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Tolley's Company Law and Insolvency

Bulletin Editor
Dr John Tribe
Kingston University

Dear Subscriber,

Welcome to the latest newsletter! I hope that you have had a productive and interesting May. A lot has occurred since the last newsletter. Following the news section this newsletter contains eight analysis pieces drawn from Lexis@PSL Restructuring and Insolvency.

The first analysis piece mulls on the question: Why is the *Premier Foods* case (*R (on the application of Premier Foods (Holdings) Ltd) v Revenue and Customs Comrs* [2015] EWHC 1483 (Admin), [2015] All ER (D) 205 (May)) so important for the future of VAT recovery in insolvency situations? Timothy Jarvis, partner at Squire Patton Boggs, explores the details of this case and argues that the result is potentially exciting news for customers in insolvency situations who have been incorrectly charged VAT.

The second analysis piece comes from Stephen Leslie, solicitor in the LexisPSL Restructuring and Insolvency team. In *Maud v Libyan Investment Authority* [2015] EWHC 1625 (Ch), [2015] All ER (D) 101 (Jun), the Chancery Division had to decide whether a statutory demand should be set aside in circumstances where the debtor claimed he was unable to make any payment as to do so would be illegal.

The third analysis piece involves a case critique. In *Bell v Birchall* [2015] EWHC 1541 (Ch), the Chancery Division was asked whether a trustee in bankruptcy appointed over the bankruptcy estate of a solicitor was entitled to recover his costs and expenses incurred—and to be incurred—in connection with storing the solicitor's practice's files and the reconciliation of sums held in the practice's client accounts. Stephen Leslie, solicitor in the LexisPSL Restructuring and Insolvency team critically evaluates the decision.

After years of speculation, the Recast Regulation has been published in the Official Journal heralding in one of the biggest changes in cross-border insolvency in the past ten years. So what will all this mean in practice for restructuring and insolvency professionals and their clients? In the fourth analysis piece, Kathy Stones, solicitor in the Lexis®PSL Restructuring and Insolvency team considers the final text of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the Recast Regulation) as it appeared in the Official Journal on 5 June 2015 (OJ L 141/19). The Recast Regulation enters force from 26 June 2015 but only applies to relevant insolvency proceedings from 26 June 2017.

The fifth analysis piece contains a case critique. How significant is the High Court's ruling in *Woolsey v Payne* [2015] EWHC 968 (Ch), [2015] All ER (D) 24 (May)? Philip Flower, a barrister at 9 Stone Buildings who acted for one of the parties, believes the ruling provides important guidance in the factors required for setting aside statutory demands and bankruptcy orders in insolvency proceedings.

In the sixth analysis piece His Honour Judge Edward Bailey discusses the changes being introduced by the Small Business Enterprise and Employment Act 2015 (SBEEA 2015).

In the seventh analysis piece Alison Curry, head of regulatory standards and support at the Insolvency Practitioners Association, discusses the new SIP 16 and how it will work in practice.

The eighth analysis piece considers the following question—how important is it to be properly served with a bankruptcy petition? Steven Thompson QC, a barrister at XXIV Old Buildings, who represented the petitioners in *Gate Gourmet Luxembourg IV Sarl v Morby* [2015] EWHC 1203 (Ch), [2015] All ER (D) 117 (May), says the court's decision in this case shows a defect in the service of a petition can be waived but points out the importance of ensuring it has a court office stamp date on it.

This newsletter contains eight summary reports of case law apposite to the jurisdictions of insolvency law and company law and one news update on a pertinent piece of legislation.

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) Insolvency Service: Director disqualifications 16 June 2015

A number of directors have been disqualified from being directors of companies following investigations by the Insolvency Service:

- Philip Christopher Twose, sole director of Newlook Roof Coatings Ltd, has been disqualified for 12 years for causing the company to target vulnerable customers using coercive and misleading selling practices.
- Jarnail Singh, director of Kilbybridge Car Sales Ltd, has been disqualified as a director for ten years for selling vehicles without disclosing they had been recorded as insurance write-offs or were unroadworthy or in need of repair.
- Three Swansea-based directors of Consortium Technology Ltd, a company which misled the public into paying £12m for services to reduce credit card debt or recover payment protection insurance, have been disqualified as directors for a combined 26 years.

Liquidations

- Carter Goldmann Ltd and Hamnett Marketing Ltd were ordered into liquidation by the High Court after they misled more than 800 members of the public into paying for services to challenge council tax banding.
- Warlord Productions Ltd, a Brighton film maker, has been placed into provisional liquidation following an investigation by the Insolvency Service.

(2) Two occupational scheme trustees liquidated

The High Court has placed two occupational scheme trustees into provisional liquidation for taking £19.4m from members of the public, the Insolvency Service has announced. The companies, trustees of two separate occupational schemes, took the pension pot money with the promise that they would provide greater returns.

Omni Trustees Ltd was the trustee of the 'Henley Retirement Benefit Scheme' occupational pension fund. The fund received £8.6m from members of the public, of which £2.6m was invested in self-storage units and £3.7m held in cash, before being transferred to another occupational scheme in July 2014.

Imperial Trustee Services Ltd was trustee of the 'Capita Oak Pension Scheme' occupational pension fund, which took £10.8m from the public.

The Insolvency Service noted the company had suffered governance issues, going swiftly through several directors, as well as from an inability to transfer member benefits according to their wishes. Because of this, the Pensions Ombudsman said the scheme was a 'pension liberation scam'.

Company Investigations, a part of the Insolvency Service, used its powers under the Companies Act 1985 to conduct a fact-finding investigation into the companies on behalf of the Department for Business, Innovation and Skills.

Order

The High Court Order put the companies into provisional liquidation following hearings of applications issued by the Insolvency Service.

Both cases are now subject to High Court action, with no further information to be made available until petitions to wind the companies up are heard on 22 July 2015.

(3) Football League updates insolvency policy

Any club in the Football League which goes into administration will receive a 12-point Sporting Sanction—an increase on the current penalty of ten points—after clubs approved changes to the League's insolvency policy.

The League's insolvency policy is intended to help manage any club which suffers an insolvency event. The changes are intended to strengthen a number of key principles while also maintaining the rescue culture which gives clubs the opportunity to continue in league football and restructure their finances.

The Administrator, once appointed, will be required to market the club for a period of at least 21 days, and must meet with the club's supporters' trust during this time to allow it the opportunity to bid for the club.

The requirement for the purchaser to achieve a Company Voluntary Arrangement (CVA) has been removed. This means the club's share in the Football League will be transferred to the Administrator's preferred bidder, subject to their compliance with the League's other requirements.

The League anticipates this change will provide greater certainty the club will be able to continue, as well as reduce the insolvency period and associated professional costs. It will also prevent the club's previous owner controlling the administration process, as in some cases they may be the only party able to achieve a CVA.

The purchaser will be required, on exit, to pay a minimum of 35 pence in the pound over three years (or 25 on transfer of share) to creditors, or face a further deduction of 15 points at the start of the season after the insolvency event.

(4) Official Journal of the European Union, L141, 5 June 2015—Regulation—Insolvency Proceedings

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 concerns insolvency proceedings. It repeals Regulation (EC) No 1346/2000.

The Regulation shall enter into force on 25 June 2015 and shall apply from 26 June 2017, with the exception of:

(a) Article 86 requiring member states to provide a short description of their national legislation and procedures relating to insolvency shall apply from 26 June 2016.

(b) Article 24(1) requiring member states to establish and maintain one or several registers in which information concerning insolvency proceedings is published shall apply from 26 June 2018.

(c) Article 25 requiring the European Commission to establish a decentralised system for the interconnection of insolvency registers by means of implementing acts shall apply from 26 June 2019.

(5) Tell Companies House about changes asap!

Companies that are late in telling Companies House (CH) about changes to officers' details could find their credit standing affected, CH has warned. Filing documentation late can affect a company's credit standing as credit reference agencies use this as one of the indicators of a company's reliability.

While searches of the CH director appointment database account for 47% of all public searches of the database, only 53% of companies let CH know within the legal timescale when their officer details have changed.

Companies must tell CH about changes including:

- directors and company secretaries, e g new appointments, resignations or changes to their personal details,
- changing a company name,
- changing a registered office address,
- changing an accounting reference date,
- changing where company records are kept, if different from its registered address,

- which records will be kept at an alternative address,
- changes to a company's share structure, eg if new shares are issued, and
- details of any new mortgages it has, or mortgages it has paid off.

Changes can be made via online filing on live systems when decisions are made.

(6) Skadden comment on Chapter 11 reforms proposed by the ABI

Skadden, Arps, Slate, Meagher & Flom LLP comment on the ABI's far reaching proposals to reform Chapter 11 of the US Bankruptcy Code.

There has been a growing view that Chapter 11 (see Practice Note: The US Chapter 11 process) does not work efficiently for many debtors and is prohibitively expensive.

Accordingly, the ABI established a Commission made up of some of the most prominent Chapter 11 professionals in the US to evaluate US business reorganisation laws. The culmination of the Commission's work was a 400-page report and recommendation dated 8 December 2014.

The ABI reports' main proposals include:

- debtor-in-possession (DIP) financing that rolls up; pre-petition debt must be provided by lenders unaffiliated with holders of the pre-petition debt or must include substantial new credit,
- DIP financing orders cannot impose case milestones within the first 60 days of the case; liens cannot be placed on avoidance actions; and there can be no waivers of the payment of costs and expenses from the proceeds of secured creditor's collateral,
- sales of substantially all of a debtor's assets cannot occur sooner than 60 days after the petition date unless there is a high likelihood of significant loss of value; equity owners can participate in plans even though creditors are not being paid in full so long as the owners contribute new value that is subjected to a market test,
- the cramdown interest rate must be based on the market or a modified approach if there is no market, and should not be based on the so-called 'prime-plus formula',
- a reorganisation plan may cram down and bind objecting creditors even if no class of impaired creditors votes to accept the plan,
- secured creditors can bid the full face amount of their debt on asset sales (ie credit bid); although it may chill bidding, it is not a reason to deny a credit bid, and

- junior, out-of-the-money stakeholders may be entitled to redemption option value from senior creditors if evidence shows a possible upswing in value.

(7) Changes to insolvency statistics methodology

Following a review of the method used to count the number of company insolvencies, the Insolvency Service (IS) statistics team has identified a number of weaknesses which need addressing. A consultation sets out proposals for changing the methods and invites feedback on revisions and the length of historic data required. It also contains proposals to change statistics on receiverships, in order to break them down into insolvent and non-insolvent receiverships. The deadline for responses is 30 June 2015.

A review of company insolvency statistics from data supplied by Companies House revealed that some new insolvencies are captured in the statistics a long time after they began, and in a small number of cases insolvencies have been counted more than once.

Proposed changes

Change the method of counting company insolvencies

Upon review of the current method, IS has recommended counting insolvencies in the period in which they actually began and eliminating doubling counting. The drawback of this, however, is that around 10% of cases in any given calendar quarter are registered after the cut-off date for data extraction.

To overcome this, IS proposes it uses statistical methods to extrapolate from incomplete data to provide an estimate of the latest statistics and revise them the following quarter as data become almost complete.

IS seeks views on what further changes would be needed as a consequence of implementing this option or any others it has set out in consultation on the matter, including the amount of historical data users would require and how frequently the statistics should be revised.

Change to statistics on receivership appointments

IS intends to change statistics on receivership appointments, which are mostly not formal insolvencies. It proposes publishing separate figures for administrative receiverships and other receiverships. The latter of which would not be included in figures for total company insolvencies, but would still be made available.

Ways to respond

Responses can be sent by email to: statistics@insolvency.gsi.gov.uk.

Or by post to: Statistics Team, The Insolvency Service, 4 Abbey Orchard Street, London, SW1P 2HT.

ANALYSIS

(1) A Premier case for VAT recovery insolvency

Why is the *Premier Foods* case (*R (on the application of Premier Foods (Holdings) Ltd) v Revenue and Customs Comrs* [2015] EWHC 1483 (Admin), [2015] All ER (D) 205 (May)) so important for the future of VAT recovery in insolvency situations? Timothy Jarvis, partner at Squire Patton Boggs, explores the details of this case and argues that the result is potentially exciting news for customers in insolvency situations who have been incorrectly charged VAT.

The claimant erroneously paid approximately £4m VAT to the interested party (QCL), which it paid to the defendant Revenue and Customs Commissioners. The claimant contended that HMRC should refuse to repay QCL, which subsequently went into administration, unless it undertook to reimburse it in full, but HMRC refused and the claimant sought judicial review. The Administrative Court, in allowing the application, held that *Reemtsma Cigarettenfabriken GmbH v Finance Minister*: C-35/05 [2007] All ER (D) 266 (Mar) applied, such that the claimant was entitled to recover the mistakenly paid VAT directly from HMRC.

What is interesting about the litigation brought by Premier?

The litigation brought by Premier relates to VAT that was incorrectly charged to it by a supplier. Normally when a customer, such as Premier, is incorrectly charged VAT by its supplier the customer's remedy is a common law restitution claim against the supplier—with the supplier having a statutory right of recovery against the taxation authority in respect of the VAT. However, in *Reemtsma Cigarettenfabriken GmbH v Finance Minister the Court of Justice of the European Union* (*CJEU*) acknowledged that this principle did not apply in all circumstances and in some circumstances the customer could have recourse directly to the taxation authority. The CJEU held:

> 'If reimbursement of the VAT becomes impossible or excessively difficult, in particular in the case of the insolvency of the supplier, these principles may require that the recipient of the services to be able to address his application for reimbursement to the tax authorities directly.'

This principle was endorsed by the Court of Appeal in *Investment Trust Companies (in liquidation) v HMRC* [2015] EWCA Civ 82, [2015] All ER (D) 181 (Feb).

The *Premier* litigation is interesting because it is the first practical example of the application of the *Reemtsma* principle before the UK courts.

What were the facts in the Premier litigation?

Premier had been incorrectly charged VAT by its supplier QCL—which were in administration. QCL owed substantial sums to various creditors.

HMRC brought an action to deny Premier the ability to recover the VAT incorrectly charged to it by QCL as input tax.

Premier argued that the *Reemtsma* principle was directly in point. This was because if Premier brought a common law restitution claim against QCL, relying on QCL to bring a statutory recovery action against HMRC, it would become one among many unsecured creditors of QCL in respect of the monies recovered. The practical consequence of this would be that:

- Premier would not be able to recover the VAT incorrectly charged to it by QCL on a pound for pound basis.
- HMRC would be able to recover the input tax incorrectly claimed by Premier on a pound for pound basis.

Therefore Reemtsma was engaged because, applying normal mechanisms, the recovery of the VAT had become ‘impossible or excessively difficult’ for Premier.

HMRC’s response was that if it were to pay out directly to Premier under a common law restitution claim it would still be liable to refund the VAT if QCL brought a statutory recovery action against it under the Value Added Tax Act 1994 (VATA 1994), s 80. HMRC would in effect have to pay out twice and thus HMRC argued, in the absence of a mechanism for determining which of the two potential claims had priority, it should not be exposed to the double payment risk thereby defeating Premier’s claim.

What did the High Court decide?

The High Court squared the circle by considering the unjust enrichment defence to VATA 1994, s 80.

