SOUTH SQUARE

Digest

South Square & FromCounsel: Introducing a dynamic, collaborative restructuring and insolvency knowledge service

Negative Declarations: A Shield to a $ ½ bn Sword of Damocles:
David Alexander KC and a team from Ogier BVI on the use of negative declaratory relief to bring about an end to a protracted threat of legal proceedings

The Demise of the Shareholder Rule:
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First Provisional Liquidators Appointed in Jersey:
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A regular review of news, cases and articles from South Square barristers

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SOUTH SQUARE

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From the editors

Marcus Haywood and William Willson

Welcome to the December edition of the South Square Digest

As we go to press, Rachel Reeves, the Chancellor, has just finished delivering her 2025 Autumn Budget. Leading up to the budget, the fast-paced rumour mill has been difficult to keep up with. First, all the talk was of increases in income tax (a breach of the Labour manifesto pledge); more recently, the noise has been about mansion tax.

And now we know. The Chancellor has raised taxes by £26 billion, taking the overall tax burden to 38% of GDP by the end of this Parliament (which is an all-time record). There will be a new mansion tax on homes worth over £2 million (in the form of a surcharge applied to Council tax, effective from April 2028); income tax thresholds will be frozen for an extra three years (raising £8.3 billion by the end of the decade; and the two-child benefit cap will be scrapped (adding about £3 billion to the welfare bill annually). Elsewhere, the tax rate on savings and property income will increase by 2%; and there are other increases in the form of new online gaming levy and increased tobacco duty.

How this plays out both for the economy – and the government's prospects at the ballot box in 2029 – are hard to predict. The only certainty for 2026 is yet further uncertainty...

Turning to this issue of the Digest, our last for 2025, we have a host of articles and news to both interest and inform over the coming festive period.

We start with *'Negative Declarations: A Shield to a $ ½ bn Sword of Damocles'* in which David Alexander KC and a team from Ogier BVI discuss the use of negative declaratory relief to bring about an end to a protracted threat of legal proceedings.

Mark Arnold KC considers how the abolishing of the centuries old "Shareholder Rule" will be a breath of fresh air for boards of directors in his article *'Demise of the Shareholder Rule'*.

Moving offshore, the Royal Court of Jersey has, for the first time, appointed provisional liquidators, as Robert Christie, Dominic Corsini-Meek and Joshua Rabet (Bedell Cristin, Jersey) explain. One of the key reasons for the appointment was an urgent need to investigate the company's affairs and safeguard its assets, pending the Royal Court's ruling on a winding-up.

With the use of alternative dispute resolution in the context of restructuring becoming a topic of increasing interest of late, in their article *'Mediation in the Context of Restructuring Plans'*, Felicity Toube KC, Charlotte Cooke and Federica Pietrogrande (of The Brattle Group) give an update following the first quarterly breakfast seminar of the INSOL ADR group, which we were delighted to host at South Square.

Then, in a follow-up to his article in the August edition of the Digest, Mark Phillips KC looks to the possible future approach to restructuring plans, in the light of *Petrofac* and *Waldorf*, in *'Restructuring Plans: A 5-Year Re-set (Part 2)'*. We then follow with a case note on Re Marshall, provided by Rory Brown and a team from Morgan Lewis & Bockius LLP: a case which resulted in the fifth largest pro bono costs order ever made.

We are also delighted to announce the launch of a dynamic, collaborative restructuring and insolvency knowledge service – *'South Square & FromCounsel'*. William Mackinlay (South Square's CEO) and Lucinda Case (FromCounsel's CEO) explain what the project (which has contributed to by a large number of members of chambers) involves and why it may be of interest.

And last, but by no means least, we are grateful to 9Fin for allowing us to reprint *'What's surprising about Atari?'*, an interview with Chambers' Associate Member, Hon James Peck, as part of 9Fin's series featuring key decision-makers in the corporate credit markets. Jim, who will be well known to readers of the Digest, and amongst other things sat on the bankruptcy bench of the Southern District of New York until 2014, gives a fascinating insight into recent develops in US bankruptcy law and the outlook for the future.

Don't miss the sizeable discount available on the forthcoming edition of Oxford University Press' *'Directors and Creditors: Law and Liability'*, which includes a chapter on *'The Legacy of Sequana'* by Joe Curl KC – see page 11.

Of course, forming the backbone of the Digest are the case digests, with Jeremy Golding KC providing an overview. Included within the case digests, is a case note of the Supreme Court's recent decision in *Mitchell and Krys (joint liquidators of MBI International & Partners Inc v (1) Sheikh Mohamed Bin Issa Al Jaber,* handed down on 24 November 2025, which considers amongst other things the principles upon which an award of equitable compensation will be made. Three members of chambers (Tom Smith KC, Joseph Curl KC and Jon Colclough) appeared at the hearing before the Supreme Court.

News and legal gossip can be found in the News in Brief section and the South Square Challenge is back, with a decidedly festive flavour.

We do hope you enjoy this edition of the Digest. If you find yourself reading someone else's copy and wish to be added to the circulation list, please send an e-mail to kirstendent@southsquare.com or sign up on our website.

If you have any feedback in relation to the Digest, positive or negative, do get in touch. As always, we are tremendously grateful to all our contributors. The views expressed by individual authors are theirs alone.

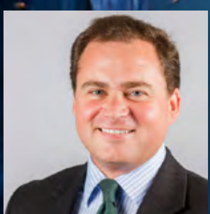
A Happy Christmas and New Year to all our readers,

Marcus Haywood & William Willson

Negative Declarations: *A Shield to a $ ½ bn Sword of Damocles*

An article by David Alexander KC and Brian Lacy, Jeremy Snead, Anna Snead and Emily Rivett of Ogier on the use of negative declaratory relief to bring about an end to a protracted threat of legal proceedings.

DAVID ALEXANDER KC
SOUTH SQUARE



BRIAN LACY
PARTNER AND HEAD OF BVI DISPUTE RESOLUTION, OGIER

JEREMY SNEAD
PARTNER, OGIER

ANNA SNEAD
COUNSEL, OGIER

EMILY RIVETT
SENIOR ASSOCIATE, OGIER

Introduction

In modern usage, the expression the Sword of Damocles has come to represent the feeling that there can be no happiness for one who is under constant apprehension. It refers to someone who lives under a threat of which they are fully aware, but which will not go away. Just such a threat arose in the context of the liquidation of the British Virgin Island company, Phoenix Commodities Pvt Ltd ("Phoenix BVI"), in *Nabil Abdul-Massih & Ors v Ryan Paul Jarvis & Ors* BVIHC(COM) 2023/0243 where the Claimants successfully shielded such an ever-present threat through the effective use of negative declaratory relief.

Background

Phoenix BVI was incorporated in BVI in 2001. One of its subsidiaries, Phoenix Global DMCC ("Phoenix Dubai") was incorporated under the laws of the Dubai Multi Commodities Centre free zone in the United Arab Emirates. Phoenix BVI and Phoenix Dubai were both part of the Phoenix Group, a group of about 90 companies which was engaged in the commodities business and was one of the world's largest rice traders.

In 2007, the Phoenix Group approached Inoks Capital SA ("Inoks"), a Swiss asset management company, to provide funding for the business of the Phoenix Group. Commencing in 2007, Inoks, via Ancile Investment Company ("Ancile Investment"), loaned substantial sums (estimated to be circa USD 450 million) to the Phoenix Group (the "Phoenix Facilities"), with the Phoenix Group providing security for that borrowing to Ancile Securities Company ("Ancile Securities"). At all material times, Nabil Abdul-Massih ("Mr Abdul-Massih") was the Chief Executive Officer and a member of the board of Inoks, as well as the sole director of each of Ancile Investment and Ancile Securities (together "the Ancile Companies").

In March 2020, at the outset of what the world would later come to know as the COVID-19 pandemic, the Phoenix Group sought further borrowing from Ancile Investment, against the backdrop of what was understood by Mr Abdul-Massih and the Ancile Companies to be a short-term liquidity crisis. Over the course of 10/11 March 2020, it was agreed between the Ancile Companies and the Phoenix Group that Ancile Investment would provide a further advance of USD 15 million to Phoenix Dubai, enabling Phoenix Dubai to purchase milling wheat from Ukraine (the "March Advance"). Whilst the Ancile Companies were already the beneficiaries of significant pre-existing security over multiple assets within the Phoenix Group, further additional security was granted by Phoenix Dubai over certain West African rice as collateral for the March Advance.

Given the high level of exposure of the Phoenix Group to the Ancile Companies pursuant to the open Phoenix Facilities, Inoks' investment committee was only prepared to remit the March Advance if this existing exposure was reduced. It was therefore agreed between the Phoenix Group and the Ancile Companies that this reduction in exposure would be effected by Phoenix Dubai transferring various equity interests it held in Phoenix subsidiary entities in Ukraine, the Netherlands and Kazakhstan ("the Shares") to the Ancile Companies, noting that the underlying assets held by these Phoenix subsidiary entities were assets over which the Ancile Companies held existing long-standing security, pursuant to the contractual arrangements underpinning the Phoenix Facilities. The debt owed by the Phoenix Group to Ancile Investment would be reduced commensurately by the cumulative value of the Shares, subject to the right for the Phoenix Group to buy back the Shares if certain conditions were met.

On 20 April 2020, Phoenix BVI was placed into liquidation in the BVI. Two liquidators were subsequently appointed, one of whom was Ryan Paul Jarvis ("Mr Jarvis"). On 9 June 2020, Phoenix Dubai was placed into liquidation. Two liquidators were initially appointed, one of whom was Paul James Leggett ("Mr Leggett") who, from 31 March 2021, acted as sole liquidator of Phoenix Dubai.

Threatened Legal Proceedings

Following more than a year of significant assistance being provided by Mr Abdul-Massih and the Ancile Companies to the liquidators, on 10 May 2021 a letter before action was sent by the BVI legal practitioners for the liquidators of Phoenix BVI, to Mr Abdul-Massih. In the letter it was alleged that Mr Abdul-Massih was a director of Phoenix BVI and that he had acted in breach of duty in effecting the transfer of the Shares. It also alleged that Mr Abdul-Massih was liable for insolvent trading. A threat to issue proceedings in BVI under ss.254 (breach of duty) and 256 (insolvent trading) of the BVI Insolvency Act 2003 ("the Insolvency Act") was made on behalf of the liquidators of Phoenix BVI. The letter said that the breach of duty claim was for more than USD 100 million and that, in addition, Mr Abdul-Massih was liable to make such contribution to the assets of Phoenix BVI as the BVI court thought proper. The letter demanded immediate payment from Mr Abdul-Massih of more than USD 100 million.

On 11 May 2021, a letter before action was sent by the Cayman legal practitioners for the liquidators of both Phoenix BVI and Phoenix Dubai, to the Ancile Companies and Ogier, legal practitioners for the Ancile Companies and Mr Abdul-Massih. The letter was copied to Mr Abdul-Massih. By the letter, similar allegations to those made in the BVI letter before action were made, and the liquidators of both Phoenix BVI and Phoenix Dubai threatened to issue proceedings in the Cayman Islands under ss.145 (voidable preference), 146 (avoidance of dispositions made at an undervalue), 147 (fraudulent trading) and 99 (transfer after liquidation) of the Cayman Companies Act as well as under s.4 of the Cayman Fraudulent Dispositions Act. In addition, proceedings were threatened on the basis of alleged breach of duty and/or in respect of breach of trust claims and/or for knowing receipt and/or unjust enrichment. The letter then demanded that the Shares be transferred to Phoenix Dubai immediately or that payment be made of more than USD 100 million.

On 12 May 2021, the Dubai-based legal practitioners for the liquidators of Phoenix BVI and Phoenix Dubai sent an email to Mr Abdul-Massih stating that the liquidators were fully prepared to commence any legal proceedings necessary and to do so without any further notice. However, none of the threats led to the Shares being returned, or payment being made to the liquidators of Phoenix BVI or Phoenix Dubai.

On 30 December 2021, the Dubai-based legal practitioners for the liquidators of Phoenix BVI and Phoenix Dubai sent an email to Ogier enclosing two sets of draft pleadings (the "Draft Statements of Claim"). The Draft Statements of Claim had been prepared to be issued to commence proceedings against Mr Abdul-Massih and the Ancile Companies in the BVI, the Cayman Islands, and the Netherlands. The accompanying email said that if Mr Abdul-Massih and the Ancile Companies failed to satisfy the claims against them as detailed in the Draft Statements of Claim by 27 January 2022, the liquidators of Phoenix BVI and Phoenix Dubai intended to commence said proceedings in the BVI, the Cayman Islands, the Netherlands and other relevant jurisdictions without notice to Ogier.

The draft Statement of Claim to be issued in BVI repeated the claims previously made against Mr Abdul-Massih and the Ancile Companies, stating that the amount now claimed from the Ancile Companies and Mr Abdul-Massih was more than USD 100 million and that the amount claimed from Mr Abdul-Massih was a further sum of in excess of USD 415 million. The draft Statement of Claim to be issued in the Cayman Islands also repeated the claims previously made and sought payment of more than USD 100 million together with such contribution to Phoenix Dubai's assets as the Cayman Court thought proper.

Legal Proceedings

Despite having placed the Sword of Damocles over the heads of Mr Abdul-Massih and the Ancile Companies through the circulation of the letters before action and the Draft Statements of Claim, the liquidators of Phoenix BVI and Phoenix Dubai did not issue the threatened proceedings in either BVI or the Cayman Islands, in 2021 or at all (notwithstanding confirmation that Ogier would accept service of proceedings commenced in the BVI or the Cayman Islands).

Instead, on 31 May 2022, the Dubai liquidator issued proceedings in the Netherlands in respect of one of the Phoenix subsidiaries whose shares were transferred by Phoenix Dubai in April 2020 (being shares in a Dutch company) (the "Netherlands Proceedings"). After considering evidence from six witnesses called by the liquidator of Phoenix Dubai (including Mr Abdul-Massih) and the making of submissions by the liquidator of Phoenix Dubai, the Netherlands Proceedings were dismissed in February 2024. The liquidator of Phoenix Dubai has appealed, although the appeal is not expected to be heard until 2026.

Subsequently, in February 2023 the liquidators of Phoenix BVI made an application to the Swiss Court for recognition of the liquidation of Phoenix BVI in Switzerland. The application was initially unsuccessful but, following assertions from the liquidators of Phoenix BVI made before the Swiss Court that Mr Abdul-Massih was a director of Phoenix BVI, on 25 May 2023, the Swiss Court recognised the ability of the liquidators of Phoenix BVI to commence claims against Mr Abdul-Massih in Switzerland. Mr Abdul-Massih appealed twice in respect of the recognition order, his second appeal being dismissed on 29 August 2024, with the consequence that the liquidators of Phoenix BVI could then look to sue Mr Abdul-Massih in Switzerland.

Furthermore, in October 2023, the liquidators of Phoenix BVI issued their own proceedings in the Netherlands, in substance repeating the failed claim made by the liquidator of Phoenix Dubai in the Netherlands Proceedings (the "Further Netherlands Proceedings"). The Further Netherlands Proceedings have, following the trial of the BVI proceedings, since been dismissed at first instance.

By November 2023, the Sword of Damocles had been hanging over Mr Abdul-Massih and the Ancile Companies in relation to potential proceedings in the BVI and the Cayman Islands for 2½ years. However, no proceedings had been issued in either jurisdiction. The failure to commence the threatened proceedings had caused unnecessary commercial uncertainty for the Ancile Companies and Mr Abdul-Massih, and had resulted in significant negative consequences. These consequences were compounded by the fact that, in 2021, following the circulation of the letters before action, Mr Abdul-Massih and the Ancile Companies had provided an unconditional undertaking to preserve the assets which were the subject of the intended proceedings, as ultimately extended indefinitely in June 2022. The liquidators of Phoenix BVI and Phoenix Dubai had refused to provide any cross-undertaking in damages, let alone a fortified cross-undertaking.

Therefore, to try to bring about an end to the negative consequences and commercial uncertainty precipitated by the letters before action and the Draft Statements of Claim, Mr Abdul-Massih and the Ancile Companies decided to commence proceedings in the BVI seeking negative declaratory and injunctive relief. These proceedings would allow for all the allegations raised by the liquidators of Phoenix BVI and Phoenix Dubai to be resolved in one Court, namely the BVI Court, being, in the view of Mr Abdul-Massih and the Ancile Companies *"plainly and obviously the forum conveniens"* for proceedings involving (at least) the internal management and control of Phoenix BVI. The BVI proceedings were also intended to combat the additional expense that was being incurred by Mr Abdul-Massih and the Ancile Companies as a result of the liquidators' approach to commencing fragmented litigation in multiple jurisdictions, as well as dealing with the risk of inconsistent judgments.

On 23 November 2023 proceedings were commenced in the BVI by Mr Abdul-Massih and the Ancile Companies, seeking negative declaratory and injunctive relief. The negative declarations sought mirrored the claims which the liquidators of Phoenix BVI and Phoenix Dubai had previously made in the Draft Statements of Claim (including the seeking of (1) a Declaration that Mr Abdul-Massih had never been a *de jure*, a *de facto* and/or a shadow director of Phoenix BVI or Phoenix Dubai; (2) a Declaration that the liquidators of Phoenix BVI and/or Phoenix Dubai had no valid claim against Mr Abdul-Massih or the Ancile Companies pursuant to s.254 or 256 of the BVI Insolvency Act; and (3) a Declaration that the liquidator of Phoenix Dubai had no valid claims under ss. 145, 146, 147 of the Cayman Companies Act, and so on).

Declarations: The Law

A Declaration is a statement made by a court at the request of a party. It is a declaration as to a state of affairs. It can be as to the rights of a party to a dispute or the existence of certain facts or as to a principle of law, in each case where those rights, facts and principles have been established to the satisfaction of the court: *Financial Services Authority v Rourke* [2002] CP Rep 14.

Anyone is, in principle, entitled to apply for a declaration as to their rights unless statutorily prohibited expressly or by necessary implication: *Imperial Tobacco Ltd v Attorney General* [1981] AC 718 at 742 and 750; *Oasis Core Investments Funds Ltd v Hollysys Automation Technologies Ltd* BVIHCOM2024/0619, 0620, 0621 & 0622, unreported, 4 March 2025 at [58]. This principle is, however, subject to the exception that the Court will not exercise its discretion to grant declaratory relief where it is not needed i.e. the court will not act "in vain": *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3131 (Comm); *JSC VTB Bank v Skurikhin* [2015] EWHC 2131 (Comm); *Pitt v Holt* [2013] 2 AC 108; *Oasis Core Investments Funds Ltd v Hollysys Automation Technologies Ltd*, supra, at [58].

A significant benefit of a declaration is that it may pre-empt and avoid further argument or litigation between the parties where a court makes a declaration of non-liability. However, a declaration does not order a party to do anything.

It has long been recognised in England that it is useful for commercial litigants in particular to have a declaration as to the parties' rights to know what course of action they may take: *Russian Commercial & Industrial v British Bank of Foreign Trade* [1921] 2 AC 438. However, the remedy has widened in scope and courts have been more willing to adopt it.

The BVI Courts are expressly given the power to grant a declaration by virtue of s.22 of the Eastern Caribbean Supreme Court (Virgin Islands) Act 1969 ("the 1969 Act"). Section 22, which is headed "Declaratory order" provides that "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment decree or order is sought thereby": see also *International Trading Holding Co Ltd v Med Trading Ltd* BVHHCMAP 2020/0002, unreported (11 February 2021) at [77].

The remedy of the grant of a declaration is discretionary. However, that discretion is exercised in accordance with established principles. The leading English case in relation to the grant of declarations is *Rolls Royce v Unite* [2009] EWCA Civ 387 (although for a recent exposition see *Elinoil Hellenic Petroleum SA v Biotechnika SRO* [2020] EWHC 3592 (Comm)). The relevant principles can be summarised as follows:

(1) There must be a real and present dispute between the parties before the Court as to the existence or extent of a legal right between them;

(2) Each party must, in general terms, be affected by the Court's determination of issues concerning legal rights;

(3) The fact a claimant is not party to the relevant contract in respect of which a declaration is sought is not fatal to an application. But the party must be directly affected by the issue;

(4) The Court must be satisfied that all those affected will have their arguments fully and properly put before the Court; and

(5) In all cases, assuming that the other tests are satisfied, the Court must ask whether the grant of declaratory relief is the most effective way of resolving the issues raised. The Court must consider the options for resolving the issue.

For a recent illustration of the approach of the Court might take in relation to the question of whether the Court could be satisfied all sides of the argument had been fully and properly put where a party against whom declaratory relief is sought was not present before the Court, see *Cape Intermediate Holdings Ltd v Protopapas* [2024] EWHC 2999 (Ch) where the Judge was satisfied that the Respondent's case appeared clearly enough from Court documents which the Respondent had filed in foreign proceedings.

Negative Declarations: The Law

A claim for a negative declaration is for a declaration by the court that the defendant has no valid claim or right against the claimant: see Dicey, Morris and Collins on the Conflict of Laws, 16th Ed at 12-055.

In the past in England it has been said that such a declaration would rarely be made, and that in most cases the person who seeks it will be left to set up its defence in the action when it is brought: *Guaranty Trust Co v Hannay* [1915] 2 KB 536 at 564-565 (CA).

However, the English Court of Appeal has made it plain (in a case applied in BVI in *Mossack Fonseca v Registrar of Corporate Affairs* (Appeal 13 of 2005)) that it no longer maintains an attitude of hostility to a claim for a negative declaration. As Lord Woolf said in *Messier-Dowty Ltd v Sabena SA* [2000] 1 WLR 2040 (CA) at [36]:

"I can see no valid reason for taking an adverse view of negative declaratory relief ... The use of negative declarations domestically has expanded over recent years. In the appropriate cases their use can be valuable and constructive."

As Lord Woolf also said in the same case at [41];

"The approach is pragmatic. It is not a matter of jurisdiction. It is a matter of discretion. The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice are achieved the courts should not be reluctant to grant such declarations. They can and do assist in achieving justice."

The BVI Court plainly has a discretionary power to grant a negative declaration: s.22 of the 1969 Act. That such is the case is also clear from the decision of the Court of Appeal of the Eastern Caribbean Supreme Court's decision in *Johann Greuner v Monika Patsy Greuner,* Civil Appeal No 8 of 2003, unreported (22 September 2003) at [12] and [13] where Saunders JA said:

"[12] ... In substance what is being sought here is a negative declaration that Mr Greuner is not indebted to Mrs Greuner.

[13] As outlined in The Declaratory Judgment by the Rt Hon Lord Woolf, a claimant may seek a negative declaration where no right has, as yet, been infringed. If the claimant is subjected to a demand or is threatened with action, then it may be useful to obtain such a declaration. Whilst in these cases no traditional 'wrong' has yet been committed or immediately threatened, a condition of affairs is disclosed which indicates the existence of a cloud upon the [claimant]'s right, a cloud which endangers his peace of mind, his freedom, his pecuniary interests. This is a tangible interest which the law protects against impairment, and by protecting it, promotes social peace."

In *BNP Paribas SA v Trattamento Rifiuti Metropolitani* [2020] EWHC 2436 (Comm), the Court emphasised that ultimately the decision whether to grant a negative declaration is discretionary and said that the issues which the Court should consider include the following:

(1) Negative declarations should be scrutinised and their use rejected where it would serve no useful purpose.

(2) The prime purpose is to do justice in the particular case (which includes justice to the claimant and the defendant).

(3) The Court must consider whether the grant of declaratory relief is the most effective way of resolving the issues raised. In answering that question, the court should consider what options are available to resolve the issue.

(4) A negative declaration will only be granted where the underlying issue is sufficiently clearly defined to render it properly justiciable. In this regard it is necessary that (1) the Court is in a position to make a decision, with clarity, across the whole scope of the relief; and (2) the defendant is able to understand and address the claim for a negative declaration in its full scope: *Millen v Karen Millen Fashions Ltd* [2016] EWHC 2014 (Ch).

Turning to the burden of proof, in *Brent LBC v Malvern Mews Tenants Association* [2020] EWHC 1024 (Ch), Miles J held that, where a party claims a negative declaration as to the existence of a legal right, the burden of proof is on the claimant. However, he also held that the evidential burden may fall on the other party: see at [23].

As regards the standard of proof, in all civil proceedings the standard of proof is on the balance of probabilities and the balance of probabilities means more likely than not: *Re H (Sexual Abuse: Standard of Proof)* [1996] AC 563 at 586; *Brake v Swift* [2020] EWHC 1810 (Ch) at [30]. The standard of proof for negative declaratory proceedings is a balance of probabilities: *Crypto Open Patent Alliance v Wright* [2024] EWHC 1198 (Ch) at [104]-[106]; *Financial Services v Rourke,* supra, at p.21.

