

3-4 DIGEST

A regular review of relevant news, cases and articles from 3-4 South Square Barristers

May 2009

Green shoots? Only in your garden!

The country seems to be in rather a difficult place at the moment with the crisis which began with the bankers now spilling over into many other sectors.

The retailers were feeling the pinch prior to Christmas and that has continued with, among others, Mosaic Fashions (Karen Millen, Principles and Oasis), Diamonds and Pearls, Elvi, Quiz and Bay Trading going into administration.

But now a number of the vehicle manufacturers seem to be in trouble. The construction and property industries also seem to be under pressure with, for example, administrations for Castlemore Securities and Wrekin Construction (the company with the £11 million ruby) and schemes of arrangement for Crest Nicholson, McCarthy & Stone and Countrywide. Furthermore, it is now clear that there have been substantial falls in the value of residential properties over the last year with further falls predicted - none of which is good news for anyone with a house.

The downturn is even affecting some firms of solicitors with a number having made significant cuts. It also seems to have smoked out allegations of another large fraud (US \$8 billion by Allen Stanford) - and it seems pretty inevitable that more will be exposed the longer the present conditions continue or, worse still, deteriorate.

To cap it all unemployment is now rising rapidly, government borrowing is soaring, there seems to be no prospect of that borrowing being repaid for many years to come and we have the return of the 50 per cent tax rate.

Whilst there may be a lot of bad news coming from the outside world, at 3-4 South Square we have some important

things to celebrate.

First, congratulations to David Marks and Lexa Hilliard who were both appointed as Queen's Counsel in the 2008/2009 round of silk appointments.

Secondly, congratulations to Gabriel Moss QC, Ian Fletcher and Stuart Isaacs QC on the publication of the second edition of The EC Regulation on Insolvency Proceedings and to Simon Mortimore QC - and the many other contributors from 3-4 South Square - on the publication of the first edition of Company Directors - Duties, Liabilities and Remedies. For a limited period of time readers of the 3-4 Digest can acquire either or both publications at a 20 per cent discount (see pages 17 and 27).

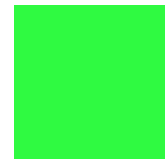
Thirdly, congratulations to Ronald DeKoven. Ron has now become a full member of Chambers having been called to the English Bar in March (see page 28).

Lastly, under the supervision of Stephen Atherton QC, we have launched a new website (www.southsquare.com) which, among other things, contains full details relating to all members of Chambers as well as all the back issues of the Digest since its first publication in 1994.

Turning to this edition of the 3-4 Digest, this time we have articles for you by Richard Fisher on Shareholder Disputes and Offers to Purchase, Georgina Peters on Derivative Claims and Robin Knowles CBE QC on Pro Bono work. The Case Digests appear at pages 5 to 16. News in Brief is on pages 28 and 29 and the latest Insolvency Challenge is on pages 30 and 31.

Finally, as always, if you wish to be added to the circulation list (or if your contact details change) please send an email to kirstendent@southsquare.com and we will try to ensure that you receive the next edition as soon as it is published.

David Alexander QC



In this issue

Feature article

page 2

Shareholder disputes and offers to purchase

Case digests

page 5

Banking and Financial Services

page 7

Civil Procedure

page 8

Commercial Court decisions

page 9

Company Law

page 10

Corporate Insolvency

page 13

Personal Insolvency

page 15

Professional Negligence

page 16

Other cases

Feature articles

page 18

Derivative claims

page 22

Pro Bono work

News in brief

page 28

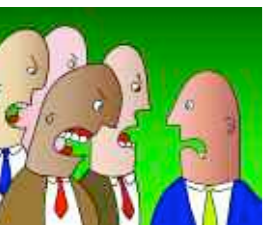
Insolvency Challenge

page 30

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When friends fall out...

Shareholder disputes and offers to purchase

There's nothing like a sharp downturn in the economy to strain relationships between shareholders. But offering to buy out the minority may mean that litigation is not inevitable says **Richard Fisher**.

As the recession bites and businesses become unprofitable, increased strain may be placed on shareholder relationships which were previously harmonious. For some, the recession will be the final straw which pushes the long-standing relationship of trust and confidence between shareholders in a quasi-partnership to the point of breaking. For others, the recession may provide the excuse that they have been looking for to cast out what they see as the deadwood in their shareholder relationship. But when push does come to shove, litigation (at least through to trial) is not inevitable.

English law does not recognize a unilateral right of exit from a shareholder relationship. No shareholder has, unless the articles of association provide otherwise, a right to have his shares acquired by other shareholders at a fair price simply because he wishes to realise his investment and seek greener pastures: see *O'Neill v Phillips* [1999] BCC 600 at 611/612.

However, the law has long recognised that considerations of a personal character arising between shareholders (whether by reason of agreement or understanding) may make it unjust, or inequitable, to insist on the enforcement or exercise of legal rights in a particular way. Consider, by way of example, the unilateral decision by the majority who are able to exercise de facto control over the company and its affairs to exclude a minority shareholder from participating in the running of the company's business. Where such exclusion is inconsistent

with an agreement or understanding as to how the company would be run, it is likely to give rise to a right of recourse for the minority shareholder pursuant to the unfair prejudice provisions in the Companies Act 2006, or possibly to entitle the shareholder to petition for the winding-up of the company on the just and equitable basis.

Faced with such a petition, the majority shareholder has a choice. He may elect to fight the allegations of unfair prejudice through to trial. However, notwithstanding that such allegations may be entirely lacking in merit, he may also consider making a reasonable offer to purchase the shares of the disgruntled minority shareholder.

Such an offer has a significant advantage over offers to settle in other contexts, because it provides a defence at law to the claim. That is to say, a winding-up petition brought by a minority shareholder cannot succeed, notwithstanding the existence of grounds that would otherwise justify an order winding up a company on the just and equitable ground, if the majority shareholders have offered a plainly reasonable alternative remedy: see Section 125(2) of the Insolvency Act 1986, *CVC v Demarco Almeida* [2002] 2 BCLC 108 at §35 and *Re Abbey Leisure Ltd* [1990] BCLC 342 at 347D. Similarly, a plainly reasonable offer to buy out the minority shareholder at an appropriate price will provide a defence to a claim based on alleged unfair prejudice, precisely because exclusion from the company's affairs is only unfair if it is

exclusion without a reasonable offer: see *O'Neill* at 614 and *CVC* at paragraphs 34 and 35.

The rationale for that approach (at least in the case of winding-up petitions) reflects the fact that such proceedings are not ordinary proceedings in light of the loss which they may cause to the company and its shareholders. Continuing with a petition in such circumstances amounts to an abuse of process, and justifies the petition being struck out.

Because of the consequences of a plainly reasonable offer having been made, the Courts have become keen to encourage such orders to be made at an early stage of the proceedings: see *O'Neill* at 613H. However, for the hard nosed majority shareholder, the ability to make an offer before proceedings have even been contemplated (or at the same time as exclusion of the minority) provides a significant practical impediment to, and discourages the bringing of, unfair prejudice proceedings.

Guidance has been provided as to how one can determine whether the majority have made a plainly reasonable offer, albeit in any case the particular facts inevitably impact significantly on whether the offer is one which it is unreasonable for the minority shareholder to refuse.

In general, if a valuation mechanism has been provided in the articles of association, this will normally provide the best (and only) method of ascertaining a fair value for the shares (see for example *Re XYZ* [1986] 2 BCC 99,520 and *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, applied in *North Holdings Ltd v Southern Tropics Ltd* [1999] BCC 746 at 758C).

Outside those cases where the

articles have made specific provision for the consequence of a shareholder dispute/the valuation of any departing shareholder's shares, a reasonable offer is (in broad terms) one which: offers to purchase the shares at a fair value; offers to determine value by way of reference to an independent accountant if the value cannot be agreed; ensures that any expert accountant is acting as an expert and, usually, in a non-speaking role; offers equality of arms in terms of access to information; and makes an appropriate offer as to costs: see *O'Neill v Phillips* [1999] BCC 600, summarised in *Apcar v Aftab* [2003] BCC 510 at 517C.

However, the details of both the offer and its method of implementation are more often than not the source of major disputes between the shareholders. Certain additional elements of what can normally be expected to amount to a reasonable offer have been clarified in the case law. Thus:

- In the context of what is a fair value, it is clear that the valuation should proceed on the basis of the going concern value of the business and not the liquidation or break up value: see *CVC* at [43] to [49].

- The date of valuation should normally be as close as possible to the date of actual sale of the shares (see *Profinance Trust SA v Gladstone* [2002] 1 BCLC 141 at [60] and [61]) unless the complainant can identify conduct which will have substantially affected the value of the company since the events complained of.

- Generally, the expert should be acting as an expert and not an arbitrator, such that he will not give reasons for his decision. This should promote finality: see *O'Neill* (above) at 614F. Similarly, the structure of any envisaged sale should normally be a "clean break" transfer: see *Bikus v King*, unreported [2003] EWHC 2516 (Ch) at [29].

- The offer should provide details of the completion date (i.e. 14 days after the valuation is provided to the parties at the vendor's solicitors' offices) and standard provisions ensuring that the shares are transferred free of any charges, liens etc,

No shareholder has a right to have his shares acquired by other shareholders at a fair price simply because he wishes to realise his investment and seek greener pastures

and that the share certificates are to be delivered to the purchaser. There must be a realistic prospect of the offeror being able to pay the price likely to be decided upon by any valuer; see *West v Blanchet* [2000] 1 BCLC 795 at 803C and *Apcar* (above) at [27] to [29]. As such, it is advisable, if possible, to indicate the basis

of the agreement governing the machinery for ascertaining the value of the shares, the Court may decide to adjourn the application to strike out for a limited period to allow the parties an opportunity to formulate the agreement; see *Fuller v Cyracuse Ltd* [2001] 1 BCLC 187 at 192 and *Re a Company* (002567 of 1982)



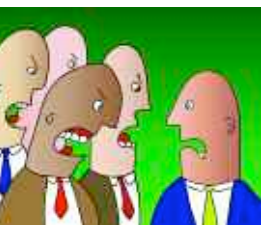
Richard Fisher

upon which financing of the purchase is likely to be provided.

- If a court is of the view that the offer provides an appropriate "other remedy" but anticipates that there may be drafting difficulties in formu-

[1983] 2 All ER 854 at 862.

Faced with an offer to purchase his shares, the minority shareholder is often in an invidious position if he does not want to sell. There is little that can be done if the offer does



provide a plainly reasonable remedy, although there are certain areas where disputes frequently arise. In particular, to the extent that a minority shareholder can raise a relevant disputed issue of fact which is not suitable for determination by an expert, an offer to purchase based on an independent valuation may not suffice to justify the striking out of a petition: see North Holdings at 637C-G and 639A-C.

One further issue relating to the reasonable offer process has been the subject of relatively recent consideration by the Court of Appeal of the Cayman Islands in *Re Fortuna Development Corp* [2008] CILR 67. The company in question was a significant holding company which held extensive interests in an urban land, industrial and electrical power development project in Vietnam. A winding-up petition presented by a minority shareholder was stayed on the basis of the making of a reasonable offer. The reasonable offer complied with the O'Neill guidance. An "independent" valuer was appointed jointly by the parties to provide a valuation of the company.

The valuation process was extremely lengthy. However, after a period in excess of 12 months, the minority shareholder sought to challenge the process on the basis that valuer was not truly independent as required by the consent order staying the petition. In particular, it was asserted that the valuer had previously considered the value of some of the assets, and had had dealings with persons who had become officers of the company.

The case therefore raised questions both of construction and of law as to the meaning of an "independent" valuation for the purpose of an O'Neill offer. For example, is it the case that an independent valuer should have had no contact with any of the parties previously? Is it sufficient to challenge his appointment if he has conducted himself in a way which could give rise to a suspicion of partiality, even if that bias cannot be proved?

The Cayman Islands Court of Appeal reviewed a significant num-

The concept of independence relates to the ability of the valuer to exercise a free and unrestrained judgment on the question of value

ber of authorities dealing with the meaning of independence in analogous contexts and in relation to valuations in accordance with the provisions in articles of association (such as *Re Boswell (Steels) Limited* (1989) 5 BCC 145; *Re Benfield v Grieg Group Plc and others* [2002] BCLC 65 (CA) and *Re Belfield Furnishings Ltd* [2006] 2 BCLC 105). However, it was noted that there was no reported English decision which specifically considered the notion of independence as used in O'Neill.

In dismissing the challenge to the valuer's independence, the Court held that the appointment of a valuer as an expert requires that the valuer be both impartial and independent. Impartiality relates to matters such as bias. The concept of independence relates to the ability of the valuer to exercise a free and unrestrained judgment on the question of value.

Loss of independence could therefore occur as a result either of external factors compromising the valuer's autonomy or freedom of choice, or as a result of internal factors such as an earlier conclusion on value for a special purpose from which the valuer might not be free to depart.

However, as regards both impartiality and independence, it was decided that there was no scope for importing notions of apparent bias, or apparent lack of independence into the role of a valuer. Thus, in the case of a challenge to a valuer's position or decision, proof of actual want of impartiality or proof that the valuer's

it was decided that there was no scope for importing notions of apparent bias or apparent lack of independence into the role of a valuer

independence has in fact been compromised would be required.

In short, it would appear that a valuer's pre-existing connections with any of the parties may not be fatal to his independence or impartiality, provided that those pre-existing connections do not (as a matter of fact) impact on his autonomy to produce a free judgment on the question of valuation.