Value Added Tax Act 1994, s 80(3) confers a defence against a VATA 1994, s 80 action if the making of a payment would ‘unjustly enrich the claimant’. The High Court concluded that if Premier were to claim successfully against HMRC then QCL would be unjustly enriched if it were to make a separate statutory claim against HMRC. Therefore, QCL could not make such a claim and HMRC’s concern that it was subject to dual claims evaporated.

This produced a fiscally neutral outcome. Premier recovered the VAT that was incorrectly charged to it by QCL from HMRC. However, the VAT incorrectly charged to Premier was not recoverable as input tax.

Is this a positive result for customers in insolvency situations?

The outcome of the Premier litigation is very good news for customers in insolvency type situations who have been incorrectly charged VAT. The circumstances of the insolvency situation may mean that it is 'impossible or excessively difficult' to recover the VAT directly from the supplier meaning that the customer has a directly enforceable restitution action against HMRC.

(2) Statutory demand thwarted by would-be illegal payment

In *Maud v Libyan Investment Authority* [2015] EWHC 1625 (Ch), [2015] All ER (D) 101 (Jun), the Chancery Division had to decide whether a statutory demand should be set aside in circumstances where the debtor claimed he was unable to make any payment as to do so would be illegal. Here Stephen Leslie, solicitor in the LexisPSL Restructuring and Insolvency team explores the decision.

The applicant debtor sought an order setting aside a statutory demand served on him by the respondent creditor, claiming that any payment made by him to the respondent would be in breach of a sanctions regime imposed by the UN that prohibited people in certain circumstances from dealing with certain Libyan individuals and entities, including the respondent.

The Chancery Division (Mrs Justice Rose) granted the application and set aside the statutory demand. Having considered the sanctions regime by reference to the international, EU and UK law that had been enacted to give it effect, the judge held that any payment made by the applicant to the respondent would be in breach of the sanctions regime and that it would be unjust in those circumstances to allow a creditor to present a bankruptcy petition when the payment of the debt would expose the debtor to criminal penalties. It did not matter whether or not the applicant was able to pay the debt.

Briefly, what were the facts of the case?

The debtor (Mr Maud) entered into a guarantee in April 2008 with the Libyan Investment Authority (LIA) in support of the indebtedness of his company, Propinvest Group Ltd (Propinvest), to the LIA. Propinvest defaulted in March 2010 and in February 2014 the LIA served a statutory demand on Mr Maud in the sum of about £17.5m. The LIA then presented a bankruptcy petition against Mr Maud, and he applied to set aside the statutory demand.

Mr Maud did not dispute that he entered into the guarantee, or that he was liable to pay following Propinvest's default. He also accepted that he did not at that time have the money to pay the debt. However, he claimed that any payment to the LIA would be in breach of the sanctions regime which had been imposed on Colonel Gaddafi, members of his family and, latterly, certain other entities including the LIA. Mr Maud therefore sought to have the statutory demand set aside under either:

- rule 6.5(4)(b) of the Insolvency Rules 1986 (IR 1986), SI 1986/1925—on the basis that the debt was disputed on substantial grounds, or
- Insolvency Rules 1986, SI 1986/1925, r 6.5(4)(d)—on the basis that the court should be satisfied on other grounds that the demand ought to be set aside.

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

Rose J had to deal with the following issues:

- as Mr Maud's application was made out of time, whether an extension of time should be granted (the first issue),
- whether a statutory demand should be set aside under IR 1986, SI 1986/1925, r 6.5(4)(d) in circumstances where any payment of the debt demanded would be illegal and expose the debtor to criminal penalties (the second issue),
- whether in this case any payment by Mr Maud to the LIA would in fact be in breach of the sanctions regime (the third issue), and
- even if it is was, whether Mr Maud was precluded from relying upon that argument if he could have applied for the appropriate licence from HMRC to make any payment (the fourth issue).

What did the judge decide, and why?

Rose J's judgment contains a thorough review of the international, EU and UK law that had been enacted (both originally, and as modified following the fall of the Gaddafi regime in August 2011) to give effect to the sanctions regime (see paras **[6]**–**[23]**). Having done that, she made the following decisions:

The first issue

Mr Maud was allowed an extension of time in which to make his application:

- he would clearly be prejudiced by having to deal with bankruptcy proceedings were the statutory demand not to be set aside—the LIA's submission that, because Mr Maud did not have the funds in

any event to pay the sum demanded he could not suffer the prejudice of having to make a payment which would be illegal, was rejected,

- however, the weight given to that prejudice was nonetheless lessened by Mr Maud's implausible assertion that he only became aware of the conflict in Libya in May 2014 despite being a person with complex business affairs and regular dealings with the LIA, and that he knew from March 2010 (when Propinvest defaulted) that he was liable under the guarantee,
- there was little prejudice to the LIA in allowing Mr Maud's application to set aside the statutory demand, albeit that a relevant factor taken into account would be the delay in appointing a trustee in bankruptcy to investigate and prosecute any potentially voidable transactions, and
- there was a public interest (as well as the private interest of Mr Maud) in ensuring that the sanctions regime was observed—the issue of whether any payment could be made to the LIA, either by Mr Maud or any trustee in bankruptcy subsequently appointed over his estate (in the event a bankruptcy order was made against Mr Maud), was something that had to be determined at some point in time. As that issue had been fully argued before the judge, it was convenient to deal with it at that time.

The second issue

Rose J confirmed that the correct test to apply where an application to set aside a statutory demand is founded on IR 1986, SI 1986/1925, r 6.5(4)(d) is for the court to consider whether the interests of justice require it—applying *In re: A Debtor (1 of 1987)* [1989] 2 All ER 46 and *Remblance v Octagon Assets Ltd* [2009] EWCA Civ 581, [2009] All ER (D) 180 (Jun).

Applying that test, the judge held that it would be unjust if a creditor was able to present a bankruptcy petition in circumstances where to otherwise make any payment of the sum demanded would be in breach of a sanctions regime and expose the debtor to criminal penalties. She further held that it did not matter whether Mr Maud had in any event sufficient funds in which he could otherwise discharge the debt.

The third issue

Mr Maud submitted that, for the purposes of his application, it was only necessary for the judge to determine whether it was arguable that the debt was not payable, rather than to actually consider whether the sanctions regime applied or not. However, for the reasons mentioned in respect of the first issue, the judge decided to determine the issue.

In doing so, she held that on a proper construction of the appropriate legislation, any payment to be made by Mr Maud to the LIA would be caught by the sanctions regime, and that to make any such payment would expose Mr Maud to criminal penalties.

The fourth issue

The sanctions regime provides that its prohibitions do not apply to anything done under the authority of a licence granted by HM Treasury. It was argued on behalf of the LIA that it was Mr Maud's responsibility as the debtor to take whatever steps he could to enable the payment of monies owed, and that he could and should have applied for the appropriate licence from HM Treasury.

The judge rejected this argument, however, by looking at the terms of the sanctions and licensing regime itself and that in this case the regime did not place a burden on Mr Maud to apply for a licence. There was also no certainty that a licence would be granted if applied for, particularly as it would necessitate the involvement of third parties.

Accordingly, having allowed Mr Maud an extension of time to make his application, the statutory demand was set aside on the basis that:

- it would be unjust to uphold a statutory demand where to pay the sum demanded would be in breach of a sanctions regime,
- any payment to be made by Mr Maud would in fact be in breach of the sanctions regime, and
- there was no burden on him to apply for a licence to allow him to make any payment,
- Unfortunately for Mr Maud, although he was successful in this case in having the LIA's statutory demand set aside, he was not so successful in a parallel case determined by Rose J at the same time that concerned his application to set aside a statutory demand served by another creditor in the sum of about £40m (see *Maud v Aabar Block SARL* [2015] EWHC 1626 (Ch)).

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

This case will clearly have limited application to most practitioners given its facts and that hardly any creditors will be subject to a UN sanctions regime. However, it does provide some useful—and perhaps unsurprising—authority that, where a statutory demand can only be satisfied by the carrying out of an illegal act, the statutory demand ought to be set aside under IR 1986, SI 1986/1925, r 6.5(4)(d).

It also confirms that the appropriate test to be applied when considering applications made under that ground is whether it would be unjust to allow the creditor to present a bankruptcy petition in all the circumstances.

(3) Can a trustee in bankruptcy be paid for dealing with trust property?

In *Bell v Birchall* [2015] EWHC 1541 (Ch), the Chancery Division was asked whether a trustee in bankruptcy appointed over the bankruptcy estate of a solicitor was entitled to recover his costs and expenses incurred—and to be incurred—in connection with storing the solicitor's practice's files and the reconciliation of sums held in the practice's client accounts. Stephen Leslie, solicitor in the LexisPSL Restructuring and Insolvency team critically evaluates the decision.

The applicant acted as trustee of the bankruptcy estate of the first respondent, a solicitor. Following his appointment, the trustee preserved the files and records of the first respondent's practice as well as sums held in separate client accounts, and sought an order permitting him to deduct his time costs and disbursements pro rata from those sums in respect of the storage of the files and the reconciliation of the client accounts that the trustee considered were necessary for the protection of clients.

The Chancery Division dismissed the application. The first respondent's bankruptcy did not absolve him of his obligation to conduct an orderly winding up of his practice—including the reconciliation of the client accounts—at no cost to clients. In the event of an intervention by the Solicitors Regulation Authority (SRA), that obligation would pass to the SRA—again at no cost to clients. The client account monies did not form part of the first respondent's bankruptcy estate, and the facts of the case did not allow the trustee to recover his costs for dealing with this trust property.

Briefly, what were the facts of the case?

The first respondent carried on a solicitor's practice (the practice) as sole principal as at the date he was made bankrupt in August 2013. The trustee was appointed a little over a week later.

The practice held sums totalling about £250,000 in 12 separate client accounts, and possessed a large number of files that were largely related to non-current instructions.

The SRA did not at that time intervene in the practice, and the trustee—alleging that the first respondent was not co-operating (a point disputed by the first respondent)—made arrangements for the files to removed and stored at a secure facility, and for the client account monies to be protected.

There followed various communications between the trustee and the SRA.

The SRA was first notified in July 2014 of the trustee's intention to seek an order permitting him to recover his costs and disbursements, both already incurred and to be incurred. Notwithstanding that, it was not until October 2014 that the SRA wrote to the trustee in respect of the threatened application.

The SRA's letter pointed out to the trustee that it was the first respondent's duty to reconcile and distribute the client account monies at no cost to clients, and that if he failed to do so, an alternative mechanism was provided by the SRA's statutory powers, also at no cost to clients. In March 2015, the SRA intervened in the first respondent's practice.

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

His Honour Judge Pelling QC had to decide the following two questions:

- whether he had jurisdiction to make the order sought by the trustee (the jurisdiction issue), and
- even if he did, whether he ought to make that order in the exercise of his discretion (the discretion issue).

What were the main legal arguments put forward?

It was accepted by the trustee that the sums held in the client accounts were exclusively client monies and that no sums were owed to the practice's office accounts. On that basis, the trustee's case relied exclusively on what is known as the *Berkeley Applegate* principle (after *Re Berkeley Applegate (Investment Consultants) Ltd (in liquidation)* [1989] Ch 32, [1988] 3 All ER 71) which, briefly, provides the court with a discretion when dealing with a claim by a person seeking to enforce a claim to an equitable interest in property to require an allowance to be made for the costs incurred in the administration of that property.

For the SRA, it was submitted that the trustee had no role to play in the safeguarding of the client monies as, until the SRA's intervention in the practice, that responsibility rested with the first respondent under the Solicitors Accounts Rules (SARs), both before and after he was made bankrupt. Following the intervention, that responsibility passed to the SRA. As neither the first respondent (prior to the intervention) nor the SRA (after the intervention) would undertake that work at any cost to the clients (except, in the case of the SRA, to any extent provided in *Re Ahmed & Co* [2006] EWHC 480 (Ch), [2006] All ER (D) 195 (Mar), it was not reasonable for the trustee to recover his costs and expenses.

What did the judge decide, and why?

The jurisdiction issue

The judge held that he did not have jurisdiction to make the order sought by the trustee, for the following reasons:

- the first respondent was under an obligation to manage the client monies in accordance with the SARs both before and after he was made bankrupt, and until the SARs intervened in the practice (at which point that obligation passed to the SRA),
- accordingly, and distinguishing the facts in this case with those in *Re Berkeley Applegate*, those persons entitled to the client monies did not require the court's assistance to enforce their rights,
- the work carried out by the trustee could have been carried out by the first respondent or SRA at no cost to the clients, and
- the *Berkeley Applegate* principle was not sufficiently wide to cover the costs of storing the old files, which were not trust property.

The discretion issue

As a consequence of the decision on the jurisdiction issue, it was unnecessary for the judge to consider the discretion issue, but he did so in the event that he was wrong on the jurisdiction issue. He held that, even if he did have jurisdiction to make the order sought by the trustee, he would not have exercised his discretion and made such order on the basis that:

- there was no need for the trustee to incur costs where the obligation to manage the client monies (including the storage of the files) was imposed on the first respondent and, latterly, the SRA—if the trustee was concerned that the client monies or files were at risk had they been returned to the first respondent, he could have notified the SRA of that view in clear and unequivocal terms,
- even if the *Berkeley Applegate* principle was sufficiently wide to cover the costs of storing the old files, the complete mismatch between the amount of the monies held in the client account and the volume of files would make it unfair for those entitled to the client monies to pay for the storage of files unrelated to their matters, especially where neither the first respondent nor the SRA would impose any charge for such storage

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

This case will be of interest to insolvency practitioners and those advising them who are appointed over, principally, solicitors' firms but also over other professional practices where client assets (whether client monies or otherwise) are held on trust for the clients by that practice.

Assets held on trust are unlikely to form part of the insolvency estate, but the terms of the trust(s) should be considered at as early an opportunity as possible and advice sought by the office-holder. This will include an assessment of whether the office-holder or some other person is responsible for the trust assets, and a consideration of any appropriate professional rules will be necessary. The judge in this case commented that the trustee did not appear to have appreciated that the client monies were held on trust by the first respondent, nor that it was the responsibility of either the first respondent or the SRA—and not the trustee—to distribute those funds.

Where there is a professional body, early contact should be made with them (as happened in this case), and a plan should be agreed with them as soon as possible. The professional body should be actively chased if it fails to respond to communications, and any concerns relating to the ability of the bankrupt to properly deal with trust assets should be raised with that professional body.

The judge also made the point that the trustee's application contained no information whatsoever as to the amount of costs and expenses he had already incurred and expected to incurred. Knowing what amounts were claimed was material to the exercise of discretion. Therefore, if an office-holder makes any similar kind of application, it should contain information as to the costs and expenses that the office-holder seeks to claim.

In the absence of being able to recover costs and expenses from trust assets, an office-holder may encounter reluctance on the part of creditors to approve any remuneration dealing solely with trust assets unless it can be demonstrated that there was some benefit to creditors in that work being undertaken.

(4) Final wording—Recast Regulation on Insolvency

After years of speculation, the Recast Regulation has been published in the Official Journal heralding in one of the biggest changes in cross-border insolvency in the past ten years. So what will all this mean in practice for restructuring and insolvency professionals and their clients? In the fourth analysis piece, Kathy Stones, solicitor in the Lexis®PSL Restructuring and Insolvency team considers the final text of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the Recast Regulation) as it appeared in the Official Journal on 5 June 2015 (OJ L 141/19). The Recast Regulation enters force from 26 June 2015 but only applies to relevant insolvency proceedings from 26 June 2017.

