



# 3-4 DIGEST

November 2010

## The Axe-Man Cometh

Welcome to the last edition of the Digest for 2010. Well the latter part of the year has seen the axe taken to public expenditure by the new Chancellor in the spending review. And the jury is out as to what the effect of that may be. Some say that it is a prudent and necessary plan. Others that it is going to ensure that we end up in the dreaded double-dip recession. Time will tell who is right. But whoever is right I suspect that the next couple of years are not going to be the easiest of years for UK plc, particularly with the unions seemingly on the warpath. And the rioting students hardly fills one with confidence that things will not get ugly. So what about the insolvency world? The three months or so since the last Digest was published have seen some interesting things happen. The coalition government dropped its sweeping insolvency reform after corporate leaders challenged whether the plans would make a difference. The Insolvency Service swung its own axe and lost 50 front line official receiver investigators in a move that was reported as being "tantamount to legalising corporate theft". In contrast it was also reported that the number of directors facing disqualification had soared by 17%.

CVA's have also been in the news. HMRC's challenge in relation to Portsmouth's CVA failed at a hearing in August with Richard Sheldon QC and Hilary Stonefrost acting for the Club. But going the other way Miss Sixty's CVA was quashed by the Court as being unfair to landlords. Cross-border collapses and restructurings, such as Nortel, Eurosail,

European Directories and of course Lehmans, continue to give rise to litigation on a diverse range of issues.

And other news? Liverpool FC very publicly avoided going into administration. Blockbuster, the DVD rental chain, filed for bankruptcy protection in the US. And Begbies Traynor predicted that there will be a torrent of firms going bust at the end of this year and into the beginning of 2011. However I am sure you will all be pleased that Crystal Palace came out of administration. It is just a pity that they do not seem to be doing so well on the pitch.

So what have we got for you in this edition of the Digest? This time, to introduce them to you, we have articles by our two new tenants, Henry Phillips and Charlotte Cooke, both of whom clearly have very bright futures ahead of them. We have a special feature by William Trower QC on our new Chief Executive, Caoilinn Hurley. And we have an update by Mark Phillips QC on the Debbie Fund and Sarah's new single. We also, of course, have the usual Case Digests, News in Brief, Diary Dates and another insolvency challenge.

I hope you all enjoy this edition of the Digest. As always, if your contact details have changed or you find yourself somewhere reading someone's else's copy of the Digest, just get in touch with me at [davidalexander@southsquare.com](mailto:davidalexander@southsquare.com) or send an email to [kirstendent@southsquare.com](mailto:kirstendent@southsquare.com) and we will endeavour to ensure that you get the next edition just as soon as it is out.

Best wishes from all at 3-4 South Square.

DAVID ALEXANDER QC – EDITOR.

### IN THIS ISSUE

#### FEATURE ARTICLES

**Making sense of preference law: s.239 of the Insolvency Act 1986** p2

**Financial Regulation Reform - An Overview** p18

#### CASE DIGESTS

Banking and Financial Services p5  
 Civil Procedure p6  
 Commercial Court p7  
 Company Law p8  
 Corporate Insolvency p9  
 Personal Insolvency p14  
 Professional Negligence p15  
 Other cases p16

**New CEO for 3-4 South Square** p17

**News on the Debbie fund** p22

**NEWS IN BRIEF** p23

**INSOLVENCY CHALLENGE** p26

# Making sense of preference law: s.239 of the Insolvency Act 1986

CHARLOTTE COOKE discusses justifications for preference law

## Introduction

Insolvency Act 1986 s.239 provides that a liquidator or administrator may apply to court for an order where the company has, at a relevant time<sup>1</sup>, “given a preference to any person” and goes on to state that a company gives a preference to a person if “(a) that person is one of the company’s creditors or a surety or guarantor for any of the company’s debts or other liabilities, and (b) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.”<sup>2</sup> Pursuant to s.239(5), however, the court is not able to make an order under s.239 unless the company giving the preference was influenced in deciding to give it by a “desire to produce” the above mentioned effect.

Insolvency law does not generally interfere with pre-liquidation entitlements and, as s.239 does just that, it calls out for justification. Potential justifications for preference law might be thought to be that, unless the office holder has the right to challenge preferential transactions, one creditor would obtain unwarranted priority over other creditors, thus undermining the principle of pari passu distribution of assets and the value

maximisation advantages associated with dealing with claims collectively rather than allowing a race to collect. It is, however, questionable whether these purported justifications make sense of preference law as embodied in s.239.

Further, even if s.239 can be justified in terms of the promoting the pari passu distribution of assets and value maximisation, it raises the question as to why it should be legitimate for some creditors to “steal a march” over others by taking security, but not by receiving a preferential payment. Like the conferring of a preference, granting security also seems to undermine the pari passu principle and threaten value maximisation but, although the granting of security can itself be reversed on the basis that it is a preference, or a floating charge for past value under s.245, it is generally permissible.

## Pari passu distribution

The idea that preference law can be justified by appeal to the pari passu principle, according to which assets of an insolvent company are to be distributed equally among equal ranking creditors, focuses on the fact that preferences distort what creditors, who would otherwise rank equally, receive vis-à-vis one another. In particular one might think that those creditors lacking information about a company’s financial situation are

at a disadvantage as compared to those possessing such information and ought to be protected against the latter exploiting their advantage to grab assets of the company.<sup>3</sup>

In fact upholding the pari passu principle cannot be the rationale underpinning preference law in the form it takes under s.239. As said above, an order under s.239 will only be made if the debtor company was “influenced by a desire” to prefer the recipient of the preference. If upholding the pari passu principle were the rationale behind s.239, all transactions which conferred a preference would be liable to be reversed.<sup>4</sup> Instead, under the provisions of the Insolvency Act, where the decision of the insolvent company to enter the transaction is influenced solely by commercial considerations, it will not be liable to be reversed. Indeed, far from protecting creditors at an informational disadvantage, s.239(5) encourages creditors in the know to exert pressure on companies so that they can receive preferential payments to the detriment of pari passu distribution.

Further, as insolvency law pursues equal treatment only in a qualified sense, in that secured creditors have recourse to the company’s assets in priority to unsecured creditors, appeal to the pari passu principle in an attempt to justify s.239 would also beg the question as to why departure from the pari passu principle is not permissible as far as preferences are concerned but is when it comes to security.



<sup>1</sup> As defined in s.240

<sup>2</sup> Without prejudice to the generality of s.239, s.241 provides that an order under s.239 may require any property transferred in connection with the giving of the preference to be vested in the company or discharge (in whole or in part) any security given by the company.

<sup>3</sup> See Walters ‘Preferences’ in Armour and Bennett (eds.) *Vulnerable Transactions in Corporate Insolvency*.

<sup>4</sup> See *Re MC Bacon Ltd* [1990] BCC 78.





CHARLOTTE COOKE

### Value maximisation

Turning to another potential justification for s.239, reference is often made to the fact a pre-liquidation race to collect dismembers a company's assets thereby reducing economic value to the detriment of the creditors as a whole. With this in mind it might be said the avoidance of preferences brings the company's assets back together, thus maximising the value of the pool of assets available for the company's creditors.

This rationale would, however, seem only to apply where the aggregate value of the assets is more than the sum of their parts and this is only likely where a non-money benefit is being conferred, though, as Prentice suggests, a blanket rule might be justified in order to prevent the dismembering of a company's assets

by indirect means.<sup>5</sup> It would also seem to apply only where it is possible to put the assets back together, unless s.239 deters creditors from racing to collect in the first place.

The fact an order under s.239 will only be made if the company was "influenced by a desire" to prefer the recipient of the preference therefore also undermines this purported justification of that section. If the justification for preference law is the maximisation of value then transactions which in fact confer a preference but in respect of which there is no desire on the part of the debtor to prefer the other party should also be liable to be reversed. Indeed, just as it seems to undermine the *pari passu* principle, s.239 may in fact subvert the aim of value maximisation as creditors are encouraged to pressure the

debtor company to make a preferential payment; s.239 sanctions the very behaviour that a provision aimed at deterrence should be designed to prevent.

Appeal to the notion of value maximisation in order also fails to explain why the law allows discrimination between creditors through the device of security while invalidating discrimination through preferred payments. The law allows secured creditors to remove secured assets from the common pool thereby potentially reducing economic value to the detriment of the creditors as a whole just as a preference might do.

### Debtor favouritism

A third potential justification for the reversal of preferential payments is what Prentice calls the prevention of 'debtor favouritism'.<sup>6</sup> The essence of this suggested justification is that it is objectionable for a debtor to desire to satisfy the claim of one creditor when it lacks sufficient assets to satisfy the other claims against it. As such, unlike the purported justifications so far discussed this justification concentrates on the intention of the debtor company and thus makes sense of s.239(5).

Additionally, notwithstanding that security has the effect of putting the secured creditor into a position which, in the event of the company going into insolvent liquidation, will be better than the position that creditor would have been in if that thing had not been done, as security is normally bargained for it might not be considered objectionable as preferences are. Indeed, for the same reason the granting of security might not be thought as an instance of debtor favouritism at all.

The major problem with attempting to justify s.239 in terms of the prevention of debtor favouritism is that, without appeal to, say, the principles of *pari passu* distribution and value maximisation, there is no explanation of what is objectionable about debtor favouritism. Further, whilst wrongdoing is attributed to the debtor company and granting a preference is a breach of a director's duties<sup>7</sup>, recovery under s.239 is often from the preferred

<sup>5</sup> 'Some observations on the law relating to preferences' in Cranston (ed.) *Making Commercial Law*.

<sup>6</sup> *Ibid.*

<sup>7</sup> *West Mercia Safetywear v Dodd* [1988] BCLC 250.



VALUE MAXIMISATION MUST BE WEIGHED AGAINST THE ADVANTAGES OF SECURITY.

creditor. If the rationale for s.239 is the prevention of debtor favouritism, one would expect there to be protection for the innocent creditor who knew nothing about the debtor company's pending insolvency rather than creditors putting pressure on the company to make preferential payments in their favour.

#### Time for reform

It is therefore far from obvious that a coherent justification for s.239 can be given. The most promising line of argument would seem to be that the rationales for preference law are in fact the upholding of the pari passu principle of distribution and the value maximisation advantages of dealing with claims collectively but that preference law as embodied in s.239 has become detached from that underlying rationale and therefore ought to be reformed. There should be no requirement that the debtor company was influenced in deciding to enter the relevant transaction by a desire to prefer the recipient of the preference for an order to be obtained by an office holder in respect of a preferential transaction; proof of a factual preference made at the relevant time should suffice.

#### Security

This leaves us, however, with the question of why discrimination in favour of certain creditors through the device security is permissible but not through preferential

payments. As hinted at above, a different approach to answering this question must be taken, the key being that security is usually bargained for.

