Issue 4: September 2021

The Three Stone Triannual Review

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Editorial

It must often seem to clients that the phrases "common sense" and "costs" are completely irreconcilable in litigation. It sometimes seems that way to lawyers. Why, for instance, have clients had to pay their lawyers at 2021 prices, but the courts would only allow them recovery at 2010 prices, with a bit of a mark up if you are lucky? Happily, as we note in the Practice Update, this particular anachronism has now disappeared with the new set of Guideline Hourly Rates. It is to be welcomed, as is the Master of the Rolls' pious hope that the rates will be more regularly updated in the future. More common sense is found in *ABC v London Borough of Lambeth* (e-filing of claims) and *Ahuja Investments v Victorygame* (drawing adverse inferences).

Costs, though, are still regularly the source of acrimonious (i.e. costly) litigation. In this Issue, we review *Axnoller Events v Brake* (the rates for summary assessment), *Candey v Tonstate Group* and *Farrar v Miller* (both related to Damages-based Agreements), *Manolete Partners v Hayward & Barrett Holdings* (on funding insolvency actions). Perhaps the Court of Appeal had the right idea in *Goknur Gida Maddeleri Enerji Imalet Ithalat Ihracat Ticaret ve Sanayi As v Aytacli* (also reviewed in these pages): "For those who believe that most civil litigation does not end up being about the costs that were incurred in pursuing that same litigation in the first place, look away now."

Setting the bar high

In this article, **Sebastian Kokelaar,** explains the decision of the Supreme Court in *Pakistan International Airline Corp v Times Travel (UK) Ltd*, which sets the bar high for any party seeking to establish that a lawful act duress has occurred.

On 18 August 2021, in the depths of the long vacation, the Supreme Court handed down judgment in the case of *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 ("*PIA v TT*"). The decision confirms that, whilst English law recognises lawful act duress as a ground for avoiding a contract, the test to be applied is a high one, which will only be satisfied in very rare circumstances.

The legal landscape prior to *PIA v TT*

Origins

At common law, where a person has been induced to enter into a contract under duress, i.e. as a result of illegitimate threats or pressure, he may be entitled to rescind the contract and claim back any payments made pursuant to it. Historically, the only forms of duress recognised as being capable of giving rise to a right to rescind the contract were duress of the person (i.e. threats to life and limb) and duress of goods (i.e. threats to seize or retain goods). However, a series of cases in the 1970s and 80s expanded the doctrine of duress to encompass forms of economic pressure such as where one party threatens to break a contract

or commit a tort unless the other party agrees to do something (e.g. make an additional payment): see most notably the decision of the House of Lords in *Monrovia v International Transport Workers Federation (The Universe Sentinel)* [1983] 1 AC 366. This is sometimes referred to as 'economic duress'.

In cases of economic duress, as well as showing that he was induced to enter into the contract as a result of a threat or pressure that was illegitimate, the party seeking rescission must also be able to demonstrate that he had no reasonable alternative to giving in to the threat or pressure: see e.g. *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530 at para. 131.

One issue which has (at least until now) proved controversial is whether, and in what circumstances, a threat to do something that is perfectly lawful can constitute duress. The courts have been apprehensive about extending the scope of duress to include lawful forms of pressure. This is understandable. To do so risks undermining the long-standing reputation for certainty and clarity of English contract law. Negotiations that precede the conclusion of a contract often involve one party exploiting the relative strength of its bargaining position and applying pressure on the other party to achieve its commercial objectives (e.g. by threatening not to terminate or not to renew a contract unless the other party agrees to some demand). Whilst it is easy to draw a line between a threat to do something lawful and a threat to do something unlawful, once one goes beyond that bright-line distinction it becomes much harder to lay down a clear and precise test to determine the point at which pressure becomes illegitimate or improper. Arguably, this is a more of question of social morality rather than legal principle.

Such concerns have led some commentators to suggest that lawful act duress should not form part of English law at all, and it is worth noting that it has been rejected in some other common law jurisdictions: see e.g. the decision of the Court of Appeal of New South Wales in *Australia and New Zealand Banking Group Ltd v Karam* (2005) NSWLR 149. This might be said that this is more consistent with the fact that English law does not recognise a general principle of good faith in contractual relations (unlike civil jurisdictions and some other common law jurisdictions such as Canada), or a doctrine of inequality of bargaining power (outside the equitable context of undue influence), or a doctrine of abuse of right.

Previous English authorities

The English courts have, however, not gone so far as to reject the concept altogether. There are a few examples in the authorities prior to *PIA v TT* in which (at least arguably) a remedy was provided for what may be analysed as lawful act duress. As Lord Hodge observed in *PIA v TT* (at [4-18]), these fall into two categories. The first category comprises three 19th and early 20th century cases in which a party uses his knowledge of criminal activity by another party (or a member of that party's close family) to obtain a contractual benefit by the express or implicit threat to report the crime or initiate a prosecution: *Williams v Bayley* (1866) LR 1 HL 200; *Kaufman v Gerson* [1904] 1 KB 591; *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389. The judges in those cases relied on the equitable doctrine of undue influence to invalidate the contract because at that stage of the development of the common law duress was understood to be limited to duress of the person, but they are now viewed as examples of lawful act duress: see Lord Hodge at [9] and Lord Burrows at [89-90]).

The second category comprises cases in which a party, having exposed himself to a civil claim by another party, deliberately manoeuvres the other party into a position of vulnerability by illegitimate means and thereby forces the other party to give up his claim. In *Borelli v Ting* [2010] UKPC 21 the liquidators of a company wished to enter into a scheme of arrangement to obtain money to fund the liquidation. This required shareholder approval. The company's former chief executive, Mr Ting, held (through two other companies) a minority shareholding which enabled him to block the scheme. Mr Ting failed to comply with his statutory duties to assist the liquidators by providing information relevant to the winding up, and sought to use his minority stake to block the scheme of arrangement. He also forged a document and procured the provision of false evidence in his opposition to the scheme. When time was running out for the liquidators to meet a court deadline for the approval of the scheme, they entered into a settlement agreement with Mr Ting whereby they agreed not to pursue any claims against Mr Ting in return for Mr Ting dropping his opposition to the scheme. Subsequently, they sought to rescind the settlement agreement on the grounds that it had been entered into under duress, and commenced proceedings against Mr Ting for misappropriation of funds

from the company. The Privy Council (on an appeal from the courts of Bermuda) held that the settlement agreement was invalid because it had been entered into as a result of illegitimate economic pressure and that Mr Ting's behaviour had been unconscionable.

A claim to rescind a settlement agreement on the grounds of duress also succeeded in *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] EWHC 273 (Comm). The claimant charterers entered into a charterparty with the owners of a vessel for the carriage of scrap metal to China. The owners, in repudiatory breach of the charterparty, then chartered the vessel to another party, but assured the claimants that they would provide a substitute vessel to ship their cargo at a later date and pay damages for any losses. In reliance on this, the claimants did not try to find another vessel and agreed a later delivery date with the Chinese purchasers in return for a reduction in the price paid for the scrap metal. The owners then made the claimants a "take it or leave it offer" to provide a substitute vessel at a discount which fell far short of the sum needed to compensate the claimants for the reduction in price they had had to agree with the purchaser, but only if the claimants agreed to waive all claims for damages arising out of the owners' breach of the charterparty. The claimants had no choice but to accept, and did so. In a subsequent arbitration it was held that the settlement was voidable for economic duress. The arbitrators founds that the owners had been in repudiatory breach of the charterparty, had lulled the charterers into a false sense of security by their assurances, and had manoeuvred them into a position where, because of the passage of time, they had no choice but to accept the "take it or leave it" offer. This decision was upheld by Cooke J on an appeal. He held that it was clear that "illegitimate pressure' can be constituted by conduct which is not in itself unlawful. On the facts, he found that the arbitrators had been entitled to conclude that the owners' refusal to supply the substitute vessel unless the charterers waived their rights, in circumstances which they had created by their breach and their subsequent misleading activity, amounted to illegitimate pressure.

It might be objected that these two cases are actually better analysed as examples of unlawful act duress. In *Borelli v Ting* the defendant's conduct in opposing the scheme of arrangement involved breaches of his statutory duties under local

insolvency law and the use of forged documents and false evidence. It is clear from the judgment of the Board delivered by Lord Savile that this unlawful conduct was key to the finding of economic duress. Similarly, in the *Progress Bulk Carriers* case the charterers found themselves in an impossible position because of the owners' repudiatory breach of the charterparty. However, in both cases the threat or pressure that was the effective cause of the impugned contract was a threat do something entirely lawful. In *Borelli v Ting* Mr Ting's companies were perfectly entitled to withhold their consent for the scheme, and in *Progress Bulk Carriers* the owners had not committed themselves to providing an alternative vessel although they had intimated that they would be willing to do so. Although the past breaches had created the opportunity to apply pressure, they did not constitute the pressure itself (as Lord Burrows observed in *PIA v TT* at [111]).

Finally, mention should also be made of the earlier decision of the Court of Appeal in *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714, although on the facts of that case a plea of economic duress was not made out. The defendant, Gallaher, was the sole distributor of certain cigarette brands in England. It had a trading relationship with the claimant, CTN, but was not contractually obliged to sell cigarettes to CTN; each consignment was sold pursuant to a separate contract on Gallaher's standard terms. Gallaher gave credit facilities to CTN which it could withdraw at any time. In error Gallaher delivered a consignment of cigarettes to the wrong CTN warehouse. When the mistake was discovered, Gallaher agreed to collect the consignment and deliver it to the correct warehouse, but before it could do so, the consignment was stolen. Gallaher, wrongly believing that risk had passed to CTN, demanded payment of the purchase price for the consignment. CTN eventually paid, but only because Gallaher threatened to cut off the credit facilities to CTN. CTN then brought proceedings against Gallaher to recover the purchase price on the grounds that it had been paid under economic duress. The claim failed at first instance and on appeal.

