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Tolley's Company Law and Insolvency

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Dear Subscriber,

Welcome to the latest newsletter! Following the news section this newsletter contains seven analysis pieces drawn from Lexis@PSL Restructuring and Insolvency.

Following concerns raised over the treatment of consumers by debt management firms by a Financial Conduct Authority (FCA) review, Dawn McKenzie, partner at Harper Macleod LLP and head of their debt recovery department, discusses in the first analysis piece the FCA's findings and how firms will have to adapt to ensure suitable advice is given to those in financial difficulty.

Can several courts have concurrent jurisdiction to decide the same issue? Stefan Ramel, a barrister at Guildhall Chambers, examines the recent ruling in *Comite d'entreprise de Nortel networks SA v Rogeau*: C-649/13 [2015] All ER (D) 143 (Jun) and attempts to simplify the matter in our second analysis piece.

In the third analysis piece Stuart Adair, a barrister at XXIV Old Buildings, takes a look at some of the common issues surrounding the application of copyright law to bankruptcy situations, in light of the recent case of *Cole v Howlett* [2015] EWHC 1697 (Ch), [2015] All ER (D) 178 (Jun).

When will a bankrupt's discharge from bankruptcy be suspended? In *Wilson v Williams (Trustee in Bankruptcy for John Wilson)* [2015] EWHC 1841 (Ch), [2015] All ER (D) 275 (Jun), the Chancery Division heard a bankrupt's appeal in respect of an order suspending his discharge from bankruptcy where the bankrupt argued that the terms of that order were too wide and were disproportionately severe. Stephen Leslie, solicitor in the Lexis®PSL Restructuring & Insolvency team examines the judgment.

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In *Astra Resources v Credit Veritas USA* [2015] EWHC 1830 (Ch) the Chancery Division had to deal with an application for an injunction to restrain the presentation of a winding-up petition, where it was alleged that the debt demanded was disputed on substantial grounds, and that the respondent was seeking a winding-up order for an improper—or collateral—purpose. Stephen Leslie, solicitor in the Lexis®PSL Restructuring & Insolvency team examines the judgment.

If a trustee in bankruptcy were to pursue an appeal in place of the bankrupt, would he be liable for the costs of hearings before his appointment? In the sixth analysis piece Adam Chichester-Clark, of Thirteen Old Square Chambers, examines the Supreme Court's decision in *BPE Solicitors v Gabriel* [2015] UKSC 39, [2015] All ER (D) 179 (Jun).

In what ways has *Re Kingstons Investments Ltd (in Creditors' Voluntary Liquidation)*; *sub nom Adlon Ltd v Sale (as Liquidator of Kingstons Investments Ltd)* [2015] EWHC 1619 (Ch), [2015] All ER (D) 122 (Jun) shed light on long-standing ambiguities in the Insolvency Rules 1986? In our seventh analysis piece Jamie Riley, commercial litigator at 11 Stone Buildings, explores the case and explains why the final decision will be so important for insolvency lawyers.

This newsletter contains six 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—June and July 2015

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

- Azfal Shaheen and Waris Ali, of property development company Lifestyle Homes (UK) Ltd, have been disqualified for four and three years respectively for failing to protect, properly use or return money paid into the company by a client.

- Russell Gwyn Williams has been disqualified from acting as a director for seven years for trading to the detriment of creditors between 25 January and 14 August 2013, while garage repairer and MOT specialist Bets Centres Ltd was insolvent, incurring further liabilities of £106,097, including £89,134 to the Crown and PAYE/ NIC and VAT.
- David Charles Allen has given an undertaking not to act as a company director for 11 years from 5 June 2015, after an Insolvency Service investigation found he breached his position of trust by knowingly instructing the submission of a VAT return which was under-declared by £5m.
- Two directors of Worldwide Sports Investments Ltd have been disqualified from being directors for a combined 19 years for their roles in the company, which purported to offer investments in a golf course and hotel development in Portugal.
- David Philip Copestake, director of North London letting agent David Philip Copestake (Highbury Ltd), has been disqualified from acting as a company director for six years for failing to protect tenant deposits.
- Stuart Edwin John Beare has been given a nine-year bankruptcy restrictions undertaking for giving false information to a finance company in respect of his assets, and for acting in the management of a company while bankrupt.
- Simon Michael Armitage, a retired solicitor, has been given a 15-year Bankruptcy Restriction Order by Exeter County Court for misappropriating funds from his clients' accounts, overcharging clients and falsifying records to cover up his actions.
- Glen Dean Crosthwaite, the director of a Leeds-based recruitment agency, has been disqualified for the second time by the Insolvency Service for breaching his original disqualification.
- Mark Albert Edmonds, an unqualified accountant from Tunbridge Wells, has received a 12-year Bankruptcy Restriction Order on 27 May 2015 following a trial at the County Court for abusing his position of trust in his provision of accountancy services by misappropriating client funds.
- Peter Phillip Leonard, director of Hove letting agency Direct Residential Lettings Ltd, has been disqualified from acting as a director for ten years for failing to make sure the tenant deposits and rent payments collected in by the company were properly protected.

- Peter John Lashmar, a self-proclaimed ‘tax specialist’, has been disqualified from acting as a director for seven years for failing to make sure his accountancy business kept proper records, dealt with its tax affairs and registered for VAT.

Liquidations

- Four London companies involved in selling ‘miracle’ software, which claimed to make investors money trading on the London Stock Exchange, has been ordered into liquidation in the High Court on grounds of public interest following an investigation by the Insolvency Service.
- Two companies, running a scheme which took large sums of money from businesses and gave nothing back, have been wound up by the High Court following an investigation by Company Investigations, a part of the Insolvency Service.

(2) More councils forced to take bankruptcy action against defaulters

The number of local authorities being forced to step up bankruptcy actions against council tax defaulters is rising, with council tax debt in England rising to more than £2.5bn, research by accounting and consulting network Moore Stephens shows. Around 32% of local authorities in Great Britain used Bankruptcy Orders to recover council tax arrears during 2014, a substantial rise from the 20% forced take this action against debtors in 2009/10.

Moore Stephens conducted its own research based on information obtained from local authorities, and estimates that councils petitioned to make 1,100 tax defaulters bankrupt in 2013/14.

Statistics from the Department for Communities and Local Government in 2014 showed that the level of council tax arrears across the UK has risen from £2.2bn to £2.5bn since 2009/10, including £105m of arrears in Birmingham and £98m in Liverpool.

Use of Charging Orders

An even higher proportion of councils in England and Wales have been found to use the less-severe option of Charging Orders, through which an unsecured debt becomes secured on a residential property, allowing a local authority to receive payment from the proceeds of a sale or re-mortgage.

Charging Orders were used by 48% of local authorities last year, compared to 26% in 2009/10.

Forthcoming change will affect debt recovery

It was announced in January that from October 2015, creditors must be owed a minimum of £5,000 before they can start bankruptcy proceedings to pursue that debt. The current minimum is £750.

This change will remove local authorities' most efficient tool to recover council tax debt, leaving only the much less-effective Charging Orders.

(3) Research predicts rise in cross-border insolvencies

Insolvency professionals are anticipating an increase in cross-border insolvencies, according to research commissioned by Grant Thornton UK LLP and barristers chambers, South Square. Overall, the survey found 63% of respondents believe the number of insolvencies involving offshore jurisdictions will increase over the next three years. The research also suggests the Cayman Islands has the most effective insolvency laws. The survey represents views from 50 leading global firms involved in cross-border insolvency.

The report, 'From discord to harmony: the future of cross-border insolvency', offers insights from global insolvency practitioners on undertaking cross-border insolvencies in major offshore jurisdictions. The research was conducted by independent consultancy, Meridian West.

The research found one in five respondents believes cross-border insolvencies will increase 'considerably' over the next three years, predominantly due to an anticipated uplift in activity in the financial services sector. Other key findings include:

- 85% of respondents said courts in different jurisdictions should collaborate more to make multi-jurisdictional insolvencies fairer and more efficient,
- formal mechanisms, such as enacting the UNCITRAL Model Law, and informal channels for greater dialogue and information sharing between judges were among the suggestions for fostering collaboration,
- 63% of respondents placed the Cayman Islands among the three most effective offshore jurisdictions,
- other jurisdictions named as particularly effective were the British Virgin Islands and Hong Kong,
- Singapore was named as a very effective location for those with direct experience of multi-jurisdictional insolvency in the territory—however, it was not ranked very highly by respondents without direct experience there,

- respondents named the top three factors when evaluating the attractiveness of a jurisdiction as:
  - its legal process and infrastructure (84%),
  - cross-border assistance provisions (63%), and
  - enforceability of foreign court orders and judgements (40%).

(4) Recast Regulation on insolvency in force from 26 June 2015

The Recast Regulation heralds one of the biggest changes in cross-border insolvency in the last ten years. So what will all this mean in practice for restructuring and insolvency professionals and their clients?

Original news

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) appeared in the Official Journal on 5 June 2015 (OJ L 141/19). The Recast Regulation enters into 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 from 26 June 2015—ie 20 days after publication in the Official Journal.

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 (see art 84(2)).

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—i e 36 months after the Recast Regulation came into force, and
- the interconnection of national registers, which shall apply from 26 June 2019—i e 48 months after the Recast Regulation came into force.

ANALYSIS

(1) A Debt management firms—a risky option for consumers?

Following concerns raised over the treatment of consumers by debt management firms by a Financial Conduct Authority (FCA) review, Dawn McKenzie, partner at Harper Macleod LLP and head of their debt recovery department, discusses the FCA's findings and how firms will have to adapt to ensure suitable advice is given to those in financial difficulty.

The debt management sector remains one of the most high-risk consumer credit areas, the FCA has reported. The FCA review examines how free-charging and free-to-customer debt management businesses are complying with consumer credit rules, what advice they provide and if customers are fairly treated.

What is the background to the review?

This was the second thematic review carried out by the FCA into the consumer credit market, focusing on specific concerns within the debt management sector. It aimed to assess compliance levels against existing rules.

What was the scope of the review?

The focal point for the review was the advice that debt management firms provide to customers. In reviewing this core service, the review covered:

- quality of advice,
- transparency and disclosure,
- cross-selling and incentives, and
- systems and controls relating to debt advice.

Within these areas the review looked to assess issues ranging from:

- suitability of advice and whether it was in a customer's best interests,
- the appropriateness of solutions,

- informing customers of the availability of free advice,
- whether staff incentive schemes influenced the quality of advice, and
- controls employed to ensure customers received appropriate advice.

The methodology included the assessment of individual advice cases, reviewing various kinds of documentation, and visiting sample firms. The review was conducted using a sample pool of eight firms of various sizes, with varying business models and a mixture of both fee-charging and free-of-charge firms.

What were the main findings of the review?

The findings revealed a general failing of firms to adhere to the rules in relation to the advice which they offer to customers in financial difficulties. In particular, the report states that the quality of advice by fee-charging firms was of an 'unacceptably low standard' (para 1.18).

