufficient justification to exclude them from whatever benefit the restructuring preserves or generates, that will not necessarily always be so. As we have already noted, and in agreement with the submissions of Mr Thornton on this point, there are myriad reasons why a company might be suffering financial difficulties, and why a plan may be proposed, and a variety of structures that it might adopt. The nature of the benefits preserved or generated by a plan and the extent to which a fair distribution of those benefits will require consideration to be given to those who would be out of the money in the relevant alternative are likely to vary accordingly."

Significance of *Thames* and *Petrofac*

The significance of the Court of Appeal's decisions in ***Thames*** and ***Petrofac*** should not be underestimated. First, the practice whereby a company would deal with senior creditors alone because they were *'in the money'* and the *'economic owners of the company'*, cramming down the junior creditors for little or *de minimis* consideration, is no longer viable. Adapting the words of Mr Dicker QC, junior creditors should be *"at the table"*. Second, junior creditors will be entitled to a fair share of the benefits of the RP that reflects what they contribute to those benefits, whether by the amendment of existing rights or new assets contributed, taking account of the risks they accept when compared with the contributions of others. In ***Adler*** Snowden LJ said:[45]

"As a matter of principle, when the court exercises its discretion to impose a plan upon a dissenting class, it subjects that class to enforced compromise or arrangement of their rights in order to achieve a result which the assenting classes of creditors consider to be to their commercial advantage. In my judgment, that exercise of a judicial discretion to alter the rights of a dissenting class for the perceived benefit of the assenting classes necessarily requires the court to inquire how the value sought to be preserved or generating by the restructuring plan, over and above the relevant alternative, is to be allocated between those different creditor groups."

In ***Petrofac*** the Court of Appeal gave useful guidance for how the negotiations that would be expected to have taken place outside a RP would affect consideration of the fairness of the RP and the scope and function of the power to cram down:[46]

"Prior to the enactment of Part 26A, a scheme of arrangement under Part 26 provided a means by which such a negotiated deal could be implemented without having to get unanimity among all affected creditors. But the terms of the deal would have to be good enough to attract a sufficient assenting majority in each of the classes of creditors, including those who would have been out of the money in the liquidation alternative. As was made clear by the legislative history to which reference was made in Adler at §259 to §270, the primary purpose of the introduction of the cross-class cram down power under Part 26A was to allow the Court, in an appropriate case, to override the absence of assent in each class and thereby to prevent any one or more classes of creditors from exercising an unjustified right of veto. The cross-class cram down power was not designed as a tool to enable assenting classes to appropriate to themselves an inequitable share of the benefits of the restructuring. The Court's discretion to refuse to

41. Paragraph 132.

42. Paragraph 133.

43. In paragraph 140 the Court of Appeal rejected the submission that the Court of Appeal in Adler supported the hard-edged rule stating that it was *"no part of the ratio of Adler to endorse this aspect of* ***Virgin Active****."* In addition, in paragraph 141 the Court of Appeal said: *"the reasons given at §258 and following of* ***Adler*** *for rejecting Mr Smith's argument that the plan should have expropriated the shares (albeit obiter) undermine the hard-edged rule for which the Plan Company contends."*

44. Paragraph 117.

45. Paragraph 160, said to be *"of particular importance"* by the Court of Appeal in ***Thames*** at paragraph 108. The relevant extracts are set out in paragraph 39 of ***Petrofac***.

46. Paragraph 131.

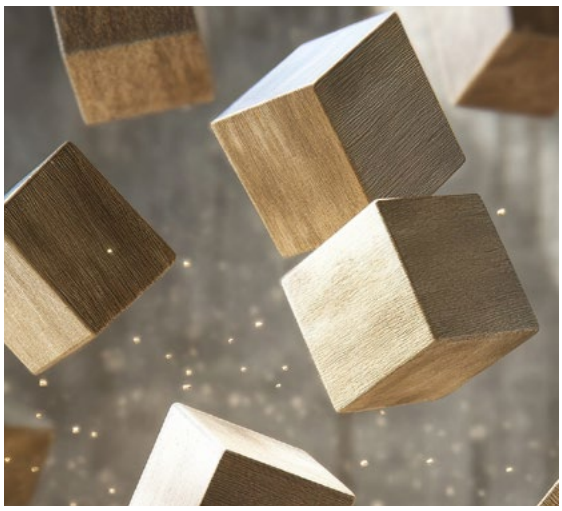
47. It is acknowledged that it is a draft out for consultation.

48. Paragraph 3.

49. *DRPS* paragraph 3. Paragraph 14 provides that it is the responsibility of the applicant and all parties intending to support or oppose the plan to facilitate the achievement of the objectives of the Practice Direction (at the convening hearing so far as they can reasonably do so.

sanction a plan would in such circumstances clearly be engaged (c.f. the Explanatory Notes to Part 26A, at §192, where it is pointed out that the Court may refuse to sanction a plan, even if the section 901G conditions are met, if it would not be just and equitable to do so)."

Not applying the *"out of the money"* analysis means the court can determine whether different treatment of different creditors under the Plan is unfair. The different treatment should not include that *"in the money creditors"* scoop the pool and *"out of the money"* creditors receive nothing or de minimis amounts. It will be fair that secured *'in the money'* creditors receive a higher proportion of the value than the unsecured creditors, but not that they receive it all.



(2) The Draft Revised Practice Statement: an inclusive and workable process

The approach of the Court of Appeal in ***Thames*** is reflected in the ***DRPS***. In its present form[47] it would lead to cooperation and early communication with all creditors and the court, and more focussed proceedings resulting in fewer irrelevant issues being live at sanction and less expense. In addition to being expensive, the procedure adopted for RPs failed to give the parties or the court adequate time to resolve issues. In several cases, numerous points were taken and extensive evidence filed late, often in relation to issues that, in the event, proved to be irrelevant or were not pursued. In ***Thames*** the Court of Appeal said:[48]

*"It is unacceptable that the judge was put under enormous pressure to hear the case and hand down judgment in such a compressed fashion. The judge said (at §133) that he was never given a satisfactory explanation why no application was made to Court before December 2024, or so little time built into the timetable for the Court to consider its decision. We note that the Plan Company did not accept this criticism, and it is not necessary to determine where the blame ultimately lies. On any view, however, there has been a wholesale failure by the parties to comply with the guidance given by this Court in Re AGPS Bondco Plc [2024] EWCA Civ 24 (**"Adler"**), at §55 and following. The financial difficulties of the Plan Company, and the urgency of the situation by the time the matter came to trial, were very real, but they hardly came as a surprise. We repeat in particular what was said in **Adler** at §64:*

> *"These considerations suggest that to prevent undue delay and expense, a plan company must (subject to the giving of any necessary confidentiality undertakings) make available in a timely manner the relevant material that underlies the valuations upon which it relies. The parties and their advisers and experts must also co-operate to focus and narrow the issues for decision so that sanction hearings are confined to manageable proportions. If sensible agreement is not forthcoming, the court should exercise its power to order specific disclosure of key information and its other case management powers robustly.""*

The *DRPS* identifies two objectives designed to cure the mischief identified by the Court of Appeal: (1) enabling issues concerning the jurisdiction of the Court to sanction the scheme or plan, the composition of classes of creditors and/or members, and the convening of meetings to be identified and, if appropriate, resolved early in the proceedings; and (2) facilitating the early identification and active case management of contested issues, with a view to such issues being resolved in an efficient and orderly manner which involves a proportionate allocation of the Court's time and resources.[49] As to (1) identifying and determining issues early should avoid all the issues being left to expensive sanction hearings towards the end of a *"burning platform."* The significance of this is that if a RP has taken a 'wrong turn', the company will have time to make different decisions and it should avoid the Court being faced with either accepting what it is presented with, or the company going into the relevant alternative. As to (2) identifying and managing the real issues should focus the proceedings on what matters. With more time, and more case management, sanction of plans should be less expensive.

The *DRPS* also identifies the importance of plan companies managing their affairs and cooperating so as to avoid foreseeable timetabling pressures and to facilitate the orderly resolution of RP proceedings. The failure to cooperate with some creditors was symptomatic of the misunderstanding that creditors who were *"out of the money"* could effectively be ignored. Following ***Thames*** and ***Petrofac*** it is clear that such creditors' views must be taken into account, and they should have a fair share of the benefits of the restructuring. It is also clear that they cannot be ignored. It is only with proper and timely cooperation and discussion with all creditors that plan companies will be able to facilitate the orderly resolution of differences. To state the obvious, a plan company cannot know what issues particular classes of creditors might have with their RP if they haven't cooperated and discussed their plans with them with a view to ironing out their differences before they are raised

in court. The need to engage fairly and provide information to all stakeholders reflects paragraph 169 of the Court of Appeal's decision in ***Thames:***

"More importantly, however, if the Plan Company wishes to obtain the Court's sanction to RP2, it will need to demonstrate that it has engaged with any reasonable proposals made to it, and that it has indeed communicated fairly with all of the Plan Creditors throughout the restructuring process. The implementation of RP2 will be conducted in the full glare of publicity, and the Plan Company has fair warning that it must engage fairly with, and provide sufficient information to, all stakeholders throughout the process. We reiterate the point made in §o above, moreover, that it must do so at an early enough stage that any issues that arise can be identified, and narrowed, so that the judge before whom RP2 comes is not placed under the same intolerable pressure as Leech J was in this case."

What is now clear is that plan companies must engage fairly with, and provide sufficient information to, all stakeholders throughout the process. The judgments in ***Thames*** and ***Petrofac*** and the ***DRPS*** are at one.[50]

The ***DRPS*** amends the process and contemplates more extensive cooperation between the company and stakeholders.

(a) The Listing Note

The first new procedural step that would be introduced by the ***DRPS*** is issuing the claim form and filing a Listing Note. There has been a practice of securing court dates without having issued a claim form. Plan companies had been 'hedging their bets' by securing future dates Sometimes the company would not be ready by the dates secured, so they were moved. That will no longer be permitted. Paragraph 5 of the ***DRPS*** is mandatory:

"A claim form seeking orders under Part 26 or Part 26A must be issued in the name of the scheme or plan company before the date for any Court hearings is arranged with the Court. The company may apply for an order restricting access to the Court file if the same is essential for reasons of commercial confidentiality."

In addition to stopping plan companies 'messing with the court's diary', the need to issue the Part 8 claim form and file a Listing Note should mean that companies will need to have done more preparatory work earlier in the process. Court dates will not be available shortly after a claim form is issued, so if plan companies want a RP to be considered at some particular point, they will need to issue the claim form in good time.[51] Paragraph 6 ***DRPS*** requires the company to file a listing note setting out a time estimate for the convening hearing; a time estimate for the sanction hearing; an indicative timetable for the proceedings overall, to include time for the giving of judgment and any application(s) for permission to appeal; and a description of any relevant matters likely to have an impact on the proposed timetable, including in particular (i) a description of matters relevant to the financial position of the scheme or plan company; and (ii) a description of any matters which it is anticipated may give rise to contested issues in the proceedings. These particulars can only be given if the plan company has front loaded its preparation and discussed matters with the stakeholders; it should re-enforce the need to have had such discussions before the case is listed. In addition, any material change in the matters covered by the listing note should be notified to the Court as soon as practicable. That gives the Listing Note the status of a quasi-pleading and accuracy and completeness will be important.[52]

(b) Notice of the Convening Hearing

The second procedural step is Notice of the convening hearing. This is not a new step. Paragraph 10 ***DRPS*** includes evidence as to the matters set out in paragraph 6 of the ***2020 Practice Direction*** regarding the responsibility of the applicant to identify certain issues by evidence. In addition, the evidence must address any issues as to the Court's international jurisdiction in respect of the plan.[53]

(c) Evidence for the Convening Hearing

The responsibility of all parties intending to support or oppose the scheme or plan to facilitate the achievement of the objectives of the DRPS at the convening hearing is particularised in paragraph 15 DRPS. The applicant is required to identify certain matters in its evidence for the convening hearing[54], including a new requirement in paragraph 15(d) DRPS for evidence as to:

"whether it is envisaged that the Court may be asked at the sanction stage to exercise its power to sanction a plan where one or more classes of creditors or members has not voted in favour of the plan, in which case the applicant's evidence should explain in particular:

(i) *whether, and if so to what extent, those promoting the plan have engaged with the plan company's creditors and members;*

(ii) *where there has been any discrepancy in the level of engagement with particular creditors or members, why that is so;*

50. Further detail of this obligation is given in paragraph 15(d) of the ***DRPS***.

51. Paragraph 8 provides that applications for convening orders and sanction are to be made before a High Court Judge. Paragraph 9 provides that at a convening hearing, the Judge should indicate whether it is desirable for them also to hear the application to sanction the scheme or plan and/or to deal with any other hearings prior to the sanction hearing. That is a change to paragraph 5 of the ***2020 Practice Statement*** which provides that "*the same judge should, if possible, hear the application to sanction the scheme.*"

52. This re-enforces the need for proper preparation before the claim form is issued.

53. ***DRPS*** paragraph 10(d). Paragraphs 12 and 13 of the ***DRPS*** represent no substantive change to paragraphs 7 and 8 of the ***2020 Practice Statement.***

54. ***DRPS*** paragraph 15. The first three matters are updates regarding the steps taken to give notification of the convening hearing and what, if any, response the applicant has had to the notification and the matters identified in paragraph 10. The plan company is also required to set out in its evidence how notice is to be given and information disseminated: see sub-paragraphs (e) and (f). (e) and (f) are similar to paragraph 13 of the ***2020 Practice Statement.***

(iii) *whether any objection to the proposed restructuring has been made by any of the plan company's creditors or members, including whether any alternative restructuring proposal has been put forward by any of the plan company's creditors or members and, if so, the nature of the objection or alternative proposal and of any remaining disagreement;*

(iv) *what information has so far been provided to creditors or members and, where there is any discrepancy in the level of information provided to different creditors or members, why that is so;"*

This provision is important and is different from paragraph 8 of the ***2020 Practice Statement*** which only referred to the response of a creditor to the PSL. Not only does the *DRPS* contemplate discussion and cooperation between the plan company and the stakeholders, but the plan company is required to explain the extent of engagement, what objection or alternative proposal there has been, and any remaining disagreement. Critically sub-paragraph (i) requires an explanation of any discrepancy in the level of engagement with particular creditors and sub-paragraph (iv) requires an explanation of any discrepancy in the level of information provided to different creditors or members. That the creditors or members are *"out of the money"* will not be a satisfactory explanation.

Given the clear policy imperative that plan companies provide information to, and engage with, all creditors a question mark arises over the practice of lock-up agreements that not only secure a locked-up creditor's intention to vote in favour of a plan, but also binds the company from providing information to, and engaging with, other creditors, or considering alternative plans. An agreement securing a creditor's vote is unexceptional. A creditor may choose how to exercise its vote and an agreement that it will vote a particular way is in the creditor's gift. However, a lock-up agreement that stops the plan company engaging with creditors, providing information or considering an alternative plan goes much further and cuts across the requirements in paragraph 15 of the *DRPS* depriving other creditors of their right to engage. It is suggested that such a lock up agreement might be unenforceable as being contrary to public policy.[55]

(d) The Explanatory Statement must be in final form

The requirements of the explanatory statement set out in paragraph 17 of the *DRPS* are unchanged from paragraph 14 of the ***2020 Practice Statement.*** However, the claimant company is now required to include a copy of the final form of the proposed explanatory statement (including any annexures). If any changes are anticipated to those documents, the evidence must explain why it is necessary for an order to be made before the documents are ready for dissemination to creditors or members. No changes that are material[56] should be made to the documents after the convening order has been made without a further order of the court.

At the convening hearing the Court will consider the form[57] of the explanatory statement and may refuse to make a meetings order if it considers that the explanatory statement is not in an appropriate form or is otherwise manifestly deficient. It remains the case that the Court will not approve the substance of the explanatory statement at the convening hearing, and it will remain open to any person affected by the scheme or plan to raise issues as to its adequacy at the sanction hearing.[58]

(e) Grounds of Objection for Convening Hearing

A practice had developed of requiring a creditor to identify grounds of objection after the convening hearing and for the sanction hearing, often in short order. This has now been codified and altered. Paragraph 18 *DRPS* provides that objections should be identified prior to the convening hearing:

"Any party objecting to the scheme or plan whose objection is likely to have an impact on matters to be considered at the convening hearing (including the directions for the future conduct of the matter), should identify the nature of their objection(s) as soon as practicable and with as much precision as possible in light of the information with which they have been provided, and (if relevant) propose such directions as they consider desirable."

This will help case management of issues arising that need to be determined after the convening hearing but will only work if plan companies engage with creditors and provide them with information in good time before the convening hearing. It is part of giving effect to the objectives identified in paragraph 3 *DRPS*.

(f) Matters considered at the Convening Hearing and case management

Paragraph 19 of the *DRPS* provides that at the convening hearing the Court will wish both (1) to dispose of such matters as can fairly and properly be dealt with at that hearing, and (2) where relevant, give directions for the case management of such other issues (and in particular contested issues) as cannot be dealt with. Making and variation or discharge of a convening order are unchanged.[59] Sub-paragraph (1) is new and

55. Whilst it is accepted that the policy broken in *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758 (HL) was the fundamental pari passu rule, the policy of engagement and provision of information to creditors of a RP is arguably sufficiently fundamental to engage the rule.

56. In the sense of being capable of affecting the approach which a creditor or member may take to casting their vote.

57. The use of *"form"* tidies up the previous use of *"adequacy"* as well as *"form"* in paragraph 15 of the ***2020 Practice Statement.***

58. Paragraph 22 of the *DRPS* which repeats paragraph 15 of the ***2020 Practice Statement.***

59. Paragraph 20 of *DRPS* is taken from paragraph 11 of the ***2020 Practice Statement*** and paragraph 21 of the *DRPS* is taken from paragraph 12 of the ***2020 Practice Statement***.

potentially significant. A tendency had developed to leave issues to the sanction hearing. Disposing of matters that can fairly and properly be dealt with at the convening hearing will reduce the number of issues left over to sanction. Coupled with the requirement that the plan company provide information and consult with stakeholders early, it should be possible to determine more questions at convening. For example, there should be no need to leave class questions over. Sub-paragraph (2) will enable the court to identify the issues that properly fall to be resolved at sanction and give directions for evidence where that is required. It should also be read with paragraphs 23 and 24 *DRPS* which are new and contemplate further case management between the convening and sanction hearings. This is to be welcomed. It will help avoid multiple issues being raised on which evidence is adduced by multiple parties leaving the court in the impossible position described in ***Adler*** and ***Thames***. Paragraphs 23 and 24 *DRPS* give substance to the Court of Appeal's warning that if the parties did not manage cases better the court would exercise its case management powers.[60] They should shape the way in which RPs are dealt with in court in the future. It is a necessary re-set.

Paragraph 23 *DRPS* provides:

"Where any issue has been drawn to the attention of the Court which is not suitable for determination at the convening hearing, the Court will consider at the convening hearing and/or at subsequent case management hearings, what further directions may be necessary for the resolution of that issue in a timely and proportionate manner, whether at the sanction hearing or otherwise."

The requirement to consider the directions that may be necessary for the resolution of issues identified in a timely and proportionate manner enables the court to consider a number of matters, including the matters identified in paragraph 24 *DRPS*:

"Without limiting the powers of the Court in this regard, the Court may give directions as regards any of the following:

(a) *defining and, where necessary, limiting the issues to be resolved either prior to or at the sanction hearing;*

(b) *the order in which, and the timetable according to which, the issues are to be resolved;*

(c) *the service of evidence;*

(d) *the service of expert evidence, including the use of a single joint expert, and, where there is more than one expert, for meetings of experts;*

(e) *making further information available to those affected by the scheme or plan, including by orders for disclosure of information, or use of a data room, website or similar, on such terms as to confidentiality as may be necessary;*

(f) *provision to be made for the costs of those appearing before the Court to support or oppose the scheme or plan, as the case may be.*

It is noteworthy that the case management directions the court might give are not limited to the matters identified. The Court will define the issues and decide whether those issues should be determined at the sanction hearing or before. Having a single expert or meetings of experts will help identify the issues. In many of the 'big ticket' cases multiple experts had given evidence and been cross examined without having met.[61] This proved to be inefficient. A single expert will be a time and cost saving direction, particularly in relation to issues such as valuation, given that the valuation question is not as significant as it was thought to have been before ***Thames***. The provision of information in sub-paragraph (e) will be important in cases in which the plan company has failed to provide a dissenting class with information in good time or has provided more information to one group of creditors that it has not provided to another.[62] As for the provision of costs, plan companies have often agreed to pay the costs of assenting creditors, often providing for them in lock up agreements, whilst threatening dissenting creditors with adverse cost orders. Where creditors make submissions helpful to resolution of issues the court has directed should be determined, their costs should be provided for.[63]

Conclusion

After 5 years it became clear that the practice and procedure applicable to RPs needed reform. The problems stemmed in part from lack of engagement with all stakeholders, in part fuelled by the *"out of the money"* misunderstanding; in part from RPs being put to Court too late; and in part from the Court being given insufficient time to resolve issues efficiently because of *"burning platforms"*. The intent to remedy those problems is clear from the *DRPS* and it will be interesting to see how many of the proposals survive the consultation process and whether they can be improved. ■

60. The court has recently been prepared to be more interventionist: In ***Madagascar Oil Ltd***, the court limited the issues for sanction to 2 and gave directions limiting evidence and experts; in Petrofac the court declined to hear expert evidence on indirect economic benefits. Marcus Smith J said in paragraph 38: *"I put this point to the parties at the outset of the hearing. The hearing proceeded on the basis that I would not be assisted by the expert evidence on this point and that the real question to be determined was whether indirect economic benefit was relevant at all when determining whether Condition A was satisfied."*

61. This was often said to be because of lack of time before the plan company's funds would run out. With early engagement with stakeholders, the requirement to file a Listing Note, and the requirement in paragraph 18 that any party objecting to the plan should identify the nature of their objection as soon as practicable and before the convening hearing (and have to show good reason why an issue they wish to raise was not raised at the convening hearing: paragraph 25 ***DRPS***) the court should be able to give directions for evidence and expert evidence in good time before the sanction hearing.

62. This is necessary because in some cases the dissenting class did not have the same access to information as the assenting class which resulted in an inequality of arms making sensible issue resolution more difficult than it should have been.

63. See: *Re Virgin Active Holdings Limited* [2021] EWHC 911 (Ch), paragraph 29; *Re Amicus Finance Plc* [2022] BCC 18. There are several scheme cases that support this approach: *Re: Peninsular and Oriental Steam Navigation Co (Practice Note)* [2007] Bus LR 554; *Re Thomas de la Rue & Co Ltd* [1911] 2 Ch 361, 367–368; *Re National Bank Ltd* [1966] 1 WLR 819; *Re British Leyland Motor Corpn Ltd* (unreported), 1 August 1975; Re T&N Ltd [2004] EWHC 1366 (Ch); *Re APCOA Parking Holdings GmbH* [2015] Bus LR 374; *Re Stronghold Insurance Company* [2019] 2 BCLC 11. In other cases the court made no order as to costs: *Re Imperial Tobacco Group Ltd* (unreported), 11 February 1969; *Re Heron International NV* [1994] 1 BCLC 667; *Re BAT Industries plc* [1998] CLY 658; *Re Ransomes plc* [1999] 1 BCLC 775; *Re RAC Motoring Services Ltd* [2000] 1 BCLC 307; *Re Rockrose Energy plc* [2020] EWHC 2496 (Ch); *Re Inmarsat plc* [2020] EWHC 76 (Ch).

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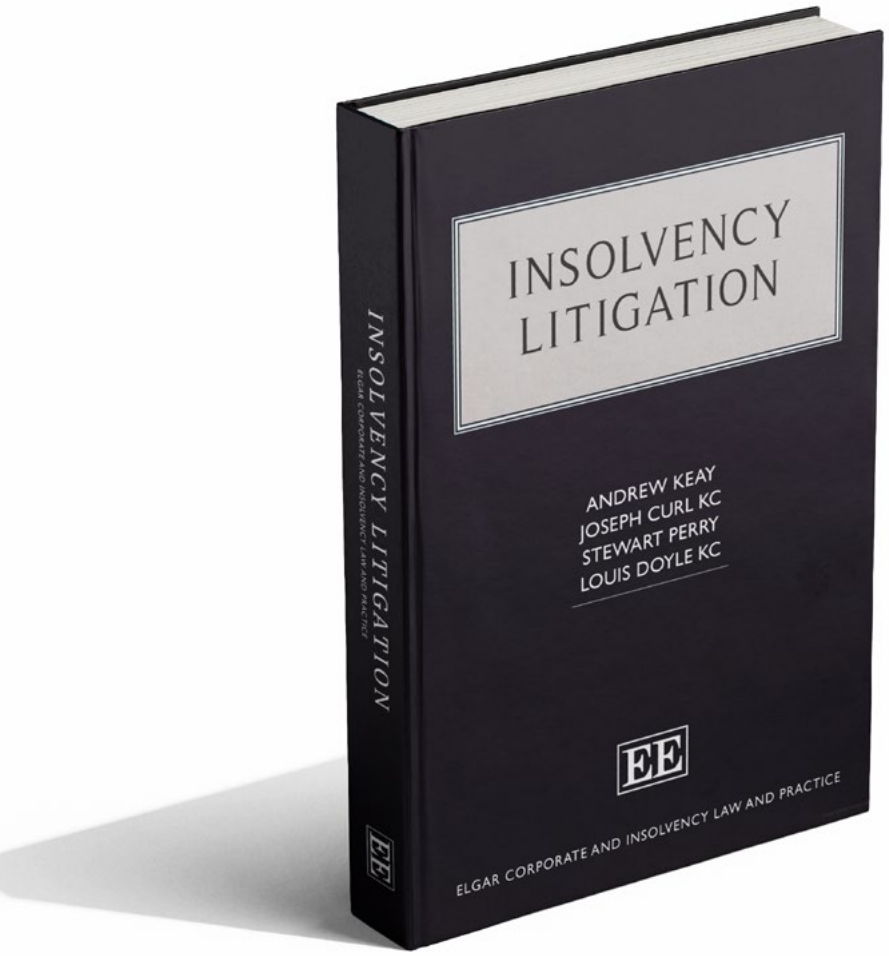

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Publication Date: 2025
ISBN: 978 1 80392 097 9
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WILLIAM WILLSON
SOUTH SQUARE

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You can dip twice but can you only prove once? The insolvency implications of "double dip" transactions

In this article the authors consider the insolvency implications of "double dip" transactions, which are becoming increasingly prominent as a form of liability management exercise. The authors first outline some of the different forms of "double dip" transaction structures, before placing them within the existing English insolvency law framework. They conclude with some practical considerations.

Key Points:

- "Double dip" transactions enable lenders to improve their recovery prospects through creating two claims to the same pool of assets.
- However, in an insolvency, there is a risk that one claim might be barred until the other is paid in full (on the basis of the rule against double proof). Whether the rule applies will depend on whether the two claims against/into the borrower group can be treated in both legal and economic substance as relating to the same debt.
- In complex corporate financings, it is the terms of the documents that will ultimately govern recoveries.

