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The Three Stone Triannual Review

THREE STONE

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Editor in Chief: Simon Hunter

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Editorial

A well-conducted trial is, to litigation lawyers at least, the most sublime piece of theatre imaginable. Part improvisation, part scripted, with an uncertain outcome dependent on the performance in the witness box of untrained laymen (and the performance at the bar of better-trained advocates), it surely beats anything the West End has to offer. Although there is probably (hopefully?) less singing. But to clients, it is a stressful, expensive process which gives you, at best, a piece of paper that says that you were right. That paper by itself is worthless except in the realm of moral bragging rights. Sensible clients (those, in particular, that do not say to their lawyers that they are "in it for the principle": the worst reason to litigate) are interested in two questions: (1) how can I get out of this without having to go into court, and (2) if I am going to have to go to court, how am I going to get my money from the other side if I win?

In this issue of the Three Stone Triannual Review we consider both of these important subjects. On the first, Matthew Marsh (lately the Chief Chancery Master) and Stephen Baister (lately the Chief Bankruptcy Registrar, both now members of Three Stone) discuss out-of-court dispute resolution, considering whether it can (or should) be made compulsory, and analysing some particular issue that arise in insolvency cases. On the second point, Simon Hunter discusses the less-than-happy situation with the current rules on taking control of goods as a means of enforcement. The recent case of *Hamilton* (no, nothing to do with the musical) laid bare a significant issue with the drafting of the relevant legislation, and has left judgment creditors and enforcement agents to bear the burden of making the legislation work. It is to be hoped that speedy action will be taken to amend the legislation. Although, as the West End Hamilton sang: "*But just you wait, just you wait...*".

Compelling Agreement?

In this article Matthew Marsh and Stephen Baister give us some thoughts on the compulsory use of mediation in Chancery proceedings

> "*Agree with thine adversary quickly, whilst thou art in the way with him; lest at any time the adversary deliver thee to the judge, and the judge deliver thee to the officer, and thou be cast into prison.*"

This short verse from St Matthew's Gospel (chapter 5:25), apparently not advising but imposing an obligation to settle rather than risk the possible consequences of trial, is often cited by proponents of mediation. There are increasing indications that our system of civil law is minded to take a similar approach. This article examines some of the many considerations that arise from this trend.

Will the court order mediation?

The question whether the court has power to order the parties to a dispute to undertake mediation has become a controversial subject. Until recently the orthodox answer to the question was found (albeit *obiter*) in Dyson LJ's judgment in *Halsey v Milton Keynes* [2004] EWCA Civ 567. Giving the judgment of the court, he expressed the view that to order the parties to mediate would be to impose "*an unacceptable obstruction on their right of access to the court*" in light of Article 6 ECHR and the decision of the European Court of Human Rights in *Deweer v Belgium* (1980) 2 EHRR 439, [1980] ECHR 6903/75 at [49]. There are clear signs,

however, that the *Halsey* approach is unlikely to be maintained for much longer.

One of the tenets of the CPR when it was introduced was to put court control at the heart of the rules. This can be seen from the constituent elements of CPR rule 1 and, in particular rule 1.4 which places upon the court a duty to actively manage cases. Rule 1.4(e) requires the court to encourage the parties to use "*alternative dispute resolution*" ('ADR'). The Glossary defines ADR as a:

> "*Collective description of methods of resolving disputes otherwise than through the normal trial process.*"

One other element should be noted. In 2015, the menu of powers in CPR rule 3.2 was amended. The general power to case-manage and further the overriding objective in rule 3.2(m) was extended to include an express power for the court to conduct an early neutral evaluation ('ENE') with the aim of helping the parties settle the case.

Three points bear emphasis before going further. First, rule 1(4)(e) only refers to the court *encouraging* the parties to use ADR. Secondly, ADR and mediation are not synonymous. It is one thing for the court to order the parties to submit to a type of ADR that is part of a court process, but quite another to order the parties to undergo a process, such as mediation that involves (1) the appointment of a neutral third party and (2) the active involvement and engagement of the parties with the mediation process. Thirdly, the new power in rule 3.2(m) only concerns the court conducting an ENE, not the court ordering the parties to conduct an ENE using the services of a third party provider.

In *Lomax v Lomax* [2019] EWCA Civ 1467 the Court of Appeal distinguished *Halsey* when deciding that the exercise of the power to order ENE to be undertaken by the court under rule 3.1(2)(m) did not require the consent of the parties. Subsequently, Sir Geoffrey Vos, when he was Chancellor, expressed the view in *McParland and Partners v Whitehead* [2020] EWHC 298 (Ch) that the *Halsey* approach was due for reconsideration.