The Negative Declaratory Proceedings in BVI

The original defendants to the negative declaratory proceedings in the BVI were Mr Jarvis, his then joint liquidator in respect of Phoenix BVI Rachelle Frisby ("Ms Frisby"), Mr Leggett and Phoenix Dubai. Phoenix BVI was not included as a defendant at the point of issue due to s.175(1)(c)(i) of the Insolvency Act which, with effect from the date of Phoenix BVI's liquidation, prohibited the commencement of proceedings against Phoenix BVI unless the Court otherwise ordered.

The proceedings were personally served on BVI-based Mr Jarvis, and on Ms Frisby. On 7 December 2023, both liquidators of Phoenix BVI filed acknowledgements of service, which stated that they did not admit the whole or any part of the claim and that they intended to defend the claim. On 13 December 2023, Mr John Johnston replaced Ms Frisby as a liquidator of Phoenix BVI. The substitution of Mr Johnston for

Ms Frisby in the proceedings was subsequently agreed by consent, effective from 15 February 2024.

On 31 January 2024, following a refusal from Mr Jarvis' BVI legal practitioners to agree to the joinder of Phoenix BVI, Mr Abdul-Massih and the Ancile Companies issued a contested application under s.175(1)(c)(i) of the Insolvency Act to have Phoenix BVI made a party to the proceedings.

On 2 February 2024, Mr Jarvis filed an application by which he sought to strike out the negative declaratory proceedings as an alleged abuse of process or for disclosing no reasonable ground in support. In the alternative, he asked the Court to stay the proceedings in favour of proceedings in Switzerland on the grounds of *forum non conveniens.*

On 8 March 2024, Mr Leggett and Phoenix Dubai were served with the proceedings c/o their legal practitioners in the BVI. Without prejudice to their rights to apply to set aside service or challenge jurisdiction, both Mr Leggett and Phoenix Dubai filed acknowledgements of service on 14 March 2024, which stated that they did not admit the whole or part of the claim and that they too intended to defend the claim.

On 3 May 2024, Mr Leggett and Phoenix Dubai filed an application by which they sought to have service upon them set aside and, in the alternative, asked the court to stay the proceedings on the basis of *forum non conveniens*, albeit no f*orum conveniens* was identified in this application.

The three interlocutory applications were heard by Honourable Justice Webster on 23 and 24 July 2024. Justice Webster handed down a written judgment[1] on 11 December 2024. He allowed the joinder of Phoenix BVI on the basis that (a) the issues in the proceedings were complex, involving negative declaratory and injunctive final relief, (b) the issues could not be more conveniently determined in the liquidation of Phoenix BVI, and (c) joinder would not add significant complexity to the proceedings. Subject to striking out two paragraphs in the Statement of Claim, he dismissed the application by Mr Jarvis. He dismissed all *forum non conveniens* arguments raised by Mr Jarvis, Mr Leggett and Phoenix Dubai, and declined to set aside service on Mr Leggett and Phoenix Dubai, considering them to be – as articulated by the Claimants – necessary and proper parties to the proceedings.

In making these determinations, Justice Webster noted, in particular, that:

(1) The proceedings were heavily contested.

(2) The use of the negative declarations procedure was open to the Claimants on the facts. The proceedings would likely resolve important issues which were integral to the disputes between the parties which needed to be resolved, and the BVI Court was the better forum for resolving those issues. In particular, the status of Mr Abdul-Massih as a purported director of Phoenix BVI, and any purported breach of duty arising from such a role was said to be a question of the internal management of Phoenix BVI, and such issues were therefore governed by BVI law, which was noted as being a *"strong connecting factor in favour of the BVI"*. Whether the declarations were granted was an entirely different matter and would depend on the Court's later assessment of the claims at trial. In particular, the liquidators' allegations of *de facto*, *de jure* and shadow directorship, reflected in the negative declarations sought by the Claimants, were found to be *"the kind of factual issue that should be determined at trial"*.

(3) The status as a liquidator does not automatically confer an immunity to claims for declaratory relief. It was question of fact whether the conduct of the Defendants was such that the Court should consider whether a claim for declarations should be granted. On the facts of this case and in the context of negative declaratory relief, the Claimants should be able to ask the Court to declare that the liquidators did not have the right to pursue the claims as initially articulated by them in the Draft Statements of Claim.

(4) The claims for negative declaratory relief were prompted by the letters before action and the Draft Statements of Claim, and the relief sought in the proceedings was reflective of the claims as initially threatened therein. It was difficult to understand why the liquidators were now asserting that the BVI Court was not the appropriate forum for the trial of the same claims that they were threatening to issue in the BVI in 2021 and the liquidators had not explained that change of position.

On 3 January 2025, following its joinder, Phoenix BVI filed an acknowledgement of service. Whilst Phoenix BVI said that it did not admit the whole or part of the claim, Phoenix BVI said that it did not intend to defend the claim.

On the same day the BVI legal practitioners for the Defendants wrote to Ogier to say that, like Phoenix BVI, Mr Jarvis, Mr Leggett and Phoenix Dubai also did not intend to defend the proceedings. However, this letter stated that the Defendants' approach to not defending the proceedings was without any admission of liability or fact whatsoever, and that the position set out in the Draft Statements of Claim, as circulated in 2021, was maintained.

On 13 January 2025 Ogier responded to state that the position being adopted was incoherent and appeared to be a breach of both the CPR, and of the duties the liquidators of Phoenix BVI owed to the BVI Court. Ogier also stated that: (1) the Defendants had been afforded every opportunity to contest whether Mr Abdul-Massih was a director of Phoenix BVI and, if so, the extent of any duties he owed, before

1. https://www.eccourts.org/judgment/nabil-marc-abdul-massih-et-al-v-ryan-paul-jarvis-et-al

the BVI Court; (2) it was not open to the Defendants to seek to maintain false allegations whilst refusing to engage in the process which sought the determination of those matters by the BVI Court; and (3) to the extent that the Defendants wished to maintain (in the BVI or otherwise) their position as initially set out in the Draft Statements of Claim, the Claimants would proceed to a merits-based judgment in the BVI, and seek the costs of pursuing such a judgment from the Defendants, in order to put an end to the threats that had been hanging over them since 2021.

On 21 February 2025, the liquidators of Phoenix BVI filed a *"Request for Conciliation"* in Switzerland, as, in summary, a pre-action step to commencing proceedings in Switzerland pursuant to the recognition order. In continuation of the allegations made in the Draft Statements of Claim, the Request contained still further allegations that Mr Abdul-Massih was a de-facto and/or shadow director of Phoenix BVI. The Request made no mention of the existing negative declaratory relief proceedings in the BVI, nor the judgment of Justice Webster.

Mr Abdul-Massih and the Ancile Companies therefore continued to prepare for a substantive trial in the BVI. A CMC took place before Honourable Justice Mithani in April 2025, and a trial *in absentia* was set down before him for 17 July 2025. In accordance with the CMC directions, standard disclosure was carried out and witness statements and expert reports were prepared and served by the Claimants. The Defendants continued to be represented in the proceedings by their BVI legal practitioners, who maintained full visibility over all Court filings made by the Claimants. Via submissions made by correspondence, both before and after the CMC and immediately prior to trial in July 2025, the Defendants continued to engage with the proceedings.

The trial duly took place on 17 July 2025. At the trial, all witnesses, including an expert on Cayman law and another expert on the laws and procedures of the UAE and the regulations applied in the Dubai Multi Commodities Centre, attended, were called and provided their evidence to the Court. The Defendants elected not to appear at the trial, nor be represented by their BVI legal practitioners (who remained on the record) in Court. Nonetheless, the submissions of the Defendants made by correspondence, which included the provision of further documentation to the Claimants immediately prior to trial, were, at the explicit request of the Defendants, highlighted to the Court, albeit the Court later held that that there was *"nothing in the material that supported anything* [the Defendants] *had or may have had to say".*

With the trial at an end, Justice Mithai gave judgment[2]: BVIHC (COM) 2023/0243. He granted all of the declarations sought by the Claimants. He also granted an injunction against the Defendants preventing them from taking further proceedings against the Claimants arising out of the facts and matters specified in the negative declaratory proceedings without the prior permission of a Judge of the Commercial Court in BVI. He ordered the Defendants to pay the costs of the proceedings on a joint and several basis. He also ordered that the Defendants were to pay USD 750,000 on account of those costs within 28 days.

In the judgment, among other things, Justice Mithani said the following:

(1) He gave a summary of the principles on which the BVI Court would grant declaratory relief, including negative declaratory relief, developing the principles outlined by Justice Webster in the earlier interlocutory judgment (paras [27]-[35]);

(2) He said that a significant, if not substantial, part of the case of the Defendants against the Claimants was based on the premise that, at all material times, Mr Abdul-Massih acted as a *de facto* or shadow director of Phoenix BVI (para [36]);

(3) He set out the law of BVI in relation to *de facto* and shadow directors (paras [37]-][43]);

(4) He concluded that there was *"no realistic prospect"* of the Defendants being able to establish that Mr Abdul-Massih was a *de facto* or shadow director of Phoenix BVI or Phoenix Dubai and that the basis for seeking to establish that he was a director of one or both entities was *"little more than bare assertion unsupported by any evidence"* (para [43]);

(5) He concluded that insofar as there was a claim for insolvent trading in the BVI, that claim had no realistic prospect of success because Mr Abdul-Massih was never a director of Phoenix BVI or Phoenix Dubai (para [46]);

(6) In accepting that the evidence of the Claimants' six lay witnesses (including that of Mr Abdul-Massih) was *"entirely consistent"* with the position adopted by the Claimants (para [53]), he concluded that all of the intended claims by the liquidators of Phoenix BVI and Phoenix Dubai were *"without substance"* (para [56]);

(7) He granted the declaratory relief, holding that the Court should give *"clarity and certainty and, so far as it can, closure to the Claimants so they can carry on with their business affairs going forward"* (paras [58]-[59]; and

(8) He granted the injunction for the reasons set out in paragraph [61] of the judgment, saying that those reasons made it *"an entirely appropriate injunction for me to grant in the circumstances"* (para [62]) in light of, amongst other factors, the risk of irreparable harm to the Claimants including ongoing costs, business disruption and the potential for inconsistent findings.

Justice Mithani's judgment, of course, brought the negative declaratory proceedings to an end. However, by those proceedings, the Claimants' shield of negative declaratory relief, levied against the Sword of Damocles raised by the liquidators' threats to bring proceedings in BVI and the Cayman Islands, was highly effective.

2. https://www.eccourts.org/judgment/nabil-marc-abdul-massih-et-al-v-ryan-paul-jarvis-et-al-2

The Demise of the Shareholder Rule

MARK ARNOLD KC
SOUTH SQUARE

Introduction

The Shareholder Rule has been paraded before the Privy Council and been told that, like the emperor in the folktale, it is *"altogether unclothed"*.[1] More accurately, it forms no part of the law of England and Wales or of Bermuda: the emperor has vanished in a puff of smoke and is no more.

It was not always thus. Since falling from the pen of Chitty J in 1888, the Shareholder Rule had existed for well over a century, largely untroubled and assumed to exist by courts up to and including the Supreme Court, before being questioned at first instance in 2023, abandoned at first instance in 2024, and finally dismantled and abrogated by the Privy Council, which promptly gave a *Willer v Joyce* direction at the conclusion of an appeal from the Court of Appeal for Bermuda earlier this summer.

The Shareholder Rule

So, what was it, and will it be missed? It was an exception to legal professional privilege; more specifically, to legal advice privilege rather than to litigation privilege.

In its original form, a company could not claim legal advice privilege as against its shareholders in respect of advice sought and paid for from the company's coffers and thus indirectly by the shareholders themselves. In more modern times, a company simply could not claim legal advice privilege against its shareholders (although it could always claim litigation privilege when it applied, as it still can: Litigation privilege remains unchanged).

1. *Jardine Strategic Limited v Oasis Investments II Master Fund Ltd* [2025] UKPC 34, at [82].

Legal advice privilege

Legal professional privilege has existed since (at least) Tudor times, since the decisions of *Berd v Lovelace*[2] in relation to solicitors and *Dennis v Codrington*[3] in relation to counsel. By Hanoverian times, it had been confined to counsel, solicitor and attorney, in *Wilson v Rastall*,[4] and could be waived only by the client. It did not – and does not – apply more widely, for example to doctors in respect of information communicated in confidence by the patient.[5]

Why is it confined to confidential communications between lawyers and their clients? The rule of law is fundamental to our system of governance and has been for a very long time; but this is neither the time nor the place for a history lesson. That means that the administration of justice must be efficient and effective. That is in the public interest. But the law is complicated and is not necessarily readily understood in all its intricacies by all members of society.[6] It is thus the right of any person to obtain skilled advice about the law, and the prevailing policy is that they should be encouraged to do so. When people consult their lawyers, it is obviously desirable that the advice they receive should be as informed, relevant and skilled as it can be. For that, it is necessary that all relevant facts and circumstances are shared by the client with the legal advisor. To encourage clients to confide in their legal advisor by disclosing all relevant information, they must be confident that their communications are and will remain confidential for so long as they, the clients, think they should be. Hence legal professional privilege. Once privileged always privileged. It is a fundamental human right long established in the common law. It is a fundamental condition on which the administration of justice as a whole rests. Thus it applies not only when litigation is contemplated or in progress (litigation privilege), but even when it is not (legal advice privilege).

All that has been established at the highest judicial levels since the nineteenth century.[7] It applies not only to people but also to legal persons created by the law but which can act only through human agency, including companies.

Exceptions to legal advice privilege

There are exceptions to it, it may be waived, and it may be lost by inadvertent disclosure. Statutory exceptions are required to be clear.[8] Exceptions at common law include the iniquity exception: privilege does not exist in a document which comes into existence in furtherance of fraud, crime or other iniquity.[9] Nor does it apply between parties who have jointly instructed the lawyers (joint retainer privilege).[10]

And for (at least) 135 years, it did not apply between shareholders and the company in which they held their shares, at least until litigation between them was contemplated or had been commenced: that was the Shareholder Rule.

Gouraud

The Shareholder Rule was recognised and applied by Chitty J in *Gouraud v Edison Gower Bell Telephone Co of Europe*,[11] and accepted without question in *Woodhouse & Co Ltd v Woodhouse*,[12] and for more than a century thereafter. It was based on the Trustee Rule pursuant to which trustees could not claim privilege against their beneficiaries for legal advice which they had obtained at the beneficiaries' expense. Just as beneficiaries collectively have an interest in the due administration of the trust and collectively own the trust fund out of which trustees pay for legal advice, so it was thought that shareholders have their own proprietary interest in the company's property, including the money from which legal advice is paid for.

(Sir Joseph William Chitty)

Faulty foundation, latent defect

The Shareholder Rule was clear enough, so what was wrong with it? The basic problem was that, as the Privy Council pointed out,[13] between *Gouraud and Woodhouse*, *Salomon v Salomon* had established that a company is both the legal and beneficial owner of its property, and is separate from its shareholders.[14] Shareholders do not hold a proprietary interest in anything other than the company's shares. When the company pays for legal advice it uses its own funds, in which the shareholders have no interest, direct, indirect or otherwise.

The courts had earlier recognised that the basis for the Shareholder Rule was the Trustee Rule (ie proprietary) rather than some form of common interest.[15] That meant that, spurred on by the doubts expressed[16] and then the abandonment of the rule at first instance,[17] and with *Salomon* fresh in judicial minds following *Sequana*,[18] the Privy Council had no hesitation in dismantling the rule altogether, despite recognising its ancient lineage:

"[The proprietary] *basis for the Rule is wholly inconsistent with the proper analysis of a registered company as a legal person separate from its members such that the members have no proprietary interest in the funds of the company used to pay for the advice."* [19]

That being so, it was time to recognise and declare that *"the Rule is altogether unclothed"*.[20]

2. (1577) Cary 62

3. (1579) Cary 100

4. (1792) 4 Durn. & E. 753

5. *Duchess of Kingston's Case* (1776) 20 St. Tr 355.

6. The same applies even to kings. As the Chief Justice of the Common Pleas Sir Edward Coke informed King James VI and I, endowed with *"excellent science and great endowments of nature"* as he was, *"His Majesty was not learned in the laws of his realm of England"* and causes concerning his subjects were *"not to be decided by natural reason but by artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it …"*: *Case of Proclamations* (1607) 12 Co. Rep. 64; BAILII Citation [1607] EWHC KB J23

7. The history has been set out in, amongst other cases, *R v Derby Magistrates' Court, Ex Parte B* [1996] 1 AC 487, at 504A–507D, *per* Lord Taylor of Gosforth; the policy in *Three Rivers District Council v Governor and Company of the Bank of England (No. 6)* [2005] 1 AC 610 at [28]–[34] *per* Lord Scott of Foscote.

8. *R (Morgan Grenfell & Co Ltd) v Special Comr for Income Tax* [2003] 1 AC 563, *per* Lord Hoffmann at [7]–[8], where he referred back to *Stradling v Morgan* (1560) 1 Pl 199

9. *Al Sadeq v Dechert LLP* [2024] KB 1038

10. *Travelers Insurance Co Ltd v Armstrong* [2021] EWCA Civ 978

11. (1888) 57 LJ Ch 498

12. (1914) 30 TLR 559

13. As courts in other common law countries, including Canada and Australia, as well as many academics had before them: *Jardine* at [45]–[47]

14. [1897] AC 22

15. *Sharp v Blank* [2015] EWHC 2681 (Ch)

16. *Various Claimants v G4S plc* [2023] EWHC 2683, per Michael Green J at [42]

17. *Aabar Holdings SARL v Glencore plc* [2024] EWHC 3046 (Comm), Picken J

18. *BTI 2014 LLC v Sequana SA* [2022] UKSC 25

19. [2025] UKPC 34 at [80]

20. [2025] UKPC 34 at [82]

Joint interest privilege

But could not the Shareholder Rule be justified on the basis of some form of joint interest between a company and its shareholders instead? After all, a company is run with a view to its success, and its success is for the benefit of its shareholders as a whole. Hence the directors' general duty to promote the success of the company for the benefit of its members as a whole, while in doing so having regard to other matters, including the interests of its employees and the need to act fairly as between members, the community and the environment and so on, now codified by s 172 of the Companies Act 2006. And collectively, of course, they own it.

The Privy Council's answer to that question was a resounding No. First and foremost, that was not the basis on which the Shareholder Rule had first emerged: its foundation was proprietary, as described above, not based on joint interest. That meant it was toppled by *Salomon*.

Secondly, the company-shareholder relationship simply does not fall within the "*supposed*" general principle of joint interest privilege: looked at on its own, there is no sufficient analogy with the other relationships which do fall within the joint interest family of relationships.[21]

The Privy Council left to one side the "*supposed*" principle of joint interest privilege: whether it exists at all will be decided at appellate level another day. For present purposes, we should take note that, having already demolished the Shareholder Rule, Picken J in his first instance judgment in *Aabar Holdings SARL v Glencore plc* also decided that the very concept of joint interest privilege as a freestanding or standalone species of privilege was not supported by the authorities. Rather it is a convenient umbrella term of shorthand for describing situations in which one party is unable to assert privilege against another on narrower and more conventional grounds.[22]

Back to the PC. Even accepting for the sake of argument that the "*supposed*" principle of joint interest privilege exists, the Privy Council said that it would not apply as between company and its shareholders. Its reasoning is interesting. First, joint interest assumes that the interests of the shareholders are always aligned between themselves, but they are not. That is particularly so in a large company; but even in a small family-owned company the PC thought there may be sharp differences in view between different generations. They are "*simply not a homogeneous block with a single shared interest which may coincide with, or diverge from, the interests of the company.*" [86]. Secondly, a company has other stakeholders, including its workforce and its providers of finance and working capital: not just its shareholders [87].

These assessments are undoubtedly true, although shareholders are treated as a whole, as a body, for the purposes of the duty to promote the company's success. If it is really a legal fiction that they can be so treated for the purposes of that duty, why not in the legal advice privilege context too? And the fact that the company has other stakeholders does not change the fact that the interests of the shareholders have primacy for the purposes of the s. 172 duty, at least while the company remains solvent.

The Privy Council's objections to the Shareholder Rule surviving in the guise of some joint interest privilege are really more fundamental still, having regard to the very purpose and policy behind legal advice privilege, the separate personality of the company, and commercial reality. As the Board recognised, it is for the directors of the company to determine where the company's best interests lie and to steer a course best suited to serve them. In doing so, they will need to make many decisions about the management and direction of the business, having regard to the often-competing interests of all its stakeholders. And many of those decisions will need or benefit from candid – confidential – legal advice [88].

The Board fully endorsed the three objections identified by Kawaley JA in the Court of Appeal for Bermuda, which he expressed as follows:

(a) [The Shareholder Rule] *unreasonably restricts the freedom of companies to access the protection of legal professional privilege, save when litigation is in contemplation;*

(b) it implicitly [ignores] the separate legal personality of the company from its shareholders; and

(c) it presumes that the company-shareholder commercial relationship translates into a commonality of interests whenever the company seeks legal advice, when the real commercial and legal relationship may be entirely different."

(The Bermuda Court of Appeal)

21. [2025] UKPC 34 at [84]

22. [2025] 2 WLR 763 at [94] and [105]. Picken J gave permission to appeal and authorised a leap-frog, which the Supreme Court declined because of *Jardine*. It is understood that *Aabar* is due to be heard by the Court of Appeal later this year

23. [2025] UKPC 34 at [89]

24. [2025] UKPC 34 at [92]–[97]

25. [2025] UKPC 34 at [99]–[100]

26. As in *Aabar Holdings SARL v Glencore* itself

27. [2025] UKPC 34 at [90]

In the Privy Council's words:

"It would discourage companies from obtaining candid legal advice in confidence. It would ignore the separate personality of the company and it would wrongly assume a simple coincidence of interests contrary to the typical commercial reality."[23]

A nuanced case-by-case approach?

Where the Privy Council parted company with Kawaley JA, however, was in respect of the nuanced approach he espoused, which would require the shareholder in every case to demonstrate not only the existence of company-shareholder relationship, which would operate only as a threshold qualification, but also that they had a sufficient joint interest in obtaining and receiving the advice in the circumstances of the particular case. If that approach were to be adopted, the PC said, it would be impossible for directors to know, when deciding whether or not to seek legal advice, whether the advice once received would be privileged from production to shareholders in the event of subsequent litigation between them. That would be inconsistent with the very objective of legal advice privilege: encouraging the taking of legal advice requires "*reasonable certainty*" as to whether or not it will apply in any given case when the decision to seek that advice is being taken.[24]

For similar reasons, the Privy Council considered that a general rule that privilege would not be available, subject to fact-sensitive exceptions, would be "*even worse. Directors would just have to make the general assumption that they could not obtain legal advice in confidence*" [93].

(Kawaley JA)

And on the facts ...

In any event, the Privy Council did not consider that the company and the shareholders did share a joint interest on the facts of the case. The legal advice concerned the fixing of a fair price for shares to be compulsorily acquired from minority shareholders and cancelled as part of a corporate amalgamation. In the Privy Council's view, there was a fundamental divergence of interest between the minority and the majority: while the minority interest lay in a high price, the majority (who were, the Board considered, effectively paying for the minority's shares) favoured a low price. That was not affected by the directors' duty to fix a value which they genuinely believed to be fair because the minority would still have an interest in the adoption of the highest reasonable value while the majority would favour a value at the lower end of the range of reasonable fair values.[25]

So, will it be missed?

The demise of the Shareholder Rule will come as a breath of fresh air for boards of directors across the land. So, too, for their legal advisers. At a time when shareholders or, more usually, certain sections of the shareholder community are increasingly challenging decisions made by the boards of directors, whether that be in the context of climate concerns, or claims in relation to the contents of a prospectus issued by the company under FSMA s 90, or of annual and other reports under FSMA s 90A,[26] or otherwise, and the legal landscape in which companies operate becomes ever more complex, the fact that the board may seek legal advice with reasonable certainty that it will remain privileged from production to shareholders is likely to be very reassuring for directors. That they should be encouraged to seek legal advice on the basis that their legal advisers are fully informed is wholly consistent with the policy considerations that justify the very existence of legal advice privilege at common law in this country.

That is now the position in relation to all companies, whether large or small (to echo the words of Lord Scott in *Three Rivers*). Both *Aabar* and *Jardine* were concerned with very large companies, but no arbitrary line is to be drawn to distinguish them from smaller companies or family companies in this respect.

That is not to say that legal advice obtained by the company will always be covered by legal advice privilege. The same exceptions (joint retainer, iniquity etc) will still apply. It is just that the Shareholder Rule will not be amongst them. And it will not apply to shareholders who are also directors; their position would justify a separate article.