Relevant in this regard might be thought to be the fact that under

*Preference law as embodied in s.239 has become detached from its underlying rationale...*

Companies Act 2006 s.860 many charges have to be registered, failing which they are unenforceable against a liquidator or administrator. In light of this requirement one might argue that where security is granted other creditors are free to adjust the terms on which they deal with the debtor company and thus that it cannot be said that there is discrimination against other creditors as there is where preferences are concerned. Against this, however, it can be pointed out that many creditors are not able to adjust; small trade creditors may not have sufficient bargaining power or the sums concerned may not warrant bargaining. Involuntary creditors such as tort victims will also be unable to adjust. As such it cannot be denied that the granting of security involves discrimination against other creditors.

The real question is therefore what makes this discrimination justified.

Appeal to the advantages of the device of security may provide the answer. In placing restrictions on the debtor company's ability to alienate assets, security gives secured creditors some control over the company's affairs in particular ensuring safe assets are not replaced with risky ones. Unsecured creditors can then free ride on the advantages this brings. This rationale for departing from the pari passu principle and the value maximisation advantages of the collectivisation of claims does not apply where preferences are concerned.

Further the availability of security plays a crucial role in extending the available body of credit, as a creditor will feel more comfortable lending if secured, thus facilitating the smooth running and expansion of businesses and in good business times giving a company more leverage to increase its profits by undertaking more business than would be possible if it could not borrow funds. Again this does not apply to preferences which are concerned with existing creditors.

#### Conclusion

Creditors can supplement a debtor company's undertaking to pay by taking security even though this undermines the pari passu principle of distribution and value maximisation. This is justified by the advantages of a system where creditors can take security. Those advantages do not however come into play where preferential payments are concerned and as such there would seem to be no justification for permitting preferences to the detriment of pari passu distribution and value maximisation. There does not therefore seem to be an obvious way to make sense of the requirement, for an office holder to obtain an order under s.239, that the debtor company was influenced in deciding to enter the relevant transaction by a desire to prefer the recipient of the preference. It is hoped this is something the legislature will look at again.

# CASE DIGESTS

Edited by HILARY STONEFROST

In *HHY Luxembourg Sarl v Barclays Bank plc* the court at first instance adopted a very literal approach to the wording defining the terms of the release of security and claims in an intercreditor agreement. This decision not only meant that the proposed sale in that case would not have been workable, but also caused wider concern as the clause in issue is a standard clause in such agreements. Within a month the Court of Appeal had, however, overturned this decision, deciding on an interpretation that took into account the commercial context. The decisions are summarised at page 6. **Company voluntary arrangements**

appear to have come back in vogue, in particular in the retail sector; the most notable recent successes have been *JJB Sports plc*, *Blacks Leisure Group Plc* and *Speciality Retail Group*. Not all CVA's in the retail sector have a happy ending. In *Miss Sixty* the landlords of a large shopping centre in Liverpool, in which the company occupied two units, successfully challenged the CVA on the grounds of unfair prejudice and accused the administrators of misconduct. The court confirmed that using a CVA to strip out a parent company guarantee can amount to "unfair prejudice"; see page 9.



HILARY STONEFROST

## BANKING AND FINANCIAL SERVICES Digested by JEREMY GOLDRING AND STEPHEN ROBINS

### *Carey Value Added SL v Grupo Urvasco SA* [2010] EWHC 1905 (Comm) (Blair J), 23 July 2010

A lender had advanced the loan in connection with a hotel development to the borrower, guaranteed by the borrower's parent. The lender claimed under the guarantee, but the borrower and the parent argued that the borrower had cross-claims against the lender under the loan agreement and that the borrower had been entitled to exercise a contractual right to cancel all outstanding

indebtedness under the loan agreement. The lender applied for summary judgment on the guarantee on the grounds that the guarantee contained certification and conclusive evidence provisions requiring the parent to pay whatever sum the lender had certified as being due (*IIG Capital LLC v van der Merwe* [2008] 2 Lloyd's Rep. 187). However, in the present case, the terms of the certification

provision only provided for the certificate to be conclusive evidence as to quantum, and not as to liability. Accordingly, it could not be said that the parent did not have any reasonable prospect of showing at trial that the effect of the exercise of the contractual cancellation provision was that there was no sum owing to the lender under the guarantee.

**[Tom Smith]**

JEREMY GOLDRING STEPHEN ROBINS

### *Trimast Holding Sarl v Tele Columbus GmbH* [2010] EWHC 1944 (Ch) (Norris J), 28 July 2010

The holder of claims under two swap agreements entered into by the borrower, applied to the Court for a declaration that its claims had become due and payable. The claims were in

respect of amounts which had crystallised following the termination of the swap agreements, and which had been assigned to the claimant. The claimant contended that, although it was not able

under the terms of the Intercreditor Agreement to commence Enforcement Action in respect of these sums, the declaration would serve a useful purpose as the borrower could decide to make



RONALD DEKOVEN

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## CASE DIGESTS

the payments as Permitted Payments. The borrower asserted that the termination of the swap agreements had occurred after the commencement of Enforcement Action, with the result that the sums due had to be paid to the Security Agent and then treated as the proceeds of enforcement of the Transaction Security and applied in accordance with the terms

of the Intercreditor Agreement. The Court rejected the borrower's contention since the relevant provision of the Intercreditor Agreement only applied where the termination of the swap agreements had taken place after a different event had occurred which constituted Enforcement Action; the termination of the swap agreement

itself could not be said to be that event. Further, the commencement of a claim for a declaration that the sums were due and payable was not itself Enforcement Action within the meaning of the Intercreditor Agreement and such a declaration would serve a useful purpose.

**[Ronald DeKoven, Tom Smith]**

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### HHY Luxembourg Sarl and another v Barclays Bank plc and others (Proudman J), 23 September 2010

An issue arose in the context of a proposed restructuring of the European Directories group of companies as to the correct construction of release provisions contained in the Intercreditor Agreement. The Senior Lenders proposed a restructuring of the group whereby the shares in a holding company at the top of the group structure (DH7), the entirety of which were held by its parent company (DH6), were to be sold by the

Security Trustee. The Senior Lenders, DH6 and the Security Trustee contended that the effect of the release provisions contained in the Intercreditor Agreement was that in these circumstances the Security Trustee was entitled to dispose of the debt owed to lenders not only by DH7 but also by its subsidiaries and to release the claims against, and security given by, not only DH7 but also by its subsidiaries. The court rejected this construction. The

ordinary meaning of the language used in the release provision that was the authority to dispose of debt and to release claims and security was limited to the entity whose shares were being disposed of. Further, such a construction did not lead to commercial absurdity.

**[Robin Knowles QC, Robin Dicker QC, William Trower QC, Antony Zacaroli QC, David Allison, Tom Smith, Marcus Haywood]**



ROBIN KNOWLES QC



WILLIAM TROWER QC

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### Barclays Bank plc & others v HHY Luxembourg Sarl and another, unreported, (Longmore LJ, Jacob LJ, Kitchin J), 22 October 2010 (On appeal from the Judgment of Proudman J)

The issues and arguments on the appeal were the same as those before Proudman J (see above). Allowing the appeal, the Court of appeal held that the release provisions should be

construed as contended by the Senior Lenders, DH6 and the Security Trustee. In the commercial context that interpretation made more sense than the interpretation found by the Judge.

**[Robin Knowles QC, Robin Dicker QC, William Trower QC, Antony Zacaroli QC, David Allison, Tom Smith, Marcus Haywood]**



ROBIN DICKER QC



DAVID ALLISON



MARCUS HAYWOOD

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## CIVIL PROCEDURE

Digested by BEN VALENTIN

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### Prudential plc v Special Commissioner of Income Tax [2010] EWCA Civ 1094, CA (Mummery, Lloyd, Stanley Burnton LJJ)

Legal professional privilege does not apply, at common law, in relation to any profession other than a qualified lawyer: a solicitor, a barrister or an appropriately qualified foreign lawyer. It does not

apply to accountants giving tax advice, even if that advice involves advice on tax law. Extension of the privilege to members of other professions, who give advice on points of law in the course of

their professional activity, would give rise to serious questions as to the scope and application of the privilege to which only Parliament could provide the answers. **[Ben Valentin]**



BEN VALENTIN

## COMMERCIAL COURT Digested by JOANNA PERKINS

### Redmayne Bentley Stockbrokers v Martin Charles Isaacs & ors [2010] EWHC 1504 (Comm) 28 June 2010



JOANNA PERKINS

The claimant stockbrokers issued proceedings against the defendant for unpaid amounts on his account with them. The defendant argued that he was not liable because (i) his account with the claimant had been an advisory one, and the claimant had accordingly owed him an obligation to assess the risk being borne by him, and had acted in breach of contract in allowing him excessive credit; and (ii) that six transactions under which shares were

rolled on his account were done without his authority. The court rejected this defence. Mr Justice Hamblen held that the documentation and the oral evidence did not demonstrate a meeting of minds on the issue of the nature of the account. However, a course of dealing over time with both the claimant and their predecessors in business showed that, despite his having signed an "Advisory Service Agreement Form", the

defendant had in fact entered into a contract for an execution only service. Furthermore, the defendant had given clear instructions to roll the shares, and it could not be said that the six transactions initiated by the claimant had not been authorised. Matters taken into consideration by the judge were the fact that the defendant was a sophisticated investor and that no advisory fees were paid.

### Carey Value Added SL v Grupo Urvasco SA [2010] EWHC 1905 (Comm) 23 July 2010

The defendant company guaranteed the obligations of its subsidiary under the sale and leaseback of a hotel. The objective of the transaction as a whole was the provision of financing by the claimant investment fund to the subsidiary for the development of the hotel. Following an alleged default by the subsidiary, the claimant ceased advancing monies and sought to recover the sums already advanced under the agreement from the subsidiary and the defendant guarantor. The question

before the court was whether, on a proper construction of the guarantee, the defendant had a secondary obligation to the claimant, typical of most guarantees, or whether it in fact had a primary, independent obligation to the claimant characteristic of a demand bond. Mr Justice Blair held that it is a question of substance, not form as to whether a guarantor undertakes a primary or secondary liability. However, outside the banking context, there is a presumption against an instrument

being construed as an on-demand bond. In this case, a clause in the guarantee providing for conclusive certification by the claimant of any "rate or amount" under the transaction documentation was not the same as a clause providing for conclusive certification by the claimant as to the "amount due and payable". Thus, a certificate by the claimant would not be conclusive evidence as to liability and the guarantee could not be construed as an on-demand bond.

### Axa Corporate Solutions v National Westminster Bank Commercial Court (Hamblen J), 29 July 2010

A term providing "Terrorism Exclusion (wording to be agreed)" was incorporated in a product and public liability insurance policy and had effect notwithstanding that no wording was in fact agreed. The words "Terrorism exclusion" were words of substance and content on their own – they did

not require the inclusion of some clause which has not been identified; rather, they stated and identified that which was excluded from cover. The fact that the parties then contemplated a fuller expression of the same exclusion in a wording subsequently to be agreed could not

undermine the fact that the exclusion was cast in terms which were capable of both interpretation and application. It is a common feature of the London market that parties contemplate a fuller wording to follow the slip or short-form statement of their agreed terms.