Steyn LJ, delivering the leading judgment (with which Farquharson LJ and Sir Donald Nicholls V-C agreed), focused on three features. First, the fact that Gallaher occupied a monopoly position (as the sole supplier of certain brands) was not sufficient in itself to convert the pressure applied by it into duress. The control

of monopolies was a matter for Parliament and English law does not recognise a general doctrine of inequality of bargaining power. Second, as a matter of law, Gallaher was entitled for any reason (or no reason) to refuse to enter into future contracts with CTN or provide credit. Third, Gallaher had believed in good faith that the goods were at CTN's risk when they were stolen. Steyn LJ said that this third feature was the "critically important" characteristic of the case.

PIA v TT

The facts and lower judgments

PIA v TT falls into the same category of cases as *Borelli v Ting* and *Progress Bulk Carriers*, i.e. where a party puts pressure on another party to waive potential claims against it by threatening to do something which is lawful. PIA is the flag carrier of Pakistan. At the relevant time it was the only airline that operated direct flights between the UK and Pakistan, and was therefore in something of a monopoly position. TT is a travel agency catering mainly for the Pakistani community in the West Midlands. Its business consisted almost entirely of selling tickets for flights to Pakistan in PIA planes. Pursuant to the contract between the parties TT was entitled to various types of commission on tickets sold. PIA was not, however, obliged under the contract to sell a minimum number of tickets to TT and could terminate the contract on giving one month's notice for any reason. A dispute arose between PIA and TT about non-payment of commission which TT said was due to it under the contract. After the dispute had arisen, PIA served notice to terminate the contract and cut TT's normal allocation of tickets from 300 to 60. It then offered TT a new contract, which included an onerous term whereby TT waived its claims to unpaid commission under the previous contract. As its business was dependent on PIA, TT had no choice but to agree to this and did so. Subsequently, however, it commenced proceedings against PIA alleging that it was entitled to rescind the new contract on the grounds of economic duress and claiming the unpaid commission.

The plea of economic duress succeeded before Warren J at first instance: [2017] EWHC 1367 (Ch). He held that PIA, although acting lawfully, had placed illegitimate

pressure on TT. Accordingly, TT was entitled to rescind the new contract. Its claim for unpaid commission succeeded in part. Importantly, for the purposes of the subsequent appeals, Warren J made no finding that PIA had acted in bad faith in the sense that it did not genuinely believe that it had a defence to the claim for unpaid commission.

PIA appealed successfully to the Court of Appeal: [2019] EWCA Civ 828. The leading judgment was given by David Richards LJ (with whom Moylan and Asplin LJJ agreed). He carried out a careful review of the authorities, including the Court of Appeal's decision in *CTN v Gallaher*, and concluded that lawful act duress can only be established if the demand is made in bad faith, i.e. if the party applying the pressure does not genuinely believe that it has a pre-existing legal right to what is being demanded, or a defence to the claim which it is demanding that the other party release. This is a subjective test; it is irrelevant whether or not there was a reasonable basis for the belief (see [114]). Commenting on *CTN*, David Richards LJ said (at [96]) that, if Gallaher had made its demand in bad faith, not believing it to be well founded, the court would have held the payment to have been made under duress. Similarly, because Warren J had not found bad faith on the part of PIA (in the sense that he had not found that PIA did not believe in good faith that it had a defence to TT's claims for unpaid commission), he had been wrong to conclude that TT had made out its case of economic duress (see [117]).

The Supreme Court's decision

The Supreme Court unanimously upheld the decision of the Court of Appeal: [2021] UKSC 40, although the Justices were divided on the reasons for doing so. Lord Burrows, in a minority of one, essentially agreed with the reasoning of David Richards LJ in the Court of Appeal. In his judgment he concludes that the decision of the Court of Appeal in *CTN v Gallaher* establishes a requirement for a 'bad faith demand' ([100-103]), and that the subsequent decisions in *Borelli v Ting* and *Progress Bulk Carriers* are consistent with such a requirement ([104-108]). Mr Ting had made his demand that the liquidators abandon their claims against him in bad faith in that he did not genuinely believe that he had a defence to those claims, and that he was seeking to prevent them from being pursued. Furthermore, he had set about deliberately increasing the liquidators' vulnerability to his demand.

The same was true of the owners in *Progress Bulk Carriers*. Whilst there was no express finding of bad faith on their part, on a fair reading of the facts, it was likely that the arbitrators would have found that the owners had made their demand for a waiver of the claim for damages against them not genuinely believing they had a defence to it.

Lord Burrows concluded at [112]:

> "Taken together, what *Borrelli v Ting* and *Progress Bulk Carriers* can be taken to have established is that, in relation to a demand for a waiver by the threatened party of a claim against the threatening party, the demand is unjustified, so that the lawful act economic threat is illegitimate where: first, the threatening party has deliberately created, or increased, the threatened party's vulnerability to the demand; and, secondly, the "bad faith demand" requirement is satisfied (ie the threatening party does not genuinely believe that it has a defence, and there is no defence, to the claim being waived)."

Applying that to the facts of the case, Lord Burrows noted that there was nothing objectionable in itself about the fact that PIA was in effect in a monopoly position as regards the supply of direct flights to Pakistan. However, there were at least two features that took the case outside the realm of mere use of monopoly power. First, PIA was in breach of contract by refusing to pay TT a substantial sum of past commission. Second, PIA had sought to increase TT's vulnerability to its demand to waive any claims for the unpaid commission by cutting its normal ticket allocation from 300 to 60 over-night. Accordingly, the "manoeuvring" requirement was satisfied. However, on the findings of fact made by the trial judge, the requirement for a "bad faith demand" was not satisfied. As the Court of Appeal had correctly held, that was enough to defeat the claim for rescission.

The majority (comprising Lords Hodge, Reed, Lloyd-Jones and Kitchin) disagreed that the absence of a "bad faith demand" was decisive of the outcome of the case. They considered that the reasoning of the Court of Appeal and Lord Burrows was an impermissible extension of the doctrine of lawful act duress, well beyond the position reached in the earlier authorities.

The majority held that, in order to make out lawful act duress, it is not sufficient

to show merely that a party had exploited a stark inequality of bargaining power in order to pressure another party to give in to a demand made in bad faith. As Lord Hodge observed ([48]), this may not be an uncommon occurrence in commercial life. Pressure should only be regarded as 'illegitimate' if it involved conduct which was so reprehensible as to make the enforcement of the agreement unconscionable.

Lord Hodge makes it clear that unconscionability for these purposes is not some overarching criterion to be applied across the board without regard to the context. The place of lawful act duress in English law has to be seen against the backdrop of the equitable doctrines of undue influence and unconscionable bargains which operate in a specific way. The former is focused on unfair advantage being taken of a protected relationship, the latter involve on the exploitation in a morally culpable manner of a party's weakness or disadvantage. In neither case does unequal bargaining power suffice ([19-25]).

On the facts of the case, Lord Hodge disagreed with Lord Burrows that PIA's conduct had gone beyond the mere use of monopolistic power. He said this at [58]:

> "While this entailed hard-nosed commercial negotiation that exploited PIAC's position as a monopoly supplier, it did not involve the reprehensible means of applying pressure which gave rise to the findings of lawful act economic duress in Borrelli and The Cenk K. There are also no findings that PIAC acted in bad faith in making the demands which it did."

It should be noted that, despite the differences in the analysis of what the law recognises as an illegitimate threat or pressure, there was a lot of common ground between the majority and minority. They were all agreed on the essential elements of economic duress (i.e. illegitimate threat or pressure, causation and no reasonable alternative), and agreed that the concept of lawful act duress existed in English law (resisting an invitation by PIA that they should refuse to recognise its existence for the sake of greater clarity and certainty). They also unanimously rejected a submission by TT that the approach to be adopted by the courts in determining whether pressure was illegitimate should be a 'range of factors' approach akin to that which now governs the doctrine of illegality following the Supreme Court's

decision in *Patel v Mirza* [2017] UKSC 42. Finally, they were all agreed that the pursuit of commercial self-interest is generally acceptable and the cases in which a plea of lawful act duress succeeds are likely to be very rare.

Conclusion

There can be no doubt that the Supreme Court has set the bar for lawful act duress very high. The exercise of raw monopolistic power, even when combined with a bad faith demand, will not be enough. A remedy is only likely to be available in respect of conduct which is so reprehensible that it shocks the conscience of the court. It would probably have to involve some element of dishonesty or sharp practice on the part of the threatening party designed to increase the threatened party's vulnerability and therefore its receptiveness to the demands made of it (as in *Borelli* and *Progress Bulk Carriers*).

Furthermore, whilst the Supreme Court has provided welcome clarity by emphasising that pressure applied by a negotiating party will very rarely come up to the standard of illegitimate pressure or unconscionable conduct, and that it will therefore be a rare case in which a court will find lawful act duress in the context of a commercial negotiation (see [30] per Lord Hodge), the adoption of a test based on unconscionability inevitably introduces an element of unpredictability. It requires judges to carry out an evaluation of the defendant's conduct and form a judgment as to whether it goes beyond what might be regarded as acceptable. The bad faith test adopted by the Court of Appeal and by Lord Burrows would arguably have resulted in greater certainty because it does not depend on a value judgment, but on a finding of fact (i.e. whether the defendant genuinely believed that its demand was well-founded). The majority, however, was concerned that this would leave too many contracts vulnerable to being set aside. It might be said that this betrays a fairly dyspeptic view of standards in commercial life.

Sebastian Kokelaar

How (not) to avoid paying business rates

Stephen Ryan takes us on an action-packed ride through business rates mitigation schemes, via Franklin, films, and football, with a stop-over in the Supreme Court.

