Volume 14 Issue 11 **May 2015**

Tolley's Company Law and Insolvency

Bulletin Editor
Dr John Tribe
Kingston University

Dear Subscriber,

It is my pleasure to welcome readers to the latest newsletter. I hope you are having an enjoyable May and that the weather is being kind to you.

Lots has occurred since the last newsletter. Following the news section this newsletter contains nine analysis pieces drawn from Lexis@PSL Restructuring and Insolvency. In the first analysis piece Barry Isaacs QC critically evaluates the ruling in *Re Welcome Financial Services* and the construction of schemes of arrangement.

On to the second analysis piece—this examines an appeal against a statutory demand where a cross-claim would reduce the sum to less than the bankruptcy level of £750 led to an interesting judgment. Marc Brown, a barrister with St Philips Commercial chambers, explains the issues surrounding the decision in *Howell v Lerwick Commercial Mortgage Corpn Ltd* [2015] EWHC 1177 (Ch), [2015] All ER (D) 42 (May).

Various reforms have been underway of late, not least the new insolvency rules. The third analysis piece is apposite in this regard. It examines the following question: Does the Arbitration Act 1996 (AA 1996) trump the taking of an account under the Insolvency Rules? Lydia Pemberton of St Philips Chambers comments on a ruling of the High Court that highlights the importance of arbitration clauses and agreements in commercial disputes.

Evidence is the key to the next analysis fourth piece which examines the following question: When will the court find a common intention and detrimental reliance in constructive trust cases? Emma Knight of 13 Old Square Chambers says the recent ruling in *Curran v Collins* [2015] EWCA Civ 404, [2015] All ER (D) 01 (May) is reminder that claimants need to produce evidence capable of establishing detrimental reliance.

Liquidators who are defective make up the subject matter of the fifth analysis piece. The piece examines the following question: Can an administration order take retrospective effect when there has been a defective appointment of liquidators? Adam Deacock, barrister, and John Jessup, pupil, at 11 Stone Buildings, examine the court's decision in *Mond v Synergi Partners Ltd* [2015] EWHC 964 (Ch), [2015] All ER (D) 81 (Apr).

Contributions from the Lexis®PSL Restructuring and Insolvency team follow. Dawn Grocock, solicitor in the team provides the sixth analysis piece. In *TBAC Investments Ltd v Valmar Works Ltd* [2015] EWHC 1213 (Ch), [2015] All ER (D) 10 (May) the High Court considered the validity of a notice to complete a property sale agreement, including who was the proper party to the sale agreement who could give such a notice, in circumstances where receivers were appointed over the property in question.

Diverting our attention to the international scene in the seventh analysis piece Sebastian Prentis, a barrister at New Square Chambers, discusses the Supreme Court's judgment in *Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27, [2015] All ER (D) 224 (Apr) which examines the correct meaning of the concept of 'establishment' in relation to EU insolvency proceedings.

The Small Business, Enterprise and Employment Act 2015 (SBEEA 2015) has introduced a number of changes to the law relating to companies and insolvency. The Lexis®PSL Restructuring and Insolvency team has published a suite of Practice Notes dealing with these changes relevant to insolvency professionals, separated into a number of different areas of insolvency law that are affected.

This newsletter contains ten summary reports of case law apposite to the jurisdictions of insolvency law and company law.

I would be pleased to hear from subscribers who have any comments or suggestions regarding the content of this Newsletter, or any comments or queries on company law, insolvency law and practice and procedure in general in those areas. Letters which raise issues of interest may be published in the Newsletter. Please address letters to the editor of this newsletter: Dr John Tribe, Kingston Law School, Kingston University, Kingston Hill, Kingston upon Thames, Surrey, England, KT2 7LB, Email: j.tribe@kingston.ac.uk.

Dr John Tribe

Newsletter Editor

NEWS

(1) Thousands of UK pensioners win share of $7bn Nortel assets

Judges in the US and Canada have issued a decision in favour of 33,000 ex-Nortel Networks pensioners in the UK who were left stranded with a huge deficit in their pension scheme when the telecoms giant entered bankruptcy in 2009. The decision means they can share on an equal footing with Nortel creditors worldwide the US$7bn residual Nortel assets currently sitting in an escrow account in New York.

Nortel Networks collapsed into insolvency in January 2009, with its European, US and Canadian entities making simultaneous insolvency filings in London, Delaware and Toronto. Recognising the hugely integrated nature of Nortel's business, and the difficulty of realising its assets on a country-by-country basis, the various insolvency office-holders worked together to sell the key assets and business units on a joint, global basis.

However, being unable to agree at that early stage how the resultant proceeds should be allocated among the insolvent entities, it was agreed that the proceeds should be held in escrow in what became known as the 'Lockbox' until agreement was reached. More than six years later, around US$7.3bn stood ready to be allocated. However, the question of allocation fell for judicial determination because the various stakeholders were unable to agree how the proceeds should be shared.

The result affects the lives and incomes of 33,000 Nortel pensioners in the UK and 20,000 pensioners of Nortel Canada. It is the first insolvency case in which assets have been distributed cross-border according to the claims of creditors following a cross-border trial.

Judge Gross of the Delaware Bankruptcy Court and Justice Newbould of the Supreme Court of Ontario delivered their judgments on 12 May simultaneously. Both Judges adopted the argument made by the Trustee of Nortel's UK pension plan and the UK Pension Protection Fund (collectively known as the UK Pension Claimants) that the assets of the global Nortel Group should be divided on a pro rata basis based on creditor claims.

The UK Pension Claimants had argued throughout that, as a matter of fairness and given the highly integrated nature of the group and its assets, the proceeds of the joint asset sales should be shared among the insolvent entities on a pro rata basis relative to the respective levels of creditor claims against each estate.

The ruling means all 33,000 UK creditors should now receive up to around two-thirds of their claim.

Hogan Lovells represented the Trustee of the Nortel UK Pension Scheme and the Pension Protection Fund. Commenting on the case, head of pensions litigation Angela Dimsdale Gill, said: ‘This bold decision does justice to the people who created the wealth of Nortel and who were promised an income in retirement for their commitment to the company in its heyday’.

‘This is a victory by UK Pensioners for Nortel pensioners on both sides of the Atlantic. They were the only party running the successful argument as their primary case. Today they can welcome this decision for fairness and common sense, along with Nortel pensioners in Canada.’

(2) Gateley to become first British law firm on stock market

UK law firm, Gateley, has generated strong interest for its shares as part of its bid to become the first legal practice to be listed on the stock market. Gateley is set to list on the Alternative Investment Market with a value of up to £14m.

Rules in the UK changed in 2012 to allow law firms to convert from partnerships to an alternative business structure and accept investment from non-lawyers.

Income and growth funds have responded positively to Gateley’s float.

(3) Changes to Takeover Panel fees and charges

Supervisor and regulator of corporate takeovers, the Takeover Panel has announced changes to its document charges. The changes relate to the payable charges where no offer document is published and the payment of document charges to the Panel, including the responsibilities of financial advisors and the requirement in all cases to supply a note setting out the calculation of whether a charge is payable or not.

In addition to the PTM levy and exempt/recognised intermediary status charges, the Takeover Panel derives income from document charges.

Where a firm offer is announced pursuant to Rule 2.7 of the Takeover Code, but no offer document is published, one-half of the document charge which would have been payable, calculated on the basis of the offer value at the time of the announcement of the offer or any revised offer, is payable.

Until further notice, all document charges are payable on all offers valued at £1m or more.

Payment of document charges

The financial advisor to the offeror is responsible for the payment of the document charge to the Panel, except in the case of a whitewash document, when the financial adviser to the offeree companies is responsible.

Payments should be sent to the Panel when documents are published or, where a firm offer is announced but is withdrawn without an offer document being published, the date on which the offer is withdrawn.

In all cases, a note setting out the calculation of whether a document charge is payable or not, including, if payable, the calculations relating to each form of the offer, should be sent to the Panel, together with the payment.

In the case of a revised offer, a similar note should be sent to the Panel with the revised offer document and any necessary further payment.

(4) An Insolvency is falling, but 'zombie companies' risk recovery

Company insolvencies have returned to pre-credit crisis levels, with liquidations reaching the lowest level since 2007 in the first three quarters of the year.

Around 4,052 businesses were dissolved in the first quarter, 6% down from the same period in 2014. The number of company liquidations, however, rose by 9.3% on the previous quarter, to 904.

Accountancy firm Baker Tilly stated many companies were servicing their debts on an interest-only basis, leaving many in a vulnerable position if interest rates rose.

These 'zombie companies', usually loss-makers who can only afford interest repayments on their loans, concern economists due to their negative impact on economic recovery if interest rates push them out of business. There are thought to be around 340,000 of these companies in the UK, a number three times higher than at the height of the recession in 2009.

In England and Wales, the number of people becoming insolvent has fallen 18.6% compared to 2014, with 21,000 becoming insolvent in the first three months of 2015.

(5) The Insolvency Service publishes Q1 2015 statistics

Creditors' voluntary liquidations in England and Wales were at their lowest level since Q2 2008, but compulsory liquidations increased for the first time since Q1 2014, the latest Insolvency Service statistical release revealed. Overall, total company insolvencies were at their lowest since Q4 2007. Individual insolvencies decreased for the third successive quarter to the lowest recorded level since Q4, and the number of individual voluntary arrangements (IVAs) at its lowest level since Q4 2008. The statistics cover January to March 2015.

The Statistics release contained the latest data on company insolvency and individual insolvency levels. The figures highlighted:

Companies

- company insolvencies were at their lowest level since Q4 2007—4,052 companies entered into insolvency in Q1 2015,
- creditors' voluntary liquidations were at their lowest level since Q2 2008—2,481 companies entered into creditor's voluntary liquidation inn Q1 2015, a 3.7% decrease on the previous quarter,
- compulsory liquidations increase first time since Q1 2014—904 companies were subject to a compulsory winding-up order in Q1 2015, a 9.3% increase on the previous quarter,
- administrations increase, but company voluntary arrangements and receivership appointments decrease—432 administrations in Q1 2015, 9.2% higher than Q4 2014 but 16.9% lower than Q1 2014, and
- the liquidation rate was at its lowest level—the liquidation rate in the 12 months ending Q1 2015 was 0.5% of active companies, the lowest level since Q4 1984.

Individuals

- individual insolvencies were at the lowest level since Q4 2005—20,826 individual insolvencies in Q1 2015, 8.7% lower than Q4 2014,
- the rate of insolvency decreased—in the 12 months ending Q1 2015, one in 478 adults became insolvent, the lowest rate since the 12 months ending Q1 2006,
- IVAs were at their lowest level since Q4 2008—10,405 IVAs in Q1 2015, a 13.1% decrease compared to Q4 2014 and 23.5% lower than Q1 2014,
- the number of bankruptcies continued to decrease—4,209 bankruptcy orders in Q1 2015, 6.6% lower than Q4 2014 and 22.5% lower than Q1 2014,
- debt relief orders (DROs) decreased for the third quarter in a row—6,213 DROs in Q1 2015, a 1.8% decrease compared to Q4 2014 and 5.1% lower than Q1 2014.

(6) EU council's position on insolvency proceedings regulation approved

Following the approval of the European Council's position, at first reading, on the adoption of the regulation on insolvency proceedings (recast) (16636/5/2014-C8–0090/2015–2012/0360 (COD)), a recommendation for a second reading has been issued. A draft European Parliament legislative resolution instructs the President of the European Parliament to sign the act with the President of the Council and the Secretary-General and arrange for its publication in the Official Journal of the European Union.

The regulation covers matters relating to company law, financial management of undertakings, business loans, accounting and judicial cooperation in civil and commercial matters.

Under the ordinary legislative procedure, the regulation currently awaits its second reading in Parliament. An update on its legislative progress can be viewed here.

ANALYSIS

(1) How far-reaching are schemes of arrangement?

What impact might the ruling in *Re Welcome Financial Services Ltd* [2015] EWHC 815 (Ch), [2015] All ER (D) 329 (Mar) have on the construction of schemes of arrangement? Barry Isaacs QC, a barrister at South Square, discusses the ruling and its significance for those drafting schemes of arrangement.

The company and the administrators of the scheme (the applicants) sought declarations concerning the proper construction of a scheme of arrangement in respect of the company and its parent. Following the passage of the 'bar date', there were two main groups of people whom it was thought might have claims—those who had lost money investing in shares in the parent company and customers who had been mis-sold payment protection insurance (PPI). The Chancery Division (Companies Court) made various declarations on the basis of whether the respondents were creditors of the scheme.

How did the issues arise?

The company was in the business of making loans to individuals, particularly those whose poor credit records meant they could not obtain loans from banks. A large number of customers and former customers asserted claims against the company arising out of their credit agreements. The questions for the court were whether the claims were barred because they were covered by the scheme of arrangement which had been sanctioned in relation to the company and the customer had not submitted a claim in accordance with the terms of the scheme.

What guidance was given on the interpretation of schemes generally?

The case is a useful example of the application of:

- the test for contingent debts propounded by Lord Neuberger in *Re Nortel GmbH* (*in administration*) [2013] UKSC 52, [2013] All ER (D) 283 (Jul), and
- the reasoning in *Re Lehman Brothers International (Europe) (in administration)* [2009] EWCA Civ 1161, [2009] All ER (D) 83 (Nov) that an arrangement between a company and its creditors means an arrangement which deals with their rights inter se as debtor and creditor.

What guidance was given on the meaning of claims arising from an obligation incurred before the effective date of the scheme?

The liabilities covered by the scheme were those which had arisen by the effective date or might arise after that date 'as a result of an obligation incurred' by that date. The court held that claims under the Consumer Credit Act 1974 (CCA 1974) arose as a result of obligations incurred before the effective date. Applying the test in *Re Nortel GmbH*, the entering into the credit agreement was the taking of a legal step which imposed legal duties under CCA 1974 and created a legal relationship between the creditor and debtor:

- this relationship resulted in the creditor being vulnerable to applications under the relevant provisions of CCA 1974, and
- it was consistent with the regime under which the liability was imposed to conclude that the entering into the credit agreement gave rise to an obligation under the Insolvency Rules 1986, SI 1986/1925, r 13.12(1)(b).