DANIEL BAYFIELD

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**Re Luxe Holding Limited, Ch. Div. (Roth J), 23 July 2010**

The respondent had agreed, under a sale and purchase agreement ("SPA"), to sell its shareholdings in 20 Russian and Ukrainian companies to the applicant for \$690 million. The SPA was governed by English law. The respondents defaulted on the agreement and agreed to sell the shares to another buyer at a higher price. The applicant brought a claim for specific performance and obtained an interim injunction preventing the sale of the shares. However, the sale of the shares had already taken place (for \$850 million) and so the claim for specific performance was unsustainable. The

applicant sought a second injunction, making: (i) a proprietary claim to the proceeds of sale so far as they exceeded the purchase price under the SPA; (ii) a claim to an account of the profits made from the breach of the SPA; (iii) a claim to damages measured by the difference between the contract price and the value of the shares, for which the sale price was the best estimate. The court held that a vendor who broke his contract of sale by reselling to someone else was accountable, by reason of his role as a "quasi-trustee", to the first intended purchaser for the proceeds of the sale. Because the SPA was governed

by English law, they had subjected themselves to the English system of remedies. Those remedies included the "qualified trusteeship" that applied as the corollary in such a case to the availability of specific performance. The respondent was required to hold the proceeds of sale for the benefit of the applicant, subject to allowing for the balance of the purchase price under the SPA. If the applicant established at trial a good claim to the proceeds of sale, it would manifestly suffer significant prejudice if those monies had been dissipated. The balance of justice therefore lay in granting the injunction.

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**Re Phoenix Contracts (Leicester) Limited, Ch. Div. (Proudman J), 24 September 2010**

On a petition brought under section 994 of the Companies Act 2006 ("the 2006 Act") by which the petitioner sought an order that his shares in a company which had practiced in unlawful collusive practices (without the petitioner's direct involvement) be bought by the respondent at a fair value, the petitioner and the respondent being the company's only executive directors and shareholder: (1) the court was satisfied that there had been unfairly prejudicial conduct where the petitioner had been suspended from work by the respondent after he had left an anonymous voicemail with a potential customer of the company's, informing it that the company was being investigated. It was found to be appropriate to consider whether the

petitioner had acted in good faith for the purposes of section 994 of the 2006 Act, by taking into account the matters in section 172. The petitioner was found to have balanced the deleterious consequences of his conduct as far as the company's relations with its major customer were concerned, and the potential for damage to its employees if the contract was not gained, against the company's reputation as a whole and in light of the investigation. The decision as to what promoted the success of a company within section 172(1) was one for a director's subjective judgment, exercised in good faith, and the petitioner could not be criticised for wanting to ensure that the contract was not obtained by the use of collusive

activities, irrespective of whether it meant that the company might lose the contract altogether; (2) in this regard, there were no proper grounds for excluding the petitioner as an employee, or as a director, which was an exclusion prohibited by the shareholders' agreement. It was wholly artificial to draw a distinction between his role as an employee on the one hand and as a director and shareholder on the other. There was prejudice to the petitioner in his exclusion from management which was prejudicial to his interests as a shareholder; and (3) the only fair and proper course was to order that the petitioner be bought out at a price fixed by reference to the value of his shares at the date he was excluded.

**CORPORATE INSOLVENCY** Digested by BLAIR LEAHY AND MARCUS HAYWOOD**In the Matter of Primera Maritime (Hellas) Ltd (Sir Andrew Morritt C) 14 July 2010**

BLAIR LEAHY

LUCY FRAZER

The applicant company applied for permission to serve a winding up petition out of the jurisdiction on the respondent company. The respondent company was incorporated in Liberia and had appointed a liquidator in Liberia whose application for recognition in the UK was pending. The Court had to consider whether it had jurisdiction to wind up the respondent and if so whether it was appropriate to exercise that discretion. The respondent appeared to dispute the making of the order allowing service out. The Court granted the application to

serve out of the jurisdiction. The Court held that there was at least an arguable case that the respondent had a sufficient connection to the jurisdiction by virtue of the fact that its debtors and the creditor entered into agreements with an English law jurisdiction and forum clauses, that given there were transactions which needed to be investigated the claimant would benefit from the order and the claimant was a person over whom the court could exercise jurisdiction being the holder of an English judgment debt. The Court also held that there was a serious

issue as to whether a winding up order should be made in England notwithstanding the fact that the company was already in liquidation. This was so where that liquidator had failed to investigate a number of transactions and the efficiency of the Liberian legal system was in doubt. The Court further held that as the Respondent had appeared and argued against the making of the order the Court may wish to take its submission to the jurisdiction into account at a later date.

**[Lucy Frazer]**

**Mourant & Co Trustees Limited and another v Sixty UK Limited (In administration) and others [2010] EWHC 1890 (Ch) (Henderson J), 23 July 2010**

Where landlords had leased two retail properties to a company, whose liabilities were guaranteed by its parent company, a subsequent company voluntary arrangement ("CVA") proposed by the company's administrators which released the parent from all liability under the guarantee upon payment of the sum of £300,000 was set aside as unfairly prejudicial to the interests of the landlords. The sum of £300,000 was said to represent 100 per cent of the tenants' estimated liabilities to the landlords on a surrender of the leases. The purported effect of the CVA was therefore that the landlords would ostensibly receive full compensation on the basis of a notional surrender of the leases, but would be deprived of any recourse against the parent company as guarantor during the

remainder of the leases. Under the terms of the CVA all creditors, with the exception of the parent company and the landlords of two other closed stores, would be paid in full. The Court held, inter alia, that: (1) It was unreasonable and unfair in principle, in the circumstances of this case, to require the landlords to give up their guarantees. (2) Even if that conclusion was wrong, the sum of £300,000 was inappropriate as, on the evidence, a sum in the region of £1 million was the least that could fairly be regarded as appropriate. (3) The sum of £300,000 was not a genuine estimate but was dictated to the administrators by the parent, who stood to benefit from the release of the guarantees. In this regard, the administrators appeared to have abdicated their responsibilities as office

holders and put forward a proposal for the CVA, which they must have known could not be objectively justified. There was no sufficient justification for the difference between the treatment of the landlords and other creditors. (4) The purpose of the CVA was to compel the landlords to give up their rights for a fraction of their value and to improve the group's negotiating position by forcing the landlords either to accept the CVA or to embark on lengthy and expensive proceedings to set it aside. It was the duty of administrators, or other office holders, in such circumstances to maintain an independent stance, to act in good faith, and only to propose a CVA if they were satisfied that it would not unfairly prejudice the interests of any creditor, member or contributory of the company.

### Re York Gas Limited [2010] EWHC 2275 (Ch) (Newey J), 29 July 2010



TOM SMITH

The partners in the same firm of insolvency practitioners had been appointed as liquidators of two companies within a group of companies. A situation had arisen where one of the companies had a claim against the other company and, in order to address the conflict of interest, the appointment of a further office-holder was sought to

one of the companies to deal with the adjudication of that claim. The further proposed office-holder was a partner in the same firm of accountants. The Registrar refused the application for the appointment of new office-holder as an additional liquidator. On appeal, the court held that the Registrar had been wrong to refuse the application. As a

matter of principle, a conflict of interest could be managed by a division of responsibility between office-holders who were members of the same firm. Moreover, on the facts of this case, there was no reason to think that this solution was not appropriate.

**[Tom Smith]**

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### BNY Corporate Trustee Services v Eurosail-UK 2007-3BL Plc [2010] EWHC 2005 (Ch) (Sir Andrew Morritt C), 30 July 2010



RICHARD FISHER

The requirement 'to take account of contingent and prospective liabilities' in s 123(2) of the Insolvency Act 1986 could not require such liabilities to be aggregated at their face value with debts presently due. Rather, the content of 'taking account of' must be recognised in the context of the overall question posed by the subsection, namely whether the company is to be deemed to be insolvent because the amount of its liabilities

exceeds the value of its assets. That involved consideration of the relevant facts of the case, including when the prospective liability falls due, whether it is payable in sterling or some other currency, what assets will be available to meet it and what if any provision is made for the allocation of losses in relation to those assets. Applying those principles, an English-incorporated issuer of mortgaged-backed securities was not

deemed unable to pay its debts within the meaning of s 123(2) of the Insolvency Act 1986, because the amount of its liabilities, taking into account its contingent and prospective obligation to make payments of principal in dollars and euros in 2027 and 2045, did not exceed the value of its assets.

**[Gabriel Moss QC, William Trower QC, Robin Dicker QC, Jeremy Goldring, David Allison, Daniel Bayfield, Richard Fisher]**

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### Rubin v Eurofinance SA [2010] EWCA Civ 895 Ward LJ, Wilson LJ, Henderson J, 30 July 2010

The Court of Appeal considered the question of whether a default and summary judgment given by the Bankruptcy Court for the Southern District of New York in the course of bankruptcy proceedings taking place under Chapter 11 of the United States Code should be recognised and enforced in England against the Respondents. The Chapter 11 bankruptcy proceedings were in relation to a trust, The Consumers Trust, which had carried on a scheme in the United States. In the course of those proceedings, claims were made against the Respondents, inter alia, seeking to

recover sums disbursed from the Trust to the Appellants prior to the Trust entering into bankruptcy proceedings. The Respondents had not contested the proceedings with the result that default judgment had been entered. The Respondents contested the recognition of the default judgment in England on the grounds that the NY Bankruptcy Court had not had jurisdiction in personam over them in accordance with rule 36 of Dicey & Morris. The Court of Appeal rejected this contention. There were three categories of foreign judgment: judgments in personam,

judgments in rem and bankruptcy judgments. The default judgment in the present case fell within the last category and, accordingly, could be recognised in England under the common law principles which enabled the recognition of, and grant of assistance to, a foreign insolvency proceeding. In the circumstances, it was not necessary to answer the question whether such recognition could also have been granted under the provisions of the Cross-Border Insolvency Regulations 2006.

**[Tom Smith]**

**Lehman Brothers International Europe, Re (Client Money Application) [2010] EWCA Civ 917 (Lord Neuberger MR, Arden LJ, Sir Mark Waller), 2 August 2010**

The Court of Appeal overturned Briggs J on two of four key issues arising in relation to the client money held by LBIE pursuant to the statutory trust imposed by Chapter 7 of the FSA's Handbook, the Clients' Assets sourcebook ('CASS 7'). The four issues were: (1) Is client money held on the statutory trust imposed by CASS 7.7 from the moment of receipt by the firm or only when it is paid into segregated accounts? (2) Do the primary pooling and distribution provisions in CASS 7.9.6R extend to identifiable client money not in segregated accounts? (3) Is the basis for sharing in the pool of client money notionally pooled on the occurrence of a PPE (the 'CMP') the amount which ought to have been segregated for each client or the amount which was in fact segregated for each

client? (4) When does money which the firm owes to a client become "client money"?

