SOUTH SQUARE

Digest

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It's Not About the Money: Mark Phillips KC on why restructuring plans are still in creditors' and companies' interests

Distributing Client Money: Samson Spanier (Kennedys) and Glen Davis KC consider the CASS 5 regime and the recent decision in *Re EC3 Brokers Ltd*

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SOUTH SQUARE

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From the editors

Marcus Haywood and William Willson

Welcome to this August 2026 edition of the Digest

What an eventful period since our April edition! As we were pulling this issue together, on 20 July 2026, Number 10, Downing Street, SW1, welcomed the seventh Prime Minister within a decade – Andy Burnham – who swiftly set about announcing a raft of new measurers including £2 bus fares, the removal of 5% VAT on household energy bills and the opening of 10 North, a branch of the Office for the Prime Minister and Cabinet in Manchester, the city of which Burnham was formerly Mayor.

John Healey became the eighth Chancellor of the Exchequer to serve over the same period of time and whilst gilt yields steadied slightly upon his appointment, investors appear to remain watchful.

Meanwhile, England put in a creditable performance in the FIFA World Cup, claiming third place with a thrilling 6-4 victory over France making this the men's team's best finish for 60 years. What began as a disappointing start at Wimbledon for British tennis suddenly perked up as wildcard entry Arthur Fery made it through to the semi-finals before being defeated by Germany's Alexander Zverev. The UK was, however, victorious in the World Snail Racing Championships, held in Norfolk in June, where 'Snailor Swift' outperformed competitors from France, Germany, Poland the US and Brazil to bring home the lettuce.

The country is suffering, as is much of Europe, from a series of serious heatwaves with six regions of England and Wales now in official drought status (having received under 2% of expected monthly rainfall) and many other areas at risk, with hosepipe bans in force. Wildfires have broken out in places as wide ranging as North Yorkshire, West and East Sussex, Devon, Somerset, Greater Manchester, Essex and Suffolk, with nuclear power station, Sizewell B, on alert as Dunwich Heath burned. None, though, a touch on the fierce fires ranging in France and Spain, with at the time of writing up to a third of million people evacuated across Europe with temperatures in some areas predicted to rise to as much as 44C.

Closer to home, much has been happening in the Courts and within Chambers and, as such, we have a bumper issue for your summertime reading. We were delighted to meet so many friends and colleagues at INSOL London 2026 in April, and to see yet more of you on our visits to Bermuda and the BVI that took place in June (see page 28). Welcome to all our new readers from those events and our thanks to all who help make these excursions such a success.

This edition starts with Tom Smith KC reviewing a trilogy of recent restructuring plans (in *Waldorf*, *Poundstretcher* and *TG Jones*) where the approach of the Court of Appeal has been applied: ***Applying the Court of Appeal***. Tom is then joined by Adam Al-Attar KC and Peter Burgess as they reflect on the decision in *Credit Suisse v SoftBank*, where the claimant won the battle to establish a transaction at an undervalue but still recovered nothing in their article ***Transactions Defrauding Creditors***.

We are then delighted to welcome a team from Walkers (Simon Hurry, Mark Dunlop and Adam Cole) who in ***A New Dawn for Corporate Rescue in Jersey*** take us through the new Jersey administration regime, introduced on 19 June 2026

Just before the case digests, with the editorial (roundup provided on this occasion by Tony Beswetherick KC) we have a case note on the significant decision by the Supreme Court in *Valeriy Ernestovich Drelle v Servis-Terminal LLC* in which Chambers' members Mark Phillips KC, Dr Riz Mokal and Clara Johnson appeared. This decision was under embargo until 27 July, and in our article ***A New Practice in Relation to Hand Down of Written Judgments*** (pages 92 to 94) we have a timely reminder of the importance of obeying embargoes and some forthcoming changes in approach to the handing down of judgments.

In ***It's Not About the Money*** Mark Phillips KC considers why restructuring plans are still in creditors' and companies' interests. This is followed by ***Distributing Client Money Held by an Insolvent Insurance Broker*** where we are delighted that Samson Spanier of Kennedys joins Glen Davis KC to consider the CASS 5 regime and the recent decision in *Re EC3* Brokers Ltd

With Christopher Nolan's epic adaptation of Homer's tale in mind, James M Peck, Associate Member of South Square and International Judge Singapore International Commercial Court (Chambers answer to Matt Damon), takes us on a canter through his remarkable career in ***A Restructuring Odyssey: From Judging Lehman to Judicial Management Hearings in Singapore***.

On pages 85 to 87 you can read an example of how the Q&A feature of the new FromCounsel Restructuring and Insolvency services works, with details of how to sign up for a trial.

As always, we are indebted to our junior members of Chambers for producing the case digests – many thanks to them for their hard work. News and legal gossip can be found in News in Brief and the South Square Challenge for this edition is inspired by summer reading lists – best of luck!

We do hope you find plenty to inform and entertain within this edition. If you find yourself reading someone else's copy and wish to be added to the circulation list please email *kirstendent@southsquare.com* or sign up on our website and we will do our best to ensure that you receive the next and all future editions.

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

William Willson KC &
Marcus Haywood

Applying the Court of Appeal:
A Trilogy of Recent Restructuring Plans

TOM SMITH KC
SOUTH SQUARE

Following its introduction in 2020, there have now been a trilogy of Court of Appeal decisions dealing with the principles applicable to restructuring plans. A different trilogy – of recent High Court decisions – show how these principles have been successfully applied in recent plans sanctioned by the Court: *Re Waldorf Production UK plc*[1], *Re Poundstretcher Ltd*[2] and *Re TG Jones High Street Ltd*[3].

A Recap

Before considering these recent plans, it is worth briefly recapping the three Court of Appeal decisions. The first in time was the decision in *Adler*[4]. That case, however, can be regarded as falling into a category of its own given the relatively unusual nature of the plan in that case which was a liquidation plan to wind down the group's business. The principal point established by *Adler* is that, where a plan of this nature is proposed as an alternative to a formal insolvency in which the creditors would be treated *pari passu*, then a (very) good reason will be required in order to depart from that *pari passu* treatment under the plan. Another point which the decision established (and which is of more general application) is that the concept of an "*arrangement*" between the plan company and creditors in Part 26A require some amount of consideration to be given even to creditors who are "*out of the money*" in the relevant alternative to the plan.

The other two decisions, *Thames Water*[5] and *Petrofac*[6], can be considered together. The key point established by those decisions is that, contrary to the approach which had been taken in earlier cases such as *Virgin Active*, it is not possible to exclude plan creditors from a share of the benefits created or preserved by a plan simply on the basis that they would be "*out of the money*" in the relevant alternative to the plan.

As a digression, there is in the author's respectful view a live question as to whether the reasoning in *Thames Water* and *Petrofac* is in fact correct. This is because neither decision grapples with the implications of section 901C(4) of the 2006 Act. Section 901C(4) allows a plan company to exclude a class of creditor from voting on a plan if that class of creditor has '*no genuine economic interest in the company*'. If a class of creditors can be excluded from voting on a plan on the basis that they have '*no genuine economic interest in the company*' then it would seem to reasonably follow that it would be permissible to provide such creditors with no material share of the benefits under a plan. It would make no sense to exclude creditors from being able to vote on a plan, whilst at the same requiring the plan to allocate some benefits to those creditors. The only question which then arises is as to the meaning of '*no genuine economic interest in the company*' in section 901C(4). This question was explicitly and deliberately left open by the Court of Appeal in *Thames Water*[7] and was not addressed in *Petrofac*.

The Court of Appeal in *Thames Water* did not deal with the effect of section 901C(4) on the basis that no actual application

1. [2026] EWHC 1014 (Ch).
2. [2026] EWHC 1438 (Ch).
3. See the Summary of Reasons for Sanction dated 1 July 2026.
4. *Re AGPS Bondco plc* [2024] EWCA Civ 24.
5. *Kington Sarl v Thames Water Utilities Holdings Ltd* [2025] EWCA Civ 475.
6. *Saipem SpA v Petrofac Ltd* [2025] EWCA Civ 821.
7. See [156] of the judgment.

had been made under that section in that case, and the Court of Appeal in *Petrofac* did not deal with it at all perhaps for the same reason. However, with respect, that is unconvincing. Section 901C(4) is an important part of the legislative scheme, irrespective of whether or not an application is made under that provision in any given case, and the principles applicable to Part 26A ought to take account of all the relevant aspects of the legislation. Be that as it may, save in a future case where an application is made under section 901C(4) where the approach to be taken to "*out of the money*" creditors appears still to be decided, then in any other case on the basis of the existing Court of Appeal authorities it is not possible simply to exclude "*out of the money*" creditors from a share of the benefits created or preserved by a plan.

However, the critical question which the Court of Appeal left open is how to measure the contribution made by an "*out of the money*" creditor and, relatedly, how to determine what share of the plan benefits such a creditor is entitled to receive. The Court of Appeal held that the contribution cannot simply be measured at zero on the grounds that the "*out of the money*" creditor would make no recovery in the relevant alternative; but it did not say how the contribution was to be measured. It seems to have been suggested in some quarters that the effect of the Court of Appeal judgments is that the contribution of an "out of money" creditor should be measured as the nominal amount of the claim being compromised. However, the Court of Appeal in fact said no such thing, merely that it cannot simply be valued at zero.

It is against this landscape that the three recent High Court decisions referred to above have provided some welcome clarity.

Waldorf

Of the three cases, the decision in *Waldorf* is the most fact specific and therefore probably of the least general application. However, it does nevertheless help establish a number of important points.

The immediate context to the *Waldorf* plan was an offer by a purchaser (Harbour) to purchase part of the Waldorf Group. The plan was proposed in order to facilitate that purchase. The allocation of the consideration to be paid by Harbour was negotiated with the Group's creditors, including through a

8. Refusal of permission to appeal dated 19 June 2026.

two-day mediation to which all relevant creditors were invited. HMRC was the only such creditor who chose not to attend.

The Plan provided (among other things) for the extinguishing of the Plan Company's circa US$94 million liabilities to HMRC arising from the Energy Profits Levy, in return for a payment of 14% of HMRC's nominal claim. A similar proposal was made in respect of debt owed to the other unsecured creditor subject to the plan who had also objected to the first restructuring plan. In addition, a key effect of the purchase being facilitated by the Plan was that the purchaser, Harbour, would be able to use the Group's accrued losses in order to reduce its own tax liabilities going forwards.

The Court held that the Plan was fair and sanctioned it. Probably the key point for the purposes of future plans is that the decision establishes that HMRC does not have any form of protected or priority status under Part 26A. To the extent that the claim of HMRC is non-preferential, then its claim is of the same character as that of any other unsecured creditor, and can be crammed down as part of a Part 26A plan. In relation to discretion, the views of HMRC naturally carry weight and respect but, as Michael Green J rightly pointed out, those views ultimately need to be scrutinised in order to determine whether or they are well founded. In refusing permission to appeal, Zacaroli LJ held that this reasoning was "*unimpeachable*".[8]

The judgment also confirms that the statutory "*no worse off*" test in section 901G(3) is to be assessed by reference to the relevant creditor's rights against the company, taking into account associated security and guarantee rights, but not by reference to rights against other parties and wider interests. As such, HMRC's ability to collect tax vis-à-vis Harbour was not relevant to the "*no worse off*" test. In this respect, the

judgment followed the Court of Appeal decision in *Petrofac* on this point.

The Judge, however, accepted that the broader impact of the Plan on HMRC was relevant to the exercise of discretion in connection with the cross-class cramdown. The court's decision on discretion ultimately hinged on its conclusion on the facts that HMRC was better off under the plan than in the relevant alternative, even taking into account the position vis-à-vis Harbour. This was clearly a solid basis for the Court sanctioning the plan.

As a result, the Court did not have to grapple with the position which would have arisen if, on the evidence, HMRC had not been better off taking into account its future ability to collect taxes from Harbour. This would have raised the question of the relevance of the creditor's position vis-à-vis third parties when it comes to the exercise of the sanction discretion. Arguably, the Court should still have been prepared to sanction the Plan in circumstances where there was no bar under the tax legislation to the relevant tax losses being used by a purchaser and set against future profits and where the statutory "*no worse off*" test was met, but provided that it was satisfied that the allocation of the restructuring benefits was fair. Take the example of a plan creditor who holds a CDS which pays out on the insolvency of the plan company; such a creditor would be worse off as a result of the sanction of the plan

but that could hardly be a good reason why, as a matter of discretion, the plan should not be sanctioned. That said, the issue was perhaps more acute on the facts on *Waldorf* than this example given the very direct link between the effect of the plan in facilitating the ability of Harbour to use the tax losses and the ability of HMRC to collect future tax from Harbour.

The question of the fair allocation of the restructuring benefits in *Waldorf* was otherwise relatively straightforward. Once the Court had determined that HMRC had no special position different from that of any other unsecured creditors, and that it was better off under the plan (including by reference to its position vis-à-vis Harbour), then there was no reason why the allocation of benefits which had been negotiated and agreed between the company and the other creditors should be regarded as unfair.

Permission to appeal in *Waldorf* was refused by both Michael Green J[9] and by the Court of Appeal[10].

Relevance of Negotiations

In *Petrofac*, the Court of Appeal had referred to "*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*"[11]. Subsequent first instance cases have confirmed that the holding of such negotiations is not a jurisdictional requirement.[12] This must be right given that in some cases, depending on the nature of the creditor base, there may be significant practical hurdles in the way of such negotiations.

Nevertheless, the usual approach now is for the plan company to seek to show how it has sought to negotiate or otherwise engage with some or all of the plan creditors. One can see this as an additional cost or hurdle to restructuring plans. However, more positively, recent cases also demonstrate how such negotiations can be a useful weapon in the armoury of a plan company when seeking sanction of the plan. In *Waldorf*, the fact that HMRC had failed to engage in the mediation clearly counted against it when it came to sanction, and the fact that the plan company had negotiated and agreed a position with all other creditors was also a clear factor in the plan company's favour. Similar in *TG Jones*, where the relevant negotiations took

9. [2026] EWHC 1316 (Ch).

10. Refusal of permission to appeal dated 19 June 2026.

11. See [191] of the judgment; see also [131].

12. *Re Waldorf Production* [2025] EWHC 2181 (Ch) at [183]; *Re Poundland Ltd* [2025] EWHC 2755 (Ch) at [58].

13. [2025] EWHC 2276 (Ch) at [43].

14. [123] of the judgment.

15. [170] of the judgment.

place in the period between the convening hearing and the plan hearings, the fact that there had been a negotiated and agreed compromise with the dissenting creditor (British Land) was a powerful factor in favour of sanction. Even in a case where negotiations do not lead to agreement, the fact that a plan company has sought to engage and modify its position in order to try and seek compromise will be a powerful factor in favour of sanction.

Poundstretcher

The second recent case is the decision of Hildyard J sanctioning the plan in *Poundstretcher.* This was a plan restructuring a large retail business, which involved the leases of a large number of stores alongside financial and unsecured creditors. The plan was opposed by certain landlords on grounds which were essentially specific to the facts of the case, and which are therefore of less interest for present purposes.

The issue which is of wider interest concerns the approach taken to the question of the assessing the fairness of the allocation of benefits between plan creditors and other stakeholders. In *Poundstretcher*, various parts of the claims of landlords and other creditors were "*out of the money*" in the relevant alternative of an administration, so the question arose as to how to value the contributions to the plan represented by the compromise of those claims.

The plan company had produced an allocation of benefits report which, first, analysed the relative contributions made and benefits received by each class of plan creditor on a nominal basis, but then also sought to assess the position by reference to the recoveries on the relevant claims in the relevant alternative.

In approaching the assessment of the fairness of the allocation of the restructuring benefits, Hildyard J referred to the summary of the principles derived from the recent "trilogy" of Court of Appeal cases set out by Sir Alastair Norris in *Re River Island Holdings Ltd*[13], which had itself been endorsed by Michael Green J in *Waldorf* as a "*helpful checklist*". One of these principles, in relation to the fair sharing of the burden and benefits of the restructuring, is that "*[t]he starting point (but only the starting point) is the treatment of the dissenting class in the relevant alternative*". It is respectfully suggested that this formulation is correct. Notwithstanding *Thames Water* and *Petrofac*, the starting point in assessing the contribution made by the compromise of any claim must be its real world value, namely, the likely recovery to the creditor in question if there was no plan. But equally, this is only the starting point, and not the end point, because an "*out of the money*" claim cannot be simply treated as providing zero contribution.

Hildyard J explained the reason why the position in the relevant alternative was the starting point. As he observed[15], in valuing contributions, there are two possible approaches:

(1) The first is to value the contributions by reference to the nominal amounts of the claims of the creditors being compromised, ignoring the likely return on those claims in the relevant alternative;

(2) The second is to value the contributions by reference to the amounts of the estimated recovery on such claims in the relevant alternative, whilst making allowance for the fact that (as per *Petrofac*) the compromise of even "*out of the money*"

claims may contribute towards the restructuring benefits.

The fundamental problem with the first approach is that it presents all contributions as having equal weight. It does not differentiate between the provision of new money and the compromise of an existing claim. Equally, in relation to the compromise of existing claims, it does not differentiate to reflect the different priority of claims in the relevant alternative. On the nominal approach, the provision of £10 million of new money is treated as the same contribution as the compromise of a secured claim of £10 million which would receive (say) a 50% recovery in the relevant alternative and in turn in the same way as an unsecured claim of £10 million which would receive no recovery in the relevant alternative. Intuitively, that seems impossible to justify.

Hildyard J therefore concluded that: "*... the better and more commercially realistic approach is to value the compromise of existing claims by reference to the estimated recovery on those claims in the Relevant Alternative (and to value new money at face value). In relation to the compromise of existing claims this reflects what the relevant creditor is actually giving up. Further, this reflects the fact that the position in the Relevant Alternative is recognised to be the starting point in the analysis ...*"[16]. On this basis, Hildyard J sanctioned the plan.

TG Jones

Similar issues arose in connection with the two inter-linked restructuring plans in the case of *TG Jones* (the renamed former high street business of WH Smith). As with *Poundstretcher*, the plans involved different categories of liabilities including finance claims, leases, unsecured claims including business rates and (in the case of *TG Jones*) certain supplier cases. There was also a contribution of new money. The landlord and unsecured claims were in part "*out of the money*" in the relevant alternative of administrations of the plan companies.

The allocation of benefits report produced by the plan companies analysed the contributions made by the compromise of claims by reference to the likely recoveries in the relevant alternative. As such, the claims were treated as making a pound for pound contribution to the extent that there would have been a full recovery in the relevant alternative. In order to give value to the "*out of the money*" element of the claims, these were treated as contributing on a *pro rata* basis to the post-restructuring equity value of the Group; in other words, the post-restructuring equity value was divided by the nominal amount of the "*out of the money*" part of the claims in order to derive the relevant contribution made by each pound of the "*out of the money*" claims. This is one way in which the appropriate value may be attributed to the compromise of "*out of the money*" claims whilst at the same time avoiding valuing their contribution at the nominal amount of the claims. Depending on the facts of the case, another way might be to treat the contribution of the "*out of the money*" claims as being represented by the saving of the costs which would be incurred in an alternative process to deal with those claims.

It was argued by one of the landlords that, on the facts of the case, the contribution made by certain landlords in writing off part of the rent which would otherwise have fallen due during the first year of the plans should

16. [174] of the judgment.

17. At [282] of the judgment.

18. [2025] EWHC 2678 at [47].

be treated in the same way as a contribution of new money. Hildyard J did not address this point in his summary of reasons for sanctioning the plan, although he indicated that he might well address the matter in any fuller judgment. It will therefore have to be seen what the Judge says about this.

However, in the author's view, the argument is wrong. The courts have already noted, in cases both preceding and following *Thames Water* and *Petrofac*, that a contribution of new money is qualitatively different from the compromise of an existing liability. As noted by Snowden J in *Virgin Active*[17], the writing-off of existing impaired claims cannot properly be equated with the contribution made by the provision of new money: "*There is, in my judgment, a considerable difference between waiver of liabilities already contracted for and which would be worthless in a formal insolvency, and new monies which will, if the Plans are sanctioned, be made available to finance future operations.*"

Similarly, in *Re Chandlers Building Supplies*[18] Hildyard J himself noted that "*the nominal values do not reflect the fact that the Secured Plan Creditors' claims rank in priority to the Unsecured Plan Creditors' claims and that new money is a far more important contribution than the writing off an existing unsecured debt which may, in the circumstances, be entirely under water.*"

This seems correct. The contribution of new money should clearly be valued at the nominal amount advanced since that represents the benefit given up and the benefit received by the plan company. But where the contribution is made by way of compromise of an existing liability, then the value of that compromise from the plan creditor's perspective reflects what the liability is worth, which would ordinarily be what the plan creditor might receive in respect of it in the absence of the plan. Equally, viewed from the plan company's perspective, the compromise of a liability which would be left unpaid or would capable of compromise in the relevant alternative is a benefit which is less than the full nominal amount of the claim.

Conclusion

Overall, these recent cases demonstrate that the courts have dealt effectively with applying the approach set out in the Court of Appeal cases, and that it is possible to devise approaches which gives appropriate value to "*out of the money*" whilst at the same time recognising that the different types of claim do not all fall to be treated in the same way.

Tom Smith KC advised the SteerCo and Bond Trustee in Waldorf and acted for the Plan Companies in Poundstretcher and TG Jones.

Transactions defrauding creditors:

Losing battles but winning the war: Section 423 and the innocent beneficiary and how they might succeed

Credit Suisse Virtuoso SICAV-SIF v SoftBank Group Corp [2025] EWHC 2631 (Ch) Lord Justice Miles (sitting in the Chancery Division, Financial List) · judgment handed down 15 October 2025

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A creditor can prove every element of a claim under section 423 of the Insolvency Act 1986 and still recover nothing.

That is the lesson of *Credit Suisse Virtuoso v SoftBank*, in which Miles LJ held that the release of c.$440 million of security at the heart of the collapsed Greensill securitisation was a transaction at an undervalue, entered into for the statutory purpose of prejudicing the noteholders. Yet he ultimately dismissed the claim. The reason lay entirely at the relief stage, and it turned on a single fact: the SoftBank entities who benefited from the transaction were innocent of the debtor's purpose. The decision is the most substantial recent treatment of how the court's restorative discretion operates in relation to a third-party beneficiary.

1. The transaction and the commercial setting

The dispute arose from the Greensill supply-chain finance business. Credit Suisse's Supply Chain Finance Subfund (the "**SCF Subfund**") had invested $440 million in notes (the "**Fairymead Notes**") issued under a programme originated by Greensill Capital (UK) Limited ("**GCUK**"). The key transaction document for those notes was a Receivables Purchase Agreement (the "**RPA**") under which a Greensill special-purpose vehicle, Greensill Limited ("**GL**"), purportedly bought receivables from the Katerra group of construction companies. GL's rights against Katerra under the RPA, and the associated US security, were the ultimate collateral for the noteholders. GL was the debtor for section 423 purposes; its sole director and controlling mind for these purposes was Mr Alexander (Lex) Greensill, and it was common ground that his knowledge, intentions and purposes were to be attributed to GL.

During 2020, Katerra experienced worsening financial difficulties. A Katerra default threatened Greensill's equity fundraising ahead of a planned IPO and risked a wholesale withdrawal of Credit Suisse's supply-chain

funds, Greensill's principal source of liquidity. It was "*a bomb that needed to be defused*". The SoftBank entities (the first to sixth defendants, comprising Vision Fund vehicles and their parent, the "**SBDs**") were heavily invested in both Greensill and Katerra and had every commercial reason to want the bomb defused too.

The solution, negotiated between October and December 2020, had two limbs. First, SoftBank's Vision Fund 2 injected $440 million into the Greensill group under convertible loan notes ("the **CLNs**"), on the shared understanding (as Miles LJ found) that Greensill would use it to buy in or redeem the Fairymead Notes and thereby "*internalise*" the Katerra risk onto its own balance sheet. Second, Katerra was recapitalised: Vision Fund 1 paid $200 million for new equity under a Preferred Share Purchase Agreement (the "**PSPA**") and wrote off $300 million of its own debt, while GL released the RPA.

The release was effected on 30 December 2020 by two instruments: a Contribution and Exchange Agreement (the "**CEA**"), under which GL gave up the RPA in exchange for a small block of Katerra shares; and a Transfer Agreement (the "**TA**"), under which those shares passed immediately to Vision Fund 2. These were the "*Impugned Transactions*" for the purpose of the claim under section 423. Critically, by 30 December the $440 million had not been used to redeem the notes: Greensill's liquidity had collapsed (BaFin had ordered an accelerated reduction in exposure to the Gupta Family Group companies led by Sanjeev Gupta, and to which Greensill was heavily exposed, on 8 December; the lead pre-IPO investor TDR had withdrawn on 23 December; and SoftBank had declined to provide a $1.5 billion bridge). The noteholders were thus converted from secured creditors of Katerra into unsecured creditors of an imperilled GL. Mr Greensill concealed the position from Credit Suisse. GL and Katerra both entered insolvency proceedings in 2021.

Quantum: the value of what GL gave up

Although ultimately academic to the result, the quantum findings are instructive on counterfactual valuation. The court had to value GL's RPA rights as at 30 December 2020. There were two key questions. First, would Katerra have survived absent the CEA? Miles LJ found it would not: he held as a fact that without the CEA the PSPA would not have been entered into either, and that Katerra would certainly have entered a Chapter 11 wind-down in late December 2020 or early January 2021. The claimants' probabilistic case (an 80% chance of going-concern survival) was rejected as resting on real-world valuations that assumed the very rescue the counterfactual had to disregard.

Second, what would creditors have recovered in that bankruptcy? On competing expert evidence, the judge adopted a 22% recovery rate (the low end of the closest comparable), applied to actual receivables of $250 million and future receivables of $10 million, plus $29 million of secured collections. That produced a value of $86.2 million for GL's rights — well above the agreed $11.3 million value of the Katerra shares GL received and passed on. The transaction was, on any view, at a substantial undervalue.

2. The decision

The judgment of Miles LJ found for the claimants on each of the statutory elements for section 423, before ultimately refusing relief.

(i) The "transaction"

The first dispute was over the scope of the relevant transaction. The claimants said the relevant transaction was the CEA and TA alone. The SBDs contended for the wider restructuring, referred to as the "Greensill/Katerra Transaction", comprising of fifteen agreements and the shared expectation that the $440 million CLN would be used to redeem the Fairymead Notes. Under this wider transaction, the SBDs said GL had received ample value.

The judge held that "*transaction*" is broadly defined (s.436(1): "*a gift, agreement or arrangement*") and extends beyond binding contracts to arrangements, and to the release of a debt (*El-Husseiny v Invest Bank PSC* [2025] UKSC 4, [60]). But there are three statutory constraints. The transaction must be one the debtor has "*entered into*" — meaning some step or act of participation by the company (*Re Ovenden Colbert Printers Ltd* [2015] BCC 615 at [32] per Kitchin LJ). The court identifies the transaction "*by reference to the person with whom*" the debtor entered into it, and "*without more*" a contract between A and B is not part of a transaction between A and C (*Phillips v Brewin Dolphin Lawrie Ltd* [1999] 1 WLR 2052 ("**Phillips CA**") at 2060-2061 per Morritt LJ; and *Feakins v Department for Environment Food and Rural Affairs* [2007] BCC 54 ("**Feakins**") at [41]-[47] per Jonathan Parker LJ). And the exercise is fact-specific and purposive, the courts being "*reluctant to* *view a number of contracts involving different parties as constituting a single transaction*" unless they have been artificially divided.

Applying these, Miles LJ preferred the claimants' case on the scope of the transaction. He accepted as a fact that all the November–December agreements were an interlinked commercial package, and that the SBDs would not have entered any one without the rest, but held that the Impugned Transactions were the only agreements to which GL was a party or under which it acquired rights or liabilities. GL had not instigated, arranged or procured the others (distinguishing *Feakins*, where the debtor had set the wider dealings in motion). The agreements had different parties and different purposes and were spread over two months, with later ones superseding earlier ones. Further, the statutory purpose requirement pointed to focusing on the discrete dealing capable of prejudicing this victim. The CEA and TA, taken together, were "*the transaction*".

(ii) Undervalue

Having confined the transaction to the CEA and TA, the undervalue analysis became more straightforward in form but important in substance. The settled comparison (*Re MC Bacon* [1990] BCLC 324 at 340 per Millett J; *Agricultural Mortgage Corp v Woodward* [1995] 1 BCLC 1 at 5–6) is between the value the debtor obtained and the value it provided, both measured in money or money's worth and from the debtor's standpoint. GL gave up RPA rights worth $86.2 million and received Katerra shares that it immediately transferred away. That alone established a significant undervalue.

Two arguments of the SBDs fell away. The "*wider consideration*" argument depended on the wider-transaction case already rejected. In any event the $440 million CLN was paid to GCUK/GCPL, not to GL, and there was no evidence it enured to GL's benefit: a payment to one group company is not, without proof of value, a benefit to another (*Re Whitestar Management* [2018] EWHC 743 (Ch) at [79] per HHJ Hodge QC (sitting as a High Court judge)). The judge held that consideration provided to a third party is disregarded except to the extent it enures to the debtor's benefit.

More interesting was the "*pass-through point*". The SBDs argued that, because the Participation Agreement obliged GL to pay GCUK sums equal to whatever it received under the RPA, releasing the RPA simultaneously released GL from an equal and offsetting liability with the result that GL was no worse off. Miles LJ rejected this. Section 423(1)(c) asks what consideration the debtor obtained, not whether it was left worse off. The cessation of an outgoing obligation that arose only because there was no longer an incoming receipt was a *consequence* of the existing terms of the documentation, not consideration obtained under the CEA. There was, additionally, an independent answer: by releasing the RPA without the consent required by clause 8.1(C) of the Participation Agreement, GL incurred a liability that offset any supposed benefit, and the SBDs' attempt to neutralise that via the clause 7 indemnity failed on construction (an indemnity will not, absent clear words, be read as absolving a party of liability for its own breach).