Did the scheme bind the five categories of claim (*CCA claims, non-PPI liabilities, overpayment claims, uncashed cheques claims, charges claims*)*?*

Applying the reasoning in Re Lehman Brothers International (Europe), CCA claims were not compromised by the scheme where the customer making that claim was not doing so in the capacity as creditor but in the capacity as a debtor. The fact that the same customer might have a claim as creditor as well as a claim as debtor did not convert all their claims in whatever capacity into claims as a creditor. The other categories of claim were (with minor exceptions) bound by the scheme.

What does this mean in practice for those drafting schemes of arrangements?

The court construed the scheme by applying the principles of construction set out by Henderson J in *Re Marconi Corpn plc* [2013] EWHC 324 (Ch) at para [37]. They can be summarised as follows:

- the court must consider the language used and ascertain what a reasonable person would have understood the parties to have meant—a reasonable person in this context is someone who has all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the entry into the instrument,
- the words used in an instrument should be given their natural and ordinary meaning—this means that the court will not readily accept that the parties have made linguistic mistakes in formal documents,
- if detailed semantic and syntactical analysis of words is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense,
- an over-literal interpretation of one provision without regard to the whole may distort or frustrate the commercial purpose—accordingly, the wording must be interpreted as a whole in light of the commercial intention which may be inferred from the face of the instrument and from the commercial context, and
- in cases where the language is ambiguous or there are two possible constructions, it is generally appropriate to prefer the construction which is more consistent with business common sense and reject the other.

(2) When can statutory demands for undisputed debts be upheld?

An appeal against a statutory demand where a cross-claim would reduce the sum to less than the bankruptcy level of £750 led to an interesting judgment. Marc Brown, a barrister with St Philips Commercial chambers, explains the issues surrounding the decision in *Howell v Lerwick Commercial Mortgage Corpn Ltd* [2015] EWHC 1177 (Ch), [2015] All ER (D) 42 (May).

The appellant appealed against a decision of a district judge dismissing his application to set aside a statutory demand. The debt itself was not disputed but the appellant relied on a cross-claim which did not equal the debt but fell short of it by less than £750. The Chancery Division held that a statutory demand should not necessarily be set aside under the residual discretion in the Insolvency Rules 1986, SI 1986/1925, r 6.5(4)(d) simply because the undisputed part was less than £750. On the facts of the present case, the appropriate course was not to set aside the statutory demand under the Insolvency Rules 1986, r 6.5(4)(d).

What was the background to the appeal, briefly?

The respondent had issued a statutory demand against the appellant in the sum of £4,736.43, being the sum of two costs orders totalling £3,935, plus interest and the costs of the demand.

The appellant sought to set aside the statutory demand on the grounds that he had a cross-claim. This cross-claim was the subject of an issued claim in the sum of £2,750. He also wished to amend that claim to claim a further £14,763.60. However, the application to amend and an appeal against it were dismissed, leaving just the cross-claim of £2,750.

On the hearing of the application to set aside the statutory demand, the district judge reduced the demand debt to £3,935 as the respondent was not entitled to interest on the costs orders (being for less than £5,000 in the county court) or costs on the demand unless and until ordered.

The district judge proceeded on the basis that the appellant had an arguable cross-claim for £2,750 and might also recover fixed sums for costs amounting to £395 in total. This gave a total cross-claim of £3,935, being £790 short of the properly demanded sum.

On the appeal, it was held that the appellant should also have been entitled to add interest to the cross-claim, amounting to either £240 (at 3.5%) or just over £100 (at 1.5%). Either sum of interest would have the effect of reducing the amount of the demand in respect of which there was no dispute or cross-claim to below £750.

What were the legal issues that the court had to decide?

In the circumstances set out above, the judge had to decide whether a statutory demand should be set aside under the discretion provided for in the Insolvency Rule 1986, r 6.5(4)(d) when it is the subject of a cross-claim which would not equal or exceed the debt, but which would have the effect of reducing the demand sum to less than the bankruptcy level (£750) and therefore a bankruptcy petition could not be pursued in respect of it.

Why did these issues arise?

Given the additions to the appellant's cross-claim of £2,750 and various costs allowances (totalling £395) and interest (of either £240 or just over £100), the total cross-claim was between £3,245 and £3,385.

The proper amount of the demand was £3,935.

As a result, the appellant's cross-claim was short of equalling or exceeding the demand debt by somewhere between £550 and £690.

Both of those sums were below £750. As a result, if a statutory demand should be set aside under the Insolvency Rules 1986, r 6.5(4)(d) if the effect of a cross-claim is not to equal or extinguish the debt, but to reduce it to below the bankruptcy level of £750, then the appellant was entitled to have the statutory demand set aside and succeed on his appeal.

However, if a statutory demand does not have to be set aside in such circumstances, the appeal would fall to be dismissed.

What were the main legal arguments put forward?

The appellant appeared in person and the respondent did not appear and was not represented. As a result, the judge had to do a great deal of the work himself in terms of identifying the key arguments and their resolution.

The judge noted that in doing so, he had consulted with the bankruptcy registrars (including the Chief Registrar) who came across the issues with more frequency.

The principal argument in favour of setting aside the demand was that the Court of Appeal had held in *Re a Debtor (No's 49 and 50 of 1992)* [1995] Ch 66 that where a debt was the subject of a dispute and the undisputed sum was less than £750, the court would exercise its general discretion to set aside a statutory demand under the Insolvency Rules 1986, r 6.4(d), as a petition presented in respect of such a sum would be bound to fail as the debt would be less than the bankruptcy level.

What did the court decide, and why?

The court dismissed the appeal and held that the statutory demand should not be set aside even though the effect of the cross-claim would be to reduce the remaining sum to less than the bankruptcy level of £750. In order to do so, it was necessary for the decision of the Court of Appeal in *Re a Debtor (No's 49 and 50 of 1992)* to be considered. The judge held that while one debt of less than £750 could not by itself form the subject of a viable petition for bankruptcy, it could if it was combined with other debts, whether owing to the same or other creditors, that together amounted to more than £750.

In this respect, the judge noted that the decision of the Court of Appeal had been in relation to disputed debts (as opposed to cross-claims) and had been based on the premise that 'there [was] no question or suggestion of other creditors or other debts'.

The judge applied the same reasoning in respect of cross-claims. He said that the Insolvency Rules 1986, r 6.5(4)(a) did not apply because the cross-claim did not equal or exceed the value of the demand debt. The judge also held that the discretion in r 6.5(4)(d) should not be exercised because, while the demand debt could not by itself form the basis of a viable petition, it could well do so if it formed the basis of a petition in conjunction with other petitionable debts, whether owed to the respondent or other creditors, and this was not a case where there was no question of other creditors or other debts.

As a result, the appeal failed and the statutory demand stood.

To what extent is the judgment helpful in clarifying the law in this area?

It has often been thought that all a debtor needed to do in order to set aside a statutory demand was demonstrate that the debt was disputed to the extent that any undisputed sum was below £750, or that there was a cross-claim which would have the effect of reducing the demand debt which was not the subject of the cross-claim to below £750.

This judgment clarifies that in respect of statutory demands this is not the case (even though it remains so in relation to the bankruptcy petition itself).

In other words, the judgment clarifies that a statutory demand may be upheld even if the undisputed debt, or the debt in respect of which there is no cross-claim, is less than £750.

What practical lessons can those advising take away from the case?

First, it is clear that the idea that a demand will be set aside if the undisputed debt or the amount in respect of which there is no cross-claim is less than £750 no longer holds good.

The key issue to be aware of that appears from the case is that what is important in such cases is whether there are other debts or other creditors. Plainly in a case where the value of the demand and an asserted cross-claim are close, it will be in the interests of the debtor to seek to show that there are no other debts or creditors. Conversely, it will be in the interests of the presenter of the demand to seek to show that there are such other debts or creditors, such that even if the properly demanded sum is less than £750, the debt can still form the subject of a viable petition in conjunction with other debts or other creditors, and so the demand ought not to be set aside in its entirety.

The interesting feature is that where the outcome of an application to set aside a statutory demand is that the application fails, but the debt is less than £750, this may well give rise to a costs order against the debtor which (if the subject of a further statutory demand) could then be aggregated with the original debt to give a total debt exceeding £750.

The judge noted that the provision in the Insolvency Rules 1986, r 6.5(6)—to the effect that where the court dismisses an application to set aside a statutory demand it will make an order authorising the creditor to present a bankruptcy petition—needed to be considered carefully in such a circumstance to ensure that the court was not authorising the creditor to present a petition for a debt that was less than the bankruptcy limit of £750.

(3) When arbitration and liquidation collide

Does the AA 1996 trump the taking of an account under the Insolvency Rules? Lydia Pemberton of St Philips Chambers comments on a ruling of the High Court that highlights the importance of arbitration clauses and agreements in commercial disputes.

The salient case is: *Philpott (as joint liquidators of WGL Realisations 2010 Ltd) v Lycee Francais Charles de Gaulle School* [2015] EWHC 1065 (Ch), [2015] All ER (D) 175 (Apr).

A company in voluntary creditors' liquidation was engaged in a construction dispute with a school. The school put in a proof of debt, which the company's liquidators had yet to approve. The school contended that an arbitration clause in the construction contract was binding and continued to apply despite the company being in liquidation. The liquidators of the company applied for directions, contending that the court had power, under the Insolvency Rules 1986, SI 1986/1925, r 4.90 in connection with the proof of debt process, to give directions as to the taking of an account of the balance due between the company and the school. The Chancery Division ruled, among other things, that the arbitration clause trumped the taking of an account under the court's directions as envisaged by the Insolvency Rules. The arbitration agreement had not become inoperative following liquidation of the company.

What was the background to the application?

WGL Realisations 2010 (formerly Welconstruct Limited) went into creditors' voluntary liquidation in 2010. In July 2008 WGL had entered into a JCT Intermediate Building Contract (the contract) with the respondent (the Lycee Francais Charles De Gaulle School (the school)).

It was common ground that the parties had 'mutual dealings' with each other prior to the liquidation (rule 4.90 of the Insolvency Rules 1986), resulting in a claim by WGL for approximately £615,000 and from the school for approximately £270,000. The school had submitted a proof of debt in around the £270,000 mark, which, at the date of judgment, was yet to be accepted or rejected by the joint liquidators.

Rule 4.90 is silent as to the mechanism by which an account can be taken. The joint liquidators argued that Part 9 of the Insolvency Rules allowed them to seek directions as to the taking of an account of the balance due between the parties.

However, the contract contained an arbitration clause and an adjudication clause. The school argued that, pursuant to the Arbitration Act 1996, s 9 (AA 1996), any proceedings taken by the joint liquidators, which were not arbitration proceedings, must be stayed unless the said arbitration clause is 'null and void, inoperative, or incapable of being performed' (AA 1996, s 9(4)). There was no suggestion by the joint liquidators that the exceptions contained within AA 1996, s 9(4) applied.

What were the legal issues that the judge had to decide in this application?

The 'real issue' for the court was whether AA 1996 'trumped' the taking of an account under the Insolvency Rules.

What did the judge decide, and why?

The judge concluded that since the case did not fall within the statutory exceptions and the school had indicated that it would invoke the obstacle, which was AA 1996, s 9, any proceedings brought by the joint liquidators would be stayed (para [28]).

Further, the judge confirmed that the arbitration clause/agreement did not become inoperative following the liquidation or in consequence of the statutory set-off. The judge rejected any notion that the fact that claims existed on both sides should be determinative of whether or not the arbitration clause applied.

Where there any further issues, and what were the main legal arguments put forward?

Firstly, the joint liquidators appear to have dipped their toes into the argument that by submitting a proof of debt, the school had compromised its position on AA 1996, s 9. The judge considered that a compromise would only arise if AA 1996, s 9(3) applied—i e the party seeking to enforce the arbitration clause had taken 'any step in proceedings to answer the company's claim'. Since the proof of debt (and any appeal from a rejection) would be the school making its own claim and not a step in answer to WGL's claim, the judge did not consider that the school had compromised its right to arbitration.

Secondly, the judge acknowledged that it remains open to the parties to follow the adjudication process. The judge commented that it seemed inconceivable that any court would enforce any order obtained in an adjudication as this would offend the pari passu distribution and as such would be likely to be met by an application for a stay by the joint liquidators. If the joint liquidators were to invoke the adjudication route, the question of a stay would not arise. The judge determined that this issue was a matter upon which others should make a commercial judgment.

To what extent is the judgment helpful in clarifying the law in this area?

It is clear that a claim for an account in the context of r 4.90 involves the resolution of a dispute, and as such it will strike at the heart of AA 1996, s 9.

What practical lessons can those advising take away from the case?

This case brings to the fore the continued importance of arbitration clauses/agreements in commercial disputes. Whether acting for liquidators or creditors, the mandatory nature of AA 1996, s 9 means that in the absence of the statutory exceptions, the arbitration clause will prevail.

(4) Finding common intention and detrimental reliance

When will the court find a common intention and detrimental reliance in constructive trust cases? Emma Knight of 13 Old Square Chambers says the recent ruling in *Curran v Collins* [2015] EWCA Civ 404, [2015] All ER (D) 01 (May) is reminder that claimants need to produce evidence capable of establishing detrimental reliance.

The parties' relationship broke down and the defendant excluded the claimant from a residential property. He denied that she had any claim to any of the three properties in which they had spent time together. In each case, the defendant had bought the property in his sole name. He also denied that the claimant had a half share in a business. The claimant brought proceedings, claiming that there was an agreement or understanding that she should have a half share in the properties. Her claim was dismissed. The Court of Appeal, Civil Division, dismissed the claimant's appeal on its facts.

