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

3-4 DIGEST

February 2010

Hold on to your hats!

Welcome to the first Digest of 2010. 2009 was a difficult year in many sectors so there will be some who are glad to see the back of it. And the last quarter of the year saw more significant insolvencies of well-known entities: Regent Inns (Walkabout, Jongleurs and Old Orleans), First Quench (Threshers, Wine Rack, Bottoms Up), Wine Cellar, Pubs 'n' Bars, Tootsies, Puccino's, d2, Aero Inventory and Borders. It also saw trouble hit Dubai and the fallout from that remains to be seen.

So what for 2010? Well, quite apart from the novel experience of there being betting on the next airline to go down, Begbies Traynor have predicted that the worst is yet to come for the UK with a deluge of insolvencies expected. R3 has predicted significant problems on the high street for retailers in 2010 with some 20 or more household names going down. And BDO has suggested that some 5000 retailers could go out of business during the year as a whole. None of this sounds very good for Britain, its economy or its currency.

And, what of the wider world? Well, this year, of course, having survived yet another plot, even Gordon Brown has to have an election – indeed, so far as the people of the country are concerned, it will be the first time they have ever had an opportunity to elect him as Prime Minister. Will he pull off a miracle? Will the election bring decisive political change? Or will we just have a hung Parliament? And what will be the effect on the economy? Whoever wins, significant cuts and tax rises seem certain with their inevitable knock-on consequences.

And then we have the World Cup in South Africa to look forward to. For those of you (like me) too young to have seen the last time England won it, could this be the year it all changes? Hmmm … Oh well, maybe Andy Murray will win Wimbledon instead!

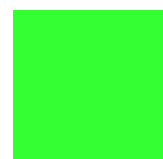
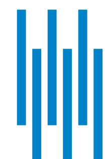
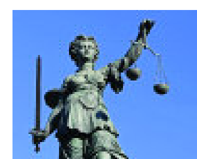
So what's in this edition of the Digest? This time we have articles by Simon Mortimore QC on what he describes as the dismal art of construing complex commercial contracts, Mark Arnold on fraud on the bankruptcy laws in the 21st century and David Allison on the Dubai International Financial Centre.

We also have the usual case digests, which contain a number of important insolvency decisions from a busy last quarter of 2009 for Chambers and include a report in relation to the approval of the largest ever pre-pack which happened in December 2009 in respect of Wind Hellas. And we have News-in-Brief, Diary Dates, a review of Chambers & Partners 2010 and, of course, the latest Insolvency Challenge.

As usual if you are not currently on our Digest circulation list and would like to be included (or if your contact details have changed and you wish to continue to receive the Digest), please email kirstendent@southsquare.com and we will do our utmost to ensure that you get the next edition of the Digest as soon as possible after it is published.

Finally, all of us here at 3-4 South Square wish you all the best for 2010. A year for holding on to your hats. For it could be a pretty bumpy ride for UK plc.

David Alexander QC - Editor.

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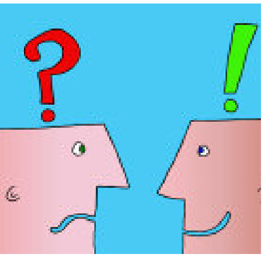


The dismal art of interpreting commercial contracts

Simon Mortimore QC discusses the Supreme Court's speeches in *Sigma* on the interpretation of contracts.

One of the areas of law that has engaged the attentions of members of Chambers with increasing frequency over the last few years is the interpretation of complex commercial contracts or instruments, particularly concerning priority and other rights on default or insolvency. If the parties cannot agree on the meaning of a provision, the issue must be referred to the court in which case the true construction of the provision is whatever the court, the Court of Appeal or Supreme Court determines it to be.

This is small comfort for the parties, because judges frequently disagree on which of two tenable interpretations should be preferred. In two cases concerning the interpretation of express terms which went to the House of Lords, *Syrius Insurance v FAI General Insurance*, concerning the interpretation of a Tomlin order to which a company in provisional liquidation was party, and *Sigma Finance,* concerning the interpretation of a security trust deed issued by a structured investment vehicle, the judges who considered the issues were divided 5:4.[1] In fact as Lord Hoffmann has observed it is not uncommon to find judges disagreeing on whether a particular interpretation leads to commercially absurd consequences.[2] In *Cattles v Welcome Financial Services* and *Mills v HSBC Trustee (CI)*, decided four days apart in December 2009, two judges of the Chancery Division appear to have adopted opposing interpretations of quite similar non-competition clauses in guarantees.[3] Since these two decisions are going on appeal (the *Mills* case may leapfrog to the Supreme Court) it would be invidious to comment on them beyond noting that seven members of Chambers were instructed and that three of them appeared in both cases.

The fact that judges are so likely to disagree on issues of interpretation is of course a great comfort to lawyers. Provided the lawyer advances a construction that is at least tenable there is little risk of him being guilty of negligence if the court prefers a different construction.[4] Furthermore conflicts between a literal interpretation and a more commercial approach are very difficult to resolve without litigation, particularly where an insolvent estate affecting many parties is involved. There is however a downside for lawyers, which explains the title of this article "The Dismal Art". No one, apart from the parties, is likely to be at all interested in the outcome or in studying the judgment. Usually a case involving an interpretation issue is only reported in the law reports if that issue is a stepping stone to a dispute about a wider principle; e.g. the anti-deprivation rule in the *Perpetual Trustee* and *Butters* cases.[5]

At first sight (a dangerous phrase in this context) it might seem odd that the courts have had such difficulty in interpreting the express terms in contracts when they have the advantage of statements of principle by the House of Lords in a string of well-known cases.[6]

Furthermore Lord Hoffmann has stated the two questions which the court is to answer when an issue arises as to the interpretation of an express term or the implication of a term. As to express terms "the question is what a reasonable person having all the background knowledge

[1] In *Sirius Insurance Co v FAI General Insurance* [2004] UKHL 54, [2004] 1 WLR 3251 the construction that prevailed was supported by Lords Nicholls, Steyn and Walker in the House of Lords and by Jacob J at first instance (4) and rejected by Lords Bingham and Brown in the House of Lords and by May, Carnwath LJJ, Wall J in the Court of Appeal (5). In Re *Sigma Finance Corporation* [2009] UKSC the construction that prevailed was supported by Lords Hope, Scott, Mance and Collins in the Supreme Court and by Lord Neuberger, with a variation, in the Court of Appeal (5) and rejected by Lord Walker in the Supreme Court, by Lloyd and Rimer LJJ in the Court of Appeal and by Sales J at first instance.

[2] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101.

[3] *Cattles Plc v Welcome Financial Services Ltd and others* [2009] EWHC 3027 (Ch) decided by HHJ David Cooke on 14 December 2009; *Mills, Bloom, Burton and Brazzill (as joint administrators of Kaupthing Singer and Friedlander Ltd) v HSBC (CI) Ltd and another* [2009] EWHC 3377 (Ch) decided by the Chancellor on 18 December 2009.

[4] Jackson & Powell on Professional Negligence (6th ed) at [11-099].

[5] [2009] EWCA Civ 1160, The Times 16 November 2009.

[6] *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 (speeches of Lords Mustill and Hoffmann); *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 (speech of Lord Hoffmann); *Investors Compensation Scheme Ltd v West Bromwich BS* [1998] 1 WLR 896 (speech of Lord Hoffmann, read with his supplementary comments in *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251); *the Sirius* case (speech of Lord Steyn); the *Chartbrook* case (speech of Lord Hoffmann).

which would be available to the parties would have understood them to be using the language in the contract to mean".[7] Where it is contended that some provision ought to be implied "the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean".[8]

It might be thought that no further guidance should be required, but the speeches of the Supreme Court in the *Sigma* case do provide additional assistance since they show how those principles are to be applied an instrument like a SIV's security trust deed which is intended to affect the interests of many different parties.

1. The first step is to understand the scheme or landscape of the instrument or the relevant part of it in order to place the critical provision in context. It is notable that the first three of Lord Hoffmann's principles in the *Investors Compensation Scheme* case focus on the instrument as a whole and the relevant background. In the *Sigma* case the court had to understand the structure of the enforcement provisions in order to determine whether the trustee was obliged to continue "Pay As You Go" regardless of its effect on other secured creditors. The Sigma enforcement scheme was unusual. Secured debts were not accelerated. Instead, during a realisation period of up to 60 days the trustee was to assemble all Sigma's assets into pools to pay its secured debts as they fell due. There was to be a short term pool for secured debts due or falling due within the year and several long term pools for secured debts falling due after more than one year. The critical provision in the case stated that while the pools were being established during the realisation period the trustee was to pay secured debts as they fell due "so far as possible". Once that provision was seen in its context it was apparent that the trustee was not obliged to give priority to secured creditors whose debts

Simon Mortimore QC

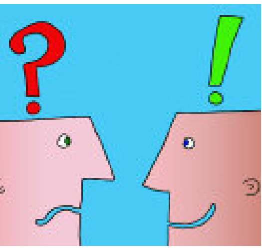
happened to become due during the realisation period. To do so could exhaust the funds and leave nothing to go into the pools, so frustrating the scheme for enforcement. (Lord Mance at [12] and [32], Lord Collins at [35] and [38]).

2. Care should be taken to avoid focussing too narrowly on the critical provision (Lord Mance at [8]). The purpose of the provision takes its meaning from the scheme of the instrument and its commercial purpose. *Charter Re*, concerning the meaning of "actually paid" in a reinsurance contract, is the best known example of apparently clear words taking on a different meaning when understood in the context of the whole instrument. So in *Sigma* Lord Mance considered that the courts below had adopted the wrong interpretation, because they had given too much weight to what they perceived to be the natural meaning of the words in the critical sentence and too

Judges frequently disagree on which of two tenable interpretations should be preferred

[7] The *Chartbrook* case at [14].

[8] *AG for Belize and others v Belize Telecom Ltd and others* [2009] UKPC 10, [2009] 1 WLR 1988 at [21].



little weight to the context and the scheme of the security trust deed (Lord Mance at [12] and [32], Lord Collins at [35]).

3. The provisions of a document such as a security trust deed, which may affect many parties over several years, should have a consistent meaning as between all parties to whom it applies (Lord Mance at [9]). So it is wrong to take account of background circumstances that may not be known to all the parties. Instead it "must be interpreted as a whole in the light of the commercial intention which may be inferred from the face of the instrument and from the nature of [Sigma's] business" (Lord Collins at [37]).

4. The resolution of an issue of interpretation is an iterative process involving "checking each of the rival meanings against other provisions of the document and investigating its commercial consequences" (Lord Mance at [12], agreeing with Lord Neuberger in the Court of Appeal). This process enables the court to identify the meaning of the critical phrase that accords with the scheme of the instrument and business commonsense and reject a conflicting meaning (the fourth of Lord Hoffmann's principles in the *Investors Compensation Scheme* case and Lord Steyn in the *Sirius* case). Lord Mance's iterative process is at [13]-[25] and his conclusion is at [31]-[32].

5. It follows that if detailed semantic analysis of the critical phrase supports one interpretation, but produces a result that conflicts with the scheme of the instrument as a whole and its commercial purpose, it must yield to the interpretation that is in harmony with those matters (Lord Collins at [37]). Nevertheless *Sigma* was not an example of the "something must have

The speeches of the Supreme Court in the Sigma case do provide additional assistance

gone wrong" type of case within Lord Hoffmann's fifth principle in the *Investors Compensation Scheme* case, where the court is driven by the business consequences and the scheme of the instrument as a whole to conclude that the parties must have used the wrong words or syntax.[9] The process of iteration described above will help the court determine whether it ought to reach that conclusion. So in *Chartbrook*, Lords Hoffmann and Walker, after considering the commercial and mathematical consequences, rejected the interpretation that appeared to be dictated by the syntax.

6. Little weight should be given to the fact that the critical provision is in a long document drafted by skilled lawyers or that the document was for use in relation to sophisticated financial transactions ([12], [23]). Infelicities are bound to emerge and there is always scope for improvement. The court should avoid "the type of textual analysis more appropriate to the interpretation of tax legislation", because that may lead to "an over-literal interpretation of one provision without regard to the whole [which] may distort or frustrate the commercial purpose" (Lord Collins at [35]).

Three further points may be made. First, no weight should be given to the argument that such an instrument was made for the benefit of skilled and sophisticated investors who should be bound by the black letter interpretation of the language used. A submission to this effect is usually made with scarcely concealed irony as those in court conjure up mental images of the banker in Bird and Fortune's Sub-prime Crisis videos, the bankers in David Hare's The Power of Yes or the appearance in Lucy Prebble's Enron of Lehman Brothers as a pair of nerdy twins sharing an oversize coat who agree for no good reason to give Enron bonds a "strong buy". It is more profitable to look at the commercial purposes of the issuer and trustee who made the instrument. The issuer will want the security trust deed to support its bonds and other secured liabilities. Its purposes would not be assisted if the enforcement scheme was haphazard or favoured some only of its secured creditors. Similarly the trustee will want the enforcement scheme to be straightforward with as little scope for controversy as possible.

Second, the Supreme Court in *Sigma* rightly paid tribute to the speed with which the courts below had heard and determined the difficult issue of interpretation. Priority disputes concerning structure investment vehicles invariably have to be determined with great urgency.[10] But a speedy hearing may mean that there is insufficient time for the advocates and the courts to fully appreciate the contextual landscape. This tends to favour the linguistic interpretation over business common sense.

Finally, it remains the case that different tribunals will have different views about the relevant features of the landscape. This may lead to disagreements as to whether or not a particular outcome is commercially absurd or merely disadvantageous to one party.

[9] To an insolvency lawyer *William Hare Ltd v Shepherd Construction Ltd* [2009] EWHC 1603 (TCC), [2009] BLR 447 appears to be a plain example of something having gone wrong, although the judge did not think so. A building contract made in 2008 had as an insolvency trigger event "on the making of an administration order against it under Part II of the Insolvency Act 1986". Since the contract was made long after the Enterprise Act 2002 had come into force, that should surely have been be read as meaning "on it entering administration under the Insolvency Act 1986"? The parties had simply overlooked the need to bring the insolvency trigger events up to date. In support of his conclusion the judge contrasted out of court appointments, which he called "self-certifying administrations" with administrations by court order, where creditors could appear and object to the making of an administration order.

[10] Re *Cheyne Finance Plc (No 1)* [2007] EWHC 2116 (Ch) [2008] 1 BCLC 732; *Re Cheyne Finance Plc (No 2)* [2007] EWHC 2402 (Ch), [2008] 1 BCLC 741; *Re Whistlejacket Capital Ltd* [2008] EWHC 463 (Ch); [2008] EWCA Civ 575, [2008] 2 BCLC 683 at [46].

case digests

Edited by Hilary Stonefrost

The frequently vilified pre-pack administration, which was given some respectability by being the subject of a Statement of Insolvency Practice (SIP 16), when it was introduced on 1 January 2009, gained additional propriety when the court made an administration order in respect of Hellas II, the immediate parent of a Greek telecommunications company, that had openly moved its COMI from Luxembourg to England to restructure under the law in this jurisdiction. On the application for an administration order, the Judge was satisfied that the company and the proposed administrators had provided the same information to the court as would be required to be disclosed by SIP 16 and, when he made the administration order, the Judge gave the administrators liberty to make the proposed pre-pack sale. This case is digested at page 12.

The Supreme Court has decided that the OFT is not entitled to assess the fairness of bank charges levied on personal current account customers in respect of unauthorised overdrafts; (page [6]).