A key failing across 'all the fee-charging firms' reviewed was the assessment of the financial positions of a customer. This was found to be far below the expected standard. Other failings included failing to establish reasons for the customer's financial difficulties, and failing to assess foreseeable changes in customer circumstances which could impact the suitability of a plan—such as customers who are approaching retirement age or who have children approaching school leaving age.

It was significant that firms failed to take into account regional differences when providing advice to customers in different parts of the UK—for example, the report found that the Debt Arrangement Scheme (DAS) was often not explained, with a debt management programme being recommended when DAS would be the Scottish option. Concerns were also raised over dealing with vulnerable customers. The advice offered by free-of-charge firms was found to be generally of a higher standard, although areas for significant improvement were identified. The report highlighted that 'all of the firms in our sample were, to varying degrees, still developing their control frameworks even though our SYSC rules applied from April 2014'. Other key failures identified included:

- failing to explore various debt solutions during the advice process, particularly where a solution would result in little remuneration for the firm,
- information regarding free advice was either not provided, or 'was biased against, or derogatory about, the free sector' (para 1.18),
- not properly considering the suitability of additional products being offered,

- some firms lacked the fundamental regulatory systems and infrastructure to manage the risks of providing unsuitable advice, and
- deficiencies in compliance resources and other areas.

What are the consequences of the review? Will firms have to change their processes as a result of the review?

As a consequence of the review, the FCA is now undertaking a broader assessment on a firm-by-firm basis, as to 'whether each individual firm meets the standards to be FCA authorised' (para 1.21). For firms that now gain authorisation it appears that a closer focus on the quality of debt management advice will be part of the FCA's ongoing supervisory work.

The FCA has already began to take action. In connection with the sample firms, they have:

- provided feedback on highlighted issues,
- required wider past business reviews in five firms—overseen by skilled persons appointed under the Financial Services and Markets Act 2000, s 166,
- undertaken further supervisory work on some additional firms which were not part of the original sample, and
- agreed for one firm not to take on any new business while it 'substantially changed its processes for assessing customers' financial circumstances' (para 1.19).

As a result of the review, what advice should firms give to their customers?

The unsatisfactory findings have not changed the belief of the FCA that debt management firms who do meet their standards can provide a valuable service to those struggling with debt (para 5.2). Moreover, they appear set to work in partnership with others, including the Money Advice Service, to achieve their goal of protecting customers in debt. It would be prudent that firms learn from the issues highlighted to ensure that the advice which they are providing to those struggling with debt meets the appropriate standard (para 5.7).

(2) The complications of concurrent jurisdiction

Can several courts have concurrent jurisdiction to decide the same issue? Stefan Ramel, a barrister at Guildhall Chambers, examines the recent ruling in *Comite d'entreprise de Nortel networks SA v Rogeau*: C-649/13 [2015] All ER (D) 143 (Jun) and attempts to simplify the matter.

The Court of Justice of the European Union (CJEU) gave a preliminary ruling, deciding, among other things, that arts 3(2) and 27 of Council Regulation (EC) 1346/2000 on insolvency proceedings (the EC Reg) 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.

How did the issue arise, and what was the chronology?

The comité d'entreprise of Nortel Networks SA (NNSA) started proceedings seeking relief relating to a sum of money standing to the credit of NNSA's account. Specifically, it sought relief in relation to whether those funds could be used to make a deferred severance payment to employees that NNSA was contractually obliged to make pursuant to a memorandum settling action entered into with those employees on 21 July 2009—post-insolvency and after the secondary proceedings were opened. The French insolvency practitioner, Mr Rogeau, had not made the payment because, under a coordinating protocol dated 1 July 2009 entered into between the English and French insolvency proceedings, certain expenses had to be paid first. Mr Rogeau sought to join the English administrators in the comité d'entreprise's action.

Does the EC Reg apply?

The CJEU concluded that the EC Reg applies to the proceedings. It reached that conclusion on the basis that the rights and obligations on which the action before the French court was based derived directly from insolvency proceedings, and were closely connected with the case. It does not appear, however, that the CJEU supplied its reasons for reaching that particular conclusion. Plainly, it would have assisted practitioners if it had done.

Which court has jurisdiction to hear the dispute—the French courts (*secondary proceedings*) *or English court* (*main proceedings*)*?*

Both. The CJEU considered that the English courts and the French courts have concurrent jurisdiction. In reaching that view, the CJEU concluded that the EC Reg did not specifically confer exclusive jurisdiction on the court first seized. Moreover, the CJEU were sensitive to the fact that one of the purposes of secondary proceedings is to protect local creditors—this was precisely a case where local creditors were seeking the assistance of the local court in protecting their interests. The CJEU thought that it would be odd, in such circumstances, if the French courts did not have jurisdiction.

What about the risk of two irreconcilable judgments?

The CJEU adopted the analysis of the advocate general to the effect that the EC Reg, art 25(1) would require a court before which a related action is brought to recognise an earlier judgment given by a court with jurisdiction under the EC Reg, art 3(1) or 3(2).

What is the applicable law for deciding which assets fall within secondary proceedings?

EC Reg, art 2(g) will determine which law decides which assets fall within the secondary proceedings. The CJEU's answer to the question is interesting because it doesn't really answer the question at all. The referring court had asked whether it was English law (main proceedings) or French law (secondary proceedings) which governed the question. By falling back on the EC Reg, art 2(g), it is one view that the CJEU hasn't really answered the question, but has left it to the local court to resolve.

What does this mean in practice for professionals advising insolvency practitioners dealing with main and secondary proceedings? Is there still a role for protocols?

There undoubtedly is still a role for protocols. In fact the recast insolvency regulation which comes into force in 2017 contains articles which permit, possibly even encourage, officeholders to enter into protocols. The real impact this case may have is having regard to the CJEU's conclusion that several courts have concurrent jurisdiction to decide the same issue. It is to be hoped that this decision doesn't amount to a starter's gun in a jurisdiction race for related actions. If it does, it may be appropriate to include in any future protocols an obligation on each officeholder to notify the other officeholders appointed in respect of the same debtor of any threatened proceedings—by way of analogy, for example, with the obligations that professionals have to notify insurers of intimated claims. That would at least enable the other officeholder to seek to actively participate in the proceedings, or open their own proceedings in their own jurisdiction.

(3) Finding the bankrupt's copyright—a right old warriors' dance

Stuart Adair, a barrister at XXIV Old Buildings, takes a look at some of the common issues surrounding the application of copyright law to bankruptcy situations, in light of the recent case of *Cole v Howlett* [2015] EWHC 1697 (Ch), [2015] All ER (D) 178 (Jun).

The claimant issued proceedings against the defendants, alleging copyright infringement of his music sample of the drum part of 'Warriors Dance', released on the album 'Invaders Must Die' by the Prodigy. He sought permission to amend his claim form and particulars of claim to plead an assignment of the causes in action to him from the Official Receiver (OR) of his bankruptcy estate and, thereby, properly constitute the claim. The Chancery Division, in allowing the application, held that it was disproportionate, since the defect had been cured, to deprive the claimant of his right to have the issue ventilated in court.

What was the background to the case?

The claimant is a musician, composer and producer. In these proceedings he claims to be entitled to be regarded as the author and owner of the copyright in the music and lyrics of a musical composition called 'Let the Warriors Dance'. He claims that his rights in that composition have been infringed by the defendants, the members of the band 'the Prodigy', the publishers of the composition and the recording company.

The claim was listed to come on for trial on 21 April 2015. However, on 9 April 2015 the defendants' solicitors wrote to the claimant's solicitors pointing out that the claimant had been adjudged bankrupt on 14 December 1990 and that all his rights in 'Let the Warriors Dance' would have vested in his trustee in bankruptcy. It necessarily followed that the claimant had no right to bring the claim.

On the first day of the trial the claimant applied to Mr Justice Peter Smith for the adjournment of the trial and permission to amend his particulars of claim to plead an assignment of the cause of action from his trustee in bankruptcy. That application was refused by the judge because at that point there had been no assignment of the cause of action and there was no evidence to demonstrate that there would be one. Furthermore, the judge found that the claimant's failure to disclose his ownership of the copyright to his trustee in bankruptcy amounted to an abuse of process. The judge observed that it was the trustee in bankruptcy who had the right to bring the proceedings and that he needed time to investigate the claim and decide whether he wished to intervene and take over the proceedings. By an order dated 22 April 2015 the judge, therefore, stayed the proceedings, but provided that if the trustee in bankruptcy, who was the OR, did not apply to intervene by 4.30pm on 20 May 2015 the claim would be struck out and the claimant would be required to pay all the defendants' costs.

The OR decided that he did not wish to intervene and become the claimant in the proceedings and entered into an agreement with the claimant to sell the cause of action to him for the sum of £25,900. The monies were paid and the OR executed a written assignment of the cause of action and associated property rights. However, although the claimant had acquired the cause of action, the order of 22 April 2015 had provided that the claim would be struck out if the OR did not apply to intervene by the specified date. The claimant, therefore, applied to the judge for:

- a variation of the order dated 22 April 2015 to prevent the order being struck out, and
- permission to amend his particulars of claim to plead the assignment from the OR.

What key issues did the application raise?

The key issues raised by the claimant's application to the judge for a variation of his earlier order and permission to plead the assignment were:

- whether the court should permit a claimant to amend their claim to plead a cause of action which arose or was acquired after the proceedings were commenced,
- the scope of the jurisdiction under the Civil Procedure Rules 1998, SI 1998/3132, Pt 3.1(7) (CPR) to vary or revoke an order and, in particular, whether the order dated 22 April 2015 was a 'final order', and
- whether the abuse of process that the judge had found was cured by the claimant's payment to the OR of £25,900 for the cause of action.

The judge determined that, in the circumstances of the case, he would exercise his discretion in favour of the claimant and:

- vary his order of 22 April 2015 to prevent the claim being struck out, and
- permit the claimant to amend his particulars of claim to plead the assignment to him of the cause of action.

The judge determined that the order he had made on 22 April 2015 was not a 'final order' for the purposes of CPR 3.1(7) because it did not give rise to any issue estoppel which would prevent the claimant from issuing new proceedings. In these circumstances he was more favourably inclined to exercise his discretion to vary the order. However, he rejected the submission of the defendants' counsel that, had the order been a 'final order', he would not have had the requisite jurisdiction to vary it. Following a review of the authorities the judge came to the following conclusions:

'1) The power to vary or revoke an order is entirely discretionary and is not prescribed by any rules or restrictions.

2) The court nevertheless will generally not allow a party to treat a review application as if it were an appeal or a simple attempt to re-run the previous hearing on precisely the same material.

3) The court will generally be less favourably inclined to consider a review of a final decision.

4) The court will generally require either a change of circumstances or a misleading of the judge in the first decision.

5) The court nevertheless must consider all the circumstances of the case and none of the above is a requirement for the court to consider varying or revoking a previous order.'