Earlier this year the Civil Justice Council (which is chaired by the Master of the Rolls) published a report produced by a working group chaired by Asplin LJ entitled *Compulsory ADR* which has been welcomed by the Master of the Rolls. The purpose

of the report was stated by its authors to be "*to inform possible future reform and development in this area.*"

The *Compulsory ADR* report is broadly-based. It concludes that the parties to a dispute can lawfully be compelled to participate in ADR, although the conclusion is subject to a number of qualifications. The report makes three observations about the form compulsory ADR might take:

1. Where participation in a suitable and effective form of ADR does not result in any expense of time or money by the parties, making it compulsory will not usually be controversial.

2. The writers of the report foresee that greater use of compulsory judge-led ADR processes will be acceptable because they are free and where they are already compulsory (such as in matrimonial proceedings) they appear to be effective.

3. "*[C]ompulsory mediation may be considered, provided it is sufficiently regulated and made available where appropriate in short, affordable formats.*"

Sir Geoffrey Vos (as Master of the Rolls) has said on more than one occasion that ADR has become a misnomer because there is nothing "*alternative*" about the parties and the court seeking to resolve disputes by means other than going to court. In a speech at Hull University on 26 March 2021 he put it this way:

> "*Dispute resolution should be an integrated whole. Mediated interventions should be part and parcel of the process of resolving disputes wherever they arise in our society […] There is nothing* ***alternative*** *about either mediation, early neutral evaluation, or judge led resolution.*" [Emphasis in the original]

There is a clear distinction between on the one hand ENE or judge-led resolution (such as Chancery Financial Dispute Resolution, 'FDR'), and on the other hand mediation using the services of a private mediator, which is the most common form of ADR used for cases in the Business and Property Courts. At present mediators are not regulated (although voluntary regulation is available under the auspices of the Civil Mediation Council) and mediation cannot fairly be described as "*short and affordable.*"

As the *Compulsory ADR* report identifies, the balance between a person's Article 6 rights and the court's ability to order mediation is a fine one because a compulsory mediation scheme should have regard to:

1. The cost and time burden on the parties;
2. Whether the process is particularly suitable in certain specialist areas of civil justice;
3. The importance of confidence in the ADR provider and the role of regulation where mediation is private;
4. Whether the parties engaged in the ADR need access to legal advice and whether they have it;
5. The stage(s) of proceedings at which ADR may be required;
6. Whether the terms of the obligation to participate are sufficiently clear to the parties to encourage compliance and permit enforcement.

The current position is strictly that *Halsey* remains the law, although there is a powerful and authoritative report from the CJC which suggests the court has power to order the parties to undertake mediation. Where does this leave practitioners?

A tentative conclusion is that the current practice in the Business and Property Courts with regard to mediation is unlikely to change without substantial revision to the CPR. If the court is to be given power to make an order requiring the parties to undertake mediation, it will have to be carefully circumscribed having regard to Article 6 and the considerations that are noted in the CJC's report. It might be necessary, for example, to create a formal regulatory structure for mediators, which is currently absent. At present the court may encourage the parties to mediate and may use its case management powers to do so. 'Ungley orders'[1] are commonly made. This, however, stops some way short of the court making an order for the parties to mediate.

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1 An order staying the claim for the parties to undertake mediation subject to a requirement to explain a refusal to participate.

Should the court order mediation?

In many ways the issue whether the court has power to order mediation is of secondary importance. On one view, regardless of the issue of *vires*, the more important question is should the court ever in litigation in the B&PCs make an order requiring the parties to mediate? It is one thing to have a power to make an order for mediation and quite another to exercise a discretion to make it. Other forms of ADR such as ENE or Chancery FDR are more directly under the court's control and different considerations apply.

Making an order to mediate is problematic for a wide variety of reasons, a sample of which follow:

1. Mediation is, like litigation, not a homogenous process. There are different approaches that are adopted, and it is axiomatic that the parties are willing to submit to a consensual process. Just what is the court ordering the parties to do if the order simply says they must mediate? Will they be required to mediate 'in good faith'?

2. Mediation involves a process that is at least in part under the control of the mediator who must act in accordance with the mediation agreement. Will the court specify the terms of the mediation agreement? Is the court merely ordering the parties to place themselves under the control of a mediator?

3. Will the mediation ordered by the court be purely facilitative or will a degree of evaluation by the mediator be permitted?

4. As a matter of general principle, the court order should be clear enough to permit enforcement by committal. And yet what goes on in the mediation process is confidential and without prejudice. How could the court determine whether a party had complied? And what would the position be if the mediator ends the mediation for reasons of propriety?

5. Critically, an order to mediate would require each party to pay a fee to the mediator. Will the court be required to investigate means before making an order? If not, what happens if one party cannot afford to pay the mediator's fee?

