SOUTH SQUARE

Digest

A Special Edition in Collaboration with INSOL International

In advance of the INSOL Conference in London in June 2022, this special edition of the Digest features twelve collaborative articles between members of South Square and members of INSOL International, with a particular emphasis on transaction avoidance.

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A regular review of news, cases and articles from South Square barristers, this edition in collaboration with INSOL International

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In this issue

08

Avoidance provisions in England and Australia: a historical introduction
Farid Assaf SC and Mark Arnold QC provide a historical introduction to avoidance provisions.

38

Arbitration and Insolvency: Clash of Cultures?
Sheila Ng, Felicity Toube QC and Matthew Abraham compare the relationship between arbitration and insolvency in England and Singapore.

78

Cross-border transaction avoidance
William Willson, Stewart Maiden QC and Jock Baird address issues of cross-border transaction avoidance, jurisdictional reach and the recognition and relief available to officeholders under UNCITRAL model law form both a British and Australian perspective.

Articles

Regulars

Case Digests

SOUTH SQUARE

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From the editors

Marcus Haywood and William Willson

Welcome to this special edition of the Digest which, marking the forthcoming INSOL International Annual Conference in London this June, is produced in collaboration with INSOL. We have twelve articles written by INSOL Fellows and members alongside members of South Square, with a particular focus on transaction avoidance.

We extend our thanks to all those INSOL Fellows and members who have contributed to this edition, as well the President of INSOL International, Scott Atkins, and the members of the INSOL committee who have helped to make this special edition possible, Farid Assaf SC, Rita Gismondi, Tara Burnside and Richard C Pedone.

The INSOL London conference marks a most welcome return to international in-person meetings and we look forward to making new acquaintances and renewing old friendships amongst the 700+ delegates currently registered. For more details, see page 9 of the Digest: the final booking deadline is 25 May 2022 and the conference is open to INSOL members and non-members alike. This year's conference is particularly close to our hearts as it will be jointly chaired by Felicity Toube QC.

Much has happened in the world since the last Digest, most notably Russia's catastrophic invasion of Ukraine and the resulting humanitarian tragedy. Our thoughts remain with the Ukrainian people.

We start this issue with a tribute to our friend and colleague Robin Dicker QC who died on 12 November 2021. A service of Thanksgiving will be held in the Temple Church on Tuesday 26 April 2022, followed by a reception in Middle Temple, where Robin was a Bencher. All are welcome to attend, and the details can be found on page 8 of the Digest.

Our special edition articles start with a historical introduction to avoidance provisions in England and Australia, written by Farid Assaf SC (Banco Chambers, Sydney) and Mark Arnold QC. Then in '*Of Covinous Designs …*' Glen Davis QC and Scott Aspinall (Ground Floor Wentworth Chambers, Sydney) consider the English and Australian approaches to transactions defrauding creditors.

Laura R. Hall (Allen & Overy) and Annabelle Wang reflect on *ultra vires*, abuse of power and illegality in transactions in England and Wales and the United States, and Noel McCoy (Norton Rose Fulbright) and Stefanie Wilkins consider the importance of evidence gathering in relation to transaction avoidance in an insolvency.

In *'Insolvency and Arbitration: Clash of Cultures?'* Sheila Ng (Rajah & Tann), Felicity Toube QC and Matthew Abraham compare the relationship between arbitration and insolvency in England and Singapore. Following COP26 in Glasgow in November last year, Scott Atkins (Norton Rose Fulbright and President of INSOL) and Hilary Stonefrost ask what does the move to net zero emissions mean for businesses, directors and the insolvency landscape in Australia and the UK?

Our next article is by Lee Pascoe (Norton Rose Fulbright) and Peter Burgess who examine the perspectives in Australia and England in the treatment of antecedent transactions and cryptocurrency. This is followed by *'The Anti-Deprivation Principle'*, in which Debby Lim (Dentons Rodyk & Davidson) and Marcus Haywood consider the differing approaches adopted by the United Kingdom Supreme Court in Belmont and in Supreme Court of Canada in Chandos and reflect upon which of the two approaches might be adopted in other common law jurisdictions

Turning back to the European Union, Bjorn Schwencke and Friedrich Kraft von Kaltenborn-Stachau (both of BRL Hamburg) provide an overview of German avoidance claims, and consider how avoidance rules could be harmonised across Europe. Clara Johnson and Stathis Potamitis (Pomatmitisvekris) examine the personal insolvency regimes in England and Greece, and the available remedies for transaction avoidance.

Continuing this edition's over-arching theme of transaction avoidance William Willson, Stuart Maiden QC and Jock Baird address issues of cross-border transaction avoidance, jurisdictional reach and the recognition and relief available to officeholders under UNCITRAL model law from both a British and an Australian perspective. This is followed by a comparative analysis of the avoidance provisions in the BVI, Cayman Islands, Guernsey, Hong Kong and Jersey, together with recent developments in legislation and case law, provided by Nicholas Fox (Mourant Ozannes), Gemma Lardner (Ogier) and Toby Brown.

Of course, we also bring you our regular Digest sections. This edition's Case Digests feature a number of important cases involving members of Chambers, with thanks to Jeremy Goldring QC for his Case Digest editorial. And for this edition's *'Legal Eye'* Daniel Judd takes us on a light-hearted canter through the variety of approaches taken by some members of the judiciary to the opening words of their judgments in *'First Lines: Bringing Judgments to Life'*. Turn to the back pages for the Digest Competition – this time with an extended deadline for entry for those who may be reading this for the first time at the INSOL conference.

Finally, we are delighted to announce that Stephen Robins has been appointed one of Her Majesty's Counsel. The appointment ceremony took place on the 21st March 2022 at Westminster Hall. Congratulations Stephen!

Many thanks to all our authors for their contributions. As always, views expressed by individuals and contributors are theirs alone.

We hope you enjoy this edition of the Digest. If you find yourself reading someone else's copy, or indeed have come across the Digest for the first time and wish to be added to the circulation list, please send an e-mail to kirstendent@southsquare.com and we will do our best to make sure you get the next and future editions.

It goes without saying that if you have any feedback to give us in relation to the Digest – positive or negative – we would be delighted to hear from you. ■

Marcus Haywood and William Willson

Robin Dicker QC

19 July 1961 – 12 November 2021

Robin was truly exceptional. Calm, kind, carefully-spoken, dry-humoured, generous, understanding – all of these and quite brilliant: as lawyer and advocate, and as friend and mentor to everyone who knew and worked with him. A man of great accomplishment achieved with such style and charm.

WRITTEN BY TONY ZACAROLI WITH ASSISTANCE FROM FRIENDS AND COLLEAGUES.

His outstanding intellect was evident the moment he walked into chambers in 1986, then at 3 Paper Buildings. Regarded by at least one of his pupil supervisors as, without doubt, the most outstanding pupil he had mentored, he very quickly established himself as the junior every silk wanted to lead. In many cases, it was Robin who led the way. One silk who had the benefit of a superb 'Dicker' script in the early 1990s relegated his own role (albeit perhaps a tad self-deprecatingly) to that of 'talking parrot'. Robin skipped straight over the 'struggling junior' part of the typical barrister's career. He quickly became the junior of choice for city solicitors. The description of an overnight opinion produced by a young Robin mid-trial, from someone who instructed him many times over his career sums up why: "It was a typically crisp, clear and concise analysis that was thrilling to read and enormously helpful".

That Robin's early promise was fulfilled, and in spades, is a matter of record. The words "stellar career" are too easily said, but in Robin's case they are a simply stated truth. A Westlaw search of "Dicker QC" reveals well over a hundred cases since he took silk at the early age of 38 in 2000, and many more before. As the same search shows, these include many of the most important cases in his chosen fields of commercial, financial, insolvency and restructuring law. He was equally at home in the Commercial Court, the Chancery Division, the Court of Appeal or the House of Lords/ Supreme Court. In one memorable case, the power of his advocacy was such that he prevailed at first instance, in the Court of Appeal and the Supreme Court, notwithstanding that his case in the Supreme Court was the exact opposite of that he advanced before the trial judge. It is a rare feat to win at all levels despite switching sides. In another, one of the BCCI appeals to the House of Lords, the written case drafted by Robin was singled out by Lord Hoffmann, no less, as the best he had ever read. A roll-call of the major cases in which Robin appeared would fill too much space: much easier to name the few cases of the last three decades in which he did not make an appearance. None of this, however, fully does him justice: it is the way he went about his work that marks him out as special.

To those of us lucky enough to be on the opposite side of a courtroom to Robin, it was always the most challenging experience. Every point of weakness would be identified and exposed, clearly, incisively, methodically and persuasively, but never unkindly. The fear of the withering "as we understand my learned friend's submission" (with the emphasis on we, conjuring up a picture of Robin and his team sat round until the earlier hours trying

desperately to decipher whatever nonsense you had written or said) was just one of the reasons you had to work twice as hard when Robin was on the other side. Sparring in a courtroom with Robin was the real highpoint of my and many others' life at the bar. His intellectual integrity meant you always knew where you were. His arguments were compelling and easy to follow: it was just that, if you did, and were not on his side, you invariably ended up at a destination where you – or more importantly your client – did not want to be. He was unfailingly calm and polite, no matter what provocation he received from the bench or the bar: it is impossible to think of an occasion where he lost that cool, confident and commanding air.

All this was the product not merely of innate intelligence, but of meticulous preparation. Indeed everything about him was meticulous, down to his incredibly clear, neat handwriting – and the exact alignment of the different coloured pens alongside his notepad on the desk. He set himself the highest standards, working long hours to ensure that every case was analysed from all angles, any weak points covered and all possible questions from the bench or from clients were anticipated.

As a leader, mentor or pupil supervisor, he expected the same high standards of others. First day of pupillage with Robin was generally daunting. Some feared they would not make it through the week. He was not someone given to small talk – never using three words where one would do. And more often than not, no words at all were necessary: who can forget his facial expression listening to a less than convincing explanation of a particular point? As one of his former juniors colourfully put it: "a look that was politely incredulous, more eloquent in its quizzical silence than any verbal unpicking of my errors could have been". Preparing written work for him to review brought its own challenges – "frankly terrifying" was the description of one former pupil. Another junior recalls waiting with dread for the return of a draft opinion, only to receive a covering email with the promising remark that he had merely "moved around some of the deckchairs" (a favourite expression of Robin's), but on reviewing the document itself finding that: the words were different; the structure was different; the points advanced were different; the cases cited were different; and – of course – the quality of the product was incomparably better. Juniors could expect a steady stream of emails in the days prior to a big case: no more than a line or two with a tightly worded question on one or other aspect, sometimes so short as to send the junior into a tailspin trying to fathom the import of, let alone the answer to, each question before the next arrived.

But when his pupils made it through the first week and beyond (they all did) they – equally universally – found the experience to have been the most rewarding. They learned that there is no substitute for hard work, for being on top of the case, for working out the answers in advance

to any questions that may come, and all through the prism of decency, calm authority and absolute integrity. In short, he provided the perfect role model of all that a barrister should be. Those lucky enough to have been trained by him have reaped – and continue to reap – the benefit through the rest of their careers.

One of the things many have carried with them, and in turn learned to pass on to others, is the generosity and kindness that Robin showed to those who worked with him. He created a genuine sense of teamwork among his juniors and solicitors. When others' work deserved to be commended, he did so. In the case of his juniors, he went out of his way to credit their work to the instructing solicitors, but would never reveal any behind-the-scenes failings in them. He took time, however busy, stressful or long the day had been, to end it by writing a thoughtful message. When the work of an associate solicitor impressed him, he wrote thanking them for their exceptional work. He treated everyone with the same respect, seriousness and interest, whether they were themselves established professionals or just starting out on their careers. He was never a big fan of "business development" (for him, the concept was irrelevant), but attended events to support more junior members. I do not think he ever believed it, but his mere presence added lustre to the benefit of those junior members.

Robin's interests spread far beyond the legal world. He was knowledgeable, and although a fundamentally private person he was immensely engaging to talk with, on a wide range of subjects. Sailing was his particular passion. He pursued this enthusiastically when holidaying in Cornwall with his beautiful classic yachts. Colleagues remember him happily discussing the finer points of the design of the America's Cup boats (perhaps admiring the precision, with every detail considered - reflecting his own approach to work). But they also remember fascinating discussions with him on subjects as diverse as classic cars, the philosophy of HLA Hart, electric bikes, haute horology, the merits of Schubert's last three piano sonatas or David Fanshawe's African Sanctus, the angst of being a season ticket holder at Arsenal, or the pros and cons of Elton John in concert at the Albert Hall. To spend time with Robin and Lindsay away from the work environment was without exception entertaining, fulfilling and enjoyable. Many of us remember with particular affection the weekend that he invited the entirety of chambers to lunch in St Mawes to celebrate with him in the year he took silk. Notwithstanding the petrol crisis, most of chambers made it down to Cornwall to enjoy the warm September sun on the Tresanton terrace and his equally warm generosity as host.

No reflections of Robin would be complete without mention of his sartorial elegance and love of the aesthetic. He was never seen other than immaculately dressed – whether casual or smart – and with every hair in its rightful place. He had a love of beautiful, elegantly designed and crafted things: his clothes, for example (photographic evidence of the Tresanton lunch in 2000 records him wearing a mustard waist coat with a check pattern that would have delighted Rupert the Bear - Robin, of course, carried it off with elegance); his Ducati racing bike (bought as a result of a passion for racing that was mercifully short-lived), the above-mentioned yachts, the stunning 1960s Aston Martin DB5 that would occasionally be seen sitting in Gray's Inn Square, and even down to his desks and choice of radiator for his room. But with only one memorable exception, the style was always accompanied with real substance. The exception was his first car. Here the style (a Lotus Elite when it was cutting edge) outweighed the substance by a significant margin, purchased as it was without him having yet taken, let alone passed, a driving test.

Despite an obvious love for the law itself, and the undoubted capacity to be a great judge, and despite wavering on the subject for some time, Robin did not in the end opt for a career on the bench. He nevertheless leaves us with seven published judgments as a deputy High Court Judge (one of which was cited with approval by Foxton J as recently as May this year), which provide ample confirmation, if any were needed, that he would have made such a success of a judicial career had he chosen it.

Universally admired and respected in life, Robin's loss at a cruelly young age is hard to take for all those who had the privilege of knowing him, whether as colleague, opponent, mentor or friend. He is, and will always be, remembered with deep and heartfelt affection.

A Service of Thanksgiving for the life of Robin Dicker QC will be held on Tuesday 26 April 2022 at 5.00 p.m., followed by a reception in Middle Temple Hall.

The Temple Church
Temple
London
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You are warmly welcome to join us to celebrate the life of our colleague and friend. If you would like to attend, do please send an e-mail to events@southsquare.com

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Avoidance provisions in England and Australia: a historical introduction

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2. Barrister, England and Wales, Joint Head of Chambers at South Square and member of INSOL and INSOL Europe.

Introduction: Ancient and Roman Law

Modern avoidance provisions as they are known today were almost non-existent in ancient legal systems. This is unsurprising given that the consequences of insolvency were directed largely towards the insolvent's person as opposed to their property. Ancient Hindu, Babylonian and Roman law typically allowed for insolvent debtors to be sold into slavery while religious sanctions such as excommunication were also used as deterrents to prevent fraud, of which insolvency was considered a species. The gradual evolution from retaliatory to compensatory objectives of legal systems eventually saw the development of what can be recognised today as proto-avoidance provisions. To that end, Roman law developed elaborate provisions for vitiating fraudulent transfers. For present purposes, three broad types of fraudulent transfers may be identified: (i) acts of forbearance by which a debtor diminished the amount of property available to creditors; (ii) transfers without consideration even if the transferee was wholly innocent; and (iii) transfers for valuable consideration where the transferee had notice ofthe fraud.

Creditors had available a range of remedies both *in personam* and in rem in response to such fraudulent alienation including: (i) an *actio Pauliana in personam*; (2) an *interdictum fraudatorium*; (3) an *actio in factum* available against a bona fide alienee; and (4) the *integrum restitutio* with a view to an action *in rem*. The description of the '*actio Pauliana*' or 'Paulian action' in the Institutes of Justinian will be familiar to modern insolvency lawyers:

> '*... if any one has transferred his property to another in fraud of his creditors, upon judgment to that effect by the chief provincial magistrate, the creditors of the transferor may seize his property, avoid the transfer and recover the things transferred; that is, they may claim that the things have not been transferred at all and accordingly are still within the legal possession of the debtor.*'

The '*actio Pauliana*' accordingly permitted a creditor who had taken possession of a debtor's property pursuant to a judgment to bring '*an action against the holder of the alienated property, since the alienation is in fraud of them*' and also extended to the recovery of profits.

The Middle Ages and the Law Merchant

Despite a revival of trade and commerce and the introduction of the *lex mercatoria* or Law Merchant in England in the late thirteenth century, it was not until the late fourteenth century that some early legislative attempts were made to avoid fraudulent transactions.

Beginning in 1376, three legislative attempts were made to control flight to sanctuary and the then prevalent practice of fraudulent conveyances to frustrate the efforts of execution creditors to obtain payment of their debts. The statutes, 50 Edward III c.6 (1376);[3] 2 Richard II c.3 (1379) and 3 Henry VII c.4 (1487),[4] only applied to fraudulent conveyances where the debtor had entered a legally defined safe haven.[5] The 1376 statute provided, relevantly:

> '*... if it be found that [the giving by creditors of their tenements or chattels to 'friends'] be so made by collusions, that the said creditors shall have execution of the said tenements and chattels, as if no such gift had been made.*'

Each of these three statutes provided relief against fraudulent alienations of property for the use of the debtor himself, but did not provide relief in respect of alienation of property for the benefit of others such as '*favoured creditors*'. By the first half of the sixteenth century, the role and influence of the Staple Courts hearing commercial disputes was in decline, and creditors were once again left largely to the inadequate machinery of the common law requiring individual creditors to pursue individual remedies. In the absence of specific legislation, fraudulent alienations of property by insolvent debtors continued.[6]

Early English bankruptcy and avoidance provisions under the Tudors

While some debate exists, it is generally considered that the first English Bankruptcy statute was the Act introduced during the reign of King Henry VIII entitled '*An Act against Such Persons as Do Make Bankrupt*' 34 and 35 Henry VIII, c .4 (1542),[7] ('the 1542 Act'). Some historians argue that the 1542 Act '*can hardly be spoken of as a true bankruptcy law, for it is in fact little more than a criminal statute directed against men who indulged in very prodigal expenditures and then made off*'.[8] Those historians argue that the foundations of modern bankruptcy laws were not fully laid until the passage of the bankruptcy statutes during the reign of Queen Anne, 4 Anne c.17 (1705) and 10 Anne c.15 (1711), which showed '*the first signs of any relenting from the severity of its predecessors towards the unfortunate insolvent*' and contained all of the elements of modern bankruptcy including discharge.[9] If and however that debate may be resolved, the 1542 Act, despite its penal character, was the first attempt in English law to deal with fraudulent debtors by a '*compulsory administration and distribution, on the basis of a statutable equity or equality among all the creditors*'.[10]

The 1542 Act introduced summary collective execution and pro rata distribution of a fraudulent debtor's property[11] and specifically dealt with fraud on creditors, by providing for the recovery of debts if the '*offenders*', as bankrupts were called:

> '*... intend to delay or defraud their Creditors deceitfully by covin or collusion, suffer...any other person to recover...debts...without...just cause and title so to do, proceeding bona fide, without fraud*'.[12]

Debtors could face imprisonment, and anyone who assisted a debtor to defraud creditors was also liable to punishment. The 1542 Act did not, however, provide adequate definition of, or procedures for, the collection and realisation of the bankrupt's property, and, accordingly, is commonly thought to have been unsuccessful.[13]

3. This Act noted the practice of debtors giving '*tenements and chattels*' to friends '*by collusion thereof to have the profits at their will*', and fleeing to privileged places such as Westminster until their creditors were bound to take '*a small parcel*' of their debt, and provided that if it were found that the gifts were made by collusion the debtor's creditors could have execution of the tenements and chattels as if no such gift had been made.

4. This statute also noted the practice of flight to sanctuary and other privileged places, and conveyances with intent to defraud, and provided that all deeds of gift of goods and chattels made, or to be made, of trust for the use of the person making the deed of gift were void and of no effect.

5. For a general discussion of these statutes see the judgment of McPherson JA in *R v Dunwoody* [2004] QCA 413, commencing at [104] - [107].

6. The prevalence of such practices is reflected in the preamble of the first English bankruptcy Act, introduced in 1542: '*Where divers and sundry persons craftily obtaining into their hands great substance of other men's goods do suddenly flee to parts unknown, or keep their houses*', cited in Michael Quilter, 'Bankruptcy and Order' (2013) 39(1) *Monash University Law Review* 188 at 196.

7. 34 and 35 Henry VIII c.4 (1542).

8. Louis Edward Levinthal, 'The Early History of English Bankruptcy' (1919) 67(1) University of Pennsylvania Law Review 1 ('Levinthal II'). See also: *Tarleton v Hornby* [1835] 160 ER 70 per Lord Chief Baron at 189; *Re Goldburg*; *Ex Parte Silverstone* [1912] 1 KB 384 at 386]; *Harkness v Partnership Pacific Ltd* (1997) 23 ACSR 1 per Priestley JA at 23, 42 [considering this statute to be '*what is usually said to have been the first bankruptcy legislation in England*' – see 23]; *Wily v St George Partnership Banking Ltd* (1999) 30 ACSR 204 per Finkelstein J at 208 [considering that the principle that '*with certain limited exceptions, all unsecured creditors of a bankrupt or an insolvent company are to be treated equally: that is, their liabilities are to be discharged rateably*' dates back to this statute].

9. Levinthal II at 18-9. See also the Report of the Insolvency Law Review Committee, entitled '*Insolvency Law and Practice*' published in 1982 (the '***Cork Report***') at [37].

10. Levinthal II at 14.

11. s 1.

12. s 4.

The deficiencies of the 1542 Act were addressed during the reign of Queen Elizabeth I, with the passage of two statutes in 1571. The first, entitled *'An Act Touching Orders for Bankrupts'*[14] introduced two significant elements to the bankruptcy system: the statute was expressly limited to merchants[15] and it created the office of Commissioners of bankruptcy who were to be appointed by the Lord Chancellor to collect and sell the bankrupt's property for rateable division among the unsecured creditors[16] and, if necessary, commit the bankrupt to prison. The second, known as the *'Fraudulent Conveyances Act'* or simply the *Statute of Elizabeth I*, is generally acknowledged as *'the foundation of the modern law'* concerning transaction avoidance.[17] It dealt with the alienation of property by any owner that was intended to defraud creditors and provided for the review of *'feigned, covinous or fraudulent'* conveyances, gifts, grants and other dispositions *'devised and contrived of malice, fraud, covin, collusion and guile'* to or for an intent or purpose to delay, hinder or defraud *'creditors and others'* and declared them to be void. The wording of the statute was comprehensive, presumably seeking to avoid some of the difficulties of the earlier provisions to control fraudulent conveyances, by incorporating *'feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions'* as well as goods and chattels. Bona fide purchasers without notice of the intended fraud were not affected.[18]

Jurisprudence under the 1571 Acts is also the source of two of the most significant principles in the law of bankruptcy: first, the concept of a fraudulent preference given after the act of bankruptcy; secondly, the doctrine of relation back, which emerged from the seminal case of *Smith v Mills (Case of Bankrupts)*[19] concerning dealings occurring in the period between an act of bankruptcy and the commencement of bankruptcy proceedings and control of the debtor's property by the Commissioners. This jurisprudence also marked the beginning of the distinction between the two fundamental types of reviewable transaction: the disposition by which property is transferred for no or insufficient consideration, or for a collateral purpose; and preferences.

The early Stuarts

In the Jacobean era further statutes were passed concerning the avoidance of transactions including 1 James I c.15 (1603) which was described as *'An act for the better relief of the creditors of such as shall become bankrupts'*. That Act provided for the avoidance as against the Bankruptcy Commissioners of transactions whereby the bankrupt *'shall convey, or procure or cause to be conveyed'* property to his children or other person or persons, and made provision for the first time for examination of the bankrupt concerning their affairs. The 1623 Act[20] notes in its preamble that by the time of its enactment, bankruptcy and transfers of property to defeat creditors, were an escalating problem. For this reason, the 1623 Act extended the punishment of pillory and ear-cutting to punish perjury, concealment of assets, refusal to disclose information about the bankrupt's estate to the Commissioners, and the making of a fraudulent conveyance of twenty pounds or more.[21] The Act did not, however, provide for the avoidance and recovery of the transfer as a preference, and only imposed criminal liability. The 1623 Act also provided that the laws made against bankrupts *'shall be in all things largely and beneficially construed and expounded for the aid, help and relief of…creditors'*.[22]

The statutes of Queen Anne

The statutes of Queen Anne (4 Anne c.I7 (1705)[23] and 10 Anne c.15 (1711)[24]) were the first to *'permit an allowance for maintenance to be made to a bankrupt who surrenders and, even more important, grant him a 'discharge' from all debts owing at the commencement of his bankruptcy,'* upon certification by the Commissioners of compliance with the bankruptcy law,[25] although the focus of the 1705 Act was the prevention of frauds frequently committed by bankrupts. The crime of fraudulent bankruptcy – defined as a debtor's failure to cooperate fully with his creditors by appearing before the bankruptcy commissioners and disclosing all assets, after becoming a bankrupt – was made a capital offence by the 1705 Act and remained so until

13. Levinthal II at 14-6. See also Fletcher at 9 [1-018]; *Re Dennis (a bankrupt)* [1995] 3 All ER 171 per Millett LJ (with whom Kennedy LJ and Sir Thomas Bingham MR agreed) at 176-7 ; *Ponsford, Baker and Co v Union of London and Smiths Bank Ltd* [1904-07] All ER Rep 829 per Fletcher Moulton LJ at 831, 833 ; *Harkness v Partnership Pacific Ltd* (1997) 23 ACSR 1 per Priestley JA at 24 [discussion on act]; *Re Csidei; Ex parte Andrew* (1979) 4 ACLR 742 at per Lockhart J [*'The power to summon persons for examination in bankruptcy was originally conferred by 34 and 35 Henry VIII c4 s 2, and was continued by 13 Eliz I c7 s 5; 1 Jac I c15 s 10; 6 Geo IV c16 s 33, and the Act of 1849. (Imp) s 120.'*].

14. 13 Elizabeth I c.7 (1571).

15. Defined as a *'merchant or other person using or exercising the trade of merchandize by way of bargaining, exchange, rechange, bartry, chevisance, or otherwise, in gross or by retail…or seeking his or her trade or living by buying and selling'*. This definition excluded merchants that traded in money or credit. In 1623, it was expanded by 21 James c.19 (1623) s 2 to include those *'that shall use the Trade or Profession of a Scrivener, receiving other Men's Money or Estates into his Trust or Custodie'*. The merchant qualification for bankruptcy would survive until 1861.

16. 13 Elizabeth I c.7 (1571) s 2.

17. JLB Allsop and L Dargan, 'The History of Bankruptcy and Insolvency Law in England and Australia', in JT Gleeson, JA Watson and E Peden (eds), Historical Foundations of Australian Law (Federation Press, 2013), vol.2, 415 at 426, noting that the *Fraudulent Conveyances Act* was the origin of provisions in Australian state property legislation (see s 37A of the *Conveyancing Act 1919* (NSW), s 172 of the *Property Law Act 1958* (Vic), s 86 of the *Law of Property Act 1936* (SA) and s 89 of the *Property Law Act 1969* (WA)), and s 121 of the *Bankruptcy Act 1966* (Cth).

18. *Fraudulent Conveyances Act* ss 1, 2, 6.

19. (1584) 2 Co Rep 25a (76 ER 441).

20. 21 James I c.19 (1623). For further discussion, see for example: *Lingard v Messiter* [1814-23] All ER Rep 762 per Bayley J at 764-5, and per Best J at 766; *IMH Investments Ltd v Trinidad Home Developers Ltd* [2003] UKPC 85 per Lord Hoffmann at [25]; *Hall v Richards* (1961) 108 CLR 84; [1961] HCA 34 per Kitto J (with whom Dixon CJ and Windeyer J agreed) at 91; *Boensch v Pascoe* [2019] HCA 49 per Bell, Nettle, Gordon and Edelman JJ at [88].

21. The bankrupt that could not demonstrate that their inability to pay their debts was due to causes beyond their control would also be pilloried, and would lose an ear. See also 21 James I c.19 (1623).

22. The Act also confirms that the Commissioners had the power to examine the *'wife or wives'* of any bankrupt suspected of concealing property from creditors.

23. *'An act to prevent frauds frequently committed by bankrupts.'*

24. *'An act for repealing a clause in the statute made in the twenty first year of the reign of King James the First, intituled, An act for the further description of a bankrupt, and relief of creditors against such as shall become bankrupts, and for inflicting corporal punishment upon the bankrupts, in some special cases, which make descriptions of bankrupts; and for the explanation of the laws relating to bankruptcy, in case of partnership.'*

25. For further discussion, see also for example: *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] 1 All ER 641 per Lord Cross of Chelsea at 655 footnote 9; *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (In Liq) (Recs and Mgrs Apptd)* (2018) 130 ACSR 262; [2018] WASCA 163 per Murphy and Mitchell JJA and Allanson J at [65] footnote 113 [*'Section 11 of the 4 and 5 Anne c 17'* was cited as authority for the proposition: *'The earliest statutory insolvency set-off provision would appear to have been enacted in the United Kingdom in 1705, which applied where there appeared to be 'mutual credit given between' a person and a bankrupt.'*]; *Ansett Australia Holdings Ltd v International Air Transport Association* (2006) 60 ACSR 468; [2006] VSCA 242 per Nettle JA (with whom Bongiorno AJA agreed) at [104] footnote 62 [the footnote states *'The earlier 4 and 5 Anne c 17, s 11 spoke in terms of 'that there hath been mutual credit given'.'*].

William Murray, 1st Earl of Mansfield- English Lord Chief Justice from 1756 to 1788

1820. Yet even at the time of the Statutes of Queen Anne, bankruptcy law only applied to traders, and individuals who were not engaged in commerce were dealt with under general laws of insolvency which itself remained a system underpinned by imprisonment.

The origins of English preference law

The concept of the preferential transfer of property developed as English law started to see bankruptcy as a resolution, or adjustment, of claims between creditor parties rather than a tort or crime. By 1584, the courts had begun to recognise what could loosely be called a preference in today's terms. Following the decision in *Smith v Mills (Case of Bankrupts)*[26] and in the absence of any statutory provision concerning preferences, the principles were developed through the common law. Lord Mansfield CJ is generally acknowledged as laying the foundations of the modern law of voidable preferences in *Alderson v Temple* in 1786:[27]

> *'... it is certain that the Statutes of Bankruptcy leave a trader, to the moment of an act of bankruptcy committed, every power an owner can have over his estate. The statute says (I Jac I, c 1 s 2), 'Fraudulent conveyances shall be an act of bankruptcy'. Other acts that are fraudulent are not made acts of bankruptcy, but they are attended with the consequences of fraud, at law; which is, 'that fraud renders every act void'.*
>
> *'All acts to defraud creditors or the public laws of the land are void; and if the nature of the act be a conveyance or grant, 'tis not only void, but an act of bankruptcy. It has been determined' that a conveyance by a trader, of all his effects for the payment of one or more bona fide creditors of the most meritorious kind, though his effects do not amount to half what is due, is void; because it is not an act in the ordinary course of business; it is not such an act as a man could do, but it must be followed by an immediate act of bankruptcy, and it is defeating the equality that is introduced by the Statutes of Bankruptcy, and the criminal (for the bankrupt is considered as a criminal) is taking upon himself to prefer whom he pleases.'*

Nineteenth century reforms

English insolvency law went through a period of substantial reform in the early nineteenth century, including the creation in 1813 of the Insolvent Debtors' Court to administer the *Insolvent Debtors Act*[28], principally in an attempt to reduce the population of debtors in prison. That Act created a system akin to bankruptcy for non-traders that permitted a debtor to be released from prison in the absence of any evidence of fraud, although by contemporary accounts the returns to creditors were poor. The system was itself reformed in 1820 by *'An Act for the Relief of Insolvent Debtors in England'*[29] however problems persisted and there was increasing pressure to apply the bankruptcy laws themselves to non-traders.

26. (1584) 2 Co Rep 25a (76 ER 441).

27. (1786) 4 Burr 2235 at 2239–40; 98 ER 165 at 167–8; see historical discussion in *Re Wilcoxon; ex parte Griffith* (1883), 23 Ch. D. 69 at 74 (CA.) per Bowen LJ. For further discussion, see for example: *Marks v Feldman* (1870) LR 5 QB 275 per Martin B at 283; *Lewis v Hyde* [1998] 1 WLR 94 per Lord Browne-Wilkinson at 99; *Harkness v Partnership Pacific Ltd* (1997) 23 ACSR 1 per Priestly JA at 33-4; *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 89 ACSR 1; [2012] WASCA 157 per Drummond AJA at [2612]-[2613], [2621].

28. 53 George III c. 102 (1813).

29. 1 George IV c.119 (1820).

In 1825, the then existing bankruptcy laws were consolidated by the passage of a statute entitled *'An Act to amend the Laws relating to Bankrupts'*.[30] The relevant avoidance provision was contained in section 73 and applied where a bankrupt, being insolvent at the time, *'shall… have conveyed, assigned or transferred to any of his Children or any other Person'*, any of various classes of specified real or personal property. In such case the Commissioners were given power to *'sell and dispose of the same… and every such Sale shall be valid against the Bankrupt, and such Children and Persons as aforesaid, and against all Persons claiming under him'*. The Court of Bankruptcy was created in 1831 to bring bankruptcy under the control of a dedicated court.[31] There was a further consolidation in 1849 by the *Bankruptcy Law Consolidation Act* 1849.[32] Section 126 of the 1849 Act used similar language to section 73 of the 1825 Act, although the power to order the sale of the subject property was now granted to the Court of Bankruptcy rather than the Commissioners.

Bankruptcy laws were finally applied to non-traders by an Act to Amend the Law relating to Bankruptcy and Insolvency in England' in 1861,[33] which provided in section 69 that *'all debtors, whether Traders or not, shall be subject to the Provisions of this Act'*.

Beginning of the modern era

Joint stock companies proliferated during the Victorian era following the repeal in 1825 of the restrictions introduced by the *Bubble Act* of 1720,[34] which forbade joint-stock companies other than those authorised by royal charter. The *Joint Stock Companies Act* 1844 (UK)[35] led to a dramatic increase in the use of companies as a business vehicle. Insolvent companies were dealt with in the Court of Chancery *'in like manner as against other bankrupts'*.[36]

The first statutory provision in English law for the avoidance of preferences in the company context was contained in s 76 of the *Joint Stock Companies Act* 1856,[37] although this simply imported wholesale the judge-made doctrine which had been developed in bankruptcy by Lord Mansfield CJ and others; an approach adopted until the Companies Act 1948, s 320.

Under the *Bankruptcy Act* 1869 (UK),[38] the debtor and his creditors were the only parties in a bankruptcy although *'in practice it proved to be a disaster and failed to obtain public confidence'*.[39] However, the final abolition of imprisonment for debt was a significant advance. Moreover, it was in the 1869 Act that the first statutory definition of *'fraudulent preferences'* was attempted (s 92). This was carried through into the Bankruptcy Acts of 1883 (UK)[40], regarded as the foundation of modern systems, and 1890 (UK),[41] and then into the *Bankruptcy Act* 1914 (UK), s 44.[42]

At the same time, the 1869 Act made provision against the avoidance of voluntary settlements (s 91), which became s 42 of the 1914 Act. Both provisions were directed towards achieving a *pari passu* distribution of the bankrupt's estate among creditors.

By contrast, the objective of the Statute of Elizabeth I was to protect creditors from fraud, insolvency not being pre-requisite. Having provided dutiful service since 1571, it was repealed and replaced by s 172 of the Law of Property Act 1925, where it remained for more than half a century.

The Cork Report

The 1914 Act (UK)[43] remained in force and largely unchanged until the 1970s. In 1977, the United Kingdom government commissioned a major review of corporate insolvency and bankruptcy, chaired by Sir Kenneth Cork. What has become known as the Cork Report was published in 1982 and repays close study. The Cork Report concluded that the United Kingdom law of insolvency was *'so unsatisfactory that, unless fresh legislation is introduced soon, it will fall into even greater decay and be regarded with contempt by society and those whose needs it is supposed to serve'*[44] and that a rescue culture would serve the longer term interests of creditors. It made a number of recommendations in relation to the avoidance provisions in particular, many but not all of which were subsequently adopted in the Insolvency Act 1986 (the 1986 Act), which enacted uniform legislation for the regulation of personal and corporate insolvency.

30. 6 George IV c.16 (1825). For a further discussion, see for example: *Re Amalgamated Investment and Property Co Ltd* [1984] 3 All ER 272 per Vinelott J at 289; *Re T and N Ltd* [2005] EWHC 2870 (Ch) per David Richards J at [79] quoting *Hardy v Fothergill* (1888) 13 App Cas 351, 53 JP 36 at 355 (Lord Halsbury LC), and at [81] quoting *Flint v Barnard* (1888) 22 QBD 90 at 92 (Lord Esher MR); *Coventry v Charter Pacific Corp Ltd* (2005) 56 ACSR 1; [2005] HCA 67 per Gleeson CJ , Gummow , Hayne and Callinan JJ at [24], [30]-[32]; followed in *Lovell v Penkin (a bankrupt)* (2008) 101 ALD 335 per McKerracher J at [22]; *Woodings v James* (1996) 21 ACSR 397 per Ipp J at 401, quoting *McQuarrie v Jaques* (1954) 92 CLR 262 at 273 (Dixon CJ).

31. *An Act to Establish a Court in Bankruptcy* 1 and 2 William IV c.56 (1831).

32. 12 and 13 Victoria c.106 (1849).

33. 24 and 25 Victoria c.134 (1861). See *Cary v Dawson* (1869) LR 4 QB 568 per Blackburn J at 572 and *Woodhouse v Murray* (1867) LR 2 QB 634 per Cockburn CJ at 637-640, per Shee J at 641 for a discussion of the 1861 Act. For a discussion of the 1869 Act see *Graham v Winterson* (1873) LR 16 Eq 243 per Sir Malins VC at 250-1; *Ex parte Dorman*; *Re Lake* (1872) LR 8 Ch App 51 per Sir Mellish LJ; *Wily v St George Partnership Banking Ltd* (1999) 30 ACSR 204; [1999] FCA 33 per Finkelstein J at 216.

34. 6 George I c.18 (1720).

35. 7 and 8 Victoria c.110 (1844).

36. 7 and 8 Victoria c.111 (1844).

37. 19 and 20 Victoria c.47 (1856), s 76. *National Acceptance Corp Pty Ltd v Benson* (1988) 13 ACLR 1 per Priestly JA (with whom Clarke JA agreed) at 10.

38. *'An Act to consolidate and amend the Law of Bankruptcy'* 32 and 33 Victoria c.71.

39. Cork Report at 48.

40. *'An Act to amend and consolidate the Law of Bankruptcy'* 46 and 47 Victoria c.52 (1883). For a discussion see for example *Al Sabah v Grupo Torras SA* [2005] UKPC 1 per Lord Walker at [15], [39]-[40]; *Haines v Hill* [2007] EWCA Civ 1284 per Sir Andrew Morritt C at [10]-[11], [32]; *Sims v TXU Electricity Ltd* (2005) 53 ACSR 295; [2005] NSWCA 12 per Spigelman CJ (with whom Sheller JA and Brownie AJA agreed) at [34]-[41]; *BH Apartments Pty Ltd v Sutherland Nominees Pty Ltd (Subject to a Deed of Company Arrangement)* (2015) 108 ACSR 110; [2015] VSC 381 per Bell J at [37]-[39].

41. 53 and 54 Victoria c.71 (1890).

42. 4 and 5 George V c.59 (1914). The 1914 Act followed the report by the Muir Mackenzie Committee in 1908 and is often described as a *'tidying up operation and did not alter in any material respect the system devised in 1883'*.

43. The form of the 1914 Act ultimately became the substantive basis of the first bankruptcy act passed by the Commonwealth of Australia, the Bankruptcy Act 1924 (Cth), although there were some differences as discussed below.

44. Cork Report at [1981].

The Cork Committee celebrating in Bentham House, the UCL Faculty of Laws.
Muir Hunter QC, former Head of Chambers at South Square, is shown far right.

It recommended first that s 172 be included within insolvency legislation and amended so as to apply to the mere payment of money as well as any other disposition of property, and so that the meaning of 'intent to defraud' be spelt out, amongst other changes.[45] These recommendations were adopted in substance in what has become s 423 of the 1986 Act.

The Cork Report also highlighted that s 42 of the 1914 Act was deficient in that it omitted out-and-out gifts of money, and that while dispositions for merely nominal consideration were caught, those for valuable consideration were not, even if this represented a gross undervalue. Recommendations were made accordingly, and largely adopted, although the Committee's reference to '*conspicuous*' undervalue became '*significant*' in the 1986 Act.[46]

Finally for our purposes, the Cork Report made recommendations to improve s 44 of the 1914 Act by removing the word '*fraudulent*' from preferences (adopted); after '*long and anxious consideration*' by reference to developments in Australia (including the Clyne Report referred to below), Canada and the United States, retaining the need to show a '*dominant intention to prefer*' required since 1869 (not adopted, being replaced instead by the requirement of showing that the decision was influenced by a desire to prefer); and reversing the burden of proof in cases where the debtor and creditor were not at arm's length, recognising the task facing the trustee or liquidator had otherwise become too difficult (adopted by the introduction of a rebuttable presumption in the case of a preference to a connected person).[47]

While the 1986 Act has been amended since in certain respects, these provisions remain essentially unaltered.

45. Ibid. at [1210]-[1220], [1283]-[1284]. See also *BTI 2014 LLC v Sequana* [2019] BCC 631 (CA), per David Richards LJ at [60].

46. Ibid. at [1221]-[1240], [1285]-[1286]. The Transaction at an Undervalue provisions of the 1986 Act are ss. 238 (companies) and 339 (individuals), with provisions concerning '*relevant time*' and the relief available set out in ss. 240 and 241, being common to Preferences too.

47. Ibid. at [1241]-[1263], [1287]. Further proposals common to all remedies were made at [1278]-[1282] and [1288]. The Preference provisions of the 1986 Act are set out at ss. 239 (companies) and 340 (individuals).

"As in England, insolvency law in Australia is predominantly statute based"

Voidable transaction law in Australia

As in England, insolvency law in Australia is predominantly statute based. Unlike England however, there exist two separate and distinct statutes dealing with personal and corporate insolvency respectively: the *Bankruptcy Act*, 1966 (Cth) which deals with personal insolvency and the *Corporations Act*, 2001 (Cth) which regulates company insolvency. The antecedents of Australian bankruptcy law have their origins in the English legislation described above with various minor amendments.[48]

Prior to the passage of the first Commonwealth bankruptcy legislation in 1924, each of the former Australian colonies, and subsequently states, had in place bankruptcy legislation that was variously based on the *Bankruptcy Act* 1883 (UK) or *Bankruptcy Act* 1869 (UK).[49] Before Federation in 1901, each of the colonies passed laws relating to bankruptcy and insolvency.

Bankruptcy Act 1924 (Cth)

Sec 51(xvii) of the Australian Constitution vests the power to make laws with respect to bankruptcy and insolvency in the Commonwealth. The passage of the *Bankruptcy Act* 1924 (Cth) was the first exercise by the Commonwealth of its legislative power concerning bankruptcy, and the delay was due to a process of research and consideration of the various iterations of the bankruptcy legislation in force at different times in the United Kingdom and the Australian states. The *Bankruptcy Act* 1924 commenced in 1928, and as enacted was based on the *Bankruptcy Act* 1883 (UK) (in its final shape enacted as the *Bankruptcy Act* 1914 (UK)[50]), although in certain areas it substantially differed. One of the areas of difference was the treatment of preferences in section 95, which required only that the transaction have '*the effect*' of giving a preference, rather than focussing on the subjective intent of the debtor to prefer the recipient creditor to the detriment of the other creditors. Section 96 gave a defence for transactions that took place before the date of sequestration where at the time of the transaction, the other party had no notice of any act of bankruptcy by the debtor, or the presentation of a petition, and the transaction was in good faith and in the ordinary course of business. The avoidance provision was contained in sections 92 and 94. Section 92 contained restrictions of the right of certain creditors to retain the benefit of execution against the debtor. Section 94 rendered void against the trustee '*settlements*' within the meaning of the section that were not made before or in consideration of marriage or in favour of a purchaser or encumbrancer in good faith and for valuable consideration or of property upon the wife or child of the settlor that accrued to the settlor after marriage in the right of his wife. Section 94(4) gave a defence to bona fide purchasers for value who acquired from the person who benefited from the settlement or from the trustee.

The Clyne Report and the Bankruptcy Act 1966 (Cth)

In 1956 the Commonwealth Attorney-General appointed a Committee to review the bankruptcy law of the Commonwealth. The Committee, chaired by Sir Thomas Clyne, a Federal Judge in Bankruptcy, reported on 14 December 1962. The recommendations of the Committee were numerous and largely adopted in whole. Those recommendations were passed into law as the *Bankruptcy Act* 1966 (Cth), which commenced on 4 March 1968 and remains in force. The avoidance provisions are contained in sections 120 to 122, which give relief against preferences, void settlements and fraudulent conveyances.

Matters arising under the *Bankruptcy Act* 1924 (Cth) and under the *Bankruptcy Act* 1966 (Cth) were heard in the Federal Court of Bankruptcy, which was established in 1930 and continued until the Federal Court was established in 1975.

Avoidance provisions in Australian company insolvency

Prior to the commencement of Part 5.7B of the *Corporations Act* on 23 June 1993, the corporations legislation (section 565 of the Corporations Law) incorporated, without modification, the provisions of bankruptcy law governing avoidance of antecedent transactions. Before the introduction of the present statutory insolvency regime on 23 June 1993, the corporations legislation contained some provisions specific to companies being wound up, such as section 266 (avoiding unregistered charges), section 566 (avoiding floating charges) and section 468 (avoiding dispositions of

48. *Robert Reid Pty Ltd v Cassidy*, unreported 15 November 1965, 25 February 1966 per Windeyer J.

49. New South Wales, Victoria, South Australia and Western Australia based on *Bankruptcy Act* 1883 (UK) and Queensland and Tasmania based on *Bankruptcy Act* 1869 (UK).

50. 4 and 5 George V c.59 (1914). The Act of 1914, followed the report by the Muir Mackenzie Committee in 1908 and is often described as a '*tidying up operation and did not alter in any material respect the system devised in 1883*'.

Attorney General Gareth Evans, who commissioned the Harmer Report

property made after winding up has commenced). However, the better known avoidance provisions such as preferences and fraudulent conveyances incorporated the avoidance provisions of the bankruptcy law by reference. The former provision provided relevantly that unless made in good faith and for valuable consideration, a settlement of property made within two years of the relevant date in favour of a purchaser or encumbrancer was void. Section 121 rendered void a disposition of property (including a mortgage or a charge) made with intent to defraud creditors.

The Harmer Report

In 1988, the authors of the Harmer Report forcefully recommended radical reform of corporate insolvency including the law relating to voidable transactions. The authors were of the view that, in light of significant social and economic change, particularly the increased use of credit, a comprehensive examination of insolvency law in Australia was warranted. The authors were also influenced by international developments and in particular the findings of the 1982 Cork Report. The recommendations contained in the Harmer Report led to the introduction of Part 5.7B of the *Corporations Act* in 1993 by virtue of the *Corporate Law Reform Act* 1992 (Cth). The recommendations included, amongst other things, specific voidable transaction provisions relating to companies only, the introduction of presumptions of insolvency and delineation and clarification of the various defences to voidable transaction claims. Those provisions persist to this day with minor modification. ■

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Of Covinous Designs...

South Square's Glen Davis QC[1] and Scott Aspinall of Ground Floor Wentworth Chambers in Sydney consider some of the similarities and some of the differences in English and Australian approaches to Transactions Defrauding Creditors, derived from a common root.

There always were, always will be, *'feigned, covinous[2] and fraudulent feoffmentes[3], gifts, grants, alienations... devised and contrived of malice, fraud, covin, collusion or guile to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, etc...'.*

The language and the style of drafting may have changed in the 550 years since the preamble to the *Statute of Elizabeth*[4] from which those words are taken, but both the vice which was identified and the paradigm statutory solution – a broad discretionary power vested in the court to remedy the situation – have endured and stood the test of time. They were carried around the globe with the merchants and colonial administrators of the eighteenth and nineteenth centuries, and nowadays form the common root of legislation in many jurisdictions. There are myriad examples: §548 of the US Bankruptcy Code and the fraudulent conveyance laws of individual States of the USA, section 237 of Bermuda's Companies Act 1981, section 31 of South Africa's Insolvency Act 24 of 1936, section 60 of Hong Kong's Conveyancing and Property Ordinance, to name just a few.

There are differences, of course, as different legislatures have made different choices reflecting different local circumstances or policies, and as local courts have come to interpret the local wording, but sometimes those choices and differences can themselvesbe illuminating.

1. With grateful acknowledgement of the assistance of Matthew Abraham and Annabel Wang of South Square in discussing the English provisions.

2. A useful word, *'covinous'*, now according to the Oxford English Dictionary, *'rare or obsolete'*. It carried the sense of a group of people colluding together to the prejudice of another by a secret plan or agreement, and so with the implication of being *'fraudulent'* in that sense. Originally from the latin, *convenire*, to convene. It deserves to be revived.

3. A feoffment was the act of putting a person in legal possession of property, rents, etc under the feudal system.

In this article we are addressing the current manifestation of provisions which empower a court to make orders in this context in the insolvency laws of England and Wales[5] (sections 423 to 425 of the Insolvency Act 1986 (IA86): see Box 1, page 25) and the insolvency and property laws of Australia (e.g. section 37A of the New South Wales Conveyancing Act 1919[6]; section 121 of the Bankruptcy Act 19960 (Cth) and section 588FE(5) of the Corporations Act 2001 (Cth): see Box 2, page 31).

The underlying paradigm for these provisions is the same:

- There has been a *transaction* (in England, at an undervalue)
- The transaction has involved an *alienation* of the debtor's property
- The intention of the transaction was to *prejudice* a person (or class) who is (or may be or become) able to make a claim against the debtor

If the court is satisfied of those propositions (to the civil standard of balance of probabilities), the transaction is voidable (and the court has power to make a remedial order).

A third party will have a defence if they can establish that they are a purchaser in good faith of the property without notice of the circumstances. That proviso in favour of the innocent third party dates back to the Statute of Elizabeth[7], which exempted a conveyance for good consideration to a person who did not at the time of the conveyance have *'any manner of Notice or Knowledge of suche Covyne Fraud or Collusion'*. In *Glegg v Bromley*[8] in 1912, Parker J said *'it is quite clear that any person relying on the proviso must prove both good consideration and the fact that he had no notice of the illegal intent'*.

Before we go on to consider the specifics of the modern regimes in England and Australia, there are some general points to be made.

The first is that the temptation to put assets out of the reach of your creditors is not exclusive to insolvency, and insolvency is not the only context in which the jurisdiction can be invoked. That can be seen in Australia by the distribution of jurisdiction across insolvency and non-insolvency statutes, described above. Although the English provisions appear in the Insolvency Act, they are in their own Part of that Act[9]. Insolvency is not a pre-condition, and while the claim can be brought by an insolvency office-holder[10], it can also be brought by a victim of the transaction[11]. Where the debtor is in insolvency proceedings, this will require permission of the court[12]. Whoever brings the application, it will be treated as made on behalf of every victim of the impeached transaction[13].