But what about ordinary shareholders? Undoubtedly, the loss of the Shareholder Rule leaves a gap that will require ingenuity (or legislation) to fill. In truth, however, outside the litigation disclosure process their rights to see the company's documents has always been limited. As the Privy Council noted, agreeing with Kawaley JA, the relationship between the company and its shareholders is essentially contractual, and the terms of that relationship typically restrict what a shareholder may see. That being so, it was always perhaps a bit strange that the Shareholder Rule should effectively operate to expand what they could see "*when the express contractual terms of* [the company-shareholder] *relationship point clearly in the opposite direction*".[27]



ROBERT CHRISTIE
PARTNER, BEDELL CRISTIN JERSEY AND BVI

DOMINIC CORSINI-MEEK
SENIOR ASSOCIATE, BEDELL CRISTIN JERSEY

JOSHUA RABET
TRAINEE, BEDELL CRISTIN JERSEY

First Provisional Liquidators Appointed in Jersey

Introduction

In March 2022, significant changes were introduced to Jersey's insolvency regime enabling a creditor of an insolvent company to apply to the Royal Court for a creditors' winding up and the appointment of a liquidator. Once a creditors' winding up application has been made, the court has a statutory power to appoint a liquidator provisionally (a "PL") pursuant to Article 157B of the Companies (Jersey) Law 1991 (the "Companies Law"). This power was recently exercised for the first time by the Royal Court of Jersey in *Representation of OWH SE i.L. v RTI Limited* [2025] JRC 204.

Background

The application for a creditors' winding up arose out of the enforcement in Jersey of a c. €213 English arbitration award in favour of OWH SE i.L. ("**OWH**"), a German bank, against RTI Limited ("**RTI**"), which is a Jersey company and part of the Rusal group (whose business is the production and sale of aluminium). OWH obtained an order for enforcement of the award in Jersey and a world-wide freezing and disclosure order ("**WWFDO**"). In response RTI made applications (i) to set aside the WWFDO on the basis that OWH had not provided sufficient evidence of a risk of dissipation and (ii) to set aside enforcement of the award in Jersey, on public policy grounds. RTI's disclosure obligations were suspended pended the outcome of the set aside application.

RTI separately brought a challenge to the award in England pursuant to Section 68 of the English Arbitration Act for "*serious irregularity*" and filed a challenge against the arbitrators alleging bias (on the basis that the arbitrators refused to stay applications dealing with questions of interest and costs in relation to the arbitration award pending the Section 68 challenge).

Following the dismissal of the WWFDO set aside and enforcement challenge applications, RTI sought to appeal the latter decision. RTI also provided disclosure of its assets to OWH, which revealed that most of RTI's assets were tied up in an illiquid financial instrument (representing less than 10% of the value of the award). Following further correspondence, RTI also revealed that shortly before the time that the parties were expecting to receive the award from the tribunal, RTI had received repayment of a $166m loan from another Rusal group company, and then transferred away the proceeds, purportedly as part of a general restructuring, involving the transfer of its assets to other Rusal group companies.

Given the information about the dissipation of RTI's assets, OWH applied for a creditors' winding up of RTI and the appointment of PLs. OWH relied on the non-payment of the award and the schedule of assets as evidence of insolvency rather than the familiar route of serving a statutory demand.

The Court's approach to the appointment of PLs

By the time of the hearing, RTI had conceded that OWH had standing to make an application for a creditors' winding up. The Court was not in favour of finally determining the application until RTI's appeals and challenges had been resolved, despite the dictum in *HWA 555 Owners LLC v Redox Plc S.A. [2023] (2) JLR 1* at [97-98] (a case in the Jersey Court of Appeal), which cites with approval the passage from Warren J in *El Ajou v Dollar Land (Manhattan) Ltd* [2005] EWHC 2861 below:

"8. The reasoning by which the courts have rejected petitions where the debt is bona fide disputed on substantial grounds is because in such a case the Petitioner cannot be said to be 'a creditor' for the purposes of the statutory provisions. ...

9. In a case where the Court has ruled in favour of a Claimant that a debt is due, then the Claimant is, in my judgment, unquestionably a creditor, even if the Judgment is the subject matter of an appeal. ... "

The Jersey Court of Appeal in *Redox* noted at [99] that the approach in *El Ajou* had been approved and followed in the Court of Appeal in Guernsey; the Court was of the opinion that, as a matter of policy, the position in *El Ajou* was the right approach in Jersey as well.

Ultimately, in the circumstances of the present case, the Court took the view that it would not be appropriate to make a final determination on the application.

The key remaining question for the Court to determine was whether PLs should be appointed, and if so on what terms. In the absence of Jersey jurisprudence, the Court agreed with OWH's submission that it was appropriate to look at English authority on the appointment of PLs. In doing so, the Court quoted from the English textbook *McPherson and Keay's Law of Company Liquidation* (5th Ed) at [58]; the extract provides as follows:

"The reason for the petition tends to be, on most occasions, that there is a perception that the assets and affairs of the company are in jeopardy, primarily because the directors and/or shareholders may dissipate the assets while the petition is pending, and that the ultimate effect of leaving the assets in the hands of the company may be that the creditors and/or members will be disadvantaged, if the company is eventually wound up. In most cases the usual concern is the attitude of the directors, and that there is a need to displace them from their position of authority to deal with the assets. This might occur where a creditor is seeking to wind up the company or where there is a conflict between the directors and the company itself."

The Court went on to note at [59] that *McPherson and Keay* describes the power to appoint Pls as a *"draconian power"* which will be a *"serious intrusion for* [any] *company"*. At [60], the Court further drew from *McPherson and Keay* to assess the factors it may consider in appointing PLs:

At [62], the Court also endorsed principles set out by the English Court of Appeal in *Revenue and Customs Commissioners v Rochdale Drinks Distributors Limited* [2011] EWCA Civ 1116 to the effect that:

"76. The appointment of a provisional liquidator to a trading company is, however, a most serious step for a court to take. It is likely in many cases to have a terminal effect on the company's trading life. It is not an order to be made lightly and its making requires the giving by the court of the most anxious consideration

[...]

77. [...] Given the potential seriousness of the appointment of a provisional liquidator, I consider that in the case of a creditor's petition the threshold that the petitioner must cross before inviting such an appointment ought to be nothing less than a demonstration that he is likely to obtain a winding-up order on the hearing of the petition."

In the present case, RTI was not a trading company and appeared to be undergoing some form of restructuring. The Court found that there were serious questions about why a loan of $166m was repaid shortly before the arbitration award was to be released, and whether, as alleged, some form of asset stripping had occurred. RTI's evidence lacked detail and begged more questions than it answered. This warranted investigation and steps being taken to preserve assets. The Court agreed with OWH that, if matters were to be left until the creditors' winding up application was resolved, the trail would likely have "*gone cold*". Investigations, and any steps to preserve assets, needed to take place as a matter of urgency.

The terms of the Court's order

Unlike a (full) liquidator's powers which are set out in the Companies Law, a PL's powers (and duties) must be determined by the Court, which has a wide discretion in that regard.

In appointing the PLs, the Court made orders preserving the rights of the directors of RTI to pursue the appeal and other challenges (in the case of the appeal, as a cost of the liquidation). The Court also made orders preserving the privilege of RTI's legal advice as against OWH, and that the PL's legal advisers should be independent of any lawyers retained by OWH to ensure the PL's independence from OWH.

Concluding thoughts

The English case law places emphasis on an urgent need to preserve assets, rather than (for example) a general need to investigate. This case is consistent with that case law, but is unusual because the assets to be preserved consisted predominantly of potential claims to recover property which had already been transferred away to other entities outside of the jurisdiction (the directors of the company apparently taking the view that no such claims existed). The PLs would have to take steps in other jurisdictions to have their appointments recognised, and it was envisaged that as part of the process of freezing assets it might be necessary to take preliminary steps in relation to such claims, albeit the Court would require the PLs to return to court for approval of preliminary steps which were in contemplation or had been taken in relation to any such claims.

[Bedell Cristin acted for OWH, the main creditor of RTI]

FELICITY TOUBE KC
SOUTH SQUARE

CHARLOTTE COOKE
SOUTH SQUARE

FEDERICA PIETROGRANDE
BRATTLE GROUP

Report on the first quarterly INSOL ADR Group Breakfast: *Exploring the role of mediation in the context of restructuring plans*

The use of alternative dispute resolution (ADR) in the context of restructuring has been a topic of increasing interest in recent years, but never more so than following the Court of Appeal's decision in *Re Petrofac Limited* [2025] EWCA Civ 821, which has placed a new emphasis on the importance of engagement between a company proposing a restructuring plan and its creditors.

In this context, the topic was a perfect fit for consideration by the INSOL ADR Group. Since its launch at INSOL London in 2021, the Group has sought to promote and advance the use of all forms of ADR techniques and skills, including but not limited to mediation and arbitration.

The Co-Chairs of the INSOL ADR Group are closely connected with South Square. **Felicity Toube KC** is a member of Chambers and The **Hon Paul Heath** is an ADR Associate. South Square also has a dedicated ADR service, with a number of members and ADR Associates who are qualified mediators and arbitrators. The current South Square ADR Associates roster is: **The Hon James M Peck** (USA), **The Hon Frank Newbould KC** (Canada), **The Hon Ian Kawaley** (Cayman and Bermuda), and **Professor Christoph Paulus** (Germany), as well as Paul Heath (New Zealand). Jim Peck and Ian Kawaley are also members of the INSOL ADR Group Steering Committee.

The INSOL ADR Group has held a series of very successful events, some jointly with the INSOL Judicial Colloquium, with which it maintains close ties. The events have so far taken place in London, Tokyo, and San Diego (alongside the main INSOL Conference). Earlier this year the INSOL ADR Group also hosted an event in Paris as part of Paris Arbitration Week. In advance of the next international event, to be held alongside INSOL in London on Monday 20 April 2026, the INSOL ADR Group has decided to include a series of regional meetings.

Against this background, on 5 November 2025 the INSOL ADR Group held its first quarterly breakfast co-hosted by South Square and The Brattle Group at South Square's offices in London. The discussion at breakfast was led by

Felicity Toube KC (South Square) and Federica Pietrogrande (The Brattle Group) and brought together leading academics and practitioners to discuss the potential role that mediation can play in facilitating engagement, and resolving disputes, in the context of a restructuring plan.

Recent developments in the restructuring landscape

The decision in *Petrofac* marked a significant development in the law governing the treatment of "out of the money" creditors, those who would not receive anything in the relevant alternative to the plan. Notably in this context, the Court of Appeal placed emphasis on the role of pre-plan engagement, observing at [130] that:

"...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."

At [191] the Court of Appeal went on to state that:

"the proper use of the cross-class cram down power is to enable a plan to be sanctioned against the opposition of those unreasonably holding out for a better deal, where there has been a genuine attempt to formulate and negotiate a reasonable compromise between all stakeholders".

Applying *Petrofac*, in *Re Waldorf Production UK Plc* [2025] EWHC 2181 (Ch) Hildyard J held that the Court of Appeal's decision

"echoes and re-emphasises the nature of the cross-class cramdown power as being to provide recourse against a class which has turned its face against reasonable engagement and/or agreement" (at [159]), noting that "the failure to enter into any negotiations presents a difficulty for the Plan Company in terms of there being no evidence that might shed light on whether the dissenting Unsecured Creditors are acting reasonably in demanding more."

Hildyard J declined to sanction the plan before him, though he did grant a leapfrog certificate and the Supreme Court subsequently granted permission to appeal, with the appeal listed for hearing early in 2026.

Following the same approach, in *Poundland Limited* [2025] EWHC 2755 (Ch) Norris J emphasised, and approved, the company's *"serious attempts to engage"* with its creditors (at [55]).

The role of mediation in restructuring

The implications of these decisions formed a central theme of the breakfast meeting, which explored how mediation might facilitate the kind of engagement envisaged by the Court of Appeal in *Petrofac*.

The discussion was framed around two central questions: *What role might mediation play in facilitating engagement in the restructuring context? What are the practical obstacles that might cause issues?*

Participants discussed the various forms that negotiation may take, from bilateral negotiations between creditors and the company, to broader facilitated processes involving multiple stakeholders. The possibility of early neutral evaluation was also noted as having the potential to guide parties toward a resolution.

The usefulness of mediation in the restructuring context was not, however, universally accepted. Some participants questioned whether mediation could be effective if one or more parties are unwilling to engage in the process, or in fact unable to do a deal for either legal or commercial reasons.

However, by providing a structured forum for dialogue, mediation was regarded by many participants as a potentially useful tool for uncovering the real issues at stake in a restructuring process. As in other contexts, a skilled mediator can assist the parties in identifying the fundamental commercial interests, bridging divergent positions, and offering each side a reality check of what outcomes are realistically achievable.

In the particular context of restructuring, it was noted that the present uncertainty surrounding the treatment of "out of the money" creditors following *Petrofac* may in fact increase the likelihood of mediation succeeding. This mirrors the experience in the United States under Chapter 11, where similar uncertainty regarding valuation issues originally served as a catalyst for negotiated settlements.

Timing issues

A substantial part of the discussion focused on the optimal timing of mediation within a restructuring process to ensure its effectiveness. Mediation may be employed at an early stage, prior to the convening hearing, to identify potential areas of consensus or to clarify the positions of dissenting creditors. Alternatively, it may take place following the convening hearing, informed by any guidance provided by the Court, or even after the creditors' meetings, once it is apparent in relation to which classes of creditors a cram-down (or cram-up, or cram-across) may be needed.

The discussion highlighted that timing issues present a considerable practical challenge. As is well known, restructuring processes often operate under stringent timetables, frequently driven by a plan company's limited cash runway. The potential implications of the new Practice Statement will also need to be carefully assessed.

Additional obstacles to early mediation were identified, including the plan's company inability to commit to terms too early and, from a creditor perspective, concerns around information asymmetry. Conversely, the Court's limited capacity to sanction a materially modified plan after the meetings limits the potential effectiveness of mediation at a later stage in the process, particularly where insufficient time remains to propose a revised plan, perhaps suggesting that the legal framework governing plan modification may warrant reconsideration.

Further practical considerations: Information, Stay and Confidentiality

Several additional issues emerged during the discussions, including concerns relating to information asymmetry, both in terms of information provided and also time available to examine any information provided. Consideration was given to whether a broader stay than that provided under Part A1 moratorium might facilitate engagement with creditors and the use of mediation, given that the current mechanism is limited both in duration and in the categories of creditors it covers. It was broadly agreed that the existence of a stay on proceedings (with extra-territorial effect, if possible) would be beneficial – although was not always essential – and that the alternative of placing the company into administration solely to obtain the administration moratorium would be unlikely to prove attractive.

In addition, the confidentiality of mediation proceedings was discussed. In light of *Petrofac*, parties might well wish to present to the Court the fact that mediation has taken place and, at least to some extent, the substance of negotiations conducted through mediation. Attendees therefore debated whether the absence of a without-prejudice framework might make it more difficult to reach agreement. Possible solutions considered included conducting mediation on an open basis, or alternatively maintaining a without-prejudice approach, while allowing, or even requiring, the parties to submit best and final offers following the mediation.

What next?

While much remains uncertain about the role of mediation – and ADR more generally– within the context of restructuring plans, the meeting highlighted the potential that mediation has to facilitate more effective negotiations in appropriate cases. It was also clear that, against the background of a developing restructuring landscape, a forum such as this plays an invaluable role in fostering dialogue and the exchange of insights. The discussions also underscored the need for further exploration of the potential legal and practical considerations around mediation, which future events in this series will aim to facilitate.

The next **INSOL ADR Group Breakfast** will take place in early 2026. Those interested in attending are invited to contact any of the authors of this article.

Anyone who is interested should also register for the **INSOL ADR Group Colloquium**, to be held alongside INSOL in London on Monday 20 April 2026, through the INSOL London conference website.

Finally, please also note that that a **South Square ADR** Event will be held on Wednesday 4 February 2026. Please contact Felicity Toube KC if you are interested in attending.

Felicity Toube KC – felicitytoube@southsquare.com

Charlotte Cooke – charlottecooke@southsquare.com

Federica Pietrogrande – federica.pietrogrande@brattle.com

For more information about the South Square ADR service, the website is below

https://southsquare.com/category/practice-areas/alternative-dispute-resolution/

Case Digests

Editorial by:
Jeremy Goldring KC

Many principles of English commercial and property law, which remain relevant, are deeply embedded in the country's history, their application stretching over many hundreds of years. This continuity is one of the strengths of English law. A recent example is the decision of the English Court of Appeal in a long-running dispute between National Iranian Oil Company and Crescent Gas Corporation, in which the latter claimed under section 423 of the Insolvency Act of 1986. This, in turn, required the court to interpret, for the first time, several aspects of s 53(1)(b) of the Law of Property Act 1925, which itself derived from the Statute of Frauds 1677. The judgment of Zacaroli LJ offers an analytical *tour de force* of the various issues that arose, including by reference to case law dating back to 1854. [Georgina Peters was instructed for Crescent.]

It is perhaps surprising that Zacaroli LJ was in the minority on one determinative issue, the Chancellor and Falk LJ concluding that the appeal should be dismissed. Many may think that Zacaroli LJ's reasoning and conclusion is to be preferred, Zacaroli LJ being an experienced Chancery and Insolvency lawyer.

Eagle-eyed readers will note that we have a slight change in format to the Case Digest section for this edition. Just as we went to press judgment was handed down by the Supreme Court in *Mitchell and Krys (joint liquidators of MBI International & Partners Inc (in liquidation) v (1) Sheikh Mohamed Bin Issa Al Jaber* – a long-running case in which three Members of South Square appeared. We lead immediately with a digest on this decision.

Featured Case Digest

Mitchell and Krys (joint liquidators of MBI International & Partners Inc (in liquidation) v (1) Sheikh Mohamed Bin Issa Al Jaber

[2025] UKSC 43 (Lord Hodge DPSC, Lord Briggs, Lord Sales, Lord Stephens and Lord Richards JJSC)

BVI company law – Fiduciary duties – Unpaid vendor's lien – Equitable compensation

24 November 2025

MBI International & Partners Inc ("the Company") commenced liquidation on a creditor's application in BVI on 10 October 2011. It was one of a number of companies in the global business empire of Sheikh Mohamed Al Jaber ("the Sheikh"), who was the Company's sole shareholder and director. The Company's only asset was its shareholding in a subsidiary, which it had acquired from other companies in the Sheikh's group in 2009.

On about 29 February 2016 (over four years after his powers as a director had terminated on liquidation), the Sheikh signed transfer forms (purportedly as a director of the Company) to transfer away a holding of shares in the Company's subsidiary ("JJW Inc") to another company he controlled ("JJW Guernsey"). In July 2017 all JJW Inc's assets and liabilities were transferred to yet another company ("JJW UK") and the shares became worthless.

In May 2019, the Company's then-liquidator commenced proceedings in the High Court in England against the Sheikh, having obtained recognition of the BVI liquidation under the CBIR. Following a trial (which, although it only lasted 19 days, took over 20 months to complete owing to repeated adjournments), Joanna Smith J found ([2023] EWHC 364 (Ch)) that the Sheikh owed a fiduciary duty to the Company, which he had dishonestly breached, and that JJW Guernsey was a knowing recipient of the shares. Judgment for €67.1m plus interest from 2016 was entered against them. The Sheikh's contention that the shares had been subject to an unpaid vendor's lien was rejected.

On the first appeal, the Court of Appeal ([2024] EWCA Civ 423) upheld the trial judge's decision on the Sheikh's dishonest breach of fiduciary duty and the unpaid vendor's lien – but decided that the value of the Company's loss was nil, because the shares had lost their value (by reason of the July 2017 asset and liability transfer) and equitable compensation had to be assessed at the date of trial. Accordingly, no compensation was payable.

Following a second appeal hearing over two and a half days earlier this year, the Supreme Court has unanimously reinstated the trial judge's order. It rejected the Sheikh's argument that, because he no longer had any powers as a director and had never taken title to the shares, he could no longer owe any fiduciary duty to the Company. Instead, their Lordships decided that fiduciary duties can arise ad hoc, including where a person takes it upon themselves to deal with assets belonging to others and that there is no need for the fiduciary to take title to the asset.

As to the Sheikh's allegation that the shares were subject to an unpaid vendor's lien, the Supreme Court held that, while such a lien arises by operation of law, the parties can exclude it. The lien is excluded where there is a "*clear and manifest inference*" that the parties meant to exclude it, which is an objective question. As the purpose of the Company's initial acquisition of the shares in 2009 had been to enable an initial public offering ("IPO") of the subsidiary's shares, and it was intended at the time of the transfers that the Company would use the returns from the IPO to pay the price, such an inference could be drawn because a lien on the shares would have undermined the IPO.

The longer-term significance of this case is likely to be found in the Supreme Court's rejection of the Court of Appeal's approach to the assessment of equitable compensation and in particular its qualification of the earlier leading cases *Target Holdings Ltd v Redfern* [1996] 1 AC 421 and *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503. In the judgment of Lord Hodge, Lord Briggs and Lord Sales (with whom Lord Stephens and Lord Richards agreed), in calculating an award of equitable compensation, the court treats the date of assessment as an open question based on what is just and equitable as between the fiduciary and the principal. If a fiduciary misappropriates property under his fiduciary control and the principal can prove it had value, the burden is on the defaulting fiduciary who relies on a subsequent event to prove that the later event has broken the chain of causation between the fiduciary's breach and the principal's loss. A fiduciary cannot rely on a subsequent event as breaking the chain of causation where he has or might have had a role in bringing that event about, unless he can give a clear and innocent account of his role. The Sheikh had not done this and accordingly the judge's order was restored.


Tom Smith KC


Joseph Curl KC


Jon Colclough

Banking and Finance

DIGESTED BY PAUL FRADLEY

Ramala Trade Finance Fund v Trafigura Pte Ltd

[2025] EWHC 1569 (Ch) (Rajah J)
Unjust enrichment – Change of position – Trade financing **23 June 2025**

The Claimant acted as a trade financer to companies trading physical assets. The Claimant had provided a third party with financing for five contracts for the supply of coal to the third party by the Defendant. It later became apparent that the third party had forged the contracts. The Defendant used the payments it received from the Claimant to discharge debts which the third party had on other contracts. The third party had provided the Defendant with a tripartite agreement agreeing to the intended manner of the Defendant's application of the payments received from the Claimant. However, the Claimant's signature on the tripartite agreement had been forged. The Court was required to determine whether there had been an unjust enrichment of the Defendant and whether the Defendant had a change of position defence.

The Judge held that the Defendant had been enriched by the value of the payments received from the Claimant and that this was at the expense of the Claimant not the third party. The Claimant was entitled to rely on the unjust factor of mistake. The Claimant had made the payments because it mistakenly believed that the sums were due under the contracts presented to them by the third party. The Claimant mistakenly thought it was making an advance under genuine contracts and did not intend to discharge the third party's old debts.

The Judge noted that there was a defence to an unjust enrichment claim if a defendant had so changed his position that it would be inequitable in all the circumstances to require him to make restitution and there was a relevant causal connection between the enrichment and the change. The Judge held that there was a sufficient change of position in reliance on the receipt from the Claimant, namely continuing to trade with the third party because it had received a payment from a third party on what it considered were satisfactory terms as to how it could use the payment. While it was the tripartite agreement that gave the Defendant a contractual right to apply the payments as it did without the payment there would have been no tripartite agreement. The Judge held that it would be inequitable to require the Defendant to make restitution – the Defendant had continued to trade with the third party and lost the opportunity to stop trading and seek to recover its debts.

Regera SARL v Cohen

[2025] EWHC 2107 (Comm) (Peter MacDonald Eggers KC)
Loan agreement – Guarantee – Service of proceedings – Unfair consumer contracts **8 August 2025**

The Defendants had guaranteed a loan facility advanced by the Claimants to a borrower. They applied for default judgment to be set aside. Under the loan facility the Claimant, Defendants and borrower had each appointed an agent for service of proceedings in the UK. The loan facility provided that if a service agent could no longer act then the borrower could appoint a replacement within five days, failing which the Claimant could unilaterally appoint a replacement. In July 2024, the Claimant appointed a replacement service agent when the original agent was dissolved, and the borrower failed to make a replacement appointment. The Claimant later issued proceedings against the Defendants on the guarantee and served the proceedings on the replacement agent. Default judgment was then entered on the claim when the Defendants failed to respond. The Defendants applied to set aside the default judgment claiming that they were unaware of the proceedings and of the appointment of a replacement agent.

The Judge held that the Claimant needed to prove they had served the Defendants on the balance of probabilities for the purposes of CPR rule 13.2. The Judge held on the evidence available that the Claimant had established that the loan facility was binding on the Defendants such that the service of process on the agent was to be treated as service on them. There was no requirement under the loan facility for the Defendants as guarantors to be notified of the replacement of the service agent. The borrower acted on behalf of the Defendants and any notification on it could be treated as a notification of the Defendants.