There are a substantial number of corporate insolvency cases summarised in this issue. In particular, a number of issues have been brought before the court in the administration of Lehman Brothers: the Court of Appeal has upheld the decision of Blackburne J concerning the court's jurisdiction to sanction a scheme that is concerned with the distribution of property held on trust for the company's creditors (page 14); the court at first instance has determined a number of issues concerning the interpretation of client money rules (page 14) and has determined the treatment of cash received post-administration deriving from securities held as by LBIE custodian (page 14).

Hilary Stonefrost

BANKING AND FINANCIAL SERVICES

Digested by Jeremy Goldring & Marcus Haywood

R (on the application of Kaupthing Bank HF) v HM Treasury [2009] EWHC 2542 (Admin) Divisional Court (Richards LJ, Maddison J), 20 October 2009

HM Treasury had acted lawfully in making the Kaupthing Singer & Friedlander Limited Transfer of Certain Rights and Liabilities Order 2008 ("the Order"). The Divisional Court so held on the application of Kaupthing Bank HF ("K") for judicial review of HM Treasury's decision to make the Order in respect of certain deposits held by one of K's subsidiaries ("S"). The Order was made pursuant to the Banking (Special Provisions) Act 2008 ("the 2008 Act"), section 6. The main effect of the Order was to transfer S's liabilities to certain deposit account holders to a third-party company. K submitted that the Order was unlawful because (1) the Treasury's purpose in making it was not one of the lawful purposes specified in section 2 of the 2008 Act, namely to maintain the stability of the UK financial system, but to protect S's depositors; and (2) the Treasury had failed to identify, to understand properly and to inform itself about the specific threat posed to the stability of the UK financial system arising out of S's liquidity difficulties. Dismissing K's application, the Divisional Court held, amongst other things, that: (1) It was clear on the face of the Order and from the explanatory memorandum that accompanied it that the primary purpose of the Order was to maintain the stability of the UK financial system. That purpose was also entirely consistent with the fuller explanation given in witness statements made by the Treasury's Director of Financial Stability, the veracity of which had not been challenged. (2) The Treasury had ample material on which to reach a properly informed view. No legal error could be seen in its decision-making process; it was difficult to see what other decision the Treasury could reasonably have taken in the circumstances.

Jeremy Goldring

case digests

SRM Global Master Fund LP & Ors v Commissioners of Her Majesty's Treasury [2009] EWCA Civ 788 (Sir Anthony Clarke MR, Waller LJ, Laws LJ), 28 July 2009

The shareholders of Northern Rock appealed against a decision dismissing their claims for judicial review of the valuation of the shares in Northern Rock pursuant to an order made under the Banking (Special Provisions) Act 2008. The Appellants challenged the assumption that the financial assistance provided by the authorities had been withdrawn and that no further assistance would be provided as the shares would have no value. The Court of Appeal held that the decision to nationalise Northern Rock was made to protect the banking system and the economy, the purpose of the assumption was to put the shareholders in the position they would have been in if the government had not provded support to Northern Rock plc. The Court would only interfere if it were to conclude that the State's judgment as to the public interest was manifestly without reasonable foundation. The appeal was dismissed.

Office of Fair Trading v Abbey National & Ors [2009] UKSC 6 Supreme Court (Lord Phillips, Lord Walker, Lady Hale, Lord Mance, Lord Neuberger) 25 November 2009

Bank charges levied on personal current account customers in respect of unauthorised overdrafts constituted part of the price or remuneration for the banking services provided within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999 reg.6(2)(b) and the Office of Fair Trading was not entitled to assess the fairness of such charges under the Regulations in relation to their adequacy as against the services supplied.

[Robin Dicker QC]

Robin Dicker QC

BNP Paribas v Wockhardt EU Operations (Swiss) AG [2009] EWHC 3116 (Comm) (Christopher Clarke J), 3 December 2009

The early termination provisions in an International Swap Dealers Association master agreement were not penal. The Court so held on BNP Paribas' ("B") application for the defence of the respondent ("W") to be struck out or for summary judgment. B and W had entered into three foreign exchange target redemption forward transactions pursuant to an International Swap Dealers Association master agreement. W failed to make a number of payments and there was in consequence an event of default under the master agreement. B designated an early termination date and then claimed an early termination amount made up of the unpaid amounts due under the forward transactions and a close-out amount. W alleged that the close-out amount was not commercially reasonable as required by the master agreement and that the early termination and close-out provisions were unenforceable as a penalty because they did not provide for a genuine pre-estimate of the loss. The Court held that (1) W had failed to demonstrate that B had not taken a commercially reasonable approach. (2) There was no realistic prospect of W establishing that the early termination provisions were penal in character. There was nothing penal in a provision which required the acceleration in the event of breach of an amount which, without breach, would become due later.

CIVIL PROCEDURE

Digested by Stephen Robins

Stephen Robins

Blythe-Whitelock v De Meyer [2009] EWHC 2839 (Ch), (McCombe J), 11 November 2009

C and D entered into a loan agreement ("Agreement 1") which was varied ("Agreement 2"). Subsequently C's company ("SWLP") and D entered into an agreement that required D to repay the loan to SWLP not to C ("Agreement 3") and, on the same day, a further agreement ("Agreement 4") varied D's obligations and provided that D would repay the loan to C (i.e. not to SWLP) and provided for C to have security over D's properties in England. Some years later, C and D made another agreement ("Agreement 5"), which provided for C to have additional security over D's properties in England. D failed to make repayments of the loan. C commenced proceedings in France under Agreement 2. D contended that her obligations were owed to SWLP not to C under Agreement 3. In response to this defence, SWLP commenced proceedings against D in France for sums due under Agreement 3. SWLP's claim was upheld and SWLP obtained judgment against D which D paid in full. Subsequently, C commenced proceedings against D in England under Agreements 4 and 5, stating that he would give credit for sums paid by D to SWLP in the French proceedings. D applied to strike out C's claim. The Judge held: (1) C had repudiated Agreements 4 and 5 by conduct by causing or procuring SWLP to commence proceedings against D in France pursuant to Agreement 3; (2) alternatively, C was estopped by convention from relying on Agreements 4 and 5 because C and D had pro-

ceeded in litigation in France on the basis that Agreement 3 was binding on D; (3) notwithstanding the fact that certain relief claimed by C under Agreements 4 and 5 was for the possession and sale of D's English properties, C could have sought this relief against D in proceedings in France, because this relief was not the "principal concern" of C's claim and therefore Article 22 of Council Regulation (EC) No 44/2001 (the "Brussels Regulation"), which provides for exclusive jurisdiction in proceedings which have as their object rights in rem in immoveable property, was inapplicable; (4) C's claim would be struck out as an abuse of process.

[Stephen Robins]

In the matter of Anderson Owen Ltd (in liquidation) sub nom David Merrygold v (1) Philip Bates (Liquidator) (2) Nicole Bates [2009] EWHC 2837 (Ch) (Norris J), 11 November 2009

The Liquidator ("L") commenced proceedings against Philip Bates and Nicole Bates ("B") seeking declarations under section 212 of the Insolvency Act 1986 that as officers of the company they had been guilty of misfeasance. L obtained permission to serve the proceedings by post on B in Germany where she lived. B issued an application challenging the service of the proceedings on a number of grounds, in particular, that the service of the proceedings in Germany by post did not comply with the provisions of EC Regulation 1391/2007 (the "Service Regulation"). L, for tactical reasons, conceded that the Service Regulation did apply. L relied on rule 7.55 of the Insolvency Rules 1986, which provides that no formal proceedings shall be invalidated by any formal defect or any irregularity, unless there is substantial injustice caused by that defect or irregularity that cannot be remedied by order of the court. L also relied on the guidance given in relation to CPR 3.10, the general power of the Court to rectify matters where there has been an error of procedure. (The first instance decision in Olafsson c Gissurarson [2006] EWHC 1362, which decided that CPR 3.10 could not be used retrospectively to cure a method of service which was defective under the law of the state where the service was effected having been overturned by the Court of Appeal ([2008] EWCA Civ 152). L also argued that B had waived the right to complain about the mode of service. The Judge accepted L's arguments. In so doing the Judge proceeded on the basis that the Service Regulation applied, although in the course of his judgment he gave a number of reasons why he was unwilling to accept that the point taken by B was correct.

[Hilary Stonefrost]

COMPANY LAW

Digested by Daniel Bayfield

Daniel Bayfield

Iesini v Westrip Holdings Limited [2009] EWHC 2526 (Ch) (Lewison J), 16 October 2009

Shareholders in Westrip Holdings Ltd ("Westrip") alleged that the defendants (other than Westrip itself) had deliberately engaged in a course of conduct which led to Westrip losing ownership and control of a very valuable mining licence and which, but for their intervention, would have led to Westrip losing all or almost all of its remaining assets. They contended that the course of conduct that they alleged amounted to breaches of duty by the individual defendants. They applied to the court under section 261 of the Companies Act 2006 for permission to continue a derivative claim on behalf of Westrip in which they claimed to reverse the alleged asset stripping and also claimed declarations about Westrip's ownership of certain assets.

The Companies Act 2006 provides for a two-stage procedure where a member wishes to bring a derivative claim. The applicant is first required to make a prima facie case for permission to continue a derivative claim. Thereafter, the court has to find that the cause of action arose from an act or omission involving negligence, default, breach of duty or breach of trust by a director. At that second stage it is not simply a matter of establishing a prima facie case and it is wrong to embark upon a mini trial of an action. However, the court must form a provisional view on the strength of the claim to consider properly the requirements of section 263(2)(a) and section 263(3)(b). Section 263(2)(a) applies only where the court is satisfied that no director acting in accordance with section 172 would seek to continue the claim.

Lexi Holdings v Pannone & Partners [2009] EWHC 2590 (Ch) (Briggs J), 26 October 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 followed); 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.

Re Phoenix & London Assurance Limited, Ch D (Norris J), 14 December 2009

The Court sanctioned a scheme of arrangement between Phoenix & London Assurance Limited ("PALAL"), a subsidiary of the Pearl Group, and certain with profits policyholders who were entitled to purchase an annuity at a guaranteed pension rate ("GPR"). The Scheme replaces the GPR with an uplift to policy values. PALAL had to set aside a large sum of money so that it could provide pensions at the GPR. This money had to be invested conservatively so only afforded very low returns. Removing the GPR under the scheme allows PALAL to release the money set aside and to change its investment strategy so that a greater proportion of its investments can be invested in shares and commercial property. This change in investment strategy is expected to produce higher long term returns which, together with the uplift to retirement funds, gives policyholders a good chance of a higher pension at retirement than would be the case without the scheme. The scheme contains a number of features novel to solvent insurance company schemes. Although not a statutory requirement, an independent actuary was appointed to assess the fairness of the scheme. The independent actuary's appointment was approved by the FSA and his duties were to the Court and not to PALAL. The scheme was subject to a number of fairness safeguards, including a condition requiring that the value to shareholders of PALAL should not increase as a result of the scheme. Policyholders were offered the opportunity to opt out of the scheme and so retain their GPRs. On this basis the judge distinguished the scheme from that which was recently considered, but not sanctioned, in The Scottish Lion Insurance Company Ltd [2009] CSOH 127.

[Gabriel Moss QC, Barry Isaacs]

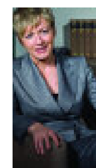
Barry Isaacs

Enviroco Limited v Farstad Supply A/S, [2009] EWCA Civ 1399 (Mummery, Longmore and Patten LJJ), 18 December 2009

The Court of Appeal heard an appeal against the decision of Gabriel Moss QC, sitting as a Judge of the High Court, who had determined a preliminary issue as to whether, following the pledge of certain shares, a company remained a subsidiary of another company for the purposes of section 736 of the Companies Act 1985, which provision had been incorporated into a charterparty. The Court of Appeal's judgment concerns the proper construction of sections 736 and 736A of the Companies Act 1985 (which have been reproduced (without any material amendment) in what is now section 1159 and Schedule 6 of the Companies Act 2006). The Court noted that the provisions of sections 736A and Schedule 10A are all but identical such that the court must, by way of construction, read the reference to "rights" in those provisions and, in particular, in section 736A(7), as a reference to the rights described in section 736. Membership of a company is not one of the rights described in section 736 nor is it a right as such at all. It is a status derived from the entry of the shareholder's name in the register of members. To meet these difficulties the draftsman introduced deeming provisions into the original drafts of both section 736 and section 258. The fact that section 258(3) remains is an almost decisive indication that the wording of Schedule 10A is not sufficient in itself to confirm the status of membership on the subsidiary through the provisions of paragraphs 7 and 8. The same must go for sections 736A(6) and (7). It is not open to the court to give section 736A(7) a different meaning and effect to the identical words contained in paragraph 8 of Schedule 10A.

CORPORATE INSOLVENCY

Digested by Blair Leahy and Georgina Peters


Blair Leahy

Georgina Peters

Decisions in this jurisdiction

Re Platinum Developers Ltd, Ch D (Mann J), 5 October 2009

The administrators of the company applied to the Court under para. 55 of Schedule B1 to the Insolvency Act 1986 for directions. The administrators' proposals had been rejected at the creditors' meeting due to the accidental non-attendance of the largest creditor, the bank, which stated in a letter to the Court that it would have voted in favour of the proposals if it had remembered to attend the meeting. The administrators' application was opposed by a dissentient creditor, who argued that the purpose of administration was not capable of achievement and that the company should be wound up. The Judge held that the purpose of administration remained capable of achievement and that the dissentient creditor's objections were misconceived. As regards the appropriate way forward, the Judge held that it would not be right for the Court itself to approve the proposals. The proper course of action in the circumstances was for the administrators to convene a further creditors' meeting to give creditors (including the bank) a further opportunity to consider the proposals. The Judge held that this would not involve any improper delegation of the Court's powers under para. 55(2) of Schedule B1 and represented a sensible and business-like solution to the problem which had arisen.
[Stephen Robins]

Nasser Kazeminy & Ors v Frazer-Nash Technology Limited (in liquidation) and Matthew James Cowlishaw and Christopher James Farrington (joint liquidators of Frazer-Nash Technology); Nasser Kazeminy & Ors v Metrocab Limited (in liquidation) and Matthew James Cowlishaw and Christopher James Farrington (joint liquidators of Metrocab Limited) (CH D) (McCombe J), 30 October 2009

This was an application by Mr. Kazeminy and a number of companies for retrospective leave to bring proceedings against two companies in liquidation, Frazer-Nash Technology Limited and Metrocab Limited, pursuant to section 130(2) of the Insolvency Act 1986. The Liquidators agreed to be bound by any decision of the Court. Proceedings had been commenced without prior permission. In 1996, Mr. Justice Lindsay, in a decision made after an exhaustive examination of the authorities, held that the lack of prior consent was not a bar to the commencement of proceedings; Re Saunders (a Bankrupt) [1997] BCC 83. More recently, in Re Taylor, Davenham Trust plc v CV Distribution (UK) Ltd [2007] BPIR 175, Judge Kershaw QC did not follow the decision of Mr. Justice Lindsay and held that the effect of the need for leave to commence proceedings was to render void any proceedings commenced without leave. Therefore, the Judge in this case was faced with two conflicting decisions of judges of co-ordinate jurisdiction. The Judge could only decide not to follow the decision of Judge Kershaw QC if he was convinced that Judge Kershaw QC was wrong in not following Mr. Justice Lindsay; Colchester Estates (Cardiff) v Carlton Industries plc [1984] 3 WLR 693. The Judge held that Judge Kershaw QC should have treated the point as settled unless satisfied that Lindsay J was wrong. The Judge, having considered the reasons given by Judge Kershaw QC as to why Lindsay J was wrong, held that Judge Kershaw QC was wrong not to follow Lindsay J. The Judge, therefore, followed the decision of Lindsay J and gave the Applicants permission to bring proceedings nunc pro tunc.
[Hilary Stonefrost]