For present purposes, we are particularly concerned with these transaction avoidance provisions as they arise for use in an insolvency. Where the debtor company or individual is the subject of formal insolvency proceedings, it will often be more convenient for a claim to reverse voidable transactions to be brought by the office-holder, not least for the practical reasons that they will have access to books and records, and may be able to use compulsory powers to investigate a transaction, which will not be available to a *'victim'*. Then too, where there is a class of victims who are creditors (or contingent creditors) of the debtor, reversal of an impeached transaction and distribution through the insolvency process will often be the obvious and most convenient route.

The English courts have gone as far as to say that *prima facie*, the proper plaintiff to recover property or obtain reimbursement for the benefit of a company in liquidation will be the company itself acting through its liquidator[14]. However that is not ubiquitously the case.

The English court will give permission for the claim to be brought by a victim rather than an office-holder in an appropriate case, although the applicant will need to show that there is a *'good reason'* why they should bring proceedings where the office-holder has not[15]. One such circumstance could be if there are no assets in the insolvent estate to fund the proceedings, or if the court is satisfied that there is sufficient substance in the allegations and, in the absence of proceedings by the office-holder, refusal of leave would in effect be to preclude investigation by the court[16].

Second, it has long been recognised that the policy of legislation in this area is to give Judges the tools to address and remedy *'fraud'* as a social and economic wrong, and that this requires a Court to give the provisions a liberal construction. That was recognised as long ago as *Twyne's Case*[17] in 1601, in which the Court of Star Chamber lamented that *'fraud and deceit abound in these days more than in former times'* and for that reason said that *'all statutes made against fraud should be liberally and beneficially expounded to supress the fraud'*. In 1776, Lord Mansfield said, *'These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud'*[18]. Modern

4. *Fraudulent Conveyances Act 1571* (13 Elizabeth 1, c 4 & 5); spelling has been modernised.

5. Although IA86 in general applies to Scotland, the law has always been different in Scotland, and relevant provision for *gratuitous alienations* is found in IA86, s242.

6. As amended by ss 2, 10 and Schedule of the *Conveyancing (Amendment) Act 1930* (NSW). The legislation of all the Australian States contains similar provisions: *Civil Law (Property Act) 2006* (ACT), s 239; *Law of Property Act 2000* (NT), s 208; *Property Law Act 1974* (Qld), s 228; *Law of Property Act 1936* (SA), s 86; *Conveyancing and Law of Property Act 1884* (Tas), s 40; *Property Law Act 1958* (Vic), s 172; *Property Law Act 1969* (WA), s 89.

7. Proviso V.

8. [1912] 3 KB 474 at 492.

9. One consequence of this is that the provisions apply in England and Wales, but (unlike other provisions of the Insolvency Act) not in Scotland. The Statute of Elizabeth predates the Act of Union and was not part of the law of Scotland.

10. An administrator or liquidator of a corporate insolvent, the official receiver, or a trustee of a bankrupt's estate: see IA86 s424(1)(a).

11. IA86 s424(1)(c); where the victim is the subject of a voluntary arrangement, the supervisor of that arrangement also has standing under s424(1)(b).

12. IA86 s424(1)(a).

13. IA86, s424(2).

14. *Menzies v National Bank of Kuwait SAK* [1994] BCC 119, per Sir Christopher Slade at 122 C–D.

15. Cf *Re Simon Carves Ltd* [2013] EWHC 685 (Ch), [2013] 2 BCLC 100 at [27]; Sir William Blackburne said that the applicant must also show they have a *'realistic prospect of establishing'* that the transaction comes within s423 and that they are a victim.

16. cf *Re Ayala Holdings Ltd* [1993] BCLC 256 at 266.

17. *Twyne's Case* (1601) 76 ER 809.

18. *Cadogan v Kennett* (1776) 2 Cowp 432 at 434; 98 ER 1171 at 1172.

support for the principle can be found in decisions of the English Court of Appeal[19] and of the High Courtof Australia[20].

Third, and without in any way detracting from the principle and approach described in the last paragraph, although the transactions impeached are referred to as *defrauding creditors*, and although the older cases refer to *'fraud'* and *'deceit'*, the *'fraud'* here consists of the process of putting assets beyond the reach of those who may make a claim. There is no need to prove criminal conduct or intent, and proof is only required to the civil standard of balance of probabilities.

Fourth, and of particular importance for cross-border insolvencies, the English Court recognises that trade (and fraud) increasingly take place on an international basis, and that money is transferred quickly and easily[21]. For that reason, it is well-established in England that section 423 has extra-territorial effect, in that the legislation gives the court power to make an order against a person outside England and Wales[22]. However, the Court retains a discretion (which will fall to be exercised on an application to serve proceedings under section 423 out of the jurisdiction) and will only exercise the jurisdiction if it is satisfied that there is a 'close enough' connection with England and Wales[23]. In an appropriate case, the English Court will also grant injunctions, up to and including a world-wide freezing order, in support of a claim brought under section 423[24].

The English Court's willingness to act extra-territorially was recently underscored by the decision of the Family Court to make orders involving Cypriot, Panamanian and Liechtenstein companies and Bermuda and Liechtenstein trusts to reverse transactions put in place to evade enforcement of a £453 million divorce settlement[25].

In Australia, the approach to making worldwide orders has traditionally been more conservative. However the High Court has very recently affirmed the capacity of superior courts in Australia to make worldwide freezing orders in appropriate cases so long as the Court has jurisdiction over the person owning the asset. By analogy, so long as a transferee in a defrauding transaction is subject to the Court's jurisdiction there will be a basis to make orders in respect of transferred property irrespective of the asset's location.

The Position in England

Relationship with Transaction at an Undervalue provisions

Since 1986, the statutory regime for England and Wales has been found in IA86 which came into force in that year. There is something of an overlap with the provisions of IA86 which enable adjustment of prior transactions on grounds that they constitute a *transaction at an undervalue* (in the corporate context under section 238 1A86[27]). Where a company in administration or liquidation has entered into a transaction within the 2 year period before the onset of its insolvency[28], and was insolvent at the time of the transaction or becomes insolvent in consequence[29] (which will be presumed if the transaction is with a connected person), the office-holder can apply within the insolvency to reverse the transaction[30]. The Court has a discretion to fashion an order to restore the position to what it would have been if the company had not entered into the transaction. There will be a defence if it can be shown both that the company entered into the transaction in good faith and for the purpose of carrying on its business, and that there were reasonable grounds at the time of the transaction for believing that the transaction would *benefit* the company.

In many cases involving a transaction at an undervalue, it will be more straightforward for an administrator or liquidator to proceed under section 238, which only requires establishment of an arithmetical undervalue and does not require consideration of any mental element of the transaction. For that reason, applications under section 238 are far more common than those under section 423.

Section 423 comes into its own where the transaction took place outside the relevant 2-year period, or where insolvency cannot be shown, and of course outside insolvency or where the proceedings are to be brought by a 'victim' of the transaction rather than an office-holder.

Limitation

Because the cause of action is a statutory one (and so technically, an action on a *specialty*), the applicable limitation period within which the action must be commenced will be twelve years[31]. Whether or not the action is brought by an office-holder, time will start to run when the relevant person becomes a victim of the transaction[32]. The time limit will be apt to be extended if (as will often be the case) the circumstances have been concealed[33].

In *Giles v Rhind (No 2)*[34], the Court of Appeal confirmed that a transaction

19. *Giles v Rhind (No 2)* [2009] Ch 191 per Arden LJ at 199.

20. *Marcolongo v Chen* [2011] HCA 3 ("*Marcolongo*") at [20].

21. In *re Paramount Airways Ltd* [1993] Ch 223, per Sir Donald Nicholls V-C at 239.

22. *Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd* [2018] 1 WLR 4847 at [30].

23. *Orexim Trading per Lewison LJ* at [30]. The relevant 'gateway' is under para 3.1(2) of Practice Direction 6B of the English Civil Procedure Rules: *Orexim Trading* at [47].

24. For a recent example, see *Integral Petroleum SA v Petrogat FZE* [2021] EWHC 2092 (Comm), where the English Commercial Court was satisfied that transfers by the Defendant were arguably impugnable under section 423. Although the first Defendant was a UAE company and the other individual defendants were resident in UAE, Iran and Kazakhstan, there was sufficient connection with England and Wales because the underlying contract to purchase a cargo of oil was subject to English law, and a subsequent arbitration and judgment were in England. See also the *Akhmedova* litigation.

25. *Akhmedova v Akhmedov* [2021] 4 WLR 88.

26. *Deputy Commissioner of Taxation v Huang* [2021] HCA 43.

27. in personal bankruptcy, the equivalent is section 339 IA86.

28. IA86, s240(1)(a); or between an administration application and an order being made (s240(1)(c)) or between filing notice of intention to appoint an administrator out of court and the appointment being made (s240(1)(d)).

29. IA86, s240(2).

30. IA86, s238(3).

31. Limitation Act 1980, s8(1); in *Hill v Spread Trustee Ltd* [2007] 1 WLR 2404, the Court of Appeal left open the question of whether, if the form of relief was a claim for payment of a sum of money, the limitation period of 6 years under s9(1) of the Limitation Act may apply.

32. *Hill v Spread Trustee Ltd* at [128]; this is because there needs to be a victim for the cause of action under s423 to be complete (see at [126]). Arden LJ also pointed out at [125] that it may be that there is no person capable of being prejudiced until the debtor becomes insolvent. However, it appears that the appointment of an office-holder does not restart the limitation clock.

33. Limitation Act 1980, s1 and s32; *Giles v Rhind* [2008] 2 BCLC 1.

34. *Giles v Rhind (No 2)* [2009] Ch 191 per Arden LJ at [39].

defrauding creditors falling within section 423 of IA86 will involve a *'breach of duty'* which is treated as amounting to a deliberate concealment of the facts for limitation purposes[35]. This means that there is no separate need to prove concealment; the deliberate commission of such breach of duty is sufficient[36].

The Tasks for the Court

On an application under section 423, the Court is concerned to identify[37]:

i. What is (or are) the relevant transaction(s)?

ii. What was the consideration for that (or those) transaction(s)?

iii. Was the consideration provided by the transferee 'significantly less' than what was provided by the transferor?

iv. Was the identified transaction entered into for the specified improper purpose?

What is the Transaction?

The expression *'transaction'* is defined in the Insolvency Act, and so for the purposes of section 423, as including a *'gift, agreement or arrangement'*[38]. The English Court of Appeal has said that an *'arrangement'* is *'apt to include an agreement or understanding between the parties, whether formal or informal, oral or in writing'*[39].

As long as the subject matter of the *'gift, agreement or arrangement'* is a transfer of property, it is well-established that the English court will take a liberal approach to the expression in determining whether there is a transaction for the purposes of section 423[40]. To take one example which may not have seemed obvious, the payment of a dividend by directors of a company, although a unilateral act, is a transaction for no consideration which can be impeached under section 423[41].

Characterising what constitutes the transaction in question will depend on the circumstances of the particular case. For example, in *National Westminster Bank v Jones*[42], a husband and wife who were sheep and cattle farmers facing financial difficulties and bankruptcy proceedings had granted an agricultural tenancy and sold their farming assets to a company of which they were sole directors and shareholders. Both the Judge at first instance and the Court of Appeal had regard only to the tenancy agreement and sale agreement. It was those transactions which had been entered into for the admitted purpose of putting assets beyond the reach of the bank which was a secured creditor. A submission that the court should take into account the benefit the defendants had received from the increase in the value of their shareholding as a result of the transactions was rejected. The issue of shares in the company was not consideration for either transaction, and such benefit was to be ignored.

However, the proper scope of the Court's inquiry will always be fact-specific. Once the parameters of the transaction have been identified, the Court will view that transaction as a whole, and will be concerned to quantify the full benefits which pass either way. So in *Agricultural Mortgage Corp v Woodward*[43], where an insolvent farmer granted an agricultural mortgage to his wife, the Court of Appeal did not confine itself to the question of whether a full market rent was being charged, but also took into account the additional benefits obtained by the wife, in that the family home and business were safeguarded, the wife obtained a surrender value for the lease, and she would have a *'ransom'* power in that she would be able to stipulate a high compensation figure before the secured creditor could obtain vacant possession. On that basis, the secured creditor's appeal was allowed and the grant of the tenancy was set aside as a transaction defrauding creditors.

Is the Transaction at an Undervalue?

To be impeachable under section 423, the transaction must involve a gift or no consideration[44], or involve consideration the value of which in money or money's worth is significantly less than the consideration provided by the debtor[45]. Millett J famously observed of similar wording in section 238 in *Re MC Bacon Ltd*[46] that the latter formulation requires a comparison to be made between the value obtained by the company for the transaction and the value of consideration provided by the company. Both values must be measurable in money or money's worth and both must be considered from the company's point of view.

The onus will initially be on the claimant to characterise the transaction and establish that, on the balance of probabilities, that transaction was at an undervalue[47]. If it is established that consideration has been provided by the transferor, in the absence of explanation that consideration (or sufficient consideration) was received the onus will effectively switch to the recipient to satisfy the Court that consideration was provided[48].

35. Limitation Act 1980, s32(2): For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

36. *Giles v Rhind (No 2)* at [37].

37. See eg *National Westminster Bank v Jones* [2002] 1 BCLC 55 at [25]-[28].

38. IA86, s436.

39. *Feakins v DEFRA* [2006] BPIR 896 at [76].

40. cf *Re Simon Carves Ltd* [2013] 2 BCLC 100 at [24] where this was common ground.

41. *BAT Industries v Sequana* [2019] Bus LR 2178 at [50], [58], [63].

42. *National Westminster Bank v Jones* [2002] 1 BCLC 55.

43. *Agricultural Mortgage Corp v Woodward* [1995] 1 BCLC 1.

44. IA86, s423(1)(a).

45. IA86, s423(1)(c). For completeness, the transaction can also have been entered into in consideration of marriage or the formation of a civil partnership (s423(1)(b)), unlikely to arise in a commercial context.

46. *Re MC Bacon Ltd* [1990] BCC 78 at 92.

47. *National Westminster Bank v Jones* [2001] 1 BCLC 98, per Neuberger J at [75].

48. cf *Re Kiss Cards Ltd* [2017] BCC 489, a case under s238, at [7].

Valuation will always involve an objective evidential exercise which comes down to an arithmetical comparison, and cases on valuation from other contexts (particularly under section 238 of IA86) will be relevant. As Lord Scott pointed out in *Phillips v Brewin Dolphin*[49], identification of the relevant '*consideration*' is a question of fact, although it may also raise an issue of law, for example as to the construction of a document. The Court approaches the valuation exercise with the benefit of hindsight. Reality is given precedence over speculation; it would be unsatisfactory and unnecessary for the Court to wear blinkers and pretend that it does not know what has happened[50].

The Court will have regard to the valuation of the consideration received by the transferor taking the transaction(s) as a whole. Examples are *Agricultural Mortgage Corp v Woodward*, discussed above, and *Phillips v Brewin Dolphin*, in which, as Lord Scott put it: '*if a company agrees to sell an asset to A on terms that B agrees to enter into some collateral agreement with the company, the consideration for the asset will, in my opinion, be the combination of the consideration, if any, expressed in the agreement with A and the value of the agreement with B*'[51].

Was the transaction entered into for a specified improper purpose?

The Court will only have power to make a remedial order under section 423(2) if it is satisfied that the transaction was entered into for one of the specified (and related) improper purposes set out in section 423(3):

(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

The person who is, or is capable of being, prejudiced is '*a victim of the transaction*'[52] who will have standing to bring a claim under section 423[53], and will be entitled to share in any recoveries[54]. The Court of Appeal has said that the term '*victim*' in this context should be construed broadly[55]. Significantly, the '*victim*' who is ultimately able to bring a claim does not need to have been in the transferor's contemplation at the time of the transaction, and may not even have had a relationship with the transferor at that time[56].

The threshold question of whether the transaction was entered into for the requisite purpose is a factual one, to be determined as at the date of the transaction(s) being impeached.

There is no requirement that the transferor was insolvent at that time, or became insolvent in consequence of the transaction[57].

In fact, there is no requirement that the transferor had *any* creditors at the time of the transaction, nor that there were yet any extant claims which might be frustrated by the transfer. That can be seen from old cases which set aside settlements made before setting out in some hazardous business venture: as Malins V-C said in 1872, a person who contemplates going into trade cannot on the eve of doing so take the bulk of his property out of the reach of those who may become his creditors in his trading operations[58]. The paradigm example, in days before professional limited liability, was often said to be the solicitor who, on being offered partnership in a law firm, put the family property in their spouse's name. The principle, established in pre-1986 cases, has continued to be applied more recently[59].

It is the entry into the transaction, rather than the transaction itself, which must have the necessary purpose . This has to be a '*real substantial purpose*'[61] (rather than a merely trivial one, or merely being a by-product or simply a result) but it has been settled since the Court of Appeal's decision in *IRC v Hashmi* in 2002 that the purpose identified does not need to be the *predominant* purpose of the transaction[62]. It need not even have been positively intended, as long as it can properly be described as a *purpose* and not merely a consequence[63].

In *Hill v Spread Trustee*, the Court of Appeal said that, while prejudice or potential prejudice is a condition for obtaining relief under section 423, the prejudice does not have to have been achieved by the purpose, and it is not even necessary that the purpose was capable of achieving prejudice[64].

The purpose of a person entering into a transaction is (or is equated to) the subjective intention of that person. As David Richards LJ put it in *BAT industries v Sequana*: what did they hope to achieve?[65]

Discerning '*purpose*' requires a factual inquiry into a subjective mental state (the state of a man's mind being, as the cliché holds, as much a fact as the state of his digestion[66]). The test is therefore a subjective test. The Court has to be satisfied that the transferor actually had the purpose, not that a reasonable person

49. *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] 1 WLR 143, another case under s238, at [20].

50. *Phillips v Brewin Dolphin* per Lord Scott at [26].

51. *Phillips v Brewin Dolphin* per Lord Scott at [20].

52. IA86, s423(5).

53. Requiring leave of the court if the debtor is bankrupt or is a body corporate which is being wound up or in administration.

54. IA86, s424(2).

55. *Hill v Spread Trustee Co Ltd* [2007] 1 WLR 2404 at [101].

56. ibid.

57. *BTI 2014 LLC v Sequana SA* [2017] 1 BCLC 453 at [494].

58. *Mackay v Douglas* (1872) 14 Eq 106 at 122.

59. Eg *Midland Bank plc v Wyatt* [1997] 1 BCLC 242.

60. *Hill v Spread Trustee Co Ltd* [2007] 1 WLR 2404 at [102].

61. *IRC v Hashmi* [2002] 2 BCLC 489 per Arden LJ at [25]. In JSC BTA Bank v Ablyazov [2019] BCC 96, Leggatt LJ deprecated introduction of the qualifier '*substantial*' which does not appear in the section, suggesting that it is unnecessary and that it is difficult to see when it would make sense to regard putting assets beyond the reach of creditors as a '*trivial*' purpose (see at [13]-[14]). Nonetheless, Judges continue to find the formulation a useful one: see eg In *re Burnden Holdings* (UK) Ltd *(in liquidation)* [2019] Bus LR 2878 per Zacaroli J at [404] '*The purpose must be a real substantial purpose (not merely a by-product of the transaction under consideration) but it does not need to be the sole or dominant purpose…*'.

62. *IRC v Hashmi*, at [23], [32], [36]; see also the Court of Appeal's decision in *BAT Industries v Sequana* at [66].

63. ibid.

64. *Hill v Spread Trustee* per Arden LJ at [101].

65. *BAT Industries v Sequana* [2019] Bus LR 2178 at [66].

66. a famous aphorism of Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483.

in his position would have it[67]. Direct evidence may well be rare, and it will often be in the interests of the transferor to deny the proposition. But the Court will be entitled to draw inferences from all the circumstances, and may disbelieve the transferor even in the face of denial[68].

In a corporate context, it will be necessary to identify the relevant mind (or minds) which are to be regarded as the mind of the company having the requisite purpose[69]. Often this will be the chief executive or a dominant individual. If the question is whether a board of directors had the purpose in question, it will be sufficient if the majority of the board acted with that purpose[70].

Remedies

If the statutory conditions for jurisdiction discussed above are satisfied, and there is at least one person with the standing under section 424(1) to bring an application[71], the Court may, and has a wide discretion to, make *'such order as it thinks fit'* for[72]:

(a) restoring the position to what it would have been if the transaction had not been entered into; and

(b) protecting the interests of persons who are victims of the transaction.

Although, strictly, the Court will have a discretion both as to whether to grant relief at all and also as to the form of relief, if the criteria for jurisdiction are made out, the Court only has a narrow margin of discretion to refuse relief[73]. Cases where no relief is granted will be rare.

> "One of the reasons the court is given such a wide jurisdiction...is to allow it flexibility in fashioning relief which is carefully tailored to the justice of the particular case"

The order which the Court makes will be both *restorative* and *protective*. The Court has power to restore the position in such a way as protect the victims' interests[74] (which are wider than their 'rights' or existing claims)[75]. This is a collective rather than an individual remedy: whoever brings the application, it is always treated as made on behalf of every victim of the transaction[76].

Section 425 offers six examples of types of order which the Court can consider making in an appropriate case, but these are expressly said to be *'without prejudice to the generality'* of section 423. As a matter of statutory construction, therefore, it can be seen that Parliament wished to emphasise the *'general'* and potentially wide-ranging nature of the order which can be fashioned to address particular circumstances. In *4Eng Ltd v Harper*, Sales J said :

> *'In choosing what relief is appropriate in a given case, a great deal will depend upon the particular facts. One of the reasons the court is given such a wide jurisdiction as to remedy under this regime is to allow it flexibility in fashioning relief which is carefully tailored to the justice of the particular case. Helpful analogies may be drawn with other areas of the law to guide the court in reaching its conclusion, but given the wide range of situations which the statutory regime is intended to deal with it would be wrong to be unduly prescriptive in trying to lay down hard and fast rules for the application of these provisions.'*

In short, there are no *'hard and fast'* rules: the Court will always be mindful of the need for the relief to be *'carefully tailored to the justice of the particular case'*[78].

67. *Hill v Spread Trustee* at [86].

68. ibid.

69. cf *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 170.

70. *BTI Industries plc v Sequana SA* [2017] Bus LR 82 at [404].

71. If the debtor (transferor) is the subject of insolvency proceedings, this will be the official receiver (a public official), a trustee in bankruptcy of an individual who is bankrupt, the liquidator of a body corporate which is being wound up, the administrator of a body corporate which is in administration (s424(1)(a) IA86); if a victim is bound by a voluntary arrangement under Part I or Part VIII of IA86, by the supervisor of the arrangement or any such victim (s424(1)(b) IA86); in any other case, a *victim of the transaction* (s424(1)(c) IA86).

72. IA86, s423(2).

73. *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd* [1990] BCC 636; *Chohan v Saggar* [1992] 750 (first instance), [1994] BCC 134 on appeal; *Bucknall v Wilson* [2021] BPIR 1404 per Trower J at [55].

74. *Chohan v Saggar* [1994] BCC 134 per Nourse LJ at 141C.

75. *Hill v Spread Trustee* per Arden LJ at [101]-[102].

76. IA 86, s424(2).

77. *4Eng Ltd v Harper* [2010] 1 BCLC 176 at [16].

78. see dicta of Rose J quoting *4Eng* in the remedies judgment in *BTI v Sequana* [2017] EWHC 2011 (Ch) at [39], quoted in turn by the Court of Appeal in *BAT Industries v Sequana* at [83] and this part of her judgment affirmed at [89].

In the most straightforward cases, of course, it is possible to identify a valuable asset which has been transferred out of the hands of the debtor and is still in the hands of the immediate transferee. The obvious order to be made will be an order that the asset should be returned[79] (or a sum of money paid representing its value, or its proceeds of sale[80]).

But the scope of the available remedies goes wider, and can extend beyond the person with whom the debtor entered into the transaction[81] or an immediate transferee, to third (or more remote) parties, and indeed to *any* person who received a benefit from the transaction[82]. A third party will have a good defence if they acquired property from a person other than the debtor[83], or received some other benefit from the transaction[84], and can show that they acquired the property or received the benefit '*in good faith, for value and without notice of the relevant circumstances'.*

The most relevant circumstance will of course be that the debtor transferred property for the specified improper purpose. These provisions will be sufficient to catch a third party which procured a transaction defrauding the debtor's creditors for their own benefit. A third party with notice of the improper purpose cannot argue that they have acted in good faith.

The specific *bona fide purchaser* defence available under section 425(2) will not protect a person who acquired the property from the debtor or was a party to the transaction. It has been suggested that the Court may, in the exercise of its discretion, consider whether there has been a '*good faith change of position'*[85], although the point is controversial[86]. Conversely, the transferee's own financial position and needs will be irrelevant[87].

There is no need positively to establish bad faith on the part of the respondent, in the sense of having engaged in sharp practice or recklessness, before the Court will consider it appropriate to fashion a remedy under section 425[88]. That is not to say that the mental state of the transferee or other person against whom an order is sought is entirely irrelevant. It will be material to consider their mental state, and '*the degree of their involvement in the fraudulent scheme of the debtor/transferor to put assets out of the reach of his creditors'* in the exercise of the Court's discretion (as is generally the case when the Court is considering the extent of recovery which should be ordered), because the Court is concerned to strike the correct balance at the time of its order between the interests of the victims and of the transferee (respondent)[89].

In an appropriate case, the Court will have regard to whether the respondent could be said to have shared the relevant section 423 purpose with the transferor, and in fact to have been the intended beneficiary of that purpose (as was found to be the position on the facts of *BTI v Sequana*[90]).

The remedy available under section 423 is not restricted to the value of the obligations of the transferor to the victims who are identified at the time of the order[91]. That would risk unfairness, and (at least in principle) the Court can have regard to changes in the relationships between relevant parties that may have been influenced by the fact that the impeached transaction has taken place.

Depending on the facts of the particular case, an order under section 423 may provide for assets to be transferred back (or sums of money to be paid) to the transferor, leaving the individual creditors to execute against that property in respect of obligations owed to them[92]. In an appropriate case, particularly if there is only one victim (particularly if the position as to execution is clear and additional costs of execution do not need to be incurred), an order may be made for the transferee to pay direct to the creditor[93]. If the debtor is the subject of insolvency proceedings, it may well be that those proceedings will be the appropriate forum and already offer the appropriate mechanisms to identify the relevant victims and their appropriate shares. Alternatively, some other mechanism may need to be put in place under the auspices of the Court to determine all the proper claimants and supervise distribution to them.

79. as contemplated in IA86, s425(1)(a).

80. as contemplated in IA86, s425(1)(b).

81. see IA86 s425(2).

82. see IA86 s425(2)(b).

83. IA86 s425(2)(a).

84. IA86 s425(2)(b).

85. see comments of Sales J in *4Eng* at [14(1)], by parity of reasoning with claims based on unjust enrichment as in *Lipkin Gorman v Karpnale* [1991] 2 AC 548, although change of position was not established in 4Eng. In *BTI v Sequana*, at [523], Rose J regarded the question of change of position as relevant to the exercise of the Court's discretion rather than providing a complete defence to a claim under s423.

86. In *Skandinaviska Enskilda Banken AB (Publ) v Conway* [2020] AC 1111 the Privy Council rejected an argument that '*change of position'* was available as a defence to a statutory claim to set aside a voidable preference under Cayman Islands law. Lord Reed noted at [116] that the decision in *4Eng* had been criticised by Prof Sir Roy Goode in his *Principles of Corporate Insolvency* (para 13-144) and in an article by Simon Davenport QC in *Insolvency Intelligence* ((2011) 24 *Insolvency Intelligence* 91). He said that this was not the occasion to decide whether or not the reasoning in *4Eng* and in *Rose v AIB Group (UK) Plc* (which concerned s127 of IA86) was correct, but that there was nothing in those cases which led the Board to doubt the correctness of its conclusion in the case before it.

87. see per Sales J in *4Eng* at [92]. In *Bucknall v Wilson*, a personal insolvency case concerning a claim that a payment by a bankrupt to his stepdaughter was a preference under s340 IA86, Trower J said *obiter* at [126] that Sales J was not '*laying down some sort of blanket exclusion that personal needs could not be taken into account if the ends of justice so require'*, and that in his view they could be taken into account '*where the circumstances are sufficiently exceptional'.*

88. *BTI Industries plc v Sequana* at [523].

89. see per Sales J in 4Eng at [13].

90. *BTI Industries plc v Sequana* at [524].

91. see per Rose J in in the remedies judgment in *BTI v Sequana* [2017] EWHC 2011 (Ch) at [39].

92. *4Eng* at [9].

93. *4Eng*, ibid.

BOX 1
THE ENGLISH PROVISIONS

INSOLVENCY ACT 1986

424 Transactions defrauding creditors.

(1.) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—

(a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;

(b) he enters into a transaction with the other in consideration of marriage or the formation of a civil partnership; or

(c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.

(2.) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—

(a) restoring the position to what it would have been if the transaction had not been entered into, and

(b) protecting the interests of persons who are victims of the transaction.

(3.) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—

(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

(4.) In this section "the court" means the High Court or—

(a) if the person entering into the transaction is an individual, any other court which would have jurisdiction in relation to a bankruptcy petition relating to him;

(b) if that person is a body capable of being wound up under Part IV or V of this Act, any other court having jurisdiction to wind it up.

(5.) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as "the debtor".

424 Transactions defrauding creditors.

(1.) An application for an order under section 423 shall not be made in relation to a transaction except—

(a) (a) in a case where the debtor has been made bankrupt or is a body corporate which is being wound up or is in administration, by the official receiver, by the trustee of the bankrupt's estate or the liquidator or adminstrator of the body corporate or (with the leave of the court) by a victim of the transaction;

(b) in a case where a victim of the transaction is bound by a voluntary arrangement approved under Part I or Part VIII of this Act, by the supervisor of the voluntary arrangement or by any person who (whether or not so bound) is such a victim; or

(c) in any other case, by a victim of the transaction.

(2.) An application made under any of the paragraphs of subsection (1) is to be treated as made on behalf of every victim of the transaction.

425 Provision which may be made by order under s. 423.

(1.) Without prejudice to the generality of section 423, an order made under that section with respect to a transaction may (subject as follows)—

(a) require any property transferred as part of the transaction to be vested in any person, either absolutely or for the benefit of all the persons on whose behalf the application for the order is treated as made;

(b) require any property to be so vested if it represents, in any person's hands, the application either of the proceeds of sale of property so transferred or of the money so transferred;

(c) release or discharge (in whole or in part) any security given by the debtor;

(d) require any person to pay to any other person in respect of benefits received from the debtor such sums as the court may direct;

(e) provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction to be under such new or revived obligations as the court thinks appropriate;

(f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for such security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction.

(2.) An order under section 423 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the debtor entered into the transaction; but such an order—

(a) shall not prejudice any interest in property which was acquired from a person other than the debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest, and

(b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.

(3.) For the purposes of this section the relevant circumstances in relation to a transaction are the circumstances by virtue of which an order under section 423 may be made in respect of the transaction.

(4.) In this section "security" means any mortgage, charge, lien or other security.

The Position in Australia

In Australia there are now three separate avenues whereby transactions to defeat creditors may be attacked depending upon the identity of the person mounting the attack. At State and Territory level, the provisions of the Statue of Elizabeth live on, albeit with updated language; and at the Federal level, the *Bankruptcy Act* 1966 (Cth) and *Corporations Act* (Cth) each contain anti-defrauding provisions available for use by trustees in bankruptcy and liquidators respectively, although the provision relating to liquidators is almost never used.

The Elizabethan equivalents

The Statue of Elizabeth remained in force in Australia from colonial times up until the 1930s. Following the repeal of the *Statue of Elizabeth* in the UK in 1925 and the transfer of modernised versions of its provisions into the *Law of Property Act*, the Australian States and Territories followed suit by adopted into their own property legislation provisions which closely essentially replicated the provisions on the 1925 UK provisions.

Despite the wording being modernised and simplified, in *Marcolongo v Chen* the High Court confirmed firstly, that *"defraud"* in the modern wording such be understood to incorporate *"delay, hinder or [otherwise] defraud"* from the original statute; and secondly, that the case law which had built up around the Elizabethan statute remained relevant to the interpretation of the revised provisions. The sentiments expressed in *Twyne's* case in Court of Star Chamber thus remain relevant to under Australian law.

Elements of a claim under the modernised Elizabethan equivalents

The Elizabethan equivalent in NSW is typical and is found in section 37A of the Conveyancing Act 1919 (NSW). It has three 3 main elements:

(a) there must have been an *alienation of property*;

(b) with the i*ntention to defraud creditors*; and

(c) the claim must be brought by a *person thereby prejudiced*.

As for the English provisions there is no requirement that the defendant be insolvent or bankruptcy at the time of the transaction or at all. Indeed in *Williams v. Lloyd*, all the members of the High Court treated the *"intent to defraud creditors"* in section 37A as capable of being established despite undoubted solvency at the time of the challenged alienation of property.[94]

Has there been an alienation of property?

The term *"alienation of property"* within the meaning of section 37A is said to have *"the widest possible application"* and *"encompasses every conceivable means whereby property might be removed from the reach of a person's creditors"*.[95] Further, the alienation in question need not occur solely by reason of the acts of the fraudulent debtor. If a person acts collusively with a fraudulent debtor in such a way as to cause ownership of property to move, or to remain away from an apparently passive debtor, there is an alienation of property for the purposes of the section. Nor does it matter that the *"alienation of property"* occurs via a complex series of steps rather than by a single disposition.[96]

Notwithstanding these sweeping statements the High Court has stated that for the purposes of section 37A, the concept of alienation must include a *"parting with property or some interest in property"*.[97] A declaration of trust in favour of a discretionary trust where the legal title does not move has been held not to be an alienation since there is no *"movement"* of the legal estate, and the beneficiaries of the trust obtain no subsisting equitable interest in the underlying property.[98]

What constitutes an "intention to defraud creditors"?

Prior to the 2011 decision of the High Court in *Marcolongo v Chen* there was significant doubt as to what a claimant needed to prove in terms of intention since earlier authority of the High Court had referred to proof of an *"actual"* or *"predominant"* fraudulent intent or purpose and a requirement that a

94. *Williams v Lloyd* [1934] HCA 1; (1934) 50 CLR 341.

95. *Hall v Poolman* (2007) 215 FLR 243; 65 ACSR 123 at [550]. Importantly the Elizabethan equivalents are able to unwind marital property settlements made by consent pursuant to section 79 of the Family Law Act 1975 (Cth).

96. *Caddy v McInnes* (1995) 131 ALR 277.

97. *Cardile v LED Builders Pty Ltd* [1999] HCA 18; (1999) 198 CLR 380 at [65] - [67].

98. *Deputy Commissioner of Taxation v Peter Sleiman Investments Pty Ltd as trustee for the Sleiman Family Trust* [2016] NSWSC 1657 at [62]; these features are sometimes termed *"the badges of fraud"*.

claimant prove an *"element of dishonesty"* in the mind of the transferor. Pleading and proving intention to that standard presented a significant barrier to success under the Elizabethan equivalents.

In *Marcolongo*, the High Court clarified that whilst there is a requirement to prove *"actual intent"* ordinarily that will be arrived at by way of inference. The intention to defraud can be inferred from the evidence as a question of fact and that it is not necessary to prove *"the actual content of the relevant person's mind"*. The relevant intention need not be a predominant or sole intention.[99]

As to the factors which might support such an inference the High Court noted the value of the consideration, if any, was highly relevant observing that it was *"easier to infer a dishonest intention if the conveyance were voluntary than if it were made for consideration"*, whilst noting that the fact that a conveyance was voluntary does not replace the requirement of proof of intent.

Subsequent case law has indicated that other factors will lead to the Court to move readily to the inference of an intention to defraud including where the alienation is made in favour of a family member; made in haste in proximity to events indicating financial stress on the disponer; or where the *"natural and probable consequences"* of the disposition is to defeat or delay of creditors.[100]

The critical time for the finding of an intention is the period leading up to the date of the transfer and the critical mind is that of the transferor,[101] although in the case of a corporation the critical mind is that of a person or persons controlling the company's actions in making the transfer.[102]

Who is a person prejudiced?

As a general proposition *"a person prejudiced"* by an alienation means any person who is entitled to rank as a creditor. In the context of the Elizabethan equivalents, the term *"creditor"* has been interpreted as *"wide enough to include any person who has a legal or equitable right or claim against the grantor or settlor by virtue of which he is or may be entitled to rank as a creditor of the latter"*[103]. It is also wide enough to include creditors who were at the time of the alienation only future creditors if they are ultimately prejudiced by the alienation. Importantly whilst there is no requirement that the transferor be insolvent to bring a claim, it has been held that a completed bankruptcy from which the transferor has been discharged will defeat a claim because property in question is not divisible between the creditors, meaning they are no longer prejudiced in the relevant sense.[104]

As a matter of practice, the bringing of a claim by a creditor without the benefit of the books and records of the transferor or the inquisitorial powers of a liquidator or trustee can present a significant hurdle to the commencement of any claim, and the use of preliminary discovery may be necessary to determine whether a claim is available.

The limitation periods for the bringing of such a claim are based upon the interpretation of the limitation laws of

99. *Marcolongo* at [57].

100. *Commissioner of Taxation v Oswal and Anor (No 6)* (2016) 339 ALR 560; [2016] FCA 762 29 at [66].

101. *Royal v El Ali* [2016] FCA 782.

102. *Marcolongo* at [64].

103. *R v Dunwoody* [2004] QCA 413 at [106].

104. *Griffiths v Falck* (2008) 200 FLR 278; [2008] NSWSC 998.

laws of the State or Territory in question. There is a dearth of case law on the issue. In New South Wales for example, actions to *"recover"* land (assuming that is what a claim under section 37A is properly described as) must be brought within 12 years from when the cause of action *"accrues"* to the plaintiff. Since, as discussed earlier, a creditor prejudiced need not be a creditor at the time of the transaction, and may not be "prejudiced" by the transaction until even later, the limitation period applicable will vary from case to case.

Defences

The modernised wording (insofar as 1924 can still be regarded as modern) provides a defence to the claim in that section 37A(3) provides that the other subsections of 37A do not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors. Whilst there was debate for some time as to whether the onus fell upon a claimant to prove that it does not apply – in other words to prove a lack of good faith or notice of the intention to defraud — recent caselaw has accepted that the onus of proving the "defence" lies upon the party asserting that it applies rather than the claimant.[105]

Remedies

A transaction impugned under the Elizabethan equivalents remains valid until reversed. Transactions are *"voidable"* rather an void, and only voidable to the extent necessary to ameliorate the prejudice which they cause to creditors. Depending upon the circumstances complex orders may need to be made dealing with trusts and the mortgage interests of financial institutions but as a general proposition the transferee will be ordered to do all things necessary to make the property available to satisfy claims of creditors. Orders under the section can be made against a transferee of Torrens title land requiring them to transfer the land as required.[106]

Section 121 of the *Bankruptcy Act 1966* (Cth)

Section 121 provides an avenue for a trustee in bankruptcy to recover property and is one of four types of voidable transaction under that Act. As with the English legislation, there is a separate provision (section 120) which makes an undervalued transactions voidable which may offer an alternative avenue. As to section 121 it differs from the Elizabethan equivalents in several important regards.

Firstly a claim may only be brought by the trustee and the transfer is only void against the trustee.

Secondly, section 121 requires the trustee to prove that the property would *"probably"* have become part of the transferor's estate or would *"probably"* have been available to creditors if it had not been transferred, which is not a requirement under the Elizabethan equivalents. *"Property"* in this context means real or personal property of every description, whether in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property,[107] but it is implicit within section 121 that the property in question must be in the hands of the transferor prior to the act taken to be the transfer.[108] As with the Elizabethan equivalents a transfer is void only to the extent necessary to satisfy the provable debts and costs of the bankrupt estate, and any surplus reverts to the transferee.[109]

Thirdly, since amendments in 1996, the trustee does not need to establish an *"intent to defraud creditors"*. Instead, the test is framed in terms of proving that transferor's *main* purpose in making the transfer was to prevent the property becoming divisible between creditors or hinder or delay that process. Whilst the Act does not limit the ways of establishing the transferor's main purpose, if a trustee can prove that it can be reasonably inferred that the transferor was insolvent or about to become insolvent at the time of the transfer then the main purpose of the transaction will be taken to be the relevant purpose. Importantly once established a finding as to the "*main purpose"* is determinative and the bankrupt cannot rebut it.[110] Trustees can be assisted in this regard by a rebuttable presumption that the bankrupt was insolvent at the relevant time if the bankrupt failed to keep appropriate records or has failed to preserve them.[111] If the trustee attacking the transaction cannot establish insolvency at the time, then the trustee will need to establish that the transferor's subjective purpose, although this can be inferred.[112] The leading authority on intention under section 121 remains the 1998 case of *Cannane v J Cannane Pty Ltd (in lid)* which arguably takes a stricter view of proving purpose then *Marcolongo* allows under the Elizabethan equivalents.

As with the Elizabethan statute, there is no temporal limitation on the status of creditors. In *Mathai v Nelson*, Tracey J said:

105. *Royal v El Ali* at [217].

106. Torrens title is a system of land title whereby the state maintains a register which is conclusive proof of title other than in very limited statutory exceptions. However, it has long been accepted however there remains the ability of a plaintiff to make a claim against a registered proprietor in personam, whereby the registered proprietor, notwithstanding registration, may be ordered to, for example, transfer the land (*Frazer v Walker* [1967] 1 AC 569 at 655). This issue was addressed in *Marcolongo* in respect to the Elizabethan equivalents.

107. *Bankruptcy Act* 1966 (Cth), section 5.

108. *Peldan v Anderson* [2006] HCA 48; 80 ALJR 1588; 229 ALR 432 at [41].

109. See, for example, *Ex parte McCullum* [1920] 1 KB 205.

110. *Re Jury; Ashton v Prentice* [1999] FCA 671, (1999) 92 FCR 68.

111. *Bankruptcy Act 1996* (Cth) section 121(4A).

112. *Prentice v Cummins* (No 5) [2002] FCA 1503 at [95], [2002] FCA 1503; (2002) 124 FCR 67 at 90.

"If the prescribed intention is present when the relevant transfer occurs, the transfer will be void against the trustee."

> *"If the prescribed intention is present when the relevant transfer occurs, the transfer will be void against the trustee. The intention may relate to persons who were, at that time, yet to become creditors. Such persons may or may not choose or be able to prove in the subsequent bankruptcy. It is, therefore, possible for a person to be a creditor for the purposes of s.121 even if that person never seeks to prove in the bankruptcy and was not foreseen as a future creditor at the time of the transfer."*[113]

In terms of limitations under section 127(4) an action under section 121 can be brought "at any time" meaning that, aside from the satisfaction of the elements of section 121 a claim can be brought in respect of transfers which occurred decades before. In one case in brought in 2012, properties purchased in 1978 and 1982 were ordered to be transferred to a trustee to meet the claims of creditors.[114] Due to the gravity of the allegation being made against the bankrupt it is now firmly accepted that whilst the civil standard balance of probabilities apply that this will be informed by the so-called *Bringinshaw* standard[115] – meaning that he circumstances appearing in the evidence must give rise to a reasonable and definite inference, not merely to conflicting inferences of equal degree of probability.[116]

As with the Elizabethan equivalents, there is protection for a purchaser for value without notice, however, under the Bankruptcy Act the requirements are more stringent. The consideration paid must have been "at least" market value. The Act excludes a variety of things from being regarded as contributing to the consideration include including "love and affection", a promise to marry, or the grant of a right to the transferor to live in the property transferred. To successfully make out the defence the transferee must also prove firstly that they did not know the transferor's main purpose for the transaction, and that they "could not reasonably have inferred" the main purpose and secondly, that they could not have reasonably inferred at the time of the transfer, that the transferor was, or was about to become, insolvent. These provisions provide powerful barriers to a spouse or family member successfully raising a purchaser for value without notice style defence.

The commencement of the bankruptcy and the availability of section 121 to the trustee has been held *not* to oust the availability of the Elizabethan equivalents to creditors, although they require leave to proceed against the bankrupt in the usual way and such leave is conditional upon any net fruits of the litigation be provided to the trustee to benefit creditors generally.[117]

The utility of section 121

Section 121 gives a trustee some potential benefits over a claimant under the Elizabethan equivalents since intention can be proven directly or it can be proven by showing the bankrupt was insolvent or about to become insolvent at the time of the transfer. A trustee also gets the benefit of the presumptions as to solvency from the absence of books and records and the information gathering powers provided elsewhere in the Bankruptcy Act. On the other hand, unlike a claimant under the Elizabethan equivalents, a trustee must prove the wrongful purpose was the *"main purpose"*, rather than merely a purpose.

113. *Mathai v Nelson* [2012] FCA 1148; 208 FCR 165.

114. ibid.

115. *Briginshaw v Bringshaw* [1938] HCA 34, 60 CLR 336: a divorce case in which adultery was alleged. Dixon J opined that where serious allegations such as adultery were made *"reasonable satisfaction"* should not be produced by inexact proofs, indefinite testimony, or indirect inferences" (at 362).

116. *Trustees of the Property of Cummins (A Bankrupt) v Cummins* [2006] HCA 6; (2006) 227 CLR 278 at [34].

117. *Zaravinos v Houvardas* [2004] NSWCA 421. at [40]; *Kattirtzis v Zaravinos* [2001] FCA 1158.

Notwithstanding some criticism of its drafting by the High Court, this section 121 is regularly used by trustees and has shown its utility over many years.[118]

Section 588FE(5) of the Corporations Act (Cth)

The final avenue, almost entirely unused, is found within Part 5.7B of the *Corporations Act* which deals with the recovery of property or compensation for the benefit of creditors of an insolvent company.

Section 588FE sets out a wide variety of types of voidable transactions in respect of which relief can be sought, and in respect of each type of transaction, it specifies a time limit for the look back period within which the transaction must have occurred (referable to so-called *"relation back day"* defined in section 91 of the Act and usually the date of filing of the winding up application). If a transaction can be shown to fall within one of the categories in section 588FE then, under section 588FG, the Court has wide discretion to make a variety of orders including orders for the payment of money or the return of property to the company.

Section 588FE(5) defines a category of transaction which includes a requirement for a liquidator to prove that the company entered into the transaction for the purpose, or for purposes including the purpose, of defeating, delaying, or interfering with, the rights of any or all of its creditors on a winding up of the company. It was added to the Corporations Act in 1992 and it is the only category of transaction within section 588FE which requires the liquidator to prove the company's purpose.

Elements of a 588FE(5) claim

In order to satisfy the definition in section 588FE(5) the liquidator must make out four key elements.

The first is that there must be a *"transaction"* as defined in section 9 of the Act although the *"transaction"* can have a series of steps.

Second, the transaction must be an *"insolvent transaction"* in that it must be:

(a) an *"unfair preference"*: a transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, or more than the creditor would receive in a winding up of the company (s 588FA); and/or

(b) an *"uncommercial transaction"*: a transaction which it could be expected that a reasonable person in the company's circumstances would not have entered into (s 588FB); and

(c) at the time the transaction occurred the company must be been insolvent, or the transaction in question made it insolvent (s 588FC).

The third element is the *"purpose element"*. Proof of this element is similar to proving intention under the Elizabethan equivalents and does require proof of subjective intent by the company or its agents.[119] Unlike section 121 of the Bankruptcy Act, the purpose need not be a sole or main purpose merely *"a purpose"*.

Why would a liquidator use section 588FE(5)?

The only benefit to a liquidator using section 588FE(5) is that is permits a 10 year lookback period. By way of comparison the lookback period for uncommercial transaction which is an insolvent is two years; or four years if a related entity of the company was party to the transaction (s 588FE(4)).

An inutile provision?

Notwithstanding its detailed provisions, in the 30 years since becoming part of Australia's corporate law, section 588FE(5) has been invoked in only a handful of cases[120].

The key difference between the provisions in the Bankruptcy Act and the Corporations Act is that under the scheme of the Corporations Act there are a variety of categories of transactions which are voidable without proving purpose and so unless the transaction predates the lookback period otherwise applicable there is no utility in using section 588FE(5).

Second, unlike a trustee using section 121 of the *Bankruptcy Act*, a liquidator using section 588FE(5) must prove insolvency at the time of the transaction but that does not obviate the need to also prove purpose.

The requirement for a liquidator to prove both purpose and insolvency makes section 588FE(5) the most onerous avenue to reverse an defrauding transaction and gives the odd result that (assuming leave is granted) a creditor of the company bears a lighter burden to impugn a transaction of the company than its liquidator even though the liquidator represents the interests of the underlying creditors and is usually must better equipped in terms of access to information than a creditor. The combination of these factors mean section 588FE(5) is essentially otiose and a barrier to reversing transaction which might otherwise have been voidable were the Elizabethan equivalents available for use by liquidators.

The drawbacks of the Australian position

As can be seen, the Australian approach is fragmented and complicated. Differing tests, onuses and presumptions apply depending upon which provision is used by the party seeking relief. As a result distinct, though overlapping, case law has had to be developed to deal with each provision. The cause of the complexity is, at least to an extent, structural. The Elizabethan equivalents are State-based ligislation whereas the Bankruptcy and Corporation Acts are Federal statues. However, even within the Federal legislation there is no uniformity of approach to fraudulent transactions or the grounds on which they can be reversed. One is left to ponder whether attempts to create bespoke provisions at the Federal level have created anything but unnecessary complexity and confusion.

Overview

The different legislative choices which have been made in Australia and in England (and of course, in other jurisdictions) mean that, although they have each evolved from a common Elizabethan root, and although comparisons will often be helpful, particular care must be used when considering authority which will reflect the local circumstances. ■

118. *Peldan v Anderson* [2006] HCA 48; 80 ALJR 1588; 229 ALR 432.

119. *Ashala Model Agency Pty Ltd (in liq) & Anor v Featherstone & Anor* [2016] QSC.121.

120. *Re SolfirePty Ltd (in liq)*[1998] 2 Qd R 92; *Ashala Model Agency Pty Ltd (in liq) & Anor v Featherstone & Anor* [2016] QSC.121; On appeal: *Featherstone v Ashala Model Agency Pty Ltd (in liq)* [2017] QCA 260 (On appeal) are rare examples.

BOX 2
THE AUSTRALIAN PROVISIONS

CONVEYANCING ACT 1919 - SECT 37A
Voluntary alienation to defraud creditors voidable

37A Voluntary alienation to defraud creditors voidable

1. Save as provided in this section, every alienation of property, made whether before or after the commencement of the Conveyancing (Amendment) Act 1930, with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced.
2. This section does not affect the law of bankruptcy for the time being in force.
3. This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors.

BANKRUPTCY ACT 1966 - SECT 121
Transfers to defeat creditors

Transfers that are void

1. A transfer of property by a person who later becomes a bankrupt (the ***transferor***) to another person (the ***transferee***) is void against the trustee in the transferor's bankruptcy if:

   (a) the property would probably have become part of the transferor's estate or would probably have been available to creditors if the property had not been transferred; and

   (b) the transferor's main purpose in making the transfer was:

   i. to prevent the transferred property from becoming divisible among the transferor's creditors; or

   ii. to hinder or delay the process of making property available for division among the transferor's creditors.