However, the provision in the loan agreement was an unfair contract term for the purposes of section 62 of the Consumer Rights Act 2015. Both of the Defendants were consumers and the Claimant was a trader. The Judge had a number of concerns about the fairness of the provision: there was no requirement for the Defendants to be notified of a replacement agent; the Defendants could not appoint a replacement agent (only the Claimant and borrower could); proceedings could be served on the replacement agent without the Defendants being aware of their appointment or the proceedings; absent the provision in the loan facility, the Defendants would have needed to have been served individually; and the Claimant was not exposed to the same risks regarding the service process. The effect of this was that the provision in the loan facility was not to be regarded as binding on the Defendants and so could not validate service. The Judge, however, rejected an argument that the clause was unenforceable under consumer credit legislation.

Caxton International Ltd v Essity Aktiebolag

[2025] EWHC 1477 (Ch) (Fancourt J)

Ultimate beneficial ownership – Intermediated securities - Declaratory relief – Service out of jurisdiction **16 June 2025**

The claimants claimed to be the ultimate beneficial holders of certain notes issued by the defendant companies, Essity Aktiebolag (Publ) and Essity Capital BV, which were respectively incorporated in Sweden and the Netherlands. The claimants issued a claim seeking declarations that a cessation of business event of default had occurred and was continuing under the notes, and that the party shown in the records of the clearing systems as the holder of a nominal amount of the notes was entitled to give notice of acceleration thereunder.

The claimants had obtained permission to serve the claim on the defendants out of the jurisdiction on the basis that the claim was in respect of contracts governed by English law and that England and Wales was the appropriate forum. The defendants applied to set aside the order on the basis that there was no serious issue to be tried, as a court hearing the trial would not consider it appropriate to grant the claimants declaratory relief.

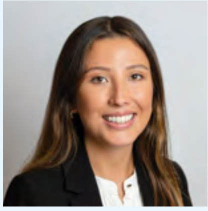
The defendants argued that the claimants had not provided sufficient evidence that they were the ultimate beneficial owners of the notes, and that in any event, the court would not grant the declaratory relief sought at the suit of the ultimate beneficial owners of the notes. The latter argument was put on three bases, namely that the ultimate beneficial owners of notes do not have a sufficient interest to be granted the declarations sought, that it was wrong in principle that a person who is not a contractual counterparty could seek declarations about the meaning and effect of the notes, and that granting the declarations sought would not serve useful purpose, as it would not give rise to any *res judicata* as between those with rights under the notes or related documents.

The Court refused the defendants' application to set aside the permission order. Fancourt J held that the claimants had provided sufficient evidence to establish that they had a real prospect at trial of proving that they had a proprietary interest in the notes. On that basis, Fancourt J also found that there was a good arguable case that the claimants had a sufficient interest in the notes to seek declaratory relief as to the meaning and effect of the notes, as they were the holders of the ultimate economic interest in the notes, whose interests would be protected by steps taken under the notes if an event of default was found to have occurred. Fancourt J reaffirmed that it is not a bar to obtaining declaratory relief in respect of a contract that the claimant is not a party to the contract and has no legal rights thereunder, provided the claimant has a legitimate interest in obtaining the relief sought.

Fancourt J also rejected the submission that the claimants' claim for declaratory relief infringed the "*no look through*" principle, which provides that parties in a custody chain of intermediated securities only have legal rights and obligations against their immediate counterparty. The claimants were not seeking to enforce payment from the defendants by their claim for declaratory relief but were seeking to give effect to the structure through which they held their ultimate beneficial rights. Fancourt J was also satisfied that there was a real prospect that the declarations would serve a useful purpose.

The defendants were granted permission to appeal in October 2025.


Tom Smith KC


Annabelle Wang

Civil Procedure

DIGESTED BY JAMIL MUSTAFA

Process & Industrial Developments Limited v The Federal Republic of Nigeria

[2025] EWHC 1405 (Ch) (Nicola Rushton KC sitting as a Deputy High Court Judge)

Costs – Foreign Currency – Indemnity principle **18 June 2025**

The Supreme Court heard an appeal in respect of a costs order made in favour of the respondent (Nigeria) following its successful application to set aside two arbitration awards made in favour of the appellant (P&ID). The arbitration awards which were set aside on grounds of serious irregularity affecting the awards, namely they were obtained by fraud, and were procured contrary to public policy, were substantial. The liability under the awards was more than $11 billion at the time of trial. Nigeria's costs were also substantial, amounting to c.£44 million.

The issue on the appeal was whether the Judge had wrongly decided to award Nigeria its costs in sterling rather than naira (the Nigerian currency). P&ID argued that the award of costs against them should be denominated in naira because, if Nigeria were to receive an award in sterling, they would receive a windfall because of the naira's marked fall against sterling.

In this regard, P&ID advanced an argument that the Court should make an award of costs to the successfully party which most accurately reflected the loss suffered by that party in funding the proceedings. Before the Judge, the parties proceeded on the understanding that Nigeria had paid its legal fees, which were billed in sterling, by converting naira to sterling for that purpose. The Judge held that because Nigeria had incurred its liability in sterling and paid in sterling, P&ID should pay the costs in sterling. The Court of Appeal agreed for the same reason.

Before the Supreme Court, P&ID maintained the same argument and, in support of its position, *inter alia*, referred to the House of Lords' decisions in *Miliangos* and the Despina R, which made clear that the Court could make awards of debt or damages in a foreign currency. P&ID argued that because a costs award was also compensatory, the same approach applicable to damages applied to an award of costs. P&ID further challenged that there was any distinction between an indemnity designed to compensate against a loss and an indemnity against a liability that a receiving party incurred to its own lawyers (which distinction the Court of Appeal had drawn), and challenged the Court of Appeal's concern about the risk of disproportionate inquiries into a party's litigation funding arrangements.

The Supreme Court rejected all of P&ID's arguments and upheld the decision to award Nigeria its costs in sterling. The Supreme Court disagreed that an award of costs was compensatory in the same way as an award of damages in tort or for breach of contract. An award of costs was a discretionary remedy, the parameters of which are regulated by statute and statutory instrument.

While an award of costs could be seen as a statutory indemnity in the sense that a party could not recover more than they had paid in legal fees and disbursements, an award of costs did not attempt to restore a party to the position they would have been in if they had not had to litigate. The indemnity principle only served to prevent a party recovering more than their liability to their own lawyers. But an award of costs was not itself an indemnity; it was a statutorily authorised contribution towards costs incurred litigation before the English courts.

Accordingly, the Supreme Court concluded that while a party who had established a breach of contract or a claim in tort, and that they had suffered calculable loss, had an entitlement to recover the amount so calculated as damages as of right, no party had a similar entitlement to costs. The Supreme Court further considered that there were practical reasons why the Court should be averse to inquiring into how a party funded their litigation, namely a risk of satellite disputes of fact.

The Supreme Court further held that the Court had jurisdiction to make an award of costs in a foreign currency. It further stated that it was consistent with the Court's costs jurisdiction that the general rule should be that an order for costs should be made in sterling or in the currency in which the client had paid or was liable to pay their lawyers. There may, however, be circumstances where the Court could choose to depart from this general rule, for example, if the Court considered that the choice of a foreign currency was abusive or inappropriate, the Court could make a costs award in sterling. However, the Supreme Court concluded that there was no reason to award costs other than in sterling in the case before it and therefore dismissed the appeal.

Eurasian Natural Resources Corporation Limited v Dechert LLP

[2025] EWCA Civ 1307

Amendments to statements of case – Delay – Disclosure

16 October 2025

This case concerned an appeal against the dismissal of an application to amend a statement of case.

The claimant (ENRC) applied to amend its claims for loss during the quantum phase ('Phase 2') of two substantial pieces of litigation. The first was commenced against Dechert LLP and Neil Gerrard, a partner in that firm (the Dechert Defendants) and the second was against the Serious Fraud Office (SFO). The litigation was case managed and tried together.

At the liability trial ('Phase 1'), ENRC succeeded. The Judge found that the Dechert Defendants had breached their duties to ENRC and that the SFO was in serious breach of its own duties and had induced breaches of contract by the Dechert Defendants. There was then another trial ('Phase 1A'), in which the Judge held that the SFO's wrongdoing had been an effective cause of the losses claimed by the ENRC and further that, but for its wrongdoing, the SFO would not have commenced a criminal investigation against ENRC (the CI) in April 2013, which lasted for 10 years but resulted in no charges against the ENRC.

The Phase 2 trial was to determine the losses that ENRC had suffered as a result of the CI. Following preliminary directions, ENRC indicated that it was changing its case on loss and then issued an application to amend. The disputed amendments followed ENRC's realisation that certain losses claimed from the outset, namely increased borrowing costs alleged to have been caused by the CI, had not been incurred by ENRC but its subsidiaries. ENRC sought permission to amend and claim that ENRC had suffered loss as a result of the diminution in value of its shares in its subsidiaries.

SFO and the Dechert Defendants accepted that the disputed amendments had a real prospect of success. However, they contended that the delay in advancing the amendments, for which were was no good reason, meant that no litigation hold had been placed on documents of some of the subsidiaries, which resulted in substantial prejudice to the defendants. The Judge dismissed the application to amend in respect of the disputed amendments.

The Court of Appeal allowed ENRC's appeal against that dismissal. There was no dispute as to the applicable principles at both first instance and on appeal. However, the Court of Appeal concluded that the Judge had approached the issue of the disputed amendments in the wrong way.

The Judge had taken the approach that, once he had concluded that the amendments were late, and there was no good reason for the delay, that ENRC had to demonstrate that there was no possibility that any documents relevant to the issues raised by the disputed amendments had ceased to be available. ENRC failed to do so, and the Judge concluded that that the risk of such documents not being available was necessarily seriously prejudicial to SFO and the Dechert Defendants. He further concluded that this serious prejudice outweighed the prejudice to ENRC of losing a substantial part of its loss claim.

The Court of Appeal disagreed with this approach, which considered an uncertain and unquantified risk of injustice to the defendants as outweighing certain and substantial prejudice to ENRC, in circumstances in which it was not necessary to reach a final view on the balance of prejudice at such an early stage of Phase 2.

The correct starting point was to consider the nature, extent and timing of the proposed amendments. As the reformulated loss claims had passed the tests of real prospect of success and cogency, it would have been highly prejudicial to ENRC to refuse the amendments, and the timing of the applications to amend did not justify a significant discount to the weight to be given to that prejudice. Although the amendments were late, and there was no good reason for the lateness, they were made at the start of Phase 2 and before disclosure issues were determined. The Judge's understandable view that the problems would have been avoided if ENRC had corrected its loss pleading when earlier pressed by the defendants and invited by the Judge coloured his view of the timing of the amendments and the lack of sympathy that he gave to ENRC in this respect.

The next stage of the analysis was to consider whether the evidence showed that allowing the amendments would cause injustice to the defendants which outweighed the significant prejudice to ENRC if they were rejected. The Court of Appeal concluded that the Judge either did not consider or satisfactorily answer the right questions in this regard. Had the Judge approached the balance of injustice in the two stages identified by the Court of Appeal, it would have been clear that there was insufficient evidence of any prejudice to the defendants outweighing that caused to ENRC if the amendments were rejected. The correct approach was to allow the amendments but keep under review whether any subsequent failure to provide disclosure of the subsidiaries' documents rendered a fair trial impossible.

The Court of Appeal considered that the Judge's approach, in effect, treated a failure to place a litigation hold on documents as necessarily seriously prejudicial to the opposing party. However, a failure to comply with obligations of document preservation did not lead to an automatic barring sanction, and nor does it cause injustice unless and until it is established that disclosable documents had not been preserved with prejudicial effects.

In these circumstances, the Court of Appeal allowed the appeal.

Lakatamia Shipping Co Ltd v Su

[2025] EWCA Civ 1389

Freezing Orders – Babneft Proviso – Conspiracy – Judgment Debts – Jurisdiction

5 November 2025

The Court of Appeal considered an appeal against the dismissal of a claim for damages based on the dissipation of funds which were meant to be frozen under a worldwide freezing order.

The litigation in question had a long history. So far as was material to the appeal, the Court had made a worldwide freezing order (WFO) against one of the defendants (Mr Su) and various companies legally or beneficially owned by him and of which another defendant (Mr Chang) was director, back in 2011. In two judgments in 2014 and 2015, the Court entered judgment that Mr Su and his companies for c.US$47 million. Neither Mr Su nor any of his companies made any payment of this amount.

Mr Su was a director of a company called Cresta Overseas until May 2013. The Judge at first instance found that Mr Su was the beneficial owner of the company which owed two villas mortgaged to Barclays. By 2015, Cresta had defaulted on its mortgage and Barclays enforced its security. In April 2015, Mr Chang became a director of Cresta. On 30 September 2015, the claimant's Monaco lawyer wrote to the lawyers acting for Barclays, informing them of the WFO and that Mr Su appeared to have an interest in Cresta. The letter was copied to the third defendant in the case before the Court (Maitre Zabaldano), who was the lawyer for Cresta.

In October 2015, the claimant applied to intervene in auction/enforcement proceedings between Barclays and Cresta in Monaco. The claimant's application to intervene was rejected and the villas were sold for c.€65 million. Around €34 million was paid to Barclays, the remainder (c. €27 million) was paid to Maitre Zabaldano as the lawyer for Cresta.

On 21 February 2017, Mr Chang, upon the instructions of Mr Su, instructed Maitre Zabaldano to transfer all the remaining cash proceeds from the sale of the villas to UP Shipping, save for €200,000 that Mr Zabaldano was to keep as a retainer. UP Shipping was one of three companies of which Mr Chang was a director. It is in respect of this transfer that the claimant brought claims, namely claims for unlawful means conspiracy and inducement of breach of rights existing under a judgment (the 'Marex' tort).

At first instance, the Judge made several important findings:

- Maitre Zabaldano had made the transfer to UP Shipping upon Mr Chang's instruction, and upon receipt the monies were dissipated by UP Shipping;
- Mr Su was subject to the WFO and owed the judgment debt at the time of that transfer;
- Mr Su was the beneficial owner of the funds;
- The transfer of the funds was in breach of the freezing order; and
- If the funds had remained in Monaco, the claimant could have enforced against them upon the subsequent recognition of the judgments in Monaco

However, the Judge dismissed the claims against the defendants. The Judge dismissed the claim against Mr Chang because he was not satisfied that Mr Chang knew either that Mr Su was bound by the WFO or that he owed the judgment debt at the time he instructed Maitre Zabaldano to make the transfer. The Judge dismissed the conspiracy claim against Maitre Zabaldano on the basis that he had a defence based on the *Babneft* proviso in the WFO. He also dismissed the Marex tort claim because he considered that Maitre Zabaldano honestly believed that he was entitled to transfer the funds beyond the reach of the WFO, and so either the mental element of the tort was not satisfied or he had a defence of justification. As regards the conspiracy claim against Mr Su, since the Judge dismissed the conspiracy claim against the alleged co-conspirators, he dismissed the claim against Mr Su, who could not be liable for conspiracy on his own.

The Court of Appeal allowed the claimant's appeal. The Court of Appeal accepted that the Judge's conclusion of fact that Mr Chang did not know that Mr Su was bound by the WFO or that he owed the judgment debt at the time of the transfer was plainly wrong and could not stand. As regards Mr Zabaldano, the Court of Appeal concluded that the *Babneft* proviso in the WFO, which was in standard form used in the Commercial Court, did not afford a defence to liability for unlawful means conspiracy to a person outside the territorial jurisdiction of the English court, as the Supreme Court had so held in *JSC BTA Bank v Ablyazov (No.4)* [2018] UKSC 19. The Court of Appeal considered that it and the Judge were bound by this decision of the Supreme Court which the Judge wrongly sought to distinguish. The Judge was therefore wrong to hold that the *Babneft* proviso gave Maitre Zabaldano a defence. As a result of these conclusions, it followed that Mr Su was liable in conspiracy. The Court of Appeal therefore held that the conspiracy claim should have succeeded against all the defendants and allowed the appeal. This meant it was unnecessary to decide the alternative claim against Mr Chang and Maitre Zabaldano that they were liable for the Marex tort, and the Court of Appeal declined to do so.

Commercial Litigation

DIGESTED BY IMOGEN BELTRAMI

Grosvenor Property Developers Limited v Portner Law Limited

[2025] EWHC 2362 (Ch) (Saira Salimi (sitting as a Deputy High Court Judge))

Dishonest assistance – Breach of fiduciary duty – Dishonesty

24 September 2025

The Claimant was a company in liquidation bringing a claim acting by its joint liquidators against a law firm. The company had been established to develop the Grosvenor Hotel site into student accommodation in Bristol but went into liquidation after the fraudulent misappropriation of approximately £7 million of investment funds by its former directors. The Defendant had been instructed by one of these directors in relation to a series of property transactions and it was accepted that sums beneficially belonging to the Claimant (or their traceable proceeds) had been paid into the Defendant's client account and were used in three separate transactions. The total sum passing through the client account across these three transactions was £2,339,000.

The Claimant alleged that the Defendant, through a partner in the firm who worked on each of the transactions, dishonestly assisted in breaches of fiduciary duty by the Claimant's former directors, resulting in loss to the Claimant. The Defendant accepted that it was vicariously liable for the partner's actions but denied the claim primarily on the grounds that he did not act dishonestly.

In assessing dishonesty, the appropriate standard was accepted as that of an ordinarily honest solicitor with the same degree of skill and experience as the partner in question. The Court considered that the evidence showed that the partner was aware of the possibility that the relevant transactions could be a cover for dishonest activities and was willing to actively make false statements during dealings with lenders. Further, the partner failed to complete the client due diligence and money laundering checks that were required as a matter of firm policy (and Law Society guidance) when dealing with the transactions and accepted funds from sources that were not his client without any investigation in contravention of those policies. The foundation of the defence was that the partner's behaviour could be explained as *"sloppy"* but that he never had any suspicion the funds with which he was dealing were not his clients'. However, the Court did not find this defence credible, particularly in circumstances where the partner was an experienced property solicitor.

The Court confirmed that for dishonesty to be made out, it is not necessary for the individual in question to have had a suspicion of any specific wrongdoing. Instead, it is enough for them objectively to be *"aware of facts that would cause an honest individual to make further inquiries, and to fail to make those inquiries without a credible reason for that failure"*. It was held that the partner's behaviour showed a *"pattern of disregard for his obligations as a solicitor, and repeated turning of a blind eye to obvious causes of concern"*; that he was *"knowingly cutting corners in the carrying out of essential checks"* and that his behaviour demonstrated a *"reckless disregard"* for *"the source of the funds with which he was dealing"*. As such, dishonesty was made out and the claim for dishonest assistance in a misappropriation of the Claimant's funds succeeded.

The quantum of the claim falls to be assessed as part of any consequentials hearing if not agreed.

Rory Brown

Transworld Payment Solutions & Hunt v First Curaçao International Bank & Deuss

[2025] EWHC 2480 (Ch) (Leech J)

Fraudulent trading – Dishonest assistance – Provision of banking services – MTIC fraud – Limitation – Section 32 of the Limitation Act 1980

1 October 2025

Following a trial over March-May 2025, Leech J dismissed all the claims against FCIB and Mr Deuss brought by TWPS and its liquidator. Mr Deuss had been accused of dishonestly seeking to capture for a bank he owned, and was CEO of, (FCIB) the business of traders engaged in MTIC fraud and dishonestly causing a UK based marketing entity (TWPS) to assist in capturing that business. TWPS and its liquidator sought to recover over £280m in claims for dishonest assistance and fraudulent trading. Leech J dismissed these allegations entirely, considering the case *"obscure"*, *"speculative"*, *"highly* *artificial"* and *"an attempt to elevate an allegation of negligence into dishonesty".*

Leech J also rejected the Claimants' case that the Liquidators' decision not to take a limitation defence in respect of inbound claims into TWPS's estate was determinative. He held this decision was *res inter alios acta* and not legally relevant and that it was not reasonable for the Court to rely on that decision. In coming to this conclusion Leech J noted that the Liquidator's funding arrangement was *"by any standards extraordinary"*. Leech J noted that, while the claims were ostensibly brought for HMRC's ultimate benefit, HMRC would see almost none of the proceeds in the event the claims were successful, and the claims were primarily brought for the benefit of the Liquidator and his partners.

On the substance of the limitation defences, Leech J held that large parts of the claim were time-barred and rejected the Claimants' reliance on section 32 of the Limitation Act 1980. He held that a reasonably diligent liquidator would by 2007 have had sufficient information to plead a fraud claim against the Defendants. Leech J also held that the *General Rolling Stock* principle (that a limitation period ceases to run against a company in liquidation) has no application to companies in a foreign insolvency process. He also rejected the Claimants' argument that provisions of the Limitation Act 1980 could be disapplied by virtue of modified universalism.

The Claimants had alleged that Mr Deuss was a *de facto* or shadow director of TWPS. Leech J held that the Claimants had failed to make out their case that Mr Deuss was a de facto or shadow director of TWPS. The allegation that Mr Deuss was a shadow director was not properly pleaded and the allegation that he was a de facto director was not supported by the evidence. Leech J also found that the Claimants had failed to make out their case on large parts of the quantum claimed. He was critical of the failure to call expert evidence to explain and justify the quantum and felt bound to record that this failure had increased the time taken to produce the judgment considerably.

Leech J concluded that, even if the claims had been sustainable on their facts, they would, in any event, have been barred by the Curacao law principle of forfeiture of rights. He held that, given settlement agreements entered into in Curacao and the negotiations around them, the Claimants were acting in a manner which could not be reconciled according to standards of reasonableness and fairness in bringing the claims.

Paul Fradley

Matière SAS v ABM Precast Solutions Ltd

[2025] EWHC 1434 (TCC) (Alexander Nissen KC (sitting as a Deputy Judge of the High Court))

Good faith – Breach of contract – Causation **11 June 2025**

The case concerned a joint venture arrangement between the parties pursuant to which they had agreed to bid together as a joint venture subcontractor for a tunnel related project on the HS2 rail link. Matière SAS ("SAS") would design the tunnels and coordinate their practical installation whilst ABM Precast Solutions Ltd ("ABM") would manufacture the tunnels. The parties entered into a Consortium Agreement before later entering into a Collaboration Agreement the following year (the "Agreements"). Both of these contracts contained clauses with express good faith obligations. Ultimately the main contractor terminated its relationship with the joint venture and later opted to contract solely with SAS for the installation work and another contractor for manufacturing the tunnels.

SAS made a claim against ABM for sums due under the Consortium Agreement. ABM then launched a counterclaim which alleged that as a result of SAS' breach of duties of good faith during the bid process, ABM's chances of securing the subcontract went from *"virtually certain"* to *"nil or virtually nil"*. This loss of chance was assessed at 90% by ABM.

ABM alleged that SAS had breached the Agreements in various ways including by undermining ABM's choice of factory to the main contractor and searching for other potential options without ABM's knowledge, presenting about the project to a key competitor of ABM and entering into separate agreements with the main contractor.

The Court held that the Agreements imposed enforceable express duties of good faith upon the parties. In assessing the applicable principles, the Court considered that a duty of good faith requires parties to act honestly and not engage in conduct that would be considered *"commercially unacceptable to reasonable and honest people, even if not necessarily dishonest"*. However, the content of the duty will be conditioned by its context, including any more specific provisions in the relevant contract. Care must be taken not to use an open-ended obligation such as one of good faith to cut across such specific provisions. In addition, a duty of good faith may comprehend *"fidelity to the bargain between the parties or adherence to the spirit of the agreement where the common purpose and aims of the parties could be objectively ascertained".*

In analysing the duty in this case, the Court held that SAS had breached its duties of good faith under the Agreements through its conduct which was either dishonest or of a type that would be regarded commercially unacceptable to reasonable and honest people. It was held that SAS *"did not keep fidelity to the bargain it made with ABM and that its actions and that its actions had the potential to render that bargain worthless or significantly less valuable".*

Despite the conclusions reached on breach of good faith, the Court ultimately dismissed the counterclaim on the grounds of causation. Specifically, ABM failed to establish that the breaches of good faith caused

Altrad Investment Authority SAS and others v Peter D Protopapas and others

[2025] EWHC 2470 (Ch) (Marcus Smith J)

Private international law – Recognition – Foreign receivership appointments – Declarations of non-liability – Anti-suit injunctions – Interference with foreign proceedings

30 September 2025

After a 2-day hearing, Mr Justice Marcus Smith granted declaratory and injunctive relief in relation to claims being pursued by the First Defendant, Mr Peter D Protopapas, which Mr Protopapas was pursuing in the name of the "Cape Parties" against the Claimants (the "Altrad Group") in the courts of South Carolina (USA).