Introduction

As credit markets continue to tighten, there is increasing interest in Europe in US-style liability management exercises (LMEs). The LME toolkit offers borrowers facing large impending debt maturities and challenging refinancing conditions with greater optionality. LMEs are increasingly seen as a facilitative tool to provide borrowers with additional liquidity or an "extended runway" under more favourable conditions.

Previous articles in this journal have offered guidance to insolvency and restructuring practitioners on the implementation of LMEs,[1] as well as highlighting potential challenges to prospective transactions (for instance, the possible infringement of the minority protection principle) that might be taken up by disaffected creditors.[2]

1. *'Dipping over here and dipping over there: lessons learned from recent double dip transactions'* (2024) 3 JIBFL 151.

2. *'Liability management exercises in England: where are we?'* (2025) 1 JIBFL 5.

This article considers the effectiveness of certain types of LMEs as a means of enhancing lender recoveries in a subsequent English law insolvency.[3]

There are broadly three categories of LMEs:[4]

- up-tiering: where a borrower issues a new super-senior tranche of debt by agreeing to amend its existing financing documentation with its majority creditor group;

- drop-downs: where assets are transferred out of the existing secured collateral package to an unrestricted entity where they are used as security to raise structurally senior debt; and

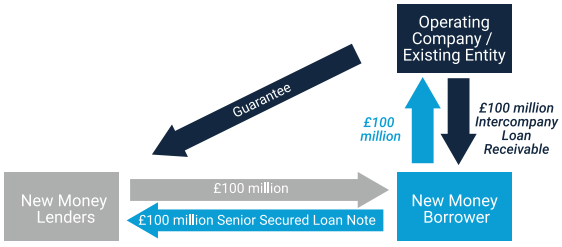
- double dips: a financing structure that enables new money lenders to lend money to one borrower but enhance recoveries by acquiring two claims.

It is this third category of transaction, the double dip, that is the focus of the rest of this article.

Double Dips And Pari Plus Transactions

Broadly there are two types of double dip transaction. First, there is the classic double dip transaction, as demonstrated in Diagram 1 below:

Diagram 1

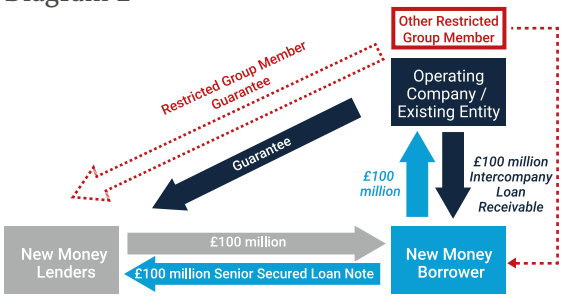


The classic double dip transaction occurs where an unrestricted entity (the "new money borrower") borrows from new money lenders and on-lends the proceeds to an entity – often an operating subsidiary – within the existing restricted creditor group (described in this article as the "existing entity").[5] The new money lenders obtain security for the intercompany receivable that arises in respect of the on-loaned proceeds. In addition, the new money lenders benefit from a direct secured guarantee from the existing entity (and/or other entities in the restricted group such as the operating subsidiary's parent). The new money lenders therefore gain two claims or "dips" in respect of one loan: (i) by way of the security over the intercompany receivable (the first dip); and (ii) from the guarantee provided by the existing entity and/or other entities in the restricted group (the second dip).

A recent example of a classic double dip transaction in the US context is the 2023 At Home Group refinancing.[6]

Alternatively, some transactions combine a double dip with other enhancements as a "sweetener" to lenders. This may include offering additional, potentially secured, guarantees from other restricted entities, or evean non-restricted entities outside the borrower group. Some double dip transactions are also combined with drop-downs, where additional assets are transferred to the new money borrower from the existing credit group. These transactions are known as *"pari plus"* financings because the new money lenders are receiving more than the other creditors to the existing credit group. Examples of recent *"pari plus"* financings in the US include: (i) Sabre Corporation (additional non-credit group guarantees); (ii) Rayonier Advanced Materials Inc. (additional asset drop-down); (iii) Trinseo PLC (additional guarantees and an asset drop-down); and (iv) Wheel Pros, Inc. (double dip combined with an uptiering).[7] Some *"pari plus"* enhancements to a double dip structure are demonstrated in Diagram 2 below:

Diagram 2



3. For a consideration of double dips under US insolvency law see *"Treatment of 'Double Dips' in Bankruptcy"* in from the Creditor Rights Coalition (8 February 2025).

4. However, every transaction is unique and may involve elements or aspects of all three.

5. The funds may only briefly sit in the account of the new money borrower: indeed, they may even be sent directly to the existing entity from the new money lenders.

6. *'Dipping over here and dipping over there: lessons learned from recent double dip transactions'* (152).

7. *'Dipping over here and dipping over there: lessons learned from recent double dip transactions'* (152–4).

Double Dips In Insolvency

It is well-established that a lender can submit a proof in the insolvency of its primary borrower and also claim against the guarantor of the primary debt simultaneously, whether that guarantor is solvent or insolvent, provided that the lender may not recover more than 100% of what it is owed. In this sense, a double dip is uncontroversial. In the example Diagram 1 above, if both the operating company (the existing entity) and the new money borrower went into an insolvent process, the new money lender could prove against them both, maximising its prospects of recovery. It may be that recoveries depend on how the assets are split across the respective entities. In this regard, a *"pari plus"* structure where the new money borrower has a separate asset pool to the existing entity/ operating company that has received the on-lent proceeds will provide better returns to the lender.

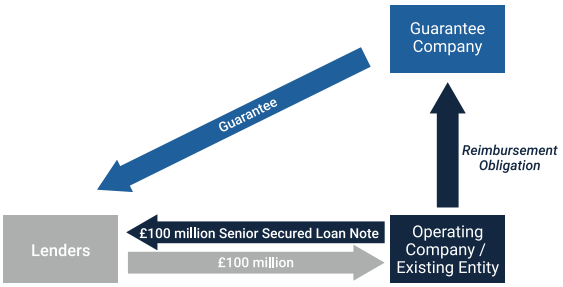
The rule against double proof

However, a potential problem may arise if there is only one pool of assets that sits at the operating company level, and the lender's double recovery is predicated on two claims to that sole asset pool – one based on the guarantee from the operating company, and the other through the new money borrower's claim to the intercompany receivable. That is because there may be an infringement of the rule against double proof under English insolvency law. The classic description of the rule against double proof is by the Supreme Court in *Re Kaupthing Singer & Friedlander Ltd (in administration) (No 2),*[8] where Lord Walker said:

"The function of the rule is not to prevent a double proof of the same debt against two separate estates (that is what insolvency practitioners call "double dip"). The rule prevents a double proof of what is in substance the same debt being made against the same estate, leading to the payment of a double dividend out of one estate. It is for that reason sometimes called the rule against double dividend. In the simplest case of suretyship (where the surety has neither given nor been provided with security, and has an unlimited liability) there is a triangle of rights and liabilities between the principal debtor (PD), the surety (S) and the creditor (C). PD has the primary obligation to C and a secondary obligation to indemnify S if and so far as S discharges PD's liability, but if PD is insolvent S may not enforce that right in competition with C. S has an obligation to C to answer for PD's liability, and the secondary right of obtaining an indemnity from PD. C can (after due notice) proceed against either or both of PD and S. If both PD and S are in insolvent liquidation, C can prove against each for 100p in the pound but may not recover more than 100p in the pound in all."

The rule is one of procedure, rather than one affecting substantive rights.[9] A similar principle preventing a double dividend on one debt is put on a statutory footing in the US under s 502(e)(1)(B) of the Bankruptcy Code. The rule is typically engaged in a guarantor/surety scenario as depicted in Diagram 3 below:

Diagram 3:
A guaranteed loan transaction



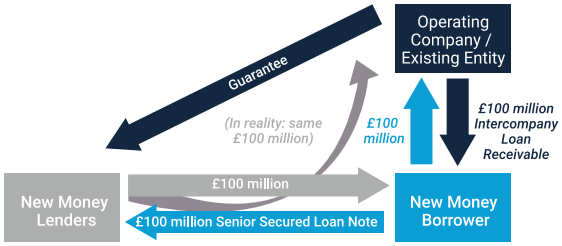
In Diagram 3, the guarantor entity is prevented from proving in the insolvency of the operating company until the lenders have been paid out in full. The reason behind the rule is that, with respect to the general body of unsecured creditors, there is only one debt on which the lender and guarantor can both claim. As a corollary to this, and in order to preserve the

8. See *Mills v HSBC Trustee* [2012] 1 AC 804 at [11].

9. *Lehman Bros Holdings Scottish LP 3 v Lehman Bros Holdings Plc (In Administration)* [2022] Bus LR 10 at [167] (Lewison LJ) and [182] (Asplin LJ).

10. [1984] 1 AC 626 at p 636E-F.

Diagram 4:
Fund flow in a double dip transaction



pari passu treatment of creditors *inter se*, there can only be one claim in respect of the full amount of that debt at any one time. By its very design, the double dip transaction appears to be aimed precisely at generating two dividends for the lenders in respect of what appears to be one debt. As demonstrated by Diagram 4, there is evident similarity between the double dip transaction and the guaranteed loan transaction.

It can be seen from comparing the two transactions in Diagram 4 above that:

(i) The funds from the lenders ultimately end up with the existing entity/ operating company: this is especially so in a double dip transaction, where the funds lent to the new money borrower only sit in that entity for a brief moment (and in some cases bypass it entirely).

(ii) With both a guaranteed loan and a double dip transaction, the lenders each have recourse to two different entities: a) with a guaranteed loan, the lenders have a direct claim against

the existing entity/operating company and a contingent claim against the guarantor entity; b) in the double dip transaction, the lenders have a direct claim against the new money borrower and a contingent claim against the existing entity/operating company under the guarantee. However, the lenders' ability to recover against the new money borrower under the direct claim depends on the new money borrower being able to claim from the existing entity/operating company under the intercompany loan.

(iii) As between the guarantor/new money borrower and the existing entity/operating company, ie the two entities against whom the lenders have a claim, there is some form of claim or reimbursement obligation. In the guarantee scenario, the guarantor entity likely has a claim for an indemnity in respect of its guarantee, whereas in the double dip transaction the new money borrower has a claim against the existing entity/operating company for repayment of the intercompany loan.

Can you double dip and double prove?

The key question in a double dip transaction, (assuming all lenders rank *pari passu* in relation to any security), is whether the two dip claims can be characterised as relating to the same debt. On a broader level, this characterisation issue has received considerable judicial treatment in England, where the courts have analysed whether two claims in a complex corporate group financing should be treated as relating to the same debt. As Oliver LJ held in *Barclays Bank v TOSG Trust Fund*, *"the rule against the double proofs in respect of two liabilities of an insolvent debtor is going to apply wherever the existence of one liability is dependent upon and referable only to the liability to the other and where to allow both liabilities to rank independently for dividend would produce injustice to the unsecured creditors".*[10] The fact that the two dip claims arise against two

entities under two separate contracts is not sufficient: in this regard, Oliver LJ concluded that where *"overlapping liabilities result from separate and independent contracts with the debtor"* that is not *"by itself determinative of whether the rule can apply. The test … is a much broader one which transcends a close jurisprudential analysis of the persons by and to whom the duties are owed. It is simply whether the two competing claims are, in substance, claims for payment of the same debt twice over"*.[11]

Accordingly, the proper characterisation of any double dip transaction will need to be subjected to an open-textured assessment of the legal/economic substance of the transaction. Helpful support can be derived from *Re Polly Peck (No.4)*,[12] where there were two claims against two entities in a group structure and the proceeds of one loan to one entity had been on-lent in an intercompany transaction. Here the court found that the two claims were separate because there

was enough substantive differentiation between the two legs of the transaction. The reasoning was broadly twofold: (i) the underlying relationship could not be classified as one of agency or nomineeship; and (ii) substance means legal substance as well as economic substance. Where different, legal substance prevails over economic reality.[13] On the facts of *Re Polly Peck (No.4)*, the classification of the debts as being one rather than two would have rendered the separate legal personality of the relevant entities nugatory.

Therefore, the ability to double dip and double prove will be highly dependent upon the terms of the documents governing the loan note to the new money borrower and the on-loan of those proceeds under the intercompany loan from the new money borrower to the existing entity/operating subsidiary as well as any intercreditor agreement. Consistent with Re Polly Peck (No 4), the more separate and divisible the two halves of the transaction are, the more likely that the lenders will be able to double dip and double prove. Any evidence that the terms of the relevant loans have been tailored to the individual borrower will assist in this regard. Conversely, where there is interconditionality and cross-referability between the two loan documents, or where there are other factors that render the two loans in substance part of the same obligation, there is more likelihood that the rule against double proof will be engaged.

The US comparison

Some guidance might also be drawn from the US, where the transaction would need to be considered against the three limbs of s 502(e)(1)(B) of the Bankruptcy Code. A double dip would therefore be statute barred if there is: (i) co-liability; (ii) contingency; and (iii) reimbursement/contribution.[14]

Viewed against the double dip, co-liability is likely easy to establish. The more difficult element is whether or not the two claims can be viewed as contingent. This will depend on the interlocking debt documents in respect of the senior secured loan to the new money borrower, the corresponding intercompany loan, and the guarantee offered to the lenders by the existing entity. If the lender can call on the loan or the guarantee independently, contingency might not be established. It has been suggested that where there is co-liability and contingency, the reimbursement element would likely be established too.[15]

Further issues

Partial guarantees

A further issue may arise in relation to a double dip transaction if and where the guaranteed claim only relates to part of the debt. In this scenario, the difference in quantum of the partial guarantee renders it distinct from the

11. [1984] 1 AC 626 at p 636D.

12. [1996] BCC 486.

13. See Miles J in *Re Sova Capital* [2023] Bus. L.R. 779 at [224]: *"Generally when the law is looking at the substance of a matter it is normally concerned with its legal substance, not its economic substance (if different)"*.

14. See *"Treatment of 'Double Dips' in Bankruptcy"* from the Creditor Rights Coalition (8 February 2025).

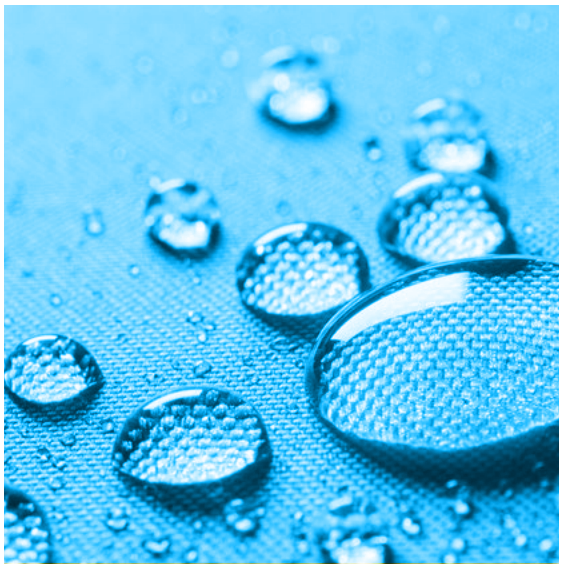
15. *Ibid.*

principal liability and avoids the rule against double proof, enabling both the lender and the guarantor to prove against a principal debtor. However, if the lender recovers under the partial guarantee, it must reduce its claim against the principal debtor by the corresponding amount. The guarantor then proves for the sum they have paid out to the lender, so that the total proofs against the principal debtor correlate to no more than the total amount still outstanding.[16]

In the premises, from the double dip lender's perspective, any partial guarantee from the existing entity/operating subsidiary would defeat the object of the transaction, since the lender would not be able to maintain two claims against the assets for the full amount of its debt.

Security

Care should also be taken when the two "dip" claims are secured. That is because security is enforced outside of a collective winding-up process. Therefore, it is the priority ranking of each of the claims to the security that will dictate recoveries. There may be little practical difference if all lenders rank *pari passu* in relation to the security. If not, the lenders should ensure that neither of the claims (or "dips") has an inferior claim to the security than the existing creditor group. That is because nothing could be paid under that inferior claim/ dip until the assets have been applied to satisfy the debts of higher-ranking lenders. In practice, this might mean that nothing remains to pay one of the claims.[17] For this reason, *"pari plus"* structures with separate asset pools attached to each of the claims are preferable.



Conclusion

Double dip transactions are a useful addition to the refinancing toolkit available to corporate borrowers. However, the efficacy of a double dip in an English insolvency scenario may depend on the ability to prove for both claims at the same time. This is by no means guaranteed. Lenders should pay careful attention to any security package and the priority of each of the claims, as well as ensuring that each of two claims is sufficiently separate and distinct from the other so as not to offend the rule against double proof. ■

[This article first appeared in the July 2025 edition of Butterworth's Journal of International Banking and Financial Law and is reproduced here with their kind permission.]

16. *Re Sass* [1896] 2 Q.B. 12 at (p14-15); *Lehman Bros Holdings Scottish* LP3 at [149] and [167] (Lewison LJ).

17. For the same reason, lenders should also ensure that neither of the claims/ dips is contractually or structurally subordinated to other existing claims.

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Waving not drowning: *Thames Water* clarifies approach to out of the money creditors

Key points

- There is no hard-edged rule that in assessing the fairness of a restructuring plan under Part 26A of the Companies Act 2006, no account should be taken of the objections of *"out of the money"* creditors to the plan, or of their treatment when considering the distribution of benefits under the plan.

- The Court of Appeal has disapproved an approach adopted in a series of first instance cases, which had taken *Virgin Active* to say the opposite.

- Questions of *whether* and *to what extent* out of the money creditors will be entitled to share in those benefits will be a fact sensitive analysis, which will require consideration on a case-by-case basis.

- This analysis will engage the Court in examining the *source* of the benefits of the restructuring, and which parties should be viewed as *contributing* to those benefits.

- The term *"benefits preserved or generated by the restructuring"* is to be preferred to the label *"restructuring surplus"*, to capture non-quantifiable benefits generated by a plan. A bridging plan can in principle (and did in this case) create such benefits.

- In the subsequent case of *Saipem S.P.A & Ors v Petrofac Limited & Anor* [2025] EWCA Civ 821 (***Petrofac***), the Court of Appeal restated and applied several of these findings, and confirmed that the reach of *Thames Water* was not limited to "bridge" plans as opposed to those implementing a comprehensive balance sheet restructuring.

1. Both authors acted on behalf of Thames Water Limited (TWL) at first instance and before the Court of Appeal. Lindsay Hingston is a Partner at Freshfields and Georgina Peters is a Barrister at South Square. Views expressed in this article are the authors' and are not the views of Freshfields or South Square. Email: lindsay.hingston@freshfields.com; georginapeters@southsquare.com

Abstract

In this article, the authors consider certain issues of principle decided or clarified by the Court of Appeal in the *Thames Water* restructuring plan: *Kington S.À.R.L. & Ors v Thames Water Utilities Holdings Ltd* [2025] EWCA Civ 475. Namely: the requirement to consider the treatment of *"out of the money"* creditors when assessing whether the allocation of benefits under a plan is fair, and the meaning of the expression *"restructuring surplus"* or *"benefits preserved or generated by the restructuring"*.

Introduction

During the lifetime of Part 26A of the Companies Act 2006 (the 2006 Act) (around five years), there has been substantial debate between practitioners and academics about the meaning of the so-called *"restructuring surplus"* and the relevance, in the context of the exercise of discretion to sanction a plan, of dissenting creditors being *"out of the money"*.

Two opposing views have emerged about the statutory interpretation of Part 26A of the 2006 Act, and in particular, the cross-class cram down jurisdiction under section 901G. One view is that out of the money creditors have no entitlement, as a matter of principle, to share in the restructuring surplus (beyond a *de minimis* payment to satisfy the jurisdictional requirements of Part 26A) and therefore the Courts should place little or no weight on their objections about the fairness of a restructuring plan.

The opposite view is that Parliament's intention behind section 901G was to prevent an out of the money creditor unreasonably "vetoing" a plan, and it does not follow that Parliament intended to preclude, as a matter of principle, out of the money creditors from sharing in the benefits of the restructuring (if fair and appropriate) or objecting to the fairness of the relative treatment of creditors under the plan. In other words, there is no rigid or binary principle to that effect, and there is no basis for construing the statute in that way.

What has been distinctive (and interesting) about this debate is the polarisation between those who view such a principle as grounded in authority,[2] and those who have not read previous decisions as going that far.[3] This divergence in the interpretation both of Part 26A and of the authorities has extended to the Courts.[4]

The Court of Appeal's decision in *Kington S.À.R.L. & Ors v Thames Water Utilities Holdings Ltd*[5] has provided an answer to this debate. This article addresses the principles relating to the treatment of so-called out of the money creditors in a Part 26A plan, as decided or clarified by the Court of Appeal.

The article assumes familiarity with the requirements of Part 26A, and the Court of Appeal's previous decision in *Re AGPS Bondco Plc* [2024] EWCA Civ 24 (***Adler***).

Key facts

Thames Water Utilities Holdings Limited (the **Plan Company**) is the holding company for Thames Water Utilities Limited (**TWUL**), the principal operating company of the group (the **Group**). TWUL is a water and sewerage undertaker, under a licence granted by the Secretary of State for the Environment, Food & Rural Affairs pursuant to sections 11 and 14 of the Water Industry Act 1991 (**WIA 1991**).

As has been widely publicised, the Group's financial difficulties are serious and it has become highly leveraged since its privatisation. The Group concluded that a substantial injection of new equity would be required, which – in light of the Plan Company's evidence as to the enterprise value of the Group – would require a reduction in its debt burden.

The plan was an interim or 'bridging' plan (the **Plan**), designed to provide a stable platform to enable a further plan based on an equity raise (**RP2**) to be implemented. The Plan provided for the maturity dates of the Group's senior debt (the **Class A Debt**), junior debt (the **Class B Debt**) and subordinated debt (the **Subordinated Debt**) to be extended for two years.

It also provided for a new subsidiary of TWUL to issue Super Senior Funding (the **SSF**) in the headline amount of £1.5 billion, with an option to provide an additional £1.5 billion on the same terms. All holders of Class A and Class B Debt were to have the right to participate in the SSF, which would have priority over (most of) the existing debt. As at the time of the appeal hearing, 93.29% of the holders of Class A Debt had chosen to participate in the SSF.

The first instance Judge, Mr Justice Leech, accepted the Plan Company's evidence that, absent the Plan and resolution of TWUL's liquidity problems afforded by the SSF, its directors would be forced to request TWUL's regulator OfWat and the SoS

2. The first instance decision in *Re Virgin Active Holdings Ltd* [2022] 2 BCLC 62 and the Court of Appeal's decision in *Re AGPS Bondco Plc* [2024] EWCA Civ 24.

3. In *Re Nasmyth Group Ltd* [2023] EWHC 988 (Ch), Leech J (at [100]) rejected the suggestion that *Virgin Active* had intended to lay down a rigid rule. In *Re Ambatovy Minerals Societe Anonyme* [2025] EWHC 279 (Ch), Hildyard J, in reliance on *Adler*, said (at [118]) that *"the general requirement to consider whether there has been a fair distribution of the restructuring surplus is to be treated as overriding and will necessarily take into account, albeit in overall terms, the treatment of the dissenting class"*.

4. First instance cases which cited or followed *Virgin Active* and took it to mean that little or no weight should be given to the views or complaints of out of the money creditors about fairness include: *Re Great Annual Savings Co Ltd* [2023] EWHC 1141 (Ch), per Adam Johnson J at [109] to [110]; *Re Fitness First Clubs Ltd* [2023] EWHC 1699 (Ch), per Michael Green J at [71], [74] and [107]; and *Re Cine-UK Ltd* [2024] EWHC 2475 (Ch), per Miles J at [69]. In *Re Project Lietzenburger Straße Holdco S.à.r.L* [2024] EWHC 468 (Ch), Richards J at [211] to [215] took *Virgin Active* to mean that out of the money creditors had no entitlement to share in the benefits of the plan.

5. [2025] EWCA Civ 475.

to apply for a special administration order (**SAR**) on the basis of its insolvency under section 23 of the WIA 1991. TWUL was said to be *"running on fumes"* absent the protection of a SAR.

Leech J sanctioned the Plan, with certain amendments made to confer additional information rights on the junior creditor classes. The two junior creditor classes appealed against the sanction order: an *ad hoc* group of holders of Class B Debt (the **Class B AHG**) and the Plan Company's sole shareholder and the holder of the Subordinated Debt, Thames Water Limited (**TWL**). Both classes had voted against the Plan and were made subject to the Court's cross-class cram down jurisdiction under section 901G of the 2006 Act.

The Court of Appeal upheld the sanction order, subject to a variation to carve-out any claims that an officeholder in insolvency proceedings might have against the directors and advisers from the releases granted to them under the Plan.

Appeal on the Judge's approach to discretion

Despite dismissing the appeals, the Court of Appeal accepted the Class B AHG and TWL's arguments that the Judge had made errors of principle. They argued that the Judge was wrong to conclude that: (1) he did not need to consider whether the Plan was fair or appropriate to impose on dissenting creditors (the Class B AHG and TWL) who he had found would be out of the money in the relevant alternative,[6] and (2) the Plan did not give rise to any issues of *"horizontal fairness"*, because the Plan was an interim plan which involved no *"restructuring surplus"*.

It was also argued that the Plan conferred unjustified benefits on holders of Class A Debt (the **Class A Creditors**) under the terms of the SSF, and the Plan was therefore unfair and should not be sanctioned.[7]

Ultimately, the Court concluded that the Judge's errors of law had not vitiated his exercise of discretion, and that he had rejected the fairness challenge on its merits – albeit largely in a section of the judgment dealing with the no worse off test. The Judge's exercise of discretion was upheld.

Restructuring surplus

The Court of Appeal held that there was a *"restructuring surplus"*. The Judge had held that there was no restructuring surplus because of the interim nature of the plan, which the Court regarded as too narrow an approach.[8]

In so doing, the Court engaged substantively with the meaning of this term for the first time. It held that the term *"benefits preserved or generated by the restructuring"* was to be preferred over *"restructuring surplus"*, which tends to suggest something of quantifiable value which exists in the restructuring that would not exist in the relevant alternative. It observed that an interim plan is a good example of a plan which gives rise to benefits which may not be of quantifiable value.

The Court viewed the benefit of this Plan as buying the Plan Company the time it needed in order to effect a longer term restructuring via RP2. It was a reasonable assumption that RP2 itself would preserve or generate tangible and quantifiable benefits, if only by avoiding the value destructive consequences of a SAR. This Plan had the more intangible benefit of preserving the Plan Company's operating subsidiary, TWUL, as a going concern in the short to medium term to enable it to pursue the opportunity of preserving or obtaining further value within RP2.