(iii) The Statutory Purpose

Section 423(3) requires that the debtor entered into the transaction for the purpose of putting assets beyond creditors' reach or otherwise prejudicing them. The law is well settled: the improper purpose need not be sole or dominant (*JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176 at [13]–[14] per Leggatt LJ); it is a subjective state of mind — "*what did the debtor aim to achieve?*" (*BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112 ("*Sequana CA*"), [66] (David Richards LJ); *El-Husseiny*, [28]); and a foreseen or even desired *consequence* is not the same as a purpose, though it is evidence from which purpose may be inferred (*Inland Revenue v Hashmi [2002] EWCA Civ 981*, at [22] *(Arden LJ); Ablyazov* and Leggatt LJ's "missile strike" illustration at [15]).

The SBDs ran a temporal argument: Mr Greensill's last real decision was on 4 December 2020, when he still expected to redeem the notes from the $440 million, so his aim was to *benefit* the noteholders, not prejudice them. Miles LJ rejected this. Purpose is assessed when the transaction is entered into (here 30

December) and by then the financial collapse of December had destroyed any realistic prospect of redemption. Mr Greensill knew the CEA would “kill” the security (as his own in-house counsel had warned him), knew it converted the noteholders into unsecured creditors of a group that lacked the resources to pay them, knew Credit Suisse would not have consented, and concealed the position. Invoking the means/ends reasoning of *OBG v Allan*, the judge held that a person who intends an end intends the necessary means: Mr Greensill’s end may have been to keep Greensill alive (and SoftBank onside for a bridge loan), but the CEA was the indispensable means, and prejudicing the noteholders was therefore positively intended, not a mere by-product.

(iv) Benefit

The claimants advanced several routes to a significant recovery. Miles LJ examined each and found it flawed.

The claimants’ headline case was that releasing $440 million of Katerra debt necessarily made the SoftBank shareholding $440 million more valuable: debt down equals equity up. This intuition was advanced by the claimants’ valuation expert but he was unable to defend it in cross-examination. He insisted a $440 million debt reduction *always* produced a $440 million equity uplift, retreating to favourable examples when pressed. The judge rejected it as economically unsound: whether a reduction in debt translates into a corresponding increase in equity value depends entirely on the company’s overall balance sheet and prospects. A release of debt in a company sliding into bankruptcy does not hand its shareholders a matching gain. The internal SoftBank valuation the claimants relied on did not, in fact, value the stake at $440 million; it valued it at $317 million, and even that was in the real world where recapitalisation had occurred.

Vision Fund 2 (the recipient of the Katerra shares under the TA): This was the only defendant to receive an actual benefit, namely Katerra shares worth $11.3 million, for which it gave no consideration. The judge fixed the value by reference to the contemporaneous PSPA (preferring it to the claimants’ subjective discounted-cash-flow figure), and held the claimants to their pleaded case, preventing them from contending in closing for $21 million when they had pleaded $11.3 million and not challenged the contrary expert evidence.

Vision Fund 1 (the $200 million PSPA investor): Here the claimants’ benefit case collapsed entirely. Vision Fund 1 paid $200 million for new Katerra equity worth exactly $200 million and additionally wrote off $300 million of its own Katerra debt as part of the recapitalisation. Crucially, its pre-existing $1.95 billion stake was diluted *to nil* in the same restructuring. So Vision Fund 1 obtained no uplift on its old investment (it was wiped out) and paid full value for its new one. It received no relevant benefit from the Impugned Transactions at all.

SBG (the parent): With no benefit established against the operating vehicles beyond Vision Fund 2’s $11.3 million, there was no independent basis for relief against the parent.

(v) Remedy

The relief discretion under ss.423(2) and 425 is broad and fact-sensitive: the court fashions the order best suited to *restoring* the position and protecting victims (*4Eng v Harper* [2010] 1 BCLC 176, [16] per Sales J; *Reid v Ramlort* [2005] 1 BCLC 331 at [125] per Jonathan Parker LJ). There were two principles that were of particular relevance to this case. First, although neither dishonesty nor any particular mental state on the defendant's part is a trigger for relief, the defendant's degree of involvement, knowledge and culpability are highly relevant to *what* relief is appropriate (*4Eng; Sequana* [2017] EWHC 211 (Ch) at [25] per Rose J). Second, in shaping relief the court may have regard to post-transaction events down to the date of the order – by analogy with equitable compensation (*Target Holdings v Redferns* [1996] 1 AC 421) – so that a transferee who merely held an asset that later fell in value is not made a guarantor of its value.

On the facts, Miles LJ found the SBDs innocent of GL's purpose. They believed in good faith, and on reasonable grounds, that the $440 million had been (or would be) used to redeem the notes before the RPA was released, that being the very purpose for which Mr Greensill had sought it. They did not share his purpose, did not know of it, and did not "orchestrate" the deal; these were arm's-length multilateral commercial negotiations conducted through external lawyers, in which SoftBank was at times a reluctant participant. The judge expressly rejected the claimants' attempts to recast SoftBank as the controlling hand.

That innocence led to the result. Vision Fund 1 had received no benefit, so no order would lie against it. Vision Fund 2's $11.3 million of Katerra shares was the only benefit, but Katerra's June 2021 bankruptcy rendered those shares worthless. Following *4Eng*, an innocent transferee who simply holds an asset that collapses in value should not be ordered to pay its former value; to do so would make it a guarantor against market fluctuations, and the bankruptcy was "an extreme case" of such a fluctuation. The usual primary remedy in a debt-release case – reinstating the debt and security – was pointless given Katerra's insolvency. Addressing the dictum in *Sequana* that relief will be withheld only exceptionally, the judge held that principle was directed at the ordinary case of an asset transfer; this was not that case. The claim was dismissed.

3. How the case develops the law

Three features of the judgment merit particular attention.

(a) Purpose where the debtor believes he is acting in the group's interest

The purpose finding is a nuanced one. Miles LJ accepted that Mr Greensill did *not* positively wish to harm the noteholders. On the contrary, he wanted to hold them whole, because a default would imperil the wider Greensill group he was trying to save. The judge nonetheless found the requisite subjective purpose, via the *OBG v Allan* means/ends route: prejudice to the noteholders was the inevitable means to the desired end of keeping the group alive and SoftBank onside.

The judgment treats his genuine belief that he was acting in the best interests of GL and the wider group as compatible with a finding that he subjectively intended to prejudice those same indirect creditors. While a debtor can desire to benefit creditors overall while intending the specific prejudice that a particular step entails, it toes the *Ablyazov* line between purpose and consequence. The factor that appears to have tipped the balance was the loss of liquidity by 30 December: once redemption became unachievable, the "benefit" justification evaporated and only the prejudicial means remained.

(b) The relief boundary

The most consequential development is the implicit threshold for relief against a third-party beneficiary. The claimants were at pains to stress that they needed prove no dishonesty. But the judgment shows that, at the relief stage, the third-party defendant's innocence can be a complete defence to any order.

It was not enough that the SBDs paid $440 million with no "*use of proceeds*" clause, set no deadline for redemption, and did not satisfy themselves that the notes had in fact been bought in before allowing the RPA release to complete. The judge treated that as reasonable reliance, not culpable carelessness. The clear implication is that mere carelessness would not expose a benefiting third party to a restorative order. What would have changed the outcome, on the logic of the judgment, is the defendant *sharing* the debtor's statutory purpose: knowing of and participating in the design to prejudice the creditor. It is interesting to note that that is, in substance, the mental element of an unlawful-means conspiracy.

(c) The nature of the remedy

Finally, the judgment reinforces – perhaps more firmly than any recent authority – that section 423 relief is a form of statutory restitution, tethered to the benefit the particular defendant received, rather than a free-standing power to award money compensation measured by the victim's loss. The court declined to make any monetary order against Vision Fund 1 precisely because it had received no net benefit; it declined to order Vision Fund 2 to pay the former value of shares that had become worthless; and it endorsed the view (from *Integral Petroleum SA v Petrogat FZE* [2023] EWHC 44 (Comm) at [110] per David Edwards KC (sitting as a Deputy High Court Judge)) that, while there may be no absolute jurisdictional bar, the court will "*ordinarily*" refuse an order against a party who received no benefit, even one who directed or facilitated the transaction, because that would be inconsistent with the restorative nature of the jurisdiction.

This clarification means that a section 423 claimant should think of recovery as capped, defendant by defendant, by the value each received and retained to judgment. Where benefits are diffuse, matched by consideration, or destroyed by supervening events, the restorative jurisdiction may leave a proven victim with no remedy.

Conclusion

Though the claimants succeeded in the battles establishing a transaction at an undervalue entered into for a prohibited purpose, the claimant lost the war. The decision is an interesting one for section 423 claimants and it provides some reassurance to good-faith counterparties to a commercially negotiated rescue, who are unlikely to share a debtor's hidden purpose. ■

Tom Smith KC, Adam Al-Attar KC and Peter Burgess acted for the successful first to sixth defendants instructed by Quinn Emanuel (Richard East, Nik Bruce-Smith, Daniel Freund, Rory Nolan, Isabel Trinca, Will Bartlett).

A New Dawn for Corporate Rescue in Jersey:
The Introduction of the Administration Regime



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Introduction

On 19 June 2026, the **Companies (Jersey) Law 1991** ("Companies Law") was amended to include a corporate rescue process, administration.

The introduction of administration represents phase 2 of Jersey's 2026 company law reforms, following the phase 1 amendments which came into force on 1 June 2026 and which are intended to enhance the clarity, efficiency and legal certainty for companies, stakeholders and advisers, while preserving the core features that have made Jersey a jurisdiction of choice for complex cross-border transactions, investment funds and private wealth.

Taken together, the two phases constitute a comprehensive modernisation of the Companies Law.

This article examines the key provisions of the new administration regime before turning to consider its advantages and its place in global restructuring.

The need for a rescue process

Jersey has, until 19 June 2026, lacked a corporate rescue procedure. All of the other insolvency procedures are terminal.

The just and equitable winding up procedure has been used (arguably beyond its natural and proper purpose) as a quasi-administration process, to enable, for example, an insolvent company to trade for a further limited period or to facilitate a pre-pack sale. However, the process will still end with the dissolution of the company.

Recourse has also been had to applications for letters of request to the High Court of England & Wales or Court of Session in Scotland to place a Jersey company into administration pursuant to section 426 of the **UK Insolvency Act 1986**[1].

This has resulted in a well-trodden path of "*passporting*" Jersey companies into administration in the UK. However, pursuing this route will now be a matter of choice rather than necessity, given the introduction of a domestic rescue process in Jersey[2].

Core mechanics: how the regime works

The statutory purposes

The administration regime is built around two statutory purposes.

The Royal Court of Jersey ("**Jersey Court**") may make an administration order where it is satisfied that the company is, or is likely to become, insolvent – using a cash flow test (i.e., can the company pay its debts as they fall due) – and that making the order is reasonably likely to achieve either or both of:

(a) the rescuing of the company, or the whole or any part of its undertaking, as a going concern; or
(b) a more advantageous realisation of the company's assets than would be achieved by a winding up.

Who may apply

An application for an administration order may be made by the following:

(a) the company;
(b) a creditor of the company with a liquidated claim of not less than the prescribed minimum liquidated sum (currently £3,000);
(c) a liquidator (including a provisional liquidator);
(d) a cell of an incorporated cell company, in the case of an incorporated cell company;
(e) an incorporated cell company, in the case of a cell of an incorporated cell company; and
(f) the Minister for External Relations, where it is necessary to safeguard the public interest.

A creditor may not make an application where it has agreed not to do so or where its only claim is for the repossession of goods.

How to apply

An application for an administration order must be made in the form approved by the Jersey Court and must be accompanied by an affidavit verifying the content of the form.

1. It is also open to the English High Court or Court of Session in Scotland to place an insolvent Jersey company directly into UK administration under Schedule B1 of the UK's Insolvency Act 1986 if the Jersey company's centre of main interests is in England or Scotland, as applicable.

2. If a Jersey administration is commenced and there are assets in England or Scotland, then this may lead to applications being made to the relevant foreign court for the recognition of the Jersey administrators.

Notice of the application must be given to the company, the Viscount of Jersey (being the head of the executive arm of the Jersey courts) (the "**Viscount**"), and such other persons as the Jersey Court directs, including any creditor.

In addition, under the **Companies (Secured Creditors and Notice of Application for Administration Order) (Jersey) Order 2026**, unless the Jersey Court orders otherwise, 5 working days' notice must be given to any secured creditor before an application is heard. This is to enable a secured creditor to make representations at the hearing should they wish to.

Making the Order

The Jersey Court retains a broad discretion as to whether to make an administration order.

On hearing the application, it may grant or dismiss it, adjourn the hearing (conditionally or unconditionally), request further information, or convene other parties.

The Jersey Court cannot make an administration order if the assets of the company have already been declared *en désastre*.

Désastre is a Jersey bankruptcy process which results in the vesting of the debtor's property, wherever situated, in the Viscount. Following the introduction of a court ordered creditors' winding up procedure into the Companies Law (being an insolvent liquidation), less recourse has been had to the *désastre* regime in a corporate context but it still plays an important role and remains the primary insolvency option for individual debtors.

The Jersey Court can make an administration order where a winding up order has been made or a shareholder winding up resolution has been passed. Where the Jersey Court makes an administration order in such circumstances, the existing winding up order is discharged or the shareholder winding up resolution ceases to have effect.

Safeguard

A safeguard is built into the framework to deter the potential abuse of the administration regime.

If an administration order is made on the application of a creditor and:

(a) the company was not insolvent or likely to become insolvent at the date of the application; and
(b) the administration order is later discharged,

then the company has a right of action against the applicant to recover damages for or in respect of any loss sustained by the company as a consequence of the order, unless the applicant, in making the application, acted reasonably and in good faith.

The moratorium

Upon the making of an administration order, a statutory moratorium becomes effective which means that:

(a) no resolution may be passed, or order made, for the company's winding up or order made that the property of the company be placed en désastre; and
(b) no action or legal proceeding may be commenced or continued against the company except with the consent of the administrator or the leave of the Jersey Court.

The moratorium provides the essential breathing space for the administrator to review the operation of the business and develop a plan to assist it, while also preserving equality between unsecured creditors.

Unlike the position in England, the enforcement of security under the Jersey regime is **excluded** from the moratorium altogether. More specifically, the moratorium does not prevent a person with security over the whole or any part of the company's assets from:

(a) enforcing that security;
(b) exercising contractual rights under the security agreement;
*(c) making a court application under Article 52 of the **Security Interests (Jersey) Law 2012**; or*
(d) commencing or continuing any action or legal proceeding to enforce a hypothec over Jersey immovable property.

This means that secured creditors are not prejudiced by the administration, and their enforcement rights remain fully intact throughout, heightening the need for administrators to work collaboratively with them in relation to the company's future.

The administrator: qualification, powers, and duties

The administrator must be on the Register of Approved Liquidators and Administrators maintained by the Viscount (the "**Jersey Register**").

To be eligible, a practitioner must be ordinarily resident in Jersey, have an appropriate level of experience (as determined by the Viscount), hold a UK insolvency practitioner licence or

be a member of one of the listed accountancy bodies, and have in place a general bond of £750,000 plus a specific bond of between £5,000 and £5,000,000 for each appointment.

A non-resident administrator may be added to the Jersey Register and appointed alongside a resident administrator.

The administrator may do all things that are necessary for the management of the affairs, business and property of the company. Schedule A1 of the Companies Law sets out a comprehensive (but non-exhaustive) list of administrator powers, including the power to take possession of and sell company property, borrow money and grant security, bring or defend legal proceedings, appoint agents and professionals, and employ and dismiss employees.

The administrator acts as the agent of the company and is excused from personal liability except to the extent that the administrator is fraudulent, reckless, negligent, or acts in bad faith.

Any director, creditor, member, or other interested person may apply to the Jersey Court at any time during the administration for an order on the ground that the company's affairs, business and property are being managed by the administrator in a manner that is unfairly prejudicial to the interests of creditors or members, that an act or omission is or would be unfairly prejudicial or that it would otherwise be desirable or necessary for the Jersey Court to make an order.

The Jersey Court's powers on such an application are broad and include the power to regulate the future management of the company's affairs, business and property and to discharge the administration order with such consequential provision that the Jersey Court thinks fit.

Unless the Jersey Court orders otherwise, the administrator has the same powers that a liquidator has in a creditors' winding up concerning transactions at an undervalue, preferences and extortionate credit transactions.

Cooperation with the administrator

If an administration order is made, the administrator may require the following to submit within 21 days a statement of affairs of the company, verified by affidavit:

(a) a person who is or has been an officer or secretary of the company;
*(b) a person who has taken part in the company's formation at any time within the period of 1 year that ends with the date of the administration order (the "**Preceding Year**");*
(c) a person who is in the company's employment or has been in its employment within the Preceding Year and is, in the administrator's opinion, capable of giving the information required;
(d) a person who is or has within the Preceding Year been an officer or secretary of, or in the employment of, a company that is, or within the Preceding Year was, an officer or secretary of the company; or
(e) with the leave of the Jersey Court, any other person.

Neither the company nor its officers may take any steps which interfere with the performance by the administrator of their functions, except with the consent of the administrator.

The administrator also has the benefit of a power under the Companies Law to require co-operation from specified individuals to give to the administrator information and documentation concerning the company and its promotion, formation, business, dealings, affairs or property which the administrator may reasonably require.

How administration concludes

The Companies Law envisages that the administrator will apply to the Jersey Court for the administration order to be discharged.

The administrator must make such an application if it appears that the purpose of the administration has been achieved or is incapable of being achieved. However, the administrator may also apply to the Jersey Court at any time for the administration order to be discharged if the administrator considers it appropriate.

The Jersey Court has wide powers on such an application, including the power to make any order it thinks fit (including an order for the winding up of the company).

If an administration order is discharged and it appears to the Jersey Court that the company has no assets that might permit a distribution to creditors, the Jersey Court may order its dissolution on a specified date.

Advantages of the new regime

The introduction of the administration regime confers a number of significant advantages.

It is Jersey's first true corporate rescue process. It enables earlier, and more efficient, restructuring of viable businesses, with the prospect of higher creditor recoveries, job preservation, and the continuation of economic activity. Ultimately, the intention is to promote a materially better outcome for stakeholders when compared to winding up or *désastre*.

Although there will be circumstances where it remains advantageous to place a Jersey company into a foreign administration process, this will now be a matter of strategic choice rather than necessity.

The administration regime is modelled on familiar and well-understood concepts. It will be readily understandable to the international insolvency community, with many of the provisions being the same as, or similar to, those found in other jurisdictions.

The policy decision to exclude secured creditor rights from the statutory moratorium (consistent with the treatment of secured creditors in a creditors' (insolvent) winding up) will continue to instill market confidence that secured creditor rights will remain a paramount consideration under the Companies Law and more generally.

A Guernsey perspective

Part XXI of the **Companies (Guernsey) Law, 2008** provides a consolidated administration regime for limited companies, protected cell companies, incorporated cell companies and their cells.

The Guernsey statutory framework has become an often used and relatively adaptable tool in Guernsey insolvency matters. Having been in effect for nearly 20 years, Guernsey's regime may also offer a useful lens through which Jersey's new framework can be considered, and a natural point of comparison given the close ties between the two Crown Dependencies.

The statutory purposes underpinning the jurisdictions' regimes are closely aligned. One point of difference is that the solvency test under Guernsey law includes reference to the balance sheet test and, as such, a Guernsey company may be considered insolvent if it cannot pay its debts as they fall due or if the value of its liabilities exceeds the value of its assets.

As with the new Jersey regime, the moratorium which takes effect upon the making of a Guernsey administration order does not affect a secured creditor's right to enforce its security. This was a deliberate policy choice in Guernsey, and the Islands' shared approach may be seen as part of a consistent creditor-friendly policy that preserves secured creditor interests as a cornerstone of the statutory framework.

Similar to the Jersey approach, a Guernsey administration is a court-based procedure. This provides an important degree of judicial oversight at the point of entry, albeit that there is a relatively wide-range of persons who may apply in Guernsey including the company, its directors, any member, any creditor (including any contingent or prospective creditor) and, in respect of supervised companies engaged in financial services business, the Guernsey Financial Services Commission.

Guernsey's administration framework has not been set in aspic since 2008. By way of example, the **Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance, 2020**, which came into effect on 1 January 2023, included enhanced powers for administrators to compel the production of documents and information from directors and officers, a statutory obligation on office holders to report director misconduct, new statutory remedies for the recovery of transactions at an undervalue and extortionate credit transactions, and a streamlined exit from administration to dissolution without the need for a subsequent compulsory liquidation. The regime thus continues to be an evolving one, with the States of Guernsey capable of acting to implement relevant changes based on industry experience.

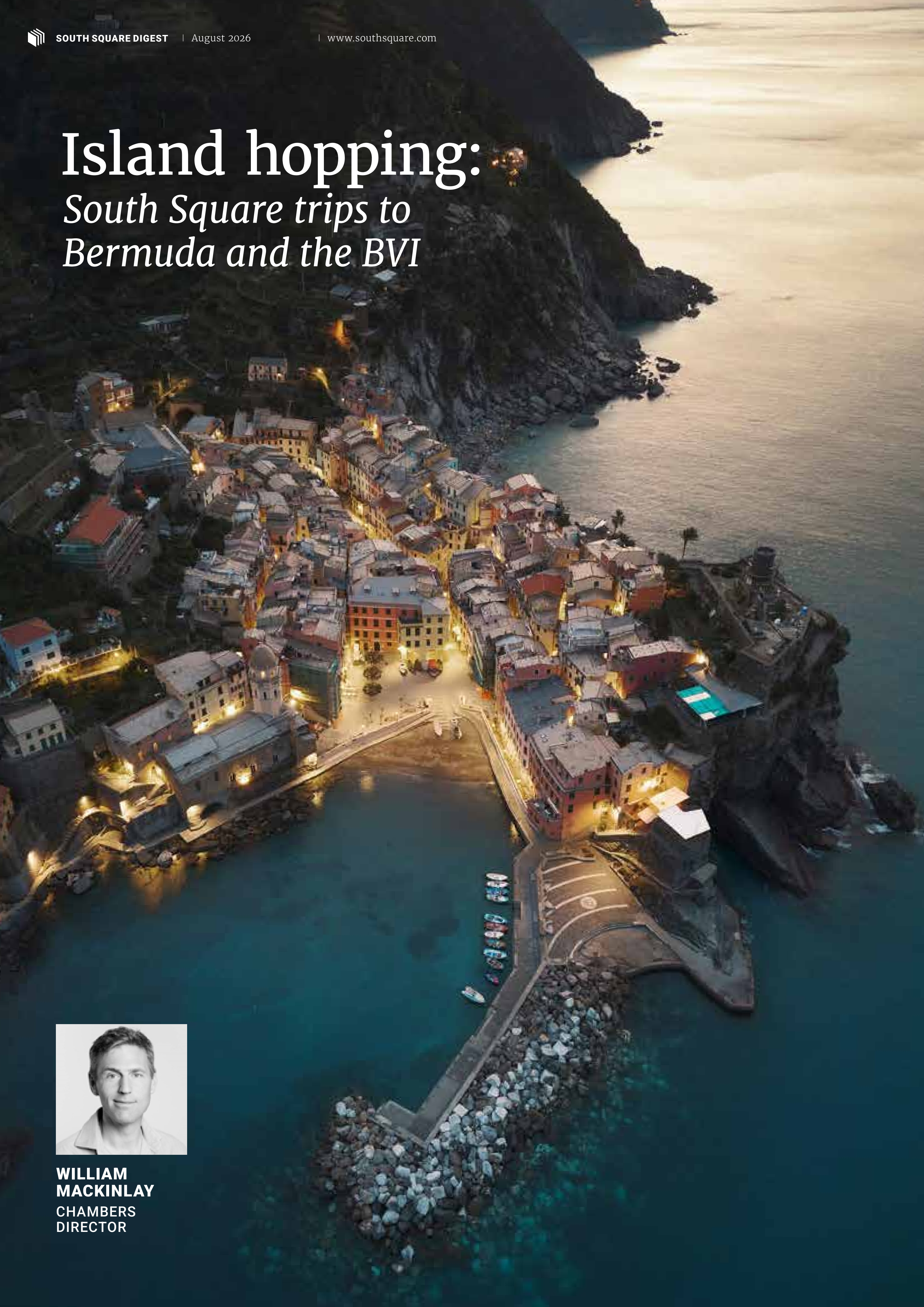
Guernsey's efficient procedural requirements at the application stage are no more demanding than routine applications for compulsory liquidation and there is no requirement for expensive independent reports that have served to hamper the uptake of administration in other jurisdictions.

The process is accordingly an accessible one, with effective gatekeeping parameters, and the Guernsey experience may offer some practical insights for the operation of Jersey's new regime.

Conclusion

The Jersey administration regime positions Jersey alongside other leading restructuring jurisdictions that offer corporate rescue procedures.

From a cross-border perspective, the introduction of administration in Jersey is also a welcome development for the Channel Islands as a whole. Practitioners advising on structures that touch upon either Jersey or Guernsey will now have access to complementary corporate rescue procedures that reflect the jurisdictions' shared principles in relation to corporate insolvency. ■



Island hopping:
South Square trips to Bermuda and the BVI

WILLIAM MACKINLAY
CHAMBERS DIRECTOR

The smallest of violins played solemnly in the background as I explained to my children the hardships of travelling for two consecutive weeks to Bermuda and on to the British Virgin Islands. They were somewhat sceptical and definitely not as sympathetic as they might have been as I headed off to Heathrow's terminal 3…

These annual trips are, without doubt, amongst the highlights of South Square international calendar. They provide an invaluable opportunity to strengthen relationships with colleagues across the offshore insolvency and restructuring community, exchange ideas on emerging issues, and to showcase the excellent work and innovative solutions of the jurisdictions' lawyers and IPs.

We have the great good fortune to work with RISA colleagues in various jurisdictions and we are indebted to many on the various committees for all their help in the planning and execution of the annual conferences we are privileged to co-host with them. Their dedication, enthusiasm and attention to detail are instrumental in ensuring the continued success of these events.

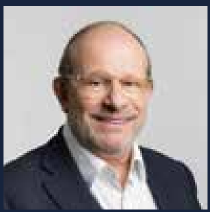
The conference in Bermuda took place on 9th June and it was followed by a leisurely boat trip around the harbour the day after. The fantastic team pulling the event together, led by our co-chairs, Jennifer Haworth and Richard Fisher KC, and the RISA organising committee: Mat Clingerman, and Nathan Bickley-May, produced an excellent programme. We were very privileged to welcome speakers from the Bermudan Supreme Court, Chief Justice Larry Mussenden, Justice Shade Subair Williams, and Justice Andrew Martin; and from the Court of Appeal, Dame Elizabeth Gloster, Justice Ian Kawaley, and Sir Julian Flaux, as well as the Governor of Bermuda, Andrew Murdoch CMG.

The following week we gladly escaped a sweltering London, which was enduring a 35°C heatwave, and headed for the cooler and much more beautiful surroundings of BVI. As ever, the RISA and South Square conference committee, co-chaired by William Willson KC and Andrew Emery, ably assisted by Sam Thompson, and Ryan Fisher, helped us to secure a suitable venue for our conference and pull together an excellent team of panellists. We were particularly pleased to welcome Justice Gerhard Wallbank KC (Ag.) who was our keynote speaker and provided much for us to reflect on while we sipped Rose by the pool of the Long Bay Hotel. The following afternoon, with boat load of our wonderful clients, we set sail for the Rum Bar on Cooper Island to fully immerse ourselves in the BVI experience.

Huge thanks to all who helped to make these events possible and to our speakers. It couldn't happen without you. We look forward to seeing you all next year, if not before.

Bermuda Panellists: Roseanna Darcy (South Square), Mike Penrose (EY), Martin Maringi (BMA), Kyle Masters (Carey Olsen), Rhys Williams (Conyers), Peter Burgess (South Square), Kevin Taylor (Walkers), Joseph Gordon (Alvarez & Marsal), Delroy Duncan KC (Trott & Duncan).

BVI Panellists: Rory Brown KC (South Square), Gabe Adedeji (Bedell Cristin), Bijorn Bullock (JTC), Emily Clegg (Campbells), Joe Curl KC (South Square), Jenni Jenkins (Mourant), Matt Freeman (Maples), Greig Mitchell (Krys Global), Romauld Johnson (Ogier), Anna Silver (JTC), Kira King (South Square), Marija Emberson (Mourant).



Mark Phillips KC

Dr Riz Mokal

Clara Johnson

CASE NOTE:
Valeriy Ernestovich Drelle (Respondent) v Servis-Terminal LLC (In Liquidation in the Russian Federation) (Appellant) [2026] UKSC 29

On 27 July 2026, the Supreme Court (Lords Briggs and Hamblen, with whom Lords Sales, Stephens, and Doherty agreed) gave judgment in *Drelle v Servis-Terminal LLC* [2026] UKSC 29. The main issue on the appeal was whether a creditor may rely on an unrecognised and unregistrable foreign money judgment as a debt, sufficient to entitle a creditor to present a bankruptcy petition under section 267 of the Insolvency Act 1986. The Court of Appeal held it could not. The Supreme Court held that it can.

The Supreme Court confirmed that in general common law terms, a debt is a "*legal obligation owed by one person to pay a sum of money to another person*". The Court found that it has always been the understanding of the common law that an unrecognised foreign judgment for a sum of money gives rise to an immediate legal obligation to pay that sum to the judgment creditor, enforceable by an action on the foreign judgment in an English court. Such obligation arises when the final and conclusive judgment is given and does not depend upon recognition. This is the "obligation principle". Within the general understanding of the common law, such judgment therefore gives rise to a debt. The Supreme Court could envisage no reason why section 267 of the 1986 Act should employ any narrower sense of "debt".

