

# 3-4 DIGEST

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

July 2009

## Stumbling on...

**W**ell somehow or other the country seems to have managed to stumble to July. Mainland Europe is now about to pack up for the summer and it is not long until August when UK plc tends to go quiet for the month. So what has happened since the May edition of the Digest?

Almost everyone will say it has been dominated by politics: MPs expenses, a poor result for Labour in the European and local elections, a new Speaker of the House of Commons (John Bercow) and the fact that Gordon Brown had to re-shuffle his cabinet early to live to fight another day. All a good distraction from the economy!

But the economy stops for no man, albeit that there appears to be a decline in the pace of retailers closing their doors over the last couple of months. But there are still some well-known names that have failed to avoid an insolvency procedure. For example, Birthdays - the greetings card chain with more than 300 stores - went into administration in May. As did Cobra beer. And some football clubs have found themselves in trouble. As has Setanta, the Irish pay-TV broadcaster. But it is the vehicle manufacturers who stand out as the ones who have had the most horrid time recently with LDV Vans going into administration in the UK and GM going into Chapter 11 in the United States in what was described as one of the biggest bankruptcies ever.

Other news: Landlords are apparently feeling the pain of so many retail collapses over the last six to nine months; R3 have said that over a million people are insolvent in the UK; Director disqualifications are said to be at record levels; The OECD has said that Britain is in a "sharp

recession"; that there will be no growth in Britain in 2010 and that unemployment will rise to 10 per cent; The Wrekin £11 million ruby appears not to have been a ruby after all; Oh and probably not surprisingly there has been more disquiet about pre-packs!

There is one rather nice piece of news however: Woolworths is back, albeit as an online shop, and will apparently stock most of the goods seen in the former stores including the much-loved pic-n-mix sweets.

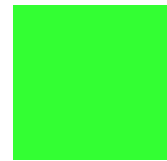
So what do we have for you to take with you as part of your summer reading? There are articles by Tom Smith on anti-suit injunctions in insolvency proceedings, Sandy Shandro on Chapter 15 of the US Bankruptcy Code and Glen Davis on the workings of the Insolvency Rules Committee.

The usual case digests are at pages 5 to 13, News-in-Brief is on pages 24 and 25 and the latest - really rather different - insolvency challenge is at page 26.

All of us at 3-4 South Square hope that you have enjoyed the first year of the new look Digest. The next one will be in the autumn. As always, if you find yourself reading this somewhere and you are not on our circulation list and would like to be, all you have to do is send an email to [kirstendent@southsquare.com](mailto:kirstendent@southsquare.com) asking to be added and we will do our utmost to ensure that you get the next issue. And if there is any topic that you would like an article from a member of Chambers to cover in a future edition of the Digest do let me know by email to [davidalexander@southsquare.com](mailto:davidalexander@southsquare.com)

In the meantime we wish everyone a pleasant summer.

*David Alexander QC - Editor*



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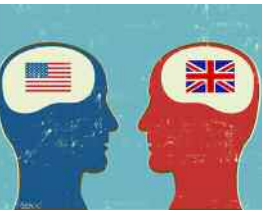
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# Anti-suit injunctions in aid of insolvency proceedings

The recent court of appeal decision regarding Oilexco confirms the ability of the English court to grant anti-suit injunctions in support of its own insolvency proceedings says **Tom Smith**

The remedy of an anti-suit injunction, granted by the English Court to restrain a litigant from pursuing proceedings in a foreign state, has in recent times been the subject of a considerable amount of development and in the context of international commercial litigation is now a familiar remedy. In contrast, there has been relatively little use and development of the remedy in the context of insolvency proceedings. Whereas in the context of normal litigation, the purpose of the remedy is usually to prevent a claimant from litigating his claim in another forum, in the context of insolvency proceedings the purpose of the remedy is usually to prevent a claimant from obtaining a greater share of the debtor company's assets than those to which he would be entitled to in the English insolvency.

In a recent decision, *Re Oilexco Northsea Limited, Harms Offshore AHT "Taurus" GmbH & Co Kg v Bloom and others*, 26 June 2009, the Court of Appeal has affirmed the availability of the anti-suit injunction as a remedy available in aid of English insolvency proceedings to prevent a creditor from proceeding against the debtor company's assets abroad and, indeed, to require a creditor to disgorge assets which it has obtained. The Court of Appeal also confirmed that this jurisdiction applies as much in administration as it does in liquidation.

The background to the case is interesting and also contains a warning for those cases where a company is placed into insolvency proceed-

ings in England but carries on business in US dollars so that its payments have to be cleared through New York. The debtor was an oil exploration company which carried on activities in the North Sea. In the course of these activities, the company incurred liabilities to two German companies under charter-parties for the hire of two vessels. The company went into administration in England at the start of the year.

The two German creditors were not content to prove their claims as unsecured, pre-administration creditors and instead made an application to the District Court in New York and obtained orders making "Rule B" maritime attachments attaching to assets of the company in New York. There were in fact no assets of the company in New York at the time the orders were made. However, since the company carried on business in US dollars it was necessary for its payments to be cleared through New York. The Administrators were not informed of the attachments so when in due course they attempted to pay a post-administration supplier the attachments, which had been notified to the clearing banks in New York, had the effect of freezing the payment.

The attractiveness of the "Rule B" procedure from the creditors' perspective is easy to see. It required no connection with New York other than that the company carried on business in US dollars. In principle, the remedy is available where a creditor has a "maritime claim", the defen-

dant is not within the district and the defendant either has or can be expected to have assets in the jurisdiction. Further, since the orders were not notified to the Administrators, as the Court of Appeal pointed out, they effectively created a trap into which the Administrators then fell when a payment was made through New York to pay the post-administration creditor. The popularity of the "Rule B" remedy has meant that large numbers of cases have been commenced in New York: on some reports up to a third of all claims commenced in the Southern District of New York in recent months have been "Rule B" cases.

Once they became aware of the attachment the Administrators adopted a twin-track strategy of seeking an injunction from the English Court requiring the attachments to be vacated and of applying for recognition of the English administration in New York under Chapter 15 of the Bankruptcy Code and for consequent relief from New York vacating the attachments. At first instance, the English Court granted the relief sought; the creditors then appealed to the Court of Appeal.

## Paragraph 43(6)

As a matter of logic, the first question was whether the terms of paragraph 43(6) of Schedule B1, which prevent the commencement or continuation of legal process after a company has gone into administration, applied to prevent the two German creditors from having commenced the attachment proceedings in New York. There was no authority on this point in the context of paragraph 43(6). However, in *Re Oriental Steam Company (1874) LR 9 Ch App*

557 and *Re Vocalion (Foreign) Limited* [1932] 2 Ch. 196 the Courts had held that the equivalent provision in winding up (now Section 130(2)) applied only to domestic process. Given the presumption against extra-territoriality and the fact that Parliament could have legislated to make paragraph 43(6) explicitly extra-territorial if it had so wished, the Court of Appeal considered that paragraph 43(6) was limited in the same way to domestic process, although it did not express a final conclusion on the issue.

This conclusion may well be right, although it is possible to conceive a distinction between a creditor who is not subject to the English jurisdiction and a creditor who is already subject to the English jurisdiction. In the latter case, it is less easy to see why paragraph 43(6) should not apply to prevent the creditor proceeding against the company's property abroad. In the *Oilexco* case, it could be said that the German creditors were already subject to the English Court either because of the effect of the EC Regulation on Insolvency Proceedings or because they had come into and proved in both the administration and the associated CVA (cf. *Re Tait & Co* (1872) L.R. 13 Eq. 311).

### Jurisdiction to grant injunctive relief

However, the Court of Appeal considered that there was a clear jurisdiction to grant injunctive relief in aid of English insolvency proceedings to prevent a creditor from proceeding abroad, or to require it to disgorge assets obtained abroad, where the circumstances required such relief to be granted.

The existence of this jurisdiction has been long established in the case law in relation to liquidation, although there are surprisingly few examples of it being exercised. The existence of the jurisdiction was recognised in *Re Oriental Inland Steam*, in *Re Vocalion* (although the judge refused to exercise it on the facts) and by Millett J in *Mitchell v Carter, Re Buckingham International plc* [1997] 1 BCLC 673. The present

## The Court of Appeal considered that there was a clear jurisdiction to grant injunctive relief in aid of English insolvency proceedings

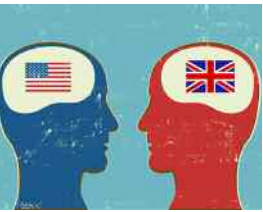
case, however, represented an extension of the jurisdiction in two respects: first, the insolvency process was administration rather than liquidation and, secondly, the creditors were not resident in England. Neither point appears to

have caused the Court of Appeal significant difficulty.

As to the first, it is true that liquidation imposes a trust over a company's assets and administration (at least prior to the giving of notice of intention to distribute) does not. It is



*Tom Smith*



also true that substantial parts of the reasoning in the early authorities as justifying the existence of the jurisdiction refer to the existence of the liquidation trust. However, the better view is that the basis for the grant of an injunction restraining a creditor from proceeding abroad is that the English Court is seeking to uphold the integrity of its own process i.e. the insolvency process in England. This consideration applies equally to administration as it does to liquidation and the Court of Appeal was clearly right to regard it as artificial to attempt to draw a distinction between the two insolvency processes for these purposes.

As to the second point of distinction, Millett J noted in *Buckingham* that in all the cases where the Court had exercised the jurisdiction the creditors in question were resident in England. In this case, the creditors were resident in Germany. However, it could properly be said that the English Court had jurisdiction over

the creditors either by virtue of the EC Regulation (under which any judgment of the English Court would have been recognised as against the creditors in Germany) or because they had come into the English insolvency by proving in the administration and CVA.

#### Discretion

The main question in any case, however, is whether the facts justify the exercise of the jurisdiction. On this, it is clear from the Court of Appeal's judgment that considerations of comity are extremely important. On the other hand, the Court of Appeal also plainly considered that in circumstances of an English administration of an English company the foreign court (in this case, the US Bankruptcy Court) would be assisted by having its views. In the *Oilexco* case, the Court of Appeal therefore upheld the granting of the injunctive relief, even though there was also a pending application by the

Administrators to the US Bankruptcy Court for relief.

The facts of the *Oilexco* case were, however, exceptional in that the creditors had sought to interfere with the payment of a post-administration creditor in circumstances where the Court clearly thought that the conduct of the creditors had been unconscionable. A more difficult set of facts might arise where a creditor seeks to attach to property which is already in the foreign country at the date of the administration order. Where the relevant foreign country has a mechanism for recognising the English insolvency (such as Chapter 15), the appropriate course may in these circumstances be for the office-holder to seek relief from the foreign court. However, where this possibility is not available, then in principle the English Court ought to grant injunctive relief to uphold the integrity of the English insolvency.

#### Footnote

The footnote to the judgment is the Court of Appeal's warning to office-holders about making US dollar payments through New York in circumstances where the English insolvency has not been recognised in New York under Chapter 15. It would, however, be unfortunate if office-holders had to go to trouble and expense of having an English proceeding recognised in New York in circumstances where the company has no link with New York other than it makes payments in US dollars. But the only other solution would be for the New York Court to restrict the availability of the "Rule B" remedy. There is some evidence that New York Court are becoming more resistant to the use of "Rule B" attachments: where a foreign insolvency is recognised in New York under Chapter 15 it appears that the Bankruptcy Court will now grant relief vacating any "Rule B" attachments granted after (and possibly also prior to) the opening of the foreign proceedings: see *Re Atlas Shipping A/S*, 27 April 2009.