Re Farepak Food & Gifts Limited [2009] EWHC 2580 (Ch) (Warren J), 23 October 2009

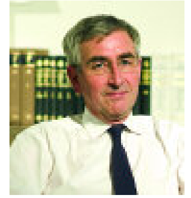
Farepak Food and Gifts Ltd's liquidators applied for an order for distribution of certain monies paid into Farepak's bank account shortly prior to its entry into administration. Farepak had operated a savings scheme under which customers paid individuals known as "agents" regular small amounts throughout the year. The agents would then pay the money into Farepak's bank account. Mr. Justice Warren accepted the analysis and conclusions of Mr. Justice Mann in an earlier summary hearing of the matter ([2006] EWHC 3272 (Ch)). He went on to find that the distribution proposed by the liquidators reflected the interests of customers falling within certain categories of customer that had been identified by the liquidators.
[Lexa Hilliard QC]

Lexa Hilliard QC

Re Sigma Finance Corporation (In Administration)[2009] UKSC 2, Supreme Court (Lord Hope, Lord Scott, Lord Walker, Lord Mance, Lord Collins), 29 October 2009

Sigma is a structured investment vehicle, whose business involved acquiring asset-backed securities and other instruments, using funds raised by issuing notes. Sigma's assets were secured in favour of noteholders and other secured creditors upon the terms of a Security Trust Deed (STD). The global financial crisis affected the value of Sigma's assets, in consequence of which an "Enforcement Event" occurred, the floating charge created under the STD crystallized, and receivers were appointed.
Under clause 7.6 of the STD, the occurrence of an Enforcement Event started a 60-day Realisation Period, and triggered an obligation on the Receivers to use their reasonable endeavours to establish by the end of that period a Short Term Pool (for Short Term Liabilities, defined as those falling due less than 365 days from the Enforcement Date), as well as a number of Long Term Pools (for any liabilities which are not Short Term Liabilities). The third sentence of clause 7.6 provided that "During the Realisation Period the [Receivers] shall discharge so far as possible on the due dates therefore any Short Term Liabilities falling due for payment during such period." Following realisation of its remaining portfolio in December 2008, Sigma's assets consisted of cash of around US$450m. Sigma's unpaid secured liabilities are around US$6.2bn. They include (a) payments on notes which fell due during the Realisation Period; (b) payments on notes constituting Short Term Liabilities which fell due between 30 November 2008 (ie after the end of the Realisation Period) and 1 October 2009 and (c) principal on notes constituting Long Term Liabilities which fell due or fall due after 2 October 2009.
The issue on appeal was how Sigma's remaining assets are to be distributed. Interested parties A and B submitted that the assets fall to be distributed preferentially to the creditors in respect of the debts identified in (a) and (b). Interested parties C and D maintained that Sigma's remaining assets fall to be allocated equitably as between Short and Long Term Liabilities, and, that, having been so allocated, its Short Term Liabilities identified in (a) and (b) fall in effect to be distributed pari passu in relation to each other, and that its Long Term Liabilities identified in (c) fall to be treated likewise in relation to each other. Sales J and, by a majority, the Court of Appeal accepted the case by interested party A. The Supreme Court allowed an appeal by interested parties C and D, by a 4-1 majority.
The Supreme Court held that the Courts below had attached too much weight to what was perceived as the natural meaning of the words of the third sentence of clause 7.6, and too little weight to the context in which that sentence appears and to the scheme of the STD as a whole. The provision by clause 7.6 for discharge of Short Term Liabilities as they fall due appears in a context where the underlying assumption is that all secured liabilities can be covered and no issue of priority can arise. It was not intended to deal with a situation requiring the application of priorities between creditors. It was improbable that clause 7.6 could be read as extracting, from the Short Term Pool, debts which fell due during the Realisation Period so as to give priority over other creditors. It was also improbable that the parties would have contemplated priorities being conferred by the fortuitous timing of debts falling due during the Realisation Period. Clause 7.6 was an ancillary provision which did not override the Receivers' discretion as to the manner in which assets were to be realised. No provision would have been made for the fees of the Receivers if the Court of Appeal were correct. The reasonable person's understanding of clause 7.6 was aided by a clear basic scheme that debts arising during the Realisation Period were to be part of the Short Term Pool with the assets to be distributed equitably amongst all the creditors at the discretion of the Receivers.
[Gabriel Moss QC, Simon Mortimore QC, Richard Sheldon QC, Barry Isaacs, Felicity Toube, Daniel Bayfield]

Simon Mortimore QC


Richard Sheldon QC

Felicity Toube

Re TPC Korea Co Limited, Ch D (unreported) (Warren J), 29 October 2009

The Korean Court-appointed Receiver of TPC Korea Co Limited applied to the English Court under the UNCITRAL Model Law (Schedule 1 to the Cross-Border Insolvency Regulations 2006) for: (1) recognition of the Korean rehabilitation proceedings as 'foreign main proceedings' under Article 17; and (2) relief under Article 21(1)(g) in the form of a moratorium in the terms of para. 43 of Schedule B1 to the Insolvency Act 1986. The Judge granted recognition under Article 17 and held that the public policy exception in Article 6 was not engaged. Further, the Judge held that, in addition to the automatic stay and suspension under Article 20, it was appropriate to grant relief under Article 21(1)(g) in the form of a moratorium in the terms of para. 43 of Schedule B1, because the aim of the Korean rehabilitation proceedings was to rescue the Company as a going concern; Re Samsun Logix Corporation [2009] EWHC 576 (Ch) applied. Accepting the view expressed by Look Chan Ho in "Smoothing cross-border insolvency by synchronising the UNCITRAL Model Law" (2009) 24 Butterworths Journal of International Banking and Financial Law 395, the Judge also held that the stay and suspension under Article 20 and the moratorium granted under Article 21(1)(g) are not extra-territorial in effect.
[Stephen Robins]

Perpetual Trustee Company Ltd v (1) Bank of New York Corporate Trustee Services Ltd (2) Lehman Brothers Special Financing Inc [2009] EWCA Civ 1160 (Lord Neuberger MR, Longmore LJ, Patten LJ), 6 November 2009

In October 2002 the Lehman Group established a multi-issuer secured obligation programme: the Dante Programme. In summary, retail noteholders were perusaded to subscribe to notes issued by a spv. The proceeds of the notes went to purchase notes issued by another spv in a tax-friendly jurisdiction. This spv purchased bonds ("the Collateral") issued by highly-rated major banks which were charged to a security trustee (eventually, an English incorporated subsidiary of the Bank of New York), D1. The beneficiaries of the charge held in trust were LBSF (D2), a US subsidiary of LBHI, the Lehman parent company, and a trustee for the retail noteholders (Perpetual). LBSF entered into a swap with the second spv which in effect gave LBSF the right to the equivalent of the income from the Collateral and eventually the capital value of the Collateral, in exchange for LBSF, guaranteed by LBHI, paying the spv sums which would fund the interest and capital redemption payments on the retail noteholders' notes. The retail customers' notes were sold on the basis that if LBSF defaulted, the noteholders would have priority over the capital and this was provided in the trust deed relating to the Collateral and in the terms of the notes. As is well known, LBHI filed for chapter 11 voluntary bankruptcy in the US on 15 Sept 2008. LBSF filed a couple of weeks later. Under the trust provisions and under the terms of the notes, either filing was a default which triggered noteholder priority over the collateral. On the other hand, if there had been no default, LBSF would generally have had priority in respect of sums payable under the swap. At the time the swap was terminated, LBSF was "in the money" for a sum referreed to as "Unwind Costs". LBSF claimed the alteration of priority was void under English law as a breach of the principle in cases such as British Eagle. This contention was rejected by the Chancellor [2009] EWHC 1912 (Ch).

The Court of Appeal upheld the decision of the Chancellor. The Court of Appeal conducted a detailed analysis of the origins and ambit of the anti-deprivation principle. In this regard, the Master of the Rolls found that (1) following the passing of the Insolvency Act 1986 ("the Act"), the courts should not extend the anti-deprivation principle beyond its present limits, save where logic or practically otherwise require; (2) it is desirable that, if possible, the courts give effect to the contractual terms which parties have agreed and that there was a particularly strong case for party autonomy in cases of complex financial instruments and in arrangements involving large corporate groups.

Lord Justice Patten found that a change in priority upon the insolvency or liquidation of a company is not prohibited by any express term of the Act and does not amount to the disposition of the property of a company.

The Court of Appeal found that the switch to Noteholder priority did not offend the anti-deprivation principle as it did not divest LBSF of property currently vested in it. It was merely to change the order of priorities in which the rights were to be exercised in relation to the proceeds of sale of the Collateral in the event of a default under the swap agreements.

The Court of Appeal also found that any "deprivation" resulting from the alteration of priorities was triggered not by the Chapter 11 filing of LBSF but by the earlier filing of LBHI (the swap guarantor) and that the anti-deprivation principle did not apply in circumstances where the provisions in question can be and are operated on other grounds prior to the commencement of any insolvency proceedings. In reaching this decision, the Court overruled the suggested in the earlier decision of Fraser v Oystertec plc [2004] BPIR 486 that the anti-deprivation principle could apply to invalidate contracts even when no bankruptcy or winding-up order is ever made.

LBSF has applied to the Supreme Court for permission to appeal.

[Gabriel Moss QC, David Allison]

Gabriel Moss QC

David Allison

Butters & Ors v BBC Worldwide & Ors [2009] EWCA Civ 1160 (Lord Neuberger MR, Longmore LJ, Patten LJ), 6 November 2009

The administrators of WW Realisation 8 Limited ("Media") and Woolworths Group plc ("Group") challenged the validity of certain clauses in a joint venture agreement ("the JVA") which set out the terms upon which Media and BBC Worldwide Ltd ("BBCW") held their shares in 2 Entertain Ltd ("2E"). 2E was the sole shareholder of company called BBC Video Ltd ("BBC Video"). Completion of the JVA was conditional upon the grant by BBCW to BBC Video of a licence of intellectual property rights and continuing access to future rights in accordance with the terms of a Master Licence Agreement ("the MLA"). Clause 16.2.5 of the MLA and clause 26.7 of the JVA ("the Relevant Clauses") purported to have the effect that upon Group or Media having suffered an Insolvency Event and a notice having been served, Media was obliged to sell its shares in 2E to BBCW for a price which is to be determined on the basis that the MLA has terminated. The administrators of Media contended, inter alia, that the Relevant Clauses were void because they infringed

Mark Arnold

the deprivation principle.
The appeal against the decision of Peter Smith J was heard at the same time as the appeal in the Perpetual case. The Court of Appeal found that (1) there had been no breach of the anti-deprivation principle; and (2) in any event, even if the principle had been engaged, the "deprivation" occurred before the administration order was made in respect of Media.
[Richard Sheldon QC, Mark Arnold, Barry Isaacs]

Re Lehman Brothers International (Europe), [2009] EWCA Civ 1161, The Times, (Lord Neuberger MR, Longmore and Patten LJJ), 12 November 2009

The Court of Appeal upheld the decision of Blackburne J that, insofar as a scheme of arrangement is concerned with the distribution of property held on trust for the company's creditors, and to the extent that it varies or extinguishes those property rights, the court has no jurisdiction under Part 26 of the Companies Act 2006 to sanction the scheme. A proprietary claim to trust property is not a claim in respect of a debt or liability of the company. The beneficiary is entitled in equity to the property in the company's hands and is asserting his own proprietary rights over it against the trustee. The failure by a trustee to preserve that property in accordance with the terms of the trust may give rise to a secondary liability to make financial restitution for the loss which results, but that is a consequence of the trust relationship and not a definition of it. An arrangement between a company and its creditors means an arrangement which deals with their rights inter se as debtor and creditor. That formulation does not prevent the inclusion in a scheme of the release of contractual rights or rights of action against related third parties necessary in order to give effect to the arrangement proposed for the disposition of the debts and liabilities of the company to its own creditors, but it does exclude from the jurisdiction rights of creditors over their own property which is held by the company for their benefit (as opposed to their rights in the company's own property held by them merely as security).
[William Trower QC, Anthony Zacaroli QC, Daniel Bayfield]

William Trower QC

Antony Zacaroli QC

BLV Realty Organization Ltd v (1) Mark Batten (2) Colin Haig (as Joint Administrators of Zegna III Holdings Inc) (3) Zegna III Holdings Inc [2009] EWHC 2994 (Ch), (Norris J), 20 November 2009

The applicants applied under paras. 74 and 88 of Schedule B1 to the Insolvency Act 1986 to, amongst other things, remove the first and second respondents as administrators of the third respondent (the Company). The Company was undertaking the redevelopment of a property and had entered into an agreement with the applicants to provide general management and co-ordination services (the Agreement). The primary basis for the application was that the administrators had allegedly wrongfully terminated the Agreement. Dismissing the application the Court held, amongst other things, that: (1) It was impossible in the instant proceedings to decide whether termination of the Agreement was wrongful. (2) In any event, a wrongful termination of the Agreement would not necessarily constitute a breach of the administrators' duty to perform their functions in the interests of the creditors as a whole nor would it necessarily constitute unfair harm to the applicants. It could be in the interests of the creditors as a whole that one particular contract with one particular creditor was terminated (even wrongfully). Unequal or differential treatment was not necessarily unfair treatment. (3) Where an application may be made by a person "as a creditor", it had to be made in that capacity and not in any other capacity. The applicants' application was not made in their capacity as alleged creditors but in their interests as contractors. (4) The fact that the administrators' firm had previously advised the floating charge holder who had applied for their appointment or that solicitors who had advised that floating charge holder had also been retained by the administrators did not of itself create a conflict of interest that disabled either from acting.
[Marcus Haywood]

Marcus Haywood

Hellas Telecommunications (Luxembourg) II SCA ("Hellas II") (unreported), (Lewison J), 26 November 2009

In what is believed to be the biggest pre-pack so far, Lewison J made an administration order in respect of Hellas II, the immediate parent of Wind Hellas, the Greek telecommunications company. Lewison J was satisfied that Hellas II, a société en commandité par actions (being a combination of a joint stock company and a limited partnership) incorporated in Luxembourg, constituted a company for the purposes of IA 1986 Sch B1, having regard in particular to its separate legal personality. He was also satisfied on the evidence that Hellas II had successfully shifted its COMI to England, having done so expressly for the purpose of facilitating its restructuring. In relation to pre-packs generally, the Judge observed that the merits of entering into the transaction proposed in relation to a particular company would be a matter primarily for the officeholders themselves once appointed, any aggrieved creditors having their

Lucy Frazer

remedy in the right to challenge conferred by Sch B1, para 74. In an obvious case constituting an abuse of the administration process, the Court might refuse to make the administration order altogether or direct the administrators not to complete the proposed transaction. In other cases, the proposed transaction might be the only real way forward, in which case the Court could give the administrators liberty to enter into the proposed transaction, leaving open the possibility that aggrieved creditors might challenge the officeholders' decision ex post facto. In the majority of cases, the position might not be clear, so that the Court should not give its blessing. After a lengthy bid process, the only bid for Hellas II's assets, including its shares in Wind Hellas, which ultimately commanded the support of the senior creditors was that of Weather Investments SpA, Hellas II's ultimate parent. On the evidence, the Judge was satisfied that the company had fully complied with its obligation to provide the same information to the Court as that required to be given to creditors pursuant to SIP 16, in accordance with the good practice guidelines in Re Kayley Vending Ltd [2009] EWHC 904 (Ch). In the circumstances, and despite complaints about the bid process from certain subordinated noteholders who ultimately decided not to oppose the application, the Judge concluded that it was appropriate to make the administration order, with a direction expressly giving the Administrators liberty to enter into the proposed sale to Weather.