Mr Protopapas had brought claims in South Carolina as the purported receiver of the Cape Parties, appointed pursuant to an order of the South Carolina Court. Mr Protopapas alleged that the members of the Altrad Group (a group of companies which had acquired the Cape Group in 2017) had participated in an unlawful scheme to cause the Cape Parties to evade their asbestos related liabilities in the United States arising out of sales of asbestos by a former subsidiary company of the Cape Parties in the 1960s and 1970s. In November 2024, the High Court (Mr Justice Mann, "Mann J") granted the Cape Parties declaratory relief confirming that the Receivership Order could not be recognised and that it had no effect, with the result that the Cape Parties' directors remained in control. Mann J also granted injunctions restraining Mr Protopapas from continuing to hold himself out as the receiver of the Cape Parties ("the Mann Order"). The decision of Mann J was digested in the April 2025 edition of the Digest.

In breach of the Mann Order, Mr Protopapas did not comply with the injunctions and continued to pursue the South Carolina Proceedings in the name of the Cape Parties against the Altrad Group. In April 2025, and based on their ongoing authority to act for the Cape Parties declared in the Mann Order, the directors of the Cape Parties entered into a settlement agreement with the Altrad Group parties to settle and release any claims that might exist between them, including those claims advanced by Mr Protopapas in the South Carolina Proceedings ("Settlement Agreement"). The proceedings before Marcus Smith J were issued by the Altrad Parties to seek declaratory and injunctive relief in relation to this Settlement Agreement. The Cape Parties (acting by their directors) were joined as defendants, but consented to the relief sought and made submissions in support of it.

Following a hearing on 23 and 24 September 2025, on 30 September 2025 the Court handed down a judgment and made an order granting the relief sought. In relation to the Settlement Agreement, the Judge agreed that the directors of Cape had valid authority to enter into the agreement notwithstanding Mr Protopapas' purported appointment. The Judge therefore held that the Settlement Agreement was valid and binding between the parties, and further that he could identify "*no arguable basis*" for contending that it was not effective. The Judge was mindful that the declarations sought directly interfered with the proceedings before the South Carolina Court, but he held that they were nevertheless consistent with principles of judicial comity both in order to protect the private interests of the parties, but also in order to protect the integrity of the English Court's own jurisdiction in circumstances where Mr Protopapas was engaged in a collateral attack on the prior judicial findings of the English Courts in *Adams v Cape* [1990] 1 Ch 433.

Marcus Smith J therefore made declarations confirming that the Settlement Agreement was valid and binding, and that it had extinguished the claims and liability that were being asserted by Mr Protopapas in the South Carolina Court. The Court also made injunctions against Mr Protopapas, including a mandatory injunction requiring him to actively take steps to discontinue the proceedings in South Carolina.

William Willson

Angus Groom

Company Law

DIGESTED BY ANNABELLE WANG

Koza Altin İşletmeleri AŞ v Koza Ltd & Anor

[2025] EWHC 2304 (Ch) (Thompsell J)

Just and equitable winding up – Summary judgment – Deadlock

10 September 2025

Koza Altin sought summary judgment on its petition for the just and equitable winding up of Koza Ltd. Koza Altin owns 100% of the ordinary shares in the Company and is the sole shareholder with a right to vote at shareholder meetings and who is entitled to a dividend on a liquidation. Mr Ipek is the sole director of the Company and is registered as the holder of one A share in the Company which affords him no entitlement to vote or a distribution of more than £1, but to veto the removal of a director, block the appointment of any other director, and to block any resolution for the winding-up of the Company. Koza Altin and Mr Ipek have been engaged in a battle for control of the Company which has been ongoing since 2016 that has so far generated 25 applications to court, 17 hearings in the High Court, 4 hearings in the Court of Appeal, and one to the Supreme Court. Koza Altin's position is that the Company is deadlocked.

Thompsell J held that there was no obstacle in principle to the granting of summary judgment in favour of a winding up order on the just and equitable ground. He held that the Court needed to consider whether the matters Koza Altin relied on were made out to summary judgment and then whether as a matter of discretion it should exercise its discretion to make a winding up order. He rejected arguments that summary judgment was inappropriate to make a winding up order on a summary basis and that this was a developing area of law.

Thompsell J was critical of expert evidence relied on by Mr Ipek to demonstrate that his A share gave him an economic interest in the Company. However, he held that he did not need to reach a concluded view as it was enough for him to recognise that Mr Ipek's A share had a nuisance value or ransom value of some amount well in excess of £1; it also has a value in the hands of Mr Ipek (if not anyone else) in securing his ability to earn a salary from Koza Ltd.

The Judge went on to consider whether there was a situation of deadlock on the facts. Prior to the first day of the hearing, Mr Ipek was refusing to recognise the authority of the directors of Koza Altin to cause it to exercise its rights as a shareholder. On the first day of the hearing Mr Ipek offered to provide an undertaking to recognise the directors authority in respect of acting as shareholder of the Company. Thompsell J concluded that prior to this change in position the argument that there was deadlock was a strong one. He considered that the just and equitable case law ought not to be viewed in particular silos. The situation was an entirely unusual one in which there is no deadlock at shareholder level (Koza Altin holds all the votes) and no deadlock at board level (Mr Ipek is the sole board member), but there was clear deadlock between the shareholders and the Board. The situation in his view had become an insupportable position.

However, Mr Ipek's decision to recognise Koza Altin's directors' authority had changed matters somewhat. It was now open to Koza Altin to exercise its shareholder reserve powers under Article 4 of the Company's Articles to pass a special resolution directing Mr Ipek to take, or refrain from taking, action. Mr Ipek had raised arguments that special resolutions need not be complied with because they were contrary to the best interests of the company or unfairly prejudicial to his rights as an A shareholder. While not determining these objections, Thompsell J was sceptical of them. Accordingly, the Judge held that special resolutions under Article 4 would provide an alternative method of breaking the deadlock, but that if he was wrong about this then the issue of deadlock would need to be revisited.

Thompsell J rejected Mr Ipek's argument that Koza Altin was unreasonably refusing an alternative offer – it could not be said to be unreasonable to rely on its own legal advice and preferring not to risk breaking the criminal law in Turkey. He also rejected Mr Ipek's argument that Koza Altin was acting for a collateral purpose. There was no collateral purpose; Koza Altin was simply seeking to achieve the winding up of the Company. Insofar as it was alleged that Koza Altin was seeking to advance political aims, this was a question of motive which was irrelevant on the petition. Thompsell J also rejected the argument that seeking the winding up of the Company could amount to an attempt to expropriate Mr Ipek's assets.

Paul Fradley

East Riding of Yorkshire Council v KMG SICAV-SIF-GB Strategic Land Fund

[2025] EWCA Civ 1137 (King, Nicola Davies and Snowden LJJ)

Unregistered companies – Investment funds - Associations – Compulsory winding-up **3 September 2025**

The Court of Appeal was required to consider whether a *"dedicated fund"* of a Luxembourg specialised investment company was an *"unregistered company"* within the meaning of section 220 of the Insolvency Act 1986 which was capable of being wound up by the court under section 221 of the 1986 Act.

The dedicated fund was operated by a Luxembourg company, which offered investments relating to one or more of its funds to institutional investors. The dedicated funds were not separate legal entities, but separate portfolios of assets owned by the company and managed by it in accordance with a specific set of investment objectives. When investors invested in a dedicated fund, they were allotted shares in the company of a specific class corresponding to the dedicated fund. The rights of the shareholders against the company were limited to the assets of the corresponding dedicated fund.

The relevant dedicated fund had experienced financial difficulties and the board of directors of the company resolved in February 2019 to conduct a liquidation of all shares of the fund and to appoint a liquidator thereto.

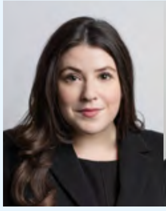
In May 2021, the East Riding of Yorkshire Council, which had invested in the relevant fund, presented a winding up petition to the Companies Court for the compulsory winding up of the fund under the 1986 Act on the grounds that it had ceased to carry on business or was carrying on business only for the purpose of winding up its affairs. The Council was granted permission to amend the petition to allege that, although the fund did not have separate legal personality, it was an unregistered company which could be wound up pursuant to sections 220 and 221 of the 1986 Act.

At first instance, Deputy ICC Judge Kyriakides rejected the Council's argument that, although the dedicated fund was not a company or association within the meaning of section 220(1) of the 1986 Act, it was nevertheless a type of structure that had similarities to both, and Parliament must therefore have intended that it should fall within the scope of the section. The Judge also held that, if she was wrong on this point, the dedicated fund was not the type of entity that Parliament could have intended should be wound up as it lacked key characteristics, including separate legal personality and the capacity to contract.

On appeal, the Council argued that the Sub-Fund was an association, or that it was sufficiently similar to an association or a company that it fell within the scope of section 220(1). Richard Smith J rejected this argument, agreeing with the conclusion of Deputy ICC Judge Kyriakides.

The Court of Appeal upheld this decision. Snowden LJ concluded that to fall within the scope of section 220(1), an association must be comprised of persons who have some substantive legal relationship with each other, rather than persons who are connected for purely social or personal reasons or who share a common interest. As the essential nature of the winding up process is a means of collective enforcement of debts, it was axiomatic that the property that is subject to the process must be property which belongs to the association or to which the association is entitled. The relevant creditors must be creditors of the association, and the persons to whom a surplus may be distributed must be persons who have such entitlement as against the association.

The dedicated fund was not an association within the scope of section 220(1) as it was not a body whose existence was founded on contractual obligations undertaken by members between themselves but was simply a collection of assets owned and managed and dealt with by the Luxembourg investment company. The investors had no direct property rights in or over the assets comprising the fund. Their only rights were rights against the company and against each other as shareholders of the company. The process of winding up by the court could not be applied to the fund, as it was not a debtor and did not have creditors. If there was any body to whom the winding up process under the 1986 Act could be applied, it would be the company and not the fund.




Corporate Insolvency

DIGESTED BY CHARLOTTE WARD AND ANGUS GROOM

Re SWS Holdings Limited; Re Greensands Financing plc

[2025] EWHC 2690 (Ch) (Richards J)
Scheme of arrangement - Part 26

9 October 2025

On 9 October 2025, Mr Justice Richards sanctioned two inter-conditional schemes of arrangement under Part 26 of the Companies Act 2006 relating to the Southern Water group. The schemes are intended to facilitate an equity injection of up to £1.2 billion of new equity capital into the group.

The first scheme was proposed by SWS Holdings Limited (the "OpCo Scheme Company"), which forms part of the 'whole-business securitisation' corporate sub-group of Southern Water (the "OpCo Scheme"). The OpCo Scheme's limited purpose was to remove a "hair-trigger" event of default from the finance documents, which was thought to create excessive uncertainty and expose the WBS group and its creditors to unnecessary risk.

The second scheme was proposed by Greensands Financing PLC (the "MidCo Scheme Company"), which forms part of the MidCo corporate sub-group (the "MidCo Scheme") and acts as a holding company raising finance for the benefit of the WBS group. The MidCo Scheme's purpose was to amend and extend c. £400 million of the MidCo group's financial indebtedness.

The schemes enjoyed very strong support. The OpCo Scheme commanded near unanimous support from the four classes of its scheme creditors, whilst the MidCo Scheme was approved unanimously by its scheme creditors voting in a single class. One MidCo Scheme creditor which had reserved its position to oppose that scheme at the convening hearing ultimately voted in favour.

Hearing the sanction applications in respect of the OpCo Scheme and the MidCo Scheme concurrently, Mr Justice Richards sanctioned both schemes. His judgment contains interesting discussion as to:

- the use of deeds of contribution in this context;
- the approach the court takes when the commercial effectiveness of a scheme is subject to conditions; and
- the effect of a unanimous vote on both the court's jurisdiction and the exercise of its discretion to sanction.


Daniel Bayfield KC


William Willson


Ryan Perkins


Edoardo Lupi

Re SWS Holdings Limited; Re Greensands Financing plc

[2025] EWHC 2318 (Ch) (Richards J)

Scheme of arrangement – Part 26 – Convening hearing – Inter-conditional schemes – Jurisdictional roadblocks – Deed of contribution – Class composition

2 September 2025

In this decision the Court made convening orders for two inter-conditional schemes of arrangement relating to different parts of the group of companies that carries on the "Southern Water" business of water supply and sewerage services. These two schemes are the "SWS Scheme" relating to debt issued by parts of the operating businesses, and the "MidCo Scheme" relating to debt issued by parts of the broader group that sit above the operating businesses and which are largely dependent on the financial wellbeing of those businesses for their own viability (as an "outcome taker").

The operating company had concluded that it was not in a position to comply with its regulatory obligations without the injection of new money, and whilst this injection had been agreed in principle from the sponsor entities who ultimately own the group, this was conditional on various amendments and extensions to group debt, which the SWS Scheme and the MidCo Scheme sought to achieve. In broad outline, the two schemes were *"amend and extend"* schemes that did not compromise any liabilities, but which instead provided for extensions of maturity and for removal of certain kinds of event of default.

The Court considered the familiar questions that need to be considered at a convening hearing: the jurisdictional conditions and any roadblocks; the adequacy of notice of proposed meetings; the correct constitution of classes; practical arrangements for meetings; and the sufficiency of the proposed explanatory statements.

The only jurisdictional point that the Court considered in substantial detail was the use of a deed of contribution whereby the scheme companies had assumed liability for obligations of certain operating and borrowing entities so as to enable it to be the scheme company in relation to the SWS Scheme—and where the scheme also provided for the release of the liabilities owed by the underlying operating and borrowing entities. The Court concluded that the technique had been used similarly in *Re Swissport Fuelling Limited* [2020] EWHC 3413 (Ch) and that at the convening hearing stage the issue could be dealt with by concluding that this did not present a jurisdictional roadblock.

For the purposes of considering class composition, the Court accepted that the relevant comparators would be likely to involve either formal insolvency processes of relevant parts of the group or alternatively other deals of arrangements which would substantially erode the value in the group. The Court accepted the submissions that there should be four classes within the SWS Scheme (in relation to the 32 debt instruments impacted by the scheme) and a single class within the MidCo Scheme (where there were two debt instruments). The Court placed particular importance on the guidance in the case law that stressed the importance of avoiding an unnecessary proliferation of classes. Whilst there were differences in rights in and rights out within some of the classes, these were not so great such that it was impossible for members of each class to consult together, and so the proposed class composition was accepted.

The Court also considered the adequacy of notice, the draft explanatory statement and the proposed terms of the convening order (including the arrangements for meetings)—none of which presented any issues—and accordingly the Court convened the meetings of creditors in relation to both the SWS Scheme and the MidCo Scheme. The Court also made case management directions to allow for one potentially opposing creditor to outline any objections and provide evidence in support of those objections in advance of the sanction hearing.

Daniel Bayfield KC

Joseph Curl KC

William Willson

Ryan Perkins

Edoardo Lupi

Re Waldorf Production UK Plc [2025] EWHC 765 (Ch) (convening)

[2025] EWHC 765 (Ch) (convening) **5 March 2025**
[2025] EWHC 2181 (Ch) (sanction) **19 August 2025**
[2025] EWHC 2297 (Ch) (leapfrog appeal to the Supreme Court) **9 September 2025**
Restructuring Plan – Part 26A – Sanction Hearing – Cross-Class Cram Down – Grounds of Opposition – Fairness – Relevant Alternative

The Plan Company Waldorf Production UK Plc ("Waldorf") is an oil and gas producer primarily operating in the North Sea. It proposed a Part 26A Restructuring Plan (the "Plan") to manage its heavy debt burden having suffered from macro-economic stress in the energy markets.

The Plan concerned:

1. US $120 million secured bonds;

2. US $75 million in tax liabilities owed to HMRC under the Energy Profits Levy; and

3. US $29.5 million owed to Capricorn Energy Plc and its subsidiary, Capricorn Energy UK Limited (together, "Capricorn"), a former shareholder of the Waldorf in relation to a previous M&A transaction.

The Court convened meetings for two classes of creditors (1) the secured bondholders and (2) HMRC and Capricorn as unsecured creditors.

The Plan proposed to extend the maturity of the bonds by 2 years (with some other amendments to the bond terms) and to compromise HMRC and Capricorn's claims for a 5% cash payment (with an additional capped upside mechanism).

The Plan did not impact the position of the equity notwithstanding that part of Waldorf's difficulties arose in part from a US $76 million dividend paid out to shareholders in October 2022 (based on management accounts later shown to have contained omissions) and from a mid-2024 refinancing which increased Waldorf's secured indebtedness by c.US $56 million.

The bondholders voted unanimously in favour of the Plan. HMRC and Capricorn objected both to the substantive terms of the Plan and to the manner in which the plan had been constructed—without meaningful engagement or negotiation with them.

The Court considered whether the cross-class cram down jurisdiction (s.901G of the Companies Act 2006 ("CA06") should be exercised to sanction the Plan notwithstanding the objections of the unsecured creditors.

As to Condition A on the relevant alternative (s.901G(3) CA06), the Court accepted Waldorf's expert evidence that the most likely relevant alternative was a distributing administration or liquidation, rejecting HMRC and Capricorn's contentions that it would instead be a different plan under which they would receive a higher amount. Waldorf had never explored the possibility of a negotiated outcome with all creditors, and the Court accepted that the bondholders driving the Plan would not have consented to this option. Further, the alternative plan was too nebulous. The Court noted that the relevant alternative must be *"sufficiently clear, certain and defined for the purpose of satisfying its function in the statutory scheme. An inchoate alternative, even though it may be likely to be achieved, has not the characteristics required."*

It was common ground that the unsecured creditors would be worse off in an insolvency process and therefore Condition A was satisfied.

Condition B (s.901G(5) was also satisfied because there was an assenting in the money class.

Fulfilment of the jurisdictional gateways aside, the Court had to consider whether it would also, as a matter of its discretion, exercise the cross-cram down jurisdiction. Following the "trilogy" of recent Court of Appeal decisions *(Adler, Thames Water, and Petrofac)*, it is now established that this requires a case-specific assessment of fairness, including consideration of (1) the horizontal comparison between the classes of the allocation of benefits preserved or generated by the plan (2) the position of out-of-the-money creditors, (which may warrant more than de minimis consideration under the plan); and (3) the nature and extent of stakeholder engagement since a Part 26A Plan was to be utilised where cooperative bargaining had failed.

As to the horizontal comparison, the Court noted that the Plan aimed to rescue the company as a going concern (in order to enact a solvent sale) and would therefore be distinguishable from a plan which sought a solvent wind-down of the business. If the Plan was sanctioned, Waldorf would gain positive value from extinguishing HMRC's and Capricorn's debts. This was contrasted to the bondholders who would be kept whole, only agreeing to adjust the maturity of the debt along with certain other terms.

The 5% payment to the out-of-the-money unsecured creditors was deemed to be arbitrary being nether the product of negotiation nor supported by an affordability analysis that the court could test. There had been no meaningful pre-launch engagement with the unsecured creditors. Subsequent exchanges were limited and conducted by Waldorf on the (now proven false) premise that the unsecured creditors need only receive a de minimis uplift over the relevant alternative (c.f. *Virgin Active).*

The burden of establishing that the plan proposed was fair rested squarely on Waldorf and it was difficult to discharge that burden where there had both been no negotiations with the unsecured creditors and no explanation as to why not. Waldorf failed to present sufficient evidence to show why the 5% payment (with capped upside) represented a fair and commercially reasonable share of plan benefits for the unsecured creditors when those benefits were derived largely from the elimination of their claims.

The Court therefore declined to sanction the Plan.

Leapfrog Appeal to the Supreme Court

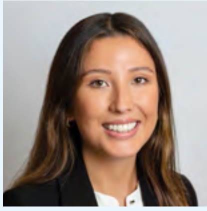
The Judge subsequently granted a certificate under s12 Administration of Justice Act 1969 for permission to 'leapfrog' an appeal to the Supreme Court.

The appeal raised an important question of law question as to whether fairness to out-of-the-money creditors is to be assessed by reference (a) simply to their treatment in the relevant alternative (as suggested in *Virgin Active*) or (b) to what those creditors, properly informed, would fairly and reasonably expect to be paid to compromise their claims so as to enable the restructuring (with its concomitant benefits) to be accomplished, if sanctioned by the Court.

In granting the certificate, the Judge also highlighted the importance of the Part 26A regime both as part of the domestic restructuring toolkit and as part of the attractiveness of the jurisdiction to foreign entities.The Supreme Court has granted the request and ordered that the appeal process be expedited with abbreviated deadlines for all intermediate steps, aiming for a hearing in January or February 2026.

Daniel Bayfield KC

Charlotte Cooke



Annabelle Wang

Jon Colclough

Matthew Abraham

BTI 2014 LLC v O'Connell

[2025] EWHC 2115 (Ch) (Simon Gleeson (sitting as a Deputy High Court Judge))
Removal of Administrators – Conflict of Interests – Proofs of Debt **7 August 2025**

The applicant creditors of a company in administration applied to remove the joint administrators ("JAs") due to a conflict of interest. In April 2024, the JAs issued proceedings to recover shares that the company's directors had transferred from the company in 2017 and 2018. The applicants discovered that the directors intended to defend the recovery claims on the grounds that they had relied on advice from one of the JAs ("C") that the share transfers were permissible and applied to remove on the grounds of conflict. The JAs cross-applied for the appointment of conflict administrators; and disputed that the applicants were creditors of the company. Held, granting the application, that the applicants had shown that there were good grounds for them to suspect that the JAs' conduct of the administration going forward would be affected by considerations other than those of the best interests of the creditors; that the JAs' conduct had been sufficiently far outside what might ordinarily be expected as to justify the applicants' concerns; that since the majority of creditors had legitimate concerns about the JAs' conduct, there was a good prima facie case that they should be replaced; and that while the JAs' removal might damage their reputation, that was not a reason to refuse to remove them where good cause was shown. Held, dismissing the cross-application, that the question was whether the conflict could be managed through the appointment of conflict administrators; that the primary function of the conflict administrators would be to conduct the recovery claims against the directors, which might also include whether the company had any claims against C; and that it would be wholly improper for the existing administrators to have any involvement in such claims until they had been determined or settled. Given the irrational positions which the administrators had taken over the applicants' proofs of debt, the role of adjudicating those proofs should also be conducted by the conflict administrators. Accordingly, the appointment of conflict administrators would not provide a satisfactory solution (*Sisu Capital Fund v Tucker* [2005] EWHC 231 (Ch) applied).


Barry Isaacs KC


Lloyd Tamlyn


William Willson

Re Standard Profil Automotive GmbH

[2025] EWHC 2313 (Ch) (Meade J)
Scheme of Arrangement – Part 26 – Restructuring – Sanction Hearing – New Money – Recognition of English Restructuring Proceedings **9 September 2025**

On 9 September 2025, Mr Justice Meade sanctioned a scheme of arrangement proposed by Standard Profil Automotive GmbH, the German holding company of a leading supplier of vehicle sealing solutions pursuant to Part 26 of the Companies Act 2006.

This followed a judgment handed down on 29 July 2025 by Mr Justice Richard Smith allowing the Company to convene a single class of creditors.

The scheme involved the cancellation of indebtedness under the company's existing notes in exchange for a share of reinstated senior notes as well as the provision of €145 million of new money funded by way of new super senior notes. All creditors were offered the opportunity to participate (in *pro rata* share to their existing debt) in the new money funding, which Meade J approved, citing his earlier judgment *Re ED&F Man Treasury Management Plc* [2020] EWHC 2505 (Ch) as being fair on the basis that the elevation of the new money instrument incentivised participation, and was fair if all creditors had equal opportunity to participate in providing it. Judicial scrutiny over the elevation mechanics in recent cases brought under Part 26A restructuring plans (c.f. *Petrofac* and *Adler*) were not warranted for schemes of arrangement, particularly ones which, as in the present case, generated a very high level of support across the class of creditors, especially where such support came from those both within and without the ad hoc group that had originally negotiated the terms of the scheme with the scheme company.

Further, the Judge held that the scheme was (reasonably) likely and/or had a realistic prospect (as the test is various stated) in being afforded recognition in Germany on the basis that the scheme company had changed the governing law of the documents to English law and had selected an English court exclusive forum. Amongst other grounds, this allowed for recognition in Germany pursuant to article 8 of the Hague Convention 2005 on Choice of Court Agreements (**HCC**). This gave the German court a realistic route to recognition notwithstanding the recent preliminary judgment of the Frankfurt Court in *Aggregate* declining to recognise a Part 26A plan.


Adam Al-Attar KC


Charlotte Cooke

Marcel Albert (also known as Marc Mysterio) v Amazon Digital UK Ltd (ex tempore, unreported)

(Chief ICC Judge Briggs)
Restraint of presentation of winding up petition – Abusive proceedings – Indemnity costs **21 May 2025**

Marcel Albert, a self-described actor/DJ/producer/boxer also known as Marc Mysterio ("Mysterio") threatened to wind up Amazon Music ("AM") based on an alleged debt said to arise from the streaming of his music on the AM platform. At a hearing before Deptuy ICC Judge Cheryl Jones in January 2025, a permanent injunction was granted preventing Mysterio from presenting a petition on the basis that AM had *"clear and substantial defences"* to the claimed debt, not least because there was no contractual relationship between Mysterio and AM – the business relationship being conducting through both Mysterio and AM contracting with a third party distributor.