In agreement with the Judge, the Court of Appeal held that money which the firm owes to a client becomes "client money" subject of the statutory trust only on appropriation by the firm by segregation and that, in the case of client money received from third parties, the statutory trust bites from the moment of receipt and not only upon subsequent segregation.

In disagreement with the Judge however, the Court of Appeal held that the client money distribution rules – the primary pooling provisions – extended to client money in accounts of the firm other than the segregated accounts and that, following from that, the correct basis for

sharing the pool of client money notionally pooled on the occurrence of a PPE was the so-called claims basis (and not the contributions basis) by which each client's client money entitlement was to be determined by his contractual entitlement to have client money segregated for him irrespective of whether it was.

The Court of Appeal preferred to analyse the statutory trust by analogy to the statutory purpose trust for creditors arising on a company's liquidation and not as a trust only for those beneficially entitled prior to the notional pooling of client money on failure: a "mini liquidation" for clients.

**[Antony Zacaroli QC, David Allison, Adam Al-Attar]**



ANTONY  
ZACAROLI QC



ADAM AL-ATTAR

**In the matter of Portsmouth City Football Club Ltd (in administration); (1) HMRC v Portsmouth City Football Club and (2) Andrew Andonikou. Peter Kubik and Michael Kiely (the joint administrators) [2010] EWHC 2013 (Ch) (Mann J), 5 August 2010**

HMRC applied to revoke or suspend the approval of a CVA. HMRC also appealed against the decision on the amount of its debt allowed for voting purposes. HMRC challenged the CVA on five grounds. HMRC's first argument was that, if the CVA were to stand, the benefits of any claims under section 127 of the Insolvency Act 1986 would be lost to the creditors as the terms of the CVA provided for a voluntary liquidation. HMRC assumed that no winding up order could be made on HMRC's petition if there were a voluntary liquidation. This was based on a fallacy as there was nothing in the arrangement that prevented HMRC from making an application for a winding up order once the administration came to an end. HMRC's second ground was that there were material non-disclosures because the CVA failed to disclose the section 127 claims and Premier League

"parachute payments". This ground also failed. So far as the section 127 recoveries were concerned the Court held that: these recoveries would have been available whether the company went into liquidation now or whether the liquidation followed the exit from administration; the fact that a creditor would have to wait for the end of the CVA (9 months) for these claims had to be weighed against the additional 19.5p dividend that was available from the CVA; and, only a sophisticated creditor would have been able to ascertain the net effect of the section 127 recoveries because, while recoveries would increase the assets, any successful challenge to a payment would increase the value of the claims to be paid from the assets. So far as the parachute payments were concerned, there were issues as to quantum and an issue as to whether

these moneys would ever come to the company in liquidation. This omission was not material because the reference to these claims would have had to be so guarded that there was not a sufficient level of likelihood that anyone's consideration of the merits of the CVA would have been affected. On the third ground, the payment of the football creditors in full, the Court held that even if the CVA had provided for such payment this would not have been unfair to the other creditors because the payments were not made at the expense of the other creditors. The fourth issue was whether it was unfairly prejudicial for the football creditors to be permitted to vote on the CVA. The Court decided that if the football creditors had no interest in the outcome of the CVA this may have had some force; however, they did have an interest as if the CVA



RICHARD  
SHELDON QC



HILARY  
STONEFROST

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## CASE DIGESTS

did not stand the company would go into liquidation and the players' contracts would come to an end. The Court also took into account that HMRC was financially better off as compared with a liquidation. Finally, HMRC sought

to challenge the decision of the Chairman of the meeting that HMRC's claims in respect of image rights and employee benefit trusts were unliquidated and should be valued at £1. This challenge also failed. HMRC

conceded that the nature of the claim should be determined at the date of the administration. On the facts in this case, the Court held that, at that date, the debt was unliquidated.  
**[Richard Sheldon QC; Hilary Stonefrost]**

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### Re Leyland Printing Co Limited (In Administration) and Leyprint Limited (In Administration) [2010] EWHC 2105 (Ch) (Judge Hodge QC), 11 August 2010

Where the claims of creditors in respect of companies in administration had become statute-barred under the Limitation Act 1980, an administrator needed the consent of the relevant shareholders and creditors of the companies whose position may be adversely affected before accepting any of those claims for the purposes of

receiving a dividend from the realisations that had been made during the course of the administration. The Court so held on the application of the administrators of the companies as to the proper treatment of all but one of the creditors' claims. In the instant case, it was not possible to translate the creditors' failure to object or to respond

negatively to the course proposed by the administrator into an agreement to the admission to proof of statute-barred claims. Moreover, the fact that the companies' parent company had not expressed any objection to the application could not be elevated to the status of an agreement on its part to the admission of statute-barred claims.

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### Gold Fields Mining LLC v Tucker and Spratt [2010] EWHC 2307 (Ch) (Arnold J), 6 September 2010

The applicant had lodged a claim in the CVA of a TXU company (EH3) and was also party to proceedings taking place in Delaware involving the same subject matter. EH3 was not a party to those proceedings, but another company in the TXU group was. The applicant's CVA claim had been rejected by the supervisors of the CVA and was proceeding to dispute resolution in accordance with the

provisions of the CVA. The applicant applied for an anti-suit injunction seeking to require the supervisors to procure a stay of the Delaware proceedings pending the determination in the dispute resolution process. The supervisors applied to strike out the application. Held that there was no basis for the anti-suit injunction; the relevant company was not a party to the Delaware proceedings and

the Court would not grant a mandatory injunction requiring the supervisors to seek to procure a stay of the Delaware proceedings since this would require the supervisors to travel outside their statutory functions and their functions under the CVA. Accordingly, the application for an anti-suit injunction would be struck out.  
**[Richard Sheldon QC, Tom Smith]**

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### Bolsover District Council and another v Ashfield Nominees Limited [2010] EWCA Civ 1129 Court of Appeal (Civ Div) (Laws LJ, Lloyd LJ, Gross LJ), 19 October 2010

The presentation of a winding-up petition in respect of sums due under liability orders for unpaid council tax was not within the scope of section 9 of the Limitation Act 1980. The Court of Appeal so held dismissing the appeal of certain companies in respect of the Order of HHJ Cooke. The winding-up petitions were in respect of liability orders obtained for unpaid council tax and some of the liability orders had been made more than six years before the dates of the petitions. The Court of Appeal held that the

appellant companies' liability to pay council tax was created by the Local Government Finance Act 1992 and the Council Tax (Administration and Enforcement) Regulations 1992 ("the Regulations"). Section 9 of the Limitation Act 1980 did not apply as regarded unpaid council tax. Instead, reg.34(3) of the Regulations imposed an equivalent restriction on obtaining an order to enforce liability, which either displaced s.9 of the Limitation Act 1980 or rendered it superfluous. Subject to that restriction, there was

no further time bar on proceedings under a liability order. That approach also avoided creating an inexplicable anomaly in the area of non-domestic rates, as between proceedings by way of a liability order and proceedings by way of a civil action. In each case, the time bar would apply at the outset, at the point of the application for a liability order or issue of a claim form, but would not apply at any later stage because once a liability order had been made, the liability was under that order.

## Gibraltar Residential Properties Limited v Gibralcon 2004 SA [2010] EWHC 2592 (TCC) (Edwards-Stuart J), 19 October 2010



GABRIEL MOSS QC

The claimant brought actions against Gibralcon ("G"), a company registered in Gibraltar, in this jurisdiction. G applied for a declaration that the English court had no jurisdiction to hear the claims because before the commencement of each action G had become the subject of insolvency proceedings in Spain.

Each claim arose out of a substantial property development in Gibraltar. The first action was for an order for repayment of an advance payment made to the defendant and the second action sought a number of declarations arising from the terms of the contract and the termination of G's engagement. The Spanish court had requested that

the English Court abstain from hearing one of the actions, however, the judgment of the Spanish Court referred to the European Union Insolvency Regulation 1346/2000 but made no reference to the Civil Jurisdiction and Judgments Regulation 44/2001 (the "Judgments Regulation").

Whether the actions were governed by the Judgments Regulation would depend on whether they fell within the exemption thereto for "proceedings relating to the winding up of insolvent companies" or "analogous proceedings". The Judge observed that to consider the Insolvency Regulation in isolation was to "assume that which one is seeking to prove: namely, that the proceedings in

question fall within the exception ...".

The Judge held that the Insolvency Regulation and the Judgments Regulation are intended to provide mutually exclusive codes in relation to jurisdiction: the former is confined to insolvency and analogous proceedings, whereas the latter applies to other civil and commercial proceedings. In this case the claims were not insolvency or analogous proceedings and, therefore, the Court in this jurisdiction did have jurisdiction to determine these claims.

There would, however, be no question of enforcement in this jurisdiction as, if the claimant were to be successful, it would lodge a claim in the Spanish insolvency.

**[Gabriel Moss QC]**

## Re Targetfollow Property Holdings Limited (ChD) (David Richards J), 27 October 2010



BARRY ISAACS

The Court considered the ambit of its discretion to grant an administration order, on an application by Bank of Scotland plc. Targetfollow Property Holdings Ltd (the Company) is the indirect owner of a portfolio of properties which include Centre Point, London. The principal amount of the debt due to the Bank had been outstanding for over three months. The Bank, as a qualifying floating chargeholder, applied to the Court rather than appointing administrators out of court, as a secured creditor had asserted that it would challenge an out of court appointment on grounds relating to prescribed consultation procedures contained in an Intercreditor Deed.

The application was opposed by the Company on the grounds that: (i) the statutory purpose would not be achieved, because administration would destroy value in the Company's assets

and because there was a good prospect that ongoing negotiations would enable the Company to continue as a going concern, whereas the evidence did not establish that a rescue of the Company could be achieved in an administration; (ii) the Company intended to pursue substantial claims against the Bank, which would be stifled by an administration order. The Company also opposed the appointment of the proposed administrators on the ground that they lacked objectivity and/or the appearance of impartiality.

The Judge granted the order sought, holding that: (1) there was a real prospect of a better result for creditors as a whole than on a winding up, and it was self-evident that property could be realised in order to make a distribution to the Bank; (2) the Court's discretion should be exercised in favour of granting the order, in circumstances where (i) no creditor opposed the

making of the order, (ii) the Company was unable to trade out of its difficulties without the Bank agreeing to refinance the existing indebtedness, and there had been a breakdown of trust and confidence between the parties, (iii) it was impossible to come to any conclusion on the alleged claims, and (iv) even if the claims did exist, the loss would be insubstantial as compared to the Company's indebtedness to the Bank; (3) although this decision was reached without taking into account the fact that the Bank was entitled to make an out of court appointment, this was nevertheless a relevant factor in the exercise of the discretion. In addition, there existed no basis for rejecting the appointment of the proposed administrators, in circumstances where all parties shared a common interest in achieving the best realisation of assets.