The judge concluded that the claimant's abuse of process in failing to disclose his ownership of the copyright to 'Let the Warriors Dance' had been cured by his payment of £25,900 to the OR and the taking of an assignment of the cause of action and the associated property rights. The judge noted the importance of the concession of counsel for the defendants that an assignee of a cause of action from a trustee in bankruptcy is not tainted by the conduct of the bankrupt and further pointed out that the claimant had taken an assignment from the person who had the power to investigate and deal with the claimant's previous misconduct.

What are the common issues in this area of copyright law and bankruptcy?

Copyright is property and the copyright to any musical composition written or created prior to the bankruptcy will automatically vest in the author's trustee in bankruptcy by virtue of the Insolvency Act 1986, s 306 (IA 1986). As a consequence of that vesting the trustee in bankruptcy will become entitled to receive any royalty payments relating to that copyright and will be entitled to bring proceedings in respect of any breach of that copyright.

A cause of action is a chose in action and, with certain exceptions, is an item of property which vests in a bankrupt's trustee in bankruptcy by virtue of IA 1986, s 306. The exceptions are causes of action which are personal to the bankrupt in that 'the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights of property' (*Beckham v Drake* (1849) 2 HL Cas 579). Such causes of action include claims for assault and injury to reputation. A cause of action for breach of copyright is an item of property which falls into the bankruptcy estate.

Once intellectual property vests in a trustee in bankruptcy it remains vested in that trustee and does not revert to the bankrupt when he or she is discharged from bankruptcy. However, the judge observed during the course of the hearing and in his subsequent judgment that at the time when the claimant was adjudged bankrupt in 1990 there was a view held by a significant number of lawyers and commentators on insolvency that assets of a bankrupt, which were not dealt with by his trustee, would re-vest in the bankrupt on his discharge from bankruptcy. This misconception was corrected by the decision in *Re Dent* [1994] 2 All ER 904.

Importantly, the judge made clear in his judgment of 22 April 2015 that he was not persuaded that the claimant had appreciated when he commenced his claim that he did not own the cause of action.

The knowledge of the claimant in this regard is highly relevant because in *Pickthall v Hill Dickinson* [2009] EWCA Civ 543, [2009] All ER (D) 235 (Jun) the Court of Appeal made clear that it is an abuse of process for a claimant to commence proceedings knowing that he does not have a cause of action and that taking a subsequent assignment of the cause of action does not cure that abuse. In the light of the judge's finding that he was not persuaded that the claimant had appreciated that he did not have a cause of action when he commenced the proceedings, it could not be said that commencing the proceedings amounted to an abuse of process. The abuse of process was confined to the claimant's failure to disclose the copyright to his trustee in bankruptcy and that was cured by the payment and the assignment.

What should lawyers advising in this area advise their clients?

It is important that any solicitor acting for a client contemplating litigation checks with their client as to whether or not he or she has ever been adjudged bankrupt. This should be done as a matter of course. In the event that the client has been adjudged bankrupt after the accrual of the cause of action or the acquisition of any property right to which the cause of action relates, it is likely that the client will not possess the requisite cause of action and will not be able to commence proceedings unless and until he or she has taken an assignment of the cause of action from the trustee in bankruptcy.

In the event that proceedings have been commenced without the claimant possessing the requisite cause of action, the trustee in bankruptcy or, if he has obtained his release, the OR should be approached with a view to the claimant purchasing the cause of action and taking an assignment of it. In the event that an assignment of the cause of action is taken, an application must be made for permission to amend the particulars of claim to plead that the claimant acquired the cause of action by an assignment. The granting of such permission is an exercise of the court's discretion and will depend on the circumstances of the case.

As previously stated, it is an abuse of process for a claimant to commence proceedings knowing that he or she does not possess a cause of action against the defendant. In these circumstances, it is unlikely that a claimant will be given permission to amend.

Do you have any best practice tips?

Always ask a client contemplating litigation whether or not they have ever been adjudged bankrupt and, in the event of there being any doubt, ask the client's permission to carry out a bankruptcy search.

(4) Suspending a bankrupt's discharge from bankruptcy

When will a bankrupt's discharge from bankruptcy be suspended? In *Wilson v Williams (Trustee in Bankruptcy for John Wilson)* [2015] EWHC 1841 (Ch), [2015] All ER (D) 275 (Jun), the Chancery Division heard a bankrupt's appeal in respect of an order suspending his discharge from bankruptcy where the bankrupt argued that the terms of that order were too wide and were disproportionately severe. Stephen Leslie, solicitor in the Lexis®PSL Restructuring & Insolvency team examines the judgment.

The appellant bankrupt challenged an order made suspending his discharge from bankruptcy, which had been made as the district judge was satisfied that the bankrupt had not co-operated with his trustee in bankruptcy.

The terms of the suspension order were not uncommon—the bankrupt would remain undischarged until such time as the trustee confirmed to the court by filing a report that the bankrupt had complied with his duties and obligations, or the court ordered otherwise. The suspension was not linked to compliance by the bankrupt of the conditions also set out in the order (e.g. to provide information in relation to his pension).

The appeal was dismissed. The bankrupt's failures were both serious and significant, and the district judge had not exercised his discretion improperly. The bankrupt was afforded sufficient protection by being able to apply to the court to have the suspension order discharged if the trustee failed to file a report and the bankrupt considered that he had fully complied with his duties and obligations to his trustee.

What were the facts of the case?

Mr Wilson was adjudged bankrupt on this own petition on 19 March 2015, disclosing liabilities of at least £1m, and that he had contributed £1m to his pension since 1988. Mr Williams was appointed as Mr Wilson's trustee in bankruptcy on 9 April 2014.

Mr Williams wrote to Mr Wilson requesting information, including details of his pension. Despite being chased, it was not until after Mr Williams issued an application pursuant to the Insolvency Act 1986, ss 279, 333 and 366 (IA 1986) that Mr Wilson provided some of the information sought. However, in relation to his pension, Mr Wilson refused to provide details, maintaining the position he had adopted prior to the application that his pension was exempt from the bankruptcy process and therefore that Mr Williams was not entitled to such information.

At the hearing of the application, the district judge was satisfied that Mr Wilson had failed to comply with his duties and obligations, and made an order:

- directing a private examination of Mr Wilson,
- ordering Mr Wilson to deliver to Mr Williams all information in relation to his financial affairs including—but not limited to—contact details of, and correspondence with, his financial advisor, details in relation to a bank account, and details in relation to his pensions, and
- suspending Mr Wilson's discharge from bankruptcy until such time as Mr Williams prepared and filed with the court a report confirming that Mr Wilson had complied with his duties and obligations to Mr Williams's satisfaction, or the court ordered otherwise—that final part of the suspension order (referring to the court otherwise ordering) was inserted into the order by the district judge, exercising his discretion.

Following the making of the order, Mr Wilson provided further information to Mr Williams. However, he continued to maintain his position regarding his pension, although he said in an email that he had no objection to Mr Williams satisfying himself that the pension was excluded from the estate and that he would 'co-operate to the extent necessary for that purpose'.

Mr Wilson appealed the district judge's order. Permission to appeal was refused on paper, but at an oral hearing, Mr Wilson was given limited permission on one ground only—whether the terms on which the suspension was granted were too wide.

What arguments were put forward?

Mr Wilson, who appeared in person, maintained that he had complied with the terms of the suspension order. In citing the decision in *Chadwick v Nash* [2012] BPIR 70, Mr Wilson argued that the suspension order made against him should have contained conditions which required him to comply with the alleged breaches, rather than the wide terms of the order which simply suspended his discharge until Mr Williams was satisfied that Mr Wilson had completed with his duties and obligations, which was a disproportionately severe punishment. He further argued that the facts in his case were nothing like as extreme as the facts of Chadwick or *Mawer v Bland* [2013] EWHC 3122 (Ch).

In *Mawer* (another appeal against a suspension order), the terms of the order suspending Mr Bland's discharge from bankruptcy were similar to those in Mr Wilson's suspension order. It was unsuccessfully argued on Mr Bland's behalf that, where his discharge was dependent upon his trustee filing a report in court, too much discretion was put in the hands of his trustee—which was oppressive—and that his discharge should be specifically linked to particular conditions.

In the instant case, counsel for Mr Williams cited the decisions in *Bramston v Haut* [2012] EWCA Civ 1637, [2012] All ER (D) 127 (Dec) and *Shierson v Rastogi* [2007] EWHC 1266 (Ch), [2007] All ER (D) 446 (May), the former of which is authority that suspending a bankrupt's discharge from bankruptcy is penal in nature. It was further argued that the terms of the suspension order ensured that an appropriate balance was struck between the need for Mr Wilson to remain subject to his duties and obligations and the need for Mr Williams to file a report upon Mr Wilson having satisfactorily complied with those duties and obligations.

What did the judge decide, and why?

The judge dismissed Mr Wilson's appeal for the following reasons:

- there was nothing in the evidence to suggest any oppression by Mr Williams—the requests that Mr Williams had made were perfectly reasonable,
- Mr Wilson's failure to comply with Mr Williams's requests in relation to the pension were both serious and significant, especially given that Mr Wilson had previously been ordered to provide that information—whether the pension vested or not would be something to be debated at another time, and
- in making the suspension order (which was in a form common to bankruptcy proceedings), the district judge considered as a matter of discretion that Mr Wilson's ability to apply to court was sufficient protection afforded to Mr Wilson.

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

As the judge reiterated in this case, the ability to suspend a bankrupt's discharge from bankruptcy is penal in nature. A trustee in bankruptcy has a duty to investigate the affairs of the bankrupt, and this can include investigations into assets which on their face are unlikely to be assets of the estate, such as pensions, where for example the trustee has the power to challenge excessive pension contributions. A bankrupt has, pursuant to IA 1986, s 333, an absolute obligation to co-operate with his trustee's reasonable requests and will generally find it difficult to oppose a well-founded application. The question will be whether the trustee's requests are reasonable in the circumstances.

A reasonable request will include the way in which information is requested to be provided. In this case, Mr Williams requested that Mr Wilson provide the information sought in writing, turning down

Mr Wilson's proposals to meet or speak—this was considered by the district judge to be reasonable. In any given situation, a trustee will need to consider what information is needed, and how best that information can be obtained and at what cost to creditors.

A bankrupt will usually be suspended from discharge because he has failed to comply with his trustee's requests—whether in relation to specific events or assets, or generally—and the application will therefore also commonly seek an order that the bankrupt provide certain information and/or attend an examination. There is no specific need to link these two provisions (as demonstrated by both this case and in Mawer), although in some cases that might be appropriate.

Finally, it is not unusual for a liberty to apply provision to be inserted into a suspension order, either at the request of the parties or by the judge exercising discretion. In any case, even if there is no such provision, a bankrupt who considers that he should be discharged from his bankruptcy (and who can satisfy the court that that is the case) can apply to court pursuant to the Insolvency Rules 1986, SI 1986/1925, r 6.216 to have the suspension order discharged.