The Supreme Court also rejected the Court of Appeal's significant reliance on the "revenue rule", by which the English courts have no jurisdiction to entertain an action for the enforcement of a revenue law of a foreign state. This is because the court "*clearly*" has jurisdiction to entertain an action on a foreign monetary judgment. Moreover, as the Supreme Court held, there is a "*world of difference*" between a sovereign authority bringing a claim asserting a sovereign right, such as to a tax or penalty, and a private person bringing a claim asserting a private right.

The Supreme Court also held that although bankruptcy or winding up proceedings are often referred to as a means of collective enforcement of debts, they are in no relevant sense a means of enforcement of a judgment.

This ground-breaking decision is an important development in domestic insolvency law. It is also important in other common law jurisdictions, some of which had, prior to the Court of Appeal's decision, proceeded on the basis that an unrecognised foreign money judgment could form the basis of a winding up petition.

Mark Phillips KC, Dr Riz Mokal, and Clara Johnson appeared for the appellant, Servis-Terminal.

Case Digest Editorial

It is a privilege to have been invited to provide the Case Digest Editorial for this edition of the South Square Digest – a publication that I have long admired.

Editorial by:
Tony Beswetherick KC

As summer holidays approach, it is fitting that several of the cases digested in this edition have an international flavour.

In the field of corporate restructuring, the court in *Re NFE Global Holdings Limited* (Daniel Bayfield KC, Ryan Perkins and Jon Colclough) sanctioned restructuring plans proposed in relation to two companies within a group engaged in business in Latin America which extinguished US$9.6 billion in debt and thereby effecting one of the largest restructurings undertaken pursuant to Part 26A). Much of the debt in question was governed by foreign law. Although the judge at the convening hearing had raised a concern as to whether the court could be sure that it "*knows what it is doing*" given that the effect of the restructuring documents might be different under a foreign law (which might in turn affect their effectiveness), this was not regarded as a difficulty at the sanction stage. The court was reassured by the involvement of numerous high-calibre law firms specialising in the relevant law in negotiating and drafting the finance documentation. In addressing the question whether approval of the plans might involve some element of "*forum shopping*", the court concluded that this was an example of "*good forum shopping*" and no difficulty arose from the fact that the group was primarily based outside the jurisdiction.

In *Re Shahzad* [2026] EWHC 1039 (Ch) (Daniel Judd), the court rejected an attempt to set aside CBIR recognition of a Danish bankruptcy on public policy grounds. The challenge was advanced by the bankrupt in reliance upon the "*revenue rule*" (the rule that English courts will not directly or indirectly enforce the revenue laws of a foreign state).

Continuing the international theme, this edition also includes decisions concerning anti-suit injunctions (*Spec 1 Ltd v Export-Import Bank of China* [2026] EWHC 1162 (Comm)), in which parties to an asymmetrical jurisdiction clause contemplating parallel proceedings were both refused cross-applications for anti-suit relief, and upon the court's inherent power to require foreign-based former officers of a judgment debtor to attend court to provide missing information concerning the debtor's assets means (*Deutsche Bank AG v Vik* [2026] EWCA Civ 581; Tony Beswetherick KC).

If that does not whet your appetite, there are a further 19 cases digested here, including a number of decisions of the apex courts. Whilst the Supreme Court's hot-off-the-press judgment in *Drelle v Servis-Terminal LLC* [2026] UKSC 29 (Mark Phillips KC, Dr Riz Mokal, Clara Johnson) merits a separate case note, readers will also find discussion of the Supreme Court's decisions concerning the application of sanctions regulations (*UniCredit Bank GmbH* [2026] UKSC 10), the principles of issue estoppel (the latest chapter in the SKAT litigation, [2026] UKSC 19), unlawful means conspiracy (*Massa v Formulation One Management Limited and Ecclestone*). The Privy Council's decision in *Rubis Bahamas Ltd v Russell* [2026] UKPC 9 contains a salutary reminder that the requirement that a witness whose evidence is to be rejected should have the point put to them in cross-examination is a flexible rule based on considerations of procedural fairness, and not "*rigid weapon which can be used to wrongfoot or ambush an opportunity who makes a technical misstep*".

Happy summer reading!

Banking and Finance

DIGESTED BY PAUL FRADLEY

Sheikh Mohammed Omar Kassem Alesayi v Bank Audi SAL

[2026] EWCA Civ 551 (Peter Jackson, Popplewell and Zacaroli LJJ)

Consumer contracts – Jurisdiction – Conclusion of contract **8 May 2026**

The Respondent had held accounts with a Lebanese bank since 1994. In 2016 he signed a suite of nine new contractual documents replacing the original terms. In 2022 he sought to transfer c.US$24 million held across eight accounts to Geneva; the Bank refused. He brought proceedings in England as a consumer claim under sections 15B and 15E of the Civil Jurisdiction and Judgments Act 1982 (the "CJJA"), which confer jurisdiction on the English court where a consumer contract was concluded at a time when the consumer was domiciled in the UK and the bank was carrying out relevant activities directed to the UK. These conditions were not met in 1994 but there was a good arguable case they were in 2016. Constable J at first instance held that the contract was concluded in 2016 and that therefore the English court had jurisdiction.

Popplewell LJ, giving the judgment of the Court, held that the question of when a consumer contract is "*concluded*" is not a matter of domestic contract law but an autonomous EU law question, the CJJA having been enacted to adopt and retain the jurisdictional provisions of Articles 17 to 20 of the Recast Regulation. The correct test was that articulated by the CJEU in *Hellenic Republic v Nikiforidis* (Case C-135/15): a variation to an existing contract amounts to the conclusion of a new contract only where the variation is of such magnitude that it gives rise not to the mere updating or amendment of the contract but to the creation of a new legal relationship, so that the initial contract must be regarded as having been replaced by a new contract. The Judge's description of the threshold as being something akin to a novation was apt, provided it was understood as a test of substance rather than form and did not import English law concepts based on the intention of the parties.

The Court upheld Constable J's evaluative assessment. The terms from 1994 had been applicable only to a passbook savings account and did not govern the remaining accounts at all, such that the legal relationship prior to 2016 was for the most part ungoverned by any express terms. The terms from 2016 were a full and comprehensive suite covering all aspects of banking operations, constituting a single new agreement which expressly treated all sub-accounts as part of a unified whole. They introduced wide-ranging provisions including consolidation and set-off rights, exclusions and limitations of liability, and an unlimited discretion to alter interest rates, as well as extending the framework to new banking products including portfolio and foreign exchange services. The Bank's contention that the exercise had been merely administrative was not a characterisation borne out by the legal effect of what had been signed; it was the objective change to the legal relationship, not the parties' subjective understanding of the purpose of the signing exercise, which mattered.

UniCredit Bank GmbH, London Branch v Constitution Aircraft Leasing (Ireland) 3 Ltd and another

[2026] UKSC 10 (Lord Hodge, Lord Sales, Lord Burrows, Lord Stephens and Lady Simler)

Sanctions – Letters of credit – Sanctions and Anti-Money Laundering Act 2018 section 44 – Protection for acts done in compliance with sanctions

25 March 2026

The Appellants were Irish-incorporated aircraft lessors whose aircraft had been leased to two Russian airlines. The leases were supported by irrevocable standby letters of credit issued by a Russian bank and confirmed by the Respondent Bank, a German bank acting through its London branch. When the Russian airlines defaulted following the invasion of Ukraine in February 2022, the Appellants made compliant demands under the letters of credit. The Bank refused to pay, contending that regulation 28(3)(c) of the Russia (Sanctions) (EU Exit) Regulations 2019 prohibited it from doing so, on the basis that payments under the letters of credit would constitute the provision of funds in connection with an arrangement whose object or effect was making aircraft available to persons connected with Russia or for use in Russia. The Bank subsequently obtained a licence to pay the principal sums but the issue of interest and costs remained in dispute.

Lord Stephens, giving the judgment of the Supreme Court, rejected the Appellants' submission that the provision required a causal connection between the provision of funds and the prohibited supply of aircraft. The language of the Regulation required only a connection between the provision of funds and an arrangement, not between the provision of funds and the prohibited supply itself. The phrase "in connection with" was deliberately broader than the phrase "in pursuance of", which appeared alongside it in the same provision, and encompassed anything which factually connected the provision of funds to the arrangement. The broad purpose of the Regulations — to put pressure on Russia by disrupting strategic industries including aviation — was achieved not by narrow targeting but by casting a wide net subject to a licensing regime designed to mitigate unintended consequences. The Bank, upon receipt of a compliant demand, would have no way of knowing the circumstances of the lessee's default or whether aircraft remained in Russia; the licensing authority, not private parties, was the appropriate arbiter of those questions. The Appellants' further arguments that the aircraft leases were not arrangements within the Regulation — because they pre-dated the prohibition, or because they had been terminated before demands were made — were also rejected. The Regulation specified the relevant arrangements by reference to their object or effect, not by reference to when they were made or performed, and the object of the leases was not altered by their termination. Payment under the letters of credit was accordingly prohibited until licences were obtained.

Lord Stephens went on to consider whether section 44(2) of the Sanctions and Anti-Money Laundering Act 2018 would have protected the Bank. Section 44(2) provides that a person is not liable to civil proceedings to which they would otherwise have been liable "in respect of" their act or omission. Lord Stephens held that the Bank's liability was in respect of its omission to pay on receipt of compliant demands and therefore only arose because it had refused to pay.

Civil Procedure

DIGESTED BY JAMIL MUSTAFA

Skatteforvaltningen v MCML Ltd

[2026] UKSC 19 (Lord Sales, DP, Lord Lloyd-Jones, Lady Rose, Lady Simler, Lord Doherty)

Civil Procedure – Issue Estoppel **1 July 2026**

The UK Supreme Court clarified the scope of the doctrine of issue estoppel.

The key issue in the appeal was whether the appellant ('SKAT') was barred by issue estoppel from bringing a claim against the respondent ('EDFM') in 2022 as a result of the dismissal of an earlier claim against EDFM in 2018. The Supreme Court determined that SKAT was not issue estopped.

SKAT is the Danish Customs and Tax Administration. Upon declaring a dividend, a Danish company was required to pay 27% of the dividend as withholding tax to SKAT which would discharge the tax liability of the company's shareholders in respect of that dividend. Certain non-Danish shareholders were entitled not to be taxed or be taxed at a lesser rate because of double taxation treaties. Consequently, these non-Danish shareholders had a right, under Danish law, to be refunded the withholding tax deducted from their dividends by SKAT.

In 2018, SKAT brought proceedings in England against multiple defendants, including EDFM, alleging negligent misrepresentation in relation to 420 tax vouchers issued by EDFM to its clients. The clients had then used those vouchers in support of applications for the refund of withholding tax from SKAT. SKAT alleged that some of the defendants had acted fraudulently. No allegation of fraud was made against EDFM.

Andrew Baker J dismissed all the claims in the 2018 proceedings on the basis that they were inadmissible under the conflict of laws rule that the English courts have no jurisdiction to entertain an action for the enforcement, directly or indirectly, of foreign penal, revenue or other public law. As regards the claim against EDFM, SKAT sought permission to appeal the judgment against EDFM on two grounds. Andrew Baker J refused to grant permission to appeal. SKAT then sought permission to appeal the judgment against EDFM from the Court of Appeal in respect of the second of its two grounds that Andrew Baker J refused, which was that the relevant conflict of laws rule was barred by the Brussels Recast Regulation in relation to those defendants domiciled in the UK or EU. SKAT also sought permission to appeal on other grounds in relation to other defendants. The Court of Appeal granted permission to appeal, but the appeal on the aforementioned ground failed (it succeeded on another ground in relation to claims against other defendants).

In 2022, SKAT brought a new claim against EDFM, alleging that it had prepared fraudulent tax vouchers for the sole purpose of inducing SKAT to pay withholding tax to EDFM's clients who were tax-advantaged US or Canadian pensions plans. Save for five new tax vouchers, the tax vouchers at issue in the 2022 proceedings had been subject to the proceedings in 2018. At first instance, Bright J dismissed EDFM's argument that the 2022 proceedings were an abuse of process or barred by issue estoppel. However, the majority of the Court of Appeal held that all of SKAT's claims against EDFM in the 2022 proceedings were issue-estopped.

The issue determined in the 2018 proceedings which the majority of the Court of Appeal (Newey and Popplewell LJJ) held gave rise to the issue estoppel was that "*private law claims to recover [withholding tax] refunds paid out by SKAT based on applications conveying misinformation amount to enforcement of a foreign revenue law*". Nugee LJ held that an issue estoppel arose for different reasons save in respect of the five new vouchers.

The Supreme Court allowed SKAT's appeal and held that no issue estoppel arose. The Supreme Court explained that issue estoppel was a powerful doctrine, and, where it applied, was much more far-reaching in its effect than the doctrine of precedent. Accordingly, issue estoppel only applied to determinations by the previous court that were necessary to decide the case or issue in question. The pleadings in the previous proceedings were key in determining whether the determination of an issue was necessary and fundamental to the decision.

SKAT had alleged, in the 2018 proceedings, that EDFM made negligent misstatements in the applications for refund of withholding tax, and the Court held that these allegations fell within the scope of the conflict of laws rule against the enforcement of foreign revenue law. By contrast, in the 2022 proceedings, SKAT alleged that misstatements were made fraudulently, whereas no such allegation was made in 2018. Andrew Baker J therefore made no findings or assumptions about fraudulent misstatements and so did not hold that such misstatements fell within the scope of the aforementioned conflict of laws rule.

The scope of an issue estoppel was not to be increased by inference, deduction or argument from the previous judgment. However, the Supreme Court held that was what EDFM sought to do, and the majority of the Court of Appeal were wrong to formulate the relevant issue as they did, which expanded the scope of the issue estoppel arising from the decision on the claim against EDFM in the 2018 proceedings to cover different facts. Equally, and notwithstanding his different approach, the Supreme Court held that Nugee LJ's approach suffered from the same flaw.

Lloyds Development Limited v Accor Hotelservices UK Limited

[2026] EWHC 1522 (TCC) (Mr Justice Constable)

Agency – Company law – Disclosure – Injunctions

19 June 2026

The Claimant ('Lloyds') applied for an order that its directors deliver their mobile phones to an independent reviewer to perform a disclosure exercise to determine whether there were any relevant documents amongst a specified class of instant messages.

Lloyds had brought a claim seeking in excess of £180 million from the defendant ('Accor') in deceit. Lloyds alleged that it had secured funding for a hotel based on a design approved by Accor in December 2018, which design Accor later sought to change. Lloyds alleged that Accor had fraudulently asserted that the changes were required to avoid infringement of copyright and that funders were unwilling to provide additional monies to perform the works in accordance with the revised design so that Lloyds had to abandon the project. Accor denied that it had ever given binding approval for the original design, denied fraud and argued that the project failed for reasons other than the design changes. Lloyds later undertook a different hotel project on the same site, which could not open until August 2023, by which time it claimed to have suffered losses which it also claimed from Accor. Accor denied responsibility for those losses. Lloyds then went into administration in December 2023.

In 2022, prior to its administration, Lloyds had represented, in its disclosure review document, that the directors' mobile phones were available to Lloyds and that there were instant messages likely to be relevant on those devices. At that time, the directors would have been responsible for giving instructions in relation to the DRD. Lloyds was then ordered to provide extended disclosure in accordance with the DRD. Lloyds did not comply with that order in relation to the mobile phones.

Then, in mid-2024, Jefford J directed that the parties agree to the appointment of an independent reviewer and that Lloyds should procure that the directors provide their mobile phones to said reviewer. The parties failed to agree to the appointment of an independent reviewer, and Jefford J ordered that Hogan Lovells

LLP be appointed in that role. The directors later applied to set aside the order for disclosure to the independent reviewer, which Jefford J suspended in early 2025 on the basis that disclosure would be given of documents from one of the directors' devices, although Accor had liberty to apply to lift the suspension if considered it necessary having reviewed the documents provided it.

Accor applied to lift the suspension and reactivate the order for disclosure to the independent reviewer. In early 2026, Alexander Nissen KC reactivated that order and further ordered that, if the directors did not give effective access to the devices, Lloyds was to make an application with any necessary originating process to require the directors to provide effective access to those devices. In response to concerns expressed by Accor, Mr Nissen KC also set out the grounds of that potential application. In the event, the directors did not allow effective access to their devices and therefore Lloyds made an application against the directors to obtain such access. Following further concerns expressed by Accor, Lloyds also issued separate Part 8 proceedings seeking specific performance and/or a mandatory injunction compelling the directors to allow effective access to their devices.

Lloyds obtained the relief sought on bases which had been outlined in the order of Mr Nissen KC.

First, the directors were agents of Lloyds and had used their phones for communications in relation to their principal's affairs, and, therefore, Lloyds had a common law right to inspect the phones and obtain those communications. The directors did not dispute this but contended that this right had to be balanced against their article 8 right to privacy and their mobile phones would contain a large amount of private, confidential and potentially privileged information. However, Constable J considered that the only points raised by the directors in this regard that had not been traversed in previous authorities was that the focus of the disclosure exercise was trained on deleted messages and it was unpredictable whether the exercise would successfully recover deleted messages. Constable J did not consider that these factors meant that the directors should not be required to provide their phones. For one thing, it was not clear that the only relevant material would be deleted messages and that all relevant non-deleted messages had been disclosed. Moreover, the deleted messages might be said to be more likely to contain relevant material, hence they had been deleted. To the extent deleted messages were recoverable, they were subject to the general common law right. The fact that it was uncertain whether the disclosure exercise would successfully recover deleted messages did not mean it was disproportionate to undertake that exercise. Constable J held that the Court should enforce Lloyds' common law rights and granted a mandatory injunction.

Second, the directors had entered into a funding agreement pursuant to which they had agreed, inter alia, to comply with the CPR and all orders of the Court and also to provide all reasonable assistance and comply with the reasonable requirements of Lloyds' solicitors in conducting the proceedings. Constable J held that the directors were in breach of this obligation by refusing to provide their mobile phones so that Lloyds could comply with the order made. Lloyds therefore had a contractual right to access the phones to comply with the Court's order and Constable J held it was appropriate to enforce that right by way of a final mandatory injunction.

Third, and although it was unnecessary to consider the application, Constable J further held that he would have ordered the directors to provide their mobile phones pursuant to CPR 31.17 if that had been the sole basis of the application. In this regard, he held that he could make an order for delivery up of the phones under that provision because the power underlying CPR 31.17 was section 34(2) of the Senior Courts Act 1981, which gave the Court power to require a non-party to provide documents on such conditions as may be specified in the order, and these conditions could include the provision of the device upon which the documents are located and giving any relevant password, as well as including safeguards for the directors' rights to privacy.

Deutsche Bank AG v Vik

[2026] EWCA Civ 581 (Popplewell, Andrews and Nugee LJJ)

Company officers – Enforcement – Inherent jurisdiction – Service

12 May 2026

The Court of Appeal considered whether the Court had an inherent power to make an order for further examination of an officer of a corporate judgment debtor who had intentionally failed to comply with a previous order for examination that had been validly served upon them. The Court of Appeal answered this question in the affirmative.

The defendant (Mr Vik) was a Monaco-based billionaire. The judgment debtor ('SHI') was his personal trading vehicle which, by the time of the judgment under appeal, owed more than US$360 million to the claimant ('DB') in respect of a judgment for the balance and interest of a margin call that SHI had failed to pay to DB. Following the judgment, Mr Vik had been joined to the proceedings against SHI for the purposes of costs and DB obtained a non-party costs order against him.

In 2015, the Court made an order under CPR Pt. 71 requiring Mr Vik, who was a director of SHI at that time, to produce certain documents by 14 October 2015 and then attend an examination on 28 October 2015 (the '2015 Order'). The 2015 Order was served personally on Mr Vik in London and, therefore, the Court had personal jurisdiction over him in respect of it.

On 7 October 2015, Cooke J changed the date of the examination under the 2015 Order to 11 December 2015. By this time, Mr Vik was no longer a director of SHI and was out of the jurisdiction. Mr Vik did attend the examination on 11 December 2015. However, he lied about the location and nature of SHI's assets and failed to provide certain documents. At the end of the examination before Cooke J, Counsel for DB raised the question of contempt and committal on the basis that Mr Vik had lied in some of his answers. Cooke J declined to make any order in the absence of a properly formulated application on notice.

DB then applied under CPR Part 81 to commit Mr Vik for contempt. Mr Vik contested that the Court had jurisdiction to do so because (i) he was resident out of the jurisdiction and (ii) the process under CPR 71.8 was the only procedure for a contempt application in the relevant context. Teare J rejected those arguments as did the Court of Appeal. Amongst other things, the Court of Appeal held that the committal application was incidental to the 2015 Order and so DB did not need permission to serve that application out of the jurisdiction.

Mr Vik then sought to strike out the committal application. Cockerill J dismissed that application, and the Court of Appeal refused permission to appeal. The committal application was then heard by Moulder J in 2022. Moulder J found Mr Vik to be in contempt and sentenced him to 20 months' imprisonment suspended on conditions, including that he attend a further examination. Mr Vik unsuccessfully appealed Moulder J's findings and order. Moulder J's order set a deadline for the further examination which expired on 24 August 2023. The further examination was listed for 19-20 September 2023. Mr Vik sought an order that he could attend the hearing remotely via video-link. Bryan J refused to make that order.

At this point, Mr Vik argued that, on the proper interpretation of Moulder J's order, his suspended sentence had ended on 24 August 2023, and he was not required to attend a further examination. Henshaw J agreed and refused to rectify or vary Moulder J's order. Males LJ refused permission to appeal. Andrews LJ records that both Henshaw J and Males LJ assumed that it would be open to DB to obtain a further order for Mr Vik to attend an examination, and although both were aware that he was no longer an officer of SHI and out of the jurisdiction, neither seemed to have realised that there may have been a distinction between DB seeking another order within an existing Part 71 process and a new application under CPR 71.2(1)(b).

At first instance, Cockerill J held that the Court did not have the power to make a further order for the examination of Mr Vik and that, even if it did, she would not have exercised her discretion to make any such order. Cockerill J also held that, to the extent relevant, the application for order for further examination had not been validly served on Brecher, the solicitors on the record for Mr Vik in the underlying proceedings to which he had been joined for the purposes of costs. The Court of Appeal held that Cockerill J erred in reaching these conclusions.

As regards the power to make the order for further examination, the key issue was whether the original Part 71 process which had been commenced by the valid personal service of the 2015 Order had come to an end. If it had, DB could not obtain a new Part 71 order, whereas, if it had not, the Court still had personal jurisdiction over Mr Vik in relation to the subject matter of the 2015 Order and matters incidental to it, including the power to enforce compliance with that order. Andrews LJ held that the original Part 71 process had not come to an end. The CPR Part 71 process would not be complete until the person concerned provides the information which the order was designed to obtain to the extent that they are able to do so. So, even though the examination of Mr Vik had not been adjourned in 2015, the process under Part 71 had not concluded because Mr Vik never provided the information. The fact that he had been released from his oath after the examination was irrelevant. As the original Part 71 process remained on foot, the Court had the power, in the exercise of its inherent jurisdiction, to enforce compliance with the 2015 Order, including by making a further order that repeated some or all of the requirements of that earlier order. The question was whether it was just or convenient to make that order. Andrews LJ held that it would bring the Part 71 process into disrepute of a person who had been properly served with the order for examination could frustrate the purpose of that order by resigning as an officer of the judgment debtor and leaving the jurisdiction. Thus, the fact that Mr Vik had done so was no basis to conclude that the Court had no inherent jurisdiction to enforce compliance with the 2015 Order.

As regards the discretion to make the order, and notwithstanding the high bar to interfere with the exercise of discretion at first instance, Andrews LJ held that Cockerill J had erred in law in her exercise of discretion. In particular, and amongst other things, Cockerill LJ had not afforded any weight to the strong public interest in taking steps to enforce the Court's previous order and uphold its authority and processes. Andrews LJ held that Cockerill J should have given this factor significant weight, and, indeed, ought to have considered that it required the further order to be granted unless there was some significant countervailing factor. She also held that it was not reasonably open to Cockerill J on the evidence to conclude, as she did, that it was almost inevitable that Mr Vik would lie again if he were confronted with the prospect of immediate imprisonment if he did so. Further, even if it was, it was not reasonably open to Cockerill J to conclude that the risk that DB would accomplish nothing from the further order sought was sufficiently strong to outweigh the importance of sending a clear message that court orders could not deliberately be disobeyed without sanction.

Finally, in relation to service on Brecher, Andrews LJ held that the application notice for the further order had been validly served on Brecher because they were the solicitors on record for Mr Vik in the underlying proceedings against SHI – to which he had been joined for the purpose of costs – and he had consequently given Brecher's address for service within the jurisdiction. The question of whether Mr Vik was obliged by CPR 6.23 to provide an address for service within the jurisdiction when served with the 2015 Order therefore did not arise. However, Andrews LJ inclined to the view that an officer of a judgment debtor did not become subject to the requirements of CPR 6.23 once an order under CPR 71.2(1)(b) was served (Popplewell LJ declined to express a provisional view). Thus, Andrews LJ concluded that DB only succeeded on the service issue because Mr Vik happened to be added to the underlying proceedings for costs purposes and Brecher had come on the record. She observed that other judgment creditors may not be in so fortunate a position and suggested that the Rules Committee should consider whether to make specific provision for service of application notices within the process commenced by Part 71.

Tony Beswetherick KC

Commercial Litigation

DIGESTED BY IMOGEN BELTRAMI

Spec 1 Ltd v Export-Import Bank of China

[2026] EWHC 1162 (Comm) (Mr Justice Bright)

Anti-suit injunctions – Exclusive jurisdiction – Stay of proceedings **15 May 2026**

The Claimants (as borrowers) were three special purpose companies which had entered into ship finance arrangements with the Defendant (as lender) in 2024. A dispute arose out of the financing arrangements. The relevant loan agreement contained an asymmetric English jurisdiction clause which essentially required the Claimants to litigate any claims against the Defendant in England but gave the Defendant the option to sue the Claimants either in England or in any other court of competent jurisdiction. This is otherwise known as an asymmetric jurisdiction clause (and is commonly seen in international financing agreements of this type).

The Defendant commenced proceedings in Singapore whilst the Claimants commenced proceedings in England. The Defendant applied for a declaration that the English court should decline jurisdiction and stay the English proceedings in favour of those in Singapore. In response, the Claimants sought an anti-suit injunction restraining the Defendant from pursuing certain of the Singaporean proceedings (on the basis that these proceedings were not covered by the relevant jurisdiction clause and had been brought in breach of it). In the alternative, the Claimants sought an anti-anti-suit injunction.

Both parties resisted the application brought by the other side.

Mr Justice Bright held that the key issue in the case was the proper construction of the asymmetrical jurisdiction clause. On its proper construction, that clause allowed for the possibility of parallel proceedings being commenced in differing jurisdictions. In the circumstances, neither party was able to rely on the risk of parallel proceedings and the risk of duplication or inconsistent judgment in circumstances where these factors were foreseeable at the time that the parties had contracted. These factors were not sufficient to displace the bargain reached by the parties.

Upon applying this reasoning, both the stay application and the application for an anti-suit injunction failed. Both parties were contractually entitled to commence their respective proceedings. The alternative application for an anti-anti-suit injunction was dismissed as unnecessary.

Grimes (t/a The Cleveland Arms) v Liberty Mutual Insurance Europe SE

[2026] EWHC 1195 (Comm) (Christopher Hancock KC)

Business interruption insurance – COVID-19 - Causation **20 May 2026**

This was the trial of preliminary issues in five conjoined actions brought by various small businesses against their business interruption insurer following the Covid-19 pandemic. The Claimants' policies provided cover under for interruption caused by compulsory closure by a public body arising from "*discovery of a notifiable human infectious or contagious disease at the Premises*". This is the first time that the question of what is required to show a "*discovery*" of COVID-19 has been considered by the Court.

The Claimants contended that a person having Covid-19 at the premises during the relevant period would trigger the cover provided for in the policy, without any requirement of symptoms or diagnosis. The Claimants also put forward an alternative case submitting that "*discovery*" in the context of the policy cover was equivalent to a manifestation (i.e requiring symptoms or a diagnosis). The Defendant argued that the term "*discovery*" required that the infection be both apparent (through diagnosis or clear symptoms) and known to the relevant public body before it imposed compulsory closure on the premises.

On the key issue of causation, Christopher Hancock KC held that the public authorities imposing the compulsory closures were responding to both "*known knowns*" and "*known unknowns*" of the pandemic, and that there was no reason to distinguish, for causation purposes, between unknown occurrences, manifestations or discoveries. The relevant public body did not need to know of any specific case of Covid-19 at the relevant premises, nor take it into account, provided that case (together with others nationally) caused the closure. In essence, it was sufficient that a case of Covid-19 existed at the premises within the relevant window and was discovered at some point, whether before or after closure to trigger coverage under the policy.

Company Law

DIGESTED BY ANNABELLE WANG

Magic Investments SA v Broadbent & Anor

Anor [2026] EWCA Civ 711 (Newey, Asplin and May LJJ)

Unfair prejudice – Board nomination rights – Share issuances **13 May 2026**

This appeal concerned whether Magic Investments SA ("Magic") had a realistic claim for unfair prejudice under section 994 of the Companies Act 2006 arising from its investment in The Greater Good Fresh Brewing Co Ltd (the "Company"). Magic had invested in the Company in 2021 and, as part of the investment, the parties had entered into a written agreement which provided that Magic would be "*entitled to nominate someone to the board*". Magic maintained that this right was essential because South African exchange control regulations required it to have board representation in overseas investments. After Magic's original nominee stepped down, the Company's founder and chief executive refused to permit Magic to appoint a replacement, contending that the agreement only allowed a single nomination rather than a continuing right to board representation.