[Richard Sheldon QC, William Trower QC, Mark Arnold, Hilary Stonefrost, Lucy Fraser]

Goldacre (Offices) Limited v Nortel Networks UK Limited (HH Judge Purle QC sitting as a Judge of the High Court), 7 December 2009

The landlord of commercial property applied for an order that the administrators of the tenant company cause it to pay the quarterly rent in full as an expense of the administration. The administrators contended that they should only pay part of the rent as an expense, because the company was only using part of the property. The Court held as follows: (a) if rental liability falls within rule 2.67 of the Insolvency Rules 1986 (the Rules), then it is payable as a matter of mandatory obligation, not as a matter of discretion; (b) rental liability falls within rule 2.67 of the Rules if the Lundy Granite principle is engaged; (c) the Lundy Granite principle was engaged in the present case by the tenant company's continued use of the property for the purposes of the administration; (d) rent payable quarterly in advance becomes payable in full from the relevant quarter day as one of the costs and expenses of the administration and would not fall to be apportioned should the administrators vacate the premises during the quarter; (e) therefore the administrators should pay every quarterly instalment of rent which accrues due on a subsequent quarter day in full for so long as the tenant company retains possession of or uses any part of the demised premises.

[William Trower QC, David Allison, Blair Leahy]

(1) Clydesdale Financial Services Ltd (2) Justice Capital Ltd (3) Focus Insurance Co Ltd v (1) Robert Smailes (2) Steven Ryamn (3) Jiva Solicitors LLP (4) Alexander Samuel & Co (A Firm) (5) Alexander Samuel LLP [2009] EWHC 3190 (Ch), (David Richards J), 8 December 2009

A credit insurer commenced proceedings against administrators of a company under para.75 of Schedule B1 to the Insolvency Act 1986 for misfeasance. The credit insurer claimed to be a creditor of the company in administration, and hence have standing to bring such proceedings, by reason of premiums alleged to be payable and unpaid by the company in administration. The administrators argued that, since the loans that were to be the subject of the insurance were never in fact made, no premium was payable on the basis of the principle, "No risk, no premium." David Richards J. applied that principle, as explained by Lord Mansfield in Stevenson v Snow (1761) 3 Burr 1237, and hence the claim was struck out. By contrast, proceedings brought by the credit insurer against the purchaser of the business of the company in administration under section 423 of the Insolvency Act 1986, transaction defrauding creditors, were not struck out. Although the credit insurers were not creditors of the company, they were arguably a "victim" of the transaction within the meaning of section 423(5).

[Lloyd Tamlyn]

Lloyd Tamlyn

Re Cattles Plc, (HHJ Cooke sitting as a Judge of the High Court) 14 December 2009

The Court determined on a Part 8 trial concerning the interpretation of an inter-group company guarantee that: (1) by reason of the contractual terms contained in the guarantee, Cattles as surety for Welcome's debt was unable to prove for any debt due to it in the liquidation of Welcome until the bank benefiting from the guarantee had been paid in full; (2) that had Cattles been able to prove, any liquidators appointed in respect of Welcome would (subject to the terms of the documentation) be able to rely on the equitable rule in Cherry v Boultbee (1839) 4 My & Cr 442 (the Rule) in respect of any proof submitted by Cattles; (3) that the decision of the Court of Appeal in

SSSL Realisations (2002) Ltd [2006] EWCA Civ 7 as far as it concerned the method of application of the Rule was part of the ratio decidendi of that decision and therefore binding on the Court at first instance such that the Rule would, in principle, entitle the liquidators of Welcome to retain an amount up to the full amount of Welcome's liability to the bank as surety; (4) that the terms of the contractual documentation in issue were sufficient to prevent reliance on the Rule, and that the bank would not be able to waive unilaterally the relevant contractual restriction; (5) the same result would occur if Welcome or Cattles entered administration (and a notice of distribution was given) rather than liquidation.
[William Trower QC, Robin Knowles CBE QC, Robin Dicker QC, David Allison, Tom Smith, Richard Fisher]

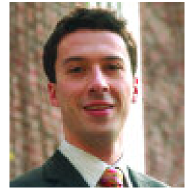
RIchard Fisher

Re Lehman Brothers International (Europe) (In Administration) [2009] EWHC 3228 (Ch) (Briggs J), 15 December 2009

This was an application by LBIE's administrators to determine numerous issues concerning the interpretation and application of the client money rules in Directive 2004/39/EC on markets in financial instruments (MiFID), as applied in the Client Assets Sourcebook (CASS 7) issued by the FSA. CASS 7 provided for client money to be held on trust and to be segregated. LBIE's administration had triggered a "primary pooling event" (PPE) under the rules - a notional pooling of all client money and an obligation on LBIE to distribute it. This meant the pool was to be distributed in accordance with the client money distribution rules. In breach of CASS 7, LBIE had failed to segregate large sums of client money and there was now also a shortfall in the pool (arising from decreases in value of the pooled assets and from the failure of one of the banks with whom such client money was held).
The Court determined several main issues, in light of which specific questions relating to LBIE's administration were determined.

On the main issues: (1) CASS 7.7.2R imposed a statutory trust on receipt of client money by a firm. (2) Pending segregation of client money, a firm was obliged to take reasonable steps to ensure that, in relation to client money mixed with its own money in house accounts, clients' rights in relation to that money were not put at risk, or the client money used for the firm's own purposes. (3) The pool that was constituted at the PPE consisted only of client money in the firm's segregated accounts. The identification of any client money outside segregated accounts depended on the established principles by which a beneficiary had to trace his property in order to pursue a proprietary claim in relation to it, which would be a difficult, time consuming and contentious process. (4) CASS 7 made no provision for the pooling or distribution of identifiable client money in a firm's non-segregated accounts outside of the pool. A client could pursue a proprietary claim in respect of such money, in accordance with established principles of tracing. (5) CASS 7 (and the general law) did not require or permit a shortfall in the pool at the time of the PPE to be topped up, either from identifiable client money outside the pool, or from the general assets of an insolvent firm in administration or liquidation. (6) The basis for a client's right to share in the pool (the client money entitlement) is by reference to the amount of client money which is in fact segregated by the firm for each client, not the amount (if different) which should have been segregated for each client. Certain adjustments are to be made to the client money entitlements thus identified, mainly to ensure that a client money entitlement does not get paid or satisfied twice over. (7) The date for calculation of the value of clients shares in the pool was the PPE; Re Global Trader Europe Ltd [2009] EWHC 699 applied. (8) Set-off and/or retainer had no part to play in relation to the distribution of money from the pool to clients pursuant to CASS 7.9; Guinness v Saunders [1987] 3 BCC 520 applied.
[Robin Knowles CBE, QC, Antony Zacaroli QC, Felicity Toube, David Allison, Adam Al-Attar]

Robin Knowles CBE QC


Adam Al-Attar

Re Lehman Brothers International (Europe) (Briggs J), [2009] EWHC 2545 (Ch) (Briggs J), 16 December 2009

In an application by the Administrators of Lehman Brothers International (Europe) ("LBIE") to determine how they should treat certain cash received by LBIE after having entered administration in consequence of corporate events or actions which affect securities held by LBIE as custodian under its standard form International Prime Brokerage Agreement (Charge Version) ("the Charge IPBA"), the Court held that: (i) securities held by LBIE as custodian for counterparties were, and remain, held upon trust, such that counterparties retained and continued to retain after the commencement of LBIE's administration, a beneficial interest in those securities, subject of course to LBIE's charge; (ii) clause 5.2 of the Charge IPBA, which provides that: "cash held by [LBIE] for [the counterparty] is received by [LBIE] as collateral with full ownership under a collateral agreement", properly interpreted, applies only for as long as LBIE is carrying on its business as such; and (iii) even if clause 5.2 had no temporal limit to its scope, cash received post-administration deriving from securities held by LBIE on trust would be payable to the relevant counterparty as an expense of the administration (subject to LBIE's security and other rights). Although the Administrators have not adopted or retained securities held by LBIE

on trust for counterparties so as to use them for a purpose of the administration, they have nonetheless thus far resisted their delivery to counterparties on demand, because to have done so would have been contrary to the efficient conduct of the administration. It has therefore been for the better conduct of the administration that the securities have thus far been retained. By contrast it is no part of the purpose of the administration that the unsecured creditors of LBIE should obtain a consequential windfall at the counterparties' expense. Payments of sums equivalent to the cash received post-administration deriving from securities held by LBIE on trust are therefore necessary disbursements, because they are necessary in order to remedy the injustice which the retention of that cash would otherwise bring about discharging its prime brokerage obligations to the Counterparty.
[William Trower QC, Daniel Bayfield]

Kaupthing Singer Friedlander Ltd v (1) Mills & Ors and (2) HSBC Trustee (C.I.) Ltd (The Chancellor), 18 December 2009

On an application for directions by the KSF administrators, the Court determined that: (1) the equitable rule in Cherry v Boultbee (1839) 4 My & Cr 442 (the Rule) was applicable by the KSF administrators to any proof of debt submitted by the administrators of Funding, a company in the KSF group which was the principal debtor whose debts had been guranteed by KSF; (2) the decision of the Court of Appeal in SSSL Realisations (2002) Ltd [2006] EWCA Civ 7 as far as it concerned the method of application of the Rule was part of the ratio decidendi of that decision and therefore binding on the Court at first instance such that the Rule would, in principle, entitle the administrators of KSF to retain an amount equal to the full amount of KSF's liability to the bank as surety; (3) the consequence of the application of the Rule was that Funding would receive nothing in the administration of KSF; (4) the terms of the inter-group company guarantee did not operate to exclude the application of the Rule because (i) the terms were insufficiently clear to have such an effect; and (ii) the Rule accrued to the benefit of the KSF administrators (and not KSF), was not the exercise of a right or remedy against Funding and was not dependent on the making of payments by KSF to the bank. The Chancellor gave permission to appeal, and certified the appeal as suitable for a leapfrog appeal to the Supreme Court.
[Gabriel Moss QC, Robin Dicker QC, Tom Smith, Richard Fisher]

Tom Smith

Corporate insolvency in other jurisdictions: decisions of the Privy Council and the Court of Appeal for Bermuda

New Hampshire Insurance Company v Magellan Reinsurance Company Limited [2009] UK PC 33, Privy Council (Lord Philips, Lord Brown, Lord Mance), 15 July 2009

The principal question was whether New Hampshire Insurance Company (New Hampshire) had locus standi to present a winding up petition in respect of a reinsurer, Magellan Reinsurance (Magellan). This depended on whether New Hampshire was a "creditor" of Magellan under the relevant Turks and Caicos Islands Companies Ordinance, which in turn depended on whether failure by Magellan to pay monies into a trust account with a bank in breach of a reinsurance obligation rendered New Hampshire a creditor. By the end of 2001 the trust account in question contained in excess of US$ 2.5 million. Following that New Hampshire made a series of withdrawals to cover unpaid losses due for settlement under the reinsurance arrangements. New Hampshire claimed that Magellan was required to replenish the trust account and duly served a statutory demand in respect of a debt of US$ 1.4 million. The court of first instance held that New Hampshire had locus standi, a decision reversed by the Court of Appeal in the Turks and Caicos. The Privy Council dismissed the appeal, holding that the Court of Appeal was correct in concluding that there was no basis upon which Magellan's failure to make payments into the trust account rendered New Hampshire a creditor. At most New Hampshire had a claim for damages which would only have entitled New Hampshire to petition had it converted its claim into a liquidated claim by judgment.
[David Marks QC]

David Marks QC

(1) GFN SA (2) Artag Meridian Ltd (3) Caribbean Energy Co v Liquidators of Bancredit Cayman Ltd (In Official Liquidation) [2009] UKPC 39, Privy Council (Lord Scott, Lord Rodger, Lady Hale, Lord Neuberger, Sir Jonathan Parker), 4 November 2009

The liquidators of Bancredit Cayman Ltd had rejected proofs of debt submitted by the appellants, who applied to the Grand Court for orders reversing the liquidators' rejection of their proofs and expunging the liquidators' admission of proofs of debt submitted by two banks. The Court of Appeal reversed the Grand Court's decision that it had no jurisdiction to grant an application brought by the liquidators for security for costs. On appeal the Privy Council held that the critical issue was not whether the court had jurisdiction to make the order sought by the liquidators, but whether, in view of the reference in the Companies Law (2004 Revision) s. 74 to "action, suit or other legal proceeding" and in Ord. 23 r. 1 to an "action or other proceedings", it would be proper for the court to entertain the application. The substance of the "proceedings" rather

Michael Crystal QC

than their form was important. Although interlocutory in form, the applications at issue were in substance originating applications aimed at determining the substantive rights of the would-be creditors in the winding-up. The commencement of litigation to resolve the substantive issues between individual creditors and the liquidators thus did constitute the commencement of "proceedings" for the purposes of both s. 74 and Ord.23.

[Michael Crystal QC]

Kingate Global Fund Limited (in liquidation) v. Knightsbridge (USD) Fund Limited and others (Civil Appeal No 17 of 2009) The Court of Appeal for Bermuda (Zacca, President; Evans, JA and Ward, JA), 19 November 2009

Monies were paid by certain investors for the purpose of subscribing for shares in Kingate Global Fund Limited (the Fund), one of a number of "Madoff feeder funds". Shortly after the payment of subscription monies was made, the Fund suspended its operations including the allotment and redemption of shares. Ultimately the Fund was placed into insolvent liquidation. The subscription monies paid to the Fund remained identifiable in the Fund's only operating bank account. The question that arose for determination was whether, as asserted by the subscribers, the monies paid by them to the Fund were paid for a particular purpose and that until the subscribers' applications to become shareholders in the Fund were accepted, the Fund was not entitled to treat the subscription monies as its own and that accordingly the subscription monies were held on trust by the Fund for the benefit of the subscribers in the event that the purpose for which the monies were paid had failed.

The Court of Appeal for Bermuda held (concurring with the judgment of Kawaley J at first instance in the Supreme Court of Bermuda) that on a proper construction of the relevant contractual documentation (including in particular the terms of the offering memorandum) and by reference to the principles set out in the speech of Lord Millett in Twinsectra Limited v. Yardley [2002] 2 AC 164 the subscription monies were held on trust by the Fund for the benefit of the subscribers.

The Court of Appeal went on to hold that the line of English cases (see for example Moseley v. Cressey's Company (1865) LR 3 Eq 299) and the line of Australian cases (see for example Re Associated Securities Limited (1981) 6 ACLR 248) where it had been held that monies paid in advance for the purpose of subscribing for shares were not held on trust by the recipient company for the benefit of the subscribers in the event that there was no allotment of shares did not create a rule of law preventing a trust arising in favour of subscribers or represent a specific category of case in respect of which a trust in favour of subscribers could not come into existence. In any given instance, whether a trust existed was dependent on the facts and circumstances of the case.

[Stephen Atherton QC]

Stephen Atherton QC

PERSONAL INSOLVENCY

Digested by Adam Al-Attar

Official Receiver v Mitterfellner [2009] BPIR 1075, 10 June 2009 (Chief Registrar Baister)

Mitterfellner ("M"), who from 1988 to 2001 had run a cafe in Germany and who claimed to have moved to England in 2007, was made bankrupt on his own petition. The Official Receiver applied under section 282(1)(a) of the Insolvency Act 1986 to annul the bankruptcy order on the basis that M's centre of main interest (COMI) for the purposes of the EC Regulation on Insolvency Proceedings (No 1346/2000) was not in this jurisdiction at the relevant time. M had accumulated signifant debts in Germany. He claimed that he came to England when his marriage broke down and that he decided to stay. The Court found on the facts his COMI was not in this jurisdiction on the relevant date because his so-called job offer was not genuine and that it was suspicious that he should open a bank account in Brighton on a day trip from Germany when he claimed to be living in Hastings. Moreover, the information that he had given the German authorities about moving to Dublin was false. In the alternative, the Court decided that even if his COMI was here at the relevant time, there was sufficient evidence that false information had been given to the Court to obtain the bankruptcy order and that this justified the annulment of the bankruptcy order. The application should have been made under section 282(1)(a), not section 376(1) of the Insolvency Act 1986.