**[Barry Isaacs, Georgina Peters]**

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## CASE DIGESTS

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### Davenham Trust plc v White [2010] EWHC 2748 (Ch) (Floyd J), 1 November 2010

Davenham Trust plc ('Davenham') advanced loans to a company for the purposes of purchasing and developing properties. The interest rate payable on default was 3% per month. The company's indebtedness to Davenham was guaranteed by Mr White, a director of the company, and was secured over the properties purchased by the company. The company defaulted on the loans and entered administration. Davenham served a statutory demand against Mr White under the guarantee. The statutory demand was set aside under rule 6.5(4)(d)

of the Insolvency Rules 1986, on the basis that it was unjust that Mr White should be exposed to bankruptcy proceedings when the administrators had not yet realised the security granted by the company to Davenham. Davenham appealed. The Judge allowed the appeal, on the basis that (i) a creditor has a free election as to whether to realise its security, sue its debtor, or sue its guarantor; (ii) although this principle has not been applied in the context of bankruptcy proceedings in this jurisdiction, it has been so applied in a number of common law jurisdictions, and

these decisions should be followed; (iii) in any event, the existence of a secured remedy against the debtor should not place the creditor in a worse position so far as bankruptcy proceedings against the surety are concerned that if the creditor had no security; (iv) there was a triable issue as to whether the default interest charged by Davenham was a penalty, but the company, and therefore Mr White, would be indebted to Davenham in a sum exceeding £750,000 even if the default interest was a penalty.

**[Barry Isaacs]**

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## PERSONAL INSOLVENCY Digested by GEORGINA PETERS

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### (1) David Emmanuel Merton Mond (2) ClearDebt Limited v MBNA Europe Bank Limited [2010] EWHC 1710 (Ch) (Sir William Blackburne), 9 July 2010



GEORGINA PETERS

The claimant debt solution providers sought declarations that the defendant bank, a creditor of the third party debtor, had breached the terms of the Individual Voluntary Arrangement Protocol when voting against the debtor's IVA proposal. The claimants' position was that the bank, as a member of the British Bankers Association (BBA) which had stated that its members agreed to comply with the Protocol, was bound by the terms of the Protocol, and that the promises each party to the Protocol made were not gratuitous but supported by consideration. The Judge held that: (1) the Protocol did not seek

to set out the terms of any contract by which the IVA provider and creditors, electing to operate the Protocol, were to be bound in law and clearly operated as a voluntary industry standard or code of best practice. The overall impression from its language and terms was that it set out how the IVA provider should go about the process of formulating and advising the debtor on the proposal and how the creditors who had elected to abide by it should treat the debtor; (2) the fact that the Protocol was no more than a code of practice did not mean that the court could not exercise its discretion to grant declaratory relief,

[www.lawtel.com/UK/Document.aspx?AC0120903](http://www.lawtel.com/UK/Document.aspx?AC0120903) "t "\_self" Rolls-Royce Plc v Unite the Union [2010] 1 WLR 318 applied. However, the Judge was reluctant to grant relief where the only parties before him were two connected IVA providers and one member of the BBA; it would thus not be right for the court to pronounce formally on the meaning and effect of an industry-wide guide to good practice; (3) (obiter) it was not correct to construe the Protocol as permitting a creditor, bound by its terms, to vote against an IVA proposal only if he had good reason to do so.

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### Andrea Warwick (formerly Yarwood) v Trustee in Bankruptcy of Clive Graham Yarwood [2010] EWHC 2272 (Ch) (HHJ David Cooke), 13 September 2010

The bankrupt's former wife appealed against an order that a payment of 75% of the net proceeds of sale of the former matrimonial home registered in the joint names of the bankrupt and his wife constituted a disposition which was void

under section 284 of the Insolvency Act 1986. The amount of the disposition was alleged to constitute the difference between the sum (75% of net sale proceeds) paid to the wife and the amount of half the net proceeds (to

which it was accepted she was entitled as joint owner). The issue was whether any relevant disposition occurred before presentation of the petition, by virtue of either (i) an agreement between solicitors in compromise of ancillary

relief proceedings, the contention being that this amounted to a legally enforceable contract for immediate transfer to the wife of an additional 25% of the beneficial interest in the property, or was otherwise sufficient to give rise to a constructive trust to the same effect or to a proprietary estoppel, or (ii) the exchange of contracts for sale of the property on the day before presentation of the petition – also said to give rise to a constructive trust or proprietary estoppel. The court below had decided that, on the authority of *Xydhias v Xydhias* [1999] 2 All ER 386 (CA), although there had been an agreement in the course of ancillary relief proceedings, it was not

enforceable so as to vary the parties' beneficial interests in the former matrimonial home. (In that case, the Court of Appeal concluded that an agreement for the compromise of an ancillary relief application does not give rise to a contract enforceable in law). On appeal the Judge refused to conclude that the passage in the authority relied on was obiter. The Judge did find that, had it been necessary to do so to decide the appeal, he would have accepted the appellant's argument that the decision in *Xydhias* was inconsistent with earlier decisions of the Court of Appeal (and that, in principle, an agreement between parties which satisfies all the normal

requirements for formation of a valid contract may be enforceable notwithstanding that it is made in compromise of ancillary relief proceedings). That notwithstanding, the Judge concluded that on the facts of the case there never was an agreement sufficient to give rise to a constructive trust or proprietary estoppel. In particular, the fact that the agreement did not purport to transfer a beneficial interest in the property but was an arrangement for payment of a sum of money was sufficient to dispose of the constructive trust argument. *Lloyds Bank Plc v Rosset* [1991] 1 AC 107 and *Stack v Dowden* [2007] 2 AC 432 considered.

## PROFESSIONAL NEGLIGENCE

Digested by WILLIAM WILLSON

*Nouri v Ali Marvi & Ors* [2010] EWCA Civ 1107 CA (Civ Div) (Rix LJ, Patten Sir Mark Waller) 14 October 2010



WILLIAM WILLSON

The appellant ("A") appealed against the decision that his claim in negligence against the respondent firm of solicitors ("R") was time-barred. A had been the registered proprietor of a property occupied by a friend ("X"). X, posing as A, instructed R to act for him as vendor and instructed another firm to act for him as purchaser. The completion of the sale of the property to himself was in April 2001. The purported transfer was registered in July 2001. X later sold the property. A did nothing until 2003, when he unsuccessfully issued proceedings to rectify title. He then issued proceedings alleging that R owed him a duty of care

in that they knew that if the sale was not handled competently he could suffer loss and that they had failed to confirm the identity of their purported client. The claim was brought over six years after R had released the forged transfer to X, but less than six years after the transfer was registered. The judge found that the cause of action had accrued in April 2001 because A suffered actual damage on completion of the sale. Held, on appeal, that a cause of action in tort only accrued when a claimant suffered actual damage in the sense of a measurable loss which could be quantified in money terms and made the subject of an award

of damages. The question was whether A suffered a diminution in the value of the property owing to the completion of the fraudulent sale to X. If the property diminished in value at the date of completion, actual damage was sustained by A at that date. If a potential purchaser had been told of the forged transfer in the period prior to registration of X's title that would undoubtedly have led to a diminution in the price that he would have been willing to pay. There were no special facts to suggest that R assumed a continuing duty which survived the completion of the transaction.

*Scullion v Bank of Scotland Plc (t/a Colleys)* [2010] EWHC 2253 (Ch) Ch D Richard Snowden QC) 8 October 2010

The Court determined issues of causation and quantum following its finding that the defendant firm of valuers ("D") breached duties of care owed to the claimant ("C"). C bought a flat to enter the buy-to-let market and the mortgagee ("M") engaged D to value it.

D's valuation report gave an open market value of £353,000 and a monthly rental value of £2,000. The court had held that a competent valuer would have valued the property at £300,000 and would have suggested a monthly rental of about £1,100. C paid £299,800.

On completion he discovered that the flat could not be let for the amount required to meet the mortgage payments. He let it for £1,050 per month, and eventually sold it for £270,000. M had levied various administration charges and other fees on

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## CASE DIGESTS

C, and after the sale a significant shortfall remained due to M. Held that, though D knew or ought to have known that C would be relying on both aspects of the valuation, it had not been engaged to advise him in general terms whether or not he should purchase. C could not recover all losses and was limited to recovering those which were

attributable to the two aspects in which the valuation report was wrong, namely the overstatement of the capital and the rental value. As to the first, he was limited to recovering the difference between the price paid for the property and its true value. In that respect, he had suffered no loss because he paid £200 less than its true value. Further, it

was obvious that M would want its customer to service the mortgage to ensure a profitable, performing loan. C was entitled to recover damages to compensate him for the losses caused by the fact that he was unable to let the flat for a rental that gave him sufficient income to cover his mortgage payments.

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## OTHER CASES

### Public law

R (on the application of EO Efeosaoserema Okuonghae) v Secretary of State for the Home Department, (Lord Justice Sedley), 17 August 2010

The Claimant sought permission to claim judicial review of the Secretary of State's decision refusing to revoke a deportation order against him. The Claimant was a citizen of the US of Nigerian origin who came to the UK as a child. On 10 June 1998 he was granted indefinite leave to remain. Thereafter he was convicted of a number of criminal offences and ultimately he was sentenced to 12 months imprisonment for offences of possessing criminal property under the Proceeds of Crime

Act. The Home Secretary made a deportation order. The Claimant appealed against that decision to the AIT. The Claimant was deported in August 2008 but returned to the UK. The Court of Appeal held that although the decision of the AIT was dubious because that tribunal failed to consider the jurisprudence of the European Court of Human Rights which asserted that the hurdle to be surmounted by a state seeking to deport an individual who had

lived in the home state since childhood was high, that was not relevant to the present application. The AIT decision was history and it was not open to the Claimant to unravel the deportation order having failed to successfully appeal against it. In the circumstances the Claimant was refused permission to appeal the decision of the Administrative Court rejecting his application to commence judicial review proceedings.

**[Lucy Frazer]**

# 3-4 gets a new Chief Executive

William Trower QC introduces 3-4 South Square's new CEO, Caoilinn Hurley

On 22nd November, we welcomed the arrival of Caoilinn Hurley as our new chief executive. She comes to us after 8 years with a national firm of solicitors, where she was employed as commercial director with specific responsibility for managing its marketing and finance departments.

Caoilinn's management background in the professional services sector is complemented by her own professional training as an accountant, and her former posts as finance director of the National Gallery of Ireland and sales and marketing director of the Excel exhibition centre. She also has a BCL from the University of Cork.