Out of the money creditors

The Court of Appeal accepted that the issue of whether and to what extent a class of out of the money creditors might be entitled to share in the distribution of benefits under a plan, had not previously been considered at appellate level.

On the disputed point of principle, the Court reached a different conclusion to the Judge: rejecting a hard-edged rule that the Court has no obligation to assess the fairness of a plan by reference to the horizontal comparison if the dissenting creditors are out of the money, and rejecting the Plan Company's argument that when considering issues of fairness, *"little or no weight"* is to be attached to their views or objections.[9]

6. This finding was appealed, but in light of the Court of Appeal's approach to discretion it was not necessary for it to resolve the question of whether or not the Class B creditors were out of the money in the relevant alternative and it declined to do so.

7. The terms of the SSF about which the Class B AHG complained were addressed in the judgment, [157] to [169]. The high cost of the SSF, on which TWL's complaint focussed, was addressed in the judgment, [202] to [209].

8. The restructuring surplus conclusions were addressed at [116] to [119].

9. The Plan Company's arguments on the *"little or no weight"* point, and the treatment of out of the money creditors, is dealt with in the judgment at [122] to [126].

What did Virgin Active decide?

Leech J's decision to the contrary[10] was based on dicta in the first instance decision, *Re Virgin Active Holdings Ltd* [2022] 2 BCLC 62. In *Virgin Active*, a group of dissenting landlords, held to be out of the money in the relevant alternative to the plan (a formal insolvency process), objected to the shareholders' retention of equity under the plan.

At [249] of *Virgin Active*, Snowden J (as he then was) addressed the effect of section 901C(4) of the 2006 Act, which permits the Court to exclude from participation at plan meetings, creditors who do not have a "*genuine economic interest*" in the company. He then said:

"The logic of this point is that if creditors who would be out of the money in the relevant alternative could be bound to a plan which effects a compromise or arrangement of their claims without even being given the opportunity to vote at a class meeting, the fact that they have participated in a meeting which votes against the plan should not weigh heavily or at all in the decision of the court as to whether to exercise the power to sanction the plan and cram them down. Nor is it easy to see on what basis they could complain that the plan was 'unfair' or 'not just and equitable' to them and should not be sanctioned. That point was made expressly by Trower J at the end of paragraph 51 of his judgment in DeepOcean".

Later in the judgment, at [266], Snowden J identified the objections of the dissenting landlords to what they said was the favourable treatment given to the (out of the money) shareholders. Since the plan in *Virgin Active* was designed to enable the company to return to profitability, the shareholders would enjoy any increase in value in their shares made possible by the plan. At [266], Snowden said:

"I have, for the reasons that I have explained, found that since the AHG Landlords would be out of the money, their objections to what the Secured Creditors have agreed with the Plan Companies in this respect carry no weight".

At [268] and following, Snowden J went on to explain why, on the facts of *Virgin Active* – even if the landlords' objections counted for anything – they were not sustainable. As the Court of Appeal recognised in *Thames Water*, he did so, however, only if it had been necessary, i.e. if his observation at [266] was wrong.

In a series of cases, other first instance Judges have cited or applied *Virgin Active* to the effect that little or no weight is to be given to the views of out of the money creditors about the fairness of the distribution of benefits under the plan, and in certain cases, the Courts have found that only in the money creditors are entitled to the value created by the plan (or to decide how that value is to be allocated), and that out of the money creditors can never have any substantive entitlement to it.[11]

The effect has been to almost entirely obviate the test on discretion: once it is shown that a creditor class is out of the money, and no worse off under the plan than in the relevant alternative, no further enquiry is required regardless of how the assenting creditors are to be treated. In other words, as Leech J held in *Thames Water*, the Court has no obligation to assess the fairness of a plan by reference to the horizontal comparison if the dissenting creditors are out of the money.

What did the Court of Appeal decide?

In *Thames Water*, the Court of Appeal clarified [249] of *Virgin Active*, and rejected [266].[12] It held that in so far as Snowden J was saying that *the fact of opposition* to a plan by out of the money creditors had little or no weight, he was correct. That is the logic of excluding such creditors from voting under section 901C(4); their veto is removed.

However, the Court disagreed with his observations, if taken to mean that the Court cannot take account of *the treatment of out of the money creditors* in considering the fair distribution of the benefits of the restructuring.

The Court rejected the rigid approach for which the Plan Company contended: that there was a hard-edged rule that in assessing the fairness of a plan, no account could be taken of the fact that an out of the money creditor received nothing more than *de minimis* consideration.[13] It also rejected the Plan Company's argument that this interpretation of *Virgin Active* had been endorsed in *Adler*.

10. [2025] EWHC 338 (Ch), at [246].

11. See the decisions at footnote 4 above.

12. The principles applicable to the treatment of out of the money creditors are addressed in the judgment at [120] to [155].

13. Affording *de minimis* consideration to out of the money creditors was said by the Plan Company to be necessary solely because, as the Court of Appeal held in *Adler*, there was no power within Part 26A to extinguish claims for no value.

The Court of Appeal held that it was no part of its ratio in *Adler* to endorse this aspect of *Virgin Active*, the discussion of which had been purely *obiter dicta*. On the contrary, properly construed, the *obiter* discussion in *Adler* (dealing with an argument in that case that the plan should have expropriated the shares in the plan company) in fact addressed and rejected the hard-edged rule for which the Plan Company contended in *Thames Water*.[14]

Instead, the Court held (at [149]):

"As a matter of principle, we reject the rigid approach suggested by the Plan Company. While it may well be right in some cases to conclude that the fact that a dissenting class would be out of the money in the relevant alternative is a sufficient justification to exclude them from whatever benefit the restructuring preserves or generates, that will not necessarily always be so. As we have already noted, and in agreement with the submissions of Mr Thornton on this point, there are myriad reasons why a company might be suffering financial difficulties, and why a plan may be proposed, and a variety of structures that it might adopt. ***The nature of the benefits preserved or generated by a plan and the extent to which a fair distribution of those benefits will require consideration to be given to those who would be out of the money in the relevant alternative are likely to vary accordingly"*** (emphasis added).

Certain of these issues came before the Court of Appeal once again just a few months later in the context of *Petrofac*. A full analysis of *Petrofac* is beyond the scope of this article, save to note that the Court of Appeal restated and reinforced various of its conclusions in *Thames Water*.

The Court of Appeal confirmed that *Thames Water* should be taken as having "squarely rejected" any hard-edged rule that out of the money creditors have no entitlement beyond *de minimis* consideration.[15] It is a fallacy to assert

that creditors who would be in the money in the relevant alternative are the economic owners of the business and entitled for that reason alone to all the benefits created by the plan.[16] *Thames Water* should not be read as indicating that in most cases an out of the money creditor can fairly be excluded from the benefits of a restructuring,[17] nor is its reach limited to "bridge" plans as opposed to those implementing a comprehensive balance sheet restructuring.[18]

Benefits of the Thames Water restructuring

Three important points arise from the Court of Appeal's conclusion that the nature of the Plan did require consideration to be given to the treatment of out of the money creditors.

The first important point is the approach the Court took to identifying the *source* of the Plan's intended benefits.

The Court found that the Plan's intended benefit was to provide a bridge and afford the Plan Company and its stakeholders time to pursue RP2, from which it was to be assumed that (at least) the senior creditors would benefit. The Plan's purpose was also to enable the continued payment of interest on existing debt in the meantime, and to avoid the potential loss of value in the Group in the event of a SAR.[19] Importantly, therefore, the benefits would be lost if any of the creditors, including the Class B Creditors, were permitted to enforce their existing rights.

The Court applied its earlier *dicta* in *Adler* that in considering whether there has been a fair distribution of benefits, it may be relevant to take account of the source of those benefits.[20] The Court viewed the Class B Creditors' agreement to postpone the maturity date under their loans as being *"as critical in achieving the benefit of the restructuring, over the relevant alternative, as the postponement of the maturity date in respect of the Class A Creditors' loans"*.[21] The maturity extension (which all three classes of creditors were providing) was thus viewed as the source of the benefits to be provided by this Plan.[22]

14. The proper interpretation of *Adler* on this point is addressed at [135] to [146].

15. *Petrofac*, [114].

16. *Petrofac*, [128].

17. *Petrofac*, [117].

18. *Petrofac*, [134].

19. Addressed at [150] to [155].

20. *Adler*, [167], endorsing the comment made in *Re Houst* [2023] 1 BCLC 729, at [31].

21. Judgment, [152].

22. Addressed at [152] to [154].

23. At [152].

24. *Virgin Active*, [284].

25. At [153] and [154].

26. See footnote 4 above.

27. *Petrofac*, [117].

28. The Court made several general observations about the approach to be taken to the Part 26A sanction jurisdiction, at [91] to [98]. These included the point that the Court's function is to work out how best to exercise its discretion on the facts of the case before it, guided as appropriate by such principles as have been identified in previous cases. It is not for the Court to assume the legislator's role and lay down principles of broader application.

29. Advanced by TWL and an interested party, Mr Maynard MP.

The second and related point is the Court's statement that *"Both sets of creditors contribute equally in this sense* [through the maturity extension] *to the benefits to be preserved or generated by the Plan"*.[23] This is the first time a court has recognised that a compromise borne by a dissenting creditor is in principle capable of being characterised as a contribution to the benefits of the restructuring. In *Virgin Active*, by contrast, Snowden J rejected the landlords' argument that the write-off of claims of certain landlords should be viewed as contributing to the restructuring surplus.[24]

The third point is that the Court considered it *irrelevant* that in the relevant alternative (a SAR), Class B Creditors would be out of the money in the sense that they would not receive a distribution.[25] This was because the initial purpose of a SAR would likely be to provide a similar bridge. So the fact that dissenting creditors may not receive a distribution in the relevant alternative, will not necessarily preclude their treatment under the plan (most likely, their compromises) from being characterised as contributing to the benefits of the restructuring.

Answered and unanswered questions

It is now clear that, while Part 26A removes the power of veto from out of the money creditor classes, this does not abrogate the need for a fair and appropriate compromise of their rights against the company. In assessing fairness by reference to the horizontal comparison, the Court is not absolved from considering the fair distribution of the benefits of the restructuring as between all classes of creditors, simply because one or more classes of dissenting creditors would be out of the money (in the sense of not receiving a distribution) in the relevant alternative.

The Court of Appeal has therefore disapproved the approach adopted in the first instance cases[26] which took *Virgin Active* to say the opposite. In *Petrofac*, the Court of Appeal confirmed that its judgment in *Thames Water* was "a clear rejection of the argument based on *Virgin Active*".[27]

Questions of *whether* and *to what extent* out of the money creditors will be entitled to *share in those benefits* will be a fact sensitive analysis, requiring consideration on a case-by-case basis. Viewed against the Court of Appeal's express disavowal of laying down principles of broader application for the exercise of discretion under Part 26A (lest the Court assume the role of a legislator[28]), it will be for plan proponents to demonstrate in future cases that the proposed treatment of relevant creditor classes is or is not fair and appropriate.

Even in the absence of broader principles, the Court of Appeal's analysis in *Thames Water* reinforces the need to examine the source of, and contributions to, the benefits of the restructuring. The nature and effect of compromises beyond the maturity extensions provided in *Thames Water* (e.g. a debt write-off, debt-for-equity swap or interest capitalisation) will need to be examined in the context of the plan at issue.

Finally, a novel feature of *Thames Water* was the Plan's provision for new money in the context of a bridging plan, to facilitate its future debt restructuring. In this sense, the plan was similar to the so-called debtor-in-possession (DIP) financing which is commonplace under reorganisations conducted pursuant to Chapter 11 of the United States Bankruptcy Code, and which have led to a competitive marketplace for DIP financing.

In *Thames Water*, the objections that the cost of the SSF was too high and conferred unjustified benefits on participating Class A Creditors were rejected by the Court of Appeal.[29] This was in part on the basis that there had been no evidence before the Judge as to what terms were available in the market. While the *Thames Water* Plan may serve as a model for future restructurings in which a two-stage process is proposed, it is to be expected that the terms of such bridging loans will attract close scrutiny. ■

Case Digest Editorial

Mark Arnold KC

The restructuring plan is five years old. What better way to mark the occasion than with the delivery of not one important Court of Appeal decision, but two: *Re Thames Water Utilities Holdings Limited* [2025] EWCA Civ 475, reasons delivered in April; and *Re Petrofac Limited* [2025] EWCA Civ 821 delivered at the beginning of July. Both repay the close attention, coming in the wake of a third, Re *AGPS Bondco Plc* [2024] EWCA Civ 24 (aka *Adler*).

Many issues have generated much comment and debate. Amongst the most prominent concerns the fair allocation of the benefits of the restructuring and the treatment of those creditors who would be out of the money in the relevant alternative. For a long time (3 years in the comparatively short existence of the restructuring plan to date feels like a long time), it was thought that, when considering issues of fairness, little or no weight was to be attached to the views or objections of out of the money creditors and that any share to be attributed to them from the restructuring surplus need be no more than de minimis, following Snowden J's judgment in *Virgin Active* [2021] EWHC 1246 (Ch). Judicial support for that view at first instance seemed undimmed in the light of *Adler*, until *Re Ambatovy Minerals Société Anonyme* [2025] EWHC 279 (Ch) earlier this year, digested in the last edition of the Digest.

But *Virgin Active* has no authority in the Court of Appeal and such a reading of it has been roundly rejected, first in *Thames Water* and again in *Petrofac*. There can be no such rigid approach given the variety of circumstances in which a company may propose a restructuring plan and the width of the court's discretion when considering whether to sanction it. Each plan, and the fairness of the proposed distribution of benefits, must be considered on a case-by-case basis. As the Court of Appeal put it in *Thames Water* at [149]:

"While it may well be right in some cases to conclude that the fact that a dissenting class would be out of the money in the relevant alternative is a sufficient justification to exclude them from whatever benefit the restructuring preserves or generates, that will not always be so. As we have already noted … there are myriad reasons why a company might be suffering financial difficulties, and why a plan may be proposed, and a variety of structures it might adopt. The nature of the benefits preserved or generated by a plan and the extent to which a fair distribution of those benefits will require consideration to be given to those who would be out of the money in the relevant alternative are likely to vary accordingly."

For good measure, the Court of Appeal added in *Petrofac* (at [117] that this should not be read as an indication that in most cases an out of the money class can fairly be excluded from the benefits of a restructuring and need only be given a *de minimis* amount necessary to satisfy the jurisdictional requirement that the plan should amount to a compromise or arrangement.

How the ramifications of this will be worked out in practice will doubtless become clear in restructuring plans to come. In the meantime, a case note on *Petrofac* can be found at the start of this issue of the Digest.

The *Quincecare* duty is owed by a bank to its customer, being a duty to refrain from executing a customer's order if and for so long as the bank is 'put on inquiry' in the sense that it has reasonable grounds for believing (assessed according to the standards of the ordinary prudent banker) that the order is an attempt to defraud the customer. It is an aspect of the bank's

duty of reasonable skill and care in and about executing the customer's orders and arises by reason of an implied term of the contract and under a co-extensive duty of care in the tort of negligence. It has been considered a number of times at the higher appellate levels in recent years: first in *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2020] AC 1189; then *JP Morgan Chase Bank NA v Federal Republic of Nigeria* [2019] 2 CLC 559; *JP SPC 4 v Royal Bank of Scotland International Ltd* [2022] UKPC 18, and *Philipp v Barclays Bank UK Plc* [2023] UKSC 25. There is no equivalent duty on the part of the bank to a third party. So, too, there is no similar duty on the part of the bank for a fraudster to protect those (i.e. non-customers) who might be harmed by the fraudster, and *Philipp* could not be read as suggesting the contrary: see now *Santander UK Plc v CCP Graduate School Ltd* [2025] EWHC 667 (KB), digested below by Paul Fradley.

The Supreme Court reminded us of the immovables rule in *Kireeva v Bedzhamov* [2024] UKSC 39. The rule is that where immovable property is situated in country A, neither the law nor the courts of country A will recognise or give effect to any laws or judicial decisions of other countries which purport to govern or decide issues of rights to and interests in that immovable property, save to the extent of any exceptions under the law of country A. As Dicey, Morris & Collins put it (Rule 139, in the 16th edition, 2022): A court of a foreign country has no jurisdiction to adjudicate upon the title to, or the right to possession of, any immovable situated outside that country. The rule reflects territorial sovereignty. Thus, exceptions aside, immovable property in this country forms no part of a foreign bankruptcy estate. That being so, a creditor would not be prevented from enforcing against such property in this country simply because the debtor is subject to a foreign bankruptcy: see *Beograd Innovation Ltd v Somovidis* [2025] EWHC 1182 (Comm), digested below by Imogen Beltrami.

Taking steps intended to prevent a liability from arising at all does not amount to a transaction defrauding creditors within s. 423 of the Insolvency Act 1986. Tax avoidance or tax mitigation is unlikely to have been what Parliament had in mind when enacting that provision. So held the Court of Appeal in *Purkiss v Kennedy* [2025] EWCA Civ 268, digested here by Charlotte Ward and Angus Groom.

It would be easy to go on, but to spend time and space here continuing to cherry-pick from this edition's Case Digests would serve only to delay the reader's arrival in the orchard. I will therefore resist temptation to dwell on the decisions of the Supreme Court in *Bilta (UK) Ltd v Tradition Financial Services* [2025] UKSC 18 (fraudulent trading) and the Privy Council in *Ashley Dawson-Damer v Grampian Trust Company Ltd* [2025] UKPC 32 (inadequate deliberation by a trustee per *Pitt v Holt*), and *Abram v UEFA* [2025] EWHC 483 (the elusive scope of the act of state doctrine), and the many other interesting cases that follow.

Many thanks, as ever, to all our Case Digesters for their contributions.

Case Digests

Banking and Finance

DIGESTED BY PAUL FRADLEY

H&P Advisory Ltd v Barrick Gold (Holdings) Ltd

[2025] EWHC 562 (Ch) (Simon Gleeson sitting as a Deputy High Court Judge)
Banking services – Unjust enrichment – Free acceptance
12 March 2025

The claimant was an investment bank which had been in early discussions with two companies about a merger and claimed they had reached an oral agreement to advise on the merger. The defendant was the product of the merger. The claimant brought a claim for fees in respect of banking services which had been provided to the companies in respect of the merger.

The Judge concluded that there was no oral agreement between the claimant and the two companies. There was a conflict in the oral evidence and the correct approach was to consider the "*footprint*" that the conversations had left in the documentary record. The claimant had clearly made an offer to the two companies, but an objective observer would not have concluded that the offer had been unequivocally accepted. Accordingly, there was no contractual basis on which the claimant could be said to be entitled to the fees claimed.

The claimant brought an alternative claim for a *quantum meruit*. The Judge accepted that the claimant had enriched the two companies by providing a valuable benefit and that this was at the expense of the claimant. However, the Judge considered there was no unjust factor. The claimant relied on the doctrine of free acceptance i.e. the receipt of a benefit by the defendant was sufficient unless there was a positive act of rejection by the defendant. The Judge followed the *obiter* comments of Lord Burrows in his dissenting judgment in *Barton v Gwyn-Jones* [2023] UKSC 3 to reject free acceptance as an unjust factor.

The Judge had three grounds for doing so. First, he said that services may be supplied in the expectation of payment, or merely in the hope of payment, but there must be some ground for this hope or expectation. If the service provider had accepted the risk of non-payment, then there was no basis for liability, but this required an examination of the basis of the expectation of payment. Second, freedom of contract implies a freedom not to contract. Mere receipt of a benefit without more is not actionable. Third, the authorities did not recognise a free-standing unjust factor of free acceptance. The concept of a *quantum meruit* was routing in a person being induced to confer a benefit on another on the basis of a non-contractual promise.

An alternative claim based on failure of basis was rejected because a reasonable person in the claimant's position would have known that they had not formally been mandated, but instead had a legitimate expectation that if there was a mandate there would be retrospective remuneration.

R (Chapman) v Financial Ombudsman Service Ltd

[2025] EWHC 905 (Ch) (HHJ Ward sitting as a High Court Judge)
Financial Ombudsman – Judicial review – Historic time bar
15 April 2025

The claimant had held a fixed-rate interest-only mortgage which was redeemed in 2016. In 2022 the claimant complained to the bank about the mortgage. The Financial Ombudsman's rules imposed a historic time bar – no complaint could be made more than six years after the event complained of, or (if later) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that they had cause for complaint. The rules required a firm in its final response to a customer to indicate whether it consented to waiving the historic time bar. When responding to the claimant the bank had referred to the right to complain to the Ombudsman, but had not referred to the position regarding the historic time bar. The claimant complained to the Ombudsman, who found the historic time bar precluded the complaint.

The claimant's application for judicial review of the Ombudsman's decision was refused. The term "*consent*" in the

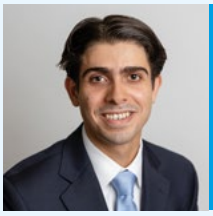
Ombudsman's rules was not defined and therefore held its natural meaning; as a noun it referred to a voluntary agreement or to acquiescence. The bank therefore had neither voluntarily agreed or acquiesced in waiving the historic time bar. The historic time bar was designed to ensure complaints were made reasonably promptly when recollections were fresher and material more easily available. The obligation on the bank to state its position on the historic time bar contributed to the complainant's knowledge of their position and the areas of dispute. The Judge considered that it was probable that the legislator had thought about a failure by the bank to comply with its obligations and had decided it was not necessary to sanction that failure by a deemed consent. It would be wrong to interpret the rules to read in a sanction that did not exist and which could easily have been included.

Santander UK Plc v CCP Graduate School Ltd

[2025] EWHC 667 (KB) (Eady J)
***Quincecare*-type duty – Authorised push payment fraud – Duty of retrieval on recipient bank** **25 March 2025**

The claimant was a victim of a fraud by which its director had been induced to make a payment from its bank (NatWest) into an account with Santander. After the fraudsters had removed funds from the Santander account, the bank received an alert from an investigator and put a stop on the account. The claimant brought a claim against both NatWest and Santander. The banks brought a summary judgment application. At first instance the Master dismissed the claim against NatWest because a *Quincecare* duty would be inconsistent with the contractual duty to effect a customer's mandate. However, the Master held it was sufficiently arguable that Santander had breached its duty of care arising from the Supreme Court's decision from *Philipp v Barclays Bank UK Plc* [2023] UKSC 25 by failing to take steps to retrieve the sums removed by the fraudsters from the Santander account. Santander appealed.

The Judge allowed the appeal. The Master had considered there was a special level of control which Santander had over the danger (the movement of money from the account) such that a duty of care was owed because it had a special position to take steps to recover the funds. This was inconsistent with Santander's primary contractual duty to its customer to comply with its instructions. There was no arguable basis for considering that the status of Santander as the bank for a fraudster gave rise to any obligation to protect those who might be harmed by the fraudster. It was not possible to read into *Philipp* a freestanding duty upon a bank to take positive steps to unwind harm already caused to a third party with whom it had no contractual relationship by attempting to reverse payment orders previously made entirely properly on the instructions of its own customer. The duty recognised in *Philipp* arose from the bank's contractual relationship with the customer and a duty of care to interpret, ascertain and act in accordance with its customer's instructions. The obligation contended for by the claimant was one for Parliament to consider not the Courts. The duty proposed by the claimant would put banks in an impossible position of having to make a speedy adjudication in relation to allegations of fraud against its own customers and place a burden on it to depart from its contractual relationship with the customer.



Civil Procedure

DIGESTED BY JAMIL MUSTAFA

Phlo Technologies Ltd v Tallaght Financial Ltd (t/a Cubefunder)

[2025] EWHC 1405 (Ch) (Nicola Rushton KC sitting as a Deputy High Court Judge)
Administration – Out of court appointments – Authority – Interim injunctions – Duty of full and frank disclosure **16 June 2025**

The High Court (Nichola Rushton KC sitting as a Deputy High Court Judge) continued an interim injunction restraining a party ('Cubefunder') from appointing an out of court administrator over the applicant company ('Phlo') despite substantial non-disclosure by the applicant and failure to give notice of the application. Cubefunder claimed that it had a right to appoint an administrator over Phlo pursuant to a debenture (the 'Debenture').

Phlo was a start-up operating a digital pharmacy business. Until 30 August 2024, Mr Sarwar was the CEO and director of Phlo. Cubefunder was an FCA-regulated lender which makes short term loans to small businesses. The CEO and majority shareholder of

Cubefunder was Mr Miller-Cheevers. Phlo argued that Mr Sarwar and Mr Miller-Cheevers had a very close relationship, and that Cubefunder made several unsustainably large loans to a company in which Mr Sarwar was interested ('UPL'), which were repaid with monies from Phlo without the knowledge of Phlo's other directors. Phlo further alleged that Mr Sarwar caused Phlo to execute a guarantee of UPL's liabilities to Cubefunder unbeknownst to the other directors of Phlo, and also to obtain a series of loans from Cubefunder, which were paid into a 'secret' bank account. Phlo argued that these loans were taken out by Mr Sarwar without authority and Mr Miller-Cheevers and so Cubefunder were on notice of that fact.

Mr Sarwar also executed the Debenture. Inititally, Phlo did not dispute the validity of the Debenture, Phlo subsequently argued that Mr Sarwar did not have actual authority to execute the debenture on behalf of Phlo, Cubefunder knew or ought to have known that he lacked authority, and the debenture was therefore unenforceable. Phlo then amended its claim further to allege that the Debenture was void.

Mr Sarwar then allegedly caused Phlo to execute a guarantee of the liabilities of another company in which he was interested ('Holdings') to Cubefunder.

Cubefunder sent three letters of demand to Phlo for sums alleged to be due under the loans made directly to Phlo and the loans to UPL and Holdings guaranteed by Phlo. In response to those demands, Phlo applied in Scotland for an interim interdict restraining Cubefunder from appointing an administrator out of court over Phlo. Cubefunder sought to discharge the interim interdict due, amongst other things, to an English jurisdiction clause in the Debenture. Following that jurisdiction challenge, Phlo applied without notice for the interim injunction in England after Cubefunder's Scottish solicitors confirmed that Cubefunder would not agree to a continuation of the interdict pending an application to the English Court. Joanna Smith J granted the injunction sought. Marcus Smith J continued the injunction at the initial return date after Cubefunder indicated that it wanted more time to prepare its case for discharge as a result of breach of the duty of fair presentation and failure to give short notice of the initial hearing before Joanna Smith J.

At the adjourned return date, Ms Rushton KC considered whether to continue the interim injunction or discharge it. Ms Rushton KC decided to continue the injunction (applying the principles in *American Cyanamid*).

Ms Rushton KC held that there was a serious issue to be tried, involving a substantial dispute of fact and law, as to whether all and any of the loans to Phlo, UPL and/or Holdings were enforceable or void as against Phlo. Ms Rushton KC also held that damages would not be an adequate remedy for either party. Ms Rushton KC accepted Phlo's evidence as credible that it the appointment of an administrator to Pho would have a very negative impact on its business. Likewise, she accepted that the ability to appoint an administrator gave a lender such as Cubefunder an important power for which damages was not an adequate substitute.