*William Trower QC (left) and Tom Smith (p3) appeared for the Administrators in Oilexco.*

# case digests

Edited by Hilary Stonefrost

The cases digested cover a wide range of issues. The approach to ascertaining the "centre of main interest" of a company has come before the Court in a contested hearing before Mr. Justice Lewison in *Re Stanford International Bank Ltd*. This is an important judgment, summarised in the Corporate Insolvency section of this digest, which clarifies the approach to the much discussed and debated question of COMI. In addition, of particular note is the decision in *Nortel Networks SA* in which administrators applied to the Court for directions in relation to the opening of secondary proceedings. A report of the *Cesc Fabregas* disciplinary hearing is also on page 13.



Hilary Stonefrost

## BANKING AND FINANCIAL SERVICES

Digested by Jeremy Goldring and William Willson

### **Cukurova Finance International Ltd (2) Cukurova Holding AS v Alfa Telecom Turkey Ltd [2009] UKPC 19 PC (BVI) (Lord Hope, Lord Scott, Lord Walker, Baroness Hale, Lord Mance), 5 May 2009**

The appellant companies ("A") appealed against a decision of the BVI Court of Appeal that the respondent company ("R") had enforced its share charges by a valid appropriation. The remedy had been introduced by article 4 of EC Directive 2002/47 ("the Directive"), put into effect in the UK by the Financial Collateral Arrangements (No 2) Regulations 2003 ("the Regulations"). Shares in A had been provided as security for a loan under two sets of equitable mortgages, one governed by BVI law, the other by English law. R claimed the English share charges

were enforceable. The court determined whether the power of appropriation had been validly exercised. A said the power could only be exercised where R became the registered holder of the shares. The judge agreed, and held that it was not enough to obtain full equitable ownership free of any equity of redemption. The BVI Court of Appeal reversed this, holding that the judge had misapplied the notion of an autonomous EC meaning of 'appropriation' as requiring uniformity throughout the EC. The Privy Council held that the judge had overstated the

importance of giving 'appropriation' an autonomous EC meaning. The Directive did not have direct effect. In transposing it into their national legal systems, Member States would be expected to refer to legal concepts familiar in their own legal systems, so long as they did not depart from the general concept of 'appropriation' in the Directive. The BVI Court of Appeal had been right to adopt a pragmatic interpretation, and to conclude that it was not necessary for the collateral-taker to become registered holder of the shares. Any other interpretation of the Regulations would mean that the collateral-taker did not have the means of rapid and non-formalistic enforcement which the Directive called for.



Jeremy Goldring



William Willson

### **Jefferies International Ltd v Landsbank Islands HF [2009] EWHC 1217 (Comm) QBD (Comm) (Cooke J), 28 April 2009**

The applicant ("A"), an Icelandic bank with a London branch, applied for a stay of the proceedings brought against it by the respondent ("R"). R had entered into a Global Master Securities Lending Agreement under which A had lent securities to R against the transfer of collateral. The agreement contained an English law and jurisdiction clause. After the collapse of A, R sent a notice of default and terminated the agreement. A sought a stay of R's proceedings on the basis

of comity, and submitted that the court should order a stay against an undertaking that A would agree to lift it if the dispute between the parties was not resolved through the administrative claims process of the Icelandic insolvency regime. It was held that the parties had agreed that any dispute should be resolved by the English courts and that any stay which had the effect of depriving R of resort to the courts of the agreed jurisdiction would be unjust (*Mazur Media Ltd*

*v Mazur Media GmbH* [2004] EWHC 1566 (Ch) applied). A could only succeed if some exceptionally strong grounds could be found which did not have the effect of depriving R of its chosen jurisdiction or bringing in forum non conveniens arguments by the back door. The weight of authority suggested that the court was deprived of its common law discretion to stay proceedings in favour of another jurisdiction on forum non conveniens grounds where the EC Regulation applied. **[Michael Crystal QC; Gabriel Moss QC]**



Michael Crystal QC



## case digests

### **Parabola Investments Ltd & Ors v Browallia Cal Ltd (formerly Union Cal Ltd) & Ors [2009] EWHC 901 (Comm) QBD (Comm) (Flaux J), 6 May 2009**

The claimant (“C”) claimed damages for deceit against an investment broker (“D1”) and its employee (“D2”). C was the corporate vehicle for the trading activities of its ultimate beneficial owner (“G”). C dealt in small-cap shares, using D1 as its broker. D1 admitted that D2 had fraudulently misrepresented to G that the trading conducted was profitable, and that it had also misrepresented the amount of funds held in the account. C claimed not only the capital loss of the amount by

which the trading fund was depleted, but also loss of profits which it would have made on alternative trades during the period of the fraud (right up until trial). D1 and D2 argued that C could not prove that it was induced to trade by D2's deceit, and that the claim for loss of profits until the date of judgment was too speculative. It was held that, as a result of the continuous misrepresentations as to the profitability of the trading and the amount of money in the account,

C and G carried on trading in circumstances where they would otherwise have ceased to do so. That was sufficient inducement. Lost profits were not only recoverable in deceit where it could be shown that there was an alternative transaction which was necessarily profitable, nor did a claimant have to identify a specific alternative transaction into which he would have entered but for the fraudulent misrepresentation. There was no reason in principle why lost profits should not be recoverable as damages for the entire period up until the trial (Smith New Court Securities v Citibank [1997] AC 254 applied).

### **Karafarin Bank v Gholamreza Mansoury-Dara [2009] EWHC 1217 (Comm) QBD (Comm) (Teare J), 4 June 2006**

The applicant (“A”) applied for a stay on the grounds that there were concurrent proceedings in Iran. The respondent bank (“R”) had sued in England on 13 cheques on which it claimed D was liable under (the governing) Iranian law. Unknown to A, R had already issued proceedings in Iran in relation to 4 of the cheques (and obtained judgment). In his absence, A had also been convicted of criminal offences in Iran, and had only discovered the civil and criminal judgments in Iran as a result of

disclosure in the English proceedings. A submitted that (1) it was an abuse of process for R to sue on all 13 cheques when it had already obtained judgment in Iran in respect of 4 cheques; (2) there should be a stay because the Iranian proceedings were *lis alibi pendens*; (3) alternatively, there should be a stay by virtue of section 34 of the Civil Jurisdiction and Judgments Act 1982 (“CJJA”). It was held that it was an abuse of process for a claimant to pursue a defendant for the same debt or

damages in two jurisdictions. Section 34 of CJJA gave statutory force to that principle, but also recognised that further proceedings might be commenced in England if the judgment obtained abroad was not enforceable in England. When the English proceedings were commenced the Iranian judgments could not be enforced in England because they were obtained in A's absence and where he had not submitted to the jurisdiction. R therefore had to issue fresh proceedings in England, and this was not an abuse of the process as it was permitted by CJJA.

## CIVIL PROCEDURE

Digested by Tom Smith

### **Icebird Limited v Winegardner, Privy Council, 2 June 2009**

Proceedings commenced by a claimant had been subject to inordinate delay in circumstances where no satisfactory excuse for the delay had been offered. The judge struck the proceedings out on grounds of inordinate and inexcusable delay and on grounds of severe prejudice to the respondent. The correct

approach to an application to strike out on grounds of want of prosecution remained *Birkett v James* [1978] AC 297: a strike out could be justified where there had been intentional and contumelious default or there had been inordinate and inexcusable delay which gave rise to a substantial risk that a fair trial would

not be possible or had caused or was likely to cause serious prejudice. In the present case, there had been inordinate and inexcusable delay but by itself this did not justify the striking-out of the proceedings. There was no reason why the delay should prevent a fair trial of any of the reasons given and accordingly the appeal against the strike-out would be allowed.



Tom Smith

**Supperstone v (1) Hurst (2) Hurst, Bernard Livesey QC, 9 June 2009**

A trustee in bankruptcy applied against the former bankrupt (B) and his wife for an extended civil restraint order ("ERCO") pursuant to Rule 3.11 of the CPR 1998 and the accompanying practice direction. In granting the order, the Court held that, in circumstances where B had conducted litigation in the name of (and on behalf of) his wife on numerous occasions, it was

permissible in exercising the discretion to grant relief to take into account the fact that an ERCO against B would be unlikely to be effective unless relief was also granted against the wife. As such, an ERCO could be granted against the wife in order to ensure the effectiveness of the relief granted against B, which order would continue for an identical period to that granted

against B. However, the inherent jurisdiction of the Court to grant an ERCO did not extend to curtailing, by way of injunction, B or the wife's right to correspond with the trustee or his representatives in any manner which they thought fit. Any remedy for pure harassment (if proven) would be likely to be founded on the Prevention of Harassment Act 1997 and not the Court's inherent jurisdiction to regulate its own process.

**[Richard Fisher]**



Richard Fisher

**Pickthall v Hill Dickinson LLP Court of Appeal (Laws, Thomas LJ, Mann J), 11 June 2009**

A former director of a company considered that he had a claim in negligence against his former solicitors. The director was adjudged bankrupt with the consequence that the benefit of the claim formed part of his estate in bankruptcy, albeit that the claim was not pursued by the trustee. Both

the bankrupt and the trustee were discharged. The former bankrupt then commenced proceedings against the solicitors. This was done prior to obtaining an assignment of the claim from the Official Receiver, in order to prevent the relevant limitation period from expiring. The assignment was sub-

sequently obtained. However, the proceedings when they were issued were an abuse of process since the claimant had known that he did not have standing to pursue the claim. Further, the Court ought not to have permitted the proceedings to be amended to plead the subsequent assignment. The proceedings would therefore be struck out as an abuse of process.

## COMPANY LAW

**Re Carson Country Homes Ltd [2009] EWHC 1143 (Ch) (Davis J), 1 May 2009**

Following the appointment of joint administrators by the bank pursuant to a debenture, C a director of CCH, alleged that his signature on the debenture was forged. The joint administrators sought directions in relation to the validity or otherwise of their appointment. Davis J found as follows: (1) The signature on the debenture was not the signature of C; (2) C did not give his fellow director, J, actual authority to sign the debenture on his behalf; (3) A forged document was not a nullity for all purposes. In the present case, J had been clothed by

CCH with ostensible authority to warrant to the bank that all formalities relating to the approval and execution of the debenture had been duly complied with and that the signatures could be relied upon as genuine; (4) Pursuant to section 44 of the Companies Act 2006, in favour of a purchaser as defined, a document which purports to have been signed in accordance with section 44 is deemed to have been duly executed; (5) Accordingly, the debenture was valid pursuant to section 44 of the Companies Act 2006 as (i)

the debenture purported to be signed by two authorised signatories; (ii) the bank was a purchaser within the meaning of section 44(5) as it had exercised forbearance from taking any enforcement steps against CCH; (iii) section 44 operated so as to validate documents which are forgeries in circumstances where the person entering the forged signature had ostensible authority to warrant to the bank that all formalities relating to the approval and execution of the debenture had been duly complied with and that the signatures could be relied upon as genuine.

**[Hilary Stonefrost;  
David Allison]**

Digested by Daniel Bayfield



Daniel Bayfield



## case digests

### **Stewart Ford v Polymer Vision Ltd [2009] EWHC 945 (Ch) (Blackburne J), 6 May 2009**

The applicant applied for summary judgment in his claim against the respondent company for declarations as to the validity of a debenture and an option agreement. He succeeded in relation to the debenture, notwithstanding that the meeting at which the resolution was passed to grant it was not validly convened, but he failed in relation to the option agreement (which

was similarly an agreement entered into pursuant to an invalid resolution by the respondent company to enter into it). The applicant relied upon section 40 of the Companies Act 2006 which provides that: In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation

under the company's constitution. For section 40 of the Companies Act 2006 to apply, it was necessary that the person dealing with the company had to deal in good faith. Good faith is presumed unless the contrary is shown. On the evidence, there was no evidence to rebut the presumption of good faith in relation to the debenture but there was such evidence in relation to the option agreement, which required the claim that it was valid to be tried.