Note:

For the application of this section where consideration is given to a third party rather than the transferor, see section 121A.

Showing the transferor's main purpose in making a transfer

2. The transferor's main purpose in making the transfer is taken to be the purpose described in paragraph (1)(b) if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent.

Other ways of showing the transferor's main purpose in making a transfer

3. Subsection (2) does not limit the ways of establishing the transferor's main purpose in making a transfer.

Transfer not void if transferee acted in good faith

4. Despite subsection (1), a transfer of property is not void against the trustee if:

   (a) the consideration that the transferee gave for the transfer was at least as valuable as the market value of the property; and

   (b) the transferee did not know, and could not reasonably have inferred, that the transferor's main purpose in making the transfer was the purpose described in paragraph (1)(b); and

   (c) the transferee could not reasonably have inferred that, at the time of the transfer, the transferor was, or was about to become, insolvent.

Rebuttable presumption of insolvency

4A. For the purposes of this section, a rebuttable presumption arises that the transferor was, or was about to become, insolvent at the time of the transfer if it is established that the transferor:

   (a) had not, in respect of that time, kept such books, accounts and records as are usual and proper in relation to the business carried on by the transferor and as sufficiently disclose the transferor's business transactions and financial position; or

   (b) having kept such books, accounts and records, has not preserved them.

Refund of consideration

5. The trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee.

What is not consideration

6. For the purposes of subsections (4) and (5), the following have no value as consideration:

   (a) the fact that the transferee is related to the transferor;

   (b) if the transferee is the spouse or de facto partner of the transferor--the transferee making a deed in favour of the transferor;

   (c) the transferee's promise to marry, or to become the de facto partner of, the transferor;

   (d) the transferee's love or affection for the transferor;

   (e) if the transferee is the spouse, or a former spouse, of the transferor--the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975*;

   (f) if the transferee is a former de facto partner of the transferor--the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975*.

Exemption of transfers of property under debt agreements

7. This section does not apply to a transfer of property under a debt agreement.

Protection of successors in title

8. This section does not affect the rights of a person who acquired property from the transferee in good faith and for at least the market value of the property.

Meaning of **transfer of property** and **market value**

9. For the purposes of this section:

   (a) ***transfer of property*** includes a payment of money; and

   (b) a person who does something that results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to the other person; and

   (c) the ***market value*** of property transferred is its market value at the time of the transfer.

CORPORATIONS ACT 2001 - SECT 588FE

Voidable transactions

5. The transaction is voidable if:

   (a) it is an insolvent transaction of the company; and

   (b) the company became a party to the transaction for the purpose, or for purposes including the purpose, of defeating, delaying, or interfering with, the rights of any or all of its creditors on a winding up of the company; and

   (c) the transaction was entered into, or an act done was for the purpose of giving effect to the transaction, during the 10 years ending on the relation-back day.

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Transaction Avoidance

In England and Wales, the core transaction avoidance toolkit consists of provisions in the *Insolvency Act 1986* which render certain transactions voidable at the instance of officeholders or victims of the transaction. These provisions primarily focus on whether the transaction was at an undervalue and whether the purpose of the transaction was to defraud the transferor's creditors. However, English law also provides that transactions may be void or voidable in other circumstances, such as where the company or directors lack the capacity to enter into the transactions or where the transactions involve some form of illegality.

Ultra vires

Under English law, there has historically been confusion between acts which are *ultra vires* and those which amount to an abuse of the directors' powers. The misunderstanding largely stems from the judgment of Buckley LJ in *Re David Payne* in which he stated:

> *"A corporation cannot do anything except for the purposes of its business borrowing or anything else; everything else is beyond its power and ultra vires."*

The foregoing passage was interpreted in later cases as referring to the capacity of the company, such that any act which was not for the purpose of the company would be *ultra vires* the company. The court therefore held that where a company exercised a power it possessed for an improper purpose, the contract would be *ultra vires* and void.

However, Slade LJ later clarified the meaning of *"ultra vires"* in the context of transaction avoidance in *Rolled Steel Products Ltd v British Steel Corporation*. The judge stated that Buckley LJ's use of the phrase *"ultra vires"* should be read as *"ultra vires the directors"*, and therefore concerned acts which would amount to an abuse of the directors' powers. The phrase *"ultra vires"* was to be confined to describing acts which are beyond the corporate capacity of the company.

A company is treated as having implied powers to do any act which is reasonably incidental to the attainment or pursuit of any of its express objects, unless expressly prohibited by the memorandum. Accordingly, whether an act is ultra vires falls to be determined by reference to the true construction of the company's memorandum which, under the predecessor to the *Companies Act 2006*, had to state the company's objects. A transaction falling within a company's objects clause will therefore normally be intra vires, except where a provision in the objects clause is not capable as existing as an object.

Transactions which are *ultra vires* are void and incapable of conferring rights onto third parties. *Ultra vires* acts cannot be ratified or become *intra vires* by virtue of estoppel, lapse of time, acquiescence or delay. The usual remedy is restitution, and the courts would not necessarily refrain from granting relief in circumstances where the precise technical basis for restitution remained unclear.

However, the utility of the *ultra vires* doctrine in a commercial context has been largely curtailed. The objects of companies incorporated under the most recent legislation will be unrestricted unless they are specifically restricted by the company's articles. There is therefore considerably less scope to claim that a transaction is *ultra vires* as it falls outside the company's objects than under the preceding legislation.

Further, Article 9 of the First EEC Directive on Company Law required member states to abrogate the doctrine of *ultra vires* to ensure security between companies and their contractual counterparties. The validity of a transaction now cannot be called into question on the grounds of the company's lack of corporate capacity. Accordingly, a transaction can be enforced by or against the company even though it is not authorised by the company's constitution.

Abuse of power

Transactions may be voidable on the basis that they amount to an abuse of the powers of the directors of the company. For example, a transaction may be *intra vires*, but amount to an abuse of the director's powers on the basis that it was entered into for an improper purpose. Transactions which amount to an abuse of the directors' powers will be voidable at the election of the company, provided that the conditions for rescission are met. Upon rescission, the parties are obliged to restore the position to what it would have been if the transaction had not been entered into, which will usually entail re-vesting any property transferred to the transferor.

However, voidable transactions will bind the company if entered into with the unanimous consent of its shareholders or if subsequently ratified, although acts which are a fraud on the company's creditors cannot be authorised by its shareholders. Accordingly, transaction avoidance may be barred by shareholder consent or ratification. A company may also be estopped from objecting to the validity of a transaction by reason of the shareholders' acquiescence, provided that those shareholders had notice of the transaction and did not oppose it.

A third party wishing to rely on a transaction impugned as an abuse of powers must rely on the directors' ostensible authority. A company incorporated under the Companies Acts holds its directors as having ostensible authority to do on its behalf anything which its memorandum expressly or impliedly gives the company the capacity to do. The directors are deemed to be free from any limitation to act under the company's constitution where parties transact with the company in good faith, and those parties are not bound to inquire as to any limits on the directors' powers.

However, there may lie a claim against the counterparty to the transaction if he has notice that the transaction was entered into in breach of the directors' duty. Further, the directors are not protected in respect of transactions entered into beyond their capacity to which they are a party on the basis that they did not have the authority to bind the company.

Illegality

A transaction may involve illegality because it involves the commission of a legal wrong, or where no unlawful act is involved, for reasons of public policy or for breaching a statutory provision. The illegality may be found in the terms of the relevant agreement, or its object, purpose, or performance. For example, a contract for insider dealing will be illegal because insider dealing is independently illegal. A legal contract which has been achieved by illegal means may also be voidable at the election of the innocent party.

The English courts have a *"long-standing repugnance"* for claims which are founded on the claimant's own illegal or immoral acts. Lord Sumption, giving the leading judgment of the *Supreme Court in Les Laboratoires Servier v Apotex Inc*, expressed the view that the court's refusal to enforce illegal contracts was not a matter of discretionary power but was a rule of English law. In his view, courts should not determine whether a transaction involved illegality based on subjective judgments as to the moral culpability of the parties to the contract and how much that behaviour mattered in the particular context.

In *Bilta (UK) Ltd v Nazir* the court remained divided as to whether the proper approach to the illegality defence was rule-based, or a more flexible approach which permitted consideration of the underlying policies of the doctrine, and the point was not decided in that case. However, the point was settled by a majority of the Supreme Court in *Patel v Mirza*. The court held that the discretionary approach was correct and that, when considering whether to enforce a contract which involves a legal wrong, the court must consider the underlying purpose of the prohibition which has been breached, any other relevant public policy, and the proportionality of denying enforcement.

An illegal contract may be void or otherwise unenforceable, and the court may make a restitutionary order in appropriate cases. Further, it is important to note that the illegality defence will not be available to directors who conspire against the company or otherwise act as accessories to the directors' breach of duty, and there is no basis for attributing knowledge of such behaviour to the company to found an estoppel.

US Law of Transaction Avoidance

In addition to the transaction avoidance provisions of the US Bankruptcy Code, state voidable transaction and fraudulent conveyance statutes are frequently invoked to recover property transferred by a debtor in certain circumstances. Less commonly, the principles of *ultra vires*, breach of debtor duty and illegal contract may be applied to void contracts.

Ultra vires

The concept of *ultra vires* transactions—those that exceed the authority of a corporation to act—was incorporated into US law from its English antecedents, but has been eroded by the adoption of statutes that limit its application and permit broad purpose provisions in corporate charters. Most US corporations are formed under Delaware's General Corporation law, which provides that:

> *"No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted:*
>
> 1. *In a proceeding by a stockholder against the corporation to enjoin the doing of any act or acts or the transfer of real or personal property by or to the corporation…*
>
> 2. *In a proceeding by the corporation, whether acting directly or through a receiver, trustee or other legal representative, or through stockholders in a representative suit, against an incumbent or former officer or director of the corporation, for loss or damage due to such incumbent or former officer's or director's unauthorized act;*
>
> 3. *In a proceeding by the Attorney General to dissolve the corporation, or to enjoin the corporation from the transaction of unauthorized business."*

Prior to 2013 legislation, however, Delaware state courts had held that failure to comply with statutory requirements in carrying out certain corporate acts (principally the issuance of stock) rendered a transaction void or voidable. Following the 2013 amendments to the General Corporation Law, such transactions can now be ratified by the board of directors or the Delaware Court of Chancery. Although the legislative text suggests that the Court of Chancery could equally hold that a transaction can declared voided in appropriate circumstances, the court has consistently held that the remedial purpose of the legislation precludes it being invoked in that way.

In the context of failure to comply with corporate bylaw requirements, where the lack of capacity is that of the individual corporate actors and not the corporation itself, it may be ratified by the appropriate actor or the shareholders.

In the context of limited liability companies (LLCs), the concept of ultra vires retains some application, as the parties to the LLC member agreement may specify that acts in contravention of the agreement will be void, although third parties may be protected from rescission by the company's express or implied ratification of the act.

Note that the limitations on the ultra vires principle discussed above apply only to private companies. Government entities, whether or not organized as corporations, are limited by their statutory purposes and the concepts of apparent authority, *quantum meruit* and estoppel may not be available to enforce contracts against them.

Breach of duty

Corporate directors and officers owe fiduciary duties of loyalty and due care to the corporation. Conduct that breaches these duties (e.g., self-dealing or negligence) generally does not render a corporate act void or voidable under Delaware corporate law, but rather may give rise to a claim for damages incurred by the corporation and its shareholders. Delaware's General Corporation Law permits corporations to indemnify directors and officers for damages from breaches of the duty of care, so long as they have acted in good faith and not derived an improper personal benefit, so the duty of loyalty is the primary focus of shareholder suits attacking corporate transactions.

The Delaware General Corporation Law further restricts the scope of duty of loyalty challenges by providing that a transaction is not void or voidable solely on the basis that a director or officer with a pecuniary interest in the transaction participates in the approval of the transaction, so long as the material facts of their interest are disclosed and it is approved or ratified by the majority of disinterested directors or the stockholders. In the absence of such informed approval, the transaction must be "*entirely fair*" to the corporation to avoid attracting liability. While rescission is in principle available, most commonly the Court of Chancery will award rescissory or compensatory damages to the corporation or shareholders.

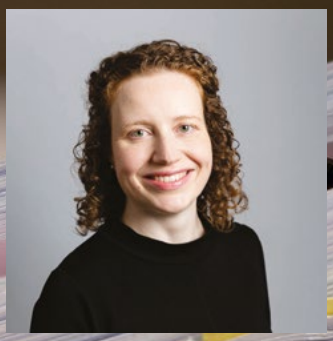
Illegality

As with English law, illegality could be considered a subset of *ultra vires* because no corporation has the authority to do an illegal act, but the treatment of illegal transactions is not constrained by the statutory limitations placed on the ultra vires doctrine. The treatment of illegal contracts is governed by state contract law, rather than state corporate law, though federal courts may refuse to enforce contracts involving federally illegal conduct even if not illegal under the law governing the contract.

A contract may be labelled illegal where its purpose is the commission of a crime or tort, where it fails to comply with applicable statutory law or regulation (e.g., licensing and usury law) or where enforcement would violate public policy. Whether an illegal contract is void, voidable or simply unenforceable depends on the nature of the illegality and the positions of the parties. Illegality ancillary to the contract may not render it voidable.

A contract to commit a crime or tort is unenforceable and the court will generally leave the parties as it finds them—i.e., it will not rescind the contract or award quantum meruit. Where one party to the contract is innocent, however, because it did not know the other party would engage in illegal conduct or because it is the protected party under the relevant statutory scheme, the illegal contract will typically be voidable at the innocent party's election. The defence of estoppel is not available on a claim to void an illegal contract. A company may also have a cause of action against directors and officers who cause the company to commit an illegal act.

The unenforceability of illegal contracts can be an obstacle in the context of disputes in the cannabis industry, which has been legalized in a number of states, but not under federal law. Thus federal courts, including bankruptcy courts, have held they cannot enforce contracts directed at federally illegal conduct, even where such contracts are legal under applicable state law. ■



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Evidence gathering in relation to transaction avoidance in an insolvency

Introduction

Essential to the successful pursuit of avoidance actions by liquidators, trustees in bankruptcy and equivalent insolvency appointees is the evidence gathering process.

Coming into the insolvent estate, the appointee will ordinarily not have personal knowledge of the pre-appointment business and affairs of the insolvent debtor. The appointee will need to gather testimonial and documentary evidence to identify whether avoidance actions might be available and to satisfy the evidentiary requirements necessary to successfully make out an avoidance case.

Avoidance actions will normally require demonstration that the particular transactions conferred a special advantage to the putative defendant over the general body of creditors that is in unfair in context.[1] As such, the appointee will need to gather evidence of potential voidable transactions in the context of the insolvent debtor's circumstances considered in their totality.

Avoidance transactions increasingly occur across international borders.

In the case of debtors seeking to defeat or defraud creditors, this is often deliberately so, with transactions to offshore or more exotic jurisdictions being made in an attempt to put the insolvent debtor's assets largely out of reach.

In view of these considerations, the appointee will need to conduct thorough investigations and gather detailed evidence before launching avoidance claims. Oftentimes this will involve cross-border investigations requiring the assistance of foreign courts and other legal authorities.

Many jurisdictions provide a patch work of evidence gathering tools for the insolvency appointee to choose from, including assisting both inbound and outbound cross-border investigations.

Necessarily, these tools will be a function of the system of law, statutory provisions and practice of the Courts and other legal authorities in the jurisdiction in question.

This article will examine the tools that are available in England and Australia to appointees to an insolvent corporation (with particular focus on liquidators) – including cross border tools. While

1. UNCITRAL Legislative Guide on Insolvency Law at [151].

the discussion is focussed on those two jurisdictions in particular, similar considerations will apply in other jurisdictions, especially those that are part of the common law tradition or have enacted the *UNCITRAL Model Law on Cross Border Insolvency* (**Model Law**).

Insolvency specific evidence gathering tools

Public examination proceedings

The most important tool in conducting a liquidator's investigation in England and Australia is the public examination proceeding.

In Australia, a liquidator is empowered under Part 5.9 of the Corporations Act 2001 (Cth), to apply to the Court to summon a person for examination about a corporation's 'examinable affairs.' The Court may also order any person to produce documents which are in his or her possession and which relate to the corporation or to any of its 'examinable affairs' (see ss 596D(2)-(3)).

The equivalent provision in England is section 236 of the Insolvency Act 1986, which enables the liquidator to apply to the Court for an order that a person appear before the Court to provide information *"concerning the promotion, formation, business, dealings, affairs or property of the company"*, or to provide documents concerning such matters.

The Australian Courts have confirmed the wide ambit of 'examinable affairs',[2] and that the purpose of the power given in Pt 5.9 of the Corporations Act is to 'provide a liquidator with the means of discovering the assets of a corporation, their whereabouts, the identity of creditors and the extent of the liabilities of the corporation.'[3] As such a wide variety of witnesses can be required to provide evidence relevant to the liquidators' examinations with few constraints beyond the evidence being connected to affairs of the company in liquidation.

Similarly, the English Courts have given a wide interpretation to the "*promotion, formation, business, dealings, affairs or property of the company*",[4] and will also give great weight to the liquidator's view as to what documents or information are reasonably required for the discharge of their functions.[5] This is because it has been recognised that section 236 is intended to provide a mechanism for the liquidator to obtain information for the purpose of their statutory functions in a relatively easy and inexpensive manner.[6]

Typically, a liquidator will obtain production of documents in advance of verbal testimony, enabling precise questioning of witnesses designed to uncover specific facts or obtain useful admissions of assistance to establishing the relevant elements of an avoidance transaction and other claims. In Australia, the testimonial evidence is provided in open Court. An examinee may not refuse to answer questions (although may claim privilege against incrimination). The evidence of the examinee can be used in subsequent proceedings. By contrast, in England, there is no privilege against self-incrimination in respect of a section 236 examination.[7] However, there are restrictive limits on who may be present during the examination,[8] the record of the examination (and certain other documents) may not be inspected without permission of the Court,[9] and material that is produced under compulsion under section 236 (or indeed section 235) will usually be confidential.[10] As in Australia, material may generally be used in evidence against examinee (subject to certain exceptions).[11]

In England, there is also an informal route to obtain information concerning the affairs of the company. Section 235 imposes a duty on certain persons – including current and former officers and employees of the company – to give to the liquidator such information concerning the "promotion, formation, business, dealings, affairs or property" of the company as the liquidator may reasonably require, and also to attend on the liquidator at such times as the liquidator may reasonably require. The liquidator requires no court order for the exercise of these powers, although there are penalties for failure to comply, and the liquidator may also seek court orders to enforce the section 235 obligation, if necessary (under Rule 12.52 of the Insolvency Rules 2016).

Cross border investigations inbound for foreign representatives

In both Australia and England, liquidators appointed in foreign insolvency proceedings may have access to domestic evidence-gathering procedures for benefit of the foreign insolvency process.

First, foreign liquidators who have been granted recognition in either Australia or England under the domestic enactments of the Model Law,[12] are granted extensive additional relief, including:

(a) the granting of the relief contemplated in Article 21(d) of the Model Law giving the foreign representative power to carry out "*the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities*"; and

(b) granting the foreign representative with all powers available to liquidators appointed under the Corporations Act (in Australia)[13] or "any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986" (in England).[14]

As such, a foreign representative will usually have the same power to conduct public examination proceedings as would a local liquidator.

2. *Re Quick Plumbing Australia Pty Ltd* [2005] FCA 1850; Re Interchase Corp Ltd (1996) 68 FCR 481; *Re Shepherds Producers Co-op Ltd* (2006) 65 NSWLR 381.

3. *Re Normans Wines Ltd; Harvey Burfield* (2004) 88 SASR 541, [119].

4. *Re Comet Group Limited* [2015] BPIR 1, [17]

5. *Sasea Finance Ltd (Joint Liquidators) v KPMG* [1998] BCLC 216, 220.

6. *British & Commonwealth Holdings Plc v Spicer and Oppenheim* [1993] AC 426, 438.

7. *Bishopsgate Investment Management Ltd (In Provisional Liquidation) v Maxwell* [1993] Ch 1, 31, 46, 61.

8. Rule 12.20, Insolvency Rules 2016.

9. Rule 12.21, Insolvency Rules 2016.

10. *R v Brady* [2004] 1 WLR 3240, [23], [26]-[27].

11. Insolvency Act 1986, section 433.

12. The Model Law is enacted in Australia in the Cross-Border Insolvency Act 2008 (Cth), and in England in the Cross-Border Insolvency Regulations 2006.

13. Look Chan Ho, *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (Globe Law and Business, 4th ed, 2017) 52.

14. Cross-Border Insolvency Regulations 2006, Schedule 1, Article 21(g).

Where recognition is not available under the Model Law (for example, because the foreign insolvency process is one which is outside the ambit of the Model Law), there are alternative routes by which a foreign officeholder may pursue investigations in the domestic jurisdiction. The main alternative option to Model Law recognition is the letter of request. Under section 581 of the Corporations Act, Australian courts are bound to *"act in aid of and auxiliary to"* Courts with jurisdiction in insolvency emanating from prescribed countries (or one of their colonies, overseas territories or protectorates).[15] The equivalent provision in England is section 426(4) of the Insolvency Act, which requires English courts to *"assist the courts having corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory"*.[16]

Further, both English and Australian courts have a discretion to assist insolvency courts from other jurisdictions and have regularly done so. Oftentimes the nature of the request is to assist in the evidence gathering process through compulsory production of documents and examination of witnesses. It is clear in England that *"there is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up"*.[17]

Cross border investigations
outbound for local liquidators and potentially also for foreign representatives granted recognition under the Model Law

In Australia, section 581 of the Corporations Act also provides for outbound letters of request. As such, the Corporations Act gives jurisdiction to Australian Courts to seek assistance from a foreign court to assist a foreign winding up.

The Court has a discretion to issue a letter of request and will generally only do so where it considers there to be utility in doing so, namely, the Court forms a view, based on expert evidence of a legal practitioner in the jurisdiction to which the proposed letter of request is to be directed that the foreign court would in all likelihood accede to it.[18]

As with inbound requests, oftentimes the nature of the outbound request is to assist in the evidence gathering process. In Australia, it is well established that *"the jurisdiction created by s.581(4) is available in relation to a s.596B [liquidator's public] examination."*[19] Examples include including obtaining orders for the production of documents which could assist in the winding up process by 'for instance, enabling the liquidator to be better informed as to the corporation's prospects of success or otherwise in [a] proceeding';[20] and for examination of a witness domiciled in a foreign jurisdiction.[21]

Obtaining Model Law recognition might provide a foreign representative with access to the letter of request mechanism to in turn seek assistance of a foreign Court.[22] For example, it seems possible that a Cayman Islands liquidator could receive Model Law recognition in Australia and ask an Australian court to issue a letter of request to the Hong Kong Special Administrative Region Court of First Instance. This possibility may offer an innovative 'work-around' to the limitations of the common law power of assistance as articulated in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675 (typically experienced by liquidators from offshore jurisdictions). Specifically, it may enable liquidators in offshore and other jurisdictions, constrained by those limitations of the common law power of assistance, to exploit the attaching to their liquidation proceeding consequences envisaged by the law of the country granting recognition.[23]

In England, there is no specific procedure for outbound letters of request in insolvency proceedings, although the English Court may, of course, issue a letter of request to a foreign court in the exercise of its inherent jurisdiction,[24] and/or pursuant to the general power under CPR 34.13 (discussed further below). The most recent authority indicates that section 236 of the Insolvency Act 1986 does not have extra-territorial effect, so that the English court will not make an order under section 236 against a person who is outside the jurisdiction (although earlier authorities reached conflicting results on this question).[25]

Of course, a domestic liquidator may also be able to seek recognition of the domestic liquidation in a foreign jurisdiction. The consequences of recognition would depend on whether the foreign jurisdiction had adopted the Model Law, and/or the domestic law of the foreign jurisdiction. It is therefore possible that additional information-gathering tools may be available to English and Australian liquidators, but this would need to be assessed on a case-by-case basis for any particular foreign jurisdiction.

Other (non-insolvency) evidence gathering tools
Pre-action and non-party disclosure

In both jurisdictions, there are provisions under the civil procedure rules, applicable to all litigants, which may facilitate the liquidator's information-gathering task in circumstances where litigation is anticipated or in process. In England, CPR 31.16 provides for pre-action disclosure from a prospective party where it would be desirable to dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings, or to save costs. CPR 31.17 provides for disclosure from a non-party where necessary in order to dispose fairly of the claim or save costs.

Norwich Pharmacal

Norwich Pharmacal relief is commonly used by applicants prior to the commencement of proceedings to compel third parties to disclose

15. These are Jersey, Canada, Papua New Guinea, Malaysia, New Zealand, Singapore, Switzerland, the United Kingdom and the USA.

16. The designated countries and territories are Anguilla, Australia, the Bahamas, Bermuda, Botswana, Brunei, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, the Republic of Ireland, Malaysia, Montserrat, New Zealand, South Africa, St Helena, Turks and Caicos Islands, Tuvalu and the Virgin Islands.

17. *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675 [25].

18. *Yeo and Rambaldi (as liquidators), Re Rennie Produce (Aust) Pty Ltd (in liq)* [2015] FCA 849 [15]; *Re HIH Insurance Limited (in liq)* [2004] NSWSC 454 [14].

19. *Re HIH Insurance Ltd (in liq)* [2004] NSWSC 454 at [6]

20. *Joye v Beach Petroleum NL & Cortaus Ltd (in liq)* (1996) 67 FCR 275.

21. *McGrath and Anor as liquidators of HIH Insurance Ltd* [2008] NSWSC 881.

22. This possibility is addressed in detail in *The Singularis Work-around? Overcoming Limitations to the Common Law Power of Assistance for Foreign Insolvency Investigations*, International Corporate Rescue, Volume 16, Issue 4, 2019.

23. *Model Law*, UN Doc A/52/17, 89; Explanatory Memorandum, *Cross-Border Insolvency Bill 2008* (Cth) 63.

24. See, for example, *Re Nortel Networks SA* [2009] B.C.C. 343 [9].

25. In *re Akkurate Ltd (in liquidation)* [2021] Ch 73; [2020] EWHC 1433 (Ch).

information enabling the applicant to identify the actual wrongdoers for the purposes of commencing proceedings, and for other specific purposes including the tracing of misappropriated assets. The jurisdiction to grant this equitable relief is well-established in key common law jurisdictions.

Norwich Pharmacal orders originated from the landmark case of *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133. That case was concerned with the disclosure of the identity of the wrongdoer against whom the applicant wished to commence civil proceedings for a specific tort (namely patent infringement). In England, *Norwich Pharmacal* relief is still frequently sought for the purpose of determining the identity of wrongdoers, but the exercise of the Court's discretion to make an order is now more flexible, and will permit disclosure of other information which is necessary to enable the claimant to seek redress for an arguable wrong (provided that the various factors which are relevant to the exercise of the discretion point to an order being made).[26]

A broader approach to the application of the *Norwich Pharmacal* principle has been substantially endorsed in Australia. The scope of the test has widened to include cases where an applicant wished to gather information that may assist in the decision as to whether or not to commence a proceeding, and information that assists in the tracing of assets in cases of fraud. The *Norwich Pharmacal* order has been used by an applicant to obtain from a relevant third party information to enable the applicant to discover the identity of the wrongdoer, to decide whether to commence proceedings against a wrongdoer[27] and to trace the disposition of monies obtained fraudulently.[28]

Whether *Norwich Pharmacal* relief might be available to assist in investigating avoidance transactions might depend on the nature of the allegations and the underlying factual matrix. In the context of granting discovery of privileged communications, the concept of "fraud" is expansive, allowing a potential plaintiff access to such communications where it can show facts that may be construed as having the ultimate purpose of attempting to frustrate the claims of creditors.[29] By parity of reasoning, particularly in view of the broad approach to *Norwich Pharmacal*, it seems reasonable to expect that Australian courts will be willing to exercise the jurisdiction in the context of avoidance transactions, particularly those seeking to establish an intent to defraud creditors.

Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

The United Kingdom, and each of the Australian states and territories, have enacted provisions to give domestic effect to the *Hague Convention On the Taking of Evidence Abroad in Civil or Commercial Matters* 847 UNTS 231, which the UK ratified in 1976 and Australia ratified in 1992.[30] In the UK, the Hague Convention was enacted via the *Evidence (Proceedings in Other Jurisdictions) Act 1975*; the Australian legislation derives from the British enactment.

Both the UK and Australia have made declarations in respect of the Hague Convention to the effect that each jurisdiction *"will not execute a Letter of Request issued for the purpose of obtaining pre-trial discovery of documents."*

However, the Australian case law authorities have facilitated requesting documents by categories[31] and depositions of the kind taken under US litigation procedures[32] so long as it can be demonstrated that the evidence sought is for use in a trial: *"that the evidence sought is described in wide or general terms is not inconsistent with its being sought for the trial."*[33] This facilitative approach reflects the overall attitude of the Australian courts that:

> It is our pleasure and duty to assist those Courts and the parties to them in arriving at a fair and just determination of their civil litigation where we can properly do so.

The Australian courts have proceeded on the basis that the real question is whether the exercise is a *"fishing expedition"*.[35] As was explained by Jordan CJ in *The Commissioner for Railways v Small*[36], fishing is *"endeavouring not to obtain evidence to support his case but to discover whether he has a case all"*.

English courts will also refuse applications to issue letters of request which are oppressive, or framed in terms which are too wide.[37] Where documents are sought, the English court will consider whether the foreign court is likely to be receptive to the request, and will ensure that the request is limited to particular documents or classes of documents that are necessary for the purpose of doing justice in the case.[38]

These potential limitations means that this procedure cannot be considered as a substitute for liquidator's public examinations described earlier. The latter are permissibly more akin to "fishing expeditions" which allows greater flexibility and lesser scope to challenge.

However, in a potential avoidance or other proceeding which seeks to prove up a case with more targeted requests for production of documents and depositions, this mechanism might prove useful. Particularly where oral testimony need be in a particular form, such as a deposition, this mechanism may be preferable to a public examination proceeding.

Of course, public examinations and procedures under the *Hague Convention On the Taking of Evidence Abroad in Civil or Commercial Matters* are not mutually exclusive and may be used complementarily. ■

26. *The Rugby Football Union v Consolidated Information Services Ltd* [2012] UKSC 55; [2012] 1 W.L.R. 3333 [14]-[18].

27. See e.g. *Idoport Pty Ltd v NAB Ltd* [2004] NSWSC 695.

28. *Computershare Ltd v Perpetual Registrars Ltd* (2000) 1 VR 626.

29. *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch 553; *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30, [212]; *R v Dunwoody* (2004) 149 A Crim R 259; *Gartner v Carter* [2004] FCA 258.

30. Pt 4 of the *Evidence on Commission Act 1995* (NSW); Pt 1, Div 1C of the *Evidence Act 1958* (Vic); Div 3 of Pt 3 of the *Evidence Act 1977* (Qld); ss115-118A of the *Evidence Act 1906* (WA); *Evidence on Commission Act 2001* (Tas); Pt 12B of the *Evidence Act 1971* (ACT); Div 2 of Pt 6 of the *Evidence Act 1939* (NT) and s59F of the *Evidence Act 1929* (SA).)

31. *Application of Computer Sciences Corporation under the Evidence on Commission Act 1995* (NSW) [2017] NSWSC 810 at [54]-[55]

32. *Eubanks v Cannar* [2003] NSWSC 1267 at [27] to [36]

33. *British American Tobacco v Eubanks* (2004) 60 NSWLR 483 at 499 item (9)

34. *British American Tobacco v Eubanks* (2004) 60 NSWLR 483 at [42] per Spigelman CJ who cited, with approval, the observations made by Burnton J in *Gredd v Arpad Busson* [2003] EWHC 3001 at 27.

35. *Application of Computer Sciences Corporation under the Evidence on Commission Act 1995* (NSW) [2017] NSWSC 810 at [54]-[55]; *Vitarich Labaratories v Alan Chen (ex parte)* [2012] NSWSC 746

36. (1938) 38 SR (SW) 564 at 575

37. *Honda Giken Kogyou Kabushiki Kaisha v KJM Superbikes Ltd* [2007] EWCA Civ 313.

38. BB Energy (Gulf) *DMCC v Al Amoudi* (unreported, Knowles J, 2 July 2021).

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Insolvency and Arbitration: Clash of Cultures?

The legislative provisions in the Insolvency Act 1986 addressing transactions entered into at an undervalue by a debtor form part of the armoury provided to an office holder to adjust/avoid transactions made in the twilight period prior to the debtor's entry into an insolvency proceeding. The origin of these legislative provisions can be traced back to the Statute of Elizabeth.[1] They are aimed at debtor misbehaviour and reversing any transaction that had the effect of depleting the value of the estate at the expense of the debtor's general body of creditors. As noted in the Cork Report: "*The justification for setting aside a disposition of the bankrupt's assets made shortly before his bankruptcy is that, by depleting his estate, it unfairly prejudices his creditor.*"[2] The Singapore insolvency regime has similar legislative provisions in the Insolvency Restructuring and Dissolution Act 2018 ("**IRDA**") (which were previously contained in the Companies Act, before Singapore consolidated all of its personal and corporate insolvency and restructuring laws into the IRDA) to address transactions entered into at an undervalue by a debtor.

There have been a number of cases recently, particularly in the English courts (but also in the ADGM – see in particular *NMC Healthcare LTD and associated companies* [2021] ADGMCFI 0006), where judges have held that arbitration clauses have force in insolvency. Whether this is right in a particular case will depend upon two questions:

1. Does the relevant dispute fall within the wording of the arbitration clause?

2. Is the dispute arbitrable?

Question 1 is unlikely to detain a court for very long. It is trite law that arbitration clauses should be widely and generously construed (*Fiona Trust v Privalov* [2008] 1 Lloyds Rep 254). As Sir Andrew Smith put it in NMC at [79]:

1. 13 Eliz.1 c.5.

2. Cork Report, para.1209.

> *"Since the decision of the House of Lords in Fiona Trust & Holding Corp v Privalov, [2007] UKHL 40, "the starting point for interpreting an arbitration agreement and determining its scope is not to focus on "fussy distinctions" about the exact terms used, but to construe it liberally, recognising that generally rational businessmen entering into an arbitration agreement will intend that any dispute arising out of their relationship should be resolved by the same tribunal: see esp. at para 13 per Lord Hoffmann and at paras 26 and 27 per Lord Hope."*

A similar approach is taken in Singapore. As stated by the Singapore Court of Appeal ("**CA**") in the case of *Larsen Oil and Gas Pte Ltd v. Petropod Ltd* [2011] SGCA 21 ("**Larsen**") at [19]:

> *"There are, all in all, strong reasons for supporting a generous approach towards the construction of the scope of arbitration clauses, given that such an approach has received widespread acceptance among the leading commercial jurisdictions, and is strongly supported by the academic community. Such an approach is also consistent with this court's philosophy of facilitating arbitration (see, for instance, the case of Tjong Very Sumito v Antig Investments Pte Ltd [2009] 4 SLR(R) 732 where we adopted a generous interpretation of the word "dispute" in an arbitration clause). Accordingly, we agree that the preponderance of authority favours the view that arbitration clauses should be generously construed such that all manner of claims, whether common law or statutory, should be regarded as falling within their scope unless there is good reason to conclude otherwise."*

There is room, however, even here for a question in the context of transaction at an undervalue claims. Such claims are made by an office holder, arising from a statutory cause of action which comes into play for the first time after the insolvency has commenced. It allows for the swelling of the debtor's assets which is to be utilised by the office holder in accordance with the statutory regime provided for in the Insolvency Act 1986 – this includes payment out of expenses in the relevant insolvency process. Can this really be said to fall into the normal wording of an arbitration clause, a clause that binds the company and the contracting party inter se? There must be room for argument here. Indeed, it is this argument that succeeded in Singapore, in *Larsen*.

In Larsen, the Singapore CA drew a line between private remedial claims (either common law or statutory) and claims that can only be made by a liquidator or judicial manager of an insolvent company, and held that arbitration clauses should not ordinarily be construed to cover avoidance claims in the absence of express language to the contrary. Since avoidance claims can only be pursued by a liquidator or judicial manager of an insolvent company, the Singapore CA considered that there is no reason objectively to believe that a company's pre-insolvency management would ordinarily contemplate including avoidance claims within the scope of an arbitration agreement: see *Larsen* at [20].

Question 2, will always, however, be the real focus of any argument in an insolvency context. Is the relevant issue arbitrable? As noted in Russell on Arbitration (24th Ed, 2015), para 2-080 the concept of arbitrability depends upon whether a matter is *"capable of being submitted to arbitration"*. So far, so good, but what determines whether or not this is the case? There are many things that will make a dispute non-arbitrable. Should it not be the case that insolvency is, quite simply, a wholly new event that takes the position out of the norm, leaving matters to be dealt with in the insolvency rather than outside. After all, this is the general approach taken to inward claims, which should normally be dealt with in the proof of debt process, rather than through litigation, unless there are particular reasons to the contrary: see for example the statement by Patten J in *A.E.S. Barry Ltd. v TXU Europe Energy Trading (In Administration)* [2004] EWHC 1757 (Ch) at [24].

However, this insolvency-centred approach has not garnered extensive approval. As noted by Gary B. Born in International Commercial Arbitration at p.1084, para 6.40(F):

> *"Parties to international arbitration agreements sometimes become subject to some form of bankruptcy or insolvency, either in their home jurisdiction or elsewhere. In most jurisdictions, only national courts (often specialised courts) have authority to commence, administer and wind-up bankruptcy proceedings, including proceedings to liquidate a bankrupt company, reschedule its liabilities, operate it under some form of receivership or administration, or distribute pro rata to designated creditors and owners. Disputes concerning these "core" bankruptcy functions are almost universally considered nonarbitrable, whether in domestic or international arbitrations, under the laws of developed jurisdictions.*
>
> *It is much more controversial, however, whether and when disputes merely involving a bankrupt entity as a party or raising questions of bankruptcy law (e.g. the continued effect of a contract), may be resolved in arbitration. Different national legislative regimes and judicial decisions have reached different conclusions about these types of disputes. In many such cases, the desirability of a centralised forum for resolving all disputes involving the bankrupt entity is weighed against that entity's preexisting commitment to resolve disputes with a contractual counterparty by international arbitration, with different legal systems adopting different resolutions of these competing interests. Again, however, the weight of authority, particularly in recent years, supports narrow nonarbitrability rules in this context."*

So, if it is not the case that it can be said that all insolvency matters are not arbitrable, how do we know whether something is arbitrable or not? For examples of such instances, we can again refer to Russell, at para 2-081:

> *"In particular, a dispute will generally not be arbitrable if it involves an issue of public policy, public rights or the interests of third parties, or where the dispute in question is clearly covered by a statutory provision which provides inalienable access to the courts".*

This suggests that there is potential for excluding transaction at an undervalue claims, which fall into at least three of these categories:

1. They bring into play the public policy question of whether matters should be dealt with in an insolvency context.
2. They affect more than just 2 parties (which also feeds into the public policy argument).
3. They are clearly covered by a statutory provision which provides

for a remedy to be given by the "court" (which, by definition, should be the court with governance of the insolvency process).

Taking all three arguments into account, prima facie that would suggest that there are likely to be very real arguments that transaction at an undervalue claims are not arbitrable.

This was in fact the approach taken by the Singapore courts. In *Larsen*, the Singapore CA considered that a distinction should be drawn between disputes involving an insolvent company that stem from its pre-insolvency rights and obligations, and those that arise only upon the onset of insolvency due to the operation of the insolvency regime. The objective of the avoidance provisions, which are to recoup for the benefit of the company's creditors losses caused by the misfeasance and/or malfeasance of its former management, could be compromised if a company's pre-insolvency management had the ability to restrict the avenues by which the company's creditors could enforce the very statutory remedies which were meant to protect them against the company's management. The Singapore CA held that such objective of the insolvency regime should thus override the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard, and to treat disputes arising from the operation of the statutory provisions of the insolvency regime as non-arbitrable, even if the parties expressly included them within the scope of the arbitration agreement.

Significantly, the Singapore CA did not say that the mere fact that one party was insolvent would render any claims non-arbitrable. A clear distinction was drawn by the Singapore CA between claims that arose only upon the onset of insolvency, and disputes that stemmed from pre-insolvency rights and obligations. The Singapore CA accepted that allowing a creditor to arbitrate the latter does not undermine the insolvency regime's underlying policy aims. Indeed, the Singapore CA was careful to note that a claim under section 73B of the Conveyancing and Law of Property Act for a claim of fraudulent conveyance of property (which has since been repealed and appears in a different form in ss 438 and 439 of IRDA) is one that may straddle both a company's pre-insolvency state of affairs, as well as its descent into the insolvency regime.

In contrast to the clear position in Singapore, decisions in this area in England do not take quite such an insolvency-friendly approach, particularly in the context of Russian bank insolvencies (which involve the appointment of temporary administrators). One such case that has caused quite a bit of recent discussion is the case of *Riverrock Securities Limited v. International Bank of St Petersburg (Joint Stock Company)* [2020] EWHC 2483 (Comm) ("**Riverrock**"), heard just over a year ago in the English High Court where the judge (Foxton J) held that principles of insolvency law does not bar the arbitration of an insolvency claim such as transaction avoidance.

In this regard, the underlying international insolvency policy he identified was that of "modified universalism" concerning the effect to be given to a foreign insolvency (at [80]). He did not consider this policy was infringed by the arbitration of the actions before him. He said at [81]:

> *"However, enforcing the LCIA Arbitration Agreements would not in any way conflict with the principle (or frustrate the policy) of modified universalism.* ***Granting an injunction would not involve recognising a second bankruptcy on the part of IBSP, nor prevent there being a single system of distribution.*** *Any recoveries made by the DIA on IBSP's behalf in an LCIA arbitration would be subject to, and administered in accordance with, the single scheme for distribution constituted by the St Petersburg bankruptcy proceedings"*

As we will come back to below, *Riverrock* may be right on its own facts, in the sense that this was a claim brought by the Bank after the end of the insolvency and therefore there are good grounds for the Court to have reached the conclusion that the relevant dispute was arbitrable. Leaving that point to one side, and looking at the principles applied by Foxton J, it seems to us, with the greatest of respect to the Judge, that he has been led into error in understanding the concept of modified universalism. It is not just about the distribution mechanism, but also about the moratorium. In other words, it is about dealing with the disputes arising in relation to claims into and out of the insolvency in the jurisdiction where proceedings are opened. Had the concept of modified universalism been better understood, it might not have led to a different conclusion, but would have led to a less concerning one.

To understand *Riverrock*, one needs to start two years earlier, with the case of *Nori Holding Limited v. Public Joint Stock Co Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm) (Males J) ("**Nori**"). In *Nori* there were two parallel causes of action in respect of a pre-insolvency transaction: a claim under Russian insolvency law to set aside a transaction for unequal consideration, and a claim under the Russian civil code for an abuse of rights (at [19]-[20]). Prior to the hearing of the application in *Nori*, there had been a temporary bank administration in Russia in relation to the bank. This had ended. Although both actions had been commenced by the temporary administrator, both were continued by the bank.

The bank submitted that no anti-suit injunction should be granted because the insolvency causes of action was not arbitrable (at [30](2) and [43]-[47]). The bank relied on *Larsen* in the Singapore CA (which distinguished between the rights that affected all creditors, and the rights that were just bilateral). Males J said that it was unclear whether this distinction was a general rule or just a procedural point for Singaporean courts (although readers of this article may take the view that this distinction is actually a fundamental principle of insolvency and, indeed, arbitration).

This submission was rejected by Males J who relied on the reasoning of the Court of Appeal in case of *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 ("**Fulham**"), which held that an unfair prejudice claim was arbitrable. Males J summarised *Fulham* at [57]-[59]:

> *"Patten LJ's conclusion was that in a case* ***where the relief sought was for an order which the arbitrators had power to make and the dispute was essentially contractual, there was no reason why the dispute should not be arbitrated,*** *but that even where an order (such as a winding up order) was sought which arbitrators had no power to make, they could legitimately decide whether there was unfair prejudice and winding up proceedings should be brought, which proceedings could then be brought before the court.*

> *58. So far as construction was concerned, Patten LJ held that in the absence of any statutory restriction or rule of public policy preventing the parties from agreeing to submit certain types of claim to arbitration, it was impossible to read into the wide language of the arbitration clause any limitation excluding claims for unfair prejudice from its scope.*
>
> *59. Longmore LJ dealt with the issues in reverse order. In relation to construction, he held that the wide expressions "all disputes" and "all differences" meant what they said, while there was no express or implied prohibition in the Companies Act 2006 to prevent arbitration of a dispute about unfair prejudice. Nor was there any principle of public policy to such effect. The fact that an arbitrator could not give all the remedies which a court could give did not afford any reason for treating an arbitration agreement as of no effect."*

Males J therefore rejected the *Larsen* "presumption" that insolvency law claims were not within the scope of an arbitration clause (at [60]-[61]). Of the question of whether the claims before him were arbitrable, he said:

> *"62. I deal next with whether the parties' dispute is arbitrable. For this purpose it is irrelevant in my judgment whether the claim is properly characterised as an insolvency claim under Russian law. It is necessary to focus on the nature of the particular claim and to consider whether that claim is capable of being determined in arbitration. In my judgment it plainly is.*
>
> *63. What matters is the substance rather than the form. In this case the parties' dispute is a straightforward factual dispute whether the August transactions constitute a fraud carried out on the Bank to replace valuable secured loans with worthless bonds. If so, the Bank will have a claim to avoid those transactions and to require the claimants to reinstate the position in which it was before they were carried out. A variety of legal labels can be and have been attached to that claim, including the labels of transaction with unequal consideration and abuse of rights under Russian law and conspiracy to defraud under Cypriot law. But in each case the essential dispute is the same, regardless of the label. This is a dispute which arbitrators can determine.*
>
> *64... There is, in this case, no remedy claimed such as a winding up order which would affect the status of the Bank or which would affect the position of third parties in such a manner as to take the case beyond the consensually derived jurisdiction of the arbitrators..."*

The conclusion in *Nori* will ring a false note in insolvency ears. First, it might well be thought that there is a presumption that insolvency law claims are not within the scope of an arbitration clause. (In other words, as suggested above, *Larsen* is right on this point.) Secondly, recharacterizing the claims as fraud claims does not mean that they are not insolvency law claims, properly so-called. As we will shortly see, in *Riverrock*, Foxton J thought that these claims were insolvency law claims.

Having said that, if we look at *Nori* and *Larsen* in the context of the underlying rights of the parties, the approaches taken can be seen as broadly consistent, because both approaches start with the same fundamental premise of protection of third parties and public policy. Where they diverged is that the Singapore CA in *Larsen* drew an important distinction between pre-insolvency claims and claims that could only be brought post-insolvency under the insolvency regime, whereas the court in *Nori* did not.

So much for *Nori*. What about *Riverrock*? The fact pattern in *Riverrock* was materially the same as Nori: see [5], [9] and [12]-[13], as noted by Foxton J at [39]. On the evidence however, Foxton J considered that the claims were those of the bank commenced by its liquidator on its behalf, rather than distinct claims of a liquidator (at [50]-[51]). By the time of this hearing the temporary insolvency proceeding had ended and the claims were being pursued by the bank. Foxton J did not therefore decide (nor need to decide) whether *office-holder* actions were arbitrable (at [54] (last sentence). Still less did he decide (or need to decide) whether English transaction at an undervalue claims would be arbitrable – a point that he expressly left open ('whatever the position might be if [the avoidance claims] were English law insolvency claims' [87(iii)]).

Like Males J, Foxton J did not consider the fact that certain of the avoidance powers in bankruptcy might not be available to the LCIA tribunal to be relevant to characterisation of the dispute in that case as arbitrable (at [62]-[66]). The dispute in relation to the transactions was arbitrable, and even if certain causes of action could not be arbitrated that did not mean the dispute was not arbitrable.

Importantly, Foxton J agreed with Patten LJ in the *Fulham* case at [69]:

> *"However, it is clear that the issue of arbitrability can involve more than simply ascertaining whether the relief sought engages third party interests in a relevant sense, or seeks an order that "only a court can make". In Fulham Patten LJ recognised that a claim might be non-arbitrable for a third reason, namely that it "represent[s] an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process" ([40]). He referred elsewhere in his judgment to relief which seeks a "state intervention in the affairs of a company which only a court can sanction" ([77]. Examples of such intervention were matters which "engaged the rights of creditors" or impinged on a "statutory safeguard imposed for the benefit of third parties".*

Foxton J also, at [71], expressly agreed with the points made by Patten LJ in the *Fulham* case:

> *"There is no doubt that many aspects of this regime are immune from interference by the members of the company whether by contract or otherwise. They cannot override the provisions of the 1986 Act which apply*

"It is necessary to focus on the nature of the particular claim and to consider whether that claim is capable of being determined in arbitration. In my judgment it plainly is."

> *on liquidation by agreeing between themselves or with a particular creditor that property which belongs to the company in liquidation should be dealt with other than in accordance with the Act The same must go for the exercise of the liquidator's powers under sections 238 to 239 of the Insolvency Act 1986 . They involve an exercise of a statutory power to intervene in and set aside transactions with third parties in the context of the insolvency regime. These are rights vested in the liquidator for the benefit of the creditors as a whole and cannot be overridden by a contract entered into by the company prior to its liquidation"*

Foxton J's reasoning moreover differed from that of Males J. Foxton J was satisfied that the actions were insolvency actions (at [75]). In his view, the important question he had to consider was whether that characterisation meant he had to give priority to (i) the policy of party autonomy or (ii) the public interest identified by Patten LJ (at [77]). He concluded that party autonomy trumped the public interest. Why? Because the temporary administrations had ended. These were not claims being brought in the insolvency, for the benefit of the estate, but by a single creditor, for its own benefit.

Where are we left by all of this? Is *Riverrock* wrong? Probably not (although Nori might well be said to have gone too far – perhaps influenced too much by the "*strong pro-arbitration policy of English law*" – *Riverrock* at [78]), unless the English courts can be persuaded to go down the more sensible and predictable *Larsen* route. However, it can convincingly be argued that *Riverrock* is right, on its facts, namely only where an insolvency process has ended, and the claims that are being brought are not essentially insolvency claims, or else are claims being brought only for the benefit of an individual. In that case the claim should remain arbitrable.

In contrast, where this is a normal transaction at an undervalue claim, brought in extant insolvency proceedings, by an office-holder, and for the benefit of all of the creditors of the insolvent estate, that is something that involves the interests of third parties (and not merely in a distribution sense). It is something that goes to the central question of the nature of the assets of the insolvent estate. It is something that is governed by a separate statutory regime, and there is a public interest in enabling this to be heard in public, in the public interest, rather than in private, as if it were something subject to a bilateral agreement. As a result, either on the basis of *Larsen*, or on the basis of arbitrability, transaction at an undervalue claims of this sort should be dealt with in insolvency, and not in arbitration.