Before considering the balance of convenience, Ms Rushton KC addressed Cubefunder's application to discharge the injunction. She held that Phlo did not give Cubefunder informal notice of its application for an interim injunction as was required. Informal notice required giving Cubefunder sufficient information about when and where the hearing was happening, what it was for and providing copies of material relied upon. Phlo did not do that prior to the hearing before Joanna Smith J. Phlo further did not explain to Joanna Smith J why it had failed to give short notice of the hearing to Cubefunder. Ms Rushton KC held that the failure to give short notice, while a significant error by Phlo's legal team, did not result from any deliberate decision not to comply with the rules on notice and thereby obtain an advantage. Furthermore, while Ms Rushton KC could not predict what Joanna Smith J would have done if there had been an *inter partes* hearing, she considered that the immediate outcome would probably not have changed if short notice had been given.

Similarly, Ms Rushton KC accepted Cubefunder's submission that Phlo had failed to comply with its duty of full and frank disclosure at the hearing before Joanna Smith J by advancing an incorrect statement of Phlo's financial position. In particular, the evidence of one of Phlo's directors ('Mr Hunter'), relied upon at the without notice hearing, had failed to refer to a recent board pack of which the director ought to have been aware, and which contradicted his evidence that Phlo was profitable in 2023 and remained in profit.

Ms Rushton KC concluded that the starting point was that she should discharge the injunction in light of this substantial non-disclosure, however, she nevertheless retained a discretion to continue the injunction in the interests of justice. Ms Rushton KC considered that the non-disclosure was primarily relevant to the cross-undertaking and the balance of convenience. At the balance of convenience stage, Ms Rushton KC considered that the most significant factor was that the discharge of the injunction would almost certainly stifle the claim and prevent the claims against Mr Sarwar and the defence to Cubefunder's claims from being resolved. The risks for Cubefunder could be mitigated through fortification of the cross-undertaking and the fact that it could still apply to the Court to appoint an administrator over Phlo. Accordingly, Ms Rushton KC held that discharging the injunction was more likely to cause irremediable prejudice than continuing it and so ordered that it should continue until trial or further order. However, by way of expression of the Court's disapproval for Phlo's failure to give short notice and material non-disclosure, Ms Rushton KC made an order for indemnity costs against Phlo and further ordered the appropriate fortification of the injunction, to be agreed between the parties, failing which there was to be a further hearing.

New Lottery Company Ltd v Gambling Commission

[2025] EWHC 1522 (TCC) (Joanna Smith J)
Impecuniosity – Inherent jurisdiction – Interested parties – Security for costs **16 June 2025**

Joanna Smith J determined two applications for security for costs; one made by the defendants to the underlying proceedings and the other by an interested party.

The proceedings concerned a procurement process run by the defendant. The claimants had been unsuccessful in their bid and commenced proceedings against the defendant. The interested parties were the successful bidders in the procurement process. Both the defendant and one of the interested parties applied for security for costs.

The interested party accepted that only a 'defendant' could apply for security for costs pursuant to CPR 25.26. Nevertheless, it argued that the Court could grant security for costs in its favour pursuant to CPR 3.1(2)(p), empowering the Court to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, and/or its inherent jurisdiction.

Joanna Smith J held that the Court did not have the power to make an order for security for costs in favour of an interested party which would have the effect of subverting the bespoke regime in CPR 25. While the Court had an inherent jurisdiction to grant security for costs, that jurisdiction was to be exercised in accordance with settled practice. CPR 25 reflected the settled practice of the Court that security for costs could only be awarded in favour of a 'defendant'. Accordingly, Joanna Smith J dismissed the interested party's application for security for costs.

As to the defendant's application, it was common ground that the key question was whether there was reason to believe that the claimants would be unable to pay the defendant's costs if ordered to do so. In this regard, it was also not disputed that this condition of impecuniosity was satisfied in respect of both claimants; the question was whether the fact that the companies were part of a group of companies with a more favourable financial position than their individual positions rebutted the prima facie satisfaction of the impecuniosity condition. Joanna Smith J resolved this question in favour of the claimants.

In particular, she held that there was substantial, unchallenged evidence that if an adverse costs order were made against the claimants, they would be put in funds to pay that order by a wholly owned subsidiary. The subsidiary had liquid assets plainly in excess of the maximum possible adverse costs liability and the group was profitable, with no indication of any change of strategy or foreseen event that would change the picture within 12–18 months' time, and with virtually no external debt. There was also no genuine concern that the claimants would be put into liquidation to avoid a costs order while the second claimant had the right to obtain funds to cover any adverse costs award from the relevant subsidiary and there was no evidence to suggest that it would not do so in that event. Joanna Smith J therefore also dismissed the defendant's application for security for costs.

Apollo XI Limited v Nexedge Markets Limited

[2025] EWHC 1488 (KB) (Saini J)
Freezing orders – Full and frank disclosure **17 June 2025**

Saini J discharged a freezing order granted *ex parte* for breach of the duties of full and frank disclosure and fair presentation.

The claimant ('Apollo'), a BVI company, had loaned US$10 million to the defendant (Nexedge) which was a FCA-regulated entity, which operated as an introducing broker. Apollo was wholly-owned by a Cayman Islands exempted limited partnership ('DNA Capital') of which Nexedge alleged that the ultimate beneficial owner was Mr Chun Pui Ting. The sole shareholder of Nexedge was Mr Tarik Sami, who was also a director of the company.

The loan agreement between Apollo and Nexedge was governed by English law and the exclusive jurisdiction of the English court

Apollo obtained an *ex parte* freezing order from the English court on the basis that Nexedge had breached the loan agreement and intended to dissipate its assets so as to prevent repayment of Apollo. After that ex parte order was made in the King's Bench Division, Apollo issued separate proceedings in the Commercial Court alleging repudiatory breach, or alternatively, breach of the loan agreement.

Apollo relied on a recording made on 11 April 2025 to obtain the without notice freezing order. The recording was of Mr Marcelo Spina (CEO-delegate of Nexedge) making a number of calls over a period of 4 hours when he was alone in Nexedge's office and was made through a laptop that was left in his office and remotely engaged to record. Apollo argued that the recording outlined an imminent plan for Nexedge to relocate its business and assets out of the jurisdiction and prevent Apollo from recovering its loan. The Judge was not provided with a full transcript of the recording at the without notice hearing.

The Judge was also not informed of the prior breakdown in the relationship between the parties. From late 2024, relations between Apollo and Nexedge had soured. The breakdown came to a head in April 2025 when Mr Ting asked for repayment of the loan and threatened to close down Nexedge. On 10 April 2025 (i.e., the day before the

recording), there was a heated meeting at Nexedge's offices at which Mr Sami informed Mr Ting that Nexedge was going to suspend access for Mr Ting and his associates to Nexedge's offices.

On 14 April 2025, Apollo served a notice of default under the loan agreement on Nexedge, purportedly accelerating and demanding full repayment of the loan and accrued interest, as the unspecified default event could not be rectified.

Nexedge argued that the freezing order should be discharged due to breach of full and frank disclosure and the duty of fair presentation. In particular, Nexedge argued that it should be discharged on this basis because of: (a) the presentation of the circumstances in which the recording had been made; and (b) the presentation of the content of the recording; and (c) the presentation of the default notice.

Saini J accepted Nexedge's submissions on all these points and held that Apollo breached its duties on the *ex parte* application. Saini J stated that, if there had been fair presentation, he was confident that the Judge would either not have granted the freezing order or ordered that short notice of Apollo's application be given.

As to the presentation of the circumstances of the recording, while the Judge was told that the recording was taken without knowledge, Saini J considered he had been misled as to the circumstances in which it had been obtained. Apollo gave different and inconsistent explanations for the recording. Before the Judge, and in its Skeleton Argument before Saini J, Apollo had said that the recording was the product of Apollo's own routine internal office monitoring protocol. Saini J concluded that there was no such protocol. However, in oral submissions to the Judge, Apollo's Counsel had said that the recording was generated accidentally. Subsequently, Apollo offered a third explanation, which was that the recording had been started and ended remotely from Australia by an alleged third-party company independent of Mr Ting.

Saini J held that this latest explanation was not supported by the evidence and inconsistent with the documentary record. He further held that, in light of the breakdown in the relationship between Apollo and Nexedge following the 10 April 2025 meeting, there was a strong inferential case that Mr Ting had orchestrated the recording as a form of 'bugging'.

Saini J also held that the contents of the recording were materially misrepresented at the without notice hearing. There was no explanation, either in evidence or submissions, of the background to the recording. Apollo's legal representative provided the Judge with a 'cut and paste' job that (wrongly) suggested that Nexedge planned to close its UK business and relocate offshore having dissipated its assets. Saini J concluded that the recording disclosed no such plans, but simply a plan for Nexedge to distance itself from Apollo for legitimate commercial reasons, to expand in line with its business plan, and there was no suggestion that it did not intend to meet its obligations under the loan. Saini J held that it was not clear to him why the full transcript of the recording was not made available to the Judge, nor how Counsel and solicitors had, at the *ex parte* hearing, concluded that it was accurately presented in the affidavit if they had not listened to the recording. He concluded that Apollo's legal representative went along with Apollo's plan to cherry pick which parts of the recording would be presented to the Judge. Consequently, the contents of the recording were not fairly presented to the Judge.

In these circumstances and having regard to other failures to give full and frank disclosure, the Judge discharged the freezing order. Whilst not required to do so having regard to his conclusion on full and frank disclosure, the Judge also concluded there was no good arguable case in respect of the claim advanced and no objective risk of dissipation considering the evidence as a whole. Nexedge had only one office, which was in the UK, all of its employees were based in the UK and so was its existing client base, while its only business was operating an FCA-regulated business in the UK. Finally, he concluded that all the circumstances of the case indicated that it would not be fair or just to continue the order. Saini J remarked that the Court's conscience was shocked by Apollo's admitted behaviour and that there was a serious case for it to answer at trial as to whether the recording resulted from unlawful bugging as part of a business strategy.

Wirral Council v Indivior Plc 7& Reckitt Benckiser Group Plc

[2025] EWCA Civ 40 (Sir Julian Flaux C, Nugee LJ, Falk LJ)
Representative claims – Multi-party proceedings – Split-trials – Securities claims – Strike out **23 January 2025**

Wirral Council ("W") brought claims against Reckitt Benckiser plc ("R") and Indivior plc ("I") under section 90, section 90A and Schedule 10A of the Financial Services and Markets Act 2000 ("FSMA") for alleged misleading or fraudulent statements and dishonest omissions in the defendants' published financial information. The defendants were alleged to have participated in an undisclosed dishonest scheme related to the opioid crisis in America.

W brought the claims in a representative capacity on behalf of an 'opt-in' class of institutional and retail investors who both owned or dealt with relevant securities at the relevant time (the "Investors") under CPR 19.8. W sought declarations on issues relevant to the defendants' liability that were common to all Investors. Claimant-side issues, such as standing, reliance, causation and quantum, were excluded from the representative proceedings.

In normal civil litigation, a claimant would need to plead and prove their case, including these elements, and give evidence and disclosure in order to make a financial recovery.

W argued that the Supreme Court decision of *Lloyd v Google LLC* [2022] AC 1217 relating to representative actions could equally apply to FSMA claims and the "*same interest*" threshold test under CPR 19.8(1) was met. W was frank

in that its aim was for the Investors to benefit from the declarations and then bring subsequent individual claims for damages. This bifurcation would be less risky, costly and burdensome for the Investors and provide greater access to justice for the retail investors.

Several investors also brought multi-party claims against R and I on a protective basis in case W's representative claim failed.

R and I applied for an order pursuant to CPR 19.8(2) that W may not act as a representative, and that the representative claims be struck out. At first instance, Michael Green J allowed those applications on the basis that he had an unfettered discretion under CPR 19.8(2) and that it was contrary to the overriding objective that the claims proceed as a representative action with the concomitant limits on judicial case management powers when they properly could and had been brought as multi-party proceedings.

The Court of Appeal dismissed W's appeal, agreeing that the Judge was entitled to exercise his discretion in the manner he had. It reasoned as follows.

First, there was no hierarchy of different procedures. Multi-party proceedings have advantages over representative proceedings, and one may be more appropriate than the other in certain cases.

Second, the Judge was entitled to consider that in other split-trial s.90A FSMA cases, the Court often orders progress on claimant-side issues (such as document preservation) in tandem to be even handed. The representative process would avoid this.

Third, W had failed to identify which claimants relied on which category of reliance and how many fell into each category. This is a critical element for these types of FSMA claims since English law does not recognise a general concept of fraud on the market. Failure to identify this at an early stage would deprive the defendants of an opportunity to strike out unsustainable claims. It was inimical to the overriding objective to allow speculative claims to proceed. The exercise of case management powers under multi-party proceedings would be more conducive to settlement.

Fourth, W had not been transparent on the funding rationale between the representative and multi-party proceedings. It had also failed to explain why the cost sharing and governance agreements to allow claimants into the representative proceedings could not equally apply to the multi-party proceedings.

Commercial Litigation

DIGESTED BY IMOGEN BELTRAMI

Conway & Ors v Air Arabia PJSC

[2025] CIGC (FSD) 41 (Asif KC J)
Section 147 of the Cayman Islands Companies Act – Extraterritoriality – Fraudulent trading
20 May 2025

The plaintiff liquidators of a Cayman Islands incorporated company issued a claim under section 147 of the Cayman Islands Companies Act, seeking a contribution from the defendant to the company's assets on the basis that the defendant had knowingly participated in the carrying on the company's business with intent to defraud or a for a fraudulent purpose.

The defendant had submitted two proofs of debt in the company's liquidation. The plaintiffs served the writ of summons for the section 147 claim on the defendant at the addresses stated in the defendant's proofs of debt, and by email. The plaintiffs issued a summons seeking declarations from the Court that they did not require leave to serve the writ on the defendant outside of the jurisdiction as the defendant had submitted to the jurisdiction of the Court for the purposes of the section 147 claim by lodging proofs of debt in the company's liquidation.

The Court held that leave to serve out of the jurisdiction was not required to serve a claim under section 147 on a creditor who has lodged a proof of debt in the company's liquidation as lodging a proof of debt amounted to a submission to the jurisdiction for the purpose of a section 147 claim.

It was common ground that lodging a proof of debt amounted to a submission to the jurisdiction for the purposes of a claim under section 145 or section 146 of the Companies Act (which respectively deal with voidable preferences and dispositions at an undervalue). The Court rejected the defendant's argument that section 147 was different in nature to sections 145 and 146, as section 147 was not concerned with restoring the status quo but created a new statutory liability to contribute to the company's estate in the exercise of the court's discretion. The Court found that there was no material distinction between claims under section 147 and claims under sections 145 and 146. Such claims are each statutory claims which only arise in the context of an insolvent liquidation and vest in the liquidator, and which give the liquidator a power or remedy to achieve a proper distribution of the estate by remedying some deficiency resulting from pre-liquidation conduct. The remedy in each case is

for the purpose of bringing additional assets into the liquidation estate for the general body of creditors, not for the benefit of the company more generally or for its secured creditors, against a person whose conduct has caused the value of the estate to be diminished in some way. A declaration that a person should contribute to the liquidation estate under section 147 is also properly characterised as an order within the winding up proceedings.

The Court confirmed that where the court's jurisdiction over a defendant is based on voluntary submission the procedural rules on service out are irrelevant as the court's jurisdiction over the defendant is not based on service. The question of leave to serve out of the jurisdiction was therefore otiose as the defendant had submitted to the Court's jurisdiction for the purposes of the section 147 claim by lodging proofs of debt.

The Court also confirmed that section 147 of the Companies Act has extraterritorial effect, finding that the English authorities addressing the interpretation of the English legislation comparable to sections 145, 146 and 147 of the Companies Act reflected the law of the Cayman Islands. The context in which sections 145, 146 and 147 were introduced into the law of the Cayman Islands strong indicated that Parliament intended the provisions to have extraterritorial effect.

Tom Smith KC

Annabelle Wang

V v K

[2025] EWHC 1523 (Comm) (Calver J)
Arbitration – Bias – Disclosure

19 June 2025

The Claimants brought an arbitration claim challenging a Partial Final Award made by LMAA arbitrators in August 2024 under sections 68(2) and 67 of the Arbitration Act 1996. The grounds for the challenge initially focused on an alleged repudiatory breach by the Tribunal in the form of actual or apparent bias invalidating the Tribunal's substantive jurisdiction over the dispute. The Claimants also contended that there was a serious irregularity affecting the proceedings in that one of the arbitrators should have disclosed personal connections with his appointing solicitors.

In examining the serious allegations of bias raised by the Claimants, the Court considered that it was clear that the Tribunal had behaved throughout the case with *"nothing but impeccable fairness"* and had acted impartially. Despite allegations to the contrary, the Court also did not find any instances of procedural unfairness in the conduction of the arbitration proceedings. Instead, the Court placed emphasis on the obstructive conduct of the Claimants and their choice to accuse the Tribunal of bias rather than *"engage with the substantive issues in the arbitration".*

As to the potential bias generated by the failure of one of the arbitrators to disclose his previous connections with his appointing solicitors, the Court held that failure by an arbitrator to make disclosure is a factor for the fair-minded and informed observer to take into account in assessing whether there is a real possibility of bias. However, other factors must also be taken into consideration including the professional reputation and experience of the individual arbitrator and the possibility of opportunistic or tactical challenges raised by parties seeking to win. The Court held that the arbitrator in this case had reasonably understood the relevant disclosure enquiry to be a general one and had responded appropriately. The Court rejected any suggestion that the arbitrator was guilty of a lack of candour and held that he had been *"fully transparent"* in respect of his history with the relevant firm.

In any case, the Court also held that the arbitrator had no duty of disclosure of his previous arbitral appointments connected to that firm in the present case. This conclusion was based on *Halliburton Co v Chubb Bermuda Insurance Ltd* [2021] AC 1083 in which the Court pointed out that there is an established custom in LMAA arbitrations that an arbitrator may take on multiple appointments without disclosure. This case was not one of multiple appointments but concerned repeated instructions in unrelated arbitrations by the same law firm over a number of years.

Various related applications were also made including an application to set aside purported service of the Arbitration Claim Form and set aside an order through which the Claimants had been granted an extension of time to bring the claim and serve the Claim Form.

AerCap Ireland Ltd v AIG Europe SA

[2025] EWHC 1430 (Comm) (Butcher J)
Russian sanctions – Aviation – Loss

11 June 2025

The Claimants leased aircraft to Russian airlines. As a result of sanctions imposed following the Russian invasion of Ukraine and various Russian counter-measures, the Claimants were unable to extract those aircraft from Russia. As such, the Claimants sought an indemnity from their insurers under various insurance policies, claiming that the aircraft in question had been lost to them. The insurers were the Defendants to the claim.

The insurance policies provided 'contingent' cover which was essentially intended to activate in circumstances where the operator's own insurance failed to do so, as well as 'possessed' cover. This cover was intended to activate in circumstances when the aircraft were in the lessor's own possession. The respective scope of these coverages was *"fiercely contested"* before the Court. Each Claimant was also the beneficiary of separate 'all risks' and 'war risks' cover. At trial there were two large groupings of Defendants making consolidated submissions which were split between the 'all risks' insurers (the "AR Insurers") and the 'war risks' insurers (the "WR Insurers").

The insurers took the position that the terms of neither the contingent nor possessed covers had been met so as to activate the relevant insurance. Specifically, the aircraft had not been lost to the Claimants and in any case, US and EU sanctions prohibited them from indemnifying the Claimants. In addition, the WR Insurers and AR Insurers each placed liability to cover the claims at the doorstep of the other. The AR Insurers contended that the aircraft remained in Russia as a result of Russian government orders and actions and therefore that it was the WR Insurers that should be liable. The WR Insurers argued to the contrary that any loss suffered by the Claimants had been incurred as a result of a commercial decision of the Russian airlines and that the AR Insurers should therefore be liable to cover it.

The Court ultimately held that the Claimants were entitled to recover under their contingent insurance policies, with the total sum payable totalling over USD 1 billion.

The Court held that the aircraft in question were 'lost' for the purposes of the relevant policies on 10 March 2022. 10 March 2022 was selected as the date when Russian legislative measures came into force with the effect of formally prohibiting the export of commercial aircraft. The test utilised by Butcher J in this assessment is whether, on the balance of probabilities, the deprivation in question has become permanent.

As to which insurers were actually liable to cover the loss suffered by the Claimants, Butcher J held that the loss fell within the 'war risk' category of cover because the cause of the loss was government restraint or detention. Butcher J gave the terms restraint and detention *"an ordinary broad meaning"* and refused the attempts by the WR Insurers to limit their scope.

Butcher J rejected the submissions suggesting that the 'all risks' cover was not activated in circumstances where the detained aircraft remained in Russia. He also determined that the lessors had taken all reasonable steps to recover the detained aircraft and rejected the submissions that US and EU sanctions prohibited the insurers from indemnifying the Claimants.

Beograd Innovation Ltd v Somovidis

[2025] EWHC 1182 (Comm) (HHJ Pelling KC, sitting as a Judge of the High Court)
Immovable property – Enforcement – Universalism

27 May 2025

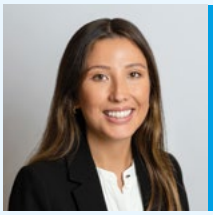
The Claimant sought recognition and enforcement in England of a Russian judgment worth c. £14 million against the Defendant. The Defendant had been resident in England since late 2016 and was served with the relevant proceedings in England. The Defendant applied for an order that the English court decline to exercise its jurisdiction and/or stay the proceedings permanently on the grounds that there were bankruptcy proceedings ongoing in Russia against the Defendant in relation to the liability that formed the basis for the judgment that the Claimant sought to enforce.

The core of the dispute rested on the proposition put forward by the Defendant which was that as a matter of English law, a creditor who submits to the jurisdiction of a foreign court administering a debtor's insolvency becomes bound by the rules governing that insolvency, and the English court will take steps to uphold those rules. As part of this approach, the Defendant suggested that the English court would stay proceedings before it that proved inconsistent with the rules of the foreign insolvency. If the Defendant was correct in these submissions and his position on English and Russian law, the Court would have been bound to stay the proceedings notwithstanding that this would effectively render the Defendant *"judgment proof"* in respect of his immovable property located in England and Wales (see *Kireeva v Bedzhamov* [2024] UKSC 39 ("Kireeva")).

The Court held that the principle of modified universalism applies so as to ensure that the collective remedy of insolvency is made available to all creditors everywhere by reference to all assets of the relevant insolvent individual or company. However, the Judge determined that the principle is one that must be applied in a manner consistent with justice and UK public policy and there is nothing to suggest that modified universalism should be applied by a court so

as to render part of a bankrupt's estate immune from distribution.

Following the decision of the Supreme Court in *Kireeva*, the Court noted that immovable assets in England are not part of a foreign bankruptcy estate. As such, enforcing against those assets would not infringe the principle of modified universalism and the Judge ultimately held that staying the proceedings would not be in the interests of justice. To consider otherwise would effectively permit the Defendant to ring fence part of his global estate. The Judge noted that a stay such as that sought by the Defendant should only be granted where the relevant applicant has demonstrated a *"powerful reason"* founded on the interests of justice for departing from the usual course of permitting claims over which the court has jurisdiction to be determined on their merits.



Company Law

DIGESTED BY ANNABELLE WANG

Hasan v Al-Raudi

[2025] EWHC 1272 (Ch) (ICC Judge Agnello KC)
Removing documents from the register of companies – Section 1096 of the Companies Act 2006 **4 June 2025**

The claimants sought an order pursuant to section 1096 of the Companies Act removing certain documents from the register of companies on the basis that the documents were invalid and/or ineffective or had been placed on the register without the authority of the company or were factually inaccurate or derived from something that was factually inaccurate or forged.

The first defendant accepted that the documents had been filed by him or on his behalf. The documents consisted variously of notices of the first defendant's appointment as a director, the termination of the appointment of three other persons as directors of the company, and a change of the company's registered office. The first claimant contended that neither he or the other two directors had resigned, been validly removed or given any authority for the documents to be filed, including the appointment of the first defendant as a director. The first defendant accepted that he was not a registered director or shareholder of the company but asserted that he had the power to remove and appoint directors, as a person with significant control over the company.

The Court confirmed that the articles of association of a company govern who has the authority to appoint and remove directors, and that a company acts through its directors who are authorised to carry out the operation and management of a company, including the registration of documents at Companies House. The first defendant had failed to identify any provisions of the Companies Act or the articles of association which allowed him to act in the way that he did. Accordingly, the first defendant lacked the authority to file any of the documents which he had sought to file.

However, the Court found that the registration of the notices appointing and removing directors did not have legal consequences so as to fall within the scope of section 1096(3) of the Companies Act. The notices did not operate to validate any appointments or removals by their registration as the appointments and removals were not valid under the provisions of the Companies Act or the company's articles.

The registration of the notice of the first defendant as a person with significant control also did not have legal consequences, as registration did not have the consequence of validating a person as having significant control. By contrast, the change of registered office did have legal consequences, as it provided to the public the address for service of legal proceedings. The company's interests in ensuring documents were sent to the registered office of the company, outweighed the first defendant's interest in being able to maintain the invalid change of registered office.

Corporate Insolvency

DIGESTED BY CHARLOTTE WARD AND ANGUS GROOM

Purkiss v Kennedy

[2025] EWCA Civ 268 (Lewison, Newey and Jeremy Baker LJJ)
Section 423 – Prohibited purpose – Transactions defrauding creditors – Putting assets out of reach – Avoiding a liability altogether – Challenge to findings of fact on appeal

14 March 2025

This appeal related to a company that had been involved in a tax avoidance scheme that was designed to enable self-employed individuals to reduce their liability for income tax and national insurance contributions through the use of an employee benefit trust. Such arrangements were held by the Supreme Court to be ineffective at avoiding the relevant tax liabilities in *RFC 2012 plc v Advocate General for Scotland* [2017] UKSC 45. As part of these schemes, monies paid for the services of self-employed individuals were paid to the relevant company (the "Company"), which would pay only a modest sum to the individuals before transferring the balance to a trust, and where the trustee would normally make discretionary loans to the self-employed individuals. HMRC assessed the Company for tax liabilities that arose from the payments of the balance into the trust (but "for" the individuals), and subsequently the Company entered liquidation.

By an application under section 423 IA 1986, the Company's liquidator (the "Liquidator") brought a claim to recover, from the self-employed individuals, the sums which should have been deducted as income tax and national insurance when the Company made payments to the trust in relation to those individuals. At first instance, Rajah J accepted that the composite transaction that the Company had entered into was an *"undervalue"*, as what the Company received (in fees) was less than the cost to it (in the tax liabilities that it then incurred). The critical issue, however, was whether the Company had entered into the transaction for the prohibited purpose under section 423(3) IA 1986, which is either putting assets out of the reach of a person who is making a claim or may at some time make a claim, or otherwise prejudicing such a person in relation to the claim which he is making or may make.