What was the background to the case?

P and B were in a relationship for over 30 years, during which period they spent time together in various residential properties registered in the sole name of B (the properties) and lived together for eight years. A kennels business was run from one the properties (the business) and, from 1994, the parties bred Airedale terriers (the dogs).

In about 1986, B declined to register P as joint proprietor of one of the properties on the basis that it would be too expensive to have to pay for an additional life insurance policy (the excuse). In 1992, B made a will leaving his estate to P on his death (the will).

At trial, P's claim for a share in the dogs was undisputed, however, B successfully defended P's claim for a share in the properties and the business following the judge's findings that:

- P had not 'really' worked in the business as a partner or otherwise,
- P had made no direct or indirect contribution to the properties, financial or otherwise,
- the parties' relationship was not such as to give rise to an inference of fact that there was an agreement, arrangement or understanding as to joint beneficial ownership,
- the excuse did not demonstrate a common intention to share the properties, and
- in any event, P had suffered no detriment.

What were the legal issues that the Court of Appeal had to decide in this appeal?

The overarching issue for the Court of Appeal to determine was whether the judge was right to conclude that there was no evidence of a common intention to share the properties, and that P had suffered no detriment such that her claim should fail. The grounds of appeal specifically required the court to consider whether the judge was wrong to:

- discount P's evidence and/or prefer the evidence of B,
- assess the excuse by reference to subjective factors,
- focus on financial factors,
- find that the business was not a partnership, and
- rely on incomplete disclosure of documents by B.

Why did these issues arise?

In the context of common intention constructive trust cases, this case was unusual. The parties hadn't lived together for much of the relationship and, in light of the judge's findings that P had contributed nothing, financially or otherwise, to the properties, P's claim rested on whether the excuse and/or the will constituted sufficient evidence of a common intention. At trial, the parties were agreed that, even if P successfully demonstrated a common intention, she had to overcome the additional hurdle of showing detrimental reliance. During the course of the appeal, P abandoned her attempt to argue that detrimental reliance was not a necessary ingredient of her claim. P raised the specific grounds of appeal outlined above in an attempt to undermine and overturn the judge's findings that she had no interest in the properties or the business.

What were the main legal arguments put forward?

In the course of the appeal, no serious challenge was made to the legal principles upon which the case had been decided. The parties were agreed that, in order to establish a common intention constructive trust, P had to show a common intention and detrimental reliance. Accordingly, the legal arguments focused on each ground of the appeal.

What did the Court of Appeal decide, and why?

The Court of Appeal unanimously dismissed P's appeal. Arden LJ methodically dealt with and dismissed each ground of P's appeal. She found no basis for criticising the judge's approach to the evidence and/or her findings of fact.

Lewison LJ reached the same conclusion by concentrating on the legal analysis underpinning the judge's decision. He restated the need for P to establish both a common intention and detrimental reliance and referred to two earlier successful 'specious excuse' cases (namely *Eves v Eves* [1975] 1 WLR 1338, [1975] 3 All ER 768 and *Grant v Edwards* [1986] Ch 638, [1986] 2 All ER 426). He distinguished them on the basis that, in those cases, the excuse:

- contained a positive assertion the claimant would have been registered as a joint owner but for the alleged obstacle, and
- had been given in the context of a property being acquired as a family home.

To what extent is the judgment helpful in clarifying the law in this area? What practical lessons can those advising take away from the case?

The grounds of appeal were very specific to this case and so the importance of the decision in that regard is limited to underlining the court's reluctance to go behind a trial judge's assessment of the evidence and findings of fact.

The real significance of this case lies in Lewison LJ's comments on the legal principles which were applied to this case. At first blush, the legal principles upon which this case was decided do not accord with the oft cited principles set out in *Stack v Dowden* [2007] 2 AC 432, [2007] 2 All ER 929 and *Jones v Kernott* [2012] 1 AC 776, [2012] 1 All ER 1265 (in which the words 'detrimental reliance' do not even appear) and yet they were largely uncontested by the parties and endorsed by the Court of Appeal.

Grant v Edwards (which was cited but was not overruled by *Stack v Dowden* and *Jones v Kernott*) offers an explanation for this apparent anomaly—common intention and detrimental reliance are required in every common intention constructive trust case, but, very often, the evidence which gives rise to the inference of a common intention (such as financial contributions), will also demonstrate detrimental reliance such that the distinction between the two elements becomes unimportant. In a case such as the instant case, where there is said to be direct evidence of the common intention (the excuse) which does not, in and of itself, demonstrate detrimental reliance, there needs to be separate evidence of this in order to show that it would be unconscionable to deny the beneficial interest asserted.

Accordingly, this case serves as a useful reminder that, in, admittedly rare, cases of this nature, claimants will need to be careful not to overlook the need to produce evidence capable of establishing detrimental reliance.

(5) Retrospective application of administration orders

Can an administration order take retrospective effect when there has been a defective appointment of liquidators? Adam Deacock, barrister, and John Jessup, pupil, at 11 Stone Buildings, examine the court's decision in *Mond v Synergi Partners Ltd* [2015] EWHC 964 (Ch), [2015] All ER (D) 81 (Apr).

The applicant, in his capacity as a creditor of the company for the purposes of the Insolvency Act 1986 (IA 1986) or (the 1986 Act), Sch B1, para 12(1)(c), sought an administration order to take effect retrospectively from November 2010. The court was being asked to make a retrospective order which would cure the fact of the void appointments of the purported present liquidators, by casting back over four years and validating the actions of those individuals, not as liquidators, but as administrators, in the intervening period, with a view to the company being moved by those freshly appointed administrators into creditors' voluntary liquidation (CVL). The Chancery Division held that, in the circumstances, the only appropriate outcome for the present administration application was to make an order for the compulsory winding-up of the company.

Briefly, what was the background to the application?

On 4 February 2015 the applicant applied for an administration order in his capacity as a creditor under IA 1986, Sch B1, para 12(1)(c). The order was to take effect from 23 November 2010 (ie it was intended to be retroactive so as to create an administration fur and a half year earlier).

The applicant had appointed an administrator to the company on 22 November 2009. The administrator purported to move the company into CVL, and to appoint joint liquidators to carry this out, by a notice completed on 23 November 2010 and registered on 27 November 2010. However, the administration period had not been extended and had expired on 22 November 2010. The joint liquidators had therefore never been validly appointed, but nonetheless acted on behalf of the company for the following four years. In the course of doing so they had commenced a wrongful trading claim which would have had to have been abandoned for want of standing. The purpose of seeking a retrospective administration order was therefore to validate the actions of the joint liquidators (albeit as administrators) and to permit them to place the company into CVL so that they themselves could be appointed as liquidators.

What were the legal issues that the judge had to decide in this application?

The potential for the making of an administration order taking retrospective effect was acknowledged in *Re G-Tech Construction Ltd* [2007] BPIR 1275. The jurisdiction to do so was based on the supposedly wide wording of IA 1986, Sch B1, para 13(2), which allows the court to make an administration order taking effect 'at a time appointed by the order'. After rejecting the argument that G-Tech was only a draft judgment, HHJ Hodge QC noted the general unease of the courts with the decision, but that the jurisdiction had nonetheless been used to cure the defective appointment of administrators in several cases.

Given the rather cautious approach the courts have taken to G-Tech it is perhaps surprising that the court should be asked to extend it to a case where there was a defective appointment of liquidators rather than administrators. The purpose of G-Tech orders is usually to clothe the 'administrators' with the office they thought they had.

Why did these issues arise?

One feature of the G-Tech jurisdiction is that it was understood in that and subsequent cases as being limited to making administration orders beginning no earlier than one year before the date of the making of the order, or in any event to creating an administration which lasted for no more than one year. This is because IA 1986, Sch B1, para 76(1) provides that the appointment of an administrator shall cease to have effect at the end of the period of one year beginning with the date on which it takes effect. This feature posed 'real difficulty' for the applicant who was asking to extend the scope of the jurisdiction considerably beyond its understood limits.

What were the main legal arguments put forward?

In an attempt to get around this problem, the applicant sought to distinguish G-Tech on the basis that that case involved the appointment of an administrator which, albeit invalid, had already been made. In the present case, there had been no purported appointment of an administrator.

What did the judge decide, and why?

HHJ Hodge QC found that the distinction drawn by the applicant was not a valid one. This is perhaps unsurprising as it might be thought to provide a cogent reason why the jurisdiction did not apply at all in the instant case, rather than a reason to extend the jurisdiction. In any event it did not offer any way round the wording of IA 1986, Sch B1, para 76(1). The court also referred to IA 1986, Sch B1, para 77(1)(b) which provides that an administrator's term of office may not be extended after it has expired. That would prevent the court retrospectively making a sequence of orders extending a one-year term to four years. The one-year limit applied, and if the court made an administration order retrospective to the date sought it would have expired on 23 November 2011.

There is a second and fundamental restriction of the G-Tech jurisdiction, namely that it could only be exercised where one of the statutory purposes of administration would be likely to be achieved. The applicant did not argue that an order limited to a one-year period from 23 November 2010 would retrospectively validate the move to a CVL. On that basis it was difficult to see how any of the statutory purposes of administration could have been served by the order, the only aim of which would appear to be to validate some of the acts of the liquidators (albeit by making them administrators).

Interestingly HHJ Hodge QC took the view that, even if the effect of the order had been to validate the appointment of the liquidators, the order would still not be granted. None of the statutory purposes would have been satisfied because the only object of making a retrospective order would have been to move the company from administration into CVL. This would not have allowed the company to continue to trade as a going concern, achieved a better result for creditors than a winding-up, or allowed the realisation of property to make a distribution to secured creditors. The judge referred to the applicant's desire to have the current 'liquidators' properly appointed as liquidators (which could only occur on exit from the proposed retrospectively—generated administration) rather than having an ordinary compulsory winding up where the Official Receiver, the Secretary of State, or a creditors' meeting would choose the liquidators. While this appeared to motivate the application it is not clear whether it was suggested as a reason why the making of an administration order would achieve a better realisation for creditors than would arise if there were a liquidation not preceded by administration. It seems unlikely that it would have been accepted as a ground for making an order.

After considering and rejecting other options (including making an order taking effect one year before the making of the order and expiring on the date the order was made), HHJ Hodge QC exercised his discretion under IA 1986, Sch B1, para 13(1) to treat the application as a winding-up petition and to make an ordinary (prospective) winding-up order. The effect was to leave a liquidator to be appointed in the ordinary way.

To what extent is the judgment helpful in clarifying the law in this area?

This case does not add anything of significance to the law. It repeats unease with the G-Tech jurisdiction already expressed elsewhere, and reiterates the already clear point that a retrospective administration order cannot be made for a period exceeding one year. It will come as no surprise to practitioners that the court was unwilling to extend the G-Tech jurisdiction way beyond its existing limits. That jurisdiction is now less frequently invoked in recent years following the line of authorities beginning with *Bezier Acquisitions Ltd* [2011] EWHC 3299 (Ch), [2011] All ER (D) 119 (Dec) which indicated that many irregularities in administration appointment would not render the appointment void.

What practical lessons can those advising take away from the case?

The practical lesson that arises from this case is that practitioners must be very careful to ensure that the exit from an administration has been properly managed before it expires. Less dramatically it is useful to recall that on an administration application the court can, as an alternative, make a winding-up order.

Adam Deacock acted for the applicant in G-Tech.

(6) High Court considers meaning of 'acting by the Receivers'

Dawn Grocock, solicitor in the Lexis®PSL Restructuring and Insolvency team provides the sixth analysis piece. In *TBAC Investments Ltd v Valmar Works Ltd* [2015] EWHC 1213 (Ch), [2015] All ER (D) 10 (May) the High Court considered the validity of a notice to complete a property sale agreement, including who was the proper party to the sale agreement who could give such a notice, in circumstances where receivers were appointed over the property in question.

The claimant had defaulted on a loan from a bank and receivers had been appointed in respect of its properties, which were charged to the bank (the properties). The claimant, with the receivers acting as agents, had entered into a contract for the sale of the properties to the defendant. The completion of the sale did not take place by the specified date and the claimant's solicitors served the defendant with a notice to complete, under the sale contract. The defendant failed to complete within the specified time and the claimant rescinded the sale contract and the premises were sold to another party at auction. The claimant sought declarations that, among other things, the contract had been terminated by rescission. The claimant applied for summary judgment. The issue was whether a valid notice to complete had been served in accordance with the sale contract. The Chancery Division, in granting the application, held that the notice had been a valid notice to complete and that the claimant had been entitled to and had rescinded the sale contract. The proper 'party' to the sale contract who could give a notice to complete was the seller (the claimant) and not the claimant acting through the receivers.

What was the background to the case?

TBAC acquired certain commercial premises (together the Property) with the benefit of a bank loan which was secured by a legal charge over the Property. TBAC defaulted on the loan, following which the bank appointed receivers (the Receivers) over the Property.

An agreement for the sale of the Property (the Agreement) was entered into between TBAC, the Receivers and Valmar, being the proposed purchaser. The Agreement stated that the Receivers had entered into it as agents of TBAC. A few months after entry into the Agreement one of the Receivers resigned and an alternative Receiver was appointed in his place.

Completion of the sale of the Property did not occur on the completion date specified in the Agreement. The Agreement Incorporated Conditions 8.8.1 and 8.8.2 of the Standard Commercial Property Conditions (the Standard Conditions). These provide that, at any time on or after the completion date, a party who is ready, able and willing to complete may give the other a notice to complete, and that the parties are to complete the contract within ten working days of giving a notice to complete, excluding the day on which the notice was given, time being of the essence of the contract.

A document titled 'Notice to complete' (the Notice) was served on Valmar by the Receivers' solicitors. There was no evidence that the Notice was signed. Valmar failed to complete in accordance with the Notice. The Receivers' solicitors wrote to Valmar giving notice to rescind the Agreement.