Some consideration must also be given to the position of the mediator who is asked to undertake a mediation where the court has made an order requiring mediation to take place. If it is clear that all the parties are willing to mediate, the position would be no different to a consensual appointment at present. But what if one or more party is showing signs of reluctance? It has not been part of the mediator's role to date to offer pre-mediation cajoling and encouragement to enter the process. It is not an attractive proposition because it risks being seen as entering the arena and actively engaging with one of the parties before the appointment takes place. Indeed, a pre-appointment process of cajoling might often make it necessary for the mediator to decline to be appointed.

Will the court make an order for ADR?

What emerges from the CPR in its current form and from the decision of the Court of Appeal in *Lomax v Lomax* [2019] EWCA Civ 1467, [2019] 1 WLR 6527 is that the court currently has power to make an order requiring the parties to submit to an ENE carried out by the court. It is not certain, however, whether the court has power to make an order for Chancery FDR.

Chancery FDR[2] is a form of dispute resolution in which the judge facilitates negotiations and may provide the parties with an opinion about the claim or elements of it. It has similarities with ENE, although the role of the court is rather more active. Its origins lie in the FDR process that is now compulsory in the matrimonial jurisdiction. Despite its origins, Chancery FDR can be useful in a wide variety of claims whether business or traditional Chancery.

Its essence is that the court will try to lead the parties to agree terms without a determination being made. Of course, the judge who conducts the Chancery FDR can have no further involvement with the claim if there is no settlement.

Lomax was in essence a decision in which the court was required to construe CPR rule 3.2(m). The court found that there was no reason to conclude that the power was limited to circumstances in which the parties to the claim consented; and so the court has power to make an order for there to be an ENE undertaken

2 See paragraphs 18.16 to 18.19 of the Chancery Guide.

by the court.

There is no similar power in the CPR to order Chancery FDR to take place. However, it is difficult to see why there should be a distinction as a matter of principle. The court is required to encourage the parties to use ADR and there is a general power in CPR rule 3.2(m), in its original form, to further the overriding objective. It cannot be said that *Lomax* is authority for making an order for Chancery FDR, but it hard to see why the court is not permitted to make an order requiring a process to be carried out that is within its purview and within the spirit of the express powers in the CPR.

Once again, it must be said that if there is such a power, the court may not be persuaded to exercise it against the wishes of the parties. On the other hand, it is free, and the court can regulate any imbalance between the parties to enable the process to be fair. If there is only one party out of several who is unwilling to consent to an order for Chancery FDR it is possible to see that the court might be willing to override the wishes of the outlier and follow the wishes of the majority.

Mediation and insolvency: the same but different?

Much of the above applies to mediating or applying ADR to an insolvency dispute as it does to any other dispute; but there are a few peculiarities about insolvency cases that need to be considered.

The principal similarity between an insolvency case and any other typical Chancery case is that insolvency is almost always just about the money. As a general rule an insolvency mediation is unlikely to be infected by, say, the kind of family feud that might be the real cause of the friction underpinning, say, a probate dispute; similarly an insolvency case is rarely tainted by the kind of animus that might impede settlement in the way it often does in the case an unfair prejudice petition under s 994 Companies Act 2006, where fallout in long term relationships between directors and shareholders, who may have enjoyed a long friendship or an even more intimate relationship, means that money is not the only issue between the parties. One can be reasonably sure that money is the only issue in almost any insolvency case because the driving force is the obligation of the office-holder "*to*

collect the assets of the company and to apply them in discharge of its liabilities [and if] there is any surplus…distribute it among the members of the company in accordance with their respective rights."[3] An insolvency office-holder is a fiduciary, and as such is obliged to account for his dealings with the assets under his control.[4] He or she is obliged to exercise commercial judgment. So his or concern is to achieve the best result for creditors, which as a general rule means that he or she is focussed on getting in money that will produce the best return by way of dividend. This may explain why there is resistance on the part of many insolvency professionals to the idea of compulsory ADR: insolvency practitioners are used to, indeed must, exercise commercial judgment, and, at least in the corporate sphere, are generally dealing with commercially aware respondents (usually directors and shareholders). Furthermore, it can be argued that there are some kinds of action peculiar to insolvency which are not about money – or not just about money – because they involve the consideration of class interests, so may be less suited to ADR than other kinds of case.

Harman J explained the difference between insolvency and other proceedings in *Re a company (No 001573 of 1983)*:[5]

> "*On a petition in the Companies Court in contrast with an ordinary action there is not a true lis between the petitioner and the company which they can deal with as they will. The true position is that a creditor petitioning the Companies Court is invoking a class right…and his petition may be governed by whether he is truly invoking that right on behalf of himself and all others of his class rateably, or whether he has some private purpose in view.*"

Annulment (in bankruptcy), rescission (in winding up), challenges to voluntary arrangements, and certain kinds of directions hearings which involve not so much the competing interests of individual parties but the interests of the whole body

3 *Ayerst v C&K (Construction) Ltd* [1976] AC 167 (HL) *per* Lord Diplock, of the office of liquidator in a compulsory winding up. The authorities contain many statements to the same or similar effect.