When are the reforms effective?

Following extensive three-way discussions between the European Commission, European Parliament and Council, the final text of the Recast

Regulation was approved by the European Parliament on 20 May 2015 and published in the Official Journal on 5 June 2015.

The Recast Regulation is effective 20 days after publication in the Official Journal (ie 26 June 2015).

The Recast Regulation has direct effect in each member state (apart from Denmark, which has opted-out) without the need for separate enactment at a national level.

However, the majority of the provisions are not effective until two years after the Recast Regulation came into force (ie from 26 June 2017). This is to allow member states to familiarise themselves with the new provisions. The original Regulation will continue to apply to proceedings opened before 26 June 2017 (art 84(2)). It will be interesting though to see if courts now start looking at cases with an eye on the new wording.

The exceptions are:

- the description of national insolvency law and procedures to be provided by each member state (particularly the matters governed by the law of the main proceedings) which shall apply from 26 June 2016 (ie 12 months after the Recast Regulation came into force),
- the establishment of national insolvency registers, which shall apply from 26 June 2018 (ie 36 months after the Recast Regulation came into force), and
- the interconnection of national registers, which shall apply from 26 June 2019 (ie 48 months after the Recast Regulation came into force).

What does the Recast Regulation cover?

New wording

Relevant proceedings will cover public collective proceedings, including interim proceedings, which:

- are based on laws relating to insolvency, and
- in which for the purpose of rescue, adjustment of debt, reorganisation or liquidation:
    - a debtor is totally or partially divested of its assets and an insolvency practitioner (IP) is appointed,
    - the assets and affairs of a debtor are subject to control or supervision by a court, or
    - a temporary stay of individual enforcement proceedings is granted by a court or by operation of law in order to allow for

negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted:

- provide for suitable measures to protect the general body of creditors, and
- no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).

Rationale

The introduction of the word 'public' clarifies that certain confidential negotiations are not included, meaning French mandataire ad hoc and conciliation proceedings are not covered. Recital 16 confirms that proceedings are not based on a law relating to insolvency when based on general company law not designed exclusively for insolvency situations. This provides welcome clarification that UK schemes of arrangement (based on the Companies Act 2006, s 885) do not fall within the scope of the Recast Regulation.

Collective proceedings are also defined to mean proceedings including all or a significant part of creditors to whom the debtor owes all or a substantial proportion of its outstanding debts. Recital 14 differentiates between:

- liquidation/cessation of business—which should involve all creditors, and
- rescue—which may not include all creditors.

The Recast Regulation also covers proceedings triggered by non-financial difficulties (e g loss of a key contract) if a real and serious threat to the debtor's actual or future ability to pay debts as they fall due (i e cash flow) within a period of several months or longer (recital 17).

The recitals clarify that the list of proceedings in Annex A is exhaustive and it is clear that debtor in possession proceedings are included.

How is centre of main interests (COMI) defined?

The new definition of COMI draws a three-way distinction between:

- companies and legal persons—where the place of the registered office is presumed to be the COMI in the absence of proof to the contrary (however, the presumption will only apply if the registered office has not been moved to another member state within the three-month period prior to the request to open proceedings),
- individuals exercising an independent business or profession—where the place of the principal place of business is presumed to be the COMI in the absence of proof to the contrary (however, the

presumption doesn't apply if the principal place of business is moved in the prior three months), and

- any other individuals—where the COMI is presumed to be the individual's habitual residence in the absence of proof to the contrary (however, the presumption doesn't apply if the habitual residence is moved in the prior six months).

Special consideration should be given to creditors and their perception as to where a debtor conducts his business. In the event of a shift in COMI, this may require informing the creditors of the new location (eg by drawing attention to the change of address in commercial correspondence or otherwise making the new location public through other appropriate means (recital 28)). For corporate entities, there is no mention of the controversial look-back period initially proposed by the European Parliament.

Courts must actively examine COMI and must set out their reasoning (recital 27). This means a written judgment must be given in all COMI cases—where an IP is entrusted to determine COMI, they must also set out their reasoning.

What changes are made to secondary proceedings?

The new definition of establishment is:

> '[…] any place of operations where a debtor carries out or has carried out in the three-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.'

This should help counter abusive forum shopping, particularly in the three months prior to opening proceedings.

The introduction of synthetic secondaries may help the liquidator in main proceedings to avoid secondary proceedings if they provide a unilateral undertaking to treat local creditors as they would be treated under secondary proceedings when distributing those assets or their proceeds. It must specify the factual assumptions made, particularly regarding the value of the assets located locally (at the time the undertaking is issued) and the options available to realise these assets. The law applicable to the distribution of proceeds and ranking of creditors' claims shall be the law of the state where secondary proceedings are opened.

The undertaking must be in writing in the official language of the state where secondary proceedings could have been opened. A balance needs to be struck between the flexibility of the undertaking and the interests of local creditors—somewhat controversially, the undertaking must be approved by the known local creditors based on applicable rules on qualified majority and voting for the adoption of restructuring plans and

national law applies for the approval of the undertaking. Where there are different rules for adopting restructuring plans, each member state must designate the relevant specific procedure. However, it is unclear why local creditors should have stronger rights than other creditors and this adds another unwelcome burden and possible delay where the IP in main proceedings needs to act quickly.

Other additions include the requirement on the IP in main proceedings to give local creditors advance notice of any distributions. Local creditors are expressly given the right to apply to the courts where main and secondary proceedings are conducted to ensure compliance with the undertaking or seek provisional protective measures. The IP is expressly liable for any damage caused to local creditors as a consequence of his non-compliance with these requirements.

The IP in the main proceedings is given the right to judicial review of the opening of any secondary proceedings. However, overall the benefits of the undertaking and synthetic secondaries as originally proposed have been significantly watered down.

What about the new registers?

This is a two-step process:

- creating national electronically searchable databases, and
- linking them up to create a central European database.

The information must be published as soon as possible after the opening of proceedings. The following 'mandatory information' must as a minimum be made available:

- the date of the opening of proceedings,
- the court and any case reference number,
- the type of proceedings in Annex A and sub-type of any insolvency proceedings opened (where applicable),
- which article jurisdiction for opening proceedings is based upon (ie main proceedings, secondary or territorial proceedings),
- for companies—the company's name, registration number, registered office or if different, postal address,
- for individual debtors—their name, any registration number and postal address or where that is protected, their place and date of birth—as a compromise to deal with data protection concerns, where the individual does not exercise an independent business or professional activity, this information either:

  - o need not be published in the registers provided that known foreign creditors are informed of the information, or
  - o may be subject to supplementary search criteria (eg conditional on a request to the competent authority and/or conditional on verification of a legitimate interest in the information),
- the name, postal address or email address of any IP appointed,
- any time limit for lodging claims or the criteria for calculating time limits (hyperlinks can be added to link to the criteria for calculating those time limits), and
- the date of closing main insolvency proceedings, if any
- the court before which decisions to open proceedings can be challenged and the applicable time limits (or the criteria for calculating the time limits).

Additional information may also be included in the national registers (eg directors' disqualifications). Although the mandatory information must be available free of charge, member states may charge for any additional information or documents. The Commission must submit a study on the cross border issues in directors' liability and disqualifications by 1 January 2016.

It remains to be seen how accurate the central European database will be and how the issue of searching in different languages will be resolved.

How are group companies affected?

Liquidators of (and courts involved with) group companies will be obliged to cooperate and communicate. However, this is subject to conflicts of interest, any procedural rights of the parties and any confidentiality issues. The costs shall be regarded as costs and expenses in the respective proceedings. IPs and courts should take best practices for cooperation into account as set out in the UNCITRAL guidelines on cooperation in cross-border insolvency cases.

A single IP can be appointed over several group companies, subject to local qualification and licensing issues.

Where a group is involved, an IP has various rights to facilitate the administration of proceedings:

- to be heard in any proceedings opened regarding another group company,
- to request a stay (of up to three months, extendable to six months) of any measure relating to the realisation of assets of another group company if:

- o a restructuring plan for all or some group members has been proposed and has a reasonable chance of success,
- o the stay is necessary to ensure proper implementation of the plan,
- o the plan would benefit creditors in the proceedings for which the stay is requested, and
- o neither the insolvency proceedings where the IP has been appointed nor the proceedings over which the stay is requested are subject to group coordination proceedings.

What are group coordination proceedings?

A new concept called 'group coordination proceedings' is introduced. Any IP appointed over a group company may request the opening of group coordination proceedings by filing a request containing the information below at any court having jurisdiction over the insolvency proceedings of any group company:

- the name of the proposed coordinator (details of eligibility, qualifications and consent to act)—note they cannot be an IP appointed over any of the existing group companies and must have no conflict of interest regarding the group members, their creditors and the IPs appointed over any group companies,
- an outline of the proposed group coordination and why the court has jurisdiction,
- a list of the IPs appointed over all group members and (where relevant) the names of all courts and competent authorities involved, and
- an outline of estimated costs and the share to be paid by each group member.

In general, the court first seised of a request to open coordination proceedings has jurisdiction and other courts must decline jurisdiction. As soon as possible, the court first seised will give notice to all other group members if it is satisfied that:

- coordination proceedings are appropriate to facilitate the effective administration of the insolvency proceedings relating to different group members,
- no creditor of any group member anticipated to participate is likely to be financially disadvantaged by its inclusion in group coordination proceedings, and
- the proposed coordinator fulfils the relevant requirements.

This may well lead to a race to the courts to take control of the new group coordination proceedings. The criteria for opening proceedings takes no account of which member state is conducting main proceedings for the parent company. However, at least two-thirds of all IPs appointed in insolvency proceedings of group companies may agree in writing that another court has exclusive jurisdiction.

IPs of the other group companies may object within 30 days to either:

- the inclusion of their company in the coordination proceedings, or
- the identity of the proposed coordinator.

The objecting IP will still be subject to any local requirements to get approval from his creditors' committee or local court (if required by the law where his proceedings have been opened) before taking the decision whether to participate or not in the coordination proceedings.

However once an IP has objected, he will not be included in the coordination proceedings. He may later request to opt-in to the coordination proceedings (subject to the group coordinator being satisfied the criteria for jurisdiction still exist or all IPs involved agree). However this, together with the fact that any IP is not obliged to follow the group coordination plan (though must give his reasons to the coordinator and any persons or bodies he reports to under his national law), severely reduces the strength of coordination proceedings and results in unpredictability for creditors and other stakeholders.

The group coordinator has various powers to:

- recommend coordinated conduct of the insolvency proceedings,
- propose a group coordination plan,
- be heard and participate in any creditors' meetings of the group companies,
- mediate any dispute between IPs, and
- request information from IPs to help identify coordination strategies.

The coordinator also has the power to request a stay of any insolvency proceedings for any group member of up to six months if it:

- is necessary to ensure implementation of the group coordination plan, and
- it would benefit the creditors of the proceedings for which the stay is requested.

Unfortunately consolidation of the proceedings or various estates is expressly prohibited (in contrast see Practice Note: US substantive consolidation).

The coordinator must give notice to the participating IPs if there is a significant increase in costs or costs exceed 10% of estimated costs. In the absence of any objections, participating IPs must pay within 30 days or file an objection with the court which opened the coordination proceedings—which may lead to delay and uncertainty.

The coordinator must communicate with the IPs (and courts) in either any language agreed with them or, failing that, the official language of the proceedings opened for that group member.

The court which appointed the coordinator may revoke his appointment if he acts to the detriment of creditors of a participating group member or fails to comply with his obligations.

The Commission must present a report on the application of group coordination proceedings by 27 June 2022.

What are the new rules on location of assets?

Welcome clarification is given on the location of various assets:

(i) registered shares (in companies other than those referred to in (ii))—the member state where the company which issued the shares has its registered office,

(ii) financial instruments (where title is evidenced by entries in a register or account maintained by or on behalf of an intermediary (book entry securities))—the member state where the register or account in which the entries are made is maintained,

(iii) cash held in accounts with credit institutions:

- o with an International Bank Account Number (IBAN), the assets are situated in the member state indicated in the account's IBAN, and
- o without an IBAN, the assets are situated in the member state where the credit institution has its central administration or, if the account is held by a branch, agency or other establishment, the member state where that branch, agency or other establishment is located (this is in line with the Eurasian Patent Organisation (EAPO) proposals).

(iv) property and rights registered in other public registers—the member state under the authority of which the register is kept,

(v) European patents—the member state for which the European patent is granted,

(vi) copyright and related rights—the member state within the territory of which the owner of the rights has its habitual residence or registered office,

(vii) tangible property (other than (i)–(iv))—the member state where the property is situated, and

(viii) claims against third parties (other than relating to (iii))—the member state where the third party required to meet the claim has their COMI as determined by art 3(1).

What's the impact on forum shopping?

Forum shopping through abusive COMI relocation had previously been identified as one of the main shortcomings of the existing regime.

New recitals specifically set out the safeguards aimed at preventing forum shopping, which include:

- presumptions as to COMI are rebuttable (and do not apply if the registered office/principal place of business/habitual residence is moved in the relevant period before the request to open proceedings), and the court should carefully assess whether COMI is genuinely located in that member state, and
- in all cases, where the circumstances give rise to doubts regarding the court's jurisdiction, the court should ask the debtor to supply additional evidence to support his assertions and give creditors an opportunity to present their views (where the applicable law allows) (recital 32).

Abusive COMI relocation is discouraged, though it seems to leave the door open for consensual COMI relocations that do benefit the general body of creditors. The Commission must submit a study on abusive forum shopping by 27 June 2020.

What do the new annexes cover?

The annexes have been revamped as follows:

- Annex A—extra proceedings included (the Commission says around 19 new national procedures will benefit from the wider scope of the Recast Regulation) and the annexes are definitive on whether the regulation applies to a particular type of proceeding.
- Annex B—list of insolvency practitioners (old Annex B listing winding up procedures is replaced).
- Annex C—lists the historical amendments to the EC Regulation (old Annex C listing liquidators is replaced).

- Annex D—is a destination (or correlation) table showing where the old articles can be found within the Recast Regulation.

(5) Annulling bankruptcy orders—what test applies?

How significant is the High Court's ruling in *Woolsey v Payne* [2015] EWHC 968 (Ch), [2015] All ER (D) 24 (May)? Philip Flower, a barrister at 9 Stone Buildings who acted for one of the parties, believes the ruling provides important guidance in the factors required for setting aside statutory demands and bankruptcy orders in insolvency proceedings.

The Chancery Division considered an appeal by the petitioning creditor, W, against findings of the Chief Registrar regarding a bankruptcy order and a statutory demand made against the respondent wife and husband respectively. In dismissing the appeal, the court held that, using the correct test, the wife's application to annul the bankruptcy order would be allowed and that the other issues raised by W required further examination at a full hearing.

What was the background to the appeal?

In December 2012, the appellant, Mr Woolsey, loaned £255,000 to Mr and Mrs Payne. The loan was subject to a professionally drafted loan agreement to which both Mr and Mrs Payne were parties as well as a limited company—Russell Payne Chartered Accountants Ltd—of which both Mr and Mrs Payne were members. Mr Payne was a chartered accountant but carried on his business through the limited company and was a director. Mrs Payne was a shareholder and company secretary but not a director of that company.