Ross v HMRC [2010] EWHC 13 (Ch) (Henderson J), 12 January 2010

The issue was whether HMRC, as a petitioning creditor, had unreasonably refused the debtors' offer of legal charges over properties to secure the petition debt. If so, the Court was entitled to dismiss the bankruptcy petition under IA 271. The debtors were the only partners in a firm of solicitors. Following the termination of their practice due to intervention by the Solicitors Regulation Authority, the debtors wrote to HMRC offering a number of legal charges over various properties as security for payment. HMRC rejected the offer, stating that (i) the offer did not guarantee when payment would be forthcoming; (ii) acceptance would not maintain the flow of funds to the exchequer; (iii) settlement of the debt was required in full; (iv) HMRC was not resourced to monitor and administer property sales to pay tax debts; and (v) the debtors had had a significant amount of time to raise finance on their properties, and it would be unfair to other taxpayers who had made provisions to pay their taxes on time if HMRC were to accept legal charges in the instant case. Henderson J held that the offer had not been unreasonably refused. The test was whether a reasonable creditor in the position of the petitioning creditor (and in the light of the actual history of the case) would have accepted or refused the offer. The relevant comparator was a national revenue authority in the same position and subject to the same constraints as HMRC. Such an authority did not have the resources to act as mortgagees and to administer the sales of mortgaged property. The refusal of the offer was within the range of reasonable responses.

PROFESSIONAL NEGLIGENCE

Digested by Andreas Gledhill and William Willson

Andreas Gledhill

William Willson

Nouri v Marvi [2009] EWHC 2725 (Ch) (Norris J), 7 October 2009

The claimant ("C") was the registered proprietor of property which had been occupied by the first defendant, C's friend ("D1"). D1, posing as C, instructed a firm of solicitors ("D2") to act for him as vendor, and another firm to act for him as purchaser, completing the sale to himself in April 2001. The purported transfer was registered in July 2001. C issued his claim over six years after D2 had released the forged transfer to D1, but less than six years after the transfer was registered. C alleged that D2 had failed to confirm the identity of their purported client, and had been negligent in their conduct of the sale. C argued that he had suffered no actual damage until he ceased to be the registered proprietor of the property in July 2001, and his claim was not time-barred. Held, that the cause of action had accrued in April 2001 and the claim was statute-barred. The court should consider whether if C had gone to another solicitor in May 2001 he would have been advised that he was no worse off than if D2 had properly performed their duty and that he would suffer no harm until the transfer was registered. It was unlikely that the solicitor would have given such advice. Until April 2001 C had an inviolable registered title: after that a third party outside C's control had obtained a document that could defeat title. That was an immediate blot on his title, and the cause of action in negligence was therefore complete when the forged transfer was put into circulation.

Axa Insurance Ltd v Akther & Darby Solicitors & Ors [2009] EWCA Civ 1166 (Arden LJ, Longmore LJ, Lloyd LJ), 12 November 2009

An insurer ("C") appealed a decision that claims against defendant solicitors ("D") were statute-barred. C was the assignee of an insurer ("I") providing ATE insurance. I entered into agreements with solicitors who vetted potential claims (which had to have at least a 51% prospect of success). C claimed that D was negligent in vetting claims, and in failing to notify when prospects were less than 50%. The judge decided that time started to run for the vetting claims at the inception of the policies, and that the conduct claims were statute-barred where the failure to notify occurred more than six years before issuing. C submitted that time only ran when the claim could be made under the policy, and that until then I's liability under the ATE was contingent. Held that damage for the purpose of negligence would not be constituted by a mere contingent liability. The loss suffered by the insurers was contingent upon the claim actually failing. But that did not make the case one of a mere contingent liability. The insurers were not immediately worse off as a result of entering into the policies because they received premiums up front and it would be a short time before they were on balance worse off, but that would be well before the claim had failed (which was the time argued for by D).
The judge was correct to conclude that in the case of the vetting breaches I's causes of action accrued when the policies were issued, and where the solicitor had failed to notify I or to progress the case properly the damage occurred when the conduct breach took place.

OTHER CASES

HM Revenue & Customs v. Micro Fusion 2004-1 LLP; HM Revenue & Customs v. Halcyon Films LLP (Davis J.) 22 May 2009

These two test cases raised issues of principle as to the availability of tax relief under s.42 of the Finance (No. 2) Act 1992 for British qualifying films (within the meaning of schedule 1 to the Films Act 1985).

In HMRC v. Micro Fusion, the taxpayer acquired a feature film called Mrs. Henderson Presents at cost from a film production partnership. It thereafter sold the master negative to a distributor, and leased out the intellectual property rights for a term of 21 years. The issue was whether the taxpayer's retention of the reversionary interest in the IP rights sufficed for it to be conducting "a trade or business which consists of or includes the exploitation of films" (s.42(1)), so as to be entitled to deduct one third of its acquisition expenditure in each of the three relevant years of assessment.

Allowing HMRC's appeal from the Special Commissioners' decision (reported at [2008] S.T.C. (SCD) 952), Davis J. held that: (1) the retention of reversionary rights to IP did not suffice to make out a qualifying trade in film exploitation. The "film" for this purpose was either the master negative alone, or the master negative plus the IP rights, but in any event, not the IP rights in isolation; (2) a sale of the master negative did not of itself constitute an exploitation. "Exploitation" connoted deriving an income from an asset on an ongoing basis (not following Millett J. in Ensign Tankers v. Stokes [1989] 1 W.L.R. 1222 on this point); and (3) the taxpayer's claim to s.42 relief was barred in any event by s.42(8), since the sale of the master negative of the film entailed that the film was "trading stock" for the purposes of that provision.

In HMRC v. Halcyon Films, the taxpayer purchased three feature films from a distributor, and leased them back. It was common ground (on the facts) that it was precluded from claiming accelerated 100% first year relief for its acquisition expenditure under s.48 of the Finance (No. 2) Act 1997, by reason of s.101 of the Finance Act 2002. The issue was whether s.101 also precluded it from spreading the relief over three years instead under s.42 of the Finance (No. 2) Act 1992.

Dismissing HMRC's appeal from the Special Commissioners' decision (reported at [2008] S.T.C. (SCD) 1016), Davis J. held that Parliament cannot have intended to deprive films to which s.101 applied of relief both under s.48 and s.42.

[Andreas Gledhill]

Phoenix Global Fund Ltd v Citigroup Fund Services (Bermuda) Ltd, (Bell J) 4 December 2009

The Court of Appeal held that: (1) on the Phoenix Capital Reserve Fund and Phoenix Global Fund Ltd ("the Funds") are two related small private hedge funds which, after a brief period of successful trading, made spectacular losses in 2003 and early 2004. In an action brought against their former administrators and their custodian, the Funds alleged that the responsibility for the losses incurred lay with the service providers because they had failed to stop the Funds from making the bad investments . This alarming claim was made on the basis that the investments had been made in breach of the liquidity and quality restrictions contained in the prospectuses on the theory that the Bermuda Monetary Authority (Collective Investment Scheme Classification) Regulations 1998 imposed a statutory duty upon the administrators to manage the Funds in accordance with the terms of each of the prospectuses, which had been incorporated by reference into the bye-laws of each of the Funds. It was alleged that these statutory duties had been assumed under the administration contracts under an obligation to provide all services "usually provided by administrators".

Regulation 11 of the 1998 Regulations provided that:

"The administrator shall (with the directors in the case of a mutual fund scheme) provide or procure that ... (1) (b) the income of the scheme is applied in accordance with its constitution ... (f) that the investment of the assets of a scheme is in accordance with its stated investment objectives ... (2) it shall be the duty of the administrator to manage the scheme in accordance with (a) the constitution; (b) these regulations; (c) the most recently published prospectus ..."

It was alleged that notwithstanding the terms of the relevant administration agreements of two successive administrators, the administrators had an overriding obligation to manage the funds, as opposed to the Board of Directors or the investment manager appointed by the Funds.

In a comprehensive judgment, the Supreme Court of Bermuda (Bell J) held that the reference to the duty of the administrator to "manage" in Regulation 11 meant, in its context, the duty of the person or entity who had the role of manager, not the person who provided administration services. Thus "administrator" in Regulation 11 meant "manager". This obviously sensible interpretation of the regulation squares with the regulations of a similar ambit which have been adopted in several other commonwealth jurisdictions (e.g. Guernsey, Bahamas, Cayman Islands) and is consistent with regulatory stan-

dards onshore. The 1998 Regulations were repealed in 2006.

In addition, Bell J affirmed the principle that contractual and tortious liability must be analysed in the context of the contractual duties assumed, and refused to imply additional duties which would conflict with the terms that the parties had actually agreed. He held that the reference in the contract to duties usually performed by administrators referred, in context, to the duties performed as corporate secretary and company administrators, not as mutual fund administrators.

The learned judge made a number of important findings as alternative grounds for rejecting the Funds' claims, which will have a wider significance in other mutual fund management contexts.

- The appointment of an administrator qualifies the appointee as an 'officer' of the company for the purposes of exoneration and indemnification contained in the bye-laws.
- The appointment as an officer also qualifies the administrator for relief under section 98B of the Companies Act which allows the Court to apportion liability as between tortfeasers. It also qualifies the administrators for potential relief from liability altogether under section 281 of the Companies Act on the basis that the officer has acted honestly and reasonably in discharging his duties. In this case the administrators relied upon the corporate actions of duly authorised directors.
- The attempted reliance by the Funds upon their own breaches of the prospectuses which were perpetrated by the duly authorised directors triggered the principle ex turpi causa non oritur actio, and barred the claims brought by the Fund for relief. The relevant actions had also been ratified and adopted by the Funds in this case.
- The defence of contributory negligence is open to the administrators, in a case of alleged breach of contract, and not defence exclusively available in tort claims.
- The 1998 Regulations do not give rise to a private cause of action by their terms and a claim could not be brought on the principle that the Regulations were intended to prevent "very thing" that occurred, holding that in order to invoke that principle, a plaintiff must first establish that the defendant was the "effective" or "dominant" cause of the loss alleged.

A large number of other findings were made against the background of the particular facts of the case which are not of general application. The Funds' claims were dismissed with costs to be assessed on an indemnity basis, and leave was given to serve third parties outside of the jurisdiction for the purposes of third party costs applications against the funders of the unsuccessful actions.

[Richard Sheldon QC, Andrew Martin]

R (on the application of Unison) v Monitor [2009] EWHC 3221 (Admin) Administrative Court (Cranston J)

The applicant ("U") brought a judicial review claim against the regulator of NHS foundation trusts ("M") to determine the lawfulness of regulations made by M permitting foundation trusts to receive income deriving from the provision of private healthcare. Section 44 of the NHS Act 2006 provides for a cap on the amount of income which a foundation trust may receive "derived from private charges". The practical application of this cap is left to M, which has a statutory power to regulate foundation trusts. The regulations imposed by M interpreted the statutory restriction in s.44 of the NHS Act 2006 narrowly so as to apply only to charges imposed by a foundation trust itself or by entities over which the foundation trust had a degree of control (including subsidiaries as defined in IAS 27, associates as defined in IAS 28 and joint ventures as defined in IAS 31). According to M's regulations, income derived from private charges imposed by other entities (e.g. a private sector healthcare provider which rented premises from a foundation trust and paid money to the foundation trust in the form of rent) did not have to be taken into account for the purpose of calculating a foundation trust's "income derived from private charges". U contended that M's regulations were unlawful, because they failed to reflect the true meaning of s.44 of the NHS Act 2006. The Judge agreed with U and held: (1) that the word 'derived' in s.44 of the NHS Act 2006 describes the real source or origin of the income, rather than the most recent transaction by which it has been received; Zim Properties Ltd v Procter (1985) STC 90 and Pennine Raceway Ltd v Kirklees Metropolitan Borough Council (No 2) (1989) 58 P&CR 482 applied; (2) that M did not have a discretion as to how to interpret the legislation; R v Monopolies and Mergers Commission, ex p. South Yorkshire Transport Ltd [1993] 1 WLR 23 and Moyna v Secretary of State for Work and Pensions [2003] UKHL 47 considered; and (3) that M's regulations were unlawful because they failed to include income derived from charges imposed by entities over which the foundation trust had no control.

[Stephen Robins]

Fraud on the bankruptcy laws in the 21st Century

Mark Arnold discusses the recent decisions of the Court of Appeal in *Woolworths* and *Perpetual*.

There is a well-settled line of nineteenth century cases that provide authority for the proposition that a contract under which a person's property is transferred to a third party on his bankruptcy is void at common law as a fraud on the bankruptcy laws because it removes from the bankrupt's estate property which would otherwise remain and vest in the trustee for the benefit of the general creditors. Perhaps the clearest statement is to be found in *Ex parte Jay, In re Harrison*[2] , where Cotton LJ put it in the following terms: "… there cannot be a valid contract that a man's property shall remain his until his bankruptcy, and on the happening of that event shall go over to some one else, and be taken away from his creditors." The common law rule has variously been referred to as the deprivation rule/principle or the anti-deprivation rule/principle, but is known historically (and perhaps more aptly) as the rule against fraud on the bankruptcy laws.

Over the last year there have been two attempts by insolvent companies to avoid contracts, which could not otherwise be impugned under the provisions of the insolvency legislation, by resorting instead to this rule. *Woolworths*[3] involved a company in administration, while *Perpetual*[4] arose in relation to a Lehman company subject to Chapter 11 proceedings in the US. Both went to the Court of Appeal and were heard together.[5] Neither attempt has been successful (although it is understood that permission to appeal to the Supreme Court has been sought in *Perpetual*).

The rule is closely bound up with, although it is to be distinguished from, the ability of the owner of property to transfer it to others on such terms as he may choose (*cuius est dare eius est disponere*). The distinction is important although sometimes difficult to draw. The classic statement is to be found in the note to the report of *Wilson v Greenwood*[6]: "The general distinction seems to be, that the owner of property may, on alienation, qualify the interest of his alienee, by a condition to take effect on bankruptcy; but cannot, by contract or otherwise, qualify his own interest by a like condition, determining or controlling it in the event of his own bankruptcy, to the disappointment or delay of his creditors; the jus disponendi, which for the first purpose is absolute, being, in the latter instance, subject to the disposition previously prescribed by law."

British Eagle

Following a flurry of cases between 1860 and 1930, the rule attracted little[7] further interest until *British Eagle International Air Lines Ltd v Compagnie Nationale Air France*[8]. As is well-known, British Eagle is authority for the proposition that as a matter of public policy one cannot contract out of the provisions of the insolvency legislation.[9] While demonstrating that the rule is alive and well, British Eagle extended it so that it applies even if the contract itself does not expressly provide for any change to take place upon liquidation, if nevertheless the effect of

1. *Brandon v Robinson* (1811) 18 Ves 429; *Wilson v Greenwood* (1818) 1 Swans 471; *Whitmore v Mason* (1861) 2 J&H 204; *Ex parte Mackay, Ex Parte Brown, In re Jeavons* (1873) LR 8 Ch App 643; *Ex parte Williams, In re Thompson* (1877) 7 Ch D 138; *Ex Parte Jay, In re Harrison* (1879) 14 Ch D 19; *Ex parte Newitt, In re Garrud* (1880) 16 Ch D 522; *Ex parte Barter, Ex parte Black, In re Walker* (1884) 26 Ch D 510*; In re Detmold* (1889) 40 Ch D 585. See also *Borland's Trustee v Steel Brothers & Co Limited* [1901] 1 Ch 279; *In re Johns* [1928] 1 Ch 737.
2. (1879) 14 Ch D 49
3. *Butters & Others v BBC Worldwide Ltd & Others* [2009] EWHC 1954 (Ch)
4. *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd &* another [2009] EWHC 1912 (Ch)
5. [2009] EWCA Civ 1160
6. (1818) 1 Swans. 471
7. Exceptions being *Bombay Official Assignee v Shroff* (1932) TLR 443 and *Apex Supply Company Limited* [1942] Ch 108
8. [1975] 1 WLR 758

the contract if implemented would be that the company's property is dealt with otherwise than in accordance with the statutory scheme.