4 *Mirror Group Newspapers plc v. Maxwell (No 2)* [1998] 1 BCLC 638. Although the judgment of Ferris J was given in relation to an office-holder's remuneration, his analysis of the fiduciary nature of an insolvency office and what flows from that has wider implications.

5 [1983] BCLC 492 (Ch).

or classes of creditors will not be easily settled by mediation or ADR. In the case of annulment/rescission, for example, it is simply not possible since the final decision as to the relief to be granted depends on the court and not on the litigants. The same might be said of certain kinds of relief that require a declaration (although there is nothing to stop the parties agreeing to a state of affairs which the court might otherwise have to declare and embodying it in an agreement or order). Disputes as to jurisdiction are plainly also unsuited to ADR. Whilst a winding up or bankruptcy petition that is in reality a dispute between a petitioner and a debtor may be settled out of court, a petition involving supporting or opposing creditors may be too complex to resolve by ADR because of the splintered interests of the participating parties.

The advent of litigation funding has had a real impact on insolvency proceedings. The availability of 'no win no fee' funding (for example in the form of a CFA or DBA) is not new, and conventional funding has also now been a market force for some time. Most forms are likely to have much the same effect on insolvency proceedings as any other kind of action. The ability of an office-holder to assign not just company claims but statutory office-holder claims[6] is already fulfilling the prediction: "*This may well produce a new dynamic in the pursuit of such claims and, conversely, the risks for directors.*"[7] A funder that has purchased a cause of action will be looking for a return on investment as well as a return to the office-holder. A director faced with an assigned or funded claim is likely to favour mediation or some other form of ADR unless his or her prospects of defending the claim successfully are very high indeed.

The problem of mediating insolvency disputes may be illustrated by two mediations which failed because of what might be described as insolvency peculiarities.

The first involved a claim by a liquidator for misfeasance. There were two problems. The first was that creditors had claimed in the liquidation, but the liquidator had not yet adjudicated on their proofs. The former directors at whom the liquidator's action was directed wanted to know what the deficiency to creditors was since the claim against them, if successful, would involve putting the company into

6 See s 246ZD Insolvency Act 1986.

7 Hamish Anderson, *The Framework of Corporate Insolvency Law* (Oxford, 2017) p. 223.

the position it ought to have been in, so the extent of the claims, they felt, was relevant to any offer they might make. It was also important because they were contending that the compromise of a piece of litigation before the company went into insolvency bound one creditor who had submitted a proof; and if that were the case he or she could have no claim, which again would have made a difference to the deficiency. In the circumstances, the former directors made only a nominal 'nuisance' offer which the liquidator was never likely to accept, so the mediation fell apart.

At the root of another failure was a problem of fees of which the mediator was ignorant. The case was a complex, substantial multi-party claim by a trustee in bankruptcy. Negotiations appeared to be going well, and settlement seemed likely. It was not, however, consummated. It did in fact settle, but not on the day of mediation. A major obstacle, as it turned out, had been disagreement between the trustee and his solicitors over how fees would be dealt with on the basis of the settlement that was being proposed: both were going to have to take a reduction to provide an acceptable dividend to creditors, and each was unhappy with the other's suggestion about the extent to which they should take the hit. This was understandable as the nature of the case had meant that a lot of work had been done, so the work in progress was significant to both. The need to take into account both the office-holder's costs and those of his or legal team can be a serious consideration, not unique to insolvency, perhaps, but a common feature.

Whilst the class nature of insolvency processes may make mediation (or other forms of ADR) difficult to apply in some cases, it might equally be said that it could provide an opportunity as well. Mediation has not, as far as the writers are aware, yet been explored to any or any significant extent, to corporate restructuring or turnaround before the onset of insolvency. There is, at least in theory, no reason why mediation should not be used as a mechanism by which to achieve debt restructuring between a company (or for that matter an individual) and its creditors. There is, however, evidence of movement on this front. INSOL International has already established an ADR Colloquium to promote the use of mediation, arbitration and other forms of ADR to a wide range of situations, including assisting a debtor and creditors to agree a restructuring plan as well as resolving disputes, including cross-border ones.

Conclusion

ADR is undoubtedly going to play an increasing part in resolving a wide range of disputes. It can save litigation costs, but it can add another layer of costs. Making it desirable should, however, be the goal; making it compulsory for all kinds of case or for parties who are the best judge of their own commercial and other interests is, however, a step too far.