(5) Disputed debts and winding-up petitions

In *Astra Resources v Credit Veritas USA* [2015] EWHC 1830 (Ch) the Chancery Division had to deal with an application for an injunction to restrain the presentation of a winding-up petition, where it was alleged that the debt demanded was disputed on substantial grounds, and that the respondent was seeking a winding-up order for an improper—or collateral—purpose. Stephen Leslie, solicitor in the Lexis®PSL Restructuring & Insolvency team examines the judgment.

The applicant debtor (Astra) applied for an injunction restraining the respondent creditor (CV) from presenting a winding-up petition in circumstances where CV had served a statutory demand on Astra in the sum of $1,535,000. The grounds of the application were:

- that the debt was disputed on substantial grounds, and
- that CV had a collateral purpose in seeking a winding-up order which should disqualify it from doing so—being a reorganisation of Astra following the making of a winding-up order.

The Chancery Division (Mr Justice David Richards) dismissed the application. Although part of the debt demanded was disputed on substantial grounds, US $600,000 was not. Further, the reorganisation of Astra following the making of a winding-up order could not be said to be for an improper or collateral purpose where such reorganisation would be reliant on the support of the liquidator and also of the court or Astra's creditors.

What were the facts of the case?

Astra was a holding company with indirect interests in commodities and green technologies and it engaged CV as of 1 August 2013 by a consulting agreement to provide various services including the identification of potential projects, project and portfolio management, and strategic advice and marketing. It was accepted by Astra that CV had brought projects to it, although none led to a transaction.

Under the terms of the consulting agreement:

- shares in Astra were transferred to CV as a signing fee,
- CV was entitled to be paid a monthly retainer, the amount of which increased every year so long as the consulting agreement had not been terminated (post-agreement fees), and
- CV was entitled to payment for work undertaken by it prior to the consulting agreement (pre-agreement fees).

In December 2014, CV served a statutory demand on Astra in the sum of $1,535,000 comprising of the following:

- $960,000 in respect of pre-agreement fees and post-agreement fees,
- $500,000 in respect of an alleged separate agreement concerning a project that CV had introduced (project claim), and
- $75,000 in respect of advice given to one of Astra's subsidiaries in connection with litigation to which it was subject (litigation claim).

Astra applied for an injunction restraining the presentation of a winding-up petition on it by CV.

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

Astra argued that CV should be restrained from presenting a winding-up petition on following grounds:

- the debt demanded was disputed on substantial grounds (the first ground), and
- CV sought a winding-up order for an improper—or collateral—purpose, which disqualified it from being able to present a winding-up petition (the second ground).

What did the judge decide, and why?

The first ground

There was no dispute as to the relevant law, which was set out by the Court of Appeal in *Tallington Lakes v Ancasta International Boat Sales* [2012] EWCA Civ 1712, [2013] All ER (D) 14 (Jan) at para [4]:

'If the company can demonstrate that the alleged debt on which the petition is founded is genuinely disputed on substantial grounds, the court will strike out the petition. There are rare exceptions to this principle.'

The judge therefore went on to consider each of the separate sums demanded and the evidence in relation to each.

Insofar as the project claim and litigation claim were concerned, the judge was satisfied on the evidence before him that there was a genuine and substantial dispute to these claims—it was not clear that the sums in relation to these claims were owed by Astra to CV. However, the claim by CV to the post-agreement fees could not be genuinely and substantially disputed—the terms of the consulting agreement relating to the pre-agreement fees stated that they would be paid upon condition of Astra raising the necessary funds, but there was no such condition in respect of payment of the post-agreement fees.

Astra argued that it was a mistake that the condition was not included in the consulting agreement in relation to payment of the post-agreement fees and that the consulting agreement would need to be rectified. The judge rejected this argument on the basis that:

- the consulting agreement was fully and carefully negotiated and drafted by the parties and their lawyers over a long period of time, and
- there was insufficient evidence to show that the consulting agreement did not reflect the common intention of the parties.

Astra's further argument that the post-agreement fees were not due without a proper itemisation of the work undertaken was also rejected. There was no suggestion that CV had not undertaken any of the services it had contracted to provide—indeed, it was accepted by Astra that CV had brought projects to it.

The second ground

The evidence in support of this ground focussed on an email sent by CV's director to one of Astra's directors suggesting that, once Astra was in liquidation, a change of leadership and control could be achieved through a reorganisation which would then allow Astra's shareholders to potentially recoup all of their investment.

This, Astra argued, was evidence that CV was seeking Astra's liquidation for an improper—or collateral—purpose and was not acting in the interests of creditors or wanted an outcome which would operate to the disadvantage of creditors. Accordingly, any winding-up petition should be struck out as an abuse of process.

The judge rejected this argument on the basis that any reorganisation—whether through a scheme of arrangement or company voluntary arrangement (CVA)—would require the support of the liquidator. Further, a scheme of arrangement would require the court's sanction (which would only be granted if the proposal was fair to creditors) or, in the case of a CVA, the approval of Astra's creditors, including CV. The facts in this case were a far cry from the type of collateral purpose which arose in the authorities discussed by Lord Wilson in *Ebbvale v Hosking* [2013] UKPC 1, [2013] All ER (D) 103 (Mar).

Decision

The judge therefore dismissed the application and declared that CV was entitled to present a winding-up petition against Astra in respect of the post-agreement fees.

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

This case was decided on its own facts, and therefore does not clarify the law to any extent. However, it does serve as a reminder that:

- an injunction restraining the presentation of a winding-up petition will usually be obtained if the applicant can demonstrate that the debt demanded is disputed on genuine and substantial grounds, and, in this case, it seems that Astra was able to easily satisfy the court of this in respect of both the project claim and the litigation claim—a person who wishes to serve a statutory demand or otherwise threatens to commence winding-up proceedings unless a debt is paid should ensure they are able to evidence liability to pay the debt and, even if the creditor is ultimately successful (as in this case), there may be a risk that any costs order made in their favour may be reduced,

- care should be taken when drafting agreements, particularly in relation to when payment is due to be made by one party to the other, and whether payment is subject to any conditions—in this case, had payment of the post-agreement fees been subject to the condition imposed on payment of pre-agreement fees (as Astra contended was agreed between the parties notwithstanding the terms contained in the consulting agreement), then it appears that the application would have succeeded and an injunction granted,

- the written terms of an agreement will usually be held to represent the intention of the parties, and convincing proof is required by the court to support a claim for rectification of the agreement,

- in the event that an applicant seeks to challenge a statutory demand or bankruptcy or winding-up petition on the basis of improper or collateral purpose on the part of the creditor, they must be able to demonstrate that either:
  - o the creditor does not want a bankrupt or winding-up order to be made, but uses the threat of it to put pressure on the debtor to do something that the debtor is otherwise unwilling to do, or
  - o the creditor does want a bankruptcy or winding-up order to be made but is not acting in the interests of the class of creditors of which the creditor is one or where the success of the petition will operate to the disadvantage of creditors.

(6) Trustees in bankruptcy—who is liable for which costs?

If a trustee in bankruptcy were to pursue an appeal in place of the bankrupt, would he be liable for the costs of hearings before his appointment? Adam Chichester-Clark, of Thirteen Old Square Chambers, examines the Supreme Court's decision in *BPE Solicitors v Gabriel* [2015] UKSC 39, [2015] All ER (D) 179 (Jun).

A trustee in bankruptcy, who was considering whether to pursue an appeal to the Supreme Court in an action which had so far been conducted by the bankrupt, asked the court if he would be liable for the costs of the hearings before the trial judge and the Court of Appeal, which had taken place prior to his appointment. The Supreme Court ruled that he would not be held personally liable for any costs in relation to the action up to an including the order of the Court of Appeal by virtue of the fact of his office as trustee in bankruptcy or of his adoption of the appeal.

What was the background to this application?

The trustee was appointed on the same day that the bankrupt was granted leave to bring an appeal in the Supreme Court in an action he had originally brought against BPE Solicitors.

The trustee applied for a declaration as to the extent of his personal liability for BPE's costs in the courts below, in the event that he adopted the appeal. According to the rule in *Borneman v Wilson* (1884) 28 Ch D 53, where a trustee decides to adopt proceedings previously carried on by the bankrupt, he becomes (potentially) personally liable for all of the opposing party's costs, including those incurred prior to his appointment as trustee. The rationale for this rule was that the law, as it was understood prior to the decision of the Supreme Court in *Re Nortel GmbH (in administration)* [2013] UKSC 52, [2013] 4 All ER 887, was that an opposing party would have no remedy for such costs, other than against the trustee, because they were not provable in the bankruptcy. It is now clear that such costs are provable.

What were the main issues?

There were two issues for the court:

- whether it had jurisdiction to decide the issue prior to the hearing of the substantive appeal, and
- whether *Borneman v Wilson* remained good law.

How did the court decide those issues?

Lord Sumption (with whose judgment each of the other members of the court agreed) decided that it was just and practical to hear the trustee's application prior to the hearing of the substantive appeal because it turned on a matter of principle, the determination of which was necessary to enable the trustee and creditors to make an informed decision as to whether to proceed with the appeal.

As to the question of principle, Lord Sumption determined that *Borneman v Wilson* was no longer good law. A trustee was not liable for the costs incurred in distinct proceedings prior to his appointment (i e in the proceedings in the courts below within the same action) by reason of his office or of the adoption of the appeal. More generally, Lord Sumption indicated that a trustee's liability for an opposing party's costs before his adoption of any proceedings was a matter for the court's discretion.

What are the consequences of this decision?

It is reasonable to suppose that, in a significant number of cases, the decision in *Borneman v Wilson* has deterred trustees from adopting meritorious claims at the expense of creditors. The effect of the rule was to require a prudent trustee to obtain an indemnity sufficient to cover his personal liability for adverse costs before the date upon which he adopted the proceedings as well as those thereafter. In many cases, this will not have been possible due to the paucity of assets within the bankruptcy, the unavailability of after-the-event insurers on affordable terms and the reluctance of creditors to throw good money after bad. In such circumstances a trustee will then have been compelled to sell the right to bring the claim on the open market for the best price, considerably below the sum that would have been recovered at trial.

The basis upon which the court will exercise its discretion to make a trustee liable for costs incurred prior to his appointment remains to be seen. However, absent compelling reasons for doing so, it is difficult to see why a court would decide to do so, bearing in mind that they will ordinarily be provable as contingent debts within the bankruptcy. If that is correct, it is probable that the effect of this decision will be to increase significantly the number of cases adopted by trustees.

(7) Resolving the rules of insolvency

In what ways has *Re Kingstons Investments Ltd (in Creditors' Voluntary Liquidation)*; *subnom Adlon Ltd v Sale (as Liquidator of Kingstons Investments Ltd)* [2015] EWHC 1619 (Ch), [2015] All ER (D) 122 (Jun) shed light on long-standing ambiguities in the Insolvency Rules 1986? In our seventh analysis piece Jamie Riley, commercial litigator at 11 Stone Buildings, explores the case and explains why the final decision will be so important for insolvency lawyers.