That conclusion is consistent with the fact that many articles of association provide for a valuation mechanism in which the existing auditors will value the shares in question (which approach was recommended by the Court of Appeal in *Davenport v Cream Holdings Ltd and others* [2008] EWCA Civ 1363 at [30]).

Provided that majority shareholders are prepared to accept a valuation process that is binding and aimed at ensuring a fair price is paid for any minority shareholder's interest in their company, the making of a plainly reasonable offer should remain one of the first matters considered by majority shareholders becoming embroiled in a dispute. If the O'Neill guidance and other cases referred to above are followed, it should be possible to avoid the costs of long and drawn-out litigation.

For some shareholders, consideration might be given to using the offer process in a more aggressive manner. Presently, valuations appear to be depressed. A plainly reasonable offer may lead to a significantly lower price being paid for a minority shareholding than it would have one, two or three years ago. ■

case digests

Edited by Hilary Stonefrost

This issue contains case summaries on a wide range of issues.

Of particular note in the section on Banking and Finance is the fact that the House of Lords has given the banks permission to appeal in the high profile bank charges case, *Abbey National Plc v Office of Fair Trading*.

Also in that section is the summary of the decision on a number of issues arising from potential trust claims against *Global Trader Europe Limited*, a firm regulated by the FSA which offered spread betting and contracts for difference and held margin deposits and some profits as "client money".

In Corporate Insolvency, there is a further SIV case, concerning *Golden Key Limited*, to add to the other SIV decisions, notably, *Cheyne Finance*, *Whistlejacket* and *Sigma*.

The decision in *Golden Key Limited* is to go to the Court of Appeal.

Also in that section is a summary of the decision in the administration of *Nortel Networks SA & Ors* in which the Court acceded to a request by the administrators to issue a letter of request to courts in a number of EC member states in order that the administrators would be given notice of any request or application to open secondary proceedings in

those states.

In *Re Castle Holdco 4 Limited*, summarised in the Company Law section, the Court decided that in a scheme of arrangement involving a debt restructuring it was appropriate for the ultimate beneficial owners of the debt constituted by bonds held through clearing systems to be given notice of and to vote on the scheme even though they are only contingent creditors of the debtor company.

Please contact Hilary Stonefrost or any of the case digest contributors if you would like further information about any of the cases summarised below.



Hilary Stonefrost

BANKING AND FINANCIAL SERVICES Digested by Jeremy Goldring and Marcus Haywood

R (on the application of SRM Golbal Master Fund LP and others v Treasury Commissioners and another [2009] EWHC 227 (Admin) QBD, Divisional Court (Stanley Burnton LJ, Silber J), 13 February 2009

Sections 5(4) and 9(2) of the Banking (Special Provisions) Act 2008 and art. 6 of the Northern Rock plc Compensation Order 2008 (SI 2008/718), the provisions establishing the assumptions upon which valuation of shares was carried out under a scheme for compensating shareholders subsequent to the nationalisation of Northern

Rock plc, did not infringe the shareholders right to peaceful enjoyment of their possessions under art. 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (set out in Pt II of Sch. 1 to the Human Rights Act 1998). The Divisional Court so held when dismissing the joined

claims for judicial review by the claimants. The Court held amongst other things that fairness did not require the state, which was representative of the tax payer, having provided financial support to Northern Rock plc, in addition to pay its shareholders the added value to their shares. The claimants had failed to show that they had to bear an individual and excessive burden as a result of the assumptions upon which the valuation under the compensation scheme was made.



Marcus Haywood

Abbey National Plc and others v Office of Fair Trading [2009] EWCA Civ 116CA (Civ Div) (Sir Anthony Clarke MR, Waller LJ (V-P), Lloyd LJ), 26 February 2009.

The adequacy of overdraft charges was open to assessment under the Unfair Terms in Consumer Contracts Regulations 1999, notwithstanding Regulation 6(2)(b), because: (a) Regulation

6(2)(b), which excluded assessments relating to "the adequacy of the price or remuneration, as against the goods or services supplied in exchange", only applied to the core bargain or core price;

and (b) the charges in question were ancillary provisions in current account contracts, rather than part of the essential bargain. (Note - the House of Lords granted leave to appeal on 31 March 2009.)

[Robin Dicker QC, Jeremy Goldring]



Robin Dicker QC

Re Eurosail-UK 2007 3 BL plc [2009] EWHC 513 (Ch) (Sales J), 12 March 2009

Eurosail issued notes divided into A, B, C and other classes, with the A class having superior rights and the others being subordinated. The A class was itself divided into A1, A2, and A3 notes of different currency denominations, with A1 and A2 notes having superior rights to A3 notes.

The Terms and Conditions of the notes provided that prior to the service of an Enforcement Notice the A1, A2, and A3 noteholders are paid their interest *pari passu* from an interest fund, but the A1 noteholders are paid from the principal fund in priority to the other A noteholders. Following the service of an Enforcement Notice, the rights of all noteholders to be paid interest and principal are accelerated and all A noteholders rank *pari passu* for the recovery of

both interest and principal.

Certain holders of the A3 notes ("the A3 Committee") purported to direct the Security Trustee to deliver an Enforcement Notice to Eurosail and/or contended that the Security Trustee should exercise its discretion to deliver an Enforcement Notice.

The Security Trustee took the position that (i) no effective direction had been given under the Terms and Conditions of the notes as, in circumstances where there was a conflict between the interests of different sub-classes of A noteholders, the Terms and Conditions required the request to be made by 25% of each of the sub-classes of A Notes before the Security Trustee is obliged to act upon it; and (ii) it was not obliged to exercise its discretion to deliver

an Enforcement Notice.

The Security Trustee therefore sought the directions of the Court as to how to proceed in relation to the request by the A3 Committee.

The A3 Committee applied for interim injunction to prevent any payments being made to the noteholders pending the effective hearing of the claim. Sales J found that (i) the construction of the Terms and Conditions and the Trust Deed contended for by the A3 Committee was not tenable; and (ii) the decision of the Security Trustee not to issue an Enforcement Notice was clearly within the range of reasonable judgments that a person in its position could reach. Accordingly, the learned Judge dismissed the application for an interim injunction on the basis that there was no serious issue to be tried.

[Barry Isaacs, David Allison]



Barry Isaacs

Re Global Trader Europe Limited [2009] EWHC 602 (Ch) (Sir Andrew Park), 24 March 2009

Global Trader Europe Limited ("GTE") was regulated by the FSA, and was subject to the FSA's Client Assets Sourcebook ("CASS") rules governing the treatment of money received from or held for or on behalf of clients. The CASS Rules were modified on 1 November 2007 to reflect the implementation of the Markets in Financial Instruments Directive (MiFID). Prior to 1 November 2007, the relevant provisions were in CASS 4; after that date, they were in CASS 7.

GTE went into administration and subsequently into voluntary liquidation. A number of issues arose regarding potential trust claims. On the nature and extent of putative claims to client money under the CASS Rules, Sir Andrew Park held:

1] Prior to 1 November 2007, money received from clients was client money, unless GTE properly operated opt-out provisions under CASS 4.1.9R. GTE had not done so, but also had not paid such money into a segregated account.

2] The money so received was held on statutory trust when it was received and remained client money held on statutory trust as long as it remained identifiable.

3] However, after payment into GTE's own bank accounts the money was unlikely to be identifiable. While the possibility of a tracing exercise was left open, it would be difficult.

4] After 1 November 2007, e-mail communications between GTE and certain "professional" clients amounted to a title transfer collateral arrangement ("TTCA"), so that money received from these clients was not client money.

5] Even in the absence of a TTCA, any trust interest in money received from professional clients would only survive as long as the money in question remained identifiable, and depended on the ability to trace.

6] When a position was closed at a profit to a client, whether before or after 1 November 2007, no trust arose unless and until money was paid into a segregated client

bank account.

The Judge rejected the trust claims made by the classes of intermediate/professional clients (although the possibility of tracing was left open). Any claim for breach of the CASS Rules sounds only in an action for damages under section 150 FSMA, an unsecured claim.

Money held by GTE for retail clients as client money in segregated accounts was to be pooled and distributed to the clients for whom that money is held. Those for whom money ought to have been held on trust were not permitted to share in those trust funds.

Further arguments concerned whether the Liquidators ought to be directed to increase the amount held on segregated accounts at the date of Administration.

The Court declined to order the Liquidators to complete a transfer of some £503,000 which GTE had attempted to transfer immediately before the Administration. The segregated clients would merely be unsecured creditors for the shortfall.

The Court also held that the



Glen Davis

CASS Rules did not continue to apply to profits which arose post-Administration on the open positions of segregated clients. Such clients would only have an unsecured claim for those amounts. However, the Court would direct a transfer to make good the short-

falls which arose as a result of the notional close out of open positions on the appointment of Administrators (see decision of David Richards J below).

Finally, the Court held that, where a segregated account beneficiary stood to receive a payment from

the pooled client money accounts, but owed GTE an amount in respect of a post-administration loss on an open position, a right of set-off exists.

[Glen Davis, Felicity Toube, Adam Al-Attar]



Felicity Toube

Re Global Trader Europe Limited [2009] EWHC 699(Ch) Chancery Division (David Richards J), 3 April 2009

Global Trader Europe Limited was a regulated firm which offered spread betting and contracts for difference, and held margin deposits and some profits as "client money" on trust. A preliminary question regarding the proper date of valuation for trust claims arose in the context of a more substantial application for directions in the firm's adminis-

tration and subsequent liquidation.

The definition of "client equity balance" in the FSA's CASS Rules contemplates a notional closing out of positions on the date of a "primary pooling event" (which would include the administration of a regulated firm to which those rules apply) for the purposes of defining the relative

rights and interests of clients under the statutory trust of client money imposed by those rules. The entitlement was therefore to be quantified as though each open position had been liquidated and closed as at that date.

NB: the actual order made fixed interests in the money held on trust at the time at which the Administrators were appointed.

[Glen Davis]

CIVIL PROCEDURE

Digested by Tom Smith

National Navigation Co v Endesa Generacion SA [2009] EWHC 196 (Comm) QBD (Commercial Court) (Gloster J), 1 April 2009

The claimant shipowner made claims under a charterparty in respect of a vessel which had been sub-chartered to a co-subsiary of the defendant from whom the defendant had agreed to buy coal. The ship was used to transport the coal under the terms of a bill of lading, but became damaged and caused the defendant a loss. The defendant issued proceedings in Spain claiming that the claimant was liable for the loss. The same

day the claimant issued proceedings for a negative declaration in the Commercial Court. The head charter contained an English law and London arbitration clause and the voyage charter contained a London arbitration clause.

The Court dismissed the action for the negative declaration since the English courts had no jurisdiction under Regulation 44/2001, the Judgments Regulation, to determine the claim; both relevant char-

ters contained London arbitration clauses, and therefore necessarily did not contain clauses submitting disputes to the jurisdiction of the English courts. However, the Court would hear and determine a separate action commenced by the shipowner for a declaration that the arbitration clause had been validly incorporated into the bill of lading. Proceedings relating to the incorporation or validity of arbitration clauses fell outside the scope of the Judgments Regulation because they came within the exclusion in art. 1(2)(d).



Tom Smith

Walbrook Trustees (Jersey) Ltd v Fattal [2009] EWCA Civ 297 Court of Appeal (Arden LJ, Lord Neuberger, Richards LJ), 8 April 2009

The power of the Court to strike out proceedings as an abuse of process where a person brings successive actions in respect of the same subject matter and seeks to raise claims in the later proceedings which he should have made in the earlier proceedings (Henderson v Henderson abuse of

process), generally required unjust harassment of the defendant and required the court to make a broad merits-based judgment as to whether there was an abuse of process. It was not enough merely to show that the claim could have been brought in the earlier proceedings. A decision by a trial

judge as to an abuse of process was one of evaluating and balancing the relevant factors and, on appeal, the court could only interfere with the decision if some relevant consideration had been left out, or some irrelevant consideration had been taken into account, or if the decision was clearly wrong. However, in the present case, the judge had erred by failing to place sufficient weight on the fact that at the relevant time, the

case digests

claimant trustees neither knew nor could reasonably have found out the information which they contended was material to their decision to make a claim. If the proceedings had been brought on

the information which the trustees did know then they would have been struck out as disclosing no cause of action. A party could not be criticised for not pleading something that would have been

struck out, and so it could not be an abuse of process for a party not to enforce its rights until it had the information that would prevent their case from being struck out.

Emerald Supplies Ltd v British Airways plc [2009] EWHC 741 (Ch) (Sir Andrew Morritt C), 8 April 2009

A claim was brought against an airline in relation to alleged price-fixing agreements for the supply of air freight services.

In part, the claimants sought to sue as representatives of all other purchasers of air freight services the prices of which had been unduly inflated by the price-fixing. The defendant airline applied to strike out the representative part of the claim on the basis that the other claimants that the claimant sought to represent did not have

the same interest so as to fall within CPR 19.6. The court held that the essential question for the operation of CPR 19.6 was whether the class that the claimant sought to represent had a common interest in the claim and a common grievance when the claim was issued, and whether the relief sought was in its nature beneficial to all of them. The relevant interest had to exist when the claim was begun, but it did not matter if the class of person

represented might fluctuate. In the present case, it was impossible to say of any given person that he was a member of the class at the time the claim form was issued since the criteria for inclusion in the class could not be satisfied at the time the action was brought because it depended on the outcome of the action itself.

Accordingly, CPR r.19.6 did not authorise the claimant to represent the other claimants. Furthermore, the relief sought in the action was not equally beneficial for all members of the class.