The terms of the loan agreement were not complied with and Mr Woolsey served statutory demands on both Mr and Mrs Payne. Mrs Payne failed to apply to set aside the statutory demand and did not attend or adduce any evidence at the hearing of the petition which was later presented and so she was adjudicated bankrupt. Her explanation for her failure to take any steps following service of the statutory demand was that she had delegated the entire matter to her husband who had mistakenly understood that there had been an adjournment. Mr Payne, however, did make an application to set aside the statutory demand.

The debt relied upon both in the bankruptcy petition against Mrs Payne and in support of the statutory demand against Mr Payne was identical.

Mrs Payne then applied to have her bankruptcy order annulled under the Insolvency Act 1986 (IA 1986) or (the 1986 Act), s 282(1)(a) on the grounds that it ought not to have been made by reason that the debt was disputed on substantial grounds. Her argument was that had she attended upon the hearing of the petition, she would have advanced the argument

that the debt was disputed on substantial grounds and, accordingly, the bankruptcy order would not have been made.

Her application for annulment and Mr Payne's application to set aside the statutory demand were heard together by Chief Registrar Baister. I represented Mrs Payne. Mr Payne was represented separately as Mrs Payne also asserted that her signature on the loan agreement had been procured by the undue influence of her husband. Apart from that argument, the grounds on both applications were identical.

The grounds on which the debt was disputed were somewhat technical and concerned the provisions of the Consumer Credit Act 1974 (CCA 1974) as in force at the date of the loan (December 2012). Some of those provisions have now been repealed and are no longer in force.

Under CCA 1974, s 16, a loan which was made wholly, or predominantly, for the purpose of a business carried on by the debtor was exempt and not regulated under CCA 1974 (the business exemption). In addition, if the loan agreement contained a declaration in a prescribed form that it was for such a purpose then a presumption arose that it was exempt from regulation under CCA 1974. This loan agreement contained such a declaration.

However, under CCA 1974, s 16B (now repealed) that presumption was rebuttable if the creditor knew, or had reasonable grounds to suspect, that the loan was not wholly or predominantly for the purposes of a business carried on by the debtor.

Before the Chief Registrar, Mr and Mrs Payne's case was as follows:

- The loan was not for business purposes but for personal matters. This was purely a matter of fact to be determined on the witness statements.
- With respect to the presumption raised by the declaration, Mr Woolsey's own evidence was that he thought the loan was for the benefit of the business. However, he also said that he thought that business was carried on by the limited company and not Mr or Mrs Payne personally. It could not be said, therefore, that the loan was for a business carried on by either Mr or Mrs Payne personally and since Mr Woolsey knew this he had reasonable grounds to suspect (if not know) this. Accordingly the presumption created by the declaration was rebutted.
- What followed from (i) and (ii) was the loan was potentially regulated under CCA 1974 if it was made by Mr Woolsey in the course of a credit lending business carried on him. Mr Woolsey was not licensed under CCA 1974 and if the loan was made in the course of a credit lending business carried on by him it was not enforceable

without authorisation from the Office of Fair Trading (now the Financial Conduct Authority) which had not been obtained. Mr and Mrs Payne contended that the loan was made in the course of a credit lending business. Again that was a matter of fact to be determined on the evidence.

- The evidence was such that there were substantial grounds for arguing all of this. Accordingly the bankruptcy order against Mrs Payne should be annulled and the statutory demand served on Mr Payne set aside on the basis that the debt was disputed on substantial grounds.

The Chief Registrar held:

- The presumption under CCA 1974, s 16B was rebutted since on Mr Woolsey's own evidence he believed that the loan was for the purpose of a business carried on by a limited company and not by the debtors personally.
- On the facts he was carrying on a credit lending business and was not licenced.
- By reason of (i) and (ii) the debt was disputed on substantial grounds and both the bankruptcy order should be annulled and the statutory demand set aside.

Mr Woolsey appealed that decision.

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

Mr Woolsey appealed on three grounds:

Annulment under IA 1986, s 282

The proper test upon an application for annulment under IA 1986, s 282 was not the same as the test for determining whether a statutory demand should be set aside. The test for setting aside a statutory demand was whether or not the debt was disputed upon grounds that appeared to be substantial. Mr Woolsey argued that on an annulment application the debtor had to go further and demonstrate that there was in fact no debt at all and not just that it was disputed.

Purpose of the loan

The Chief Registrar erred in finding that the fact the loan was for the purposes of a business carried on by a limited company meant that it could not be carried on by the debtors personally.

Credit lending business

The Chief Registrar erred in finding on the facts that Mr Woolsey was carrying on a credit lending business while not being licenced under CCA 1974.

What were the main legal arguments put forward?

As regards the relevant test, Mr Woolsey argued that the court should follow the decision of Mr Elleray QC sitting as Deputy High Court Judge in the case of *Flett v Revenue and Customs Comrs* [2010] EWHC 2662 (Ch). In that case the judge stated that:

> 'It may not be enough in my view for a debtor to say at the time of an application for annulment: "I had an arguable defence to a given case". He should be saying: "I did not in fact owe the money for this or that reason, and it is for that reason that he now seeks the annulment of the order." '

It was argued on behalf of Mrs Payne that the proper test was the same as that for setting aside a statutory demand—relying upon a decision of Neuberger J (as he then was) in *Guinan III v Caldwell Associates Ltd* [2003] EWHC 3348 (Ch), [2004] All ER (D) 123 (Mar) where, after considering a statement by Laddie J in *Everard v The Society of Lloyd's* [2003] EWHC 1890 (Ch), [2003] All ER (D) 334 (Jul), he stated:

> '… if there is what he called "a genuine triable issue" then, whether it is raised at the statutory demand stage, the petition stage or the annulment stage, it is an equally valid point.'

It was also argued on behalf of Mrs Payne that common sense dictated that Neuberger J's approach was correct since what followed from *Flett* would be the anomalous position whereby the statutory demand might be set aside but Mrs Payne's bankruptcy order would remain even though both were founded upon exactly the same debt.

On the question of whether or not a person carries on a business personally as a director of a limited company, it was argued that the Chief Registrar took too narrow a view. Mr Woolsey relied upon *Turner & Co (GB) Ltd v Abi* [2010] EWHC 2078 (QB) and, secondly, on a series of cases under the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (the Regulations).

Turner was a case involving the consideration of the meaning of the term 'consumer' within the context of a Council Directive 93/13/EEC on unfair terms in consumer contracts (Unfair Contract Terms Directive). In that case, it was held that Mr Abi was not acting as a consumer within the meaning of the term when he had entered into a contract whereby he would be personally liable for commission upon a sale of a business carried on by a limited company of which he was a shareholder and

director. It was argued that, where a director borrows money for the purposes of a business carried on through a limited company, he was acting otherwise than as a consumer—which term had been defined as acting in a purely personal capacity.

Mr and Mrs Payne argued that the Chief Registrar had been correct in the first instance. The words of CCA 1974 referred to a loan made 'wholly or predominantly for a business carried on by [the debtor]' and accordingly considerations of the meaning of the term 'consumer' were irrelevant.

As regards the final ground of appeal, this was a matter of fact to be determined by the evidence contained in the witness statements. It was submitted on behalf of Mr and Mrs Payne that a determination of whether or not Mr Woolsey was carrying on a credit lending business was not something that could be determined upon a summary application on paper but was a matter for a trial judge having regard to all the facts of the case. Mr and Mrs Payne referred to the decision of Lord Neuberger MR in *Helden v Strathmore Ltd* [2011] EWCA Civ 542, [2011] All ER (D) 92 (May), in which he considered an earlier case—*Tamimi v Khodari* [2009] EWCA Civ 1109, [2009] All ER (D) 87 (Oct)—and in which he stated:

> 'In my view, that case [i e Tamimi] helps to the extent of emphasising the point that, whether a person carries on the business of engaging in a specific activity is a matter of secondary fact, an inference, which is essentially for the trial judge, who must determine the issue by reference to all the relevant facts of the case.'

What did the judge decide, and why?

The judge held that the correct test to be applied in an application under IA 1986, s 282(1)(a) was the same as that to be applied on an application to set aside a statutory demand. He preferred Neuberger J's analysis in *Guinan III* to that of Mr Elleray QC in *Flett*.

On the question of whether or not a loan made to a director for the purposes of a business carried on by a limited company, the judge held that the Chief Registrar had adopted too narrow an approach. He rejected the argument that the principle of a limited company having a separate legal identity meant that its business could inevitably be separated from that of its directors within the context of CCA 1974—which had to be interpreted in light of the Unfair Contract Terms Directive.

However, he also found that there was sufficient evidence raised by Mr and Mrs Payne that notwithstanding this, the loan may have been, as they contended, for purely personal matters. In light of his finding as to the correct test to be applied on both applications, he found that the debt

was disputed on substantial grounds in this respect and, accordingly, he did not allow the appeal on this ground.

On the final ground—whether or not Mr Woolsey made the loan in the course of a credit lending business—the judge found that in light of Lord Neuberger's statement in *Helden* this was not a matter that was suitable for a summary determination on paper. Since sufficient factual matters had been raised in the witness statements to support the contention that Mr Woolsey may have made the loan in the course of business, this was a matter that should be determined at trial by a judge with the benefit of oral evidence and cross-examination. Again in light of the finding as to the appropriate test, the judge found that this issue was disputed on substantial grounds and accordingly did not grant the appeal on this point.

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

The judgment at least provides a considered analysis of what might be seen as conflicting judgments (*Flett* and *Guinan III*) as to the appropriate test to be applied upon an annulment application under IA 1986, s 282(1)(a) where the bankrupt was arguing that the bankruptcy order ought not to have been made by reason of a dispute as to the debt. The appropriate test is the same as that upon an application to set aside a statutory demand—namely that the debt is disputed on grounds that appear to the court to be substantial.

Although CCA 1974, s 16 has been repealed, the same business exemption is continued in CCA 1974, s 55, and while the case was not decided on this point there is at least some guidance as to the interpretation of the phrase 'a loan made wholly or predominantly for the purposes of a business carried on by [the debtor]' within CCA 1974. It may be that directors or shareholders of limited companies taking loans for the purposes of the company's business cannot rely upon this phrase so as to pray in aid the protection of CCA 1974 by reference to the separate legal identity of the company. However, this case was not decided on that issue and it does not provide any binding authority on the point.

(6) One minute with His Honour Judge Edward Bailey

His Honour Judge Edward Bailey discusses the changes being introduced by the SBEEA 2015.

How do you think SBEEA 2015 will affect the courts?

It is a particular feature of English insolvency law when contrasted with the insolvency laws of almost all continental systems that so much can take place in the insolvency of a company without the involvement of the court. This is possible of course because we have both the official receiver

and the qualified insolvency practitioner (IP), the latter regulated by his professional body. Against this general background it is unsurprising that there is little in SBEEA 2015 which impacts directly on the courts.

The prime exception is the new power, with as yet no date for implementation, of an administrator or liquidator to assign a right of action vested in him as office-holder. For the litigator and the courts it will be intriguing to see the extent to which this power is used. Given the importance in the insolvency landscape of administration, the extension of claims for fraudulent and wrongful trading to administrations is significant in this connection. Office-holders have been understandably reluctant to pursue such claims themselves, and for so long as the proceeds of any successful claim formed part of the company's assets there was little incentive for creditors, however incensed with the manner in which the company's pre-insolvency affairs had been administered, to fund the bringing of office-holder claims. This is now changed. A third party may take an assignment and keep the proceeds, subject to the agreement he makes with the office-holder. In the majority of cases there will be sufficient uncertainty in the success of any particular claim to justify an assignment at a relatively low premium making it a sufficiently attractive proposition to encourage the use of these provisions.

If the market in office-holder claims assignment does indeed take off, the focus will turn to the ability of the courts to handle the additional work with reasonable expedition. Waiting times both for interim and final hearings are at present not what most courts would wish. It is plain that whoever wins the forthcoming election there will be considerably increased pressure on HMCTS budgets, so the outlook for improvement in a generally unsatisfactory situation is not exactly bright. Litigants can rely on the Chancellor to do whatever can be done to reduce waiting times, but the background is not favourable.

Which areas of the reforms are likely to concern lawyers (if any)?

Lawyers should not be concerned, in the sense of being uneasy, at any of the changes resulting from SBEEA 2015. The assignment of office-holder actions should interest lawyers, especially where the office-holder is agreeable to assigning the claim for a percentage of recovery (after costs) as opposed to the payment of a fixed sum. Experience in other fields of litigation is hardly comparable but is generally encouraging.

Other than the above, the more technical changes, the removal of the need for sanction for the liquidator (or trustee) exercising his IA 1986, Sch 4 (or 5) powers, the removal of the need to hold physical meetings, the extension of an administrator's term of office, and the ability of an office-holder to pay small debts without formal proof, will reduce the need (such as it is) for legal advice on technical matters.

Which areas of reform are likely to concern IPs (if any)?

An essential element of the 1986 legislation—the requirement for properly qualified and regulated IPs—has worked well. England and Wales have avoided the scandals encountered in continental countries involving IPs and judges, and not only because of the quality of our judiciary. Nonetheless, IPs have to steady themselves for choppy waters ahead both on fees and regulation. The changes to fees were coming without SBEEA 2015, and it remains to be seen whether the requirement to provide additional information to creditors will in fact reduce overall fee levels or whether, as is regrettably the case in much of the smaller civil litigation, it will have no or even the reverse effect.

Small Business Enterprise and Employment Act 2015 brings in a new regulatory regime, and brings insolvency work into line with other areas of life where broadly stated and high-minded regulatory objectives are the order of the day. The new recognised professional bodies (RPBs) (SBEEA 2015, s 137) are given 'regulatory objectives' (hardly new but newly stated) to provide a framework within which their regulatory functions are to be carried out (SBEEA 2015, s 138). As the explanatory notes to SBEEA 2015 (para 780) state: 'At present, these do not exist in law'. Why, it may be asked, after almost 30 years of the new regime? How did we manage? But this is the tide that is flowing strongly, and any suggestion that the profession managed well without such a statutory framework must be consigned to a misplaced eddy. These regulatory objectives are intended to ensure that:

- the RPBs have a system of regulating IPs that:
    - delivers fair treatment for persons affected by an IP's acts and omissions,
    - reflects the regulatory principles that the RPB's regulatory activities are transparent, accountable, proportionate, consistent and targeted, and
    - ensures consistent outcomes,
- the RPBs are encouraging an independent and competitive IP profession, whose members deliver high quality services at a fair and reasonable cost, act with transparency and integrity and consider the interests of the creditors in the case,
- IPs seek to maximise returns to creditors and are prompt in making those returns, and
- the public interest is protected and promoted during the insolvency process.

The concern of IPs must be that on the one hand any professional who misbehaves is caught and dealt with firmly, and on the other hand that

monitoring for regulatory purposes is concerned more with substance than form. IPs face a torrent of time limits which they must take seriously. They will appreciate that it is easier for a monitor to pick up on actions taken a day or two late than on an asset sale pursued with less diligence than might have been employed and, by the same token, less credit given for a sale achieving a higher price than might reasonably have been expected. At the end of the day there is no escaping the fact that effective regulation requires monitors both to put in the necessary hard work and to exercise sensible judgment. The present regime has done pretty well and, while there can never be cause for complacency in this area, IPs are entitled to hope that the changes in statutory background will not lead to any more intrusive monitoring than exists at present. They can have no realistic expectation, however, that the cost associated with being an IP will not rise just at a time when there is to be pressure on fees. Doubtless the profession as a whole will manage.