To sum up, as noted extra-judicially by Quentin Loh J in The Limits of Arbitration (2014) 1 McGill Journal of Dispute Resolution 66 at 74:

> *"Apart from the inherent difficulties that come with any two-stage or sequential resolution of issues, there are also other concerns that might complicate matters, e.g., the solvency of the company and possible impact on would-be creditors, and the interests of other shareholders who are not party to the arbitration.*
>
> *...*
>
> *Instead of trying to stretch arbitration to its breaking point, the more logical step to take might be to accept that arbitration, useful as it may be, has its limitations. ... This is not necessarily inconsistent with a pro-arbitration stance; it is merely to acknowledge the consensual nature of arbitration and its consequent inherent limitations."* ■

Book Review

'Company Voluntary Arrangements - Law and Practice'

Editors: Elaine Nolan, Kirkland & Ellis International LLP and Tom Smith QC, South Square

Publisher: Oxford University Press, 2022

By Richard Fleming, European Head of Restructuring, Alvarez & Marsal*

This book fills a major gap in the market, being the first dedicated to the law and practice of company voluntary arrangements (CVAs) - which are perhaps loved and loathed in equal measure by different players in the market. The law on CVAs has evolved significantly since the procedure's introduction, especially in light of recent cases such as Debenhams, New Look and Regis. This text offers a clear, accessible guide to CVAs packed with practical and technical insights from market-leading practitioners, principally from Kirkland & Ellis and South Square.

The contextual framework begins by charting the development of CVAs - from early origins, formal introduction (following the Cork Report), use in a wide variety of restructuring/insolvency scenarios, deployment to restructure leasehold obligations and the subsequent evolution of 'landlord CVAs'. The book also highlights the impact of the Covid-19 pandemic and how CVA practice, process and procedure was utilised.

The book then takes a closer look at the use of CVAs in wider restructurings such as TXU, T&N and MF Global, among others. It next analyses the more-common use of 'landlord CVAs', charting detailed developments across four chronological 'phases'. It moves on to consider 'CVAs in practice', with a valuable array of practical points including key practical considerations around voting and creditor engagement and a detailed case study regarding the Steinhoff CVAs. This is followed by a detailed look at CVA process, from preparation to decision and everything in between.

The book proceeds to cover various technical aspects of CVAs including difficult questions of CVAs in a cross-border context (including the Irish court's recent decision to decline to recognise the Monsoon CVA) and post-Brexit considerations. It then offers detailed commentary on the controversial area of challenges to CVAs - an especially notable section given recent high-profile challenges. Following a further chapter offering insight on specific property law issues (focusing on forfeiture and restrictions on / relief from forfeiture), the book concludes with a consideration of future deployment of CVAs and a handy comparison to the new restructuring plan procedure. This will be especially interesting for advisors considering viable implementation alternatives, as in Virgin Active's use of a restructuring plan to compromise leasehold obligations.

Altogether, this commentary is an excellent contribution to existing libraries, as the first text to focus on CVAs and provides insights from leading insolvency practitioners, UK property counsel and international counsel, in addition to the teams at Kirkland and South Square. I'm confident the book will be an excellent resource for all insolvency and restructuring professionals, private equity investors, special situations investment and real estate funds, property agents and advisers, management teams and academics.

Given ongoing calls to reform CVAs (principally led by the British Property Federation), I am sure the next edition will be enriched with even more interesting developments. I will look forward to it.

* Richard Fleming is acknowledged in the restructuring industry as the market-leading CVA insol¬vency practitioner having pioneered the use of CVAs in large retail, hotel, restaurant and gymnasium businesses both listed and private. He contributed to Chapter 3 (Landlord CVAs) in the book.

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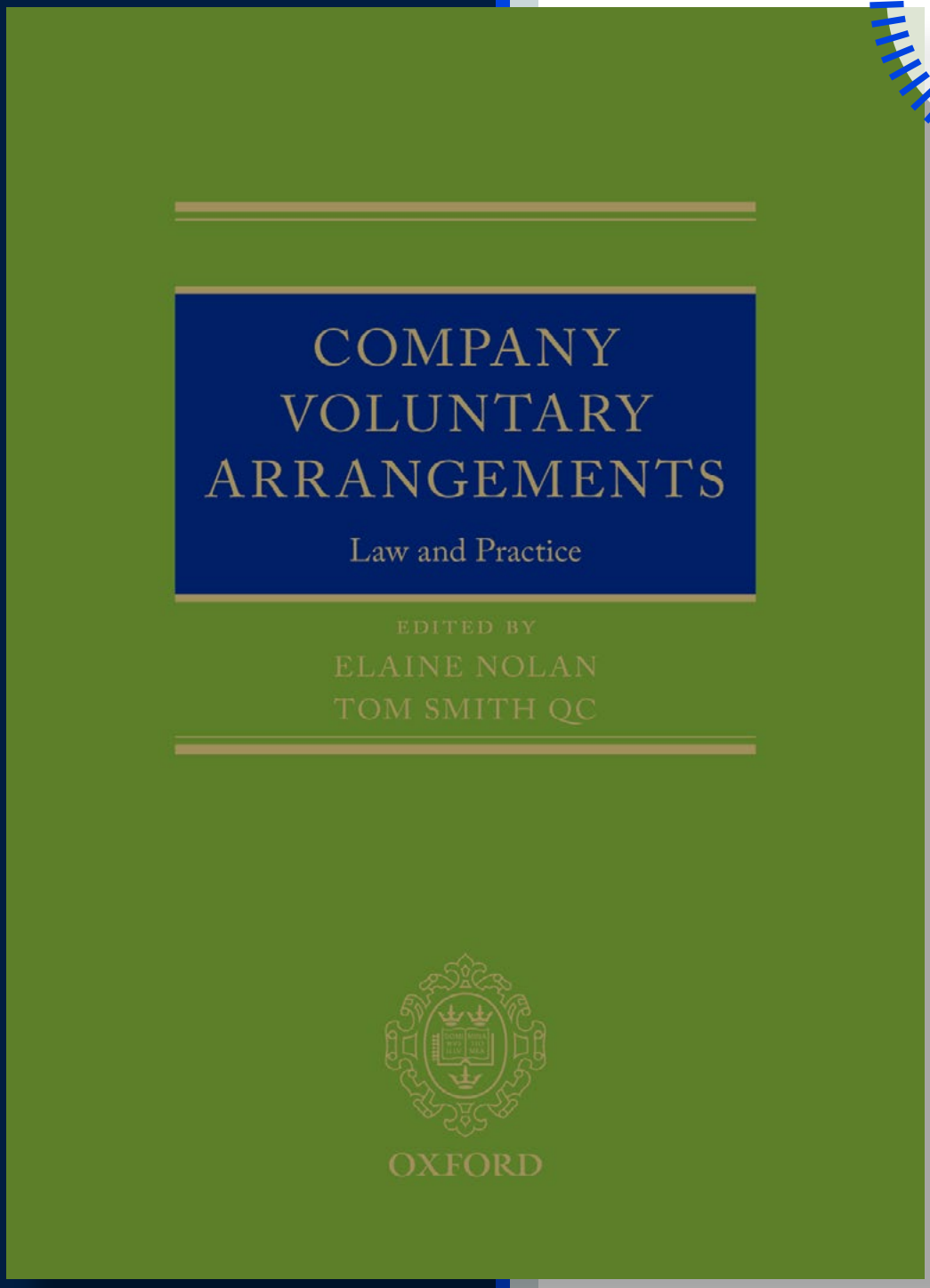

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Net zero gains pace: what the move to net zero emissions means for businesses, directors and the insolvency landscape in Australia and the United Kingdom

As the move to net zero emissions intensifies following COP26, questions and legal issues arise for directors and businesses in how they navigate this process. There are opportunities and risks ahead for entities as they begin or continue the net zero transition, which will likely require the involvement of restructuring and insolvency practitioners. This article explores the challenges and opportunities ahead in 2022 as the move to net zero gains pace.

The policy landscape

The impacts of climate change and move to net zero emissions has been at the forefront of global policy and business discourse for many years. As efforts to reduce emissions have gathered pace at the governmental level, so too has the business community accelerated their efforts to contribute to a net zero emissions economy.

The COP26 Summit held in Glasgow, Scotland in October-November 2021 brought greater spotlight, and progress, on these efforts. UK Prime Minister Boris Johnson noted the Summit reached a "*game changing agreement*" which sounded the "*death knell for coal power*",[1] following agreement by major nations to phase down their use of coal and by major financial institutions to end the funding of unabated coal.[2]

1. Doug Faulkner, 'COP26: Climate deal sounds the death knell for coal power – PM', *BBC* (online, 14 November 2021) https://www.bbc.com/news/uk-59284505.

2. UN Climate Change Conference 2021, *End of coal in sight at COP26* (online, 4 November 2021) https://ukcop26.org/end-of-coal-in-sight-at-cop26/.

The shift from funding fossil fuel based entities to 'green' lending has been evolving for some time, with research showing in 2021 that global banks earned more from green finance deals than capital raising for the fossil fuel industry ($US3.4 billion and $US3.3 billion respectively).[3]

With the landmark agreement reached at COP26 by major financial institutions controlling over US$130 trillion – or 40% of the world's capital – to pursuing net zero for their own businesses and across their lending and investing portfolios,[4] this trend is only going to increase. It is likely that there will be a rapid ripple effect across industries and major markets as lenders require net zero commitments in order to access capital into 2022 and beyond.

As businesses choose to or are required to begin the transition to net zero, there are significant challenges and opportunities which directors and entities must be aware of and finely balance. This article outlines the transitions underway to achieve a net zero emissions economy in Australia and the United Kingdom, the impact of this on boards and specifically directors' duties, and how this is likely to affect business practices and the insolvency landscape into 2022 and beyond in both countries.

Australia

Transition to a net zero emissions economy

The Australian Government released Australia's Long Term Emissions Reduction Plan to deliver net zero by 2050 in October 2021. The plan identifies four main areas through which the transition to net zero will be achieved:

1. Driving down the cost of low emissions technologies;
2. Enabling deployment at scale;
3. Seizing opportunities in new and traditional markets; and
4. Fostering global collaboration.[5]

The Government's plan is focused on using existing and new technologies to reduce emissions, with significant investment into new and emerging low emissions technologies. However, Australia's net zero emissions reduction target for 2050 is not enshrined in legislation at this stage. Previous commitments were made to reduce emissions by 26 to 28% of 2005 levels by 2030, though this commitment was not updated in 2021 when a commitment to net zero by 2050 was announced.

While progress at the governmental level to a commitment to net zero in Australia has not been as rapid as elsewhere in the world, the Australian business community has and continues to take independent steps towards their own net zero commitments. In 2021, net zero commitments made by ASX200 companies more than tripled with over 50% of the total ASX200 market capitalisation now committed to net zero.[6]

Implications for directors and compliance with directors' duties

With commitments to net zero gaining pace across the Australian business community, alongside strong community and industry pressure on those yet to pledge their net zero ambitions and moves to restrict access to capital to entities without a plan in place, businesses face a complex time ahead.

There is likely to be heightened scrutiny of the actions boards and directors take in implementing their net zero frameworks, particularly where changes in corporate strategy or focus are required. The potential for this to lead to greater company restructuring – including insolvency events – is inevitable, as with any major change to corporate strategy and capital access.

The *Corporations Act 2001* (Cth) clearly sets out the duties of care and diligence (section 180) and good faith (section 181) for all directors and other officers. While directors may be in breach of these duties if they fail to take steps to decarbonise their business,[7] they also may be in breach if they fail to consider, disclose and effectively mitigate the numerous risks that arise in the context of transitioning to net zero and operationalising climate commitments.[8]

The specific risks vary across different sectors and industries, however the key common risks for businesses would include:

1. Physical risks (such as the risk to the businesses' tangible assets, for example damage caused by the changing climate and extreme weather events)
2. Transition risks (such as reduced access to capital for non-net zero compliance entities and the costs incurred in transitioning to a net zero economy)
3. Liability risks (such as the business disruption or potential adverse outcomes of litigation and regulatory enforcement due to action or inaction on climate change).[9]

Each of these risks carries with it measureable and potentially significant financial impacts for a business. Directors must seriously consider the materiality of the risks to their business and the impacts of any actions undertaken to mitigate them. This will involve balancing the (often competing) interests of stakeholders and shareholders, and engaging in strategic and risk planning for both the short-term and long-term.

Directors must also be careful, however, to ensure that climate mitigation commitments are properly pursued. There are significant liability risks for a business which commits to a climate change

3. Colin Packham, 'Banks earn more from green finance than fossil fuels', *Australian Financial Review* (online, 6 January 2022) https://www.afr.com/companies/financial-services/banks-earn-more-from-green-finance-than-from-fossil-loans-20220106-p59mfm.

4. Jill Baker, 'Mark Carney's ambitious $130 trillion Glasgow finance alliance for net zero', *Forbes* (online, 8 November 2021) https://www.forbes.com/sites/jillbaker/2021/11/08/mark-carneys-ambitious-130-trillion-glasgow-financial-alliance-for-net-zero/.

5. Australian Government, *Australia's Long Term Emissions Reduction Plan*, October 2021, Part B (online https://www.industry.gov.au/sites/default/files/October%202021/document/australias-long-term-emissions-reduction-plan.pdf).

6. Business Council of Australia, *Achieving a Net Zero Economy*, October 2021, p 4 (online https://d3n8a8pro7vhmx.cloudfront.net/bca/pages/6612/attachments/original/1633693581/BCA_Achieving_a_net_zero_economy_-_9_October_2021.pdf?1633693581).

7. Sarah Barker, Climate Change and Directors Duties – Opinion, Australian Institute of Company Directors, 19 December 2016 (online https://aicd.companydirectors.com.au/advocacy/governance-leadership-centre/external-environment/climate-change-and-directors-duties).

8. Elisa de Wit, Rebecca Hoare, Noni Shannon, *The time is now – climate risk a mandatory issue for all boards*, 26 November 2019 (online https://www.nortonrosefulbright.com/en-au/knowledge/publications/c528fde6/the-time-is-now---climate-risk-a-mandatory-issue-for-all-boards).

9. Australian Prudential Regulation Authority, *Prudential Practice Guide – Draft CPG 229 Climate Change Financial Risks*, April 2012, p 7 (online https://www.apra.gov.au/sites/default/files/2021-04/Draft%20CPG%20229%20Climate%20Change%20Financial%20Risks_1.pdf).

mitigation strategy and then fails to deliver – leading to accusations of 'greenwashing' and potential actions by regulators and/or shareholders. The Australian Securities and Investments Commission (ASIC) has publicly stated that greenwashing is an area of enforcement focus in the years ahead.[10]

Moreover, the risk of reputational harm to a corporation in both failing to make and to deliver on climate commitments cannot be ignored. Whether a director has breached their section 180 duty to exercise their powers and discharge their duties with care and diligence involves balancing the *"foreseeable risk of harm to the company"* stemming from the director's conduct and the *"potential benefits that could reasonably be expected to have accrued to the company from that conduct"*.[11] The Federal Court of Australia has confirmed that this assessment involves consideration of *"all the interests of the corporation"*, including not only financial harm but also reputational harm, irrespective of prospective loss.[12] As activism and regulatory scrutiny surrounding corporations' environmental, social and governance commitments continues to gain momentum, there is little doubt that climate-related conduct falling short of community and industry standards – and which can be construed as 'greenwashing' – carries a risk of reputational harm that is both significant and likely to be found to have been foreseeable by the courts.

The COVID-19 pandemic and associated economic and supply chain impacts has added an additional layer of complexity for directors. As the pandemic has had a significant financial impact on business, the weighing up of stakeholder and shareholder interests has been made more difficult – with many businesses still focused on their short-term financial recovery rather than prioritising for long-term business evolution. This will have a more material impact on some industries than others but, as the pandemic enters its third year with no definitive end in sight, this conflict is a material risk for the business community.

Directors must ensure they finely balance their duties, the solvency of their business and the physical risks associated with climate change on the one hand, and on the other their climate change commitments and the transition and liability risks inherent in achieving net zero, as they navigate the coming period.

Potential impacts for the insolvency landscape

Whether directors succeed or fail in effecting the decarbonisation and net zero transition for businesses, opportunities for insolvency practitioners to become involved are almost certain to arise.

To move beyond mere compliance with minimum climate-related governance and disclosure requirements and effectively operationalise climate commitments, companies – especially those in the energy and resources, food, agriculture and other environment-intensive sectors – will need to restructure and incur the significant associated costs.

Similarly, banks and insurers will be affected where they lend to or insure companies in these sectors or which operate in climate-affected regions, or when they take decisions to reduce or cease lending to or to cease insuring fossil-fuel intensive industries.

This will necessitate careful risk assessment and may require restructuring of certain operational aspects of relevant businesses. For businesses with the greatest threat to their operations under a net zero framework there is an increasing risk that they may face difficulty obtaining finance or maintaining insurance cover. Companies in other non-fossil fuel based sectors may also experience flow-on effects, due to affected supply chains, resourcing or financing.[13]

Insolvency practitioners therefore have an important role to play in assisting all of these companies with their net zero transition.

Directors must continuously ensure the solvency of the company – that is, that the company can pay its debts as and when they become due and payable.[14] This task is made more difficult by the unpredictability of both the changing climate and governmental response. We may see that more and more companies opt to engage a restructuring advisor or monitor to prevent, as much as possible, risk-taking in decarbonising resulting in insolvency. Certainly close and careful monitoring of all climate risk – covering the physical,

10. Australian Institute of Company Directors, *Climate Risk Governance Guide*, October 2021, p 15 (online http://aicd.companydirectors.com.au/-/media/cd2/resources/advocacy/research/2021/pdf/climate-risk-governance-guide-a4-30pp-web.ashx).

11. *Cassimatis and Another v Australian Securities and Investments Commission* (2020) 376 ALR 261 [458] (Thawley J) (***Cassimatis 2020***).

12. *Australian Securities and Investments Commission v Cassimatis and Another (No 8)* (2016) 336 ALR 209 [481], [483] (Edelman J); *Cassimatis* 2020 [459] (Thawley J); most recently confirmed by the Federal Court in *Australian Securities and Investments Commission (ASIC) v GetSwift Ltd (Liability Hearing)* [2021] FCA 1384 [2529] (Lee J) (10 November 2021).

13. de Wit, Hoare, Shannon, n 8.

14. *Corporations Act 2001* (Cth) s 95A(1).

transition and liability risks – must become a norm for all boards in the coming years.

Where a restructured company is unable to continue operations and insolvency does occur, the conduct of the directors will be investigated by an appointed insolvency practitioner and may result in actions against the directors to recover company funds, as well as reporting to ASIC. Directors' conduct in such instances could form the basis of causes of action ranging from misleading and deceptive conduct, to breach of directors' duties and the duty of reasonable care, to breaches of other consumer protection claims.

There is also likely to be a continuing increase in climate litigation, as shareholder class actions increase and community standards and expectations for company actions on climate change and net zero continue to grow.

Directors must therefore balance the twin pressures of decarbonising and delivering net zero alongside their obligation to take appropriate steps to preserve the company's assets and values. Failure to take any climate action risks their short-term capital access, long-term strategy and viability and community reputation; but equally any action must be appropriate and monitored to ensure their ongoing duties are not breached.

While there are myriad risks posed by climate change for businesses in Australia, as covered in these pages, there is some room for comfort for directors. Recent insolvency reforms have provided some element of calculated risk taking which could encompass decarbonisation and moves to net zero.

The safe harbour provision in section 588G of the *Corporations Act 2001* (Cth) operates as a defence to liability for directors who allow a company to trade whilst insolvent, engage in conduct that results in making a creditor-defeating disposition of property, and engage in conduct of, among other things, procuring a creditor-defeating disposition of property, in breach of s 588GA.

While this does not provide a defence to breaches of director's duties or other voidable transaction claims, and directors must always take appropriate steps to preserve the company's assets and value, the provision allows directors to take some risks without threat of an immediate appointment of an insolvency practitioner – a useful protection in this time of significant social change.

Insolvency practitioners must also undertake a balancing exercise of their own. Upon appointment, insolvency practitioners become officers of the company and therefore must fulfil the aforementioned section 180 and 181 duties throughout their appointment. They also owe a common law fiduciary duty to the company to which they are appointed. These duties they must weigh against their obligation to ensure the best possible return to creditors and, in the case of receivers, their obligation to achieve the objectives for which they were appointed[15] and ensure the payment of certain secured creditors. While such an exercise and the potential for conflicts of interest are hardly novel in insolvency scenarios, it will be interesting to see how practitioners balance these various duties when faced with the new, pressing concerns of climate change, the commitments made to climate targets and net zero by the companies to which they have been appointed, and the risks associated with those commitments.

There is no doubt that the time ahead is a complex one for Australian businesses and directors (and insolvency practitioners) as they navigate the challenges of transitioning to net zero, recovering from the COVID-19 pandemic, and addressing the multitude of other challenges facing the global economy. However, with careful and calculated risk assessment, strategic planning and – where appropriate – support from restructuring practitioners there is an opportunity for local businesses to set themselves up for a successful and carbon neutral future.

The United Kingdom

Transition to a net zero emissions economy

The World Economic Forum's *"Global Risks Report"* which was released in January 2018 concludes that environmental concerns are at the top of the global risk list. There are three readily identifiable categories of risk:[16]

1. Physical risks from flooding and sever weather events.

2. Liability risks from risks of claims being brought against those who created physical risks or failed to deal with their effect.

3. Risks associated with the transition to low emissions as a consequence of the shift from capital investment in carbon fuels to alternatives.

A decade before the World Economic Forum report, the Climate Change Act 2008 (CCA) had committed the UK to reduce its greenhouse gas emissions to 80% of the 1990 level by 2050. The gas emissions target was made more ambitious in 2019[17] when the commitment was changed to a reduction of 100% by 2050 i.e. net zero.

This revised target was introduced in response to a report[18] which declared that the UK could end its contribution to global warming within 30 years by reaching a net zero target in 2050 and that this target could be achieved by at an annual cost of 1% to 2% of GDP to 2050 (but only if policies were implemented to achieve this result).

Under the CCA (section 36) the Government is required to produce an annual report setting out its

15. *Corporations Act 2001* (Cth) s 420.

16. See, for example, the article published by Mark Carney when he was the Governor of the Bank of England called *"Breaking the Tragedy of the Horizon – climate change and financial stability"*, 29 September 2015.

17. The Climate Change Act 2008 (2050 Target Amendment) Order 2019 SI 2019/1056.

18. Following the May 2019 Committee on Climate Change (**CCC**) called *"Net zero: the UK's contribution to stopping global warming"*, Parliament passed a motion declaring a climate change emergency. The Order was laid before Parliament on 12 June 2019, was made on 26 June 2019 and came into force on 27 June 2019.

views on the progress that has been made towards meeting a series of five-year carbon budgets. The Committee on Climate Change[19] reported that the first and second budgets were met and that the UK is on course to meeting the third budget (2018-2022) but not on track to meeting the fourth (2023-2027) or fifth budget (2028-2032).

More recently, the Committee on Climate Change has welcomed the Government's decision, in April 2021, to set the Sixth Carbon Budget, covering the period from 2033-2037, such that there is a legal obligation to reduce greenhouse gas emissions by almost 80% by 2035 and, for the first time, this carbon budget includes emissions from international aviation and shipping.

Directors' duties and the implications of a move to net zero

The duties of directors of companies incorporated in England and Wales is, for the most part,[20] codified in sections 171 to 177 of the Companies Act 2006. The duties are owed to the company and not to the shareholders; section 170(1).[21]

In the context of the policy response to climate change, the most obvious relevant duties are:

1. The duty to promote the success of the company for the benefit of its members as a whole; section 172.

2. The duty to exercise reasonable care, skill and diligence; section 174.

The duty to promote the success of the company for the benefit of the members as a whole, includes a duty to *"have regard to"* wider factors that are listed in section 172(1)(a) to (f). These factors are intended to reflect *"enlightened shareholder value"*.

Section 172(1) provides that: *"a director of a company must act in a way in which he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole and in doing so have regard to ...(d) the impact of the company's operation on the community and the environment"*.

Lord Sales, in his address to the Anglo-Australian Law Society in Sydney on 27 August 2019, on *"Directors' duties and climate change: Keeping pace with environmental challenges"* considered the first instance decision in an Australian case *ASIC v Cassimatis (No 8)* which suggested that reputational damage might constitute harm to a company's interests pursuant to section 180(1) of the Corporations Act 2001.[22] Lord Sales observed that the point in that case about the close nexus between financial detriment and environmental impact would also seem to apply to the duty of directors pursuant to section 172.[23] On this approach, where there is a close nexus between financial detriment and environmental impact the duty pursuant to section 172 to promote the success of the company applies independent of the need to have regard to the environmental impact pursuant to section 172(1)(d). As Lord Sales observed:

> *"In short, there is a growing recognition of the fact that good environmental practices will often be financially prudent, at least in the long term, on top of being laudable from a corporate social responsibility and ethical perspective."*

In this context it is also relevant that another factor that a director is required to have regard to is *"...the likely consequences of any decision in the long term"*; section 172(1)(a). Business decisions in anticipation of or response to climate change are, for the most part, likely to have long-term consequences.

As to what is meant by the words to *"have regard to"* the factors listed in section 172(1)(a) to (f) this was explained, as follows, by the DTI[24] (as it then was) at the time that section was introduced:

> *"In having regard to the factors [listed in section 172], the duty to exercise reasonable care, skill and diligence (section 174) will apply. It will not be sufficient to pay lip service to the factors, and, in many cases the directors will need to take action to comply with this aspect of the duty. At the same time the duty does not require a director to do more than good faith and the exercise of reasonable care, skill and diligence would require, nor would it be possible for a director acting in good faith to be held liable for a process failure which would not have affected his decision as to which course of action would best promote the success of the company."*

A duty of a director under section 172(1) is now accompanied by reporting obligations. From 2013 directors have had a duty to prepare a strategic report for each financial year,[25] and since 1 January 2019 directors have had been required to include in the strategic report a statement that describes how the directors have had regard to the matters set out in section 172(1)(a) to (f) when performing their duty pursuant to that statutory provision.[26]

GC100, the group of General Counsel of the FTSE 100, have issued guidance to help directors in

19. This is an independent body that provides evidence-based advice to the Government and Parliament on the mandatory carbon budgets.

20. Some common law duties that pre-dated the statute that have not been codified continue to be relevant duties.

21. There are limited exceptions, including the right of shareholders to bring derivative actions in the company's name against a director pursuant to sections 260-269 CA 2006 (there are procedural and substantive thresholders to be met before such a claim can be met).

22. [481]-[483].

23. Since Lord Sales's address the decision of Justice Edelman has been upheld by the Full Federal Court (by a majority of 2:1) in *Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52.

24. The Department of Trade and Industry which was replaced, in June 2007, by two new departments: the Department for Business, Enterprise and Regulatory Reform and the Department for Innovation, Universities and Skills.

25. The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013. (This obligation is not imposed on directors of companies which are entitled to prepare accounts in accordance with the small companies regime.)

26. Although this does not apply to a company that qualifies as medium-sized in that financial year.

the performance of their duty under section 172[27] which is focused on the need to identify factors of strategic importance for long-term success; induction and ongoing training; review of information gathering to ensure relevant factors in section 172(1) are addressed; and, considering those factors in the context of policy-making. As Lord Sales observed in his address on s 172(1)(d):

> "This drives home the point that environmental impact assessment duties on directors are quite procedural in nature."

The same point can made about the largely procedural nature of the assessment of the likely consequences of any decision in the long term pursuant to section 172(1)(a).

A recent study of the factors that directors included in their strategic report notes that factors identified in section 172(1) (a) the likely consequences of any decision in the long term and (d) the impact of the company's operations on the community and the environment were not discussed as much as (b) and (c), which relate to employees and suppliers. The report notes (a) and (d) *"...are both important areas that we would expect to be relevant to a number of companies' strategies."*[28]

No doubt the balance is changing, and could be speeded up, if the statement on section 172 that is required to be included in the strategic reports were to specify a requirement to disclose issues relevant to the environment. Such matters could include, for example, corporate waste disposal, the environmental impact assessments for major projects and energy consumption.[29]

Although the directors' duties as currently drafted are capable of being developed to encompass the relatively new world of legal commitments to achieve net zero emissions by 2050, given the urgency and the importance of meeting these commitments amendments to directors' duties to reinforce this process are, at the very least, worthy of consideration as a matter of urgency.[30]

Some potential impacts for insolvency

In October 2019 a former governor of the Bank of England, Mark Carney, warned that companies and industries that are not moving towards zero-carbon emissions will be punished by investors and go bankrupt.

Many different types of businesses face financial difficulties either as a consequence of climate change or because of the impact of the transition to a net zero environment. The problems faced by many companies are likely to require structural change to the way in which business is conducted. A widely reported example is that of California's largest utility company, Pacific Gas & Electric, which filed for Chapter 11 bankruptcy in the US in January 2019. The company's power lines had started some of the worst fires California had seen. PG&E's business emerged from the bankruptcy process in July 2020. The company still has substantial debts and needs to avoid causing further fires and shutting down the power to prevent fire while maintaining financial viability. The corporate governance of the business that has emerged from bankruptcy is better placed to deal with these issues because, for example, the company's remuneration policy has been connected to wildfire protection and there is a focus on environmental risk management strategies.

27. This was published in October 2018.

28. PwC publication, *"Navigating the stakeholder agenda"* which reports on Section 172.

29. This was one of the reforms suggested by Lord Sales in his address. He also suggested there be a specific requirement to report on the supply chain management and company investment profiles.

30. This was also a reform suggested by Lord Sales in his address.

31. This is an industry-led group which is intended to help investors understand their financial exposure to climate risk and works with companies to assist with disclosure of this information in a clear and consistent way. It was launched at the Paris COP21 in 2015. Since then, Mark Carney, in his capacity as the UN Special Envoy on Climate Action and Finance and UK Finance Advisor for COP26, as published recommendations on climate-related financial disclosure.

The focus for now in the United Kingdom is on reporting. From 6 April 2022 some 1,300 of the largest UK-registered companies and financial institutions will have to disclose climate-related financial information on a mandatory basis, which accord with recommendations from the Task Force on Climate-Related Financial Disclosure.[31] The companies include private companies with over 500 employees and turnover of £500 million. The purpose is intended to be to identify information needed by investors, lenders and insurance underwriters to assess and price the climate-related risks and opportunities.

Even with this information, insolvency practitioners will be faced with new challenges in assessing whether a company can survive or the business needs to be restructured or the problems are terminal. Further, where there is a restructuring, consideration will need to be given to appropriate corporate governance changes intended to address the risks of climate change, as happened with PG&E (described above).

The issues referred to above in the context of the potential impacts for the insolvency in Australia, apply equally to the UK, in particular:

1. There are likely to be companies in a wide-range of sectors that will need to restructure to address the financial and governance issues that arise as a consequence of climate change, the associated laws and regulations and difficulties obtaining finance or insurance.

2. Where companies go into insolvency proceedings, new issues will arise in considering whether directors have breached their duties by reference to the corporate governance in a context where directors are and will increasingly be expected to consider and respond to the risks faced by the company's business as a consequence of climate change. ■

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Antecedent Transactions and Cryptocurrency: The Australian and English Perspectives

Introduction

It is only a matter of time before insolvency professionals are faced with a corporate insolvency involving cryptocurrency within the insolvency estate. Given their increasing use and acceptance, it is also becoming more likely that when approaching insolvency an insolvent company may have entered into transactions using cryptocurrencies with the view to putting such assets out of reach of creditors. This article looks at what the authors consider to be a likely potential scenario, namely where a company converts liquid assets of a company (such as cash) into cryptocurrency and transfers it to a director or related party. This could appear to bad actors to be a quick, efficient, and effective, means of diverting assets away from creditors in the period leading up to liquidation.

Reviewing and seeking orders in relation to such transactions is common for insolvency professionals dealing with dispositions of tangible property but, with the increasing prevalence of cryptocurrency forming part of corporate asset portfolios, the prospect of 'clawing back' cryptocurrency has become a reality. This article considers how the insolvency laws of the United Kingdom (specifically those of England and Wales) and Australia may respond to an application by a liquidator for orders relating to antecedent transactions involving the transfer or disposition of cryptocurrency.[1]

1. The scope of this article is limited to dispositions of cryptocurrency and not digital assets generally, given the many differing forms such assets can take that may give rise to different legal outcomes.

Insolvency regimes for antecedent transactions

Antecedent transactions in England and Wales and Australia share several similar characteristics. First, the transactions are undertaken by a company in the period approaching insolvency. Second, the transaction usually involves a payment of money or transfer of property from the company's assets to a third party that may have been made at an undervalue or with the intention of preventing the property from becoming available to creditors. Finally, such transactions are susceptible to challenge and/or being overturned after the company is placed into liquidation.

In England and Wales, the antecedent transaction provisions are located in the Insolvency Act 1986 (the "**UK Act**").[2] The main forms of antecedent transactions are transactions at an undervalue,[3] preferences,[4] and transactions defrauding creditors.[5] Transactions at an undervalue involve the transfer of assets to another party for no consideration or for significantly less than the asset's value, at a time when the company was insolvent or became insolvent as a result of the transaction. A preference involves a transaction that puts a creditor in a better position it would otherwise have been in upon the company's insolvency. A transaction defrauding creditors is a transaction at an undervalue entered into for the purpose of putting the assets beyond the reach of a creditor to frustrate an actual or potential claim the creditor has against the company. A transaction defrauding creditors does not need to have taken place when the company was insolvent or in insolvency proceedings.

In Australia, part 5.7B of the Corporations Act 2001 (Cth) (the "**Australian Act**") is the applicable law governing any transaction undertaken by a director converting cash funds of an Australian registered company into cryptocurrency and in turn moving such assets away from the company in the period prior to winding up. The Australian Act is the applicable law on the basis that, like most jurisdictions, Australia adopts the *lex fori concursus* or law applicable to the insolvency of the company rather than that of the location of the transferred assets.[6]

Antecedent transactions under the Australian Act, involving attempts to move assets away from the hands of creditors, may be broadly categorised into uncommercial transactions, unreasonable director related transactions, related party transactions or creditor defeating dispositions under Australia's voidable transaction regime.[7]

If such a transaction is within the required timeframes, there are no defences available and it is found to be voidable then a Court may make a variety of orders upon the application of a company's liquidator. Commonly the order may be that money be paid to the company equalling the amount of some or all of that which was paid under the transaction, or the return of company property transferred under the transaction. What is a cryptocurrency

As yet there is no legal definition of a cryptocurrency (which is sometimes also referred to as virtual currency) in either Australia or England, but it can be broadly defined for practical purposes as "*a digital currency in which encryption techniques are used to regulate the generation of units of currency and verify the transfer of funds, operating independently of a central bank.*"[9]

There are numerous examples of cryptocurrencies and they do not all operate in exactly the same way. The two more well-known examples are Bitcoin and Ethereum, which operate in a similar manner. These are represented by public and private data parameters commonly known as the public and private keys. The public parameter is represented on the blockchain, the decentralised, distributed ledger that contains information relating to the ownership, value and transaction history of the cryptocurrency, while the private parameter enables a transfer of the cryptocurrency to be authenticated and effected. In short, it is the private key that gives a person control over the asset.

Issues with antecedent transaction claims involving cryptocurrency

Given the anonymity they can provide and their decentralised nature, cryptocurrencies could appear to be an ideal method for the unscrupulous to divert assets out of a company approaching insolvency. Indeed, one of the criticisms of cryptocurrencies, and the reason some central banks are taking a tough stance on them,[10] is their ability to be used for money laundering or other such illegal activity. If an insolvent company attempted to divert assets away in the form of cryptocurrencies, then the question would be whether the insolvency practitioner would be able to claw it back for the benefit of the insolvent estate, in the form of the relevant cryptocurrency or the equivalent in the traditional fiat currency form.

England and Wales

Cryptocurrency as property

The issue of whether cryptocurrency is property was the subject of a judgment by Bryan J in the Commercial Court in *AA v Persons unknown*.[11] There, the claimant sought a proprietary injunction in respect of Bitcoins transferred as a result of a cyber ransom attack. The judge considered the question of whether Bitcoins could be property capable of being the subject of the proprietary injunction.

The difficulty lay in starting with the premise that in English law property is of only two kinds: things in possession; and things in action. Bitcoins are not things in possession because they are virtual, intangible, and are not capable of (physical) possession. Nor are they things in action because they do not represent any right that can be enforced by action.[12]

2. England, Wales and Australia also share legislative provisions derived from the Statute of Elizabeth which may provide a complimentary framework for recovering transfers intended to delay, hinder or defraud creditors.

3. s 238, UK Act.

4. s 239, UK Act.

5. s 423, UK Act.

6. s 5, Australian Act.

7. s 588FE, Australian Act.

8. s 588FF(1)(a), (b), Australian Act.

9. Oxford English Dictionary.

10. Such as the controls imposed by the People's Bank of China (the Chinese central bank) on cryptocurrencies from 15 September 2021.

11. [2019] EWHC 3556 (Comm).

12. *AA v Persons unknown*, [55].

Bryan J cited the reasoning from the legal statement on crypto assets and smart contracts published by the UK Jurisdictional Task Force in November 2019 (the "**UKJT Statement**"). He considered that, while the UKJT Statement is not a statement of the law, its detailed and careful consideration rendered its analysis compelling, and considered it to be an accurate statement of the law.[13]

The UKJT Statement took the view that the starting premise, that something cannot be property unless it is one of two kinds of property in English law, is mistaken. Rather, the cases indicate the flexibility of the common law conceptualisation of property, and that it is capable of adapting traditional concepts to new business practices. The UKJT Statement concluded that while a crypto asset might not be a thing in action on a narrow definition of that term, that does not mean that it cannot be treated as property.[14]

On this basis, Bryan J held that that crypto assets, including cryptocurrency, are property. He also considered that they met the common law definition of property because they are definable, identifiable by third parties, capable in their nature of assumption by third parties, and have some degree of permanence, the four common law conditions set out by Lord Wilberforce in *National Provincial Bank v Ainsworth*.[15] In the circumstances, since he was satisfied that the conditions for granting a proprietary injunction were satisfied, Bryan J granted a proprietary injunction in relation to the Bitcoins.

Property in antecedent transactions

While the UK Act does not expressly define *"transaction"* for the antecedent transaction provisions by reference to property,[16] it is a necessary implication of the powers conferred on the court when dealing with an antecedent transaction, which allows the court to require any *"property transferred as part of the transaction"* to be vested in the company.[17] Property has a wide statutory definition in the UK Act and is defined as: *"money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property"*.[18]

Following the decision in *AA v Persons unknown*, since cryptocurrencies come within the common law definition of property, cryptocurrencies – and indeed other digital assets – clearly come within the (wider) statutory definition for the purposes of antecedent transactions. This is consistent with the UKJT Statement's view on the point.[19]

This means that the court's powers under the UK Act would extend to an order requiring cryptocurrencies to be transferred back to the company, or the proceeds of the sale of cryptocurrency to be returned to the company. Cryptocurrencies have already been the subject of a freezing order[20] and proprietary orders,[21] so there is every reason to expect that they will soon be the subject of an order made pursuant to the Court's powers to unwind an antecedent transaction.

A further consideration that will arise particularly in the case of cryptocurrencies is that of valuation. In a transaction at an undervalue, both the outgoing and incoming consideration (from the debtor company's point of view) should be valued as at the date of the transfer. In the case of cryptocurrencies, information as to the objective market value of a cryptocurrency should be relatively easy to obtain given that many are readily traded on publicly accessible markets. However, given the notorious volatility of cryptocurrencies,[22] insolvency practitioners will have to take care that the valuation at the precise time of the transfer is obtained.

Australia

Cryptocurrency as 'property'

Similar to the position in England and Wales, for the purpose of the Australian Act in order for there to be an antecedent transaction there first be a *"transaction."*[23] However, under the Australian Act *"transaction"* is defined by way of a broad and non-exclusive list of example conduct including a *"conveyance, transfer or other disposition…of property of the [company]."*

Although no Australian court has yet determined whether cryptocurrency is *"property"* and able to form the subject matter of the *"transaction"*, the Australian Act itself defines *"property"* as including *"any legal or equitable estate or interest…in real or personal property of any description and includes a thing in action…"*[24] Further, and unfortunately without any written reasons, an Australian court has similarly to the Commercial Court in *AA v Persons unknown* ordered that *"digital currency"* can form the subject of a freezing order. In drafting the relevant order Moschinksy J defined *"digital currency"* as meaning *"property as defined in s 9 of the [Australian Act] that is digital currency, virtual currency, cryptocurrency or similar."*[25]

In interpreting what the *'legal or equitable interest'* may be, as it relates to cryptocurrency, one may be assisted by the general interpretation given for the phrase *"property"* as *"a description of a legal relationship with a thing…[referring] to a degree of power that is recognised in law as power permissibly exercised over the thing… Usually treated it is a 'bundle of rights.'"*[26] Implicit in that *"bundle of rights"* is a right to use or enjoy the property, the right to exclude others, and the right to sell or give the property away.[27]

Taking the concept of property further, the UKJT Statement pointed out that in order to consider cryptocurrency as property the concept of ownership and ability to transfer must also be

13. *AA v Persons unknown*, [57], [61].

14. UKJT Statement, [84].

15. [1965] AC 1175.

16. S 436(1), UK Act.

17. s 241, UK Act.

18. s 436, UK Act.

19. UKJT Statement, [109].

20. *Vorotyntseva v Money-4 Ltd (t/a Nebeus.com)* [2018] EWHC 2596 (Ch).

21. *Robertson v Persons Unknown* (unreported) 15 July 2019; *AA v Persons unknown*, above.

22. As acknowledged by Birss J in *Vorotyntseva*, [2]. For example, during the course of 2021 a single Bitcoin could have been worth the equivalent of anywhere between USD 31,576 and 64,400.

23. s 9, Australian Act.

24. *Australian Securities and Investments Commission v Remedy Housing Pty Ltd* [2021] FCA 673, 5.

25. *Yanner v Eaton* (1999) 201 CLR 351, 365-366.

26. *Milirrpum v Nabalco* (1971) 17 FLR 141, 272.

27. UKJT Statement, [42].

considered.[28] At a rudimentary level, a holder of cryptocurrency has an interest in and rights to get value from the cryptocurrency that it owns. Such ownership interest is recognised on the blockchain as a cryptographic line entry. The owner of that cryptocurrency can effect a transfer of those rights by engaging the cryptographic transfer process. Once a transferee accepts a transfer of the rights associated with the cryptocurrency, via its private key, that new owner's interest is recognised on the blockchain by way of a new cryptographic line entry. The interest of the original owner remains as a cryptographic line on the blockchain but no worth or rights remain attached to it.

Given the above analysis it would appear that at the appropriate time the Australian courts are likely to recognise the rights to exploit cryptocurrency as property, the subject matter of a '*transaction*', for the purpose of an antecedent transaction under the Australian Act.

Property in antecedent transactions

The "*transaction*" involving the "*property*" must be one to which both the company and the creditor are parties, even if someone else is also a party.[29] Importantly, in the context of the proposed conduct referred to above, for the purpose of the Australian Act the transaction can comprise a series of steps which taken together form one transaction.[30]

As noted above, although it is commonly thought that cryptocurrency can be "*transferred*" from one digital wallet to another this may not strictly be the case. Unlike the transfer of a tangible asset, where the identical asset moves unchanged from one to another, a transfer of cryptocurrency is effected when a new pair of data parameters is brought into existence with the rights in the old data parameter being reduced to zero (i.e. the new cryptographic line entry entered onto the blockchain following authentication of the transaction by the new owner's private key holds the right to exploit the value in the cryptocurrency).

Accordingly, such a transaction is less likely to be a "*transfer*" of a company's rights in the property but rather be characterised as a "*disposition.*" In the context of a transaction under the Australian Act, courts in Australia have broadly interpreted the phrase "*disposition*" as a "*dealing with definitely or a getting rid of or a getting done with a particular item…*"[31]

Notwithstanding the above, the practical issue that is likely to confront a liquidator in prosecuting an antecedent transaction is company versus personal ownership of the cryptocurrency the subject of the disposition. In determining ownership, the UKJT Statement took as its starting point the "*person*" who has knowledge of the private key that enables the transfer of cryptocurrency (or more importantly the authentication of the transfer). In the context of a company this will routinely be an office holder or executive of the company. But in circumstances where the physical control of the private key is with the intent of transferring assets away from the company this in and of itself cannot be a definitive answer to ownership. Where an antecedent transaction is suspected a liquidator will need to look at the series of steps that resulted in the private key being in the control of the relevant person including whether company assets were involved in acquiring the underlying cryptocurrency, associated with that private key. For example, such steps could include determining whether company funds were used in the initial conversion of fiat currency to cryptocurrency prior to there being any disposition of the cryptocurrency away from the company.

Available remedies

A positive finding of an antecedent transaction, with no available defences to the conduct, entitles a liquidator to seek orders from the Court for, amongst other things, the payment of money or the transfer of property. However, there is very limited authority in Australia that indicates a court would direct the transfer of property to a company when payment of money is an available alternative.[32] This is particularly so if the recipient of the property is not a party to the transaction,[33] i.e. if there has been a subsequent transfer of some or all of the cryptocurrency to a third party it is unlikely that orders will be made as against that third party for the return of the property.

At this point, it is important to note that transactions on the blockchain cannot be reversed or set aside. Therefore, it is questionable that orders can be made directing a person to "*transfer to the company property that the company has transferred under the transaction*".[34] Rather, the more likely course would be for a court to order property be transferred that fairly represents "*proceeds of property that the company has transferred under the transaction.*"[35] Courts have found that this order may be fashioned as a proprietary claim. However, it will be interesting to see how such a proprietary remedy could be utilised, in the context of cryptocurrency, given the difficulties that would likely arise in identifying the property to which such remedy attaches.

Save for with respect to unreasonable director related transactions, the Australian Act does not prescribe the amount of property or money to be paid to a company on a finding of an antecedent transaction. Nor is it required that the amount to be transferred be equal to that which was transferred away. With respect to a finding of an unreasonable director related transaction, the Court may only make orders for the purpose of recovering for the benefit of creditors of the company the difference between the total value of the benefits provided by the company under the transaction and the value (if any) that it may be expected that a reasonable person in the company's circumstances would have provided.[36] In determining this it is anticipated that

28. *Capital Finance Australia Ltd v Tolcher* (2007) 164 FCR 83 at [122] per Gordon J.

29. *Kalls Enterprises Pty Ltd (in liq) v Baloglow* (2007) 63 ACSR 557; 25 ACLC 1,094; [2007] NSWCA 191 at [211] per Ipp J; *Capital Finance Australia Ltd v Tolcher* (2007) 164 FCR 83 at [120] per Gordon J.

30. *Roache v Australian Mercantile Land & Finance Co Ltd (No 2)* [1966] 1 NSWR 384 at 386 per Jacobs JA.

31. *Roache v Australian Mercantile Land & Finance Co Ltd (No 2)* [1966] 1 NSWR 384 at 386 per Jacobs JA.

32. *Rivarolo Holdings Pty Ltd v Casa Tua (Sales) Pty Ltd 1997 24 ACSR 105* appears to be the only reported decision where the power to transfer property under s 588FF(1)(b) has been exercised.

33. *Re Pacific Hardware Brokers (Qld) Pty Ltd* (1997) 16 ACLC 442.

34. s 588FF(1)(b), Australian Act.

35. s 588FF(1)(d)(ii), Australian Act.

36. s 588FF(4), Australian Act.

the Court would consider the trading price for the cryptocurrency at the time of the disposition.

From a practical perspective, until a determination is made on the available remedies for claims involving cryptocurrencies it may be that a prudent liquidator would seek orders for both the transfer of equivalent cryptocurrency, disposed of by the company, and alternatively, payment of fiat currency equal to the value of that cryptocurrency at the time of the disposal. Given the volatility of cryptocurrency and the time required to secure judgment on a claim it is entirely feasible that a transfer of equivalent cryptocurrency could be a financial windfall to creditors in a winding up if the price of that cryptocurrency has increased and realisation of the asset then occurs at a higher market value than that at the date of transfer.

Conclusion

The authors are not aware of any English or Australian cases that have finally determined how cryptocurrency is to be dealt with in the context of antecedent transactions. The US case of *Kasolas v Lowe (In re Hashfast Technologies LLC)*[37] is the only known case to date which has attempted to grapple with some of the issues associated with remedies for an alleged preferential transfer of Bitcoin, albeit without a final determination on the fundamental issues raised above. Accordingly, it is yet to be seen how English and Australian courts will determine the issues associated with antecedent transactions involving cryptocurrency and in particular, attempts to misappropriate company assets by utilising conversion of traditional assets to cryptocurrency in the period leading up to liquidation. ■

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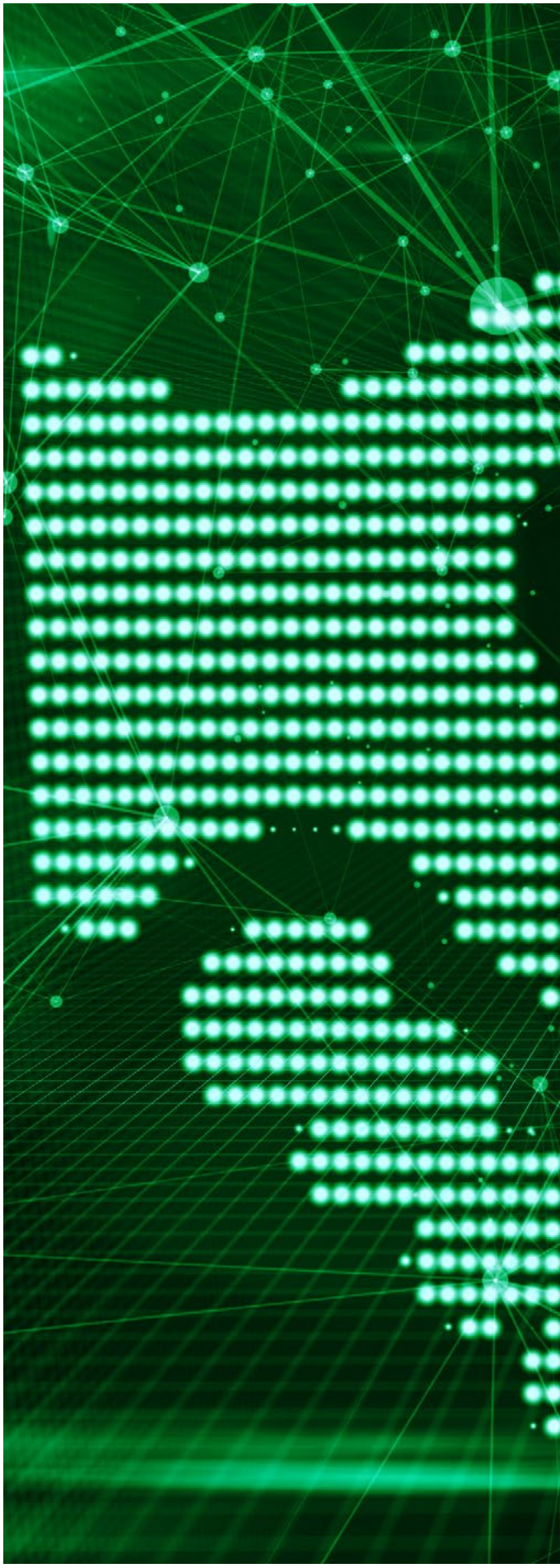
37. No.14-3-725DM (Bankr. N.D. Cal.) June 17, 2016.



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The Anti-Deprivation Principle: Contrasting Approaches to the Common Law Rule

Introduction

The anti-deprivation rule has existed for at least two hundred years. The rule is a rule of common law that is aimed at attempts to withdraw an asset on bankruptcy, liquidation or administration, thereby reducing the value of the insolvent estate to the detriment of creditors.[1] In this article we consider two contrasting approaches that have been taken to the rule.