COMMERCIAL COURT DECISIONS

Digested by Ben Valentin

Stocznia Gdynia SA v Gearbulk Holdings Ltd [2009] EWCA Civ. 75 (Ward, Smith and Moore-Bick LJ), 13 February 2009

Following the termination of a shipbuilding contract, a dispute arose between the parties as to whether the buyer was entitled to claim damages from the shipyard for breach of contract or was limited to recovery of the contractual price.

In considering an appeal in relation to an arbitral award in favour of the buyer, the Court of Appeal held: (1) it is impossible for a party to terminate a contract, in the sense of discharging both parties from further performance, whether by invoking a term which entitles him to do so or by exercising his rights under the general law, and at the same time treat it

as continuing, since the two are inconsistent. Either the primary obligations remain for performance, or they do not; (2) on discharge of a contract of this kind a buyer who has paid the whole or part of the price in advance is entitled, in the absence of any agreement to the contrary, to recover what he has paid by reason of a total failure of consideration. He therefore has a right to recover in restitution any payments he has made in respect of the price, a right which is quite distinct from any right he may have (if he is the injured party) to recover damages for the loss of his bargain; (3) if the contract and

the general law provide the injured party with alternative rights which have different consequences, he will necessarily have to elect between them and the precise terms in which he informs the other party of his decision will be significant, but where the contract provides a right to terminate which corresponds to a right under the general law (because the breach goes to the root of the contract or the parties have agreed that it should be treated as doing so) no election is necessary. In such cases it is sufficient for the injured party simply to make it clear that he is treating the contract as discharged. If he gives a bad reason for doing so, his action is nonetheless effective if the circumstances support it.

Associated British Ports v MSC Belgium NV [2009] EWCA Civ. 189 (Sir Antony Clarke MR; Jacob and Maurice Kay LJ), 18 March 2009

In considering a contract entered into the Court made the following observations about the distinction between a guarantee or indemnity

and a letter of comfort: (1) whether a document is a guarantee, or whether it imposes a secondary or a primary liability, will

always depend upon the true construction of the actual words in which the promise is expressed. In the present case, it was clear, from the terms of the agreement as to choice of law, exclusive jurisdiction and the service of process, that the relevant agreement created

and was intended to create legal rights and obligations; (2) a letter of comfort, properly so called, is one that does not give rise to contractual liability.

The label used by the parties is not necessarily determinative. It is a matter of construction of the document as a whole. A document

expressed to be a letter of comfort will usually not give rise to legal obligations (except, perhaps, as a warranty of present intention) but sometimes a primary continuing legal obligation may arise as a matter of construction, notwithstanding the rubric of a letter of comfort.

As always, the court's task is to ascertain what common intentions should be ascribed to the parties from the terms of the documents and the surrounding circumstances. In the present case, the relevant agreement was not merely a letter of comfort giving rise simply to moral obligations.

COMPANY LAW

Digested by Daniel Bayfield

Re Neath Rugby Ltd [2009] EWCA Civ 291, CA (Moore-Bick and Stanley Burnton LJ, Blackburne J)

Mr. Justice Lewison gave the Petitioner permission to appeal on two issues: (1) What duties does a nominee director (Mr. Cuddy) of a company (Neath-Swansea Ospreys Limited ("Ospreys")) owe to (a) the company and (b) his appointor (Neath Rugby Club ("Neath"))? And (2) What counts as the affairs of Neath for the purposes of sections 994 and 995 of the Companies Act 2006? On the first ground the

Court of Appeal held that the fact that a director has been nominated to that office by a shareholder does not, of itself, impose any duty on the director owed to his nominator.

An appointed director, without being in breach of his duties to the company, may take the interests of his nominator into account, provided that his decisions as a director are in what he genuinely considers

to be the best interests of the company; but that is different from being under a duty to a person who has nominated the director to that office. On the second ground the Court of Appeal agreed with Lewison J. that a decision of Mr. Cuddy as a director of the Ospreys in what he genuinely considered to have been the best interests of that company, could not be said to be unfairly prejudicial to the Petitioner. It was Mr. Cuddy's legal duty to make the decisions on the basis that he did.



Daniel Bayfield

Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 11, PC (Lords Hoffmann, Rodger, Carswell and Baroness Hale)

The PC gave helpful guidance on the approach to construction of contracts and company constitutional documents generally. Lord Hoffmann, who delivered the judgment of the court, held that the implication of a term is not an addition to an instrument but only spells out what the instrument

means and that in considering whether to imply a term there is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

The issues as to whether the implied term must "go without

saying" or be "necessary to give business efficacy to the contract" should not be treated as different or additional tests but are the ways in which the courts reformulate that question. In this case, by implication, the true construction of the articles of association under consideration was that a director appointed by virtue of having a specified shareholding must vacate his office if he no longer had that shareholding.

Lebon v Aqua Salt Company Ltd [2009] UKPC 2, PC (Lords Hoffmann, Rodger, Walker and Mance and Sir Jonathan Parker)

The PC considered the principles upon which the knowledge of a person should count as the knowledge of a corporate body. Lord Hoffmann, who delivered the judgment of the court, referred to the principles established in Meridian Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500 and the application of these principles in Jafari-Fini v Skillglass Ltd [2007] EWCA Civ 261. Lord Hoffmann stated that

there was no reason why the general principle formulated by Moore-Bick LJ in the latter case should not apply in this case. In the Jafari-Fini case the issue was whether information that a bribe had been paid to one of the parties for the purposes of a provision in a financing agreement had "come to the attention" of the company when the information was available to only one of the directors. Moore-Bick LJ had held

that the information relevant to the company's affairs that had come to the attention of one director, however that may occur, can be regarded as information in the possession of the company itself. In this case, where a company director and shareholder of the company had used the company to purchase land knowing that there was a prior purchaser, whose rights the company had subsequently tried to override, the knowledge of that director and shareholder was properly imputed to the company.

Re Castle Holdco 4 Limited (Unreported, 23 March 2009) (Ch) (Norris J)

When a scheme of arrangement involving a debt restructuring comes to be considered, it was appropriate for the scheme to be considered by those who had an economic interest in the debt, that is to say, by the ultimate beneficial owners of that debt. Accordingly, where: (i) global notes were held by a common depository or its nominee and the terms of the trust deed or indenture provided

that the common depository was to be treated as the absolute owner of the global security for all purposes; and (ii) the rights of the ultimate beneficial owners of the debt arose out of electronic book entry systems operated by Euroclear and Clearstream, it was nevertheless appropriate for those ultimate beneficial owners (not the common depository) to be given notice of, and to vote on, the

scheme. They may do so, however, only where they are creditors (actual or contingent) of the debtor company. Where the trust deed or indenture contained a mechanism whereby the beneficial owners could seek definitive securities upon the occurrence of certain events, the ultimate beneficial owners were properly to be regarded as contingent creditors of the scheme company entitled to vote on the scheme.

[Robin Dicker QC, Daniel Bayfield]

CORPORATE INSOLVENCY

Digested by Blair Leahy and Stephen Robins

Re Golden Key Limited (in receivership) [2009] EWHC 148 (Ch) (Henderson J), 4 February 2009

The company was a structured investment vehicle (SIV) and had issued short-term US and Euro commercial paper to investors secured on investments in residential property.

The company ran into financial difficulties in August 2007 and ceased paying commercial paper as it fell due for redemption.

Receivers were subsequently appointed and applied for directions as to the manner in which the funds held by them should be distributed. The parties with CP

which matured in August 2007 ("the shorts") argued that payments were obliged to be made on a "pay as you go" basis whereas parties with later maturing CP ("the longs") contended that the funds had to be distributed *pari passu* amongst all outstanding CP. The court held that on the correct construction of the documents the shorts had an accrued right to payment by the company in August 2007.

Although payment had not in fact been made by the security trustee,

the rights arose under a trust and equity regarded as done that which ought to be done.

Further, the concept of mandatory acceleration of the CP, under which CP was to be redeemed at the acceleration redemption date, did not apply to CP which fell due for redemption prior to that date. Accordingly, the receivers were obliged to pay the relevant funds to the shorts.

(Note - the decision in *Golden Key* is to be heard by the Court of Appeal.)

[Mark Phillips QC, Robin Dicker QC, Antony Zacaroli QC, Barry Isaacs, Tom Smith]

Re Nortel Networks SA & ors [2009] EWHC 206 (Ch) (Patten J), 5 February 2009

On 14 January 2009, Blackburne J made orders placing 19 companies in the Nortel group into administration on the basis that the COMI of each of the companies was located in England. 18 of the companies ("the Companies") were registered in EC Regulation Member States other than the United Kingdom.

The joint administrators wished to avoid secondary proceedings being opened in respect of any of the Companies as this was likely to impede the global restructuring of the Nortel group. Accordingly, the joint administrators applied to the Court requesting (i) that the

Court do send a letter of request to the courts of a number of Member States in the EC asking those courts to put in place arrangements under which the joint administrators would be given notice of any request or application for the opening of secondary proceedings in respect of any of the Companies; and (ii) a direction that the joint administrators of each of the Companies be at liberty to take any suitable measures to guarantee the interests of the creditors of the Company in the jurisdictions in which the Companies have establishments within the meaning of

Article 2(h) of the EC Regulation. Patten J granted the relief sought by the joint administrators. The learned Judge made the following findings in relation to the request for the Court to send a letter of request:

(i) The High Court has inherent jurisdiction to issue a letter of request to a foreign court in appropriate circumstances.
(ii) The request for the assistance of the various foreign courts stems directly from the duty of co-operation imposed by Article 31(2) of the EC Regulation. As found by the Vienna Higher Regional Court in *Re Stojevic*, this duty of co-operation incorporates a wider obligation which extends to the courts which exercise con-

trol of insolvency procedures.
(iii) In order for the duty of co-operation to be effective, it is obviously desirable for the court dealing with the application to open secondary proceedings to be provided with the reasons why such proceedings might have an adverse impact on the main proceedings.
(iv) The difficulties which may be caused by a secondary proceeding could not necessarily be addressed

by a stay of the secondary proceedings under Article 33(1) of the EC Regulation. As found by the Higher Regional Court of Graz in *Re Collins & Aikman*, although this would halt the realisation of the assets which fell within the secondary proceeding, it would not prevent the continuation of the winding-up proceedings and the effect of the commencement and the continuation of such proceedings is

likely to be to cause the Companies to cease to trade save for the purposes of winding-up.
(v) In all the circumstances, it is highly desirable that the assistance of the foreign courts should be sought with a view to enabling the joint administrators to be heard prior to the opening of any secondary proceedings.
[Gabriel Moss QC, David Allison]



Gabriel Moss QC

Re Energiea Umwelttechnologie GmbH (District Judge Fairwood, Chancery Division, Leeds District Registry), 10 March 2009

The term "establishment" in Art. 2(h) of the EC Regulation on Insolvency Proceedings is to be given a wide and purposive meaning. It was sufficient that the debtor company (the "Debtor") had previously had a site office in the UK from which its staff had managed the design, manufacture and construction of a large biodiesel and glycerine production plant. The Debtor had left the site in July 2006, apparently due to financial difficulties, and main proceedings had since been opened in Austria, the state of the Debtor's

centre of main interest. The Petitioner's claims arose from the Debtor's defective performance of the design, manufacture and construction of the plant, and were potentially covered by a policy of professional indemnity insurance governed by English law and jurisdiction. The residual position was that a local creditor, local liabilities and local assets all remained in the local jurisdiction. The Debtor's insurers were disputing cover under the policy, and although there would be a right to "separate and attach" proceeds of insurance

under section 157 of the Austrian Insurance Contracts Act, the Debtor's insurers were maintaining that the Petitioner would only be able to commence proceedings to establish the scope of cover if there were a statutory transfer of rights under the English Third Party (Rights Against Insurers) Act 1930.

It was sufficient good reason for the Court to exercise its winding up discretion that there was a prospect of benefit to the Petitioner as a result of a transfer of rights under the 1930 Act. Accordingly, the Court made a winding-up order opening secondary proceedings in England under the EC Regulation.

[Glen Davis]

Re Energy Holdings (No 3) Ltd (in liquidation) [2009] EWCA Civ 173 CA (May, Rimer and Sullivan LJJ), 11 March 2009

The joint supervisors of EH3 appealed against the decision of The Chancellor that GFM's purported claim was not time-barred under the terms of EH3's CVA. The relevant clause of the CVA provided as follows:

"If a Claim Form is lodged after the Claims Date, a CVA Claim will not rank for Distributions unless the CVA Supervisors of the relevant CVA Company or the Court determines either that the failure to lodge the Claim Form earlier did not result from a wilful default or lack of reasonable diligence on the part of the CVA Creditor, or that the CVA Creditor:

(a) did not have notice of the Creditors' Meeting of the relevant CVA Company; and
(b) within 28 days of becoming aware that the Creditors' Meeting of the relevant CVA Company had taken place it lodged its Claim Form with the CVA Supervisors." GFM was not given notice of the creditors' meeting and had failed to file its claim within 28 days of becoming aware that the creditors' meeting had taken place. The Court of Appeal found that the two exceptions in clause 23.5 from the primary rule that claims have to be lodged by the Claims Date were alternatives.

Accordingly, the claim of a creditor was not conclusively excluded if it was not made within 28 days of the creditor becoming aware of the creditors' meeting approving the CVA. Rather, it was necessary to consider whether the late lodging of the claim form was due to wilful default or lack of reasonable diligence on the part of the creditor.

The finding on the issue of construction meant that the Court of Appeal did not need to consider GFM's contentions that an effective time-bar would have been a breach of GFM's rights under the ECHR.