Matthew Marsh

Stephen Baister

Papering over the cracks

The recent case of *Hamilton* considered in detail the legislation for taking control of goods. In this article Simon Hunter (who appeared for a respondent in *Hamilton*) looks at the fallout from the judgment

It is reasonably rare in this jurisdiction to have cause to complain about the drafting of legislation. The draftsmen at the Office of the Parliamentary Counsel and elsewhere in the Civil Service are excellent, and most statutes and secondary instruments are tightly and clearly drafted with careful thought given to the practical operation of the schemes they establish. Sadly not so Schedule 12 of the Tribunals, Courts and Enforcement Act 2007 ('Sch 12'), which provides for the taking control of goods, a central part of the process of enforcing judgments and orders of the courts. Of course, a judgment is only a piece of paper unless you can enforce it, so this is an important piece of legislation of significant practical importance to litigants up and down the country. At least one of the inadequacies in Sch 12 was laid bare by the recent decision of the High Court in *Hamilton v Secretary of State for Business, Energy, and Industrial Strategy* [2021] EWHC 2647 (QB).

Background Facts

This is a case which has some not insignificant history which starts in the courts in Scotland. In December 2010 Ascot Care Homes Ltd, a Scottish company which ran 4 care homes, went into administration. Mr Hamilton was a director and 50% shareholder in the company. On 21 April 2015 the Secretary of State (acting through the Insolvency Service in Scotland) obtained a director's disqualification order against Mr Hamilton ([2015] ScotCS CSOH 46). The Lord Ordinary in the Outer House of the Court of Session found, amongst other things, that Mr

Hamilton misapplied more than £150,000 of company money from Ascot, and had retained within the company Free Personal Care payments from the local authority, which should have been paid to some of the residents of the care homes, for much longer than he should have. Mr Hamilton was disqualified for 9 years.

Mr Hamilton was (indeed he remains) dissatisfied with the outcome of these proceedings. He appealed to the Inner House of the Court of Session on 32 grounds. On 13 January 2016 the Inner House delivered its opinion dismissing Mr Hamilton's reclaiming motion: [2016] CSIH 13. In that opinion Lady Smith opined that the Inner House found that there was nothing in the grounds of appeal "*which ought to be regarded as a point of law rather than a disagreement with the Lord Ordinary's findings in fact on the evidence before him*": [13]. On 24 April 2017 a heavyweight Supreme Court panel (Lord Neuberger, Lord Clarke, and Lord Reed) refused permission to appeal.

Over the course of the Scottish proceedings the Secretary of State was awarded two decrees of costs in the total sum of £20,300-odd. The Secretary of State registered those decrees for enforcement in England, having discovered the existence of a vessel, the MV Samara, moored at St Katherine Dock in London. To aid with enforcement the Secretary of State instructed a High Court Enforcement Officer (an 'HCEO'). On 10 April 2019 the HCEO obtained two writs of control and then, because of the curious drafting of Sch 12 and the attendant regulations, passed the matter on to an Enforcement Agent (an 'EA') to execute.

Notices of enforcement were sent by the EA by email to Mr Hamilton on 18 April 2019. This gave the EA 12 months to take control of the goods. On 30 April 2019 the EA visited the MV Samara and Mr Hamilton signed two Controlled Goods Agreements ('CGAs'). A CGA is one of the ways in which goods can be taken into control by an EA. It is what used to be called a walking possession agreement. This last date, 30 April 2019, is crucial for what follows.

At some point in 2019 a Mr Newett served a notice under CPR, r 85.4 by which he alleged that the MV Samara belonged to him rather than Mr Hamilton. Such an application should be made within 7 days of control being taken: CPR 85.4(1). Mr Newett's application was not within that time, but the court always retains the power to extend the procedural time limit.

After various procedural happenings that need not concern us here Mr Newett's application finally came on for hearing on 22 May 2020. It will be quickly noted that this was more than 12 months after the date on which the CGAs were signed. The application was dismissed on its merits. Mr Newett was ordered to pay costs and Master Cook went on to order (at paragraph 2) that "*the [HCEO] do sell MV Samara pursuant to paragraph 60 of [Sch 12].*"

Mr Hamilton applied to have the entirety of Master Cook's order set aside. This application was dismissed by Master Cook as being totally without merit on 2 June 2020. It was from both of these orders of the Master that Mr Hamilton appealed. Those appeals (after more procedural shenanigans that need not concern us) came on for hearing in front of Mr Justice Lane on 22 July 2021: [2021] EWHC 2647 (QB).

Lane J found that "*there is no arguable merit in the grounds of challenge advanced by Mr Hamilton to the decisions of Master Cook*": [134]. One might reasonably wonder why, having said that, the Judge both granted Mr Hamilton limited permission to appeal, and allowed the appeal as against paragraph 2 of Master Cook's first order (quoted above). The answer lies in the provisions of paragraphs 40, 53 and 54 of Sch 12 and the rules on the abandonment of controlled goods.

The Abandonment Lacuna

Those wanting an introduction to the operation of Sch 12 could do a lot worse than reading Lane J's meticulous judgment in detail. So as not to try the patience of readers, however, this article will not set out the provisions or their interpretation in much detail. For what follows it is necessary to understand the following:

1. There are four ways to take control of goods, of which one is entering a CGA: Sch 12, para 13(1).

2. The EA must sell or dispose of controlled goods for the best price that can be reasonably obtained: Sch 12, para 37(1).