Firstly, we review the approach adopted by the United Kingdom Supreme Court in *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383 ("***Belmont***") which focuses on the intention of the parties. Secondly, the more recent approach adopted by the Supreme Court of Canada in *Chandos Construction Ltd v Deloitte Restructuring* 2020 SCC 25 ("***Chandos***") which focuses on the effect of the relevant contractual provision, not whether the intention of the contracting parties was commercially reasonable. In light of these contrasting approaches, we reflect upon which of the two approaches might be adopted in other common law jurisdictions, in particular the Asian financial centres Singapore and Hong Kong.

Summary of the rule

The anti-deprivation rule operates to render void, as contrary to public policy, contractual provisions designed to remove assets from the estate of a bankrupt or an insolvent company on the commencement of the bankruptcy, winding up or administration.[2] Classic statements of the principle include:[3]

1. *Belmont* at [1] per Lord Collins.

2. The rule has no application to deprivations triggered by a non-insolvency event, at least where the event occurs prior to the commencement of insolvency proceedings: see *Belmont* at [14] and [115] per Lord Collins.

3. Cited by Lord Collins in *Belmont* at [3].

> *"the law is too clearly settled to admit of a shadow of doubt that no person possessed of property can reserve that property to himself until he shall become bankrupt, and then provide that, in the event of his becoming bankrupt, it shall pass to another and not to his creditors": Whitmore v Mason* (1861) 2 J & H 204 at 212, per Sir William Page Wood V-C.

> *"a simple stipulation that, upon a man's becoming bankrupt, that which was his property up to the date of the bankruptcy should go over to someone else and be taken away from his creditors, is void as being a violation of the policy of the bankrupt law"*: Ex p Jay (1880) 14 Ch D 19 at 25, per James LJ.

In short, the anti-deprivation rule operates to prevent an insolvent company or individual from being deprived of an asset which would otherwise be available for the benefit of its creditors. The rule seeks to prevent an arrangement whereby if a company or individual is the subject of insolvency proceedings certain assets which belong to that company or individual are no longer regarded as its assets or are transferred to some other party.

The *pari passu* principle

The anti-deprivation rule must be distinguished from the common law rule outlawing contractual provisions that undermine the principle of *pari passu* distribution. The anti-deprivation rule is designed to avoid a reduction in the net asset value of a company to the detriment of its creditors at the point of winding-up. It is not concerned with the order of distribution among creditors. By contrast the *pari passu* rule is aimed at provisions that would give a particular creditor an unfair advantage over other creditors by circumventing the rule against *pro rata* distribution.[4] As Lord Collins put it in *Belmont* at [1]:

> *"The anti-deprivation rule and the rule that it is contrary to public policy to contract out of pari passu distribution are two sub-rules of the general principle that parties cannot contract out of the insolvency legislation. Although there is some overlap, they are aimed at different mischiefs: … The anti-deprivation rule is aimed at attempts to withdraw an asset on bankruptcy or liquidation or administration, thereby reducing the value of the insolvent estate to the detriment of creditors. The pari passu rule reflects the principle that statutory provisions for pro rata distribution may not be excluded by a contract which gives one creditor more than its proper share."*

There are important distinctions between the scope and application of the two rules. One such difference is that the *pari passu* rule is concerned with the effect of the arrangement in question, rather than its underlying purpose or commercial justification. Moreover, whereas the anti-deprivation rule is concerned with the preservation of assets in an insolvency, the *pari passu* rule is concerned with the distribution of those assets. Thus, although the rules may overlap in practice, their application is in principle different.

Belmont

The leading English case in relation to the application of the anti-deprivation rule is *Belmont*. The issue before the United Kingdom Supreme Court in *Belmont* was whether the lower courts had been right to conclude that the anti-deprivation rule did not operate to invalidate certain provisions of English law-governed agreements concerning the issue of credit-linked notes under a synthetic securitisation programme established by a Lehman Brothers entity.

The structure was widely used in the financial markets, such that the case was regarded as having important implications. The Supreme Court held that the anti-deprivation rule did not apply to invalidate the relevant provisions, yet for quite different reasons to those given by the lower courts. These differences reflect the way in which the anti-deprivation rule was formulated by Lord Collins (who gave the leading judgment in the Supreme Court in *Belmont*), and the decision to limit the scope of the rule not primarily by reference to considerations of contractual form but by reference to the intention of the parties.

Specifically, the United Kingdom Supreme Court held that the anti-deprivation rule should be applied in a commercially sensitive manner, so as to uphold *bona fide* commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy or winding up.

Lord Collins explained the types of factors the court should consider in deciding whether to apply the principle as follows at [103] to [106]:

> *"[103] As has been seen, commercial sense and absence of intention to evade insolvency laws have been highly relevant factors in the application of the anti-deprivation rule. Despite statutory inroads, party autonomy is at the heart of English commercial law. Plainly there are limits to party autonomy in the field with which this appeal is concerned, not least because the interests of third party creditors will be involved. But, … it is desirable that, so far as possible, the courts give effect to contractual terms which parties have agreed.*

> *[104] No doubt this is why, except in the case of a blatant attempt to deprive a party of property in the event of liquidation … the modern tendency has been to uphold commercially justifiable contractual provisions which have been said to offend the anti-deprivation rule …. The policy behind the anti-deprivation rule is clear, that the parties cannot, on bankruptcy, deprive the bankrupt of property which would otherwise be available for creditors. It is possible to give that policy a common sense*

4. The leading English case on the application of the *pari passu* rule is *British Eagle International Airlines Ltd v Cie Nationale Air France* [1975] 758.

application which prevents its application to bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy. …

[105] [I]t is the substance rather than the form which should be determinant. …

[106] … the anti-deprivation is essentially directed to intentional or inevitable evasion of the principle that the debtor's property is part of the insolvent estate, and is applied in a commercially sensitive manner, taking into account the policy of party autonomy and the upholding of proper commercial bargains."

As Lord Collins stressed,[5] this does not mean that a subjective intention is required, or that there will not be cases so obvious that an intention can be inferred. However, in borderline cases a commercially sensible transaction entered into in good faith will not be held to infringe the anti-deprivation rule.

The role of the court, the United Kingdom Supreme Court held, was to look at the substance of the agreement rather than its form and ask whether the purpose and effect of the relevant provision amounted to an illegitimate intent to evade the insolvency laws or had a legitimate commercial basis.

Developments in England since *Belmont*

Since *Belmont*, the English courts have had a number of opportunities to consider how the Supreme Court's focus on good faith and intention operates in a commercial context.[6]

Accordingly, in *Lomas v JFB Firth Rixson* [2013] 1 BCLC 27 the Court of Appeal rejected a contention that a provision within an ISDA Master Agreement which, on its true construction, suspended a non-defaulting party's payment obligation (rather than extinguished it) offended the anti-deprivation rule. At [87] to [88] Longmore LJ said as follows:

"[87] … The suspension of the payment obligations of the Non-defaulting Party for the duration of the insolvency does no more than to prevent [the Non-defaulting party] from having to make payments under a hedging arrangement with a bankrupt counterparty. There is no suggestion that it was formulated in order to avoid the effect of any insolvency law or to give the Non-defaulting Party a greater or disproportionate return as a creditor of the bankrupt estate. … The commerciality of the arrangements has to be judged by considering the operation of Section 2(a)(iii) throughout the life of the contract and not solely by reference to the point in time when it comes to operate.

[88] Looked at in this way it cannot be said that the suspensory effect of Section 2(a)(iii) engages the anti-deprivation principle."

Similarly, in *HMRC v The Football League Ltd* [2013] B.C.C. 60, David Richards J considered whether provisions in the articles of association of the English Football League fell foul of the anti-deprivation rule, or the *pari passu* rule. In so far as the anti-deprivation rule was concerned, the court held that the rule applied to the administration of a company, just as it did to a company in liquidation. The purpose of the anti-deprivation rule was to prevent insolvency proceedings from being undermined by dispositions of assets designed to avoid the effects of the proceedings. However, in the present case, the predominant purpose of the Football League's articles of association was to implement a commercial response to an insolvent club, rather than to deprive an insolvent club of an asset.

By contrast, in *Mayhew v King* [2012] 1 BCLC 550 the Court of Appeal held that a clause in a settlement agreement between an insurance broker and an insured which provided for payment of various sums to the insured to terminate in the event that the insured should enter into administration did offend the anti-deprivation principle. Rimer LJ said of the relevant clause in that case as follows at [22]:

"What was the commercial objective of cl.11? … As it seems to me, it was apparently a naked attempt to provide that, whilst Milbank's right to payment and Folgate's obligation to pay were to survive so long as the payment would accrue exclusively to the benefit of Mr Mayhew, they were to be extinguished if such payment would instead be available for Milbank's creditors generally in the event of its insolvency. This is not a commercial purpose so much as a collateral device to avoid the consequences of the insolvency legislation."

The approach of the Supreme Court of Canada: *Chandos*

The approach of United Kingdom Supreme Court to the anti-deprivation rule stands in stark contrast to that adopted by the Supreme Court of Canada in *Chandos*.

Chandos concerned a construction contract between Chandos Construction Ltd. ("**Chandos**"), and Capital Steel Inc. ("**Capital Steel**"). The contract contained a clause which provided that Capital Steel would pay Chandos 10 percent of the contract price as a fee for the inconvenience of completing the work using alternative means and/or for monitoring the work during the warranty period in the event of Capital Steel's bankruptcy. When Capital Steel went into bankruptcy prior to completing the contract, Chandos argued it was entitled to set off the costs it had incurred to complete Capital Steel's work and to set off 10 percent of the contract price, as provided by the relevant clause. Capital Steel's trustee in

5. *Belmont* at [79].

6. There have also been recent statutory developments in England. Section 14 of the Corporate Insolvency and Governance Act 2020 introduced a new section 233B into the Insolvency Act which restricts the ability of a supplier of goods or services to a company in a formal rescue or insolvency procedure to terminate the supply contract (i.e. limiting the effect of so called "*ipso facto*" clause). For a detailed review of these reforms see Felicity Toube QC and Georgina Peters, *Ipso Facto Reform: Why now, and does it go too far (or not far enough)?*, South Square Digest, June 2020.

bankruptcy applied for directions as to whether the clause contravened the anti-deprivation rule.

In particular, the question for the Supreme Court of Canada was the relevance of the intention of the parties and the commercial purpose of the clause.

In an 8 to 1 majority decision, the Supreme Court of Canada held that the anti deprivation rule had existed in Canadian common law since before federal bankruptcy legislation existed and had not been eliminated by any decision of the court or by statute. However, it rejected the approach adopted by the English Supreme Court in *Belmont* and instead adopted a two part "effects-based" test to the application of the anti-deprivation rule. Firstly, that the relevant clause is triggered by an event of insolvency or bankruptcy. Secondly, that the effect of the clause is to remove value from the insolvent's estate.

What was to be considered by the court is whether the effect of the contractual provision was to deprive the estate of assets upon bankruptcy, not whether the intention of the contracting parties was commercially reasonable. Adopting a purpose-based test (like that adopted in *Belmont*), the Supreme Court of Canada held, would create new and greater difficulties. It would require courts to determine the intention of contracting parties long after the fact, detract from the efficient administration of corporate bankruptcies, and encourage parties who can plausibly pretend to have bona fide intentions to create a preference over other creditors by inserting such clauses.

In contrast to the approach taken by the United Kingdom Supreme Court in *Belmont*, Justice Rowe (who gave the judgment of the majority of the Supreme Court of Canada in *Chandos*) held at [35]:

> *"The effects-based rule, as it stands, is clear. Courts (and commercial parties) do not need to look to anything other than the trigger for the clause and its effect. The effect of a clause can be far more readily determined in the event of bankruptcy than the intention of contracting parties. An effects-based approach also provides parties with the confidence that contractual agreements, absent a provision providing for the withdrawal of assets upon bankruptcy or insolvency, will generally be upheld."*

Applying this test to the facts of the case, the Supreme Court of Canada held that the effect of the relevant provision in the contract was to create a debt from Capital to Chandos in the event of insolvency. In these circumstances Justice Rowe held "*one can hardly imagine a more direct and blatant violation of the anti-deprivation rule.*"

The Supreme Court of Canada rejected the United Kingdom's purposive interpretation of the anti-deprivation rule and endorsed the policy underlying the anti-*ipso facto* clause provisions in the United States Bankruptcy Code.[7]

Approaches in other common law jurisdictions

Belmont was consistent with the trend then adopted by the House of Lords and subsequently

7. As to the approach adopted in the United States, which is largely based on statute, by way of comparison to that adopted in England in *Belmont*) see Gabriel Moss QC, *Anti-deprivation, flip clauses, ipso facto rules and the Dante inferno Lehman Brothers Holdings Inc v Bank of American National Association Judge Chapman 28 June 2016*, Insolvency Intelligence (2017) 30(2), 24-27.

the Supreme Court (for example, *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38) towards taking a purposive interpretation of contracts in order to uphold the parties' intentions as far as possible[8]. Subsequently, there was a retreat from this trend, in favour of a reassertion of some traditional orthodoxies from earlier cases including the primacy of language in the interpretation of contracts.[9] Notwithstanding this, recent case law indicates that the anti-deprivation rule is unlikely to be the subject of reconsideration in England (at least in the short term).[10]

The question then arises whether, in the light of the contrasting approaches adopted by the English and Canadian Supreme Courts in *Belmont* and *Chandos* what approach might be followed in other common law jurisdictions.

We first consider the approach that has been taken to the anti-deprivation rule in Hong Kong. We then consider which approach - that adopted in *Belmont* or *Chandos* - is likely to find favour in Singapore were the issue required to be decided in the future.

The approach in Hong Kong

The Hong Kong Court of Appeal in *Hsin Chong Construction Co Ltd (In Provisional Liquidation) v Build King Construction Ltd* [2019] HKCA 1305; [2020] 1 HKLRD 316 ("***Hsin Chong***") applied *Belmont* and held that it was necessary to look at the substance of the agreement and consider whether the provision amounted to an illegitimate attempt to evade insolvency law or had some legitimate commercial basis.

In *Hsin Chong*, only one of the five events specified in the exclusion clause in question concerned insolvency. The remaining four events of default concerned breaches of contract. This evinced an absence of intention of the parties to seek to evade insolvency law. Also, it was clearly sensible and in the interests of the parties to provide for the contingency that had occurred, namely, the insolvency of one of the parties. This was a commercial bargain entered into freely by the parties.

It was also commercially fair that the company had to bear its share of post-exclusion losses until the completion of the project, given that in large construction projects, claims for latent defects tend to only emerge upon completion of the project.

As such, the Court of Appeal upheld the High Court's ruling that there was no infringement of the anti-deprivation rule as the exclusion clause did not amount to an illegitimate attempt to evade insolvency law and had some legitimate commercial basis. Notably, the Court of Appeal rejected the argument that the anti-deprivation rule should focus on the effect of the provision on the unsecured creditors to be protected, rather than the intention of the parties or the bona fide or otherwise of the provision itself, which the creditors have no control of or involvement in.[11]

The anti-deprivation rule has yet to be decided on in Singapore

Unlike in Hong Kong, the anti-deprivation rule has not been the subject of any detailed consideration by the Singapore courts. In so far as the *pari passu* principle is concerned, the Singapore High Court in *Joo Yee Construction Pte Ltd (in liquidation) v Diethelm Industries Pte Ltd and others* [1990] 1 SLR(R) 171 ("***Joo Yee***") at [21] held that a direct payment clause in a contract between a developer and the main contractor could be struck down in the liquidation of the main contractor as being contrary to public policy, as it fell afoul of the *pari passu* principle. The Court in *Joo Yee* followed *British Eagle International Airlines v Compagnie Nationale Air France* [1975] 1 WLR 758.

Subsequently, the Singapore High Court in *Encus International Pte Ltd (in compulsory liquidation) v Tenacious Investment Pte Ltd and others* [2016] 2 SLR 1178 ("***Encus***") correctly noted at [79] that the anti-deprivation rule has not been applied in any Singapore judgment, although its cousin, the *pari passu* principle, has. The Plaintiff in *Encus* had argued that because the anti-deprivation rule was well established in English law prior to 12 November 1993, it was received into Singapore law pursuant to Section 31 of the Application of English Law Act (Cap 7A, 1994 Rev Ed).

The Court in *Encus* was of the view that since the Plaintiff was entitled to succeed on the basis of the statutory avoidance provisions, there was no need in that case to consider the applicability of the anti-deprivation rule, its extent, or the defences available when it is raised.

Very recently, the Singapore Court of Appeal in *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2020] SGCA 119 at [141] to [142] referred to *Chandos* but in respect of the law relating to contractual penalties and not in the context of the anti-deprivation rule.

It, therefore, remains an open question as to how the Singapore courts might approach the anti-deprivation rule.

How might the Singapore courts approach the anti-deprivation rule?

In determining which approach to adopt, the Singapore courts will have to grapple with the theoretical underpinnings of the anti-deprivation rules and how the policies underlying collective winding up proceedings are to be balanced with freedom of contract and the need for commercial certainty.

The Singapore courts approach to contractual interpretation may shed some light on which of

8. Oliver Gayner, Case Comment: *Belmont Park Investments v BNY Corporate Trustee and Lehman Brothers Special Financing* [2011] UKSC 38". UKSC Blog. (24 August 2011).

9. Lord Sumption, *A Question of Taste: The Supreme Court and the Interpretation of Contracts*, Harris Society Annual Lecture, Keble College, Oxford, (8 May 2017).

10. Whilst the approach of the United Kingdom Supreme Court to the anti-deprivation rule has not been without its criticism (see, for example, Worthington, Good Faith, Flawed Assets and Emasculation of the UK Anti-Deprivation Rule (2012) 75(1) MLR 78-121, which was cited with approval by Rowe J in *Chandos* at [33]) in *Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch) Morgan J (at [113]) preferred the policy choice made by the United Kingdom Supreme Court in *Belmont* over the contrasting approaches to ipso facto clauses adopted by the United States, Canada and Korea.

11. This argument was put forward based on an earlier decision of the Hong Kong Court of Appeal in *Peregrine Investments Holdings Ltd & Anr v Asian Infrastructure Fund Management Co Ltd LDC & Ors* [2004] 1 HKLRD 598. See [37] to [41] of *Hsin Chong*.

"Unlike the retreat in England, the Singapore courts appear to have consistently adopted the contextual approach to contractual interpretation"

the differing approaches in *Belmont* or *Chandos* will be followed in Singapore. In Singapore, contracts are interpreted using the contextual approach rather than the textual approach. The Court of Appeal summarised the contextual approach in *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 ("***Yap Son On***") at [30] as follows:

> *... the purpose of interpretation is to give effect to the objectively ascertained expressed intentions of the contracting parties as it emerges from the contextual meaning of the relevant contractual language. Embedded within this statement are certain key principles: (a) first, in general both the text and context must be considered; (b) second, it is the objectively ascertained intentions of the parties that is relevant, not their subjective intentions; and (c) third, the object of interpretation is the verbal expressions used by the parties and so, the text of their agreement is of first importance ....*

[citations omitted]

To elaborate further on this contextual approach, essentially the courts will first consider the plain language of the contract and the admissible extrinsic material that is objective evidence of its context: *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("***Zurich***") at [130]. In fact, *Zurich* "*cautiously suggested that prior negotiations and even subsequent conduct may be admissible for the purpose of interpretation*".[12]

The contextual approach is not without limits. In *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 ("***Soup Restaurant***"), the court held that "*although the relevant context is also important, the text ought always to be the first port of call for the court*"[13]. Further, however absurd and uncommercial the result, it remains the case that "*the context cannot be used as a pretext to rewrite the text*": *Oxley Consortium Pte Ltd v Geetex Enterprises Singapore (Pte) Ltd* [2020] SGHC 235 at [43]. This is because the court is not free to disregard the parties' intention as ascertained from the objective evidence and to rewrite the contract for them based on the court's subjective view of what is just and fair.[14]

Unlike the retreat in England, the Singapore courts appear to have consistently adopted the contextual approach to contractual interpretation. It is therefore likely that the Singapore court will take a purposive approach to examining whether a transaction falls foul of the anti-deprivation rule. Further, it could be argued the anti-deprivation rule goes beyond contractual interpretation and actually engages public policy considerations. The Singapore courts are used to making subjective good faith assessments in other areas of insolvency, be it in the context of undervalue transactions, preferences, transactions defrauding creditors or wrongful trading.[15]

The Singapore courts are certainly not averse to considering the subjective intentions of the parties in respect of voidable transactions. For example in determining whether there was a "desire to prefer" the recipient, the Singapore courts will undertake a subjective assessment of the debtor's intentions at the relevant time of the transaction. In fact, Singapore declined to follow the objective approach taken in the Australia Corporations Act[16]. As such, it seems likely the Singapore courts will follow *Belmont's* focus on good faith and intention and eschew *Chandos's* effects-based approach.

Conclusion

The divergence in approach between the United Kingdom Supreme Court in *Belmont* and the Canadian Supreme Court in *Chandos* reflects a conflict between the pro-commerce model of freedom of contract, on the hand, and the collectivist public policy model of insolvency law, on the other.

While Canada's effects-based interpretation of the anti-deprivation rule protects creditors' interests and promotes certainty in commercial transactions, the United Kingdom's purposive approach shows a greater degree of respect for party autonomy and commercial expectations.

The debate as to which of these approaches should be adopted by other common law jurisdictions as and when relevant cases come before their courts is likely to be hotly contested. ■

12. VK Rajah JA, "*Redrawing Boundaries of Contractual Interpretation: From Text to Context to Pre-text and Beyond*" (2010) 22 SAcLJ at 520

13. *Soup Restaurant* at [32]

14. Ibid

15. Michael Schillig, "*Corporate Insolvency Law in the 21st Century: State-Imposed or Market-Based?*", Journal of Corporate Law Studies, Vol. 14, No. 1, 2015, p. 1-38.

16. Insolvency Law Review Committee, *Report of the Insolvency Law Review Committee* (2013) (Chairman: Lee Eng Beng SC), p172 to 175.

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German Avoidance Law and EU-Harmonization Efforts

The German regulations on avoidance claims are considered to be one of the most comprehensive and strict among the European legal systems.

Despite current mitigating measures by the legislator, business partners of a German company in crisis should take precautionary measures to reduce the risk of a later avoidance action in the event of insolvency. The following article provides an overview of the German rules on avoidance in insolvency, possible precautionary measures, the effects of the European Insolvency Regulation on avoidance claims in cross-border contractual relationships, and approaches as to how the avoidance rules could be harmonised across Europe.

I. Basics on German avoidance claims

1. *Basic prerequisite for any avoidance in insolvency: prejudice to creditors pursuant to section 129 InsO*

The basic prerequisite for any avoidance in insolvency is that the avoided legal act disadvantages the insolvency creditors, section 129 (1) German Insolvency Code ("**InsO**").

A creditor disadvantage exists if the legal act has either increased the debt estate or reduced the asset estate and thereby thwarted, impeded or delayed access to the debtor's assets, i.e. the satisfaction options of the insolvency creditors would be more favourable without the act from an economic point of view.[2]

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2. Cf. Federal Court of Justice ("BGH") judgement dated 22 October 2015 – IX ZR 248/14, NZI 2016, 35, with further references.

The simplest and most relevant case of a legal act detrimental to the creditors is a payment, as this reduces the assets and the amount paid out is no longer available to satisfy the creditors as a whole.

However, there is no creditor disadvantage if an item is surrendered that was already the property of the satisfied creditor and therefore should have been segregated in the insolvency proceedings. The same applies to the redemption of a right to segregation or separation by payment. Cases of practical relevance are in particular the redemption of a simple (segregation), extended or prolonged retention of title (separation). In the case of rights to separate satisfaction, however, their acquisition could in turn be detrimental to the creditors and thus possibly avoidable under sections 130 et seq. InsO, e.g., if goods delivered during the debtor's crisis are processed and/or resold.

If a creditors' disadvantage exists, the special prerequisites for avoidance under sections 130 et seq. InsO must also be met. The most relevant avoidance requirements in trade relations with a German insolvency debtor are presented in outline below.

2. *Conditions for avoidance pursuant to section 130 InsO*

The avoidance of congruent performances, i.e., such debtor performances to which the creditor was basically entitled, is also possible under section 130 InsO in the period of three months before filing for insolvency.

Pursuant to section 130 (1) InsO, a legal act is voidable if it granted or enabled an insolvency creditor to obtain security or satisfaction if it was performed within the last three months prior to the filing for insolvency and (i) at the time of the act the debtor was already illiquid and the creditor was aware of the illiquidity at that time or (ii) if it was performed after the filing for insolvency and the creditor was aware of the illiquidity or the filing for insolvency at the time of the act.

Pursuant to section 130 (2) InsO, knowledge of the illiquidity or the filing for insolvency is equivalent to knowledge of circumstances which necessarily indicate the illiquidity or the filing for insolvency.

3. *Conditions for avoidance pursuant to section 131 InsO*

Section 131 InsO regulates the avoidance of so-called incongruent performance (i.e., satisfactions or security) by the debtor to an insolvency creditor in the period of three months prior to filing for insolvency.

An incongruent performance exists if the creditor receives a performance from the debtor which the creditor was not entitled to, not in the manner or not at the time.

A performance not to be claimed is given, if the creditor has no claim to the performance versus the debtor at all, if a claim exists but is not enforceable or an objection exists versus the enforceability of the claim.

A performance not to be claimed in the manner is given if the creditor has in principle a claim to the performance, but this claim is fulfilled in a manner which is more disadvantageous for the other creditors than it corresponds to the agreement or the legal claim.[3] A practical example is that a customer fulfils his payment obligation by assigning claims against a third party to the creditor or by instructing the third party to pay the creditor. If the third party fulfils the obligation and pays the creditor, he has obtained a satisfaction to which there was no claim as such.

A performance not to be claimed at the time for example is rendered if a customer pays early although the due date of the claim had not yet occurred.

Within the last month prior to filing for insolvency the performances above constitute an avoidance claim without further ado. With the second and third month prior to filing for insolvency the debtor has to be illiquid already or the creditor has to have knowledge that the performance disadvantages the creditors.

4. *Conditions for avoidance pursuant to section 133 InsO*

The so-called avoidance for intent pursuant to section 133 InsO opens up the possibility of avoidance for the period of at least theoretically up to 10 years before filing for insolvency.

Pursuant to section 133 (1) InsO, a legal act is avoidable which the debtor performed in the 10 years preceding the filing for insolvency or after such filing with the intent to disadvantage its creditors if the other party was aware of the debtor's intent at the time of the act. Such knowledge shall be presumed if the other party knew that the debtor's illiquidity was imminent and that the act disadvantaged the creditors.

If the legal act has granted or enabled the other party security or satisfaction, the period of the voidable legal act is 4 years (cf. section 133 (2) InsO).

Intent to disadvantage within the meaning of section 133 (1) InsO is generally given if the debtor, in this case the customer, when performing the legal act, generally intended the disadvantage of the creditors as a result of his legal act or recognised and approved it as a presumed consequence - even if it is an unavoidable secondary consequence of another advantage sought *per se*.[4]

A debtor who is aware of his insolvency usually acts with intent to disadvantage; such intent is

3. Cf. BGH, judgement dated 18 November 2004 - IX ZR 299/00, NZI 2005, 329, 330.

4. Cf. BGH, judgement dated 8 January 2015 - IX ZR 203/12, NZI 2015, 369.

to be presumed even if the debtor is aware of his impending illiquidity.[5] This is because a debtor who makes further payments in the knowledge of his (impending) illiquidity necessarily expects the other creditors to be disadvantaged. Furthermore, there is an indication of an intention to disadvantage if a debtor makes an incongruent cover payment as described above.

Knowledge of the intent to prejudice creditors is presumed under section 133 (1) sentence 2 InsO if the other party knew that illiquidity was imminent or had already occurred and that the act prejudiced the creditors. In case law such knowledge was assumed if the debtor's liabilities with the creditor are constantly not settled to a considerable extent over a longer period of time,[6] payment targets and payment promises were not met, the customer declared that he cannot fulfil his obligations as owed, the customer repaid liabilities in other ways than owed, e.g. through assignment of receivables or performance by a third party (so-called incongruent cover), or (partial) satisfaction of the claims was only achieved under enforcement pressure or even only by way of compulsory enforcement and the creditor was aware that there were other creditors with uncovered claims that would not be served in the same way.[7]

With section 133 (3) sentence 1 InsO the conditions for avoidance have recently been tightened in favour of the opposing party, if congruent cover payments are made.[8] These are - as explained - cover services to which a claim existed and which were provided according to the agreement. In this case, the debtor's imminent illiquidity under section 133 (1) sentence 2 InsO is replaced by an illiquidity that has already occurred.

If the other party had entered into a payment agreement with the debtor or otherwise granted the debtor payment relief, it is now presumed under section 133 (3) sentence 2 InsO that he was not aware of the debtor's illiquidity at the time of the act.

This new version of section 133 InsO in favour of creditors contradicts partially the previous case law, which has often seen the request for an instalment payment agreement as an indication of economic difficulties and their documentation vis-à-vis the creditor. In a recent decision, the BGH took up the legislator's tendency and accordingly tightened the requirements for the intent to disadvantage the creditors also for old cases, i.e. before the introduction of section 133 (3) sentence 1 InsO.[9]

5. *Conditions for avoidance pursuant to section 134 InsO*

Furthermore, the possibility of avoidance under the aspect of gratuitousness must be emphasised. Pursuant to section 134 InsO, a gratuitous performance by the debtor is avoidable unless it was made earlier than 4 years before filing for insolvency.

In principle, a performance is gratuitous if, according to the agreement, an asset is relinquished in favour of another person without this person providing or being obliged to provide a compensatory consideration to the debtor or, with the debtor's consent, to a third party.[10]

While it is unlikely that a customer provides a gratuitous service to a creditor in business transactions (other than over-payment), it could be more likely that a third party pays the creditor on the customer's debt and that this third party subsequently becomes insolvent. In this case, the third party has repaid a third-party debt for the benefit of the creditor. This is often the case in insolvencies of groups of companies, for example when the parent company makes payments to the creditors of the subsidiary for its liabilities. The avoidance claim is then made by the insolvency administrator of the third party, in this case the parent company.

The repayment of a third-party debt in a three-person relationship is generally gratuitous if the recipient of the service, in this case the creditor, does not provide any compensatory counter-performance.[11] In this respect, it is irrelevant for the assessment of the (non-)gratuitousness whether the rendering party itself has received compensation for its performance. Rather, it is decisive whether the recipient of the service has to provide a consideration.[12] In the case of the repayment of a third party's debt, such consideration is usually already the fact that the recipient of the service (in this case the creditors) loses its claim against the third party.[13] However, the redeemed claim must have been of value at the time of the receipt of the service. If the creditor's claim against the customer was already worthless at the time of the receipt of the service because the customer was already illiquid (and thus no satisfaction could be obtained from him anyway), there is gratuitousness in the aforementioned sense.

If a third party pays for the customer, the avoidance pursuant to section 134 InsO therefore applies if the creditors could not have enforced their claim against the customer for economic reasons.

6. *Conditions for avoidance pursuant to section 135 InsO*

Finally, a rescission provision that is not too common in other jurisdictions is the avoidance of repayments of shareholder loans under section 135 InsO.

According to section 135 (1) no. 2 InsO a legal act is avoidable that granted a satisfaction for a repayment claim on a shareholder loan or for an equivalent claim if granted within the last year prior to filing for insolvency. The granting of security for such a claim is even avoidable within the last ten years, section 135 (1) no. 1 InsO.

5. Cf. BGH, judgement dated 8 January 2015 – IX ZR 203/12, NZI 2015, 369.

6. Cf. BGH, judgement dated 25 February 2016 – IX ZR 109/15, NZI 2016, 266 nos.13 and 18; BGH, judgement dated 24 May 2007 - IX ZR 97/06 NZI 2007, 512; BGH, judgement dated 17 February 2004 - IX ZR 318/01, NZI 2005, 690.

7. Cf. BGH judgement dated 25 February 2016 – IX ZR 109/15, NZI 2016, 266 no. 30.

8. Act to Improve Legal Certainty in Respect of Rescission under the Insolvency Code and the Rescission Act dated 29 March 2017 (BGBl. I S. 654), in force since 5 April 2017.

9. Cf. BGH, judgement dated 6 May 2021 – IX ZR 72/20, NZI 2021, 720.

10. Cf. BGH, judgement dated 1 March 2018 – IX ZR 207/15, ZInsO 2018, 1039; BGH, judgement dated 4 March 1999 - IX ZR 63–98, BGHZ 141, 96, 99.

11. Cf. BGH, judgement dated 1 June 2006 - IX ZR 159/04, NZI 2006, 524; BGH, judgement dated 4 February 2016 – IX ZR 42/14, NZI 2016, 307.

12. Cf. BGH, judgement dated 4 February 2016 – IX ZR 42/14, NZI 2016, 307.

13. Cf. BGH, judgement dated 4 February 2016 – IX ZR 42/14, NZI 2016, 307.

It is also avoidable if a shareholder is freed from a security he has provided to a lender of the debtor (e.g., when the debtor repays the loan) within the last year prior to filing for insolvency. The avoidance claim then exists in the form of a payment claim against the shareholder in the amount in which he was released from his security deposit.

Interest payments are not avoidable under section 135 (1) InsO as long as they are not above the market standard.[14] How such a market standard is to be determined and whether the debtor's default risk (especially since shareholder loans are often granted when the debtor is no longer creditworthy for a bank loan) may be included in the calculation is left to future case law.

7. *Ineffectiveness of set-offs pursuant to section 96 (1) no. 3 in conjunction with sections 129 et seq. InsO*

Parallel to the avoidance claims, set-offs may also be challenged by the insolvency administrator if the receipt of the set-off position was obtained in an avoidable manner within the meaning of sections 129 *et seq.* InsO. In this case, a declared set-off is invalid and the insolvency administrator may continue to collect the claim against which the creditor has set-off in the opened insolvency proceedings.

Of particular practical relevance are cases in which mutual and, in principle, offsettable claims arise in the last three months before filing for insolvency, but according to the contractual relationship of the creditor with his customer there was no entitlement to obtain the offsetting option. Then the possibility of set-off would be incongruent within the meaning of section 131 InsO with the above-mentioned lesser prerequisites for avoidance. Typical cases of incongruent cover are, for example, that the creditor acquires its claim against the customer by assignment or that the creditor buys an object from the insolvency debtor and thus becomes its debtor.

II. Cash transaction objection

Even if the conditions for avoidance are met, the risk of avoidance in insolvency can be greatly reduced by a timely and congruent exchange of equivalent performances in the sense of a cash transaction.

From the point of view of a cash transaction pursuant to section 142 InsO, a performance is exempt from avoidance if it is countered by an equivalent consideration which has reached the debtor's assets in temporal proximity to the performance and directly.

Contestability remains if and to the extent that the requirements of section 133 (1) InsO are met and if the other party has recognised that the debtor acted unfairly. High demands are to be made on the proof of unfairness. Examples of unfair conduct are to be assumed in cases of deliberate disadvantaging of creditors, in the case of squandering assets for ephemeral luxury goods without benefit to creditors or in the case of disposing of business assets necessary for the continuation of the business. Since this is an indeterminate legal concept on which there is no case law yet, the courts still have to work out on the basis of individual cases when unfair action is to be assumed.

The existence of a cash transaction precludes avoidance under section 130 InsO and must also be considered in the context of avoidance under section 133 InsO. In the case of an incongruent cover within the meaning of section 131 InsO, on the other hand, a cash transaction cannot exist, since in these cases there is always a significant deviation from the original agreement and thus no reason to favour legal acts of the debtor that are settled differently than agreed.[15]

The "immediacy" of the exchange of performance requires a close temporal connection between performance and consideration. According to section 142 (2) sentence 1 InsO, the customs of business transactions are decisive. In a cash transaction, performance and consideration do not have to be concurrent. There may be a certain period of time between performance and consideration. This time span must not be so long that the legal transaction takes on the character of a credit transaction. As a rule, the legal concept of section 286 (3) BGB, according to which the default period is 30 days, can be used to determine the proximity in time. Hence, in general the immediacy requirement is fulfilled if the respective performance and consideration were rendered within 30 days.

If there is a cash transaction, this exchange of services regularly stands in the way of a successful avoidance. Thus, the cash transaction is the most effective protection against an avoidance of performances received during the debtor's crisis.

III. Art. 16 European Insolvency Regulation objection

An important objection against an avoidance claim regarding a cross-border transaction may arise in accordance to Art. 16 European Insolvency Regulation. Generally, the law of the state of the opening of proceedings – here, Germany – shall determine the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors, see Art. 7 (2) point (m) European Insolvency Regulation.

According to Art. 16 European Insolvency Regulation this shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that (a) the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and (b) the law of that Member State does not allow any means of challenging that act in the relevant case.

14. Cf. BGH, judgement dated 6 May 2021 - IX ZR 72/20, NZI 2021, 720.

15. Settled case law since BGH, judgement dated 30 September 1999 – IX ZR 227/92, BGHZ 123, 320, 324.

Hence, if the transaction is subject to a different Member State law and if such transaction would not be avoidable or by other means challengeable under such law, then, this objection blocks any avoidance claim of a German insolvency administrator.

However, it is a controversial topic as to how the applicable law (the *lex causae*) for a transaction is assessed. In general, if a contractual duty is fulfilled and the contract is subject to the other Member State's law, the statute of debt would lead to the Member State's law to be applicable. The result may differ for example in case of a repayment of a shareholder loan as this legal act can be assessed under several statutes. It affects the standing of the shareholder in the insolvency proceedings as his loan repayment claims by German law (sec. 39 (1) no. 5 InsO) are subordinated in German insolvency proceedings as well as the capital contributions of the shareholder to its subsidiary. Hence, the insolvency statute (German law) or even the company statute (within Member States the incorporation statue would decide the applicable law) could be decisive for the *lex causae*.

"it is a controversial topic as to how the applicable law (the *lex causae*) for a transaction is assessed"

IV. Recommendations for action to minimise the risk of avoidance in insolvency

Besides the objections described above, a creditor can optimise his business relationship with a German debtor to minimise the risk of avoidance in insolvency as follows.

1. For deliveries of goods: Retention of title

Protection against insolvency avoidance can initially be achieved by agreeing on a reservation of title for deliveries of goods. With the agreement of a retention of title, ownership is only transferred to the buyer subject to the condition precedent of payment of the purchase price. If the debtor becomes insolvent before payment has been made, the creditors can then in principle segregate (i.e. demand the return of) their delivered goods in accordance with section 47 InsO in opened insolvency proceedings. In addition, the transfer of ownership by payment of the purchase price is a consideration that falls under the cash transaction pursuant to section 142 InsO, so that payments to

redeem a simple reservation of title are not subject to avoidance as a rule.

Furthermore, extended and expanded reservations of title may be beneficial. In the case of extended retention of title, it is agreed that in the event of processing of the delivered goods, the right in rem, i.e. the ownership, continues in the object that is newly created by the delivered goods. In addition, it can be agreed that in the event of resale of the delivered or processed goods, a security interest is created in the purchase price claim against the further purchaser. The extended retention of title is an agreement that in addition to the purchase price claim for the delivered goods, further claims of the creditor must be satisfied by the customer in order to transfer ownership of the goods. However, at least the extended retention of title does not fall under the cash transaction, as there is regularly a lack of equivalence of the exchanged performances.[16]

2. *Trade credit insurance and avoidance insurance*

Parallel to the retention of title, it may also be advisable to take out trade credit insurance. In the meantime, insurers also offer avoidance insurances, which provide insurance cover for cases of incongruent and congruent cover (including intentional avoidance).

3. *Enforcement of a claim in the crisis of a debtor*

When enforcing a claim against a debtor in crisis the following actions may minimise the avoidance risk:

- No acceptance of a satisfaction by (third-party) benefits to which there was no claim as such (e.g. assignment of claims instead of payment).
- If despite a crisis of a debtor the business relationship shall be continued, it should be ensured that an exchange of services is guaranteed within the meaning of the cash transaction privilege which does not exceed the period of generally 30 days. Fixed payment targets that fall within this period should be agreed and compliance with them should be monitored.
- Performance only after advance payment constitutes a cash transaction if the service is rendered by the creditor within the period of generally 30 days after receipt of the advance payment.
- If mutual claims exist regularly, it may make sense to agree on offsetting the creditor's against the customer's claims as an alternative means of satisfaction. This would make a later set-off in the crisis at least congruent and thus more difficult for the insolvency administrator to contest.
- If the creditor has an enforceable title for its claims (i.e. payment obligations established by enforcement order, judgement or notarial acknowledgement of debt with submission to compulsory enforcement), within the enforcement the creditor should not accept payment by instalments or deferral and the bailiff should also be instructed accordingly. It is then already documented that the debtor cannot pay and voluntary payments by the debtor would in all likelihood be contestable in subsequent insolvency proceedings. However, if the insolvency petition is filed later than 3 months after receipt of a foreclosure proceeding, it cannot be contested, as outside the 3-month only an act of the debtor could be avoided. An actual enforcement, for example by seizure of the debtor's account, cash or claims, is not an act of the debtor.

V. Harmonization Efforts within the EU

On September 24th, 2020, the European Commission introduced an action plan for a Capital Markets Union.[17] Part of said plan is to make the outcomes of insolvency proceedings more predictable. For this reason, "*the Commission will take a legislative or non-legislative initiative for minimum harmonisation or increased convergence in targeted areas of core non-bank insolvency by mid-2022*".[18] Avoidance actions in insolvency proceedings was defined as one of the core elements.

In a next step, a working group, led by Prof. Reinhard Bork (Hamburg University) and Prof. Michael Veder (Radboud University) reviewed the various national insolvency laws of the EU-member states and the UK and drafted a "Model Law on Transactions Avoidance Law"[19] (Model Law) as a harmonization template. This regulatory proposal is currently being reviewed by a group of experts on restructuring and insolvency law appointed by the European Commission. This group of experts is expected to submit a recommendation for action to the European Commission by mid-March 2022. The European Commission must then decide by the end of June 2022 whether to recommend the harmonization of Transactions Avoidance Law to the EU legislative bodies and whether harmonization should take the form of a recommendation, a directive or a regulation.[20]

1. *The approach of the Working Group*

In a first step, the working group identified the actual need for harmonization. Since national insolvency laws differ considerably in the EU, it is undisputed that harmonization of insolvency avoidance rights is necessary. The differences significantly hinder cross-border legal transactions in the EU, as well as the handling of insolvency proceedings including cross-border restructuring efforts.

16. Cf. BGH, judgement dated 12 February 2015 – IX ZR 180/12, NJW 2015, 1756.

17. EUR-Lex Document 52020DC0590.

18. EUR-Lex Document 52020DC0590, Annex, Action 11.

19. https://www.intersentiaonline.com/library/model-law-on-transactions-avoidance-law.

20. Bork, ZRI 2021, p873 *et seq.*

In a next step, the working group defined the scope of the research project. The aim was to formulate standards which could be transposed into national law, thereby creating legal certainty as to which legal acts should be voidable in all Member States under the same conditions and which should not. The project was limited to transaction contestation claims and a *"minimal harmonization"* was sought. It should be regulated what should at least be contestable in all member states under the same conditions and what should not. There is no objection to deviating stricter, national rights.

Methodology-wise, the expert group drafted the model law according to pre-defined principles rather than using a combination of the existing national laws as a template for the model law. It defined general principles of insolvency law in general and those of avoidance law in particular. According to the working group the principles supporting avoidance claims are:

- best possible creditor satisfaction;
- equal treatment of creditors;
- collective principle;
- fixation principle; and
- effectiveness principle.

Principles that set limits to avoidance claims were defined as:

- protection of legitimate expectations;
- predictability (legal certainty); and
- proportionality.

The working group found these principles to be generally accepted and internationally acknowledged.[21] Hence, it used these principles as the defining cornerstones of the Model Law.

Members of the working group have researched the potential impact of the Model Law for the national laws of the member states. The working group will publish these assessments in the near future.[22]

2. *The systematics of the Model Law*

For reasons of legal certainty and transparency, the working group decided to separate the prerequisites for contestation, the grounds for contestation and the legal consequences within the Model Law.[23] The General Prerequisites are laid out in § 1 of the Model Law. Accordingly, legal acts – including forbearance – which have been perfected prior to the opening of the proceedings to the detriment of the general body of creditors are voidable provided the prerequisites of an avoidance ground (§§ 2-5) are met.[24]

According to this broad definition, in principle all legal acts (and omissions) are voidable - i.e. not only legal acts of the debtor but also legal acts of third parties. The decisive factor is the nature of the legal act that is detrimental to the creditors.

The specific grounds for avoidance claims are defined in §§ 2-5 Model Law.

§ 2 Model Law states the grounds for voiding preferential actions including congruent coverages. § 3 Model Law declares certain congruent coverages as not voidable – noteably legal acts performed directly against fair consideration to the benefit of the estate. § 4 Model Law declares legal acts against no or inadequate consideration to be voidable. § 5 Model Law declares legal acts as voidable provided the debtor intentionally disadvantages the general body of creditors.

The legal consequences of voiding a legal act are described in §§ 7, 8 Model Law.

Conclusion

As described above, German avoidance law is relatively complex in relation to the legal systems of other member states. In the case of cross-border insolvencies, this leads to legal consequences that are not always comprehensible for the parties to the proceedings and provide little legal certainty. Against this background, the intended harmonization of avoidance law by defining minimum standards is to be welcomed.

With the introduction of the Restructuring Framework, the EU has shown, that with the appropriate political will, relatively rapid implementation of new legislature is possible.

By using standard legal principles, which are at least recognized by most legislatures within the EU, the working group successfully avoided the otherwise inevitable discussion of whether the Model Law favors one jurisdiction over another. This certainly increased the chances of the Model Law being implemented. However, it remains to be seen whether the EU Commission will put the ball that the working group has set rolling into the goal. ■

21. Bork, ZRI 2021, p873, 876.

22. Bork, ZRI 2021, p873, 879.

23. Bork, ZRI 2021, p873, 876.

24. https://www.intersentiaonline.com/publication/model-law-on-transactions-avoidance-law/2.

Diary Dates

South Square members will be attending, speaking and/or chairing the following events

Spring 2022

Womens Insolvency Lunch

South Square will be hosting a lunch for Women in Insolvency. Details to be confirmed

18-20 May 2022

R3 Annual Conference

De Vere Beaumont Estate, Burfield Road, Windsor, SL4 2JJ

26 May 2022

South Square Spring Reception

Spencer House, London

17 June 2022

South Square/RISA BVI Conference

International Arbitration Centre, Tortola

26 - 29 June 2022

INSOL Conference

W Marriott Grosvenor House, 86-90 Park Lane, London, W1K 7TN

29 June 2022

FTI Consulting Royal Academy of Arts Summer Exhibition

Burlington House Piccadilly London, W1J 0BD between 18.45 and 20.45

7 July 2022

FIRE Thought Leaders 4 Insolvency Presentation

Summer 2022

Commercial Litigators' Forum
The CLF 125th anniversary reception has been moved to summer 2022

It will be held at the Royal Courts of Justice, London WC2A 2LL

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Consumer Bankruptcy: UK and Greece

South Square's Clara Johnson and Stathis Potamitis of Potamitis Vekris in Greece examine the personal insolvency regimes in England and Greece and the available remedies for transaction avoidance.

In this article, we compare the personal insolvency regimes under English and Greek law: as explained below, it was only in June 2021 that Greece adopted a formal insolvency process for individuals who are not merchants. By comparison, this was recognised in English law in 1861. As such, insolvency related avoidance measures have only recently become applicable to consumers in Greece, whereas they have long been applied to consumers in England. As this article describes, there are key similarities between the two jurisdictions, which are both underpinned by the same principle of *pari passu* distribution.

The position in England

England's personal insolvency regime has deep historical roots. The Bankruptcy Act 1861 (24 & 25 Vict c 134) abolished the distinction between the trader and the non-trader and made every adult (other than married women non-traders – an anomaly ended only in 1935) liable to be declared bankrupt.[1] This marked an important shift away from the widespread use of '*Debtors' Prison*' towards a more orderly, rational state-controlled scheme for dealing with insolvent individuals based on the principles which continue to underpin the modern law. Imprisonment for debt was all but abolished by the Debtors Act 1869.

Provisions dealing with antecedent transactions in the context of personal insolvency can be traced back to the Bankruptcy Act of 1869 (32 & 33 Vict c 71), which included a provision for the setting aside of "*voluntary settlements*" (which are now known as "*transactions at an undervalue*"). The setting aside

1. Section 69.

2. Sections 42 and 44.
3. Section 339(1).
4. Section 341(1) to (3).
5. Section 339(3).
6. *Reid v Ramlort Ltd* [2005] 1 BCLC 331.
7. *Papanicola v Fagan* [2009] BPIR 320.
8. Section 436.
9. *Re HHO Licensing Ltd* [2007] BPIR 1363.
10. *Hampton Capital Ltd* [2015] EWHC 1905 (a case decided under section 238 of the 1986 Act, the corporate equivalent of section 339).
11. Section 339(2).
12. *Singla v Brown* [2008] Ch 357.
13. *Re Paramount Airways Ltd* (No.2) [1993] Ch 223.
14. Section 341(1)(b) and (c).

of "*voluntary settlements*" as well as a new provision for the avoidance of certain preferences, went on to feature in the Bankruptcy Act of 1914.[2]

Just over 70 years later, the Insolvency Act 1986 ("**the 1986 Act**"), a significant piece of insolvency legislation in many respects, made its way on to the statute books. The 1986 Act revamped the transactions at an undervalue and preferences provisions under sections 339 to 342 (which have their corporate insolvency equivalents under sections 238 to 241) which still apply today, virtually unchanged.

A further provision dealing with transaction avoidance not mentioned so far is the setting aside of fraudulent conveyances (what are now known as "*transactions defrauding creditors*"). These provisions can be traced back to the Fraudulent Conveyances Act 1571 (13 Eliz.1, c.5), commonly known as "the Statute of Elizabeth". The historical roots of these provisions are considered by Glen Davies QC and Scott Aspinall in their joint article published in this Edition. These provisions are now set out under sections 423 to 425 of the 1986 Act.

Transactions at an undervalue: section 339 of the Insolvency Act 1986

A transaction will fall within section 339 if the following conditions are met: (1) an individual, who is made bankrupt within the "*relevant time*" (2) enters into a transaction with any person (3) which is at an undervalue.[3]

The "*relevant time*" in this context is within the period of five years ending with the day of the making of the bankruptcy application or the presentation of the bankruptcy petition; but it must also be shown that the individual was either: (1) insolvent at that time; or (2) became insolvent in consequence of the transaction (the "**Insolvency Condition**"). Insolvency in this context means both "*cash flow*" and "*balance sheet*" insolvency.

However, the Insolvency Condition does not apply where the transaction was entered into within two years of the date of the bankruptcy application or presentation of the petition. Further, there is an automatic but rebuttable presumption that the Insolvency Condition is met where the transaction was with an "*associate*" of the bankrupt.[4] In such cases, the burden of proof is reversed from the trustee-in-bankruptcy to the transferee.

A transaction will be at an undervalue if: (a) it is a gift or for no consideration; (b) it is a transaction in consideration of marriage or a civil partnership; or (c) it is a transaction for consideration "*the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the bankrupt*".