[Antony Zacaroli QC, David Allison]



David Allison

Re Samsun Logix Corporation [2009] EWHC 576 (Ch) (Morgan J), 12 March 2009

The Korean Court-appointed Receiver of Samsun Logix Corporation (“the Company”) applied to the English Court under Schedule 1 to the Cross-Border Insolvency Regulations 2006 (“the Model Law”) for: (1) recognition of the Korean rehabilitation proceedings as foreign main proceedings; and (2) discretionary relief under Article 21(1)(g) of the Model Law in the form of a moratorium under paragraphs 42 and 43 of Schedule B1 to the Insolvency Act 1986. The Receiver’s evidence showed that (inter alia): (1) the Company was facing a large number of claims,

many of which had been submitted to arbitration in London; (2) the Korean rehabilitation proceedings were broadly in the nature of US Chapter 11 proceedings; and (3) the aim of the Korean rehabilitation proceedings was to rescue the Company as a going concern by way of a rehabilitation plan, which would be broadly in the nature of a scheme of arrangement under English law. The Judge held (inter alia) that: (1) the requirements of Article 17(1) of the Model Law had been satisfied, and the Court was obliged to grant recognition under Article 17(1) of the Model Law; (2) the

evidence showed that the Company’s centre of main interests was in Korea, and therefore the Korean rehabilitation proceedings would be recognised as foreign main proceedings under Article 17(2)(a) of the Model Law; (3) the automatic consequences of such recognition would include a stay on proceedings under Article 20, and therefore arbitrations against the Company would be stayed as a consequence of recognition; (4) in light of the evidence as to the nature and purpose of the Korean rehabilitation proceedings, it was appropriate to grant discretionary relief under Article 21(1)(g) in the form of a moratorium under Schedule B1. **[Stephen Robins]**



Stephen Robins

Re Britannia Bulk Holdings Inc (Morgan J), 16 March 2009

The Company was incorporated in the Marshall Islands to be the holding company of a group of companies engaged in dry bulk shipping, and was the guarantor of a substantial loan to the group’s operating company. The group had been affected by the collapse in international shipping freight rates in 2008, and the operating company had entered administration in October 2008.

The operating company had employed all the group’s management and staff, and since the administration of the operating company, the group’s London offices had been closed and the landlord had re-entered. The evidence was that the Company’s interests were administered from the group’s offices in London until those offices were closed on 27 February 2009,

shortly before an application for Administration was made by the directors of the Company. Since that time, they had continued (insofar as they arose) by the Company’s only active director, who was in the UK. The Court was satisfied that the Company’s centre of main interests was in the UK for the purposes of founding jurisdiction under the EC Regulation. An administration order was made. **[Glen Davis]**

Re Kaupthing Singer & Friedlander Limited; Newcastle Building Society v Mills [2009] EWHC 740 (Ch) (Sir Andrew Morritt C), 8 April 2009

A building society (NBS) had issued a certificate of deposit for £10 million to Kaupthing Singer & Friedlander Ltd (KSF). The certificate of deposit had been issued in accordance with the rules of the CREST system and was held in the CREST system as a dematerialised security. Payment under the certificate of deposit was to be made in accordance with the rules of the CREST system. Further, NBS had executed a deed, which applied to the certificate of deposit, under which payment was to “be made without set-off, counterclaim or other deduction, save as required

by law”. KSF went into administration on 8 October 2008 and failed to make payment under a certificate of deposit and other deposits due to NBS. NBS sought to set off these sums against the sums owing under the certificate of deposit issued by NBS to KSF. NBS contended that the purpose of the no set-off provision in the deed was to place the certificate of deposit in the same category as a negotiable instrument and that legal set-off was therefore permitted. The Chancellor held that it was well established that rights of legal set-off could be excluded by the

terms of a contract and that he was bound by first instance and Court of Appeal authority to this effect (HSBC v Kloeckner & Co AG [1990] 2 AB 514; Coca-Cola v Finsat International [1998] QB 43). Further, as a matter of construction, there was no basis for limiting the no set-off provision to rights of equitable set-off only. The commercial context demonstrated that all types of set-off or counterclaim were excluded since it was of the essence of the CREST system that bargains were completed immediately and without regard to any other transactions the parties might have entered into. **[Simon Mortimore QC, Robin Dicker QC, Lloyd Tamlyn, Daniel Bayfield, Tom Smith]**



Simon Mortimore QC



Lloyd Tamlyn

Re Trinity Street Direct Limited (Chief Registrar Baister), 8 April 2009

The Company provided “digital marketing” services to the management of various well-known performers and the promoters of various events. Tickets and merchandise were sold on-line from internet pages operated by the Company. Customers typically received confirmations by e-mail, although physical goods would be delivered to a postal address in the UK or around the world. The average price of orders was less than £35.

When the Company entered administration in February 2009, there were some 16,700 con-

sumer clients who were potentially creditors, although many of these would have their orders honoured or fulfilled by third parties.

It was estimated that the costs of sending out notices and proposals by post would be of the order of £84,000, whereas the costs of an email exercise would be of the order of £400.

On an application for directions by the Administrators, the Chief Registrar permitted notices of appointment and the statement of the Administrators’ proposals to be sent only by email to any credi-

tor for whom the Administrators held an e-mail address, and confirmed that it would be sufficient if the Administrators posted their proposals on an internet website and included a reference to the address of that page in the email or letter sent to creditors. The Administrators were to indicate their willingness to provide paper copies to any creditor who might request them. Similar directions would apply to any further notices that might be required under the Insolvency Act or Rules. Time for sending out proposals and for holding the initial creditors’ meeting was also extended by two weeks. **[Glen Davis]**

Tai Shing Maritime Co SA v (1) Samsun Logix Corporation (2) Hyun-Chul Hur (the Korean Court Appointed Receiver of Samsun Logix Corporation) (Norris J), 16 April 2009

In circumstances where a stay on arbitration proceedings had arisen under Article 20 and 21 of the UNCITRAL Model law (as modified by the Insolvency Cross Border Regulations 2006) on the recognition of Korean rehabilitation proceedings, the question of whether any such stay was to be

lifted was a matter of English law for the English Court, in respect of which the English Court had unfettered discretion. In exercising that discretion, the purpose of the foreign proceedings was a factor to be taken into account so that, although the stay granted pur-

suant to Article 20 was equivalent in scope and effect to the stay imposed by Section 130(2) of the Insolvency Act 1986, the purpose of that stay (and the criteria that the Court would consider when lifting the stay) would take into account that the Korean proceedings were aimed at the rehabilitation of the company. **[Jeremy Goldring, Richard Fisher]**



Jeremy Goldring



Richard Fisher

PERSONAL INSOLVENCY

Digested by William Willson

Tagore Investments SA v Official Receiver Ch D (Mann J), 11 November 2008

The applicant company (“A”) applied under section 346 (6) of IA86 for relief from the consequences of section 346 (1)(a) so that it could retain the benefit of a charging order over property vested in the name of a bankrupt (“M”). A was the beneficiary of a judgment against M, and obtained an interim charging order over his property. The charging order was not finally made absolute until one day after M procured his own bankruptcy on a debtor’s petition, the application for the charging order having been made in ignorance of M’s bankruptcy. A maintained that M’s decision to petition for his own

bankruptcy was a deliberate one that was not taken in the interests of his creditors, but in order to disadvantage A and to frustrate the charge. A relied on various pre-judgment events, M’s conduct in the litigation and the judge’s findings as to M’s dishonest behaviour. Held that the jurisdiction under section 346 (6) had to be exercised with great caution. In judging fairness, the extent to which, and the reasons for which, the enforcement of the judgment had been frustrated had to be considered. Emphasis had to be placed on post-judgment events, and it was open to the court to consider pre-

judgment events to enable the court to draw an inference as to the motivation behind post-judgment events. In the instant case, M’s conduct underlying the claims and his conduct in the litigation would lead to the conclusion that M’s decision to petition was a deliberate one, taken in order to disadvantage A. The judgment awarded clearly demonstrated that M was a fraudster who had not hesitated to lie, conceal and steal. M had not given any notice of his intention to present his own petition and he had no pressing creditors apart from T. The appropriate degree of unfairness had therefore been established in the case, and the court could exercise its discretion under section 346 (6).



William Willson

Revenue & Customs Commissioners v (1) Shaun Cassells (2) Nicholas Reed [2007] EWHC 3180 (Ch) Ch D (Sir Andrew Morritt C), 4 December 2008

The appellant Commissioners ("A") appealed against a decision to rescind a bankruptcy order made against the first respondent ("R"). A obtained a bankruptcy order against C for unpaid tax returns. The Official Receiver's report noted that R had a number of creditors. R filed his outstanding tax returns, but A but mistakenly failed to give him credit for his sub-contractor tax deductions. On re-investigation, A realised that R was entitled to an immediate refund (which would expunge his

liability). R applied to rescind or annul the bankruptcy order. The judge rescinded it on the basis that A's failure to notify R amounted to an exceptional circumstance for the purpose of section 375 of IA86. On appeal, it was held that questions of the appropriate weight to be given to material factors under consideration were not sufficient, of themselves, to justify the interference with discretion under section 375 by an appellate court. There was no evidence from which it could

be inferred that C would have applied for an annulment at the earliest possible date once he had been informed of A's mistake. R had repeatedly shown inaction. In any event, an application to annul, made at the earliest possible date, would have failed under section 282(1)(a) on the basis that, at the time the order was made, it was premised on a legally enforceable debt, and under section 282(1)(b) as he would have been unable to secure all his debts. Further, the judge had failed to consider the existence of the remaining, legitimate creditors and the lapse of time, in years, since the imposition of the order.

Mary Theresa Power v (1) Kevin Brown (2) Arnold Chadwick (A Firm) (3) Noel Godfrey [2009] EWHC 9 (Ch) Ch D (G Moss QC, sitting as a Deputy Judge of the High Court), 15 January 2009

The appellant ("A") appealed against a decision dismissing his application to set aside an assignment of a cause of action made by the first respondent trustee in bankruptcy ("T") in favour of the third respondent creditor ("G"). G had obtained a debt owed by A's wife ("W"). W was declared bankrupt and T was appointed trustee. G commenced proceedings against A, W and others in relation to certain property. To comply with a court order, T assigned his cause of action in those proceedings to G. At trial G succeeded in proving that the properties were, prior to her bankruptcy, held on a bare trust for W and subsequently for T. Subsequently, G presented a bank-

ruptcy petition against A, and A applied to set aside T's assignment to G. The judge refused that application on the grounds that T had appropriately exercised his powers and P should have contested the assignment at the trial. Before the bankruptcy order was made, A purported to assign alleged causes of action he had against W and G to a company ("B"). Once the bankruptcy order was made, the same rights were assigned back to A by B. A then appealed against the dismissal of his application to set aside T's assignment to G. The issue for determination was whether, by virtue of the invalidity of A's disposition to B pursuant to section 284 of IA86, A had standing to bring the

appeal. Held that A's assignment made no commercial sense and was obviously part of a manoeuvre to keep his purported rights under his control. A's ability to raise any objection to T's assignment depended upon his status as an alleged creditor of W. Any potential claim against W would, without such a manoeuvre, pass to his trustee in bankruptcy. This overlooked the fact that under section 284 the making of the bankruptcy order rendered any such disposition between the filing of the petition and the bankruptcy order void. A's assignment to B had already been ruled void in related proceedings between G and A. That being so, both the right of appeal and the underlying rights sought to be enforced by A's challenge to T's assignment had passed to the Official Receiver. Accordingly, A had no standing to pursue the instant appeal.

David Truex v Eugenie Romanovna [2009] EWHC 396 (Ch) Ch D (Proudman J), 6 March 2009

The appellant ("A") appealed against a bankruptcy order made against on the petition the respondent ("R"), her solicitor in matrimonial proceedings. The petition was based on two unpaid invoices, and A opposed it on the basis that there was a substantial dispute, seeking a review of the bill under an assessment proce-

dure. The chief registrar held where R's costs had not formed the subject of a judgment or agreement they were not a liquidated, though a bankruptcy order could be made if there was evidence that A had accepted the invoices. The chief registrar looked for, and found in the transcripts of the matrimonial proceedings an

admission of the fees claimed in the two outstanding invoices, and concluded that there was no bona fide dispute. On appeal, it was held that a claim for solicitors' fees not as yet judicially assessed or determined was not a claim for a liquidated sum.

The sum claimed became a liquidated sum once the fees had been assessed by the costs judge or determined in an action. The question in the instant case was

what else could convert a solicitor's unassessed bill into a debt capable of founding a bankruptcy petition. Any admission, acknowledgment or agreement converting an amount claimed from an unliquidated to a liquidated sum had to be one to which the client had

bound himself. A mere acknowledgment would be insufficient. The bill as a whole was capable of challenge as to quantum, and therefore was for an unliquidated sum and did not fulfil the requirement of section 267 of IA86. Even if the court was wrong as to the

principle that an unliquidated sum did not become liquidated by a mere admission unsupported by consideration or estoppel, the appeal would succeed on basis that there had been no clear or unequivocal admission of the invoices.