The Property was subsequently offered for sale at auction and another party agreed to buy it. However, before the sale could be completed, Valmar's solicitors wrote to the Receivers' solicitors challenging the validity of the Notice and the purported rescission of the Agreement. Valmar took steps to register unilateral notices against the Property at the Land Registry preventing completion of the sale.

TBAC commenced proceedings seeking a declaration that the Agreement was terminated by rescission, an order that the unilateral notices be cancelled and an injunction restraining Valmar from attempting to register any other notice or restriction at the Land Registry in respect of the

Agreement. Valmar issued a defence and counterclaim, claiming specific performance of the Agreement. TBAC applied for summary judgment.

What were the issues that the High Court had to decide and what were the main arguments put forward?

The issue for the High Court was whether the Notice was a valid notice to complete.

Valmar asserted that the Notice was not valid for four reasons:

- the Notice was not signed,
- the relevant party to the Agreement who could give notice to complete was TBAC 'acting by the Receivers' who were defined in the Agreement by reference to the names of the original Receivers (not including their successors in title)—they suggested therefore that a notice to complete could only be given by those specific individuals,
- the Notice was very confusing as it contained errors, and
- the Notice was given for the wrong date.

What did the High Court decide, and why?

Mr Kevin Prosser QC, sitting as a Deputy Judge of the High Court, found that the Notice was a valid notice to complete and therefore TBAC was entitled to, and had, rescinded the Agreement. As Valmar's attacks on the validity of the Notice and counterclaim had no prospect of success and there was no other compelling reason for a trial, TBAC's application for summary judgment was granted and Valmar's counterclaim dismissed. The court also declined to exercise its statutory discretion to order the return of the deposit and declared that TBAC could forfeit it. The reasoning is as follows:

Absence of a signature

The court rejected Valmar's contention that a notice to complete is customarily signed, and as the Notice was clearly intended to be signed, the fact that it was not signed indicated that it was only a draft and was never intended to take effect. The judge found that a reasonable recipient would understand from the fact that the Notice had been sent (with a copy having been sent to Valmar's solicitors) that it was intended to take effect, notwithstanding the fact that it had not been signed.

The meaning of 'acting by the Receivers'

The court further rejected the assertion that the Notice was not a valid notice to complete as it was not given by both of the original Receivers on three grounds:

- the 'party' to the Agreement who could give a notice to complete was TBAC (the seller) and not 'TBAC acting through the Receivers'—the Agreement made it clear that the Receivers entered into it merely as agents for TBAC and the court did not construe the words 'acting by the Receivers' which appeared in the Agreement as words of limitation or compulsion; rather, they were words of description,
- in any event, the expression 'the Receivers' should be construed as including their successors in office—it would be absurd to give a literal construction to 'the Receivers' so as to exclude successors given their agency status,
- if, contrary to the above, TBAC could only act through 'the Receivers' which did not include their successors, 'the Receivers' included any one of them—this interpretation was confirmed by reference to the Agreement.

Errors in the Notice

The court did not agree with Valmar's assertion that errors in the Notice meant that it was very confusing, and therefore not a valid notice. The errors, although numerous, were minor because whether viewed separately or cumulatively they would not create any doubt in the mind of a reasonable recipient as to the purpose or effect of the Notice.

Incorrect date of completion

Regarding Valmar's contention that the Notice was not valid due to the date given for completion being incorrect, the court found that a reasonable recipient of the Notice would understand that the Notice required completion of the Agreement in accordance with Standard Condition 8.8—ie within ten clear working days excluding the date of the Notice.

What practical lessons can those advising take away from the case?

The court's sensible approach in construing the words 'acting by the Receivers' as mere words of description and not words of limitation or compulsion will be of interest to practitioners, although not a surprising outcome.

Although the absence of a signature was found not to affect the validity of the Notice in the present case, such notices should be signed to avoid arguments that they are in draft form only and not valid and effective. Likewise, consideration should be given to expressly stating in an agreement when parties include successors in title.

Again, although the errors in the Notice were held not to affect its validity, this case is a useful reminder for practitioners to ensure the accuracy of documents, and in particular that time periods are calculated correctly, especially when the relevant time period involves working days and falls over a bank holiday, as was the case here.

(7) 'Establishment' in EU insolvency—a win for territorialists?

Sebastian Prentis, a barrister at New Square Chambers, discusses the Supreme Court's judgment in *Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27, [2015] All ER (D) 224 (Apr) which examines the correct meaning of the concept of 'establishment' in relation to EU insolvency proceedings.

The respondent company was a Greek state-owned airline that had gone into administration. The appellants were trustees of its pension scheme. The trustees presented a petition in England to wind-up the company on the ground that it was unable to meet its liabilities. The Chancery Division granted the petition, but it was overruled by the Court of Appeal. The Supreme Court dismissed the trustees' appeal. On the proper construction of 'economic activity' in the definition of 'establishment' of Council Regulation (EC) 1346/2000, art 2(h) (the EU Insolvency Regulation), the company could not, at the date of the petition, be said to have had an 'establishment' in the United Kingdom.

What were the jurisdictional issues?

In Olympic Airlines SA the Supreme Court expounds on the meaning of 'establishment' in the EU Insolvency Regulation.

The EU Insolvency Regulation applies where a debtor has his or its 'centre of main interests' within an EU state (which for these purposes does not include Denmark). Only the courts of that state will have jurisdiction to open main insolvency proceedings. By art 3(2), courts of another member state can open proceedings (which will be 'territorial' or 'secondary' depending on whether they are opened before or after the main proceedings) only if the debtor has an 'establishment' in that state. It is therefore a pre-condition to the opening of secondary proceedings that the debtor possesses an establishment.

'Establishment' is defined by art 2(h) as 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods'.

How did the matter arise?

Olympic Airlines was the Greek national airline. In 2008 the European Commission determined that it had received illegal state aid and ordered its immediate recovery by the Greek state. On 29 September 2009 Olympic's flight operations ceased and were transferred to an unconnected company. On 2 October 2009 it was placed into main proceedings special liquidation by the Court of Appeal in Athens. The shortfall is estimated at €500m.

In the UK, by June 2010 there remained a single office in Conduit Street, Mayfair, which was owned by a related company. It contained books and records, and worthless furniture and equipment. There was a van, again owned by a different company, and two bank accounts.

On 17 June 2010 the Greek liquidator told the trustees of the employees' pension fund that on 14 July 2010 the employment of the 27 remaining staff would be terminated, and payments into the pension fund would cease.

Three staff were retained from 14 July 2010 on ad hoc contracts. They attended the Conduit Street office to reconcile accounts, deal with any post and telephone calls, and dispose of the remaining assets. Olympic continued to make payments for:

- their services,
- council tax and utility supplies for the office, and
- repairs after a break in.

On 20 July 2010 the trustees presented a winding-up petition to the High Court in London in respect of the estimated shortfall in the fund of about £16m. The trustees were obliged to seek a winding-up order in this country because they wanted to have recourse to the Pension Protection Fund (PPF) and the Pensions Act 2004 had failed to include in its qualifying insolvency events an EU liquidation. By the time of the Supreme Court hearing a statutory instrument had modified this, but effectively only for the trustees.

What is the relevant time for assessing 'establishment'?

The art 2(h) definition is framed in the present tense, and the relevant time is the date of presentation of the petition (here, 20 July 2010). Before the Supreme Court the trustees argued that a factor tending towards an establishment was that until six days before the relevant date there were 27 employees. This is implicitly rejected in the judgment. No doubt the nature of the activities on the relevant date may be informed by what is occurring on surrounding dates, but it would be detrimental to the notion of certainty to find an establishment on the basis of a fact which no longer subsisted. In any event, it is plain from the judgment that the correct question would be what any employees were actually doing on the relevant date.

What did the Supreme Court find is meant by 'economic activity'?

The Supreme Court determined that 'economic activity' required business dealings through market activity with third parties, and not mere acts or payments referable to internal administration. The trustees' appeal was therefore dismissed.

That is a lot to unpack from two words. The Virgos-Schmit Report (3 May 1996, OJL 6500/96) was described by the Supreme Court as 'much the most useful source of guidance' (albeit it is directed at the earlier draft Insolvency Convention which became the EU Insolvency Regulation). It describes 'establishment' as one of the most debated provisions, being subject to a battle between universalists wanting a single insolvency procedure within the EU, and territorialists wanting local procedures based on the presence of business assets. The final concept was a compromise which rejected both absolutist positions. The Virgos-Schmit Report goes on to describe a place of operations as 'a place from which economic activities are exercised on the market (ie externally), whether the said activities are commercial, industrial or professional'.

The other main guidance comes from the Court of Justice of the European Union (CJEU) in *Interedil Srl v Fallimento Interedil Srl: C-396/09* [2011] All ER (D) 195 (Oct), in which it said that to promote certainty an establishment should be determined in the same way as a centre of main interest (COMI), namely on the basis of objective factors ascertainable by third parties.

In a ringing phrase, Lord Sumption said that the art 2(h) definition of establishment must be 'read as a whole, not broken down into discrete elements, for each element colours the others'. In that way the ambit of the concept becomes apparent. Firstly, the words of the definition themselves require an active business operation. Secondly, the relevant objective factors are not just the existence of a manned office in Conduit Street, but the economic activities being carried out from there—Lord Sumption rejects a mere brass-plate test. Thirdly, as it was an argument for the trustees, one can add that the purpose for seeking the opening of secondary proceedings has no bearing on the meaning. 'Establishment' is a threshold which applies whatever the nature of any main proceedings, whatever the nature of the desired territorial or secondary proceedings, whoever is the applicant, and whatever is their ultimate purpose. To return to Interedil, certainty is key.

Is there guidance on other aspects of 'establishment'?

In saying that 'establishment' must be read as a whole and not broken into its elements, Lord Sumption is not saying that each element does not require to be met: it does, but it contributes to a definition which is not limited by its parts.

That duality is especially pointed when looking at 'non-transitory', the meaning of which was a separate ground of appeal which did not in the event require answering. Although placed next to 'economic activity' in art 2(h), it can also be seen as colouring each part of the definition, as well as the overall quality of the alleged establishment.

What does this mean in practice for pension scheme trustees seeking to assert English jurisdiction in order to gain access to the PPF?

Whether there is an establishment is a matter of the particular facts of each case. As noted by the Supreme Court, even if a company is in liquidation that does not mean that it cannot have an establishment: the liquidator may, for example, trade on or realise stock. As a general rule, any applicant or petitioner should seek to open proceedings as soon as they are able simply because the longer the liquidation or administration or other insolvency procedure continues, the more likely it is that market activity will have ceased.

Any further points of interest?

Firstly, it may be noted that a similar definition of establishment is also adopted by the UNCITRAL model law on cross-border insolvency.

Secondly, it is anticipated that the recast EU Insolvency Regulation will come into force in 2017. The art 2(h) definition is expected to remain, albeit that 'goods' will be replaced by 'assets' (which is how it is read anyway). Importantly, though, art 3(2) will be altered to permit an applicant to demonstrate the existence of an establishment either at the date he seeks to open secondary proceedings, or at any time within the three months prior to the opening of main proceedings. One senses an adjustment in favour of the territorialists.

Sebastian Prentis specialises in modern Chancery, with a particular emphasis on insolvency (both corporate and personal) and, increasingly, on shareholder disputes. In Olympic Airlines SA Sebastian was junior counsel for the respondent.

(9) Small Business, Enterprise and Employment Act 2015—impact on insolvency

The SBEEA 2015 has introduced a number of changes to the law relating to companies and insolvency. The Lexis®PSL Restructuring and Insolvency team has published a suite of Practice Notes dealing with these changes relevant to insolvency professionals, separated into a number of different areas of insolvency law that are affected.

What is the significance of SBEEA 2015 for insolvency professionals?

Small Business, Enterprise and Employment Act 2015 received Royal Assent on 26 March 2015 and introduced a series of amendments and legislative clarifications intended to ensure that the UK continues to be recognised globally as a trusted and fair place to do business and to open up new opportunities for small businesses to innovate and compete. This has brought in a number of changes to companies and insolvency to ensure a strong regulatory regime for those that administer insolvencies.

Insolvency professionals should be aware of these changes as they have an impact on many aspects of insolvency practice and procedures, and the directors' disqualification regime. Most of the changes brought about under SBEEA 2015 will be introduced by separate statutory instrument, but some are effective from May 2015 (see Commencement below).

Directors' disqualification (*SBEEA 2015, ss 104–111 and Sch 7*)

The main changes to the Company Directors Disqualification Act 1996 brought about by SBEEA 2015 are:

- to require insolvency practitioners (IPs) to report to the Secretary of State (SoS) on the conduct of every director of a company that becomes insolvent,
- to require the report to describe any conduct which may assist the SoS in deciding whether it is in the public interest to apply for the making of a disqualification order,
- to require courts to consider a wider range of matters than previously, including the director's track record, and the nature of those who have suffered due to the misconduct, when deciding whether or not to disqualify,
- to enable disqualification proceedings to be taken in the UK where there has been misconduct, or directors have been convicted, in overseas companies,
- to enable proceedings to be taken against a person who has caused a director's unfitness,
- to increase the period of time within which disqualification proceedings may be taken following a formal insolvency from two to three years,
- to remove legislative barriers between regulators which currently restrict the use which may be made of information and reports provided by other regulators in deciding whether or not to bring disqualification proceedings, and

- the introduction of a new power to enable the SoS to apply for a compensation order to be made against a disqualified director where the misconduct has caused identifiable loss to a creditor or creditors.