At first instance, the Liquidator's primary case was that the intention of preventing a tax liability from arising through the avoidance scheme was a prohibited purpose because of the way that it prejudiced HMRC. Rajah J rejected this primary case, saying that the purpose was to make it so that HMRC had no claim, rather than to prejudice any claim. The Liquidator also advanced a secondary case which was that the scheme had been designed and implemented with the purpose that, if it failed, it would impede HMRC in recovering the tax such that HMRC was prejudiced. Rajah J rejected this case on the evidence. Permission to appeal was given in relation to both the primary and the secondary case, and the respondent self-employed individuals raised respondent's notice points appealing the judge's conclusion on undervalue and raising further points in relation to discretion.

The Court of Appeal rejected the Liquidator's appeal on the primary case. The Court considered that Parliament was unlikely to have considered tax avoidance or tax mitigation as within the scope of section 423, and further the Court did not consider that the underlying philosophy behind section 423 was consistent with the section covering the purpose of preventing a liability from arising at all. Crucially, the Court also concluded that the Liquidator's arguments were inconsistent with the wording of section 423 itself.

In relation to the Liquidator's secondary case, the Court of Appeal noted that this was a challenge to Rajah J's finding of fact such that the Court had to be satisfied that the first instance judge had been plainly wrong and/or had reached a conclusion that was rationally unsupported by the evidence. The Court of Appeal did not consider that such a challenge could be established, and so the appeal was dismissed. In the circumstances, the Court did not consider the respondent's notice arguments).

Daniel Bayfield KC

Jon Colclough

Re Madagascar Oil Ltd

[2025] EWHC 1015 (Ch) (Mellor J)
Restructuring plan – Part 26A – Convening hearing – "Compromise or arrangement" – "Give and take" **28 April 2025**

This decision involved the grant of a convening order in relation to a novel restructuring plan being promulgated for the benefit of the plan company (Madagascar Oil Limited, "MOL") and its subsidiary (Madagascar Oil S.A., "MOSA").

The plan was unusual in that is related to only two creditors, BMK Resources Ltd ("BMK") and Outrider Master Fund LP ("Outrider"). BMK is MOL's parent company that owns all of the shares in MOL. Outrider is a vehicle within a distressed debt hedge fund that is (together with BMK) a creditor of MOL and MOSA. MOL proposed two plan meetings where BMK and Outrider would each form their own class, and where it is anticipated that BMK would support and Outrider would oppose the plan. The purpose of the plan was to allow for the release of liabilities under intercompany loans and the release of guarantees to allow for an injection of new funds into MOSA, and in order to allow MOSA to restart production at an oilfield it controls.

The plan essentially involved the release of all debts owed by MOL and MOSA to both BMK and Outrider for essentially peppercorn consideration, and (1) with BMK entering into a new loan agreement with MOL, and (2) with Outrider having the election of either USD 200,000 in cash or 1.25% of MOSA's net revenue for the 12 years following the plan (capped at USD 1.45 million), together with a further anti-embarrassment protection.

Outrider had applied to adjourn the convening hearing on the basis that they had not had time to prepare the relevant issues, but the Court rejected this submission and proceeded to decide the substantive convening issues.

Of the convening issues, a key point of dispute was whether the plan had the requisite amount of *"give and take"* to amount to a *"compromise or arrangement"*. Unusually, Outrider was arguing that the plan did not have the requisite give and take in relation to the other creditor BMK, on the basis that BMK was being expropriated, but the Court took a practical approach to this question and concluded that BMK would only be supporting the plan and the making of a substantial further loan if it considered that this would be to its benefit. The Court also concluded that certain releases under the plan were also a significant benefit to it, and so this objection by Outrider was dismissed.

Outrider also objected to the class composition, saying that Outrider and BMK should form a single class as their rights were not so different to make it impossible for them to consult together with a view to their common interest. Whilst the *"rights in"* (before the plan) were similar between the two creditors, the Court noted that the differential treatment under the plan means that the *"rights out"* (under the plan) were very different. The Court accepted this and also, again taking a practical approach, appeared to take into account both the history between the parties that suggested that these specific parties were unable to consult together and also the fact that having a single class would kill the plan by preventing any statutory majorities from being reached.

The Court also concluded that there were no roadblocks to the plan and that the explanatory statement was in an adequate form, and so the Court made an order convening the plan meetings.

Mark Phillips KC

Matthew Abraham

Rabin Kok

Bilta (UK) Ltd and others v Tradition Financial Services Ltd

[2025] UKSC 18 (Lord Hodge DPSC, Lords Briggs, Hamblen, Burrows and Richards JJSC)
Fraudulent trading – Outsiders – Limitation – Time-bared – Dishonest assistance **7 May 2025**

Bilta (UK) Ltd ("Bilta") was one of a number of companies that had been involved in a missing trading intra-community fraud ("MTIC fraud") which involved those companies running up very large VAT liabilities, failing to account for this VAT and passing the benefit to third parties before entering insolvent liquidation. The liquidators of Bilta (and of a number of related companies) brought a claim against Tradition Financial Services Ltd ("Tradition") in fraudulent trading under section 213 IA 1986 and also based on dishonest assistance to the breach of fiduciary duties by the directors of the insolvent claimant companies. Certain factual issues were decided between the parties, but legal issues were left to be determined by the Courts.

The first issue was the scope of section 213, as Tradition argued that it was not capable of being a defendant to a section 213 fraudulent trading claim on the basis that it had not been in the management or control of the fraudulent business being carried on by the claimant companies. Tradition's argument had been unsuccessful before the High Court

and the Court of Appeal, and it had then appealed to the Supreme Court.

The second issue was whether the dishonest assistance claims were time barred. This depended on whether the running of time for limitation had been postponed under section 32 Limitation Act 1980 due to the companies not having been able to discover the fraud with reasonable diligence. This in turn depended on the effect of the deeming provision at section 1032 Companies Act 2006, which deems a company which has been struck off the register and then restored to the register as always having been in existence. The relevant claimant companies ("Nathanael" and "Inline", both of which had been struck off and then restored) had been unsuccessful on this issue before the High Court and the Court of Appeal, and had then appealed to the Supreme Court.

The Supreme Court dismissed Tradition's appeal on the first issue. Once the Court concludes that any business of a company has been carried on with the intent to defraud creditors or for any fraudulent purpose, section 213(2) imposes liability on *"any persons who were knowingly parties to the carrying on of the business in the [fraudulent] manner"*. The Supreme Court held that the natural meaning of the words "any person" were wide enough to cover not only "insiders" involved in the management and control of the company's fraudulent business, but also "outsiders" who were knowing parties to that business such as by participating in transactions with the company when they had the relevant knowledge. The Supreme Court considered arguments based on statutory context, case law and parliamentary materials and concluded that these was nothing in any of those arguments to sufficient to justify a departure from this natural meaning of the wording in the legislation.

The Supreme Court also dismissed Nathanael's and Inline's appeal on the second issue. The essential question was whether the deeming provision (deeming that the restored companies had always been in existence) had the effect of deeming the companies as having been reasonably able to discover the fraud during the period of their dissolution. As a key part of this argument Nathanael and Inline had argued that, notwithstanding the deeming provision, it had to be assumed that they would have no directors or other officers during the time of their dissolution such that the companies would not have been able to discover the fraud. The Court left open the question of whether this conclusion might apply to some companies on specific facts, but the burden was on the companies to show this and it was not accepted as a general proposition. As a result, the lack of evidence adduced by these claimants meant that Nathanael and Inline had failed to show that they would have had no directors in the deemed situation, with the result that they had failed to show the ability to rely on section 32 Limitation Act 1980.

Almeqham v Al-Sanea

[2025] EWHC 1662 (Ch) (ICC Judge Burton)

CBIR 2006 – Article 21 – Disclosure – Reasonably required – "When necessary" – Dispensing with service **02 July 2025**

This was an application by the liquidation trustee of Maan Bin Abdul Wahed Al-Sanea and Saad Trading, Contracting and Financial Services Co seeking discretionary relief under Article 21(1)(d) Cross Border Insolvency Regulations 2006 (the "CBIR"). This provision allows an office holder who has been recognised under the CBIR to seek relief including in relation to the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities. The Court noted that the test under Article 21(1)(d) has been held to be potentially different to the more familiar test that the Court applies in relation to an application for an order requiring the production of information or documents under section 236 IA 1986 (which requires than an office holder reasonably requires the information they seek), but any such difference was not considered to be material on the facts of the case and so the Court proceeded to apply the more familiar section 236 test.

The Court concluded that the documents in question did concern the debtor's affairs and assets and then considered the discretionary question of whether the information was reasonably required. The Court noted that the purpose of the provisions is not to allow an office holder to gain an advantage in litigation that is not available to other litigants. The Court also noted that the draft request had been phrased in very wide terms – seeking *"all"* documents within certain categories – but with no explanation as to why this breadth was necessary. As a matter of discretion, the Court declined to make these wide orders, which were being sought in order to assist in litigation that was already ongoing. The Court granted orders for the provision of other information on terms that had been substantially agreed between the parties shortly before the hearing.

The Court also dispensed with service of the application on the debtors. As the debtor company was under the sole control of the applicant trustee there was no issue with this. As to the individual debt, the Court noted that they were in prison, they had refused to accept service in the past, and they had shown no suggestion that he now wanted to engage with the litigation. In a context where the Court had already dispensed with service on this debtor in related proceedings, and where there did not appear to have been any change in circumstances, the Court therefore dispensed with service on both debtors.

Re Afiniti Ltd

[2024] SC (Bda) 65 civ (Martin J)

Provisional Liquidation – Restructuring – Application for Sanction – Out of the Money Creditors

21 March 2025

The "Company", Afiniti Ltd., is a global customer experience and artificial intelligence provider. Between 2017 and 2021 it had been valued at over $1bn and was considered to be a *"unicorn"*, however the Company's financial position had deteriorated.

Provisional liquidators had been appointed in September 2024 (the "JPLs") and sought to undertake a c.$500 million multi-process restructuring transaction that would involve inter alia the transfer of all of Company's business and assets via direct and indirect means to a United States LLC ("Newco") owned by the secured creditors.

The JPLs applied to the Supreme Court of Bermuda for its sanction to exercise their powers to enter into the transaction under sections 175(1)(e) (relating to compromise, referred to as "Type 1")) and/or 175(2)(a) (relating to sale, referred to as "Type 2")) of the Bermuda Companies Act 1981 the ("Sanction Application") and also sought Chapter 15 recognition and relief in the United States.

The JPLs application was supported by the Company and by the secured creditors. It was opposed by the Company's founder and former Chairman and CEO in his capacity as a shareholder and unsecured creditor (the "Founder").

The Founder contended (amongst other things) that the valuation report which underpinned the JPLs' Sanction Application was materially flawed and/or unreliable for showing the value breaking in the secured debt. He sought either an adjournment for a valuation trial or a refusal of the relief applied for, which he said could not be granted without a further testing of the valuation, following disclosure and cross-examination (to a great or lesser extent, depending on the test to be applied).

After an initial short adjournment, the Court rejected these arguments and granted the relief applied for by the JPLs. The Court found that:

(i) the test for sanction in a "Type 1" case (on compromise) was focused on what was in the best interests of creditors as a whole; and

(ii) the test for sanction in a "Type 2" case (on sale) was focused on the JPLs' genuine and rational belief that proper value had been obtained.

The Court was satisfied that both tests were met in this case.

In both case, the Court found that the JPLs had put all the relevant materials before the Court, and had explained their reasons for coming to their conclusions, taking into account the concerns, criticisms and objections made by the Founder (and in expert evidence the Founder had tendered in support of his opposition).

The Court was also satisfied that the JPLs' valuation report was not flawed or based on a flawed understanding of the facts and had *"obvious and discernible benefits to both the Company and its creditors"*.

The Judge also found that the liquidity position was critical and so he would not allow time for a valuation trial.

The JPLs subsequently obtained Chapter 15 recognition and relief.

The Founder sought to injunct the JPLs from carrying out the transaction which was rejected by an ex tempore ruling of Martin J on 26 November 2024.

The Founder's application for permission to appeal was rejected by the Judge on 21 March 2025 (Re Afiniti Ltd [2025] SC (Bda) 33 civ).

Tom Smith KC

Felicity Toube KC

Adam Al-Attar KC

Matthew Abraham

Charlotte Ward

Byers & Ors v Chen Ningning

BVIHCMAP 2024/0009 –Eastern Caribbean Court of Appeal
Recognition – Foreign judgments – Bankruptcy petitions – Enforcement **20 June 2025**

This case concerned the ability of a company in liquidation to bring a claim against a director for causing a payment to be made to a creditor in breach of the creditor interests duty.

The respondent, ("Ms. Chen") was the sole director of the company ("PFF"). PFF had entered into a loan agreement by which the lender ("Z") paid US$13m to PFF. PFF conceded that by 23rd October 2009, it was commercially insolvent but in the subsequent month. PFF repaid its indebtedness to Z in three tranches. When the Z Payments were made, PFF was insolvent and an insolvent liquidation or some other protective process was inevitable. Ms Chen was the sole authorised signatory on the account from which the Z Payments were made.

The appellants, as joint liquidators of PFF (the "JLs"), brought proceedings in the BVI Commercial Court for breach of fiduciary duty against Ms Chen in her capacity as de jure/shadow director of PFF, for causing or authorizing the Z Payments to be made and claimed the sum of US$13m plus interest. The BVI Commercial Court held, and the Eastern Caribbean Court of Appeal upheld, that Ms Chen had resigned before the Z Payments were made and as such did not owe PFF any fiduciary duties. The matter was appealed to and overturned by the Privy Council who found that Ms Chen had not resigned, had continued to owe fiduciary duties to PFF and had been in breach of those duties by allowing the Z Payments to be made. The matter was remitted to the BVI High Court to decide what sums, if any, Ms Chen must pay as a consequence of its finding that she had acted in breach of fiduciary duty (the "Quantum Application").

In February 2024, the BVI High Court heard the Quantum Application and decided that the Z Payments were balance sheet neutral, since the act of paying a creditor caused no net loss to the company because the payment resulted in a corresponding discharge of the company's liability. Accordingly, PFF did not suffer a net loss and there was no need for Ms Chen to pay compensation. The High Court also declined to order any equitable remedy for compensation because Ms. Chen had not benefitted from the Z Payments in any tangible way.

The Court of Appeal overturned that conclusion on appeal, holding that a loss to the body of creditors is to be regarded as a loss to the company for the purposes of a breach of the creditor interests duty which is engaged where a company is insolvent or bordering on insolvency (as PFF was here), and that the body of creditors would suffer loss by reason of the amount of assets available for distribution being reduced.

The approach taken by the English Court of Appeal in *West Mercia Safetywear Ltd (in liq) v Dodd* [1998] BCLC 250 was correct, and was not limited to the circumstance where the director derived a personal benefit from the transaction.

Tom Smith KC

Re HSE Finance SARL

[2025] EWHC 1386 (Ch) (Hildyard J)
Restructuring – Scheme of Arrangement – Convening Hearing – Sanction Hearing **5 June 2025**

HSE Finance SARL is the Luxembourg financing arm of a German live-commerce retail business operating in Germany, Austria and Switzerland.

On 6 to 7 May 2025 the Company sought the Court's approval to convene a single meeting of its creditors to consider a scheme of arrangement under Part 26 of the Companies Act 2006. On 11 June Mr Justice Hildyard sanctioned the scheme, which was supported by 100% of its voting creditors, representing 93% of the company's debts.

The scheme was part of a comprehensive restructuring which sought to compromise €630 million of debt, representing substantially all of the Company's existing indebtedness (excluding lease liabilities relating to the German office and studio headquarters).

There was no creditor opposition at either the convening or the sanction stage.

The high level of creditor support exhibited at the convening stage gave Mr Justice Hildyard pause to consider if the restructuring could be achieved consensually. However this was not possible given that the high support was not enough to cross the requisite 90% threshold and no event of default had occurred to trigger it.

Richard Fisher KC

Stefanie Wilkins

Personal Insolvency

DIGESTED BY RABIN KOK

Péretié v Eden Farm SrL

[2025] EWHC 1349 (Ch)
Statutory demands – Jurisdiction – Anti-suit injunctions – Bankruptcy petitions
3 June 2025

Section 265 of the 1986 Act sets out a number of jurisdictional requirements for the presentation of a bankruptcy petition – the debtor must be domiciled in England & Wales, must be ordinarily resident here, carry on business here or have their COMI or an establishment here.

In two cases, ICC Judges Burton and Prentis have held that challenges to these jurisdictional required can be raised under rule 10.5(5)(d) on an application to set aside a statutory demand. But in two later decisions, Chief ICC Judge Briggs and HHJ Cawson reached the opposite view, holding that challenges under rule 10.5(5)(d) must be concerned with the integrity of the debt, and not with jurisdiction.

In *Péretié*, Deputy ICC Judge Parfitt has considered these conflicting authorities and has given valuable (albeit *obiter*) guidance on how jurisdictional challenges to statutory demands are to be raised in future. The Judge affirmed that the later decisions of Chief ICC Judge Briggs and HHJ Cawson are to be followed, as required by the rules of precedent.

But the debtor is not without jurisdictional remedy. Instead of challenging the statutory demand, the Judge said that the debtor should issue an application for an anti-suit injunction immediately on receipt of the statutory demand. The reference to an 'anti-suit injunction' is inapt, what is meant is an injunction to prevent presentation of a bankruptcy petition in the English courts (and not in a foreign court). In cases where the debtor wishes to raise *both* jurisdictional issues and dispute the petition debt, the proper course is to issue a rolled-up application to set aside the statutory demand and for an injunction restraining presentation of the petition.

Any injunction should be urgently heard and listed during the three week period for compliance with the statutory demand. The judge encouraged petitioning creditors to give undertakings not to present a petition until the hearing of an injunction if appropriate, or be met with costs consequences.

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

[2025] EWCA Civ 681
Bankruptcy petitions – Jurisdiction – Residence
30 May 2025

One of the grounds for jurisdiction under section 265(2)(b)(i) of the Insolvency Act 1986 is that the debtor has, in the three years prior to the date of presentation, been *'ordinarily resident, or...had a place of residence'* in England & Wales.

Can this ground of jurisdiction be satisfied by the fact that there is, in England & Wales, a place of residence owned by someone other than the debtor that is regularly made available for him to live in when asked, even if the debtor *never in fact* asks?

The Court of Appeal concluded that it could not.

The Prince completed his studies in London in 1990 and after doing so relocated with his family to a large house in Riyadh. He visited London intermittently over the years, during which visits he stayed at a variety of accommodation including York House, owned by his mother. The Petitioners sought to argue that the Prince would, had he asked, have been able to stay at York House or any one of a number of other properties purchased by his relatives, and this was sufficient to meet the residence test.

In Snowden LJ's view, such a connection with England & Wales lacked the degree of substantiality and continuity of connection between the debtor and the jurisdiction that section 265 required. The Prince's visits to London were intermittent and for short periods, and he did not intend to return to live in London.

Perhaps, said Snowden LJ, he had at most an 'expectation' that if he had asked, he would have been given permission to stay as a guest in a property in London owned by his mother. But as he made no such request and did not in truth visit this jurisdiction and was not likely to, a mere expectation of this kind was insufficient to satisfy the residence test.

Snowden LJ also explained that there was no principle of law that a person must have 'abandoned' a residence they had previously for it to cease being their residence. The only test was whether someone had or did not have a residence during the relevant period.

Bridging Finance Inc (acting by its receivers, PricewaterhouseCoopers Inc) v Anthony Lyons

[2025] EWHC 1694 (Ch) (Deputy ICC Judge Baister)
Bankruptcy – Jurisdiction – Carrying on Business
1 July 2025

The Court heard the trial of a contested bankruptcy petition presented by a Canadian alternative finance company (in receivership) ("P") against the debtor property investor ("D"). The petition debt was for Canadian $ 55 million and based on a personal guarantee between the parties relating to significant loans borrowed to fund a substantial property development in Northumberland. D – who is domiciled in The Bahamas – opposed the petition on the basis that (a) the Court had no bankruptcy jurisdiction over him and (b) the petition debt was disputed. In relation to jurisdiction, P maintained that D had been carrying on business in England during the relevant period – either (i) through carrying on business as a serial property entrepreneur (which business was separate and distinct from that of the underlying companies owned/controlled by him to carry out that business) or (ii) through carrying on business through the ownership and rental of a large property at 100 Hamilton Terrace, St John's Wood. As to the first of these, the Court held (albeit with *"considerable misgivings"*) that D's companies were merely part of the machinery by which he implemented his business projects (see *Re Brauch* [1978] Ch 318; *Masters v Barclays* [2013] BPIR 1058) – such that D was not carrying out an independent business separate from them; as to the second, the Court held that the letting of 100 Hamilton Terrace was the carrying out of business (see *Durkan v Jones* [2023] BPIR 1074) and that the eventual sale of the property for £22 million was an important transaction representing the culmination of years of investment and effort (*Conway v Kenny* [1999] EWCA Civ 639). In relation to the purported dispute, the Court held that D's case was inconsistent with the contemporaneous documentation; advanced late in the day; as well as being commercially implausible. Taking the points together, they were no more than the proverbial *"cloud of objections"*. Accordingly, the Court made a bankruptcy order.

William Willson

Angus Groom

Re Khilji

[2025] EWHC 548 (Ch) (Richards J)
Bankrupt's home – Section 283A – Bankruptcy estate – Investigations by trustee
11 March 2025

The 'use it or lose it' provisions of section 283A of the 1986 Act provide that a bankrupt's interest in his home re-vest in the bankrupt (and cease to form part of his estate) if not realised by the trustee within three years. However, section 283A(5) provides that where the bankrupt fails to inform the trustee or Official Receiver of his interest in the relevant property, then the three year period starts to run only on the date on which the trustee *"becomes aware of the bankrupt's interest"*.

In this case, the bankrupt argued that on a proper construction of section 283A(5), the three-year period began to run not when the trustee had subjective knowledge of the bankrupt's interest in the property, but when the trustee *could* have discovered that interest after making reasonable enquiries.

Richards J rejected this argument on appeal from the Insolvency and Companies Court. The wording of the statute obviously required the trustee to have subjective knowledge of the relevant interest, and made no reference to the concept of making reasonable enquiries. As such, there was no room for policy considerations supporting a requirement to make reasonable enquiries, and in any case it was not obvious that those were the considerations which Parliament had in mind.

Property and Trusts

DIGESTED BY PETER BURGESS

Ashley Dawson-Damer v Grampian Trust Company Ltd

[2025] UKPC 32 (Lord Burrows and Lady Rose)
Discretionary trusts – Inadequate deliberation – Attribution – Corporate settlor **7 July 2025**

The Privy Council heard an appeal from the Court of Appeal of the Commonwealth of The Bahamas relating to a family discretionary trust. The appellant was a discretionary beneficiary of the trust and sought to set aside two appointments, by which 98% of the trust assets were transferred into new trusts of which the appellant was not a discretionary beneficiary, on the basis that they constituted an improper exercise of discretionary power by the trustee. The appellant argued that there had been a breach of duty by the trustee by "*inadequate deliberation*" (per the Supreme Court of the United Kingdom in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108, [60]). It was not in dispute that the relevant law in the Bahamas is the same as English law.

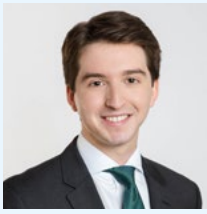
The appeal concerned two issues. Issue 1 related to what was the correct wish and intention of the corporate settlor when selling the assets on a discretionary trust, which is a relevant factor that the trustee must take into account when making appointments from the trust assets. Issue 2 was whether there had been inadequate deliberation in making the two impugned appointments.

On Issue 1, the appellant submitted that the first-instance judge had failed to make any finding of the decision made by the board of directors of the corporate settlor. The Board concluded that the Judge did make such a finding, because he applied the correct test for corporate attribution, the parties' submissions at trial had focused on the finding of the board of directors, and while it was difficult to pinpoint precisely where in the judgment the Judge had made the finding, the Judge had been entitled to consider all of the evidence before him and reach the conclusion he reached.

On Issue 2, the Board noted that it was concerned with the exercise of a discretionary power by the trustee, and not acting outside the scope of a power or using it for an improper purpose. Thus, in the shorthand terminology used in *Pitt v Holt*, the issue was whether there had been "inadequate deliberation" when the trustee had exercised its power. The Board reviewed *Pitt v Holt* and concluded that there are two separate stages to the analysis: first whether there had been a breach of fiduciary duty; and second, what were the consequences of that breach. Any alleged inadequate deliberation must be sufficiently serious as to amount to a breach of fiduciary duty. The consequences encompass the causal effect of the breach on the decision made and the court's remedial discretion as to whether or not to set aside the disposition.

The Board held that there were indeed sufficiently serious failings by the trustee to amount to a breach of fiduciary duty. The appellant's needs and wishes were relevant considerations which should have been taken into account. The trustee did not have the relevant information as to her wishes and needs since it had no updated information as to her financial circumstances.

The crucial question was therefore what were the effects of that breach of duty. The Board agreed with the Judge's finding that even if the trustee had given proper consideration to the appellant's circumstances, it could not be said that the trustee or a reasonable trustee would not have made the appointments. The Board went further, and held that given that the wishes and intentions of the corporate settlor were that this trust was primarily for the benefit of the next generation, it is clear that the appellant could not show that the decision would have been, or even might have been, different had there been no breach of fiduciary duty. As a result, the appeal was dismissed.



Sport

DIGESTED BY DANIEL JUDD

Abram v Union des Associations Européens de Football (UEFA)

[2025] EWHC 483 (KB) (Turner J)
Sporting events – Foreign policing – Act of state doctrine
7 March 2025

The 2022 UEFA Champions League final took place on the evening of 28 May 2022 between Liverpool and Real Madrid. The venue was the Stade de France in Paris. But this case had nothing to do with the match or the players. It arose out of the chaos involving the crowds of fans, which ultimately triggered action on the part of the French police.

The claimants in this case were over 800 Liverpool supporters who claimed to sustain injuries as a result of being crushed in the melee, sprayed with tear gas and pepper spray by the French police, and assaulted by members of the French public. The claims were brought against UEFA in tort and contract and largely relied on French law.

UEFA denied liability generally, but this case concerned a preliminary issue raised by UEFA as to whether the English courts had jurisdiction to hear the claims. UEFA's case was that it was entitled to rely on the common law doctrine of act of a foreign state. In particular, the hearing of the claims would involve the English court adjudicating upon actions of organs of the French state, which was impermissible.

The court considered the parties' pleaded cases in detail before turning to the act of state doctrine, describing its precise scope as "elusive". The court explained that the issue was whether there were actions engaging act of state doctrine in the first place. Not every act of a foreign authority fell within the doctrine, the court observed. In approaching the application of the doctrine, the court identified two exceptions: first, where the issue concerns the existence of an act without any need to consider its legal effectiveness; and second, where the challenge to a foreign act of state is merely ancillary or collateral. If one or other of those exceptions applied to acts said to engage the doctrine, then the claims could proceed.