In the intervening period between AM's application for the injunction (the "Application") and its hearing, Mysterio issued an application seeing to *"strike off"* the Application under CPR r.3.4(2)(a), (b) & (c) and/or grant a civil restraining order under CPR 3.4(6)(a) & (b) and to remove the *"confidential status"* of the case – it being the practice of the ICC to list all cases seeking an injunction to restrain presentation or advertisement of petitions as "Re A Company" – until the Judge has decided whether or not the matter should become public by way of presentation or advertisement – (the "Strike Off Application").

The Strike Off Application came alongside correspondence from Mysterio seeking to adjourn, cancel or suspend the hearing of the Application. However Mysterio failed to appear at the Hearing of the Application and failed to exercise his liberty to apply to vary or discharge the Order granted by Deputy ICC Judge Jones.

The Strike Off Application was dismissed by Chief ICC Judge Briggs and AM was awarded its costs on the indemnity basis. The Judge held, in particular, that *"the court does not conduct litigation through correspondence and does not have the ability to process and respond to streams of e-mails and letters prior to a hearing."* The overwhelming provision of material, including the citation of more than 60 authorities (without providing any copies of them nor citing any basis for what proposition those authorities were said to support), as well as the proliferation of *"unsustainable, unparticularised and unsupported allegations"* against AM and its solicitors were cause for AM to be awarded its costs on the indemnity basis.

Rory Brown

Re Madagascar Oil Ltd

[2025] EWHC 2129 (Ch) (Richard Smith J)
Restructuring plan – Part 26A – Sanction hearing – Cross-class cram down – Grounds of opposition – Relevant alternative – Fairness – International effectiveness **15 August 2025**

This decision contains the Court's reasons for sanctioning the restructuring plan proposed by the plan company (Madagascar Oil Limited, "MOL") in relation to itself and its subsidiary (Madagascar Oil S.A., "MOSA").

The Court had previously made an unusual convening order ([2025] EWHC 1015 (Ch)) for meetings of only two creditors in separate classes: 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. 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.

BMK and Outrider each formed their own class and, as anticipated, BMK had voted in favour of the plan and Outrider had voted against it.

At the convening hearing, the Court ordered a case management conference to consider what grounds of objection the opposing creditor Outrider would be permitted to argue at the sanction hearing, and the Court treated these grounds of objection as a pleading to which Outrider was committed and by reference to which the Court conducted its analysis at the sanction hearing.

Outrider had been permitted to argue the following four grounds of objection: the correct relevant alternative, whether BMK was actually in the money under the correct relevant alternative, the fairness of the plan, and the plan's international effectiveness.

In relation to the relevant alternative, it was common ground that the relevant alternative was a liquidation of the plan company. The plan company's position was that the most likely outcome in the relevant alternative was a sale of the shares in MOSA to BMK. Outrider suggested two possible alternatives of either a sale of MOSA to Outrider or of putting MOSA into liquidation. The Court concluded that these alternatives were insufficiently certain or concrete and concluded that the true relevant alternative was as BMK and the plan company proposed. Outrider's ground of objection based on the relevant alternative therefore fell away, together with the related ground of objection based on whether or not BMK was in the money under its own relevant alternative (as if BMK had not been in the money, BMK could not be a cramming class for the purposes of condition B within section 901G).

The Court then considered Outrider's objection based on the fairness of the plan. This was the first occasion where the Court had taken into account to guidance given by the Court of Appeal in relation to the *Petrofac* restructuring plan, where the Court had reiterated among other things: that the burden of proof was on the plan company to show fairness including in relation to the terms of any new money; that the Court should enquire into whether any fairer terms for the plan were available instead; and that the proper use of the cross-class cram down power is to enable a plan to be sanctioned against the opposition of those unreasonably holding out for a better deal, where there has been a genuine attempt to formulate and negotiate a reasonable compromise between all stakeholders.

The Court concluded that the plan company had satisfied the burden on it. The Court considered the greater possible benefits available to BMK under the plan, but concluded that these were commensurate to the additional resources that were being put in and to the additional risk that BMK would bear through the restructuring process. The Court considered whether a better plan might have been available but concluded that a better deal was not realistically available and indeed that Outrider was adopting the position of an unreasonable hold out creditor seeking to "kick the can down the road" in the hope of extracting a better offer, but where such conduct had in fact meant the possibility of any viable alternatives was increasingly remote. The Court therefore dismissed the ground of objection based on fairness.

Finally, the Court considered international effectiveness. The Court considered expert evidence in relation to both Mauritian and Malagasy law, and the parties were in opposition in relation to the prospects of the plan being recognised in relevant jurisdictions overseas. The Court noted, however, that it does not have to resolve all of these issues at a final level. Instead, it is only necessary for the plan company to show a real prospect of recognition such that the Court has credible evidence to justify the conclusion that it will not be acting in vain. The Court concluded that this hurdle was met, such that international effectiveness was not a valid basis to oppose the sanction of the plan.

After having disposed of the grounds of objection mounted by Outrider, the Court reviewed the requirements for sanction derived from the statute and the case law, and concluded that it should exercise its discretion by sanctioning the plan.

Mark Phillips KC

Charlotte Cooke

Matthew Abraham

Re River Island Holdings Ltd

[2025] EWHC 2276 (Ch) (Sir Alastair Norris)

Restructuring plan – Part 26A – Sanction hearing – Landlords – Cross-class cram down **4 September 2025**

This decision relates to the Court's sanction of a restructuring plan proposed as part of a broader "Transformation Plan" in relation to the well-known clothing retailed River Island.

The plan involved the secured finance creditor extending existing facilities and providing new money by means of a new revolving credit facility, various proposed modifications and releases to the terms and claims of different categories of landlord creditors, and the release of other unsecured creditors. The landlords and other unsecured creditors were to be instead given a payment of 200% of their estimated return in an administration as well as the right to participated in a "Profit Share Fund". Relevant landlords were also offered a break right.

The Court noted that this was a relatively common kind of restructuring plan proposed in relation to companies with substantial landlord liabilities, and that whilst there was no active opposition by any creditor at the sanction hearing it was nevertheless necessary for the Court to be satisfied that the jurisdiction was being used properly and conscientiously.

The Court noted in particular that the terms of the funding being provided by the secured creditor were in fact more favourable than was likely to have been available on the market, and that the plan company's proposed relevant alternative of an administration should be accepted as in line with the commercial realities that the group faced.

As certain landlord classes had not voted in favour of the plan (or had not voted in favour of the plan by the necessary statutory majorities), it was necessary to consider the exercise of the cross-class cramdown power in relation to these classes.

Whilst the Court accepted that there was differential treatment between different landlords and between different groups of other creditors, it was accepted that the differential treatment was objectively justified by the different contributions (past, present and future) to the group's financial difficulties and to its intended transformation. The Court also noted the careful methodology that had been used to divide landlords into different categories.

Finally, the Court considered the position of excluded creditors and shareholders, whose differential treatment was also justified by the valuable contributions that both groups would make to the implementation of the plan and to the future operation of the group's business.

In all of the circumstances, the plan was a genuine attempt to bridge a funding gap whilst an operational restructuring could be implemented, and the plan was therefore sanctioned.

Matthew Abraham

Re Monneo Ltd

[2025] EWHC 2818 (Ch) (HHJ Davis-White KC)
Payment and Electronic Money Institutions – Special Administrations – Distribution Plans

16 October 2025

The joint special administrators ("JSAs") of an insolvent authorised payment institution asked the Court to approve a distribution plan and to set hard bar date after which claims would be shut out. The company ceased carrying on business and it was discovered that there was a shortfall in its accounts of over €8.8 million. The JSAs were obliged to pursue the primary statutory objective of returning relevant funds to customers. They had taken extensive steps to recover funds from overseas banks and had recovered assets from subsidiaries and the company's sole shareholder. The result was that they had recovered over €18 million in respect of customer claims of over €25 million. The Court was satisfied was satisfied that the distribution plan was fair and that the costs reserve was fair and reasonable to meet the anticipated costs (*Re Xpress Money Services Ltd (In Special Administration)* [2023] EWHC 1120 (Ch), [2023] 2 WLUK 640 and *Kicks v MLS-Multinational Logistics Services Ltd* [2025] EWHC 1958 (Ch), [2025] 7 WLUK 571 applied). The Court was satisfied that the hard bar date was an integral part of the plan and had to be separately approved by the court (*Re Sova Capital Ltd* [2023] EWHC 2690 (Ch), [2023] 10 WLUK 378 considered). The Court was satisfied, that the JSAs had taken all reasonable measures to identify and contact persons who might be entitled to the return of relevant funds, and that, if a hard bar date was set, there was no reasonable prospect that the JSAs would receive claims for the return of relevant funds after that date. The hard bar date would be triggered by the JSAs when they were satisfied that there were no further assets to get in – and therefore it was appropriate to set it prospectively.

William Willson

Re Argentex LLP (In Special Administration)

[2025] EWHC 2625 (Ch) (ICC Judge Agnello KC)
Special Administrations – Administrations – Administration Expenses

15 October 2025

This case concerned an application for directions by the Special Administrators of Argentex LLP ("Argentex") in connection with the proposed close out of Argentex's trading book.

Argentex was placed into special administration on 21 July 2025. Its business included the provision of foreign exchange services. The trading book comprised contracts for foreign exchange derivatives (forwards and options) that Argentex had written for its customers. As at August 2025, the trading book included a total of 3,346 open transactions for 302 customers.

After the Special Administrators concluded that a sale of the trading book was not possible, they considered that it would be desirable, if contractually entitled to do so, for Argentex to close out the contracts that make up the trading book and pursue the debts which would arise on any close out.

The Special Administrators sought directions from the Court as to whether: (i) their proposed course action would create any liabilities as an expense of the administration (the "Expense Question"); and (ii) Argentex was entitled to close out the contracts which made up the trading book (the "Termination Question").

In relation to the Expense Question, the Judge held that the Special Administrators would not be incurring any liabilities as an expense of the special administration by: (i) not performing the contracts which made up the trading book as they reach maturity following the appointment of the Special Administrators; or (ii) closing out the customer contracts that make up the trading book.

As to non-performance, it is well established that 'doing nothing' does not create a liability as an expense of the administration. As to close out, whilst close out involved a positive step being taken by Argentex under the terms of the contracts (an election to close out) that did not lead to any liability as an expense. At its highest, the ability to exercise the closing out may enable the Special Administrators to pursue what they consider are debtors of the firm for a precise crystallised sum. That did not fall within the scope of the *Lundy Granite* principle and create a "super priority" expense claim in relation to any unsecured creditor's claims arising against Argentex on close out of an "in the money" contract.

Richard Fisher KC

Marcus Haywood

Personal Insolvency

DIGESTED BY RABIN KOK

Re Jones

[2025] EWHC 2652 (Ch) (ICC Judge Jones, sitting in retirement)

Centre of Main Interests — Annulment

16 October 2025

In this case the *trustees* in bankruptcy of a bankrupt, rather than the bankrupt, applied to annul the bankrupt's bankruptcy. A bankruptcy order had been made against the bankrupt on a debtor's petition, where (after a review) the bankrupt established that his COMI was in England & Wales rather than Austria. Subsequently, the trustees sought to recognise the English bankruptcy in Austria, which the bankrupt resisted on the grounds that his COMI was, in fact, in Austria and had always been there.

The trustees applied to annul the bankruptcy order under section 282(1)(a) of the Insolvency Act 1986. The first issue was whether a trustee had standing under section 282(1)(a). The bankrupt argued they did not, given that the trustee's function is stated to be the realisation and distribution of assets and given that various provisions of the Insolvency Rules provide for service of the papers for an annulment application on the trustee.

The Court concluded that these provisions did not denude the trustee of standing to apply for an annulment – if such a course was in the interests of creditors, they had a legitimate interest in seeking an annulment order and had standing to do so.

The Court went on to conclude that the bankrupt's COMI was and always had been in Austria. Pending the making of a final order, the application was adjourned for the trustees to file and serve further evidence.

Vesnin v Queeld Ventures Ltd

[2025] EWCA Civ 951 (Coulson, Snowden and Falk LLJ)

Bankruptcy petitions – Jurisdiction – Residence

22 July 2025

This case concerned, amongst other question, whether a foreign bankrupt or corporation has any standing to appear and oppose a common law recognition application in respect of the foreign insolvency proceedings to which they are subject.

Mr Vesnin applied to recognise the Russian bankruptcy of a corporation, Q&M, of which Mr Vesnin was the Russian trustee in bankruptcy. At first instance, Chief ICC Judge Briggs (sitting as a High Court Judge) held that Q&M had no standing to oppose Mr Vesnin's common law recognition application in respect of Q&M's own bankruptcy.

The Court of Appeal allowed Q&M's appeal. A recognition application was a gateway to the Court recognising a foreign proceeding and asserting property rights in or managing the assets of the individual or company which is the subject of the foreign proceeding. That was so whether or not there was a surplus in the foreign proceeding – restricting the right of a foreign bankrupt or corporation to oppose recognition to cases in which there is likely to be a surplus in the foreign proceeding would, the Court of Appeal held, beg the question of whether the foreign proceeding should be recognised in the first place.

The decision substantially aligns the test for standing in recognition applications at common law with the test for standing in recognition applications under the Cross Border Insolvency Regulations 2006, where Article 17(4) of Schedule 1 allows 'a person affected by recognition' to apply to modify or terminate a recognition order made under the CBIR.

Daniel Bayfield KC

Property and Trusts

DIGESTED BY PETER BURGESS

National Iranian Oil Company v Crescent Gas Corporation Limited

[2025] EWCA Civ 1211 (Sir Julian Flaux C, Falk and Zacaroli LJJ)
Company law – Trusts – s53(1)(b) Law of Property Act 1925 – s423 Insolvency Act 1986 **30 September 2025**

This was a claim under section 423 of the Insolvency Act 1986 brought by Crescent Gas Corporation Limited ("CGC") against the National Iranian Oil Company ("NIOC"). CGC had succeeded in an arbitration against NIOC arising out of a long-term gas sales and purchase agreement.

CGC had sought to enforce the award and register an interim charging order against a property in London, called NIOC House, which NIOC had purchased in 1975 and which was registered in the name of NIOC. However, CGC discovered that NIOC had effected a transfer of NIOC House into the name of the Retirement, Savings and Welfare Fund of Oil Industry Workers Fund (the "Fund").

CGC issued a claim under s 423 on the grounds that that transfer was a transaction at an undervalue entered into by NIOC for the purpose of putting assets beyond the reach of a person who is making, or may at some time make, a claim against it. The Judge held that NIOC had entered into the transfer with the statutory purpose and ordered that NIOC House be transferred from the Fund to CGC. Part of the Judge's reasoning was that certain declarations of trust by NIOC over NIOC House were not enforceable because they were signed by NIOC's agent rather than NIOC itself.

NIOC was granted permission to appeal on the ground (among others) that the Judge was wrong to conclude that a document signed by an agent cannot amount to *"writing signed by some person who is able to declare such trust or by his will"* for the purposes of s.53(1)(b) of the Law of Property Act 1925. NIOC also contended on appeal that even if the Judge was right to find that there was no document satisfying that section of the LPA, he was wrong to find that the consequence was the NIOC and the Fund could not rely on the trust which had been declared.

The Court of Appeal dismissed the appeal on all grounds, with Zacaroli LJ dissenting on the latter. The Court unanimously concluded that s 53(1)(b) requires written evidence of the declaration of a trust over land to be signed personally by the settlor or, if relevant, the person holding the relevant interest which is the subject matter of the trust, and not by their agent.

On the latter issue, the critical issue was whether the transfer was at an undervalue within s.423(1). It was, since the mere a *"moral obligation"* that arose by the failed declarations of trust was worth very considerably less than the value of NIOC House and in the absence of evidence complying with s.53(1)(b), the Court was obliged to treat NIOC as the beneficial owner of NIOC House at the date of the transfer.

Georgina Peters

Waypark Commercial Mortgage 1 Limited v Vanguard Number 1 Limited (in liquidation)

[2025] EWHC 1786 (Ch) (Deputy ICC Judge Baister)
s130(2) Insolvency Act 1986 – Stay – Sale by secured creditor **14 July 2025**

Section 130(2) of the Insolvency Act 1986 provides that *"[w]hen a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose."*

Following an unopposed hearing, Deputy ICC Judge Baister made a declaration that the stay imposed by s 130(2) did not apply to a sale of property by a secured creditor pursuant to a power of sale in a fixed legal charge. He followed the judgment of Michael Green J in *Financial Conduct Authority v Carillion plc* [2021] EWHC 2871 (Ch), [2022] Ch 162 that *"action"* had to refer to Court proceedings. He further held that a *"proceeding"* does not include a secured creditor exercising its power of sale, since the proceeds of its sale do not form part of the general pot of assets available to the company's creditors unless the security is impugned.

MARK PHILLIPS KC
SOUTH SQUARE

Restructuring Plans:
A 5-year re-set (Part 2)

Introduction

Since publication of my article "*Restructuring Plans a 5 year re-set*" in the August 2025 edition of the South Square Digest, there have been three developments that confirm the direction of travel I identified in that article. First, The Practice Statement Companies: Schemes of Arrangement and Restructuring Plans under Parts 26 and 26A of the Companies Act 2006 ("***the Practice Statement***"). Second, the Court of Appeal's decision in *Re: Petrofac Ltd, Saipem S.P.A and others v Petrofac Ltd and another* ("***Petrofac***")[1] and third, Hildyard J's decision in *Re: Waldorf Productions UK Plc* ("***Waldorf***")[2]

The Practice Statement Companies: Schemes of Arrangement and Restructuring Plans under Parts 26 and 26A of the Companies Act 2006

On 18th September 2025 the Chancellor published the Practice Statement. It applies to all cases where an application for convening hearings is listed after 1 January 2026. The Practice Statement includes the provisions in the draft intended to increase engagement, improve information flows to creditors, move away from last minute urgent applications and it now includes requirements to simplify Explanatory Statements. The requirement for a listing note has been adopted and where the PSL should be filed with the claim form when available.[3] Several provisions require documents to be concise and avoid repetition. Paragraph 14 provides:

"It is the responsibility of the applicant to ensure that such notification is given in a concise form and is communicated to all persons affected by the scheme or plan in the manner which is most appropriate to the circumstances of the case. The applicant should avoid providing unnecessarily long or repetitive information and ideally should include a short and/or tabular summary of the proposal at the beginning."

1. [2025] EWCA Civ 821.

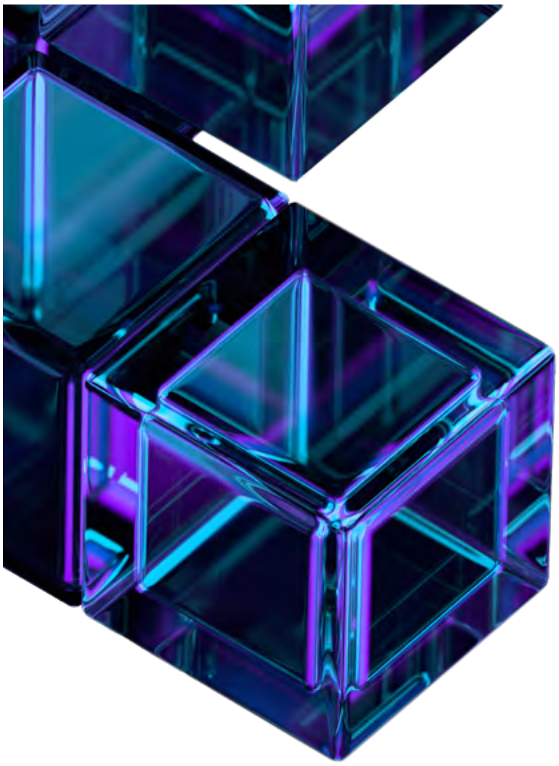
2. [2025] EWHC 2181 (Ch).

3. Practice Statement paragraphs 5 and 8.

Similarly paragraph 19 requires that annexes should be summarised in the body of the Explan to avoid a proliferation of long and complicated attachments:

"The explanatory statement should include a short and/or tabular summary of the terms at the start of the document. Documents may be annexed to the explanatory statement or incorporated by reference, but if so, the material part(s) of the documents should be summarised and readers should be clearly told how they can access such documents."

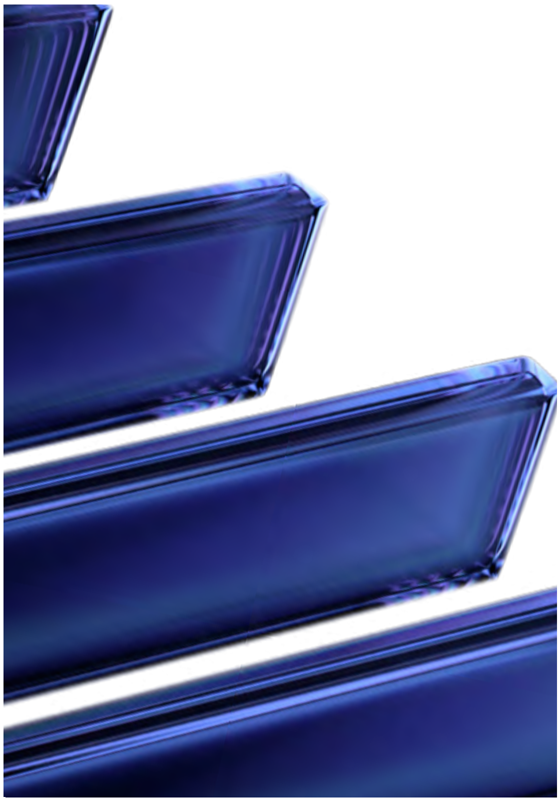
The other provisions that differ from the draft relate to the court process, which will require documents to be filed in more time before hearings. This is to deal with the criticisms of the way the process had been used made by the Court of Appeal in ***Adler*** and ***Thames***.[4]



The Court of Appeal's decision in Petrofac

On 1st July 2025 the Court of Appeal, Snowden and Zacaroli LJJ and Sir Christopher Floyd gave judgment on the appeal in *Petrofac*. The Court of Appeal's judgment is a clear rejection of the arguments that had been run in *Kingston S.a.r.l and others v Thames Utilities Holdings Ltd and another* ("***Thames***") that "*out of the money*" creditors can fairly be excluded from the benefits of the restructuring and that the *"in the money"* creditors were the economic owners of the company.[6] The Court of Appeal put the point in unambiguous terms:

"The cross-class cram down power was not designed as a tool to enable assenting creditors to appropriate to themselves an inequitable share of the benefits of the restructuring."[7]



The material facts in *Petrofac* were not complicated.[8] The restructuring of the company would result in an equity value of about US$1.5bn. As part of the restructuring new money of US$350m was being provided to the company. In exchange for that new money shares worth US$1bn of the US$1.5bn were being provided to the new money lenders. That value was not going towards the creditors' compromised claims. However, those compromised claims contributed to the company's increased value of US$1.5bn. The compromised creditors were not receiving the benefit of that value. The company could not show that US$1bn was a competitive market return on a loan of US$350mn to a restructured company worth US$1.5bn and so that was not a fair distribution of the benefits resulting from the restructuring and sanction was set aside.[9] The mistake made in formulating this plan was to pay insufficient attention to the value of the company post restructuring, and to the contributions to that value by creditors, rather than on rights under the waterfall pre-restructuring.

The Court of Appeal reminds us that the satisfaction of the *"no worse off"* test in section 901G(3) is a necessary, but not sufficient, condition for the exercise of the cross-class cram down power.[10] The exercise of the judicial discretion to alter the rights of a dissenting class for the perceived benefit of the assenting class *"necessarily requires the court to inquire how the value sought to be preserved or generated by the restructuring plan, over and above the relevant alternative, is to be allocated between those different creditor groups."*[11]

4. Objections are to be filed 7 days before the convening hearing (paragraph 20). Bundles are to be filed 5 days before the convening hearing (paragraph 21)

5. [2025] EWCA Civ 475.

6. In paragraph 128 the Court of Appeal in ***Petrofac*** said: *"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."*

7. Paragraph 131 ***Petrofac.***

8. In paragraph 53 of ***Petrofac*** the Court of Appeal stated: *"Of the remaining equity in the restructured group, and excluding fees, 67.7% will be allocated to the providers of US$350 million "New Money" to the restructured Group (as set out below). On the basis of Teneo's low case post-restructuring equity valuation of US$1.5 billion, this equity will be worth about US$1 billion. It is this allocation of value to the providers of New Money that is at the heart of the second ground of appeal.*

9. In paragraph 178 of ***Petrofac*** the Court of Appeal identified the correct question: *"the correct question is the cost at which new money could be raised by the Group on day one after the restructuring and conditional upon the sanction of the Plans which would remove the existing liabilities from the Plan Companies' balance sheets and hence avoid liquidation."*

10. ***Petrofac*** paragraph 108.