Fraser v Oystertec; Peregrine Investments

The rule was further extended in two decisions reported in 2004. In *Fraser v Oystertec Plc*[10], it was held that the rule could apply to invalidate contracts even where no bankruptcy or winding-up order is ever made. It sufficed if the company could be deprived of an asset on the grounds of its insolvency. In *Peregrine Investments Holdings Ltd v Asian Infrastructure Fund Management Co Ltd LDC*[11], the Court of Appeal of Hong Kong (by a majority, Cheung JA dissenting) decided that the rule applied so as to avoid a contract the effect of which was to reduce the value of the company's assets upon insolvency even if (i) the company itself was not party to the contract and (ii) the relevant "assets" were shares in another entity owned not by the company itself but by its subsidiary (although there was no basis for piercing the corporate veil).

Mark Arnold

Woolworths

The rule would have been extended yet further in *Woolworths* had the matter rested at first instance. BBC Worldwide (BBCW) and Woolworths Media plc (Media), a subsidiary of Woolworths Group Plc (Group), entered into a joint venture, in furtherance of which they each invested in a joint venture company (2e). In addition, 2e became the parent of another company, BBC Video, to which BBCW licensed the rights to certain intellectual property (including certain DVD and video rights it acquired from the BBC) under the terms of a Master Licence Agreement. By the terms of the joint venture agreement, if Media or Group suffered an insolvency event, BBCW was entitled by written notice to require Media to sell its shares in 2e to BBCW at fair value, to be determined in accordance with a contractual formula. By the terms of the Master Licence between BBCW and BBC Video, if Media or Group suffered an insolvency event and BBCW served notice requiring Media to sell its shares in 2e, the Master Licence was to terminate immediately. The termination of the Master Licence was to be taken into account for the purposes of determining fair value of

9. *British Eagle* has been treated as authority for the proposition that where the effect of a contract is that an asset which is actually owned by a company at the commencement of its liquidation would be dealt with in a way other than in accordance with section 302 of the Companies Act 1948 (now section 107 of the Insolvency Act 1986, which provides for the distribution of property pari passu to creditors), then to that extent the contract as a matter of public policy is avoided, whether or not the contract was entered into for consideration and for bona fide commercial reasons and whether or not the contractual provision affecting that asset is expressed to take effect only on insolvency *(Carreras Ltd v Freeman Matthews Ltd* [1985] 1 Ch 207, per Peter Gibson J at 226F). In *British Eagle* itself, the majority decided that at the time the company went into liquidation the relevant debts already constituted its property with the result that they must be dealt with in accordance with the provisions of the insolvency legislation rather than the IATA clearing house arrangements to which British Eagle was a party, which were void as an attempt to contract out of the provisions of the statute.

10. [2004] BPIR 486 (Peter Prescott QC)

11. [2004] 1 HKLRD 598

the shares.

Group suffered an insolvency event, in reliance on which BBCW served notice requiring Media to sell its shares in 2e. Subsequently, Media itself also suffered an insolvency event and went into administration. BBCW asserted that the Master Licence terminated upon service of the notice. The Administrators of Media recognised that, taken separately, there was nothing objectionable in the fact that BBCW was entitled to require Media to sell its shares in 2e and that the Master Licence terminated automatically in certain circumstances. Nevertheless, they argued that the linkage of the rights, so that the Master Licence terminated on service of the notice, inevitably meant that the realisable value of Media's shares in 2e would be reduced. They maintained that this contravened the rule, with the result that the relevant clauses were void as a matter of public policy.

At first instance, Peter Smith J agreed that by reason of the linkage the rule was infringed. It was irrelevant, in his judgment, that the insolvency event on which BBCW relied related to Group and not to Media, or that BBCW served the notice before Media went into administration. To hold otherwise, he said, would lead to the bizarre result that if, as seemed probable on the facts, Media suffered an insolvency event at the same time as Group did, BBCW could evade the operation of the rule by relying only on Group's insolvency. The Court was entitled instead to look at the overall position to see whether, on insolvency, BBCW's position had been improved at Media's expense through reduction in the value of Media's shares on termination of the Master Licence. The fact that Media was not a party to the Master Licence was also irrelevant, having regard to *Peregrine Investments*. (In the result, however, the judge considered that the problem could be cured by using the judicial blue pencil to remove the offending reference to the service of the notice in the Master Licence, notwithstanding that this achieved exactly the same result.)

Over the last year there have been two attempts by insolvent companies to avoid contracts, which could not otherwise be impugned

Perpetual

In concluding that the rule was infringed in *Woolworths*, Peter Smith J's approach differed from that of the Chancellor in *Perpetual*. *Perpetual* involved complex financial instruments constituting synthetic collateralised debt obligations. In essence, however, LBSF (as swap counterparty) enjoyed priority in respect of certain collateral purchased with funds provided by noteholders so long as no event of default occurred. If an event of default did occur, however, priority "flipped" under the relevant clauses and was enjoyed instead by the noteholders. Events of default occurred when first LBHI, the ultimate parent of LBSF, and then (some two weeks later) LBSF itself filed for chapter 11 protection. LBSF asserted that the operation of the "flip" so as to change priorities infringed the rule. The Chancellor disagreed, holding that the alleged deprivation fell outside the ambit of the rule and (obiter) that the rule would not have been engaged in any event, any deprivation occurring before LBSF filed for Chapter 11 protection.

The Court of Appeal

The Rule

The *Woolworths* and *Perpetual* appeals were heard together. It was common ground before the Court of Appeal that the rule applies where the company goes into administration (at least where the administration is effectively for the purpose of maximising the return prior to liquidation) or where the company concerned files for Chapter 11 protection in the US (at least where the filing is for the purpose of maximising the return on insolvency and cessation of business).[12]

The Court of Appeal concluded that the rule was not engaged or contravened in either case. Lord Neuberger MR identified five principles to be borne in mind when considering the ambit of the rule[13]:

(1) *British Eagle* is authority for the proposition that the rule is based in public policy, but only to the extent that one cannot contract out of the insolvency legislation.

(2) Citing the majority judgment of the Australian High Court in *Ansett Australia*[14], in each case where the rule is invoked "it is essential to begin from the elementary proposition that insolvency law is statutory and primacy must be given to the relevant statutory text."

(3) Save possibly where there is an attempt artificially to avoid the insolvency regime, there is in principle no difference between cases where the contractual provision is expressed to apply on insolvency or liquidation and those where it is not so expressed.

(4) Given the rule is based on the proposition that one cannot contract out of the provisions of the insolvency legislation, it would be hard to justify going beyond the established limits of the rule, save to the extent required by legislation. It is for Parliament to legislate against anti-avoidance devices in the insolvency field, as it had done in the 1986 Act. Where Parliament had intervened so substantially and so significantly, it would rarely be appropriate for the court to invent its own anti-avoidance policies and frustrate the terms of commercial contracts freely entered into by

12. [2009] EWCA Civ 1160 at [43]
13. [2009] EWCA Civ 1160 at [53]-[58], [90]-[92]; [123]
14. *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] BPIR 57
15. [2009] EWCA Civ 1160 at [64], [70]-[75], [95]; [124], [151], [165]-[170], [171]-[172]

sophisticated parties.

(5) So far as possible, judicial decisions in the insolvency field should ensure that the law is clear and consistent, and that effect should be given to contractual terms if possible, given the undesirability of interfering with party autonomy in business transactions.

As regards the rule itself, the Court of Appeal identified the following principles from the authorities[15]:

(1) The rule applies to assets which were vested in the person on whose bankruptcy the deprivation is to occur. In the context of corporate insolvency, it does not apply if the deprivation occurs before, rather than on or after, the winding-up or administration order. It does not suffice that the company deprived is merely insolvent at the time of deprivation, unless the deprivation is effected pursuant to a sham transaction. There is nothing inconsistent with the provisions of the 1986 Act about a contractual arrangement which effects a deprivation of an asset of a company before it goes into liquidation, save to the extent that the deprivation falls within the reach of the anti-avoidance provisions. *Fraser v Oystertec* was wrong in principle to the extent that it suggested the contrary, and is overruled.

(2) The rule may have no application to the extent that the person in whose favour the deprivation of the asset takes effect can show that the asset, or the insolvent person's interest in the asset, was acquired with his money.

(3) The rule cannot apply to invalidate a provision which enables a person to determine a limited interest, such as a lease or a licence, which he has granted over or in respect of his own property, in the event of the lessee's or licensee's bankruptcy.

(4) There is no sound basis for a wider principle that the anti-deprivation rule should apply to transactions which reduce or limit the economic value of the estate. The rule could not be extended to apply not merely to an agreement for the removal of the property of an insolvent company but also to any contractual arrangement, to which the insolvent company was not even a party, which had the effect of reducing its value even if it did not affect the ownership of its property, at least where the corporate veil could not be pierced. In this context, the views expressed by the minority in *Peregrine Investments* were to be preferred to those of the majority.

Woolworths Appeal

Applying these principles to the facts, the relevant clauses in the *Woolworths* appeal neither engaged nor infringed the rule.[16] The provision for termination of the Master Licence did not involve the vesting of property belonging to the insolvent company in a third party: it merely involved a limited interest coming to an end, the licensor (BBCW) being entitled to grant the licence on any terms it wished to agree with the licensee (BBC Video). The provision for transfer of Media's shares in 2e, even if it might otherwise have constituted a deprivation, did not fall foul of the rule because they were to be transferred at market value. Each of the relevant clauses being unobjectionable on their own, they did not become objectionable through being linked. This was especially so where the effect of the linkage was to improve Media's position while fettering BBCW's rights, as it could only exercise the right to terminate the Master Licence on insolvency if at the same time it became bound to purchase Media's shares in 2e. Further, any deprivation occurred on service of the notice, when equitable title in the shares passed to BBCW. Since that took place on the occurrence of the insolvency event in relation to Group, *before* Media went into administration, the rule was not engaged in any event.

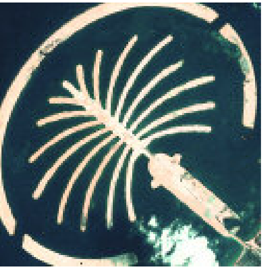
Perpetual Appeal

Likewise, the rule was neither engaged nor infringed on the facts of the *Perpetual* appeal.[17] In the first place, there was no deprivation. The effect of the "flip" provisions was not to divest LBSF of monies, property or debts currently vested in it, and to revest them in the noteholders, nor even to divest LBSF of the benefit of the security rights granted to it, but merely to change the order of priorities in which rights were to be exercised in relation to the proceeds of sale of the collateral in the event of a default. The priority enjoyed by LBSF had never been more than a contingent right: the noteholders merely granted LBSF rights over assets derived from their monies, which rights were liable to be modified on the happening of an event of default. Applying the principles set out in above, therefore, there was no deprivation within the rule. Even if there had been a deprivation, however, the rule was not engaged because the triggering event was LBHI filing for Chapter 11 protection, rather than LBSF itself.

Conclusion

Within the boundaries set by the Court of Appeal, the rule is likely to have limited application. It will not be triggered by the mere insolvency of the company (unless possibly there is an artificial attempt to avoid the insolvency regime), nor the formal insolvency of a third party even if closely connected to the company. The rule merely supports the application of the insolvency legislation; certainly it seems to have no free-standing existence of its own. Having regard to the detailed anti-avoidance provisions of the 1986 Act, the Court of Appeal has emphasised that it is ultimately up to Parliament to legislate against anti-avoidance devices in the insolvency field[18]. Whether Parliament will do so thereby extending the current anti-avoidance provisions remains to be seen, and may depend on the outcome of any further appeal in *Perpetual* if permission is given to take the matter further.

16. [2009] EWCA Civ 1160 at [79]-[89]
17. [2009] EWCA Civ 1160 at [59]-[75]
18. [2009] EWCA Civ 1160 at [92], [162]



The Jurisdiction of the DIFC Courts

David Allison discusses the limits of the jurisdiction conferred upon the DIFC Courts

While the Dubai International Finance Centre (DIFC) remains the world's fastest growing financial centre, it is noteworthy that only a handful of financial cases have come before the DIFC Courts. The increase in litigation over the past few months suggests that this may be about to change. Accordingly, it is an appropriate time to consider the limits of the jurisdiction of the DIFC Courts.

It is important to bear in mind the genesis of the DIFC when considering the scope of the jurisdiction of its courts. The DIFC, in its current form, is the outcome of a unique arrangement between federal and local authorities, whereby the federal authorities exempted the DIFC, as a financial free zone, from being subject to federal commercial and civil laws.

The starting point of the analysis is the Federal Law No.8 of 2004 pursuant to which there is a power to create financial free zones by Federal Decree in any Emirate of the UAE. The DIFC was established in accordance with this legal framework pursuant to Federal Decree No. 35 of 2004. The following four headline points can be taken from Federal Law No. 8 of 2004:

1. Article 2(2) provides that financial free zones are to be delineated by location and area.
2. Article 4(5) provides that the actual existence of companies and establishments licensed to operate by the free zones shall be restricted to the boundaries of those zones. In other words, the concept of a financial free zone where the financial authorities license entities to exist anywhere in an emirate, similar to the Qatar Financial Centre, was specifically rejected.
3. Article 8 provides that financial free zones may license companies and establishments to perform their operations outside the managerial and geographical boundaries of those zones in the state.
4. In accordance with Article 7 of Federal Law No. 8, the financial free zone may issue only those "regulations which are necessary for the carrying out of their activities". These activities are limited to those financial and ancillary activities set out in the preamble to Federal Law No. 8 which, in summary, are banking, financial, financial markets activities and services and matters ancillary thereto

Dubai International Finance Centre

Next, it is necessary to examine the laws pursuant to which the DIFC Courts derive their powers. These provisions are found in the Dubai Law No. 9 of 2004, the Law of the Dubai International Financial Centre ("the DIFC Law") and Dubai Law No. 12 of 2004, The Law of the Judicial Authority at the Dubai International Financial Centre ("the Judicial Authority Law").

Article 8 of the DIFC Law is the provision pursuant to which the DIFC Courts are formed. Article 8(2) provides that the DIFC Courts shall have exclusive jurisdiction to hear and determine any claims in which the DIFC, the Centre Establishments (i.e. any entity or business duly established or carrying on activity in the DIFC) or any of the DIFC's Bodies (e.g. the Dubai Financial Services Authority) is party to and also to hear and determine any dispute, arising out of any transaction carried out in the DIFC or an incident which took place in the DIFC.

The detail of the jurisdiction of the DIFC Courts is to be found in the Judicial Authority Law. It is encapsulated within Article 5(A) which provides as follows:

(1) Without prejudice to paragraph

2 of this Article, the Court of First Instance shall have the exclusive jurisdiction over:

(a) civil or commercial cases and disputes involving the Centre or any of the Centre's Bodies or any of the Centre's Establishments.

(b) civil or commercial cases and disputes arising from or related to a contract that has been executed or a transaction that has been concluded, in whole or in part, in the Centre or an incident that has occurred in the Centre.