The relationship between the parties deteriorated further in 2022 when the company encountered significant financial difficulties following a failed product launch. To raise emergency funding, the company proposed a rights issue at a heavily discounted valuation, combined with the conversion of loans made by the founders into equity. Existing shareholders who did not participate would suffer substantial dilution. Magic objected that the proposal breached earlier assurances regarding the founders' loans and unfairly penalised minority shareholders who chose not to invest additional funds. The transaction proceeded and Magic's shareholding was significantly diluted. Magic then presented an unfair prejudice petition seeking, among other relief, a buy-out order in respect of its shares.

The petition was struck out at first and second instance, as both judges concluded that it had no real prospect of success. The Court of Appeal disagreed. Newey LJ (with whom Asplin and May LJJ agreed) held that although "nominate" can sometimes mean merely proposing a candidate, the nomination agreement was intended to confer a genuine and continuing right for Magic to have a representative on the board. Construing the agreement otherwise would deprive it of any practical value and would be inconsistent with the commercial purpose of satisfying South African regulatory requirements. The Court therefore concluded that denying Magic this right could amount to unfair prejudice and that the claim should not have been summarily dismissed.

The Court also held that Magic's allegation concerning the discounted share issue was not bound to fail. While recognising that companies facing financial distress may legitimately issue shares at a discount, the Court considered there was evidence that the shares had deliberately been priced below market value as a means of encouraging further investment through the threat of dilution. The Court held that issuing shares at an undervalue may amount to unfair prejudice even where all shareholders are offered the opportunity to participate equally. Although the pleading required clarification, this could be remedied by amendment rather than striking out the claim.

The Court further rejected arguments that relief against the Company's founder, Mr Broadbent, was unavailable or that his later offer to purchase Magic's shares rendered the petition academic. There was a real prospect of Magic persuading the Court that Mr Broadbent was "sufficiently implicated" that relief could be granted against him if unfair prejudice were established. Mr Broadbent's purchase offer was also insufficient to justify striking out the proceedings because it came nearly eight months after the petition had been presented and made no provision for Magic's costs. Accordingly, the Court allowed the appeal and dismissed the strike-out or summary judgment application.

Tony Beswetherick KC

BCNO Limited v Cooke

[2026] EWHC 1263 (Ch) (HHJ Paul Matthews sitting as a Judge of the High Court)

Register of members – Request under section 116 CA 2006 – Validity of request – Orders under section 117 CA 2006 – Invalid request – Jurisdiction

28 May 2026

After a trial of the claim on 30 April 2025, the High Court dismissed the claim brought by the Claimant "BCNO" against the Defendant "Mr Cooke". The Court dismissed the claim without needing to engage with any of the factual issues underlying the BCNO's case after accepting Mr Cooke's submission that the Court had no jurisdiction to make the orders sought by BCNO.

The proceedings arose out of an email sent from Mr Cooke to BCNO asking for information relating to BCNO's register of members. Section 116 of the Companies Act 2006 ("CA 2006") provides for requests to be made to exercise rights in relation to a company's register of members, but it was common ground that the email was not a request that satisfied the requirements specified at section 116. Nevertheless, BCNO adopted the position that it was required to make an application to the Court and so it issued a claim and sought orders under section 117 CA 2006. BCNO also sought a significant adverse costs order against Mr Cooke.

At trial, the Court noted that there was a preliminary issue in relation to whether the Court even had jurisdiction to entertain the substance of the claim. In a reserved judgment handed down on 28 May 2026: (1) the Court accepted Mr Cooke's submission that the fact that his email was not a compliant request under section 116 CA 2006 meant that BCNO had no obligation under section 117 CA 2006 either to comply with the request or to challenge the request by issuing a claim; and (2) the Court accepted Mr Cooke's further submission that section 117 CA 2006 could not be read in a way that gives the Court jurisdiction to make any orders under that section in the absence of a valid request.

In accepting Mr Cooke's submissions, the Judge was also led to express doubts about what he had himself said in a previous decision on a claim under sections 116 and 117 CA 2006 (*Sir Henry Royce Memorial Foundation v Hardy* [2021] EWHC 714 (Ch)). As a result, the claim was dismissed without any need for the Court to even consider the factual issues between the parties and underpinning BCNO's claim.

Angus Groom


Corporate Insolvency

DIGESTED BY CHARLOTTE WARD AND ANGUS GROOM

Re Deutsche Glasfaser Group GmbH

[2026] EWHC 1467 (Ch) (convening hearing) (Hildyard J)

Scheme of arrangement – Part 26 – Convening hearing – Class composition – Distribution of documents

19 May 2026

On 19 May 2026, the High Court gave an *ex tempore* judgment and made an order convening a single scheme meeting in relation to a proposed scheme of arrangement between Deutsche Glasfaser Group GmbH and its scheme creditors.

The scheme company, and the group of which it is a part, is a leading provider of fibre optics in Germany. The scheme forms part of a wider proposed recapitalisation of the group. The recapitalisation was proposed in order to manage the group's existing debt of €7 billion and in particular an imminent liquidity requirement at the end of June 2026. The recapitalisation proposed three key elements: bifurcation and reinstatement of the existing debt at two different levels of seniority, the injection of €400 million in new money on a super senior basis, and an equity contribution of €845 million from affiliates of the existing shareholders of the group (with the first and second of the three elements of the recapitalisation taking place by the scheme).

The scheme enjoyed very high support from an early stage, and by the time of the convening hearing over 95% of scheme creditors had already locked up in support of the scheme.

After considering and being satisfied of issues of notice and jurisdiction, the court considered class composition and concluded that the scheme company had been correct to suggest that there should be a single scheme meeting with only one class of scheme creditors. In relation to practical matters, the court agreed with both the scheme company and the scheme creditors that it was permissible and appropriate for the Court to order that documents before the Court at the convening could be further amended before being distributed to scheme creditors. The Court therefore ordered a staggered distribution of documents to scheme creditors, in order to allow more time for the parties to engage and reach a collective view on outstanding issues where possible.

Tom Smith KC

Adam Al-Attar KC

Henry Phillips

Matthew Abraham

Angus Groom

Re Deutsche Glasfaser Group GmbH

[2026] EWHC 1563 (Ch) (sanction hearing) (Adam Johnson J)

Scheme of arrangement – Part 26 – Sanction hearing – Statutory requirements – Distribution of documents – Adjournment of scheme meeting – Amendments to scheme documents **24 June 2026**

The High Court (Mr Justice Adam Johnson) has handed down judgment giving reasons for sanctioning a scheme of arrangement proposed between the scheme company, Deutsche Glasfaser Group GmbH, and its scheme creditors.

The background to the application for sanction is set out in the case digest of the convening judgment ([2026] EWHC 1467 (Ch)) within this issue above.

Following the convening hearing, the scheme creditors voted overwhelmingly in favour of the scheme, and so the scheme company invited the Court to sanction the scheme. In doing so, the Court considered the familiar principles summarised in Re Noble Group Ltd [2019] BCC 349. In doing so, the Court reached a number of important conclusions of relevance to practitioners.

First, the Court concluded that whilst there had been amendments to the scheme document and the scheme transaction documents following their formal distribution to scheme creditors under the convening order, this was permissible where the amendments were not material and related to points of mechanics and drafting only. This reflects the position set out in the new Practice Statement Companies: Schemes of Arrangement and Restructuring Plans under Parts 26 and 26A of the Companies Act 2006.

Secondly, the Court confirmed that it was "*entirely proper*" for the chair of the scheme meeting (after formally opening the meeting as required by the convening order) to adjourn the meeting and voting to a later date in order to give scheme creditors more time to consider the documents which had been circulated. Whilst the power to adjourn the scheme meeting is commonly granted to the chair in a convening order, this judgment gives a rare reported decision with an example of where the power has been properly used.

Thirdly, the Court confirmed that an amendment to a mobile definition that did not itself require an amendment to any scheme document was unobjectionable. In this case, a key scheme document contained a defined term that referenced a definition in the lock up agreement that had been entered into, where the lock up agreement was an already executed document (and so not a scheme document) that contained provision for amending that definition. Following an amendment to the definition in the lock up agreement, the scheme company accepted that this changed the effect of the scheme document but it was submitted that this did not amount to an amendment to the scheme document as voted on because scheme creditors (when voting) always knew that the definition could have been amended in this way. The Court accepted this submission, holding that "*this has not involved any amendment to the Scheme as such*", as "*it was implicit in the structure to begin with that it might occur, given the ambulatory nature of the definition.*" As a result, where a mobile definition is amended by amending something that is not a scheme document, the Court is not required to view its task as considering whether to sanction the scheme subject to a modification.

Each of these points highlights the flexible and practical approaches and opportunities that a well-advised company and creditor group can take when pursuing a scheme of arrangement.


Tom Smith KC


Adam Al-Attar KC


Henry Phillips


Matthew Abraham


Angus Groom

Re Greenbank Technology Limited

[2026] EWHC 1466 (Ch) (ICC Judge Agnello KC)

Members voluntary liquidation – Creditors voluntary liquidation – Statutory declaration – defect or error – Fundamental defect – Waiver under IR rule 12.64 – Jurisdiction – Rescind a voluntary liquidation – Stay a voluntary liquidation

16 June 2026

The High Court ordered a stay of a creditors' voluntary liquidation, holding that it was not possible to waive a defect that had prevented the entry into a members' voluntary liquidation and holding that it was not possible to rescind a voluntary liquidation.

If a company wishes to enter members' voluntary liquidation, it is necessary for the company's directors to make a statutory declaration of solvency which exhibits a statement of assets and liabilities of the company. In the present case where the company had been placed into voluntary liquidation, one of the two directors had made the statutory declaration as required, but the other of the two directors had simply signed the declaration document and had their signature witnessed. The declaration was rejected by Companies House as non-compliant and so the appointed liquidators applied to the Court for directions.

The Court considered whether the failure of one of the directors to validly make a statutory declaration before an authorised person could be described as a defect that could be waived under rule 12.64 of the Insolvency Rules 2016. Distinguishing case law in relation to errors in the statement of assets and liabilities, and also distinguishing case law in relation to defective statutory declarations filed in support of administration appointments, the Court concluded that "*the requirement that the statutory declaration is to be made before a suitably qualified person is fundamental*" and that the error in this case was "*much more fundamental*" than in previous cases. As such, the defect was not able to be waived by the Court and so it was confirmed that the company had entered a creditors' voluntary liquidation.

The Court then considered whether it was possible to rescind the voluntary liquidation. Whilst there is no explicit power of the Court to rescind a voluntary liquidation, the Court noted that section 112 of the Insolvency Act 1986 allowed the Court to exercise all of the powers that the Court might exercise in a compulsory liquidation in the context of voluntary liquidation, and also that rule 12.59 of the Insolvency Rules 2016 gave the Court the power to rescind a winding up order. However, the Court concluded that rule 12.59 was a jurisdiction in relation to orders of the Court and could not be described as a power relating to compulsory liquidations. As such, section 112 was not apposite to enable the Court to rescind a voluntary liquidation by reference to rule 12.59.

However, the Court accepted that section 112, in conjunction with section 147 of the Insolvency Act 1986, did give the Court jurisdiction to grant a stay of the voluntary winding up without any time limit, and the Court considered that it was appropriate to grant such a stay in the circumstances of the case. The Court therefore ordered a stay of the liquidation.

Matthew Abraham

Angus Groom

Re Fission Recruitment Services Limited

[2026] EWHC 1369 (Ch) (HHJ Hodge KC sitting as a judge of the High Court)

Administration appointments – Defective notice – Consent to act – Fundamental defect – Waiver under IR rule 12.64 – Jurisdiction

13 March 2026

On 13 March 2026 the Court gave an *ex tempore* judgment granting declaratory relief in relation to defective administration appointments. In rather unusual circumstances, the administrators were actually seeking confirmation that their purported appointment had been invalid and a nullity, and the Court made orders accordingly.

In error, a company filed a document with the Court which contained the front page of a notice of appointment of administrators followed by two pages from a notice of intention to appoint administrators. This document was accepted by the Court and sealed as a notice of appointment of administrators. Given the defects in the document that had been sealed by the Court, the company and its purportedly appointed administrators wished to regularise the position and have a correct administration appointment made in due course (subject to wider developments that would mean that an appointment was appropriate).

The Court concluded that the appointment document was defective in particular because it was not supported by consents to act from the proposed administrators, and because as a result there was also nothing from the proposed administrators confirming that the purpose of the administration was reasonably likely to be achieved. After considering the position, the Court concluded that this defect was substantial and went to the very heart of the power to appoint administrators, such that the appointment was void, a nullity and of no effect. As such, the Court concluded that the defect was not something that could be cured or waived under rule 12.64 of the Insolvency Rules 2016. The Court also concluded that, if they were wrong and the defect could be waived, it would nevertheless not be appropriate to waive or remedy the defect because it had caused substantial injustice to the administrators, to the company and to its creditors.

The Court therefore made orders: that the purported appointment of the administrators was a nullity and void; that the document filed at court did not take effect as a valid notice of appointment of administrators so as to place it into administration; that the purported notice of appointment be removed from the court file; and that any further notice of intention to appoint filed should not be rejected by the Court solely by reason of the previous sealing of the invalid notice of appointment.

Re Poundstretcher Limited

[2026] EWHC 1321 (Ch) (), [2026] EWHC 1438 (Ch) (Hildyard J)

Restructuring plan - Part 26A - Lease restructuring - Cross-class cram down – Release of intra-group guarantees - Allocation of restructuring benefits

7 May 2026 – Convening
12 June 2026 – Sanction

On 12 June 2026 Mr Justice Hildyard sanctioned a restructuring plan proposed by Poundstretcher Limited, a discount retailer trading from 298 UK stores, exercising the cross-class cram down power under section 901G of the Companies Act 2006 against six of fourteen creditor classes. The company was in severe financial difficulty owing to falling sales, rising costs and an expensive lease portfolio. The unchallenged relevant alternative was an insolvent administration of both the company and its parent ("PLL").

At the convening hearing the Judge approved the large fourteen-class structure as rational "*even if it might tend towards the cautious*", there being "*no contrivance*" in the proposal.

At the meetings, eight classes approved the Plan and six voted against.

Three landlord creditors opposed sanction of the Plan. They objected to the compromise of guarantees granted by PLL, which the Plan amended to mirror the compromised leases, arguing that the Plan was "*more intrusive than is necessary or proportionate*" and should instead have compromised the ricochet claims by PLL against the plan company. The Judge rejected the objection, distinguishing PLL's guarantees from third-party guarantees: PLL's only material asset was its shareholding in the plan company, so its ability to satisfy the guarantees was intrinsically linked to the company's financial position, and leaving them in place could destabilise the restructuring and undermine the rescue of the group.

The Plan had been modified before sanction to meet the opposing landlords' evidence that its notice provisions left them worse off than in the relevant alternative. The modifications ensured that the landlord creditors would recover their premises no later than the date anticipated in an administration or, in some cases, receive full contractual rent for any extended notice period.

On the allocation of restructuring benefits, the Judge observed that expert reports "*can appear to offer a scientific solution where in reality an ultimately subjective answer must be given*". The better and more commercially realistic approach was to value the compromise of existing claims by reference to estimated recoveries in the relevant alternative, and new money at face value, with some allowance for the contribution made by out-of-the-money claims. The Plan fell within "*a spectrum of potentially fair results*", with different parties making different contributions and all receiving some share of the benefits.

Two matters gave the Court pause. First, only one compromised landlord class had approved the Plan. The Judge considered this concern was met by considerable support for the Plan from within the Class C Landlords (81% by value and 69% by number), who faced a 100% reduction in rents. Second, whether the Plan would in fact succeed in rescuing the business. There was no written turnaround plan and a CVA had failed in 2020. The Judge accepted the inference of viability from the willingness of sophisticated funders to forgo £16.2 million of interest, but suggested that future plans should be more specific as to how their objectives are to be achieved.

Tom Smith KC

Henry Phillips

Annabelle Wang

Re NFE Global Holdings Limited & NFE Brazil Newco Limited

[2026] EWHC 1223 (Ch) (Hildyard J), [2026] EWHC 1620 (Ch) (Cawson J)

Restructuring Plans - Sanction - Part 26A - Inter-conditional Plans - Sanction - Third Party Releases – Conditions Precedent - Forum Shopping

14 May 2026 – Convening
18 June 2026 – Sanction

Mr Justice Cawson sanctioned two inter-conditional restructuring plans proposed by English-incorporated members of the New Fortress Energy group, a global LNG infrastructure business headed by a NASDAQ-listed Delaware parent. The Plans extinguished some US$9.6 billion of debt, including approximately US$6.5 billion owed to external creditors, making it one of the largest restructurings yet effected under Part 26A.

The Plans emerged from eight months of negotiation, culminating in an Restructuring Support Agreement signed by creditors representing 97% by value. They separated the group into a "CoreCo" group (assets outside Brazil) and a creditor-owned "BrazilCo" group, with Plan Creditors exchanging their claims for equity plus US$971 million of new take-back debt. The relevant alternative was a Chapter 11 bankruptcy for CoreCo and an accelerated going-concern sale for BrazilCo. This was projected to yield a US$1.88 billion return to creditors against US$3.32 billion under the Plans. Existing shareholders retained 35% of CoreCo equity, justified on the basis that their cooperation was required and the equity was valued at nil at completion.

At the convening hearing, Hildyard J held that a US$885 million new-money subscription offer taken up by only some of the single BrazilCo class did not fracture it: what mattered was that the offer had been made to all (*Re Primacom* applied). By sanction the new notes had been subscribed for but not yet paid for or taken up, but Cawson J held this made no difference: the capital raise sat outside the Plans and no BrazilCo creditor had objected.

Turnout was very high, with six of the seven classes voting unanimously and only one plan creditor, holding less than 0.1% of the plan debt, voted against the plans.

On forum shopping, notwithstanding Snowden LJ's *obiter* reservations in Adler, Cawson J followed the established High Court line (*Codere, Gategroup, APCOA, Project Lietzenburger Strasse*) and held this to be a clear case of "good" forum shopping: the English jurisdiction was used to deliver a US$1.44 billion improvement for creditors as a whole "*without any obvious detriment to anybody at all*". Unchallenged expert evidence confirmed a reasonable prospect of effectiveness in the United States and Mexico.


Daniel Bayfield KC


Ryan Perkins


Jon Colclough

Re Cross Transport Ltd (in administration)

[2026] EWHC 1636 (Ch) (ICC Judge Jones (sitting in retirement))

Administration – Moratorium – Paragraph 64A of Schedule B1 – Super-priority – Administration expenses – Litigation funding

30 June 2026

The Court gave the first substantive guidance on paragraph 64A of Schedule B1 to the Insolvency Act 1986, which applies where a company enters administration within 12 weeks of the end of a Part A1 moratorium and requires the administrator to make a distribution in respect of moratorium debts and priority pre-moratorium debts in priority to floating charge realisations and sums payable under paragraph 99 of Schedule B1.

The Company had incurred protected moratorium debts of c.£643,000. Its remaining assets were c.£110,000 in cash, litigation claims under sections 212, 238 and 239, and potential loan recovery claims exceeding £1 million. HMRC was both a protected moratorium creditor and the sole preferential creditor with a debt of about £726,000. No returns were expected to unsecured creditors. The litigation funder was going to withdraw unless it was guaranteed recovery of its funding from the fruits of the litigation ahead of the moratorium creditors. The administrators were concerned that the wording in paragraph 64A of Schedule B1 meant that the priority pre-moratorium debts and moratorium debts "must" be paid ahead of any other expenses or contractual liabilities of the administration (including the administrators' remuneration). Without funding there would be no litigation, and without the litigation there would be no meaningful return for any creditors. The administrators applied for directions under paragraph 63 of Schedule B1.

The Judge held that while paragraph 64A confers super-priority over other creditors in the administration, super-priority does not equate to an absolute entitlement to pre-payment. The paragraph contains no ring-fencing of the company's assets and no words fixing when payment must be made. A construction paralysing the administration until the moratorium debts were paid would be absurd: it would prevent the very steps needed to generate realisations, and "*[n]o one is going to work for free*". The obligation is instead to be performed in the context of the administrators' fulfilment of the purpose of the administration, so that expenses and remuneration may be paid where the administrators judge that it is a proper exercise of their functions. That construction mirrors the approach long taken to paragraph 99 of Schedule B1 and its predecessor (*Re Salmet; Re Paramount Airways (No 3)*). If Parliament had intended to exclude payment of administration expenses ahead of moratorium creditors, it would have said so expressly.

The administrators accordingly had power to enter funding agreements requiring the funder to be paid from litigation recoveries ahead of the protected moratorium creditors: at worst the moratorium creditors were no worse off, at best realisations would increase. The Court declined to opine on whether the funding agreements should be entered into, which was a decision to taken to be the administrators.

HSBC UK Bank Plc v Ethical Power Connections Ltd & Ors

[2026] EWHC 1695 (Ch) (Cawson J)

Administration order - Paragraph 37 of Schedule B1 - Qualifying floating charge holder – Discharge of winding up order - Validation of dispositions

5 June 2026

HSBC, a qualifying floating charge holder, applied under paragraph 37 of Schedule B1 for an administration order in respect of a company already in compulsory liquidation given that paragraph 8(1)(b) precluded an out-of-court appointment. The Company formed part of a renewable infrastructure group with heavy cross-guaranteed bank exposure. It had been wound up on HMRC's petition in May 2026 after a failed pre-pack sale and ICC Judge Greenwood declined to allow the company further time to enter into voluntary liquidation. The wider group restructuring depended on novating contracts away from the Company. These included (i) two onerous battery-storage contracts which had been novated on the day of the winding up order (and were thus void under section 127 unless validated); and (ii) nine further contracts which the Company, being in liquidation, could no longer perform, which were to be novated in exchange for a share of net project cash receipts plus £1.57 million of supply payments to the Company's creditors.

Cawson J was satisfied that the debenture was qualifying and enforceable, that the Company was insolvent in the context of the group cross-guarantees notwithstanding that the petition debt had then been paid, and that there was a real prospect of a better result for creditors than liquidation, the Official Receiver being unlikely to progress the novations at the necessary speed. No notified party opposed the application. The administration order was made and the winding up order discharged under paragraph 37(3)(a).

On validation, the Judge followed Re Albany Building Ltd: the discharge of a winding up order under paragraph 37(3)(a) of Schedule B1 is distinct from rescission, so the court cannot proceed as if the order had never been made, and section 127 continues to avoid post-petition dispositions unless validated. The court has a wide jurisdiction under paragraph 37(3)(c) to validate transactions consequential upon the discharge, the basis on which he proceeded, although he could equally have acted under section 127 itself. Applying the *Denny v John Hudson* principles, both categories of disposition were validated: the novation of the onerous contracts caused no prejudice, the Company standing only to incur liabilities under them; and payments of £62,400 of restructuring fees did not offend the pari passu principle because the funds had been provided by another group company for that specific purpose immediately before payment, and were never truly assets available to the general body of creditors.

Oliver Hyams

Personal Insolvency

DIGESTED BY RABIN KOK

Re Shahzad

[2026] EWHC 1039 (Ch) (ICC Judge Agnello KC)

Cross-border insolvency – Recognition - Public policy - Foreign revenue rule - CBIR

7 May 2026

It is a long-established principle, restated in *Government of India v Taylor* [1955] AC 91 and rule 3 of Dicey, that the English courts will not directly or indirectly enforce the revenue laws of a foreign State. In the insolvency context, however, that principle has been substantially blunted. Article 13 of the Cross-Border Insolvency Regulations 2006 (the CBIR) provides that a claim in a British insolvency proceeding may not be challenged 'solely' because it is made by a foreign tax authority (save where it is in substance a penalty, or falls to be rejected on some other ground), and the public policy exception in Article 6 is a narrow one.

In *Shahzad*, Mr Shahzad had been made bankrupt in Denmark. The Danish trustee had obtained recognition of that bankruptcy as a foreign main proceeding

The question was whether Mr Shahzad could set aside recognition of the foreign bankruptcy on public policy grounds, on the footing that the proceeding was in substance the enforcement of foreign revenue liabilities. This was in circumstances where the foreign tax authority had petitioned for the bankruptcy, nominated the trustee, and funded the estate.

ICC Judge Agnello KC held that Mr Shahzad could not do so. In seeking to set the recognition order aside, the bankrupt relied on *Peter Buchanan Ltd v McVey* [1954] IR 89 and *QRS1 ApS v Frandsen* [1999] 1 WLR 2169, the familiar authorities on indirect enforcement, in each of which a liquidation had been the vehicle for the collection of tax for a foreign revenue.

The distinguishing feature of those cases, the Judge held, was that the tax authority was the sole creditor, so that the whole object and only result of the proceeding was the recovery of tax. Here, however, the Danish tax authority's proofs came to less than 10% of the claims in the estate; it was not even the majority creditor, let alone the sole one. There was accordingly no direct or indirect enforcement of foreign revenue law, and the application was dismissed.

Daniel Judd

Fletcher v Desai

[2026] EWHC 728 (Ch) (ICC Judge Agnello KC)

Transactions at an undervalue - Section 339 - Section 423 - Section 375 - pari passu - Charging orders - Vesting orders

27 March 2026

This case considered the scope of section 339 of the 1986 Act which empowers the court, where a bankrupt has entered into a transaction at an undervalue, to make '*such order as it thinks fit for restoring the position to what it would have been*' had the transaction not been entered into.

Mr Razeem had transferred two properties to his wife for £1 apiece in 2016, shortly after Mrs Desai had begun to obtain judgments against him. Mrs Desai secured a series of charging orders over Mr Razeem's interest in the properties and, in due course, petitioned for and obtained his bankruptcy. His trustees applied under sections 339 and 423, and Deputy ICC Judge Frith declared transfers transactions at an undervalue, vesting the properties in the trustees. Mrs Desai, who had not been a party to that application, applied under section 375 to vary the order so as to have her charging orders recognised and herself treated as a secured creditor over the properties.

The Judge dismissed the application. Two obstacles were fatal to Mrs Desai's application. The first was that a section 339 recovery is a cause of action vested in the office-holder for the benefit of the estate as a whole, the proceeds of which fall to be distributed pari passu (see sections 328(3) and 342(3)). The provision could not, therefore, authorise a restorative order that cuts across the rules governing the distribution of the insolvent estate. Once a bankruptcy order is made, creditors are to be treated alike. None is entitled to a better recovery than the rest by way of the grant of proprietary security.

The second obstacle was the non-retrospectivity of vesting orders. On the authority of *Stonham v Ramrattan* [2011] 1 WLR 1617, a vesting order under section 342(1) takes effect from the date of the order, and not *ab initio*. It followed that, at the moment the properties vested in the trustees, Mrs Desai held no security over any interest of Mr Razeem. The transfers had stripped him of any interest, and there was accordingly nothing for her charging orders to bite upon. She was not a secured creditor at all.

Property and Trusts

DIGESTED BY PETER BURGESS

BLCP Eden 1 Limited (in administration) & Anr v Rooksmead Securities Limited & Ors

[2026] EWHC 1268 (Ch) (Saira Salimi (sitting as a Deputy High Court Judge))

Companies Act 2006, ss 43-44 – Execution of contracts by companies – Appointment of receivers – Correction of mistake by construction

1 June 2026

This was a Part 8 claim raising two preliminary issues in a larger dispute over land owned by two companies in administration, BE1 and BE2. Funds to buy the companies' shares had been borrowed from Octopus by Allouison Investments Limited (AIL), a company owned by the group's controller, which on-lent the money. The loan was secured by a debenture under which BE1, BE2, AIL and a fourth company charged their assets, giving Octopus the right to appoint receivers over any of them on default.

After the group's controller and primary shareholder was made bankrupt and the directors resigned, a new director, Ms Currie, was appointed. On the same day, she signed a contract to sell the companies' land to Rooksmead. Octopus purported to appoint receivers, but the appointment documents named the wrong company (Allouison Investments Limited, the original borrower) while describing BE1 and BE2's land in the schedule. The receivers went on to complete the sale to Rooksmead, who immediately sold it on to Senior Living (Edenbridge) Limited (SLEL) at a higher price.

The first issue was whether the sale contract was validly signed. Ms Currie signed once for each company, in a signature block reading "SIGNED by the Seller... for and on behalf of... BCLP Eden 1 Ltd" (sic). The claimants argued that the placing of her signature meant the contract was signed "by" the companies, which under s 43 of the Companies Act 2006 needed a common seal, and since it did not comply with the two-signatory or witnessed-signature rules in s 44 either, it was invalid. The deputy judge rejected this. She held that s 43 only requires signature on behalf of a company by someone with authority, and that the placing of a signature within a printed block should not carry that much legal weight. She also noted, relying on *Redcard v Williams* [2011] EWCA Civ 466, that the clear intention of the document, taken as a whole, was for Ms Currie to sign on behalf of each company. The contract was validly executed.

The second issue was whether the receivers were validly appointed. It was common ground that the appointment and acceptance letters contained an obvious mistake, since they had named the wrong company. The question was whether the court could correct that mistake by construction, applying the test in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101: was the mistake obvious, and was the correction also obvious? The deputy judge found the mistake was plainly obvious, but that the correction was not. SLEL argued the obvious fix was to change the company name to BE1 and BE2 and leave the land description alone. The claimants argued it was at least equally possible that the intended fix was the opposite: correct receivers over Allouison's own assets (which included a right to be repaid by the companies). Because more than one correction was reasonably open, the deputy judge held she could not correct the documents. The receivers' appointment was therefore invalid, and the resulting transfers were open to challenge.

The claimants therefore succeeded in obtaining a declaration that the receivers were not validly appointed but their claim that the contract was not validly executed was dismissed.