### **Enviroco Ltd v Farstad Supply A/S [2009] EWHC 906 (Ch) (Gabriel Moss QC), 22 May 2009**

The court was required to determine whether an indemnity contained in a charterparty extended to the claimant, a contractor who had been engaged to clean the oil tanks of a vessel owned by the defendant and chartered to a third party. The charterparty defined "affiliate" as covering a situation in which the relevant companies were each subsidiaries of the same parent. The term "subsidiary" was, by cross-reference, given the meaning assigned to it by section 736 of the Companies Act 2006. The claimant and the third party were each subsidiaries of the same parent company that had pledged its shares in the claimant to a bank.

The bank's nominee had become the registered holder of the shares, but the parent company retained its voting powers. The key issue was whether the indemnity applied to the claimant as an "affiliate" of the third party. The claimant succeeded on the basis that, with reference to section 736A(7), a holding company did not cease to be such simply because it pledged its shares in a subsidiary as security, even if the security required that the shares were registered in the name of the security holder. Treating the rights to vote and appoint directors as being held by the provider of the security also required it to be treated as the

registered member; the alternative made no sense. In so holding the court followed the Court of Appeal's approach in *Brett v Brett Essex Golf Club Ltd* (1986) 52 P & CR 330 that when a section of a statute was incorporated into a contract by cross-reference, it was treated as having been set out in the contract and its meaning was to be taken from that context, which meaning might not be the same meaning as the section had in other contexts. Further, where the express terms of the section were not, on their literal terms, wide enough to prevent absurdity, the words could be given a non-literal meaning (*Antaios Compania Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191). **[Gabriel Moss QC]**



*Gabriel Moss QC*

### **Re Southern Counties Fresh Foods Ltd [2009] EWHC 1362 (Ch) (Warren J), 17 June 2009**

Following the court's judgment on an unfair prejudice petition, requiring the first respondent to buy out the petitioner's shares in the company, the court was asked to admit new expert evidence and evidence of fact to assist on the question of the price to be paid for the shares. The court held that, in relation to applications to

adduce evidence after a trial, unfair prejudice petitions are in a class of their own and that the question whether to admit further evidence raises issues of fairness, justice and of proportionality. The Judge was not being asked to admit new evidence to reverse findings which he had already made; the new evidence was

sought to be adduced to fill some of the gaps which the Judge had identified, the purpose being to enable him to achieve as fair a result as possible as between the parties as regards the purchase price of the shares. The correct approach was to address each proposed piece of new evidence aspect by aspect and admit further evidence if to do so would further the overriding objective to deal with the case justly.

# CORPORATE INSOLVENCY

Digested by Blair Leahy and Marcus Haywood

## Re Golden Key Limited (in receivership) [2009] EWCA Civ 636, Court of Appeal (Master of the Rolls, Arden, Lloyd LJ), 30 June 2009

The Company, which was an SIV investing in residential mortgage-backed securities, had issued CP to investors. In August 2007 the Company had encountered financial difficulties and subsequently went into receivership. On 23 August 2007 a Mandatory Acceleration Event had occurred in relation to the Company and on 24 August 2007 notice of a Mandatory Acceleration Event was given by the Security Trustee. Those creditors with later maturing CP ( the

Longs ) contended that the effect of the notice was to postpone the date for payment of all outstanding CP to the Acceleration Redemption Date (24 September 2007) at which time all CP would be paid out *pari passu*. Those creditors with CP maturing on 23 and 24 August 2007 ( the Shorts ) contended that mandatory acceleration did not apply to CP which matured prior to the Acceleration Redemption Date, or at least did not apply to the CP maturing

prior to the date on which the notice was served by the Security Trustee, and that this CP therefore enjoyed priority. Held that the service of notice of a Mandatory Acceleration Event did postpone to 23 September 2007 the date on which all outstanding CP were to be due for payment, except for that CP with maturity dates which fell on or before the date on which that notice was served. Accordingly, the payment dates for the CP held by the Shorts was not postponed.

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



Robin Dicker QC



Barry Isaacs

## Re Stanford International Bank Ltd [2009] EWHC 1441 (Ch) (Lewison J), 3 July 2009

The Court considered rival applications under the Cross-Border Insolvency Regulations 2006 by: (i) the Antiguan Liquidators of Stanford International Bank Ltd ("SIB"), a company incorporated in Antigua, for recognition of the Antiguan liquidation of SIB; and (ii) the receiver appointed by the United States District Court for the Northern District of Texas over the assets worldwide of SIB, for recognition of that receivership. Both applications alleged that SIB's centre of main interests was in the jurisdiction where the applicant had been appointed. Both applications sought an order entrusting the applicant with the distribution of SIB's assets located in Great Britain pursuant to Article 21(2) of the Model Law. The US Receiver also applied for similar relief in relation to his appointment over other Stanford entities and, in every case, recognition at common law in the alternative. The Court approached the question of where SIB had its COMI on the basis that the COMI concept in the Model Law is the same as that under the EC Regulation on Insolvency Proceedings. It was common

ground that the court should follow the ECJ's guidance on COMI in Re Eurofood IFSC Ltd [2006] Ch 508. The Judge considered the Advocate-General's opinion and the ECJ's judgment in Eurofood and accepted that, to the extent he had, in Re Lennox Holdings Ltd [2009] BCC 155, considered and applied the "head office functions" test on the basis of paragraph 114 of the A-G's opinion (i.e. that the "ascertainability by third parties" of the centre of a debtor's main interests is not central to the concept of the "centre of main interests"), he had been wrong to do so. The Judge held that Pre-Eurofood decisions by English courts should no longer be followed in this respect. COMI must be identified by reference to factors that are objective and ascertainable by third parties (paragraph 33 of the ECJ Eurofood judgment). What was ascertainable by a third party was what was in the public domain and what a typical third party would learn as a result of dealing with the company. An important feature is the perception of the objective observer. The COMI test provides certainty and foreseeability for creditors when they enter into a transaction. The

Judge rejected the US Receiver's submission that where it is alleged that the company was used as a vehicle for fraud, the court should not investigate the COMI of the company, rather it should investigate the COMI of the fraudsters.

By its very nature the existence of a fraud behind the scenes is unlikely to be ascertainable by third parties. In Eurofood the ECJ emphasised the importance of the presumption in favour of COMI coinciding with a company's registered office and the Judge accepted that this presumption is a true presumption and the burden lies on the party seeking to rebut it. On the facts, and applying the proper test for identifying a debtor's COMI, the Judge found that SIB's COMI was in Antigua. The Judge also found that the US Receivership was not a "foreign proceeding" within the meaning of the Model Law as he was not satisfied that the US Receivership was a "collective proceeding" or that the US Receiver was appointed "pursuant to a law relating to insolvency" for the purpose of "reorganisation or liquidation". Accordingly, the Antiguan liquidation was recognised as a foreign main proceeding and the Court held that the Antiguan Liquidators should take possession of SIB's assets within this jurisdiction and



Blair Leahy



Marcus Haywood



Stuart Isaacs QC



Antony Zaccaroli QC



## case digests

could remit those assets to Antigua. The US Receiver's application for common law recognition of SIB's receivership was dismissed.

Common law recognition was given in the case of the receiverships over the assets of the other Stanford entities. The US receiver has been

granted permission to appeal. **[Stuart Isaacs QC; Antony Zacaroli QC; Felicity Toube; Daniel Bayfield]**



FelicityToube

### **Hardy v McLoughlin and another [2009] EWHC 944 (Ch) (Bernard Livesey QC), 6 May 2009**

By an administration order made in January 2002, the Respondents were appointed administrators of NMG plc and other companies within the NMG group. In April 2004, the administration order was discharged and the administrators were released from liability under s 20 of the Insolvency Act 1986. Hardy applied to the Court seeking (1) an order setting aside or varying the order releasing the administrators from liability; and (2) an order for an inquiry into damages allegedly caused to him by the administrators during the time

they had acted as administrators of NMG plc. The application was based upon an allegation that the order for the release of the administrators had been obtained by fraud and false accounting. The Judge dismissed the application finding (1) It was not sufficient for Hardy to show there was or might have been an irregularity during the conduct of the administration or an inaccurate statement in the application for discharge; (2) There was no evidence to suggest that the Respondents secured their discharge and release by any fraud-

ulent or other misrepresentations to the Court; (3) Hardy was not a person with appropriate locus standi to bring the matter before the Court. Absent an assumption of responsibility to a particular individual, the Respondents did not owe a duty of care at common law to creditors, or to shareholders or officers or prospective officers of NMG plc; (4) In any event, not one of the alleged misrepresentations was made directly to Hardy. This was clearly insufficient to act as a foundation for a cause of action in negligence or in misrepresentation, whether negligent or fraudulent.

**[David Allison]**



David Allison

### **Re Nortel Networks SA, 20 May 2009 (HHJ Kaye QC)**

On 14 January 2009, Blackburne J made orders placing 19 companies in the Nortel group into administration on the basis that the COMI of each of the companies was located in England. 18 of the companies ( the Companies ) were registered in EC Regulation Member States other than the United Kingdom. On 5 February 2009, Patten J directed that the Court do send a letter of request to the courts of a number of Member States in the EC asking those courts to put in place arrangements under which the joint administrators would be given notice of any request or application for the opening of secondary proceedings in respect of any of the Companies. Subsequently, the joint administrators determined that secondary proceedings were necessary in

respect of Nortel Networks SA ( NN SA ). The joint administrators applied to Court to seek directions in relation to the opening of secondary proceedings, including incidental directions in relation to their power to pay over the assets under their control within the main proceedings whilst ensuring that the administration expenses would continue to be met. HHJ Kaye QC ordered that (1) the joint administrators were at liberty to apply to The Commercial Court of Versailles ( the Versailles Court ) in accordance with Article 29(a) of the EC Regulation for the opening of secondary insolvency proceedings in respect of NN SA; (2) the joint administrators were at liberty to enter into a protocol, in substantially the form placed before the court, with the relevant adminis-

trateur judiciaire and liquidateur judiciaire appointed by the Versailles Court in any secondary proceedings; (3) the joint administrators were at liberty, following the opening of secondary proceedings, to pay over from time to time such of the assets currently under their control within the administration as they think fit to the secondary proceedings provided that (a) the Versailles Court made a final and binding order that the current and future administration expenses arising in the administration shall be paid from the assets of NN SA situated in France in priority to all other claims, debts, liabilities and expenses payable or arising under or in connection with the secondary proceeding; (b) the joint administrators were satisfied that all administration expenses were otherwise adequately secured.

**[Gabriel Moss QC; David Allison]**

### **Re Stocznia Gdynia SA; Re Stocznia Szczecinska Nowa sp. z o.o. Chancery Division, Companies Court, Chief Registrar**

The Court recognised Compensation Proceedings under Poland's law of 19 December 2008 on

Compensation Proceedings conducted in undertakings of particular importance for the Polish shipbuilding industry. Although

the companies' centre of main interest was in Poland, the special proceedings in Poland fell outside those listed in Annex A of the European Insolvency Regulation.

**[Glen Davis]**



Glen Davis

**Re First Orion Amber Limited; Re First Orion Amber Nominees Limited Chancery Division, Companies Court (Peter Smith J), 25 June 2009**

Acting on a Letter of Request from the Royal Court of Jersey, the Court made administration orders in respect of two Jersey-

incorporated companies owning property in London, and directed that the creditors who would have had priority status under the

Bankruptcy (Désastre) (Jersey) Law 1990 (on the facts, the Comptroller of Income Tax) were to be afforded preferential status if there were a distribution in the English administrations  
[Glen Davis]

**Re Oilexco Northsea Limited, Harms Offshore AHT "Taurus" GmbH & Co Kg v Bloom and others Court of Appeal (Ward, Stanley Burton LJJ, Sir John Chadwick), 26 June 2009**

Following a company going into administration, two creditors had sought and obtained attachment orders in New York which had subsequently had the effect of attaching a payment made by the administrators to a post-administration creditor. The administrators applied

for an injunction requiring the release of the attachments and preventing further steps being taken in New York. The Court held that the relief should be granted. Although para. 43(6) of Sch. B1 probably did not apply to process commenced abroad, the Court had a jurisdiction

to grant injunctive relief to protect the assets of a company which is in administration in England. On the facts of the case, the conduct of the creditors in obtaining the attachment orders was unconscionable and it was appropriate to grant the relief sought, notwithstanding that proceedings were also pending before the Bankruptcy Court in New York.