The technical changes referred to above will surely be welcomed by IPs. The changes continue an updating process began with the 2010 amendment rules and which, it may reasonably be expected, will continue without lagging too far behind technological change.

(7) One minute with Alison Curry at the Insolvency Practitioners Association

Alison Curry, head of regulatory standards and support at the Insolvency Practitioners Association, discusses the new SIP 16 and how it will work in practice.

What is the current status of the new SIP 16?

The new SIP has been through a lengthy process of refinement and is now in its final approval stages with the recognised professional bodies (RPBs). The Joint Insolvency Committee is looking at an issue date of 1 June 2015, with an effective date of 1 July 2015, to give the Pre-Pack Pool Steering Group time to complete their work in setting up the new pre-pack pool.

What changes will the new SIP 16 make to pre-pack sales in administration?

The most significant change is in respect of the increased emphasis placed on the marketing of the business and the adoption of Teresa Graham's six 'marketing essentials'. Other significant changes include requiring the insolvency practitioner (IP) to make a prospective connected party purchaser aware of their ability to approach the pre-pack pool and the potential for enhanced stakeholder confidence from the connected party approaching the pre-pack pool and preparing a viability statement for the purchasing entity. There is also a stipulation that any valuations obtained

should be carried out by appropriate independent valuers and/or advisors, carrying adequate professional indemnity insurance.

Throughout the SIP, there is generally a shift towards a 'comply or explain' methodology.

How will the pre-pack pool work?

The intention is that in cases involving connected parties, the prospective purchaser will be encouraged to approach the pool for an independent opinion on whether the transaction is appropriate and in creditors' best interests. The pool member's view will not be binding on the administrator, but will form part of the SIP 16 disclosure. The opinions will be in the form of one of two standards outcomes, either a 'no reason not to proceed' letter or in the alternative a letter indicating that the pool member has not seen sufficient evidence to make that statement.

Which provisions are likely to concern IPs most?

The intention of the SIP is to tackle creditor distrust of pre-packs with increased transparency.

However, consistently, IPs have expressed some concerns about the difficulties that may be encountered in marketing a business while avoiding the damage that might flow from publicity of an impending insolvency. The new SIP significantly reinforces the emphasis placed on appropriate marketing and there will be an onus on practitioners to justify departures from the marketing essentials. We would anticipate the need for more transparent marketing to be the most challenging area for practitioners.

What practical guidance will be available?

The SIP itself is a standalone document for IPs to follow when considering a pre-packaged sale. Additional guidance for potential users of the pre-pack pool is being prepared in the form of a Q&A explaining that process for them in greater detail. We intend to include both documents within the latest edition of our handbook.

When and where is the new IPA handbook available and what does it cover?

Our handbook is scheduled for publication in July 2015 and will include the Code of Ethics for Insolvency Practitioners, the latest statements of insolvency practice (including SIP 16), insolvency guidance papers, our technical helpsheets and other non-statutory regulation and guidance, such as our PII and client money regulations.

The Insolvency Practitioners' Handbook is a 'one-stop-shop' for IPs and their professional advisers and will be available via the Lexis online bookstore and as an ebook.

(8) Bankruptcy petitions—are you being served?

How important is it to be properly served with a bankruptcy petition? Steven Thompson QC, a barrister at XXIV Old Buildings, who represented the petitioners in *Gate Gourmet Luxembourg IV Sarl v Morby* [2015] EWHC 1203 (Ch), [2015] All ER (D) 117 (May), says the court's decision in this case shows a defect in the service of a petition can be waived but points out the importance of ensuring it has a court office stamp date on it.

The Chancery Division made a bankruptcy order in respect of the respondent, having considered issues of jurisdiction, service and security.

What was the background to the hearing briefly?

A few years ago Mr Morby sold a group of companies to Gate Gourmet for several million pounds. However, a tax dispute arose after the sale and Gate Gourmet brought proceedings against Mr Morby. The proceedings were settled. Under its terms Mr Morby agreed to pay Gate Gourmet two tranches of money—he paid the first tranche but not the second. The debt was secured by a second charge over a property owned by Mr Morby in the south of France. Gate Gourmet issued a statutory demand which Mr Morby sought to set aside on the basis that Gate Gourmet had the charge. There was an issue about the extent of any equity in the house but Mr Morby refused to let a valuer into his house. Mr Morby appeared in person in the county court, but it dismissed the challenge to the demand. The same day, Gate Gourmet presented the bankruptcy petition.

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

There were three issues:

- did the court have jurisdiction,
- was Mr Morby properly served, and
- did the existence of the charge preclude a bankruptcy order.

What were the main legal arguments put forward?

As to jurisdiction, Gate Gourmet said that the court had jurisdiction on any or all of three bases:

Presence in the country

Mr Morby was in the country on the date of presentation of the petition. The petition had been presented on the same day as the dismissal of the application to set aside the statutory demand. Mr Morby alleged that he was not in England that day, despite having been in the county court. But later he changed his story and said that he had made a mistake. Now he

said he had been in England on that day, but he had not been in the country three days later. The petition was presented on the earlier date, but it was only three days later that the High Court had date-stamped it with the endorsement. The issue turned on what the court had stamped and written on the petition. Gate Gourmet filed evidence that it had presented the petition on the earlier date, which was also clear from the face of the petition, albeit the later date was marked on the endorsement.

Being domiciled in England

Gate Gourmet said Mr Morby was domiciled in England. Mr Morby said that he was domiciled in Dubai but on the basis of transient employment and accommodation. Gate Gourmet argued on the facts that Mr Morby was domiciled in England.

Carrying on business in England

Gate Gourmet argued that Mr Morby remained carrying on business in England while he had outstanding business debts. *Re A Debtor (No 784 of 1991)* [1992] Ch 554, [1992] 3 All ER 376 is authority for the principle that a person does not cease to carry on business until their business debts are settled. Mr Morby had not settled his debts payable pursuant to the settlement of the litigation arising out of the sale of his companies to Gate Gourmet.

As to service, Gate Gourmet knew that Mr Morby lived in Dubai. Mr Morby agreed to meet a process server at Heathrow airport for the purposes of service. The process server, who had seen him at the county court hearing, handed him the petition personally. According to the process server, Mr Morby handed the petition to his friend who then complained that the address on the petition was wrong and tried to give it back to the process server. The process server said he could not take it back and Mr Morby‘s friend then threw it in the bin. Mr Morby claimed that he had not been personally served, but that the process server had given the petition to his friend.

Gate Gourmet also argued that under IR 1986, SI 1986/1925, r 7.55 (IR 1986) any defect of service as alleged could be waived. There are conflicting decisions on this in the High Court: some cases say that service is so important a concept in bankruptcy that the court cannot waive any defect. But other decisions put less weight on the formality of service and that seems in line with the modern approach to the mechanics of service generally.

Gate Gourmet also submitted the court could retrospectively give permission for substituted service following the thinking in *Abela v Baadarani* [2013] UKSC 44, [2013] All ER (D) 249 (Jun). Under the Civil Procedure Rules 1998 (CPR 1998), SI 1998/3132 there is more flexibility than under the IR 1986.

What did the Registrar decide, and why?

The Registrar held that the court had jurisdiction over the petition, on each and all of the three bases:

- he had been present in England on the day of presentation of the petition,
- he was domiciled in England, and
- he was carrying on business here.

As this last point, the Registrar found that 'it would be a strange result if Mr Morby was able to claim that even though there had not been finality in relation to his dealings … he was not carrying on business' and that 'he continues to carry on business as a result of the share purchase agreement and the litigation arising out of it'.

There was no dispute that there were minor errors on the face of the petition but that could not invalidate it or render service ineffective. There was a straight conflict of fact as to who had been served by the process server. There was no order for cross-examination on the statement, and the Registrar declined to resolve the dispute on the papers. However, the Registrar held that good personal service was achieved by the process server giving the petition to Mr Morby's friend, at Mr Morby's request, at an appointment he had made specifically to be served, while he stood there watching him.

So the Registrar agreed that the petition had in fact been personally served and, further, the court had power to waive the defect and that, if there was one, he should do so in this case.

The Registrar declined to read the ambit of the IR 1986 to permit retrospective substituted service.

The issue of security was not really fought in the end. The Registrar noted that evidence suggested that there was no equity left in the French property after the first charge. He also held that in any event the petition had the requisite statement making it clear that Gate Gourmet was not relying on the secured element of the debt.

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

This case follows the recent thinking on IR 1986, r 7.55. There are conflicting cases about whether the court can waive a defect in service of a bankruptcy petition and this is a clear decision that says the court can do so. It is also clear that the IR 1986 are more restrictive than CPR 1998, but noteworthy that the Registrar recommended that the Rules Committee consider extending the IR 1986 to follow the CPR 1998. It also

indicates a common-sense approach to personal service, suggesting that it does not necessarily entail handing a document literally into the hands of the debtor.

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

When you present a petition make sure that the court office date-stamps it and put the right date on it, but when you serve a debtor personally do not worry too much if they ask the process server to hand it to someone else standing next to them.

CASE LAW

(1) Comite d'entreprise de Nortel networks SA v Rogeau [2015] All ER (D) 143 (Jun), C-649/13

In the Court of Justice of the European Union (First Chamber), before Judges Tizzano (President of the Chamber), Borg Barthet, Levits, Berger (Rapporteur) and Biltgen.

European Union – Insolvency proceedings – Interpretation of regulation – Nortel group opening main insolvency proceedings in United Kingdom and subsequent secondary insolvency proceedings in France – Whether France having exclusive jurisdiction or concurrent jurisdiction with UK to rule on determination of Nortel's assets falling within scope of effects of those secondary proceedings – Determination of law applicable to rule on Nortel's assets falling within scope of effects of secondary insolvency proceedings – Council Regulation (EC) 1346/2000, arts 2(g), 3(2), 27.

Facts:

The Nortel group was a provider of technical solutions for telecommunications networks. Nortel Networks Ltd (NNL), established in Mississauga (Canada), held the majority of the Nortel group's worldwide subsidiaries, including the applicant (NNSA), established in Yvelines (France). Almost all the intellectual property resulting from the research and development activities of the Nortel group's specialist subsidiaries was registered, mainly in North America, in the name of NNL, which granted those subsidiaries, including NNSA, free exclusive licences to exploit the group's intellectual property. Those subsidiaries were also to retain beneficial ownership of that intellectual property, in a proportion based on their respective contributions. An intra-group agreement, known as the 'Master R&D Agreement' (the MRDA), organised the legal relationships between NNL and those subsidiaries. Since the Nortel group was experiencing serious financial difficulties in 2008, its executives decided to arrange for the opening of insolvency proceedings simultaneously in Canada, the United States and the European Union. By order of 14 January 2009, the Chancery Division of the High Court of Justice of

England and Wales opened main insolvency proceedings under English law in respect of all the companies in the Nortel group established in the EU, including NNSA, pursuant to art 3(1) of Council Regulation (EC) No 1346/2000 (on insolvency proceedings) (Regulation 1346/2000). Following a joint application lodged by NNSA and the joint administrators, by judgment of 28 May 2009, the Commercial Court, Versailles, France (the referring court) opened the secondary proceedings in respect of NNSA and appointed the respondent, R, as liquidator in those proceedings. On 1 July 2009, a protocol coordinating the main and secondary proceedings was signed by the persons responsible for the two sets of proceedings (the coordinating protocol), under which, in particular, the administration expenses had to be paid in full, in priority, wherever the assets sold were situated. By judgment of 24 September 2009, the referring court approved, inter alia, the coordinating protocol and a memorandum of agreement settling an action relating to industrial action at NNSA. That agreement had provided for the making of a severance payment of which one part was payable immediately and another part, known as the 'deferred severance payment' (the deferred SP), was to be paid, once operations had ceased, out of the available funds arising from the sale of assets, after payment of the costs resulting from continuance of NNSA's activities during the main and secondary proceedings and of the administration expenses. In order to secure a better price for the Nortel group's assets, the administrators and liquidators in the various insolvency proceedings throughout the world agreed to sell those assets on a global basis, by branch of activity. Under an agreement entitled 'Interim Funding and Settlement Agreement' (the IFSA), concluded on 9 June 2009 between NNL and a number of subsidiaries in the Nortel group, those subsidiaries would at the appropriate time waive their industrial and intellectual property rights covered by the MRD. Pursuant to the IFSA, the proceeds from sale of the Nortel group's assets would be placed in escrow accounts (the lockbox) with credit institutions established in the US and none of the sums paid into the lockbox could be distributed without an agreement concluded by all the relevant entities in the group. NNSA became a party to the IFSA by means of an accession agreement concluded on 11 September 2009. The sale proceeds had been blocked as was provided for by the IFSA, but no agreement had yet been reached concerning their allocation. On 23 November 2010, a report drawn up by R in the context of the secondary proceedings showed a credit balance of €38,980,313 in the bank accounts of NNSA as at 30 September 2010, and it was accordingly possible to consider making a first disbursement of the deferred SP from May 2011. However, after having been given notice to proceed by the works council of NNSA, R informed it, by letter of 18 May 2011, that he was unable to give effect to the terms of the memorandum settling the action as a cash-flow forecast showed a deficit of nearly €6m, in particular because of several requests for payment from the joint administrators in respect, inter alia, of the costs resulting from

continuance of the activities of the Nortel group during the proceedings and from the sale of certain assets. Contesting that state of affairs, the works council of NNSA and former NNSA employees brought an action before the referring court, seeking, firstly, a declaration that the secondary proceedings gave them an exclusive and direct right over the share of the overall proceeds from the sale of the Nortel group's assets that fell to NNSA and, secondly, an order requiring R, as court-appointed liquidator, to make immediate disbursement, in particular, of the deferred SP, to the extent of the funds available to NNSA. Subsequently, R summoned the joint administrators as third parties before the referring court. However, they requested the referring court, in particular, to decline international jurisdiction, in favour of the High Court of Justice of England and Wales, Chancery Division. In the alternative, the joint administrators requested the referring court, in particular, to decline jurisdiction to rule on the assets and rights which were not situated in France for the purposes of art 2(g) of Regulation 1346/2000 when the judgment opening the secondary proceedings was delivered. The referring court stated that, in order to rule on the claims before it, it would have to rule first on its jurisdiction to determine the scope of the effects of the secondary proceedings. It further considered that it would be required to determine whether the effects of secondary proceedings could extend to the debtor's assets situated outside the EU. In those circumstances, the referring court stayed the proceedings and referred a question to the Court of Justice of the European Union (the Court) for a preliminary ruling.

By the first part of its question, the referring court asked, in essence, whether arts 3(2) and 27 of Regulation 1346/2000 should be interpreted as meaning that the courts of the member state in which secondary insolvency proceedings had been opened had exclusive jurisdiction, or concurrent jurisdiction with the courts of the member state in which the main insolvency proceedings had been opened, to rule on the determination of the debtor's assets falling within the scope of the effects of those secondary proceedings. By the second part of its question, the referring court asked, in essence, which law was applicable to the determination of the debtor's assets that fell within the scope of the effects of secondary insolvency proceedings.

Held:

(1) Articles 3(2) and 27 of Regulation 1346/2000 should be interpreted as meaning that the courts of the member state in which secondary insolvency proceedings had been opened had jurisdiction, concurrently with the courts of the member state in which the main proceedings had been opened, to rule on the determination of the debtor's assets falling within the scope of the effects of those secondary proceedings (see **[46]** of the judgment).