In her role as commercial director, Caoilinn was responsible for helping the firm to develop its practice by finding new ways of providing legal services to clients, in particular by innovative use of the internet. She has always regarded it as an essential part of her role to assist both the fee-earning professionals and the organisation from which they work in maintaining the highest standards of client care.

In addition to her core responsibility, which is to ensure the smooth running of Chambers, we all anticipate that Caoilinn will bring a fresh new perspective to the way in which we as practitioners are able to serve our clients. We are sure that her experience, including in particular her expertise in managing a firm of professionals in a changing world, will help us to rise to the challenges which are faced by all sets of Chambers in the present climate. We are also looking forward to working with her on ways in which we can better explain to our clients the full range of expertise which is available here at 3-4 South Square.

We hope that you will have the opportunity to meet Caoilinn over the

course of the next few months; she is very keen to get to know as many clients as possible. Whilst our team of practice managers will continue to manage the practices of individual members of Chambers, we want to try and ensure that

all clients feel able to treat Caoilinn as an essential part of the 3-4 South Square team. Please ask to be introduced when you are next in chambers; if she is free, she would be delighted to meet you.

*William Trower QC*



CAOILIONN HURLEY

# Financial Regulation Reform - An Overview

## Introduction

On 6 June 2010 George Osborne, in a speech delivered at Mansion House, outlined the coalition's plans to revise the regulation of financial products and services.

"What we are preparing is a new system of regulation that learns its lessons from the greatest banking crisis of our lifetime. I can confirm that the government will abolish the tri-partite regime and the Financial Services Authority will cease to exist in its present form. We will create a new prudential regulator, which will operate as a subsidiary of the Bank of England...we will also establish a powerful new Consumer Protection and Markets Authority. It will regulate the conduct of every authorised financial firm providing services to consumers"

The plans are now well underway, with the Treasury publishing a consultation paper in July of this year<sup>1</sup> and draft legislation planned for early 2011<sup>2</sup>.

This article provides an introductory overview of the proposed reforms, questioning both the practicality and sense of separating micro-prudential from conduct of business regulation.

## HENRY PHILLIPS reviews the coalition government's proposed reforms of financial regulation

### Background

In 1997 the labour government reformed regulation of financial services by creating a single, statutory regulator - the Financial Service Authority (FSA) - with a remit covering both "prudential" and "conduct of business" regulation<sup>3</sup> for a full range of financial businesses. The FSA is part of a "tripartite" superstructure of regulation under which HM Treasury is responsible for maintaining the overall legal and institutional framework and the Bank of England is responsible for stability of the financial sector.

In the wake of the financial crisis, the Turner Review was commissioned to conduct a post-mortem and dissect the UK's approach to financial regulation. When the report was published in March 2009, it highlighted that profound failures in regulation left systemic risk to build up unchecked and unnoticed by the FSA, Bank of England and Treasury.

The approach of the FSA was criticised for placing too much faith in market discipline as a tool for containing risk. As

a consequence, regulation tended towards the supervision of individual institutions with insufficient attention being paid to the system as a whole<sup>4</sup>. In addition, the FSA's reliance on senior management and boards of individual firms led, in the view of Lord Turner, to conduct of business issues being focussed on at the expense of micro-prudential supervision<sup>5</sup>.

Following the publication of the Turner Review further criticism was levelled<sup>6</sup> at the regulatory superstructure. The most damning and persistent criticisms<sup>7</sup> were directed towards the absence of a leadership structure, the lack of clearly defined roles and poor avenues of communication within the tri-partite system. As a result, no institution had the responsibility or wherewithal to put together and act upon the various warning signals sounding in the UK and global economies. The evidence given by Professor Geoffrey Wood to the House of Lords Select Committee on Economic Affairs<sup>8</sup> sums up these concerns:

<sup>1</sup> "A new approach to financial regulation: judgement, focus and stability" Cm 7874 (the Consultation Paper") The consultation period ends on October 18 2010.

<sup>2</sup> Para 1.26 Consultation Paper

<sup>3</sup> "Prudential" regulation looks at factors relevant to the stability of a particular institution such as its management and ownership or the adequacy of its financial and other resources. "Conduct of business" regulation relates to how an institution behaves towards its customers and includes, among other things, financial promotions and the provision of advice and information."

<sup>4</sup> "The Turner Review – A regulatory response to the global banking crisis" p 87

<sup>5</sup> Ibid at p 87

<sup>6</sup> In particular, but not exclusively, by the Conservative opposition: see the Conservative party Policy White Paper: "From crisis to confidence: plan for sound banking" published in July 2009

<sup>7</sup> See, for example the House of Lords Select Committee on Economic Affairs, Banking Supervision and Regulation 2 June 2009

<sup>8</sup> Q 48

"On occasions it [the tripartite system] functioned with jaw-dropping incompetence and chaos. It was astonishing how badly their system worked...in the present tri-partite structure it is clear that nobody was actually in charge...So we do need to have a modification in the tripartite system where someone is clearly in charge from the beginning"

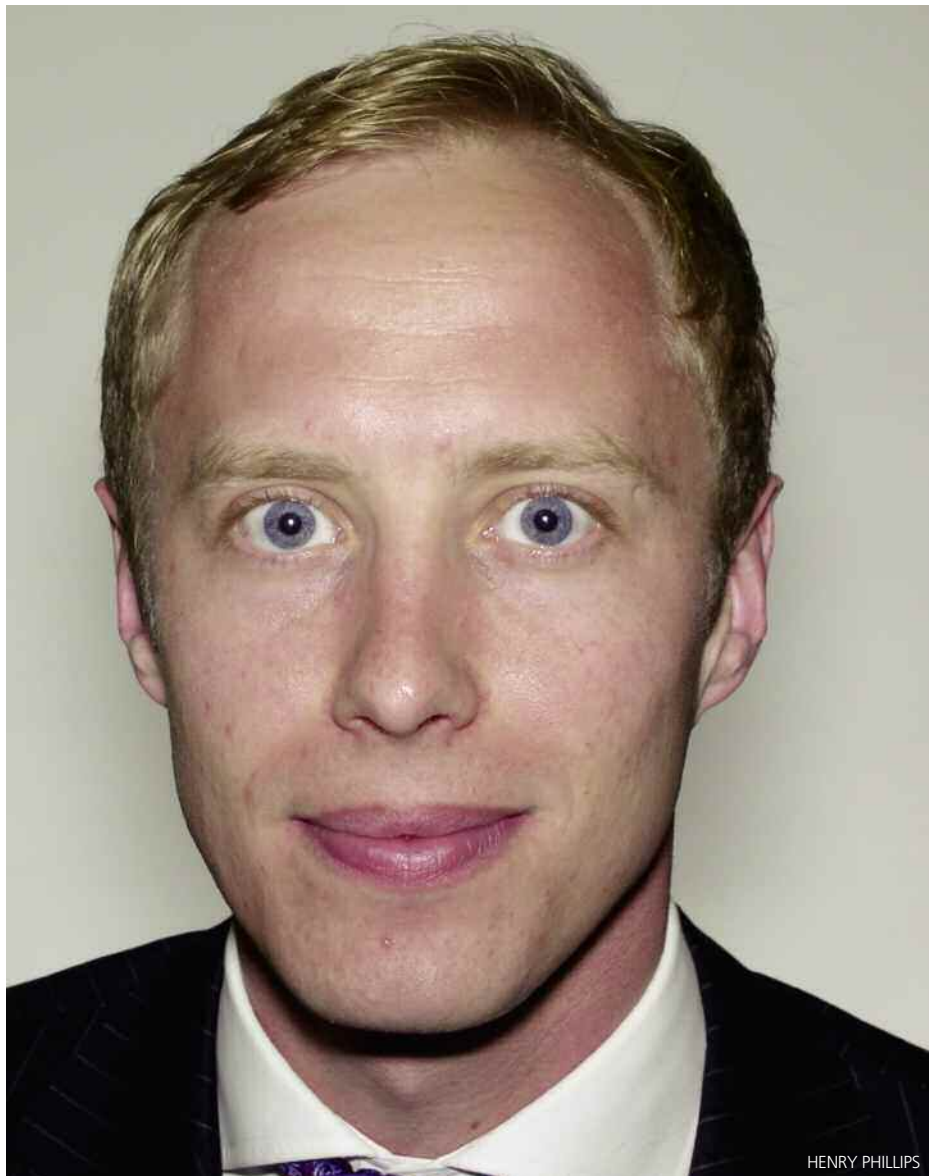
### Outline of the proposed reforms

The coalition's response to these failures has been to pursue fundamental reforms of the regulatory superstructure. The FSA and tri-partite system are to be abolished and greater power and authority transferred back to the Bank of England. These reforms comprise of two core elements.

First, the Bank of England will be put in charge of identifying, monitoring and responding to systemic risks. To these ends, the Government intends to create a Financial Policy Committee (FPC) within the Bank, specifically charged with the task of macro-prudential regulation.

Second, micro-prudential and conduct of business regulation will no longer be undertaken by a single regulatory body, as is currently the case under the FSA. Instead, regulation will be split between two new bodies, the Prudential Regulation Authority (PRA) and the Consumer Protection and Markets Authority (CPMA). As macro-prudential overseer, the FPC will monitor the activities and responsibilities of both the PRA and CPMA for their systemic consequences.

The PRA will be a separate legal entity operating under the auspices of the Bank of England. Its primary objective will be to promote the stable and prudent operation of the financial system through the effective regulation of deposit takers, investment banks and insurers<sup>9</sup>. Under present proposals<sup>10</sup> it will have the power to, inter alia, make rules governing performance of regulated activities by regulated firms, authorise firms to engage in regulated activities and



HENRY PHILLIPS

approve individuals to perform certain controlled functions.

Unlike the FPC and the PRA, the CPMA will not formally be connected to the Bank of England. It will regulate the conduct of all firms – including those subject to supervision by the PRA - in their dealings with retail consumers and, where appropriate, in their dealings in wholesale markets. The proposals indicate<sup>11</sup> that the CPMA will have powers to, inter alia, make rules governing the conduct of financial firms, write the prudential regulatory framework for institutions not regulated by the PRA and authorise individuals in relation to

conduct-related functions.

Although the first legislative draft remains in the pipeline, the coalition is committed to bringing about these changes. There are, however, serious questions to be raised over the practicality and wisdom of dividing responsibility for prudential and conduct of business regulation between two separate bodies.

### The problems with separation

The decision to separate prudential from conduct of business regulation is motivated by the perception that, regulated together, one or the other

<sup>9</sup> Including friendly societies

<sup>10</sup> As detailed in para 3.20 Consultation Paper

<sup>11</sup> See paras 4.14-4.18 of the Consultation Paper

## *It is essential for firms and individuals to be able to identify the relevant regulator of a particular activity*

would become neglected, as the experience of the FSA demonstrates. This is partly because there is a difference in culture between conduct of business regulation, which requires lawyerly analysis of rules, and prudential regulation, which demands an economist's understanding of the impact of business decisions<sup>12</sup>. Under any system reliant upon a single supervisory body, there is a risk that either a lawyerly or an economic approach would dominate, reducing the overall effectiveness of regulation. Separation promotes specialisation, allowing the different approaches to be promoted within their respective institutions.