Whoever said that the only certainties in life were death and taxes* had never heard of a decent business rates mitigation scheme. Business rates (or, more accurately, "national non-domestic rates", chargeable under the Local Government Finance Act 1988), are rates charged by local councils on the owners of non-domestic properties (shops, offices, pubs, etc). They have been charged on occupied properties since the reign of Elizabeth I, but the notion of charging rates on unoccupied property (as a means of discouraging properties being left unused) dates to the General Rate Act 1967, and continues today under section 43 of the 1988 Act. But must you pay them? Must you really? Yes, as it turns out, you must. Probably.

(* The phrase was used by Benjamin Franklin, in a letter of 1789 to Jean-Baptiste Le Roy, but it appeared earlier in Daniel Defoe's The Political History of the Devil (1726), and before that in Christopher Bullock's The Cobbler of Preston (1716).)

Rates and their mitigation

If you own a property that appears in a "local non-domestic rating list" (see s.41 of the 1988 Act), and the property is unoccupied, you may receive from the local council a business rates demand in respect of that property. (Of course, you may also receive one if the property is occupied, but this article is concerned with unoccupied properties under s.43 of the 1988 Act.) Rather than paying these and thereby putting your local council in funds which could be used for such myriad communal benefits as [insert your favourite], you might be tempted to give your money instead to a property developer who in return will attempt to mitigate your liability for business rates via a rates mitigation scheme.

The particular scheme relevant to this article has had a number of iterations. Much like the Fast and the Furious film franchise, it adapts to deal with changing circumstances. The scheme is now in its third season. In the first version of the scheme, the scheme operator would set up a special purpose vehicle ("SPV"). This is something of a misnomer, since this empty vessel of a company with no assets would be neither special, nor would it have any purpose in life other than to accept a lease of the property from the owner, either for a peppercorn rental or for a rental which was never intended to be collected, and on terms that allow the owner to terminate the lease on short notice.

If you're thinking that this classic switcheroo gambit wouldn't fool your eight year-old, you (and your eight year-old) need to brush up on the details of the 1988 Act, section 65(1) of which defines the owner of the property as "the person entitled to possession of it". The scheme seeks to use the lease to transfer the right to possession to the SPV, so that the SPV becomes the "owner" of the property and thus the person liable to pay the rates. However, the SPV never gets around to coughing up the money it doesn't have, because it is dissolved (either under section 1000 of the Company's Act 2006, as a dormant company, or under section 1003 of the Company's Act 2006, upon application for dissolution) without any prior liquidation process. Upon dissolution, pursuant to section 1012 of the Company's Act 2006, the lease vests in the Crown as bona vacantia and with that the liability for rates passes to the Crown as the "owner" of the property (and the local councils never bother to ask Her Majesty to pay the bill). By that time, the

bill is usually quite large, because after the lease is granted to the SPV, the SPV is allowed to rack up business rates for months, or even years. In fact, under section 1013 of the Companies Act 2006, the Crown could disclaim the lease and thereby thwart the scheme. However, the scheme relied on the local authorities not finding out of about the dissolution until long after it occurred. Rates avoided, no harm done. Except that, as it turns out, this might be a criminal offence contrary to section 1006(4) of the Companies Act, see *Rossendale Borough Council v Hurstwood Properties (A) Ltd and others;Wigan Council v Property Alliance Group Ltd* [2021] UKSC 16 ("Rossendale") at [41-42]. Whoopsie!

Enter the Fast and the Furious 2. This version of the scheme employed the same method of granting a lease to the SPV, but within days of the grant of the lease the SPV is placed in members' voluntary liquidation. Regulation 4(k) of the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008 provides an exception to business rates for properties whose owner is a company which is subject to a winding-up order made under the Insolvency Act 1986, or which is being wound up voluntarily under that Act. The difficulty with this is that ordinarily, once liquidators were appointed, they would disclaim the leases and the true owner would become liable for rates once more. However, the scheme was arranged so that the liquidations would continue rather than proceed to a conclusion, by the use of nominal liquidators who sat around, were eventually removed and not hastily replaced, artificially prolonging the liquidations to shelter the leases so as to allow the SPV to continue being the "owner" of the property, see Rossendale at [44].

If you're now thinking that this all sounds a bit, sort of, naughty, and that you'd rather just pay the business rates, then you lack the backbone of a true rates mitigator. As it turns out, however, all this mucking about with nominal liquidators and artificially prolonging liquidations is an abuse of the insolvency legislation, as was found by Norris J in *PAG Management Services* [2015] BCC 720, where the judge ordered the promotor of the schemes (a PAG entity) to be wound up compulsorily in the public interest under section 124A of the Insolvency Act 1986.

But the cat was out of the bag, even one of the cat-handlers had been wound up compulsorily. The winding up of the company operating the schemes (one of

many PAG entities) had no effect on the SPVs (who are the cats in this confusing analogy) to whom the leases had been granted.

The third season is now underway. In it, one can look forward to a further finessing of the scheme. Spoiler alert: they sit down (they actually did sit down - see [50] of the judgment of HHJ Stephen Davies in *Re PAG Asset Preservation Ltd* [2019] EWHC 2890 (Ch)) and come up with a "determination premium", devised with a view to creating something of value to the SPV within the lease which was in the nature of a contingent asset (the determination premium might be paid at any time up to the date of expiry of the lease), so that the liquidator would be justified in not disclaiming the lease and instead maintaining the liquidation for the duration of the lease so as not to lose the opportunity of receiving the little pot of gold at the end of the rainbow (ibid, [61-64]). This does the trick, because HHJ Stephen Davies, in *Re PAG Asset Preservation Ltd*, dismissed the Secretary of State's petition to wind up the companies operating Scheme 3, and they all live happily ever after in a mitigators' paradise, free from business rates, their properties forever unoccupied. The Tiger King is released from prison. (This does not actually happen.)

But, in a remarkable plot twist, the Supreme Court has recently put something of a spanner in the works for the inventive business rates avoider.

Rossendale in the Supreme Court

The decision of the Supreme Court in Rossendale concerns only the first two variants of the rates mitigation scheme described above. In 2017, various local authorities brought claims seeking recovery of business rates against the true owners of the properties, who had, when faced with demands for business rates, directed the local councils to the SPVs to whom they had, under the schemes, leased the properties. The claims alleged that the schemes failed to achieve their purpose, (i) because under the so-called "Ramsay principle" (see *WT Ramsay Ltd v Inland Revenue Comrs* [1982] AC 300) of statutory construction, on a purposive construction of the rating legislation the leases did not make the SPVs the owners of the properties, (ii) because the leases were sham leases, or (iii) because the court could pierce the veil of incorporation of the SPVs on the basis of the evasion

principle as set out in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 (the "Prest argument").

A number of the defendants to these claims brought applications to strike out the claims under CPR r. 3.4(2)(a), contending that they disclosed no reasonable grounds for bringing the claim. Two of the claims - those brought by Rossendale Borough Council against various Hurstwood companies (employing Scheme 1) and by Wigan Council against PAG (employing Scheme 2) - were selected as, in effect, test cases for the strike out applications, which came before HHJ Hodge QC sitting in the Liverpool District Registry as a judge of the Chancery Division: [2017] EWHC 3461 (Ch). The Judge held that the councils' arguments based on the Ramsay principle and sham were unarguable but that the Prest argument was arguable, particularly since it concerned an area of developing jurisprudence, so that the claims could continue to trial on that argument alone. The Judge granted the Respondents permission to appeal against the decision to continue the claims on the basis of the Prest argument but refused to grant the Councils permission to appeal against his decision to strike out the claims as they related to the Ramsay principle and sham. The Court of Appeal granted the Councils permission to appeal on the Ramsay principle only.

Accordingly, when the case went on appeal to the Court of Appeal, the two issues were (i) whether the Ramsay principle or (ii) the Prest argument had any arguable application. The Court of Appeal held that neither point was arguable, and struck out the claims entirely. The Supreme Court granted permission to appeal on both points. Judgment was handed down in May 2021, by Lord Briggs and Lord Leggatt JJSC (with whom Lord Reed PSC, Lord Hodge DPSC and Lord Kitchin JSC agreed), allowing the appeal on the Ramsay principle and upholding the Court of Appeal's decision of the Prest argument. In order not to end on a downer, I begin with the fate of the Prest argument.

The Prest argument

The leading case on piercing the corporate veil remains *Prest v Petrodel Resources Ltd*. In that case, Lord Sumption sought to confine the doctrine's applicability to

what he termed the "evasion principle" i.e. when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control, the court may pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. Usually, as Lord Sumption explained, there will be some other legal principle available which will make it unnecessary to pierce the veil, in which case the court should avoid doing so. The majority of the Supreme Court in Prest agreed with Lord Sumption's evasion principle, but declined to rule out the existence of other circumstances in which the court could pierce the veil, though they made clear that such circumstances would be very rare.

The councils argued that, if all else failed, the doctrine of piercing the veil had arguable application to the case, since the owners of the properties had interposed the SPVs in order to evade a liability for business rates – the evasion principle was engaged. The Respondents seized on the fact that under s.43 of the 1988 Act, a person was subject to a rate if certain conditions were fulfilled "in respect of any day in the year". They argued that this meant that liability for business rates accrued day to day, which meant that the liability that was sought to be avoided by the interposition of the SPVs was not an existing liability, but rather a new liability that was incurred daily, and as Lord Sumption made clear in Prest ([34]), there is nothing wrong with causing a legal liability to be incurred by a company in the first place.