***Office-holder actions* (*SBEEA 2015, ss 117–119*)**

The main changes to office-holder actions brought about by SBEEA 2015 are:

- fraudulent and wrongful trading actions will be able to be brought by an administrator (currently, only liquidators have the power to bring such actions),
- corporate office-holders will be able to assign causes of action or the proceeds arising from them, in respect of:
  - o fraudulent and wrongful trading,
  - o transactions at an undervalue and preferences (England and Wales),
  - o gratuitous alienations and unfair preferences (Scotland), and
  - o extortionate credit transactions,
- a new statutory provision will confirm the existing position created by case law that the proceeds arising from the above claims—or any assignment of them—will not be treated as part of the company's net property for distribution to the holders of any floating charge created by the company.

***Removal of the requirement to seek sanction* (*SBEEA 2015, ss 120, 121*)**

Small Business, Enterprise and Employment Act 2015 contains provisions meaning that liquidators and trustees in bankruptcy will no longer be required to seek sanction of either the court or a creditors' committee (or where there is none, the SoS or (in the case of a liquidation) a meeting of creditors).

For further reading on the removal of the requirement to seek sanction, see Practice Note: Small Business, Enterprise and Employment Act 2015—office-holder actions and removal of requirement to seek sanction.

***Position of creditors* (*SBEEA 2015, ss 122–126 and Sch 9*)**

The main changes to the position of creditors brought about by SBEEA 2015 are:

- physical meetings of creditors will no longer be the default mechanism for decision making by creditors in insolvency proceedings. This also applies to contributories in corporate insolvency proceedings,
- a new deemed consent procedure is being introduced which can be used in certain cases. This will mean that a proposed decision will be deemed approved unless sufficient creditors object—should such objection be made, then the office-holder must use a qualifying decision procedure or creditors' decision procedure,
- creditors will be able to opt-out of receiving notices (which will include correspondence and reports) from the office-holder in relation to any given insolvency proceeding. This ability to opt-out will not, however, extend to a notice of distribution or proposed distribution, or where the court orders that any notice must be given, and
- for further reading on the removal of the requirement to seek sanction, see Practice Note: Small Business, Enterprise and Employment Act 2015—position of creditors (decision making, notices, small debts etc).

***Administration* (*SBEEA 2015, ss 127–130*)**

The main changes to administration brought about by SBEEA 2015 are:

- the period by which an administration may be extended with the consent of creditors is to be extended from six months to one year,
- where there is a prescribed part available for distribution to unsecured creditors, administrators will no longer need to seek the court's permission to make such a distribution. However, administrators will still need the court's permission to make a distribution of funds to unsecured creditors which are not derived from the prescribed part, and
- the SoS will be given a reserve power to regulations by way of statutory instrument to either prohibit disposals, hiring out or sale of property to connected parties where the company is in administration or impose requirements or conditions on them. This should allow such transactions with connected parties in administration to be reviewed if the non-legislative solutions recommended by the Graham Review (i e oversight by a pool of experienced practitioners or other measures) do not change behaviour/increase confidence in these transactions. As it is only a reserve power, it falls away if not exercised within five years of the relevant provision coming into force.

***Small debts* (*SBEEA 2015, ss 131, 132*)**

Where a creditor is owed a small debt (expected, at least initially, to be a debt of less than £1,000), and the office-holder has clear and undisputed evidence that the debt is due, SBEEA 2015 creates the power for rules to be made effectively exempting that creditor from having to prove for their debt.

For further reading on the removal of the requirement to seek sanction, see Practice Note: Small Business, Enterprise and Employment Act 2015—position of creditors (decision making, notices, small debts etc).

***Trustees in bankruptcy* (*SBEEA 2015, s 133 and Sch 10*)**

Small Business, Enterprise and Employment Act 2015 contains provisions meaning that upon the making of a bankruptcy order, unless the court orders otherwise, the Official Receiver (OR) will be appointed as trustee in bankruptcy. This will bring to an end the current position where the OR is appointed as receiver and manager of the bankruptcy estate until a trustee in bankruptcy is appointed (whether that is the OR himself or an IP). The OR will no longer have to summon a meeting of creditors to appoint a trustee in bankruptcy, although it will still be possible for creditors to request that the OR apply to the SoS for the appointment of a different trustee in bankruptcy.

For further reading on the removal of the requirement to seek sanction, see Practice Note: Small Business, Enterprise and Employment Act 2015—trustees in bankruptcy.

***Voluntary arrangements* (*SBEEA 2015, ss 134, 135*)**

The main changes to voluntary arrangements brought about by SBEEA 2015 are:

- where, in the case of an individual voluntary arrangement (IVA), no interim order has been sought by the debtor, it will be made clear that the period in which a creditor can challenge a decision of creditors in relation to the IVA proposal will be 28 days from the date of that decision, and
- fast-track IVAs are to be abolished.

***Regulation of IPs and power to establish a single regulator of IPs* (*SBEEA 2015, ss 137–146 and Sch 11*)**

Small Business, Enterprise and Employment Act 2015 amends the IA 1986 to introduce:

- regulatory objectives for the recognised professional bodies (RPBs) when regulating IPs,

- a range of sanctions so that proportionate action can be taken where the SoS (as oversight regulator) is satisfied that an RPB is not adequately fulfilling its role as a regulator, or where it is in the public interest to do so, apply to court for a direct sanctions order against an IP, and
- a reserve power for the SoS to designate a single regulator of IPs.

Commencement

The majority of the provisions of SBEEA 2015 relevant to insolvency professionals will be brought into force by statutory instruments which are yet to be made. However, the following provisions will come into force on 26 May 2015:

- the removal of the requirement for liquidators and trustees in bankruptcy to seek sanction (SBEEA 2015, ss 120, 121),
- those relating to administration (SBEEA 2015, ss 127–130),
- the power to create rules in relation to small debts (SBEEA 2015, ss 131, 132),
- the clarification on the period in which a decision of creditors in respect of an IVA may be challenged, and the abolition of fast-track IVAs (SBEEA 2015, ss 134, 135), and
- those relating to progress reports in voluntary winding-ups (SBEEA 2015, s 136).

CASE LAW

(1) Cadlock (The Trustee in Bankruptcy of Anthony Ivor Dunn) v Dunn [2015] All ER (D) 115 (May), [2015] EWHC 1318 (Ch)

Chancery Division, Leeds District Registry, before HHJ Behrens sitting as a Judge of the High Court in Leeds.

*Bankruptcy – Trustee in bankruptcy – Power to sell property of bankrupt – Second respondent husband being made bankrupt twice – First respondent wife, making application to set aside court's order for sale of matrimonial home (*the property*) and for warrant for possession on property to be vacated – Court declaring second charge on property be paid first from interest in property of trustee, and setting aside possession order and warrant for possession – Trustee appealing – Whether equity of exoneration in favour of wife arising out of re-acquisition of trustee's interest – Insolvency Act 1986, s 375.*

Facts:

The proceedings concerned the second bankruptcy of the second respondent (the husband). In 1998, the husband was made bankrupt for the first time. The bankruptcy severed the beneficial joint tenancy he had with his wife, the first respondent, in the matrimonial home (the property) and caused it to become vested in the claimant trustee. The husband was discharged from bankruptcy in 2001. In 2009, the trustee agreed to release his interest in the property for £150,000. In the event, it was agreed that £150,700 was or would be paid. In November 2010, a second bankruptcy petition was presented against the husband in the sum of approximately £170,000. In January 2011, the husband and wife executed a charge on the property in favour of the lenders for security of £196,500. No explanation of what made up that sum was provided. In 2013, the trustee made an application for a declaration that he and the wife were beneficially entitled to the property in equal shares and for an order for sale. In June, the court acceded to the application, making an order for sale no sooner than 1 October 2013. In February 2014, a warrant for possession was issued and was due for execution in March. In July 2014, the wife made an application under s 375 of the IA 1986 (the 1986 Act) to set aside the court's order and for the warrant for possession to be vacated. The court: (i) declared that the second charge on the property be paid first from the interest in the property of the trustee, and (ii) set aside the possession order and the warrant for possession but gave the trustee permission to apply at such time as the values of the property and the legal charges were such as to entitle the trustee to a portion of the proceeds of sale of the property. The trustee appealed.

The main issue was whether there was an equity of exoneration in favour of the wife arising out of the re-acquisition of the trustee's interest.

Held:

A person who mortgaged his property to secure the debt of another stood in the relation of guarantor towards the person whose debt was thus secured, and was entitled to be exonerated by the principal debtor. That principle also applied where jointly owned property was charged to secure the indebtedness of one co-owner (see [43] of the judgment).

It was not in dispute that the wife had charged her equitable half share of the property. The next question was whether that had been to secure the husband's debt. The primary purpose of the loan had been to enable the husband to re-acquire his beneficial half share of the property. The wife had obtained no financial benefit from the payment at all. It had been used solely to acquire the husband's half share in the property. In those circumstances, the person primarily responsible for repaying the lenders had been the husband. The wife had indeed charged her beneficial interest to secure the indebtedness of the husband. Although the equity of exoneration depended on the presumed intention of the parties and that the circumstances in a particular case might not justify the inference, there was nothing in the facts of the present case to negate the inference and (in effect) show that the wife had been effectively making a gift to the husband. On the authorities, if any of the sums loaned were spent on joint or household expenditure or for the joint benefit of the parties then the equity of exoneration did not arise in respect of those sums. In the present case, the sum needed to acquire the trustee's interest had been £150,700. Yet the charge had been in the sum of £196,500. There had been no explanation of how the £196,500 was made up and it was by no means clear that it was wholly referable to the moneys used to acquire the husband's half share. Therefore, the judge had been correct to find that the wife had been entitled to the equity of exoneration. However, the court would limit the equity of exoneration to the sums loaned in respect of the acquisition of the husband's half share plus interest. It was clear that the wife had effectively been in the position of a surety for the husband's debt. She was not only entitled to be indemnified by the husband, but she was also entitled to a proprietary right over his share of the property (see [44], [46]–[49] of the judgment).

It followed that the judge's approach in respect of the order for sale had been correct (see [50] of the judgment).

Pittortou (a bankrupt), Re, ex p Trustee of the Property of the Bankrupt v Bankrupt [1985] 1 All ER 285 applied; *Day v Shaw* [2014] All ER (D) 120 (Jan) applied; *Chawda (in bankruptcy), Re*; *Lemon v Chawda* [2014] BPIR 49 applied.

Andrew Vinson **(*instructed by Gateley LLP*)** ***for the trustee.***

Fred Banning **(*Solictor Advocate*)** **(*instructed by Clarke Mairs LLP*)** ***for the wife.***

(2) Gate Gourmet Luxembourg IV Sarl v Morby [2015] All ER (D) 117 (May), [2015] EWHC 1203 (Ch)

Chancery Division, before Registrar Briggs.

Bankruptcy – Petition – Dismissal – Making of bankruptcy petition being resisted by respondent – Whether court lacking jurisdiction – Whether service of petition being effective – Whether petitioning creditor secured – Insolvency Rules, SI 1986/1925 – Insolvency Act 1986, ss 265, 269(1)(b).

Facts:

In September 2007, the petitioners entered into a share purchase agreement with the respondent for a group of 13 companies, the F Group. In July 2009, the first petitioner, GG, issued proceedings against the respondent and the F Group for breach of warranty and breach of a tax covenant contained in the share purchase agreement. A settlement agreement was entered into which provided for the respondent to pay GG £1.1m in two tranches. The respondent paid the first tranche in June 2011. The second tranche was due on 30 March 2012. The second tranche was said to have been secured by the respondent by the grant of a second charge in favour of the second petitioner in respect of a property in France. In August 2013, the respondent was served with a statutory demand. In the county court his application to set aside the statutory demand was refused and permission was given to present a bankruptcy petition. The respondent was said to be working as a consultant in Dubai and had flown to England to attend the hearing. The petition was filed and stamped at the High Court on 21 July 2014. Arrangements were made for the respondent to meet with a process server at Heathrow Airport for the purpose of effecting personal service. The evidence of GG was that the petition was handed to the respondent. The respondent contended that the process server gave the petition to M, a friend, who had attended the airport for the purpose of receiving the petition on his behalf. The making of a bankruptcy order was resisted by the respondent.

Consideration was given to issues of: (i) jurisdiction; (ii) service; and (iii) security. In respect of (ii), the court went on to consider substituted service and the cure provision contained within the Insolvency Rules 1986, SI 1986/1925 (the Rules). Consideration was given to ss 265 and 269(1)(b) of the IA 1986.

Held:

(1) On the evidence, the petition was presented when the respondent was present in England. As a result, the court had jurisdiction pursuant to s 265 of the Act (see [20], [69] of the judgment).

(2) Rule 7.55 of the Rules provided the court with a discretion so that it had the power to deal with defects and irregularities on a case-by-case basis. A three-staged test or approach could be identified from the plain language of the Rules. Firstly, the court had to ask whether or not there was an insolvency proceeding on foot. Secondly, on the facts of the case, the court needed to be satisfied that if it were to cure a defect or irregularity there would be no injustice which could be described as substantial in nature. Thirdly, if the court identified an injustice it had to consider whether 'the injustice cannot be remedied by any order of the court.' (see [60] of the judgment).

In circumstances where a petition was handed to a specified agent at the request of the debtor, in the presence of the debtor in the manner described, personal service was effected. In any event, the court would exercise its discretion and waive any defect or irregularity of service (see [34], [65], [69] of the judgment).

Awan, Re [2000] BPIR 241 considered; *Andrews v Bohm* [2005] All ER (D) 161 (Jul) considered; *Anderson Owen Ltd (in liquidation), Re*; *Merrygold v Bates* [2009] EWHC 2837 (Ch) considered; *Frontsouth Ltd (in admin), Re* [2011] All ER (D) 41 (Jul) considered; *Abela v Baadarani* [2013] 4 All ER 119 considered; *Care People Ltd, Re* [2013] All ER (D) 254 (Oct) considered.

(3) In the circumstances, the security held by the second petitioner did not preclude a bankruptcy order being made. The petition contained a statement of estimated value of the security and was expressed not to be made in respect of the secured part of the debt and so satisfied s 269(1)(b) of the Act. The petition was true, the debt had not been paid, secured or compounded for (see [68], [69] of the judgment).