Theory and practice, however, rarely see eye-to-eye. The practical problems arising from the coalition's policy, along with the view that "co-operation" between the PRA and CPMA can act as a panacea<sup>13</sup>, challenge the soundness of the principle of separation.

Under current plans<sup>14</sup>, it is likely that the Financial Services and Markets Act 2000 (FSMA)<sup>15</sup> will be used as a template for the legal framework of both the PRA and the CPMA. The Government intends to identify which of the powers and functions set out in FSMA relate to prudential and which relate to conduct of business regulation and to allocate them accordingly. Underpinning this aspect of the scheme is the dubious assumption that the FSA's powers are capable of being so divided. Some, such as the FSA's Treating Customers Fairly Initiative, do not fall comfortably into either category. In itself, there is nothing necessarily harmful about a more or less arbitrary allocation at the margins. However, it is essential for firms and individuals to be able to identify the relevant regulator of a particular activity. In this respect, arbitrary designation is

likely to lead to uncertainty and confusion.

These problems could, of course, be answered through adequate publicity of the PRA and CPMA's respective functions and responsibilities but unless the distinction between them is instinctive, the reforms will impose an increased administrative burden on financial institutions through the need to check and ensure that a proposed activity is governed by the relevant regulator.

Even if it is possible to divide the existing FSA rules between the PRA and the CPMA, the style and content of the two rule books are cause for further concern. Unless mechanisms are put in place to ensure that, as the separate rule books develop, they remain co-ordinated and consistent in approach, financial institutions will be compelled to devote resources to reconcile rule book

## *Arguably, the importance of close coordination undermines the principle of separation*

inconsistencies which would not have arisen had the rules continued to be the responsibility of a single authority<sup>16</sup>.

The proposed reforms intend to deal with these and other criticisms by promoting a "significant degree of cooperation and coordination between the authorities to ensure that they avoid duplicating efforts or cutting across each other's work", especially "where action taken by one authority directly or indirectly interacts with the objectives of another"<sup>17</sup>. Arguably, the importance of close coordination undermines the principle of separation. This is especially so in light of the complex and, in places,

contradictory arrangements intended to secure synchronization. By way of example, it is envisaged that the CPMA should consult the PRA before taking any decision which might give rise to a firm-specific stability risk. While laudable in principle, practical implementation requires the CPMA to be able to identify which of its own decisions are likely to generate micro-prudential issues. Given the highly specialised culture and approach envisaged for the CPMA, it is unclear how it will have the expertise to recognize such decisions correctly and quickly.

If, as the Consultation Paper tacitly recognises, conduct of business decisions are capable of engendering stability risks, then a question is obviously raised over the wisdom of separating it from prudential regulation in the first place.

### **Conclusion**

As they stand, the coalition's plans contain a number of significant lacunae. They contain no indication as to whether dual-regulated firms will have to apply for separate passports under EU's passporting

regime, provide no guidance on how the separate roles of the PRA and the CPMA will apply to the operation of consolidated supervision under various EU Directives and, significantly, are silent on whether contracts made with third parties will be enforceable notwithstanding any lack of relevant authorisation. The consultation process will, undoubtedly, provide answers to these and other problems highlighted in this article. The fear is, however, that the stalwart commitment to "breaking up" the FSA may inevitably lead to solutions which increase regulated firms' administrative burdens and result in significant regulatory overlap.



<sup>12</sup> House of Lords Select Committee on Economic Affairs, Banking Supervision and Regulation, June 2009, p.33

<sup>13</sup> See Box 3.B "Co-ordination between the authorities" Consultation Paper

<sup>14</sup> See paras 3.17-3.18 and 4.17 of the Consultation Paper

<sup>15</sup> FSMA informs much of the present regulatory framework

<sup>16</sup> Thanks to Ruth Fox and Michael Raymond of Slaughter and May for this observation, which is entirely theirs.

<sup>17</sup> See Box 3.B "Co-ordination between the authorities" Consultation Paper



# SARAH PHILLIPS RELEASING HER XMAS SINGLE "SAY IT'S POSSIBLE"

On the evening of her mother's death, Sarah Phillips, then 16, picked up her mobile phone and sang Paolo Nutini's "Autumn" into it, without music, but with perfect pitch. Four hours later, her mother Debbie died. What followed was wholly unexpected. The recording was uploaded onto YouTube where it became an internet sensation (with over 430,000 hits to date); it was released as a single and went into the UK Charts. This led to a contract with Strike Back records and her new CD. On 6th December Sarah is releasing her new single "Say It's Possible". It will be available for download on iTunes and all major digital download sites for only 79p. In addition, she is releasing a 4 track CD, that will have on it "Say It's Possible", Sarah's follow up song "Blue Chair", written by her and friend Charlie Mole, Sarah's cover of "Broken Strings" and, "Autumn, the track that started it all. The 4 track CD will be downloadable on iTunes but also available in hard CD form from all Tesco's stores and from Amazon. It's the perfect Xmas stocking filler! All the proceeds of her music go to Debbie Fund. There will be more information soon on: [www.myspace.com/sarahphillipsmusic](http://www.myspace.com/sarahphillipsmusic) and the Debbie Fund website: [www.debbiefund.org](http://www.debbiefund.org).

Debbie Fund was set up in memory of Debbie Phillips, wife of Mark Phillips QC, who died of Cervical Cancer on 11th February 2010. During the progression of Debbie's disease, it became apparent that there was no dedicated research into a drug treatment specifically for Cervical Cancer.

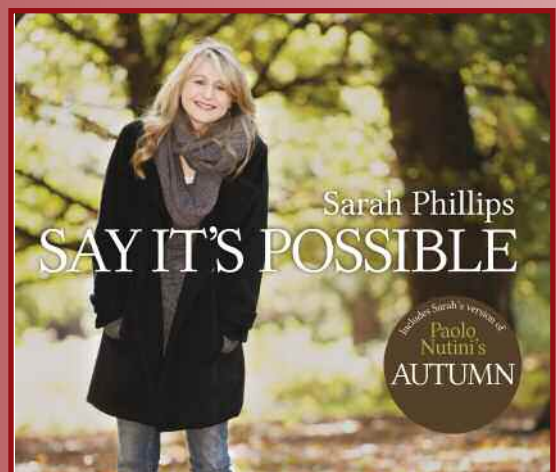
Cervical Cancer is the second most common cause of cancer death in woman worldwide with almost half a million new cases per year. Unlike most cancers, which occur in older age groups, the peak incidence for Cervical Cancer is between 30-39 years. In the UK around 3000 new cases are diagnosed per year and, despite treatment with surgery or a combination of chemotherapy and radiotherapy, a third of women will die of their disease within 5 years; for those with disease which has spread the prognosis is much worse. In most third world countries, almost no women survive, and in some the treatment for advanced Cervical Cancer is merely paracetamol to dull the pain.

Debbie Fund is funding research at the UCL Cancer Institute to identify receptors that can be targeted with an antibody based therapy. Radioactivity will be attached to the antibody so that it can be used like a 'magic bullet' to deliver radioactivity to kill specifically the cancer cells. The UCL Cancer Institute also proposes the introduction of a Cervical Cancer medicinal chemistry group that will, in collaboration with other leading institutions, embark on a programme of discovery for novel drugs focused on Cervical Cancer. New Agents will be subjected to the biological "proof of principle" testing necessary to support the clinical trial.

In the short time since Debbie Fund was set up it has raised over £455,000 in cash and pledges. Research has started at UCL. The UCL team includes Professor Boshoff, Professor Calvert, Professor Chester and Dr Tim Meyer. Also a Senior Researcher, who will work exclusively on the Debbie Fund Project, has been identified and will start work in January 2011. Asked what Debbie Fund hopes to achieve, Sarah said:

"I hope that one day a lady will come up to me and tell me that she had Cervical Cancer, but because of a drug that came out of our research, she survived."

By buying Sarah's records, you are helping to make Sarah's hope a reality. Sarah's EP is now available to be pre-ordered on iTunes and Amazon.



# NEWS in brief

## Insolvency regime “too forgiving” say IPs...

The UK’s insolvency regime is too forgiving to company directors who fail, according to 60 per cent of insolvency practitioners polled in new research. The study of 329 insolvency practitioners (IPs), which was carried out by insolvency trade body R3, also found that 56 per cent of corporate failures were caused by

incompetence or bad management. Respondents also argued that nearly 40 per cent of businesses could have been saved if professional advice had been sought earlier, while over half of respondents felt that company directors should receive mandatory financial education before opening a business.

## SPEED JUSTICE

India’s court system, which is notoriously slow, has cleared more than 100,000 cases in one day of “speed justice” to try to reduced what is believed to be the world’s biggest legal backlog.

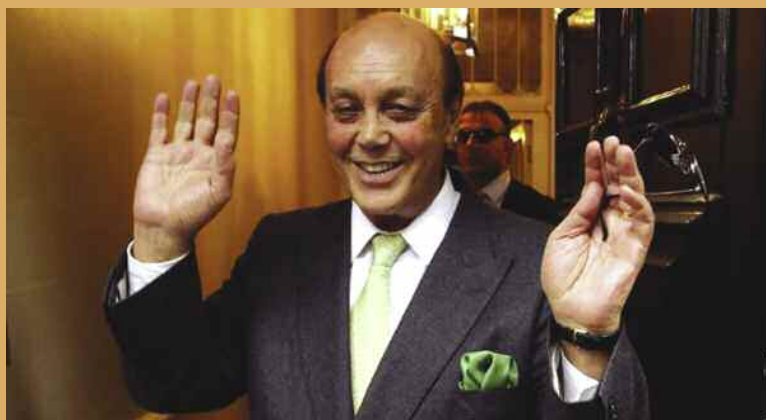
There are more than 31 million legal cases pending in India which one High Court Judge said would take an estimated 320 years to clear. Some cases await a verdict more than four decades

after they were first launched. Several hundred judges, including 260 at the Delhi High Court alone, sat at seven courts to settle an estimated 10,000 cases per hour.

The cases were settled in a “Lok Adalat” or “people’s court”. The “Lok Adalat” system is a voluntary alternative dispute resolution system where both parties agree to an instant verdict.

## Asil Nadir faces £375 million in alleged bankruptcy debts

According to the Daily Telegraph, following his high profile return to Britain, Asil Nadir is facing the threat of further legal action in respect of the £375 million worth of alleged claims made in his bankruptcy proceedings. Nadir has spoken repeatedly about his determination to clear his name nearly two decades after being charged with 66 counts of theft by the Serious Fraud Office. However, it appears the 69-year-old is also facing investigation into his personal affairs, having been never been discharged as a bankrupt.