The court considered the acts and allegations that were likely to feature in the case, and concluded that UEFA was unable to establish (at that stage) that neither of the two exceptions applied to all of the conduct that might be in issue. Hence, UEFA's application to dismiss the claims on grounds of jurisdiction did not succeed, and the claims would proceed to further directions.

JAMIE LEADER
PARTNER, ENYO LAW LLP

No break with tradition: *Section 213, Fraudulent Trading and the Supreme Court's Decision in Bilta v Tradition Financial Services*

Introduction

Since the passing of the Insolvency Act 1986 ("**IA 1986**") the general understanding of s.213 of that Act (entitled "*fraudulent trading*") has been that it allows the liquidator of a company to assert claims against anyone who was knowingly involved in a fraudulent business carried on by the company, including third parties. That that is the case is supported not only by a natural reading of the words of s.213 but also by the scheme of the Act itself, which arms the liquidator with other causes of action against directors and others who have been engaged in the management of the company, including s.212 (entitled "*summary remedies against delinquent directors, liquidators, etc.*") and s.214 ("*wrongful trading*"). In contrast to those other provisions, s.213 imposes a more stringent test (in that the liquidator must prove knowing participation in fraud) but, according to the conventional view, also extends beyond those involved in the management of the company to include outsiders.

This orthodoxy stood largely unchallenged until 2018, when David Foxton QC (now Foxton LJ) published an article entitled Accessory liability and section 213 Insolvency Act 1986 [2018] JBL 324. Mr Foxton QC argued that the traditional view of s.213 was too broad and that its scope should be limited to "*insiders*", i.e., those who exercised management or control over the company's business (such as directors and shadow directors).

The principal question that the Supreme Court had to decide in *Bilta (UK) Ltd (in liquidation) and others v Tradition Financial Services Ltd* [2025] UKSC 18 was whether that contention was correct: is the scope of s.213 limited only by knowing participation in the fraud or is it further restricted to insiders?

1. It being recognised that s.212 does not of itself create a cause of action but rather provides a procedural means by which existing causes of action—typically for misfeasance and breach of duty—may be pursued.

Additionally, the court's judgment addresses connected questions relating to s.32 of the Limitation Act 1980 ("**LA 1980**"), s.1032(1) of the Companies Act 2006 ("**CA 2006**") and the combined effect of these provisions on limitation where a company has been dissolved and subsequently restored.

The background

Bilta was one of five companies (the "**Companies**") which were involved in a substantial missing trader intra-community (or "MTIC") fraud in 2009, involving spot trading in carbon credits under the EU Emissions Trading Scheme. The Companies were wound up by HMRC and their liquidators subsequently brought proceedings against numerous defendants which had been involved in the fraud, including Tradition Financial Services Ltd ("**TFS**").

On the assumed facts[2], TFS had facilitated the fraud by identifying counterparties that were prepared to trade in carbon credits and negotiating the terms of those trades, although it knew that (or did not care whether) the trades were linked to an MTIC fraud (see [8] – [15]). The claims against TFS were based on: (i) dishonest assistance in the breach of duty by the directors of the Companies; and (ii) fraudulent trading pursuant to s.213 IA 1986.

These two heads of claim were based on the same facts. The chief difference between them concerned limitation. The fraud having taken place in 2009, the primary limitation period had expired in 2015 (some two years before proceedings were issued), with the result that the dishonest assistance claims were time-barred unless the Companies could rely on s.32 of the LA 1980 to delay the date on which time started to run. By contrast, the period applicable to the fraudulent trading claims had started later, on the dates when the Companies were wound up, so that no limitation issue arose.

Before trial a settlement was reached between the parties which left only two issues to be decided by the court, being:

Issue 1: whether TFS was within the scope of s.213 IA 1986; and

Issue 2: whether the claims in dishonest assistance were statute-barred.

Both questions were answered affirmatively in the judgment of Marcus Smith J at first instance ([2022] EWHC 723 (Ch)) and by a unanimous Court of Appeal ([2023] EWCA Civ 112), and both issues were appealed to the Supreme Court.

Issue 1: Who is "knowingly party" to fraudulent trading under section 213 IA 1986?

Section 213 IA 1986 provides that if, *"in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose"*, the court may declare that *"any persons who were knowingly parties to the carrying on of the business in the manner abovementioned"* are liable to contribute to the assets of the company.

The issue for the court was the scope of the words *"any persons who were knowingly parties to the carrying on of the business"*. As noted above, those words have generally been understood to include any third party which knowingly participated in the fraudulent business (so that, for example, in *Bank of India v. Morris* [2005] EWCA Civ 693 the defendant conceded that point). However, inspired by Mr Foxton QC's article, TFS argued for a narrower interpretation, whereby the section would apply only to those who exercised management or control over the company's business.

This narrow interpretation was roundly rejected by the Supreme Court. In the judgment written by Lords Hodge and Briggs (with whom the other Justices agreed) the court noted that the natural meaning of s.213 is wide enough to cover third parties, including those *"who transacted with the company in the knowledge that by those transactions the company was carrying on its business for a fraudulent purpose"* [26].

Furthermore, the court noted that the language used in other sections of IA 1986 to identify the targets of those sections was strikingly different from that of s.213. In sections 212 and 214 IA 1986, for example, Parliament had unambiguously confined the scope of those sections to "insiders", and in s.216 it had *"identified different types of involvement in a business, distinguishing between the management of a company and taking part in the carrying on of a business."* The court therefore concluded that there is nothing in the statutory context of s.213 that militates against giving the relevant words their natural meaning [28–29].

2. As agreed by the settlement agreement referred to below.

Finally, notwithstanding that there was no binding authority on the point, there was nonetheless a *"line of judicial statements [...] which amount to a line of strong persuasive authority which points only in one direction."* Although the Court of Appeal's decision in *Bank of India v. Morris* was not binding in this respect, because it was based on a concession that the broad interpretation applied, the court observed at [54] that that *"very significant concession was consistent with the prior case law and was accepted without question by the Court of Appeal."*

Given that the strong persuasive authority pointed in only one direction, practitioners may be surprised that this point reached the Supreme Court at all[3], and most will be relieved that the court has upheld the existing orthodoxy. The narrow interpretation of s.213 for which TFS contended would have robbed that section of most of its practical utility (given that liquidators already have other effective causes of action against directors and other insiders). If the court had allowed TFS's appeal, liquidators would thus have been denied one of their most potent weapons in seeking recoveries for the victims of fraud.

Issue 2: The interaction of s.32 LA 1980 and s.1032 CA 2006

The second issue concerned the dishonest assistance claims brought by two of the Companies: Nathanael Eurl Limited ("**Nathanael**") and Inline Trading Limited ("**Inline**"). The relevant facts were as follows:

- The primary six-year limitation period in relation to the dishonest assistance claims asserted by all the Companies had expired at the end of July 2015, whereas the claim form against TFS was issued on 8 November 2017. The question was therefore whether the Companies could rely on s.32 LA 1980 to postpone the date on which the limitation period had started to run until at least 8 November 2011.

- At first instance the judge held that the dishonest assistance claims of all five Companies were statute-barred.

- Nathanael and Inline obtained permission to appeal that decision on the basis that, unlike the other Companies, they did not exist in November 2011 (having been abandoned by their directors, struck off, and not restored to the register until March 2012 and June 2015 (respectively)).

At the heart of this second issue was the interaction between s.32 LA 1980 and s.1032(1) Companies Act 2006 ("**CA 2006**").

To be able to rely on s.32 LA 1980, Nathanael and Inline needed to show that they did not discover—and could not with reasonable diligence have discovered—the fraud during the period between their striking off and November 2011. It was common ground that, prior to their striking off, the dishonest directors had been in control of both companies and that the directors' knowledge of the fraud could not be attributed to them. Nathanael and Inline argued that, until the companies were restored and the liquidators appointed, there had been no-one in control of them who could have discovered the fraud so as to start time running.

As the Supreme Court noted at [63], because the claims in fraudulent trading and dishonest assistance were derived from the same facts and sought to recover the same loss, its decision in relation to Issue 1 meant that no commercial consequences flowed from Issue 2. However, the court considered that Issue 2 ought to be addressed because of its general public importance.

The law

The effect of s.1032(1) CA 2006 is that, when a dissolved company is restored, it *"is deemed to have continued in existence as if it had not been dissolved or struck off the register."* That deeming provision is subject to s.1032(3), which provides that the court may *"give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register".* Neither the Companies nor TFS had sought such a direction.

At first instance the judge held that s.1032(1) required him to deem not only that Nathanael and Inline had continued in existence but also that *"they had had the minimum number of ordinarily competent directors in place".* To decide otherwise, he observed, would be *"entirely contrary to the schema of the Limitation Act"*, and would *"incentivise the manipulation of the timing of applications to restore a company to the register."*

Although the Court of Appeal dismissed Nathanael and Inline's appeal, it rejected the trial judge's conclusion that it was necessary to deem the existence of ordinarily competent directors, holding that the answer to the conundrum posed by the deeming provision lay in the relief available under s.1032(3). It noted (at [150]-[152]) that the s.32 test (whether the companies could with reasonable diligence have discovered the fraud) was a question of fact in relation to which the claimant companies carried the burden of proof. It therefore fell to them to seek a direction under s.1032(3), on the evidence, as regards what would have happened if the companies had not been dissolved.

The Supreme Court reviewed the principles applicable to deeming provisions and concluded in relation to s.1032(1) that *"all which is to be deemed to be true about the restored company is that it continued in existence during the period of its dissolution, no more and no less."* As a result, the question of whether it should be assumed that the company had competent directors in place during the relevant period:

3. Even Mr Foxton QC concluded his article by noting that *"Given the increasing prevalence of cross-border fraud, it is probably unrealistic to expect the judiciary to row back from an interpretation of s.213 which has produced a provision of such protean scope"*—a statement with which Lewison LJ laconically agreed in giving the unanimous judgment of the Court of Appeal (at [20]).

"is to be answered on the balance of probabilities as a question of fact (counterfactual not historical) by reference to such evidence as is adduced by the opposing parties, and paying appropriate regard to the burden of proof if evidence is lacking." ([81]).

It therefore upheld the decision of the Court of Appeal that, by not obtaining a limitation direction under s.1032(3), Nathanael and Inline had failed to discharge the burden of proof that they could not with reasonable diligence have discovered the fraud during the period when they were (in fact) dissolved but (in law) deemed to have existed.

In reaching that conclusion, the Supreme Court echoed the concerns raised by the courts below about the policy implications of the alternatives, stating at [82]:

"If every restored company wishing to pursue a claim in fraud was to be deemed to have had no competent officers, and therefore to have been unable to discover the relevant fraud while dissolved, that would give restored companies carte blanche to rely upon the postponement of the running of time, because they could always demonstrate that they could not have discovered the fraud by the use of reasonable diligence. But that would run counter to the general purpose of section 32, namely to postpone the running of time in favour of prima facie deserving claimants, rather than those which (in most cases) only got struck off and dissolved through their own default."

At first sight, it might seem surprising to characterise a company which has been used by dishonest directors to perpetrate a fraud, and which is asserting claims on behalf of the victims of that fraud, as an *"undeserving claimant"*. However, although it did not expressly refer to it, the Supreme Court will doubtless have had in mind the practical reality of such cases. Dissolved companies are not restored without reason and, prior to their restoration, there will inevitably be third parties who know enough about the fraud that they consider it desirable to restore the company to investigate and pursue claims. The real concern underlying this paragraph therefore appears to be that which was alluded to by the trial judge: that someone intending to apply to restore a dissolved company might seek to *"game the system"* and postpone the commencement of the limitation period by delaying the restoration (whilst investigating the company's claims by other means).[4]

The practical effects of the court's decision on Issue 2

An application for a limitation direction under s.1032(3), in the terms proposed, is likely to be a strange and artificial process which presents a prohibitively high bar to claimants. As the Supreme Court noted at [75], citing *Regent Leisuretime Ltd v Natwest Finance Ltd* [2003] EWCA Civ 391 and *County Leasing Asset Management Ltd v Hawkes* [2015] EWCA Civ 1251, a limitation direction should only be made in exceptional circumstances, and fairness will generally require that the restored company, like any other claimant faced with a limitation defence, should be left to attempt to meet that defence by recourse to the statutory regime in LA 1980.

However, the practical significance of this decision is likely to be more limited than might at first appear.

The typical case in which these issues will arise is exemplified by the facts of *Bilta v. TFS*: the dissolved company is restored and immediately wound-up, with the investigation and litigation of the fraud then conducted by its liquidator. In such a case, if the evidence supports a claim in dishonest assistance against a third party, the liquidator will also have grounds to pursue a claim against that party under s.213 IA 1986 (the elements of the two causes of action being essentially the same), with the limitation period for the s.213 claim commencing on the date of the winding-up order. Thus, if the dishonest assistance claim is statute-barred by reason of the period of dissolution, the liquidator may decide that it is unnecessary to seek a limitation direction, the effect of which would only be to permit the company to pursue an alternative cause of action which mirrors the s.213 claim.

It follows that this aspect of the Supreme Court's decision is only likely to make a significant difference to those less common cases where a company that has been the victim of a fraud is restored without being wound up (so that no s.213 claim is available). An example could be where a shareholder of a solvent company restores it in order to sue a fraudulent director and any third parties who assisted with the fraud. In such a case obtaining a limitation direction is still likely to pose significant challenges, but the applicant may at least be better placed to provide evidence of what would have happened (in the counterfactual in which the company had not been struck off) than a third party creditor or liquidator. ■

[Enyo Law LLP acted for the liquidators of the Companies]

4. Although of course, it could not do so indefinitely, as a company may only be restored within the six years following its dissolution or striking off. Furthermore, because limitation only starts to run in relation to officeholder claims such as that under s.213 at the date of winding-up, it is already possible for creditors effectively to extend limitation by deferring the restoration of the company.

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The UAE's New Bankruptcy Law: *A Modern Framework for Restructuring and Insolvency*

Introduction

The UAE's onshore insolvency landscape has undergone a significant transformation with the enactment of Federal Law No. 51 of 2023 (the "New Bankruptcy Law"), which came into force on 1 May 2024. Replacing Federal Law No. 9 of 2016 (the "2016 Bankruptcy Law"), this new legislation introduces a more sophisticated and flexible framework for corporate restructuring and liquidation, aligning the UAE more closely with international best practices.

This article explores the background to the reform, the key features of the new law, its practical implications to date, and how it fits within the UAE's broader restructuring ecosystem, including the separate insolvency regimes in the Dubai International Financial Centre ("DIFC") and the Abu Dhabi Global Market ("ADGM").

Background

UAE Law

The UAE draws inspiration from Egyptian and French legal models and consequently has established a civil law jurisdiction. Each Emirate is permitted to operate its own local judicial system or participate in the federal judicial system. The Emirates of Sharjah, Ajman, Fujairah and Umm Al Quwain follow the federal judicial system, whereas Abu Dhabi, Dubai and Ras Al Khaimah maintain their own independent judicial departments.

Unlike English common law, the UAE does not operate by way of binding judicial precedent and a lack of a formal reporting system for case-law means that not all decisions can be publicly accessed. All UAE Court hearings and judgments are conducted and handed down in Arabic. By contrast, the DIFC and ADGM "financial free zones" follow an English common law approach and proceedings are conducted in English and often presided over by English judges.

UAE Insolvency Law

Prior to 2016, the UAE Government had relied on issuing emergency laws establishing special committees to deal with the insolvency of high-profile companies such as financial

institutions or investment companies. In 2009, "Decree 57" was enacted to create an insolvency framework for a specific set of corporate entities within the Dubai World group. The 2016 Bankruptcy Law therefore marked a watershed moment in the UAE's legal development, introducing for the first time a formal mechanism for debtors to restructure under court supervision.

However, practical challenges—such as procedural delays, limited judicial expertise, and rigid voting thresholds—meant that aside from a handful of high-profile restructuring plans in 2023, restructuring procedures under the 2016 Bankruptcy Law were generally avoided.

The New Bankruptcy Law builds on the foundation of the 2016 Bankruptcy Law, addressing many of the shortcomings of its predecessor. It introduces a dedicated Bankruptcy Court, a Bankruptcy Department, and a Bankruptcy Unit within the Ministry of Justice, all designed to streamline proceedings and enhance institutional capacity.

Key Features of the New Bankruptcy Law

Throughout 2022 and 2023, the UAE restructuring market closely monitored three high-profile restructurings implemented under the 2016 Bankruptcy Law[1]. The common consensus was that whilst the legislation worked procedurally, the speed with which decisions were being implemented was not favourable to businesses facing financial distress and liquidity pressures.

The amendments introduced under the New Bankruptcy law therefore primarily focus on improving efficiencies: a statutory objective of the new legislation is to ensure that proceedings are conducted in a *"fair, equitable, quick and organised manner"*.

1. Institutional Infrastructure

The infrastructure of the judicial framework itself has been significantly reconstructed with the introduction of three new bodies:

Bankruptcy Court: A specialised Court with jurisdiction over all bankruptcy matters has been established to address concerns that cases under the previous regime were simply allocated to the next available judge on the Court's general circuit. This often led to judges being allocated high-value and complex cross-border restructurings despite having little to no experience of the Bankruptcy Law. It is hoped that the introduction of a specific Bankruptcy Court will lead to a smaller number of specialised judges presiding over all restructuring cases, which in turn should improve the consistency of outcome.

Bankruptcy Department: A court-affiliated administrative body headed by a Court of Appeal judge has been established to manage filings and procedural compliance with the calling of meetings and distribution of notifications.

Bankruptcy Unit: A Ministry of Justice body responsible for expert oversight, training of the judiciary, and maintaining the register of insolvency professionals.

2. New Procedures

The procedures under the 2016 Bankruptcy Law have been amended, renamed and streamlined into three distinct processes:

Preventative Settlement Procedure (PSP): A debtor-in-possession process for distressed but not yet insolvent companies. It allows for early intervention and includes a moratorium on creditor actions.

Restructuring Procedure (RP): A more intensive court-supervised process involving the appointment of a trustee to oversee the debtor's business, as well as broader creditor engagement.

Liquidation: A formal winding-up process with enhanced protections for creditors and clearer rules on asset realisation and distribution.

3. Voting and Cram-Down

Arguably one of the most significant changes in the New Bankruptcy Law was the amendment to the consent thresholds for implementing the restructuring procedures.

The 2016 Bankruptcy Law required the debtor to obtain the support of two thirds by value and a majority in number of creditors affected by the proposal. This frequently left minority trade creditors whose claims were being compromised with a disproportionate veto over the restructuring.

The New Bankruptcy Law, by contrast, simply requires the support of two thirds (by value) of those present and voting – and the numerosity threshold has been replaced with a quorum test that requires 50% (by value) of the debtor's creditors to attend the meeting. In practice, the quorum threshold is likely to be academic as a debtor will typically refrain from launching a restructuring procedure until it has the support of at least 50% (by value) of its creditors.

Perhaps even more radical than the changes to the voting thresholds is the introduction of the internationally familiar "cram-down" mechanism to allow the Court to approve a restructuring even where the statutory thresholds have not been achieved. This tool is typically employed throughout other insolvency frameworks to allow the positive vote of a class of senior (or occasionally junior) creditors that has approved the restructuring to override and cram-down a separate class of non-approving creditors.

However, the New Bankruptcy Law goes further still and allows a debtor to seek Court approval for a restructuring where not a single creditor has approved the restructuring, paving for the way for the first known use of a "Company cram-down" tool in international restructuring.

This radical approach has raised eyebrows within the investor community at a time when the region is seeking to encourage international investment. With the absence of a credible "pre-pack" or lender-led regime, this new tool could arguably lead to restructuring dynamics being driven entirely by the debtor.

There are, however, statutory safeguards to prevent the misuse of this powerful new tool, including the familiar *"no-worse off"* test requiring the provision of financial information evidencing that the affected creditors are no worse off under the restructuring than in a hypothetical liquidation. It is also clear that the opinion of the Trustee and the objections of the creditors must be taken into consideration by the Court when exercising its discretion – and so, in practice, it

1. JBF RAK, Emirates Hospital Group, and Drake & Scull

is likely this will be employed to provide flexibility where the statutory threshold has been narrowly missed; rather than a carte-blanche for a debtor to disenfranchise its entire creditor base. Nevertheless, there will remain concerns about how such a powerful tool will be applied in an insolvency regime that is still relatively untested by international standards.

4. Trustee Powers

The New Bankruptcy Law directly confers on the Trustee all the powers that the directors of the debtor exercise. This is an important development as many debtors who have entered into bankruptcy processes in the UAE have lacked a functioning board of directors. Under the 2016 Bankruptcy Law, this resulted in Court applications to seek authorisation for the Trustee to take action (including signing documentation on behalf of the debtor), causing unnecessary procedural delays to implementation of the restructuring. The incorporation of this legislative authority directly into the New Bankruptcy Law should reduce the administrative burden associated with the existing tools and provide greater certainty and efficiency for all stakeholders.

5. Shareholder Consent

A more surprising amendment was the introduction of a shareholder consent right to any proposed restructuring plan, which of course defies how the dynamics of restructuring negotiations would typically be expected to unfold. Many restructuring tools in other jurisdictions contain the flexibility to compromise shareholder interests without their approval, which is often useful as part of a more holistic restructuring – for example, a debt for equity swap where creditors agree to write down their debt claims for a share of the new equity.

The Case for Good Forum Shopping

Although restructurings under the New Bankruptcy Law are expected to increase as a result of the changes, there will inevitably be instances where the UAE is not the appropriate forum to restructure the debts of an entity incorporated in the UAE. This may be a result of legal impediments to a UAE process: English law governed debt may require that a UK process is pursued to address the rule in *Gibbs*; or a difficult shareholder may not provide the requisite consent to initiate the restructuring. Alternatively, a debtor simply may not be able to garner the support of a sufficient majority of its international creditors to pursue a relatively untested procedure in a civil law jurisdiction before the Arabic Courts. In any of these scenarios, debtors will need to consider whether procedures can be initiated elsewhere and subsequently recognised and enforced in the UAE.

The Petrofac group opted against procedures under the New Bankruptcy Law and was able to obtain an expert opinion that, on the balance of probabilities, a UK Part 26A Restructuring Plan would be recognised and given effect in the UAE. Although *Petrofac's* Plan was ultimately set aside by the Court of Appeal, the expert opinion was itself sufficient for the High Court to initially approve the Plan. There has been a long-standing question as to whether the UAE (which has not adopted the UNCITRAL Model Law) would in practice recognise an insolvency proceeding initiated in England. It is of course possible that the Court in *Petrofac* took the view, in light of the jurisdiction of the dissenting creditors, that a challenge in the UAE was an unlikely outcome (such that any issue as to enforcement was merely theoretical). Nevertheless, a precedent has been established for UAE companies to explore forum shopping outside the parameters of the New Bankruptcy Law.

Additionally, a UAE corporate may look closer to home and seek to utilise the DIFC or ADGM (where often they will already have a holding company or other nexus to those jurisdictions). Both the DIFC and ADGM operate independent insolvency regimes based on more familiar English common law principles and offer credible alternatives to UAE or UK proceedings. For example, both jurisdictions have a scheme of arrangement (modelled on the English law concept), the DIFC provides a "rehabilitation plan" route (largely modelled on a UK Part 26A, with the availability of cross-class cram down and the ability to compromise shareholder claims) and the ADGM offers a "deed of company arrangement" (as successfully implemented in the *NMC Healthcare* restructuring).

In the absence of any precedent or test case, it is difficult to determine conclusively whether a UAE Court would recognise and give effect to an English, DIFC, or ADGM insolvency proceeding. However, given the approach taken in *Petrofac*, it is not difficult to envisage international courts taking the view that their proceedings will – on the balance of probabilities – be recognised in the UAE, particularly where (in the case of the DIFC Courts, for example) there is a memorandum of understanding with the UAE Courts to facilitate judicial cooperation and coordination between the courts for mutual recognition and enforcement of judgments.

Conclusion

The enactment of the New Bankruptcy Law marks a pivotal evolution in the UAE's legal and economic landscape. By embedding international restructuring standards into its domestic framework, the UAE has signalled its intent to become a credible and competitive jurisdiction for insolvency. The introduction of specialised institutions, streamlined procedures, and international tools such as the cram-down mechanism reflects a deliberate shift toward efficiency, transparency, and investor confidence.

The practical application of the New Bankruptcy Law will inevitably be shaped by the judiciary's ability to apply these reforms consistently and expeditiously in complex, cross-border cases. If the UAE Courts recognise the ability to conduct good forum shopping within the DIFC and ADGM, the New Bankruptcy Law could serve as a cornerstone for a more resilient and investor-friendly insolvency regime in the Middle East. ■

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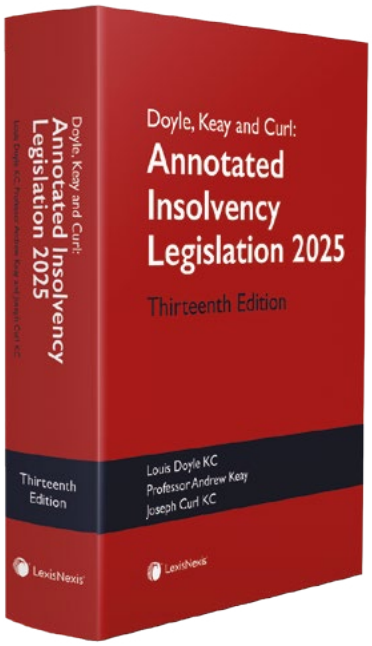

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Publication date: **22nd May 2025**

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Unrecognised foreign judgments as the basis of a winding up petition – *the position in the BVI, Cayman Islands and Bermuda*

Introduction

In the wake of the decision of the English Court of Appeal in *Servis-Terminal LLC v Drelle* [2025] EWCA Civ 62, the issue of whether an unregistered or non-domesticated foreign judgment or arbitration award can be used as a basis for insolvency proceedings has emerged as a significant topic of discussion amongst legal practitioners across common law jurisdictions worldwide.

The decision in *Drelle* in a nutshell

In *Drelle*, the English Court of Appeal held that an unrecognised foreign judgment had no direct operation in England and Wales and could not be regarded as giving rise to a "debt" capable of founding bankruptcy proceedings under section 267 of the UK Insolvency Act 1986.

The position in the British Virgin Islands (the *BVI*)

In the BVI, as a matter of course, prior to *Drelle*, it was widely accepted that winding-up applications can be made relying on non-domesticated foreign judgments and arbitration awards.

While there is no direct authority on the issue of unrecognised foreign judgments forming the basis of statutory demands and/or winding up applications in the BVI, there have been decisions upholding the use of unrecognised foreign arbitration awards to establish an undisputed debt for the purposes of the BVI Insolvency Act, Revised Edition 2020 (*BVI IA*).