The proceedings concerned a company (the company) in creditors' voluntary liquidation. The applicant creditor of the company applied for an order, under SI 1986/1925, r 4.70(2), varying or setting aside the decision of the first respondent liquidator and chairman at a meeting of the company's creditors to admit the applicant as a creditor for voting purposes for a lower sum than the applicant contended should have been admitted, with the result that a resolution for the appointment of a joint administrator was defeated. The Companies Court, in allowing the application, held that S had erred in treating a liquidated claim (the moiety) as an unliquidated claim and in the application of the rules. The moiety claim was a provable debt under the rules and the applicant had, on the evidence, established its claim. It had not been open to the respondents to use a sum by way of set off against the moiety claim.

What were the facts of the case?

The applicant, Adlon, is a construction contractor that entered into a joint contract tribunal (JCT) contract with Kingstons Investments Ltd (the company) for the design and construction of a commercial and residential development. A dispute arose between the parties when the company defaulted in making interim payments in respect of certified sums following practical completion. The matter was referred to adjudication, by which time most of the development had been sold. The adjudicator awarded Adlon a sum equivalent to the outstanding interim payments. The company failed to make any payment of the adjudication award, which Adlon sought to enforce in proceedings before the Technology and Construction Court. The enforcement proceedings were settled by a consent order pursuant to which the company agreed to a judgment being entered against it.

Despite agreeing to the judgment, the company still failed to pay the sums owed. Soon after negotiating the consent order, the company's directors arranged to place the company into creditors' voluntary liquidation (CVL). They approached the first respondent, Ms Sale, an insolvency practitioner operating a sole practice. During the negotiation of the consent order, the directors had made no mention of their plans for the company to enter CVL.

By this stage, Adlon had presented a winding-up petition on the same day that the notices of the s 98 creditors meeting were sent out. The petition debt was based not only upon the judgment but also upon an additional claim under the JCT contract for delay, damage, loss and expense—the so-called DDLE claim. In advance of the meeting, Adlon submitted its proof of debt for voting in a total sum made up of the judgment—an outstanding half of the 3% retention under the JCT contract (the moiety) and the DDLE claim. Adlon also submitted a proxy form in which it nominated another insolvency practitioner as liquidator instead of Ms Sale.

At the s 98 meeting, the second respondent, who was one of the directors, acted as chairman and admitted Adlon's proof only in respect of the judgment debt—thus rejecting the moiety and DDLE claim for voting purposes. In the event, the directors' nominee, Ms Sale, was voted in as liquidator. Adlon did not appeal the chairman's decision at the s 98 meeting. The petition was still on foot and Adlon had expressly reserved its position.

In her report of the s 98 meeting, Ms Sale, now the liquidator, highlighted various concerns and areas of investigation raised by creditors regarding the conduct of the directors both in relation to the manner in which the affairs of the company had been conducted and as to the lack of transparency in providing information ahead of the meeting. In particular, there was a dramatic shift in the 'cash at bank' position of the company in the lead up to CVL with a sum in excess of £1m suddenly reducing to a balance of £198.

Adlon decided not to pursue the winding-up petition on the return date but instead sought to agree the appointment of its nominee. Ms Sale agreed to convene another meeting of creditors for that purpose. In advance of the second creditors' meeting, Adlon provided a substantial amount of detail and documentation in support of all its claims.

At the second meeting, Ms Sale, the liquidator, was chairman. In dealing with the proofs for voting, she unquestioningly admitted the proofs of other creditors, principally made up of claims by the second defendant and other connected creditors. However, in relation to Adlon's proof, she was not so accommodating. The liquidator admitted the judgment debt in full although marked it as objected to on the basis of a counterclaim asserted by the company's directors. In relation to the DDLE claim, the liquidator applied the same set-off to reduce the amount claimed but allowed the balance. As for the moiety, the liquidator initially rejected it on the basis that it was a future debt but when Adlon's nominee explained that this was an incorrect approach, she admitted it but only for £1. In so doing she treated the moiety as an unliquidated claim and applied r 4.67(3) rather than r 4.70(3).

The result was that the resolution for a joint appointment was defeated by a very narrow margin. Adlon appealed under r 4.70(2), seeking to set aside the liquidator's decision on its proof and an order that its nominee be jointly appointed—as would have been the outcome of the meeting had the liquidator properly dealt with its proof.

What are the main points of interest for insolvency lawyers arising from this case?

The key points of interest were:

- the impact of cross claims on the decision of the chairman of a creditors' meeting when deciding whether to admit a creditor's proof for voting,
- the task of the court on an appeal under r 4.70(4), and
- whether it is appropriate to convene a new meeting to consider the proposed resolution afresh or order a joint appointment.

We will look at each of these in more detail below, in each case exploring the arguments raised and the ultimate decision from the Registrar.

What was the impact of cross claims?

The arguments raised

It was argued on behalf of Adlon that a chairman cannot reject or reduce a liquidated claim for voting purposes on the basis that it may be reduced or extinguished by a cross claim. Relying on the authority of *Emery v UCB Corporate Services Ltd* [1999] [2001] EWCA Civ 675, [2001] All ER (D) 226 (Apr), it was argued that the fact that the creditor has a claim is not altered by the possibility that the debtor's cross claim may succeed at some future point. As to the respondents' argument that the set off had to be applied because of the provisions of r 4.90, it was argued that r 4.90 did not apply. It was part of a separate chapter within dealing with the adjudication of proofs for a dividend—a process which is carried out exclusively by the liquidator, as opposed to a chairman, and which involves a separate appeal procedure. Alternatively, it was submitted that at the very least the existence of a cross claim gave rise to a doubt that the debt claimed was owed such as the proof should be accepted for voting purposes but marked as objected to in accordance with r 4.70(3).

On behalf of the second respondent director, it was submitted that *Emery v UCB* had no direct application to the present case because the decision arose in the context of voting on an individual voluntary agreement in relation to which there is no automatic set-off provision as provided in r 4.90 for liquidations. In a written submission after the hearing, counsel for the second respondent referred to the guidance given by Lord Hoffman in *Stein v Blake* [1995] 2 WLR 710, [1995] 2 All ER 961 in support of the proposition that insolvency set off was automatic and mandatory.

The decision of Registrar Barber

The Registrar found that there are strong arguments in favour of treating the valuation of a debt for voting purposes as an example of a situation in which claim and cross claim should continue to be considered separately—notwithstanding, r 4.90. This was because in *Stein v Blake*, Lord Hoffman himself acknowledged that for certain purposes, claim and cross claim must continue to be considered separately.

However, given that the respondents had not addressed *Emery v UCB* and had only referred to *Stein v Blake* after the hearing, the Registrar erred on the side of caution and did not reach a concluded view on whether the chairman at a creditors meeting would be precluded from applying a set-off to reject a liquidated claim for voting purposes.

Nonetheless, the Registrar held that r 4.90 and Lord Hoffman's guidance in *Stein v Blake* did not displace r 4.70(3). This meant that, following *Emery v UCB*, where the chairman is really in doubt as to whether a debt is owed because of a cross claim in favour of the company, the chairman should allow the claim for voting but mark it as objected.

The Registrar rejected the argument that *Emery v UCB* was of no application to the current case. In all material respects, r 4.70(3) and r 5.22 are identical. The authorities to which Adlon's counsel referred made clear that in general the schemes should be approached in the same way. For example, see *Power v Petrus* [2008] EWHC 2607 (Ch), [2008] All ER (D) 319 (Oct) per Lewison J at paras [10]–[11].

What was the role of the court on an appeal under r 4.70?

The arguments raised

In *Re a Company (No 004539 of 1993)* [1995] 1 BCLC 459, [1995] BCC 116, Blackburne J stated that:

> 'The task of the court, on an appeal under r 4.70(4) is simply to examine the evidence placed before it on the matter and come to a conclusion whether, on balance, the claim against the company is established and, if so, in what amount.'

In undertaking this task, he continued, the court was not confined to the evidence that was before the chairman at the time that he made his decision, but was entitled to consider whatever admissible evidence on the issue the parties chose to place before the court. This was qualified by Lewison J in *Power v Petrus* as excluding evidence of events which took place subsequent to the meeting.

On behalf of Adlon, it was argued that these authorities had to be seen in their own context. In particular, the issue in *Re a Company* was whether the debt of the creditor had been compromised by an agreement so that it no longer existed. Furthermore, it was submitted that the subject of an appeal under r 4.70(4) is the chairman's 'decision'. Accordingly, it was in relation to that part of the decision that was said to be incorrect that an applicant had to establish his case. Therefore, the rule should not be read as requiring the applicant creditor to prove his entire case on a balance of probabilities. Such a requirement was inconsistent with the procedure for evaluating proofs for voting as being a quick, rough, and ready process.

The respondents seized upon the quotation from *Re a Company* as a basis for arguing that even if the court is satisfied that the chairman misdirected herself, the outcome of the appeal isn't dependent solely on that issue, but, instead, the court must look at all available evidence and determine if Adlon was a creditor and, if so, in what sum.

The decision of Registrar Barber

The Registrar expressed the view that the respondents' arguments amounted to an over simplification and that it was necessary to guard against an over-literal application of Blackburne J's words. Reviewing the relevant authorities, she concluded that the scope of the factual enquiry to be undertaken by the court on an appeal under r 4.70 must depend on the scope of the appeal. In *Re a Company*, the issue was whether the debt existed. Therefore, the reference to the court being required to determine 'in what amount' the claim is established was strictly obiter.

In support of her conclusion, the Registrar relied upon the judgment of Lewison J in *Power v Petrus* in which he referred to an 'examination of the objection to the proof'. The Registrar determined that the scope of the enquiry depended upon the scope of the objection. If, for example, a creditor lodged a proof of debt in relation to ten separate debts of which nine were admitted but the tenth was denied, it could not sensibly be argued that, in order to successfully challenge the rejection of the tenth, the creditor must make out his case on the other nine—which had already been admitted. Further support for this conclusion was to be found in *Re Portsmouth City Football Club Ltd (in administration)* [2012] EWHC 3088 (Ch), [2013] 1 All ER 975 in which Mann J focused on that element of a proof which had been rejected.

To underline her conclusion on the need to have regard to the scope of the appeal, the Registrar stated the following reasons and guidance:

- such appeals are in many cases time critical, as their outcome often has a significant impact on key decisions in an insolvency which may have far reaching consequences as to the manner in which it is administered—the legislature has recognised this by imposing tight time constraints on the issue of such appeals,
- the court should be mindful of the fact that it will assist the party favouring the status quo to press for a wider factual enquiry in order to defeat or delay the appeal,
- the decision reached on the appeal will only determine the validity of the proof at a given meeting—it will not determine the claim for the purpose of participating in a dividend,
- while the court may regard evidence predating the meeting that was not available to the chairman, it must exclude evidence of events subsequent to the meeting—this means that the court may well be ruling on a position which, by the date of the hearing, had become historic, and
- the court should take active steps to ensure that appeals are resolved quickly and efficiently and that the scope of any factual enquiry is kept to a minimum in order to justly dispose of the matter.

What order should be made?