3. Before selling controlled goods the EA must give the debtor and any co-owner notice of the date, time and place of the sale: Sch 12, para 40(1).

4. Notice of sale (i.e. a notice giving the time, date and place of the sale) must be given within the permitted period, which is 12 months beginning with the day on which control was taken: Sch 12, para 40(4)-(5).

5. This period can be extended, but only by agreement in writing between the creditor and the debtor before the end of the period: Sch 12, para 40(6).

6. The EA must give at least 7 days' notice of the sale: Taking Control of Goods Regulations 2013, r 38(1). (It has been suggested to me by an HCEO that it is possible, at least sometimes, simply to give a notice of sale with under Sch 12, para 40(1) with a date and time for the sale a long way off in the future, say 12 months after the expiry of the statutory period for giving that notice. This may be possible, but requires that the EA can identify a time, date, and place of sale accurately that far in advance. This will not always necessarily be a feasible option. It also cannot be right that the good operation of the legislation depends on whether the EA can identify a time, date, and place of sale sufficiently far in advance.)

7. If the EA does not give notice of sale within the 12-month period the goods are abandoned, and the enforcement power concerned ceases to be exercisable in relation to them: Sch 12, paras 53(1), 54(1).

8. Where a third party makes a claim to the goods under CPR, Part 85 the EA may not sell or dispose of the controlled goods unless directed to do so by the court: Sch 12, para 60(2).

9. The court has two powers to make an order for sale, the first being where payments into court have not been made, the second where the court considers that it would be appropriate to make such an order: Sch 12, para 60(3), (6).

10. The court has no power to extend the 12-month period for giving notice of sale.

11. The court has no power to make an order for sale when it dismisses a Part 85 application.

The problem here is this: once a Part 85 claim is made the EA cannot sell the

goods, but the time for giving notice of sale is still running, and the court has no power to suspend it. If the court dismisses that Part 85 claim it has no power to make consequential provision for the sale. So time is running, but the EA is unable to substantively act. This would seem to be an error in the scheme of the legislation as drafted.

(As an aside, the ability to extend the period for giving notice of sale by written agreement between creditor and debtor is probably about as good as useless. No debtor with half an ounce of tactical sense is going to agree to extend the period. Keeping the period short puts pressure on the creditor, which makes it more likely that the debtor will be able to obtain a favourable settlement out of court.)

In the *Hamilton* case, the effect of these provisions was that by the date of the hearing before Master Cook the EA had abandoned the MV Samara, and Lane J replaced paragraph 2 of Master Cook's order (quoted above) with a declaration that the vessel was abandoned on 30 April 2020.

Much of the lengthy and careful judgment is taken up with the submission made by counsel for the EA that the court could read an additional power of sale into Sch 12, para 60 using what is known as the *Inco* test. This the Judge refused to do. Those interested with the questions of statutory interpretation should look to the judgment in detail for the consideration of the point. My purpose in this article is to explore in some more detail what can be done to mitigate the problem caused by the drafting of Sch 12.

Two Wallpapering Solutions

If the applicant under CPR, r 85.4 (the 'Third Party') does what they should do and applies within 7 days of control being taken, then there is likely to be no problem with abandonment. It should be possible in all but the most complex of cases to prosecute a Part 85 claim to its completion within 12 months (less 7 days), although EAs and judgment creditors should still be aware of the time-limit and when it expires. However, plenty of applications are made outside the time, and sometimes even timeous applications can be delayed by procedural goings-on (and also, we have learned over the last couple of years, pandemics) and can therefore

take their time to come to final hearing.

In an ideal world, the court would have the power to deal with sale of the goods if and when it dismissed a Third Party's claim (it appears that Master Cook thought he did have such a power). It should have such a power, and the lack of it is a clear omission from the drafting. This could be achieved by allowing the court to extend the 12-month period by court order, or by allowing the court to make a free-standing order for sale at the conclusion of the claim. Either way would work.

Given Lane J's decision in *Hamilton* the only way to really solve this problem is to amend the legislation concerned. However, given the pandemic, and given that this is not the only problem with the legislation, it is unlikely that the necessary Parliamentary time or energy is going to be found any time soon. Until Sch 12 and the attendant regulations are replaced wholesale, it seems that it will be necessary to apply some wallpaper over the holes. I can see two principal types of wallpaper that can be applied to this particular hole.

First there is the possibility of applying for a *Celador* order. This, named after *Celador Radio Ltd v Rancho Steak House Ltd and Others* [2018] EWHC 219 (QB), is colloquially known as a put up or shut up order. It orders the Third Party to make any application within a stated, usually quite short, period of time. (It is notable, given my earlier criticism of the scheme of the legislation, that the *Celador* order was invented by Master McCloud, who held that CPR, Part 85 (which contains the rules supplementing Sch 12) "*must be said to be deficient*": [10].)