Re Jesus Fellowship Community Trust

[2026] EWHC 1080 (Ch) (Chief Master Shuman)

Trustees' powers – Winding up of trust – Extended *Re Benjamin* relief – *Re MF Global UK Ltd (No 3)* **5 May 2026**

The Jesus Fellowship Community Trust held property and other assets built up over decades by members of the Jesus Fellowship Church, a religious organisation that operated a form of communal living until its collapse following widespread allegations of abuse by its founder and senior leaders. Once the community collapsed, the trust's main purpose fell away, and in December 2020 the trustees resolved to wind it up. Since then, they had run a redress scheme paying out about £7.76 million in compensation to around 601 people, and had returned capital to a fixed, closed class of beneficiaries known as the Listed Beneficiaries. What remained was around £24.9 million still to be distributed, with the risk that other people connected with the community might come forward later with equitable or proprietary claims to that money. The trustees brought a Part 8 claim under CPR Part 64, asking the court to approve a process for flushing out any further claims before making final distributions. Under the proposed order, notice would be given to anyone who might have a claim, with a deadline to provide specified information. The trustees, with legal advice, would then classify each claim as rejected or pending resolution, with a right for a rejected claimant to ask the court to review that decision. Once the process finished, the trustees would be free to distribute the remaining trust fund to the Listed Beneficiaries, protected from personal liability for having done so, and keeping back a defined fund to cover costs and any pending claims.

Chief Master Shuman confirmed that this went beyond a standard Re Benjamin order (which usually deals with uncertainty about who the beneficiaries are or where they can be found). Relying on *Re MF Global UK Ltd (No 3)* [2013] 1 WLR 3874, she held that extended Re Benjamin relief can also cover claims that are speculative or hard to resolve through ordinary means but cannot simply be ignored. The trust deed gave the trustees wide power to deal with the trust assets, and there was nothing in it stopping the proposed process. She was satisfied that the trustees had acted in good faith, for a proper purpose, and within the range of choices open to reasonable trustees, so the court would not second-guess their judgment.

The Chief Master approved the trustees' proposed procedure and granted the extended Re Benjamin relief sought, allowing the trustees to move to final distribution once the claims process had run its course.

Rubis Bahamas Ltd v Russell

[2026] UKPC 9 (Lord Sales DPSC, Lord Briggs, Lord Leggatt, Lord Burrows, Lady Rose JJSC)

***Browne v Dunn* – *Rylands v Fletcher* liability – Non-natural use of land – Petrol service station** **13 March 2026**

This appeal to the Privy Council from The Bahamas concerned a fuel leak from underground pipework at a petrol service station, which the claimant said had contaminated her neighbouring property. The station was owned by the defendant, Rubis, and let to an operating company, Fiorente, under a lease. The claimant sued Rubis under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330, HL(E). She succeeded at trial, but had her award of damages reduced by the Court of Appeal. Rubis appealed to the Board.

The appeal was allowed because the Board held that the trial judge had wrongly treated the rule in *Browne v Dunn* (1893) 6 R 67, HL(Sc) as requiring him to find, as a matter of law, that fuel from the leak had reached the claimant's property, simply because the point had not been put to her expert in cross-examination by the defendant. The Board held this was not how the rule in *Browne v Dunn* operates and that the judge should have weighed the evidence himself. Because neither the trial judge nor the Court of Appeal had made a proper finding on whether the leak had actually caused damage to the claimant's property, and the Court of Appeal's damages award had also been based on unsupported assumptions, the Board remitted those questions to the first-instance court for a re-trial.

The Board also considered two particular issues in relation to the *Rylands v Fletcher* rule: whether the appellant was liable under the rule where it neither occupied the station nor owned or controlled the fuel that leaked, and whether storing fuel underground at a service station was an ordinary use of land, not a non-natural use.

On the first issue, the Board held that neither ownership nor occupation of the land is the test for liability under *Rylands v Fletcher*. The person liable is whoever created the risk by bringing the dangerous thing onto the land and keeping it there for their own purposes. Simply giving permission for someone else to keep a dangerous thing on your land is not enough on its own. Here, the lease required Fiorente to run the site as a service station using fuel supplied by Rubis, and Rubis retained ownership of the storage equipment along with wide rights to inspect, repair, replace or remove it. Taken together, those features meant Rubis had brought the fuel onto the site and kept it there, so it could be held liable even though Fiorente held the lease and owned the fuel itself.

On the second ground, the Board reviewed the case law on non-natural use since *Rylands v Fletcher* itself, including the House of Lords decisions in *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, HL(E) and *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1, HL(E). It rejected the idea that an activity escapes the rule merely because it is commonplace in the area or beneficial to the community. The real question is whether the use is specialised, meaning not something carried on by a large proportion of people, and whether it involves keeping something on the land that creates an exceptionally high risk of harm if it escapes. Storing large quantities of fuel underground met both parts of that test. Even though a service station was not out of place in the locality, storing fuel in bulk was a specialised and dangerous activity, so the rule in *Rylands v Fletcher* was engaged.

Peter Burgess

Sport

DIGESTED BY DANIEL JUDD

Felipe Massa v Formula One Management Limited, Bernard Charles Ecclestone, Fédération Internationale De L'Automobile

(UKSC/2026/0035) (Lords Reed, Hamblen and Richards)

Formula One – Permission to appeal – Unlawful means conspiracy **26 May 2026**

The Formula One ("F1") racing driver Felipe Massa claims he was the true 2008 F1 World Drivers' Champion. The key allegation is that the FIA and FOM, the F1 authorities, conspired not to investigate the crash of the Renault driver, Nelson Piquet Jr, at the 2008 Singapore Grand Prix. Felipe Massa claims that the crash was deliberate and conferred a race advantage on his teammate, at a time when Felipe Massa himself was in the lead. He alleges that FIA and FOM received information that the crash was deliberate but concealed it in order not to investigate the crash.

The last edition of this Digest considered the decision of Jay J on 20 November 2025 ([2025] EWHC 3064 (KB)) in response to the application by the Defendants (FIA and FOM) to strike out or obtain reverse summary judgment on the claims. The court stuck out contractual and tort claims based on French law. The court also held that it would not grant declaratory relief.

But the court held that English law claim based on unlawful means conspiracy was sufficiently arguable to proceed to trial.

The FIA and FOM appealed against the decision of Jay J on the unlawful means conspiracy claim. They sought a "leapfrog" appeal so that the appeal would be heard by the Supreme Court rather than the Court of Appeal. A leapfrog appeal is rare and requires "*a point of law of general public importance*". On 26 May 2026, the Supreme Court (Lords Reed, Hamblen and Richards) granted permission to appeal.

The Supreme Court will consider whether the "unlawful means" required for the tort of unlawful means conspiracy can include: (1) a civil wrong that is not independently actionable by the claimant; (2) a breach of contract to which the claimant is not a party; (3) a breach of foreign law; and (4) conduct that the defendant did not know to be unlawful.

Diary Dates

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

17 September 2026

INSOL Channel Islands Seminar

St Pierre Park, Guernsey
South Square is delighted to be sponsoring this event

22 September 2026

Legal 500 Bar Awards

Park Plaza Hotel, 200 Westminster Bridge Rd, London

2 October 2026

R3 Annual Business Lunch

London Hilton, 22 Park Lane, London

15 October 2026

ILA Dinner

Great Hall, Lincoln's Inn, London

15-18 October 2026

INSOL Europe 45th Annual Congress

Tivoli Marina Hotel, Vilamoura, Portugal

22 October 2026

R3 Restructuring Forum

The offices of Addelshaw Goddard, 41 Lothbury, London
South Square is delighted to be a networking sponsor at this event

11 November 2026

South Square and RISA Cayman Conference

Ritz Carlton, Grand Cayman

12 November 2026

INSOL Grand Cayman Seminar

Ritz Carlton, Grand Cayman

12 November 2026

Chambers Bar Awards

Old Billingsgate, London

2 December 2026

R3 Eastern Christmas Lunch

The Assembly House, Theatre Street, Norwich
South Square is delighted to be a sponsor of this event

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

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

MARK PHILLIPS KC[2]
SOUTH SQUARE

"It's not about the money"[1]:

Why restructuring plans are still in creditors' and companies' interests

It is idiomatic that greatest strengths are often greatest weaknesses. This is true of the common law. The development of the law, and in particular, the discretion in restructuring plans is incremental. As the Court of Appeal explained in *Thames Water Utilities Holdings Ltd*[3] previous decisions should not be taken to be statements of principle applicable to all other restructuring plan cases. In that context, the Court of Appeal made the following 'preliminary comments':[4]

1. "It's not about the money, money, money" per Jessie J, Price Tag released January 2011.

2. I am grateful to Dr Riz Mokal for his comments on the draft of this paper which were both incisive and testing. The views I express are my own, and Dr Mokal should not be taken as agreeing with all of them.

3. [2025] EWCA Civ 475.

4. At paragraphs 93 to 96.

5. The Court of Appeal makes clear that there are two factors that determine any wider applicability of a particular case, namely, the facts of the case, but perhaps more important, the arguments advanced by the parties.

"94. First, where Parliament has left it to the Courts to develop the approach to be taken upon sanctioning a plan, the Court's function in any case is to work out how best to exercise its discretion on the facts of the case before it and in light of the arguments advanced by the parties[5], guided as appropriate by such principles as have been identified in previous cases. It is not for the Court to assume the legislator's role and lay down principles of broader application. Development on a case-by-case basis is an inevitably slower process, but has the advantage that the principles that emerge are moulded by real-life examples.

95. Second, when considering the guidance offered in previous cases, it is important to recognise their limitations. Many applications to sanction a scheme or plan are uncontested, and while the views of judges experienced in this area are to be afforded great respect, they have not always been tested by adversarial argument.

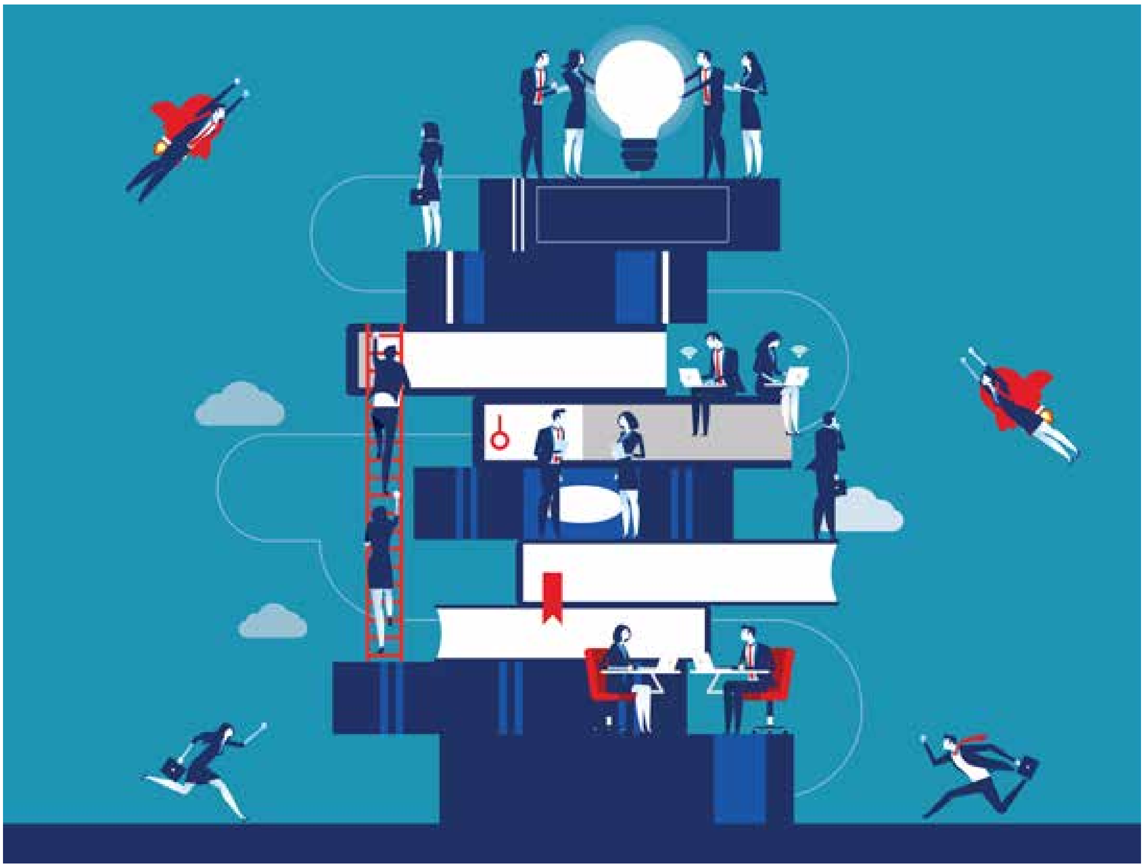
96. Third, it is important not to divorce guidance in an earlier decision from the circumstances of that case. Restructuring plans can be used in a variety of situations and can be structured in many ways. To take three examples: they might be used (as in Adler) as an alternative to a formal distribution process in liquidation or administration; or (as in Virgin Active) as a means of restructuring a balance sheet (for example by swapping debt for equity) in order to enable the company to continue to trade as a going concern with a reduced debt burden; or (as in this case) simply as a mechanism to avoid a formal insolvency process now, so as to buy time to enable a further, substantive, restructuring to be implemented in the future."

While it is a great strength that the law develops incrementally, it has also proved to be a weakness, not least from the point of view of practitioners, because the scope and application of the discretion has not been explained by the Court in a comprehensive fashion. The Court of Appeal made it clear that it is not the court's function to lay down principles broader than those required to determine the case before the court. As a result, there are misunderstandings amongst practitioners, often resulting from attempts to extrapolate broad principles from particular cases. There also appears to be a widely held view that restructuring plans are uncertain. One of the misconceptions is that, in every case, it is all or largely about immediate cash payments; the share of the pot available for immediate distribution between creditors. The financial return to creditors can be about more than just immediate cash and can take different forms, for example, warrants, shares or other contingent-value instruments that can give creditors benefits in the future. Other forms of financial benefit might fairly reflect a creditor's contribution to the restructuring.

In this paper I am going to give two labels to restructuring plans as aids to analysis, although it should be noted that the labels have not been used consistently in the cases. First is a **terminal distributive case**, using the language of the court of appeal: "*an alternative to a formal distribution process*". Second is a **balance sheet restructuring case**, again using the language of the court of appeal: "*restructuring a balance sheet in order to enable the company to continue to trade as a going concern with a reduced debt burden*".

The focus on immediate cash distributions has arisen, at least in part, because of the history of the development of the jurisdiction. The early cases were primarily concerned with the size of distributions in a terminal distributive case, *AGPS Bondco* ("*Adler*")[6] being the leading example[7]. What was being considered in those cases was the rights of different classes in an insolvency distribution, and whether that was being fairly reflected in the plan (and if not whether the differences could be justified). In that context, where it is a question of immediate cash distributions, if a class of creditor would receive nothing in a terminal distribution, it may well be fair that they receive nothing in the plan. However, that was thought to result in a hard rule that "*out of the money*" creditors had no interest in any restructuring plans. That misconception, traced back to *Virgin Active*, was dispelled in *Thames Water Utilities Holdings Ltd* and *Petrofac*[9].

It wasn't until balance sheet restructuring cases, such as *Petrofac* and *Waldorf Productions UK (No.1)*[10] that it was recognised that more nuanced questions arise when the company is being restructured and re-launched as a 'shiny new ship', because all creditors whose rights need to be compromised in order to launch the 'shiny new ship' are contributing to the restructuring. Even if those creditors would not receive a cash dividend in an



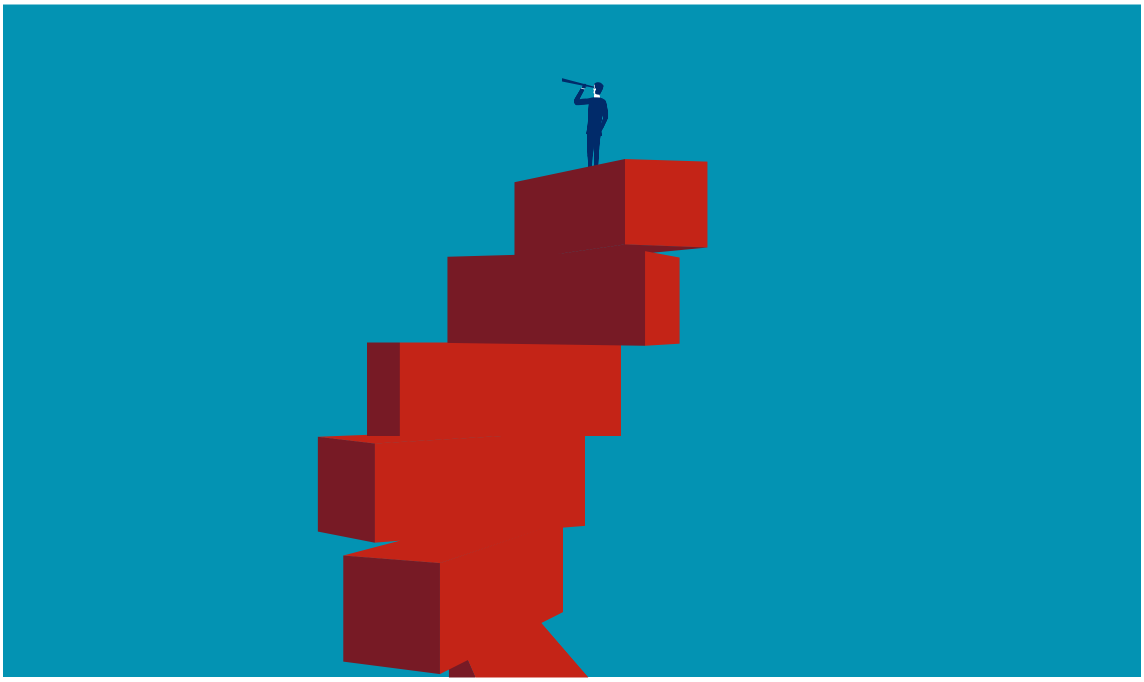
6. [2024] EWCA Civ 24.

7. The plan in *Adler* did not envisage a continuation of the business of the group as a going concern but was simply designed to achieve a more advantageous realisation and distribution of the assets in a wind-down process controlled by the management than would have been the case in a formal insolvency. See *Petrofac* at paragraph 109.

8. See paragraphs 124 to 125, 133 to 134, and 142 to 149.

9. [2025] EWCA Civ 821. See paragraphs 111–117.

10. [2025] EWHC Civ 2181.



11. The value of that contribution will depend on the facts. It is not determined by what dividend they may or may not get in an insolvent distribution.

12. *Waldorf Production UK Plc* [2026] EWHC 1014.

13. The increase being the additional cash available after deducting what would be available in an insolvent distribution.

14. The words put by Zacaroli LJ to Thames Water's counsel in argument.

insolvent distribution, they should receive value reflecting their contribution through the necessary amendment of their rights.[11] *Waldorf Productions UK (No.2)*[12] illustrates the misconception that what is 'fair' to creditors who would otherwise receive little or nothing in an insolvency distribution, continued to be thought to depend on giving them a bigger immediate cash payment. In *Waldorf Productions (No.2)*, the unsecured creditors shared pari-passu in the increased pot available as a consequence of the restructuring. In terms of the "*benefits of the restructuring*", the plan provided that "*out of the money*" creditors received a *pari-passu* share of the increased immediately available cash[13] along with all other creditors, whatever their ranking. That may have been commercially acceptable to the negotiating parties, but it was not principled. Just because "*out of the money*" creditors should receive something, it does not follow that they have to receive immediate cash payments, let alone large cash payments relative to "*in the money*" creditors. After all, in the relevant alternative they would not receive cash payments. The misconception that "*out of the money*" creditors have to receive immediate cash payments is likely to have contributed to the perceived uncertainty, or unfairness, of restructuring plans to senior creditors. Senior creditors might well take the view that if they were expected to share the cash "*benefits of the restructuring*" *pari-passu* with all creditors, given the costs and perceived uncertainty, there isn't enough in it to justify supporting a restructuring plan.

In a balance sheet restructuring case, looking no further than immediate cash payments to each class of creditor is too narrow a focus. For creditors whose claims need to be compromised in order to restructure the company, they are 'entitled to something'[14] but that does <u>not</u> need to be immediate cash. It could, for example, be warrants or other forms of upside agreement entitling the creditor to cash, or shares, if value is realised in the future. The corollary to that, is that senior creditors do not need to share the immediately available cash benefits as generously as they did in *Waldorf Production (No.2)*. The value junior creditors should receive should reflect the value they are contributing to the restructuring by virtue of the amendment of their rights. What the fair value of that contribution is will be fact specific. How that value can be given to the creditors might take various forms, but it need not be cash.

In order to understand the differences between terminal distributive cases and balance sheet restructuring cases (ie. where the company is re-launched as a 'shiny new ship'), it helps to consider the key questions that arise in every restructuring case. As is well known, section 901A of the Companies Act 2006 identifies the two primary conditions that have to be met. First, condition A is that the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern. Condition B provides that the compromise or arrangement proposed between the company and its creditors, or any class of them, should have the purpose to "*eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties*" that are identified in condition A. The key questions arise in the context of that overarching rubric. The answers to those key questions, identified below, differ depending on the nature of the restructuring.

(1) Does the creditor have a genuine economic interest in the compromise or arrangement?

The first question is whether the creditor has a genuine economic interest in the compromise or arrangement. Section 901C(3) provides that every creditor or member of the company whose rights are <u>affected</u> by the compromise or arrangement must be permitted to participate in a meeting. The key in section 901C(3) is whether or not a creditor's rights are affected by the compromise or arrangement. Section 901C(4) provides that this does not apply in relation to a class of creditors or members of the company if the court is satisfied that none of the members of that class has a genuine economic interest in the company.[15] Reading section 901C(3) together with 901C(4), the question of a genuine economic interest arises in the context of rights affected by the arrangement. It is often assumed that the reference to a "*genuine economic interest*" refers to whether the creditor is "*out of the money*". That is not least because that phrase is used in the Explanatory Notes. The assumption is incorrect. Whilst in a terminal distributive case the genuine economic interest will refer to whether the creditor would receive a dividend, in a balance sheet restructuring case it will depend on whether the creditor has an economic interest as a result of a right they have which will be affected by the compromise or arrangement.

In support of the "*out of the money*" assumption, reliance is usually placed on two authorities, *Re: British & Commonwealth Holdings (no.3)*[16] and *Re Maxwell Communications Corp Plc*[17] In both of those cases the key was that the creditors who did not need to be summoned to meetings, did not have rights that needed to be compromised by the schemes. Whilst they did not need to be compromised because they were "*out of the money*" that was not the reason why they could be left out of the schemes. They could be left out of the schemes because their rights were unaffected by them.[18] Their rights against the insolvent companies, MCC and B&C, were left in those insolvent companies unaffected. Should the estates of those companies have produced dividends at their level in the waterfall[19], the "*out of the money*" creditors would have been able to prove, and share in those dividends. In *Thames Water Utilities*, the Court of Appeal explained these cases as follows:[20]

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

The question whether a creditor has a "*genuine economic interest in the compromise or arrangement*" turns on whether the creditor has rights that the company wishes

15. In *Thames Water Utilities (Ibid)*, the Court of Appeal recorded my submission that under s.901C(4) a "*genuine economic interest in the company*" does not mean an interest in the company in the relevant alternative and said "*We do not need to determine that issue.*" See paragraph 156.

16. [1992] 1 WLR 672.

17. [1993] 1 WLR 1402. The principle applied in those cases can be traced back to *Re Tea Corp Ltd, Sorsbie v Tea Corp Ltd* [1904] 1 Ch 12.

18. Reflecting the test in 901C(3).

19. Or if there was another right to their benefit.

20. *Thames Water Utilities (Ibid),* at paragraph 143.

21. It does not follow that the value of that right is its full or face value. For example, amending maturity dates of Notes may not contribute much financial value to the restructuring.

22. At paragraph 117.

to compromise by the restructuring plan. Those rights have economic value and "*must be worth something*." As the Court of Appeal noted, the question was whether the plan involved interference with the creditor's rights against the company. If rights against the company are interfered with (compromised), the creditors holding those rights have a genuine economic interest, and they will need to be summoned to a plan meeting.[21]

(2) Are the dissenting creditors no worse off than they would be in the Relevant Alternative?

The second question is whether the dissenting creditors are "*no worse off*" than they would be in the relevant alternative. The relevant alternative is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned. Section 901G provides that the fact the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning the restructuring plan if two conditions are satisfied. Condition A applies to the dissenting creditors and Condition B applies to the assenting creditors. Condition A is that the court is satisfied that none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative. The comparison required by section 901G(3) is between the outcome for the members of the dissenting class under the compromise or arrangement and in the relevant alternative.

In *Thames Water* the Court of Appeal explained why they preferred the phrase "*benefits preserved or generated by the restructuring*" to the phrase "*restructuring surplus*" which had been used in some cases:[22]

> *"As a preliminary point, we prefer the term "benefits preserved or generated by the restructuring", in place of the term "restructuring surplus", because the latter tends to suggest something of quantifiable value which exists in the restructuring that would not exist in the relevant alternative. In many cases, that will accurately describe the benefit of a restructuring over the relevant alternative, but it <u>will not necessarily do so in every case</u>.*" (my emphasis)

The court of appeal's concern was that there may be cases in which the dissenting class contributes to the benefits preserved or generated by the restructuring, but that contribution might not be of quantifiable financial value. Accordingly, in *Thames Water* the Court of Appeal recognised that the benefits preserved or generated by the restructuring would not always be of quantifiable value, or a greater immediate cash payment. Nevertheless, it appears from *Petrofac* that the contribution must have a financial value.Reading those together it appears that the contribution must have a financial, but not necessarily a quantifiable financial value.[23] In *Petrofac* the Court of Appeal made it clear that whilst the focus may not be on cash payments, the court is required to determine the financial value which a creditor's existing rights would likely have in the relevant alternative, and to compare it with the financial value of the new or modified rights which the plan offers in return for the compromise of those existing rights.[24] The Court of Appeal went on to say that: "*the scope of that enquiry is primarily concerned with the financial value of rights of the creditor against the plan company, but where a plan compromises or releases other rights of the creditor, it extends to those other rights.*"[25] The focus is on the financial value of all compromised rights.

This would be likely to affect valuation evidence. The valuation would not be of competing cash payments but of the competing financial values. If the comparison is between recoveries in the insolvency and non-cash consideration under a restructuring plan, valuation evidence is likely to be different to the valuation evidence the Court has considered in past cases. In most cases to date, valuation evidence has compared the amount of a dividend in an insolvent distribution and the amount of the immediate cash payment in the plan. There has often been a hard-edged comparison. Valuers have opined on realisable asset values in great detail and at great expense. They then compare that to the proposed immediate cash distributions in the restructuring plan. Comparing whatever immediate money payment a creditor might receive in the insolvent distribution with the financial value of rights under warrants or other instruments may be different. The focus should be on the financial value of the compromised rights. Where a creditor is "*out of the money*" in the insolvent distribution, or even where they might receive limited dividends, the financial value of their rights in an insolvent distribution may well be nil. That is then compared to the financial value of the compromised rights which might be reflected by non-cash consideration. Depending on the value of the potential future recovery, the financial value of non-cash consideration in the restructuring plan, the chance of future recoveries from the restructured company, will, in most cases, be greater than the value of their rights in the relevant alternative.

(3) Would the assenting creditors receive a payment or have a genuine economic interest in the relevant alternative?

Section 901G(5) provides that the assenting class should receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative. The receipt of a payment "*or*" having a genuine economic interest are alternatives. Whilst receiving a payment would satisfy the test, so too would having a "*genuine economic interest*". That distinguishes between cash and non-cash consideration. The interest must have content, it must be genuine and economic, which means of financial value. The genuine economic interest is in the relevant alternative. By contrast, under section 901C(4) the question whether a creditor has a "*genuine economic interest*" for the purposes of calling a meeting, is not limited to the relevant alternative. Ordinarily the relevant alternative will be an insolvent distribution, in which event the question is what dividend the assenting creditors are likely to receive. However, it is possible that the relevant alternative is a different restructuring plan, in which event the question would be what the assenting creditors would receive in that alternative. It would not necessarily be cash. This is a binary question, the

23. It is arguable that there is a tension between these statements. The solution may be one of valuation. An unquantifiable financial contribution may, in reality, have no 'cash value',

24. *Petrofac* paragraphs 79 and 91.

25. See paragraph 79.

assenting class either would receive payment or have a genuine economic interest in the relevant alternative, or they would not.

(4) Is the plan fair to the dissenting creditors?

The final question has proved to be the most difficult to answer. The question is whether the plan is fair to the dissenting creditors. One reason why it has proved difficult, is that too much attention has been paid to how much immediate cash the dissenting creditors will receive. This has distorted the debate, largely to the disadvantage of senior creditors. Blame cannot be laid at the door of the court because, as the Court of Appeal pointed out in *Thames Water*, the court can only exercise its discretion on what is presented to it.