Against this, the Councils argued that the use of chargeable days in s.45 of the 1988 Act was simply a mechanism for computing the amount to be paid by a ratepayer in a chargeable financial year, so that it was incorrect to characterise the liability itself as arising afresh every day. Rather, the liability is clearly set out in s.45(2) as a liability for a chargeable financial year: it is a liability that continues from one day to the next, and the use of days was (similar to the computation of, say, a daily rate of interest, or many other liabilities that continue to accrue over time, which require some unit of time to be specified for computational purposes) simply mechanical. Such a liability was, therefore, clearly an "existing liability", particularly

having regard to the facts in Prest which explain the sense in which Lord Sumption used those words. Alternatively, the councils argued that the use of the SPVs was so obviously an abuse of their separate legal personality that the doctrine could arguably be incrementally developed by the trial judge so as to apply to the facts of these cases.

Nevertheless, the Supreme Court seemed to take at face value the fact that the liability for business rates accrues from day to day ([73]), and on that basis accepted the Respondents' argument, holding that if the leases were effective to transfer ownership, then from the date of the lease the only person liable for business rates incurred thereafter was the SPV, and the interposition of the SPV had no effect at all on the liability of the landlord for the rates up to the date of the grant of the lease ([75]).

The Ramsay principle

As the judgment sets out, the Ramsay principle was developed in relation to tax avoidance schemes, but it is not confined to that context. In essence, it simply involves taking a purposive approach to legislation, but in the context of fiscal legislation the effect is often that transactions or elements of transactions which have no business purpose and have as their sole aim the avoidance of tax are disregarded, because Parliament will usually not be taken to have intended to exempt from tax a transaction which has no purpose other than tax avoidance. (The Ramsay principle has a further aspect, which is that where a tax avoidance scheme involves a series of steps, it is necessary for the court to consider the scheme as a whole rather than merely the particular steps.)

So, in the Ramsay case itself, a company sought to counteract a chargeable gain for the purposes of corporation tax by contriving an allowable loss, made purely for the purposes of tax avoidance, and the House of Lords held that this was not a real loss (its only purpose was tax avoidance), as required by the relevant legislation, purposively interpreted. Similarly, in *UBS AG v HMRC* [2016] UKSC 13, a tax avoidance scheme used an SPV and imposed conditions in relation to its shares solely in order that they would constitute "restricted securities" (shares subject

to a condition providing for their forfeiture in certain circumstances) within the meaning of the relevant legislation, Ch. 2 of the Income Tax (Earnings and Pensions) Act 2003. The Supreme Court found that for shares to be "restricted securities" the conditions imposed had to have a business or commercial purpose, as opposed to commercially irrelevant conditions whose only purpose was the obtaining of the exemption.

In other words, taking a purposive approach of fiscal legislation allows courts to interpret statutory concepts in such a way that contrived and uncommercial arrangements undertaken solely to fall within the statutory concept in fact fall outside of it. But, explained Lord Reed in *UBS,* "not always": some legislative provisions are simply not capable of a "Ramsay" interpretation and "confer relief from taxation even where the transaction in question forms part of a wider arrangement undertaken solely for the purpose of obtaining the relief": [65].

The Court of Appeal held that the business rates avoidance scheme fell into the "not always" category, in that the relevant provisions of the 1988 Act were not capable of a Ramsay interpretation: the Act made clear that the "owner" was the person entitled to possession, possession is a purely legal concept, and the leases transferred a right to possession to the SPVs.

The Supreme Court disagreed, holding at [49]:

> "In our view, Parliament cannot sensibly be taken to have intended that "the person entitled to possession" of an unoccupied property on whom the liability for rates is imposed should encompass a company which has no real or practical ability to exercise its legal right to possession and on which that legal right has been conferred for no purpose other than the avoidance of liability for rates. Still less can Parliament rationally be taken to have intended that an entitlement created with the aim of acting unlawfully and abusing procedures provided by company and insolvency law should fall within the statutory description".

The reasoning behind that finding was that the purpose of the legislative provisions imposing liability for rates on unoccupied property was to provide an incentive to bring unoccupied property back into use by focussing the burden of the rate

on the person who has the ability in real terms to achieve that objective ([30]). In no sense could that person be the SPV, who had no assets, no business purpose, and no real ability under the lease to bring the property back into use; rather, the schemes were designed so that the real owner, who granted the lease, could terminate the lease once they found a real commercial use for the property.

So, the Court concluded, the leases "did not transfer to the SPVs the entitlement to possession required by the Act as the badge of ownership", and the grantors of the leases remained the owners of the properties for business rates purposes ([50]).

Where to from here?

It should be recalled that the Supreme Court was dealing with strike out applications, so the actual result of the decision is that the councils' cases are not struck out and the claims can continue. In practical terms, however, it is difficult to see the basis on which the Respondents can continue to defend the claims. The Respondents' defence has always been that they are not liable to pay the rates because they successfully employed an effective rates avoidance scheme. The scheme cannot be effective if the leases failed to confer on the SPVs the necessary entitlement to possession so as to make them the owners for the purposes of the 1988 Act.

Yet the Respondents continue, unfazed. Not only that, scheme-operators continue to employ the scheme (now in the guise of Scheme 3) for new would-be mitigators against local councils, buoyed by the fact that HHJ Stephen Davies in Re PAG Asset Preservation Ltd declined to wind up the companies operating Scheme 3. But again, if the scheme itself falls at the first hurdle (the lease), then whether the later steps taken in liquidating the SPVs constitute an abuse of the insolvency legislation is irrelevant.

Following the handing down of the Rossendale decision, the Respondents' solicitors, Addleshaw Goddard, posted an article on their website, which concludes:

> "Using a football analogy, it could be said that the decision is 2-v-1 at half

time to the property owners and matters will revert to the High Court for full trials".

That seems a somewhat buoyant description of the result, but then again, as a fan of Arsenal, I clearly know nothing about football.

Stephen Ryan

Stephen Ryan appeared, with James Couser, as junior counsel for the Appellants in the Supreme Court, led by Robin Mathew QC

Case Reviews

Re Rufus; Sands v Dyer [2021] EWHC 2124 (Ch)

Trustees in bankruptcy applied for relief under s. 339 and/or 423 of the Insolvency Act, but failed to serve the application within the timeframe required by r.12.9(3) of the Insolvency (England and Wales) Rules 2016 – i.e, at least 14 days before the hearing. The application had been issued in October 2019 and the first hearing listed in March 2020. The dates are important because the relevant limitation period expired in February 2020. Realising their error, the trustees applied for an adjournment two days before the hearing. They raised the procedural breach. The application was adjourned to a hearing in May 2020. Then, in November 2020, R applied to strike out the application. By that time, R had taken various steps in the proceedings, and indeed the CCMC was listed to take place the day after the strike out application was issued. The Court rejected R's application chiefly on the basis of equitable waiver: on the facts of the case, R had plainly waived its right to object to the trustees' procedural breach by its own conduct, namely the steps R had taken in the proceedings. Although R was being deprived of a limitation defence, that was not because of late service of the application, but because of R's own decision to waive the breach and participate in the proceedings.

Christopher Howitt

Axnoller Events Ltd v Brake [2021] EWHC 1706 (Ch)

Regular readers of the recent judgment lists on BAILII and elsewhere will be aware of the ongoing Axnoller Saga. Since November 2019 at least 18 judgments have been handed down in various connected pieces of litigation, the majority of them given by HHJ Paul Matthews. This judgment concerned a short, but important, point about the copying charges for trial bundles. An order of Marcus Smith J (itself following a somewhat extraordinary judgment: [2021] EWHC 828 (Ch)) had provided that one side, the Guy Parties, need only provide the other side, the Brakes, with an electronic copy of the trial bundle, and the Brakes would then prepare their own hard copies if they needed them. The Brakes' solicitors then came off the record without providing the Brakes with a hard copy. Mrs Brake asked the Guy Parties for a hard copy. They said they would only provide one on payment of reasonable copying and courier charges. Mrs Brake said (in an email to the court) that not having a physical bundle was hampering her preparation for trials due to start in September. The Guy Parties did provide a hard copy, saying that they would send the invoice for charges.

The underlying question for HHJ Matthews was whether to vary the order of Marcus Smith J. He referred to the so-called Tibbles criteria, namely that interlocutory orders will only be varied if there is a material change of circumstances, or if the factual basis on which the original order was made was wrong. He held that ceasing to be represented by solicitors does not constitute a material change of circumstances, at least not on the facts of this case. He also rejected arguments (1) that the Brakes' alleged impecuniosity was relevant, and (2) that the Brakes' Art 6 rights were interfered with. There was no reason to vary Marcus Smith J's order. The Brakes had an electronic copy, and if they requested and received a hard copy from the Guy Parties' solicitors, then those solicitors were entitled to charge for it "in accordance with their usual practice."

Simon Hunter

Axnoller Events Ltd v Brake (mental health crisis moratorium) [2021] EWHC 2308 (Ch)

In another judgment in this same matter HHJ Matthews had to consider an application to consider an application to cancel a mental health crisis moratorium which Mr Brake had entered. This is one of the first, if not the first, case to consider the regulations (the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020) made last year to provide moratoria in certain cases, including during a mental health crisis. The application to cancel the moratorium was made under r 19 of the regulations on the ground that it unfairly prejudices the applicants.

HHJ Matthews, construing the legislation untrammelled by previous authority (because there isn't any) decided that the words "unfairly prejudices" are ordinary English words to be used as such and not terms of art: [32]. However, he was not prepared to give guidance for the future, on the basis that the way the common law develops is "decide individual cases first, and infer a principle from the results later": [33]. The three more general points that the learned judge does make, at [34]-[36] are cogent, in particular that it is very hard to balance the interests of the creditor against those of the debtor: "they are chalk and cheese". Perhaps the most important part of the judgment, though, is Judge Matthews' conclusion at [55], [61], and [70] that debts incurred after the moratorium has come into force are not covered by the moratorium. It is to be hoped that more individual cases are reported soon so that a firmer idea can be gleaned of the true effect of these important regulations.