ASIL NADIR

## NEW APPOINTMENTS

**Robin Godfrey Spencer, QC**, has been appointed a Justice of the High Court with effect from July 14, 2010, on the elevation of Mr Justice Tomlinson to the Court of Appeal, assigned to the Queen’s Bench Division.

**Michael Alan Supperstone, QC**, has been appointed a Justice of the High Court with effect from July 14, 2010 on the elevation of Mr Justice Gross to the Court of Appeal, assigned to the Queen’s Bench Division.

**Keith John Lindblom, QC**, has been appointed a Justice of the High Court with effect from October 2, 2010 on the retirement of Mr Justice David Clarke, assigned to the Queen’s Bench Division.

**Simon Barker QC** has been appointed a Specialist Chancery Circuit Judge, assigned to the Midland Circuit, based at Birmingham Civil Justice Centre, with effect from Wednesday 27 October 2010

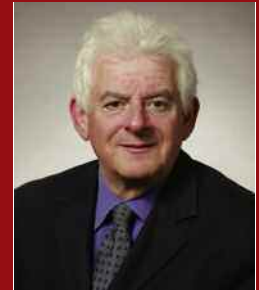
## North South divide lives on...

There is apparently a seventy per cent higher risk of being bankrupt in North. Recent personal insolvency figures have pointed to a distinct North South divide in the number of bankruptcies in the UK. The North of England experienced the highest number of personal insolvencies in 2009, while London experienced the lowest, according to figures released by the Insolvency Service.

There were 38.1 personal insolvencies per 10,000 adults in the North East during 2009, higher than the national average of 31.1 and considerably higher than the lowest level of 19.6 recorded in London. The two locations were also the areas for the highest and lowest rates of personal insolvencies the year before in 2008, showing it is a recurring trend.

# JERSEY LECTURES

On Thursday 16 September 2010 Michael Crystal QC, David Alexander QC and Adam Goodison gave a series of presentations at Bedell Cristin in St Helier, Jersey. Michael Crystal spoke on Judicial Co-operation in Insolvency Matters. David Alexander spoke on Trusts and Insolvency. Adam Goodison spoke on Insolvency Comparative Clawback and Pensions Clawback.



MICHAEL CRYSTAL QC



DAVID ALEXANDER QC



ADAM GOODISON

## Current Insolvency Issues

On Wednesday 8 December 2010 Sweet & Maxwell, in association with 3-4 South Square, will be holding a Current Issues in Insolvency Conference. The Conference will be chaired by Len Sealy and David Milman. Among other things, Gabriel Moss QC and Professor Ian Fletcher will talk on Cross Border Insolvency. Hilary Stonefrost and Georgina Peters will talk on Insolvency and Bank Failures. Marcus Haywood and Blair Leahy will speak on Pre-Packs (including landlord and tenant issues) and Christopher Brougham QC and Adam Al-Attar will give a personal insolvency law update. Bookings can be made on the Sweet & Maxwell website.



CHRISTOPHER BROUGHAM QC



ADAM AL-ATTAR



BLAIR LEAHY



GEORGINA PETERS

## WEST COUNTRY WOES

Exeter based social housing group, Connaught, went into administration in September 2010. Stephen Atherton QC obtained administration orders in relation to various companies within the group on 8 September 2010 and KPMG were appointed as administrators. Some 10 weeks later another building and social housing repairs group, Rok, also based in Exeter, has now collapsed into administration with PwC being appointed as administrators.



STEPHEN ATHERTON QC

## DIARY DATES

2010

8 December 2010.  
Sweet & Maxwell Insolvency Conference  
London

2011

13-15 March 2011.  
Singapore.  
INSOL Conference, Singapore.

26 March 2011

ILA Annual Conference, Oxford.

11-13 May 2011

Newport, Wales, UK (Celtic Manor  
Resort).  
R3 21st Annual Conference.

22-23 September 2011.

Venice, Italy.  
INSOL Europe, Annual Conference.

2012

17-20 May 2012.  
Miami, USA.

## Record personal insolvencies forecast.. .

The UK is still set to be hit by a record number of personal insolvencies this year, despite commentators taking recent falls in quarterly statistics to mean the worst is over. The UK remains on track to see a record 140,000 personal insolvencies this year, according to analysis of personal insolvency statistics by RSM Tenon Tracker.

RSM said there were 3,700 people entering personal insolvency during the third quarter of the year - equivalent to around 366 people a day becoming insolvent during July, August and September.

## ConDem Insolvency reforms dropped

The coalition government has quietly dropped its sweeping insolvency reform after corporate leaders challenged whether the plans would make any difference, it has emerged.

Prime Minister David Cameron had previously championed introducing US-style Chapter 11 rules. Before coming into power he argued that the current regime did not offer enough protection to struggle companies.

However, these efforts were tossed aside earlier this year in favour of a wider focus on the coalition government's spending review.

## Bankrupts denied bank accounts...

Increasing numbers of people in bankruptcy are being denied basic bank accounts, Citizens Advice has claimed. According to the charity, only two out of the seventeen banks that provide basic bank accounts offer them to people who have recently been made bankrupt.

Citizens Advice has argued that banning people in bankruptcy from opening a bank account prevents them from taking control of their finances and can result in people being unable to find work, as most employers only pay wages directly into bank accounts.

## Bankers cautious at TMA conference

Senior level bankers have expressed their surprise at the low level of corporate failures during the credit crunch, but warned of a possible double-dip in two years time. Heads of commercial finance at Barclays, Landsbanki, Lloyds TSB and Royal Bank

of Scotland said at the Turnaround Management Association annual conference that the low levels of insolvencies had meant that they had turned to more business advisors than insolvency practitioners than they would have expected.

## Chambers Bar Awards

We are delighted to announce that 3-4 South Square was awarded Insolvency/Corporate Restructuring Set of the Year at The Chambers Bar Awards that were held at the London Hilton on Park Lane on 30 September 2010. We also congratulate Antony Zacaroli QC, who was awarded Insolvency/Corporate Restructuring Silk of the Year and David Allison who picked up the Insolvency/Corporate Restructuring Junior of the Year award.



DAVID ALLISON



ANTONY ZACAROLI QC

# 3-4 South Square Seminars

3-4 South Square held two insolvency law seminars and receptions at The Old Hall, Lincoln's Inn, London, on Tuesday 21 September 2010 and Monday 27 September 2010.

The seminars, which were chaired by Gabriel Moss QC and William Trower QC respectively, were extremely well attended by both solicitors and insolvency practitioners from London and the Home Counties and deemed a great success by all.

Talks were given by: Lucy Frazer (Domestic issues arising from foreign insolvencies), David Alexander QC & Stephen Robins (Attacking Administrations and Administrators), Hilary Stonefrost (HMRC v Portsmouth FC: Decision of Mann J), Joanna Perkins (Registration of Company Charges and Insolvency), Felicity Toubé (Officeholders' Remuneration), Glen Davis (Service out of Insolvency Process under the 2010 Rules), Lexa Hilliard QC & Adam Al-Attar (Retention and Passing of Title and Trust Claims), Lloyd Tamlyn (CVAs and Landlords with Guarantees), Marcus Haywood (Pre-Packs) and William Willson (Common Pitfalls in Winding Up Proceedings).

If you would like copies of any of the above talks, please feel free to contact one of our Senior Practice Managers, Dylan Playfoot at [dylanplayfoot@southsquare.com](mailto:dylanplayfoot@southsquare.com) and he will be delighted to assist. The talks were also filmed and it is our aim to have them uploaded on to our website, [www.southsquare.com](http://www.southsquare.com) for general viewing at the earliest opportunity.

3-4 South Square would like to take this opportunity to thank John Briggs and his team for all the hard work that went into organising these events.



JOHN BRIGGS



LEXA HILLIARD QC



GLEN DAVIS



LLOYD TAMLYN



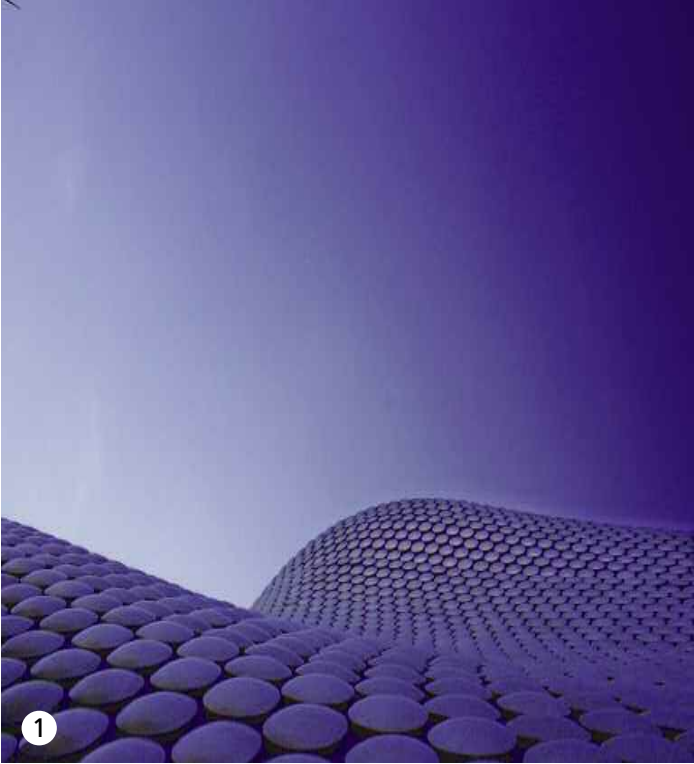
FELICITY TOUBE



LUCY FRAZER

# Insolvency Challenge

Welcome to the November 2010 Insolvency Challenge. This month we have a challenge with a bit of a difference. The challenge comprises eight photographs. You need to identify which city in England and Wales each of the photographs relates to (and yes, some are easier than others). Once you have done that you need to explain the connection between the places in the eight photographs. As always there will be a M agnum of Cham pagne for the winning entry (and if there is more than one, the winner will be drawn from the wig tin). So test your knowledge of England and Wales and send your entries to [kirstendent@southsquare.com](mailto:kirstendent@southsquare.com) please. Closing date for entries is **Monday 17 January 2011**. Good luck! *David Alexander QC*





And the connection is?

### July Insolvency Challenge

The answers to the July 2010 Insolvency Challenge set by Lloyd Tamlyn are as follows: 1 - pawn. 2 - charge. 3 - mortgage. 4 and 8 - flawed asset. 5 and 6 - triple cocktail. 7 - slavenburg. 9 - stoppage. 10 - lien. 11 - garnishee. 12 - pledge. 13 - pignus. 14 - re-entry.

# 3-4 South Square

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Robin Knowles CBE QC	Adam Goodison	Marcus Haywood
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