AM Lawrie Paulin v (1) Nancy Paulin (2) Cativo Ltd (in liquidation) [2009] EWCA Civ 221 CA (Civ Div) (Longmore, Wilson Lawrence Collins LJJ), 17 March 2009

The appellant husband ("A") appealed against an order annulling his bankruptcy and ordering a payment to the respondent wife ("R"). R had obtained an order for maintenance during their divorce, and A made himself bankrupt on his own petition. After two hearings, R successfully applied for this order to be annulled on the basis that A was trying to frustrate her claims. On appeal, it was held that a court had discretion to annul a bankruptcy

order where it concluded that, at the date of the order, the bankrupt was able to pay his debts. It was for R to prove that A had been able to pay his debts on the date of the presentation. Where an applicant for annulment of an order made on a debtor's petition established that the debtor's assets exceeded his liabilities, the evidential onus shifted to the debtor. That approach accorded with common sense, for the existence of commercial insol-

veny in such circumstances called for an explanation. The evidential burden had therefore shifted to A. Since his statement of affairs was substantially dishonest, and at the time of presentation of his petition he held assets worth approximately £1.2 million against debts of only £136,000, it was clear that he had not discharged the evidential burden. A's motive in procuring his own bankruptcy, namely to defeat R's claim, and the effect on R of refusing to annul the order were two factors which strongly militated in favour of exercising the discretion to annul.

PROFESSIONAL NEGLIGENCE

Andreas Gledhill and Adam Al-Attar

Rushmer v Smith [2009] EWHC 94 (QB) (Jack J), 30 January 2009

In this case Jack J considered the duty of care owed by an auditor to the surety of a company's trading liabilities. Mr Rushmer claimed against his company's accountants, Mervyn E Smith & Co, for, amongst other things, his liability as surety for the company's trading loss. The judge found that Mr Rushmer had not in fact relied on any erroneous draft accounts or on the overstated final accounts in deciding whether to grow or wind down the company's business. The

Judge considered what the position would have been had there been such reliance. On the evidence the Judge found that it was probable that, if the company had substantial bank borrowings, a guarantee of the borrowings would be required by the lending bank, but that Mervyn Smith & Co did not know Mr Rushmer had provided a guarantee and, it followed, did not know the extent of Mr Rushmer's liability under the guarantee.

Applying Caparo Industries plc v Dickman [1990] 2 AC 605, Jack J held no duty of care was owed to Mr Rushmer as a surety of the company's liabilities, having regard, in particular, to (i) the purpose for which the statements in the accounts were made; (ii) the purpose for which those statements were communicated; and, (iii) the state of knowledge of Mervyn Smith & Co. The same conclusion flowed from the fact that, as a member/creditor, Mr Rushmer's loss was merely reflective of his company's loss.



Andreas Gledhill



Adam Al-Attar

Axa Insurance Ltd v Akther & Darby Solicitors [2009] EWHC 635 (Comm) (Flaux J), 27 March 2009

Flaux J was required to determine, as a preliminary issue, the point at which time began to run in a negligence claim by an insurer against panel solicitors acting in connection with a scheme for the provision of after the event legal expenses insurance.

Axa Insurance Ltd ('Axa'), as an

assignee of National Insurance and Guarantee Corporation ('NIG'), claimed against 89 firms of panel solicitors alleging that they had owed a duty to NIG to (i) vet and only take on scheme claims that had a greater than 50 per cent prospect of success and a likelihood of damages of £1000 or

more; and (ii) conduct cases with reasonable care and skill, which meant that panel solicitors had a duty to notify NIG where prospects of success fell below 50 per cent and/or damages would not exceed £1000. The claims flowed from the requirement that claims accepted under the scheme had to have prospects of success of at least 51 per cent and be for a minimum amount of £1000. The panel

solicitors contended that the claims in respect of policies which incepted from April 2001 onwards were time-barred.

The issue was when time started to run under LA 1980 s 2. Axa contended that damage could not be said to have occurred until the date when the underlying claim had failed. The panel solicitors contended that, on the contrary, actual

damage was first suffered when each after the event legal expenses policy was entered into. *Flaux J*, applying *Forster v Outred & Co* [1982] 1 WLR 86 and *Pegasus Management Holdings v Ernst & Young* [2009] PNLR 11, considered that it was an established principle in professional negligence cases that a person suffered damage if he did not receive what he ought to have

received. The panel solicitors had a duty to procure a transaction having certain characteristics and their failure to do so cause NIG to enter into flawed transactions. On this basis, the actual damage occurred when each after the event legal expense policy incepted. It was irrelevant that NIG would not actually pay out until the claim failed.

OTHER CASES

Ferrari, Renault and Red Bull v FIA, BMW, McLaren, Brawn, Toyota and Williams Interested Parties, International Court of Appeal of the FIA

At the Australian Grand Prix in Melbourne that took place between 26th and 29th March 2009 Ferrari, Red Bull and Renault protested the legality of the diffusers of the Toyota, Brawn and Williams cars. It was alleged that the diffusers infringed Article 3.12 of the Formula One Technical Regulations. The protests were dismissed by the Stewards. Ferrari, Red Bull and Renault appealed the decisions to the FIA International Court of Appeal in Paris. BMW and McLaren supported the appeals as interested

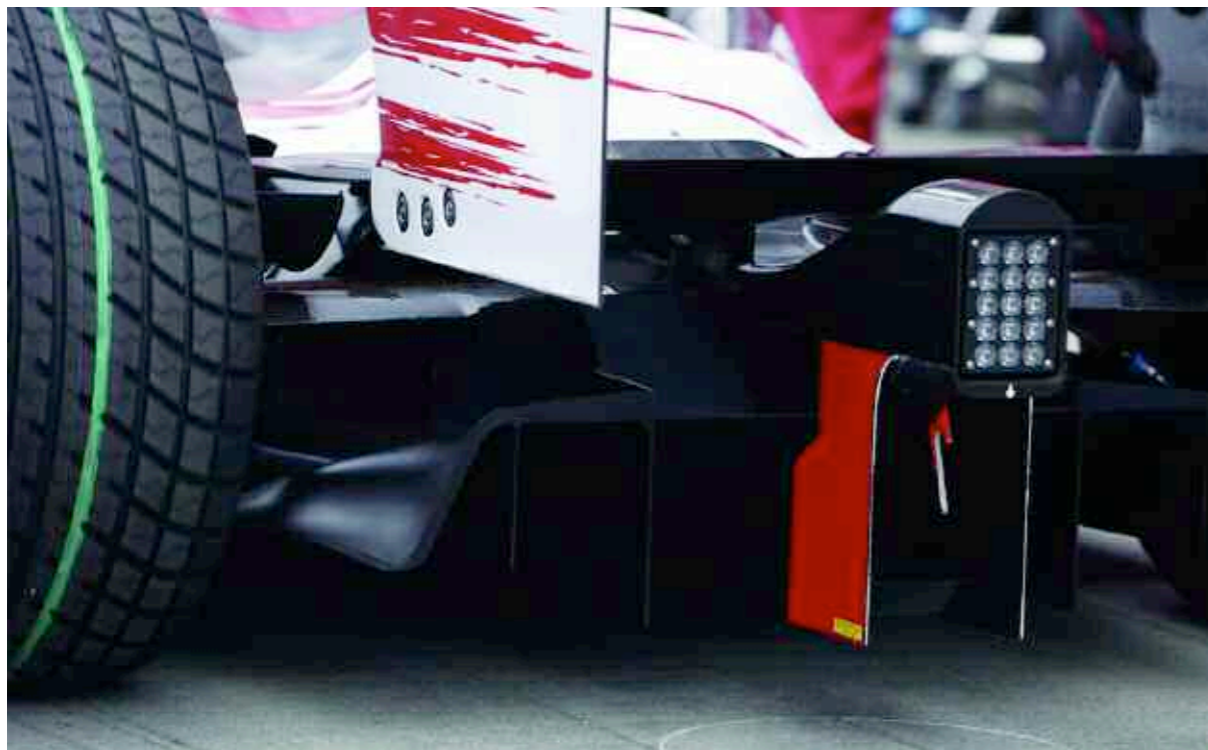
parties. At the hearing of the appeals on 14th April 2009, the protesting teams argued (a) that the “double diffusers” subverted and circumvented the intention of Article 3 which they argued was to give effect to the Formula One Overtaking Working Group and (b) that the underbodies were not “impervious or continuous” as required by Article 3.12.5 and (c) that there could only be a single “vertical transition” on each side of the underbody. Toyota, Brawn and Williams successfully persuaded the International

Court of Appeal that their underbodies were legal because under Article 3.12.3 there was no need to have a “vertical transition” between the “reference plane” (the plane at the very bottom of the car) and the “step plane” (the plane that sits 50mm above the reference plane) at any point where the step plane could not be seen vertically above the periphery of the reference plane. Where there was a gap at the edge of the step plane there was no need for a vertical transition and this could be used to channel air into what has been described as the “double diffuser”.

[Mark Phillips QC appeared for Panasonic Toyota Racing]



Mark Phillips QC



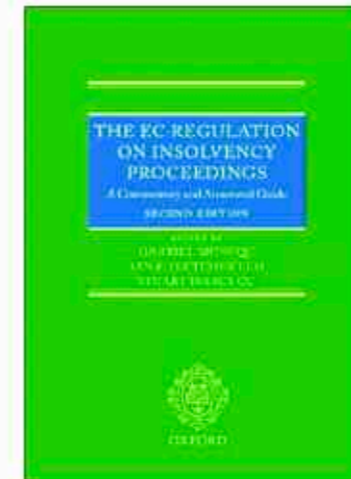
Toyota's rear diffuser

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Hypothesising the hypothetical director...

...an unpredictable opponent, explains **Georgina Peters**

Two interesting questions have emerged as relevant since the institution of Part 11, Chapter 1, ss. 260-264 of the Companies Act 2006 (the 2006 Act). They concern: (i) whether derivative claims will now have a better prospect of obtaining permission to continue; and (ii) how the courts will approach the “hypothetical” or “objective” director test established under those provisions.

As to the first question of whether such claims will have a greater prospect of successfully proceeding to a hearing on the substantive merits of the claim, it is too early to tell. To observe otherwise would be frivolous. During the eighteen-month period since the provisions came into force, there have been only two reported decisions in which permission to continue a derivative claim under the 2006 Act has been sought and determined: *Mission Capital Plc v Sinclair* and another [2008] BCC 866 and *Franbar Holdings Ltd v Patel* and others [2008] BCC 885. The second question, however, has been the subject of judicial consideration on both those occasions.

Introduction

The introduction of a new statutory procedure for bringing a derivative claim under the 2006 Act immediately generated substantial speculation. Permitting a derivative claim to proceed was no longer to be confined to the application of the rule in *Foss v Harbottle* (1843) 2 Hare 461 and its exceptions. Both academic and professional commentators were quick to point to the wider

ambit of the derivative claim and consequently to speculate that the new legislation would facilitate a rise in the number of such actions, or at least an enhanced prospect of launching a derivative claim. An assortment of other reasons were also put forward; hasty conclusions drawn. For example, certain analyses pointed to the twin effect of a new statutory statement of directors' duties instituted by Part 10 of the 2006 Act and the new procedure contained in Part 11. In so doing, they echoed concerns expressed during the Bill's passage through the House of Lords that this combination would lead to "... a double whammy" for litigants (679 HL Official Report (5th Series) col GC2 (27 February 2006)).

Such prophecies have not (or not yet) been borne out by events. Certainly the statutory procedure will alert interested parties to the existence of the provision. The ambit of the derivative claim is also now wider than at common law; it covers any cause of action falling within the four categories of “wrongs” listed in s. 260(3) of the 2006 Act. And the limiting requirements of fraud on the minority and control by alleged wrongdoers no longer operate (cf. *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) [1982] Ch 204). However, Part 11 came into effect on 1 October 2007. The past eighteen months have seen only two reported decisions in which permission to continue a derivative claim under the new regime has been the subject of determination; in

neither case has the court acceded to the application. In a third case, *Fanmailuk.com Ltd v Cooper* and others [2008] BCC 877, an application for permission to continue a derivative claim was adjourned for consideration, if necessary, after the trial of a preliminary issue. The issue was whether the claimant company was the beneficial owner of all issued shares in the respondent company. That question was decided in the affirmative in a later judgment [2008] EWHC 3131 (Ch); at the time of writing it is the last reported decision in the matter.

There is thus not yet reason to suggest that the position under the previous regime - whereby derivative claims were seldom brought and those which were brought were seldom successful - will be modified. Certainly both *Mission Capital Plc* and *Franbar Holdings Ltd* were concerned with an analysis of the facts at issue. The very nature of the substantive criteria according to which the court will now determine whether a derivative claim may proceed, as prescribed by s. 263 of the 2006 Act, means that each case will, on analysis, invariably concern questions of fact individual to that case. That notwithstanding, these two recent cases call for comment as they provide an (and the first) insight for putative litigant shareholders of a company as to how the courts will approach the new legislation. In particular, the cases are instructive in indicating the courts' application thus far of the “hypothetical” director test.

General Overview of the Legal Framework

The principal legislative provisions may be swiftly summarised. A derivative claim is defined by s. 260(1) of the 2006 Act as a claim by a member of a company in respect of a cause of action vested in the company and seeking relief on behalf of the company. Subsection 260(3) constitutes a greater innovation. It categorises the conduct which may found a cause of action: “A derivative claim ... may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company”.

Section 261 deals with the procedure for an application for permission to continue a derivative claim and establishes a two-stage approach. By s. 261(1) (as supplemented by the new CPR 19.9), a member of a company who brings a derivative claim must apply to the court for permission to continue it. A prima facie case is required to continue the derivative claim or the application will be struck out: s. 261(2).

Where, however, the court is satisfied without having yet heard from the company that a prima facie case exists, the applicant must still surmount the second stage of the permission application. Section 261(4) affords the court a further opportunity, following a hearing, to give permission to continue the claim or to refuse permission and dismiss the claim. By that stage the evidence of the applicant shareholder, the company and the defendant directors will be before the court (cf. s. 261(3)).