[William Trower QC; Tom Smith]



William Trower QC

## PERSONAL INSOLVENCY

Digested by Georgina Peters

**(1) Paul Warren Lewis (2) Gonda Taryn Lewis v Metropolitan Property Realisations Limited [2009] ewca Civ 448 (Laws and Thomas LJJ, Mann J), 20 May 2009**

The Court allowed the appeal against a decision refusing a declaration that the respondent (M) had no interest in property formerly belonging to a married couple (L), of which the husband was bankrupt. Rather than seek an order for sale of the property, the trustees in bankruptcy had assigned the husband's beneficial interest to M, the second largest creditor, for £1 and 25 per cent of any proceeds of sale. L contended that after three years the husband's interest vested in him pursuant to section 283A(2) of the Act. The Court rejected M's

contention that the trustees had "realised" the interest within the meaning of section 283A(3)(a) by virtue of the assignment. Having considered the use of the word "realise" in various authorities, the Court concluded that its normal meaning involved a conversion to cash. That did not happen until the cash was actually available. The word was also used elsewhere in the Act and subordinate legislation in a sense which involved turning realised property into cash; this was inconsistent with part of its value being left outstanding in an unfulfilled monetary (or other)

obligation. That interpretation was supported by an analysis of the structure and apparent parliamentary purpose of section 283A(3)(a). The section was part of a scheme under which the trustee was not allowed to wait forever as co-owner to see if property values rise. The provision also achieved a degree of certainty for both bankrupt and co-owner. A sale of the beneficial interest for a future price, or partially future price, would not fit into that apparent background. Such a transaction consequently did not constitute a "realisation" within section 283A(3)(a) and the husband's interest reverted to him.

[John Briggs]



Georgina Peters



John Briggs

**Rottmann v Brittain [2009] EWCA Civ 473 (Ward, Keene, Lawrence Collins LJJ), 18 March 2009**

The case concerned an application by R, a bankrupt German citizen, for permission to appeal against an order that a public examination pursuant to rule 6.175(6) of the Insolvency Rules 1986 be suspended until further order on the condition that he submit to a private examination. R, having fled to

the United Kingdom to avoid criminal proceedings in Germany, was subsequently adjudged bankrupt.

The Court of Appeal dismissed the application, rejecting R's contention that continuance of the hearing would infringe his right not to incriminate himself and

prejudice his right to a fair trial enshrined in Article 6 of the European Convention of Human Rights. The Court held that the judge had correctly exercised his discretion under rule 6.175(6) by ordering a private hearing. The bankruptcy court retained control over the use of proceedings. To reveal the information without permission would constitute a contempt of court. It was for the



judge dealing with the matter to exercise his discretion in allowing or not allowing incriminating questions to be put to and answered by R. Further, it had to

be assumed that the German court would consider any objection to the use of the transcript should R stand trial in Germany. It was for that court to control its

proceedings; it was not for the English bankruptcy court to be further concerned about the hypothetical use of the information in those proceedings.

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**Louise Brittain v (1) Hamid Dehdashti Haghghat (2) Nasrin Dehdashti Haghghat [2009] EWHC 934 (Ch) (George Bompas QC, sitting as a Deputy Judge of the High Court), 23 March 2009**

The Deputy Judge refused the bankrupt's (H) application for a rehearing of the determination of a preliminary issue under section 375(1) of the Insolvency Act 1986, concluding that H had failed to demonstrate exceptional circumstances which required H to show that there was a material difference in the evidence before the Court or that there was a realistic prospect of the rehearing having a different outcome. B, the trustee,

brought proceedings concerning ownership of a property. The court determined as a preliminary issue that, in the face of an earlier 2000 judgment, it was not open to H and his wife (N) to argue that the property belonged beneficially to N. The two grounds were abuse of the court's process and estoppel by record. H contended that when the preliminary issue was argued, he had been sent away by N's counsel who had lied to the

court. H pointed to extra documents which, he argued, amounted to fresh evidence authenticating an alleged declaration of trust. H's account of the reason for his absence from court was rejected. Further, in the case of new evidence, it was relevant to know why it had not been before the Court at the previous hearing (cf. *Papanicola v Humphreys* [2005] 1 All ER 418) and H had failed to provide a good explanation. In any event, the additional documents did not affect the finding on estoppel by record and the appropriate forum for a challenge to that decision was by way of appeal.

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**Official Receiver v Christine McKay [2009] EWCA Civ 467 (Mummery and Lloyd LJJ, Sir Paul Kennedy), 7 May 2009**

The Court dismissed the appeal of a former bankrupt (M) against a decision annulling her own bankruptcy. The petitioning creditor had withdrawn her claim and agreed to discharge the costs and expenses of the estate; that debt had constituted M's only liability. The Official Receiver sought directions as to whether an annul-

ment order ought to be made. M contended the conditions for making an order under s.282(1)(b) were not satisfied where the bankruptcy debts had been released by way of a withdrawal of a proof of debt. The Court found no reason why the requirement to pay in full all proved debts should require pay-

ment in full of a debt which once had been proved but where its proof had been withdrawn or expunged under rules 6.106 and 6.107 (notwithstanding that the underlying debt still existed and had not been released). In addition, if the amount of a proof had been varied by agreement under rule 6.106, section 282(1)(b) did not require payment of the original amount rather than the varied amount.

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**John Remblance v Octagon Assets Limited [2009] EWCA Civ 581 (Ward, Mummery and Dyson LJJ)**

The Court of Appeal held that in circumstances where a debtor and guarantor's obligations were co-extensive, it was material to application of rule 6.5(4)(d) of the Insolvency Rules 1986 when considering setting aside a statutory demand served on the guarantor, to consider whether a statutory demand in respect of the principal debt would be set aside as against the principal debtor under rule 6.5(4)(a). The Court (Mummery LJ dissenting) there-

fore allowed the appeal of the guarantor (R) against a refusal to set aside a statutory demand. In this case the principal debtor company had a pending action against the creditor for damages; had a statutory demand been served against the principal debtor, it would thus have been capable of being set aside under rule 6.5(4)(a). R was not in a position to invoke rule 6.5(4)(a) as the cross claim belonged to the principal debtor. However, R's lia-

bility depended on the principal debtor's default: their obligations were co-extensive. Where the principal debtor would be likely to succeed in a hypothetical application under rule 6.5(4)(a) on the basis of a cross claim, and having regard to the co-extensiveness principle, the mere fact that the guarantor could afford to pay the debt should count for no more in relation to rule 6.5(4)(d) than should the fact that the principal debtor could afford to pay in relation to rule 6.5(4)(a). Justice required that both cases be treated in the same way.

## PROFESSIONAL NEGLIGENCE

Digested by Andreas Gledhill and Stephen Robins

### **Tamlura NV v CMS Cameron Mckenna [2009] EWHC 538 (Ch) (Mann J), 19 March 2009**

C claimed damages for negligence in respect of the sale of shares in a company. The total consideration for the shares was £40 million: £21 million to be paid in cash on completion ("the Completion Date") and £19 million to be paid in the form of shares in another company ("Consideration Shares"). The agreement provided for £15 million worth of Consideration Shares to be allotted on the Completion Date, and for the remaining £4 million worth of Consideration Shares ("the Second Tranche") to be allotted 2 years later ("the Allotment Date"). The agreement also provided for the value of each Consideration Share to be fixed by

reference to the market price of the Consideration Shares on the Completion Date. During the period of 2 years after the Completion Date, the market price of the Consideration Shares fell substantially. As a result, the Second Tranche was not worth £4 million when allotted. However, because of the terms of the agreement, C was entitled only to such number of Consideration Shares as would have been worth £4 million on the Completion Date; the fact that the market value of the Consideration Shares had fallen substantially by the Allotment Date was irrelevant. C contended that D should have drafted the sale agreement so as to

provide for the number of Consideration Shares in the Second Tranche to be calculated by reference to the market value on the Allotment Date, so as to ensure that C received Consideration Shares which were worth £4 million when allotted. C's claim was dismissed. The Judge held that the parties had agreed for the Second Tranche to be valued as at the Completion Date and that D had accurately implemented the terms of this agreement. Further, D was not under a duty to explain the meaning or effect of the agreement to C. The terms of the agreement had been concluded between experienced men of commerce. D was simply implementing C's clear instructions and had not acted negligently.



Andreas Gledhill



Stephen Robins

### **So v HSBC Bank plc & Anor [2009] EWCA Civ 296 (Sir Anthony Clarke MR, Keene LJ, Etherton LJ), 3 April 2009**

The Court of Appeal held that: (1) on the facts, D was under a duty of care to C (Caparo Industries plc v Dickman [1990] 2 AC 605 and Customs & Excise Commissioners v Barclays Bank plc [2007] 1 AC 181 followed); (2) D's employee

had acted negligently by making certain representations to C; (3) D was vicariously liable for its employee's negligence (Armagas Ltd v Mundogas SA [1986] AC 717 considered; Dubai Aluminium Co Ltd v Salaam [2003] 2 AC 366 fol-

lowed); but (4) the breach of duty had not caused any loss to C, because C had not relied on D's employee's representations, and had relied instead on assurances given to him by fraudsters. Accordingly, the claim failed because of the absence of a causal link between the breach of duty and the losses suffered.

### **Levicom International Holdings BV v Linklaters [2009] EWHC 812 (Comm) (Andrew Smith J), 21 April 2009**

The Judge held that C had failed to show on the balance of probabilities that different advice from D in respect of the merits of an

arbitration claim brought by C against a third party would have caused C to act differently in the conduct of settlement negotia-

tions with that third party. Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602 and Bolitho v City and Hackney HA [1998] AC 232 considered. Accordingly C was entitled to nominal damages only.

## OTHER CASES

### **The Football Association v Cesc Fabregas, the Decision of the Regulatory Commission, Thursday 14 May, 2009**

Cesc Fabregas was charged with misconduct for breaches of FA Rule E3 in respect of the FA Cup Quarter Final between Arsenal and Hull City. It was alleged that his words and/or behaviour to players and/or officials of Hull City had amounted to improper conduct and that he deliberately spat in the

direction of Brian Horton, the Hull City Assistant Manager. The FA's Disciplinary Rules provide that a player can deny the charge but not request an oral hearing on the understanding that the charges will be dealt with on the content of the documents served on the player and the material supplied him to

the FA in answer to the charge. Fabregas put in a full written submission supported by witness statements and CCTV/Video material. A request by the FA to adjourn the hearing so that they could put in further evidence in response was refused. The Disciplinary Commission reviewed the material and found that neither charge against Fabregas had been proved. **[Mark Phillips QC]**



Mark Phillips QC



# Chapter 15 of the US Bankruptcy Code: Our way or the Highway?

The US is seen as out of step, explains **Sandy Shandro**

<sup>1</sup>There is a strong feeling in other parts of the world that the US has taken a large step backwards in the cause of the efficient administration of cross-border cases by the way in which the UNCITRAL Model Law has found expression in Ch.15 of the US Bankruptcy Code, and also by the way in which it has been interpreted by the courts.<sup>2</sup>

This is where we started:

“Chapter 15 is fundamentally procedural in nature and does not constitute a change in the basic approach of United States law, which has long been one of honouring principles of comity.”<sup>3</sup>

This seems to be where we are now:

“Attempting to cloak the clearly intended objective standards [of Ch.15] with a robe of comity and flexibility is conjury.”<sup>4</sup>

And it is therefore clear that the comments of US commentators Sid Brook and Robert Lanz were prophetic:

“[Chapter 15 is] a law that is certain to be more complicated and possibly controversial as it is applied over the next few years.”<sup>5</sup>

Section 304 (the predecessor of Ch.15) was a very effective expression of a US legislative choice to endow the US bankruptcy court with powers to assist a foreign proceed-

ings. It also provided guidance on the principles to be applied in exercising those powers. Looked at from overseas one did not have the impression that there was a profound inquiry, as a condition of deciding whether or not to hear a request for assistance, into the basis on which the jurisdiction to initiate the foreign proceeding was founded. Rather, the kind of assistance to be rendered would be conditioned on the case, and of course on any resistance to what was being sought by any opposing stakeholders. This approach was inherently respectful of the authority conferred on an office holder by virtue of his appointment. It was also an approach which always betokened a healthy respect for the principle of comity, described not so long ago by the late Judge Tina Brozman in these terms:

“Comity, however, is much more than a discrete element or factor to be considered as part of a larger analysis; it is a pervasive principle of international law which reflects that courts of one nation ought to respect the authority of another nation to legislate over, command and adjudicate issues concerning its own citizens”.<sup>6</sup>

It also needs to be said, for non-US practitioners are alive to this point, that this was consistent with

the approach which the US bankruptcy court has taken to founding its own jurisdiction: assets of negligible value will do. The key to it all is that the US bankruptcy court is confident, based on a long and extremely successful history of so doing, that once the parties are before it, relief can be tailored to suit the case and ongoing supervision provided.