The value of the consideration is to be assessed at the date of the transaction and without the benefit of hindsight.[6] It must also be assessed from the point of view of the debtor. As is clear from the statutory wording, the consideration need not be in money but can apply to any arrangement or agreement by which things of value are exchanged. It can include, for example, the promise by a spouse not to pursue a divorce.[7]

Under the 1986 Act, a "*transaction*" includes a "*gift, agreement or arrangement*".[8] The definition is intended to cover as wide a range of mutual dealings as possible: the existence of a contract is not required.[9] It is necessary, however, for there to have been a transaction and a claim will not usually be made out without some form of mutual dealing.[10]

Importantly, there is no mental element to be satisfied in relation to transactions at an undervalue: it does not matter whether the bankrupt or the transferee apprehended insolvency. These provisions are not concerned with wrongdoing or dishonesty.

If all the elements are made out, the court will make an order "*for restoring the position to what it would have been*" if the bankrupt had not entered into the transaction.[11]

Section 342 of the 1986 Act contains an inexhaustive list of orders that the court may make and includes ordering property to be transferred, the release or discharge of any security or an order for the payment of money. Although the court does have the discretion to decline to make any order, this will only apply in an exceptional case.[12]

Claims under section 339 have extra-territorial effect.[13] However, whether the English court will grant permission to serve proceedings out of the jurisdiction on a defendant will also depend upon whether the trustee-in-bankruptcy can demonstrate that England is distinctly the most appropriate forum in which to hear the claim.

Preferences: section 340 of the 1986 Act

A transaction will fall within section 340 if the following conditions are met: (1) an individual who is subsequently made bankrupt has at the relevant time; (2) given a preference to a person.

The "*relevant time*" is virtually the same as that in relation to transactions at an undervalue, save that the period is (a) two years where the preference was given to an "*associate*"; or (b) six-months in any other case.[14] The Insolvency Condition also applies. As with transactions at an undervalue, the Insolvency Condition is presumed to be satisfied where the preference was given to an associate (although this is a rebuttable presumption).

As to what constitutes a preference, section 340(3) of the 1986 Act sets out two conditions: (a) the person to whom a preference is given is a creditor of the bankrupt, or a surety or guarantor for any of

his debts or liabilities; and (b) the bankrupt does anything or suffers anything to be done which "*has the effect of putting that person into a position which, in the event of the individual's bankruptcy, will be better than the position he would have been in if that thing had not been done*".

However, this requirement is tempered by section 340(4), which provides that the court "*shall not*" make an order "*unless the individual who gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (3)(b) above*". The onus of proving this condition falls on the trustee-in-bankruptcy unless the preference was given to an associate, in which case it shall be presumed (unless proved to the contrary).[15]

It is clear from the statutory wording that the provision does not just apply where money has been paid in satisfaction of a debt. It applies more generally where the bankrupt has done something which has the effect of putting the preferee in a better position in the event of bankruptcy, than he would otherwise be. A very common example is where a payment is made to a creditor, which has the effect of releasing the guarantor from any liability.

In order to establish a preference, it must be shown that the debtor was influenced by a desire to prefer. This is a subjective test that does not simply look at the effects of the transaction in question. There may be cases where a person has mixed motives but provided one of them was the desire to prefer, this will be sufficient for the purposes of section 340(4). It is not, however, a necessary ingredient of the relevant desire that the prospective bankrupt knew or believed himself to be insolvent (or foresaw bankruptcy) when deciding to give the preference.[16]

The fact that something has been done pursuant to a court order, does not, without more, prevent it from constituting the giving of a preference.[17] If the position were otherwise, this would mean that paying a judgment creditor could never be a preference.

As with transactions at an undervalue, claims under section 340 have extra-territorial effect.[18]

Transactions defrauding creditors: section 423 of the 1986 Act

Claims under section 423 are not restricted to cases where a person has been made bankrupt: rather, claims under section 423 can be brought by the "victim" of the relevant transaction without any intervening insolvency.[19]

The conditions to be satisfied under section 423 are that: (1) there has been a transaction at an undervalue;[20] and (2) the transaction was entered into by the person for the purpose: (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.[21]

In this context, a transaction at an undervalue has the same broad meaning as it does under section 339(1). Entirely lawful transactions may be caught, including, for example, the payment of dividends by a company to its shareholders.[22]

It is not necessary to prove that the specified purpose was the sole or the dominant purpose, or even that it was a real substantial purpose.[23] Rather, all that needs to be established is that it was 'a purpose'.[24] This is a subjective test. Generally, the courts do not answer this question by reference to the *effect* of the transfer: rather the question to be asked is whether the person acted with the relevant purpose.

The honesty of the parties to the transaction is irrelevant and there is no requirement that the bankrupt was motivated by any ill will towards a particular creditor. Similarly, the mental state of the recipient is not relevant when trying to determine the purpose of the bankrupt when entering into the transaction. Even if the bankrupt received legal advice that the transaction was proper, this would not mean that it was not carried out for the relevant purpose.[25] Where there is prima facie evidence of breach of section 423, privilege may not apply to communications passing between the bankrupt and his lawyers.

Unlike transactions at an undervalue and preferences, section 423 does not contain any rebuttable presumptions in cases where the transaction was with an associate. A further difference is that there is no fixed look-back period. However, claims going back many years may be statute-barred under the relevant limitation period.

Where the relevant conditions are made out, the court may make an order it thinks fit for (a) restoring the position to what it would have been if the transaction had not been entered into, and (b) protecting the interests of persons who are victims of the transaction.[26] A non-exhaustive list of remedies available are set out in section 425.

Claims under section 423 also have extra-territorial effect.

Consumer insolvency in Greece

Greece has been one of the last hold outs in Europe for the view that bankruptcy should only be available to merchants. Accordingly, until last year, one of the threshold tests for a bankruptcy petition for an individual was whether the debtor was a merchant.

15. Section 340(5).

16. *Katz v McNally (Recovery of Preferences)* [1999] BCC 291 (a case decided under section 239, the corporate equivalent of section 340).

17. Section 340(6).

18. *Re Paramount Airways Ltd (No.2)* [1993] Ch 223.

19. Section 424(1)(c).

20. Section 423(1).

21. Section 423(3).

22. *BTI 2014 LCC v Sequana* [2016] EWHC 1686.

23. *Inland Revenue Commissioners v Hashmi* [2002] 2 BCLC 489.

24. *JSC BTA Bank v Ablyazov* [2019] BCC 96 per Leggatt LJ at [13].

25. *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd (No.2)* [1990] BCC 636.

26. Section 423(2).

27. Law 3869/2010.

28. IMF Country Report No. 17/41 GREECE, available in: https://www.imf.org/~/media/Files/Publications/CR/2017/cr1741.ashx.

29. Law 4738/2020, the "DSL".

30. The distinction between large and small bankruptcies tracks the recommendations made by Jason Kilburn in a recent article: "*It may well be sensible to differentiate not between business and consumer cases, but between high-value and low-value cases; that is, cases in which the debtor has assets and/or income of significant value, sufficient to attract meaningful attention from creditors.*" Kilborn, Jason J., The Personal Side of Harmonizing European Insolvency Law (August 1, 2016). Available at SSRN: https://ssrn.com/abstract=2816618 or http://dx.doi.org/10.2139/ssrn.2816618, p. 26.

"Instead of providing a second chance for individuals...the system appears to be used to fend off creditor actions and preserve assets"

A first attempt to provide debt relief to consumers: the Katselis Law

In 2009 Greece was caught up in a devastating sovereign debt crisis that swiftly encompassed the private economy as well. It quickly became clear that the danger of over indebtedness does not only concern businesses but can be a major problem also for consumers. Indeed, at the early stages of the crisis Parliament decided to legislate a type of consumer bankruptcy, named after its proponent (Finance Minister Katselis) the Katselis law.[27]

As the explanatory report to that law made clear, the Katselis law was not designed as a bankruptcy proceeding but as a proceeding that would encourage negotiations between debtor and creditors but would also enable the judge (the Justice of the Peace for that proceeding) to adjust the debts. The judge was also entrusted with the decision of how to use the debtor's property (or some of it) to satisfy the creditors to the extent of the adjusted debts. The process started with an application by the debtor, seeking debt haircuts and proposing the manner of satisfaction of the surviving claims. The application triggered an automatic stay of all enforcement actions. There was then a first hearing at which the parties were given the opportunity to reach a settlement. If, however, no settlement was reached (as was usually the case) the judge would fix the payments that the debtor would be required to make to its creditors pending the decision of the court on the debt settlement application. The law gave the court very broad discretion to decide on the proper level of adjusted debt. Moreover, the Katselis law expressly excluded the primary residence of the debtor from liquidation – instead the debtor would be required to make a series of monthly payments (at a level of a rental payment) for an extended period, between 25 and 35 years. The law also provided for debt discharge after a period of 3 years of complying with the requirements set by the decision.

The Katselis law proved very popular but also a great failure. A 2017 IMF Country Report had this to say: *"the personal insolvency framework has been over- and misused... [I]nstead of providing a second chance for individuals who are experiencing over indebtedness so that they can return to productive activity, the system appears to be used to fend off creditor actions and preserve assets".*[28] The combination of judicial inexperience and the great number of applications made for extremely slow processing - in some cases hearings were set for more than 10 years after the application, during which time the statutory stay remained in effect. As a result, at the end of the 10 year long crisis, Greece still lacked an efficient consumer bankruptcy proceeding.

The 2020 Insolvency Framework

On June 20, 2019 the European Parliament and the Council adopted Directive (EU) 2019/1023. This Directive is primarily focused on business recovery and second chance for entrepreneurs but also includes a strong recommendation for debt discharge for consumers as well:

> "21) *Consumer over-indebtedness is a matter of great economic and social concern and is closely related to the reduction of debt overhang. ... [A]lthough this Directive does not include binding rules on consumer over-indebtedness, it would be advisable for Member States to apply also to consumers, at the earliest opportunity, the provisions of this Directive concerning discharge of debt.*"

At that time, the new Greek government was already considering the overhaul of the insolvency framework. Indeed, a new law replacing all previously existing insolvency and over-indebtedness proceedings (Including the Katselis Law) was passed in October 2020 and was fully put into effect by June 2021.[29] The new law opened up the availability of bankruptcy to all natural persons and to all legal persons that pursue an economic purpose.

Under the DSL there are two kinds of insolvency proceeding, large and small. Small insolvencies are designed for small and micro enterprises and for consumers (although there may be consumers with assets of significant value that may follow the larger bankruptcy path).[30] Small insolvencies are the responsibility of the magistrate's court, as was the case for the Katselis Law proceedings. Petitions for small bankruptcies are filed electronically and if unopposed are granted automatically after 30 days. Upon the appointment of the bankruptcy administrator, and the taking of inventory of the available assets, the process immediately turns to the piecemeal liquidation of all such assets via e-auctions. The introduction of the expedited procedure for small bankruptcies may be expected to facilitate both distressed small businesses and over-indebted consumers to obtain relief form their debts and take advantage of the debt discharge offered by the statute.

A petition for bankruptcy, unless rejected as failing to meet the requirements set by the law, such as cessation of payments, will lead either to the appointment of a bankruptcy administrator tasked with the liquidation of the assets and the distribution of the proceeds to the creditors, or the registration of the debtor's name or simply to the registration of the debtor as insolvent on the insolvency register. The latter applies where the debtor lacks assets (other than any provided as security to his or her creditors) of sufficient value to cover the cost of the proceeding. This registration does not impede secured creditors from enforcing their security rights (which under Greek civil procedure is limited to auctioning off the collateral).

Once appointed, the bankruptcy administrator is required to compile an inventory of the assets and thereafter immediately proceed to their liquidation. Liquidation is done via an electronic auction process generally applied in Greece for enforcement of creditors' claims.[31] Assets are sold in lots of a minimum value of EURO 50,000 and the administrator is responsible to set the minimum price as the mean of the estimates of two certified valuators. If there are no qualifying bids then the minimum price is subject to automatic adjustments, without court intervention, and given the time intervals provided in the statute, the whole process is likely to be completed within less than a year, much faster than the practice until now.

Transactions' avoidance rules form part of the bankruptcy law and apply equally to all types of insolvent debtors, consumers included. The DSL distinguishes between three different kinds of avoidance. The first concerns those at an undervalue, including gratuitous transactions of the debtor, and certain types of preferences, such as the satisfaction of debts not yet due, the provision of security for an existing debt or for the refinancing of an existing debt and the

31. The compulsory use of the e-auction platform was introduced by law 4512/2018.

repayment of a debt that is due in a manner that differs from the agreed manner for satisfaction. The second concerns transactions of the debtor where the opponent was aware (or should have been aware) that they would be detrimental to the general body of creditors. The third encompasses transactions into which the debtor entered with the intention of causing harm to the creditors, or benefitting some to the detriment of others.

The Greek rules apply to transactions within the suspect period, i.e. those that take place after the cessation of payments or the substantive insolvency of the debtor, or the six months immediately preceding such a suspect period (in the case of preferences and transactions at an undervalue).

As noted above, a transaction may be set aside provided that the opponent was aware, or should have been aware at the time of the transaction, that it would be detrimental to the general body of creditors. Of particular importance in the consumer bankruptcy context for this basis of avoidance is the knowledge presumption in the law for closely related parties. The definition of closely related parties under the Greek Insolvency Law covers relatives (both blood and via marriage) and persons co-habiting with the debtor.

Insolvent individuals are discharged of substantially all their debts on the third anniversary of the issuance of the respective court decision (either declaring them bankrupt or filing the petition due to insufficiency of available funds), unless an interested party files an objection to such discharge.[32] Discharge can be avoided where the cessation of payments is due to the debtor's intent or where the debtor failed to show good faith whether at the time of the declaration of bankruptcy or thereafter. Similarly, discharge may be avoided where the debtor failed to disclose his or her assets and more generally to be cooperative with the bankruptcy organs or if convicted or has been charged with crimes related to insolvency or for theft, fraud, forgery or defrauding of creditors. Moreover, debts created after the filing of the bankruptcy petition, or arising from bodily injury or death due to intent or gross negligence, money laundering or family maintenance are also excluded from discharge.

The introduction of consumer bankruptcy will be followed by a primary residence preservation scheme for vulnerable individuals, as well as loan subsidies and rental subsidies. The tendering process for the selection of the private entity to be entrusted with this task (the Scheme Entity) has commenced and the scheme should come into operation within 2022. However, social measures neither interfere with individual or collective enforcement nor limit the degree or speed of creditor recovery. The mechanism involves the purchase of the primary residence of an insolvent debtor by the Scheme Entity at a market price providing the estate (and therefore also its creditors) with reasonable recovery and liquidity. The Scheme Entity is then required to lease back the primary residence to the vulnerable debtor for a period of 12 years and also provide them with a buy-back option at a then current market value.

Overview

The personal insolvency regimes in England and Greece have substantial differences, but also, particularly in the context of transaction avoidance, substantial similarities. The principle underpinning the measures for transaction avoidance is the same: the collection in, and distribution of, the bankrupt's assets to unsecured creditors on a *pari passu* basis; with the recognition that transactions which favour some creditors over others, or wrongly deplete the bankrupt's estate at the relevant time, should be unwound for the benefit for unsecured creditors as a whole. ■

32. In cases where the estate includes assets of a value greater than Euro 100,000 or the debtor's primary residence and such assets are worth more than 10% of the total liabilities, then discharge occurs on the first anniversary of the court's decision.

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Cross-border transaction avoidance, jurisdictional reach of anti-avoidance provisions, recognition and relief available to officeholders under UNCITRAL model law

Introduction

This article considers cross-border transaction avoidance and, in particular, the ability or scope for foreign officeholders to access domestic anti-avoidance or claw-back legislation as a part of the package of assistance they are granted upon or consequent to recognition of their status and the currency of the foreign insolvency proceeding.

The authors address this issue first from a British perspective, and then from an Australian perspective.

The View from Great Britain

Introduction

Post-Brexit, foreign insolvency officeholders can no longer take advantage of Regulation (EU) 2015/848 on insolvency proceedings (the "**Recast Insolvency Regulation**"). There are three remaining methods by which foreign officeholders may obtain assistance from the English Court: (i) under the Cross-Border Insolvency Regulations 2006 (the "**CBIR**"); (ii) pursuant to section 426 of the Insolvency Act 1986 (the "**1986 Act**") and; (iii) at common law.

The UNCITRAL model law and the CBIR: an overview

The CBIR represents the implementation of the UNCITRAL Model Law on Cross-Border Insolvency (the "**Model Law**") in Great Britain. The CBIR entered into force on 4 April 2006 and provided that the Model Law shall have the force of law in Great Britain in the form set out in Schedule 1 (which contains the Model Law with certain modifications).[1]

Article 1(1)(a)[2] provides that the Model Law applies where assistance is sought in Great Britain by a foreign court or a foreign representative in connection with a foreign proceeding. In this context, *"foreign representative"* means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets.[3] Such a representative is entitled to apply directly to a court in Great Britain for recognition of the foreign proceeding in which they have been appointed.

Article 17(1) stipulates that, subject only to the public policy exception in Article 6, a foreign proceeding shall be recognised if: (a) it is a collective judicial or administrative proceeding in a foreign State under which the debtor's assets are being reorganised or liquidated; (b) the foreign representative making the application is authorised to administer the debtor's assets in those proceedings; (c) the application is accompanied by evidentiary material affirming the representative's appointment, and; (d) the application has been submitted to the High Court.

Availability of interim relief

In cases of urgency, where relief is required to protect the debtor's assets, an application may be made by the foreign representative for provisional relief under the CBIR from the time of filing of an application for recognition until determination of that application.[4] The provisional relief available includes providing for the examination of witnesses, suspending the right to transfer or dispose of any assets of the debtor, and staying execution against the debtor's assets.

This provides a useful mechanism for officeholders to safeguard a debtor's assets pending the grant of recognition. For example, in *Re Derev* Zacaroli J provisionally suspended a Russian citizen's right to deal with his property in the UK[5], pending determination of an application made by his Russian bankruptcy manager for recognition of the bankruptcy in the UK.[6]

Effects of recognition under the CBIR

Where recognition is granted, the High Court has extensive powers to assist a foreign insolvency officeholder. These powers include, *inter alia*, *"entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court"* (Article 21(1)(e)) and "granting any additional relief that may be available to a British insolvency office-holder under the law of Great Britain" (Article 21(1)(g)). Thus, the CBIR can make statutory provisions which are applicable in the context of a domestic English insolvency available to a foreign officeholder, and the foreign officeholder can obtain, in this regard, relief as if the foreign proceeding were an English insolvency.

Importantly, for current purposes, this extends to transaction avoidance provisions. Article 23(1) provides that recognised foreign officeholders have standing to initiate such *"types of actions to avoid or otherwise render ineffective acts detrimental to creditors"*. Specifically, foreign officeholders are given standing to bring actions under the 1986 Act to avoid transactions at an undervalue (ss 238/339[7]), preferences (s 239/340), extortionate credit transactions (s 244), floating charges to secure past indebtedness (s 245), transactions defrauding creditors (s 423), and actions to facilitate the recovery of excessive pension contributions made by individual debtors (s 342A).

While Article 23 does not transpose foreign law into local law or require the recognition of the preference laws of the law of the foreign proceeding, it confers a procedural right on foreign representatives to bring transaction avoidance claims using the provisions of the 1986 Act.[8] The entitlement of foreign office-holders to commence these actions was included in the Model Law as it was regarded as "essential" to protect the integrity of the assets of the debtor.[9]

Such relief is, however, available only in relation to a *"foreign main proceeding"* or a *"foreign non-main proceeding"*, and for a foreign proceeding to qualify as one of these the debtor must have either (a) the centre of his main interests or (b) an establishment in the country in which the foreign representative has been appointed.[10] Article 23(5) stipulates that where the foreign proceeding is "non-main", the English court must be

1. Regulation 2(1) of the CBIR.

2. References to articles in what follows are references to the articles of Schedule 1 to the CBIR.

3. Article 2(j) of Schedule 1 to the CBIR. For a discussion of what amounts to a "foreign representative" see *Re 19 Entertainment Limited* [2016] EWHC 1545 (Ch).

4. Article 19(1).

5. The court also made an order for the delivery up of the bankrupt's passport. Ultimately, the Russian bankruptcy manager was unable to show that there was a real risk that the bankrupt would leave the jurisdiction, and the passport order was not continued: see *Igor Vitalievich Protasov v Khadzhi-Murat Derev* [2020] EWHC 2884 (Ch).

6. This injunction was subsequently discontinued by Adam Johnson J when the foreign proceeding was recognised: *Igor Vitalievich Protasov v Khadzhi-Murat Derev* [2021] EWHC 392 (Ch).

7. Under the 1986 Act, s. 238 addresses corporate insolvency, and s. 339 addresses personal insolvency.

8. Para 201 of the Model Law's *Guide to Enactment and Interpretation* (2013 edition) explains how Article 23 does not create any substantive right regarding anti-avoidance actions. That said, it ensures that a foreign representative is not prevented from initiating such actions by the sole fact that s/he is not the insolvency representative appointed in the enacting State.

9. See para 212 of the Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17).

10. See the definitions in Article 2 and Article 17(2). It will be noted that a foreign insolvency is not entitled to recognition where there is less than a branch (e.g. local assets, as opposed to a centre of interests or establishment).

satisfied that the application to avoid a transaction relates to assets which should be administered in those non-main proceedings.

More generally, the English court will only grant relief in respect of a transaction avoidance claim under the CBIR where there is a *"sufficient connection"* between the claim and this jurisdiction.[11] When considering the depth of the connection, the English court will examine the factors highlighted by Sir Donald Nicholls V.C. in *Re Paramount Airways (No. 2)* [1993] Ch 223, 240 (CA), including the domicile of the defendant, his connection with the insolvent, whether the transaction was carried out in England, and the locality of the property involved.

Transaction avoidance under the CBIR: recent application

To date, there have been relatively few cases in which foreign officeholders have brought anti-avoidance actions in England using the powers under Article 23, Schedule 1 of the CBIR.

One such case is *Re Peak Hotels and Resorts Ltd (in liquidation)* [2017] EWHC 1511 (Ch). Here, the liquidators of a company incorporated in the British Virgin Islands applied for a determination as to whether, and if so to what extent, certain amounts of money were subject to charges in favour of the company's former solicitors. The solicitors had acted for the company in international litigation and their invoices had fallen into arrears. The company faced a potential bill in a sum of between £5-£6 million if no settlement could be reached. In order to assist the company's cash-flow, the former solicitors agreed a fixed fee of £3.86 million (plus interest of 8% p.a. from settlement), secured by a charge registered in the BVI, for continuing to act. When the company entered liquidation in February 2016, the solicitors had done work totalling about one third of the fixed fee but claimed to be a secured creditor for the full amount. The issue centred on whether a valid fixed charge had come into existence, such that the solicitors could recover the full £3.86 million sum.

The proceedings were recognised as a foreign main proceeding under Article 17(2)(a) of the CBIR. The liquidators were therefore entitled to apply for the same relief as if the liquidation were an English one. Against this background, the liquidators argued that section 245 of the 1986 Act applied to limit the scope and effect of the charge registered in the BVI.

Agreeing with the liquidators, His Honour Judge Davis-White QC held (at [101]) that section 245 of the 1986 Act applied by virtue of Article 23 of Schedule 1 to the CBIR. The efficacy of the charge was restricted on the grounds that it was (a) floating, (b) brought into existence within 12 months of the onset of the company's insolvency, and (c) created at a time when the company was unable to pay its debts. The company was consequently entitled to avoid a large proportion of the £3.86 million charge. To hold otherwise would have allowed the solicitors to jump the queue of unsecured creditors for a *pari passu* distribution in respect of fees it hoped to receive for work it planned to carry out, but which in fact it had never done.[12]

The decision in *Re Peak Hotels and Resorts Ltd (in liquidation)* illustrates the potential for foreign officeholders to apply English anti-avoidance provisions using the CBIR.

This potential was further highlighted by the High Court's recent decision in *The Deposit Guarantee Fund for Individuals (as liquidator of National Credit Bank PJSC) v Bank Frick & Co AG* [2021] EWHC 3226 (Ch).

In that case, the liquidation of a Ukrainian bank ("**PJSC**") was recognised as a foreign main proceeding, and the Ukrainian appointed liquidator of that bank ("**DGF**") was recognised as a foreign representative under the CBIR.[13] In 2013-2014, PJSC entered into a series of pledge agreements with the First Defendant ("**Frick**"), a Lichtenstein Bank. Under those agreements, PJSC pledged funds as security for various loans made under agreements between three entities incorporated in the UK, including the Second Defendant, Eastmond Sales LLP. The debtors failed to repay the loans, such that Frick was entitled to call on PJSC to pay the securities. DGF (the liquidator of PJSC) subsequently claimed that this was part of a complex fraud committed by the directors of PJSC, who incorporated the debtor entities to take money from Frick which would then be repaid by PJSC under the securities, ultimately defrauding PJSC bank's creditors. As a consequence of having been recognised as a foreign representative under the CBIR, the liquidator of PJSC was entitled to bring a claim in England under s 423 of the Insolvency Act.

The case demonstrates how the existence of UK anchor defendants may enable recognised foreign officeholders to bring actions under the 1986 Act in circumstances where equivalent anti-avoidance provisions are potentially unavailable (or less effective/far-reaching/beneficial) under the laws of their local jurisdiction.

Accordingly, the CBIR provides foreign officeholders with a powerful tool to achieve cross-border transaction avoidance. Where the requirements for recognition of a foreign proceeding are met, the English court will afford the foreign office-holder the same powers that would be available as if they were appointed under a domestic insolvency.

Section 426 of the 1986 Act

While the discussion thus far has focused on the remedies which are available to foreign officeholders under the CBIR, it should be noted that s 426 of the 1986 Act

11. See *Orexim Trading Ltd. v. Mahavir Port & Terminal Pte Ltd* [2018] 1 WLR 4847 (CA) , at [55]-[60]; and *The Deposit Guarantee Fund for Individuals (as liquidator of National Credit Bank PJSC) v Bank Frick & Co AG* [2021] EWHC 3226 (Ch) at [48].

12. While HHJ Davis-White QC's approach to valuing the services provided by the solicitors to the company was overturned on appeal ([2018] EWCA Civ 345), the Court of Appeal agreed with his conclusion that the liquidators were entitled to apply for an order under s.245 of the 1986 Act by virtue of Article 23 of the CBIR.

13. By an order dated 29 April 2021 of Deputy Insolvency and Companies Court Judge Passfield.

provides an alternative route for foreign officeholders to access England's anti-avoidance provisions.

Where a request for assistance is made by a foreign court in a *"relevant territory"* pursuant to section 426,[14] an English court can choose to apply English insolvency law or the insolvency law of the country or territory making the request.[15] If English insolvency law is applied, the full range of relief which might have been given to an insolvency officeholder appointed in England may be made available to office-holders in foreign proceedings.

Significantly, this includes relief under the provisions of the 1986 Act for the avoidance of prior transactions. It follows that in relevant territories where the s 426 procedure applies there is a possibility that English anti-avoidance provisions may be used to avoid a transaction, even if no insolvency proceedings have in fact been opened in England.

For example, in *Re Bank of Credit and Commerce International SA* [1993] BCC 787, a referral had been made by the Grand Court of the Cayman Islands in the aftermath of the BCCI collapse. The liquidators of BCCI Overseas, which was a Cayman company being wound up by the Cayman Islands court, alleged that senior management of the BCCI group had participated in fraudulent activities, and sought relief under ss 212, 213, 214 and 238 of the 1986 Act. The liquidators accepted that, because Cayman Islands insolvency law did not include provisions comparable with the sections of the 1986 Act under which the declarations were sought, the action would fail unless the English court exercised its discretion under section 426.

The respondents applied to have the claims struck out, arguing that the English High Court did not have the jurisdiction to make the orders sought. The matter came before Rattee J, who refused to strike out the claims of the liquidators (at page 803). It was held that the English court must exercise its discretion to assist the referring court unless there is good reason not to. Since, in the case of BCCI, there was no principle of private international law indicating that this assistance should not be given, the liquidators were granted access to the powers sought under the 1986 Act. This included the ability to challenge transactions at an undervalue (s 238).

While the utility of s 426 is restricted by the fact that it only applies in relevant territories, it provides a further route for foreign officeholders to apply English anti-avoidance provisions.

Relief available to foreign officeholders at common law

In cases where neither the CBIR nor s 426 of the 1986 Act are applicable, foreign officeholders may seek the assistance of the English court under its common law jurisdiction. Historically, there have been cases in which English courts have exercised their discretion to extend the use of English anti-avoidance provisions to foreign officeholders at common law.

In *Re Phoenix Kapitaldiesnt GmbH* [2013] Ch 61 Proudman J decided that the court had the power at common law to recognise a foreign administrator appointed in Germany and to provide the same assistance as it was entitled to provide in a domestic insolvency. Since proceedings to set aside antecedent transactions were central to the purpose of insolvency, the court had jurisdiction to authorise the administrator to invoke s 423.

The position adopted by Proudman J in Re Phoenix built on the approach of the Privy Council in the earlier case of *Cambridge Gas v Navigator Holdings plc* [2007] 1 AC 508, where Lord Hoffmann held (at [20]):

> *"The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum".*

However, the broad universalist approach espoused by Lord Hoffmann in *Cambridge Gas* was subsequently limited by the Supreme Court's decision in *Rubin v Eurofinance SA* [2012] UKSC 46.

This position was confirmed by the Privy Council's decision in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36. This took a narrower view of common law assistance, concluding that that there is no common law power to make statutory provisions which are applicable in the case of a domestic insolvency available to foreign insolvency officeholders. Specifically, Lord Collins held (at [95]-[98]) that Proudman J's decision in *Re Phoenix* was wrong, since it involved an impermissible application of legislation by analogy. While the legislature had decided to make UK insolvency provisions available to foreign officeholders in cases involving the CBIR or s 426, it was not possible to achieve the same result at common law where those statutes did not apply.

More recently, in *Kireeva v Bedzhamov* [2022] EWCA Civ, the Court of Appeal held[16] that no assistance was available to a foreign officeholder in England in respect of real property assets due to the so-called *"immovables rule"*, and the power to appoint a receiver over English real property assets was available in s 426 cases, but not where assistance was sought at common law. The Court of Appeal concluded that modified universalism had to be made subject to local law and local public policy (at [101], and that a common law exception to the *"immovables rule"* was a matter for Parliament. Arnold LJ (dissenting) described this as a *"complete retreat from universalism".*

14. These are mainly Commonwealth countries or former British colonies: Anguilla, Australia, Bahamas, Bermuda, Botswana, Brunei, Canada, Cayman Islands, Channel Islands (Jersey, Guernsey, Sark and Alderney), Falkland Isles, Gibraltar, Hong Kong, Isle of Man, Malaysia, Montserrat, New Zealand, Republic of Ireland, South Africa, St Helena, Turks and Caicos Islands, Tuvalu and the British Virgin Islands.

15. See *Hughes v Hannover-Rucksversicherungs AG* [1997] BCC 921.

16. Newey LJ and Stuart-Smith LJ (with Arnold LJ dissenting).

Hence, as matters stand, the relief available to foreign officeholders at common law is more restricted than what is possible under either the CBIR or s 426 of the 1986 Act. It is evident from *Singularis* that, at common law, the English court does not have power to assist a foreign officeholder by entitling them to do anything a domestic officeholder would have been able to do.

Conclusion

From this brief analysis of the case law, it is clear that foreign officeholders have a number of options in the UK in relation to clawback. While there have been few cases in which Article 23 of the CBIR has been used to date, it is significant that this provision enables foreign officeholders to utilise the same anti-avoidance provisions that would have been available to them if they had been appointed in Great Britain.

In contrast to the limited relief that is available at common law, the CBIR provides recognised foreign representatives with a swathe of interim and final remedies that can help safeguard creditors' assets. Given that complex fraudulent schemes which seek to put the assets beyond the reach of creditors are increasingly perpetrated on a cross-border level, it is likely that the CBIR will assume a key role in foreign officeholders' toolkits in the future.

The View from Australia

Introduction

Australia adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2008 when it enacted the *Cross-Border Insolvency Act 2008* (Cth) ("**CBIA**"). The unmodified Model Law is a schedule to the CBIA, and it is given the force of Australian law by virtue of CBIA s 6. Other sections of the CBIA prescribe how the Model Law operates in local conditions.

There have now been nearly 100 decisions published concerning recognition cases in Australia under the CBIA. The vast majority of them have been issued by the Federal Court of Australia, which has exclusive jurisdiction with respect to proceedings relating to debtors who are individuals, and co-ordinate jurisdiction with the supreme courts of the various states and territories in relation to proceedings relating to corporate debtors: CBIA s 10.

That distinction reflects the fact that under Australian law, personal insolvency (referred to as '*bankruptcy*') is dealt with under the *Bankruptcy Act 1996* (Cth), a statute made under Commonwealth (federal) constitutional power, while corporate insolvency (referred to as '*insolvency*') is governed by the *Corporations Act 2001* (Cth), a statute made in part under Commonwealth power and in part under power referred to the Commonwealth by the states.

The Australian approach to recognition is consistent with those in the UK and the USA, insofar as reciprocity is not required in order for a foreign representative to apply for recognition of any foreign proceeding in Australia.

Article 21 of the Model Law provides the relief that may be granted upon recognition of a foreign proceeding. This includes providing for the examination of witnesses, the taking of evidence and the obtaining of information concerning a debtor's assets, affairs, rights, obligations or liabilities, entrusting the administration or realisation of all or part of the debtor's assets located in Australia to the foreign representative or another person designated by the court, and granting any additional relief that may be available to a liquidator or a trustee in bankruptcy under the laws of Australia.

Article 23 of the Model Law provides as follows:

> *"Actions to avoid acts detrimental to creditors*
>
> 1. *Upon recognition of a foreign proceeding, the foreign representative has standing to initiate [refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation].*[17]
>
> 2. *When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding."*

Section 17 of the CBIA prescribes the provisions of the Bankruptcy Act and the Corporations Act which provide the '*actions*' described in Art 23(1). The specified actions include the familiar avoidance proceedings such as those to impugn fraudulent transactions, uncommercial transactions and the preferential treatment of creditors.

Chapter 1 of the Explanatory Memorandum to the *Cross-Border Insolvency Bill 2008* (Cth) explains the objectives of the Bill, the scope of its application and the nature and extent of its implementation. It states that Article 23 is "*drafted narrowly in that it does not create any substantive right regarding [avoidance] actions and also does not provide any solution involving conflict of laws.*"[18] Article 23 and CBIA s 17(1) make that proposition good in respect of the Australian implementation of the Model Law. That is, they give the foreign representative 'standing' to initiate proceedings under Division 2 of Pt 5.7B of the *Corporations Act* (overcoming the fact that the foreign representative may not be the liquidator of the debtor – generally the only person entitled to bring suit under the

17. Italicised text in the Model Law contains directions to local lawmakers.

18. Explanatory Memorandum, Cross-border Insolvency Bill 2007, [67]. The text of the Explanatory Memorandum closely follows that of paragraphs 200 and 201 of the Guide to Enactment in the *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (2013) (**UNCITRAL Guide**).

provisions of Part 5.7B Div 2) but do not purport to create substantive rights in the foreign representative that would not otherwise have existed. That is, Art 23 grants a foreign representative standing to commence a proceeding under Corporations Act s 588FF against (for example) a director of the debtor company for being the beneficiary of an unreasonable director-related transaction entered by the company[19], but does not provide the choice of law rule that determines whether or not an Australian court would apply the section to a given director of a given company.

In *Wild v Coin Co International Plc* [2015] FCA 354, [72] Foster J stated that the *'combined operation'* of Article 23 and CBIA s 11 had the effect of investing the foreign representative and any Australian representatives of that foreign representative with standing to initiate anti-avoidance proceedings under the Corporations Act.[20] That statement is a significant extension to the plain words of the article and the section, which does not find ready support in the Explanatory Memorandum or the UNCITRAL Guide. However, it arguably finds some assistance in Model Law Art 21(1)(g).

Article 21(1)(g) allows the court granting recognition to grant any additional relief available to Australian liquidators or trustees in bankruptcy (as the case may be). For example, a foreign representative might seek orders allowing that representative to issue proceedings against a local director of the debtor company for insolvent trading under Corporations Act s 588G.

The difference between Articles 21(g) and 23 is that the former, although it allows the court to grant relief much wider than (and inclusive of) the relief available under Article 23, is discretionary, whereas Article 23 operates as an automatic consequence of recognition for foreign main proceedings and subject to a non-discretionary (albeit subjective) condition for foreign non-main proceedings.

As with Article 23, while Article 21(g) gives the court the power to grant relief, it does not provide a choice of law rule to determine whether or not the law will grant such relief at the suit of the foreign representative. In both cases, Australian courts have to look to Australian choice of law rules to determine whether any particular action is available to the foreign representative of any given proceeding.

An alternative view of Article 23, which might appear more consistent with the express terms of Article 23 and CBIA s 17 (albeit inconsistent with the Explanatory Memorandum and the UNCITRAL Guide) is that by granting standing to a foreign representative as if the representative were a trustee or liquidator, Art 23 and CBIA s 17 invest the foreign representative with a statutory right to commence proceedings under the *Corporations Act* or the *Bankruptcy Act* (as the case may be) regardless of the operation of the common law choice of law rules.[21] But an argument to that effect was disposed of in *King v Linkage Access Ltd* [2018] FCA 1979 (*The Dragon Pearl*).

The Dragon Pearl concerned a Singaporean debtor company. The trustee of a Ch 7 liquidation of the debtor in the United States of America sought to cause the debtor to bring proceedings in the Federal Court of Australia under the Corporations Act concerning a ship called 'The Dragon Pearl'. The debtor was neither registered nor carrying on business in Australia. It thus did not fall within the Corporations Act definition of a 'company'. Because the proceedings in question could only be brought *"on the application of a company's liquidator"* and in respect of *"a transaction of the company"*, the proceedings were struck out as incompetent.

The effect of *The Dragon Pearl* is that Art 23 does not create a substantive right in foreign representatives to commence avoidance proceedings under the Corporations Act. However, it does not necessarily rule out the possibility that analogous actions might be brought in cases of personal insolvency. That has not yet been the subject of any published judgment. Nevertheless, any argument would have to confront Perram J's statements in *The Dragon Pearl* to the effect that to give a foreign representative such powers would be to *"alter the substantive insolvency law of Australia"* and *"[to take] Art 23 well beyond a standing rule."*[22]

Notwithstanding *The Dragon Pearl*, there are many Australian decisions which confirm the standing of foreign representatives to take anti-avoidance actions (as opposed to the availability of those actions) as part of the panoply of powers granted upon recognition (or by way of interim assistance).

Where the debtor carries on a business in Australia it is usual for the foreign representative, upon recognition of the foreign proceeding as a foreign main proceeding, to be entrusted with the administration of the debtor in Australia (including the realisation and distribution of all its assets in Australia) and to be given all the powers usually available to a liquidator or trustee in bankruptcy, as the case may be. There have also been occasions where a foreign representative has sought the joint appointment of a local insolvency practitioner, or even the appointment of a local practitioner alone. Where a local practitioner is appointed alone, the foreign representative may not be able to take control of the debtor's estate or become the registered owner of the debtor's property (particularly real property).[23]

In *Kapila, in the matter of Edelsten (No 2)* [2016] FCA 1269 the applicant was the trustee of a personal bankruptcy under Ch 7 of the United States Bankruptcy Code. He was granted recognition of the bankruptcy as a foreign non-main proceeding in Australia. The recognition orders included orders empowering an

19. See *Corporations Act* s.588FDA.

20. The reference to Australian representatives was to persons designated by the Court in orders granted under Art 21(1)(e).

21. On this argument, Article 23 would have a practical effect loosely similar to that of *Corporations Act* s 186, as to which see *ASIC v MacDonald (No 11)* (2009) 71 ACSR 368, 523-524 (Gzell J). However, note the principle that general words in a statute are to be read down by reference to principles of private international law so as to be confined to what "*it is within the province of our law to affect or control*": *Wanganui-Rangtikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 601 (Dixon J); *Valve Corporation v Australian Competition and Consumer Commission* (2017) 351 ALR 584, 617 [105] and see Stewart Maiden, 'Private International Law' in Michael Gronow, *McPherson's Law of Company Liquidation* (online service) [17.1210], text at footnotes 14-17 and authorities there cited.

22. *King v Linkage Access Ltd* [2018] FCA 1979, [28]; see too at [38]-[40].

23. See e.g. *Palmer v Registrar-General of Land Titles of the Australian Capital Territory* (2017) 181 ACTR 1 (Mossop J).

Australian agent to examine witnesses and conduct examinations under Article 21(1)(g), with all the powers normally available to a trustee in bankruptcy under the Bankruptcy Act. Subsequently, the US trustee obtained orders varying that order to allow him to exercise those powers directly himself, in place of the Australian representative, and entrusting the administration and realisation of the debtor's Australian assets to him directly.

After obtaining recognition, the trustee commenced proceedings in the United States to set aside two Australian registered mortgages that the debtor had granted to an Australian bank as a fraudulent transfer of an interest in property for no consideration.

In coordinating the two sets of proceedings and facilitating cooperation between the Australian and United States courts under Model Law Arts 25 to 30, Beach J accepted an undertaking from the US trustee to the effect that any claims under *Bankruptcy Act* ss 120 or 121 or equivalent legislation for the avoidance of transactions by a trustee in bankruptcy would only be commenced in the Federal Court of Australia, and not in United States courts. Nothing in the law reports suggests that any such proceedings were ever commenced.

Kapila illustrates the operation of Article 23 in an Australian anti-avoidance setting, but it was decided prior to the decision in *The Dragon Pearl* and did not address the interesting choice of law questions to which Art 23 gives rise.

There is another line of cases that provided for the grant of powers directly to foreign representatives which, while not providing for anti-avoidance actions themselves, give powers that might assist anti-avoidance actions.

For example, in *Abate, in the matter of Chang Rajii v Chang Rajii (No 3)* (2019) 135 ACSR 643, Gleeson J, after recognising a Chilean bankruptcy as a foreign main proceeding and the Chilean bankruptcy trustee as a foreign representative, entrusted the Chilean trustee with the administration and realisation of the debtor's assets in Australia and made orders empowering him to conduct examinations under the Bankruptcy Act in the same way as if he had been appointed as trustee under the Australian statute. In so doing, her Honour followed two earlier decisions in the Federal Court of Australia empowering the foreign representative to conduct examinations under equivalent sections of the *Corporations Act*.[24]

An alternative to applying for Model Law recognition and relief is the *"letter of request"* procedure under Corporations Act s 581 and its equivalent, Bankruptcy Act s 29.

Section 581 provides that the Court, in an external administration matter, *must* act in aid of, and be auxiliary to, a court of a prescribed country, and *may* act in aid of courts of other countries. Prescribed countries include the UK, USA, New Zealand, Canada, Singapore, Switzerland, Malaysia, Jersey and Papua New Guinea. *Bankruptcy Act* s 29 is in substantially the same terms. Section 29(3) provides that where a letter of request from a court of a country other than Australia is filed in the court, the court *may* exercise such powers with respect to the matter as it could exercise if the matter had arisen in its own jurisdiction.

There are many examples of the use of the letter of request procedure. For example, in *Dick v McIntosh* [2002] FCA 1135, Cooper J made orders under Bankruptcy Act s 29 pursuant to a letter of request from the High Court of Justice of England and Wales, including appointing an Australian receiver of the debtor's property in Australia and empowering an English trustee in bankruptcy to have the carriage of examinations by the receiver. *Dick v McIntosh* followed earlier decisions including *Radich v Bank of New Zealand* (1993) 45 FCR 101 (***Radich***).

Since the enactment of the CBIA, the letter of request procedure has most often been applied in Australia where the debtor has neither a centre of main interests nor an establishment in the country of the foreign proceeding (rendering Model Law recognition unavailable). For example, *Gainsford v Tannenbaum* (2012) 216 FCR 543 (***Gainsford***), concerned a man who had been bankrupted in South Africa but was found to have neither his centre of main interests nor any establishment there.

There are also cases where the procedure has been used as an adjunct to the Model Law. For example, in *Crumpler v Global Tradewaves* [2013] FCA 1127, Logan J utilised both Model Law Art 21(1)(d) and Corporations Act s 581 to order the examination of an Australian resident by the foreign representative. In that case, the Court received in to evidence a letter of request from a court in the British Virgin Islands.

In *Gainsford*, Logan J extended assistance under *Bankruptcy Act* s 29(2) to a South African trustee, acting pursuant to a letter of request from the High Court of South Africa, and made orders for the bankrupt to produce a statement of his affairs and for the conduct of examinations in Australia.

In doing so, his Honour stated at [29]:

> *"Section 29 of the Bankruptcy Act has a lengthy provenance in the insolvency law of Australia and the United Kingdom … In turn, s 29 and its cognates have, in part, a declaratory quality in that, at common law, there is an ideal of universality of application with respect to bankruptcy proceedings: Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508 at [14] to [20] (**Cambridge Gas**). In Williams v Simpson at [82], Heath J opined that the common law position as described for the Judicial Committee by Lord Hoffman in Cambridge Gas should inform the exercise of the discretion under the New Zealand equivalent of s 29 of the Bankruptcy Act. I respectfully agree with this approach to the exercise of such a discretion."*

The use of the letter of request provisions in circumstances where the Model Law applies is limited by CBA ss 21 and 22, which provide that those provisions have no effect to the extent of any inconsistency with the Model Law, but inconsistency is given a relatively narrow

24. *Lawrence v Northern Crest Investments Limited (in liquidation)* [2011] FCA 925; *Crumpler v Global Tradewaves Ltd (in liquidation)* [2013] FCA 1127.

meaning for that purpose: see *Re Chow Cho Poon (Private) Ltd* (2011) 80 NSWLR 507 (***Chow Cho Poon***).

The question that is relevant for present purposes is what judicial assistance is available under the letter of request procedure, and whether that extends to allow foreign representatives to prosecute local anti-avoidance actions.

The answer to that question might draw indirect assistance from the decision of Gordon J in *Lees v O'Dea (No 2)* [2014] FCA 1082 (***Lees***), which concerned a letter of request from a court in Hong Kong. At [21]-[22], her Honour stated as follows:

> *"Is there power under s 29 of the Bankruptcy Act for the Court to appoint a receiver of Mr O'Dea's divisible property in Australia in aid of the administration of Mr O'Dea's insolvent estate in Hong Kong?*
>
> ...
>
> *The assistance provided by an Australian Court is not limited to where the Australian Court and the foreign court have powers that mirror each other: Radich at 121. As Drummond J (Foster J agreeing) said in Radich:*
>
> > *If there is a "matter of bankruptcy" within s 29(3) before the foreign court, the Australian court, in response to a request for aid, can exercise any of the powers it has under the Bankruptcy Act if that same matter had arisen in Australia, being powers the exercise of which will provide assistance to the foreign court in the circumstances of the particular case ..."*

The width of the statement made in *Lees* suggests that Bankruptcy Act s 29 (and by analogy Corporations Act s 581) may enable a court to clothe a foreign trustee with the power to take advantage of Australian anti-avoidance provisions. And yet *Radich* (on which *Lees* relied) rested in part on the unanimous High Court decision in *Hall v Woolf* (1908) 7 CLR 207, where Griffith CJ (for the Court) stated at 212 that a provision equivalent to Bankruptcy Act s 29 *"does not create any new rights but only creates new remedies for existing rights."*

Referring to that passage from *Hall v Woolf*, in re *Independent Insurance Company Ltd* [2005] NSWSC 587, [15] – [16], Barrett J held:

"The effect of analogous United Kingdom provisions in s 426 of the Insolvency Act 1986 (UK), from the perspective of a court receiving a letter of request, was considered by the English Court of Appeal in England v Smith [2001] 1 Ch 419. It was there observed, following Hughes v Hannover Ruckversicherungs AG [1997] 1 BCLC 497, that the task of the receiving court is to apply either its own insolvency law or the insolvency law of the requesting country and, in either case, its own general jurisdiction and powers. Under s 581, the position is somewhat different. Section 581(3) enables an Australian court having jurisdiction under the Corporations Act 2001 (Cth) which receives a letter of request issued by an English court invested with jurisdiction in respect of companies under the Insolvency Act 1986 (UK) to exercise, in respect of matters relating to the United Kingdom insolvency, powers that the Australian court could have exercised if the matters had arisen in Australia. Section 581(2)(a) requires the Australian court, by exercise of those powers or other aspects of its own jurisdiction, to act in aid of the English court. But the Australian court is not expressly permitted or required by the Australian legislation to exercise the statutory powers that the English court itself may exercise; nor, of course, can the United Kingdom legislation be the source of any direct power of the Australian court to do so.

"In the present case, this court is asked to award remedies that are general equitable remedies. This is in line with cases in which the equitable remedy of appointment of a receiver has been granted by a court exercising auxiliary jurisdiction in support of a foreign insolvent administration: see, for example, Re a Debtor [1981] Ch 384; Dick v McIntosh [2001] FCA 1008. The Privy Council has recently confirmed in Al Sabah v Grupo Torras SA [2005] 2 WLR 904 that the aim of provisions like ss 581(2)(a) and 581(3) is to provide a basis for the exercise of the domestic court's jurisdiction where such a basis does not already exist. Such provisions do not augment the jurisdiction except in a geographic sense. It is in that light that the reference by Griffith CJ in Hall v Woolf to the creation of "new remedies for enforcing existing rights" is to be understood."

Barrett J repeated interpretation of *Hall v Woolf* in *Re Chow Cho Poon* at 513 [20].

The authors are aware of no situation where the letter of request procedure has been employed to utilise Australian anti-avoidance provisions in respect of a transactions of a foreign debtor. While the authorities explored above suggest that such an outcome might be possible, *Hall v Woolf* remains a potential obstacle imposed by Australia's highest court, despite Barrett J's first-instance interpretation of it. In resisting the application of Australian provisions, defendants might also be expected to invoke choice of law rules and statutory interpretation arguments which militate against the extraterritorial application of domestic legislation.[25] All that can be said with certainty is that it remains ground fertile for dispute.

In addition to the letter of request procedure, there also remains the prospect of common law assistance in the exercise of the inherent jurisdiction of superior courts. Such a notion was referred to by Barrett J in *Chow Cho Poon* at [78], but in an extra-curial article, James Spigelman (then Chief Justice of the Supreme Court of New South Wales) wrote:

> *"[t]he concept of an inherent jurisdiction to provide assistance to foreign courts as a matter of common law principle remains a matter of contention in a context where the artificial legal personality involved is a product of statute and is subject to detailed statutory regulation, including express provision in the relevant respect."*[26]

Whether the same contention would apply in cases of personal bankruptcy is a matter worthy of consideration. But whatever the answer, the authors are aware of no Australian case where any inherent jurisdiction has been invoked to allow access to Australian avoidance actions in aid of a foreign insolvency proceeding.

In conclusion, then, the availability to foreign representatives of anti-avoidance relief under Model Law Articles 21 and 23 of the Model Law is – at least in theory – well established in Australia, but only in circumstances where that relief would otherwise be available independent of the Model Law. It may be a rare case where a foreign-domiciled debtor satisfies that criterion, and there are as yet no reported decisions in which a foreign representative has successfully invoked Australian anti-avoidance provisions.

In a case where Model Law relief may not be available, alternative assistance to similar effect can be sought under the letter of request procedure equivalent to that of s 426 of the 1986 Act. While that more general provision might potentially offer a little more comfort to a foreign representative seeking to utilise Australian anti-avoidance provisions, the question remains undetermined.