Simon Hunter

Axnoller Events Ltd v Brake (summary assessment of costs) [2021] EWHC 2362 (Ch)

As if to undermine the point about the multitudinousness of judgments in this matter, on 23 August HHJ Matthews handed down another judgment, this time on the summary assessment of costs following the hearing at which the last-noted judgment was handed down (there had in fact been a separate consequentials judgment as well between the two: [2021] EWHC 2343 (Ch)). This is interesting (i) because the learned judge was prepared to apply the recently-approved 2021 guideline rates, at least in principle, and (ii) because of his comments on the appropriateness of instructing London solicitors in a "provincial" (see [6]) case. On this second point, 4 matters weighed on the judge's mind: (1) the property the subject of the underlying possession claim is worth several million pounds; (2) the Guy Parties have been kept out of it for almost 3 years; (3) the facts are complex and parts of the claim is legally complex; (4) the matter is being tried in the High Court, albeit in the District Registry in Bristol: [8]. These reasons, like those relied on by the Court of Appeal in *Wraith v Sheffield Forgemasters*, noted by HHJ Matthews in [7], can only be indicative of the sort of reasons that will make the instruction of London solicitors in provincial cases reasonable. But they provide a useful yardstick by which to measure submissions on this point.

Simon Hunter

Stokoe Partnership Solicitors v Grayson [2021] EWCA Civ 626

The facts of this case are unusual. Stokoe Partnership commenced litigation on behalf of a prisoner in the UAE against an international law firm and certain of its current or former partners, alleging that they had been complicit in his rendition to the UAE and his subsequent interrogation and torture. The firm applied for a Norwich Pharmacal order against a man (R) suspected of trying to obtain confidential information that concerned the firm and was linked to the litigation. The application was settled by consent, with R swearing an affidavit claiming that he had been paid by a private investigator (G) to obtain information, but that he did not know why the information had been required, or for whom G was acting. The firm then issued proceedings against G, who swore an affidavit denying that anyone had hired him to obtain confidential information or that he had received any such information from R.

The Court at first instance rejected the firm's application for cross-examination orders to resolve the inconsistencies between the two affidavits, largely because cross-examination on the affidavit would pre-empt cross-examination at trial. The Court of Appeal agreed, and discussed the various situations in which oral interrogations of a party outside trial may arise. English law does not generally permit depositions of an opposing party who has already chosen to given evidence. The two obvious and long-standing exceptions arise in situations where the Court does not assist a claimant to establish his substantive case, but seeks to prevent a judgment debtor from evading enforcement by dissipating assets. These exceptions are (a) examination of judgment debtors under CPR Part 71 and (b) the jurisdiction to order cross-examination on an affidavit sworn in answer to an application for a freezing injunction which contained an order for disclosure of the whereabouts of assets. The Court of Appeal also rejected the argument that G, by swearing the affidavit, had opened himself to an application for cross examination.

Christopher Howitt

Tinkler v Her Majesty's Revenue & Customs [2021] UKSC 39

This case concerned the application of estoppel by convention in the context of non-contractual dealings between the Revenue and Customs Commissioners ('the Commissioners') and a taxpayer. The Commissioners appealed against a declaration that the respondent taxpayer was not estopped by convention from denying that the Commissioners had opened a valid enquiry into his tax return for the year 2003/2004. The taxpayer argued that a closure notice issued by the Commissioners was invalid because the initial notice of enquiry had been sent to an address which was neither his usual nor last known place of residence, nor his place of business or employment. The Court of Appeal found that the copy notice enclosed with the Commissioners' letter was not effective as a s 9A Taxes Management Act 1970 ('TMA') notice, and as the taxpayer had never received such a notice, no s 9A TMA notice was given and further the taxpayer was not estopped by convention from denying the Commissioners had opened a valid enquiry. The Commissioners' ground of appeal was that the taxpayer was estopped, under estoppel by convention, from denying that a valid enquiry under s 9A TMA had been opened. The Supreme Court allowed the Commissioners' appeal.

The five principles governing estoppel by convention, as outlined in Revenue and Customs Commissioners v Benchdollar Ltd [2009] EWHC 1310 (Ch) and amended by Blindley Heath Investments Ltd v Bass [2015] EWCA Civ 1023, were applied: (i) It was not enough that the common assumption upon which the estoppel was based was merely understood by the parties in the same way. It had to be expressly shared between them; (ii) The expression of the common assumption by the party alleged to be estopped should be such that he might properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it; (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter; (iv) That reliance should have occurred in connection with some subsequent mutual dealing between the parties; (v) Some detriment had thereby to have been suffered by the person alleging the estoppel, or benefit

thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

On the facts all five principles were satisfied. While there was no transaction between the Commissioners and the taxpayer this is not a requirement of estoppel by convention, and the mutual dealings between the parties were sufficient. Of importance to taxpayer's dealings with HMRC in the future is the finding that estoppel by convention does not undermine the statutory protection given to taxpayers by s 9A TMA. Furthermore, the above statement of the five principles of estoppel by convention apply equally to non-contractual and contractual dealings.

Stephen Woodward

Candey Ltd v Tonstate Group Ltd [2021] EWHC 1826 (Ch)

This is the second of two judgments handed down by Zacaroli J in respect of an application by Candey Ltd, a firm of solicitors, for a charging order pursuant to s.73 of the Solicitor's Act 1974 (which gives effect of a solicitor's lien over property recovered or preserved in litigation). The basis of Candey's application was that it was entitled to security for its unpaid fees (under a damages-based agreement) in respect of its representation of its client, EW, in long-running litigation in which inter alia the entirety of EW's shareholding in a company was claimed by the parents of his ex-wife. A settlement was reached in which EW would transfer most of his shareholding, but would be entitled to retain 22,500 shares (the "Shares"), title to which would not be disputed, and which shareholding could not be diluted by the issuing of further shares in the company. Candey contended that this settlement constituted property being "recovered or preserved" by Candey's instrumentality within the meaning of s.73, and therefore that Candey should be entitled to a charging order in respect of the Shares.

Candey's application was opposed by EW's opponents in the main litigation (the "Claimants"), who had obtained a final charging order (the "FCO") covering the Shares, and who contended that Candey could not obtain its own charging order in priority to the FCO. However, a preliminary objection to Candey's application was that Candey was not owed anything under its DBA, because the DBA was unenforceable for want of compliance with the Damages-based Agreements Regulations 2013, alternatively that no right to payment had arisen under the DBA because EW was a defendant and had lost at every stage of the proceedings, so that he had not made a recovery sufficient to trigger payment under the DBA. That preliminary point was the subject of Zacaroli J's earlier judgment ([2021] EWHC 1122 (Ch)) in which the Judge held that no right to payment under the DBA had accrued to Candey and on that basis dismissed Candey's s.73 application. However, the Judge went on to determine the remaining points relating to Candey's assertion that it was entitled to a charging order. The Judge held that Candey obtained an equitable interest in the Shares upon the settlement being reached, by virtue of the "solicitor's lien", importantly holding that the proposition stated in

James Bibby Ltd v Woods and Howard [1949] 2 KB 449 - that prior to the granting of a charging order, the solicitor did not have any existing interest in the fruits of litigation, but merely had an inchoate right to apply for a charging order – was inconsistent with the Supreme Court's reasoning in *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] UKSC 21 and must therefore be taken to have been at least implicitly overruled by the Supreme Court. However, the Judge went on to hold that the Claimants had no notice of Candey's lien, and that accordingly the lien could not take priority over the FCO, and that Candey could not come within the principle that the solicitor's lien gives the solicitor a first-ranking charge, as if the solicitor had earned salvage, because the Claimants were not seeking to take the benefit of anything recovered by Candey. Candey has sought permission to appeal to the Court of Appeal.

Stephen Ryan appeared as junior counsel for the Applicant.

Stephen Ryan

Goknur Gida Maddeleri Enerji Imalet Ithalat Ihracat Ticaret ve Sanayi As v Aytacli [2021] EWCA Civ 1037

"1. For those who believe that most civil litigation does not end up being about the costs that were incurred in pursuing that same litigation in the first place, look away now." This is a case about a non-party costs order. The appellant (a Turkish company, hereafter "C") sued an English company (hereafter "D") in respect of stock that had been delivered but not paid for. D defended and counterclaimed in breach of contract. "The subsequent litigation has proved nothing short of a disaster for both [C and D]." C failed to comply with an unless order of Master Kay QC, and its claim was struck out. C was ordered (after a 3-day hearing) to pay D's costs, in a sum more than the amount of its claim. But D's counterclaim remained. This was fought to trial. D won on breach, but failed on causation. The judge awarded nominal damages of £2. He ordered D to pay 25% of C's costs. It appears that throughout this period (2012-2019) D was balance sheet insolvent. The litigation was being funded, in essence, by the director, the respondent to this appeal (hereafter "Mr A"), and D's solicitors were acting on a CFA. Mr A also controlled D's conduct of the case. After some additional procedural twists C sought a non-party costs order against Mr A. This was refused by a deputy High Court Judge in 2020. C appealed.

The appeal was dismissed. At [40] Coulson LJ gives a helpful summary of the principles that apply where a non-party costs order is sought against a director or shareholder of a company involved in litigation. Of these the second seems the most important: the question is who was the real party to the litigation? If the litigation was being conducted for the benefit of the director, then a non-party costs order can be made, but if it was being conducted for the benefit of the company then it will be a rare case where such an order will be appropriate. In that latter case the court is likely to want to see evidence of impropriety or bad faith on the part of the director before making such an order. On the relevant findings of fact Mr A did not benefit personally, and was not acting in bad faith or with impropriety.