Of course, applying for such an order requires the EA/judgment creditor to be aware of the identity of the potential Third Party. Assuming the EA/judgment creditor is aware of the likely Third Party, they can apply for a *Celador* order in good time. In this context 'good time' must be more than the 7 days given by CPR 85.4, but will probably not be much more than 6 months. This will give time for any third-party claim to run its course before the 12-month period for giving notice of sale expires.

In those cases, all too common in practice, where the EA/judgment creditor is not aware of the identity of the Third Party, a different approach is required. A different approach is also needed in any claim which has rumbled on for longer

than perhaps it should have. In any such case, an EA/judgment creditor may find time running out on them just through the time taken to complete procedural steps such as the production of evidence.

Second, therefore, is the judicious use of Sch 12, para 60(6). If the time is running out on an extant third-party claim, or if a late claim is made by an unexpected Third Party, then serious consideration should be given to applying for an order for sale under that paragraph as early as possible. Indeed, the existence of this power was one of the reasons why Lane J was less convinced in *Hamilton* that there was even a lacuna at all in the legislation: see [120].

The next question is whether the court could make an order for sale under Sch 12, para 60(6) but suspend the sale until after the statutory abandonment date. This is a very real concern where the goods concerned are not essentially fungible. It makes no difference if 35 widgets are sold and the proceeds held in cash if a Third Party can, if successful in their claim, go to the market and obtain 35 widgets with the cash that is held. The court can therefore order sale before determination of the Part 85 Claim safe in the knowledge that it will make essentially no difference to the Third Party even if that Third Party wins their application.

An application for an early sale looks very different if the goods concerned are unique and irreplaceable (a work of art, for instance). Then the court must balance on the one hand the appropriateness of not rendering the enforcement dead-letter by allowing the goods to become abandoned against, on the other hand, the Third Party's claimed interest in this particular item. The question of suspension of the para 60(6) order beyond the statutory abandonment date then becomes crucial.

Sch 12, para 60(7) expressly makes an order for sale under para 60(6) subject to Sch 12, paras 38-49 (therefore including the 12-month period in para 40). Such an order for sale is therefore subject, in theory, to the same 12-month period. However, the order for sale is also expressly subject to any modifications that the court may make.

This makes it abundantly clear that the court can suspend the order until beyond the statutory abandonment date. It does this by simply directing that in place of

the 12-month period for giving notice of sale under Sch 12, para 40(4), a different period should apply. Any application to use this second solution should seek such a direction. Such a suspension protects both the creditor and the Third Party, and it is hard to see how it could be particularly controversial.

It also appears, although it is not totally clear, that Lane J's view in *Hamilton* was that the court could make such a suspension. In [120] his Lordship said:

> "*In the course of oral argument, I asked Mr Royle [counsel for the EA] why, if the deadline for giving notice of sale was fast approaching, an application could not be made to the court pursuant to paragraph 60(6) for a direction to sell or dispose of the goods before the court determines the applicant's claim. Mr Royle responded that there would still be no provision for the court to direct a sale, if the claim were dismissed. As I have said, however, I do not regard the absence of such a provision as a problem. So far as the time limit issue is concerned, it seems to me that paragraph 60(6) represents the legislature's acceptance that the prohibition on sale contained by paragraph 60(2) requires tempering. The court's power to act "if it considers it appropriate" is obviously broad in nature. It would clearly encompass the situation where, unless the court orders a sale, it is certain or likely that the proceedings would become a dead letter, as a result of the operation of paragraph 40(4).*" (emphasis added)

This seems to me to imply that it is possible to suspend the order beyond the statutory suspension date.

Herein, however, lies a trap for the unwary. The court's power to make an order under Sch 12, r 60(6) is only exercisable "*before the court determines the [Third Party's] claim*" (emphasis added). Leave it until after the determination of the claim and the court is unable to use the power. This, in fact, was why Master Cook's order in *Hamilton* was not salvageable: the Master only made it after dismissing Mr Newett's claim.

When should this second type of wallpaper be applied? In my view the answer to that question is: as soon as possible. If the Third Party applies to extend the time limit for bringing their claim, then the appropriate moment is probably by counter-application to be heard at the same hearing. If the Third Party does not make (or

does not have to make) an application to extend time, then the application for an order for sale should be made at the earliest opportunity when it becomes clear that time is running out. EAs/judgment creditors should remember that the order for sale must be made before the 12-month period runs out. It is not enough to have made the application, and if time is very short then the hearing of the application will have to be expedited.