It is on the permission application that the new criteria prescribed by the 2006 Act are applied. Section 263 sets out the criteria to which the court will have regard in arriving at its determination. Again the approach is twofold. First, section 263(2) contains criteria which require the court to refuse leave to commence or continue the claim. As such, where any one of those factors applies there is an absolute bar to continuance. This will occur where

the court is satisfied: “(a) that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim...”. Sections 263(2)(b) and (c) set out two alternative bases which relate to whether the conduct has been authorised or ratified by the company. It will thus be readily apparent whether those circumstances are met in a particular case.

Second, and by contrast, section 263(3) sets out a non-exhaustive list of factors which the court must, “in particular”, take into account in considering whether to give permission. Put differently, the court possesses a residual discretion to refuse permission under s. 263(3) even where the absolute bar does not operate. Regard should be had to the terms of the legislation. Relevant to the discussion below are the following factors: “(b) the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it; ... (f) whether the act or omission ... gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company”. Also relevant is s.263(3)(d), which requires consideration of whether the conduct “could be, and in the circumstances would be likely to be” ratified by the company.

Accordingly, the grounds at s. 263(2)(a) and s. 263(3)(b) both require the court to apply the standard of the objective, reasonable director under s. 172 of the 2006 Act. As such, the court is required to decide whether the litigation is required to promote the success of the company for the benefit of its members as a whole, by reference to the views of a hypothetical director in the same circumstances. Importantly: (i) this question will only arise where the remaining (more straightforward) grounds in s. 263(2) are not established; and (ii) the court is required by s. 263(3)(b) to consider the “importance” that the hypothetical director would attach to continuing the claim, on the premise that the court has not been satisfied

under s. 263(2)(a) that such a person would not seek to continue the same claim.

The Case-Law

The first of the two cases in which permission to continue was refused was *Mission Capital Plc*, decided on 17 March 2008. The various applications before the court arose out of two actions: that commenced by the company (*Mission Capital*) and a derivative claim commenced by its former executive directors (the Applicants). The Applicants constituted a minority on the board of *Mission Capital*. Three non-executive directors were in the majority. The board purported to terminate the Applicants' employment and required them to resign from the board. *Mission Capital* obtained an interim injunction excluding the Applicants from its premises and requiring delivery up of certain documents.

The Applicants: (i) counterclaimed; and (ii) brought a derivative claim against the non-executive directors and their replacement director. By their counterclaim, the Applicants contended both that their employ-



Georgina Peters

ment contracts were still subsisting and their purported resignations were invalid. They claimed injunctive relief equating to specific performance of service contracts and reinstatement to the board. By the derivative claim, the Applicants: (i) contended that Mission Capital would suffer damage from their wrongful dismissal and the replacement director would act improperly; and (ii) claimed the same heads of relief as in the counterclaim.

On the application for permission to continue the derivative claim, Mr. Justice Floyd first addressed his mind to s. 263(2)(a) and the question whether a notional director would not seek to continue the claim. The debate focussed on whether the derivative action was purely duplicative of the counterclaim. "Nobody brings a claim just for the sake of it" (at [41]). Hence his conclusion that he could not be satisfied, negatively, that such a person would not seek to continue the claim, was premised on the finding that the derivative action was not duplicative of the counterclaim. In so concluding, he accepted the reasons submitted by the Applicants. Specifically, that: (i) the derivative claim might succeed where the counterclaim failed, due to the reasoning on which the latter relied; and (ii) Mission Capital would be able to claim damages against the directors for the damage it had suffered as a result of the Applicants' wrongful dismissal, which would not be available to the Applicants' as shareholders.

Put differently, it seems that Floyd J reasoned that the derivative claim was the sole mechanism by which certain relief could be obtained by Mission Capital and that it may (subject to the success of the counterclaim) have been the sole mechanism by which other, injunctive relief could be obtained. As such, there was "real purpose" (at [42]) in bringing the claim and he could not be satisfied that a hypothetical director would not seek to continue it.

Floyd J went on to consider how to exercise his discretion under s. 263(3). His refusal of permission was largely based on his judgment as to how important the hypothetical

director would regard continuation of the claim within the meaning of s. 263(3)(b). He held (at [43]) that although he could not be satisfied that the notional s. 172 director would not continue the claim, he did not believe that he would attach that much importance to it. His reasons were twofold: "Would a company which had wrongfully dismissed a director normally take action against those responsible for the damage that it has suffered? It would depend, but I suspect that the action it would take in preference would be to replace the directors. Moreover, on the evidence before me the damage... [Mission Capital] will suffer is somewhat speculative - another reason why the section 172 director would not attach great weight to it".

A second ground for Floyd J's refusal seems to have been his brief consideration of s. 263(3)(f), although not expressly cited (at [46]). He was not satisfied that there was anything sought by the Applicants which they could not recover by means of an unfair prejudice petition under s. 994 of the 2006 Act.

Franbar Holdings Ltd was decided on 2 July 2008. The applicant company (Franbar) was a minority shareholder in Medicentres (UK) Ltd. Amongst the various applications before the court, Franbar sought permission to continue a derivative claim against the directors of Medicentres (the Respondents), on behalf of that company. Franbar claimed negligence, default and various breaches of duty of care owed by the Respondents to Medicentres. The same substantive allegations founded a claim against the majority shareholder in Medicentres (Casualty Plus Ltd) for breach of a shareholders' agreement it had entered into with Franbar and an unfair prejudice petition under s. 994 against the Respondents and Casualty Plus.

First applying the hypothetical director test in s. 263(2)(a), Mr. William Trower QC, sitting as a Deputy Judge of the High Court, summarized the different stances which could be adopted by the hypothetical director (at [30]). He observed that: "[d]irectors are often in the position of having to make

what is no more than a partially informed decision on whether or not the institution of legal proceedings is appropriate, without having a very clear idea of how the proceedings will turn out. Some directors might wish to spend more time investigating and strengthening the company's case before issuing process, while others would wish to press on with proceedings straight away; in a case such as this one, both approaches would be entirely appropriate".

In this case the discussion focussed on whether there were circumstances which, if made out at trial, may give rise to a cause of action. The case was judged to be one where there was "sufficient material for the hypothetical director to conclude that the conduct of Medicentres' business by those in control of it had given rise to actionable breaches of duty", leading to the conclusion that "I cannot be satisfied that a hypothetical director acting in accordance with section 172 would conclude that the case advanced was insufficiently cogent to justify continuation of the claim. Even though he may take a healthily sceptical approach to Medicentres' ability to prove the allegations at trial, it does not follow that the claim should not be continued on that ground alone".

However, the balancing exercise carried out with regard to the factors at s. 263(3) resulted in the refusal of permission. Applying the hypothetical director test in s. 263(3)(b), Mr. William Trower QC went on to set out certain of the considerations such a person would take into account (at [36]): "... the prospects of success of the claim, the ability of the company to make a recovery on any award of damages, the disruption which would be caused to the development of the company's business by having to concentrate on the proceedings, the costs of the proceedings and any damage to the company's reputation and business if the proceedings were to fail. A director will often be in the position of having to make what is no more than a partially informed decision on continuation without any very clear idea of how the proceedings might turn out".

It was held that the hypothetical director would not presently attach great importance to continuation of the claim, as there was work still to be done in formulating a clear claim for breaches of duty which had caused actionable loss to Medicentres. This did not preclude the hypothetical director from attaching importance to its continuation at some future stage (i.e. when the complaints were in a form which would tend to that conclusion). It was also considered that the hypothetical director would be more inclined to regard its pursuit as less important in light of the fact that several of the complaints were more naturally formulated as breaches of the shareholders' agreement and acts of unfair prejudice, already the subject matter of proceedings (and where all parties sought and/or had offered a buy-out of the minority and the principal issue was one of valuation).

In a similar vein the availability (and use) of both the s. 994 petition and shareholders' action was attributed considerable weight, in a determination under s. 263(3)(f). On an analysis of the facts, both the allegations of breach of duty to Medicentres and the losses it might have sustained were held likely to be relevant, respectively, to Franbar's complaint of unfair prejudice as well as to the fair value of Franbar's shares and attendant questions arising on the valuation.

Consideration was also devoted to s. 263(3)(d). In determining that certain of the conduct alleged may prove to be incapable of ratification, Mr. William Trower QC construed section 239(7) of the 2006 Act, which preserves any rule of law as to acts incapable of ratification, as including not only acts which are ultra vires the company in the strict sense, but also acts which, pursuant to any rule of law, are incapable of ratification for some other reason. He concluded that the proposition in *North-West Transportation Company v Beatty* (1887) 12 App Cas 589, 594 (that a company cannot ratify breaches of duty by its directors where it is oppressive towards those shareholders who oppose it) remained good law. Consequently,

A derivative claim is defined as a claim by a member of a company in respect of a cause of action vested in the company and seeking relief on behalf of the company.

that where the question of ratification arises in the context of an application to continue a derivative claim, the court must still ask itself the question whether ratification has the effect that the claimant is being improperly prevented from bringing the claim (cf. *Smith v Croft* (No. 2) [1988] Ch 144, 185B).

Future Consequences

Mission Capital and Franbar Holdings illustrate that certain of the criteria listed in s. 263 will involve similar considerations to those given to derivative claims under the previous regime. As such, for those factors assistance may be derived from decided case-law in anticipating how the tests will operate in practice. For example, in relation to the issue of whether there is a personal claim that could be pursued without involving the company arising under s. 263(3)(f) (cf. *Konamaneni v Rolls-Royce* [2002] 1 WLR 1269; *Jafari-Fini v Skillglass* [2005] BCC 842; *Mumbray v Lapper* [2005] BCC 990). Or indeed under s. 263(3)(d), as illustrated by the Franbar Holdings judgment.

Anticipating judicial determination of the hypothetical director test will, it is suggested, present greater difficulty when advising a prospective litigant on risk. The usual uncertainties of litigation will inevitably bear on a court's determination of what such a person would decide in known circumstances. The considerations attributed to the hypothetical directors discernable in the decisions above, despite reflecting the facts at issue, reveal a similarity of approach and constitute broader commercial considerations militating against continuation. To that extent the cases afford an insight as to how the test will operate in practice. The hypothetical director deciding whether to continue the claim would, in Mission Capital, consider whether it had a "real purpose", and in Franbar Holdings, consider whether there was "sufficient material" or a suffi-

ciently cogent case to substantiate a cause of action. The hypothetical director deciding how much importance to attach to its continuation would, in Mission Capital, consider the availability of an alternative course of action which did not involve litigation as well as the extent to which it could be said that the company will suffer loss, and in Franbar Holdings, consider the facts that the complaints were not in a form supporting a clear claim for breaches of duty causing actionable loss and more naturally fell within other types of claims already being pursued.

Of contrast is the position under s. 172 of the 2006 Act. Section 172 grants a discretion to directors to act in the way they consider, in good faith, would be most likely to promote the success of the company. Although the factors listed in s. 172 will be relevant to the balancing exercises conducted under both that section and on an analysis under subs. 263(2)(a) and (3)(b), at common law the duty now contained in s. 172 was held to be a subjective one. The question was not what a court may consider was in the interests of the company (cf. *Re Smith and Fawcett Ltd* [1942] Ch 304; *Re Regentcrest plc v Cohen* [2001] 2 BCLC 80). This contrast in approach may, it is suggested, be explained on two bases. First, an act or omission challenged on an allegation of breach of the duty now contained in s. 172 is conduct capable of subjective assessment - a judgment on past conduct rather than on a hypothetical. Second, the hypothetical director test is central to a permission application as the effect of permission being granted is to override the rights of a company's directors to determine whether litigation should be commenced to enforce the company's rights. That determination being displaced, the court steps into the shoes of a director to substitute its - hypothetical - view. ■





In an hour of need...

the profession in service of the public

Pro bono work - a long way travelled and a long way to go says **Robin Knowles CBE QC**

Access to justice means law that is actually available to each citizen. Law that in fact, and not just in theory, protects each citizen. And not only those citizens with financial means.

The challenges are huge - and never more so than at the present time of profound economic difficulty. The call for access to justice in areas of debt and employment is acute. The legal problems then cluster, and begin to extend to housing and family and immigration law issues and beyond.

This article looks at the role and development and importance of pro bono work. It looks at its future in service of the public interest, and its future alongside legal aid - now in its 60th anniversary year.

The gaps

Two weeks after his retirement as Senior Law Lord, Lord Bingham presented the Bar's Pro Bono Award for 2008. It was thought provoking to look across some of the shortlist of entries. All deserved our respect and admiration. But the help each of those shortlisted had given pro bono

told us something about the gaps in our legal system.

One barrister was left to represent pro bono at inquests the families of UK soldiers killed in service. Another supported pro bono those with no means but in urgent need of immigration advice. A QC represented pro bono a grandparent in family proceedings requiring a 15 day High Court hearing. Another QC appeared pro bono in test cases on the implications of social security law for children. In these and other examples, public funding or legal aid was not available - either as a matter of policy, or in practice.

In England & Wales there is no legal aid for representation in most cases of unfair dismissal from a job. In practice many people cannot find solicitors ready to take family cases on legal aid. An exclusion for what are treated as "business" cases rules out legal aid for the poor family running a corner shop business and threatened by their landlord. These are just examples.

In any assessment of legal aid in the UK, it is important to keep in mind that some countries have none

and not just that we do not have enough. But we have seen so many decisions driven either by a priority of saving money, or by an assumption that the numbers helped, rather than the depth or quality of help, is what matters.