(c) objections filed against decisions made by the Centre's Bodies, which are subject to objection in accordance with the Centre's Laws and Regulations.

(d) any application over which the Courts have jurisdiction in accordance with the Centre's Laws and Regulations.

This provision of Dubai Law finds its reflection in Article 19(1) of the DIFC Law No. 10 of 2004, The Court Law ("the Court Law") which provides as follows:

(1) The DIFC Court of First Instance has original jurisdiction pursuant to Article 5(A) of the Judicial Authority Law to hear any of the following:

(a) civil or commercial cases and disputes involving the Centre or any of the Centre's Bodies or any of the Centre's Establishments;

(b) civil or commercial cases and disputes arising from or related to a contract concluded or a transaction concluded by any of the Centre's Establishments or the Centre's Bodies;

(c) civil or commercial cases and disputes arising from or related to a contract that has been executed or a transaction that has been concluded, in whole or in part, in the Centre or an incident that has occurred in the Centre; and

(d) any application over which the DIFC Court has jurisdiction in accordance with DIFC Laws and Regulations.

The wording of the relevant laws throws up a number of issues in relation to the jurisdiction of the DIFC Courts which will need to be resolved before the outer limits of their jurisdiction can be identified with any certainty. This article touches on four of these issues, namely:

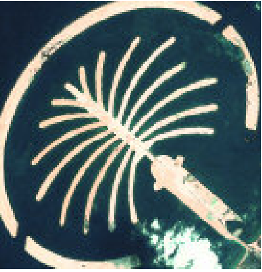
1. The scope of Article 19(1)(a) of the Court Law;
2. The "coffee shop" jurisdiction question;
3. The effect of an agreement by the parties to a contract to submit to the jurisdiction of the DIFC Courts; and
4. Whether jurisdiction can be ousted where a party has failed to comply with the requirements of registration applicable in the DIFC.

(1) Scope of Article 19(1)(a) of the Court Law

The first issue concerns the scope of Article 19(1)(a) of the Court Law and, in particular, whether the use of the word "involving" in Article 5(A)(1)(a) of the Judicial Authority Law and Article 19(1)(a) of the Court Law means that (i) the DIFC Courts have jurisdiction where the transaction in issue involves a DIFC entity in the sense that it is involved in the matters giving rise to the dispute; or (ii) whether it is a requirement for the DIFC entity to be a party to the claim.

This issue was considered by Deputy Chief Justice Hwang in *Amarjeet Singh Dhir v Waterfront Property Investment Limited and Linarus Fze*, 8 July 2009 (reported at http://difccourts.complinet.com/en/display/display_main.html?rbid=2725&element_id=3948) where the Claimant contended that, although the parties were located outside the DIFC, the DIFC Court had jurisdiction over the dispute on the basis that the parties were parties to an arbitration before the DIFC Arbitration Centre, with the consequence that the case

David Allison



fell within Article 19(1)(a) as it involved one of the DIFC's bodies, namely the DIFC Arbitration Centre.

The Judge conducted a close textual comparison of the Judicial Authority Law and the Court Law and made four key findings:

1. The operative provision for conferring jurisdiction upon the DIFC Courts was Article 5(A) of the Judicial Authority Law (i.e. the Dubai Law) and not Article 19(1) of the Court Law (i.e. the DIFC Law).

2. The Judicial Authority Law was originally enacted in Arabic. The true meaning should be discovered by receiving an official translation of the Arabic as opposed to relying upon the unofficial translation found in the Court Law.

3. The Judicial Authority Law provides exclusive jurisdiction to the DIFC Courts in the event that the matter falls within Article 5(A). It would be odd to adopt an interpretation which conferred exclusive jurisdiction in all cases involving the DIFC, the DIFC's Bodies and the Centre's Establishments without any requirement for those institutions to be a party to the proceedings.

4. In light of the above matters, the proper interpretation of the law was that the word "involving" meant involving as a party.

Accordingly, the answer to the first issue is that jurisdiction is conferred pursuant to Article 5(A)(1)(a) only where the DIFC, a DIFC body or a DIFC establishment is a party to the proceedings.

In addition, the analysis in the *Waterfront Properties* case suggests that the DIFC Courts should not be able to claim a wider jurisdiction under Article 19(1) of the Court Law than that contemplated by Article 5(A)(1) of the Judicial Authority Law. Thus, it is likely that Article 19(1)(b) of the Court Law, which has no equivalent provision in Article 5(A) of the Judicial Authority Law, would be found not to confer any additional basis of jurisdiction on the DIFC Courts.

...it is necessary to examine the laws pursuant to which the DIFC Courts derive their powers.

(2) "Coffee Shop" jurisdiction

The second issue is what is commonly called the "coffee shop" jurisdiction test. In other words, do the DIFC Courts have jurisdiction in circumstances where parties located outside the DIFC, in relation to a contract to be performed outside the DIFC, sign an agreement over a coffee within the confines of the DIFC.

The relevant provisions are Article 5(A)(1)(b) of the Judicial Authority Law and Article 19(1)(c) of the Court Law. The key phrase found within these provisions is "a contract that has been executed or a transaction that has been concluded, in whole or in part, in the Centre".

There are two competing schools of thought in relation to the scope of this provision. The first contends that the signature of the contract in the DIFC or the performance of the contract in the DIFC represent separate jurisdictional gateways. The other contends that actual performance within the DIFC is required in order for the DIFC Courts to have jurisdiction over the matter.

The first school of thought is supported by the fact that the law refers to both a "contract that has been executed" and "a transaction that has been concluded". It could be argued that there is a need to give meaning to both of these expressions and that this would be achieved by restricting the word "execution" to the act of signing an agreement, thereby conferring jurisdiction where a contract has been signed within the DIFC irrespective of the place of performance.

However, there are three matters, in particular, which point to favour a more restrictive interpretation of the provision:

1. It is likely that the narrowly defined ambit of the DIFC as a financial free zone militates in favour of reading down the jurisdiction of the DIFC Courts as opposed to an interpretation of the Judicial Authority Law which gives the DIFC Courts a potentially wide jurisdiction.

2. The reasoning underlying the decision in *Waterfront Properties* case may point towards a restrictive interpretation. This is on the basis that an official translation of the Arabic text used in Article 5(A)(1)(b) suggests that the English word "executed" in the law may be misleading and that a more accurate translation of the Arabic is "implementation" in the sense of performance of a contract. If correct, this would support a construction of Article 19(1)(c) which does not confer jurisdiction on the DIFC Courts on the "coffee shop" basis.

3. In *Shihab Khalil v Shuaa Capital*, 7 December 2009, Sir Anthony Colman found that the phrase "contracted that has been executed" referred to "a contract that has been performed within the Centre".

(3) Submission to the jurisdiction

The third issue concerns the question of submission to the jurisdiction and, in particular, whether a clause which confers jurisdiction on the DIFC Courts is sufficient to give jurisdiction in circumstances where the parties are located outside the DIFC and the contract is performed outside the DIFC.

Once again, there are two competing schools of thought in relation to whether the parties may by agreement confer jurisdiction upon the DIFC Courts in circumstances where such jurisdiction would not otherwise exist.

The following matters point in favour of the DIFC Courts acquiring jurisdiction where a contract contains a clear submission to the jurisdiction:

1. Article 5(A)(1)(d) of the Judicial Authority Law as reflected in Article 19(1)(d) of the Court Law which provides that the DIFC Courts will have jurisdiction in relation to "any appli-

cation over which the DIFC Court has jurisdiction in accordance with DIFC Laws and Regulations";

2. Article 7 of the DIFC Law No. 6 of 2004, The Contract Law provides that the DIFC Law No. 10 of 2005, The Law Relating to Application of DIFC Laws makes provision with respect to the choice by the parties of the governing law and jurisdiction in a contract; and

3. Article 13(1) of that Law provides that a submission to the courts of a jurisdiction in a contract shall be effective.

However, there are substantial arguments in favour of the jurisdiction of the DIFC Courts being construed in a limited way which does not enable jurisdiction to be conferred by agreement when jurisdiction would not otherwise exist. To give five examples:

1. The DIFC has a narrowly defined ambit as a financial free zone. As noted above, it is likely that this points in favour of reading down the jurisdiction of the DIFC Courts.

2. A submission to the jurisdiction clause does not fit within Articles 19(1)(a)-(c) of the Court Law. Accordingly, unless jurisdiction can be found pursuant to Article 5A(1)(d) as reflected in Article 19(1)(d) of the Court Law, there will be no jurisdiction.

3. The principle of submission to the jurisdiction can give the DIFC Courts jurisdiction only to the extent of removing objections thereto which are purely personal to the party submitting. For example, where a party has not been duly served with the proceedings. The principle of submission to the jurisdiction cannot give the DIFC Courts jurisdiction to entertain proceedings which lie beyond the competence or authority of the DIFC Courts.

4. Article 5(A)(1)(d) of the Judicial Authority Law and Article 19(1)(d) of the Court Law refer to "any application". By contrast, Articles (1)(a)-(c) refer to "civil or commercial cases". The reference "any application" may suggest a restricted set of circumstances, such as an application for relief in support of a DIFC arbitration proceeding or an application within an existing court proceeding.

Burj Al-Arab: The world's only '7 star' hotel

5. Speaking extra-judicially, Chief Justice Sir Anthony Evans has publicly stated that he does not see the DIFC as an "opt-in" jurisdiction.

(4) Failure to register in the DIFC

This issue raises the question whether the jurisdiction of the DIFC Courts over a dispute in relation to a contract performed within the DIFC is capable of being ousted by an allegation of illegality founded on the fact one of the parties has failed to register in the DIFC as required by the provisions of the DIFC Companies Law.

The issue was considered in *Dutch Equity Partners Limited v Daman Real Estate Capital Partners* (reported at http://difccourts.complinet.com/en/display/display_main.html?rbid=2725&element_id=3471). Deputy Chief Justice Hwang found that there was an insufficient nexus between the requirement of registration under the DIFC Companies Law and the entry into the contract for the contract to be tainted with any illegality. In reaching this conclusion, the learned Judge relied upon a line of English and Commonwealth authority including *Curragh Investments Ltd v Cook* [1984] 3 All ER 658, [1974] 1 WLR 1559; and *Maronis Holdings v Nippon Credit Australia* (1990) 2 ACSR 138 at 142.

David Allison has appeared in a number of cases to come before the DIFC Courts. These include the case of Dutch Equity Partners Limited v Daman Real Estate Capital Partners referred to above which was the first trial to be heard by the DIFC Courts

news in brief

OFT Corporate Insolvency Study

The Office of Fair Trading (OFT) is to launch a market study into corporate insolvency. The move follows concerns raised within Government, the Insolvency Service and the industry itself and reports by the World Bank which showed the costs of closing a business in the UK are higher than other countries with similar or even better recovery rates. The OFT will be studying the market in order to see whether it operates efficiently and in the best interests of the wider economy.

Clive Maxwell, OFT Senior Director of Services, said: "We want to identify any potential problems within the corporate insolvency market to ensure that firms and practitioners are competing freely and that the market is working well for the end consumers." The investigation is due to be completed by the end of 2010.

Bahrain: Arbitration Independence

The Kingdom of Bahrain has set out its stall as the new go-to place for arbitration with what it claims is a world first: a national law that guarantees the independence of arbitral decisions.

Its new ADR statute means that where companies have elected to use Bahrain as their seat of arbitration, the country's national courts cannot get involved - a common problem in other jurisdictions that leads to delays and uncertainty.

The Kingdom has recently launched its Bahrain Chamber of Dispute Resolution, which is working in partnership with the American Arbitration Association and will be known as the BCDR-AAA. James McPherson, the chamber's chief executive, said several multi-national companies have already signed contracts naming Bahrain as the seat of arbitration and he expects cases to start coming through his door this year.

The Supreme Court: Is the House of Lords "Losing Part of Itself"?

On 2 December 2009 Georgina Peters chaired a charity event on behalf of The British Friends of the Hebrew University's Young Legal Group. Generously sponsored and hosted by Freshfields Bruckhaus Deringer LLP, Lord Neuberger of Abbotsbury MR spoke on the Supreme Court, considering the above question. The evening raised funds in support of an access to justice programme established by the Hebrew University in Jerusalem.

Georgina Peters

New Insolvency Rules

On 8 January 2010 the Insolvency Service published the final version of the new Revised Draft Insolvency (Amendment) Rules 2010. These were published together with the Rules Modernisation Project Update for January 2010. The Insolvency Service intends to publish by the end of January 2010 a further draft of the full Insolvency Rules 1986, showing, as tracked changes, the amendments to be made as a result of the Insolvency (Amendment) Rules 2010.

HMRC to target pre-packs

According to an article in *The Times* (2 November 2009), HMRC has indicated that it will seek to implement some little-used rules in the VAT legislation in relation to pre-pack successor companies. Paragraph 4(2) of Schedule 11 to the Value Added Tax Act 1994 provides HMRC with the right to demand from any taxable person security in such amount as it may require for the payment of any VAT which is or may become due from that person.

With the professed intention of protecting future tax revenues, and against a backdrop of unpaid taxes by insolvent predecessors, HMRC may now demand payment from the "newco" on account of future VAT.

This is particularly likely where there is a perceived risk of non-payment of future VAT or where a director of the "newco" is considered to have been culpable in causing the predecessor's demise.

New appointments

Guy Newey QC *has been appointed to the Chancery Division of the High Court, effective 12 January 2010.*

Mr Justice Pitchford *has been appointed as a Lord Justice of Appeal following the retirement of Lord Justice Scott Baker.*

Frances Patterson QC *has been appointed as a Law Commissioner. She replaces Kenneth Parker QC who has been appointed a High Court judge.*

Law Society in legal challenge over acquitted Defendants

The Law Society has launched legal action over Government reforms that prevent acquitted defendants recouping their full legal costs. The changes mean that people acquitted of criminal offences may be left with crippling fees, despite being cleared.

The professional body for more than 100,000 solicitors in England and Wales is warning that the new rules will deter innocent people from seeking advice to clear their names and could lead to miscarriages of justice.

Ministers have launched a new scheme to make convicted people pay for their defence costs where they have the means to do so. A pilot scheme has been introduced in some Crown Courts - Bradford, Norwich, Preston and Swansea - under which defendants will be means-tested before being granted legal aid.

Current Issues in Insolvency

A one-day conference was held on 27 November 2009 at the Radisson SAS Portman Hotel by Sweet & Maxwell and 3-4 South Square on Current Issues in Insolvency.

The conference was chaired by Professor Len Sealy of Cambridge University and Professor David Milman of Lancaster University.

Gabriel Moss QC and Professor Ian Fletcher spoke on Cross Border Insolvency, David Marks QC (with Stuart Frith of Stephenson Harwood) spoke on Office-Holder's Liabilities, Marcus Haywood gave a talk on Pre-packs and Daniel Bayfield (with Sarah Patterson of Slaughter & May) gave a talk on Schemes of Arrangements entitled "Guide to Successful Scheming".

Finally from 3-4 South Square, Hilary Stonefrost and Georgina Peters spoke on Insolvency and Bank Failures. There was also a talk by Philip Ridgway of Temple Tax Chambers on tax issues.

Daniel Bayfield

Henry case dropped

Following an alleged handball by Thierry Henry during the build up to France's second goal during the France v Ireland World Cup qualifier, FIFA's Disciplinary Committee was asked to open an investigation. It concluded that the incident was not sufficiently serious to justify bringing a charge against Thierry Henry. Mark Phillips QC (right) was instructed by Thierry Henry.

diary dates

2nd February 2010.
Lexis Nexis Webinair Seminar on the EC Regulation and the Cross Border Regulations (David Marks QC and Robin Henry of Simmons & Simmons).