(2) It was apparent from art 2(g) of Regulation 1346/2000 that, for the purposes of that regulation, the 'Member State in which assets are situated' was, in the case of tangible property, the member state within the territory of which the property was situated, in the case of property and rights ownership or of entitlement to which should be entered in a public register, the member state under the authority of which the register was kept and, finally, in the case of claims, the member state within the territory of which the third party required to meet them had the centre of his main interests, as determined in art 3(1) of that regulation. In order to identify the assets falling within secondary insolvency proceedings, it was sufficient to establish whether, on the date of the opening of the insolvency proceedings, the assets were situated, within the meaning of art 2(g) of Regulation 1346/2000, within the territory of the member state in which those proceedings had been opened, and it was not relevant in that regard to determine, as the case might be, in what other state those assets were situated at a subsequent stage (see **[51]**, **[53]** of the judgment).

The debtor's assets that fell within the scope of the effects of secondary insolvency proceedings had to be determined in accordance with art 2(g) of Regulation 1346/2000 (see **[55]** of the judgment).

(2) Re Kingstons Investments Ltd (in Creditors' Voluntary Liquidation); subnom Adlon Ltd v Sale (as Liquidator of Kingstons Investments Ltd) [2015] All ER (D) 122 (Jun), [2015] EWHC 1619 (Ch)

In the Chancery Division, Companies Court before Registrar Barber.

Company – Insolvency – Creditors' voluntary liquidation – Company entering into creditors' voluntary liquidation – Applicant creditor of company submitting proof of debt for voting at creditors' meeting – Sum including judgment debt against company and remaining half of retention outstanding under JCT contract (moiety) – First respondent liquidator of company and chairman of creditors' meeting admitting applicant, for voting purposes, for lower sum than sum applicant contending should have been admitted (decision) – Decision resulting in defeat of resolution for appointment of joint administrator – Applicant applying to set aside or vary decision – Whether liquidator erring – Whether applicant establishing moiety claim – Whether moiety claim provable debt in liquidation – Whether application should be allowed – Insolvency Rules 1986, SI 1986/1925, r 4.70.

Facts:

The proceedings concerned a company (the company) in creditors' voluntary liquidation (CVL). The applicant (Adlon) was a creditor of the company. The first respondent (S) was the sole liquidator of the company. The second respondent was one of two directors of the company and

claimed to be a creditor of the company. Adlon and the company had entered into a JCT contract for the design and construction of a development in London. A dispute arose when the company defaulted in making interim payments in respect of agreed and certified sums following practical completion, and failed to make the remaining half of a 3% retention that was due under the contract (the moiety). The dispute was referred to adjudication and Adlon was awarded the sum of £313,869.55 (the award). The company failed to pay that sum and Adlon brought a claim to enforce the award. The company filed evidence in opposition, including a witness statement of its solicitor (V), setting out an intended claim in the sum of £312,489.60, by the company against Adlon, for alleged defective workmanship. The enforcement proceedings were settled by a consent order, in which the company agreed to a judgment being entered against it in the principal sum with interest (the judgment debt). The company failed to pay the judgment debt. Preparations were made for it to enter into a creditors' voluntary liquidation and to hold a meeting of creditors, pursuant to s 98 of the IA 1986 (the s 98 meeting). Adlon presented a petition to wind up the company based on the judgment debt and on an additional claim of £809,153.47 for delay damage loss and expense (the DDLE claim). In advance of the s 98 meeting, Adlon submitted its proof of debt for voting at the meeting in the sum of £1,214,237.51, which included the judgment debt and the moiety. At the s 98 meeting in January 2014, the second defendant, acting as chairman, only admitted Adlon's claim for voting purposes in respect of the judgment debt. S was voted as liquidator. A further creditors' meeting was held on 5 March 2014 to consider and vote on a resolution for the appointment of a joint liquidator. At that meeting, S, as chairman, admitted the judgment sum of £361,575.65 in full. However, in relation to the DDLE claim of £809,153.44 (excluding VAT), S applied a set off in the sum of £312,489.60 (inclusive of VAT), namely the sum which the company claimed to be due from Adlon in respect of alleged defective work. In respect of Adlon's moiety claim of £43,508.38, S admitted the claim for £1. It was contended that, in so doing, S, in the purported exercise of a 'discretion', appeared to place 'a minimum value' of £1 on the moiety part of the claim for voting purposes. In other words, S had treated the moiety claim as an unliquidated claim rather than a liquidated claim, and had applied r 4.67(3) of the Insolvency Rules 1986, SI 1986/1925, which provided that 'A creditor shall not vote in respect of a debt for an unliquidated amount, or any debt whose value is not ascertained, except where the chairman agrees to put upon the debt an estimated minimum value for the purpose of entitlement to vote and admits his proof for that purpose', rather than r 4.70(3) of the Rules, which provided that: 'If the chairman is in doubt whether a proof should be admitted or rejected, he shall mark it as objected to and allow the creditor to vote, subject to his vote being subsequently declared invalid if the objection to the proof is sustained.'. In the result, Adlon was allowed

to vote for a total sum of £858,240.52, with the effect that the resolution for the joint appointment was defeated. Adlon maintained that it should have been admitted as a creditor for voting purposes in a sum of at least £901,747.90. It applied for an order, under r 4.70(2) of the Rules, varying or setting aside the decision. Adlon also sought an order appointing an individual, K, as joint liquidator of the company, on the basis that, had it been admitted for voting purposes in the sum of £901,747.90, it would have carried a creditors' resolution appointing S.

The issues for consideration were, among other things: (i) whether the chairman had misdirected herself in her treatment of the moiety; (ii) whether Adlon could make out its case of entitlement to the moiety; and (iii) the way forward in the event that it had. The question arose whether the moiety claim was a provable debt under the Rules (see r 13.12(3) of the Rules). Adlon submitted that entitlement to the moiety, as a future debt, at the date of the meeting, was clearly established on the evidence. The respondents submitted that the moiety claim was, as at the date of the meeting of 5 March 2014, met or extinguished by way of a set off or cross claim. Consideration was given to r 4.90, the role of the court on an appeal under r 4.70 of the Rules and to Lord Hoffman's comments on the rule in *Stein v Blake* [1995] 2 All ER 961. Adlon further submitted that a chairman could not reject or reduce a liquidated claim for voting purposes on the basis that it might be reduced or extinguished by a cross claim. In that regard, it relied upon the case of *Emery v UCB Corporate Services Ltd* [1999] BPIR 480. The second respondent, relying on the automatic and mandatory nature of insolvency set off in *Stein v Blake*, contended that Emery v UCB had not direct application to the present case. He contended that *Emery v UCB*, insofar as it was based on the 'logically prior point' should be distinguished.

Held:

(1) The rules on the admission or rejection of proofs for voting at a meeting of creditors in creditors' voluntary liquidation were set out in rr 4.67–4.70 of the Rules. With regard to liquidated claims, the position was governed by r 4.70(3). The chairman of a creditors meeting of a company in CVL would not be precluded by operation of the 'logically prior point' identified in *Emery v UCB* from rejecting a liquidated claim for voting purposes in the light of a set off or cross claim which clearly equalled or exceeded it. Where the chairman was in any doubt, however, r 4.70(3) prevailed. If the chairman had a doubt about a creditor's liquidated claim, he should not reject it. He should instead allow it for voting, but mark it as objected to. Where the chairman was in any doubt, however, r 4.70(3) prevailed. Rule 4.90 and Lord Hoffman's comments thereon in *Stein v Blake* could not and did not displace the clear wording of r 4.70(3). In *Stein v Blake*, Lord Hoffman acknowledged that for certain purposes, claim and cross claim in insolvency cases had to

continue to be considered separately. It was settled law that the task of the court, on an appeal, under r 4.70(4) of the Rules, was simply to examine the evidence placed before it on the matter and come to a conclusion whether, on balance, the claim against the company was established and, if so, in what amount. In undertaking that task, the court was not confined to the evidence that had been before the chairman at the time that he made his decision, but was entitled to consider whatever admissible evidence on the issue the parties to the appeal chose to place before the court, excluding evidence of events subsequent to the meeting. The onus of demonstrating that the chairman's decision was wrong and should be reversed or varied lay on the creditor mounting the appeal. The scope of the factual enquiry to be undertaken by the court on the hearing of an appeal under r 4.70 had to depend in part upon the scope of the appeal. The ultimate question for the court was simply whether or not the debt existed as at the date of the meeting, a question determined by considering the scope of certain contractual documentation, earlier court orders, and certain correspondence. The court should take active steps to ensure that such appeals were resolved timeously and efficiently and that the scope of any factual enquiry was kept to the minimum required in order justly to dispose of the matter. Rule 4.70(4) of the Rules provided that, if, on appeal, a chairman's decision was reversed or varied or a creditor's vote was declared invalid, the court might order that another meeting be summoned or make such order as it thought just. Whether a further meeting should be summoned was a matter of judicial discretion (see **[109]**, **[111]**, **[114]**, **[117]**, **[127]**, **[129]**, **[133]**, **[134]**, **[136]**, **[140]**, **[163]**, **[181]**–**[182]** of the judgment).

Applying settled principles to the facts, S had misdirected herself in her treatment of the moiety. On the evidence, she had: (i) admitted the (liquidated) judgment sum of £361,575.65; (ii) treated the (liquidated) moiety claim of £43,508.38 as an unliquidated rather than a liquidated claim and, in purported pursuance of r 4.67(3), placed a minimum value of £1 on it for voting purposes; and (iii) having applied a set off of £312,489.60 against the (unliquidated) DDLE Claim of £809,153.47, had placed a value of £496,663.87 on it for voting purposes. Accordingly, S had erred in her application of r 4.67(3) to the moiety claim. As it was a liquidated claim, she had three options: (i) to admit it; (ii) to reject it; or (iii) if she had been in doubt whether it should be admitted or rejected, to mark it as objected to and allow Adlon to vote in respect of it. In purporting to exercise 'discretion' and placing a minimum value of £1 upon it, she had misinterpreted the Rules (see **[131]**, **[132]**, **[178]** of the judgment).

Debtor, a (No 222 of 1990), *Re, ex p Bank of Ireland* [1992] BCLC 137 applied; *Cranley Mansions Ltd, Re, Saigol v Goldstein* [1995] 1 BCLC 290 applied; *Company, a (No 004539 of 1993), Re* [1995] 1 BCLC 459 applied; *Emery v UCB Corporate Services Ltd* [1999] BPIR 480 applied; *Stein v*

Blake [1995] 2 All ER 961 explained; *Swissport (UK) Ltd v Aer Lingus Ltd* [2007] All ER (D) 197 (May) considered; *Power Builders (Surrey) Ltd, Re* [2008] All ER (D) 319 (Oct) considered; *Re Mercury Tax Group Ltd (in administration)* [2011] BPIR 480 considered; *Revenue and Customs Comrs v Portsmouth City Football Club Ltd (in administration)* [2011] BCC 149 considered.

(2) On the evidence, Adlon had, on the balance of probabilities, established its claim against the company in respect of its entitlement to the moiety as a future debt as at the date of the meeting of 5 March 2014. The fact that the moiety was repayable in the future, at the end of the rectification period (12 months after practical completion) did not prevent it from being a provable debt for voting purposes. By virtue of r 13.12(3) of the Rules, debts in that context included debts or liabilities which were present or future, certain or contingent. Under the Rules, the moiety claim was a provable debt. The defendants' contention that the moiety claim had been, as at the date of the meeting of 5 March 2014, met or extinguished by way of a set off or cross claim was not made out on the evidence. The full amount of the alleged cross claim indicated by V's statement (namely, £312,489.60, inclusive of VAT) had already been applied by way of set off against the DDLE claim and there was no appeal from S's decision in respect of the balance of the DDLE claim. It had not been open to the respondents, therefore, to use the figure of £312,489.60 again, by way of set off against the moiety claim. Taking the sum of £858,240.52, in respect of which Adlon was allowed to vote, together with the moiety claim, it followed that, at the meeting of 5 March 2014, Adlon should have been permitted to vote in respect of a minimum sum of £901,747.90. Had it been permitted to do so, K would have been appointed as joint liquidator (see **[170]**–**[174]**, **[179]**–**[181]** of the judgment).

(3) Given S's declared stance and given also the misguided nature of it, there was a very high likelihood that a further meeting would simply result in yet more litigation, delay and expense, in the context of an insolvency with no assets save for two or three possible claims. In those circumstances, it seemed that the court should dispense with a meeting of creditors and should simply order the appointment of a joint liquidator (see **[212]**, **[213]** of the judgment).

The appropriate course was to allow the appeal and, subject to K filing a further consent to act as joint liquidator, in accordance with r 4.102(2), by the time of handing down of the present judgment, to order that K be appointed as joint liquidator (see **[221]** of the judgment).

Jamie Riley (instructed by Barker Gillette LLP) for Adlon.

Kevin Shannon (instructed by Cameron Legal Ltd) for S.

Matthew Weaver (instructed by KW Law LLP) for the company.

(3) Re Glenn Maud; subnom Maud v Libyan Investment Authority [2015] All ER (D) 101 (Jun), [2015] EWHC 1625 (Ch)

In the Chancery Division before Mrs Justice Rose.

Insolvency – Statutory demand – Setting aside statutory demand – Applicant applying to set aside statutory demand served on him by respondent Libyan Investment Authority – Whether applicant should be granted permission to extend time for applying to set aside statutory demand – Whether payment out by applicant under guarantee being prohibited under sanctions regime – Whether, if prohibited, applicant being precluded from relying on illegality of payment under guarantee due to failure to apply for licence from HM Treasury – Insolvency Rules 1986, SI 1986/1925, r 6.4 – Council Regulation (EU) 204/2011, regs 5, 9, 12.

Facts:

The applicant applied, under r 6.4 of the Insolvency Rules 1986, SI 1986/1925, to set aside a statutory demand served on him by the respondent Libyan Investment Authority (the LIA). By the statutory demand, the LIA claimed that the applicant owed it over £17m, pursuant to the terms of a guarantee. Because the application to set aside was made out of time, the LIA had already presented a bankruptcy petition, which, at the time of the present proceedings, stood adjourned. The applicant did not dispute that he had entered into the guarantee and that the principal debtor, his company, had defaulted. He accepted that the guarantee was overdue as from 2 March 2010 and that, at the time of the present proceedings, he did not have the money to pay the debt. He sought to set aside the demand on the grounds that any payment of the amount due would amount to a breach of the sanctions regime in place at the time of the present proceedings, prohibiting people in certain circumstances from dealing with the LIA. In particular, he contended that, given that the words 'all funds and economic resources' in art 5(4) of Council Regulation (EU) 204/2011 (concerning restrictive measures in view of the situation in Libya) (the Regulation) were given the very wide definition in art 1 of the Regulation, the guarantee was frozen and he would be in breach of the prohibition imposed in art 5(4) if he paid it. To express the same argument in terms of the Libya (Asset-Freezing) Regulations 2011, SI 2011/605 (the domestic Regulations), he argued that he would be in breach of reg 3(1A) if he made the payment under the guarantee and hence would be committing an offence under reg 10(1). He therefore contended that the debt was substantially disputed or, alternatively, that the illegality of any payment under the sanctions regime constituted 'other grounds' on which the court should be satisfied that the demand should be set aside.