The point is that the Courts provide access to the laws that Parliament is making. We see those laws themselves becoming more and more complex; with the consequence that more and more citizens need help to understand them and, ultimately, to enjoy them as Parliament intended.

Pro bono work

In England & Wales we can take pride in our profession when we speak of legal work pro bono publico - professional legal work without charge and in the public interest. Pro bono work has been in the legal profession for centuries. Yet in a real sense we are only just beginning. The shift is from important examples by exceptional individuals, to mainstream activity by an exceptional profession.

We can go back a long way. 400 years have passed since the Lord Chief Justice of the day spoke to the Sergeants-at-Law of their duty to defend without reward "the poor and oppressed". Ad hoc examples of pro

bono work by members of the profession have occurred across the centuries.

Safe, trusted, points of entry to the system

60 or more years ago, three advice centres were established in London, which survive today with names held in great affection - Toynbee Hall, Mary Ward and University House. These, alongside many traditional law firms, may be among the earliest examples of safe, trusted, points of entry to the system for those without means. 30 years ago saw the creation of an advice bureau to support those appearing unrepresented in the main court building in England, the Royal Courts of Justice. Today it deploys pro bono lawyers from 55 law firms, is complemented by the Personal Support Unit, and has a direct referral relationship to the in-depth pro bono resources of the profession - barristers, solicitors and legal executives.

The RCJ Advice Bureau is unique in a number of ways, but at the same time it is part of a national network of advice bureaux. That network is joined now by a network of Law Centres and of independent advice agencies. This, alongside the law firms, is the front line; the first point of access to pro bono help.

But we have realised more recently that sometimes points of access need to be fashioned around the community they serve rather than the service they offer, if those who need help are to be encouraged to obtain it. The Pro Bono initiative at the London Muslim Centre, including access through its Women's Link, is perhaps a good example. The Wai Yin centre focussed on the Chinese community in Manchester is another.

The decade of coordination

The 10 years from 1996 to 2006 might be seen as the decade of coordination for the UK's pro bono effort.

Of course there had been earlier examples. The Free Representation Unit - or FRU as we all call it, with affection and pride - had organised employment tribunal representation in the South East since the 1970s. Some Bar Circuits later set up FRU schemes in other parts of England &

Wales to deal with a similar type of pro bono work. A City panel existed by the 1980s to help with death row appeals from jurisdictions for which the Privy Council was still the final court of appeal.

But in 1996 the Bar Pro Bono Unit was formed, by Lord Goldsmith QC (who was later to become Attorney General) as a national clearing house for the pro bono work of the Bar, in every subject area and at every level of seniority. LawWorks followed shortly afterwards, and was in due course to become the national clearing house for the pro bono work of the solicitors profession. Then came

the Pro Bono Forum of the Institute of Legal Executives, and more recently, on the international side, both Advocates for International Development (A4ID) and the International Lawyers Project (ILP).

A standing National Pro Bono Coordinating Committee chaired by the Attorney General was formed. An International Committee has followed. The Attorney General's Pro Bono Envoy, Michael Napier CBE, QC, leads their work on a day to day basis. A national coordination website, probonoUK.net, has been created. The entire profession, through the professional bodies, has sub-



Robin Knowles CBE QC

scribed to a Pro Bono Protocol and to a Statement of Principles for International Pro Bono Work, each setting basic standards and methods. There are sub committees focussed on law schools and on law in schools. In-house lawyers have increasingly become part of this coordinated picture.

A decade of collaboration and strategy

After the decade of coordination we have more recently entered what might be called a decade of collaboration and strategy.

The first Joint National Pro Bono Conference in 2007 started in the planning as a LawWorks conference but became a collaboration between LawWorks, the Bar Pro Bono Unit, ILEX and the Advice Services Alliance. Its organising committee is now chaired by a member of the Government Legal Service, making her pro bono contribution in this way. National Pro Bono Week, in its 8th year, is now built around themes and key messages agreed and delivered in a spirit of collaboration. A database of international pro bono projects has been introduced, and more joint working should result.

LawWorks and the Bar Pro Bono Unit have, for example, come to realise that regional development needs a sustained, sequential programme, and will not happen with just a general "push". The careful and appropriate engagement of the judiciary, beyond simply welcoming their encouragement, is another area.

A significant example of a strategic approach being taken came in October 2008. Legislation was brought into force allowing the Courts to make an order equivalent to a costs order against the losing party when a pro bono case was won, even though no actual costs had been incurred. The sum ordered to be paid must be paid to a designated charity, The Access to Justice Foundation. That charity will in turn apply this new, additional money to help add to the resourcing of the infrastructure that enables pro bono assistance to be made available to others. With the help of the Civil

Justice Council, the creation of the Foundation has been accompanied by the formation of Regional Legal Support Trusts. These give the Foundation a picture of the regional and local unmet need so that some of that can be met with the help of the new money available through the Foundation. They also carry out regional and local fundraising activity and, in time, will help develop regional pro bono activity in a strategic way.

As can come if a strategic approach is taken, the Access to Justice Foundation has large potential for bringing other new resources into the system. The Civil Justice Council recently recommended it as a suitable destination for damages awarded but unclaimed under "opt out" class litigation. The new financial resources available through these and other routes could be very material indeed. In early discussion about "pro bono costs orders" some had said the money should go to a place chosen by the lawyers in the particular case. The welcome greater potential I have just described is handsome reward for resisting that idea in favour of a strategic approach.

Another initiative introduced this year will take a strategic approach to the involvement of lawyers in school governance, using their legal skills rather than their knowledge of the law, especially at the schools that face the greatest educational and social challenges.

This latter is an illustration of the broader reach in the contribution made once there is a trusted entry point, coordination, collaboration and strategy. To give other illustrations, mediation - both mediator and mediation advocate - is available pro bono. Highly specialised commercial and competition lawyers have found calls for their skills to help the poorest developing countries manage engagements with developed nations over free trade, with multinationals over commodities, with vulture funds over assigned loans. Advocates have delivered advocacy training across the developing world, helping local legal professions to capacity build. One city has

twinned its legal community with that of a region in Africa in a successful model that it is hoped others may emulate. African Prisons Project and International Law Book Facility show other approaches. Most recently, the current Attorney General, Baroness Scotland, working with the International Pro Bono Committee she chairs has led the development of a draft "Pro Bono Toolkit" designed to be contributed to and shared, through Law Officers and others, across the Commonwealth.

Pro bono work by lawyers has also been combined with that of other professionals, especially through ProHelp. Streetlaw and Public Legal Education or PLE have brought knowledge of rights and responsibilities into schools, youth clubs and community centres - a PLE demonstration of work of the National Centre for Citizenship and the Law opened National Pro Bono Week 2008 in the courtroom of the Lord Chief Justice.

Some of these broader efforts have, beneficial, implications beyond access to justice. They go to the broader subjects of citizenship, engagement, multiculturalism and social cohesion. It is not an overstatement to say that ProBono in the London Muslim Centre is playing a small but significant part in bringing the Muslim and non Muslim community together in London's near East End (an area where the Muslim ethnic minority is in the majority). The readiness of the immediate past Lord Chief Justice, Lord Phillips, to come into the London Muslim Centre and Mosque, at the request of the pro bono initiative there, and speak on "Equality before the Law" has reinforced this. So too the readiness of the President of the Family Division and of Munby J to join a seminar on forced marriage.

A long way travelled

The combination of trusted entry point, coordination, collaboration, strategy and reach have taken pro bono work into an altogether different league. I am not sure we have realised it yet, but what has happened is that pro bono is rightly tak-

ing its proper place as an integral part of the justice system rather than simply as a collection, however generous, of acts of charity.

One can offer statistics that are encouraging. National Pro Bono Week 2008 completed 70 events across 20 cities. There are 2000 pre-volunteered members of the Bar on the Bar Pro Bono Unit's books, and many more willing to act besides. LawWorks has enabled more than 100,000 pieces of legal advice. Advocates for International Development has matched UK lawyers to over 200 projects across two dozen countries in the last 2 years. One of the sponsored walks saw 2000 people walk. Their collective presence spoke eloquently the messages "it matters" and "we care".

Some of the steps I have described or illustrated were not easy. The survival of some of the oldest of the safe, trusted, points of entry serving the poorest in the great but sometimes harsh City that is London, has had episodes of serious challenge and difficulty. It is hard to believe now that there was real difficulty to persuade some of the point of there being a Pro Bono Unit, and to persuade others of the value of the Pro Bono Protocol. Today there are those who are not yet convinced about the Access to Justice Foundation. More generally there are still lawyers who assume pro bono work is just for the youngsters, or for those in some areas of law only. We still see initiatives embarked on that are not sustainable. Too often still the focus is not on seeing a person with a deserving case through to the end of that case but rather is simply on offering help at the beginning.

The importance to the profession

The profession's pro bono work is key to the health of the legal profession. The health of the legal profession is key to the health of the future judiciary. More and more it is pro bono work that brings the profession together; connecting senior and junior; specialist and generalist; legal executive, solicitor and barrister. It is a rare but true source of

After the decade of coordination we have more recently entered what might be called a decade of collaboration and strategy.

respect for the profession. It attracts talent to the profession, and keeps that talent in the profession, and in the firms and chambers that encourage and support it. It is part of the key to diversity in the profession, and to retaining diversity so that it is present at all levels of the profession. It keeps the practice of law in touch. I want to suggest this is about having a profession to be proud of.

A long way still to travel

But let me now have the courage to suggest that our profession can do much more. I support, without qualification, the call for further financial resources. But there are things we can do for which further resources are not a precondition.

My first suggestion can take the form of a question. Why - forgive my being direct, but I do so from a position of respect - why are some lawyers not volunteering to do anything pro bono? This is not a question of charity; it is about being a lawyer. In the past there have been barriers of time and organisation to our volunteering. But it is now possible: the vehicles are there, the infrastructure is there. It is utterly practical for pro bono work to be "part of being a lawyer". If the whole profession is involved the demands on each individual member of the profession are not too great. And I hope we shall increasingly hear, not "my chambers or firm does it", but "I do it".

My second suggestion is that we now need to avoid separate initiatives and schemes where possible. I do understand the pride that a firm, a chambers, a pro bono organisation or even an individual professional body will have in an initiative that they have thought of or that bears their name. And sometimes competitive instincts, excitement, or pride in one's own legal stable, tempt a body to want its own initiative rather than

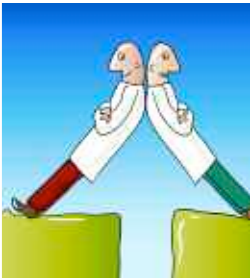
to look for the opportunity to praise and support and encourage and join and extend the initiatives in which others are already involved.

Imagine if you were the person in need. Your chances of help are higher if a good idea has been shared and undertaken with others. Your chances of getting to that help are better if there is one coordinated referral scheme, in which many have joined, rather than several schemes which carve up access to the profession between them. How can we expect clients or lawyers to manage if a request has to be taken to and examined by lawyer after lawyer, or scheme after scheme, until someone is prepared to help? Surely we can organise things so that there is one place to approach for help, and one place to approach to volunteer; one place to examine a request for help, and examine it once?

My third suggestion is related. A concerted effort is needed to ensure that the safe, trusted points of entry to the system know precisely how to get further help to a person where that is needed. This does not mean giving the person a list. While there is a list then it should be for the use of the front line agency, not the person seeking help. We need to encourage more and more front line agencies to see their role and responsibility as including knowing and identifying the, single, place from which further help can in fact be obtained.

A future relationship between legal aid and pro bono work

My fourth and final suggestion is that we need to move on from proper coordination of pro bono work to proper coordination between legal aid and pro bono work. We are a long way from that type of coordination at present, but why are we? I suspect the reason is that it is a difficult place to go. It requires a dia-





logue with Government. It carries the fear that it will end up being a dialogue about pro bono substituting for legal aid. In fact the dialogue, in my view, offers the best way of guarding against that fear being realised.

On any view, the legal profession needs to make sure it is heard in the public funding debate. To do so it needs to be heard from a place of knowledge, and not from a place of self-interest, and as a voice that is respected. It needs to decouple its voice from its trade union voice - however merited - that speaks to rates of remuneration.

It is the profession's very involvement in pro bono work that gives the opportunity and entitlement to be heard in this way. The profession knows most about the unmet need, about the front line. It is the profession that is there where Legal Aid is absent.

The Government's interest is in securing access to justice - access to the laws that Parliament is making. It is therefore in the Government's interest to accord respect to the profession in this dialogue; a profession that comes from a place of knowledge and with a pro bono contribution to make.

Attacking the profession in order to control the legal aid budget solves nothing, because legal aid will never be enough.

In truth, for the profession and for Government alike, pro bono work has reached the point at which it offers a different entry point to the discussion of public funding, and the vital discussion of how public funding and pro bono work can together be coordinated to provide better access to justice.

This is about the intelligent use of public funds and pro bono work alike. If we cannot increase the amount of public funding at least we can try and better organise its use. Legal aid - public funding - is key to the survival of entire legal specialisms, such as housing law, social security law, immigration law, and of course criminal law.

Intelligent use of public funds is also key to the survival of many trusted points of entry to the justice system.

Pro bono work keeps the practice of law in touch. I want to suggest this is about having a profession to be proud of.

We might see a number of practical results. First, we should see public funds focussed strategically, with priorities that include investment in areas of law that cannot survive without public funding, and contracts that are workable for not for profit agencies.