21st-23rd February 2010.
Insol International Annual Conference.
Dubai, UAE.

25th-27th February 2010.
Trusts and Estate Litigation Forum Conference (David Alexander QC).
Four Seasons Provence at Terre Blanche, France

17th March 2010.
Jordans Insolvency Seminar (John Briggs).
London, UK.

27th March 2010.
ILA Annual Conference.
Grosvenor Hotel & Spa Chester.

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

19th-22nd May 2010.
R3 Annual Conference.
Vilamoura, Portugal.

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

2011
22nd-23rd September 2011.
INSOL Europe, Annual Conference.
Venice, Italy.

Friends in Law

Friends in Law, a joint initiative of the Bar Pro Bono Unit and the Free Representation Unit which recognizes Chambers which provide financial support and volunteers to both charities, was launched in November 2009. At the launch of Friends in Law 3-4 South Square were presented with an award for past contributions.

news in brief

Dubai

ChBA presentation in Dubai

The Chancery Bar Association gave a presentation to the legal community of the Dubai International Financial Centre (DIFC) on 7-8 December 2009 at the Capital Club.

David Alexander QC, Adam Goodison and William Willson spoke on Cross Border Insolvency (the UNCITRAL Model Law, Cross Border Protocols, Judicial Dialogue, Avoidance Provisions and Letters of Request) and David Allison spoke on Credit Crunch litigation, including hedge fund redemption issues and cases in which he has been involved in the DIFC. *(see further David Allison's article on pages 24 to 27).*

David Alexander QC

Adam Goodison

David Allison

William Willson

INSOL Conference in Dubai

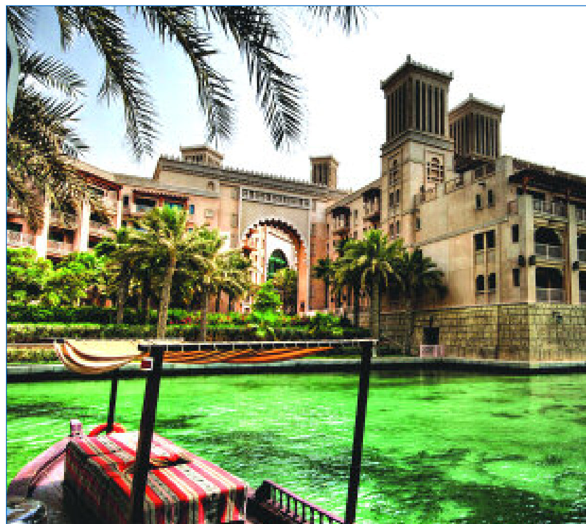
INSOL International's Annual Regional Conference takes place on 21-23 February 2010 at the Madinat Jumeriah, Dubai, United Arab Emirates. Michael Crystal QC, David Alexander QC, John Briggs, Adam Goodison, David Allison, Professor Ian Fletcher and our senior practice manager, Paul Cooklin will be attending from 3-4 South Square. Whilst in Dubai, Professor Fletcher will also teaching a seminar on the UK approach to international assistance in cross-border cases, with special reference to the Cross-Border Insolvency Regulations, as part of the INSOL International Fellowship programme in insolvency practice.

Michael Crystal QC

Professor Ian Fletcher

John Briggs

Paul Cooklin



Madinat Jumeriah, Dubai.

Appointments

David Marks QC has been appointed to represent the UK on an INSOL Europe Working Party which has been formally engaged by the European Commission to address the desirability and feasibility of the harmonisation of insolvency laws on an EU Basis. David has also been appointed as a part time judge in the new General Regulatory Chamber designated to sit in relation to Consumer Credit Appeals.

Meanwhile, 3-4 South Square's Lucy Fraser (below) was elected to the Bar Council in December 2009 and has been appointed to the Public Affairs Committee.

Chambers & Partners 2010

The recent publication of Chambers & Partners 2010 had 3-4 South Square listed in four principal sections: Restructuring/Insolvency, Banking & Finance, Chancery: Commercial and Company.

In the Restructuring/Insolvency section 3-4 South Square's "excellence and absolute purity of focus" was said to account for Chambers continued dominance in the insolvency sector and 3-4 South Square was described as "everyone's first port of call" with all members of the set being recommended for their "serious intellectual brilliance". In the Chancery: Commercial section it was said that "Quality is the watchword at a set that has many of the finest minds at the Bar billeted within its premises"

Chambers & Partners 2010 also highlighted that, whilst 3-4 South Square was "primarily an insolvency set" with "barristers renowned for their might in insolvency", many members of Chambers worked across the banking and commercial areas generally with members of Chambers advising on "a wide range of structured financial transactions" and having "significant involvement in shareholder disputes, directors' duties and disqualification proceedings".

Individual members of Chambers were listed in the four main categories referred to above as well as in Commercial Dispute Resolution, European Law, Fraud: Civil, International Arbitration: General & Commercial Insurance and Sport.

Below are highlights from Chambers & Partners 2010 about the silks and juniors at 3-4 South Square:

SILKS

Robin Knowles CBE QC: "a courteous and frank adviser who does not get lost in the minutiae – a veteran of big-ticket litigation"; "talented insolvency and company advocate" and someone "who exudes confidence in court"; "exceptionally good with difficult clients"; "handles tricky diplomatic issues with ease"; universally renowned for being "incredibly pleasant to deal with".

Christopher Brougham QC: (left) prized for his "commercially sound advice" on insolvency matters.

Stephen Atherton QC: "tough advocate"; "smart and streetwise."

Stuart Isaacs QC

Christopher Brougham QC

Mark Phillips QC: has developed a "fine practice" and is "strong at both insolvency and sports related law"; He is a "punchy advocate" who is "a tenacious court performer who really warms to the battle"; "absorbs vast amounts of information in a short time and is never taken by surprise"

Stuart Isaacs QC: (left) "has a broad European law practice and has appeared in over 20 cases in the ECJ and the Court of First Instance"; "has been acting as counsel and co-arbitrator in several insurance claims in Singapore"

Richard Sheldon QC: is prized as "creative, clever and great on his feet"; regarded as "a very measured lawyer who is highly commercial and understands at a trice the key issues in a case"

Simon Mortimore QC: "extremely distinguished"; "great work ethic and tremendous eye for detail"

Richard Hacker QC: "a strong and purposeful advocate" with an "international" practice

Richard Adkins QC: (below) prized for his "commercially sound advice" on insolvency matters

Richard Adkins QC

Chambers & Partners 2010

WIlliam Trower QC

William Trower QC: (above) has “unquestionably deep banking and insolvency expertise” which seems almost tailor made for the current economic situation;“riding high”; he is “the complete package – great either when you’re in court or whether you are just after advice”;“an incredible mind and superb case management skills”;“a good team player who is outstanding in high pressure situations”;“He is just fantastic in court and holds the com plete attention of the judge”;“expert at dealing with cross-border insolvency cases”; the “go-to barrister of choice” for many.

Martin Pascoe QC

Martin Pascoe QC: (above) “clear, straightforward and to the point”

Michael Crystal QC: A “massive name” in insolvency; has “a massive reputation”; he “certainly packs a punch” and “is someone you go to when you need to tear the heads off the opposition”;“an excellent choice if you have a problematic case that needs some punch”;“definitely someone you bring in if you have a particularly complex offshore trust problem”

Robin Dicker QC: (right) “hard-working, tenacious and furiously intelligent”;“a brilliant and highly capable professional for banking and insolvency work; his approach is always sure footed and analytical”;“at the top of his field”;“a superb leader”;“Clearly an extraordinary practitioner”;“a total class act”.

Gabriel Moss QC

Gabriel Moss QC: (above) “clear star”;“phenomenally brilliant”“at the top of the tree”;“in a class of his own and has an unbeatable roll call of cases”;“a phenomenon”;“a demon at producing innovative strategies and creative approaches”; has “an endlessly imaginative approach to problem solving”;“the unquestionable doyen of the insolvency bar”;“especially renowned for his cross border capabilities”;“very down to earth and humble for one who has achieved so much”

David Alexander QC:“impressive operator”;“excellent choice for insolvency and corporate reconstruction matters”

Robin Dicker QC

Antony Zacaroli QC: **(below)** ”a litigator with a strong presence in both insolvency and commercial chancery cases”; displays skill when “handling complex, knotty issues”;“Clearly one of the brightest young silks at the Bar”;“exceptional intelligence puts him up there with the best of them”; “his advocacy is of the highest standard”;“fantastically nice and easy to work with”

Antony Zacaroli QC

David Marks QC: “deservedly made a silk in 2009”

Lexa Hilliard QC: “clear, straightforward and to the point”

JUNIORS

3-4 South Square's "fine body of silks are supported by an equally able gaggle of juniors". Some highlights from Chambers & Partners 2010 about the juniors at 3-4 South Square:

John Briggs: "especially strong on the personal insolvency side"; "one of the best in the country"; "applies the law in a brilliant way and is very easy to deal with"

Mark Arnold: "incredibly meticulous and thorough"; particularly recommended for "document-heavy cases".

Adam Goodison: "highly intellectual practitioner"; "comes up with great solutions"; "enjoys the full confidence of the market"

Tom Smith: "extremely bright, very approachable and tactically alert"; has a "pro-active no-nonsense approach"; "a junior of choice for magic circle firms"; a "fine and capable barrister with good communication skills"; "widely tipped to be a future leader"

Richard Fisher: one of the set's "up and coming juniors"; "bright, creative and clearly going places"; "extremely thorough and doesn't miss a thing".

Hilary Stonefrost: "stands out for her intellectual brilliance"; "banking background is seen as a definite plus"; "widely respected for her efficiency and great practical advice"; "you get a lot of pound for your money when you hire her"; "excels in areas of shareholders' rights, schemes of arrangement and directors' duties"

Lloyd Tamlyn: "on the way up"; has a "down-to-earth style" and the "ability to quickly cut through the issues"; "assertive advocacy style"; "a formidable opponent"

Felicity Toube: "has always been one of the brightest and the best"; "a great combination of intellectual ability, charm and confidence", "has a speedy turnaround" is "user-friendly" and "a pleasure to deal with".

Blair Leahy: "continues to impress"; "amazing work ethic, she puts in all the hours and gets results"; "handles corporate and personal insolvency cases to a high standard"

Blair Leahy

Glen Davis

Glen Davis: "immense technical capabilities"; "an almost encyclopaedic knowledge of the law"; "strong commercial approach that allows him to see the wider picture"; "handles corporate and personal insolvency cases to a high standard"; particularly strong on insolvencies relating to the banking sector.

Barry Isaacs: "praised for his clear and focused advice"; "has a good grasp of the financial sector"

Barry Isaacs

Ben Valentin

Ben Valentin: "razor sharp intellect", "collaborative approach" and has an "ability to charm clients"

Lucy Frazer: "a wonderfully pleasant court style"; "A determined advocate who fights for her clients"; "will not let a point go if it still has legs"

David Allison: "incredibly skilful"; "a talented junior with a rapidly growing catalogue of high-profile cases under his belt"; "always alive to the commercial context of a case and never makes something more complicated than it needs to be"; an expert at juggling a large and varied caseload; provides "outstanding support" to solicitors and "has a facility for sorting things out"

Daniel Bayfield: "best recognised for his insolvency expertise" but has a "broader commercial chancery practice"; "a good choice for a difficult case"; "consistently appears in high-profile, complex cases alongside the heavyweight silks of the set"; Peers note his impressive confidence and reveal "He just seems to have this amazing instinct"

Stephen Robins: "a star in the making"; "efficient worker"; "resourceful tactician"; "excellent both on paper and on his feet"; "warm and cheerful personality"

Andreas Gledhill: "recommended for his tenacity"; "when it comes to fighting his corner he is formidable": "has the ability to see the wider picture and produce innovative solutions to problems"

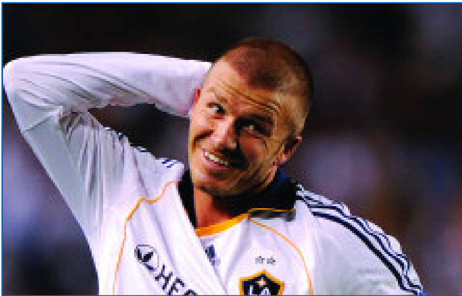
Jeremy Goldring: "Razor-sharp"; "an excellent choice for complex cases"; "tremendously hard working and clever"; "sensible and extremely bright"; "phenomenal drafting skills"; someone "who has an exceptionally good future ahead of him" and whose "profile continues to rise" "tactician"; "excellent both on paper and on his feet"; "warm and cheerful personality"

Marcus Haywood: "shows maturity beyond his years"

Insolvency Challenge

Many thanks to all those who entered the November Insolvency Challenge. The correct answers and the winner appear in the box at the foot of the page. As for this issue of the Digest, a similar challenge to the last issue. Again the clues are in the pictures. There will, of course, be a **Magnum of Champagne** for the winner, the winner being drawn from a wig tin if there is more than one correct entry. Answers by email to kirstendent@southsquare.com or by post to the address on the back page in either case by Friday March 26th 2010.

1.



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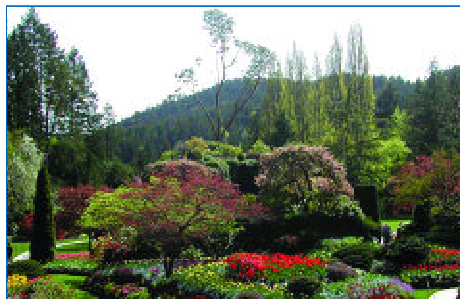

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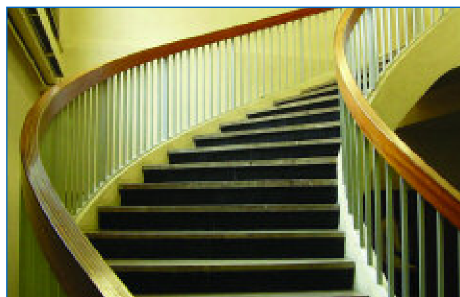

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9. ...and the link is?

November Insolvency Challenge

The correct answers to the November 2009 Insolvency Challenge were (1) (Jeremy) Goldring. (2) (Hilary) Stonefrost. (3) (Marcus) Haywood. (4) (Richard) Sheldon QC. (5) (Christopher) Brougham QC. (6) (Michael) Crystal QC. (7) (Tom) Smith. (8) (Gabriel) Moss QC. The common denominator was of course all members of 3-4 South Square Chambers. Once again there were a considerable number of correct entries. But the winner, as drawn by 3-4 South Square's senior practice manager, Paul Cooklin, is Andrew Marshall at Linklaters to whom go our congratulations and a magnum of champagne.

3-4 South Square

Barristers

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Chambers 2010

Michael Crystal QC
Christopher Brougham QC
Gabriel Moss QC
Simon Mortimore QC
Stuart Isaacs QC
Richard Adkins QC
Richard Sheldon QC
Richard Hacker QC
Robin Knowles CBE QC
Mark Phillips QC
Robin Dicker QC
William Trower QC
Martin Pascoe QC
Fidelis Oditah QC
David Alexander QC

Antony Zacaroli QC
Stephen Atherton QC
David Marks QC
Lexa Hilliard QC
Ronald DeKoven
John Briggs
Mark Arnold
Adam Goodison
Hilary Stonefrost
Lloyd Tamlyn
Glen Davis
Andreas Gledhill
Barry Isaacs
Ben Valentin

Felicity Toube
Jeremy Goldring
Lucy Frazer
David Allison
Daniel Bayfield
Tom Smith
Richard Fisher
Blair Leahy
Stephen Robins
Marcus Haywood
Hannah Thornley
Simon Fuller
William Willson
Georgina Peters
Adam Al-Attar

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