In light of decisions like that of Sweet DJ in *Bear Stearns*<sup>7</sup> and Judge Gerber in *Basis Yield*<sup>8</sup>, it would appear that the flexibility of the former approach has been swept away with the coming into force of Ch.15.

The question is, is the new approach fit for purpose?

## The new Chapter 15 approach

“Recognition is the 'gateway' to entering the US legal system ... [Recognition] is the seminal and triggering event that accords legitimacy for a foreign proceeding ... without recognition, nothing happens”.<sup>9</sup>

What the US courts require in order for recognition to be granted was set out by Sweet DJ in *Bear Stearns* in very clear terms:

“The objective criteria for recognition reflect the legislative decision by UNCITRAL and Congress that a foreign proceeding should not be entitled to direct access to or assistance

1/ A version of this paper first appeared in the March 2009 ABI Journal, vol. XXVIII, No.2, reprinted with permission from the American Bankruptcy Institute (www.abi-world.org). 2/ See, for example, Guy Locke “What are we achieving through the UNCITRAL Model Law?” *INSOL World - Second Quarter 2008*; 20-21: “... the policy of throwing out 15 years of cross-border co-operation and replacing it, instead with the rejection of comity and co-operation, is bewildering.”, and George Kehinde “Chapter 15 Recognition of Bermuda Proceedings after Bear Stearns” *INSOL World - Second Quarter 2008*, 24-25: “[It is] an unwelcome surprise.” 3/ *In Re Lida* 377 BR 243 at 256. 4/ D Glosband, “Bear Stearns Appeal Decision” *INSOL World - Third Quarter 2008*. 5/ *Transnational Insolvency 101: A New Guide to Cross-Border bankruptcy Proceedings*. 6/ *Re Board of Directors of Hopewell International Insurance Ltd* (1999) 2238 BR 25. 7/ *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* Case Nos 07-12383, 07-12384 - BRL (Bankr. S.D.N.Y. 2007). 8/ *Re Basis Yield Alpha Master Fund* Case No. 07-12762 (REG) (Bankr. S.D.N.Y.). 9/ *Transnational Insolvency 101*.

from the host country courts unless the debtor had a sufficient pre-petition economic presence in the country of the foreign proceeding.”<sup>10</sup>

It is seen as following that this permits or indeed requires a close examination by the US court under its own rules whether the foreign proceeding is main, non-main or neither.

In the latter event, there will be no recognition of any kind, and thus no assistance. It has been persuasively argued by a distinguished US commentator that this state of affairs was brought into being deliberately, and that Ch.15 does indeed require more of a jurisdictional basis in the foreign country than was required under s.304. This was done so as to

impose “clearly intended” objective standards.<sup>11</sup> As a result, each and every request for assistance will give rise to a fact-based inquiry to ascertain if the threshold requirements of Ch.15 are met.

I could not possibly argue that the analysis of learned US commentators is wrong. That said, assuming that the analysis is correct, it would be unfortunate if there is nothing that can now be done to reverse a developing dogma which is arguably contrary to the interests of debtors and creditors alike.

To put the point differently, one wonders if, under s.304, there would have been assistance available to the foreign representative in one or both

of Bear Sterns and Basis Yield. If there would have been, then the result of the decisions is unwelcome, and is out of step with the evolving consensus in other important bankruptcy jurisdictions. There are in any event a number of bases for real concern about the direction of US Ch.15 jurisprudence:

(a) It is inconsistent with the objectives of the Model Law. The authors of the Model Law did not have in mind that it would replace existing modes of assistance, but that it would supplement them. It is for this reason that Article 7 of the Model Law provides that “Nothing in this law limits the power of a court ... to provide additional assistance to a foreign representative under other law of this State.” I shall leave it to others to explain why s.304 was replaced by Ch.15, but in the UK the possibility of repealing IA s.426 when the Model Law came into force was considered and rejected, and, importantly, Article 7 was adopted verbatim from the draft Model Law. In the US, s.1507 makes the provision of any additional assistance contingent on recognition.<sup>12</sup>

(b) The cases make short work of the statutory presumption that COMI is presumed to be the debtor's registered office “in the absence of evidence to the contrary.” But there is a choice of insolvency law being made when a jurisdiction of incorporation is selected, and this ought, if possible, to be respected, particularly in the case of entities whose existence is more metaphysical than real, and whose stakeholders are very likely to be sophisticated. Many (probably most) jurisdictions accept that the place of incorporation is going to be the location of the main or principal insolvency proceeding. One wonders why the US court would go to such lengths to thwart these expectations.<sup>13</sup> To put the point comparatively, in the Eurofoods case it was held that the presumption could only be rebutted by reference to cri-



Sandy Sandro

<sup>10</sup> House Report at 110. <sup>11</sup> DM Glosband, “The Bear Sterns Decision” *INSOL World - Third Quarter 2008*, 14-16. <sup>12</sup> S.1507(a) provides: “subject to the specific limitation stated elsewhere in this chapter, the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.” The comparable UK provision is: “Nothing in this Law limits the power of a court or of a British insolvency officeholder to provide additional assistance to a foreign representative under other laws of Great Britain.” <sup>13</sup> See A Dessain, “Bear Sterns and COMI - a worried reaction from Jersey,” *INSOL World - Second Quarter 2008* 25-26.



*For example, in both Bear Sterns and Basis Yield there was consideration of what kind of “business” could be done by an “exempted company” under Cayman law*

teria that were both objective and ascertainable by third parties; the US view seems to be that the presumption is only there for speed and convenience where there is no serious controversy. It is ironic that US courts are attaching much less weight to the presumption even though the consequences of recognition in the EU are far more significant, extending not merely to jurisdiction but also to important matters of substance.

(c) The US approach does not take adequate account of the nature of different types of debtor. A hedge fund, for example, does not make widgets, and may have no employees. Its activities consist in the main of entering into contracts with managers and auditors by the actions of its board. It is effectively nothing more than the entity governing relations between investors and assets. To consider in such a case the concept of COMI as somehow akin to the US concept of a “principal place of business” (as Sweet DJ did in Bear Sterns) is bound not to be helpful. The jurisdiction of incorporation

of such an entity is likely to have been chosen for tax and regulatory convenience. However difficult it may be to do so, the motivation for this choice ought to be as irrelevant to the COMI decision as it was for its stakeholders. When viewed in this way, choosing to permit the presumption to operate is a logical choice.<sup>14</sup>

(d) The US approach may require the court to examine very subtle issues of law arising in the jurisdiction of incorporation. This must be undesirable as a matter of principle, quite apart from the time and costs required to do so without engaging in a form of guesswork. For example, in both Bear Sterns and Basis Yield there was consideration of what kind of “business” could be done by an “exempted company” under Cayman law when on the face of it such a company could not by virtue of that

status have a presence or conduct business in Cayman. The conclusion reached by the US courts on this point has been called “plain wrong” by an eminent Cayman lawyer.<sup>15</sup>

(e) The US approach may give rise to competing sets of main proceedings. Under the EU Insolvency Regulation, the decision of the first country to open main insolvency proceedings is unimpeachable except in the courts of that country. There can never be two sets of main proceedings, as a jurisdictional quagmire would be the result. And yet this could be the consequence of decisions like Bear Sterns, where the Cayman court will continue to consider that its proceedings were the principal proceedings, and its office holder the validly appointed agent of the debtor for all purposes. In addition to this, other courts may well recognise the proceedings begun in the jurisdiction of incorporation. In Basis Yield, the Cayman liquidations were recognised in the UK (under IA s.426) and in Australia (on comity grounds). There was evidence that third parties had appeared in Cayman and in Australia and that no court or creditor had challenged the basis for the liquidation proceedings in Cayman. It is not obvious how a full-blown Ch.7/11 would co-exist within this framework of proceedings ancillary to the main one in Cayman. One thing is clear: it would be costly to find out.

(f) Without wishing to overstate the point, there may be a risk that Ch.7/11 proceedings “thrust upon” an unwilling debtor (in essence its liquidator appointed elsewhere) might not be recognised elsewhere. It is well known that the US courts will assume what amounts to primary bankruptcy jurisdiction without a COMI clearly being in the US, and, in that event, presumably expect

## **The US approach does not take adequate account of the nature of different types of debtor.**

<sup>14</sup>/ Guy Lock, “What are we achieving Through the UNCITRAL Model Law?” *INSOL World - Second Quarter 2008* 20-21.

<sup>15</sup>/ Guy Lock, “What are we achieving Through the UNCITRAL Model Law?” *INSOL World - Second Quarter 2008* 20-21, n.4. Another commentator has pointed out that there are many technical requirements imposed on exempted companies to have a presence in jurisdictions where they are found, including reporting obligations to the local regulator. In Bermuda, exempted companies are also permitted to carry on business within the jurisdiction with parties outside the jurisdiction, with other exempted companies for the furtherance of their business in Bermuda, and reinsurance of companies incorporated in Bermuda. See: K. George, “Ch.15 Recognition of Bermudan Proceedings after Bear Sterns” *INSOL World - Second Quarter 2008* 24-25.

recognition abroad. But if the US courts do not recognise proceedings considered to be principal (or main, if you will) proceedings begun elsewhere, perhaps a similar reception might be expected in other parts of the world. The stark fact is that other jurisdictions do recognise proceedings based on the presumption, and thus they deal in their own way with what has been identified as the main philosophical reason for the US approach, namely that “US bankruptcy laws are decidedly in rem and a lack of significant property in the foreign proceedings suggests a proceeding that may not effectively control the debtor’s assets”.<sup>16</sup> The term “foreign proceeding” is defined in 11 U.S.S 101(23) as a proceeding in which “the assets and affairs of the debtor are subject to control or supervision by a foreign court”, and “foreign representative” is defined in the next paragraph as a person authorised in such proceeding to “administer the reorganisation or liquidation of the debtor’s assets or affairs.”

In making its order commencing the liquidation, the foreign court considers that it has kicked off such a proceeding and appointed just such a person. Indeed, the capacity in which the foreign representative approaches the US court depends on accepting the validity of his agency, which itself hinges on the jurisdictional validity of his appointment. One could say that there is an undercurrent in the Bear Sterns and Basis Yield cases of a feeling that these rather odd vehicles may be somewhat shady offshore entities with no fixed abode, incorporated for the most part in sunny faraway places out of reach of US style regulators, and that the US courts ought to allocate to themselves a large degree of control over how they are wound up.