11. Petrofac paragraph 108 quoting from paragraph160 of Snowden LJ in *Re: AGPS Bondco Plc* [2024] EWCA Civ 24 ("***Adler***")

Having quoted the submissions made by Mr Smith KC, counsel for Thames, recorded in paragraphs 124 and 125 of ***Thames***[12] in which *"He 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."* The Court of Appeal in ***Petrofac*** stated[13]:

"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."

Having referred to paragraphs 133 and 142 to 148 of ***Thames*** and quoted paragraph 149, the Court of Appeal in ***Petrofac*** made it clear that the *"out of the money"* argument had been clearly rejected, as had the idea that in most cases *"out of the money"* creditors could receive a de minimis amount:

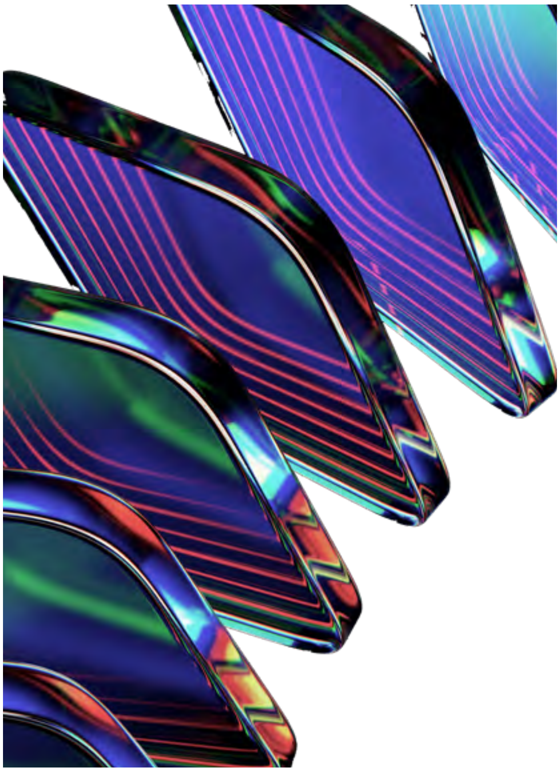
"That was a clear rejection of the argument based upon Virgin Active. It should also not be read as an indication that in most cases an out of the money class can fairly be excluded from the benefits of a restructuring and need only be given a de minimis amount necessary to satisfy the jurisdictional requirement that the plan should amount to a "compromise or arrangement."[14]

The Court of Appeal expanded on the reasons why a company and "in the money" creditors have to negotiate with creditors who would have to give up their claims:

"130. In these circumstances, 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." (emphasis added)

"131. 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 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)."

This reflects paragraph 169 of the Court of Appeal's decision in ***Thames*** and the new requirements of the practice direction.



*Hildyard's decision in **Waldorf***

On 19th August 2025 Hildyard J gave judgment in *Waldorf* refusing to sanction a restructuring plan. As Hildyard J recorded the *"Terms of the plan represent[ed] the outcome of the Plan Company's negotiations and ultimate agreement with the [Steer Group of secured creditors]."*[15] As with ***Petrofac***, the effect of the restructuring was to increase the value of the company, in Waldorf's case by about US$100 million.[16] However, in exchange for compromising their debts the unsecured creditors were to receive only 5% of their claims[17], while the rest of the increase went to the secured creditors. Hildyard J recorded in paragraph 119(4): *"… all the benefits of the restructuring are generated by the extinguishment of the debts owed to HMRC and Capricorn. The Bondholders are not contributing anything, save for the extension of the maturity date."* That was not a fair distribution of the benefits of the restructuring. The company and the Senior Creditors argued that this was fair because the unsecured creditors were *"out of the money"*. However, that argument was based on the law before ***Thames*** and ***Petrofac***.

12. At paragraph 113 of ***Petrofac***; [2025] EWCA Civ 475.

13. Paragraph 114 ***Petrofac***.

14. ***Petrofac*** paragraph 117.

15. ***Waldorf*** paragraph 53. The procedural flaw in Waldorf's approach is captured in paragraph 62(9) which records an answer given in XX: *"…We needed to reach agreement with the Bondholders on what a restructuring plan would look like before talking to HMRC, so we were not in a position to talk to HMRC because we did not know what the plan would look like."* The 'need to reach agreement with the Bondholders' was based on the misunderstanding that what the company needed was agreement with the *"in the money"* creditors, whereas there was never anything to stop the company approaching all creditors and negotiating based upon their contributions to the surplus or benefit of the restructuring.

16. ***Waldorf*** paragraph 119(4): *"The difference between those two figures is US$101.8 Million, which is the value of the liabilities owed to HMRC and Capricorn being extinguished under the Plan."*

17. As Hildyard J recorded in paragraph 119(5): *"The offer to the Unsecured Plan Creditors of 5% is not the product of negotiation, nor is it the product of any analysis of science or otherwise explained: it appears, essentially arbitrary."*

18. ***Waldorf*** paragraph 139.

19. ***Waldorf*** paragraph 160. Hildyard referred to paragraphs 117, 130 and 131, 132 to 134, 183 and 191 of *Petrofac* and paragraphs 130, 131.

20. In paragraph 188 Hildyard J said *"I agree …that the Plan appears to have been conceived and promoted on the false assumption of the application of the de minimis test in Virgin Active."*

21. ***Waldorf*** paragraph 172.

Hildyard J referred to ***Adler***, ***Thames*** and ***Petrofac*** and said:[18]

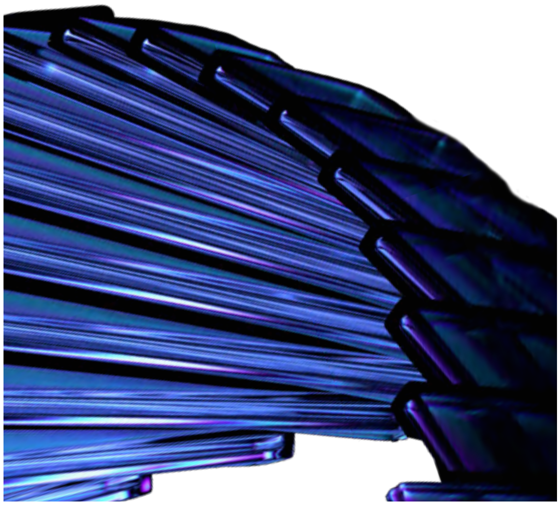
"This trilogy of Court of Appeal decisions has demonstrated and explained, not only the process of "horizontal" comparison between classes …. but also an issue of developing importance generally, and acute importance in this case: the weight (if any) to be given to the views of "out of the money creditors. These cases mark, with increasing emphasis, a departure from the case principally relied on by Mr Bayfield in this context and described by him … as the "starting point for considering the treatment of out of the money creditors", namely Re Virgin Active…"

Hildyard J noted that ***Petrofac*** unequivocally marks the demise of the theory that the views of *"out of the money"* creditor can be ignored:[19]

"Re Petrofac unequivocally marks the demise of the theory propounded in Virgin Active (and a series of cases thereafter …) that the views of "out of the money" creditors can in effect be ignored. The Plan Company's submission in its original skeleton argument that Thames Water only applied to "bridging" transactions and that "out of the money" creditors in non-bridging transactions "can fairly be given a minimal form of consideration (such as a small cash payment) in return for the discharge of their claims" is not (or is no longer) correct."

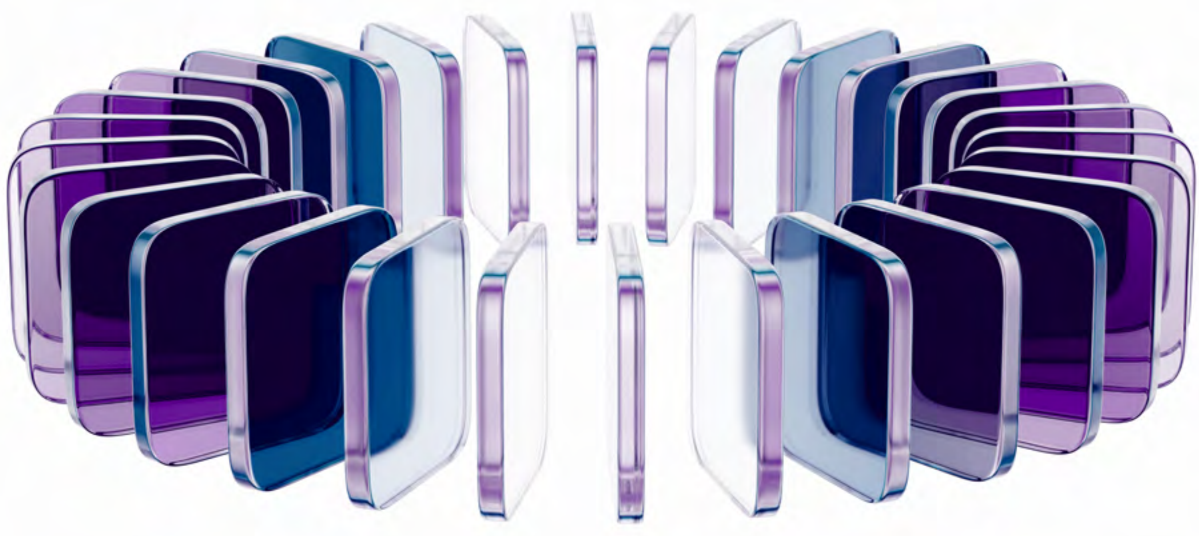
However, the plan had been designed in a pre-*Thames* world.[20] In paragraphs 167 and 168 Hildyard J said:

"167. The influence on the plan of the approach in Virgin Active seems to me to be plain. In his skeleton argument for the Sanction Hearing Mr Bayfield continued to assert that in cases such as the present one where the Plan is put forward as an alternative to a distributing insolvency process, the "starting point for considering the treatment of out of the money creditors is the decision of Snowden J in Re Virgin Active". On that basis, he persisted in the submission that "'out of the money' creditors can fairly be given a minimtal form of consideration (such as a small cash payment) in return for the discharge of their claims." The only nod to Thames Water was the defensive assertion, in the description in that skeleton argument of the "current state of the law (pending the Court of Appeal's judgment in Re:Petrofac)", that such a 'de minimis' payment (as Snowden J described it at [100] in his judgment sanctioning the plan in Re Virgin…" does not involve ignoring the views of the 'out of the money' creditors, rather it involves distributing the benefits of the restructuring in a way that reflects the position in the relevant alternative…."



"168. The judgment of the Court of Appeal in Petrofac …stating (at [117]) that the reasoning on the appeal on Thames Water "was a clear rejection of that argument based on Virgin Active", made Mr Bayfield's continuing reliance on the latter case difficult."

Hildyard J said that in his view, it is clear from ***Petrofac*** that what falls to be assessed in determining the fairness of the Plan at the discretion stage is whether what the Plan would achieve *"is a fair and reasonable allocation of the benefits of the restructuring having regard to the amounts contributed by each creditor class, including the class proposed to be crammed down."*[21] That is a correct summary of the relevant question.



In addition to the substantive flaw, namely the absence of a fair and reasonable allocation of the benefits of the restructuring, there was also a procedural flaw. There was no evidence that might shed light on whether the dissenting creditors were acting reasonably in demanding more because there had been no engagement with them.[22]

Waldorf were given permission to appeal direct to the Supreme Court in respect of his decision to decline to sanction the Plan, without first applying to the Court of Appeal on 9th September 2025. The primary point is that the Court of Appeal's approach in ***Thames*** and ***Petrofac*** is wrong. On 9th October 2025 Lords Briggs and Sales and Lady Simler granted permission to appeal.[23]

Restructuring Plans in future

The old approach whereby secured creditors and companies did a deal that provided *"in the money"* with a large part of the benefits of the restructuring surplus and then presented the *"out of the money"* creditors with the deal on the assumption that the *"out of the money"* creditors can be crammed down, is over.

In future companies are going to have to negotiate with all stakeholders, or have good reasons why they didn't. Companies will have to satisfy the court that the Plan provides for *"a fair and reasonable allocation of the benefits of the restructuring having regard to the amounts contributed by each creditor class, including the class proposed to be crammed down."* When it comes to fair value, there is a fundamental distinction between 'terminal' plans that provide for a better realisation and distribution and plans which restructure a company so that it can trade in future (a "going concern plan"). In a terminal plan the distributions should reflect the waterfall (and if it doesn't, explain why not). That is the decision in *Adler*. In a going concern plan a reasonable allocation of the benefits falls into two parts. First, there is a base line value to each creditor of what they would receive in the relevant alternative. However, the second part does not turn on a creditor's place in the waterfall but on what each creditor contributes to the benefits of the restructuring or the increase in value. For example, in ***Petrofac***, the company was valued at US$1.5bn post restructuring. The question should have been: what contributed to that benefit over and above the value in the relevant alternative? If debt instruments are amended and extended, what does that contribute? If unsecured debt is written off, what does that contribute? If shareholders take a write-down or an issue of shares, what does that contribute? If the going concern takes with it other benefits to a purchaser, what does that contribute? These are different questions to the question of how would the increased value be distributed down the waterfall, if that value became available in an insolvency and was capable of distribution. That is the *"in the money"* question, and, as has now been established, it's the wrong question. ■

22. ***Waldorf*** paragraph 176.

23. The appeal is due to be heard in February 2026. I will leave readers to form their own views as to the prospects on the appeal. I should disclose that I am instructed to oppose the appeal by HMRC.

Diary Dates

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

4 December 2025

R3 Eastern Christmas Lunch

The Assembly House, Norwich
South Square are delighted to be the main sponsors of this event

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20 – 21 January 2026

International Insolvency Institute Regional Conference

Radisson Blu Waterfront, St. Helier, Jersey

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4 February 2026

South Square Alternative Dispute Resolution Event: *Mediation in the context of restructuring*

Gray's Inn, London

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25 – 27 February 2026

8th Annual Asset Recovery International Conference

InterContinental Hotel, Dublin

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20 April 2026

INSOL International Offshore Day
INSOL International ADR Colloquium

JW Marriott Grosvenor House, London

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21 – 22 April 2026

INSOL International Annual Conference

JW Marriott Grosvenor House, London
South Square are delighted to be an 'inclusive spaces' sponsor

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22 – 23 April 2026

International Women's Insolvency and Restructuring Confederation 23rd Annual Spring Conference

Marriott Marquis, Washington DC

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6 – 8 May 2026

R3 Annual Conference

Marriott Budapest Hotel, Hungary

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14 May 2026

South Square Spring Reception

Further details to follow

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19 – 21 May 2026

Thought Leaders 4 FIRE International

EPIC SANA Algarve Hotel, Vilamoura, Portugal

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14 – 16 June 2026

International Insolvency Institute Annual Conference 2026

Montreal, Canda
Further details to follow

June 2026

South Square/RISA Annual conferences in BVI and Grand Cayman

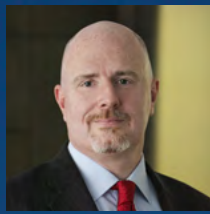
Further details to follow

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

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

Case Note: *Re Marshall*

Building contractor's claim to share profits of hotel redevelopment dismissed at trial. Six figure *pro bono* costs order in favour of the Access to Justice Foundation: *EJW Builders Limited and Mr Eamonn Joseph Wynne v Mrs Audrey Elizabeth Marshall and Mr Edward Marshall and others [2025] EWHC 2898 (Ch) and [2025] EWHC 2765 (Ch)*


David Waldron
Partner, Morgan, Lewis & Bockius


Robert Bolgar-Smith
Partner, Morgan, Lewis & Bockius


Michelle Page
Associate, Morgan, Lewis & Bockius


Rory Brown
Commercial Barrister, South Square

His Honour Judge Paul Matthews has, after a two-day trial in the High Court of Justice (Business and Property Courts) in Bristol handed down a judgment in favour of hotel owners and developers ("The Defendants") in relation to a claim brought by EJW Builders Limited ("EJW") and Mr. Eamonn Joseph Wynne ("The Claimants") against the Defendants.

The Claimants (a construction company and its director) alleged that they entered into a partnership with the Defendants (the land owners and developers) and were owed profits under that alleged partnership agreement in respect of a project to redevelop a hotel into four residential properties. The question for the court turned on whether a partnership agreement or profit-share agreement ever existed between the parties. Morgan, Lewis & Bockius UK LLP ("Morgan Lewis") and Rory Brown of South Square represented the Defendants on a *pro bono* basis via Pro Bono Connect and Advocate. The Claimants were represented by Contract Answers Solicitors and Jessica Powers of New Square Chambers.

The Defendants' case concerned their engagement of EJW to carry out the conversion of a hotel they owned into three houses, together with the construction of a new property on a neighbouring site. The project did not go according to plan, took longer than expected and cost significantly more than anticipated. The Defendants were forced to hire new contractors and suffered heavy losses, leading to their bankruptcy and need for *pro bono* assistance. The Claimants later brought a claim against the Defendants asserting that the Defendants, the owners and developers of the hotel, had entered into a partnership or contractual joint venture with the Claimants, pursuant to which the Claimants would share in any profits of the redevelopment. The Defendants maintained a steadfast denial that any such partnership agreement was entered into and denied that the assortment of documents upon which the Claimants relied demonstrated the alleged profit-sharing agreement.

This case turned squarely on the facts. HHJ Matthews explained that the burden of proof lay with the Claimants to demonstrate that there was a profit share agreement in relation to the proceeds from the property redevelopment and found that the arrangement did not meet the criteria for a partnership as defined by *The Partnership Act 1890*, which requires a single business carried on by the parties with a view to profit. The Claimants were remunerated through a JCT Building Contract rather than contributing their services to a partnership, and the Defendants were not contributing their land to a partnership but were simply having it developed. HHJ Matthews also noted that the Claimants continued to undertake other building projects, indicating they were not part of a single business with the Defendants.

HHJ Matthews also had regard to whether or not the other orthodox *indicia* of a partnership were present, holding for example:

A further point is that the Second Claimant was quite clear in his evidence, that he was not undertaking any personal liability for the Defendants' loans, or any of their other debts, even though he had been prepared to put up his own property as security, up to the value of £130,000, and there was no evidence, at all, that the Second Claimant – or, for that matter, the First Claimant – ever held himself (or its self) out to the world as a partner in this partnership, or contracted with any third party on behalf of the partnership. So in my judgement, whatever else this was, it was not a partnership.

Regarding the profit-sharing agreement, HHJ Matthews concluded that the evidence presented by the Claimants, such as messages and emails fell short of evidencing the alleged profit-sharing or partnership agreement with the Defendants. The judge determined that the only contract between the parties was the JCT Building Contract, the existence of which the Claimants had initially denied:

The Second Claimant's evidence on this agreement, unfortunately chopped and changed throughout his cross-examination, and indeed in the documents proceeding that, including the pleadings. But finally, his evidence was that he did not remember signing it; though, he recognised his signature and accepted that it was "possibly likely" that he signed it.

Ultimately, the Claimants failed to establish on the balance of probabilities that the Defendants had agreed to a profit share, as the arrangement would have been extraordinarily generous to the Claimants and likely deprived the Defendants of the benefits of the redevelopment. As such, HHJ Matthews dismissed the claim in its entirety with costs in the form of a *pro bono* costs order in favour of the Access to Justice Foundation.

In a reserved judgment on costs (doubting the continued relevance in the modern legal market of the principles governing the reasonableness of instructing non-local solicitors), HHJ Matthews assessed the costs at £117,000. This is the fifth largest *pro bono* costs order ever made.

As well as demonstrating the fact-sensitivity of claims about the existence of partnerships and the criticality of focus on whether the indicia of a partnership are present, this case highlights impact of pro bono support. Without pro bono support, the Defendants (who said they had been driven to bankruptcy by the hotel redevelopment itself) would have faced complex litigation in the High Court entirely on their own. The case involved an extensive disclosure exercise running to thousands of documents, the preparation of comprehensive witness statements and cross-examination at trial.

By acting *pro bono*, Morgan Lewis and Rory Brown of South Square enabled the Defendants to vindicate their position, maintained throughout, that there was no agreement to share profits of the hotel redevelopment. The Defendants' legal team devoted hundreds of hours to this matter. The costs order in favour of the Access to Justice Foundation will facilitate the continuation of the charitable work done to make the justice system available to all, regardless of means.

On 23 October 2025, the Claimants sought permission from the Court of Appeal to appeal HHJ Matthews' judgment. That application is pending. ■

Introducing a dynamic, collaborative restructuring and insolvency knowledge service

WILLIAM MACKINLAY
SOUTH SQUARE

LUCINDA CASE
FROMCOUNSEL

South Square and FromCounsel have just announced the forthcoming launch of the *FC R&I Knowledge* service, written by members of South Square and FromCounsel's team of senior knowledge lawyers.

The *FC R&I Knowledge* product will supplement the existing *FC Corporate Knowledge* service launched in 2017 in collaboration with Erskine Chambers and now used by over 200 law firms.

We spoke to Lucinda Case, the CEO of FromCounsel and Will Mackinlay, South Square's Chambers' Director to find out more.

Lucinda, if I can start with you. The launch sounds very exciting. For those who don't know, what is FromCounsel?
LC: FromCounsel was established by members of Erskine Chambers almost 10 years ago to provide an in-depth corporate law knowledge service.

The service includes a knowledge data set comprising approximately 8 million words of content, arranged in a Q&A style, and draws on the collective experience of the 25 contributing barristers and the FromCounsel in-house knowledge team (recruited from leading law firms). The Q&A content is fully maintained and supported by news, legislation, documents, training plus M&A and capital markets analytics content. The content is delivered on a proprietary software platform, including recently launched AI SmartSearch functionality.

An employment service was launched in 2023, in partnership with Cloisters Chambers.

I joined FromCounsel earlier this year to take on the CEO role, having previously run the Thomson Reuters European legal business. Prior to my appointment, Andrew Thornton KC of Erskine Chambers ran the business. He is now the Executive Chair. I have been brought in to enable the business to scale by moving into new areas of law and products.

There are lots of knowledge services out there. What's different about FromCounsel?
LC: Ultimately, we believe that it is the quality of the content that distinguishes FromCounsel from other products available on the market and our client feedback supports that belief. We only partner with the leading barristers in each content area and the content is therefore informed by those individuals who see more of the market than any other group of individuals. They are able to write content based on their lived professional experience, not just providing commentary based on reported decisions. We often think of it as combining the collective knowledge of the leading practitioners in an area and delivering it to subscribers in a readily usable format.

The style of writing is a key strength in that regard, with a Q&A format being particularly suitable for explaining difficult concepts, addressing real issues as they are faced by subscribers and being ideal for consumption in a digital world and by generative AI algorithms. We aim to equip practitioners to deal with the real questions they encounter, whether practical or legally complex.

I should also mention our editors' views. FromCounsel tries to answer difficult questions that have not been considered yet by a court. Our editors' views, of which there are thousands in the content, are produced following robust debates amongst our contributors and we are often told by subscribers that they are treated as equivalent to decided cases. Subscribers are aware of how much work goes into producing the content and that the practitioners write the content with the same degree of care they would for a client opinion or a skeleton argument.

Who are FromCounsel's customers?
LC: FC Corporate Knowledge is now used by over 200 firms: including approximately 95% of the leading 100 UK corporate law firms. Subscribers range from all the Magic Circle and the major US firms in the UK to the legal arms of the Big 4 accountants, regional law firms and in-house legal departments. Firms subscribe across their entire corporate teams, meaning that it is used by several thousand individual practitioners, often on a daily basis.

Why did FromCounsel choose South Square?
LC: That's an easy one. As I have already said, FromCounsel's approach is only to collaborate with the leading Chambers in any given field. South Square was the obvious choice for the FC R&I Knowledge collaboration because they are the pre-eminent chambers for R&I law in jurisdictions around the globe. It's as simple as that!

We are delighted to have captured within the collaboration South Square contributors including:

- Tom Smith KC and Ryan Perkins on *schemes and restructuring plans*
- Clara Johnson, Robert Amey and Paul Fradley on *the moratorium procedure*
- Mark Arnold KC, Henry Philips and Daniel Judd on *CVAs*
- David Alexander KC, Peter Burgess, Rabin Kok and Dhananjay Kumar on *liquidations*
- Marcus Haywood, Hannah Thornley, William Willson, Angus Groom and Charlotte Ward on *administration*
- Andrew Shaw, Edoardo Lupi and Paul Fradley on *cross-border insolvency*
- Adam Al-Attar KC, Edoardo Lupi, and Peter Burgess on *transaction avoidance*
- Mark Arnold KC, Stefanie Wilkins and Imogen Beltrami on *distribution of assets in insolvency*
- Tom Smith KC, Ryan Perkins and Jamil Mustafa on *set-off and netting*
- Georgina Peters, William Willson and Rabin Kok on *liability of directors in insolvency*
- Henry Philips on *decision-making in insolvency proceedings*
- Clara Johnson on *documents in insolvency proceedings*

Will, if I can turn to you, why did South Square get involved?