In *Adler* the Court of Appeal made it clear that the discretion is additional to satisfaction of Condition A[26] and noted that the exercise of the discretion subjects dissenting creditors to an enforced compromise of their rights:[27]

> *"This exercise cannot, however, properly be carried out merely by asking whether any dissenting creditor will be any worse off as a result of the restructuring plan than in the relevant alternative. That would simply be to restate Condition A in section 901G. As a matter of principle, when the court exercises its discretion to impose a plan upon a dissenting class, it subjects that class to an enforced compromise or arrangement of their rights in order to achieve a result which the assenting classes of creditors consider to be to their commercial advantage. In my judgment, that exercise of a judicial discretion to alter the rights of a dissenting class for the perceived benefit of the assenting classes necessarily requires the court to inquire how the value sought to be preserved or generated by the restructuring plan, over and above the relevant alternative, is to be allocated between those different creditor groups."*

In *Thames Water Utilities*, the Court of Appeal summarised the questions arising on fairness:[28]

> *"103. In any case where the cross-class cram-down power is engaged, however, the Court cannot simply apply the rationality test ... either (i) as regards voting within the dissenting class, or (ii) as regards the overall vote across different classes.... The logic that drives the rationality test in a scheme of arrangement – that a majority of those who share materially the same rights against the debtor are in the best position to consider their own commercial interests – is lacking when the question is whether to impose the plan on one or more of the classes which have not approved the plan by the requisite majority.....*
>
> *104. Nor is it sufficient to establish that a dissenting class is no worse off under the plan than in the relevant alternative (the so-called "vertical comparator" test borrowed from CVAs). That is a necessary requirement for the exercise of the cross-class cram-down power, embodied in Condition A in s.901G(3) of the 2006 Act, but is clearly not in itself sufficient to justify the exercise of the power...*
>
> *105. It is, however, obviously appropriate to conduct some form of "horizontal comparison" in deciding whether to sanction a plan where the cross-class cram-down power is engaged...*
>
> *106. That requires the Court to examine whether the Plan provides for differences in treatment of the different classes of creditors inter se, and whether those differences can be justified.... In doing so, an obvious reference point is the treatment of the creditors in the relevant alternative. Departure from that treatment within the Plan is not, however, fatal to the plan, and nor is the exercise to be carried out merely by restating the "no worse off test"....*

In *Petrofac*, the Court of Appeal identified three points:

(1) The fairness of the treatment of dissenting classes of creditors under a plan requires more than simply deciding whether they would be out of the money in the relevant alternative.[29]

26. At paragraph 153: "*Condition A was a necessary jurisdictional requirement for cross-class cram down but gave rise to no presumption in favour of sanction.*"

27. At paragraph 160.

28. At paragraphs 103 to 106.

29. *Petrofac* at paragraph 126.

(2) The purpose of the plan is one of the factors to be taken into account, there is nothing in *Thames Water* which supports the proposition that the impact on the out of the money creditors should carry no or even little weight in the case of a plan designed to implement a comprehensive restructuring of the company's balance sheet.[30]

(3) Those providing new money to facilitate a restructuring can properly expect to be repaid that money in priority to the existing indebtedness of the company. That also clearly applies to the return on the new money, insofar as that return reflects the price for new money that would be obtainable in a competitive market. But whether, and if so, to what extent, the providers of new money should also be entitled to share – above and beyond market rates for such funding – in the benefits generated by the restructuring is dependent on the facts of each case.

In *Waldorf Production (No.1)* Hildyard J said:[32]

> *"Where, however, there is a dissenting class which a plan company wishes to "cram down", the plan company must persuade the Court that it can satisfy conditions A and B under section 901G of CA 2006. If those conditions are met, the Court has jurisdiction (assuming an otherwise valid Part 26A claim) to sanction a plan under section 901F notwithstanding that the arrangement has not been approved by the requisite majority in every meeting of creditors, provided that conditions A and B are met (a cross-class cram down)."*

And more generally in relation to the discretion:

> *"In the context of a Part 26 Scheme, where the Court also has a discretion which, it is well established, must be exercised by reference to the particular facts of the case, the fact that the jurisdictional requirement of assent by the statutorily required majorities of each class is, as it were, a large part of the answer, unless there is evidence that the results are polluted by the majority vote having been improperly motivated or suborned. That is not so in the context of a Part 26A plan, where the exercise of discretion is more complex, partly because the consequences maybe more severe and partly because (or as an aspect of that) the Court does not have the comfort of the views of a majority within a class. It is one thing that (as in a Part 26 scheme) the views of the regiment within a class should prevail unless polluted by improper purpose and/or majority pursuing objectives of which the minority may substantially be deprived, and quite another (as in a Part 26A plan) to overrule a majority class dissent."*[33]

"…. 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."[34]

There are two themes that come out of the cases. First, whether the dissenting creditors are receiving a fair share of the benefits of the restructuring. Second, and linked to the first, whether the company engaged with the creditors.

(a) A fair share of the benefits of the restructuring

What is fair depends upon what the company needs to compromise in order to "*eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties*" and what that compromise contributes to the benefits of the restructuring. In other words, what does the compromise of the dissenting class's rights contribute to the elimination, reduction, prevention, or mitigation of the effect of, any of the financial difficulties. To use the words of Jessie J, it is "*not about the money*" – immediate cash – in every case, and it depends both on what type of plan it is, and what rights the creditor has that are being compromised. Although there have been a number of cases that have considered the discretion to cram down dissenting creditors, there has been limited analysis of the value of what is being compromised and what is fair in exchange, or whether non-cash consideration might be appropriate.

30. *Petrofac* at paragraph 134.

31. *Petrofac* at paragraph 136.

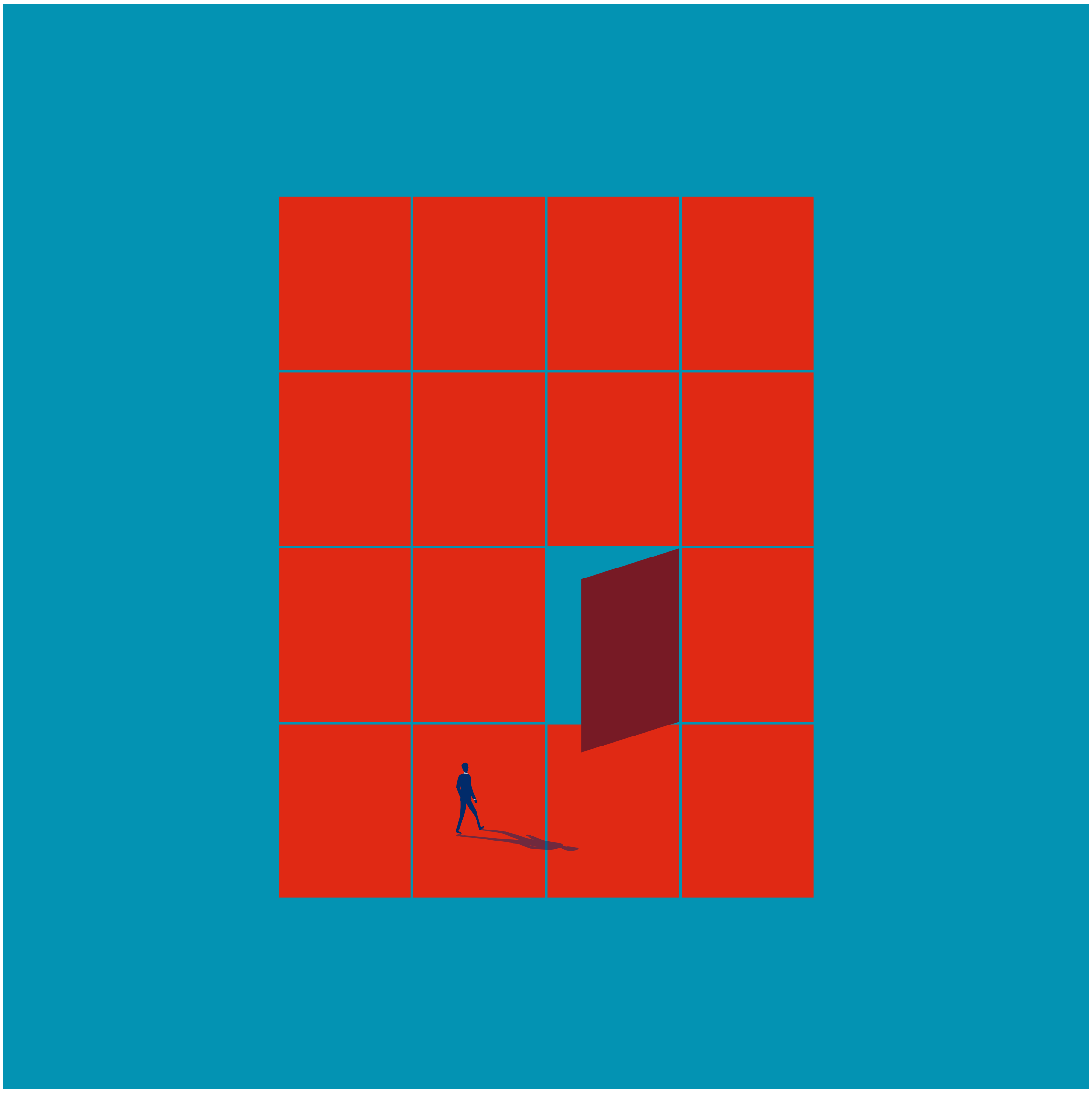
32. At paragraph 85.

33. At paragraph 136.

34. At paragraph 172.

35. Paragraph 143.

36. *Thames Water Utilities* at paragraph 107. At paragraph 109: "*One example of a justification for giving a class of creditors some priority or proportionately enhanced share of the benefits is where it has provided some additional benefit or accommodation to assist the achievement of the restructuring in the interests of creditors as a whole.*"



In *Waldorf (No.1)* Daniel Bayfield KC recognised the differences between terminal distributive cases and balance sheet restructuring plans:[35]

"*Mr Bayfield sought to draw a difference between these two types of restructuring plan in terms of the importance to be attached to the comparison to be made, in assessing fairness, with what would be the rights of dissenting creditors in the relevant alternative ordinarily applicable in such a case, that is to say, an insolvency process. In contrast to a plan of the first type* [a comprehensive recapitalisation], *he submitted that in a plan of the second type* [a wind down], *the litmus test of fairness should continue to be predominantly, perhaps exclusively, based on the relevant alternative.*"

In that case, the objective of the Plan was to realise some economic advantage from the continuation of the plan company as a going concern, and so was not characterised as a terminal distributive case.

In a terminal distributive case the benefits of the restructuring will ordinarily be a bigger dividend. Where a "*wind down*" plan is proposed as an alternative to a formal insolvency in which the claims of creditors would rank equally for a *pari-passu* distribution of the debtor's assets, the Court would normally approve a plan which replicated that *pari-passu* distribution, although a departure from the principle of pari-passu distribution could be approved, provided it was justified, in the sense that there was a good or proper reason for doing so.[36] The rights of creditors contributing to that increased dividend will be giving up their rights to dividends in an insolvent distribution in exchange for an increased immediate dividend. *Adler* identifies that what is fair in that situation should reflect the insolvency waterfall. If the increased dividends result in a shortfall to creditors at the bottom of that waterfall, that is fair because they are contributing nothing. They are giving up a right to a dividend in the insolvent distribution of no financial value. There is no need to compromise their claims.[37] In *Virgin Active* parlance they are "*out of the money*" in both the relevant alternative and the restructuring plan.

In a balance sheet restructuring plan, or an interim plan like *Thames Water*, what is fair is likely to be more nuanced. There will be creditors whose claims are being compromised who would receive a dividend in an insolvent distribution. It is right that they should also receive a money payment in the restructuring plan, at least in part. The relevant alternative establishes each class's minimum entitlement and provides a presumptive measure of relative entitlement. Unless they agree otherwise, senior creditors should receive greater rights in the restructuring plan, usually a bigger payment than in an insolvent distribution. Junior creditors should also receive greater returns than they would in the relevant alternative. Immediate cash is one possibility, but it is <u>not</u> the only possibility. Where a creditor has rights that need to be compromised by the restructuring plan, for example paper that needs to be amended, those rights have value and the creditor could fairly be given a form of non-cash consideration. The most likely example is warrants giving the creditor rights to payments or shares if the company reaches certain landmarks in the future. It might be fair for the senior creditors to receive immediate cash, but for junior creditors to receive non-cash consideration, or a mixture. Every case will be fact specific. Giving creditors non-cash value is an area that is developing. Hopefully, the courts will recognise that returns to creditors do not necessarily need to be in immediate cash, and it will recognise that the use of non-cash consideration giving value on future contingent events can be fair.

(b) Engagement with creditors

Engagement with creditors is said to help the court determine whether what has been presented to the dissenting creditors is fair, and whether the dissenting creditor is an unreasonable hold out. The necessity to engage was first identified in Thames *Water Utilities Ltd*[38]:

> "*More importantly, however, if the Plan Company wishes to obtain the Court's sanction to RP2, it will need to demonstrate that it has engaged with any reasonable proposals made to it, and that it has indeed communicated fairly with all of the Plan Creditors throughout the restructuring process. The implementation of RP2 will be conducted in the full glare of publicity, and the Plan Company has fair warning that it must engage fairly with, and provide sufficient information to, all stakeholders throughout the process. We reiterate the point made in §3 above, moreover, that it must do so at an early enough stage that any issues that arise can be identified, and narrowed, so that the judge before whom RP2 comes is not placed under the same intolerable pressure as Leech J was in this case.*"

In *Waldorf Productions (No.1)* Hildyard J referred to this paragraph and commented that:[39]

> "*This emphasis on proper engagement with all stakeholders reflects increasing focus on the issue of consultation/negotiation in restructuring plans among judges, practitioners and academics.*"

The underlying basis for engagement and negotiation was explained in Petrofac:[40]

> "*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 <u>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</u>*

37. Following MCC and B&C.

38. At paragraph 169.

39. At paragraph 157.

40. At paragraph 131.

41. At paragraph 191.
42. At paragraph 102.
43. At paragraph 123.

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)." (my emphasis)

The terms of the deal had to be good enough to attract the assenting majority. Necessarily, where there is a dissenting class the terms of the deal are not good enough to attract an assenting majority. The question is at what point is opposition unreasonable and cram down fair. In *Petrofac*, the Court of Appeal said:[41]

> *"As we have observed (see above at §131), 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. Our conclusion that the Plan Companies have failed to justify the returns granted in respect of the New Money as a cost of the restructuring means that the formulation of the Plans – and such negotiation as there may have been between the different classes of creditors – has taken place on a false premise. It has failed to address at all the appropriate allocation of such part of the return on the New Money that constitutes a benefit preserved or generated by the restructuring. Moreover, the absence of evidence as to the price at which equivalent funding for the restructured Group could have been obtained in the market means that we could only speculate as to what part of the return on the New Money should be regarded as a benefit of the restructuring, the fair allocation of which falls to be considered."* (my emphasis)

In *Waldorf Productions (No.1)* Hildyard J noted the complaint about a lack of engagement:[42]

> *"Both Capricorn and HMRC submitted that the Plan Company had never properly explored the obvious possibility of a successful negotiation with them resulting in a consensual deal. This would not involve the Plan Company in a complex negotiation process across multiple stakeholders. It has always been clear that the Plan Company would need to negotiate with only three constituencies – the Bondholders, HMRC and CEPLC. The Plan Company has previously agreed a deal with the Bondholders. HMRC and CEPLC have shown themselves to be realistic, pragmatic counterparties (albeit they have negotiated in a vacuum to date)."*

Hildyard J found on the facts, that the offer to the Unsecured Plan Creditors was not the product of negotiation, nor was it the product of any analysis of science or otherwise explained: but appeared, essentially arbitrary. Hildyard J considered that there could be a realistic prospect of negotiations to achieve a consensus on a figure:[43]

> *"Put another way, I consider the prospect of the Bondholders taking the loss and forsaking the upside as perfectly possible but not likely."*

Hildyard J summarised the law on engagement in paragraph 158 of his judgment in which he distilled 4 principles:

> *"(1) First, Part 26A is to be used when cooperative bargaining has failed. As Professor Paterson put it:*
>
> > *"...we would not expect engagement of a cross-class cram down power without any prior attempt at bargaining – the cross-class cram down power is invoked because cooperative bargaining has not proved possible".*

(2) Secondly, it is for the plan company to explain why the proposed distribution of the benefits of the restructuring is fair. To quote Professor Paterson again:

> *"...the company would need positively to explain why the proportion of the benefits of the plan that those who stand to gain the most are prepared to share with the dissenting creditors is commercially reasonable".*

(3) Thirdly, the dissenting creditors must explain what they say a commercially fair share is. Quoting her once again:

> *"... the dissenting creditors would need positively to describe why the proposed compromise or arrangement is unreasonable, and what it is that they would be prepared to accept instead".*

(4) In the round, in considering what is a commercially fair share,

> *"the search is for the standards of reasonableness that the parties themselves would accept".*

On engagement Hildyard J concluded:[44]

> *"The failure to enter into any negotiations presents a further difficulty for the Plan Company in terms of there being no evidence that might shed light on whether the dissenting Unsecured Plan Creditors are acting reasonably in demanding more. Furthermore, the obvious implication from the fact that the Plan Company has not offered any explanation for not engaging is that the Plan Company and the Bondholders have proceeded on the basis that they were not required to engage because the Unsecured Plan Creditors were "under water," consistently with the position pre-Thames Water that "under water" creditors need only be offered a de minimis amount."*

There is a danger in thinking that the <u>process</u> of engagement is sufficient, in other words that provided the company entered a process of engagement it will have satisfied any requirement to engage. However, that will not necessarily be the case. There are two points to have in mind. First, engagement is not an additional statutory requirement. It is relevant in the context of the court's discretion to sanction. It might assist the court in assessing what is fair, for example, negotiations may illuminate valuation, feasibility, liquidity constraints and respective contributions. However, engagement is also affected by bargaining power, information and timing, all of which should be recognised. Secondly, engagement will only be of assistance to the parties and the court if there is a <u>substantive</u> discussion around what might be fair. The fact that negotiations have failed only establishes that the parties have not agreed. It is only unreasonable for the creditor not to agree if what is put to them is substantively fair. There is a danger in focusing on engagement of treating every creditor that has declined to engage, or rejected proposals made on engagement, as unreasonable. The cram down power only arises when a class of creditors have rejected a plan so procedural engagement cannot itself answer the question of fairness. In *Petrofac*, summarised in *Waldorf Productions (No.1)* it was put as follows:[45]

> *"[T]he Plan Company should have made a "genuine attempt to formulate and negotiate a reasonable compromise between all stakeholders..." with the objective of achieving by the plan "the appropriate allocation of...[any]...benefit preserved or generated by the restructuring."*

In Waldorf Productions (No.2) there was a mediation between the commercial creditors.[46] There is no question that this was a "*genuine attempt to negotiate a reasonable compromise between stakeholders*". It satisfied the question of process. However, as a matter of substance all that was negotiated was division of the lump sum payment being made by the purchaser. Accordingly, the unsecured creditors received a significantly greater payment than they would have received in an insolvent distribution, but this was at the expense of the immediate payments the senior creditors would receive.

44. Paragraph 176.

45. *Waldorf Production (No.1)* at paragraph 184.

46. Mark Phillips KC was counsel to HMRC. The issues relating to HMRC were particular to HMRC and irrelevant to this paper.

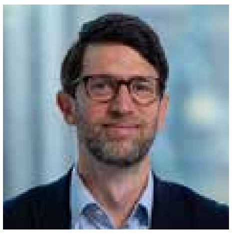
Waldorf was a balance sheet restructuring case, not a terminal distributive case. The purchaser wanted to acquire the company not least to utilise its tax losses. That meant that the company would have to make profits in the future. In future similar cases, rather than agree to significant one-off payments to junior creditors, companies should consider offering warrants or upside agreements, so that if the company returns to profit junior creditors will receive part of the upside. Such rights are, by definition, the benefits of the restructuring. Immediate cash payments to senior creditors, who would receive significant payments in an insolvency distribution, could be correspondingly larger, again, reflecting their contribution to the restructuring benefits, i.e, not enforcing their secured debt. As this part of the jurisdiction develops, it will be substance, not process that will be important. Substantively, negotiations should not only be about the size of immediate payments but about what would be a fair compromise for the creditor's rights. That is "*not about the money*".

Conclusion

The view that restructuring plans will result in lower returns to senior creditors as a consequence of recent decisions is incorrect. So too is the view that it is difficult to predict what the outcome of a restructuring plan might be. The move to enforcement is probably resulting in lower returns to senior creditors, and almost certainly to junior creditors who lose the chance of paper rights to potential future benefits in a restructured company. The necessary paradigm shift is to recognise that it is "*not about the money*", in particular junior creditors should not necessarily receive immediate cash payments. The error in the early cases was to treat the "*out of the money*" question as binary: creditors were either in or out. That error was then taken over into balance sheet restructuring cases where it doesn't work. The proper question was always: what rights need to be compromised, and what is a fair return for those rights given what the creditor would receive in the relevant alternative?

Distributing Client Money held by an Insolvent Insurance Broker

Samson Spanier of Kennedys and Glen Davis KC of South Square consider the regime in CASS 5 and the recent decision in Re EC3 Brokers Ltd



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1. [2016] Lloyds Reports IR 217

2. see Art 4 of Directive 2002/92/EC on insurance mediation; more recently, and until Brexit, the rules in CASS 5.1-5.6 gave effect to the requirements of the Insurance Distribution Directive, Directive (EU) 2016/97

Introduction

The insolvency of an insurance broker can give rise to numerous and complex technical questions, particularly when it comes to the proper treatment of client money held by the firm. But this is an area on which there has been very little decided authority. Until recently, the last decided case specifically on point was the decision of HHJ Keyser QC in *Re Allanfield Property Insurance Services Ltd*[1] ("***Allanfield***"), dating back to more than 10 years ago.

So the decision of Chief ICC Judge Briggs in *Re EC3 Brokers Ltd (In Administration)* [2026] EWHC 829 (Ch) ("***EC3***"), in which the Court has sanctioned a Scheme of Distribution proposed by the eponymous broker's administrators in a case where there were difficulties establishing client entitlements is particularly welcome and bears careful consideration as a useful guide and precedent.

The Regulatory Background

Before we come to the particular difficulties which needed to be addressed in *EC3*, and the tools which were approved to deal with them, it is necessary to consider the position of an insurance broker such as EC3 Brokers Ltd, and the regulatory context.

EC3 Brokers Ltd operated as a regulated insurance broker registered with Lloyds of London. It brokered insurance and reinsurance policies, between end-insureds or reinsureds (or in some cases, producing brokers operating in a chain), and the insurers or reinsurers (or their agents) underwriting the policies. Depending on the direction of travel, such a broker would receive premium from (or on behalf of) insureds for onward payment to insurers or reinsurers, and payments from insurers or reinsurers (representing, for example, refunds of overpayments and payments of claims). They would also receive payments of commission and the like, for their own account. It is worth noting that brokers may have multiple transactions either way with their counterparties and account to them on a 'net' basis. It is also worth noting that the counterparties may rely on the broker's records to confirm what monies are due.

This activity is regulated by the Financial Conduct Authority ("**FCA**"), and is in particular subject to the rules and guidance in chapter 5 of the FCA's *Client Assets Sourcebook* ("**CASS**"). CASS 5 has the force of delegated legislation, being made under the FCA's powers in the Financial Services and Markets Act 2000.

In the language of CASS and the FCA Handbook Glossary, the activities of a broker will be *insurance distribution activity*, and a firm other than an insurer carrying on such activity is categorised as an *insurance intermediary*. In this article, we will for convenience refer to such a broker simply as an 'Intermediary'.

Before 2005, Intermediaries operated bank accounts designated as 'Insurance Broking Accounts' ("**IBA**"). These were separate accounts for their insurance business, but they were not trust accounts. The Intermediary's relationship with insureds and (re)insurers was a debtor-creditor relationship. Money received from insureds and (re)insurers was the Intermediary's own money (though it may have been charged to secure the Intermediary's obligations).

Intermediaries became regulated by the then Financial Services Authority ("**the FSA**") in 2005, and since 2013 have been regulated by the FCA. CASS 5 implemented the UK's European-law obligations under the Insurance Mediation Directive to protect customers against the insolvency risk that an insurance intermediary would be unable to transfer the amount of premium to the insurer or transfer the amount of a claim or return premium to the insured[2]. However it did so in a manner which preserved the Intermediary's option to continue carrying on business as before, as long as certain conditions were met.

CASS 5 applies to a firm that receives or holds money in the course of or in connection with its insurance distribution activity. This did not originally apply automatically to reinsurance activity, but reinsurance was brought within its scope in 2018. It continues to apply optionally to large risk contracts where the risk is situated outside the EEA[3].

The FCA's Rules in CASS 5.1 R to CASS 5.5 R are styled the *client money rules*. In the language of CASS 5, money (of any currency) which, in the course of carrying on insurance distribution activity, a firm holds on behalf of a client or which a firm treats as client money in accordance with the *client money* rules is designated as client money. There are detailed provisions in the FCA Handbook defining the term *client* for these purposes[4], but in general it will be a person to whom the firm has provided or intends to provide a service in the course of carrying on a regulated activity (in this case, insurance distribution activity), including a potential client. The definitions are intentionally wide, and the central questions of who is a 'client' and what is the 'client money' will necessarily be the subject of factual inquiry in a relevant case.

Detailed exposition of the niceties and uncertainties of CASS 5 mercifully falls outside the scope of this article, but there are key features which are significant. Broadly, there are two approaches which a relevant firm can adopt for the purpose of protecting clients against the inability of an Intermediary to transfer premiums to an insurance undertaking or to transfer the proceeds of a claim or a premium refund to the insured. The first is to provide for a transfer of risk from the Intermediary to the insurance undertaking ('risk transfer'); the second is to segregate client money by transferring it to client accounts that cannot be used to pay the firm's other creditors in the event of the firm's insolvency (a 'trust' model, for which CASS 5 offers two alternative approaches)[5].

(1) Risk Transfer

The conventional position is that a broker is the agent of the insured. The insured therefore bears the risk that the premium paid to the broker is not paid on.

3. see Art 72D of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2000 and CASS 5.1.1 R (3)(b)

4. see the Handbook Glossary and COBS 3.2 R

5. see CASS 5.1.7 G (2)

6. CASS 5.1.6 R
7. CASS 5.1.5 R (1)(b)
8. CASS 5.1.5 R (1)(a)
9. CASS 5.1.5A R
10. CASS 5.1.5A R (2)
11. CASS 5.2.3 R (3)
12. See section 137B(1) FSMA and CASS 5.3.1 G
13. CASS 5.3.1G
14. CASS 5.3.2 R (4)
15. CASS 5.3.2 R (2)
16. CASS 5.3.2 R (3)
17. CASS 5.3.2 R (5)
18. CASS 5.4.1 G (1)
19. CASS 5.5.11 R

The general position is that the Intermediary's 'clients' will be the insureds and reinsureds (or would-be insureds and reinsureds). An insurance undertaking when acting as such (ie acting as insurer or reinsurer) will not be a 'client'[6]. This exposes insureds to the insolvency risk of a failure of the Intermediary.

It is possible under CASS for an Intermediary to agree to act as the agent of an insurance undertaking. This requires the conditions specified in CASS 5.2.3 R to be met. The starting point here is that where an Intermediary is acting as an agent of an insurance undertaking, money it receives as agent will not be client money[7] (and similarly it will not be client money where money becomes properly due and payable to the Intermediary for its own account[8]).

However, it is also possible for the Intermediary and an insurance undertaking to agree that money which it receives and holds as agent for the insurance undertaking <u>will</u> be client money[9]. This requires an agreement in writing which is adequate to show that the insurance undertaking consents to its interests under the relevant trust (discussed below) being subordinated to the interests of the firm's other clients[10]. The Intermediary has to inform clients who are not insurance undertakings and may be affected if it is to hold money as the agent of the insurer[11].

Alternatively, as in the case of client money held by a regulated investment firm, the chosen method to protect clients in the case of an Intermediary's insolvency will be a form of trust. In the case of an Intermediary, however, there are two options.

(2) Statutory Trust

First, the default position is that there will be a 'Statutory Trust' under CASS 5.3. The FCA has statutory power to make provision which results in client money being held on trust[12]. This will be a trust of the client money that the Intermediary receives and holds, which will be 'in the legal ownership of the firm but remains in the beneficial ownership of the client'[13]. This Statutory Trust introduces a waterfall in CASS 5.3.2 R, under which:

(i) the payment of the costs 'properly attributable to the distribution of the client money' will be paid in priority on a failure of the firm[14] (ie on an insolvency);
(ii) clients who are not insurance undertakings then have priority[15], subject to payment of those costs, 'in accordance with their respective interests' in the client money;
(iii) Insurance undertakings are subordinated, and are then paid 'in accordance with their respective interests' in the client money, after all the claims in (ii) have been met[16];
(iv) any balance is paid to the Intermediary itself[17] (meaning, to the 'house' estate on an insolvency).

(3) Non-statutory Trust

In the alternative, there is the possibility of a so-called 'Non-statutory' Trust under CASS 5.4. This permits an Intermediary which has adequate resources, systems and controls to declare a trust on terms which expressly authorise it, in its capacity as trustee, to make advances of credit to the firm's clients[18]. In other words, the Intermediary can use the money in its client money trust account(s) to pay premium to an insurer before that has been received from the policyholder, or to pay out a claim before the money has been received from the (re)insurer. (In the case of a Statutory Trust, the Intermediary is barred from making a payment out for the benefit of a client unless the client has provided the firm with cleared funds to allow the payment to be made[19].)

However, an Intermediary is prohibited from operating a Non-statutory Trust unless all the statutory conditions in CASS 5.4.4 R are met. In particular, it must maintain the requisite systems and controls, it must take reasonable steps to ensure that its terms of business or other client agreements adequately explain the basis on which client money is held, and it must obtain the informed consent of its clients to their client money being held on such basis. In addition, where the client is an insurance undertaking acting as such, there has to be an agreement satisfying CASS 5.1.5A R. This will be a written agreement that the insurance undertaking agrees that the Intermediary may treat money which it receives as the agent of the insurance undertaking as client money, and that the insurance undertaking consents to its interests under the trust being subordinated to the interests of the firm's other clients.

Where an Intermediary wishes to go down this route (and all the conditions are satisfied for it to be permitted to do so), it will execute a trust deed (or equivalent)[20]. Although this is described as a 'Non-statutory Trust' (presumably reflecting the proposition that it would apparently take effect as a form of express private trust), this is something of a misnomer. The parameters and compulsory terms of the trust deed are specified in CASS 5.4.7.

The 'Non-statutory Trust' must provide that the money (and if appropriate, any designated investments) are held on the terms of and for the purposes of CASS 5.4, CASS 5.5 (which requires segregation as discussed below) and the *client money (insurance) distribution rules* in CASS 5.6 (also discussed below). Beyond that, the compulsory terms for the 'Non-statutory Trust' (and so the effects on an insolvency of an Intermediary) impose exactly the same waterfall as applies in the Statutory Trust under CASS 5.3.2 R.