The arguments raised

Counsel for the liquidator, Ms Sale, argued that the only relief to be granted should be an award of costs. It was openly argued that were a new meeting convened then the result was bound to be the same because she would reject Adlon's proof in its entirety. Furthermore, if Adlon's nominee were appointed a joint liquidator then it was likely that creditors representing at least 10% of the total debt would summon a further meeting to remove Adlon's nominee.

For the second respondent director it was argued that the court should direct a new meeting at which the creditors could reach a decision taking into account the additional costs associated with a joint appointment.

On behalf of Adlon, it was argued that a second meeting should not be directed and that the court should simply appoint its nominee and grant associated relief. In support of that argument, the guidance of Lewison J in *Power v Petrus* was referred to and the following factors were relied upon:

- the meeting had involved a single, clear-cut issue, namely whether Adlon's nominee should be appointed,

- all those entitled to vote at the meeting did so—the problem arose because the chairman had not allowed Adlon to vote in the correct amount,
- the reversal of the chairman's decision on the moiety meant that Adlon would have secured the majority,
- mathematically the outcome of the meeting could be declared and as such it was an appropriate case for a re-count and not re-run, and
- the liquidator had confirmed that she was investigating preference claims against the directors and so it was appropriate to appoint a joint liquidator to ensure such investigations were conducted fully and independently.

The decision of Registrar Barber

Having regarded the court's approach in *Power v Petrus*, the Registrar considered that the starting point in such cases is that a new meeting should be ordered unless there is something in the evidence to displace that default position.

On the facts of this case, the Registrar concluded that the factors relied upon by Adlon, the delay caused by this matter coming to court for determination and the liquidator's open lack of objectivity were sufficient to displace the default position. Accordingly, the Registrar declined to direct a new meeting to take place and instead ordered the joint appointment of Adlon's nominee.

What practical lessons can be taken away from this case?

This case has provided some necessary clarification on the role of the court and the test to be satisfied on an appeal under r 4.70(4). The nature of the chairman's decision and the scope of the appeal determine the extent of the court's investigation into the creditor's claim. For those creditors whose proof for voting is said to have been decided wrongly by the chairman, it means that they need to establish their claim only to the extent that it has been rejected by the chairman or opposed by another creditor. It is not necessary to establish all claims in their full amount irrespective of whether the chairman had accepted them in part or in the majority. As a corollary, chairmen whose decisions are appealed and creditors who support the decisions should not expect to maintain the status quo by introducing arguments or evidence challenging those parts of the proof in respect of which no objection is made to the chairman's decision and no appeal is made.

This decision underlines the importance of chairmen clearly explaining what part of a proof is accepted or rejected and why. It also demonstrates that where there is a risk of imbalance or lack of objectivity on the part of the liquidator, the court will be prepared to take matters into its own hands and not refer the matter back to a meeting of creditors.

Finally, although the Registrar did not reach a final determination on the impact of cross claims, she nonetheless gave a useful indication that the set-off provisions under r 4.90 do not apply to the evaluation of voting proofs.

CASE LAW

(1) Tchenguiz v Grant Thornton UK LLP [2015] All ER (D) 36 (Jul), [2015] EWHC 1864 (Comm)

Queen's Bench Division, Commercial Court, before Mrs Justice Carr DBE.

Practice – Stay of proceedings – Summary judgment – Entitlement to summary judgment – Claimants issuing proceedings against defendants – Fourth defendant insolvent Icelandic bank and member of its winding-up committee seeking dismissal or stay – Whether Icelandic law prohibiting court proceedings against bank in winding up applying – Whether exclusion to court's jurisdiction where proceedings relating to winding up applying – Credit Institutions (Reorganisation and Winding Up) Regulations 2004, SI 2004/1045, reg 5 – European Parliament and Council Directive (EC) 2001/24, arts 9, 10 – Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, art 1(2)(b).

Facts:

The claimants issued proceedings, alleging that the individual defendants had committed torts, including malicious prosecution, conspiracy to injure by unlawful means, and malicious procurement and execution of arrest and search warrants. The fourth defendant insolvent Icelandic bank (Kaupthing) was alleged to be vicariously responsible for the acts of the first defendant accountancy firm and the fifth defendant (JJ), an Icelandic lawyer who was a member of Kaupthing's resolution committee and then of its winding-up committee. Kaupthing and JJ sought the dismissal or stay of the proceedings.

Kaupthing alleged that the claimants were barred from bringing the proceedings against it under art 116 of the Icelandic Bankruptcy Act 1991, which prohibited court proceedings against a bank in winding-up proceedings, and which had effect in England under the Credit Institutions (Reorganisation and Winding Up) Regulations 2004, SI 2004/1045, specifically reg 5. Kaupthing and JJ contended that the English court had no jurisdiction under the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matter (the Lugano Convention) because the proceedings fell within the scope of the exception in art 1(2)(b) of that Convention, concerning proceedings relating to the winding-up of insolvent companies. Consideration was given to arts 9 and 10 of European Parliament and Council Directive (EC) 2001/24 (on the reorganisation and winding up of credit institutions).

Held:

(1) Iceland and the United Kingdom were parties to a pan-European legal order which provided for insolvency proceedings concerning credit institutions to be conducted in, and according to the laws and procedures of, the relevant 'home' member state. As part of the mutual recognition of, and respect for, that regime, the insolvency law of the home member state was to have effect in relation to a lawsuit commenced in any European Economic Area state after the start of the insolvency proceedings. The effect of arts 9 and 10 of the Directive was that, by art 9, the only court with jurisdiction to wind up a credit institution was the home member state and, by art 10, the effects of those winding-up proceedings on proceedings brought by individual creditors were governed by the lex concursus. The choice of law provision in art 10(2)(e) of the Directive clearly provided that the law of the home member state would determine the effects of winding-up proceedings brought by individual creditors. The relevant law was the domestic substantive and procedural law of the home state (see [62], [63] of the judgment).

The relevant law was art 116 of the Act. Applying that law, legal action could not be brought against Kaupthing and there was a prohibition on the proceedings so far as they related to Kaupthing. Article 116 of the Act had been imported into English law, irrespective of whether or not it had extra-territorial effect as a matter of Icelandic law. Accordingly, reg 5 of the Regulations had the effect contended for by Kaupthing, namely that the prohibition on proceedings in art 116 of the Act was effective in England. The proceedings against Kaupthing had been brought in breach of that prohibition. The claimants' contentions that, where the Lugano Convention applied, the Directive only applied to proceedings that fell within art 1(2)(b) of the Convention and, alternatively, that the Directive did not grant the home state the power to take exclusive jurisdiction over any claim of whatever nature against a credit institution in liquidation and nor did the Regulations, would be rejected (see [25], [63], [65], [71], [113], [159] of the judgment).

Lornamead Acquisitions Ltd v Kaupthing Bank HF [2011] All ER (D) 214 (Oct) applied; *Joint Administrators of Heritable Bank plc v Winding up Board of Landsbanki Islands hf* [2013] 2 All ER 355 applied; *LBI hf v Kepler Capital Markets SA*: C-85/12 [2013] All ER (D) 301 (Oct) considered.

(2) It could not be said that the pleaded claims against Kaupthing and JJ derived directly from the proceedings relating to Kaupthing's winding up.

It was not the principal subject matter of the claims against them. Kaupthing's winding up was the relevant context, but the claims had not derived directly from it. The fact that there was no direct juridical derivation was, of course, not determinative, but it was relevant. Further, the claims were not closely connected with the winding-up proceedings. There was clearly a connection, but not a sufficiently close one. Accordingly, the claims against both Kaupthing and JJ were within the Lugano Convention and not excluded by art 1(2)(b) (see [153], [154], [156], [158] of the judgment).

Kaupthing's application succeeded on the insolvency ground, but the application for a stay or dismissal by Kaupthing and JJ on the jurisdiction ground failed (see [160] of the judgment).

Polymer Vision R & D Ltd v Van Dooren [2011] All ER (D) 170 (Nov) applied; *Rubin v Eurofinance SA; New Cap Reinsurance Corp (in liq) v Grant* [2013] 1 All ER 521 applied; *German Graphics Graphische Maschinen GmbH v Schee*: C-292/08 [2009] All ER (D) 75 (Sep) considered.

Romie Tager QC, Jonathan Crystal and Samantha Knights (instructed by McGuireWoods London LLP) for the claimants.

Robert Miles QC, Jeremy Goldring QC and Tom Gentleman (instructed by Travers Smith LLP) for Kaupthing and JJ.

(2) Wilson v Williams (Trustee in Bankruptcy for John Wilson) [2015] All ER (D) 275 (Jun), [2015] EWHC 1841 (Ch)

Chancery Division, Leeds District Registry, before Judge Behrens (Sitting as a Judge of the High Court in Leeds).

Bankruptcy – Discharge – Suspension – Judge making order suspending discharge from bankruptcy until claimant complying with duties to disclose full financial position to trustee – Judge ordering examination of claimant's financial position – Claimant appealing against part of order – Whether order disproportionately severe – Whether order should be varied – Insolvency Act 1986, ss 279(3), 333, 336.

Facts:

The claimant was adjudged bankrupt on his own petition. In his statement of affairs, he disclosed liabilities of at least £1m to a pension fund since 1988. A trustee was appointed. He made an application to the court, under s 333 of the Insolvency Act 1986, for a court-ordered examination of the claimant, alleging that the claimant had failed to co-operate, in particular, by failing to disclosure of his income and outgoings and details of his pensions. The claimant filed a witness statement in answer to the trustee's application, contending that he had done his best to cooperate with the trustee. A judge ordered an examination of the claimant under ss 333 and 366 of the Act and required him to deliver to the trustee all information in relation to his financial affairs within his possession. The judge also made an order suspending the automatic discharge of the claimant's bankruptcy until the claimant had complied with his duties to the trustee (the order). Subsequently, the claimant submitted a supplementary bundle which included email correspondence between himself and the trustee after the date of the order. The emails asserted purported compliance with the order and included certain details of his financial advisor. However, the claimant maintained his right to privacy of his financial affairs as regards his pension funds, which, he contended were excluded from the bankrupt estate by law. The claimant appealed against part of the order.

The claimant submitted, among other things, that the terms of the order were disproportionately severe and that s 279(3) of the Act, which provided that the court might suspend the running of the period during which a person remained bankrupt if satisfied that he had complied with his obligations, was not penal. The claimant submitted that he was, in effect, at the mercy of the trustee and might be left as an undischarged bankrupt for an indeterminate time, which he submitted, was contrary to the policy of the Act. Consideration was given to r 6.216 of the Insolvency Rules 1986, SI 1986/1925 (the Rules).

Held:

The appeal would be dismissed.

It was clear from the authorities that s 279(3) of the Act was penal. Before the court could interfere with a discretionary decision of a judge, it had to be shown that the judge had either erred in principle in his approach or had left out of account, or had taken into account, some feature that he should, or should not, have considered, or that his decision was wholly wrong because the court was forced to the conclusion that he had not balanced the various factors fairly in the scale (see [32], [35] of the judgment).