A bankruptcy order would be made at the date of handing down (see [69] of the judgment).

White v Davenham Trust Ltd [2011] All ER (D) 230 (Jun) considered.

Per curiam: 'The ability of a court to grant a retrospective substituted service order has potential to prevent abuse of the service provisions reducing court time and expense. The Insolvency Rules Committee may wish to consider making an amendment to the IR 1986 permitting the application of CPR 6.15(2) and thereby incorporate the existing jurisprudence in respect of the rule, or otherwise provide the court with a tailored power to grant retrospective substituted service.' (see [41] of the judgment).

Steven Thompson QC (instructed by Memery Crystal) for the petitioners.

Shuvra Deb (instructed by Mundays) for the respondent.

(3) Re Sanko Steamship Co Ltd; Sanko Steamship Co Ltd v Glencore Ltd [2015] All ER (D) 59 (May), [2015] EWHC 1031 (Ch)

Chancery Division, Companies Court, before Judge Simon Barker QC (Sitting as a Judge of the High Court).

Insolvency – Cross-Border insolvency – Foreign proceedings – Japanese company (company) being engaged in insolvency proceedings in Japan for purpose of reorganisation – English court ruling Japanese proceedings being foreign main proceedings – US$ 3.85m (funds) being held in English court following sale of company's vessel, pursuant to orders in Admiralty Court – Japanese insolvency proceedings being terminated – Company and director applying for continued recognition of director as foreign representative and for remission of funds to company – Whether court should make orders sought – Cross-Border Insolvency Regulations 2006, SI 2006/1030, Sch 1, arts 17(4), 21(2).

Article 17(4) of Sch 1 to the Cross Border Insolvency Regulations 2006, SI 2006/1030 provides: 'The provisions of articles 15 to 16, this article and article 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partly lacking or have fully or partly ceased to exist and in such a case the court may, on the application of the foreign representative or a person affected by recognition, or of its own motion, modify or terminate recognition, either altogether or for a limited time, on such terms and conditions as the court thinks fit'.

Facts:

The proceedings raised issues under the UNCITRAL Model Law on Cross-Border Insolvency, as set out in Sch 1 to the Cross Border Insolvency Regulations 2006, SI 2006/1030 (CBIR). The first applicant (Sanko) was a Japanese company, which had its head office in Tokyo. The second applicant, T, was one of its directors. Sanko owned and operated cargo ships, including the MV Sanko Mineral (the vessel). In April 2012, the interested party (Glencore) entered into a contract with Sanko for the carriage by the vessel of some 10,000 tonnes of silicon manganese (the cargo) from Bulgaria to New Orleans. The vessel was delayed for three months as the result of various attachments over it made by creditors of Sanko. Glencore contended that the delay was a breach of the terms of the contract of carriage and that it had sustained financial losses, amounting to some US$3m. In July, Sanko entered into proceedings in Japan for the purpose of effecting a reorganisation. The reorganisation was conducted under the supervision of the Japanese Court, which appointed and individual, A, as trustee, and T as deputy trustee. In July, an English court ordered that the Japanese proceedings were to be recognised as the foreign main proceeding in respect of Sanko for the purposes of the CBIR. Glencore submitted claims in the reorganisation, which were rejected by the trustee. In December 2012, Glencore lodged petitions in the Japanese court challenging the rejections by the trustee. Sanko contested those petitions. In July 2013, the reorganisation plan was submitted to the Japanese court and was approved in October. In 2014, the vessel was the subject of proceedings in the Admiralty Court in England, which were brought by a Japanese bank, which had a first mortgage over the vessel. The court ordered that the vessel be sold and the proceeds (the funds) be paid into court. In August, Glencore filed a request for a caution against the release of the funds in the sum of US$3.85m. The judge struck out Glencore's caution. He considered that, where the reorganisation in Tokyo had been recognised as the foreign main proceedings in the present jurisdiction under the CBIR, the court would not wish to hinder the proper working out of the reorganisation by the Tokyo court. Accordingly, he ordered that the funds were to be paid out to the trustee, but imposed an undertaking as a condition affecting the release of those funds (see [15] of the judgment). In December 2014, the Japanese court terminated the Japanese proceedings with immediate effect. T, who had ceased to be a trustee in respect of the reorganisation in Japan, applied, under art 17(4) of Sch 1 to the CBIR (art 17(4)) for the continued recognition of his status as foreign representative of Sanko for the purpose of allowing him to discharge his residual obligations in relation to Sanko's reorganisation plan (the recognition application). The applicants, Sanko and T, applied, under art 21(2) of Sch 1 to the CBIR (art 21(2)) for payment to Sanko of the funds (the remission application).

The issues for consideration were: (i) whether, as contended by the applicants, on the true construction of art 17(4) of CBIR, the main proceedings had only partly ceased to exist because implementation of the plan was ongoing, and so the recognition application ought to be granted; and (ii) whether the remission application should, in all the circumstances, be granted. The applicants submitted that art 17(4) appeared to envisage the possibility of modification of recognition even after the proceedings had ceased to exist. Glencore submitted that, on the true construction of art 17(4), where foreign proceedings had come to an end, the authority of a foreign representative had also terminated.

Held:

(1) A foreign proceeding might be recognised as such where the control or supervision of that proceeding or process was undertaken by a non-judicial administrative body. There was, however, nothing to suggest that competence as an authority to control or supervise a foreign proceeding might devolve on anyone not independent of the debtor. For there to be a foreign proceeding there had to be court or other official independent control or supervision of the assets and affairs of the debtor, albeit that the debtor might also enjoy some measure of control or supervision. Article 17(4) of CBIR was engaged where the grounds for granting recognition of foreign proceedings had fully or partly ceased to exist. In such circumstances, the court might, on the application of the foreign representative or a person affected by recognition, or of its own motion, modify or terminate recognition, either altogether or for a limited time, on such terms and conditions as the court thought fit (see [27]–[29] of the judgment).

The submission that the main proceedings had only partly ceased would be rejected. The substance of the evidence was that the Japanese proceedings were no more and that was consistent with their description as 'terminated'. The fact that the plan had not been fully implemented did not serve to render the Japanese proceedings ongoing (see [46] of the judgment).

The recognition application would be dismissed (see [50] of the judgment).

(2) The court had to recognise that the underlying circumstances had changed materially since Sanko had issued the remission application. It was significant that the Japanese proceedings had been terminated, that T was no longer trustee or a foreign representative, that the Japanese court no longer supervised implementation of the plan and that, as a result of the reorganisation, Sanko was trading again, free from insolvency process, that was, as a going concern. The court had also to recognise and respect, and, as a matter of comity, assist the process before the Japanese court, which was the forum the parties had chosen, and which would decide the issues as to the entitlement to the funds. Leaving the funds in court in England seemed likely to tolerate, if not encourage, delay, which was itself a hallmark of injustice. The just course was to encourage Glencore to take the initiative to obtain a ruling from the Japanese court as to the appropriate interim order in respect of the funds (see [69], [72], [73] of the judgment).

It was proposed to be ordered that, providing Glencore undertook: (i) within 42 days to issue an application before the Japanese Court for an order for the preservation of the funds pending determination of its petitions in that court; (ii) to progress its petitions with all due expedition; and (iii) to provide a cross-undertaking in damages enforceable by the present court over the period from the present time to the date of an order by the Japanese court on an application made pursuant to (i), the funds should be paid out of court and be held in a US dollar account in the joint names of the parties' solicitors to abide an order of the Japanese court in respect of the application referred to under (i). In the absence of such an undertaking, the court proposed to order the payment out of court of the funds to T for disbursement, in accordance with the reorganisation plan and his undertaking to the Japanese court, such order to take effect in 21 days (see [75] of the judgment).

Edward Davies and Anna Scharnetzky (instructed by Ince & Co LLP) for the applicants.

Tom Smith QC and Andrew Shaw (instructed by Holman Fenwick Willan LLP) for Glencore.

(4) Wilson v SMC Properties Ltd [2015] All ER (D) 115 (Apr), [2015] EWHC 870 (Ch)

In the Chancery Division before Mr Registrar Briggs.

Company – Insolvency – Application to validate transaction – Second claimant company entering into contract for sale of property to first defendant company, SMC – Transaction being completed after presentation of petition against second claimant by Revenue and Customs Commissioners

– SMC applying to validate transaction – Whether transaction being made in good faith – Whether court should exercise discretion to validate transaction – Insolvency Act 1986, s 127.

Facts:

The second claimant company (the company) carried out business as a scrap gold and silver merchant. It purchased a property in Hatton Gardens, London, in 2011, for £1.2m. The company subsequently defaulted on its VAT. In November 2013, it placed the property on the market. In February 2014, the Revenue and Customs Commissioners (the Revenue) presented a petition in respect of a VAT debt for £280,000 against the company. The company entered into a contract, dated 6 March 2014, with the first defendant company, SMC, for the sale or the property for £850,000 (the transaction). On 4 April, completion of the sale of the property took place. On 14 April, a winding-up order was made on the Revenue's petition. The first claimant liquidator was appointed. The liquidator advised SMC that the transaction was void, in accordance with s 127 of the IA 1986, as it had been made after the date of the petition. In June, HM Land Registry registered SMC as the legal proprietor. SMC applied to the Companies Court, seeking an order that the transaction between the company and SMC be validated pursuant to s 127 of the Act. A declaration was also sought that the transaction was void and relief against C, who was at all material times the sole de jure director of the company.

Consideration was given to: (i) whether SMC had bought the property in good faith; and (ii) whether, having considered the value of the property, the court should exercise its discretion to validate the transaction. Consideration was given to expert valuations. In the course of the trial, the court directed that an assumption should be made that the market value of the property should be based on a constrained marketing period between 23 January 2014 and 6 April 2014 (the special assumption).

Held:

(1) On the evidence, SMC had not known about the presentation of the petition before the agreement to purchase the property or the date of the transaction. The petition had not been advertised until 3 April 2014. The transaction had been made in good faith and at arm's length, within the context of a tight time frame (see [54] of the judgment).

SMC had entered the transaction in good faith. It had been an arm's-length commercial transaction (see [75] of the judgment).

Re Wiltshire Iron Co (1868) LR 3 Ch App 443 considered; *Re Civil Service and General Store Ltd* (1887) 57 LJCh 119 considered; *Re Tramway Building and Construction Co Ltd* [1976] 1 WLR 292 considered; *Denney v*

John Hudson & Co Ltd [1992] BCLC 901 considered; *Hollicourt (Contracts) Ltd v Bank of Ireland* [2001] 2 WLR 290 considered; *Re Tain Construction Ltd*; *Rose v AIB Group (UK) plc* [2003] EWHC 1737 (Ch) considered.

(2) On the evidence, the appropriate value of the property at the date of the transaction had been £900,000. Accordingly, the value of the asset lost to the company was approximately £900,000. That did not take account of the special assumption. In exchange, the company had received £850,000. The loss was approximately £50,000. If a 5% margin was applied (2.5% either way), the general body of creditors would not have suffered significantly or at all. If the special assumption was applied the same result would be reached. Accordingly the policy behind s 127 of the Act was not undermined as the transaction had not favoured a pre-liquidation creditor. In any event, those findings led to a conclusion that there had been no or no significant loss to creditors (see [71], [77], [78] of the judgment).

In the circumstances the court would exercise its discretion and validate the transaction. Validation disposed of the Pt 8 claim (see [78], [80] of the judgment).

Oriental Bank Corp (1884) 28 Ch 634 considered; *Burton and Deakin Ltd* [1977] 1 WLR 390 considered; *Denny v John Hudson & Co Ltd* [1992] BCLC 901 considered.

Christopher Harrison (instructed by Wedlake Bell LLP) for the claimants.

Hugh Sims QC (instructed by Hausfield Solicitors LLP) for SMC.

(5) Philpott (as joint liquidators of WGL Realisations 2010 Ltd) v Lycee Francais Charles de Gaulle School [2015] All ER (D) 175 (Apr), [2015] EWHC 1065 (Ch)

In the Chancery Division, Birmingham District Registry, before Judge Purle QC (sitting as a judge of the High Court).

Company – Liquidation – Creditor's voluntary liquidation – Dispute between company and school regarding money allegedly owed under construction contract – Company entering into creditor's voluntary liquidation – School submitting proof of debt – Liquidators contending court having power under relevant insolvency rules in connection with proof of debt process to give directions on taking of account – Liquidators applying to court for directions – Whether arbitration clause in contract 'trumping' taking of account under relevant insolvency rules – Arbitration Act 1996, s 9 – Insolvency Rules, SI 1986/1925, r 4.9.

Facts:

A company (the company) had been contractually involved in a construction project with the respondent school (the school). The company went into administration and later, creditor's voluntary liquidation. A dispute arose between the parties as to whether money was due on one side or the other under a JCT Intermediate Building contract (the contract). The contract contained an arbitration clause, which the school contended applied to the current dispute. There was also provision in the contract for adjudication. The liquidators of the company contended that some £615,000 was due to the company. The school contended that it was owed a sum in excess of £270,000. The school formally put in a proof of debt for around £270,000, which the liquidators had yet to accept or reject. The school contended that the arbitration clause in the contract was binding and continued to apply after an administration and liquidation. The liquidators contended that the court had power under r 4.9 of the Insolvency Rules 1986, SI 1986/1925, in connection with the proof of debt process, to give directions as to the taking of an account of the balance due between the company and the school. The liquidators applied for directions as to how to resolve the conflict.

The issues for consideration were whether: (i) s 9 of the Arbitration Act, which provided that a party to an arbitration agreement, against whom legal proceedings were brought in respect of a matter which was to be referred to arbitration, might apply for a stay of legal proceedings, trumped the taking of an account under the court's directions, under the Insolvency Rules; (ii) by proving its debt, the school had in some way compromised its position; and (iii) adjudication was available.