The issues for determination, were, first, whether the applicant should be granted permission to extend time for applying to set aside the statutory demand. Second, whether the payment out by the applicant under the guarantee was prohibited under the sanctions regime. The LIA submitted that the opening words of art 5(4) of the Regulation did not include within the term 'funds' the obligation of the applicant under the guarantee, because that obligation was of the kind that would fall naturally within the 'making available' prohibition, rather than within a freezing prohibition. The LIA contended that, since it was no longer subject to a 'making available' prohibition, but only to the limited freezing prohibition in art 5(4) of the Regulation, there was nothing to stop the applicant paying out under the guarantee. The LIA further identified a conundrum relating to the operation of art 9(1) of the Regulation. If the applicant was right that the obligations on third parties to pay (as well as the right of the targeted entity to receive) money under those contracts was subject to the freezing prohibition, rather than just the 'making available' prohibition, then art 9(1)(b) could never be relied on by a targeted entity or its contracting counterparty, because the payment under the contract would be a breach of art 5(1) from which there was no derogation conferred by art 9(1). The court also considered whether the immunity conferred by art 12 of the Regulation applied to prevent the court from allowing the statutory demand. Third, if it was prohibited, whether the applicant was precluded from relying on the illegality of the payment under the guarantee because he had failed to apply for a licence from Her Majesty's Treasury.

Held:

The application would be allowed.

(1) The reason why the time for the making of the application would be extended was that there was a public interest as well as the private interest of the applicant in ensuring that the sanctions regime was observed. The substantive issue of the applicability of the regime to the applicant's obligation under the guarantee would need to be resolved at some stage of the bankruptcy proceedings. It could not be allowed to go by default because that would risk opening a crack in the regime through which other parties who wished to collude with each other to manipulate the bankruptcy process in order to evade the regime could slip (see **[30]** of the judgment).

Debtor, a (No 1 of 1987, Lancaster), *Re, ex p Debtor v Royal Bank of Scotland plc* [1989] 2 All ER 46 considered.

(2) The term 'funds and economic resources' had to mean the same thing in the three places that it was used in art 5 of the Regulation. There was no indication that it was intended to have a different and narrower content where it was used in art 5(1) and 5(4) compared to its use in

art 5(2). Similarly, there was no indication in art 1(a)(v) of the Regulation that the draftsman had intended to draw a fine distinction between the different elements of the guarantee; the obligation on the guarantor to pay on the one hand and the chose in action in the hands of the targeted entity on the other. The very wide definition of 'freezing of funds' in art 1(b) of the Regulation included any alteration in funds which would result in any change in their character or other change that would enable the funds to be used. That was entirely apt to describe the conversion of the contingent rights under a guarantee into cash once the principal debtor had defaulted and liability under the guarantee had arisen. In construing art 12 of the Regulation, it had to be borne in mind that the provision had to be applied in all the member states. Court procedures differed greatly between member states and it was likely that the procedures for personal insolvency did too. The service of a statutory demand was covered by the reference to a 'claim under a guarantee' in art 12 and a refusal of the court to set aside that statutory demand on the debtor's application amounted to a satisfaction of that claim for the purposes of art 12. Article 12 was not limited to judgments following court proceedings. There were other provisions in the Regulation, such as art 5 which referred expressly to judgments and the use of the words 'claims' in art 12 had to encompass some earlier stage in proceedings (see **[42]**, **[47]** of the judgment).

The payment by the applicant of sums due under the guarantee was prohibited by art 5(4) of the Regulation and reg 3(1A) of the domestic Regulations. The conundrum identified by the LIA in art 9(1)(b) of the Regulation was real. However, the solution to it was much more straightforward. It had to mean that the payment of a frozen obligation into a frozen bank account did not amount to unfreezing it for the purpose of art 5(1) of the Regulation (or reg 3 of the domestic Regulations). It was unfortunate that the drafters of art 9 of the Regulation had referred only to a derogation from art 5(2) rather than from both art 5(1) and 5(2), but that omission could not support the weight of the chain of reasoning that the LIA sought to place on it. Article 12 of the Regulation was a further reason why the statutory demand should be set aside. The contract was affected by the sanctions regime (see **[43]**, **[46]**, **[47]** of the judgment).

(3) The question of upon whom the burden of applying for a licence to approve an otherwise prohibited transaction had to be answered by looking at the terms of the sanctions and licensing regime itself. HM Treasury could not grant a licence unless they could be satisfied that one of the exemptions conferred by the Regulation applied. Those exemptions depended on the purpose for which the unfrozen money was going to be used. Whether the money was going to be used for a purpose envisaged by the relevant articles of the Regulation was something exclusively within the knowledge of the Libyan entity. It did not make sense in that regime

for the burden of applying for a licence to lie on someone other than the Libyan entity which wanted the transaction to take place (see **[49]** of the judgment).

In the circumstances of the present case, the regime did not place a burden on the applicant to apply for a licence. Further, there was no reason to conclude in the present case that a licence would have been forthcoming. It would be wrong for the present court, with no knowledge of the overall position, to make an assumption about the likely use to which the money would be put or the likelihood of a licence being granted. Furthermore, the present case differed from the other earlier sanctions in previous authority, in that the relief sought in those cases had been the payment of money which would not, in itself, be a breach of the sanctions regime in issue. In the present case, the payment of the guarantee would of itself be unlawful and a breach of sanctions (see **[49]**–**[51]** of the judgment).

Accordingly, the applicant was not precluded from relying on the illegality of the payment under the guarantee because he had failed to apply for a licence from HM Treasury. His application would be granted and the statutory demand set aside (see **[52]** of the judgment).

Taylor & Co v Landauer & Co [1940] 4 All ER 335 distinguished; *Vidler & Co (London) Ltd v R Silcock & Sons* [1960] 1 Lloyd's Rep 509 distinguished.

Pushpinder Saini QC (instructed by Squire Patton Boggs (UK) LLP) for the applicant.

Jonathan Swift QC and Adam Al-Attar (instructed by Hogan Lovells International LLP) for the LIA.

(4) Re Pan Ocean Co Ltd; subnom Seawolf Tankers Inc v Pan Ocean Co Ltd [2015] All ER (D) 102 (Jun), [2015] EWHC 1500 (Ch)

In the Chancery Division, Companies Court before Mr Registrar Jones

Practice – Stay of proceedings – Variation – Court previously granting first respondent company recognition order and staying commencement of actions or proceedings against first respondent – Applicants seeking variation of order to permit arbitration proceedings – Whether stay should be lifted – Cross-Border Insolvency Regulations 2006, SI 2006/1030, Sch 1, arts 15, 20 – Insolvency Act 1986, s 130(2).

Facts:

The first respondent company entered into a pool agreement and a time charterparty with the applicants. Both agreements were governed by

English law and both contained agreements to refer disputes to arbitration in London. The court had previously recognised the first respondent company's rehabilitation proceedings in the Republic of Korea as foreign main proceedings. Accordingly, it granted a recognition order, under art 15 of Sch 1 to the Cross-Border Insolvency Regulations 2006, SI 2006/1030, and stayed the commencement of actions or proceedings against the company. The stay was a modification of the automatic stay that took effect upon recognition, subject to modification by the court, under art 20.1 of Sch 1 to the Regulations. The court's order provided that the stay might be lifted only with the consent of the Korean court-appointed receivers, including the officer holder, or with the English court's permission. The applicants applied, under art 20.6 of Sch 1 to the Regulations, for the variation of the recognition order insofar as it stayed the commencement of actions or proceedings against the company. They sought the variation to permit them to pursue their contractual claims against the company in arbitration proceedings in London. The application was made on the basis that the applicants would not seek to enforce any arbitration award or subsequent judgment against the company's assets without agreement of the office holder or further court order.

The issues for determination were: (i) whether it was too late to make the application and/or the order sought because of extant proceedings in Korea; (ii) whether the applicants' claims had merit, given the company's contention that the applicants' claims had to fail because art VIII of the pool agreement contained an ipso facto clause, such that the agreement automatically terminated when the rehabilitation proceedings had commenced; (iii) whether the claims the applicants wished to advance in arbitration required determination of issues of English law for which there was no established authority; and (iv) whether the stay should be lifted. Consideration was given to s 130(2) of the IA 1986.

Held:

The application would be allowed.

(1) The fact of the court proceedings in Korea was a relevant issue when deciding whether to exercise discretion to lift the stay. However, it was not a fact which prevented the application being determined (see **[23]** of the judgment).

(2) Under English law, contractual construction was based upon the meaning the words would convey, in the context of the agreement as a whole, to a reasonable man taking into account the admissible background facts which would reasonably have been available to the parties at the time of the contract (see **[29]** of the judgment).

Applying a literal construction, art VIII of the pool agreement applied to the rehabilitation proceedings. There was no reference to administration

or its equivalent. However, the proper approach to contractual construction needed careful consideration of alternative arguments and a decision upon construction could only be reached having heard, not just read, evidence of the facts surrounding the making of the pool agreement in order to apply an objective intention test. Accordingly, there was an arguable case which left a substantive claim for which full argument based upon such evidence was required (see **[29]**, **[30]** of the judgment).

Pan Ocean Co Ltd, Re; Fibria Celulose S/A v Pan Ocean Co Ltd [2014] All ER (D) 03 (Jul) considered.

(3) There was authority identifying the law to be applied to the issues of construction and enforceability of art VIII of the pool agreement. However, it was equally apparent that such authority required a full trial of the issues including oral evidence. Further, the application of the legal principles to the facts to be found by the trial judge would present a relatively difficult task, even for a court of English law and particular difficulty for a court in a different jurisdiction reliant upon expert evidence (see **[38]** of the judgment).

(4) The proper approach the court should take when lifting a stay pursuant to art 20.1 of Sch 1 to the Regulations was the same test and principles as it would apply to the stay of a winding-up order under s 130(2) of the Act. As a result, the court had a free hand to do what was right and fair according to the circumstances of each case. In exercising that discretion under s 130(2) of the Act, the court sought to achieve realisation and distribution for the benefit of the creditors. However, the stay would be lifted, usually, when disputed claims needed to be resolved by proceedings, and it was right and fair, in all the circumstances, to accept and implement that need (see **[42]**, **[43]** of the judgment).

Applying the proper approach, the balancing exercise leaned heavily in favour of varying the stay as asked, when applying the relevant factors and matters in the exercise of discretion. The factors relied on by the company did not have sufficient weight to shift the balance in favour of refusing arbitration and leaving English contractual law to be decided as a matter of expert evidence in Korea (see **[60]**, **[67]**, **[68]**, **[70]**, **[71]** of the judgment).

In the context of substantive claims involving contracts governed by English law and agreeing to disputes being heard in arbitration in London, the recognition order would be modified by lifting the stay preventing that arbitration (see **[74]** of the judgment).

Atlantic Computer Systems plc, Re [1992] 1 All ER 476 considered; *Cosco Bulk Carrier Co Ltd v Armada Shipping SA* [2011] 2 All ER (Comm) 481 applied.

Anthony Beswetherick **(*instructed by MFB Solicitors*)** ***for the applicants.***

Michael McParland** (**instructed by Hill Dickinson LLP, Liverpool**) **for the respondents.

(5) Chadwick (trustee in bankruptcy of Anthony Burling) v Burling [2015] All ER (D) 98 (Jun), [2015] EWHC 1610 (Ch)

In the Chancery Division before Mr Justice Warren.

Practice – Civil litigation – Case management – Relief from sanction – Trustee in bankruptcy of A applying for declarations as to beneficial ownership of two properties – A and wife (B) being respondents to application – B failing to comply with orders of court to submit evidence – Deputy registrar refusing B's application for relief from sanction – B appealing – Whether deputy registrar erring – Whether B entitled to relief from sanction – CPR 3.9(1).

The judgment is available at: [2015] EWHC 1610 (Ch).

Facts:

The applicant in the underlying claim was the trustee in the bankruptcy of an individual, A. The respondents to that application were A and his former wife (B). The applicant had applied for the possession of two properties (237 Rayleigh Road and 9 Selwood Road) and for declarations that he was the beneficial owner, as to 100% of the first, and as to five sixths of the second. A deputy registrar ordered that the applicant was to serve his evidence by 26 March 2014 and the respondents were to file theirs by 25 April 2014. The respondents did not file any evidence in accordance with that direction. At a hearing in May, an order was made by a registrar (registrar Barber) that, unless the respondents filed and served written evidence in answer to the application by 4pm on 5 August 2014, 'they shall be debarred from relying upon any such evidence without the permission of the court' (the order). B did not file any evidence in accordance with the order. She later contended that she did not remember receiving the order or if she had, she had not understood its implications. B applied for the relief from sanction under CPR 3.9. A deputy registrar refused to grant any relief from the sanction imposed by registrar Barber and in so doing refused her request for further time to obtain legal assistance. B appealed.

B submitted that the deputy registrar had erred in failing properly to engage with the third stage of the test in *Denton v TH White Ltd* [2014] 1 All ER 880 (Denton), namely to evaluate all the circumstances of the case. He had failed to pay proper regard to the proportionality of the sanction as it impinged on B as compared with the prejudice to the applicant in terms of delay and costs. The applicant submitted that the

deputy registrar had not erred in his approach and had correctly applied the law and that his decision was unimpeachable.

Held:

(1) On an application for relief from sanction, under CPR r 3.9, the court had to consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need: (i) for litigation to be conducted efficiently and at proportionate cost; and (ii) to enforce compliance with rules, practice directions and orders. Applications should, in accordance with sub-r (2), be supported by evidence. As a general rule, the fact that an individual was a litigant in person was not of itself a reason for the disapplication of the rules. It was settled law that there might be cases in which the fact that a party was a litigant in person had some consequence in the determination of applications for relief from sanctions, but that was likely to operate at the margins (see **[11]**–**[13]** of the judgment).

The judgment of the deputy registrar displayed an error of principle. There was force in B's submissions about what the deputy registrar should have, but had not expressly, taken into account. That, coupled with his conclusions on the facts, led to the conclusion that he had not properly exercised his discretion. He appeared to have taken the merits into account as part of all of the circumstances of the case when he should not have done so. The court could, in the circumstances, exercise the discretion itself. The fact that B had been a litigant in person was only relevant at the margins. In the present case, the relevant orders were straightforward and easy to understand. Taking account of all the circumstances, including the breach of the order and the fact that her conduct had not been consistent with the efficient conduct of the litigation, notwithstanding that the result in terms of delay was not likely to have been great, relief from sanction should not be granted (see **[35]**, **[36]**, **[42]**, **[43]** of the judgment).

B's appeal against the refusal of relief from sanctions would be allowed in relation to 237 Rayleigh Road only. However relief from sanction would not be granted in relation to that property (see **[40]**, **[48]**, **[49]** of the judgment).

Denton v TH White Ltd; *Decadent Vapours Ltd v Bevan*; *Utilise TDS Ltd v Davies* [2015] 1 All ER 880 applied; *Nata Lee Ltd v Abid* [2014] All ER (D) 213 (Dec) applied.

(2) In respect of 9 Selwood Road, the judgment of the deputy registrar did not display any error of principle. On the material before him, it had been well within the range of appropriate decisions for him to conclude that, applying the third stage of the Denton test, in all the circumstances relief from sanctions should not be granted (see **[44]** of the judgment).