The court was persuaded not to interfere with the order. The present case was not one where there was any evidence of oppression by the trustee. The requests he had made were perfectly reasonable and had not been made in any oppressive manner. The claimant's default had been serious. It had to be borne in mind that the only significant asset disclosed by the claimant was the pension fund worth in excess of £1m. The trustee wished to investigate the circumstances and the terms of the pension fund in order to determine whether to challenge the claimant's view in relation to it. The claimant had steadfastly refused to provide the trustee with the necessary information or documents relating to his pension fund which would enable the trustee to carry out the investigation. He had been ordered to do so in the order. He had not complied with that order. The claimant was protected by his right to apply to the court either under the express provisions of the order or under r 6.216 of the Rules (see [35] of the judgment).

Save that a typographical error in the order would be corrected by amending the fifth last word of para 3 to 'or', the appeal would be dismissed (see [36] of the judgment).

Phonographic Performance Ltd v AEI Rediffusion Music Ltd [1999] All ER (D) 169 applied; *Chadwick (trustee in bankruptcy of Nash) v Nash* [2012] BPIR 70 applied; *Mawer v Bland* [2015] BPIR 66 applied; *Shierson v Rastogi* [2007] All ER (D) 446 (May) considered; *Bramston v Haut* [2012] All ER (D) 127 (Dec) considered.

The claimant appeared in person.

Beth Harvey-Smith (instructed by Freeths LLP) for the trustee.

(3) Astra Resources plc v Credit Veritas USA LLC [2015] All ER (D) 252 (Jun), [2015] EWHC 1830 (Ch)

Chancery Division, Companies Court, before Mr Justice David Richards.

Insolvency – Practice – Pre-trial or post-judgment relief – Injunction – Respondent creditor (CV) serving statutory demand on applicant company based on outstanding fees for consulting services provided to company under terms of agreement – Company applying for injunction to restrain CV from presenting winding-up petition on basis debt claimed by CV in statutory demand being disputed on substantial grounds and petition amounting to abuse of process – Whether injunction should be granted.

Facts:

The respondent (CV) was a limited liability company, incorporated in New York, which carried on business as the provider of investment and other services, including consulting work. The claimant company (the company) was incorporated in England as a public company. A consulting agreement was made between CV and the company in 2013. CV claimed that sums were owed to it by the company under that agreement. CV subsequently served a statutory demand on the company for a total of approximately US$1.5m for services provided. That sum included $75,000, which CV contended was for an advisor fee for services it had performed under an agreement between CV and an Australian subsidiary of the company in respect of certain litigation in America. The second element in the statutory demand was a claim for US$500,000 in respect of a project called the 'Stanley Meyer project'. The largest element in the statutory demand was a claim for US$960,000 in respect of services provided over a period form 1 April 2012 to 30 November 2014. A proportion of that sum (US$480,000) was contended to be conditional upon certain funds being raised, a condition the company contended had not been satisfied. The balance of the statutory demand was for US$600,000, which represented sums claimed under para 8 of Sch B to the agreement for unpaid retainer fees. The company applied for an injunction to restrain CV from presenting a winding-up petition against it.

CV submitted that the injunction should be granted on two grounds: (i) that the evidence showed a sufficient dispute concerning the amounts claimed as to preclude the presentation of a petition; and (ii) that it would be an abuse of process because CV's purpose would not be for its benefit as a creditor of the company. Instead, it contended, CV had a collateral purpose in seeking to present a winding-up petition, namely to obtain control of the company through the submission of a reorganisation plan in the London courts. Consideration was given to whether the company had a seriously arguable case for rectification of para 8 of Sch B to the agreement in the event that it was liable to pay CV the sum claimed in the statutory demand pursuant to it.

Held:

The application would be dismissed.

(1) It was settled law that, if a company could demonstrate that the alleged debt on which a petition was founded was genuinely disputed on substantial grounds, the court would strike out the petition (see [18] of the judgment).

On the present state of the evidence, there was no clear basis for the claim for US$75,000 and the liability of the company to pay that sum was genuinely disputed on substantial grounds. As regards the US$480,000 element of the claim, there was a genuine dispute on substantial grounds. As a matter of construction of the terms of the agreement, there could be no doubt that the retainer, for which provision was made by para 8 of Sch B to the agreement, was unconditionally payable. On the evidence, the company had been unable to demonstrate a genuine dispute on substantial grounds as regards the claim for US$600,000 (see [21], [25], [27], [35] of the judgment).

Tallington Lakes Ltd v Ancasta International Boat Sales Ltd [2013] All ER (D) 14 (Jan) applied.

(2) The collateral purpose contended for by the company was far from the type of collateral purpose which arose in the authorities. On the facts, it would not be an abuse of process for CV to present a petition to wind-up the company in its capacity as a creditor for unpaid retainer fees amounting to US$600,000 (see [39], [41] of the judgment).

Accordingly, the company's application for an injunction to restrain the presentation of a winding-up petition by CV would be dismissed and a declaration would be made that CV was entitled to present a winding-up petition based on unpaid retainer fees amounting to US$600,000 (see [42] of the judgment).

Ebbvale Ltd v Hosking (trustee in bankruptcy) [2013] All ER (D) 103 (Mar) considered.

The company appeared by its director, Uriel Rubinov.

Iain Pester (instructed by Gallant Maxwell Ltd) for CV.

(4) Re Atrium Training Services Ltd; Re Kimberly Scott Services Ltd; subnom Smailes v McNally [2015] All ER (D) 232 (Jun), [2015] EWHC 1755 (Ch)

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

Disclosure and inspection of documents – Production of documents – List of documents – Failure to product documents – Proceedings concerning amounts of tax allegedly due between 2003 and 2005 – Disclosure taking place – Court making unless order requiring liquidators to conduct full search for documents, in default of which claim being struck out – Liquidators failing to comply with order – Claim being struck out – Liquidators seeking, among other things, relief from sanction – Whether application to be allowed – CPR 31.6, 31.7.

Facts:

In the proceedings, the applicant liquidators claimed approximately £50m pursuant to s 213 of the Insolvency Act 1986, on the basis that the respondent companies had failed to pay the correct amount of tax due to the Revenue and Customs Commissioners in the years 2003–2005 inclusive. In June 2013, the court made an order by which it directed that, unless the liquidators conducted a search for documents falling within CPR 31.6, in compliance with CPR 31.7, and provided a list of documents identifying the documents located in that search, the claim would be struck out (the default order). In July 2014, the court held that the respondents had not complied with the default order and that, in consequence, the proceedings had been automatically struck out. In August, the liquidators issued an application for, among other things, relief from the sanction imposed by the default order.

The application was to be determined in accordance with the principles in *Denton v TH White Ltd*; *Decadent Vapours Ltd v Bevan*; *Utilise TDS Ltd v Davies* [2015] 1 All ER 880. First, it was necessary to identify and assess the seriousness and significance of the alleged failure to comply with any rule, practice direction or court order. If the breach was neither serious nor significant, the court was unlikely to need to spend much time on the second and third stages. The second stage was to consider why the default had occurred. The third stage was to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application, including the first two stages.

Held:

The application would be dismissed.

On the evidence, regarding the first stage of the test, a reasonable search had not been carried out. The breach was both serious and significant. If the mechanism that had been devised for the search had not worked correctly then there could not have been a reasonable search, and that would be both serious and significant, because the disclosure exercise would not have been completed correctly, and what remained to be done would take significant further time. Regarding the second stage, there had been no satisfactory explanation for the failure that had occurred. In those circumstances, it was impossible for the purposes of stage three to persuade the court that relief should be granted. Considering all the factors in the case, there had been, in particular, a lamentable history of the liquidators' disclosure exercise down to the date of the default order. There was no excuse for that. The way in which the liquidators had breached the default order demonstrated a failure to approach the litigation appropriately. In any event, the errors that had occurred showed that, as a result of the liquidators, the proceedings had not been conducted efficiently or at proportionate cost (see [90], [92]–[96] of the judgment).

In the circumstances, it was inappropriate to grant relief from the sanction imposed by the default order (see [97] of the judgment).

Denton v TH White Ltd; *Decadent Vapours Ltd v Bevan*; *Utilise TDS Ltd v Davies* [2015] 1 All ER 880 applied.

Alan Steinfeld QC and Andreas Gledhill QC** (**instructed by Isadore Golman**) **for the liquidators.

Jonathan Crow QC and Stephen Robins** (**instructed by Mishcon De Reya**) **for the respondents.

(5) Hickox v Brilla Capital Investment Master Fund SPC Ltd [2015] All ER (D) 220 (Jun), [2015] UKPC 30

Privy Council, before Lord Neuberger, Lord Mance, Lord Carnwath, Lord Toulson and Lord Hodge.

Company – Voluntary winding up – Application for leave to sell assets – Company going into voluntary liquidation – Liquidators applying to court *for leave to sell specified assets by private treaty – Remainder of assets being earmarked for sale by public auction – Parties each seeking to buy assets subject of application – Judge adjourning and indicating minded to sanction highest bid received by resumption of proceedings – Appellants making highest offer shortly before deadline – Respondent making higher offer shortly after deadline – Judge approving sale to appellants – Respondent successfully appealing to Court of Appeal of the Eastern Caribbean – Whether judge's order being flawed to extent justifying set aside – Whether judge having given proper notice of intent to authorise sale on resumption of proceedings – Whether imposition of deadline being unfair in circumstances where terms of sale made available four minutes before cut-off.*

Facts:

A company was the owner of a large resort that comprised land and 14-and-a-half villas. Pursuant to a voluntary liquidation, joint liquidators were appointed. The bulk of the company's assets were due to be sold by public auction on 2 May 2012. The company owed a judgment debt to two of the appellants, Charles and Linda Hickox (the appellants). One of the respondents, Brilla Capital Investment Master Fund SPC Ltd (the respondent) was an unsecured creditor of the company with whom the liquidators were negotiating a sale of assets on certain terms. The liquidators made an application for leave to sell the property by private treaty which came before the judge on 19 April. By that time, the liquidators had received an offer from the respondent in the sum of US$8.25m subject to the court's approval and conditional on completion by 30 April. On 24 April, the application was continuing when the appellants submitted an offer of US$9.25m. The following day, the application was stood out to enable the liquidators and the appellants to negotiate heads of terms. On 27 April, the application was mentioned to the judge to remind him of the need for a contract by 2 May and of the fact that the respondent's offer was due to expire on 30 April. That was significant as 29 and 30 April were a Sunday and a Monday and 1 May was a bank holiday. The judge indicated that he would sit on the Monday if the liquidators had not agreed terms for the sale by then. On the Sunday, the matter was mentioned and the judge was told that the liquidators were inclined to accept the respondent's offer. The appellants were permitted to put in further evidence for the following morning's hearing, at which the appellants and respondent would have 45 minutes each to make submissions before judgment would be delivered at 10.30am. The liquidators informed the parties of the events of the hearing and invited best offers by 7pm on that day. At 6.59pm, the respondent emailed an offer of US$10.018m. At the hearing on 30 April, the judge criticised the liquidators for having imposed the cut-off time for offers on the previous day when, instead, they should have left the opportunity to bid open until the hearing. Second, he considered that the liquidators had been wrong in having offered terms to the appellants that were materially more onerous than those that had been offered to the respondent; the terms offered should have been the same for both parties. The judge said that he would deal with the matter on the basis that the parties had another opportunity to make competitive bids. At around 11.30am, the judge made clear that a definitive decision had to be made that day. The judge rose at 12.10pm, saying that he would return at 1.15pm. He said that, when he sat again, it was likely that the highest offer would be the one that he would sanction. The liquidators, the respondent and the appellants then entered into discussions outside court. At 1.10pm, the liquidators sent a message asking the judge whether he would defer resuming the hearing from the original time of 1.15 until 1.30pm, to which he agreed. The judge said that, when they resumed, he wanted to be told the highest bid and that he should be told at that point if there was any reason why that bid should not be the one that he sanctioned. He took the opportunity to reiterate that a resolution had to be found that day so that contracts could be exchanged before 2 May. Second, at 1.26pm, the liquidators finally produced to the parties the revised written terms on which the property was to be sold (the Terms). Third, at 1.28pm, the appellants unconditionally offered the liquidators US$10.3m for the property, which offer was also notified to the respondent by email. Fourth, the respondent made an offer of US$10.4m, subject to obtaining instructions, at 1.32pm. The hearing resumed at 1.40pm and the respondent confirmed its offer. The judge decided that the best offer which had been communicated by 1.30pm on that day was the offer which the liquidators should be authorised to accept. That was the appellants' offer. A fairly detailed order was drawn up that authorised the liquidators to sell the property to the appellants for US$10.3m on specified terms, including the Terms. No agreement was executed between the appellants and the liquidators by 1 May. On the morning of 2 May, the application came back before the judge and he was told that the respondent had increased its offer to US$11m. The judge confirmed his earlier order and the sale of the property was formally agreed and the transfer completed. The Court of Appeal of the Eastern Caribbean Supreme Court allowed the respondent's appeal. The appellants appealed.

The property had been sold by the liquidators to the appellants in accordance with a valid court order which had not been obtained illegitimately. It was, therefore, necessary to consider the grounds upon which the respondent contended that the judge's order had been flawed to such an extent that it should be set aside. It submitted, inter alia, that the order had been unfairly made because the judge had failed to give proper notice that he would authorise a sale of the property by reference to the best offer which had been made by 1.15pm (later extended to 1.30pm). Second, the order had been unfairly made because it was unreasonable to impose a 1.30pm cut-off time when the Terms had only been communicated to the potential buyers four minutes earlier.

Held:

The appeal would be allowed.

(1) Bearing in mind the judge's persistent emphasis on the need for a speedy resolution of the issue of which bid was to be accepted, he had made clear before he had adjourned at 12.10pm that, when he resumed, he proposed to authorise the liquidators to accept the highest bid made by then, unless a good argument to the contrary was raised on behalf of the unsuccessful party. By his words, he had not absolutely committed himself, but the parties had been warned that the highest offer would be accepted and that had to have been intended, and understood, to mean the highest offer made during the adjournment. There was nothing that called into question the conclusion that the judge had made it clear to the parties before he rose at 12.10pm on 30 April that, when he resumed at 1.15pm, he would accept the highest bid made by that time, unless he was given a good reason for not doing so (see [25]–[30] of the judgment).

(2) There were a number of features in the present case which, when taken together, meant that the judge's order had not been unfair because of the delay in communicating the Terms. Firstly, a successful bid by 1.30pm on 30 April would not have automatically given rise to a binding contract, even once the judge had decided what order to make. Secondly, the adjournment at 12.10pm had been on the basis that: (i) it was to be for a short time; (ii) the parties were to make bids which would very probably be final; (iii) all parties knew that the Terms had yet to be finalised; and (iv) time was pressing. It was striking that at no time before the judge rose had anything been said to suggest that there would be a difficulty about proceeding as he had proposed because the Terms had not been finalised. It was apparent from what had been said—and not said—after the judge had resumed the hearing at 1.40pm, that the respondent had not been relying on the fact that it had not been provided with the final Terms until about 1.26pm as a reason for not having been able to bid for the property between 12.10pm and 1.30pm. Although he had made a number of points to support his case that the respondent should not be prevented from making a bid after 1.40pm on 30 April (and indeed on 2 May), counsel for the respondent had never suggested that it was unreasonable of the judge to have expected the respondent to make a bid between 12.10pm and 1.30pm because the Terms were unknown (see [33]–[40] of the judgment).

Allan S Wood QC and Tana-ania Small Davis (instructed by MA Law (Solicitors) LLP) for the appellants.

Robert Levy QC, Edward Knight and Ravi A Bahadursingh (instructed by Seymours Solicitors (London)) for the respondent.

The Registrar of Companies did not appear and was not represented.

The company did not appear and was not represented.

(6) Re Worldspreads Ltd (In Special Administration) [2015] All ER (D) 225 (Jun), [2015] EWHC 1719 (Ch)

Chancery Division, before Mr Justice Birss.

Insolvency – Administration order – Special administration – Distribution of assets – Regulated investment bank (company) holding client money under rules imposing statutory trust – Trust requiring pooling of client money – Joint special administrators being appointed in respect of company – Client monies being held on trust in accordance with relevant rules – Joint special administrators seeking directions in respect of distribution of client money – Whether court having jurisdiction to make order sought – Whether order sought should be made – FSA Handbook, Client Assets Sourcebook, CASS 7, 7A – Insolvency Act 1986, Sch B1, para 63 – Investment Bank Special Administration Regulations 2011, SI 2011/245, regs 10, 15.

Facts:

The proceedings concerned a company (the company), which was an investment bank within the meaning of s 232 of the Banking Act 2009. The company, which was engaged in the business of providing online trading platforms to enable customers to carry out spread betting and to trade in contracts for differences, held client assets, which included client money. Client money was held on a statutory trust governed by the Client Assets Rules (the CASS rules). The company was regulated by the Financial Services Authority (the FSA), now the Financial Conduct Authority (FCA). By an order made in March 2012, the company was placed into special administration after it emerged that there was a substantial deficit in the client money, which it ought to have held. Under r 7A.2.2R(1) of the CASS rules, the appointment of the special administrators was ‘a failure of the firm’, and accordingly, a ‘primary pooling event’, which triggered a requirement to treat client money as pooled and to distribute it under CASS 7A. Under the CASS rules, the trustee of the statutory trust holding the client money was the company and the pool was under the control of the joint special administrators appointed to the company. Under para 63 of Sch B1 to the Insolvency Act 1986 (the 1986 Act), the administrator of a company could apply to the court for directions in connection with his functions. One of the objectives of special administrator, under the special administration procedure, and pursuant to reg 10 of the Investment Bank Special Administration Regulations 2011, SI 2011/245 (IBSAR), was to ensure that client assets were returned as soon as reasonably practicable. However, there was no other provision in IBSAR or in the general FCA rules, which provided a procedure governing distribution of client money in a special administration. The joint special administrators of the company sought an order from the court which would, in effect, create a procedure to deal with that problem and to enable them to finally distribute client money. The company contended that the CASS 7A rules on distribution did not envisage the existence of non-responsive clients, nor did they provide a mechanism for dealing with funds which would otherwise be due to clients, but for their failure to submit a claim. The resulting impasse, it was contended, was not in the best interests of the special administration since it would necessarily have to remain open pending resolution of the unresolved claims. On the application of the administrators, the FCA had agreed to a proposed modification of the CASS 7A rules and had issued a direction to that effect. The modified rule permitted the administrators to make a final distribution without regard to the client money entitlement of a client which had not submitted a proof, provided the administrators took certain steps subject to a timetable. The modified rule applied only to the company and for a limited period. The proposed order as sought by the special administrators would permit them to set a bar date for outstanding claims, to make provision for costs and expenses, to deal with claims to client money which were not agreed and to make a final distribution to those with agreed money claims notwithstanding the potential claims of others who had not responded to communications from the administrators or not pursued a court application if their claim had been rejected by the administrators. The gross claims of clients against the client money pool were put by the special administrators at approximately £28.8m.

The issues for consideration were: (i) whether the court had jurisdiction to make the order sought; and (ii) if it did, whether the order should be granted. The special administrators submitted that, while the modified rule issued by the FCA was important, from the point of view of the administrators, it only provided that that course was open to them, it did not alter the fact that they should nevertheless come to court for directions. They submitted that the court had jurisdiction to give directions and to sanction the approach the administrators wished to take on two bases: (i) under para 63 of Sch B1 to the 1986 Act as applied to the special administration of the company by IBSAR; and (ii) under the court's inherent jurisdiction in relation to trusts where it was satisfied it was just and expedient to do so. Consideration was given to *Re MF Global UK Ltd* [2013] 2 BCLC 426 and to reg 15(4) of IBSAR.

Held:

(1) The court's inherent jurisdiction to supervise and intervene in the administration of a trust did not enable the court to vary beneficial interests, but it did permit the court to give directions to trustees to distribute trust property on particular bases when the court was satisfied

it was just and expedient to do so. That extended to distribution notwithstanding the existence of claims or potential claims of third parties, and in the context of a rejected claim to a beneficial interest. Paragraph 63 of Sch 1 to the 1986 Act provided that the administrator might apply to the court for directions in connection with his functions. By reg 15 (4) of IBSAR, the provisions of Sch B1 set out in Table 1 were applicable to a special administration with the modifications set out in that Table (see [20], [24] of the judgment).

The present case was on all fours with MF Global at the level of the principles to be applied. Insofar as the application raised matters arising within the scope of the administrators' appointment under IBSAR, the court had jurisdiction under para 63 of Sch 1 to the 1986 Act to give directions. Paragraph 63 of Sch B1 applied to special administrations such as the present one in unmodified form (see [20], [24] of the judgment).

It followed that the court had jurisdiction to make the orders sought (see [24] of the judgment).

MF Global UK Ltd, Re [2013] All ER (D) 139 (Jun) applied.

(2) The present state of affairs plainly did not accord with the objective in reg 10 of IBSAR of ensuring the return of client assets as soon as reasonably practicable. Consideration was taken, and the court was satisfied, of the fact that the administrators had taken all reasonable steps to identify or notify all potential client money claimants. The proposals properly balanced the interests of established clients to a timely return of their money with the interests of persons who might have serious, but unresolved claims to be treated as clients with client money claims. It was in the best interests of the proper administration of the client money trust and in the best interests of the clients for an order to be made substantially in the form sought. Wider factors included, among other things, that the creditors committee and the Financial Services Compensation Scheme had been provided with copies of the proposed application and that the FCA had been kept fully informed and had been notified of the application (see [16], [27], [31], [32] of the judgment).

The order sought would be made (see [33] of the judgment).

Glen Davis QC* (*instructed by Reed Smith*) *for the joint special administrators.

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