Held:

(1) The Arbitration Act did trump the taking of an account under the court's directions as envisaged by the Insolvency Rules. The importance of giving effect to the mandatory provisions of the Arbitration Act had been recognised in a number of cases and Parliament had clearly chosen to strengthen the impact of arbitration clauses, and the present case did not come within any of the limited statutory exceptions. Accordingly, any legal proceedings which the liquidators might thereafter wish to bring to ascertain the net balance would come up against the obstacle of s 9 of the Act, which, if invoked by the school, would have to be enforced. The mere fact that there was a claim on both sides should not be determinative of whether or not the arbitration clause was to be enforced. The dispute ultimately could only be resolved by some form of proceedings, and legal proceedings, if brought, would be subject to the mandatory requirement of a stay under s 9 of the Act. That conclusion could not be avoided by presenting the claim as a claim for an account in the context of r 4.90 of the Insolvency Rules, as the taking of the account required the court to

resolve the dispute which was subject to the arbitration clause. Were the liquidators to seek directions under r 4.9 of the Rules, in connection with the proof of debt process, they would be bringing legal proceedings against the school within the arbitration clause, which would have to be stayed, unless the arbitration agreement was null and void, inoperative, or incapable of being performed, none of which applied. The arbitration clause in the contract plainly applied as a matter of construction to the current dispute. The agreement did not become inoperative following a liquidation, or in consequence of the statutory set-off. As the proceedings concerned a voluntary liquidation, arbitration proceedings could be commenced, though they would be vulnerable to an application for a stay. It was clear that arbitration proceedings were legal proceedings or process for that purpose (see [4], [20], [25], [28] of the judgment).

Fulham Football Club (1987) Ltd v Richards [2012] 1 All ER 414 applied; *Farley v Housing and Commercial Developments Ltd* [1984] BCLC 442 considered; *Stein v Blake* [1995] 2 All ER 961 considered; *Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd* [2010] All ER (D) 126 (Apr) considered; *Hudson v Gambling Commission (Re Frankice (Golders Green) Ltd)* [2010] All ER (D) 59 (May) considered; *Bannai v Erez* [2013] All ER (D) 288 (Nov) considered.

(2) The school's position would only be compromised if s 9(3) of the Act applied. That subsection precluded a stay application once the person wishing to enforce the arbitration clause had taken 'any step in those proceedings to answer the substantive claim'. The mere making of a proof of debt did not come within those words, nor, were the liquidators to reject the proof, would an appeal from the rejection of that proof, which would be necessary in order to preserve the school's position, amount to taking a step in 'those proceedings', there being none, 'to answer the substantive claim' (see [29] of the judgment).

(3) In the particular circumstances of the case, under the terms of the contract, adjudication was an available process which it was open to the liquidators to pursue. While, therefore, the contractual right to an adjudication remained, whether it was of any practical use was for others to reach a commercial judgment upon (see [30] of the judgment).

J Morgan (instructed by Squire Paton Boggs (UK) LLP) for the liquidators.

L Briggs (instructed by Browne Jacobson LLB) for the school.

(6) Woolsey v Payne [2015] All ER (D) 24 (May), [2015] EWHC 968 (Ch)

In the Chancery Division, before Mr John Male QC (Sitting as a Deputy Judge).

Bankruptcy – Appeal – Appeal from decision of Chief Registrar – Petitioning creditor, W, appealing against findings of Chief Registrar regarding bankruptcy order and statutory demand made against respondent wife and husband respectively – Whether, regarding bankruptcy order, correct test having been applied – Whether loan agreement being exempt from statutory provisions – Consumer Credit Act 1974, s 74(1)(a).

Facts:

The present appeal arose out of insolvency proceedings against the respondent husband and wife. Before the Chief Registrar, the respondents submitted that there was no enforceable debt, so that a statutory demand against the husband should be set aside and a bankruptcy order made against the wife should not have been made. They raised challenges to the enforceability of the relevant loan agreement under the CCA 1974, which included, firstly, whether the loan agreement had been a regulated agreement or whether it fell within the exception in s 16B of the Act. Secondly, whether, even if the loan agreement had been a regulated agreement, it was exempt from the provisions relied upon by the respondents as being a non-commercial agreement within s 74(1)(a) of the Act. Both the statutory demand and the bankruptcy order were based upon the same loan agreement and the same alleged debt claimed by the petitioning creditor, W. The Chief Registrar set aside the statutory demand against the husband and annulled the bankruptcy order made against the wife. W appealed to the Chancery Division against the Chief Registrar's findings.

The first issue applied only to the wife's application to annul the bankruptcy order. W submitted that, in order to satisfy the test for annulment, it was not enough for the wife to show that the debt had arguably not been enforceable at the time of the order. Instead, she had to show, on the balance of probabilities, that the debt was not due. The issue was whether the test in

Guinan v Caldwell Associates Ltd [2004] All ER (D) 123 (Mar) (Guinan) or *Flett v Revenue and Customs Comrs* [2010] BPIR 1075 (Flett) was to be preferred. In the second issue, W submitted that the loan agreement in question had not been a regulated agreement subject to the Act. Consequently, it had not been improperly executed and W had not been required to hold a consumer credit licence in order to enter into the loan agreement. In the third issue, W submitted that, even if the loan agreement had been a regulated agreement, it had been exempt from the provisions relied upon by the husband and wife by reason of s 74(1)(a) of the Act. Consideration was given to *Everards v Society of Lloyd's* [2003] All ER (D) 334 (Jul) (Everards).

Held:

(1) Guinan held that there was no distinction between the test to be applied, whether on an application to set aside a statutory demand, on the

hearing of a petition or on an application to annul on the ground that it ought not to have been made. The test was whether there was a genuinely disputed debt. Flett held that the burden of proof was on the debtor to demonstrate that, on the balance of probabilities, he did not owe the petition debt. It was not enough for a debtor to say at the time of an application for annulment that he had an arguable defence to the petition debt; he had to establish that he did not in fact owe the money (see [15], [17] of the judgment).

On the evidence, the test in Guinan was to be preferred. Firstly, among other things, while it appeared that the point had not been specifically argued by the parties in Guinan, the same applied to Flett. Secondly, neither Guinan nor Everard had been referred to in the judgment in Flett. Thirdly, the decision in Guinan drew on the reasoning in Everard. While Everard had concerned a narrower point, it was sound in principle and the dicta in Everard applied equally to the present issue. Fourthly, Flett was ambiguous. Fifthly, the application of different tests to the different stages could produce strange results. The present case illustrated that very point in that the application of different tests to the same basic issue might lead to the husband succeeding in setting aside the statutory demand, but to the wife failing to set aside the bankruptcy order (see [22] of the judgment).

The first ground of appeal failed (see [25] of the judgment).

Guinan v Caldwell Associates Ltd [2004] All ER (D) 123 (Mar) applied; *Everards v Society of Lloyd's* [2003] All ER (D) 334 (Jul) considered; *Flett v Revenue and Customs Comrs* [2010] BPIR 1075 not followed.

(2) The Chief Registrar had adopted an unnecessarily narrow interpretation of s 16B(3) of the Act and, consequently, he had erred in the approach which he adopted in his judgment. However, there was a substantial dispute of fact between the parties as to what had been the purposes of the loan agreement, what W had known and what he had had reasonable cause to believe. In a summary application, it was not possible to say whose recollection of events was to be preferred, or whether parts of each side's recollection were correct. That would depend on the precise facts found at trial after disclosure took place and witnesses were cross-examined (see [43], [52], [53] of the judgment).

The second ground of appeal therefore failed (see [53] of the judgment).

(3) The Chief Registrar had erred in finding that, because the loan agreement had to have been regulated, W had, in all probability, been carrying on a lending business. The question whether W had been carrying on a lending business required, first, findings of fact, then a consideration of the relevant statutory provisions and then application of those provisions to the facts found to see whether or not the loan

agreement had been made by the creditor in the course of a business carried on by him as set out in the definition of a 'non-commercial agreement'. The Chief Registrar does not carry out that exercise and that disclosed an error of law. Having regard to the authorities and the witness statements, there were cogent arguments on both sides which raised issues that could only be determined by reference to all the relevant facts of the case. The dispute could not be resolved on a summary basis. It needed to be resolved at a trial with the benefit of disclosure and cross-examination (see [61], [63], [81] of the judgment).

The third ground of appeal failed (see [82] of the judgment).

Tamimi v Khodari [2009] All ER (D) 87 (Oct) considered; *Helden v Strathmore Ltd* [2011] All ER (D) 92 (May) considered; *Bassano v Toft* [2014] All ER (D) 36 (Mar) considered.

Sarah Clarke (instructed by Adie Pepperdine LLP) for W.

Philip Flower (instructed by Sills & Betteridge LLP) for the respondents.

(7) Winnington Networks Communications Ltd v Revenue and Customs Comrs [2015] All ER (D) 19 (May), [2015] EWHC 1096 (Ch)

In Chancery Division, Companies Court, before Mr Nicholas Le Poidevin, QC (Sitting as a Deputy Judge of the Chancery Division).

Company – Winding up – Petition – Corporation tax – Revenue and Customs Commissioners (Revenue) presenting petition to wind up company based on assessment for alleged unpaid corporation tax and alleged VAT fraud – Company applying to dismiss petition on basis debt disputed in good faith on substantial grounds – Whether petition should be dismissed.

Facts:

In April 2014, the Revenue and Customs Commissioners (the Revenue) presented a creditor's petition for the winding-up of a company (Communications). The petition was based on an assessment for alleged unpaid corporation tax of around £239,000. Communications appealed against the assessment to the First-tier Tribunal (Tax) (the FTT). It also applied for the petition to be dismissed, contending that there was a substantial dispute as to the liability for corporation tax. The petition was amended by consent to allege instead a liability of approximately £1.6m for VAT. The assessments for that liability asserted that Communications had failed to pay certain inputs claimed and so was not entitled to set off the input tax against the output tax for which it was liable (the non-payment issue). Communications lodged another appeal with the FTT on the non-payment issue and applied to have the petition dismissed on the ground that there was a substantial dispute as to the liability for VAT. The petition was again amended to refer to further assessments made by the Revenue. The Revenue contended, in the alternative, that there had never been any supply to Communications to justify the inputs claimed (the non-supply issue). It considered that Communications and its sister company (Networks) had been engaged in VAT fraud. In particular, the Revenue alleged that Communications had been a party to fictitious trading in voice-over-internet protocol (VoIP) VAT fraud. The Revenue submitted evidence of transcripts (the transcripts), which had been made by covert audio devices of two meetings at a hotel in 2013, at which a director of Communications had been present. Communications contended that there had been genuine trading in VoIP services between Networks and Communications. It lodged a third appeal with the FTT in respect of the non-supply issue and applied for the petition to be dismissed.

Communications submitted, among other things, that the petition debt was disputed in good faith on substantial grounds and should be dismissed.

Held:

The application would be dismissed.

It was settled law that a debt disputed on substantial grounds could not ordinarily found a winding-up order. The rule did not, however, entitle a company to do no more than assert that it disputed the debt and then expect the petition to be struck out or, if the hearing was a substantive one, dismissed. It had to condescend to particulars by properly explaining the basis of the claimed dispute and showing that it was a substantial one (see [11] of the judgment).

Applying settled law, it was not necessary to assess all the details of the Revenue's allegations against Communications. The court would confine itself to the question of whether Communications had a real prospect of success on the non-payment and non-supply issues. Since the great bulk of the payments claimed rested on nothing more than unsubstantiated assertions on behalf of Communications that purchases had been made, it had failed to substantiate its case in respect of the non-payment issue. Further, the absence of confirmation of relevant supplies by Communications, coupled with the evidence of the transcripts, made it impossible to say that the appeal on the non-supply issue had any real prospect of success. It followed that Communications' appeal had no real prospect of success on either the non-payment issue or the non-supply issue (see [13], [20], [31], [54], [55] of the judgment).

Revenue and Customs Comrs v Rochdale Drinks Distributors Ltd [2012] STC 186 followed; *Changtel Solutions UK Ltd (formerly Enta Technologies Ltd) v Revenue and Customs Comrs* [2015] All ER (D) 211 (Jan) considered.

Marc Brown (instructed by Frisby & Co) for Communications.

Christopher Brockman (instructed by Howes Percival LLP) for the Revenue.

(8) Re DTEK Finance BV [2015] All ER (D) 214 (Apr), [2015] EWHC 1164 (Ch)

In the Chancery Division, Companies Court, before Mrs Justice Rose DBE.

Company – Scheme of arrangement – Jurisdiction – Company seeking order of court sanctioning scheme of arrangement – Whether court having jurisdiction to make order sought – Whether court should exercise discretion to make order – Companies Act 2006, s 899.

Facts:

The proceedings concerned a company (DTEK), which was incorporated in the Netherlands. DTEK was part of a group (the group), which was engaged in the energy business including, among other things, mining coal. Its customers included residential and industrial customers in Ukraine. Some of the guarantees given by Ukranian operating companies within the group were governed by English law. DTEK's role within the group was to raise finance in the capital markets and distribute it to the group. Loan notes were issued by DTEK and the proceeds were then lent by DTEK to other companies in the group. In 2010, it issued loan notes which matured on 28 April 2015 (the 2015 Notes). The group ran into financial difficulties as a result of instability in Ukraine. Consequently, DTEK sought to restructure the 2015 Notes. Pursuant to the terms of those Notes, the governing law of the Notes was changed from New York law to English law by a collective decision of the noteholders in April, effectively to create a link with the English court so as to seek approval for a proposed scheme of arrangement (the scheme). The scheme proposed that: (i) the existing 2015 Notes would be acquired by DTEK and then cancelled; (ii) the noteholders would get new notes for 80% of the par value of the 2015 Notes with a 2018 maturity date and same interest rate; and (iii) for the remaining 20% of the par value, the noteholders would receive cash. DTEK applied, under s 899 of the Companies Act 2006 (the 2006 Act), for an order sanctioning the scheme between DTEK and the holders of the 2015 Notes (the scheme creditors). A scheme creditors' meeting was held in April 2015, following the grant, by the court, of permission to convene a single meeting. At that meeting, 289 scheme creditors voted in favour of the scheme and none voted against it. The value voting in favour was either 92.2% or 91.1%, depending whether the votes of noteholders who were affiliated companies were taken into account.