However, the sophistication of the typical investor in such vehicles is a strong reason to permit the insolvency regimes in those jurisdictions to operate fully, including recognising decisions taken within them.

Those who defend the present position maintain that cases like


## **“Nothing in the Chapter limits the ability of the court to provide additional assistance to a foreign representative under this title or under other laws of the United States.”**

Bear Sterns and Basis Yield were “letter box company” cases, and that the results in those cases were in that context neither surprising nor unfortunate. This justification underestimates the intellectual enterprise of US bankruptcy attorneys. Letter box cases they may be, but they open the door widely to a fresh consideration of the COMI decision of any foreign court in any type of case.

Granted, the Bear Sterns and Basis Yield reasoning is likely to apply in cases where the debtor’s operations are, in corporate terms, atypical, but it is safe to predict that it will not be long before a US bankruptcy judge will be in the invidious position of having a good, hard look at the way in which (say) a UK court handled COMI arguments in the context of an application by a UK-appointed insolvency officeholder for assistance under Ch. 15. It is already apparent that US attorneys are in practice approaching any Ch.15 application as a hearing de novo of the COMI question.

It is the contention of this article that s.1507(a) should be amended so as more closely to conform with

the suggested wording in the Model Law itself. Instead of making “additional assistance” conditional upon recognition, the section should say: “Nothing in the Chapter limits the ability of the court to provide additional assistance to a foreign representative under this title or under other laws of the United States.”

If that were done, then the shopping list of factors which are now set out in section 1507(b) could remain and, in the appropriate case, the residual common law discretion which is beginning to take on a lease of life in other common law jurisdictions could also be invoked in the United States. Surely every effort must now be made to ensure that the present iteration of Ch.15 (any more than s.304 before it) does not become firmly entrenched as the only gateway to the very important role which the US courts can play in cross-border insolvencies. Not to do so will mean that, over time, one will find that non-US bankruptcy practitioners will pay ever greater attention to the ways in which the US bankruptcy system can be avoided altogether. 



*Those who defend the present position maintain that cases like Bear Sterns and Basis Yield were “letter box company” cases,*

<sup>16</sup> D Glosband, “The Bear Sterns Appeal Decision,” *INSOL World - Third Quarter 2008* 14-16.



# Anyone for sausage?

**Glen Davis** discusses his work as a member of the Insolvency Rules Committee.

**T**he Insolvency Rules Committee occupies a somewhat curious niche in the constitutional landscape. For more than thirty years, it has operated as a sort of appendix to the legislative process relating to insolvency, relying on the voluntary services of practitioners, with at best influence but no formal power. It formally exists nowadays merely to be consulted before relevant secondary legislation can validly be passed into law. There is no requirement for lawmakers to act in accordance with the views of the committee, although in a public law sense those views must no doubt be taken into account.

Nonetheless, at the time of the debates on what became the Enterprise Act, the existence of the Insolvency Rules Committee was adduced by the government as justification for using the “negative resolution” Parliamentary procedure to make and amend Insolvency Rules: that is to say, they are laid before Parliament subject to the possibility that they may be annulled by a resolution of either the House of Commons or the House of Lords (which has never happened). What Lord McIntosh said was this:

*“The first power in Section 412 of the Insolvency Act 1986 allows the Lord Chancellor, in agreement with the Secretary of State, to make rules giving effect to the bankruptcy pro-*

*visions contained in that Act. Those words, ‘giving effect to’ are important in terms of restricting how the power can be used. They mean that the power can be used only to put flesh on the bones of the primary legislation, not to alter it.*

*“For instance, the Act may say that a meeting of creditors should be called and what its purpose is. The power then allows rules to be made setting out where it should be held, who should be the chairman, who could come and vote, and so on. That is what a negative resolution procedure is about.*

*“That does not mean that the Government can bring forward rules without giving careful thought to their content. Under Section 413 of the Insolvency Act 1986, the Lord Chancellor must consult the Insolvency Rules Committee before making any rules. That is a knowledgeable committee, chaired by a High Court judge ... and made up of individuals with a considerable understanding of insolvency law and practice. One of the committee’s key functions is to ensure that rules*

*work properly in practice. It has been in place since 1976 and has the confidence of all parties involved in insolvency. In light of the scrutiny of the rules by the Select Committee, it is the Government’s view that it is not necessary to change the current arrangements for parliamentary consideration of the rules.”*

Leaving aside the rather flattering nature of those comments, and the obvious slip of the minister’s tongue elevating the Rules Committee to the status of “select” committee, the government of the day clearly regarded the role of the Rules Committee as a significant one.

In reality the role of the Committee is limited. It has no role regarding primary legislation (and as can be seen from, for example, the drafting of Schedule B1, there is no hard and fast rule as to what is dealt with by primary legislation and what is left to be filled in by Insolvency Rules).

For the first decade of its existence, the remit of the Rules Committee was a pro-active one; it

**The making of laws is like the making of sausages - it doesn't do to enquire too closely into either, and the less you know about the process, the more you respect the result.**

was required by statute to keep under review the Bankruptcy Rules (made under the Bankruptcy Act 1914) and the Winding-up Rules (made under the Companies Act 1948) and make recommendations to the Lord Chancellor as to any changes in the rules that may from time to time appear to the committee to be desirable. Since 1986, it is merely required to be consulted before rules relating to corporate insolvency (made under section 411 of the Insolvency Act) and bankruptcy (made under section 412) are made or amended, but it has no role regarding other forms of secondary legislation (regulations or orders) which are made under other powers in the Insolvency Act or other statutes (which is one of the reasons why the patchwork of legislation governing the insolvency regime is so complicated).

Rule-making powers governing various special insolvency regimes often cross-refer to section 411 of the Insolvency Act, and in those cases the Rules Committee is generally consulted. The Rules Committee was consulted, for example, regarding the draft Insurers (Winding Up) Rules 2001 (SI 2001/3635) (technically made under section 411 of the Insolvency Act as modified by section 379 of the Financial Services and Markets Act 2000. The Rules Committee was also consulted before the Energy Administration Rules 2005, SI 2005/2483 were made pursuant to power in section 159(3) of the Energy Act 2004, but not when the Railway Administration Order Rules, SI 2001/3635 were made for the purposes of provision made by sections 59-65 and Schedules 6 and 7 of the Railways Act 1993. In the case of rules to give effect to the new bank administration regime under Part 3 of the Banking Act 2009, special provisions were included in the modifications to the Insolvency Act introduced by section 160(6) so that there was no duty to consult the Insolvency Rules Committee in respect of the first set of rules to govern that regime, but the Rules Committee will have a role thereafter.

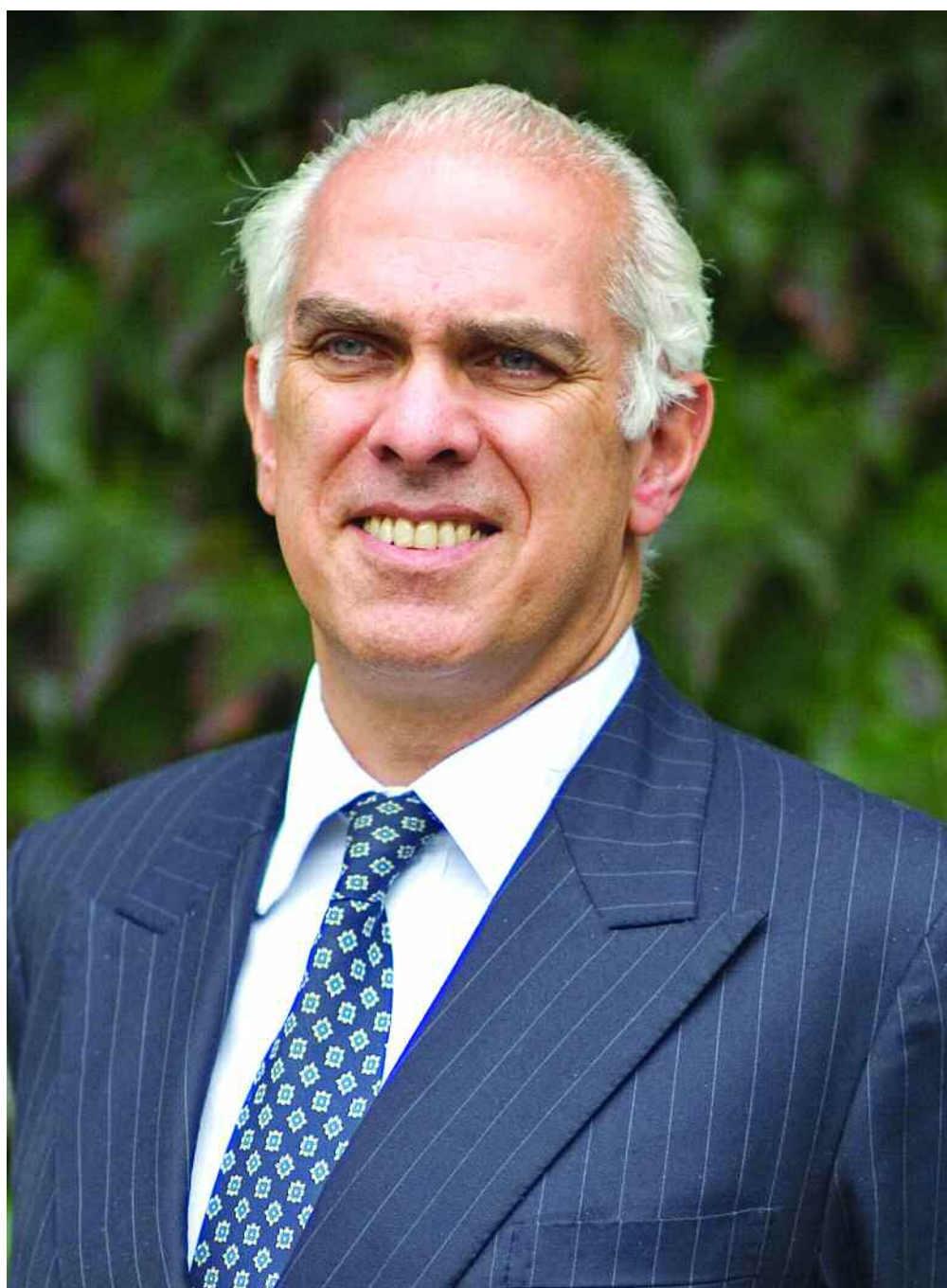
Technically, the Insolvency Rules Committee is an unfunded, advisory

## **It is the Government's view that it is not necessary to change the current arrangements for parliamentary consideration of the rules.**

non-departmental public body (or NDPB) sponsored by the Department for Constitutional Affairs. For some purposes, at least, it qualifies as a public authority (it is one of the bodies listed in Schedule 1A to the Race Relations Act 1976, and as such it has a statutory duty, in carrying out its functions, to have due regard to the need: (a) to elimi-

nate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups).

The members of the committee are required to be: a Chancery Judge (the present energetic Chairman is Mr Justice David Richards); a circuit judge (presently HH Judge Behrens);



*Glen Davis*



Otto von Bismarck: Sausage analogist.

a High Court Bankruptcy Registrar (presently Mr Registrar Jacques); a county court registrar (at present, District Judge Bullock); a practising barrister; a practising solicitor; and a practising accountant. There is also the possibility of appointing “additional members” who appear to have qualifications or experience that would be of value to the committee: there are currently two additional barristers and one additional solicitor serving on the committee.

Members of the Rules Committee are appointed for a three-year term, with the possibility of being invited to serve for a further term. They are not paid. In former times, prospective appointees were nominated by the Lord Chancellor's Department and the selection process was somewhat informal. Nowadays, vacancies are advertised, and there is a formal interview process.