In *Vendort Traders Inc v Evrostroy Grupp LLC* [2016] UKPC 15, the Privy Council considered whether an arbitration award was not enforceable in the absence of an order under section 28 of the BVI

Arbitration Act 1976 for its enforcement in the same manner as a judgment. The Privy Council noted that an unenforceable liability could not properly be made the subject of a statutory demand, but decisively held that the award gave rise to an enforceable debt as soon as it was issued ([11]). Moreover, the award was conclusive evidence as between the parties that an enforceable debt was due. The only relevance of an order under section 28 is that it makes available the court's procedural facilities for satisfying that debt. An order under section 28 recognises the enforceability of the debt, but the source of its enforceability is not the order but the contract.

In *BEC Limited v A2* BVIHC (COM) 59/2022 (2 June 2022), at [17], the BVI Commercial Court held that an arbitration award does not need to be registered in the BVI before steps under the BVI IA could be taken and that the BVI IA just requires an undisputed debt and an arbitration award is sufficient evidence of that.

While the issue of whether an unrecognised arbitration award could evidence a debt for the purposes of proving insolvency was not raised, in *Grand Pacific Holdings Limited v Pacific China Holdings Limited* BVIHCV 389/2009 (11 January 2010) and *Anadarko China Holdings 2 Company v Win Business Energy (Caofeidian) Limited* BVIHC (COM) 217/2022 (21 March 2023),[1] the BVI Commercial Court made winding up orders with respect to foreign arbitration awards which had not been recognised. On appeal, the order made in *Grand Pacific* was overturned on the basis that the company had established there was a real question of enforceability, and thus a real or bona fide dispute on substantial grounds on the debt.[2]

After *Drelle*, in March 2025, Harneys successfully acted for a petitioner in obtaining a winding-up order against a debtor company based on an unpaid, non-domesticated foreign judgment in the BVI. The application was uncontested. While the Court of Appeal judgment in *Drelle* was brought to the attention of the Commercial Court judge, it did not present a hurdle for a winding up order to be granted in that case, where part of the judgment debt relied upon had been entered by consent. Further, as *Drelle* arose in the context of personal bankruptcy proceedings, it is unclear if the same considerations would be extended to corporate winding up proceedings, either in the UK or in other jurisdictions such as the BVI.

The position in the Cayman Islands

In the Cayman Islands, there is pre-*Drelle* authority that a foreign judgment may form the basis of a winding-up petition without first being domesticated: see *Re Guoan International Limited* [2021] (2) CILR 625.

In *Guoan International*, the petitioners were entitled to a winding up order as of right having served a statutory demand under section 93(a) of the Companies Act (2021 Revision). It was the general position under the laws of the Cayman Islands that (a) a final and conclusive judgment of a foreign court could not be challenged locally by parties bound by it, and (b) the mere pendency of an appeal did not deprive a foreign judgment of its final and conclusive character. The general principles according to which a foreign judgment final on the merits could not be challenged by a party bound by it applied in the winding up context.

The Grand Court accepted an analogy between (i) a foreign award which has not been converted into a local judgment through formal enforcement per *Re China Hospitals Incorporated* [2018] (2) CILR 335, and (ii) a foreign judgment. In *China Hospitals*, the Grand Court expressly decided that the foreign award could, without more, be relied upon in a winding-up petition as the basis for the petition debt.

In this regard, Justice Kawaley of the Grand Court declined to follow the Bermuda Supreme Court's decision to the contrary in *Holborn Oil Company Ltd v Tesora Petroleum Corporation* [1990] SC (Bda) Civ 273 (in relation to which see further below).

Since *Drelle*, the Cayman Islands Grand Court has issued a judgment in *Re SIN Capital (Cayman) Ltd* [2025] CIGC (FSD) 18 where it made an order for the winding-up of the company (unopposed by the company) on the insolvency ground, based

1. Appeal against the decision not to set aside the statutory demand was dismissed by the Court of Appeal in *Win Business Energy (Caofeidian) Limited v Anadarko China Holdings 2 Company* BVIHCMAP 44/2022 (5 July 2023).

2. *Pacific China Holdings Ltd v Grand Pacific Holdings Limited* BVIHCVAP 7/2010 (20 September 2010).

on a statutory demand which in turn was based on an unrecognised arbitration award of the Singapore International Arbitration Centre.

In that case, Justice Doyle of the Grand Court referred, without comment, to *Drelle* as well as the Isle of Man decision in *Obertor Ltd v Gaetano Ltd* 2ds2010 17 (J1094) (25 November 2010), in which it was held that a foreign judgment does not need to be registered prior to relying on it in a statutory demand.

The petitioners submitted that, for the making of a winding-up order, no further steps are required in the Cayman Islands to recognise or register the arbitration award, and that the statutory demand is, in and of itself, sufficient. Ultimately, the Judge was satisfied that the company was unable to pay its debts and made a winding up order.

The position in Bermuda

The only authority directly on point in Bermuda appears to be the decision in *Holborn Oil Company Ltd v Tesora Petroleum Corporation* [1990] SC (Bda) Civ 273. In *Holborn Oil*, the Supreme Court stated it as being basic law that a foreign judgment is not enforceable in Bermuda per se.[3] Where the petitioner has not taken any steps in Bermuda to have the foreign judgment legally enforced there, there is no debt in Bermuda which would give the petitioner a right *ex debito justitiae* to an order to wind up the company. The petitioner was therefore not a creditor for the purposes of section 162 of the Companies Act 1981 (definition of in ability to pay debts) and any petition was bound to be dismissed.

Accordingly, the position in Bermuda appears to be that foreign judgments must first be domesticated to be a debt for the purposes of winding up a company.

As set out above, in *Guoan International*, Justice Kawaley of the Grand Court of Cayman declined to follow *Holborn Oil* and expressed doubt whether *Holborn Oil* reflected the modern Bermudian law position on the issue. In particular, Justice Kawaley made the following observations at paragraphs 14 and 23:

"At first blush this authority [Holborn Oil], when placed in the scales with the petitioners' authorities on this point, is found wanting. Not only was Bermudian winding-up law in 1990 in its infancy, Sir James Astwood did not appear to have been referred to any relevant authority on the topic of the recognition of and reliance upon foreign judgments at common law, as opposed to enforcement of foreign judgments in the strict (or narrower) sense. It seemed doubtful that the Holborn case reflected the modern Bermudian law position on this issue."

"In light of the weight of the above authorities, I had little difficulty in declining to follow Holborn Oil … where the petition was dismissed on the grounds that the foreign judgment had to be locally enforced before reliance could be placed upon it. That decision was unsupported by any other authority, and the company's counsel in the present case were unable to garnish their bare reliance on that summary decision with more meaty authority supportive of the Bermuda Supreme Court's decision."

Appeal to the UK Supreme Court

On 6 June 2025, Servis-Terminal applied to the United Kingdom Supreme Court for permission to appeal. Practitioners across common law jurisdictions eagerly await to see whether the Supreme Court will grant permission to appeal.

While not technically binding a decision from the Supreme Court on the issue may very well be followed in the offshore jurisdictions. ■

3. *Young v Hodge* [2001] Bda LR 70 cites Holborn Oil in support of this proposition in a non-insolvency context.

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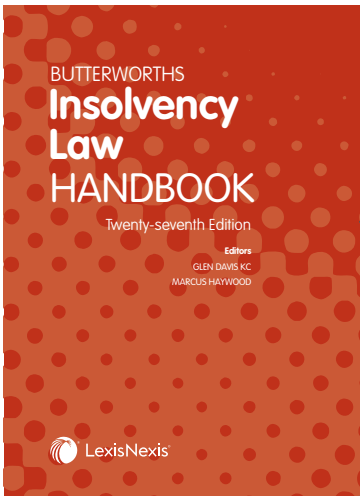

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Publication details:

Publication scheduled: April 2025
Formats available:

- Print (paperback): ISBN: 9781474330909 – Price: ~~£391.00~~ £351.90
- eBook: ISBN: 9781474333399 – Price: ~~£391.00~~ £351.90
- Print + eBook: ISBN: Z00005100835X – Price: ~~£489.00~~ £440.10

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Introduction

It is certainly not surprising to see that in this new edition of a column with a, by-now considerable, tradition it is once again the European Court of Justice (ECJ) which acts as the main driver of the expansion of European law. No less than seven decisions from Luxembourg are to be reported here, and all of them were initiated by national courts asking for a preliminary ruling pursuant to art. 267 TFEU (Treaty on the Functioning of the European Union). For the reader of these lines who is interested in legal history and the connecting lines between old and new, it should be noted that this procedure in which national courts bring a national procedure to a halt in order to ask the European court for authoritative interpretation of the European law (thereby disregarding the facts of the case and, thus, explicitly not acting as a supreme court) resembles in many respects the ancient Roman law institution of rescripts. These had been answers from the imperial centre, often signed even by the emperor himself, which the imperial office gave to questions for legal advice from literally everybody in the empire.[1] Often these rescripts would then be used in subsequent lawsuits in which the imperial answer would be binding for the parties and the judge.

This instrument was adopted by the church from early on and in the most modern version of the *Corpus Iuris Canonici* there is still a chapter entitled "Rescripts". Ignorant of this kind of subcutaneous connection, the European institutions decided to call this procedure *"preliminary ruling"*.

1. Cf. *F.Millar,* The Emperor in the Roman World, 1977, p. 240 ff., 537 ff.

2. *IO*, CJEU, 13.6.2019, C-420/18, ECLI:EU:C:2019:490, and TP, 21.12.2023, C-288/22 – TP, ECLI:EU:C:2023:1024.

3. *Novo Banco*, CJEU, 16.7.2020 – C-253/19, ECLI:EU:C:2020:585.

A. European Insolvency Regulation (EIR)

I. CJEU, 19 Sept, 2024, C-501/23 – *Finanzamt Wilmersdorf*

To classify this case as an insolvency case is somewhat dubious as the debtor is likely to be a rich person who just doesn't want to pay taxes. He has four residences – allegedly all of which are more or less equally used: in Berlin, Monaco, Los Angeles, and on the Island Saint Barthélemy. His assets consist of a bank balance in Monaco and holdings in companies governed by Monegasque law which hold assets, a security account, and shareholdings in Germany. The tax authority in Berlin has a claim against him since the debtor has not only a place of residence in Berlin, but he also acts as the chairman of the board of a company seated in Mainz/Germany. This was qualified by the tax authority as an independent business activity pursuant to art. 3 par. 1 subparagraph 3 EIR and on that basis filed a petition to commence an insolvency proceeding at the insolvency court in Berlin. That court, however, dismissed this petition on the ground of lacking territorial jurisdiction. Upon immediate appeal, the higher court (Regional Court Berlin) found that the German courts have the international competence to open that case but not in Berlin. The debtor filed an appeal to the German Federal Court of Justice (Bundesgerichtshof, "BGH") with the argument that German courts have no international jurisdiction in this case.

The BGH rightfully sees that the international jurisdiction must be based on art. 3 par. 1 EIR (well – that's an easy one). What is less clear, however, is which category of par. 1 the present debtor falls into: subparagraph 2 addresses companies and legal persons and therefore plays no role in this case. The two subsequent subparagraphs deal with individuals, whereby subparagraph 3 specifies those who are exercising an independent business or professional activity, and subparagraph 4 covers all other individuals. It is in this context that the BGH refers three questions to the court in Luxembourg. The first one is here of minor interest as it centres around a language question which is a peculiarity of the German version of the EIR. It was quite predictable that the German word for what in English is *"principal place of business"*, in French *"le lieu d'activité principal de l'intéressé"*, or in Italian *"il luogo in cui si trova la sede principale di attività"* has no inner connection with an establishment as defined in art. 2 no. 10 EIR. But in German, an establishment is *"Niederlassung"*, and the principal place of business in subparagraph 3 is translated as *"Hauptniederlassung"*. The BGH wanted to have this terminological overlapping of the two words declared by the CJEU as being irrelevant for the definition in art. 2 no. 10. And indeed, the CJEU, based primarily on the different language versions of this term, confirms that *"Hauptniederlassung"* does not require anything like operations carried out with human means and assets.

The second question appears to be of a more general interest as it aims to clarify whether the first sentence of the third subparagraph of art. 3(1) EIR is to be interpreted as meaning that the centre of main interests is presumed to be the place where the independent business or professional activity is exercised in the absence of proof to the contrary? However, when reading this question and comparing it with that subparagraph's wording: *"In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary"*, one is a bit irritated what precisely the question is as it seems to be: is that sentence to be applied as it is? Most likely, the judges from the BGH were still struggling with the Niederlassung-establishment puzzle. The CJEU, however, confirms what has been pretty obvious right from the outset – namely that the first sentence is to be applied as it reads.

The third question needed not to be answered. It dealt with the issue whether an individual exercising an independent business or professional activity but not fulfilling the requirements of subparagraph 3 might fall into the category of individuals as described in subparagraph 4: in case of any other individual.

In the meantime, the BGH has not only received this answer from Luxembourg but has also rendered its decision by which it sent back the case to the Regional Court in Berlin with some clarifications. The most important one is the language issue around the words *"Niederlassung"* and *"Hauptniederlassung"*; the others are a reference to a previous CJEU decision[2] in which that court vaguely defines what is to be understood as independent business and professional activity, and a further reference to another previous CJEU decision[3] in which some guidance is given for the clarification of a habitual residence. Unfortunately, however, the latter definition is not really helpful in a case like the present one where the debtor has multiple domiciles rather than just one main asset. In such cases, it appears to be appropriate to apply the priority principle, i.e. to allow creditors to choose.

II. CJEU from 27 Mar, 2025, C-186/24 – *Auto1 European Cars*

This case was brought to Luxembourg by the Austrian Supreme Court (Oberster Gerichtshof) and deals with the interpretation of art. 31 EIR. The underlying facts are anything but exceptional: After the commencement of the insolvency proceeding over his estate in Austria (Linz), the debtor sells his car to the Austrian branch of a Dutch company, Auto 1 and receives the purchase price through a German bank account of the Dutch company. The appointed Austrian insolvency administrator had no knowledge about the deal, nor did the purchasing company know anything about the pending insolvency proceeding (it was published in the proper manner pursuant to Austrian insolvency law). After discovering what had happened, the administrator sued the Dutch company Auto 1 alleging that the price paid (later extended to the value) belongs to the insolvency estate. Auto 1 disputes such claim based on the trust protection mechanism of art. 31(1) EIR which states: *"Where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the insolvency practitioner in those proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of the proceedings."* After all, in a previous judgment,[4] the CJEU had already decided that art. 24 (which is now art. 31 in the Recast-EIR) is a provision of substantive law.

Whereas the first instance of the dispute decided in favour of the administrator and the second instance in favour of the opponent, the Supreme court referred its doubts about the applicability of art. 31 EIR in the present case to Luxembourg. Those doubts resulted from the Austrian rule, sec. 3(1) Insolvency Code, pursuant to which any "(l)*egal acts concluded by the debtor after the opening of insolvency proceedings which affect the insolvency estate shall be unenforceable against the insolvency creditors.*" Under Austrian law, therefore, the purchase price paid to the debtor could be recovered. But since the wording of art. 31(1) EIR is so broad that it possibly covers also payments like the present one which honours a debt which is invalid under the *lex concursus*, the Oberste Gerichtshof asked the CJEU: *"Is Article 31(1) of Regulation [2015/848] to be interpreted as meaning that obligations honoured for the benefit of the debtor which should have been honoured for the benefit of the [insolvency] practitioner in the insolvency proceedings also include, for the purposes of that provision, such obligations arising from a legal transaction which the debtor did not conclude until after the opening of the insolvency proceedings and the transfer of powers to the insolvency practitioner?"*

The answer to this question is *"no"* and this is based, in the words of the Court, on the wording, the context and the objectives of this rule, i.e. the traditional methodological toolkit. Whereas the wording might indeed be broad enough to encompass the honouring of a debt which has arisen only after the commencement of an insolvency proceeding, the Court continues that – irrespective from its previous judgment in the *Buggenhout* case – the context of art. 31(1) EIR has to be respected and that, thus, art 7 EIR must be taken into account. Its par. 2 litt. b and m state that it is left to the *lex concursus* to determine which assets form part of the estate and which acts detrimental toz the general body of creditors are void and voidable. Accordingly, the wording in art. 31(1) EIR honouring an obligation can only mean that an enforceable obligation under the *lex concursus* exists at the time of its honouring. The CJEU sees this result affirmed by the legislative objective of art. 31 EIR which shall not free third parties from any insolvency risk. A complete trust protection as envisaged by the defendant in the present case would invite not only all debtors to sell assets of the estate even after commencement of the case but would also provide the purchaser with a privilege which is contrary to principle that exceptions to the automatic recognition of the effects of insolvency proceedings in art. 19 and 20 EIR must be interpreted strictly.

4. *Van Buggenhout and Van de Mierop*, CJEU, 19.9.2013 C–251/12, ECLI:EU:C:2013:566.

5. The Court refers here to the decision in *Luis Carlos and others*, C-765/22 and C-772/22, ECLI:EU:C:2024:331, mar. no. 74.

Accordingly, since sec. 3(1) of the Austrian Insolvency Code declares such contracts as concluded by the present debtor to be unenforceable towards the estate, the purchaser is not heard with its reference to its good faith and ignorance of the seller's insolvency. Because of this answer the CJEU had no reason to turn to the second question which related to the international complexity of the present case. What follows from this decision is the practical advice to all potential buyers to check beforehand whether the envisaged seller is debtor of an insolvency proceeding! This is easily written but hard to realise in practice. Since not only that the European-wide register – as foreseen in art. 24 et seq EIR – does not yet exist; it will also be quite a cumbersome exercise once it *does* exists (just think of a foreign name – possibly written in Greek). Therefore, this particular risk with which Auto 1 was confronted in this case will hardly be eliminated in the future.

III. Bundesgerichtshof, decision from 16 Jan, 2025 – IX ZR 60/24

In this case, the question referred by the German Supreme Court to the CJEU is of such importantance that it merits at least a brief description of the respective issue before the answer from Luxembourg is presented extensively in one of the next editions of this "Euroland".

Pursuant to the CJEU-made rule that exclusive jurisdiction for insolvency-related disputes rests with the courts of the *lex concursus*, a German insolvency administrator sued the Polish State for repayment of taxes which were paid briefly before the commencement of an insolvency case by the German debtor before a German court. The defendant argued that the court had no international jurisdiction because the Polish state had not waived its immunity. For this very reason, the administrator lost his case before the two inferior instances whereas the third instance, the Bundesgerichtshof, decided to put this question before the Luxembourg judges.

It is hard to predict even a likely outcome of this case. It is to be assumed, however, that the judges will not accept the finding that they scored an own goal (i.a.) in its *Valach decision*[6] in which they declared that lawsuits under art. 6 EIR are exclusively to be dealt with by the courts of the debtor's COMI. If they had given the plaintiff a right to choose the administrator of the present case could easily have changed the venue from Germany to Poland.

B. European Judgment Regulation

CJEU from 14 Nov. 2024, C-394/22 – *Oilchart International*

The decision is on art 1(2)(b) of the EU Judgment Regulation (1215/2012) and results from a proceeding between the Belgium company Oilchart International NV ("Oilchart") and a company registered in the Netherlands (O.W. Bunker, Netherlands BV, "OWB") concerning the recovery of an unpaid invoice drawn up for bunkering services provided by Oilchart on behalf of OWB, which was later declared bankrupt in the Netherlands. Oilchart had lodged its claim in the Dutch insolvency proceeding and, nevertheless, afterwards sued the insolvent OWB for the same claim before a Belgium court. The background of this lawsuit was that Oilchart had managed to get several vessels precautionarily seized to which it had delivered fuel. In order to get these precautionary seizures lifted, guarantees were issued in favour of Oilchart which could be invoked on the basis of an arbitral award or a court ruling either against OWB or the respective owner of the vessels. Thus, Oilchart initiated the lawsuit and that happened to take place after the commencement of the insolvency proceeding. Oilchart failed to mention OWB's insolvency status to the Belgium court but the judge found out and ruled accordingly that, irrespective of having jurisdiction to rule on the case, the action was inadmissible because of the Dutch insolvency proceeding.

6. *Valach*, CJEU, 20.12.2017 – C-649/16, ECLI:EU:C:2017:986; *Tünkers France*, CJEU, 9.11.2017 – C-641/16, ECLI:EU:C:2017:847; *Wiemer & Trachte*, CJEU, 14.11.2018 – C-296/17, ECLI:EU:C:2018:902; *Tiger et al.*, CJEU, 4.12.2019 – C-493/18, ECLI:EU:C:2019:1046.

The Plaintiff brought an appeal to the court of appeal which is the referring court in this case. In reflecting on its own international jurisdiction, this court wondered whether the present lawsuit is based on the rules of the Jurisdiction Regulation EU 1215/2012 or whether it was excluded by the applicability of art. 1(2)(b) of the Regulation. There is a particular rule in the Dutch insolvency law, art. 25(2), which immunises actions against the debtor in the course of the insolvency proceeding when they affect just personal interests of the debtor and not the estate. That was the reason why Oilchart had not mentioned the fact that the defendant of the claim is subject to an insolvency proceeding. Given this, the court wondered whether the present lawsuit is, as it were, taking place outside of the insolvency proceeding or whether it is closely connected with the Dutch insolvency proceeding and falls therefore under art. 6 EIR; in that case, the international jurisdiction would lie in the Netherlands.

The CJEU goes a long way to give its final answer – namely that the present lawsuit is covered by the Jurisdiction Regulation. The applicable law in this case is still the original EIR (i.e. EU 1346/2000) but the ruling is equally relevant for the Recast Regulation (EU 848/2015), art. 6. Repeatedly, the answer emphasises (or at least mentions) that plaintiff had not addressed the defendant's insolvency proceeding in its statement of complaint. I will come back to this, but this is irritating insofar as it seems to indicate that not so much objective criteria are guiding the answer but that it contains also a kind of punitive flavour for this particular plaintiff.

Be that as it may, the court begins with repeating its *"dovetail-mantra"* pursuant to which the Brussles-Ia Regulation and the EIR are to be interpreted as seamlessly fitting together; there shall be no overlapping but also no vacuum between them. Thereby, the EIR is to be seen as the exception which implies that the interpretation of what constitutes a *"civil or commercial matter"* shall be broad and, in contrast, that of the exception in art. 1(2)(b) Brussels-Ia narrow. Accordingly, only actions which derive directly from insolvency proceedings and are closely connected with them fall within the realm of the EIR (this is now explicitly stated in art. 6 Recast-EIR). The court, thus, clarifies that the issue at hand is whether an action against an insolvent debtor meets that twofold criterion. Regarding the first one, the decision repeats that it is not the procedural context but the legal basis which determines the direct derivation from an insolvency proceeding: i.e., does the right forming the basis of the action has its source in *"the ordinary rules of civil or commercial law"* or in rules *"specific to insolvency proceedings"*? After listing its previous rulings on this issue,[7] the court concludes that the present action has its sole basis in civil and commercial law.

Regarding the second criterion, the decision refers to Advocate General's remark about the closeness of the connection that it allows to take into account contextual factors. However, the court continues, the mere fact that the claim lodged in the insolvency proceeding and sued for in the present lawsuit are the same, does not suffice to establish such closeness. Instead of stopping here – after all, with this test it is clear, that the Brussels-Ia Regulation is relevant for this lawsuit - the CJEU continues to elaborate in much detail that determining the competent court does not prejudge the law applicable to the claim at issue. It concludes that it follows from art. 4 EIR (now: art. 6 and 7) that the Belgium court has to apply Netherland law.

As it has already been said, the undertone of the decision is somewhat irritating as it remains unclear what role (if any) the fact plays that the plaintiff did not mention the pending insolvency proceeding in its statement of complaint. But when, and if, this is mentioned just for the sake of completeness and without indicating any further impact, the result is quite straight forward. Since the two criteria to be checked under the test of the applicability of art. 1(2)(b) Brussels-Ia Regulation are clearly indicating the non-insolvency-related nature of the lawsuit. Insofar the decision presents a welcome clarification.

7. *German Graphics Graphische Maschinen*, C 292/08, EU:C:2009:544; *F-Tex*, C 213/10, EU:C:2012:215; *SCT Industri*, C 111/08, EU:C:2009:419; *Riel*, C 47/18, EU:C:2019:754; *Valach and Others*, C 649/16, EU:C:2017:986; *NK*, C 535/17, EU:C:2019:96; *CeDe Group*, C 198/18, EU:C:2019:1001.

8. South Square Digest December 2024, p. 63 – 66.

9. *AEAT*, CJEU, 11.4.2024, C-687/22, cf. South Square Digest December 2024, p. 63

C. Preventive restructuring

I. CJEU from 7 Nov. 2014, C-289/23, C-305/23 – *Corván Bacigán*

This ruling responds to the referrals of two Spanish courts and can be read in connection with two previous decisions which are presented in a previous edition of this Digest.[8] Like those cases, here again art. 23 of the Directive EU 1023/2019 on Preventive restructuring frameworks is in the centre of interest. This is not entirely surprising as that article lists several admissible derogations from the harmonised concept of discharge in the preceding articles 20 to 22.

In the first case *(Corván)*, the debtor who had been director of a company, filed for bankruptcy in July 2022. A few weeks later the proceeding was discontinued for lack of insufficient assets upon which the debtor applied for being granted full discharge. The Spanish Agencia Estatal de la Administración Tributaria ("AEAT") objected on the grounds of the revised Spanish insolvency law in which the transposition of the Directive

is included. The details of this reform are complicated, but suffice it to mention here that the Spanish legislator used the opportunity to amend the law in a way that privileged the public law creditors considerably and more than before. For instance, discharge is harder to get than it used to be. Accordingly, AEAT argued that one of the debts is a final (and less than 10 years old) decision to enforce secondary liability and that others are public law debts.

In the second case (*Bacigán*), the debtor is a natural person who had still before filing for insolvency ended his career as a self-employed entrepreneur and who was, at the time of filing, a consumer. After the liquidation of his entire estate, he, too, filed a petition for becoming discharged from his debts and here, too, it is AEAT that opposes this petition. The reason given is that the debtor cannot be seen as being '*in good faith*' (under the new Spanish law, this seemingly subjective criterion is, in fact, dependent of the fulfilment of certain objective factors) because there is, at the time of the petition for discharge, a still unpaid fine over some 500 € (sic!) from the time when the debtor was still an entrepreneur.

Both courts, the one from Alicante as well as from Barcelona, referred a rather long list of – partially overlapping – questions to the Luxembourg court and the answers shall be reported here in a rather diluted form since many of the details are a peculiarity of the Spanish law and the legislator's somewhat unfair move to use the reform for improving its own position in insolvency proceedings – i.e. the age-old game of the rule-setter who cannot resist the temptation to formulate them to its own benefit.