Segregation

There are detailed provisions under CASS 5.5 governing the operation of the client money accounts, which apply to both Statutory and Non-statutory Trusts[21].

Fundamentally, CASS requires the segregation of client money from the firm's own money[22]. This is to be done by paying

it as soon as practicable into a *client bank account*[23]. An Intermediary is prohibited from holding its own money in a client bank account unless it is the minimum sum required to open (or keep open) the account, commission or part of a mixed remittance temporarily in the account (which must be withdrawn as soon as reasonably practicable[24]), or interest due to the firm which has not yet been withdrawn[25].

Failure of an Intermediary

The appointment of a liquidator, receiver or administrator of an Intermediary will be a *failure* of the firm[26], and will be a *primary pooling event* under CASS 5.6.5 R. This automatically triggers the operation of CASS 5.6, the *client money (insurance) distribution rules*[27].

A primary pooling event triggers a notional pooling of all the client money, in every type of client money account, and the obligation to distribute it[28]. The Intermediary must distribute the pooled client money in accordance with the Statutory Trust under CASS 5.3.2 R or the Non-statutory Trust under CASS 5.4.7 R (which, as observed above, provide for identical waterfalls) 'so that each client receives a sum which is rateable to the *client money entitlement* calculated in accordance with CASS 5.5.66 R'[29]. In the alternative, there can be a transfer to a dormant asset fund operator under the Dormant Assets Act 2022[30].

20. CASS 5.4.6 R

21. CASS 5.5.1 R ('unless otherwise stated' in the CASS Rules)

22. CASS 5.5.3 R, and see CASS 5.5.2 G

23. CASS 5.5.5 R (1)

24. CASS 5.5.16 R

25. CASS 5.5.9 R

26. see the Handbook Glossary

27. CASS 5.6.1 R (1)

28. CASS 5.6.7 R (1); CASS 5.6.4 G

29. CASS 5.6.7 R (2)

30. CASS 5.6.7 R (4)(a)

31. CASS 5.6.7 R (3)

32. *Re Lehman Brothers International (Europe) (in administration)* [2012] 3 All ER 1

CASS also envisages that there may be debts due to the firm as trustee (an example would presumably be where a payment has been made from funds held on Non-statutory trust before the relevant receipt has been received from the insured or the insurer). The Intermediary is required to call in and make demand for such a debt, which will form part of the client money pool; similarly, the firm must liquidate any designated investment or guarantee on which it relies to meet a shortfall in its client money, and the proceeds are added to the pool[31].

In principle, if an Intermediary has been fully compliant with its obligations under CASS 5, there will have been regular and relatively-recent reconciliations so that the amount held in the client money accounts

reflects the client money entitlements of the interested clients, enabling a straightforward identification of such clients and the amount of their claims so that the proper amounts can be distributed to them. If only real life was always that simple!

It is likely that there will be a shortfall in the pooled client money, if only to take account of the costs of the distribution exercise. The clients (insurer and non-insurer clients) can prove for any shortfall as a common creditor against the general estate of the Intermediary. However, in practice, it will often be the case that the general estate has very little in the way of funds, because the Intermediary would have traded using the client money.

The contrast with the FCA's CASS rules for financial institutions

It is no coincidence that aspects of the client money rules for Intermediaries in CASS 5.1 – 5.5 and the *client money (insurance) distribution rules* in CASS 5.6 mirror the provisions of what are nowadays CASS 7 and CASS 7A governing the client money trust and the distribution of client money held by an investment firm. Relevant provisions were copied over when the FSA took over the regulation of Intermediaries in 2005.

It was the provisions of what was then CASS 7 which were the subject of detailed debates following the collapse of Lehman Brothers in 2008, which ultimately went to the Supreme Court[32]. On specific points, the Lehman case-law may be relied on by direct analogy when interpreting provisions of CASS 5. However, it is worth noting that there are still many unresolved points of construction and unanswered questions.

Lehman revealed the difficulties office-holders faced when they were trying to operate the CASS regime and client money trust estate in the context of a conventional administration. Part of the regulatory response was the introduction of a dedicated 'special administration' regime under the Investment Bank Special Administration Regulations 2011 and Investment Bank Special Administration (England and Wales) Rules 2011 (together, 'IBSAR'). This addresses many of the practical issues which are likely to arise, not least by importing relevant provisions of the Insolvency Rules (as they stood in 2011) and applying them to the administration of the trust estate.

None of that is available in the insolvency of an Intermediary. It is often necessary to address the issues which arise from first principles (which is one reason why the decision in *EC3* is a welcome addition to the pantheon).

Particular issues under the CASS rules for Intermediaries

First, there will need to be a fact-specific inquiry as to whether and in what form the required agreements we have described above have been entered into, whether the required notices have been given, whether requisite consents have been obtained. CASS 5 is drafted on the assumption that the books and records of the Intermediary are in good order, so that the tasks of identifying agreements, trusts and risk transfer agreements, and identifying segregated client money and client entitlements, can be straightforward. In fact, this is often not the case. Further, this may be exacerbated by complex flows of funds and net accounting that may be encountered in the books of an Intermediaries (bearing in mind that some insurance can be very long tail, dating back years if not decades).

Second, as Arden LJ somewhat waspishly observed of CASS 7 in *Lehman*: *'There is no doubt that CASS7 imposes a trust. The provisions of that trust are, however, rudimentary. The trust is created with little elaboration and so the court is thrown back on general trust law'*[33]. The same is very much true of the Statutory Trust under CASS 5.3 or the Non-statutory Trust under CASS 5.4.

It is the Intermediary firm which is the trustee of the relevant trust; an office-holder appointed in the insolvency of an Intermediary will be at one remove, but responsible for the firm's conduct as trustee, and as such at risk of being liable for procuring a breach of trust where distributions are made which (despite the best of intentions) turn out later to not be in accordance with the client entitlements.

Third – and of understandably great concern to office-holders – the need for detailed factual investigations and the technical legal issues which may require consideration mean that the time-costs and expenses incurred before client money can be distributed to those identified as entitled to share in it may be considerable. While it is an incident of the respective trusts as applied on an insolvency that 'the payment of the costs properly attributable

33. *Lehman Brothers International (Europe) (in administration) v CRC Credit Fund Ltd* [2011] Bus LR 277 CA, at [65]

to the distribution of client money' will fall to be paid in priority to the client money claims of clients, there is no apparatus in CASS to govern the scope of this provision or how these costs are to be assessed.

The Court's Jurisdiction

In *EC3*, as in similar cases, the Court's jurisdiction is founded on twin pillars of the statutory power to give directions on an application by an office-holder and the Court's inherent jurisdiction to supervise and give directions for the proper administration of a trust. In *Allanfield*, the Court confirmed that, in a proper case, the court can exercise its inherent equitable jurisdiction when seised of an application under paragraph 63 of Schedule B1 to the Insolvency Act ("**Para 63**")[34] (and the same would apply to analogous provisions).

One aspect of that equitable jurisdiction which is of particular relevance in this context is its ability to give directions under the *Re Benjamin* principle. This jurisdiction does not enable the court to vary the beneficial interests in trust property, but rather to enable trustees to distribute trust property on an assumed basis when it is satisfied that it is just and expedient to do so[35]. However, since *Re Alpari* in 2016[36], it has been understood that the statutory trusts *can* be varied to extinguish the entitlements of non-responsive clients or those with minimal interests, particularly when this is the effect of an FCA rule modification[37].

The application in *EC3*

EC3 was an application by the firm's administrators ("**the Administrators**") for directions under Para 63 in respect of a proposed 'Scheme of Distribution' to govern distribution of client money held by the firm. Interestingly, it was made to an ICC Judge, and in fact heard by the Chief ICC Judge. There were practical advantages in having the matter heard by a tribunal so deeply steeped in insolvency practice, not least when it came to considering approval of the administrators' remuneration and expenses.

The facts of EC3

EC3 Brokers Limited was incorporated in 2013 and operated as a regulated insurance broker registered with Lloyds. The firm brokered insurance and reinsurance policies, particularly focussing on the construction industry, live events and property. It also acted as broker or coverholder in relation to Binding Authority agreements. The insureds and reinsureds were corporate entities rather than individuals. the client base was predominantly overseas, with a focus on the North and South American, Australian and New Zealand insurance and reinsurance markets.

The firm had suffered a reduction in sales during the Covid pandemic, and its losses were exacerbated when key staff left to join a competitor. It entered administration in November 2022. Immediately before administration, the firm was trading and had live insurance contracts. It was not merely a legacy business. At the time of administration, the firm held around £13 million of client money, in a range of currencies.

The administrators had encountered significant difficulties. In some cases, payments of premium had been made by different entities on behalf of Clients. There were deficiencies in the Client Money records, and different databases and spreadsheets had been used over the years to record relevant transactions. There had been foreign currency reconciliation issues, issues with particular payments and with unallocated monies; it appeared that bulk payments to and from Lloyds or LIRMA 'had not been undertaken with care'[38].

The bottom line was that the administrators were unable to determine by inspecting the books and records of the firm if there had been full compliance with CASS 5.1 to 5.6, to protect the client money.

The key issue faced by the administrators against that background was how to determine the 'client money entitlement'

34. *Allanfield* at [55]; see also *Re Pritchard Stockbrokers Ltd* [2019] EWHC 137 (Ch) (*Pritchard*) at [25]

35. See: *Re Benjamin* [1902] 1 Ch 723; *In re MF Global UK Ltd (in special administration)* [2013] 1 WLR 3874 per David Richards J at [26]; *Allanfield* at [52]-[53]

36. *Alpari* was a decision of Newey J as he then was, for which we have the order but no judgment is available

37. see *Pritchard* at [18]-[24]

38. *EC3* at [52]

calculated from numerous factors such as premiums paid but not yet returned, money received for claims made but not yet remitted, and return premiums due. Their proposed Scheme of Distribution was designed to address these problems.

The FCA Rule Waiver

The administrators' proposed approach had the support of the FCA, which granted a significant modification of CASS 5.5.67R, CASS 5.6.7R, and CASS 5.6.9R ("**the FCA Modifications**")[39].

The key change to assist the administrators was the modification of CASS 5.5.67R with a new and tailored sub-paragraph (6):

> *For the purposes of distribution of client money under CASS 5.6.67R, when the individual client balance needs to be ascertained for any purpose, such individual client balance for each client shall be deemed to be the amount which represents the firm's administrators or liquidators'* ***current best understanding at the relevant time of clients' identities and respective client money entitlements*** *(based upon their reasonable efforts as approved by the court to investigate, verify and correct the records kept by the firm).* (Emphasis added).

The FCA Modifications also envisage that the Administrators' approach and calculations would be based on a '*best practical reconstruction of the firm's books and records*'.

The FCA Modifications set out a detailed and prescriptive program of the steps which the firm was required to follow, aimed at giving notice to stakeholders, insurer and non-insurer proofs, adjudicating claims made in a fair and just manner (including late claims), making distributions (where funds are allocated and safeguards for the allocated funds) and keeping records.

The Modifications provide for the setting of two bar dates, first one for insurer clients and then later one for non-insurer clients. They include provision to deal with non-responsive clients, both those who had not submitted a proof to claim against the client money, and those where the firm was unable to make a payment. The share of client money attributable to such client is to be paid into the Insolvency Service's Unclaimed Dividend Account (or another such Insolvency Service account), and at that point the client would cease to have an interest in the client money. (Their claim would be against the Insolvency Service account).

There is also provision to deal with *de minimis* amounts, with a threshold set at £100 (or the foreign currency equivalent). The firm is not obliged to send notices to clients with such small claims.

However, the FCA Modifications envisaged that they were to go hand-in-hand with the Court process. The first condition for the firm to take the mandated steps is that it should not go ahead until "*the firm's receipt of a sealed order of the Court approving the terms of a proposed Scheme for the client money held by the firm which has been pooled in accordance with CASS 5.6.7R*".

The Court's approach

The Chief ICC Judge noted that, in *Allanfield*, HHJ Keyser QC had observed that paragraph 63 (of Schedule B1) does not specify the scope of directions which may properly be given, a question which arises where, as in *Allanfield* (and in *EC3*), administrators seek approval for a scheme

39. The FCA has power to modify the CASS Rules in a particular case by a direction under section 138A FSMA; the FCA Modification is available on-line from the FCA website.

40. *Allanfield* at [51]; *EC3* at [22]

41. at [23]

42. at [46]

of distribution which, in circumstances of imperfect knowledge, might involve a course of conduct that would otherwise amount to a breach of trust[40].

The Chief ICC Judge said[41]:

> *The starting point, in my judgment, is that administrators are officers of the court and as such would have scope to make an application for directions in the absence of paragraph 63. The court could therefore provide directions pursuant to its inherent jurisdiction as it could to a liquidator in a compulsory winding up or a trustee in bankruptcy. .... The language of paragraph 63, in my view, sets the tolerable parameters for directions. The scope of directions given must be consistent with the statutory functions and duties of an administrator and promote the purpose of the administration as defined by paragraph 3 of Schedule B1. In doing so, the court "should provide effective assistance, by arriving at a practical and fair outcome, while ensuring that delay and costs are kept to a minimum": In re Lehman Bros International (Europe) (No 2) [2010] Bus LR 489 [86]*

The Chief ICC Judge identified 5 key issues[42]:

(i) The difficulties in establishing entitlements to the money held in the client accounts;
(ii) The imperfect company records which did not make clear what client money balance was attributable to a non-insurer client (where there had been no risk transfer) or to the insurer (where there had been risk transfer);
(iii) The likelihood that some clients would not make a claim;
(iv) How small sums due should be handled, particularly where distribution cost would be greater than the sum distributed;
(v) Where a client money balance could not be matched due to record failures or tracing issues.

The pragmatic answer to meet these issues was for the Administrators to be able to proceed on a 'Current Best Understanding' basis, and this was reflected in the FCA Modifications and their draft Scheme of Distribution ("**the Scheme**"). They proposed to proceed on certain assumptions (in particular, cases where risk transfer arrangements were assumed not to apply); there was a rebuttable presumption that money was held for non-insurer clients.

The Scheme included detailed proof provisions importing the powers of an administrator when considering proofs of debt in a conventional insolvency, and enabling the administrators to reach a conclusion based on their reasonable efforts to investigate and verify records.

The Scheme (reflecting the FCA Modifications) envisaged that in this case there would be a two-stage proving process, involving first a period for Insurer Clients (or Insurers seeking to prove that they were Insurer Clients) to submit their claims, followed by a period for submission of claims by Non-Insurer Clients, and the detailed proof provisions divided insurer from non-insurer proofs. As the Chief ICC Judge noted, the rationale for this was that insurers were more likely to keep accurate records allowing the joint administrators to cross reference the records with non-insurer claims; the joint administrators took the commercial view that this would save time and costs.

The Chief ICC Judge was interested in some key aspects of the Scheme.

First, as there was a bar date, he records that he had questioned counsel about the discretion and how it would work in practice. He was satisfied that a bar date was consistent with the "Alpari order" jurisdiction, which we have discussed above, and which he says '*provides that a non-responsive client or a client with a minimal entitlement shall cease to have an interest in client money from a date certain*'. He was also satisfied that a bar date is both practicable and consistent with the work to be undertaken based on the Best Practical Reconstruction and the FCA Rule Modification[43].

He was satisfied that the Scheme incorporated '*a working basis for cases where it is either proportionately impractical or not possible to find whether there has been a risk transfer*', and that the rebuttable presumption that money was held for the benefit of non-insurer clients is consistent with the principles of CASS 5 '*where the non-insurer clients are to be protected before the insurer clients*'[44].

The Chief ICC Judge was content with the proposal to deal with the concern that some clients would either not engage with the process or would fail for some other reason to claim their entitlement by the arrangement for money to be paid into the Insolvency Service account (and he notes that the Insolvency Service had confirmed that it is able to accept the transfer of such unclaimed client money entitlements where the court orders or approves a scheme of distribution, on the same terms as unclaimed creditor dividends[45]).

It was thought that the cut-off for no notice to be given to clients with small balances below £100 might affect 14 clients. The Chief ICC Judge agreed that the cost of giving notice, adjudicating on a proof and to make a distribution is disproportionate to the sums involved (and noted that the FCA also agreed[46].

He also agreed that it was a practical solution to deal with cases where, after a Best Practical Reconstruction of the records, there was no or insufficient

43. at[59]
44. at [60]
45. at [61]
46. at [62]

47. at [63]-[64]
48. at [84]-[85]
49. Allanfield at [144]
50. EC3 at [72]
51. at [73]
52. at [76]-[78]

evidence to support the allocation of a client balance by treating the funds as part of the client money pool available to make up any shortfalls[47].

On that basis, the Chief ICC Judge was satisfied[48] that the directions sought under paragraph 63 were consistent with the functions and duties of the Administrators, did not put them in a position of conflict, and that the court should provide effective assistance. He was also satisfied that the Scheme was compliant with the requirements of the FCA and the modified [CASS] Rules, and did not breach the laws of England and Wales. He says that in his judgment:

> *the Scheme strikes a proper balance between the rights of established clients, the prompt return of their money, the position of those with substantial claims, and the need for an efficient, cost-effective process that brings finality.*

He therefore gave the directions sought, permitting the firm to proceed, and directing the administrators to cause the firm to proceed, on the footing that the client monies held by the Company at the time of administration are to be distributed in accordance with the terms of the Scheme.

Costs

As we have described above, it is an incident of both the Statutory Trust and the Non-statutory Trust that the firm held client money as trustee for payment of the costs properly attributable to the distribution of the client money following a failure of the firm. The Chief ICC Judge records that in *Allanfield*, a submission that the expression 'the costs properly attributable to the distribution' encompassed all costs incurred for the purposes of effecting the distribution of the client money had been accepted by HHJ Keyser QC[49], and notes that HHJ Keyser had further held that the general principle in *Re Berkeley Applegate* namely, that an allowance may be made for costs, skill and labour expended in

the administration of property where the work confers a substantial benefit on the trust property and those interested in it was capable, in principle, of supporting payment out of the pool of costs incurred in bringing about the distribution[50].

The same submission was made to the Chief ICC Judge in *EC3* (in fact, by the same Counsel), and he saw '*no reason to provide a different answer*'[51].

So far, so good, but what about quantification? The Scheme included provision for recovery of relevant remuneration, costs and expenses, and the Administrators asked the court to quantify remuneration. That is an exercise with which an ICC Judge is of course very familiar, and as the Chief ICC Judge says, 'the general principles applicable to court-based quantification of an office-holder's costs apply'. As he says[52], the principles are provided by Part VI of the 2020 Insolvency PD, which specifies the objective:

> *The objective in any remuneration application is to ensure that the amount and/or basis of any remuneration fixed by the Court is fair, reasonable and commensurate with the nature and extent of the work*

> *properly undertaken or to be undertaken by the office-holder in any given case and is fixed and approved by a process which is consistent and predictable.*

The Administrators had provided detailed evidence, both as to the work done and the projected future work. The Chief ICC Judge was satisfied that the steps taken by the Administrators had ensured that the costs were proportionate, duplication was avoided and tasks were allocated to suitable grades of staff[53]. He found that the costs incurred to date were 'fair, reasonable and proportionate' and that the work undertaken was necessary to secure an accurate reconciliation and orderly distribution of client money. He therefore allowed these costs in full, and also considered that the estimated further costs covering the remaining steps required to complete the distribution, were justified by the scope and necessity of the work identified.

Reflections

Although the Administrators in *EC3* faced particular difficulties arising from the state of the Intermediary's books, the complexities of the underlying commercial relationships and of the CASS regime mean that it is probably inevitable that such issues will arise when an *Intermediary* collapses.

And although *EC3* is not strictly an authority as such (because only the Administrators were represented at the hearing and the Chief ICC Judge did not have the benefit of adversarial argument), it will be a useful source and precedent for cases in this area.

On the question of remuneration and costs, *EC3* is welcome confirmation of the approach the Court will take, and it will be reassuring to office-holders that, as long as the evidence is sufficient and the procedure under the Insolvency PD is followed, the Court in an appropriate case will approve their costs in full. ■

53. at [82]

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The anti-deprivation rule is a common law rule which can render void any provision by which a debtor is deprived of assets by reason of insolvency with the effect that they are not available in the insolvency proceedings.

Whilst the scope of the anti-deprivation rule can be considered, it is often difficult to determine whether the rule will apply in practice. This is because it is difficult to identify the precise nature of the rule or its precise limits (something both Lord Neuberger and Lord Collins recognised in *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd [2011] UKSC 38*, in paras 32 and 58 respectively.

One reason for this is the inherent tension between the courts' desire to give effect to contractual terms which the parties have agreed and the desire to ensure that a party to an arrangement is not improperly advantaged if the other party becomes insolvent: *Belmont Park Investments* (para 103). Another reason is the acceptance in *Belmont Park Investments* of a series of established categories of determinable interests that sit outside the scope of the rule. The marked absence of a judicial desire to rationalise the rule and its exceptions is because of the judges' recognition that the common law rule is too well established to be abolished judicially and that the practical need for its application is diminished by statutory rules to avoid antecedent transactions.

Importantly, the anti-deprivation rule is not some kind of anti-avoidance provision which renders void each and every contractual provision which gives a party an advantage on the insolvency of the other party: *HMRC v Football League Ltd [2012] EWHC 1372 (Ch)* (para 188). Rather, in practice, the rule must be applied by carefully considering each of the factors identified by Lord Collins in *Belmont Park Investments*.

The Hong Kong Court of Appeal case of *Hsin Chong Construction Co Ltd (in provisional liquidation) v Build King Construction Ltd* [2019] HKCA 1305 provides a useful example of how the court would apply the principles in *Belmont Park Investments* in practice. In *Hsin Chong Construction* a company had entered into a joint venture agreement to build a museum in Hong Kong. Clause 17 of the agreement provided that if one of five conditions were met, the innocent party could exclude the defaulting party from the joint venture and complete the project itself. The defaulting party was then excluded from participating in the profits of the joint venture, while continuing to bear its share of the costs and losses (whether before or after the date of the exclusion). One of the five conditions related to the insolvency of a party. The insolvency condition was met and the other joint venturer excluded the defaulting party from the joint venture.

One of the issues considered in the appeal was whether clause 17 of the joint venture agreement breached the anti-deprivation rule. The first instance judge had sought to apply *Belmont Park Investments* and held that clause 17 did not breach the anti-deprivation rule; the judge's reasons for doing so included the following.

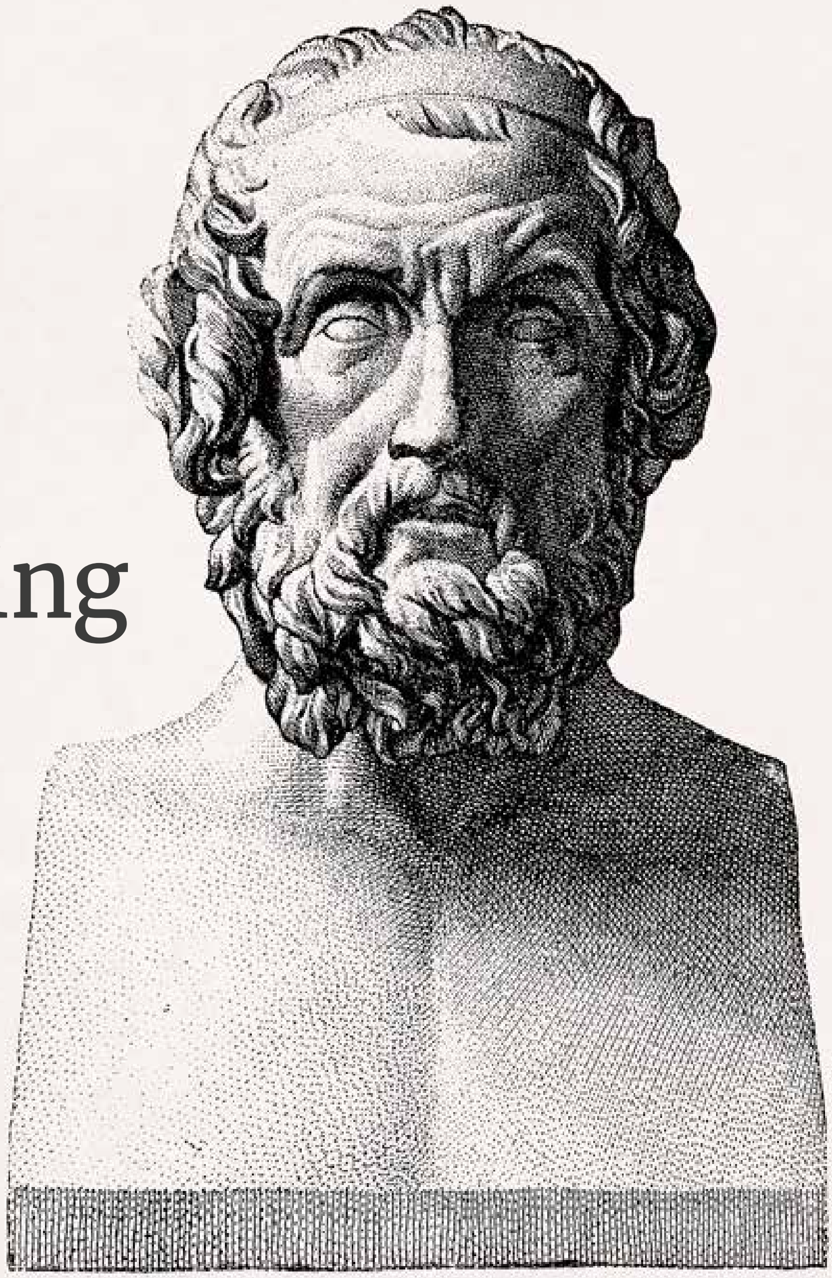
(a) Of the five conditions which could trigger the right to exclude, four of them concerned breaches of contract and not insolvency events. This suggested an absence of any deliberate intention to evade insolvency law.

(b) The insolvency of one party completely changed the risk profile of the project so far as it concerned the continuing party. Clause 17 was negotiated to protect a continuing party and gives it legitimate protection. When it agreed the joint venture agreement it did not do so on the basis of having to assume 100% of the risk of the project.

(c) It was clearly sensible and in the interests of the parties to provide for what happened when one of them became insolvent. Both joint venturers were seasoned players in the construction industry, with similar bargaining strengths and access to legal advice. This was a commercial bargain entered into freely by the parties and it is not the function of the court to rewrite the commercial bargain.

The Hong Kong Court of Appeal expressly approved of this reasoning, saying that the first instance judge applied the anti-deprivation rule "in a commercially sensitive manner and taken [*sic*] into account the policy of party autonomy and the upholding of commercial bargains" (para 43).

A more recent example is *GGF Fund Ltd v Anglian Windows Ltd (now called ASHI Group Ltd) [2025] EWHC 2397 (Ch)*. In that case various companies had contributed to a fund to protect deposits paid to them by their customers, in the event the relevant company became insolvent. Chief Master Shuman considered an argument that various rules regarding eligibility to receive distributions from a fund breached the anti-deprivation rule. The judge quoted from Lord Collins's judgment in *Belmont Park Investments* and held that the provisions did not breach the anti-deprivation rule because "*it cannot therefore be said that this arrangement is designed to evade insolvency laws, it is commercially justifiable and the anti-deprivation rules are not applicable*" (para 108). ■



A Restructuring Odyssey

From Judging Lehman to Judicial Management Hearings in Singapore

JUSTICE JAMES M PECK
ASSOCIATE MEMBER, SOUTH SQUARE AND INTERNATIONAL JUDGE SINGAPORE INTERNATIONAL COMMERCIAL COURT

I am looking forward to this summer's anticipated blockbuster "The Odyssey" which ambitiously depicts the classic story of Odysseus confronting and overcoming twists of fate to realise his destiny.

Such mythic adventures function as metaphors for the mysteries of life and the twists of fate and uncertain career trajectories affecting all of us. These universal mysteries have been top of mind for me lately as I have thought back on my own career path.

I started out as a business bankruptcy lawyer, was appointed a bankruptcy judge in New York about twenty years ago, retired from the bench to return to a "big law" private practice for a decade and now practice as an independent consultant, arbitrator, and mediator.

But I also have the exceptional opportunity to serve as an

International Judge on the Singapore International Commercial Court (SICC) focusing on cross-border insolvency and restructuring. How did this latest career defining pivot come about and how did a native New Yorker end up presiding over transnational commercial disputes in Southeast Asia is a question that frequently intrigues my peers.

Destiny came knocking on my courtroom door at One Bowling Green in Manhattan when I was assigned to preside over the Lehman Brothers bankruptcy.

In an instant, a random case assignment changed everything. I found myself at the centre of the global financial crisis responsible for addressing the unprecedented challenges of the biggest bankruptcy of all time. I was thrust by circumstance into the role of having to approve transactions impacting creditors and the global economy under extreme time pressure and managing a massive number of complex competing claims presented by creditors from all over the world. These claims included the multi-billion-dollar intercompany claims of affiliated Lehman businesses.

The impact on my career was immediate. The vast international nature of the case was a unique challenge that accelerated changes in the field of International Insolvency law.

The competing claims of Lehman's foreign affiliates required a novel case management strategy.

These massive intercompany claims grew out of arcane financial structures and derivative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s and oil prices plunge, thousands lose jobs

an Economics Editor

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of US capitalism's biggest Merrill Lynch, is to be y Bank of America in a akeover to save it from

as fear spread through ystem. Central banks unmeasures amid concerns l economy was entering ew phase. The Bank of ted £5 billion of emerinto money markets. ehman staff in Britain

Dow Jones industrial average was down 300 points, or 2.6 per cent. Sentiment was also bolstered by steep falls in oil prices, which dropped by more than \$5 a barrel to \$96, closing under \$100 for the first time in six months and raising hopes that cheaper fuel would ease economic stresses on Western nations.