## The workload of the Rules Committee seems set to be substantial for some time to come.

My own involvement dates back to 1998 when, with Robin Dicker, I was asked to participate in a hastily-convened sub-committee to advise the then Vice-Chancellor on what amendments to the Insolvency Rules might be required to accommodate the imminent implementation Civil Procedure Rules. Fortunately the changes required were not too great, and our recommendations were reflected in the Insolvency (Amendment) (No 2) Rules 1999 (SI 1999/1022). I was asked to assist with the review of some of the secondary legislation which implemented aspects of the Financial Services and Markets Act 2000 in relation to insolvency, and some time after that the opportunity arose to join William Trower as a formal “additional member” of the Insolvency Rules Committee, a position I have held since 2002.

There have been periods over the history of the Insolvency Rules Committee since 1976 when the committee has had little to do, and has rarely met. That has not been the case in recent years. It has been a very busy time, with the implementation of the new Administration regime, successive changes to the Insolvency Rules, consideration of various special insolvency regimes and more recently the early stages of the Modernisation and Consolidation of the Insolvency Rules, the changes to advertising requirements and the introduction of the Debt Relief Order regime. The workload of the Rules Committee seems set to be substantial for some time to come. The most recent announcement from the Insolvency Service is that there will be a Legislative Reform Order (to amend primary legislation) and Insolvency (Amendment) Rules 2010 in April of next year, followed by complete consolidation of the Insolvency Rules as amended in April 2011.

How does the Rules Committee

work in practice? The actual discussions are of their nature confidential but the fact that the membership has been stable for some time means that a good working relationship has developed with the individuals in the Insolvency Service who are responsible for the detailed drafting. Although there are still occasions when the Rules Committee is only asked to comment at a relatively late stage and against a tight time-table, the usual procedure (at least, where substantial changes are envisaged) is for there to be substantive engagement between the Rules Committee at a relatively early stage. The role of the Rules Committee is then to scrutinise the drafts as they emerge, and draw attention to points which may raise issues of interpretation or practical application. Often the comments of the committee are taken into account in a re-draft, or the policy issues are explained and can be debated.

Ultimately (and with one eye on the Parliamentary timetable) a final draft is provided and the Secretary to the Rules Committee - who is the Director of Policy at the Insolvency Service - writes to the Chairman of the Rules Committee asking him to confirm that the Rules Committee has been consulted regarding a proposed rule or amendment to the Rules, and is content with it. The Chairman replies confirming that the Rules Committee has been consulted and is content. Insofar as the Rules Committee has any power, it derives from the theoretical possibility that such consent might be withheld.

There is an observation, traditionally attributed to the 19th century German Chancellor, Otto von Bismarck, that the making of laws is like the making of sausages - it doesn't do to enquire too closely into either, and the less you know about the process, the more you respect the result. If that is an appropriate analogy, the function of the Insolvency Rules Committee falls somewhere between tasting and quality control just before the raw meat is extruded into the casing.

**3-4 South Square Barristers is delighted to announce its**

# **INSOLVENCY LAW SEMINAR AND RECEPTION**

**AT THE MIDLAND HOTEL, MANCHESTER**

**WEDNESDAY 23 SEPTEMBER 2009, 5.00PM - 8.00PM**

3-4 South Square is keen to continue and improve its long-standing links with professionals practising in our field of expertise and has organised a Seminar to take place at The Midland Hotel, Manchester, M60 2DS (The Derby Suite) on Wednesday 23 September 2009, 5.00pm-8.00pm for solicitors and insolvency practitioners.



**There will be four or five 10-15 minute talks on topical insolvency law issues including:**

- o **Licensing, landlords and administration.**
- o **Council Tax and bankruptcy.**
- o **Challenging administrations (and pre-packs)**
- o **IP's remuneration/costs**

**Members of Chambers who will either be speaking or attending the Seminar include:-**

**David Alexander QC (chair)**  
**Lexa Hilliard QC**  
**John Briggs**  
**Lloyd Tamlyn**  
**Blair Leahy**  
**Stephen Robins**  
**Hannah Thornley**  
**William Willson**  
**Georgina Peters**  
**Adam Al-Attar**

Registration will begin at 4.30pm and it is anticipated that the Seminar will justify 2 CPD Points. It is free of charge and will be followed by drinks and canapés.

**If you and any colleagues wish to attend the seminar, please contact our Practice Manager, Dylan Playfoot, by Monday 7 September 2009 on 0207 696 9900 or by email to [dylanplayfoot@southsquare.com](mailto:dylanplayfoot@southsquare.com).**

**We look forward to seeing you there.**



*David Alexander QC*



*Lexa Hilliard QC*



*John Briggs*



*Lloyd Tamlyn*



*Blair Leahy*



*Stephen Robins*



*William Willson*



*Hannah Thornley*



*Georgina Peters*



*Adam Al-Attar*



# An appreciation in honour of Lord Hoffmann

**This is the text of a speech given by Michael Crystal Q.C. on Friday June 19 2009 at the Ninth Annual International Insolvency Conference at Columbia University Law School, New York.**

Lord Hoffmann, Lenny Hoffmann, celebrated his 75th birthday last month. Last night he was presented with the III 2009 Outstanding Contributions Award in New York. He is the first British jurist to receive this award. This is a short appreciation in his honour.

Let me start with a brief biographical introduction. Lord Hoffmann was born in South Africa. After an outstanding career as a law student and teacher including 10 years of teaching at Oxford University and a period at the junior bar, he became a Queen's Counsel after 13 years of practice in 1977. As a Q.C. Lenny became one of the leading and most sought-after advocates of his generation.

In 1985, at a young age for those days, Lord Hoffmann became a judge of the High Court of Justice in London. After 7 years there he was appointed an Appeals Court judge in 1992. After a very short period as an Appeals Court judge, in 1995 he was made a Lord of Appeal in Ordinary, in other words a member of the British equivalent of the U.S. Supreme Court. From that position, after 14 years, Lenny has recently retired.

During his time as a Lord of Appeal in Ordinary Lenny also participated in, and presided over, the hearing of many important final appeals from States in the British Commonwealth of Nations as a member of the board of the Privy Council in London. These appeals came from jurisdictions from all over the world, from the Caribbean and Bermuda to New Zealand and Hong Kong. And since 1988, after the resumption of Chinese sovereignty, Lord Hoffmann has sat as a judge in Hong Kong as a non-permanent member of the Court of Final

Appeal of Hong Kong in the Peoples Republic of China.

And now a little about the range of Lord Hoffmann's judgments as a judge. It is no exaggeration to say that his judgments over the last quarter of a century have touched on and influenced almost every important area of the law. From human rights law to intellectual property law. From tort law to commercial law in all its branches. And also company law. And more recently, the assimilation of European law into a UK context.

Lenny is one of the jurists whose influence on the development of British and Commonwealth law will continue to be felt in the decades to come. He is one of a handful of British judges since the end of WWII whose judgments, in whatever area of the law, command immediate respect and attention.

And what are the secrets of Lenny's success? Let me venture a couple of suggestions. First, he has a liveliness of thought. Secondly, he has demonstrated a willingness to break with convention where justice requires and to think outside the box. And thirdly, his judgments disclose a style of reasoning with clarity from first principles. From the grundnorms on which a legal system is based, melding principle and legal precedent. I am sure there are many others.

This is a distinguished gathering of judges and insolvency professionals from all over the world. I therefore thought you would welcome a few words on Lenny's contribution to the British and commonwealth insolvency law over the last 25 years.

Lord Hoffmann did not have a specialist bankruptcy or insolvency practice while he was a junior barrister or

a QC. And the UK, unlike many other industrial nations, does not have specialist bankruptcy judges at the High Court or Appellate levels. None the less, from his earliest years on the bench Lenny made his mark on bankruptcy and insolvency law. At roughly the same time as his appointment as a High Court judge, the bankruptcy and insolvency law in the UK was radically overhauled in the most important shake-up since WWII. A rescue regime was introduced and a rescue culture began to permeate insolvency legislation. This new approach was developed by a number of modernist judges, including Lenny in particular. These judges gave the impetus to making the rescue regime workable and manageable. And there are literally dozens of reported precedents decided by Lenny in the insolvency and related fields between 1986 and 2009.

A lot of English bankruptcy law is technical and procedural. The reforming influence of Lenny made the procedure clear and workable. In some cases, distilling 150 years of precedent into a modern approach to a recurrent insolvency issue, such as set-off.

I would like to single out two areas of Lenny's judicial activism in the bankruptcy field for special mention this afternoon. These are first, cross-border insolvency and secondly the management of conflicts in insolvency situations.

Cross-border insolvency is probably the most obvious area of interest in the bankruptcy field world-wide. And Lord Hoffmann has moved English non-statutory law forwards in this field. Although English Courts have for many years been prepared to recognise, in appropriate cases, foreign bankruptcies, the nature and extent of such assistance has been a matter of debate and uncertainty over a lengthy period of time. In particular, whilst

the English Courts have accepted an over-arching principle of universalism for 200 years or more, or at least modified universalism, certainly in insolvencies emanating from the former British Empire, the nature and extent of the assistance to be afforded has been less clear.

Cross-border recognition and assistance can, in modern times, be assisted and developed by international convention, EC regulation or the UNCITRAL model law. But the English common law still has a real role to play in this area as Lord Hoffmann recently demonstrated in a decision of the Privy Council in which he gave the judgment of the Court.

In the Cambridge Gas case (2007) 1 AC 508, the Privy Council was faced with an insolvent Isle of Man company which was in proceedings under Chapter 11 of the US Bankruptcy Code in the United States. (The Isle of Man is between England and Ireland). A request was made by the United States Court to the Isle of Man court to give assistance to the US proceedings by giving effect at common law to a reorganisation plan which had been promulgated in the Chapter 11 proceedings. The Privy Council held that the principle of universality and the principle of assistance conferred on the Isle of Man Court jurisdiction at common law to assist the US Chapter 11 proceedings by recognising and giving effect to the reorganisation plan.

Lord Hoffmann said:

“The domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office-holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.”

This description of comity and full faith and credit assistance to foreign insolvencies is likely to inform the English judicial approach in confronting issues arising out of the current global credit crisis.

One more striking illustration of

Lord Hoffmann's influence in the cross-border insolvency world is the Maxwell bankruptcy. Many in this audience will remember the competing administrations in that case. The critical role played by Lenny was to approve and implement the diarchy, the separation of roles and powers, between the English court and the US Bankruptcy court and to dismiss anti-suit injunction relief sought in London by a UK bank only wanting to be sued in its own back yard. His judgment in that case is still a classic. It was upheld by the Court of Appeal and is well worth a re-read even 17 years later.

The second specific area I want to touch on is the topic of conflict of interest in insolvency situations. Lenny has had an interest in devising an approach to managing problems of conflict of interest in insolvency situations in the United Kingdom. In that context (primarily through his decisions as High Court level and more recently in the Privy Council) there have emerged workable and manageable rules of thumb.

Large group insolvencies, whether domestic or international, inevitably raise the potential for conflicts of interest. These can relate to a myriad of matters including, for example, inter-company balances, competing claims to assets, allocation of liabilities, guarantee and indemnity claims, issues of set-off or double proof claims, the validity of security, tax and avoidance or recovery actions. Often, at the stage at which insolvency office holders are appointed and for some considerable time thereafter, it may not be clear what conflicts exist or how they should be managed.

In the context of large group insolvencies, Lord Hoffmann's approach has been that the appointment of a common office holder is prima facie likely to be in the interests of the general body of creditors of each company. The conduct of the insolvencies by a common office holder will be more efficient and less costly than having a plethora of appointments.

Having regard to these considerations, Lord Hoffmann has approached the issue of conflicts in relation to large group insolvencies in

a common sense and pragmatic way. His approach has been:- (1) that licenced insolvency practitioners are professional men who are well accustomed to dealing with conflicts; (2) that in general it is in the interests of creditors, at least in the first instance, to appoint a single office holder and any conflicts are usually best left to be managed if and when that becomes necessary; (3) that if and when it becomes clear that any conflict is sufficiently material to require to be managed, one of a variety of different approaches may be appropriate depending on all the circumstances and (4) that such different approaches may include, for example, obtaining legal advice, the appointment of an additional partner from the same firm or the appointment of an independent partner from a different firm.