The appeal in respect of 9 Selwood Road would be dismissed. The declarations made by the deputy registrar in relation to both 237 Rayleigh Road 9 Selwood Road would stand (see **[46]** of the judgment).

Shepherd (instructed by SGH Martineau LLP) for the applicant.

Alexander Smith (instructed by Thames Chambers) for B.

(6) Bell v Birchall [2015] All ER (D) 57 (Jun), [2015] EWHC 1541 (Ch)

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

Bankruptcy – Trustee in bankruptcy – Expenses in bankruptcy – Solicitor – Defendant solicitors being partners in practice until declared bankrupt – Applicant trustee in bankruptcy of first defendant applying for order that costs and expenses incurred in preserving files and records of practice, reconciling client accounts and incidental costs should be deducted from client accounts of practice – Whether court having jurisdiction to make order sought.

Facts:

The first and second defendants were solicitors who had been in practice together in partnership, under the name: 'Birchall Ryan' (the practice). Both defendants were declared bankrupt. The second defendant's bankruptcy was subsequently discharged. The applicant trustee in bankruptcy of the first defendant (the trustee) applied for an order that the time costs and expenses, which had been incurred in: (i) preserving files and records of the practice; (ii) reconciling the client accounts of the practice, together with incidental connected costs; and (iii) the costs of the proceedings, should be deducted pro rata from the client accounts of the practice. The trustee contended that, following his appointment, the third defendant Solicitors Regulation Authority (SRA) had decided not to intervene and, in those circumstances, it had been necessary to make arrangements for the files to be held securely and, since the client accounts had not been reconciled prior to the first defendant being declared bankrupt, it had been necessary for him to take action to protect the clients by storing the files and reconciling the client accounts. The SRA opposed the application, contending that the trustee had had no role to play in the safeguarding of client monies or files held in connection with the administration of client accounts because neither the second defendant not the SRA were undertaking that activity. The first defendant supported the SRA's position.

The principal issue for consideration was whether the court had jurisdiction to make an order permitting the trustee to recover his costs and expenses for preserving files and records of the practice and reconciling

the client accounts of the practice and incidental costs as sought. Consideration was given to the principle in *Re Berkeley Applegate (Investment Consultants) Ltd* [1988] 3 All ER 71 (*Re Berkeley*) that, where a person sought to enforce a claim to an equitable interest in property, the court had a discretion to require, as a condition of giving effect to the equitable interest, that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. Consideration was also given *to Re Ahmed & Co* [2006] All ER (D) 195 (Mar) (*Re Ahmed*), s 283(3)(a) of the IA 1986 (the 1986 Act), Pt II of Sch 1 to the Solicitors Act 1974 (the 1974 Act), para 6(1) of Sch 1 to that Act, and to the Solicitors Accounts Rules (the Rules).

Held:

The application would be dismissed.

The Rules imposed a direct and personal obligation on solicitor principals to manage client money in accordance with the Rules (see rr 6.1 and 7). The effect of the Rules was that a solicitor who was made bankrupt generally remained under the same direct and personal obligations concerning client monies that he had prior to being made bankrupt. Following a decision to intervene, the SRA came under a duty to perform that function, at no cost to those entitled to the funds, other than to the extent permitted by *Re Ahmed*. Money held in a client account was held on trust and did not form part of the estate of the bankrupt solicitor. It did not vest in the trustee in bankruptcy of a solicitor who was made bankrupt (see s 283(3)(a) of the 1986 Act) (see **[21]**, **[22]** of the judgment).

The court did not have jurisdiction to make the order sought by the trustee in the circumstances of the present case because: (i) the first defendant was under an unbroken and continuing duty to manage the client accounts and client monies in accordance with the SARs; (ii) that obligation could not be, and was not, displaced by his bankruptcy and could be, and was, displaced only when the SRA decided to intervene in the practice and to exercise the powers conferred by Pt II of Sch 1 to the 1974 Act and that the monies referred to in para 6(1) of Sch 1 should vest in the Law Society; (iii) in those circumstances those entitled to the monies held on the client accounts did not require the assistance of the court to secure their rights and (iv) the work carried out by the trustee, even if it had been necessary, would have been carried out either by the first defendant, at no cost to the clients, or, in default of the first defendant carrying out the necessary work, the SRA. The present case was different from Re Berkeley because in that case the company had not been in a position to carry out the necessary work and anyone appointed by the court to carry out the work would have been willing to act only if paid (see **[28]** of the judgment).

Berkeley Applegate (Investment Consultants) Ltd, Re, Harris v Conway [1988] 3 All ER 71 distinguished; *Ahmed & Co (a firm), Re* [2006] All ER (D) 195 (Mar) considered.

Paul Tindall (instructed by Freeths LLP) for the trustee.

The first defendant appeared in person.

The second defendant did not appear and was not represented.

Richard Coleman QC (instructed by Russell-Cooke LLP) for the SRA.

(7) Stevensdrake Ltd v Hunt [2015] All ER (D) 229 (May), [2015] EWHC 1527 (Ch)

In the Chancery Division before Judge Purle QC sitting as a judge of the High Court.

Solicitor – Costs – Conditional fee agreement – Master entering summary judgment for claimant solicitors' firm for counsel's fees incurred by first defendant liquidator, H – Master striking out defendants' estoppel defence and counterclaims – Defendants appealing – Whether H being personally liable for counsel's fees – Whether master erring in striking out defence and counterclaim.

Facts:

The claimant solicitors' firm acted for the first defendant company liquidator, H, pursuant to a conditional fee agreement (CFA). The schedule to the CFA provided 'You are personally responsible for any payments that you may have to make under this agreement'. The result of the claimant's work for H constituted success within the CFA's terms and the claimant issued proceedings against the defendants based on an invoice in respect of work done for H for a sum just under £1m. The defendants relied on estoppel in defence, and counterclaimed for breach of fiduciary duty and undue influence. In the claimant's application for summary judgment, the master awarded the claimant counsel's fees to be paid by the defendants. He was unimpressed by the defences advanced, but allowed most of them to proceed upon condition of a payment into court of £100,000 (the condition). However, he struck out the defence of estoppel and the counterclaims for breach of fiduciary duty and undue influence. The defendants appealed.

The defendants contended that the CFA had been an agreement entered into by H as liquidator of the company and he was not personally liable. In particular, the matter had been argued before the master on the false basis that H had been the client, whereas the only person who might be said to be the client had been the company. The court further considered

whether the parts of the defence and counterclaim struck out by the master should remain struck out and whether to maintain the condition imposed.

Held:

The appeal would be dismissed.

(1) The master had been right to have given summary judgment and there was no basis upon which to set aside the order granting summary judgment for an indemnity in respect of counsel's fees. The defendants' argument as to counsel's fees overlooked the relevant part of the schedule referring to H's personal responsibility. As the proceedings had resulted in a win, as defined, the payments that 'you might have to make' had included counsel's fees. On the material before the master, he had been entitled to enter summary judgment, as he had in respect of counsel's fees. Further, the reason the words 'personally responsible' were used was quite simply because H, as the liquidator, though acting in one sense as agent for the company, was also assuming personal responsibility and contracting personally, even though the starting point and assumption was that a liquidator did not contract personally. Accordingly, H's responsibility under the CFA and its schedules had been to pay the disbursements as well and his attempt to guide away from the plain words of the CFA and schedules could not succeed (see **[21]**, **[23]**, **[24]**, **[27]** of the judgment).

(2) The master had been entitled to be unimpressed by the defences and to proceed to impose the condition. Further, he had been entitled to strike out the parts of the pleading he had, as formulated before him. Nothing established that the condition should be altered and it would remain. With respect to the pleadings struck out, reviewing the master's decision on the material before him, his decision to strike out the defence of estoppel had been faultless. It was for the defendants, if they wished to rely on an estoppel plea, to advance another claim to that effect, properly pleaded. The same applied to the parts of the counterclaim which had been struck out. The master appeared to have recognised that summary judgment could not be granted, but struck out those paragraphs on the ground that the pleading had been inadequate. He had been justified in having taken that approach, but matters might look different if the matter was pleaded properly. The appropriate course was for the defendants' pleading, once reconsidered, to be considered at a hearing in which both sides had a proper opportunity to argue it (see **[28]**, **[31]**, **[32]**, **[35]**–**[37]** of the judgment).

Andrew Sutcliffe QC (instructed by Stevensdrake Ltd, Crawley) for the claimant.

Stephen Davies QC (instructed by Devonshires Solicitors LLP) for the defendants.

(8) Re Hartmann Capital Ltd (in special administration) [2015] All ER (D) 18 (Jun), [2015] EWHC 1514 (Ch)

In the Chancery Division, Companies Court before Newey J.

Company – Administration order – Administrator – Costs of administration – Administrators seeking to take advantage of funding regime applicable to insolvency proceedings generally – Whether conditional fee arrangements available to administrators appointed pursuant to special administration regime – Investment Bank Special Administration Regulations 2011, SI 2011/245 – Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 5 and Saving Provisions) Order 2013, SI 2013/77, art 4.

Facts:

The joint administrators of HC Ltd sought a declaration which would establish in substance that they were entitled to take advantage of the funding regime which applied in relation to insolvency proceedings generally. The government had delayed commencing ss 44 and 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the LAPSO Act), with the result that conditional fee arrangements continued to be available in respect of insolvency proceedings. Article 4 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 5 and Saving Provisions) Order 2013, SI 2013/77 (the 2013 order), stated that earlier articles were not to apply to, among other things, 'proceedings brought by a company which has entered administration under Part II of the [Insolvency Act] 1986…'. However, in the present case, the administrators had been appointed pursuant to the Investment Bank Special Administration Regulations 2011, SI 2011/245 (the 2011 regulations).

The administrators asked the court to adopt a purposive approach. They contended that there could be no sensible reason for excluding the administrators of an investment bank, or administrators appointed pursuant to one of the other specific regimes, from the general exemption for which art 4 of the 2013 order provided regarding insolvency proceedings.

Held:

The application would be dismissed.

It was not open to the court to achieve the result sought by the administrators as a matter of construction of the relevant regulations. That result could not be achieved consistently with the wording of art 4 of the 2013 order. HC Ltd had not entered into administration under Pt II of the 1986 Act, and its administrators had not been appointed pursuant to the provisions of that part. They had been appointed rather pursuant to the 2011 regulations (see **[8]**–**[10]** of the judgment).

As matters stood, and in the absence of further legislative intervention, the administrators were denied the funding possibilities available to other administrators (see [10] of the judgment).

Adam Al-Attar (instructed by Bird & Bird LLP) for the administrators.

LEGISLATION

(1) Insolvency (Amendment) Rules (Northern Ireland) 2015, SR 2015/262

Provision has been made in insolvency legislation for an administrator to recover expenses incurred before the administration started. An option has also been included in the legislation for the administrator to be paid a set amount. These changes affect Northern Ireland, and come into force on 3 September 2015.

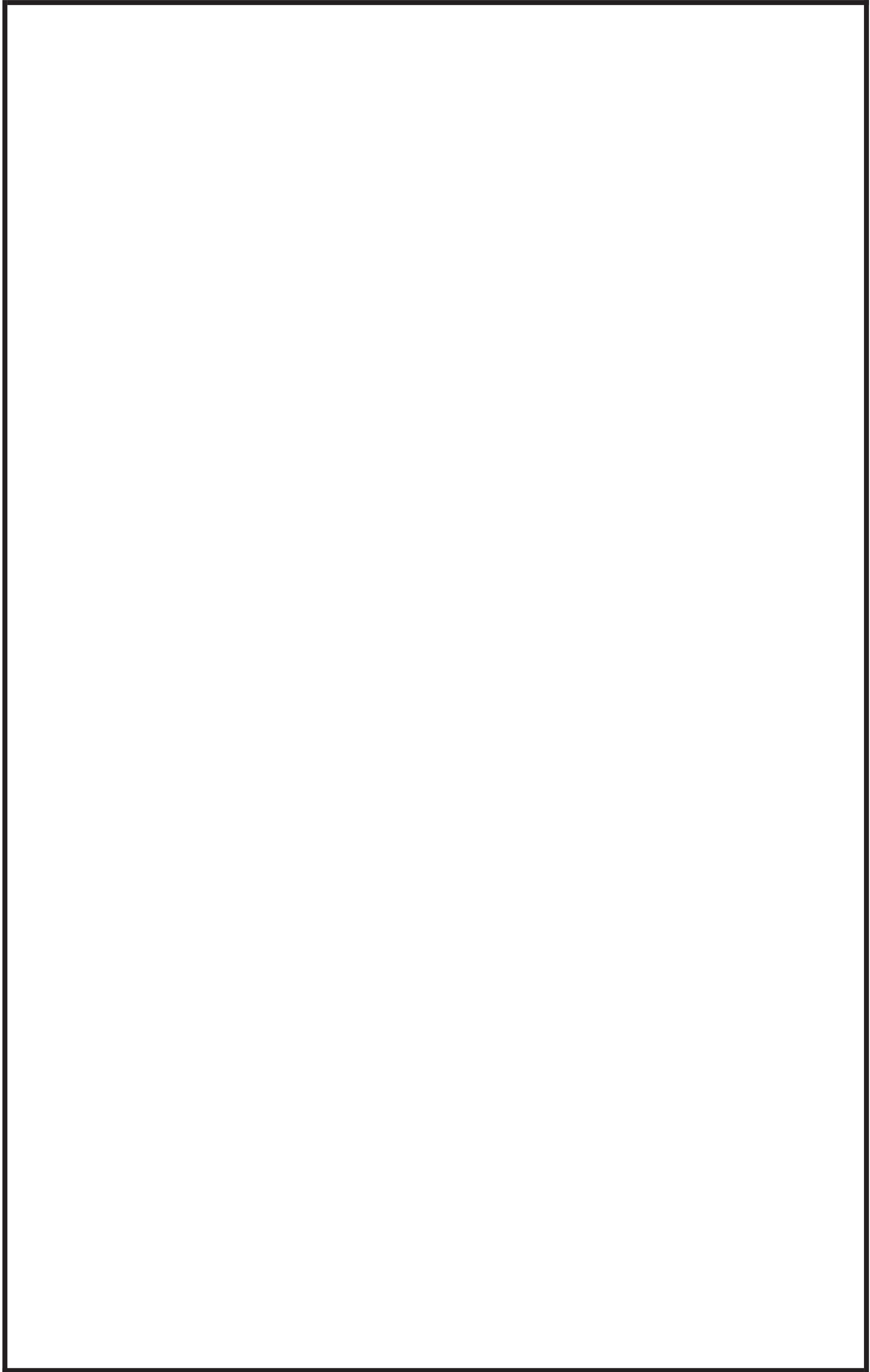
Changes have been made to the Insolvency Rules (Northern Ireland) 1991, SR 1991/364, in order to make improvements in insolvency administration, providing a better service for both debtors and creditors.

A number of procedures are introduced into SR 1991/364, including allowing administrators to recover expenses incurred before the administration's formal start. Other changes include provision for:

- an option for administrators to be paid a set amount, and
- the block transfer of cases, in situations where an insolvency practitioner has died, retired or cannot continue in office.

In addition, SR 1991/364, r 7.28, is revoked, taking away many of the requirements for filing advertisements in insolvency cases at court, as well as the requirement to file a memorandum giving particulars of insolvency advertisements.

Minor amendments are also made to existing forms relating to insolvency, and introduce a new form for the submission of information to the registrar of companies.



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

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