Simon Hunter

Zavarco plc v Nasir [2021] EWCA Civ 1217

Is a Claimant who has obtained declaratory relief in earlier proceedings barred by the doctrine of merger from bringing later proceedings to enforce the rights that had been declared? In this case the Court of Appeal answered that question with an emphatic "no". The appeal was a second appeal. At first instance, Chief Master Marsh held that he had no jurisdiction to determine a claim for payment of €36 million unpaid on some shares because the claimant had previously obtained a declaratory judgment in 2017 that the shares were unpaid and that the claimant was entitled to forfeit the shares. Birss J allowed an appeal against the Chief Master's judgment ([2020] EWHC 629 (Ch)) on the basis that the application of the doctrine of merger to a judgment for declaratory relief depended on the terms of the declaration. The Court of Appeal dismissed the appeal against Birss J's judgment and went much further, holding at [41] that the doctrine of merger has no application at all to declarations.

Michael Smith

Zavarco UK plc v Sidhu [2021] EWHC 1526 (Ch)

The Court considered the rule under section 584 of the Companies Act 2006 ("the 2006 Act") that shares taken by a subscriber to the memorandum of a public limited company must be paid up in cash and the general prohibition under section 593 of the 2006 Act against plcs issuing shares for non-cash consideration. In this case, it was common ground that the relevant shares issued to the defendant were not paid up in cash. The key dispute was whether the shares were issued pursuant to an arrangement falling within section 594 of the 2006 Act. The Court found that on the facts they were not issued pursuant to such an arrangement and therefore held that the defendant was liable to pay their nominal value (some €84m). In doing so, the Court rejected the defendant's defences of estoppel by convention and relief under section 606 of the 2006 Act.

Michael Smith

Lonsdale v Teasdale [2021] EWHC 2342 (Ch)

This is an appeal decision of HHJ Cadwallader (whose elevation to the Bench we noted in Issue 2 of this Review) sitting as a Deputy High Court Judge in Liverpool. A number of issues arise, most of which are specific to the facts of the case. The most interesting is the discussion at [22]-[33] of the lengths to which a judge can go when one party is a litigant in person. It was said by the claimant that there was a serious procedural irregularity because the district judge who had heard the trial had descended into the arena by cross-examining the claimant 'on behalf of' the first defendant. The first defendant had been unrepresented. There was no implication of bias on the part of the district judge, and it was accepted that the district judge did what he did with the best of intentions. But, the claimant said, he went too far.

This was rejected by HHJ Cadwallader. He noted that the court is obliged under CPR, r 3.1A to take necessary steps where one party is acting in person, and that that includes (sub-rule (5)(b)) putting appropriate questions to a witness. One factor that weighed heavily on the judge was that the claimant was represented by experienced counsel at the hearing below and he had not objected at the time that the questioning was unfair or inappropriate. "The questions the judge asked were fair to be asked, even where the question was whether the witness was making up her evidence 'on the hoof'. That they were asked from the bench, rather than by the First Defendant, was inevitable, in the particular circumstances of this case. The fact that they were asked and pursued robustly, as they were, did not make the conduct of the trial unfair": [28]. HHJ Cadwallader did criticise the district judge for not allowing the witness to finish answering some of the questions, but noted that he had cured that irregularity himself by allowing her counsel to re-examine her.

Simon Hunter

Re Deville [2021] EWHC 1843 (Ch)

An appeal by HMRC against a rejection of its proof of debt of an insolvent estate. It was common ground that before his death the deceased filed a self-assessment return which erroneously claimed a substantial tax refund (£5,042,000) to which he was not entitled. HMRC made the refund, but subsequently opened an inquiry and served a closure notice pursuant to section 28 Taxes Management Act 1970 ('TMA') five months before the deceased's death. The refund was not returned during the remaining months of the deceased's life and following his death HMRC claimed to be a substantial creditor of an insolvent estate. HMRC submitted a proof of debt which was rejected by the trustee of the insolvent estate under r.14.7 of the Insolvency (England and Wales) Rules 2016 on the basis that HMRC's closure notice did not amend the deceased's self-assessment return as required by section 28A(2)(b) TMA, and therefore HMRC was not entitled to prove for the full amount of the refund.

HMRC's application was granted on three grounds: (1) The closure notice complied with statutory requirements as it set out HMRC's conclusions, indicated how the deceased's self-assessment return had been amended and set out how much was to be paid; (2) If the foregoing was wrong and the closure notice was defective, the defect could be corrected by inserting a few words concerning amendments to the self-assessment. The closure notice was as close to compliance as it was possible to achieve, and the case was a perfect one for the application of section 114 TMA (Want of form or errors not to invalidate assessments); and (3) Again, if the closure notice was defective, the rule in Re Condon exp James (1874) 9 Ch App 609, which imposes a duty on the court's officers (the trustee of the insolvent estate) to act fairly, would have applied to do justice between the parties. The court would not permit its officers to act in a way that it would be clearly wrong for the court itself to act, judged by the standard of right-thinking people representing the current view of society.

Robin Mathew QC appeared for the Trustee in Bankruptcy

Stephen Woodward

Manolete Partners Plc v Hayward and Barrett Holdings Ltd & Ors [2021] EWHC 1481 (Ch)

Can an assignee of a liquidated company's cause of action for breach of duty bring a claim under section 212 of the Insolvency Act 1986 ("the Act")? In this case, Chief Insolvency and Companies Court Judge answered that question with a "no". Section 212 gives a right to an officeholder and that right is not assignable. The assignee must generally bring a Part 7 claim for the underlying breach of duty cause of action, paying the appropriate value-based court fee rather than the flat application fee available to officeholders using section 212.

The judgment also contained a timely reminder that claims under section 423 of the Act are not "insolvency proceedings" and the Insolvency (England and Wales) Rules 2016 do not apply to them. Whilst the court can permit hybrid claims, it is entitled to impose conditions. In the circumstances of this case, the Court felt compelled – albeit reluctantly – to impose a condition that the claimant should pay the maximum Part 7 value-based court fee - £10,000.

This decision is likely to have an impact on the funding of claims by companies in liquidation. At the very least the risk of larger court fees will need to be priced into the funding arrangements or the consideration for claim assignments. It is likely that some less certain claims will not be brought at all as a consequence of the decision.

Michael Smith

Boston Trust Company Ltd v Verhoef [2021] EWCA Civ 2021 1176

In this case the first instance judge had given the claimants permission to bring a derivative action (in fact a double-derivative action), but had made the order conditional upon them becoming shareholders of the relevant company. (By the date of the first instance hearing the claimants had applied for rectification of the company's register of shareholders to show that they were shareholders. This action succeeded shortly afterwards). The question for the Court of Appeal was whether the court has jurisdiction to make an order giving conditional permission to bring a derivative action.

The first instance judge had asked himself 2 questions: (1) is there jurisdiction to grant conditional permission; (2) if so, should he exercise that jurisdiction. Sir David Richards held that this was the wrong approach: [40]. The right question was whether it is ever right to grant even conditional permission to someone who lacks standing to bring the proceedings, as the claimants undoubtedly did in this case. They had no standing because, at the date of the permission hearing, they were not shareholders. That being so, the Court of Appeal allowed the appeal but, given that the claimants had by now become shareholders, substituted it with an order giving unconditional permission to bring the action. "If, in any future case, a similar situation should arise, the court should not make a conditional order for permission but should adjourn or stay the permission application, pending (within a reasonable time) determination of an application for rectification of the register of members or the taking of such other steps as may be necessary to give the claimant standing": [46].

Simon Hunter

Adare Finance DAC v Yellowstone Capital Management SA [2021] EWHC 1680 (Comm)

This case provides an interesting demonstration of the scope of orders which may be made under CPR r. 71.2, which empowers a judgment creditor (the JC) to apply for an ordering requiring the judgment debtor (JD) to attend court to provide information about his means. Here the JDs were a French company, and an individual resident in France. The JC had obtained summary judgment in the sum of c. £12m in the English Courts, having started proceedings here on the back of jurisdiction agreements. The JC had also started enforcement procedures in France. The JC obtained a disclosure order under CPR Part 71, requiring the second JD to provide all documents in his control relating to his means to pay the judgment debt. An Annex specified all the assets the JC was either contending the JD owned, or might own, and the JD was to disclose all documents relating to his ownership of or any interest in such assets, and all documents relating to the location or value of them, and any outstanding encumbrances or charges on them. The second JD applied to set aside or vary the order on various grounds, including chiefly that he should not be required to provide disclosure about French assets. It was not disputed that the English Court had jurisdiction to order disclosure in respect of assets outside the jurisdiction, which provides welcome confirmation of the extra-territorial scope of such orders. The main argument was rather that disclosure of the French assets would be pointless on the facts of this case, because the English judgment might prove unenforceable in France. In considering this point, Master Dagnall observed that the power under Part 71 was not an enforcement process per se, but an anterior procedure aimed at enabling the judgment creditor to identify and assess the appropriateness of potential enforcement steps. He ordered the disclosure of documents relating to the French assets, because they could enable the those assets to be policed if they were moved abroad or turned into something on which enforcement could be made. Disclosure may also help to counter the JD's claims to impecuniosity in other jurisdictions. Ultimately, however, the jurisdiction under Part 71 is discretionary and must be exercised in accordance with the overriding objective, as well as the policy underlying Part 71.