Very recently, the Privy Council on an appeal from the Cayman Islands in a judgment delivered by Lord Hoffmann, affirmed that the attitude of the Courts to conflicts should be to leave them to be dealt with by the Courts (on the application of the relevant office holders) as and when they arise during an insolvency. And not to waste valuable resources of time and money exploring the hypothetical.

It may seem to you in the audience that the solutions given by Lord Hoffmann to the issues mentioned above are obvious and right. If that is so, then I will have demonstrated the contribution which Lenny has made. Because as a practitioner in the bankruptcy field I can assure you that the answers were not all that obvious at the time Lenny's judgements were delivered.

The time allotted for this appreciation does not enable full justice to be done to all Lord Hoffmann's achievements as a jurist, even just in the bankruptcy field. But I hope that this appreciation explains why Lord Hoffmann's talents as a jurist in the insolvency field will be sorely missed by practitioners in the UK and the Commonwealth and in the British Courts in the years to come.

I would like to wish Lenny a long and scintillating retirement, whatever that means in his case. 🍷



## news in brief

# Proposals for a contingent legal aid fund

The Bar Council's Policy Advisory Group led by former Chairman Guy Mansfield QC, has suggested that a self-funding scheme be established to provide assistance to those deemed eligible for help to ensure access to justice for those currently ineligible for legal aid but without the means to enforce their rights.

The Contingent Legal Fund ("CLAF") would be an actively managed pool of money intended to fund legal costs. The cases which a CLAF would fund would be those which are considered to be worthwhile but outside the scope of the current civil legal aid regime. The CLAF would be managed by financial

professionals who would determine whether claims should be supported. Successful claims would pay a reasonable proportion of their winnings back into the CLAF pool which would in turn fund future claims. The Bar Council's Policy Advisory Group will report to Lord Justice Jackson as part of his Review.

# Consultation on rescue culture

On 15 June 2009, the Insolvency Service launched a consultation on measures aimed at enhancing further the UK's business rescue culture, to give struggling, but viable, companies a greater chance to succeed. In particu-

lar, the proposals consider the introduction of a new Court-sanctioned moratorium available to all companies to allow them time to reach agreement on a Company Voluntary Arrangement.

The proposals are part of

the Government's business rescue measures that the Chancellor of the Exchequer announced in the 2009 Budget Report earlier this year. The deadline for responses to the consultation is 17 September 2009.

# Court Dress

**The Chairman of the Bar Council has issued revised guidance on court dress. In particular changes have been made to remove the distinction between different types of appeal in the Chancery Division and to clarify the position in relation to hearings in the County Court. Details are available on the Bar Council website.**

# Jackson review

Lord Justice Jackson is conducting a wide-ranging review of the rules and principles governing the costs of civil litigation. The objective of the Review is to find ways of controlling the costs of litigation so as to promote access to justice at proportionate costs. Lord Justice Jackson released his Preliminary Report on 8 May 2009. A copy can be downloaded from the Judiciary of England and Wales website. The deadline for responses is 31st July 2009.

# Lord Justice Patten

**The Honourable Mr Justice Nicholas John Patten has been appointed as a Lord Justice of Appeal with effect from 4 June 2009, following the appointment of Lord Justice Collins as a Lord of Appeal in Ordinary.**

# OECD Forecast

The Organisation for Economic Cooperation and Development (OECD) has revised down its forecast for the UK economy in 2009. It warns that the UK is in "a sharp recession" with output set to contract by 4.3% in 2009, worse than its previous forecast of a 3.7% fall. The OECD predicts zero growth in the UK economy in 2010 and says the UK budget deficit will hit 14% of GDP next year.

# Legal transplantation

An article by Ron Harris, a Professor at Law and Legal History at Tel Aviv University, and Michael Crystal QC (right) entitled "Some Reflections on the Transplantation of British Company Law in Post-Ottoman Palestine" appeared in Volume 10, Number 2 of *Theoretical Inquiries in Law*. *Theoretical Inquiries in Law* is published by the Cegla Center for Interdisciplinary Research of the Law at the Buchmann Faculty of Law, Tel Aviv University. The article discusses the transplantation and harmonization of company law legislation in the British Empire in the early 20th century and in Palestine in particular. It describes the displacement of Ottoman law and its replacement by British company law in Palestine.



# Law commission publishes report on capital and income in Trusts

The Law Commission has published a report on capital and income in trusts. The project examined the complicated rules governing the treatment of trust receipts and outgoings as capital or income and the extent to which trustees who have to distinguish between income and capital should be able to invest

on a "total return" basis, with reference particularly to trusts for interests in succession and to charitable trusts with permanent endowment. The Law Commission's report recommends that receipts following tax-exempt corporate demergers should be classified as capital, subject to a limited discretion to

make a payment to income. It also recommends the abolition of the equitable and statutory rules of apportionment for all new trusts. Finally, it recommends a new statutory provision that will make total return investment more easily accessible to charitable trusts with a permanent endowment.

## New appointments to the QC appointments selection panel

Professor Dame Joan Higgins has been appointed as the new lay Chair of the Queen's Counsel Selection Panel, replacing Baroness Butler-Sloss who acted as interim Chair in the 2008-09 competition. Two new lay members and a solicitor member have also been

appointed to the QC Appointments Selection Panel. The appointments to the Selection Panel bring the total number of those on the Panel up to nine. Sir Colin Budd, former Ambassador to the Netherlands, and Helen Pitcher, the Chief Executive and

Deputy Chair of IDDAS, a company which specialises in mentoring and advisory services to senior executives, are the two new lay members of the Appointments Panel. Razi Shah, is the new solicitor member of the Appointments Panel.

## Former law lord calls for scrapping of ID card plan

Former law lord, Lord Steyn, has called for the £5.3bn national identity card scheme to be abandoned. He said there was no evidence ID cards would improve security, that their introduction for foreign

nationals was a pretext to condition the public to their use and the idea that they would be useful in the fight against serious crime was a Home Office fiction. Delivering the Lord Williams of Mostyn

memorial lecture, he also questioned the official costings and said that heading into a prolonged economic downturn was an inopportune time to introduce an ID card system.

## Regional venues for the Administrative Court

**From 21 April 2009 it will be possible to issue most Administrative Court proceedings at the District Registry of the High Court at Birmingham, Cardiff, Leeds or Manchester as well as at the Royal Courts of Justice in London.**

## Partners predict market consolidation...

**Two out of three law firm partners believe the recession will present attractive opportunities to secure opportunistic mergers, suggesting that the UK market could be set for a run of consolidation.**

## Far East appointments



*Stuart Isaacs QC has been elected as a Fellow of the Singapore Institute of Arbitrators. Stuart has also been appointed to the Commercial Mediators Panel of the China Counsel for the Promotion of International Trade.*

## diary dates

### 8th-10th September 2009.

**Insolvency & Restructuring Summer School, chaired by Sir Gavin Lightman.**  
London.

### 23rd September 2009.

**3-4 South Square Conference.**  
Midland Hotel, Manchester.

### 1st-4th October 2009

**Insol Europe Annual Congress.**  
Stockholm, Sweden.

### 9th October 2009

**ABI International Insolvency Symposium.**  
Paris Westin, France.

### 12th October 2009

**ABI Chicago Consumer Bankruptcy Conference.**  
Chicago, Illinois, USA.

### 5th November 2009

**Insol International Seminar.**  
Grand Cayman.

### 11th November 2009

**ABI Detroit Consumer Bankruptcy Conference.**  
Dearborn, Michigan, USA.

### 11th November 2009

**ILA Annual Dinner.**  
Natural History Museum, London

### 2010

### 21st-23rd February 2010

**Insol International Annual Conference.**  
Dubai, UAE.

### 15th-18th April 2010

**American Bankruptcy Institute, 28th Annual Spring Meeting.**  
**Gaylord National Resort & Convention Center, National Harbour, MD, USA.**

### 13th-17th October 2010

**Insol Europe Annual Congress.**  
Vienna, Austria.

### 2nd-23rd September 2011

**INSOL Europe, Annual Conference.**  
Venice, Italy.



# Insolvency Challenge

Many thanks to all those who entered the insolvency challenge in the May edition of the Digest: a record number of entries! The correct answers and the winner appear in the box at the foot of the opposite page. In the meantime here is an insolvency challenge with a difference devised by Stephen Robins. All you have to do is name the eight faces: they are all people who have been influential as lawyers in the insolvency world, although to make it slightly easier clues appear with each photograph. There will, of course, be a magnum of champagne for the winner. Answers by email to [kirstendent@southsquare.com](mailto:kirstendent@southsquare.com) or by post to the address on the back page in either case by Friday 15 September 2009. Good luck!



1 Judge of the Chancery Division from 1985-1992; Lord Justice of Appeal 1992-1995. Appointed to the Lords in 1995.



2 Judge of the Chancery Division 1996-1994; Lord Justice of Appeal 1994-1998; Appointed to the Lords in 1998.



3 Judge of the Chancery Division 1991-1997; Lord Justice of Appeal 1997-2007.



4 Author of "Principles of Corporate Insolvency Law".



**5** Judge of the Chancery Division from 1970- 1979; Lord Justice of Appeal 1979-1982; Appointed to the Lords in 1982.



**6** Called to the Bar in 1938; took silk in 1965.



**7** Judge of the Chancery Division from 1994-2008.



**8** Judge of the Chancery Division from 1 October 2003.

### **May Insolvency Challenge**

(1) *In re Condon, ex parte James*. (2) *Mann v Goldstein*. (3) *Barclays Bank Ltd v Quistclose Investments Ltd*. (4) *British Eagle International Airlines Ltd v Compagnie Nationale Air France*. (5) *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd*. (6) *Ayerst v C & K (Construction) Ltd*. (7) *Re a Debtor (No 1 of 1987)*. (8) *Re Produce Marketing Consortium Ltd*. (9) *Bristol Airport v Powdrill, Paramount Airways*. (10) *Re MC Bacon Ltd* (11) *Re Atlantic Computer Systems plc*. (12) *British & Commonwealth Holdings plc v Spicer & Oppenheimer*. (13) *Re Shoe Lace Ltd, Power v Sharp Investments Ltd*. (14) *Stein v Blake* (15) *Re T&D Industries plc* (16) *Bank of Ireland v Hollis (Contractors) Ltd*. (17) *Cadbury Schweppes v Somji* (18) *National Westminster Bank v Spectrum Plus Ltd, Spectrum Plus* (19) *Re Eurofood IFSC Ltd* (20) *McGrath v Riddell, HIH Casualty and General Insurance Ltd*.

There were a considerable number of correct entries. But the winner of the Insolvency Challenge from the May Digest - drawn from the wig tin by 3-4 South Square's senior practice manager, Paul Cooklin - is John Harvey of Kennedy's to whom go many congratulations and, it being a rollover from the previous Digest, two magnums of Champagne.

# 3-4 South Square

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*"You cannot get any better"*

*Chambers 2009*

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Simon Mortimore QC	Lexa Hilliard QC	David Allison
Stuart Isaacs QC	Ronald DeKoven	Daniel Bayfield
Richard Adkins QC	John Briggs	Tom Smith
Richard Sheldon QC	Mark Arnold	Richard Fisher
Richard Hacker QC	Adam Goodison	Blair Leahy
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Mark Phillips QC	Lloyd Tamlyn	Marcus Haywood
Robin Dicker QC	Glen Davis	Hannah Thornley
William Trower QC	Andreas Gledhill	Simon Fuller
Martin Pascoe QC	Barry Isaacs	William Willson
Fidelis Oditah QC	Ben Valentin	Georgina Peters
David Alexander QC		Adam Al-Attar

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