Second, we should see a focus on pro bono as added value throughout the system. The agency that offers a combination of funded provision and pro bono provision should attract the public funding authorities. This might be the publicly funded law centre that offers additional clinics with the assistance of pro bono volunteers from law firms. It might be the law firm that offers a combination of publicly funded and pro bono services (as with the Law for All practice in England). It might be the advocate who is remunerated from public funds for advocacy but who provides advice pro bono.

The third thing we should see is the opportunity to revisit existing ideas. With the type of coordination to which I refer we might not have seen the ambition of a nationwide Community Legal Service in the UK encounter problems as it did at the stage of attempting to map unmet need. The idea of a contingent legal aid fund - involving the allocation of some of the proceeds in a successful publicly funded case towards a fund available to support other publicly funded cases - could attract fresh consideration but this time jointly between the profession and government.

Meeting unmet need in a strategic way

This therefore is I suggest the dialogue that the legal professional bodies, government, the coordinating pro bono bodies, and the judiciary, need to have, together. With hard work, and mutual respect, a

true strategy could emerge. And help us move on from a world in which the reason some legal need is unmet is because Government decides in comparative isolation what it will purchase, presenting the profession and the charity sector with a given position to which it is left to add a pro bono contribution as best it can. And help us move away from a world in which Government and profession and charity sector are left to measure by number of people helped, or money value of hours given, rather than by true inroads into unmet legal need, including in the areas that are most difficult.

As in any challenge in this field, the continuous sharing of ideas, including between one country and another, will play a key role. At no time is that need more than it is now. ■

Robin is the Chairman of the Bar Pro Bono Unit, a Trustee of LawWorks, the Chairman of the Advisory Board of A4ID, a Trustee of the RCJ Advice Bureau, Chairman of University House and Chairman of Pro Bono in the LMC. He chaired the working party on section 194 and the Access to Justice Foundation.

This Article is abbreviated from an address he gave at the 2008 National Access to Justice and Pro Bono Conference in Sydney, Australia.

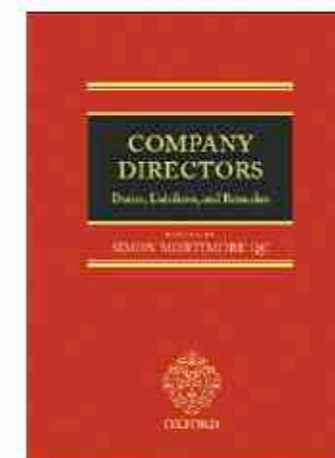
Robin acknowledges his gratitude to the following for their comment, advice and encouragement in the preparation of that address: Michael Napier CBE, QC (Attorney General's Pro Bono Envoy); Bob Musgrove (CEO, Civil Justice Council); Rebecca Hilsenrath (CEO, LawWorks); Rebecca Wilkie (Director, Bar Pro Bono Unit); Chris Marshall (Chairman, A4ID); Toby Brown (his legal assistant).

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news in brief

US Bankruptcies surge

The number of US businesses and individuals declaring bankruptcy is rising amid the recession despite a three year old Federal law that made it tougher for Americans to escape their debts an Associated Press analysis has found. "There's no end in sight" said one bankruptcy lawyer who is working seven days a week and scheduling prospec-

tive clients a month in advance. "To be doing this well and having this much business, it is depressing. It's not a laugh a minute job" the lawyer said. Nearly 1.2 million debtors filed for bankruptcy in the past 12 months according to Federal Court records collated and analysed by Associated Press. Last month 130,831 sought

bankruptcy protection - an increase of 46% over March 2008 and 81% over March 2007. In 2005 Congress voted to make bankruptcy more cumbersome after lobbying by lenders. Bob Lawless, a professor at the University of Illinois College of Law, recently said bankruptcies could reach 1.5 million in 2009 and 1.6 million in 2010.

Debt relief orders

Those in personal financial difficulties have a new tool in England and Wales: Debt Relief Orders, which were introduced from 6 April 2009. The new procedure is intended to be an inexpensive and simple way to go bankrupt. It is designed to help

people with relatively low debt, little surplus income and few valuable assets. A debtor must not owe more than £15,000 and have total assets not exceeding £300. The process costs £90. The new system is intended to remove some of the strain placed

on the courts by the current volume of personal insolvencies and to make bankruptcies more affordable. The Insolvency Service expects many thousands of indebted consumers to declare themselves bankrupt using the new procedure.

Dual qualification

Ronald DeKoven (right) was called to the Bar by Lincoln's Inn on 12 March 2009, forty years after Ron began practising law in the United States. For most of his career Ron was a senior partner at Shearman & Sterling in New York; he was head of Shearman & Sterling's insolvency and leasing practice. For the last six years Ron has been practising US law in London as an associate member of 3-4 South Square. Following his call to the English Bar, Ron has now become a full member of Chambers.



He is one of the very few barristers who is dual qualified in insolvency and business law in the US and England and Wales.

Economic downturn means less new laws

The number of new laws being passed by the Government has dropped as ministers concentrate on fighting the economic downturn. Research by a top

City law firm shows that the amount of legislation created during 2008 was the lowest since 1991 - the height of the last major economic slow-

down. Just 2,037 new laws were made last year compared to 2,346 in 2007, a fall of 13% according to research by Sweet & Maxwell

Pre-Packs

After a string of high profile pre-packs in 2008 and 2009 (e.g. Tom Aikins' restaurants, Whittard, The Officers' Club and USC) and the introduction of transparency guidelines in January 2009, the Business and Enterprise Regulatory Reform (BERR) committee is apparently looking at the new administration process in the context of an inquiry into the operations of the Insolvency Service. Peter Luff MP, the Chairman of the committee, has said that the review will establish whether changes are needed. The original administration procedure, which required the involvement of the Court, came into effect in 1986. The current system, which in many cases removed the requirement that a judge have the opportunity to examine the proposals for the administration, came into effect in 2003.

Appointments

Lord Justice Lawrence Antony Collins has been appointed as a Lord of Appeal in Ordinary. He was admitted as a solicitor in 1968, took Silk in 1997 and was appointed to the High Court in 2000 and to the Court of Appeal in 2007.

He replaces Lord Hoffman who retired on 20 April 2009. He will become a Justice of the Supreme Court of the United Kingdom on 1 October 2009 when it is launched.

The Right Honourable Sir Anthony Peter Clarke, the Master of the Rolls, is also to become a Justice of the Supreme Court with effect from 1 October 2009 following the retirement of The Lord Scott of Foscote on 30 September 2009.

Automatic Crystallisation

"Automatic Crystallisation Revisited: Taking Down the Necessary Particulars" by David Marks QC appeared in the April Butterworths Journal of Integrated Banking and Financial Law. The article considers whether, as a result of regulation 3 of the Companies (Particulars of Company Charges) Regulations 2008 (SI 2008 No 2996) which comes into effect on or about 1 October 2009, automatic crystallisation clauses require registration.

Law students turn to a career in law as finance falls from grace

The number of law students seeking to pursue a non-legal career has fallen over the last two years as the collapse of the financial markets drives students away from jobs such as banking. Research by Legal Week's research arm in association

with BPP Law School found that the number of students looking to move into non-legal jobs when they leave university has fallen from 18% in 2007 to 13% in 2009. The survey highlights the impact the problems in the bank-

ing sector have had on perceptions of the financial services industry as a career, with only 17% of the 2,500+ students canvassed also considering working in investment banking, down from 25% two years ago. Overall 50% of under-

graduates want to be solicitors, 16% want to be barristers and 22% would be happy with either option. The figures alter for Oxbridge where 31% want to go to the Bar compared with 15% at other universities.

Insider dealing conviction

The Financial Services Authority secured its first conviction in an insider trading case at the end of March 2009. Christopher McQuoid, a solicitor and the former general counsel of TTP

Communications, and his father in law, James Melbourne, were each found guilty at Southwark Crown Court on one count of insider dealing in relation to a profit of £48,919.20 which they made when

McQuoid told Melbourne that TTP was going to be taken over by Motorola. McQuoid was sentenced to eight months in prison. Melbourne was sentenced to eight months, suspended for a year.

New silks

David Marks and Lexa Hilliard, who were both appointed as silks in the latest round of silk appointments, received their Letters Patent on 30 March 2009. They were also called to the Inner Bar by the Lord Chief Justice on the same day. David, who is also a member of the Illinois and US Federal Bars, a Deputy Bankruptcy Registrar of the High Court and Deputy Chairman of the Data Protection and Information Tribunal, was called in 1975 (Gray's Inn). Lexa was called in 1987 (Middle Temple).



diary dates

19th May 2009
UCL Seminar on Advanced Insolvency Law. Gabriel Moss QC, Richard Sheldon QC, Professor Fletcher, Professor Robert Stevens.
3-4 South Sq. /Gray's Inn, London.

12th June 2009
Joint R3 and INSOL Europe Annual Conference on European Restructuring and Insolvency.
London

21st-24th June 2009
Insol 2009 Eighth Quadrennial Congress.
Vancouver, Canada.

1st-4th October 2009
Insol Europe Annual Congress.
Stockholm, Sweden.

9th October 2009
ABI International Insolvency Symposium.
Paris Westin, France.

11th November 2009
ILA Annual Dinner.
Natural History Museum, London

2010
15th-18th April 2010
American Bankruptcy Institute, 28th Annual Spring Meeting.
Gaylord National Resort & Convention Center, National Harbour, MD, USA.

13th-17th October 2010
Insol Europe Annual Congress.
Vienna, Austria.

2011
2nd-23th September 2011
INSOL Europe, Annual Conference.
Venice, Italy.

Insolvency Challenge

We all remember as children sitting in a car playing 20 questions to idle away the journey in the days before the advent of the Nintendo DS and the in-car DVD. Well here are 20 questions with a difference. The answer to the clues (which all start with the year in which the decision was reported) are all the names of well-known insolvency cases. Given that there was no winner of the Insolvency Challenge in the last Digest, this time it is a rollover. **Two magnums of champagne** for the winner – to be drawn from the wig tin if there is more than one correct answer. As ever, answers by email to kirstendent@southsquare.com or by post to the address on the back page in either case by Friday 26th June.

David Alexander QC



- 1 **1874:** Officers of the Court have to act in an exemplary manner and do the fullest equity.
▶
- 2 **1968:** To invoke the winding up jurisdiction when the debt is disputed on substantial grounds is an abuse of the process of the court.
▶
- 3 **1970:** Money paid to a company prior to liquidation into a specific account for a specific purpose and which remains with the company on liquidation is held on resulting trust.
▶
- 4 **1975:** The pari passu principle is a mandatory code. Contracting out of it is not permitted as a matter of public policy.
▶
- 5 **1976:** For years this gave its name to what are now thought of as retention of title clauses.
▶
- 6 **1976:** On winding up a company's assets become impressed with a statutory trust and cease to be beneficially owned by it.
▶
- 7 **1989:** Unlike under the old bankruptcy legislation, defects in statutory demands would not prevent bankruptcy proceedings save where a defective demand would cause injustice to the debtor.
▶
- 8 **1989:** The jurisdiction under Section 214 of the Insolvency Act 1986 was primarily compensatory rather than penal.
▶
- 9 **1990:** The Court of Appeal assessed the meaning of taking steps to enforce security or repossess goods from a company in administration.
▶
- 10 **1990:** The creation of security over a company's assets is not a transaction at an undervalue and to establish a preference the company must have positively wished to improve the creditor's position.
▶

- 11 **1992:** The Court of Appeal made observations as to when leave should be granted under what was then Section 11 of the Insolvency Act 1986 and is now paragraph 43 of Schedule B1.
▶
- 12 **1992:** The powers of the court under Section 236 of the Insolvency Act 1986 are not limited to assisting the office-holder to reconstitute the state of knowledge of the company.
▶
- 13 **1993:** No monies paid prior to the grant of a debenture qualify for the exemption under Section 245(2) of the Insolvency Act 1986 unless the interval between payment and execution is so short that it can be regarded as minimal and payment and execution can be regarded as contemporaneous.
▶
- 14 **1996:** Lord Hoffmann on set off in bankruptcy and its mandatory and automatic nature.
▶
- 15 **2000:** Where an administrator proposes to dispose of in effect the entirety of the company's assets and undertaking prior to the holding of a meeting of creditors he does not require the leave of the Court prior to effecting such disposal.
▶
- 16 **2001:** Payments made by cheque out of a company's bank account to a third party involve no disposition of the company's property to the bank whether the account is in credit or overdrawn.
▶
- 17 **2001:** In relation to compositions and voluntary arrangements there was a strict requirement of good faith as between competing unsecured creditors which prohibited any secret inducement to one creditor even if it did not come from the debtor's estate.
▶
- 18 **2005:** The House of Lords finally overruled Siebe Gorman.
▶
- 19 **2006:** "The most famous case on the EU Regulation," per Gabriel Moss QC.
▶
- 20 **2008:** Section 426 of the Insolvency Act 1986 gave the Court jurisdiction to accede to a request by a relevant country to remission of English assets to the liquidator in that relevant country.
▶

February Insolvency Challenge

The correct answers to the Insolvency Challenge in the February Digest were as follows:
 2007/2008 *AIG, Fannie Mae, Lehman Brothers, HBOS, Northern Rock, Bear Stearns, Woolworths, MFI, Zavvi and Whittard of Chelsea.*
 1990s: *BCCI, Polly Peck, Maxwell, British & Commonwealth, International Leisure Group, Barlow Clowes, Leyland Daf, Olympia & York and Rush & Tompkins.*
 1970s/1980s: *William Stern, John Poulson, Guardian Properties, Slater Walker, Airfix, Keyser Ullman, British Eagle, Northern Developments, Burston Finance and Burmah Oil.*

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