Christopher Howitt

ABC v London Borough of Lambeth [2021] EWHC 2057 (QB)

Those that deal with issuing claims and lodging documents may shudder a little to know that in this case Deputy Master Grimshaw was called on to decide when, almost to the last minute, a claim was issued using the CE File electronic working system. The underlying point, needless to say, was whether the Defendant had a limitation defence. At some point on 17 February 2021, before 16:15, the Claimants filed an application for their names to be anonymised in a claim. At 16:15 their solicitor filed the claim form. At 16:19 the fee was paid. At 16:20 an automated email recorded that the documents were filed at 16:18. At 07.46 on 18 February 2021 the Claimant's solicitor received an email rejecting the submission of the case documents because the anonymity order had not yet been made by a Master. They were told to await the anonymity order and resubmit the documents. The anonymity order was made the same day, and the case documents were re-filed at 17:39. The claim form was sealed with an issue date of 19 February 2021. The Claimants requested (as the court told them they could) that the claim form be back-dated to 17 February. The Defendants objected.

PD 51O (the pilot scheme for electronic working) says at 5.4(2) "The date and time of payment will also be the date and time of issue for all claim forms and other originating processes submitted using Electronic Working." The Queen's Bench Guide says much the same at paragraph 3.17. The Claimants relied heavily on these sections. The Defendants, noting that that paragraph of the PD only applies where a claim form has been Accepted, argued that the email rejecting the submission of documents on 18 February meant that the claim had not been Accepted until the point at which they were re-filed, and so the correct date was 19 February 2021. The Deputy Master agreed with the Claimants and held that the claim form had been Accepted when it was first filed, and so the issue date was 17 February. For good measure he said that if he was wrong about that he would exercise the court's discretion to remedy an error of procedure. This is a victory for common sense and is much to be welcomed. The Court of Appeal's comments in Denton about discouraging opportunism also come to mind.

Simon Hunter

JR&B Farming Ltd v Hewitt [2021] EWHC 1704 (Comm)

This case concerned the interaction of transcription services and video hearings. At a PTR it became apparent to the judge (HHJ Davis-White) that the hearing was being streamed to a transcriber (an official one, although not acting in that capacity in this case) who was not only transcribing the hearing live but also taking a recording of it. No permission had been sought from the court for transcription to be taken in advance. Once he became aware of the position HHJ Davis-White gave the necessary permission to enable the transcript to be made of the remainder of the hearing, but required evidence to be filed and submissions to be made on the effect of what had happened. Recording a hearing without permission is, needless to say, a contempt of court.

Having reviewed the evidence and the law HHJ Davis White summarised the key points (see [26]). They are worth quoting in full. "(1) whatever the form of hearing, real time transcription requires the permission of the court and therefore a specific court order; (2) the court will frequently wish to regulate to whom any such real-time transcript may be disseminated; (3) the relevant form, currently Ex 107 OFC will need to be completed both by the relevant party and the transcriber and submitted to the Judge when an order and his or her approval is sought. (4) any order should be provided to the transcribers and their usual practice should be to require sight of such an order rather than simply assuming such an order is in place and in any event they should provide or offer to provide the relevant form completed by them as appropriate." Any solicitor arranging transcription should also note that HHJ Davis-White would likely have referred the solicitors concerned to the SRA were it not for the fact that they had already self-reported.

Simon Hunter

Taylor Goodchild Ltd v Taylor [2021] EWCA Civ 1135

In this case, the Court of Appeal considered the application of the rule in *Henderson v Henderson* in the context of an unfair prejudice petition. A shareholder (G) had prevailed in an unfair prejudice petition against the other main shareholder (T), obtaining an order requiring T to sell his shares to G. The company then issued proceedings seeking relief against T in respect of matters which had been relied on in the unfair prejudice petition. T obtained an order striking out parts of the company's claim on the basis that they constituted an abuse of process under the rule in *Henderson v Henderson*. The Court of Appeal overturned that order. It was common ground that the court in the earlier unfair prejudice proceedings had jurisdiction to grant the relief now sought by the company. Whereas the first instance Court had found that company's claim was necessarily abusive because the company could have petition for the relief in the earlier proceedings, Newey LJ held that it is "not always abusive to raise later a claim that could have been put forward earlier." Whether or not a party is abusing the court's process is answered taking a "broad, merits-based judgment which takes account of the public and private interests involved". There is no dogmatic approach. Here, the claims sought by the company were properly those of the company. There is "no suggestion that a petitioner applying under section 994 of the 2006 Act who alleges that a respondent has breached his duties to the company normally includes in the relief he seeks an order compensating the company for the misconduct." Indeed, the authorities showed that the "legitimacy of a shareholder asking for relief in favour of the company by way of unfair prejudice petition rather than derivative claim is very questionable." The Court also considered the application of the guidelines in *Aldi Stores Ltd v WSP Group plc* [2008] 1 WLR 748. Sir Nigel Davis found in terms that "there is no rule of law that a failure to draw attention to the prospect of further proceedings as proposed in Aldi will always render such further proceedings an abuse of process." He also doubted that those guidelines applied in the "rather special position relating to s.994 Petitions."

Christopher Howitt

Windhorst v Levy [2021] EWHC 1168 (QB)

In March 2003 L obtained a judgment against W in the Regional Court in Bielefeld, Germany. In August 2007 W was the subject of a binding insolvency plan under an order of the Regional Court in Charlottenburg, Germany. On 17 August 2020 Master Eastman registered the 2003 judgment under Council Regulation EC 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. W appealed, arguing that the registration should be set aside, on the basis that the judgment was no longer enforceable as it had been waived by the insolvency plan (although this point was effectively conceded by W not to be fully the case), and that the English court was bound to recognise that plan under Council Regulation EC 1346/2000 on Insolvency Proceedings (now replaced by an EU Regulation). He further argued that execution should be stayed under CPR, r 83.7(4) in any event. The appeal came on before Eady J, who was called on to consider the court's approach to registration and the interrelationship with the EC Insolvency Regulation.

Having decided, on the basis of the common ground between the parties, that at the date of the hearing the 2003 judgment was enforceable as a matter of German law, albeit still the subject of proceedings in the Court of Appeal in Hamm that may yet make it unenforceable, Eady J came to the only real conclusion open to her: it did not matter that the English court was bound to recognise the German insolvency plan (which it is), because as a matter of German law the 2003 judgment remains enforceable despite the existence of the plan. She also refused the stay under the CPR on the basis that the judgment was enforceable in Germany and thus it was not unjust that it should be enforceable in England. W had had it in his power to obtain an effective interim bar on enforcement in Germany by paying a sum of money by way of security in that jurisdiction, but he had not done so.

Simon Hunter

Claydon Yield-o-Meter Ltd v Mzuri Ltd [2021] EWHC 1322 (IPEC)

This consequential judgment shows the importance of time limits. On 24-26 February 2021 a trial happened before HHJ Hacon. On 22 April 2021 judgment ([2021] EWHC 1007 (IPEC)) was handed down remotely with no attendance by the parties. (The judgment itself is memorable for beginning with the words "In 1701 Jethro Tull invented a seed drill…"). The Claimant lost. Neither party asked for an order adjourning the hearing for the purpose of consequential submissions. On 13 May 2021 the Claimant's solicitors circulated a draft order which included them seeking permission to appeal on one ground. The next day the Defendant's solicitors replied to say that the court had no jurisdiction to deal with permission to appeal, since no application was made at the hearing at which the decision was taken, and, in any event, the 21-day time limit had expired (on 13 May 2021). HHJ Hacon dealt with the matter on written submissions. The brave submissions of counsel for the Claimant were that the COVID Protocol (i) meant that the remote handing down of the judgment was not a "hearing" for the purposes of CPR, r 52.3(2)(a), and (ii) the remote handing down of judgment was an automatic adjournment of the hearings for consequentials, or at least that that is what it meant in this case. HHJ Hacon unsurprisingly rejected both arguments. He had handed down his decision on 22 May 2021 with no adjournment of the consequentials. At that point he had no further jurisdiction to consider an application for permission to appeal. Also, as the application was outside the 21-day period in any event, an application for an extension of time could only be made to the Court of Appeal.

Simon Hunter

Farrar v Miller [2021] EWHC 1950 (Ch)

Farrar v Miller is another case in which the Court considered the operation of champerty and maintenance in the context of modern litigation funding arrangements, which have continued to evolve since the enactment of the Courts and Legal Services Act 1990. The Courts have stressed in the past how those rules must keep abreast of the times, lest they "die in a lingering and discredited old age." As the Judge observed, "access to justice has rendered proper and lawful transactions that would - in older days - have been caught by [those] doctrines." In this case, Mr Farrar had engaged a law firm to act for him under a damages-based agreement to act for him in his claim against Mr Miller. While the proceedings were still on foot, Mr Farrar assigned the claim itself to the firm on terms that brought an end to the DBA. Mr Farrar died unexpectedly before the case came to trial, and the firm applied to be substituted as claimant. The Court found the assignment void and dismissed the application, re-iterating that there is a very hard distinction between potentially champertous transactions between non-lawyers and potentially champertous transactions involving a lawyer. The latter cases are either sanctioned by the Courts and Legal Services Act 1990 or they are not; and if they are not, the common law does not ride to the rescue. The assignment was not a DBA or CFA within the meaning of the 1990 Act, and it made no difference that the assignment had replaced a compliant DBA. In assessing whether the assignment was champertous, the Judge took exception in particular to two its features. First, the Judge considered that the control of the proceedings had moved permanently and decisively away from the proper claimant to a party with no legitimate interest in prosecuting the proceedings, apart from its interest in fee recovery. That arrangement was inconsistent with the "purity of justice." Second, there was insufficient control of fees. Under the regime established by the assignment, the firm would be acting on its own behalf. There was no mechanism for challenging the costs incurred, as Mr Farrar had been entitled to do under the DBA. As a result, the arrangement fell on the wrong side of the line and was found champertous and void.

Christopher Howitt

School Facility Management Ltd v Governing Body of Christ the King College [2021] EWCA Civ 1053

This case concerned a contract for the provision of a school building. The precise facts are not relevant to the point of law discussed here; it suffices to say that the contract was void for being ultra vires. The point of law concerns the extent to which a party seeking restitution must give credit for benefits received from the other party, although it remains unanswered. The parties agreed that the principle of counter-restitution existed. The differed, however, on almost everything else, from the juridical basis of the principle to its application.