WM: As a Chambers, we were always intrigued by what Erskine had done on the corporate side. As you know, the South Square Digest is hugely popular and to move into the legal knowledge space was the next obvious step.

The story goes that the first time Tom (Smith KC) and Andy (Thornton KC) came together to talk about the prospect of a collaboration on this, they realised that they had both been thinking about how they could do something together for a number of years. But neither had taken the next step of reaching out.

Ultimately, we feel that combining our market-leading knowledge and experience in the R&I field with Erskine's corporate content and the tools provided by FromCounsel will provide our clients with a fantastic resource enabling them to practice safely and efficiently. We are really looking forward to letting people loose on the service.

What will the service cover?

WM: The 2026 launch content will cover core topics and processes including:

- Introduction to insolvency and restructuring
- Schemes of arrangement and restructuring plans
- Moratorium procedure
- Company voluntary arrangements (CVAs)
- Administration
- Liquidations
- Cross-border insolvency
- Effect of insolvency on contracts
- Adjustment of prior transactions
- Distribution of assets in insolvency
- Set-off and netting
- Directors' duties and liabilities in insolvency
- Decision-making in insolvency proceedings
- Documents in insolvency proceedings

Will subscribers also gain access to the FC Corporate Knowledge Service?

LC: For those subscribers who are already FC Corporate Knowledge subscribers, adding the FC R&I Knowledge service will mean that both their corporate and R&I teams will get access to both services. We believe this creates an unbeatable combination of the collective knowledge of over 50 members of South Square and Erskine Chambers. We are aware that many R&I practitioners already use FC Corporate Knowledge for help on issues such as directors' duties and the principles of maintenance of capital. Anyone subscribing for both services will have access to a fully maintained service of over 10 million words of corporate and R&I content.

The adoption of Gen AI is a hot topic at the moment. How does the new service fit into the jigsaw?

LC: FromCounsel is adopting a twin-track approach. We are evolving our own platform with Gen AI capabilities where we consider it will enhance the user experience, and we do so in consultation with our users. We have practice committees for both our FC Corporate Knowledge and FC R&I Knowledge services that gives us a direct line of communication into the customer base.

In addition, we also enter into partnerships with appropriate commercial third parties we believe can offer appropriate tools for using our content. At the moment, we have deals with Legora, Vlex, LegalFly, Document Drafter and Clarilis and are in negotiations for several more. We believe that the FromCounsel content is a key component for customers wishing to make the most out of the technology advancements.

What else is on the horizon for FromCounsel?

LC: Our relationship with South Square is the first step in a significant scaling of the business and we will be announcing shortly partnerships enabling the launch of content covering banking and finance, commercial disputes, private client and tax. Watch this space!

To find out more or to register your interest in FC R&I Knowledge ahead of launch, please contact us at – info@fromcounsel.com ■

What's surprising about Atari?

9Questions — James Peck, former US bankruptcy judge and associate member of South Square

Will Macadam
9Fin

Hon James M Peck
Associate Member, South Square

In August of this year 9Fin's Will Macadam interviewed South Square Associate Member Jim Peck as part of their series featuring key decision-makers in the corporate credit markets. With their permission, we are delighted to reprint that interview here in the Digest.

When thinking about the 2008 financial crisis, few names stick out more than Lehman Brothers. The defunct bank's Chapter 11 filing involved more than $600bn in assets and remains one of the largest US bankruptcies of all time. James Peck was the judge presiding over the bank's Chapter 11 case, having been "randomly assigned" it.

Peck sat on the bankruptcy bench of the Southern District of New York until 2014, when he returned to private practice. In recent years, Peck has gone back to the judiciary – having been appointed as a judge on Singapore's International Commercial Court — and continues to work on private engagements through his own firm James Peck ADR LLC.

Peck handled all kinds of transactions in different industries during his time as a corporate bankruptcy lawyer — essentially representing every conceivable type of interested party in the restructuring world during the 1990s and early 2000s.

9fin sat down with Peck to discuss his views on how the US restructuring market has developed in recent years, which non-US processes he's following, and why Atari was one of the most surprising bankruptcy cases he presided over.

1. How have Chapter 11 restructurings and the US restructuring market evolved since your time on the bench?

The evolution started while I was on the bench and is tough to encapsulate in just a few sentences, but I believe there is a much greater emphasis now on pre-negotiated restructurings and restructurings that are designed to avoid bankruptcy court altogether. These bankruptcy avoidance tactics are liability management exercises (LMEs) intended to buy a company time by restructuring its balance sheet without fixing the underlying causes of financial distress, and these out of court deals represent a significant focus in the market right now.

So, I think both trends I've identified — the pre-negotiated/prepack filing and the liability management exercise — share somewhat similar objectives of minimizing time spent in bankruptcy court or totally side stepping the court process.

2. What's the most recent piece of case law affecting US bankruptcies and why is it significant?

The Supreme Court's decision in Purdue Pharma, in which it determined that non-consensual third-party releases are impermissible as a matter of US bankruptcy law, has had a huge effect upon restructuring practice especially in mass tort cases and has led to thinking about alternative ways to approach restructurings.

The focus now is on ways to achieve similar restructuring outcomes using consensual releases at a time when there is some disagreement among the courts as to what constitutes consent. Parties are also thinking about how to use jurisdictions outside the US where non-consensual third-party releases are permitted.

We are still in the early stages of coping with this development. The Purdue decision makes it harder to achieve global peace in restructurings as the market had come to expect — an indication to me that there will be continued creative attempts to adjust to this new reality. It could lead to more cross border cases seeking to import releases into the United States by using chapter 15 or transactional structures that incentivize parties to give their consent.

3. What non-US restructuring processes are you following and are there any developments that have caught your attention?

I naturally tend to follow what's going on in Singapore and in London. Singapore updated its restructuring law in 2018, having adopted the Insolvency, Restructuring and Dissolution Act. Around the same time, the UK enacted part 26A as part of the Corporate Insolvency and Governance Act 2020, which allowed for the cramdown of non- consenting classes — or cross-class cramdown.

I am paying attention to the development of English law around the cross-class cramdown power, as it may represent an opportunity for companies that might otherwise restructure under Chapter 11 in the United States to obtain comparable, but not identical outcomes in England.

And in Singapore, there is a prepack scheme regime that allows for prepacks to be confirmed on a very rapid and efficient schedule. In fact, I handled such a case myself as a judge: the case is called No Va Land. It was a Vietnamese real estate company that went through a prepack scheme last year in Singapore.

But those aren't the only jurisdictions. The restructuring market is always on the lookout for efficiency, cost effectiveness, predictability, and the ability to obtain recognition in appropriate commercial jurisdictions. I see a continuing process of evolution worldwide. I just read that Malaysia is adopting the Model Law on Cross Border Insolvency. Greater cooperation in the insolvency world is coming and seems inevitable to me.

4. US-style valuation fights seem to be on the rise in English restructurings. What advice would you give to English judges on how to best tackle the thorny problem of distressed valuations?

It's an extraordinarily difficult question because each case is different and valuation is so dependent on multiple factors. The court must evaluate the stature, credibility, and depth of analysis of the expert witnesses who provide guidance to the court when determining valuation questions.

I don't think there's one source of advice that I would have other than to pay very close attention to the bias that's baked into the analysis that supports a valuation report. Very frequently parties will have different goals in their valuation assessment: some are trying to produce a high estimate of value, while others want a relatively conservative or low-end judgment as to value. And one of them may be right, or neither may be right. Often valuation is within a range between the two extremes.

The best advice I could offer, based upon my own experience having listened to competing well coached witnesses, is to pay close attention to the credibility of the witness. How effective is the witness in dealing with cross-examination questions? And to trust your judgment. Because at the end of the day, valuation is more art than science and the art is in finding the sweet spot.

5. You've turned your hand to producing opinions on the likelihood that foreign restructuring processes would be recognised in the US. What features in foreign restructuring processes/jurisdictions do you think could make the US courts reluctant to provide recognition?

Speaking for myself, I don't think US courts should be reluctant to recognize procedurally fair restructurings that have been sanctioned or approved in foreign jurisdictions.

The general approach of US courts under chapter 15 is to liberally apply international comity such that a procedurally fair determination made in a foreign court — an English or Singaporean decision to reference two examples I'm familiar with — would almost always be recognized in the US.

The exception, I suppose, would be a restructuring that pushes the envelope to the point of breaking the envelope. This could be a restructuring where there are parties whose interests have been adversely affected by a process in a foreign jurisdiction that is subject to legitimate criticism — that the judge did not consider all the evidence or that the deal was structured in a manner that was manifestly prejudicial to a particular party and seemingly abusive and unjust.

But that's just a hypothetical. I have never seen examples of that in the UK or in Singapore — that's not to say they couldn't occur. I think each of these situations must be assessed on a case-by-case basis.

6. How can, and should, judges in different jurisdictions collaborate to better facilitate cross-border restructurings and insolvencies?

Judges actually do collaborate with one another, both in specific cases and more generally. I am a member of INSOL International and of the International Insolvency Institute (III) — judges participate in both of those organizations. INSOL has a judicial colloquium in which judges meet in private sessions to share experiences, to educate one another, and to allow judges from developing jurisdictions to benefit from the experiences of judges from more mature jurisdictions like the US or the UK.

This information sharing is a kind of informal education that helps to build confidence and trust across borders. The III has a judicial committee and I just attended a meeting in Sao Paulo a few weeks ago and judges from different jurisdictions shared information in much the same manner that I described with reference to the judicial colloquium of INSOL.

But there are also opportunities for specific cooperation in particular cases. A number of years ago, when I was on the bench, I had a cross-border case with Canada. The Canadian CCAA proceeding was in Montreal, while the US proceedings were in the Southern District of New York. I had court-to-court communication with a Superior Court justice in Montreal named Robert Mongeon.

Robert and I conferred during a particularly difficult confirmation hearing. We spoke with each other during the lunch break. We were having a joint hearing in which the two courts were connected by flat panel television screens and during the break between the morning session and the afternoon session we talked to each other.

I consider that to be totally appropriate in managing cases that were pending simultaneously in two separate jurisdictions. To similar effect, in the Nortel case, a joint trial was held with the District of Delaware and Justice Newbould in Toronto. It was a long and complicated trial— and it doesn't happen frequently. But when it does happen, it's a sign of how it's possible for courts to cooperate across borders in managing a complex dispute that needs to be resolved in a cooperative way.

7. With an increase of contentious restructurings going to court, how can practitioners resolve disputes ahead of filing for a formal restructuring process?

Well, there are several ways. Step one is bilateral negotiations with commercially reasonable people involved in those discussions. That's the traditional way to get to consensus.

Throughout my career, when I was a lawyer and before I was a judge, that's what we did: we got together, often over a meal, and talked about issues and tried to come up with commercial solutions.

That doesn't always work and sometimes the parties have conflicts that are very tough to resolve and that may lead to mediation, which I have a lot of experience with. I think mediation, certainly in the US, has become a standard practice to try to avoid conflict that otherwise would go to court or would get in the way of developing a pre-negotiated restructuring term sheet or a restructuring support agreement.

Another alternative is arbitration. But that's less likely because parties generally don't want to give up control. They can and sometimes do, but it requires a very discreet issue that parties are willing to turn over to an expert or a trusted third party who's viewed as completely neutral and balanced and then get an answer and move on from there.

Those are the standard techniques. There is another label I could put on something that isn't quite mediation and isn't arbitration, and is closer to a facilitation — if I can use that term — whereby a trusted individual is appointed to help bring a group to consensus. This could be in cases where parties want to avoid a formal mediation or arbitration, but lack the mutual trust required for effective bilateral negotiations. I have worked as a facilitator on three occasions recently, and each of these ended successfully.

8. There have been a few stories about lawyers being caught out by using AI to draft or assist in the drafting of documents and court submissions. What advice would you give to practitioners about how and when they should use AI to support their work?

It's a mistake to use an AI-generated document without treating it as a starting point to then be fact-checked and fully researched. Practitioners need to protect against the risk of so- called hallucinations that are attributed to some AI programs, in which cases citations are literally made up out of thin air. It can be embarrassing or even lead to sanctions.

I suppose the main benefit that AI offers is a chance to save time and to generate language that could be used with appropriate editing, and follow-up research as part of judicial submissions to the court.

I have never done it and doubt I will ever do it. I am very old school – old school in the sense that I edit everything myself based upon my writing style. I don't write the way an AI program writes and believe that's a good thing. I think that there is a risk in being overly dependent on machine learning — expecting one word to follow another in a particular sentence — and in the process losing the personality and passion of the individual advocate.

I think advocacy is something that an AI program might be able to mimic, but truly outstanding advocacy is uniquely personal.

9. What was the most unique or unexpected asset listed in a bankruptcy case you presided over?

I'm going to hearken back to a case that was assigned to me during the time that I had Lehman Brothers: Atari.

Atari was a very famous name many years ago, when video games were in their infancy. Atari filed for Chapter 11 in 2013. One of the company's goals was to maximize value by selling its intellectual property to the highest bidder. The assets being sold were the intellectual property rights associated with Atari's video games.

To my disappointment, but frankly much more to the disappointment of the creditors of Atari, those assets fetched very little value. It was an auction that was disappointing to everybody who participated in it. Part of what made it interesting was that Atari was at one time a household name. Everyone of a certain age knew and even had some affection for the brand.

I haven't looked back at the case in many years, but at the time it was interesting to think about what these iconic video games might be worth at auction. And it was frankly shocking, and maybe a sign of the times, that current software developers had essentially no interest in these old assets. The auction was a total failure. ■

News in Brief

Changes at the Supreme Court

Lord Sales has been appointed as the next Deputy President of the Supreme Court. He will succeed Lord Hodge upon his retirement in January 2026. Lord Hodge was appointed Deputy President in 2020.

Lord Sales, who became a Justice of the Supreme Court in January 2019, having served as Lord Justice of Appeal since 2014, read law at both Churchill College, Cambridge, and Worcester College, Oxford. He was called to the Bar of England and Wales at Lincoln's Inn in 1985 and was appointed First Treasury Junior Counsel in 1997.

Lord Richards has also announced his intention to retire from the bench in the summer of 2026. A former company law barrister, Lord Richards became a Justice of the Supreme Court in October 2022. The Lord Chancellor has now convened a selection commission to appoint his successor.

A slice of the pie

DC London Pie Ltd, the company running the UK Pizza Hut operations, appointed FTI Consulting as administrators on Monday 20 October after increasing financial pressures. Like all hospitality venues, Pizza Hut suffered from rising costs but changing consumer habits appear to have been the final nail in the coffin of the chain with its all-you-can-eat buffet, unlimited salad bar and self-serve ice cream being seen as dated, poor quality and low value when compared with the burgeoning 'craft' pizza market.

On the day of administration, the US company Yum! Brands (Pizza Hut's global parent company, which also owns KFC and Taco Bell) bought the UK restaurant operation in a pre-pack administration deal, saving 64 of the 132 UK restaurant sites and 1276 workers' jobs. 68 Pizza Hut restaurants across the country will be closed, and 11 delivery-only sites will suffer the same fate as part of a restructuring of the business.

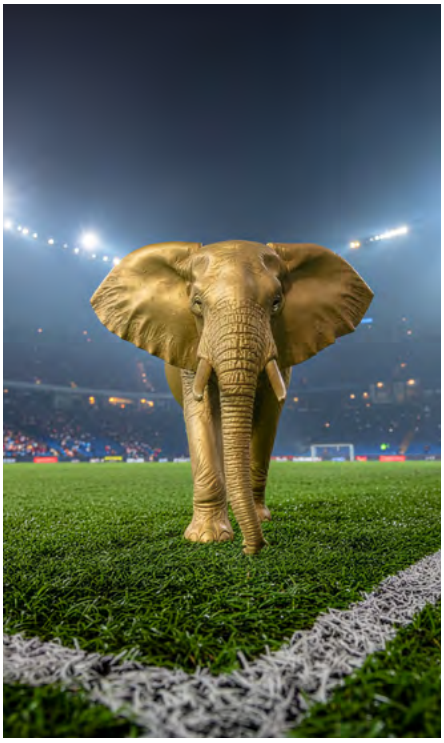
Auction the golden elephants in the room?

On 24 October 2025, Sheffield Wednesday football club ("The Owls") filed for administration after the 'somewhat disliked' former owner, Thai businessman Dejphon Chansiri, relinquished control, the club having been served a winding-up petition by HMRC over an unpaid tax bill of around £1 million. Whilst administration is usually seen as a dark day, fans of The Owls were apparently jubilant that Chansiri is no longer involved with the club and flocked to purchase tickets for matches and spent over £200,000 in the club shop – all of which enabled players and staff to be paid on time for the first time in several months.

The club were already bottom of the Sky Bet Championship and were automatically deducted a further 12 points by the English Football League ("EFL") for filing for administration, leaving them on -6 points. The EFL had previously charged the club with multiple breaches of regulations for failing to pay players' wages on time.

Begbies Traynor (which acted as administrator for Wigan Athletic in 2020) were appointed as administrators and are apparently hopeful of finding a buyer for both the club and its ground at Hillsborough by Christmas. They have not ruled out auctioning off the two golden elephant statuettes installed by Chansiri at the stadium's main entrance at the start of his ownership in 2016. In Thai culture, golden elephants are believed to offer strength, power and good luck.

First formed in 1867 as The Wednesday Football Club as an offshoot of The Wednesday Cricket Club, and thus one of the oldest surviving football clubs in the world, Sheffield Wednesday gained their nickname of "The Owls" as their ground since 1899 has been the Hillsborough stadium, in the north-west Sheffield suburb of Owlerton. In 1912 one of the club's players, George Robertson, presented the club with an owl mascot, further cementing the name.



Beware the bankrupt builder

Wayne Millar, a bankrupt builder from Kent, deliberately concealed his status from a customer who employed him to build a two-storey extension including a brand-new kitchen, but abandoned the project when it was nowhere near finished, having inveigled his victim into handing over more than £30,000.

Following investigations by the Insolvency Service, Miller was sentenced to 6 months imprisonment, suspended for 12 months, at Southwark Crown Court in mid-October, and ordered to repay £18,000 to his victim (having previously made a payment of £7,500) plus a further £1,000 in costs.

Restrictions under the insolvency regulations require those in receipt of an extant bankruptcy order to disclose bankruptcy on borrowing or obtaining credit of £500 or more, either alone or with another person. Failure to do so is a criminal offence. Miller had previously been declared bankrupt in January 2016, but his bankruptcy remains ongoing as he failed to make all the payments required of him under the terms of an income payment agreement with the Official Receiver.

Steel yourselves

China's dominance in the steel market has led to the European Union planning to impose 50% tariffs (up from the current 25%) and cut quotas on imports to the bloc to shield its producers from industrial overproduction by China in the main, but also India and Turkey. Nations neighbouring the EU such as Norway and Ukraine who are integrated into the single market via the European Economic Area will be exempt from the increased tariffs but, now no longer part of the EU, UK steel will be at risk: Britain currently sends over half of its steel exports to the EU, making the bloc's upcoming tariffs and quota cuts an "existential threat" according to industry lobby group UK Steel.

British steel manufacturers are currently beleaguered by serious financial difficulties with both British Steel and Liberty Steel having received government intervention, following their collapse into insolvency processes to protect jobs and their businesses. According to Sir Chris Bryant, UK minister for trade, Britain is currently seeking a carve-out from the EU measures and is in discussions about a possible two- or three-way pact with either or both the US and EU to align tariff policies and grant members of the "steel club" preferential tariffs on steel trade.

Dispatches: Will AI take my job?

In mid-October, Channel 4's show Dispatches pitted the UK's first regulated AI law firm, Garfield AI, against a trainee solicitor from Summerfield Browne, Charlotte Jaques, in a programme that set out to test AI against skilled workers in the fields of healthcare, law and beyond.

The legal task was to tackle a real life small-claims dispute between a builder and his client who was refusing to pay a £4,500 bill, with each of the Jaques and AI preparing a claim form for court. The results were judged blind by Jaques' supervisor, Zainab Zaeem, who was "impressed by both documents" but ultimately decided that Jacques was the stronger of the two: Garfield's AI version left out a key details, including that a WhatsApp message can amount to a binding contract, though it was still considered good enough to be put before a judge.

Perhaps unfortunately, the client's verdict was determined by price. Jacques' work took over three hours and cost over £1000. In contract, the AI version was produced in around 10 minutes, costing £100 plus VAT.

Garfield AI was co-founded by a former City lawyer and a quantum physicist and approved by the Solicitors Regulation Authority in May this year and specialises in small-claims debt recovery.

A Hard Stare?

Paddington and Company, together with StudioCanal (which makes the Paddington films), is suing Avalon, the producer of Spitting Image, over a parody of the famous bear that portrays him as a cocaine-snorting, drug-smuggling, gun-toting party bear who co-hosts a podcast with a caricature of Prince Harry. Episodes are available on the Spitting Image YouTube channel.

Paddington, as created by Michael Bond, was described in the original books as polite, well-meaning and truthful and appeared in an iconic skit with the late Queen Elizabeth II to celebrate her Platinum Jubilee.

The companies are seeking an injunction as well as an order demanding the "frightening" puppet be either handed over to them or destroyed, and potential damages.

Avalon has, at the time of writing, yet to file a defence to the claim.

SOUTH SQUARE CHALLENGE

Welcome to the December South Square Challenge!

For this December edition of the South Square Digest we are challenging you to decipher those laws that relate, or used to relate, to Christmas (and some that also relate to other days, but which also include Christmas!) Using the images to the right, and perhaps a little imagination, work out to which law we are referring

To assist, in relation to each image we included the year the relevant legislation was enacted. For the winner, a magnum of Champagne to belatedly celebrate the New Year and a South Square umbrella to protect you from the rain.

Best of luck …

Please send your answers by Monday 9 February 2026 to Kirsten either by e-mail to **kirstendent@southsquare.com**, or to the address on the back cover.

Previous South Square Challenge: Name That Case – correct answers were:

1. ***London Capital Finance (LCF)***
2. ***S&P Global***
3. ***Thames Water***
4. ***Mega Restructuring***
5. ***Link Fund Solutions***
6. ***Yuzhou Group***
7. ***Consort Health***
8. ***Sebastian Holdings***
9. ***Aggregate***
10. ***Superdry***
11. ***Phoenix Commodities***
12. ***China Evergrande Group***

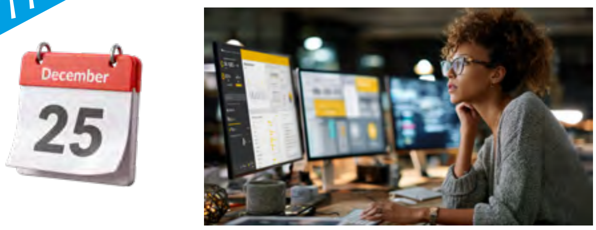
THE LAWS OF CHRISTMAS

1

2015

2

1677



3

1831

4

1872

5

1551

6

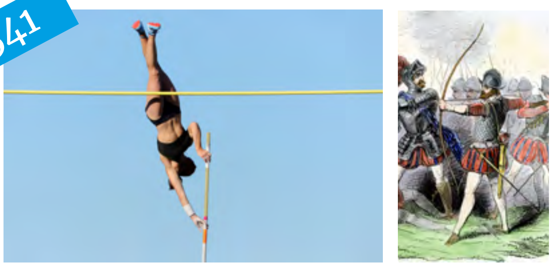
1836

Christmas at Restaurant Digest

Starters	Mains	Desserts
Seared scallops, kohlrabi, fennel, pak choi, saffron	Seared halibut, courgette, Jerusalem artichoke, nasturtium	Christmas pudding, brandy Anglaise
Butter-poached lobster risotto, spring onion, samphire	Roast turkey, stuffing, glazed chestnut, pumpkin, cranberry sauce	Poached pear in mulled wine, gingerbread ice cream
Beef tartare, red chicory, pickled quail's egg, shallot, sorrel, Oscietra caviar	Loin of venison, fig, turnip, bussels sprouts, sorrel, juniper	Black forest with vanilla, dark chocolate, cherry
Roasted breasts of quail & confit leg, charred sweetcorn, onion, nasturtium	Roasted breast of goose, salsify, grape, cavolo nero, oyster mushroom	Yuzu & citrus Mont Blanc
Pumpkin & ricotta ravioli, brown butter sauce, sage, parmesan	Roasted squash, apple, bulgur salad, kale, oxalis	Selection of British cheeses with traditional accompaniments

7

1541



8

1990

9

1989

10

1644
25 December

SOUTH SQUARE

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3-4 South Square | Gray's Inn | London WC1R 5HP | UK
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