The first set of questions deals with the concern whether it is permissible for a national legislator to deviate from the ruling in art. 23(2) of the Directive and to instrumentalise its transposition into national law for deteriorating the conditions for achieving a discharge in comparison with the previous rules by denying or restricting access to discharge, by revoking the benefit of discharge, or by providing longer periods for obtaining a full discharge? Like in its earlier judgment,[8] the CJEU refers to the wording of art. 23(2) which begins the enumeration with '*such as*' – thereby indicating that the list is not meant to be exhaustive and exclusive. Similarly, changes of the existing law are said to be permissible. All what is needed pursuant to the Directive's norm is that any deviations must comply with two requirements, namely being '*duly justified*' and based on '*certain well-defined circumstances*'. The Court sees no need to elaborate this for the present context.

The next set of questions centres again around art. 23(2) and (1) of the Restructuring Directive by asking for the legitimacy of a national legislator to use the transposition law for altering "*the ranking of insolvency claims that was applicable before the adoption of that legislation in so far as it requires the debtor to pay non-preferred claims governed by public law following insolvency proceedings in order to be able to benefit from a discharge of debt, excludes access to the discharge of debt in circumstances where the debtor has acted negligently or imprudently, without having acted dishonestly or in bad faith, and excludes such access where, during the 10 years preceding the application for discharge, the debtor has been penalised by a final administrative decision for a very serious tax offence, or for a social security offence or for a labour offence, or where the debtor has been the subject of a final decision to enforce secondary liability, unless that debtor has, on the date on which the application for discharge was made, paid in full his or her tax and social security debts*"? Again, in its answer the Court

refers to the permissibility of deviations pursuant to art. 23(2) as long as the aforementioned two requirements are fulfilled, thereby referring inter alia to the earlier decision *Instituto Segurança Social IP.*[10] Accordingly, all those newly introduced derogations appear to be permissible, but with regard to the 10-year-period for public law obligations from a final decision the judges clarify that it is for the national court to examine whether or not the reasons for this amendment are based on a legitimate public interest and whether it is apparent from the national legislation that those reasons justified the exclusion of a discharge in well-defined circumstances.

The next issue dealt with is the question whether exclusion from discharge is permissible when and if the national legislator failed to duly justify that exclusion? The answer given by the Court is straightforward: No, it is not permissible.

In a similar manner the Court responds to the next question whether the list in art. 23(4) of the Restructuring directive is exhaustive: by referring to its earlier AEAT-judgment, the answer is again: No.

What follows is part of the ever-lasting effort of the *fisc* to justify its privileged position in cases of insolvency. The Court summarises the next set of questions as follows: *"whether Article 23(4) of the Directive on restructuring and insolvency must be interpreted as precluding national transposing legislation which provides for a general*

exclusion, from discharge of debt, of claims governed by public law, on the ground that the satisfaction of those claims is of particular importance for a fair and cohesive society, based on the rule of law, except in very strict circumstances and with very strict quantitative limits, irrespective of the nature of those claims and the circumstances in which they arose, and which, consequently, restricts the scope of the national provisions relating to the discharge of debt applicable to that class of claims before the adoption of that legislation." Here, too, the Luxembourg judges inform their Spanish colleagues that it is their task to examine whether this fiscal privilege is based on duly justified reasons. It is to be assumed that the receiving Spanish judges were not really amused when they read this clarification as they, most likely, had posed this question to the CJEU with the expectation that their northern colleagues will take over that thorny task to tell the Spanish legislator that this self-service-ruling is illegitimate!

It is on the same lines of argument that the present decision subsequently plays back the ball to the Spanish judges regarding the question whether the self-service attitude of the Spanish legislator is allowable under art. 23 of the Restructuring Directive. They are told to be the ones who must assess whether the privilege is duly justified or not.

The next question deals with the permissibility of a discharge ceiling in the new Spanish law pursuant to which discharge is possible with regard to certain debts but only up to an amount beyond which discharge is excluded. Arguing primarily with an *argumentum a maiore ad minus* and the principle of proportionality, the answer is: Yes. Since when, and if, the derogation of an entire class of claims from discharge is admissible, the same must be true even more for a partial derogation.

The final question refers to the extent to which a national legislator is free to shape the rules on discharge for natural persons who are not

10. CJEU, 8.5.2024, C-20/23, cf. South Square Digest December, p. 65.

11. On this, cf. *R. Benedict*, The Chrysanthemum and the Sword, 1st ed., 1946.

12. *Rodríguez Mayor and Others*, CJEU, 10.12.2009, C 323/08, EU:C:2009:770.

entrepreneurs or whether the rules have to comply with the provisions of Title III of the Restructuring Directive. The Spanish legislator has made use of the option provided for in art. 1(4) of the Directive and has extended dischargeabilty also to consumers. Whereas the Spanish government referred to the irrelevance of this question for the final decision since it grants anyway discharge to consumers, the CJEU refers to the presumption of relevance and decides that once the option of art. 1(4) has been chosen, the provision of Title III of that Directive must be observed.

II. CJEU from 10 Apr., 2025, C-723/23 – *Amilla*

It is again a Spanish court (Ovieda) that brought this case to Luxembourg and it deals again with questions about discharge of debts. Accordingly, we encounter our '*old acquaintance*' AEAT opposing the debtor's (VT) petition of a discharge. What had happened?

Some time before filing the petition for the commencement of *"his"* case, VT had been, together with his wife, joint and several directors of two companies which went into an insolvency proceeding. As a consequence thereof, both spouses were declared as '*persons concerned*' of '*fault-based*' insolvency proceedings which meant for both (a) disqualification from management of other persons' property and representing any person for a number of years, (b) loss of their roles as creditors of *"their"* companies, and (c) the obligation to pay, jointly and severally, the shortfall in the assets of the two companies. It turned out afterwards, that VT was unable to repay those amounts, so that he eventually decided to file for his personal insolvency proceeding. AEAT's opposition to the discharge is grounded on the badge '*person concerned*' which, under the relevant (and new) Spanish law, disallows access to discharge. The Spanish court is uncertain whether this result is in compliance with the Restructuring Directive, in particular its art. 20 and 23. It refers, therefore, three questions to the CJEU.

Question 1 asks whether art. 23(1) of the Directive precludes national legislation which rejects access to discharge where the debtor has acted dishonestly or in bad faith towards the creditors of a third party and has been declared as '*person concerned*' of a fault-based insolvency of that third party? Pursuant to the relevant Spanish provision, a '*person concerned*' has access to discharge within a 10-years-period only when and if all payments have been made for which this person is liable. In a first step towards its answer, the CJEU recalls its three methodological approaches for any interpretation, namely the law's wording, the context and its objective.

With regard of the wording, the Court derives from art. 23(1) and its use of '*when becoming indebted*' that the better interpretation is to include in the present case the creditors of the third party, thereby referring to the language of, *inter alia*, the French version which makes it clearer that not '*his creditors*' is meant but '*the creditors*'. The Court, here, adds another methodological instrument for this conclusion by arguing that VT by having been declared a '*person concerned*' must have concluded that all the third parties' creditors are from then on also '*his*' creditors. As a matter of fact, on this basis, the entire question and its reliance on the difference of own creditors and those of a third party turns out to be irrelevant. Nevertheless, the Court goes on to the contextual interpretation which is said to support the one of the wordings in that art. 23(1) is just one of several provision enabling the national legislator from introducing a derogation from discharge. And because the member states are not only given a '*margin of discretion*' for introducing such derogations but to maintain or introduce them, the Court concludes that the contextual interpretation leads to a negative answer of the relevant question. This brings the Court to the interpretation based on the provision's objective which also confirms the result so far achieved. Since the Court finds that objective specified in recitals 78 and 79 where the wording of art. 23 is elaborated and where no indication can be found of a distinction between 'my creditors' and those of someone else. If this is really a teleological interpretation or arguably rather one of wording shall remain unanswered since the overall answer to question 1 is that the Spanish regulation is in conformity with EU law.

Question 2 and 3 are examined together. After some clarifying statements the Court repeats these questions as aiming ('in essence') at the correct interpretation of art. 23(2) of the Restructuring Directive. Does it preclude a provision like the Spanish one which excludes access to a discharge for a period of 10 years without the national courts examining whether the debtor acted dishonestly or in bad faith? In its answer, the Court begins with more or less repeating its reasoning in the case *Corván* and *Bagicán* (see above) pursuant to which the national legislator is given broad discretion in modifying the discharge rules as long as the requirements as set out in recitals 78 and 81 are met. Accordingly, here, too, the Luxembourg judges remind the Spanish colleagues that it is their job to examine whether the relevant

Spanish provision fulfil those requirements of a legitimate public interest and whether this interest justifies the derogation. Additionally, the Court clarifies that the wording of art. 23(2) and the respective recitals 79 and 80 of the Directive are broad enough to allow a national legislator to introduce a rule which refrains from examining subjective factors as long as the exclusion from discharge is confined to 'well-defined circumstances' and that such exclusion is justified by the pursuit of a legitimate public interest.

In sum, the CJEU maintains its position as a strong defender of national variations of the concept of discharge. The US-American idea of a fresh start and the UK idea of fostering entrepreneurialship is not yet an ubiquitous idea and the guilt-cultural[11] background of any insolvency stigma in the rest of the world is still a powerful sentiment.

D. Labour law

i. CJEU from 11. Apr., 2024, C-196/23 – *Plamaro*

The referring court is the Tribunal Superior de Justicia de Cataluña and the case deals with a dispute arising out of the correct application of the Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies. The facts are quite simple: 8 workers received a termination of their labour contracts. The employer did not go through a period of consultation since the Spanish transposition of the said Directive does not foresee this in cases in which the termination is based by the retirement of the natural person employer. Whereas the first instance saw this as sufficient reason to reject the actions of the applicants, the second and referring court had doubts as to the EU law-conformity of the Spanish law. It posed, therefore, the questions to the Luxembourg Court as to whether the Spanish law is violating the Directive and, if so, whether the case at hand allows for a so-called horizontal application of the Directive?

The reasoning of the CJEU begins with a section on the admissibility of the referral. Since the employer had eight undertakings in which 54 workers were employed it was upon the Commission's intervention that the issue arose whether, for simple numerical reasons, the said Directive is applicable at all in the present case. The CJEU swipes this concern aside quite casually, saying that it is the referring court's task to verify (or falsify) the relevance of the respective law. Because of the presumption of relevance, the Court continues and turns to the decisive issue whether the termination of several employment contracts because of the employer's retirement is to be classified as *'collective redundancy'* pursuant to art. 1 of the Directive. After clarifying that (a) *'redundancy'* is a EU-autonomous concept the purpose of which is to encompass all cases of terminations which are not sought be the workers themselves, and (b) that because of the protective intent of the Directive the term's interpretation must not be narrow, it is clear what the final answer to the referred question will be.

However, the Court is fair enough to go a longer way and to discuss the opponent's arguments. They are (a) that the termination because of the employer's retirement is nothing but paying tribute to the same fate as any employee whose employment, too, ends with entering retirement age. And the employer's age was forseeable. (b), the opponent refers to a previous case of the CJEU[12] in which an employer's death was said not to be classified as *'redundancy'*. Regarding the first objection, the Court refers to previous decisions which clarified that terminations because of external circumstances or without the wishes of the employer do not exclude the need for a consultation period. The labour-friendly tendency of the Directive beats, as it were, the individual circumstances of the respective cases. The only exception to that being the death of the employer. The Court here explain rather extensively why that is so – the most convincing argument being that in such a case the deliberation to terminate does not precede the termination. In sum, the Spanish transposition of the Directive is deficient, and the CJEU emphasises once again[13] the employee-friendly interpretation of that Directive.

Regarding the second question, the judges tell their Spanish colleagues to primarily apply all sorts of (under Spanish law) admissible interpretation methods to achieve the result they find to be more convincing. In this context, the CJEU hints at the divergent interpretation of the opponent in the case at hand and the Spanish government regarding the relevant transposing law. The rest of a rather lengthy argumentation is a paradigm of judicial (and political) self-restraint: The Court concludes from settled case law as well as from the interpretation or the EU Charter of Fundamental Rights that in the present case no direct application of the Directive is permissible; it would violate the competence order of the EU.

Good to hear that from Luxembourg!

13. Cf. Euroland, South Square Digest December 2024, p. 58 and 60.

ii. CJEU from 3 Apr. 2025, C-431/23 – *Wibra Belgie*

This case concerns Article 5(1) of Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. However, the starting point is again an alleged breach of the requirements in connection with a collective redundancy – this time in the context of a Belgium insolvency proceeding in which the insolvency administrators have terminated. While this would exclude the applicability of the Directive pursuant to its art. 5(1), the peculiarities of the present case make this result doubtful. Since the employer's (i.e. Wibra Belgie SA) was preceded by a preceding on judicial restructuring which is seemingly a kind of predecessor of the preventive restructuring as mandated by the EU. In the course of that first proceeding, the administrators were offered by the parent company Wibra Netherland BV to take over that very company which covered 38 commercial premises of Wibra Belgie SA plus some 180 employees out of the existing 439. A few days later – still in the course of the restructuring proceeding – a new entity was set up, Wibra Belgie SRL, which was supposed to continue the business.

Some 8 days later, the court rejected approval of the envisaged takeover because, in the opinion of the court, it violated the abovementioned Council Directive in that the deal provided for a (sole?) liability for holiday pay and end-of-year payments of Wibra Belgie SA. On that very same day, the competent insolvency court declared Wibra Belgie SA insolvent and appointed the previous administrators as insolvency administrators. This opening decision was communicated on the very same day to the staff including the termination of all employment contracts. On the following day – now in the course of an insolvency proceeding – part of the assets of Wibra Belgie SA were transferred to the NewCo Wibra Belgie SRL and some 180 employees were re-engaged for the new company. 60 employees of the previous employees then sued the three administrators for breach of the necessary consultation with the workers' representatives in case of a collective redundancy. The court was uncertain as to the applicability of the Council Directive 2001/23/EC and referred the question to the Luxembourg judges: can art 5(1) to be ignored in a case like the present one in which the transfer has been prepared before the commencement of an insolvency proceeding and been carried out after that date?

The Court does not actually answer the question but develops elaborate '*considerations of the question referred*'. In the end of the day, the CJEU says, it is up to the Belgium court to decide on the interpretation of the Belgium law. Beginning with the statement that the Directive pursues a labour law-friendly goal, the Court goes on by recognising that art.

5(1) renders this goal inapplicable. Therefore, the decisive issue is whether the respective proceeding fulfilled the three requirements of that provision. They are: (a) the transferor must be the subject of bankruptcy proceedings or any analogous insolvency proceedings, (b) the proceeding must be instituted with a view to liquidation of the transferor's assets, and (c) those proceedings must be conducted under the supervision of a competent public authority.[14]

Regarding the first requirement, the CJEU informs the Belgium colleagues to examine the relevant provisions of the Belgium law whether (or not) the preceding proceeding on judicial restructuring is to be seen being one and the same as the subsequent insolvency proceeding pursuant to art. 5(1). This slightly surprising reasoning is substantiated by several more references. It is in this context, that the second requirement – a proceeding with a view to liquidation – must be interpreted likewise whereby, again, the Court gives extensive guidance for such interpretation. And finally, the Luxembourg judges point to art. 5(4) of the Directive which prohibits misuse of an insolvency proceeding to circumvent the otherwise mandatory application of the employees' protection. ■

14. *Cf. Federatie Nederlandse Vakvereniging and Others*, CJEU, 22.6.2017, C 126/16, EU:C:2017:489.

Death in Paradise

WILLIAM MACKINLAY
CHAMBERS DIRECTOR

At about midnight on 10th March 1973, while the annual police ball was in full swing, the Governor of Bermuda, Sir Richard Sharples, was hosting a private dinner party at Government House. After dinner, when the guests had departed, he and his Equerry, Captain Hugh Sayers of the Welsh Guards, left the house for a stroll around the garden. They were accompanied by Sir Richard's Great Dane, Horsa.

In the statement taken from the one police officer left behind to protect the Governor, he remembered hearing four shots ring out. When he arrived at the tennis court he found Sir Richard, Captain Sayers, and Horsa, dead.

A team of detectives from Scotland Yard flew out to Bermuda to investigate the murders. Petty criminals Erskine Burrows and Larry Tacklyn were accused of carrying out the shooting in support of the anti-British Black Power movement. Both were later convicted of the murder of George Duckett, the British Police Chief in Bermuda, which had happened six months before the deaths of Sharples and Sayers, but only Burrows was found guilty of the murder of the Governor and his Equerry.

When I was planning the South Square team's trip to Bermuda, I knew nothing of these events. However when I mentioned the visit to my mother she told me about the murders and that she had known Hugh Sayers well. Hugh was her cousin, and she clearly remembered the moment she had heard about the shootings.

When I arrived on island, I assumed that after more than 50 years had passed since the assassination, the events that night would now be confined to the history books. To my surprise it remains very much in the consciousness of the people of Bermuda and is still the subject of discussion.

On the last day of our visit to Bermuda I took a taxi to St Peter's Church in St George's to visit the grave of my cousin, the Governor, and his dog. They are buried in a peaceful, well-kept graveyard on a small hill behind the church which affords visitors a view of the town and the harbour. On the Governor's headstone it says that he was assassinated, on my cousin's that he was murdered.

I couldn't help but wonder what convoluted process was followed by the civil service at that time to determine which label was most appropriate for whom...

Diary Dates

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

28 August 2025

INSOL International Shanghai Seminar

Grand Hyatt Hotel, Shanghai, China

10 September 2025

INSOL Channel Islands Seminar

Radisson Blu Waterfront, ST. Helier, Jersey

19-21 September 2025

British-German Jurists' Association/ BGJA/ DBJV Conference

The Mancunian Suite, Etihad Stadium, Manchester

3 October 2025

R3 Business Lunch

The Royal Lancaster Hotel, Lancaster Terrace, London, W2

13 October 2025

INSOL International Australia & New Zealand Seminar

W Sydney, Darling Harbour, Sydney, Australia

6 November 2025

International Women's Insolvency & Restructuring Confederation London Conference

One Moorgate Pace, London, EC2R

20 November 2025

South Square & RISA Cayman & Conference

The Ritz Carlton, Seven Mile Beach, Grand Cayman

4 December 2025

R3 Eastern Christmas Lunch 2025

The Assembly House, Norwich

20-22 April 2026

INSOL Annual Conference - London

JW Marriott Grosvenor House Hotel, Park Lane, London, W1

6-8 May 2026

R3 Annual Conference

Marriott Budapest Hotel, Budapest, Hungary

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

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

News in Brief

Crunching the numbers

Released towards the end of June this year, the May figures released by the Insolvency Service show an increase of 8% in the number of company insolvencies when compared with April 2025, and a 15% increase on the same period last year. This puts the numbers in the first five months of 2025 on a par with 2023, which saw a 30-year high annual number of insolvencies. The increase was mostly driven by 1,734 creditors' voluntary liquidations, thought to be down to continuing high business costs causing more company directors to close their businesses voluntarily rather than waiting for creditors to take legal action.

Whilst short-term figures are climbing (currently equivalent to 53 insolvencies per 10,000 registered companies), the over rate of insolvency is still well below that seen during the 2008- 09 (113.1 per 10,000).

A Barrister's Briefs

At the end of May 2025 the Shropshire Star reported that a barrister appeared before Shrewsbury Crown Court, via video link, without his trousers.

When the court and Recorder Julian Taylor connected to the live link they were treated to a view of a messy bedroom with background music playing. The clerk of the court had to repeatedly ask *"Can you see and hear the court?"* before the barrister walked into view wearing a wing collared shirt and his gown but, as mentioned, no trousers.

"The bedroom looks most unsatisfactory. These hearings, when conducted remotely, should be treated as though they are in court" reprimanded Taylor. *"I'm not impressed with you appearing in a state of undress. You should be properly dressed for these hearings. The background doesn't fill me with satisfaction."*

"I understand that", responded the barrister before popping on his wig and complaining that he had been waiting on the link for over an hour.

Whilst the barrister was incorrectly attired below the waist, he was arguably over-dressed above it. The Bar Council's dress code states that 'Court Dress' of wing collar, gown and wig do not need to be worn during remote hearings except those in the Court of Appeal.

Spilling the Tea!

A fraudster was jailed for thee-and-a-half years in June for a £550,000 scam spanning five years where he conned luxury hotels, shops and aspiring tea growers into buying his *"Scottish-grown"* tea and tea plants, all of which came from abroad.

Going by the name of Tam O'Braan, and trading as The Wee Tea Plantation, he supplied Edinburgh's Balmoral Hotel and the Dorchester in London with teas named 'Highland Green', 'Silver Needles' and 'Scottish Antlers', claiming they had been grown in Perthshire and Dumfries and Galloway. In reality, he had purchased the tea, most likely to have originated in Sri Lanka or India, from a wholesaler in Oxford and simply repackaged it before selling it on at hugely inflated prices.

When a buyer from Fortnum & Mason wanted to visit the Wee Tea plantation near Loch Tay prior to placing an order, Robinson quickly purchased plants from a nursery in Sussex and put them on show. He also defrauded genuine tea growers in Scotland and Jersey by selling them plants of *Camellia sinensis* (the leaves and leaf buds of which are used to make tea) at £12.50 a pop which he claimed were genetically engineered by him for Scottish conditions. In truth, he had imported them from Italy for around £2 per plant. Many of the plants died or failed to thrive.

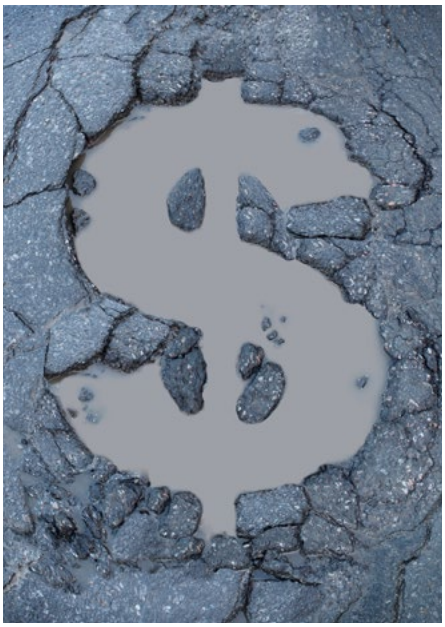
The Digest would like to make it clear that there are, indeed, genuine tea-growers in Scotland, as the plants enjoy acidic soil and long hours of summer daylight. However, the Scottish climate means that the plants are dormant from October until April/ May so overall growth for plucking is low, which is why prices for genuinely Scottish-grown teas are high.

Premier League Legend Declared Bankrupt

Lee Clark, a former midfielder who played for Newcastle United, Sunderland and Fulham during his career, has been declared bankrupt over a debt owed to York-based business finance firm 'One Stop Business'.

When approached for comment by the Mirror newspaper, Clark said he had no knowledge of the bankruptcy order.

Meanwhile a media company associated with former Liverpool and England footballer, John Barnes, has accumulated debts of over £1.5 million. The company went into liquidation in 2023 after failing to meet its tax obligations. A recent report released by the liquidators indicates that only a small distribution will be made towards the outstanding tax bill and that no funds will be available for unsecured creditors.



Pothole Fraud

Alykhaan Nourani, a personal injury lawyer, has been found guilty of four counts of fraud relating to false vehicle claims by unanimous verdict at Hanley Crown Court.

In November 2019 and again in April 2021, Nourani submitted claims to Stoke-on-Trent City Council that his vehicle has sustained damage due to potholes in the roads. However, a council insurance officer noticed anomalies in the April 2021 that Nourani had provided from a local garage. Further investigation revealed a similar pattern in the invoice submitted from November 2019.

At a court hearing in late June, the sentencing judge highlighted Nourani's role as a solicitor who regularly dealt with personal injury claims as an aggravating factor in his high level of culpability. According to his probation officer, Nourani had also shown no remorse during the proceedings. He was also ordered to carry out 300 hours of unpaid work, abide by a 19:00 to 07:00 curfew for six months and pay £30,000 in costs as well as £874 for the fraudulent invoice.

Nourani has also been referred to the Solicitors Regulation Authority, who had already imposed conditions on his practising certificate in relation to his time working at Simcox Oliver – a Manchester firm closed down by the SRA in 2024 owing to *"suspected dishonesty by Mrs Simcox-Oliver in connection with the firm's business"*.

Who'd be a Barrister?

The Bar Council's Pupil Survey 2025 has revealed a *"significant decline"* in the number of pupils who would recommend the profession as a career. Only one third of all pupils who responded to the survey (170 out of a total of 609 pupils) would now *"definitely"* recommend the profession as a career path – down from 42% in 2024.

A lack of work-life balance and work-life boundaries was cited as the main reason for a career at the bar not being viable long-term. 88% of respondents also described their stress levels as being *"moderate"* to *"high"*, with last-minute workloads, poor scheduling and financial hardship being flagged as additional problems. Reports of bullying, harassment and discrimination were, happily, down when compared with previous surveys, although 17% still reported personal experience.

But, the report is not all doom and gloom. 90% of respondents still said they had a positive experience during pupillage.

River Island Restructuring

High street stalwart clothing retailer, River Island, has announced a restructuring and turnaround plan involving the closure of 33 of its store and the possible loss of hundreds of jobs. It also wants its landlords to reduce rents at a further 71 stores which are also at risk. Creditors will start voting on the plan on 4 August, with a court decision on whether to approve the plan on 7 August 2025.

The last set of published accounts show that the family-owned retailer made a loss of £33.2m in 2023, with sales falling 19%. Ben Lewis, River Island's chief executive, has blamed the sharp rise in the costs of doing business and the rise of online shopping (making a large portfolio of physical stores financially untenable) for the company's woes.

SOUTH SQUARE CHALLENGE

Welcome to the August South Square Challenge!

To keep you occupied over the summer, we have a picture quiz where your task is to work out the correct name of the cases from the images provided, and then decide what ties all the cases together.

As we had no correct answers to our taxing April challenge, this time it is a roll-over with two magnums of champagne and two of our highly-sought-after South Square umbrellas for the lucky winner.

Good luck!

Please send your answers by Friday 26 September 2025 to Kirsten either by e-mail to **kirstendent@southsquare.com**, or to the address on the back cover.

Previous South Square Challenge: Name That Digest correct answers were:

1. ***The Mystery Digest***
2. ***Golf Digest***
3. ***The Children's Digest***
4. ***Reader's Digest***
5. ***Littera Florentina – the closest surviving version of the official Digest of Roman law***
6. ***South Square Digest***
7. ***International Insolvency Institute DIIIgest***
8. ***Architectural Digest***
9. ***Bird Watcher's Digest***

NAME THAT CASE

1

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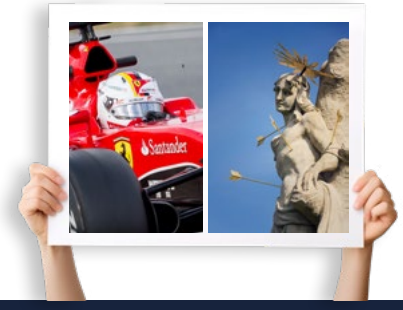

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SOUTH SQUARE

"South Square has an array of sparkling KCs and juniors who are real experts in the fields of Insolvency and Company Law"

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