Popplewell LJ (giving the leading judgment) identifies 4 possible justifications for the rule: (1) it might reduce or extinguish the enrichment; (2) it might change what is seen as unjust; (3) it might be seen as a cross-claim in unjust enrichment; or (4) it might be nothing more than a condition of recovery. Each finds some support in the authorities. Having extensively traversed the authorities, both judicial and academic, however, the judge concludes that it is neither necessary nor (more tentatively said) possible to decide between them. Each has their place but, on the facts of the case the counter-restitution principle simply was not engaged. That said, his Lordship did give a definition of what benefits a claimant must give credit for: "the benefits for which the claimant must give credit are those which are sufficiently closely connected with the benefits provided to the defendant that justice requires him to do so": [83]. This question is an interesting one which, surely, will re-appear. As Popplewell LJ notes at [85] there may be "acute difficulties" in applying the test to a case where a change of position defence and a counter restitution argument both applied but it was unclear which was to be applied first.

Simon Hunter

Ahuja Investments Ltd v Victorygame Ltd [2021] EWHC 2382 (Ch)

HHJ Hodge's judgment in this matter begins with Hamlet. It might as well have begun with Mercutio's curse from Romeo and Juliet: "a plague o' both your houses". It certainly ended that way ("It is only right that the court records the considerable debt that the parties owe to the skill and attention to detail of their respective counsel and solicitors. Neither side merited such application and effort on the part of their legal team": [172]). The Hamlet reference ("not so much a case of "Hamlet without the Prince" as one of Hamlet without any of Polonius, Gertrude or Laertes": see [1]) though, takes us to the heart of the interest in the case: when can a court draw adverse inferences from the failure to call a relevant witness at trial? The Supreme Court recently had a go at this question, in Efobi v Royal Mail Group Ltd [2021] UKSC 33, and emphasised that really this is just a matter of "ordinary rationality": basically, the court can do it when it is appropriate in the circumstances.

Judge Hodge's procedural comments on that ordinary rationality are a helpful guide to how the court should assess adverse inference submissions (and how parties should make them): (1) the party making the submission should establish that the other party might have called a particular person and that that person had material evidence to give; (2) the party making the submission must identify the particular inference (it is no good to say simply 'please draw adverse inferences from the failure to call the witness'); (3) the party making the submission must then identify why the inference is justified on the basis of other evidence that is before the court; and (4) the court then has a discretion based on an assessment of the overriding objective and the circumstances of the case.

Simon Hunter

Practice Update

General Practice and Procedure

Probably the biggest area of general practice news in the last few months has been that the Civil Justice Council has published its final report on the Guideline Hourly Rates for assessments of costs. Practitioners will know that these have not been updated for over a decade, although anecdotal experience (and some reported decisions) suggested that many judges were adding a reasonable uplift factor onto the 2010 hourly rates. The report recommends raising the rates by between 6.8% and 34.8% (the precise percentage varies by location and band), and also recommends abolishing the National 3 categorisation. Indeed the new geographic categorisation is, at first glance, easier to understand. Being, as it is, based largely around the administrative counties, it should also scotch an old idea, occasionally still heard, that costs should be assessed at the rate appropriate to the court where the hearing is, rather than at the rate for the location of the solicitor's office (but see the *Axnoller* case noted above for a related argument, about instructing expensive London solicitors). A new Guide to the Summary Assessment of Costs has been produced. The Master of the Rolls' forward to that Guide gives the hope that "*it will not be so long before the Guide is reviewed again*", which is encouraging.

In other changes, the **Civil Procedure (Amendment No. 4) Rules 2021** make clear that applications for permission to appeal made to the lower court can be made at the lower court hearing or any adjournment of that hearing. The last part was not previously certain, and the rule is to be welcomed. The **132nd Practice Update** has created a new pilot scheme (PD51ZB) called the Damages Claims Pilot. This creates an online system, the Damages Claims Portal for use in issuing claims which are solely for damages (and meet certain other criteria). It remains to be seen whether such online systems genuinely improve efficiency and experiences in the justice system, or whether they end up doing nothing more than making the whole system more Byzantine. The **133rd Practice Update** has,

amongst other things, extended the Business and Property Courts' Disclosure Pilot until 31 December 2022. Changes to the fees payable in certain cases have been made by the **Civil Proceedings Fees (Amendment) Order 2021**.

HMCTS has put on its website a guide to telephone and video hearings (https://www.gov.uk/guidance/what-to-expect-when-joining-a-telephone-or-video-hearing). Practitioners may find this helpful for both clients and opponents acting in person. The BPC in Manchester has produced a helpful guide to the preparation and service of bundles and skeleton arguments (https://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/courts-of-the-chancery-division/the-business-and-property-courts-bpcs-in-manchester/news/). Although the guide only has force in Manchester, its provisions are sensible, particularly the guidance on electronic bundles at paragraph 1(n).

Finally, the Civil Justice Council has completed its report on Compulsory ADR, concluding that it is lawful for the court to impose ADR on the parties. This will no doubt be a recurring issue in this update.

Insolvency and Companies

This Update usually considers only legislation made, or guidance issued, before the end of the month preceding publication (the end of August 2021 for this Issue). However, since that date Parliament has passed the **Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) Regulations 2021**. These regulations completely replace the old (well, not that old) Schedule 10 to the CIG Act 2020 and replace it with a much simpler version. This new schedule is in force from 1 October 2021 to 31 March 2022. This makes it unnecessary to further consider the **Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) (No. 2) Regulations 2021**, which extended the life of the old Schedule 10 to 30 September 2021. Presumably the practice direction supplementing Schedule 10 will be replaced in due course. The previous temporary insolvency practice direction dealing with COVID issues (other than those relating to Schedule 10) was extended until 30 September 2021. It will presumably be extended again.

Changes relating to Debt Relief Orders raising the permitted values of certain items in the relevant calculations are made to the Insolvency (England and Wales) Rules 2016 by the **Insolvency (England and Wales) (Amendment) Rules 2021** and to the Insolvency Proceedings (Monetary Limits) Order 1986 by the **Insolvency Proceedings (Monetary Limits) (Amendment) Order 2021**.

It is not every day that one gets to consider a new insolvency procedure. In fact there are a number of specialist procedures that most practitioners in this area will never see in a career, and it is likely that this new one falls into that category. It is to be called "payment institution special administration" or "electronic money institution special administration", and is created by the **Payment and Electronic Money Institution Insolvency Regulations 2021**. The regulations are comparatively lengthy, and given the (un)likelihood of most practitioners ever seeing a special administration of this sort, this Update will not consider them further.

Property

Two statutory instruments alter COVID provisions imposed over the course of the last year. The **Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No. 2) Regulations 2021** extend the restrictions on the right or re-entry and forfeiture for non-payment of rent to 25 March 2022. By Sch 12, paragraph 12 of the Coronavirus Act 2020, alterations were made to the forms prescribed under the Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 2015. That provision has been suspended by the **Assured Tenancies and Agricultural Occupancies (Forms) (England) (Amendment) and Suspension (Coronavirus) Regulations 2021**, and two of the forms attached to the 2015 Regulations have been replaced by those in the Schedule to these 2021 Regulations.

Other Areas of Practice

The last edition of this practice update noted the passing of the Pensions Schemes Act 2021. Two sets of commencement regulations have now been made. The

Pension Schemes Act 2021 (Commencement No. 1) Regulations 2021 brings a very few provisions into force with effect from 31 May 2021. The **Pension Schemes Act 2021 (Commencement No. 2) Regulations 2021** brings another two into force. The Explanatory Note to the No. 2 Regulations contains a helpful table showing which provisions have been brought into force. As with the Act itself, the full scope of the changes is beyond the scope of this Update.

In related news, the **Pensions Regulator (Information Gathering Powers and Modification) Regulations 2021** give details, as their name suggests, of the powers of the Pensions Regulator and, in particular, details of the new civil penalty for non-compliance with those powers.

Chambers News

New book published

Back in June, Prof Subedi published a new book, entitled *Unilateral Sanctions in International Law* (Hart Publishing, Oxford, 2021).This is the first book that explores whether there are any rules in international law applicable to unilateral sanctions and if so, what they are.

This study finds that unilateral sanctions by a state or a group of states against another state as opposed to 'smart' or targeted sanctions of limited scope would be unlawful, unless they meet the procedural and substantive requirements stipulated in international law. Importantly, the book identifies and consolidates these requirements scattered in different areas of international law, including the additional rules of customary international law that have emerged out of the recent practice of States and that increase the limitations on the use of unilateral sanctions.

Prof Subedi appointed Legal Procedural Adviser to the IUCN World Conservation Congress 2021

We were pleased to announce that Prof Subedi has been appointed as Legal Procedural Adviser to the International Union for Conservation of Nature World Conservation Congress 2021. The International Union for Conservation of Nature (IUCN), which is also known in short as the World Conservation Union, is a prestigious international organisation. Professor Subedi was appointed to advise them on legal and procedural matters during their World Congress which takes place every four years. This year the event took place in the French city of Marseille between 3 – 11 September 2021.

The Congress was inaugurated by French President Emmanuel Macron. A number of other heads of states or governments also addressed the Congress. Professor Subedi attended the opening ceremony, as well as the full proceedings of the Congress.

Chambers congratulates Prof Subedi on both counts.

Mark Baldock taken on as a tenant

In July 2021 Chambers was pleased to welcome Mark Baldock (previously a 3rd six pupil in Chambers: see Issue 2 of this Review) as a tenant. Chambers congratulates Mark on the successful completion of his 3rd six pupillage.

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