The issues for consideration were whether: (i) the court had jurisdiction to sanction the scheme; (ii) it had been appropriate to convene a single meeting of scheme creditors; (iii) the statutory requirements had been satisfied; and (iv) the scheme should be sanctioned in the exercise of the court's discretion. In respect of jurisdiction, DTEK relied on, as establishing sufficient connection, among other things, the fact that the governing law of the 2015 Notes was English Law. A question arose as to whether the connection created with the present court by the governing law was any less 'sufficient' because it had been changed to English law to create a link with the English court so as to seek approval for the scheme of arrangement only shortly before the sanction hearing. Account was taken of, among other things, the fact that DTEK had moved its centre of main operations to England. Consideration was given to the IA 1986 (the 1986 Act) and to *Re APCOA Parking Holdings GmbH* [2014] All ER (D) 221 (Nov) (Apcoa).

Held:

(1) The jurisdiction of the court to sanction a scheme of arrangement under s 26 of the 2006 Act arose in respect of a 'company'. A company for that purpose was any company liable to be wound up under the 1986 Act. A foreign company could be wound up under the 1986 Act as an unregistered company. The court had to, in addition, be satisfied, before exercising its discretion to approve a scheme, that the company had a sufficient connection with England. There was authority holding that, where English law was the governing law of the debt instruments that were compromised by a proposed scheme, that was a sufficient connection for the purposes of establishing jurisdiction (see [10], [11] of the judgment).

Applying Apcoa, the change of governing law to English law should be treated as a sufficient connection with the present court. The fact that the 2015 Notes were presently governed by English law created a sufficient connection to confer on the present court jurisdiction to approve the scheme. Further, the fact that some of the guarantees given by Ukranian operating companies within the group were and had always been governed by English law and that DTEK had moved its centre of main operations to England provided a sufficient connection. Further, the court was satisfied that the scheme would have a practical effect (see [16]–[19] of the judgment).

Drax Holdings Ltd, Re; InPower Ltd, Re [2004] 1 All ER 903 applied; *Lehman Brothers International (Europe) (in administration) (No 2), Re* [2010] 1 BCLC 496 applied; *Primacom Holding GmbH v a group of the senior lenders & Credit Agricole* [2011] EWHC 3746 (Ch) applied; *La Seda de Barcelona SA, Re* [2011] 1 BCLC 555 applied; *Vietnam Shipbuilding*

Industry Group, Re [2013] All ER (D) 241 (Jun) applied; *Magyar Telecom BV, Re* [2013] All ER (D) 20 (Dec) applied; *Apcoa Parking Holdings Gmbh, Re* [2014] All ER (D) 221 (Nov) applied.

(2) It had been appropriate to convene a single meeting of the scheme creditors in the present case where the existing rights of the scheme creditors against DTEK, that would be discharged by the scheme, were the same and the rights conferred on them by the scheme were also the same for all scheme creditors (see [20] of the judgment).

(3) On the evidence, the court was satisfied that notice of the scheme meeting ordered by the judge had been properly given to all scheme creditors and that the meeting had been duly convened. The necessary statutory requirements in s 899(1) of the 2006 Act as to voting had been fulfilled, namely a majority in number of those voting had agreed to the scheme and they represented 75% or more by value of the 2015 Notes (see [21] of the judgment).

(4) There was nothing in the opposition and there was no reason not to sanction the scheme (see [32] of the judgment).

An order would be made sanctioning the scheme (see [32] of the judgment).

Tom Smith QC and Charlotte Cooke (instructed by Latham & Watkins LLP) for DTEK.

(9) Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA; sub nom: Re Olympic Airlines SA [2015] All ER (D) 224 (Apr), [2015] UKSC 27

Supreme Court, before Lord Neuberger P, Lord Mance, Lord Sumption, Lord Reed and Lord Toulson SCJJ.

Insolvency – Petition – Foreign winding-up proceedings – Cross-border insolvency proceedings – Greek airline company carrying on business in England – Company being put into liquidation by Greek court – Trustees of UK staff pension scheme applying to wind up company – Judge granting petition – Court of Appeal overruling decision – Whether company having 'establishment' in England – Meaning of 'economic activity' – Whether jurisdiction to wind up company – Council Regulation (EC) 1346/2000, art 2(h).

Facts:

In October 2009, the respondent company, a Greek state-owned airline (Olympic), was wound up on the direction of the Athens Court of Appeal. Since then, the main liquidation proceedings had been in progress in Greece. The appellants were the trustees of Olympic's pension scheme (the trustees). Olympic was the principal employer in the scheme and the only employer who was, at the time of the proceedings, participating in it. Under the rules of the scheme, it had to be wound up upon the liquidation of Olympic. Upon its winding up, a deficit was ascertained of around £16m, which Olympic was bound to make good under s 75 of the Pensions Act 1995. On 20 July 2010 (the relevant date), the trustees presented a winding-up petition against Olympic in England on the ground that it was unable to meet that liability. The winding-up order was necessary in order that the scheme should qualify for entry into the Pension Protection Fund under s 127 of the Pensions Act 2004. One of the conditions of entry was that a 'qualifying insolvency event' should have occurred, and the only available one was that the company should have been ordered to be wound up under the IA 1986 (s 121(3)(g) of the 2004 Act). Accordingly, the question arose whether Olympic had an 'establishment' in the United Kingdom on the relevant date so as to justify the presentation of a winding-up petition on that date. As at the relevant date, Olympic had a number of offices in the UK, but the only one which it still occupied was its former UK head office (Conduit Street). Both the Chancellor at first instance and the Court of Appeal made a number of findings regarding the activities conducted at Conduit Street (see [6] of the judgment). The Chancellor found that, to be 'economic', an activity did not have to amount to 'external market activity' (see [2013] 1 BCLC 415). He found that the activities conducted at Conduit Street as at the relevant date had constituted 'non-transitory economic activities' for the purpose of the definition of 'establishment' pursuant to art 2(h) of Council Regulation (EC) 1346/2000 (on insolvency proceedings) (the Insolvency Regulation), and made the winding-up order. The Court of Appeal allowed Olympic's appeal. It held that the relevant 'economic activity' had to consist of more than the activity involved in winding up the company's affairs, and that Olympic's three remaining employees in the UK had been doing no more than that. The trustees appealed. Following an amendment to the 2004 Act introduced by the Pension Fund (Entry Rules) (Amendment) Regulations 2014, SI 2014/1664, Olympic qualified for the Pension Protection Fund on the basis of the Greek proceedings. However, the appeal continued as the issue remained one of importance.

The issue for determination was the connection a foreign company had to have with the UK to entitle an English court to wind it up, if its centre of main interests was in another member state of the European Union. That answer depended upon the meaning of 'economic activity' within the definition of 'establishment' in art 2(h) of the Insolvency Regulation.

Held:

The appeal would be dismissed.

The definition in art 2(h) of the Insolvency Regulation had to be read as a whole, not broken down into discrete elements, for each element coloured the others. The relevant activities had to be: (i) 'economic'; (ii) 'non-transitory'; (iii) carried on from a 'place of operations'; and (iv) using the debtor's assets and human agents. That suggested that what was envisaged was a fixed place of business. The requirement that the activities should be carried on with the debtor's assets and human agents suggested a business activity that consisted in dealings with third parties, and not pure acts of internal administration. The activities had to be exercised on the market, namely, externally. The activities had to be sufficiently accessible to enable third parties, that was to say, in particular, the company's creditors, to be aware of them. That could not be taken as requiring that the debtor should simply be locatable or identifiable by a brass plate on a door. It referred to the character of the economic activities. They had to be activities which, by their nature, involved business dealings with third parties. Where a company had no subsisting business, it was clearly not the case that the mere internal administration of its winding up would qualify. Such activity would not be 'exercised on the market'; further, if it were enough to establish jurisdiction then the requirement for 'economic activities' would add little or nothing to the rest of the definition. Indeed, the definition would almost always be satisfied by a debtor who retained premises in the UK with inevitable outgoings such as the payment of rent and business rates (see [13], [14] of the judgment).

On any reasonable view of the meaning and purpose of the definition of 'economic activity', the facts of the present case were on the wrong side of it. Olympic had not been carrying on any business activity at Conduit Street on the relevant date. On the facts, the last of its business activities had ceased some time before. All that the remaining employees had been doing was handling matters of internal administration associated with the final stages of Olympic's disposal of the means of carrying on business. The company could not, therefore, be said to have had an 'establishment' in the UK (see [15] of the judgment).

Interedil Srl v Fallimento Interedil Srl: C-396/09 [2011] All ER (D) 195 (Oct) considered.

Decision of Court of Appeal, Civil Division [2013] 2 BCLC 171 affirmed.

Gabriel Moss QC and Marcus Haywood* (*instructed by Baker and McKenzie LLP*) *for the trustees.

David Chivers QC and Sebastian Prentis* (*instructed by Philip Ross Solicitors*) *for Olympic.

(10) Secretary of State for Business, Innovation and Skills v APW Asset Management Ltd [2015] All ER (D) 160 (Apr), [2015] Lexis Citation 57

In the Chancery Division, Manchester District Registry, before Judge Pelling QC (Sitting as a Judge of the High Court).

Company – Compulsory winding up – Advertisement of petition – Respondent company being insolvent – Applicant Secretary of State seeking compulsory winding up petition – Hearing to appoint provisional liquidator – Secretary of State inviting court to proceed immediately to making winding up order – Whether appropriate to dispense with advertisement of petition – Whether appropriate to accelerate hearing of petition – Whether compulsory winding up order should be made – Insolvency Rules 1986, r 4.11(1).

Facts:

The respondent company's business had been to provide a wine investment service to members of the public who were invited to supply funds to the company for the purpose of enabling it to purchase wines on behalf of the customers concerned. It then stored those wines and offered them for resale in a market said to be available that consisted of both retail and wholesale purchasers but, necessarily, independent of the company. A number of serious concerns arose regarding the company, including as to the identity of its principal shareholder (a second company that could not be identified) and the major role played in the company of someone who had been disqualified from being concerned in the management of the affairs of a company. Due to the inability to identify the true shareholder of the company, an insolvency practitioner advised that an application be made to the court by the director ostensibly in charge of the company for the appointment of an administrator. The evidence established that the company was insolvent and there was a strong prima facie case that the affairs of the company had been run in fraud of its customers. Those activities were that: (i) wines had not been offered for sale to any external market, but had been predominantly sold to other customers of the company, at a profit for the company, but almost always at a loss to the selling customer; (ii) money that had been notionally generated from the sale of wines had not been passed on to the customers; and (iii) there was a net deficiency on the stocks of wine held by the company of some 19,000 bottles. The applicant Secretary of State applied for a compulsory winding-up order. Abortive attempts were made to appoint an administrator, and the present application was made for the appointment of a provisional liquidator. The Secretary of State invited the court to proceed immediately with the winding-up petition and to make a compulsory winding-up order, such an order being in the public interest.

The issues for determination were: (i) whether the present case was an appropriate one for dispensing with advertisement of the petition pursuant to r 4.11(1) of the Insolvency Rules 1986; (ii) whether it was appropriate to accelerate the hearing of the petition; and, if the answer to the first two questions was 'yes'; and (iii) whether a winding-up order in the public interest should be made.

Held:

The winding-up petition was almost bound to succeed when it was called on for hearing on its listed day. Further, it was clearly necessary, if the petition was not disposed of at the present hearing, that a provisional liquidator be appointed for the purposes of controlling the management and affairs of the company. The court was satisfied that it had the power to dispense with advertisement of the petition by reference to r 4.11(1) of the Insolvency Rules. It was clear that the principal creditors of the company were its customers and that they were very concerned that there should be an immediate compulsory winding-up order made. Further, the company had stated that it would not contest the winding-up petition. In circumstances where the company was hopelessly insolvent, it had to be run in the interest of its creditors rather than in the interest of shareholders. The creditors of the company would benefit from an immediate winding-up order because it would result in an immediate change of control of the company into the hands of those who can manage its affairs in the interests of all of its creditors. Further, it eliminated the possibility that the company was being used in unlawful or inappropriate means for effecting money laundering. On that basis, no useful purpose would be served by advertisement followed by winding up as opposed to winding up at the present stage. To the extent that the cost of first appointing a provisional liquidator, then advertising the petition, and then having a further hearing at which a compulsory winding-up order would be made was greater than the cost of proceeding as the Secretary of State requested, hat additional cost could not be justified (see [6], [7] of the judgment).

Accordingly, the present was an appropriate case for dispensing with advertisement of the petition, it was an appropriate case for accelerating the hearing of the petition and it was manifest that a winding-up order in the public interest should be made (see [8] of the judgment).

Giles Maynard-Connor for the Secretary of State.

The company did not appear and was not represented.

Correspondence about this bulletin may be sent to Victoria Burrow, Content Acquisition and Development Specialist, LexisNexis, Lexis House, 30 Farringdon Street, London EC4A 4HH (tel: +44 (0)20 7400 2707, email: victoria.burrow@lexisnexis.co.uk). If you have any queries about the electronic version of this publication please contact the BOS and Folio helpline on tel: +44 (0)845 3050 500 (08:00–18:00 Monday – Friday) or for assistance with content, functionality or technical issues please contact the Customer Service teams between 08:00–18:30 Tel: +44 (0)800 007777; Email: contentsupport@lexisnexis.co.uk

Published by LexisNexis (www.lexisnexis.co.uk)

FSC
www.fsc.org
MIX
Paper from responsible sources
FSC® C020438

ISSN 1475-1887
9 771475 188142 11