However, by close of trading the Dow had fallen by more than 500 points — its biggest one-day drop since the reopening after the September 11 attacks — as concerns mounted over the world's largest insurer. Shares in American International Group (AIG), which sponsors Manchester United, fell by 45 per cent after it made an unprecedented approach to the US Federal Reserve for \$40 billion in emergency funding.

Last night the Fed asked Goldman Sachs and J P Morgan Chase, two of Wall Street's remaining big banks, to head a \$75 billion emergency package to keep AIG afloat.

As central banks battled to stabilise the system, the Fed eased its rules for emergency lending further. It announced that it would accept company shares in return for crisis loans for the first time. In Frankfurt, the European Central Bank injected €30 billion in emergency funds into eurozone markets.

A group of ten global banks also attempted to foster calm

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page 24

transactions and needed to be sorted responsibly and efficiently. Trustees and estate representatives from all over the world were in their separate silos and limited by the lack of procedures and precedent to guide them. A judicially sanctioned process for engagement was needed.

Because the Model Law on Cross Border Insolvency applies only to individual corporate entities and not multiple affiliated members of an enterprise group such as Lehman, I proposed a bespoke approach to foster cross border cooperation among separate estates that might generate constructive dialogue and substantive negotiations.

A court approved protocol became the procedural vehicle that provided justification and encouragement for adverse estate fiduciaries to negotiate with one another to resolve disputed claim amounts, establish entitlements based on verified accounting data and develop a joint plan of reorganisation.

The process took time, but it worked. The pragmatic and successful implementation of the Lehman cross-border protocol demonstrated that even the most complex disputes arising within an interconnected global enterprise group can be resolved when parties are given access to relevant financial information and can rely

on a well-developed restructuring regime such as Chapter 11.

It helped that the parties were sophisticated and motivated to overcome obstacles, manage transaction costs and guard against unwanted value destruction. Despite a few reluctant participants, the protocol's underlying premise of information sharing and cooperation was sound and encouraged constructive dialogue without being overly prescriptive.

The experiment, I am delighted to tell you, was a great success. An overwhelmingly consensual joint plan was confirmed after little more than three years of bankruptcy; that plan has exceeded expectations and distributed considerably greater value than initially projected or that was even thought possible. In retrospect, the Lehman plan serves as a remarkable example of enlightened compromise based on sensitivity to commercial reality and the desire to maximize distributable value as markets stabilized and recovered.

The negotiated framework reallocated value from subsidiaries to the holding company as the means to settle contested positions on whether it was proper or not for the Lehman estates to be treated as a consolidated entity. The settlement avoided costs and accelerated the timing of distributions to creditors.

This pragmatic resolution was seen as a much better alternative than waiting for the uncertain conclusion of a lengthy litigation with attendant appellate risks and delays.

The success of the plan negotiations in Lehman fifteen years ago was a tremendous achievement for stakeholders that validated the effectiveness of the Chapter 11 process in relation to any kind of business, no matter how large it might be.

It is quite clear to me that my Lehman past became the prologue that augured my present judicial work.

After the Lehman consensual plan, I became actively engaged in alternative dispute resolution and international organisations like INSOL and International Insolvency Institute devoted to cooperation in cross-border insolvency law, and a variety of international projects and guest lectures.

My travels included various speaking engagements and collaborative trips to Singapore that happened to take place during the same time period that Singapore was actively considering updating its insolvency and restructuring laws.

I learned about contemplated revisions and reforms that included many of the newest restructuring tools (e.g. prepack schemes) and the adoption of the Model Law on Cross-Border Insolvency as part of a new Insolvency, Restructuring and Dissolution Act (IRDA) which became law in 2018.

Singapore's commitment to becoming a respected hub jurisdiction for cross-border restructuring was enormously impressive to me.

Within the past decade, Singapore has become an undisputed global leader in cross border insolvency law and practice and is on the verge of becoming the first jurisdiction in the world to enact two new model laws promulgated by UNCITRAL: one dealing with enterprise group insolvency cases like Lehman and a second that concerns the recognition of insolvency related judgments.

That same open-minded approach to innovation was evident to me when I participated in discussions regarding the Restructuring and Insolvency Arbitration Protocol introduced by the Singapore International Arbitration Centre (SIAC) – a novel framework geared to the resolution of insolvency and restructuring disputes.

While in Singapore for this initiative, I visited the Supreme Court and received an irresistible offer to join my colleague, Justice Christopher Sontchi, as an International Judge on the SICC to concentrate on cross-border restructuring cases.

Being on the SICC has proven to be an immensely rewarding experience. My cases have included a prepack scheme for a company from Vietnam, cross-border cases involving the recognition of Chapter 11 restructuring plans confirmed in the Delaware bankruptcy court and very recently, presiding over a contested application for judicial management.

For those interested in the logistics of being a judge in a court that is twelve time zones away from my home, the SICC has the technology and resources to make remote judging seamless.

Case management conferences and most hearings are routinely conducted virtually via video conference, allowing for administrative efficiency and significant transaction cost savings for international litigants.

We have entered a new age in which globally distributed restructuring solutions are available and well suited to remote utilisation. In the aftermath of Lehman and the Global Financial Crisis, many jurisdictions have enacted the Model Law and have updated their insolvency laws in a manner that shows respect (even admiration) for Chapter 11 reorganisation principles. These newly enacted regimes have been designed to meet the expectations of global investors and to promote administrative efficiency.

Parties now have the option to select from an array of restructuring alternatives that have all become law since Lehman. These include (i) restructuring plans in the UK with cross-class cramdown, (ii) WHOA plans in the Netherlands with independent restructuring experts and (iii) restructurings, prepacks and judicial management cases in Singapore under the revised IRDA. The common theme is innovation and a commercially aware process for meeting the needs and expectations of companies in distress and their stakeholders.

We have, it seems, entered a period of unprecedented restructuring optionality on a global scale. Senior management and corporate boards are no longer restrained by the limitations of their home jurisdictions (including courts that may be slow in granting relief). With the guidance of astute advisors and the consent of relevant stakeholders, it has become increasingly commonplace to consider the merits of restructuring options that may beckon beyond domestic borders.

Singapore has positioned itself as an attractive jurisdiction of choice for this new era of cross-border restructurings. I am pleased to be part of it, to have the opportunity to continue my work in this dynamic field and to be associated with a distinguished judiciary that soon will be celebrating its 200th anniversary of unbroken commitment to the rule of law. It seems that my odyssey has brought me to a very appropriate place. ■

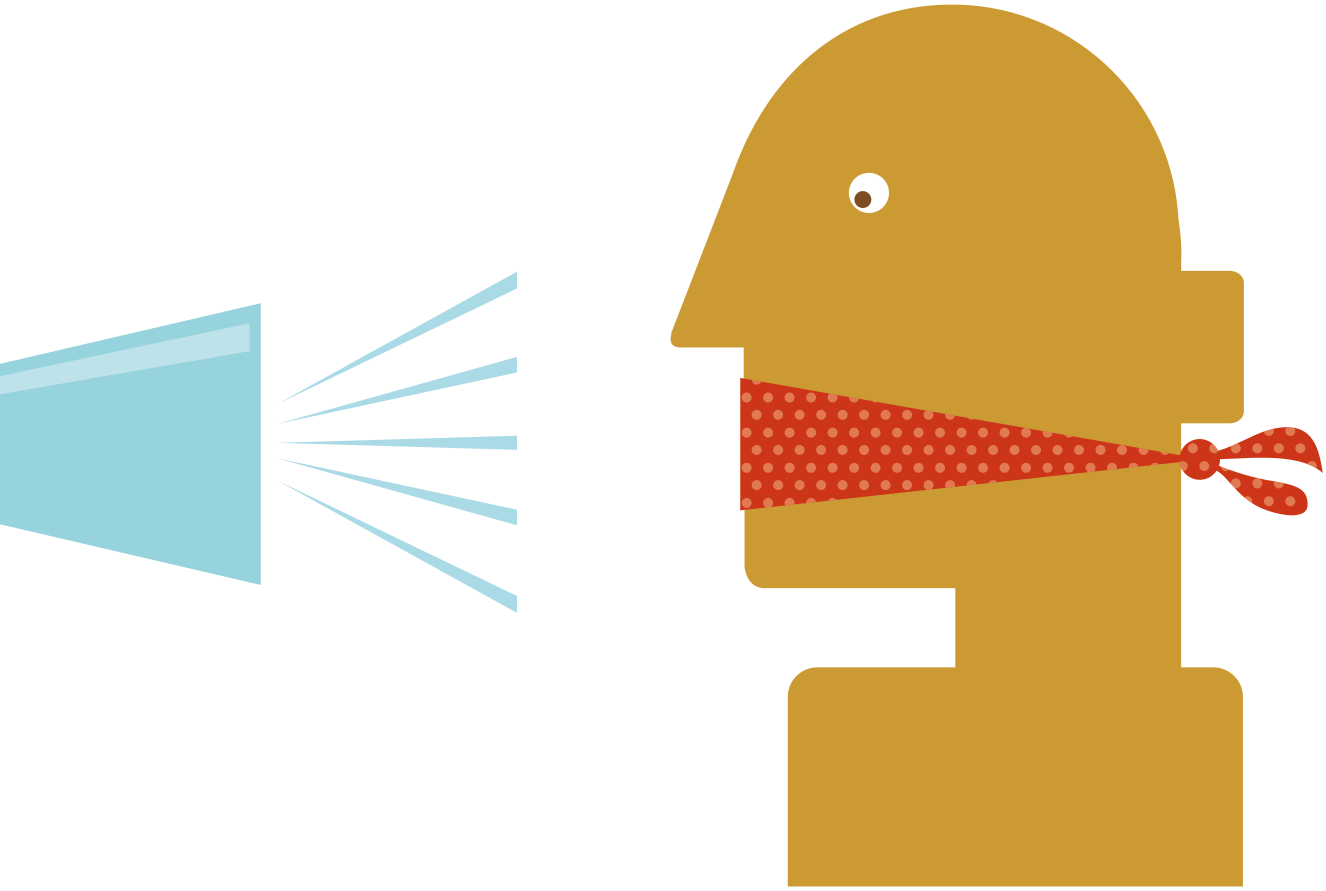
[This article first appeared in the June 2026 edition of Global Turnaround and is reproduced here with their kind permission].

A New Practice in Relation to Hand Down of Written Judgments

Your phone lights up with a new email: it's from the court, attaching the draft judgment in your case. Understandably, you are excited to share the news of your victory on LinkedIn, or anxious to brief friendly journalists in order to put a positive spin on your defeat. However, as the losing party found out in *Match Group, LLC and others v MuzMatch Limited and others* [2022] EWHC 1023 (IPEC), the first rule of draft judgments is that you don't talk about draft judgments to parties that do not need to know about them: you must obey the embargo.

In complex business and property matters, courts usually reserve judgment rather than delivering it immediately. Under the default rules, when a judgment is reserved, the court provides a copy of a draft judgment to the parties and their lawyers and counsel by 4pm on the second working day before handing down of the final judgment: para. 2.3, Civil Procedure Rules Practice Direction 40E (Reserved Judgments) ("**PD40E**"). When the judgment is handed down, it is published to the wider world. In the period between the provision of the draft judgment and the formal handing down of the final judgment, the draft judgment is said to be embargoed. What this means is that the parties to the case and their lawyers must not circulate it to any other people: para. 2.4 PD40E.

The embargo period exists for several reasons. By giving parties and their counsel an opportunity to read through the judgment before it is handed down, the embargo period gives the parties and their lawyers some time to make preparations for the handing down. It also gives counsel the opportunity to prepare for matters consequential upon handing down, such as further applications and costs. And it allows counsel to read through the judgment and suggest corrections to the court before the text is finalised. Judges are, after all, human. Corrections to typographical errors and other obvious slips of the judge's pen are expected and welcomed, but counsel should not seek to alter the draft judgment by relitigating the issues. It is only appropriate to raise points of substance in exceptional circumstances, for example where it appears that the judge has not given adequate reasons for an aspect of the decision, or has decided the case on a point which was not properly argued, or relied on an authority which was not considered: *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002.



The important functions served by the embargo period require it to be protected as an institution. Any behaviour that undermines it must therefore be disincentivised. Further, the embargo period requires that sensitive information in the judgment is briefly available to the parties and their counsel before it is published to the wider world. This could include personally sensitive information about individuals or price-sensitive information that could affect businesses or markets. Breaches of the embargo are therefore punished severely in order to protect both the parties and the integrity of the legal system.

It is unsurprising that, following a breach of the embargo in *Counsel General for Wales v The Secretary of State for Business Energy and Industrial Strategy* [2022] EWCA Civ 181, Sir Geoffrey Vos MR drew attention to the importance of the embargo. Vos MR emphasised in Practice Note [2022] 1 WLR 1915 at [21] that breaches of the embargo would be treated as contempt of court, as provided for by para. 2.8 PD40E. Vos MR also stressed at [30] that precautions must be put in place to prevent unauthorised access to draft judgments:

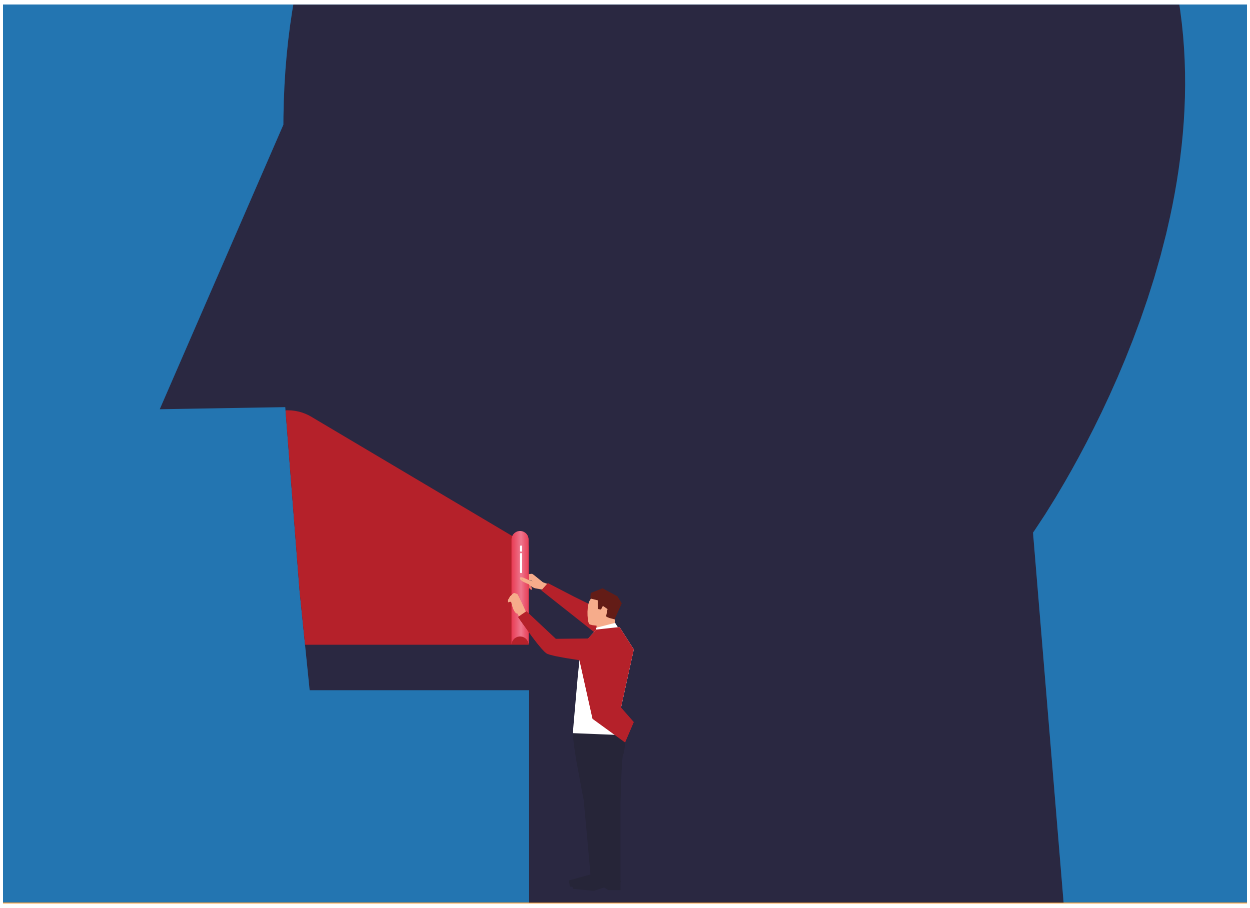
"*My conclusions are as follows: (i) it is not appropriate for persons in the clerks' rooms or offices of chambers to see the draft judgment or to be given a summary of its contents, (ii) drafting press releases to publicise chambers is not a legitimate activity to undertake within the embargo, (iii) it should be sufficient for one named clerk to provide the link between the court and the barrister or barristers, (iv) proper precautions and double-checks need to be in place in barristers' chambers and solicitors' offices to ensure that errors come to attention before the embargo is breached, and (v) in future, those who break embargoes can expect to find themselves the subject of contempt proceedings as envisaged in para 2.8 of CPR PD 40E.*"

However, even when making best efforts, legal teams can have difficulty in discharging all their obligations in response to draft judgments without any mishaps or in the time available. Para. 4 PD40E provides that counsel must agree or otherwise apply for any consequential orders and deliver the necessary agreed order or application, together with lists of proposed corrections or amendments to the draft judgment, to the relevant court office by 12pm on the working day before the handing down. There is therefore a very tight turnaround for the legal team to do its work between provision of the draft judgment and handing down of the real thing. This comes on top of the other responsibilities faced by counsel and solicitors in these circumstances, such as advising clients on steps they need to take to comply with the judgment; or considering and advising on the prospects of appeals of the judgment and potentially preparing an application for permission to appeal before the handing down. Further, it is often not possible to plan in any meaningful way, as advance notice has not usually hitherto been given of the date on which embargoed draft judgments will be provided. Counsel and the wider legal team may or may not be in a good position to attend to all these matters on the unknown date that the draft judgment arrives, depending on an unlimited number of potential factors affecting their availability at the relevant time.

In order to make the process of dealing with draft judgments more manageable, the Commercial Bar Association, Chancery Bar Association and Technology and Construction Bar Association jointly wrote to the Judges of the Business and Property Courts on 25 October 2025, asking that the Courts consider either extending the default embargo period; or alternatively providing counsel with a minimum (in ordinary circumstances) of 7 days' forewarning of the arrival of a draft judgment.

In response, the Business and Property Courts Leadership Judges considered the proposals, and on their behalf, as Judge in Charge of the Commercial Court, Henshaw J issued a response on 1 June 2026. This response noted that the Chancellor and Judges in Charge of the Commercial Court and the Technology and Construction Court had discussed the proposals, taken on board the concerns expressed, and had therefore sent a message to Rolls Building judges. The message asks judges to bear in mind the concerns expressed in the proposals and to give advance warning of the circulation of draft judgements where feasible, as well as considering exercising judicial discretion to increase the time between circulation of the draft and handing down where the default timetable seemed unrealistic (as would usually be the case).

Counsel and litigation teams should take comfort from this response, but they should still check twice before clicking "*Send to All.*"



News in Brief

William Willson KC elected to ChBA Committee

William Willson KC has been elected to serve on the Committee of the Chancery Bar Association, the specialist association for barristers appearing in the Business and Property Courts.

ChBA was established in 1935 and is the oldest specialist bar association, drawing its membership from barristers across the whole spectrum of finance, business and property law. Amongst the functions it offers are education in the form of continuing professional development, responding to consultation papers issued by Government, the Judiciary and others and representing the interests of members on the Bar Council and the Bar Standards Board.

Our congratulations to William!

***Charlotte Cooke** takes on the Three Peaks Challenge in aid of Thomley!*

Chambers' Charlotte Cooke is taking on the gruelling Three Peaks Challenge on 15 – 16 August to raise money for Thomley, a fantastic and inclusive play, leisure and learning centre for people of all abilities and disabilities just outside Aylesbury.

Covering an 8-acre countryside site, Thomley provides a host of activities designed to enhance the lives and experiences of people with disabilities, and their families, who can often feel excluded from mainstream facilities. Thomley focuses on what each person **can** do and **would like** to do as they grow and their needs change. Amongst myriad things you can learn to cook, swing on a giant sausage, play in the splash park and it even has a dedicated teenage den and camping pods for overnight stays!

Almost 37,500 people make use of Thomley's facilities each year and it costs over £1 million per annum to run and maintain the charitable site and its activities.

Not only is Charlotte a Trustee of Thomley, but she and her family make frequent visits. Having seen first-hand the difference it can make to families, and the opportunities it offers to disabled children and teens – opportunities which many of us take for granted – Charlotte will be scaling the highest mountains in Scotland, England and Wales: covering about 37 km of hiking, a total ascent of 3,064 meters and all within 24 hours!

If you are able to support this brilliant effort, do please visit https://www.justgiving.com/page/charlottesthreepeakschallenge. More information about Thomley can be found at https://thomley.org.uk/

It's a Bleak House for the Chancery Division

On 2 June 2026 the Lady Chief Justice of England and Wales, Baroness Carr, announced that the Chancery Division will be replaced by a new Business and Property Division, which will stand alongside the King's Bench and Family Divisions of the High Court.

The move is intended to make it easier for court users to understand where to bring their cases. Under the current structure the various courts dealing with business and property are spread across both Chancery and King's Bench which is thought to create confusion and obstruct access to justice.

The new Business and Property Division will collect together the specialist civil courts dealing with high-value, complex and often international disputes, including commercial, business, property, technology, construction and intellectual property cases.

The loss of the Chancery Division name will be a blow for fans of Charles Dickens (who for a time resided at 48 Doughty Street, just up the road from Chambers) who famously critiqued the inefficiencies and injustices of the Court of Chancery at that time through the fictional case of *Jandyce and Jarndyce* in his novel, Bleak House.

Interest rates held

On 30 July the Bank of England announced it was holding interest rates at 3.75% for the fifth time in a row, a wait-and-see approach which many analysts had predicted. Whilst inflation currently remains stable it is still above the Bank's 2% target and two of the nine members of the monetary policy committee voted to increase rates to 4%.

The Bank's announcement came after the Office of National Statistics ('ONS') new release demonstrated that the UK economy contracted in April by 0.1%, the first fall since August 2025. The ONS said that whilst some manufacturing, transport and travel business had seen trading affected by the conflict in the Middle East, the main driver behind the latest contraction was a fall in the services section, which accounts for around 75% of the UK economy.

Bounce Back Loan Fraudster 'Broke Almost Every Rule'

On 18 June 2026 Steven Brookes, 40, of Bude in Cornwall was jailed for three years and banned as a director for 10 years when he appeared at Southwark Crown Court. According to David Snasdell, Chief Investigator at the Insolvency Service, Brooks '*broke almost every rule going*' when he used his wife's identity to steal £300,000 in Covid support funds.

Brookes had been disqualified as a company director for 11 years in April 2010 following a conviction for mobile phone theft. He therefore used his wife's name, without her knowledge, to apply for a total of six Bounce Back Loans across five companies (when only one loan per company should be allowed), using false turnover figures in each case, and secretly opened bank accounts in her name to receive the funds. The fraudulently obtained money was then spent on a trip to Disneyland, a holiday rental in Tenerife, an Audi with personalised number plates for his wife, and private school fees.

Mr Snasdell continued "*The Insolvency Service has relentlessly pursued Covid fraudsters since the pandemic. We are equally determined to enforce director bans – and hold those who wilfully break them to account.*"

Life in the old Pheasant yet

As noted in the April issue of the Digest, the past few years have been difficult for heritage British pottery brands, with many downsizing or, in the case of Denby, going into administration. However, Christopher Bailey, the fashion designer who turned Burberry into a global powerhouse in the early 2000s, has put together a cohort of investors to rescue Burleigh pottery - spun out from the Denby portfolio - from a similar fate, and protects the jobs of all 62 people who work at the Grade II-listed factory in Stoke-on-Trent that the brand has called home since 1889.

Founded in 1851, Burleigh's iconic designs, from the chintzy Asiatic Pheasants to the artsy Regal Peacock and floral Calico, have found its way into homes and hotels around the world. They are made using tissue transfer printing, a dying craft with Burleigh said to be the last heritage pottery in the world still using this Victorian method by hand.

The private investment in Burleigh – the value of which has not been made public – comes after a £120 million rescue package announced by the UK government in May with the purpose of backing "*energy efficiency, decarbonisation and long-term competitiveness in sector vital to UK manufacturing*". Last year, another heritage pottery brand, Moorcroft, was saved by private investment when the founder's family bought the business back. Design brands such as Original BTC are also acquiring potteries, skills and staff, to make components for their lighting collections.

Pro bono? Non gratis ago!

Achieving the status of 'Executive Legal Counsel and Chief of Staff' may be the ambition of a lifetime for some – but perhaps not as an unpaid role. Metrocart UK Ltd – a multi-ethnic grocery supply business - posted a job listing on LinkedIn seeking a "'*Swiss Army Knife' of the legal world*" a "*distinguished and versatile legal professional ... to serve in a uniquely multifaced capacity*". The successful candidate would, amongst a plethora of other requirements, need to be an expert in Corporate, Civil and (slightly worryingly) Criminal law, head up the HR department and ensure full regulatory compliance with UK employment law, personally represent the CEO in both business-related and private legal matters and act has their private secretary, gatekeeper and strategic advisor. And all *pro bono*!

Applications for the post have now closed.

6th Century Cathedral on verge of Insolvency

The Cathedral in the UK's smallest city of St Davids, Pembrokeshire, is two years away from financial ruin according to a visitation report commission by its Bishop, Bishop Dorrien Davies. The report notes several factors that have led to the financial challenges, including low visitor and donation numbers, but that urgent and robust planning and financial management needs to be is taken to reverse seven years of unrestricted deficits, particularly as the cathedral will lose £98,000 a year in diocesan support by the end of 2026.
The present building of St Davids Cathedral was begun between 1180 and 1182, built on the site of a 6th Century monastery associated with St. David, the patron saint of Wales.

SOUTH SQUARE CHALLENGE

Welcome to the August edition of the South Square Challenge. Inspired by summer holiday reading lists, below you will find an array of novels, images of authors and dates of publication.

Your task is not only to correctly match novel, author and publication date but also to then identify what ties them all together.

If you need a clue to help with the last part of the task, refer to News in Brief!

To the winner, drawn from the wig tin in the likely event many of you complete the task correctly, the spoils – a magnum of champagne and a South Square umbrella.

Best of luck!

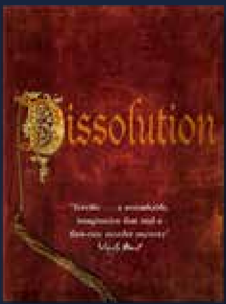
Answers to Kirsten, please (**kirstendent@southsquare.com**) by 1 September 2026.

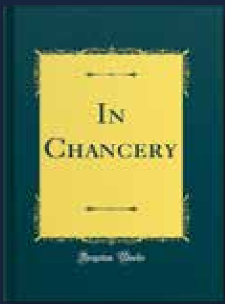
The winner of our April 2026 Challenge, drawn from the wig tin, was Chris Chapman of Quayside Chambers, Wellington, New Zealand. Many congratulations (again!) to Chris, to whom will go the Champagne and South Square umbrella.

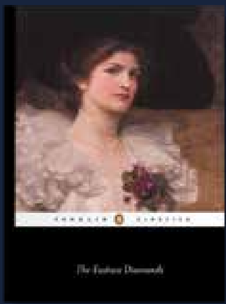
The correct answers were:

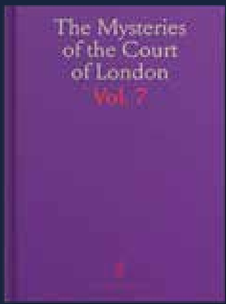
Judge no.	Judge's name	Hobby letter	Hobby
1.	Lord Justice Colin Birss	D	Beekeeping
2.	Mr Justice Michael Green	J	Manchester United
3.	Lady Chief Justice Baroness Sue Carr	G	Skiing
4.	Mr Justice Richard Meade	H	Table tennis
5.	Lord Justice Richard Arnold	F	Walking in Suffolk
6.	Mrs Justice Joanna Smith	I	Relaxing in Italy
7.	Mr Justice Edwin Johnson	A	Scuba diving (also skiing)
8.	Lady Justice Sarah Falk	E	Walking (preferably with dog)
9.	Mr Justice Adam Johnson	B	Sheffield Wednesday
10.	Lord Justice Christopher Nugee	C	Tideway sculling

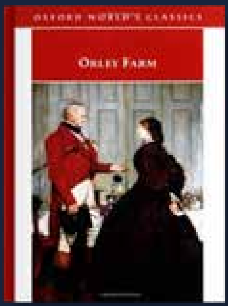
NOVELS

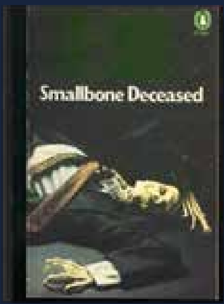


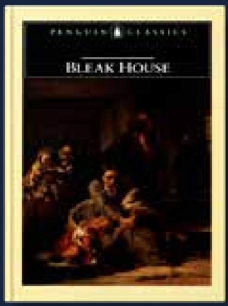






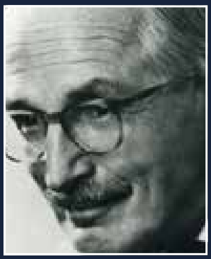
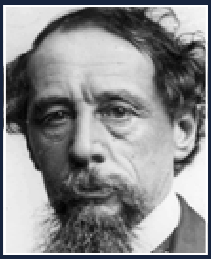


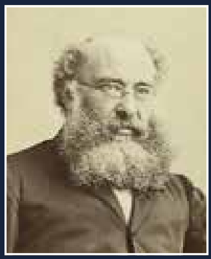




AUTHORS





DATES

1950

1871

1844

1853

1861

2003

1920

SOUTH SQUARE

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

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