Conclusion

The varied extent to which local powers are made available to foreign representatives by the respective laws of the UK and Australia demonstrates that even as the procedural laws of cross-border insolvency have been developing in parallel, there remain remarkable differences in substantive law, even between two jurisdictions which share a common insolvency law heritage.

Those differences have the potential to drive different outcomes dependent on the decisions taken in any given case, particularly by the insolvency practitioner or debtor-in-possession that has carriage of the relevant proceeding.

Consequently, it is incumbent on those advising insolvent debtors, their counterparties and company officers, and insolvency practitioners, about the means available to pursue their clients' rights using foreign law. It is also important for advisers to keep an open mind about the prospects of using (and the risk of having to defend against) actions brought by foreign means. ■

25. See fn 21 above.

26. J Spigelman, *Cross-border Insolvency: Cooperation or Conflict?* (2009) 83 ALJ 44, 49.

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Transaction avoidance in offshore jurisdictions and recent developments of interest

Gemma Lardner, Nicholas Fox and Toby Brown provide a comparative analysis of transaction avoidance provisions in the BVI, Cayman Islands, Guernsey, Hong Kong and Jersey, noting a number of recent developments in legislation and case law.

In the context of winding up proceedings, the need for legal certainty can conflict with the need for an equal distribution of assets to unsecured creditors, and the balance between these interests comes into play in the transaction avoidance provisions enacted across the offshore world. In this article we will summarise the similarities and differences between these provisions across a number of Crown Dependencies and Offshore Territories, namely the Cayman Islands, BVI, Guernsey, Jersey ("**CDOTs**"), and in addition Hong Kong ("**HK**").

The origin of these provisions is ancient, dating back to the Statute of Elizabeth of 1571 which declared void all dispositions and conveyances of property made with the intention of defrauding creditors. There are now a variety of transaction avoidance provisions on the statute books that we will review in this article, namely: (a) preferences; (b) transactions defrauding creditors or at an undervalue; (c) avoidance of dispositions after commencement of liquidation; (d) extortionate credit transactions; and (e) avoidance of floating charges. After providing tabular summaries of these provisions, we will discuss several recent developments in legislation and case law in the CDOTs.

Preferences

The prohibition against giving preferences stems from the English common law developed during Lord Mansfield's time in the 18th century, later being enacted into bankruptcy and then corporate insolvency legislation in England. Similar legislation was enacted in the 20th century in all of the CDOTs and HK, and in the UK can currently be found in s 239 of the Insolvency Act 1986 ("**1986 Act**").

Broadly speaking these provisions are aimed at creditors who, in the *"sunset"* period before commencement of the liquidation, unfairly jump the queue by being paid their debt (or given security) ahead of other creditors, thus reducing the assets available for equal distribution to all unsecured creditors. Where the creditor is thus *"preferred"*, the transaction can be unwound by the court on an application by the liquidator.

We provide an analysis of the different provisions in the table below. As with all the tables in this article, when advising practitioners should check the local legislation we refer to, as well as considering what limitation period might be applicable.

	BVI	Cayman Islands	Guernsey	Hong Kong	Jersey
Unfair Preferences					
Vulnerability Period	Within 6 months of onset of insolvency(2 years for connected persons).	Within 6 months of commencement of winding up (2 years for related parties).	Within 6 months (or 2 years in the case of a "connected party") immediately preceding the application for a compulsory winding-up.	6 months (2 years for associates).	12 months.
Jurisdiction	Insolvency Act, section 245.	Companies Act, section 145.	Companies (Guernsey) Law, section 424.	Companies (Winding Up and Miscellaneous Provisions) Ordinance, sections 266 & 266A.	Companies (Jersey) Law 1991, Article 176A. Bankruptcy (Désastre) (Jersey) Law 1990, Article 17A.
Legal Test (summary)	· insolvency; · not ordinary course of business; · the company takes a step which puts a creditor into a better position than the creditor would have been in if that step had not been taken; · transactions withconnected persons presumed to constitutea preference.	· insolvency; · transaction made with the dominant intention of giving the creditor a preference over other creditors; · related party transactions deemed to have been made with a view to giving the creditor a preference.	· insolvency; · the company does anything, or permits anything to be done, which improves a company's creditors or a surety or guarantor for any of the company's debts or other liabilities position in the company's liquidation.	· the company does anything or suffers anything to be done which has the effect of putting that person into a position which, in the event of the company going into liquidation, would be better than the position that person would have been in if that thing had not been done; · the company is influenced by a desire to produce that result; · presumption of influence for connected persons (except employees).	· the company enters into a transaction which: i. puts the company's creditors, guarantor or surety in a better position, in the event of a declaration en désastre/ winding up, than it would have been in but for the transaction; and ii. there was a desire to prefer; and iii. the transaction occurred within 12 months of the declaration/ winding-up; and · the company was insolvent or became insolvent as a result of the transaction.

Transactions defrauding creditors / at an undervalue

We next turn to consider transactions defrauding creditors, and transactions at an undervalue, which are overlapping provisions which ultimately originate from the Statute of Elizabeth of 1571 (also known as the Fraudulent Conveyances Act). Broadly speaking their purpose is to discourage the management from transferring the company's property to their associates and thus depleting the estate available to creditors.

Such a transaction might involve a gift of the company's property for no consideration, or the selling one of the company's assets at lower than market value, or acquiring an asset at an inflated price. We compare the provisions in the CDOTs and HK below, which in the UK may be found in ss 238 and 423-425 of the 1986 Act.

	BVI	Cayman Islands	Guernsey	Hong Kong	Jersey
Dispositions at Undervalue					
Vulnerability Period	Within 6 months of onset of insolvency(2 years for connected persons).	6 years (limitation period).		5 years.	5 years.
Jurisdiction	Insolvency Act, section 246.	Companies Act, section 146.	Amendment likely to take effect in 2022, see recent developments below.	Companies (Winding Up and Miscellaneous Provisions) Ordinance, section 265D Cap 32.	Companies (Jersey) Law 1991, Article 176. Bankruptcy (Désastre) (Jersey) Law 1990, Article 17.
Legal Test (summary)	· insolvency; · where a disposition was made for no consideration or significantly less than its value · transactions with connected persons presumed to be insolvency transaction and not in good faith and for benefit of company.	· insolvency; · where a disposition was made at an undervalue (for no consideration or for consideration the value of which is significantly less than the value of the property the subject of the disposition); and with an intent to defraud the company's creditors.		· insolvency; · the company makes a gift to a person, or otherwise enters into a transaction with a person on terms that provide for the company to receive no consideration; or · the company enters into a transaction with a person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.	· insolvency; · the company makes a gift to a person, or otherwise enters into a transaction with a person on terms that provide for the company to receive no cause; or · the company enters into a transaction with a person for a cause the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the cause provided by the company.
(Fraudulent) Transactions to Defeat Creditors					
Jurisdiction		Companies Act, section 147.	Customary law notion of fraudulent preferences and Pauline actions.		Customary law remedy of Pauline action.
Legal Test (summary)		Where any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose.	· The person bringing the action must have been a creditor at the time of the transaction. · The debtor must have been insolvent at the time of the transaction, measured on the balance sheet test of insolvency. · The transaction must have been carried out by the debtor with the intention, or for the substantial purpose, of defrauding his creditors.		· The debt of the creditor must precede the transfer in question. · The debtor must be insolvent at the time of the transfer or rendered insolvent by it. There must be a close connection in time and effect between the transfer and the subsequent insolvency. · Insolvency is to be measured by the balance sheet test. · The transfer must have been undertaken with the intention (object) of defeating his creditor. There is no need for that intention to be the dominant purpose – it is sufficient for it to be a substantial purpose of the transfer. · Where no cause is given for the transfer (lucrative transfer), only the debtor need have an intention to defeat the creditor. Alternatively, where there is adequate consideration (onereuse transfer), the debtor and counter party must have an intention to defeat the creditor.

Commencement of liquidation

Another key way that transactions may be avoided is by the statutory provisions which provide that dispositions of the company's property are void (unless the court orders otherwise) from the commencement of winding-up, the timing of which is deemed to retrospectively commence when the petition was presented rather than the winding-up order. The details are to be found in the jurisdictions' insolvency legislation, which in the UK is to be found in ss 127 and 129 of the Insolvency Act 1986.

Extortionate credit transactions

A further remedy available to liquidators in some jurisdictions is to apply to court to set aside an extortionate credit transaction previously entered into by the company. We provide a further tabular summary below for the CDOTs and HK, noting that in the UK the current provision is s 244 of the 1986 Act which was modelled on ss. 137–139 of the Consumer Credit Act 1974.

	BVI	Cayman Islands	Guernsey	Hong Kong	Jersey
Extortionate Credit Transactions					
Vulnerability Period	5 years.			3 years.	3 years.
Jurisdiction	Insolvency Act, section 248.		Check upcoming changes to Companies (Guernsey) Law, see recent developments below.	Companies (Winding Up and Miscellaneous Provisions) Ordinance, section 264B Cap 32.	Article 179 Companies (Jersey) Law 1991. Bankruptcy (Désastre) (Jersey) Law 1990, Article 17C.
Legal Test (summary)	If the transaction required grossly exorbitant payments to be made in respect of the credit or otherwise grossly contravenes ordinary principles of fair trading.		If the terms require grossly exorbitant payments or otherwise grossly contravenes the ordinary principles of fair dealing.	· insolvency; · the terms require grossly exorbitant payments to be made in respect of the provision of credit; or · it otherwise grossly contravenes ordinary principles of fair dealing.	· insolvency; · the terms require grossly exorbitant payments to be made in respect of the provision of credit; or · it otherwise grossly contravenes ordinary principles of fair dealing.

Avoidance of floating charges

The final type of transaction avoidance provision concerns floating charges granted over the company's assets which can be declared invalid under certain circumstances. As set out below, the only jurisdictions covered by this article that feature this type of avoidance provisions are the BVI and HK, which in the UK may be found in s 245 of the 1986 Act.

	BVI	Cayman Islands	Guernsey	Hong Kong	Jersey
Voidable Floating Charges					
Vulnerability Period	6 months prior to onset of insolvency (2 years for connected persons).			· 2 years ending with the on which the winding up commences for a person connected to the company; · 12 months from the commencement of the winding up if in favour of any other person.	
Jurisdiction	Insolvency Act, section 247.			Companies (Winding Up and Miscellaneous Provisions) Ordinance, section 267.	
Legal Test (summary)	· insolvency; · any floating charge granted in relevant period unless the floating charge secures money advanced / a liability discharged at the time of, or after, creation of the charge.			· insolvency; · if the company creates a floating charge on its undertaking or property within the relevant time.	

Recent Developments

As shown above, each jurisdiction has adopted a different array of statutory remedies as part of its transaction avoidance regime. They have also seen distinct developments revolving around quite different areas of avoidance transactions. We set out some of these changes below, to give a flavour of the types of issues that are still being developed in relation to this area of law.

Cayman Islands

We are going to focus on three recent developments in the Cayman Islands.

Changes to liquidation commencement date in a restructuring context

The recent Companies (Amendment) Act 2021 brought in provisions, not yet in force, allowing for the appointment of a Restructuring Officer ("**RO**"), as an alternative to filing a winding-up petition and then seeking the appointment of Provisional Liquidators.

Part of those changes impact s.100 of the Companies Act, governing the deemed date of commencement of the winding-up. Once in effect, if an RO is appointed and not discharged and the company subsequently goes into liquidation, then the date of winding-up will be deemed to be the date on which the RO was appointed.

This is an important protection for creditors in the event that a restructuring effort is ultimately unsuccessful, as it prevents any delay in presentation of a winding up petition from extinguishing potential clawback claims.

Recent case-law regarding the test for validation of post-petition transactions

The Grand Court has, in recent years, been called upon to make a number of validation orders regarding transactions involving Cayman companies after a winding-up petition has been presented.

For many years, the threshold test was thought to be tolerably clear. Following the judgments in *Re Fortuna Development Corporation*[1] and *Re Cybervest Fund*[2] a five-fold test had to be surmounted before an applicant could obtain a validation order, namely:

> *"... First, the proposed disposition must appear to be within the power of the directors... Secondly, the evidence must show that the directors believe the disposition is necessary of expedient in the interests of the company... Thirdly, it must appear that in reaching the decision the directors have acted in good faith. The burden of establishing bad faith is on the party opposing the application. Fourthly, the reasons for the disposition must be shown to be ones which an intelligent and honest director could reasonably hold."*[3]
>
> *"... in the context of an application to validate a specific payment that was not in the ordinary course of business and where irregularities in the conduct of the affairs could be shown... even if the company is clearly solvent, payment may not be validated where irregularities in the conduct of the affairs of the company can be shown."*[4]

Fortuna and *Cybervest* both involved solvent companies and both involved proposals intended to further the companies' ordinary courses of business. Subsequently, however, the Cayman Court of Appeal reconsidered this area in the 2020 case of *Tianrui v China Shanshui*.[5] In that case, whilst the company was solvent, the proposed transaction did not form part of the company's ordinary course of business.

In considering the previous formulations of the applicable test, Moses JA said:

> *"The real danger I detect in the approach in Burton and Fortuna is that it focuses on the burden of proof and creates a presumption in favour of the belief of the directors as to the propriety of their proposals. Cases will rarely turn on the burden of proof; there is no presumption. In every case, those seeking a validation order must be able to satisfy the court that what is proposed will not undermine the avoidance function of s.99, that it will not impede or frustrate the unwinding of transactions after the presentation of the petition but will maintain the status quo. That is so whether the company is solvent or insolvent, and whether the proposal is made in the ordinary course of business or not. Where the proposal is made for the purposes of the ordinary course of business, the court will more readily take the view that there is no unacceptable risk to the maintenance of the status quo. In such a case the views of the directors as to whether the proposals are for the benefit of the company will plainly be relevant even though not dispositive."*

That reformulated test was followed in *Jian Ying Ourgame High Growth Investment Fund v Ourgame International Holdings Limited*,[6] [although it appears not to have been brought to the Court's attention in the more recent case of *Evenstar v Fang Holdings* – unreported 13 September 2021.]

Voidable preferences

As readers will know from previous articles in the South Square Digest,[7] the Privy Council recently considered the test for voidable preferences in the case *Skandinaviska v Conway*.[8]

As stated in that article: *"The statutory provision, s. 145 of the Companies Law, renders a payment 'invalid,' the effect of which is the payment is voidable (not void ab initio). However, the Cayman legislation contains no statutory remedy to*

1. [2004-05 CILR 533].
2. [2006 CILR 80].
3. *Re Fortuna*, relying on the English case of *In re Burton & Deakin Ltd* [1977] 1 WLR 390.
4. *Evenstar v Tianquan and Fang*, unreported, 13 September 2021.
5. [2020(1) CILR 417].
6. Unreported 11 August 2021.
7. November 2019 - https://southsquare.com/wp-content/uploads/2019/11/Digest-Nov-2019.pdf.
8. [2019] UKPC 36.

recover the payment (to be contrasted to ss. 239 and 241 of the Insolvency Act 1986 in the UK).”

The Companies (Amendment) Act 2021 remedies this (when it comes into force) by changing s.145 by deleting the word “*invalid*” and substituting the words “*voidable upon the application of the company’s liquidator*”. Whilst the effect of this amendment will remain to be seen, it appears to be an attempt to fill the previously absent statutory remedy to recover the monies.

BVI

We are going to mention two recent cases from the BVI.

The first is the 2018 decision of the Eastern Caribbean Supreme Court in *Byers v Chen Ningning*,[9] which dealt with unfair preferences under s.245 of the Insolvency Act. This case examined the scope of the ‘ordinary course of business’ exemption to what would otherwise be an unfair preference. The Defendant made the argument that any repayment of a loan during a contractually obligated time would be a repayment in the ordinary course of business. The Court emphatically rejected that argument, commenting that if it was correct, then that would:

> *“Render the rules on unfair preferences wholly otiose as… no payment to a creditor in accordance with obligations under a commercial contract could ever be susceptible to challenge as a preference.”*

The second is the well-known 2019 decision of the Privy Council in *UBS v Fairfield Sentry*,[10] which held that s.246 of the Insolvency Act, covering undervalue transactions, did not either expressly or by necessary implication confer an exclusive jurisdiction on the High Court so as to preclude foreign courts, when assisting a BVI liquidation, from exercising such powers.[11]

Jersey

A recent development in Jersey involved the 2021 case of I*nvestin Quay House Limited (in Liquidation) v BUJ Architects LLP.*[12]

There, a Jersey company, which was the subject of a winding-up petition before the English Court, placed itself into voluntary liquidation and then applied for an anti-suit injunction to restrain the petitioner from continuing with the English proceedings.

The Company argued that, based on the principle of universalism, it should be wound-up in its place of incorporation. It said that the alternative, a race to begin insolvency proceedings in other jurisdictions in which individual creditors might perceive particular advantage for their individual positions, could result in an unattractive free-for-all in the distribution of the company’s assets.

The English petitioner argued that the Company’s position was merely an attempt to protect its sole director and only shareholder from an anticipated avoidance action. In England, the relevant look-back period for a preference was two years prior to insolvency, whereas in Jersey it was only one year. In this case, a substantial payment had taken place between one and two years prior to the commencement of the winding up.

The Jersey Court recognised that the starting point would be that ordinarily insolvency proceedings should take place in the jurisdiction of incorporation but determined that, in this case, the desirability

9. BVIHCVAP2015/0011 - 12 June 2018.

10. [2019] UKPC 20.

11. See pages 27 of the July 2019 Digest and 15 of the March 2020 Digest.

12. [2021] JCA 299.

of having only one set of proceedings in that jurisdiction was superseded by the interests of the company's stakeholders in allowing the avoidance action to take place. Accordingly it refused to grant an anti-suit injunction and that decision was upheld on appeal.

Guernsey

Finally, in Guernsey there are a number of significant developments, brought about by the new Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance, 2020 (the "**Ordinance**"), which was passed on 15 January 2020.

While not yet in force, the Ordinance makes wide-ranging improvements to Guernsey's corporate insolvency regime, including introducing avoidance provisions for transactions at undervalue and extortionate credit transactions.[13]

Under the new provisions, a liquidator or administrator, can apply to court to set aside a transaction at undervalue,[14] if entered into within six months immediately preceding the commencement of the insolvency proceedings,[15] and at a time when the company was insolvent, or became insolvent as a result of the transaction. The period is extended to transactions entered into within two years immediately preceding the commencement of the insolvency proceedings (and at a time when the company was insolvent) in situations where the company transacted with a connected person. An exception is included for transactions entered into in good faith and for the purpose of carrying on the company's business, or if at the time, there were reasonable grounds for believing the transaction would benefit the company.

A liquidator or administrator can, under the new provisions, apply to the court for relief in respect of an extortionate credit transaction,[16] if the transaction was entered into during a period of three years immediately preceding the commencement of the insolvency proceedings. The court is empowered to make any order it thinks fit, including an order to set aside the transaction, to vary the terms of the transaction, for repayments in respect of the transaction, for the surrender of property held as security for the transaction and for the taking of accounts.

The publication of insolvency rules are anticipated, which will provide further guidance on the operation of the new provisions.

The Ordinance brings clarification to Guernsey's insolvency regime, enhancing existing statutory powers and providing codification where Guernsey insolvency practitioners have historically relied on customary law.[17] Customary Law will still be useful in circumstances beyond the scope of the legislative provisions.

Concluding remarks

The various provisions we have considered in this article show that a uniform approach has been adopted in a number of offshore jurisdictions in order to provide the necessary tools to liquidators to claw-back assets from creditors, where they can be said to have obtained an unfair advantage over other creditors. However, the distinct approaches that remain between these provisions (which are not necessarily the same as England) emphasise the need for careful consideration in each case. ■

13. The Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance, 2020 introduces new sections 426D (transactions at undervalue) and 426E (extortionate credit transactions) into the Companies (Guernsey) Law, 2008.

14. A transaction will be considered undervalue if the company makes a gift or otherwise enters into a transaction on terms that provide for the company to receive no valuable consideration, or consideration which is significantly less than the consideration provided by the company (new section 426D(2)(a)).

15. The relevant date being the earlier of: (i) the date of the making of any application for the compulsory winding up of the company; (ii) the date of the passing by the company of any resolution for the voluntary winding up of the company; or (iii) the date of the making of any application for an administration order.

16. A credit transaction will be considered extortionate if, having regard to the risk accepted by the person providing the credit, the terms require grossly exorbitant payments, or otherwise grossly contravene the ordinary principles of fair dealing (new section 426E(2)(a)).

17. Flightlease Holdings (Guernsey) Limited v International lease Finance Corporation 2005-06 GLR [N] 11; *Batty v Bourse Trust Company Limited* 2017 GLR 54.

Case Digest Editorial

by Jeremy Goldring

Much has happened in the world since the last Digest, not all of it good. But as shells rain down on Ukraine, there is something re-assuring about the continuing steady flow of judicial decisions across the common law world, both onshore and offshore. One may always disagree with a judgment but remain content that it was properly reached in good faith and reasonably confident it will be respected by other national institutions. That is a bulwark against a lawless dystopia.

Four judgments were of particular interest. In the latest part of the *Brownlie* litigation, the Supreme Court continued to explore the consequences of a terrible car crash in Egypt, a majority holding (perhaps surprisingly) that the claimant had suffered damage in England for the purposes of the tort jurisdictional gateway.

In *Aquila Advisory*, the Supreme Court applied *Bilta (UK) Ltd v Nazir* as authority for the proposition that the unlawful acts or dishonest state of mind of a director cannot be attributed to the company so as to afford the director an illegality defence to the company's claim against him for breach of fiduciary duty.

Thirdly, the Cayman Island Court of Appeal handed down its long-awaited and lengthy judgment in the *Saad* litigation, largely upholding the conclusions of the trial judge, the Chief Justice. It remains to be seen whether there will be appeals to the Privy Council or whether the saga, which arose out of the 2008 financial crisis, is approaching its conclusion.

Finally, the courts have also been concerned with more recent troubles, the effects of Covid. In *Corbin & King*, for example, the Companies Court interpreted and applied the new moratorium provisions in Part A1 of the Insolvency Act 1986, enacted in 2020, demonstrating their potential usefulness, though in fairly limited circumstances, for trading debtors with cashflow difficulties.

Case Digests

Banking and Finance

DIGESTED BY STEFANIE WILKINS

Wang v Darby

[2021] EWHC 3054 (Comm) (Stephen Houseman QC, sitting as a Deputy Judge of the High Court)
17 November 2021

Cryptocurrencies · Trusts

The claimant (Mr Wang) and the defendant (Mr Darby) had entered into contracts which provided that the parties would exchange with each other a specified amount of their respective cryptocurrencies (Tezos and Bitcoin), and that, after two years, the cryptocurrencies would be restored. The legal question for the Judge was whether these arrangements were simply a sale and buy-back agreement (in which no proprietary interest was created), or whether some form of trust was created in respect of the Tezos that Mr Wang had transferred to Mr Darby.

It was common ground between the parties that "fungible and non-identifiable digital assets", such as the Tezos, were property that could be the subject of a trust as a matter of English law. However, on the facts of the case, no trust could arise. The "economic reciprocity" of the transactions prevented the creation of any trust. Further, the negotiations between the parties, and the terms which were binding on them, were set out in informal electronic messages; the arrangements were properly characterised as being in the nature of a sale and purchase transaction, which would be "inimical to the creation or imposition of a trust".

The Judge further observed that there would be difficulty in proving that a constructive trust had been created in respect of assets which were fungible and non-identifiable. It was not a case in which there could be said to be a specifically enforceable contract for unique property. Moreover, a trust was unnecessary to give effect to the parties' legitimate expectations or commercial obligations.

Accordingly, the proprietary claim was dismissed summarily. The Judge observed that this was the first contested hearing in England and Wales to deal with the question whether a trust exists over cryptocurrency. In the event, it was common ground between the parties that a trust could exist as a matter of law, albeit that it could not arise on the facts of the case.

Civil Procedure

DIGESTED BY ANNABELLE WANG

Rapid Displays Inc & Anor v Ahkye & Anor

[2022] EWHC 274 (Comm) (HHJ Pearce sitting as a Judge of the High Court)
10 February 2022

Relief from sanctions · Summary judgment · *Denton v White*

In the context of a claim by which the claimants sought recovery of USD$500,000 paid into the account of the second defendant, the Judge had previously made an unless order requiring the defendants to pay £18,000 to the claimant, otherwise they would be debarred from defending the claim and the claimants would be at liberty to enter judgment. The defendants failed to comply with that order and made an application for relief from sanctions, which was heard alongside the claimant's application for summary judgment.

The Judge held that the Court is entitled to consider the overall merits of the claim on an application for relief from sanctions at the third stage of the Denton test in particular circumstances, namely where the merits of the claim are before it in any event and it is able to reach firm conclusions on the merits.

As the defendants had failed to explain their non-compliance with the unless order, relief from sanction was refused.

Re JD Group Ltd

[2022] EWHC 202 (Ch)
(Deputy ICC Judge Agnello QC) 3 February 2022

Adducing further evidence · Fraudulent trading · Breach of duty

Following conclusion of the trial to determine whether the applicant liquidator should be granted relief pursuant to section 213 and 212 of the Insolvency Act 1986, the respondent's solicitors wrote a letter to the Court requesting to adduce further evidence on an issue which they claimed had been raised for the first time in cross examination.

The respondent's solicitors set out that the further evidence ought to be admitted as the issue to which it related may be determinative of the claim, and admission of the evidence would be consistent with the overriding objective. No formal application to seek relief from sanction had been made and no alternative basis for the application had been cited. The respondent had also failed to provide an explanation as to why the evidence which it sought to adduce could not have been obtained with reasonable diligence prior to the trial.

The Judge rejected the respondent's claims that the issue had been raised late in the day, stating that it had clearly been before her at trial. The Judge also noted that, although it would be unusual, the issue of further evidence could have been raised during the trial, and the respondent had failed to explain why it had not done so. The Judge refused to allow the further evidence to be adduced as there were no exceptional circumstances which would justify the court re-opening the case.

Charles Russell Speechlys LLP v Beneficial House (Birmingham) Regeneration LLP

[2021] EWHC 3458 (QB) (Cotter J)
20 December 2021

Permission to appeal · Statements of case

This case was an application for permission to appeal. The claim before the lower court was for fees in respect of legal services provided to the appellant in the appeal by the respondent. Following a trial, HHJ Sephton QC found that there was an implied contractual retainer in place between the appellant and respondent at the material times, following which an express agreement had been reached. The appellants appealed the Judge's decision on the basis that the respondent had not pleaded the existence of an implied retainer at trial and that the Judge was not entitled to rule in favour of the respondent on a cause of action which had not been pleaded.

On appeal, the Judge determined that there was no express reference in the respondent's Claim Form, its Amended Reply or its counsel's Skeleton Argument at trial to an implied contract. He stated that a claimant's statement of case must include a concise statement of the facts relied upon to establish and support a cause of action. The Judge had erred in proceeding on the basis that the pleading adequately raised the issue of an implied contract, and that it was not open to him to make a finding on this alternative basis as there was a real risk of prejudice to the appellant from being denied the opportunity to properly test and explore the alternative case. The case was remitted for re-trial.

"He stated that a claimant's statement of case must include a concise statement of the facts relied upon to establish and support a cause of action"

JD Classics Ltd (in administration) v Hood & ors

[2021] EWHC 3189 (Comm) and [2021] EWHC 3193 (Comm) (Bryan J)
26 October 2021, 27 October 2021

Civil Procedure · Disclosure · Imaging Orders · Unless Orders

The claimant, formerly a leading classic and prestige car dealer, brought various claims against a former director alleging breaches of fiduciary duty which led to its ultimate collapse into administration. Amongst other things, it was alleged that the director had engineered fictitious and inflated transactions (and also included cars on the balance sheet of the claimant which it did not own), in order to artificially inflate the claimant's revenue, profit and EBITDA figures, first, to secure a leveraged acquisition of the claimant's parent company—of which the former director was one of the shareholders (along with his ex-wife)—and then to secure the payment of deferred consideration under the transaction documents, payment of which was contingent on the claimant's EBIDTA meeting a contractually stipulated benchmark.

The claimant considered that the former director had failed to adequately comply with his disclosure obligations in the proceedings. In particular, the claimant considered that the defendant had failed to disclose relevant communications on his personal computer and mobile devices and sought an order imaging these devices for relevant documents (an 'imaging order'). The former director, however, also contended that the claimant had failed to comply with its disclosure obligations, and on that basis professed that he was unable to prepare his witness statements for trial, which he had failed to provide by the date required by the case management directions made in the case and for which he sought an extension of time to serve. Accordingly, the Court heard overlapping disclosure applications brought by the claimant and former director, and an application for an unless order by the claimant in respect of the sequencing of witness evidence and an application for an extension of time to serve witness evidence brought by the former director.

Save in very limited respects, the Judge dismissed the entirety of the disclosure application brought by the former director (which had been part-heard at an earlier hearing) and also dismissed his application for an extension of time to serve his witness evidence. Conversely, the Judge granted the claimant's disclosure application and made an imaging order. The Judge accepted that the former director had been given an opportunity to comply but had not adequately complied with his disclosure obligations, as it appeared that the former director—acting as a litigant in person—did not understand his disclosure obligations. The Judge further considered that the imaging order sought by the claimant contained extensive and appropriate safeguards to protect his personal, confidential and/or privileged information. The Judge also made an unless order requiring the defendant to serve his witness evidence by a particular date or certain paragraphs of his Defence would be struck out. The unless order provided for mutual sanctions, as it provided that the claimant had to provide is expert report on valuation by the same date, otherwise it could not advance its case on that basis at trial. The Judge, however, declined to include within the unless order a debarring order sought by the claimant, preventing the former director from making further disclosure applications in the proceedings without permission of the Court. The Judge noted that the claimant recognised that the sanction sought was akin to a limited civil restraint order, and that applications for such orders were generally brought under the specific provisions of the CPR but had identified that the Court retained the power to make such an order under its inherent jurisdiction. Nevertheless, the Judge concluded it would not be appropriate to make such an order in the circumstances of the case.

Adam Al-Attar

Jamil Mustafa

Commercial Litigation

DIGESTED BY JAMIL MUSTAFA

Leeds CC v Barclays Bank plc

[2021] EWHC 363 (Comm) (Cockerill J)
22 February 2021

Banking · Loan Agreements · LIBOR · Fraudulent misrepresentation · Reliance · Strike Out

A bank brought a strike out application in respect of a claims brought against it by two local authorities for rescission of loans which were alleged to be tainted by the LIBOR rigging scandal. It was common ground that the bank had participated in the manipulation of LIBOR, and the local authorities submitted that they had entered into the loans on the basis that the bank was honestly and properly setting LIBOR rates. The bank submitted that the claims should be struck out because it was a necessary element for reliance to be made out in a claim for misrepresentation that the representee was aware that the relevant representations had been made. The local authorities denied this.

The Judge considered that whilst there was some uncertainty in the caselaw there was a significant body of authority supporting a requirement that the representee should understand that a representation was being made as part of a claim in misrepresentation. The Judge considered that an 'awareness requirement' was particularly important where implied representations were concerned, because if a representation was not understood to have been made then inducement could not be established. In this respect, awareness was a logical precondition of reliance. The Judge therefore concluded that the awareness requirement was established by the authorities. Further, in the particular context of LIBOR rigging, the Judge held that the authorities established that a representee had to be aware of and understand the alleged representations were being made in order to bring a claim in misrepresentation. Conversely to *Crossley and Ors v Volkswagen AG* [2021] EWHC 344 (QB) (digested below), the Judge did not consider that there was any relevant distinction between verbal misrepresentations and misrepresentations by conduct. Accordingly, the Judge struck out the local authorities' claims.

Ahmad Hamad Algosaibi and Brothers Company v Saad Investments Company Limited & Ors

(Cayman Islands Court of Appeal, No. 15 of 2018) (Sir Bernard Rix JA, John Martin QC JA, Sir Michael Birt JA)
21 December 2021

The Cayman Islands Court of Appeal ("CICA") dismissed Ahmad Hamad Algosaibi and Brothers Company's ("AHAB") appeal in respect of its claims against Saad Investments Company Limited and certain other companies incorporated in the Cayman Islands and now in liquidation.

AHAB's claim involved allegations made by AHAB, a Saudi Arabian partnership, that during the period from at least 2000 to 2009, Maan Al Sanea (who had married into the Algosaibi family) used his alleged complete managerial control of the Money Exchange, a division of AHAB, to defraud AHAB by misappropriating over US$4 billion from the Money Exchange and funding the misappropriations by causing AHAB to be liable to third parties for, and eventually in default in respect of, over US$9.2 billion in alleged unauthorised debt.

The CICA upheld the decision of the Chief Justice of the Cayman Islands on the facts that, by reason of AHAB's knowledge and consent, Al Sanea was not in breach of his fiduciary duty owed to AHAB/the Money Exchange.

The CICA also held that the Chief Justice was correct to hold that the governing law of AHAB's proprietary claim and the claims in knowing receipt and unjust enrichment was Saudi law. AHAB's claims in dishonest assistance and conspiracy were tortious claims which are subject to the double actionability principle.

As to the substance of Saudi law, the CICA upheld the Chief Justice's decision that Saudi law: (i) does not recognise a proprietary claim against substituted property representing misappropriated monies; and (ii) that the liability of the Respondent companies (if any) would not be on a joint and several basis but would instead be limited to the amount which each company received.

As to tracing under Cayman law, in accordance with the decision in Sinclair Investments (UK) Limited v Versailles Trade Finance Limited [2012] Ch 453, the burden of proof may be reversed even where the defaulting fiduciary (Al Sanea) did not create a maelstrom or cross firing for the specific intention of rendering it more difficult to trace misappropriated assets and even if the property is in the hands of companies owned by the defaulting fiduciary rather than the defaulting fiduciary himself. However, on facts, save in respect of one of the Respondents, the CICA upheld the decision of the Chief Justice that AHAB could not trace into any property of the Respondent companies.

Marcus Haywood

FS Cairo (Nile Plaza) LLC v Brownlie

[2021] UKSC 45 (Lord Reed, Lord Lloyd-Jones, Lord Briggs, Lord Leggatt, Lord Burrows JJSC)
20 October 2021

Conflict of laws · Jurisdiction · Service out · Pleading foreign law

This further judgment of the Supreme Court in the *Brownlie* litigation has significant implications for jurisdiction in commercial claims where reliance is placed on the tort gateway in Practice Direction 6B ('PD6B'), and also in relation to pleading foreign law. The *Brownlie* litigation arose out of a car accident in Egypt in 2010, which killed Sir Ian Brownlie and severely injured his wife, Lady Brownlie. Lady Brownlie then brought proceedings in England seeking damages in contract and tort. The proceedings went to Supreme Court on a previous occasion when it was held that Lady Brownlie had brought the proceedings against the wrong defendant and the matter was remitted to the High Court. Lady Brownlie did, however, subsequently obtain permission to substitute the current defendant and to serve it out of the jurisdiction. The defendant successively appealed that grant of permission to serve out.

The two issues before the Supreme Court were (i) whether Lady Brownlie had suffered damage within the jurisdiction for the purposes of the tort gateway in PD6B and (ii) whether in order to show, as she was required, that her contractual and tortious claims had a real prospect of success, Lady Brownlie had to adduce evidence of Egyptian law.

The Supreme Court held by a majority that Lady Brownlie had suffered damage within the jurisdiction for the purposes of the tort gateway. The majority considered that damage in this context meant damage both direct and indirect and was not limited to damage required to complete the cause of action. In this respect, the tort gateway differed to the EU jurisprudence which drew a distinction between direct and indirect damage for the purposes of jurisdiction under the Brussels regime. With respect to pleading foreign law, the Supreme Court distinguished between two rules: the 'default rule' and 'the presumption of similarity'. The first treated English law as the applicable law in default of pleading the application of foreign law. Conversely, the presumption of similarity was a rule of evidence which applied where foreign law had been pleaded but its content not proved, provided that it was reasonable to expect the applicable foreign law to be materially similar to English law on the matter in issue. In this respect, whether the presumption applied was a fact-sensitive question but the Supreme Court provided guidance as to when it was more likely to apply and when it was displaced. On the facts, given that Lady Brownlie's claims were pleaded under Egyptian law, the default rule did not apply, but the Supreme Court concluded that the Judge was entitled to rely on the presumption of similarity for the purposes of finding that Lady Brownlie's claims had a real prospect of success.

Windhorst v Levy

[2021] EWCA Civ 1802 (Newey, Arnold, Stuart-Smith LLJ)
2 December 2021

Conflict of laws · Insolvency Regulation · Judgments Regulation · Stay of execution

In 2003, Mr Levy obtained judgment against Mr Windhorst in the sum of USD 2 million ('the **2003 Judgment**'). Subsequently, in 2005, Mr Windhorst entered into a German insolvency process and creditor approved plan ('the **Plan**'). In 2018, Mr Levy stated an intention to seek to enforce the 2003 Judgment in England. Mr Windhorst commenced proceedings in Germany to have enforcement of the 2003 Judgment declared inadmissible. It was common ground that, whilst the Plan bound creditors, under German procedural law the 2003 Judgment retained its formal character of enforceability until declared inadmissible by the German court. In 2020 Mr Levy successfully applied to have the 2003 Judgment registered in England.

Mr Windhorst appealed against the registration of the 2003 Judgment under the EU Judgments Regulation on the basis that the judgment was not 'enforceable' in Germany. Mr Windhorst also sought a stay of execution under CPR rule 83.7(4) relying on the Plan, which the Courts were bound under the EU Insolvency Regulation to recognise.

By the time of the hearing before Eady J the German courts had made interlocutory orders which would have stayed the formal enforceability of the 2003 Judgment subject to the payment of security. Eady J at first instance rejected both the appeal against registration and the stay case. Mr Windhorst was granted permission to appeal on both points.

The Court of Appeal concluded that a stay should be granted. Mr Levy's ability to enforce the 2003 Judgment in Germany depended on the outcome of ongoing proceedings in Germany. Arnold LJ held that it would be "*manifestly unjust*" to allow execution in those circumstances and that Mr Levy had "*no real answer to this argument*". The stay should be ordered on the same terms (as to security) as the German court had imposed. However, the Court of Appeal agreed with Eady J that the 2003 Judgment remained formally enforceable under the EU Judgments Regulation given its status in Germany. The Court therefore did not need to consider whether it was open to an appellant against the registration of a judgment, such as Mr Windhorst, to raise the non-enforceability of a judgment on appeal. Arnold LJ, however, did make a tentative suggestion that the non-enforceability of a judgment may be distinct from other threshold questions (such as whether the judgment is a civil and commercial judgment), such that it could not be raised on an appeal. The resolution of that issue remains outstanding.

Adam Al-Attar

Paul Fradley

Crossley and Ors v Volkswagen AG

[2021] EWHC 3444 (QB) Waksman J)
20 December 2021

Group Litigation · Fraudulent misrepresentation · Reliance · Strike out · Summary judgment

In the 'NOx Omissions' case, 86,000 owners of VW, Audi, Skoda and SEAT diesel cars brought claims for breach of statutory duty, fraudulent misrepresentation against the manufacturers of the vehicles (the 'VW Manufacturers'), and further claims against a finance company that financed certain of the claimants' purchase of the cars and authorised VW dealers (together 'VW') for breach of contract and under consumer protection legislation. The basis for all the claims was that the engines in the cars sold to the claimants all contained a 'defeat device', which, when operated in Mode 2, caused the engine to emit nitrogen oxide and dioxide (NOx) above the level permissible under EU Regulation 715/2007 ('the Emissions Regulation').

The VW Manufacturers brought an application to strike out or summarily dismiss the fraudulent misrepresentation claim made against them on the basis that the claimants had failed to properly plead a claim in deceit. In particular, the claimants had failed to plead that they were consciously aware of the false representations which had allegedly impliedly been made to them (which for the purposes of the application, it was assumed had been made and were false), which was necessary to prove reliance for the purposes of a fraudulent misrepresentation claim. In this respect, the VW Manufacturers relied heavily (although not exclusively) on *Leeds CC v Barclays Bank plc* [2021] EWHC 363 (Comm) (digested above).

The Judge considered that the claimants had not made a proper plea of conscious awareness of the relevant false representations (implied by conduct), and the question on the application became whether, as a matter of law, such a plea was required to sustain the claim. The Judge held, in contrast to the *Leeds* case, that, the deceit claim should not be struck out. The Judge distinguished the case from *Leeds* on the basis that the latter case was one where the relevant implied representations might have been difficult to establish, which was different to the case before him (where he considered that the implied representations were relatively simple), and further considered that there were particular issues raised where implied misrepresentations by conduct were alleged which were not settled. He also noted that the Judge in *Leeds* (Cockerill J) had given permission to appeal (which appeal had not been heard at the time of writing). In summary, the Judge viewed the law in the area as not settled and the issue not suitable for summary determination.

Company Law

DIGESTED BY PETER BURGESS

Aquila Advisory Ltd v Faichney and others (Crown Prosecution Service intervening)

[2021] 1 WLR 5666, SC(E) (Lord Stephens, Lord Lloyd-Jones, Lord Sales, Lord Burrows and Lady Rose JJSC)
3 November 2021

Corporate attribution · Fraud · Knowledge of company

Two directors, F and P, had exploited their position as directors of a company, V, in breach of their fiduciary duty, and made a secret profit of £4.55m. Another company, A, acquired the proprietary rights (including things in action) of V, and asserted that F and P should be treated as holding the secret profit as trustees under a constructive trust (arising as a result of breach of fiduciary duty) for V, and now A, as beneficial owner.

Following F and P's criminal convictions for cheating the public revenue, the Crown Prosecution Service ("**CPS**") obtained confiscation orders under the Proceeds of Crime Act 2002 ("**POCA**"). A argued that since it had a proprietary claim to the secret profit it had priority over the confiscation orders, which did not give the CPS any proprietary interest in assets. As a result, A argued it was entitled to all of F and P's assets, which left nothing to satisfy the confiscation orders. The Judge granted the declaration sought by A. The Court of Appeal dismissed an appeal by the CPS.

The CPS appealed to the Supreme Court. The central issue in the appeal was whether, as contended by the CPS, the fraud of F and P could be attributed to V in circumstances where V suffered no loss but rather stood to profit from their illegal actions by obtaining a proprietary interest in the proceeds of crime.

The Supreme Court held that its reasoning in *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1, SC(E), although concerned with loss-based claims rather than claims to strip profits, applies with equal force to a breach of fiduciary duty. The Court explained that *Bilta* is authority for the proposition that the unlawful acts or dishonest state of mind of a director cannot be attributed to the company to provide the director with an illegality defence to the company's claim against him for breach of fiduciary duty. This meant that the principles of illegality set out by the court in *Patel v Mirza* [2017] AC 467, SC(E) did not arise. The scheme in POCA does not interfere with any property rights (except tainted gifts) and protects property rights of others regardless of how those rights arise. As a result, the Court dismissed the appeal.

Re West African Gas Pipeline Co Ltd

[2021] EWHC 3360 (Ch) (Miles J) 9 December 2021

International jurisdiction · Sufficient connection · Parallel schemes

A company incorporated in Bermuda, WAG, sought permission from the English court to convene a meeting of its members for a proposed scheme of arrangement under Part 26 of the Companies Act 2006 (the "**CA 2006**") between WAG and the holders of its ordinary shares, the purpose of which was to amend a shareholders' agreement governed by English law.

The decision raised an issue of the court's international jurisdiction to convene a scheme meeting and approve a scheme under s 895(2)(b) of the CA 2006.

Miles J considered the holding of Lawrence Collins J in *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch), that the English court has territorial jurisdiction to approve a scheme of arrangement in respect of an overseas company but as a matter of discretion the court would need to be satisfied that there was a sufficient connection with England.

In the present case, WAG had made a parallel application to the Bermudan court, and it was proposed that the two schemes should run in parallel and be inter-conditional. The shareholders' agreement was governed by English law, and under English conflict of laws there was a reasonable doubt that an amendment to the agreement under a Bermudan scheme would be enforceable under English law. The use of parallel and inter-conditional schemes provided the English court with a legitimate reason to convene and sanction a scheme alongside one taking place in the courts of the place of incorporation.

Miles J considered it appropriate in the circumstances to convene the meeting sought by WAG.

Re Kings Solutions Group Ltd

[2021] EWCA Civ 1943 (Snowden, Nugee and Green LJJ) 17 December 2021

Unfair prejudice · conduct of the affairs of the company · causation

In a long-running dispute between the shareholders of KSG, a holding company for a group providing security and fire services, an unfair prejudice petition under s 994 of the Companies Act 2006 (the "**CA 2006**") had been presented alleging that the affairs of the KSG had been conducted by the majority shareholder, PK, and its directors, F and S, in a manner which was unfairly prejudicial to the interests of the petitioners.

The respondents had applied to strike out certain allegations in the points of claim on the basis that they could not amount to conduct of the affairs of the company, KSG, for the purposes of s 994(1)(a). In the decision below, the Judge struck out a number of the allegations, but refused to strike out others, which became the subject of the appeal by the respondents to the petition.

The main issue on the appeal was whether it is permissible in a petition under s 994 CA 2006 to include allegations of personal conduct by the respondents of that petition who are not, themselves, within the scope of s 994.

The Court of Appeal emphasised the need for careful identification of what can properly be included in a petition or statement of case under s 994. On the correct analysis of the majority decision in *Graham v Every* [2014] BCC 376, CA, there must be a causal connection between the personal actions of the shareholder or third party and some other act or omission constituting the conduct of the affairs of the company.

At a general level in the present case, the Court observed that even if two actions were part of an orchestrated plan, it did not follow that both would amount to conduct of the affairs of KSG, and nor did causation follow. Further, though misapplying KSG's funds or resources would constitute conduct of KSG's affairs, it did not follow that the matters to which the funds or resources were misapplied would also constitute conduct of the affairs of KSG as to justify a separate complaint under s 994.

The Court allowed the appeal. It reviewed the specific paragraphs that the Judge had refused to strike and held that the Judge was wrong not to have struck them out, since they did not themselves amount to, or result in, conduct of the affairs of KSG within the scope of s 994.

Corporate Insolvency

DIGESTED BY DANIEL JUDD AND PAUL FRADLEY

Re Corbin & King Holdings Limited and others

[2022] EWHC 340 (Ch) (Sir Alastair Norris)
17 February 2022

Termination of moratorium · Payment holiday · Inability to pay · Unfair harm

This case concerned the Moratorium provisions in Part A1 of the Insolvency Act 1986 (the "**Act**").

The Applicant was the secured creditor of each of a number of companies (the "**Companies**"), which were subsidiaries of a company in administration ("**Topco**"), and whose business was to operate restaurants. It was common ground that Topco defaulted on its loans from the Applicant. The Applicant made a demand on Topco, subsequently placing it into administration. The directors of the Companies filed notices placing the Companies into the moratorium (the "**Moratoria**"), with the Respondents as Monitors. The Applicant then made a demand on the Companies, which had guaranteed the loans. At around the same time, offers had been made to the ultimate parent of Topco to acquire its direct and indirect interests.

The Applicant sought to terminate the Moratoria. The issue for the Court was whether the Respondents were required to terminate the Moratoria under section A38 of the Act.

It was common ground that the debts due to the Applicant were pre-moratorium debts for which the Companies did not have a "*payment holiday*" under section A18 of the Act, because they were excepted "finance" debts. The Court noted that the absence of a payment holiday for such debts was the clear meaning of the Act, and the same result was contemplated by its legislative history.

Under section A38 of the Act, the Respondents were required to terminate the Moratoria if they "*think*" that "*the company is unable to pay … pre-moratorium debts for which it does not have a payment holiday*".

The Court held this section requires a monitor to assess the immediate prospect of a company being able to pay the relevant debt. The test was not the same as the cash flow test under section 123 of the Act. The Judge concluded that a company "*is able*" to pay a presently due pre-moratorium finance obligation if (being itself unable to pay out of current cash resources) it has "*the immediate prospect of receiving third party funds or owns assets capable of immediate realisation*". What constitutes an "*immediate*" prospect is a commercial judgment for the monitor to take, on which they will be accorded substantial latitude, bearing in mind that (in view of rule 1A.24 of the Insolvency Rules) anything over 5 business days will require specific assessment. An offer to refinance the loan made on the eve of the hearing was a sufficient basis to think that there was an immediate prospect of payment, as occurred on the facts of this case.

The Judge also explained that, in any event, he would not have exercised his discretion to terminate the Moratoria under section A42(5) of the Act, as the harm to the Applicant (as creditor) from continuation of the Moratoria was outweighed by the harm to the Companies (which were trading, and whose debts might be repaid imminently) from insolvency proceedings being commenced against them.

Tom Smith QC

Stephen Robins QC

Paul Fradley

Re Amicus Finance

[2021] EWHC 3036 (Ch) (Sir Alastair Norris)
15 November 2021

Restructuring plan · Small and medium-sized enterprises · Cross-class cram-down · Burden of proof

This was an application to sanction a restructuring plan under Part 26A of the Companies Act 2006 (the "**Plan**"). The case is notable as the first use of the restructuring plan procedure in the context of an SME and by a company in administration.

The Judge commented on the use of the scheme (and restructuring plan) jurisdiction in this context. He explained that it enables realistic scrutiny of the proposed restructuring, albeit on limited material and within a tight timetable, with the object of producing a fair outcome for creditors of a company in distress. He added that – while it is essential that there is proper scrutiny – this utility would be lost if the enquiry is side-tracked into a time-consuming examination of detailed disputes, with the potential to impose a heavy cost-burden on the company, particularly where the company in question is a small or medium enterprise.

Turning to the Plan, the threshold statutory conditions had been satisfied. The Judge ultimately concluded that the meetings had been appropriately constituted and that they were representative of the class. Sanction of the Plan was opposed by one dissentient creditor. Since the applicable statutory majority had not been met in the senior secured creditor class, sanction of the Plan also depended on the exercise of the cross-class cram-down power. Two particular objections merit comment.

One group of objections to the Plan proceeded by reference to the lack of detail in the Explanatory Statement. The basis for the objection was that, in reliance on *Sunbird Business Services Ltd* [2020] EWHC 2492 (Ch), the Plan contained inadequate detail in relation to the outcome in a prospective liquidation, giving creditors no real alternative, and such that the Court could not meaningfully evaluate whether the views of the proposers of the restructuring were objectively justified. The Court disagreed as to the application of the principle. The context was one of an SME, and what was provided was sufficient to enable the creditors to make an informed decision: it was adequate for its purpose.

A second objection related to the 'no worse off' test: the creditors must be no worse off in the relevant alternative. It was common ground that the senior secured creditors would not be better off in an immediate liquidation. But there was a difference of view as to the standard to be met –the balance of probabilities or 'no real prospect' of a better outcome. The Judge held that section 901G(3) required the Court to be "*satisfied*" that the test was met, which meant the balance of probabilities. He noted that a dissentient creditor bears only a burden of proving a factual basis for challenge, and does not need to show that the relevant alternative is relatively beneficial to him. The question is then whether the company proposing the plan can refute that challenge and still satisfy the court on the balance of probabilities. The Judge rejected the eight grounds of challenge put forward on the facts, and held that it was fair to sanction the Plan.

Marcus Haywood and William Willson

Lehman Brothers Holdings Scottish LP 3 v Lehman Brothers Holdings Plc (In Administration)

[2021] EWCA Civ 1523 (Lewison, Henderson, Asplin LLJ)

Subordinated debt · *Pari passu* principle · Partial discharge of secured debt · Rule against double proof

The proceedings ultimately concerned the ranking of subordinated debt in the administrations of Lehman Brothers companies – two claims against LB Holdings Intermediate 2 ("**LBHI2**"), labelled Claims A and B, and a further two claims against Lehman Brothers Holdings Plc ("**PLC**"), labelled Claims C and D – where those debts came into existence for regulatory purposes and had been subject to various amendments. In particular, had some debts been subordinated to others, or did they rank *pari passu*? In addressing the ranking of these claims, the Court of Appeal considered the interpretation of the underlying debt instruments, rectification of those instruments, partial discharge and release upon part-payment, and the rule against double-proof.

Lewison LJ gave the leading judgment. The *pari passu* principle, that debts rank equally, was subject to the parties having agreed to subordinate one claim to another: the purpose of such a provision was to displace the *pari passu* principle. The question was whether the various instruments evinced an intention that distribution should be on a basis other than *pari passu*. The documents were sophisticated, based on FSA standard forms, and where (at least in principle) tradable, all of which meant that textual analysis was likely to be the principal method of analysis. His Lordship added, however, that the regulatory background was a potential aid to interpretation.

As a matter of contractual interpretation, his Lordship concluded that Claim B had been subordinated to Claim A. Claim A was a debt claim, to be paid out on the hypothetical basis that the creditor was a preference shareholder entitled to a full return on capital and interest. By contrast, Claim B agreed to take its place in the queue along with preference shareholders, and was necessarily expressed to be subordinated to all forms of debt, and is treated as such.

The next issue was whether the instruments in Claims A and B should be rectified such that they ranked *pari passu*, on the basis that amendments to the notes were not intended to alter their respective priority. Lewison LJ rejected this: Claim B was junior to Claim A in the unamended notes. Even then, the amendments were deliberately inserted, and for the reason of addressing a specific tax difficulty. There was no positive outward expression of accord. While the knock-on effect on priority might not had been appreciated at the time, the Court would not speculative on what consequent amendments there might have been had that implication been appreciated.

The relative priority of Claims C and D raised a problem: each appeared to be subordinate to the other. Marcus Smith J had concluded that the answer was that they ranked *pari passu*. That decision was challenged on appeal. The Court of Appeal considered the point to turn on the definitions of "Subordinated Liabilities" in Claims C and D. Lewison LJ decided that Claim D subordinated itself to claims *senior* to it, but not claims *pari passu* with it, whereas Claim C had subordinated itself further – to claims *other* than those junior to it, meaning subordination to claims which would otherwise rank *pari passu* with it.

Two further questions then fell to be considered. The first related to partial discharge of a debt secured by a guarantee. Was the amount to be paid on Claim C to the creditor – who was an assignee of the debt claim – partially discharged by payments previously made in the administration to that same creditor, albeit in their (former) capacity as guarantor? The Court of Appeal found the authorities to favour the intuitive answer that the debtor's liability was extinguished *pro tanto* to the prior payment. The second related to the rule against double proof. Where a creditor had not been paid in full, the rule operated to prevent a surety from proving in competition with the creditor of the principal debtor. The position here was that a surety had part-paid the principal debtor's debt, but released its right to an indemnity from the principal debtor. Could the creditor prove for the whole debt (despite the part-payment by the surety), as the rule implied, which may lead to the creditor gaining a windfall? The Court of Appeal was willing to develop the rule, and held that in this situation, the creditor had to give credit for the payment in the insolvency of the principal debtor, meaning the creditor could not prove in the insolvency of the principal debtor to the extent of the surety's part-payment.



Mark Phillips QC, William Willson and Edoardo Lupi

Doran v County Rentals Ltd (t/a Hunters)

[2021] EWHC 3478 (Ch) (HHJ Cadwallader)
20 December 2021

Winding-up petitions · Inability to pay debts · Coronavirus test

Petitioning creditors appealed to the High Court against the dismissal of a winding-up petition following a preliminary hearing. The Court had found that it was not likely to make a winding-up order under the Insolvency Act 1986 having regard to the coronavirus test, applicable to winding-up petitions presented from 27 April 2020 until 30 September 2021.

That test required the petitioning creditor to show that it had reasonable grounds for believing that coronavirus either has not had a "*financial effect*" on the company, or that – if it had caused a "*financial effect*" on the company – the company would still have been insolvent and *unable to pay its debts* in any event. In the present case, the petitioner appealed on the basis that the company was 'unable to pay its debts' in any event.

The facts were that the petitioner had not queried any missing payments for a period of six years. It transpired in March 2020 that the payments made by the company had been to an incorrect bank account, and that the company was not aware of this fact. The petitioner presented a winding-up petition for the balance of the payments on the basis that the debts had remained due and that the company had been unable to pay them. The company had, separately, disputed the debt on the basis that the company must have been instructed to make payments to the account it did, else it would not have made those payments.

HHJ Cadwallader upheld the decision of the Judge and rejected the appeal. The Court noted that non-payment of a single undisputed debt may be sufficient to establish that a company is unable to pay its debts as they fall due, and that normally it must be shown that the company was notified of the amount of the debt and was given an opportunity to pay it. Here, the pre-pandemic payment of debts to the wrong account was *not* evidence of the company's ability to pay its debts – but it *was* evidence that the company was not *unable* to pay its debts when they fell due. The natural inference was that payment to the allegedly wrong account was a mistake. The petitioners did not tell the company until much later that the company was paying into the wrong account. Given this, and the company's lack of knowledge that the debts were not being discharged, it was not possible to infer an inability of the company to pay its debts.

Financial Conduct Authority v Carillion Plc (in Liquidation)

[2021] EWHC 2871 (Ch) (Michael Green J)
26 October 2021

Compulsory liquidation · Leave to proceed · FCA regulatory decisions

The FCA appealed against a decision of ICC Judge Jones that it was required to obtain court permission before taking regulatory action against a company in liquidation. ICC Judge Jones had determined that the FCA required permission under section 130(2) of the Insolvency Act 1986 before it could issue statutory notices (under sections 91 and 123 of the Financial Services and Markets Act 2000) against Carillion Plc and certain of its directors in respect of market abuse and breaches of listing rules. ICC Judge Jones had granted the FCA that permission.

Michael Green J held that an action could only be within section 130(2) if it was a *"proceeding"* and this was limited to *"legal proceedings or quasi-legal proceedings such as arbitration"*. Any court proceedings were included, and non-court proceedings could be included if they were similar to court proceedings having regard to the statutory purpose of section 130(2). That purpose was to ensure a *pari passu* distribution, protect the procedures for adjudicating claims and avoid expensive and unnecessary litigation. The Judge held that Parliament could not have intended that the comprehensive regime set down by FSMA should be overlaid with a requirement to seek permission to proceed when a company was in compulsory liquidation. Parliament had decided that the FCA could issue decision notices outside any court process, and this was distinguished from the alternative courses of action through the courts available to the FCA.

ICC Judge Jones had therefore been wrong to construe section 130(2) as covering any proposed action that might diminish the assets in the estate available to creditors.

The Judge held that the FCA's Regulatory Decisions Committee was not an independent and impartial tribunal, and it was not engaged in a judicial or quasi-judicial process. The fact that there was an established process that had to conclude in a formal way, including the right to make representations, did not render it a *"proceeding"*. The right of the recipient of a statutory notice to refer the matter to the Upper Tribunal did not convert the notice into a *"proceeding"*, since it did not change the nature of the original decision, and a reference would be made by the company not against the company.

Re Border Control Solutions Ltd

[2021] EWHC 2965 (Ch) (ICC Judge Barber)
15 November 2021

Dissolution of companies · Appeals from decision of Secretary of State · Standing · Extension of time

ICC Judge Barber considered what is believed to be the first appeal against a decision of the Secretary of State to defer the dissolution of a company. The appeal was brought under section 205(4) of the Insolvency Act 1986. The Secretary of State had deferred the dissolution of the Company for 5 years, but it became apparent within 3 months that any further investigations being conducted by the Official Receiver were concluded.

The Judge held that CPR Part 52 applied to such appeals based on the provisions of the Insolvency Rules 2016. The Judge did not follow comments in *Re Budniok* [2017] EWHC 368 (Ch) which might have suggested a different conclusion, as they were made without the Chief Registrar being directed to Court of Appeal authority which made clear that Part 52 applied to appeals from non-judicial bodies. The Judge was satisfied that permission to appeal was not required, as the decision appealed from was not that of a judicial body. The Judge was also satisfied that under CPR rule 52.21(1) it was appropriate to hold a rehearing. The deferral decision was an entirely administrative process, no prior warning was given, no evidence was considered, there was no hearing, and there was no consideration of the circumstances of the individual case.

The Judge held that section 205 does not identify the class of persons who can bring an appeal, and applied the legitimate interest test in *Deloitte & Touche AG v Johnson* [1999] 1 WLR 1605 to the question of *locus standi*. The Judge held that the appellant had demonstrated a sufficient legitimate interest as the sole director and shareholder of the company. He was clearly and potentially uniquely affected by the deferral. The Judge held that there was no justification for the deferral continuing and that it should be brought to an end. The Official Receiver, as liquidator of the company, agreed that the deferral served no continuing useful purpose. The Judge noted that the length of the adjournment was in any event for an unnecessarily and disproportionately long period, justified only by a blanket policy of the Official Receiver to seek 5 year deferrals.

Matthew Abraham and Paul Fradley

Re Edengate Homes (Butley Hall) Limited (In Liquidation)

[2021] EWHC 2970 (Ch)
(HHJ Halliwell) 5 November 2021

Assignment of claims · Standing · Challenge to office-holder decisions

The liquidator of Edengate had assigned claims vested in the company, and statutory claims vested in him as officeholder, to a litigation funder ("**Manolete**"). Mrs Lock, a creditor, member and director of Edengate, brought an application to challenge the assignment. The claims which had been assigned by the liquidator were against Mrs Lock, her husband, and her parents, and Manolete commenced proceedings against those persons. Mrs Lock applied to have the assignment set aside under section 168(5) of the Insolvency Act 1986.

The Judge held that, applying *Deloitte & Touche AG v Johnson* [1999] 1 WLR 1605, Mrs Lock needed to show a legitimate interest in the relief sought. The Judge held that this required the applicant, in addition to being a member of a class, to have an interest in the outcome of the application which was aligned with the interests of the class as a whole and not a collateral interest which transcended the class interest. Mrs Lock had failed to demonstrate this on the facts and did not have standing. It was obvious that Mrs Lock's real complaint was that she and her family had been subject to the substantive claims, and that her motivation was to protect her parents, not to maximise the return for the company's creditors. The Judge's conclusions significantly reduce the prospects of a successful challenge to an assignment by the target of the assigned claims.

In any event, Mrs Lock had not established that the liquidator's decision was so unreasonable or absurd so as to satisfy the perversity test. The liquidator had failed to explain his failure to approach Mrs Lock or her family to explore the options for them purchasing the claims. However, he had plainly considered that Mrs Lock would not have sufficient funds to compromise the claims. There was no basis for concluding that he could have achieved better terms than those obtained from the litigation funder.

Personal Insolvency

DIGESTED BY LOTTIE PYPER

BJ v M Case C-168/20

European Court of Justice

Bankruptcy estate · EU law · Equal treatment · Pension schemes

The English High Court sought a preliminary ruling from the European Court of Justice ("**ECJ**") concerning the interpretation of Articles 21 and 49 of the Treaty on the Functioning of the European Union ("**TFEU**") and Directive 2004/38/EC. The underlying proceedings were commenced by the joint trustees in bankruptcy ("**TIB**") of Mr M, who claimed the benefit of certain rights accrued by Mr M under an Irish pension scheme for the benefit of the bankruptcy estate.

The applicable UK legislation, section 11 of the Welfare Reform and Pensions Act 1999, provided that, where a bankruptcy order is made, any rights under an *"approved pension arrangement"* are excluded from the bankruptcy estate, where the definition of an "*approved pension arrangement"* was limited to arrangements approved by the UK tax authorities.

The ECJ held that the UK was precluded from making the exclusion of pension rights from a bankruptcy estate dependent on the pension scheme in question having obtained tax approval from the UK tax authorities in circumstances where (1) such approval had to be obtained prior to the bankruptcy order being made and (2) that pension scheme had already been approved in another member state.

John Briggs

Kireeva v Bedzhamov

[2022] EWCA Civ 35
(Newey, Arnold Stuart-Smith LLJ)

Russian Bankruptcy · Immovables Rule · Modified Universalism

Mr Bedzhamov ("**B**") was made bankrupt in Russia on 2 July 2018 and Ms Kireeva ("**K**") was appointed as trustee of his bankruptcy estate. K made an application to the English High Court seeking common law recognition of the bankruptcy and further orders in respect of B's English assets.

At first instance, Snowden J recognised the bankruptcy and K's appointment at common law, but declined to make any further orders. B appealed the recognition of the bankruptcy, and K appealed the dismissal of the further relief sought in her application.

The Court of Appeal overturned the order recognising the bankruptcy. B's evidence was that the bankruptcy order had been obtained by fraud and, in the circumstances, it had not been open to the Judge to dismiss the contents of B's witness statement on the balance of probabilities. The appropriate course was to remit the matter to the High Court so that directions could be given for a hearing at which B's evidence could be tested in cross-examination.

The Court of Appeal upheld the dismissal of the further relief sought by K. The orders sought by K concerned certain properties owned by B in England. As a matter of English law, immovable property and land does not automatically vest in a foreign office-holder, even if the foreign law provides for that. Absent concurrent proceedings being opened in England, the English court had no power to assist a foreign office holder in relation to immovable property located here.

Stephen Robins QC and William Willson

Property and Trusts

DIGESTED BY ROSEANNA DARCY

Byers v Saudi National Bank

[2022] EWCA Civ 43 (Newey, Asplin and Popplewell LLJ)
27 January 2022

Breach of Trust · Knowing Receipt

The appellants appealed against the dismissal of their knowing receipt claim. The appellants were a Cayman Islands registered company (the "**Company**") and its joint liquidators. The Company was the beneficiary of a Cayman Islands trust which owned shares in five Saudi Arabian companies. The trustee of that trust had transferred the shares to a Saudi Arabian bank (the "**Bank**") to discharge part of the debt he owed to the Bank. The share transfer was governed by Saudi Arabian law.

The questions on appeal were (i) whether the claim for knowing receipt depended on the claimant having had a continued proprietary interest in the property in question when in the hands of the defendant, and (ii) whether such an interest existed in the present case having regard to the relevant Saudi Arabian law.

At first instance the Judge concluded that absent a continuing proprietary interest the claim in knowing receipt would fail. Here, as the Company had no continuing interest in the shares after the transfer on the basis that under Saudi Arabian law, there was no distinction between legal and beneficial interest, the claim had to fail. Again, under Saudi Arabian law, the Bank's title either extinguished or overrode the Company's proprietary interest, even if the Bank had knowledge of it.

The appeal was dismissed. On the first question, while it may be legitimate to refer to knowing receipt as a species of equitable wrongdoing, it was not based exclusively on fault. For liability to arise, the defendant must have received trust property and unconscionability must coincide with possession of that trust property. A continuing proprietary interest was also a prerequisite of a knowing receipt claim (*Akers v Samba Financial Group* [2017] UKSC 6 followed). In cases where the court had accepted that knowing recipients had "custodial" obligations, including an obligation to restore the property, the claimant must also have had a proprietary interest in the property when it was in the hands of the defendant. It is the state of knowledge of the recipient which makes it unconscionable for him to retain the property. The Judge was therefore right that a claim in knowing receipt, where dishonest assistance is not alleged, will fail if, at the moment of receipt, the beneficiary's equitable proprietary interest is destroyed or overridden so that the recipient holds the property as beneficial owner of it. A continuing proprietary interest in the relevant property is required for a knowing receipt claim to be possible. A defendant cannot be liable for knowing receipt if he took the property free of any interest of the claimant.

On the second question, foreign law is a question of fact which the trial judge is required to determine on the basis of the evidence deployed by the parties. The task for the judge is to determine what the highest available court in the foreign jurisdiction would decide if the point came before it (*Dexia Crediop SpA v Comune di Prato* [2017] EWCA Civ 428). Where the foreign law is in the form of a provision in a code, statute or other written source, the task of the court is to determine how the foreign courts would apply it, based on the evidence of expert witnesses. It is not the court's task to address how it would interpret and apply the provision itself. The appellant's arguments did not come close to satisfying the criterial for the Court of Appeal to interfere with the Judge's findings of fact based on the evidence he heard. There was nothing to suggest he was wrong in his conclusions.

LA Micro Group (UK) Ltd v LA Micro Group Inc

[2021] EWCA Civ 1429 (Lewison LJ, Newey LJ, Sir Christopher Floyd)
5 October 2021

Beneficial ownership · Estoppel by conduct

In the context of a dispute concerning the beneficial ownership of shares, the Court examined the doctrine of estoppel by conduct and held that it was not constrained by strict rules, like other forms of estoppel. Instead, it was to be approached by a means of a broad, merits-based assessment.

The parties, a group of former business partners, had a litigious history. Two of the partners ("**F**" and "**L**") had owned a US company equally and subsequently set up a UK company as a joint venture with the third partner ("**B**"). Pursuant to an oral agreement B owned 49% of the UK company. Disputes later arose between F and L over the beneficial ownership of the remaining 51%. B had indicated in a deposition in 2021 that the UK company was owned by F, L and B. In 2015, F sought a declaration that he and L owned 25.5% each. B later clarified his position that he considered F and L to be owners via the US company rather than in their personal capacities. In 2017 a judge held that F had disavowed any interest in the UK company and that the 51% was owned by the US company. In 2020, B and the UK company sought a declaration that B and L were the sole shareholders. F argued that B was estopped from seeking the declaratory relief due to the earlier assertions regards the ownership of the UK company. At first instance the Judge rejected that argument given B's earlier position had not been consistent. The Judge therefore granted the declaration sought finding that F's disavowal amounted to an irrevocable disclaimer of the US company's interest in the shares of the UK company. L and B were not estopped by their conduct in the earlier litigation.

The appeal was allowed in part. On the question of whether a party was estopped by its own conduct from assuming in legal proceedings a position which was inconsistent with the position taken in earlier proceedings, this was to be approached by a broad, merits-based assessment and was not constrained by strict rules. The matters to consider (as enumerated in the US case of *New Hampshire v Maine* 532 US 742) were whether (i) a party's later position was clearly inconsistent with its earlier position, (ii) the party had succeeded in persuading a court to accept its earlier position so that judicial acceptance of an inconsistent position in later proceedings would create the perception that either the first or second court was misled, (iii) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped, and (iv) it was apparent that the earlier decision was obtained because of the stance by the party in the earlier proceedings. Absent the latter factor there would not be an impression that one or other court was misled. In the present case it was not possible to say whether B had won the earlier proceedings because of the position taken in relation to the continued ownership of the UK company and so it followed that B was not estopped by his conduct in the earlier proceedings in seeking the present declaratory relief. However, the Judge had erred in law in finding that the US company had earlier disclaimed an interest in the UK company. The appeal was therefore allowed on that ground alone. Issues of contractual surrender, laches and proprietary estoppel were referred to the Judge for determination.

DANIEL JUDD
SOUTH SQUARE

First lines: bringing judgments to life

Legal Eye

"*The appellant is a lap dancer*", begins Lord Justice Ward, in an appeal ultimately concerning a contract for services. "*I would not, of course, begin to know exactly what that involves*", he continues. "*One can guess at it, but could not faithfully describe it*". The first instance judge, he adds, "*tantalisingly tells us, at paragraph 21 of his judgment, that the purpose is "to tease but not to satisfy"*".[1]

All judgments have to start somewhere. Many begin quite straightforwardly. They record what needs to be recorded, and decide what needs to be decided, without obviously seeking to amuse or entertain.

Not all judgments are like that. On occasion, we discover first lines which offer the reader an early moment in which to reflect on the human or the historical, the colourful or the unlikely, or indeed, the predicament of the judges themselves. In this edition of Legal Eye, we explore a selection of the ways in which opening lines can bring a judgment to life.

Denning

We begin with Lord Denning. Many of his introductions might be mistaken for the first words of a story, hinting at events soon to unfold. "*It happened on April 19, 1964*", begins one well-known opening, "*It was bluebell time in Kent*".[2] The "*it*" was a car crash, causing psychiatric harm to an unfortunate witness. "*It all started in a public house*",[3] begins another, where a first meeting is but the starting point in a case whose events culminate in the assessment of damages.

There is the bucolic setting of one particularly memorable example. "*In summertime village cricket is the delight of everyone*", "*Nearly every village has its own cricket field where the young men play and the old men watch*".[4] The reader receives a further foretaste of the judge's disinclination to restrain the locals of Lintz, Durham, from committing an actionable nuisance. "*The wicket area is well rolled and mown*", "*The outfield is kept short*". "*The*

1. *Sutton v Hutchinson* [2005] EWCA Civ 1773, [1].
2. *Hinz v Berry* [1970] 2 QB 40, 42.
3. *Heywood v Wellers* [1976] QB 446, 453.
4. *Miller v Jackson* [1977] QB 966, 976.

village team play there on Saturdays and Sundays," and "*On other evenings after work they practise while the light lasts.*" Then comes the fateful denouement. "*Yet now after these 70 years a judge of the High Court has ordered that they must not play there any more.*" The author fears "*the consequence, I suppose, that the Lintz Cricket Club will disappear*", that "*the cricket ground will be turned to some other use*". "*The whole village will be much the poorer,*" it is mournfully concluded. "*And all this because of a newcomer who has just bought a house there next to the cricket ground.*"

Lord Denning would locate cases in time and space, especially where English villages were concerned. It is thus that we read that "*Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy was a farmer there. His home was Yew Tree Farm: it went back 300 years*".[5] "*The village has an attractive name, Dibden Purlieu*", he writes in one of his last cases, "*It goes back to the times of the Norman French*".[6] Other judges have sought to take up the mantle more recently. "*Sheffield is one of the great cities of Northern England*", the reader is told, in a case involving the review of a planning decision about felling trees. It "*lies where several rivers and streams … flow eastwards off the Pennines*", but "*suffered during the deindustrialisation of the late 20th Century*".[7]

Modern judgments likewise tell stories. "*Some time between midnight and 1 o'clock in the morning on 30th August 2001 a burglar alarm went off at Whetstone golf club in Leicestershire*", begins one criminal appeal about theft.[8] Police officers arrived at the scene, only to discover "*two men dressed in frogman, or diving suits, and in possession of a sack, it can be described in no other way, of very wet golf balls*". Other judges may launch into the heart of the action. "*"Just a spliff, man", responded Mr Mondelly, when he was arrested by two police officers at his home at 9.30 p.m. on 16 February 2005.*"[9]

The temptation to narrate may be hard to resist when presented with the unusual. "*Overnight on 29th January 2012 the Defendant, Fatih Ozcan had a dream.*"[10] In the dream, "*he was holding a large bundle of cash and standing in front of him was the Claimant*", his employer. "*The Defendant is a strong believer in the power of dreams and interpreted this to mean that he and the Claimant would win the lottery*". A lottery ticket was then bought, winning the sum of £1 million. *"What is disputed is who bought the ticket and who is entitled to the winnings."*

In less extraordinary cases, opening lines may shine a light on the people behind the proceedings. The recovery of tax credits from HMRC provides an example. The protagonist is given centre stage, as the judge foreshadows the difficulties he would come to face. "*The Appellant was born in Hungary in 1985*", and so "*probably cannot remember life there before the collapse of the former Communist regime in 1989*", albeit that he likely heard stories from his family members.[11] He arrived to work in the UK in 2012. "*He probably thought he had left those family memories well behind*", the judgment ponders. "*Little did he know; his problems with Kafkaesque officialdom had only just begun*".

Life's rich tapestry

All manner of disputes find their way into a courtroom. If judgment is to be given, the subject matter must be described. Even blunt statements of what a case is about can give the reader a chance to reflect on the manifold ways in which the law impacts the diversity of human experience.

"*This case involves counterfeit unicorn drawings*," starts one recent decision from Illinois, the plaintiff unabated by the onset of the Covid pandemic.[12] "*This is a case about garment hangers*", begins another.[13] "*This case concerns an accident which took place on April 23, 1961, in the sausage department of the defendants*", the reader finds, left for a moment to picture the scene.[14] "*These proceedings relate to the ownership of "Bongo's Bingo" ("BB"), an entertainment medium fusing bingo with rave and dance-offs*", recounts a more recent judgment,[15] leaving much to the imagination.

There are alliterative variants of the pithy opening description. Rather than walk the reader through the process by which judicial review was sought on environmental grounds of a decision to use a former railway track as a bus route, one is instead greeted with an overview of the key words: "*This is a case about bats and badgers, Beeching and bus-ways*".[16] Others may simulate tongue-twisters in their concise summary of events. "*This is the case of the barmaid who was badly bitten by a big dog.*"[17]

Judges might use an opening to juxtapose the seemingly inaccessible with the quite ordinary. "*This application by the joint administrators of Dent Company (a partnership) ("the Partnership") affords the opportunity to consider the application of the equitable doctrines of marshalling and subrogation in relation to a fixed charge over a dog.*"[18] Sometimes, however, no such juxtaposition is available, and the judge must simply grasp the nettle. "*This is a case relating to design rights and registered design in a sling and a portable*

5. *Lloyds Bank Ltd v Bundy* [1975] QB 326, 334.
6. *Jennings Motors v Secretary of State for the Environment* [1982] QB 541, 547.
7. *The Queen (on the application of David Dilner) v Sheffield City Council* [2016] EWHC 945 (Admin), [1].
8. *R v Rostron* [2003] EWCA Crim 2206, [1].
9. *R (on the application of Mondelly) v Commissioner of the Police for the Metropolis* [2006] EWHC 2370 (Admin), [1].
10. *Kucukkoylu v Ozcan* [2014] EWHC 1972 (QB), [1].
11. *TM v Revenue and Customs* [2016] UKUT 0512 (AAC), [1].
12. *Art Ask Agency v Individuals*, N.D. Ill., Case No. 20-cv-1666 (18 March 2020).
13. *The Junger Ltd v Tesco Plc* [2020] EWHC 3450 (IPEC), [1].
14. *Braham v J Lyons & Co Ltd* [1962] 1 WLR 1048, 1050.
15. *Shua Limited v Camp and Furnace Limited* [2020] EWHC 687 (Ch), [1].
16. *R (on the application of Morge) v Hampshire County Council* [2010] EWCA Civ 608, [1].
17. *Cummings v Granger* [1976] QB 397, 402.
18. *McLean & Anor v Trustees of the Bankruptcy Estate of Dent & Ors* [2016] EWHC 2650 (Ch), [1].

frame from which such a sling can be hung, for use during sexual activities involving bondage."[19]

Judicial moments

A judgment may allow a judge to mark a moment of wider legal significance. Are finders keepers of an unclaimed chattel? Donaldson LJ acknowledges that the particular discovery before him, of a gold bracelet in an airport lounge, was of wider import. "*On November 15, 1978, the plaintiff Alan George Parker, had a date with fate – and perhaps with legal immortality.*"[20] Points of law might similarly provide an opportunity to make a self-referential comment about law and lawyerisms. "*The Clapham omnibus has many passengers*", writes Lord Reed. "*The most venerable is the reasonable man, who was born during the reign of Victoria but remains in vigorous health.*"[21] "*Amongst the other passengers are the right-thinking member of society, familiar from the law of defamation, the officious bystander, the reasonable parent, the reasonable landlord, and the fair-minded and informed observer, all of whom have had season tickets for many years.*" These tests are legal fictions, a means of describing a standard applied by the court. Having set the scene, the judgment descends to the particular. "*In recent times, some additional passengers from the European Union have boarded the Clapham omnibus. This appeal is concerned with one of them: the reasonably well-informed and normally diligent tenderer.*"[22]

Historical interest may warrant an opening mention too, as a decision brushes with the past. "*Richard III was the last King of England to die on the battlefield*",[23] announces one judgment, which went on to reject an effort to quash the decision to bury the former King's remains in Leicester Cathedral, and have them re-interred in York Minster instead. Others do not brush with history, but merely flirt with it. "*In 60 or 61 AD, Boudicca, Queen of the Iceni, reached modern day Chelmsford*", begins Mr Justice Turner, "*through which she led her formidable army of warriors along what is now Moulsham Street as they made their destructive way from Colchester to London in their savage but ultimately doomed resistance to the might of the Roman Empire*".[24] The next paragraph muses that, inspired by these events, "*the developers of properties located in a courtyard to the rear of 154 Moulsham Street, re-named them Boudicca Mews*".[25] Here the link to history starts to run dry. "*It was thus that they unwittingly set the scene for the further, but distinctly more mundane, territorial conflict which forms the subject matter of this appeal*" – the acquisition of a property by adverse possession.

By the same token, the first lines of a judgment may provide space to introduce the matter at hand in more light-hearted terms. "*Cheryl Pile brings this appeal to establish the liberty of inebriated English subjects to be allowed to lie undisturbed overnight in their own vomit soaked clothing.*"[26] Such a right, "*perhaps of dubious practical utility*", may extend to those intoxicated at home. But Ms Pile had been arrested in a police station. The officers had her clothing removed, and gave her a clean and dry outfit to wear. She sued the police for trespass to the person and assault: they should have left her alone, she claimed. "*Fortunately, because this appeal will be dismissed, the challenge of assessing damages for this lost opportunity will remain unmet.*"[27]

Judges occasionally come perilously close to wordplay and comedy. "*This case involves a number of – and here I must not fall into Dr Spooner's error – warring bankers*", Lord Justice Ward said, according to legend.[28] "*An ordinance dealing with semi-nude dancers has once again fallen on the Court's lap*", starts a regulatory case from Texas, the San Antonio authorities pleading for dancers to cover themselves more extensively.[29] Sometimes a judge will go the extra mile. "*The D.A. was ready*", "*His case was red-hot*", "*Defendant was present*", "*His witness was not*".[30]

Lawyers and litigants

Now and again, the legal process appears to take its toll on members of the judiciary. A salvo at the start of a judgment may signal to the parties, and their lawyers, the frustration experienced by those tasked with resolving the disputes of others.

Claims or applications, and the events giving rise to them, might be introduced with a knowing judicial eye-roll. "*I have an application before me brought on behalf of a company called Officeserve Technologies Limited ("the company")*", begins one judgment.[31] "*The company has achieved what must be the stellar ambition of many of generating a turnover, I am told, of £52,000 per annum and spending £450,000 a month doing so*". The judge then shows his hand a little further. "*That is of itself astonishing and it is not surprising to find it appearing before me today on an application made by its directors seeking some form of insolvency process*". Another device is to take a legal metaphor literally. "*Fishing expeditions are a popular pastime for many people*", wrote Associate Judge Sargisson, in the High Court of New Zealand. "*The fisher does not know, of course, what he or she might reel in*", but "*Nonetheless, the line is*

19. *Uwug Ltd & Anor v Ball* (t/a Red) [2013] EWPCC 35 at [1].

20. *Parker v British Airways Board* [1982] QB 1004, 1007.

21. *Healthcare at Home Ltd v The Common Services Agency* [2014] 4 All ER 210, [1].

22. Ibid, [4].

23. *The Queen (on the application of Plantagenet Alliance Ltd)* [2014] EWHC 1662 (QB), [1].

24. *McClelland v Elvin* [2017] EWHC 2795 (QB), [1].

25. Ibid, [2].

26. *Pile v Chief Constable of Merseyside Police* [2020] EWHC 2472 (QB), [1].

27. Ibid, [2].

28. See https://sirhenrybrooke.me/2017/05/01/miscellany-of-the-best-opening-lines-etc-part-2/#_ftnref7. I am greatly indebted to this website for many of the examples which feature in this piece.

29. *35 Bar and Grille, LLC v City of San Antonio*, 943 F. Supp. 2d 706 (W.D. Tex. 2013).

30. *Brown v State*, 134 Ga. App. 771 (1975).

31. *Officeserve Technologies Limited* [2017] EWHC 906 (Ch), [1].

"This is the kind of litigation that could feed the public's worst perception of lawyers and the law"

thrown out in the hope, and the expectation, that something will bite".[32]

The judge then turns to the claimant liquidators' application for disclosure of company accounts. "*The liquidators in this case, Ms Finnigan and Mr Van Delden, are said to be 'going on a fishing expedition'.*"[33]

Lawyers may have to face the judge's ire from time to time, and that is no less true of a first line. "*This is the kind of litigation that could feed the public's worst perception of lawyers and the law*",[34] starts one appellate judgment, in an opening section entitled "*In praise of forensic schizophrenia*". The claimant had found itself arguing a position opposite to that which it had pursued vigorously in previous proceedings. The tendency to the complex can also come in for criticism. "*This case ought to have been a simple one, but the lawyers have made it a very complicated one.*"[35]

The indefatigable and vexatious litigant provides an increasingly established means of opening a judgment. "*Anal Sheikh is no stranger to these courts. For about a decade, she has waged a lonely forensic campaign against an ever expanding cadre of judges, barristers, solicitors and others.*"[36] An earlier decision from Ontario, Canada, was to like effect. "*Roger Callow is a litigant possessed of seemingly inexhaustible stamina. His behaviour suggests that he views the Canadian court system as something akin to a perpetual, all-day, all you can eat buffet.*"[37]

But not all opening mentions of litigants are so disparaging. Admiration may be accorded to the plucky. "*It is one of the glories of this country that every now and then one of its citizens is prepared to take a stand against the big battalions of government or industry. Such a person is Lisa Ferguson, the claimant in this case.*"[38]

Intransigent parties or long-running litigation may also prompt judicial creativity in an opening. "*Paging Dr. Freud. Paging Dr. Freud,*" complains a family judge in Ontario, faced with a dispute about a separation agreement.[39] He continues acerbically. "*This is yet another case that reveals the ineffectiveness of Family Court in a bitter custody/access dispute, where the parties require therapeutic intervention rather than legal attention. Here, a husband and wife have been marinating in a mutual hatred so intense as to surely amount to a personality disorder requiring treatment.*"[40] Conflict between parties may be signalled in more muted and ominous terms. "*Mixing business and friendship can be the ruin of both*", starts another Canadian judgment. "*Here, only the business survived.*"[41] Matters might be put more candidly and directly, eliciting sympathy in the reader. "*Well, here we go again*", begins one judge, in a case about tax credits.[42] Or, more prosaically still, "*Oh dear. Oh dear. Oh dear.*"[43]

From first lines to last words

"*These reasons are not so much a judgment as a requiem*", opened Master Sanderson, in the Supreme Court of Western Australia.[44] The long-running litigation arising out of the collapse of the Bell Group of companies was coming to an end. "*Thousands of people worked on this case. Most have put the experience behind them and moved on; many, shattered by the experience, have retired; more than a few have gone mad.*"[45] He was invited to terminate the winding up of a company in that group. "*It was tempting to drive a wooden stake through the heart of the company to ensure it does not rise zombie like from the grave*", and "*As an alternative, I considered ordering the files be removed to a secure facility in Roswell and marked: 'Never to be opened*".[46] The judge made orders dismissing the winding up application with no order as to costs. In laying the case to rest, the judge leaves us an important reminder. The first lines of a judgment may charm or delight, but in the end, it is often the last words, in law as in life, which matter the most. "*Amen*", he closed.[47] ■

32. *Finnigan v Ellis* [2017] NZHC 1397, [1].

33. Ibid, [2].

34. *Greenland Bank Ltd v American Express Bank Ltd* [2009] EWCA Civ 1, [1].

35. *Marsden v Regan* [1954] 1 WLR 423, 436.

36. *Sheikh v Page* [2017] EWHC 1772 (QB), [1].

37. *West Vancouver School District No. 45 v Callow*, 2014 ONSC 2547, [1].

38. *Ferguson v British Gas Trading Ltd* [2010] 1 WLR 785, [1].

39. *Bruni v Bruni*, 2010 ONSC 6568, [1].

40. Ibid, [2].

41. *Gill v 1176520 Alberta Ltd*, 2020 ABQB 274, [1].

42. *NI v Revenue and Customs (TC)* [2015] UKUT 0490 (AAC), [1].

43. *AF v Secretary of State for Work and Pensions (DLA) (No 2)* [2017] UKUT 366 (AAC), [1].

44. *Bell Group (UK) Holdings Limited (in liquidation)* [2020] WASC 347, [1].

45. Ibid, [3].

46. Ibid, [8].

47. Ibid, [9].

News in Brief

Stephen Robins is made Silk

We are delighted to announce that Stephen Robins has been appointed one of her Majesty's Counsel. The QC appointment ceremony took place on the 21st March 2022 at Westminster Hall.

Stephen has been widely recognised as a stand-out junior. Client comments in recent legal directories include: *"He is a corporate insolvency supremo – he has a first-class brain and is a great team player. He's one of the most able juniors at the Bar"* (Chambers & Partners UK Bar); *"One of the true leading senior juniors at the insolvency bar; prodigiously hard-working and intelligent"* (Legal 500); *"One of the best juniors I have instructed"* (Legal 500).

Stephen' practice encompasses all of Chambers main practice areas, and he has substantial experience of heavy trials (in both the Chancery Division (e.g. *Uralkali v Rowley*) and the Commercial Court (e.g. *Magdeev v Tsvetkov*)) and arbitrations.

Stephen has also been involved in a considerable amount of appellate work, both in the Court of Appeal (including *Bedzhamov, AA v BB, Peak Hotels, Fraser Turner, Titan, IBRC, Lehman Waterfall I, Lehman Waterfall II, Firth Rixson, Tambrook, Ovenden Colbert)* and the Supreme Court/Privy Council *(Lehman Waterfall I, BONY Mellon v LBG Capital, PwC v Saad, Singularis v PwC, Rubin v Eurofinance, Landsbanki v Heritable, Nortel/Lehman, EL Trigger*).

Civil Procedure (Amendment) Rules 2022 and 140th Practice Direction Update

The Civil Procedure (Amendment) Rules 2022 (SI 2022/101) (SI) and 140th Practice Direction Update (140th PD update) were published in February.

The SI makes a number of changes to the Civil Procedure Rules (CPR) with effect from 6 April 2022. It introduces a completely re-drafted CPR 10 (Acknowledgment of Service) and CPR 12 (Default Judgment), reflecting work by the Civil Procedure Rule Committee to simplify and condense the CPR and following public consultation.

Other rules that are amended include:

- CPR 2 (Application and Interpretation of the Rules) and CPR 42 (Change of Solicitor), relating to the introduction of a system to allow notices of change of solicitor to be filed at the court online.
- CPR 26 (Case Management, Preliminary Stage), to increase the small claims track limit in personal injury claims that do not arise from a road traffic accident from £1,000 to £1,500.
- CPR 39 (Miscellaneous Provisions Relating to Hearings), to bring all instances in which the court may exercise a jurisdiction to anonymise under the same procedural provision.
- The 140th PD Update amends various CPR PDs consequential on the SI, including the total removal of PD 10 and PD 12. Other changes include:
- PD 3C is amended to increase the maximum term of a Civil Restraint Order from two to three years.
- The Electronic Working Pilot Scheme PD 51O has been extended to 6 April 2023 to enable final roll out of the project for e-filing. There are also amendments to PD 23A (Applications), PD 25A (Interim injunctions), Application for a Warrant under The Competition Act 1998 PD and the Civil Recovery Proceedings PD to update the language regarding electronic communication and to reflect more accurately current and future practice.
- All the provisions regarding planning claims have been consolidated into one place (new Practice Direction 54D (Planning Court Claims and Appeals to the Planning Court)).
- A suite of amendments regarding forms in PD 4 (Forms).

Tax Fraud Barrister Jailed

A barrister who lied about his earnings to reduce the amount of tax he paid has been jailed for 21 months.

Christopher John Wilkins, 57, of Chichester, West Sussex, stole £98,732 in tax by deliberately understating his income and inflating his expenses over a five-year period.

Wilkins was arrested in May 2017 and told HM Revenue & Customs (HMRC) that he was behind on his VAT payments. However, HMRC compared Wilkins' VAT declarations to those provided by his chambers which revealed that he had lied about his income to reduce this tax liability.

He was charged in February 2020 for being knowingly concerned in the fraudulent evasion of VAT between March 2012 and June 2017. Mr Wilkins pleaded guilty at Taunton Crown Court in November 2021 and was sentenced in January of this year.

Are Barristers' Wigs Due a Cut?

Leslie Thomas QC, one of Britain's most high-profile black QCs, has called for wigs to be cut from court for being culturally insensitive. Thomas spoke out after Michael Etienne, a junior barrister with an afro hairstyle, was told by the Bar Council that he risked being in contempt of court if he declined to wear his wig before a judge. Since he tweeted the Bar Council's response a number of black barristers have spoken out, including Alphege Bell, the first barrister to appear in court with dreadlocks. He does not suggest wigs should be completely banned, but that there should be recognition of the impact that wearing them can have.

In most court hearings in England and Wales, wigs are no longer worn. But court rules state that they must be worn in specific circumstances, including for trials in the crown court and some civil hearings, as well as in cases before the High Court and Court of Appeal. But barristers and other advocates appearing before the Supreme Court and at tribunals simply wear dark business suits with no wigs or gowns.

Barristers' wigs are usually made in a Georgian style peruke from horsehair. There have, however, been a number of efforts in recent years to modernise the wig. Samuel March, a junior barrister at 9 King's Bench Walk, developed what is believed to be the country's first vegan wig, 100% hemp, after discovering none of the main legal dressers in the UK supplied them. Elsewhere, Doughty Street Chambers barristers Karlia Lykourgou and Maryam Mir launched a range of court-friendly hijabs for Muslim lawyers who struggle to find appropriate legal headwear.

Curtains for Cockerels?

Owners of a quartet of rescue cockerels residing in a residential street in Blackpool were ordered in December 2021 by Blackpool Magistrates Court to find the birds alternative accommodation. The court heard that neighbours began to raise formal objections to the ceaseless crowing from dawn till dusk back in 2018, after diplomatic attempts to have the birds removed failed. Eventually the council installed decibel monitors which revealed the extent of the din.

Sentencing the cockerel's owners to year-long conditional discharges, and ordering them to pay £122 costs each, Blackpool Magistrates Court chairman Simon Bridge told them 'You must sort this out now. This is a warning.' The Digest has been unable to discover the eventual fate of the birds.

News in Brief

Crystal Cruises Crash

In early February of this year Crystal Cruises, the most-awarded luxury cruise line in the industry, ceased operations without a word to consumers or travel agents, leaving behind it a trail of debt. Abruptly abandoned by its parent company, Genting Hong Kong Ltd, debts are owed to customers who had put down payments and deposits for sailings into 2024; to agents owed commissions; to employees in offices; to crew still on ships; and to unpaid vendors.

Although a debt of $4.6 million in outstanding fuel bills was central to its demise, signs that Crystal was in trouble appeared weeks earlier, with the insolvency of a German shipyard triggering a domino effect of a petition to wind up the company, layoffs, and a halt to future sailings. Throughout, Genting assured Crystal employees that the brand was not in jeopardy. Indeed, passengers were still on ships!

However, in early February, when the line's new 200-passenger expedition ship, the Crystal Endeavor, disembarked its final passengers in Argentina, the cash had run dry and Genting filed for liquidation in Bermuda.

A specialist assignee company now has control of the remains of Crystal's non-ship assets, its accounts and records and will be collecting creditors' claims for payment. This includes the claims of passengers, travel advisors, vendors, shoreside employees and, if needs be, crew.

For those customers who paid by credit card, their funds are being held in trust by VISA, Mastercard and American Express through whom they can expect to be refunded.

The ships — which were not owned by Crystal but on bareboat charter — have been taken over by their secured creditors, the banks that hold the mortgages who have appointed River Advice and V.Ships Leisure as managers.

Train driver sues for loss of earnings

A Japanese train driver is suing his employer, JR West, after he was docked 56 yen (£0.36) in wages for causing a brief delay to the country's famously punctual rail system.

The driver had been due to drive an empty train to Okayama station for warehousing, but went to the wrong platform whilst waiting to take over from the previous driver. By the time he realised his mistake and had rushed to the correct platform, the transfer between the two drivers had been delayed by two minutes, leading to a one-minute delay in the train's departure and a one-minute delay in warehousing the train at the depot.

JR West initially docked the driver 85 yen (£0.55), arguing that no labour had been performed during the stoppage, relying upon Japan's 'no work, no pay' principle, but later agreed to reduce the fine after the driver took the case to the Okayama Labour Standards Inspection Office.

The driver has, however, refused to accept the reduction, arguing that the delay caused no disruption to timetables or passengers as the train was empty during the incident. He has taken his case to the Okayama District Court, seeking 2.2 million yen (£14,347) in damages for mental anguish caused by the ordeal.

Grade 1 Listing for Derby County?

Football club Derby County, which won the English first division twice in the 1970s, has been in administration since September 2021. Now Gary Neville (former Manchester United player and now football pundit at Sky Sports) has weighed in on the action stating *"Football clubs need to be treated like grade I listed buildings and not like and not like normal businesses on the street that are subject to free market conditions".*

FCA Crack Down on Buy Now, Pay Later firms

In mid-February the Financial Conduct Authority (FCA) reported that it had instructed four 'buy now pay later' firms (BNPL) to change their contracts after identifying "potential harms" to consumers. The four firms involved were Clearpay, Klarna, Laybuy and Openbuy and all are reported to have fully co-operated with the FCA demands, with Klarna saying it had already implemented the proposed changes.

Whilst the FCA is unable to regulate BNPL firms, the watchdog said it was able to use Britain's consumer rights laws to make their contracts fairer, easier for consumers to understand and better reflect how they use them in practice. The FCA said that all firms in the sector should comply with all requirements of consumer protection laws that apply to their business

BNPL firms typically offer on-the-spot interest-free short-term loans that spread payments for retail goods like clothing. The market more than trebled in size during 2020 to £2.7 billion when COVID-19 lockdowns saw more people struggling to make ends meet

Studio Retail Administration

Mike Ashley is the gift that keeps on giving to the NIBS section of the Digest! Now Studio Retail, an online shopping company backed by Mike Ashley's Frasers Group, is calling in the administrators after its request for a short-term £25 million working capital loan was turned down by HSBC. This is the third company that Ashley has backed which has failed, the other two being Debenhams and Goals Soccer Centres.

Frasers Group owns a 28.9 percent stake in the retailer – buying shares initially in 2015 and recently taking advantage of a fall in the share price to increase its stake.

Studio Retail began life as Express Gifts, a catalogue retailer focused on gifts and educational supplies, but later switched to selling home and electrical products together with personalised products, shoes and clothes on flexible payment terms to around 2.5 million customers. Its administration puts up to 1,400 jobs at risk.

Lord Theodore Agnew of Oulton

Pandemic Loan Losses May Dwarf UK Fraud Bill

As much as £20 billion of taxpayer-backed Covid loans may have to be written off because of defaults by struggling borrowers. The resignation in January of Lord Agnew of Oulton as counter-fraud minister to the Boris Johnson's government, prompted increased scrutiny of losses to criminals in the government's emergency schemes. Accountancy firm Azets has, however, warned that these will be eclipsed by the hit to the public purse from legitimate borrowers going bust.

The Treasury has so far written-off £4.3 billion of the £5.8 billion that was stolen from its emergency Covid schemes, which propped up swathes of the workforce during successive lockdowns, including the furlough scheme, the self-employed income support programme and Eat Out to Help Out.

SOUTH SQUARE CHALLENGE

Welcome to the first South Square Challenge of 2022!

Your mission, should you choose to accept it, is to work out what is represented by each image, identify its location and then determine the link that binds them.

The winner, whose name will be drawn from the wig tin in the event of multiple correct answers, will win a magnum of Champagne and one of our famous South Square Umbrellas.

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Please send your answers to Kirsten either by e-mail to **Kirstendent@southsquare.com**, or to the address on the back cover, by 28 June 2022 - an extended deadline for the INSOL London Conference.

We had several correct answers to our last competition and the lucky winner, drawn from the wig tin, is Emma Clifton of EY Cayman. As it was a roll-over event, we send Emma our congratulations, two magnums of champagne and two South Square Umbrellas.

And the link is that Members of South Square have been involved in their restructurings.

A. Steinhoff International
B. Greensill Capital
C. New Look
D. Café Nero
E. Virgin Active
F. Pizza Express
G. National Car Parks (NCP)
H. NMC Healthcare
I. Luckin Coffee

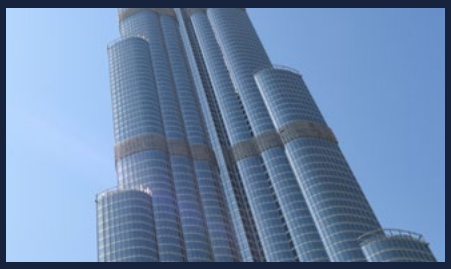
1. 2022

2. 2019

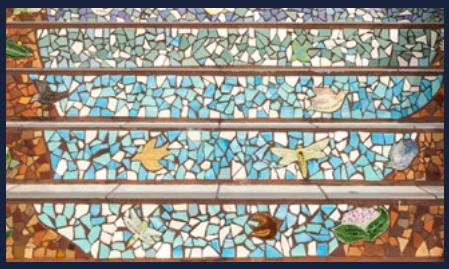
3. 2018

4. 2017

5. 2016

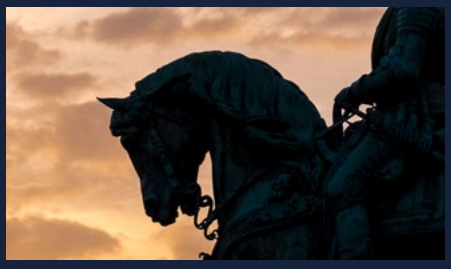


6. 2015

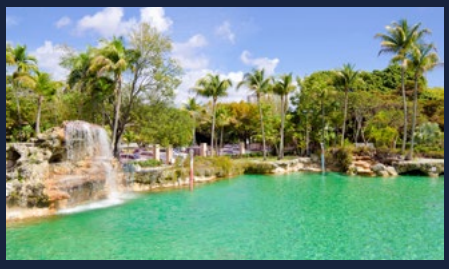


7. 2014

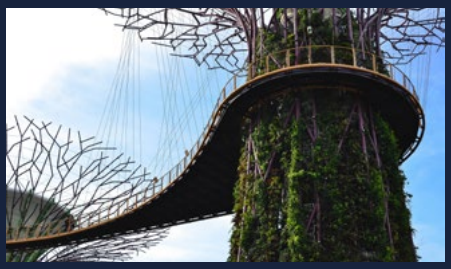
8. 2013



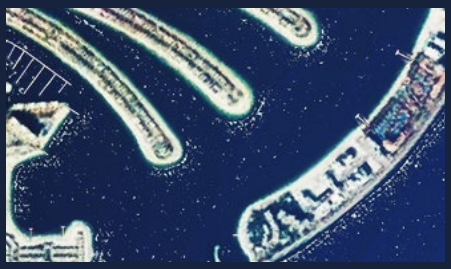
9. 2012



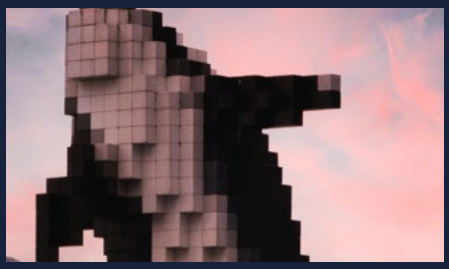
10. 2011



11. 2010



12. 2009



13. 2008

SOUTH SQUARE

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