Conclusion

Until such time as the legislature amends this legislation, it will be up to EAs and judgment debtors to be on the ball and do what they can to make the scheme of the legislation work. This is particularly unfair on judgment creditors, who usually have no experience of the enforcement process and, in most cases, will be entirely unaware of the existence of the 12-month period. EAs can, at least since *Hamilton*, be expected to know about this problem. But it is unfair to place on them the responsibility for papering over the cracks in this inadequately drafted legislation. Putting up some wallpaper, though, is probably preferable to falling through a hole in the wall.

Simon Hunter

Case Reviews

Swallow v Mashreqbank PSC [2021] EWHC 3265 (Ch)

Jon Turner QC, sitting as a Deputy High Court Judge, dismissed an appeal by a debtor whose application to set aside a statutory demand by a bank had been refused in the County Court. The Deputy Judge decided that the debtor's denial of the debt in the face of overwhelming documentary evidence against him was fanciful and not capable of belief.

The case serves as a reminder to would-be set-aside applicants that it is not enough simply to say 'I deny the debt' or even to allege that a signature is not theirs or that documents are not genuine. It is the debtor's burden to show that the debt is disputed on grounds that appear to be substantial. In discharging that burden, the debtor's evidence needs to grapple with the allegations made by the creditor. A convincing challenge is necessary.

Michael Smith

Michael Smith appeared for the Respondent both on appeal and at first instance

HM Attorney General v Crosland [2021] UKSC 58

This appeal raises the question as to whether there can be an appeal against a first instance decision of the Supreme Court. C is involved with a party to a different case before the Supreme Court. He was sent the court's draft judgment under the terms of the usual embargo, which he deliberately breached. The A-G brought contempt proceedings which had to be brought in the Supreme Court. A panel of 3 justices found C in contempt and fined him. He sought to appeal. The preliminary question above therefore arose. A majority (Lords Briggs, Kitchin, Burrows, Lady Rose) found that there could. Their reasoning principally focused on s 13 of the Administration of Justice Act 1960, which provides that "*an appeal shall lie under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt).*" Insofar as the Court's procedures do not provide for such an appeal, r 9(7) of the Court's rules allow it to devise one.

Lady Arden dissented. Her 5 reasons included: (2) rights of appeal are substantive, so the court's r 9(7) powers are irrelevant; (3) there is no equivalent to s 13 in Scottish cases, and Parliament cannot have intended there to be a difference between English and Scottish proceedings; and (5) 'appeal' means 'appeal to a higher authority', and there is no higher authority. However, her Ladyship held that the court did have inherent jurisdiction to review and vary its own orders, and she would have dealt with the matter under that power. All the justices would have dismissed C's case. Lady Arden's dissent is powerful and persuasive. The majority's reasoning, by contrast, seems to strain the wording of s 13. The inherent jurisdiction is a sufficient power, and there is no need to manufacture a route of appeal. That said, the result is likely to be the same either way.

Simon Hunter

Re Hussain [2021] EWHC 3276 (Ch)

No doubt practitioners in every area of law become rather tetchy when judges with no apparent understanding of that area of law make decisions that, to an insider, make no sense at all. This, an insolvency case, is one of those cases. Trustees in bankruptcy brought proceedings for possession and sale of the bankrupt's family home, in which the bankrupt had a half interest. This application (brought under s 335A of the Insolvency Act) came on before a Deputy District Judge in Brighton. He dismissed it on the extraordinary basis that it had been brought by way of application under the Insolvency Rules 2016 when it should have been brought by way of a Part 8 Claim under the CPR, and he therefore had no jurisdiction to make the order.

In a judgment which will surprise no insolvency lawyer, Peter Knox QC (sitting as a Deputy High Court Judge) allowed the appeal. He went through the relevant provisions of the Insolvency Act and Rules and TOLATA, holding that it was "*plainly*" the case that an application under s 335A had to be brought by insolvency application. For good measure, the Deputy Judge went on to hold that even if he were wrong about that, making the application on the wrong form did not deprive the court of jurisdiction. He declined to remit the matter back to Brighton and made a possession order, his provisional view being that 3 months should be given for vacant possession.

Simon Hunter

Re Nero Holdings Ltd [2021] EWHC 2600 (Ch)

This case concerned a challenge to a CVA. Shortly before voting on the CVA closed, a third party offered to buy the company ('the Offer'). The nominees neither altered their report nor postponed voting on the CVA but they did notify creditors of the Offer and modified the CVA so that, in the event the third party did buy the company, the company would use best endeavours to procure that the creditors would receive from the deal what had been promised to them by the Offer.

The court accepted that it may be possible to adjourn or postpone an electronic voting procedure, but that it could not be done without a court order and it was unclear whether the court could have done anything meaningful in this case due to the lateness of the Offer. The nominees' decision not to postpone did not amount to a material irregularity. The court was satisfied that the disclosure of the Offer was fair and reasonable and the criticisms of that disclosure were not material in the sense that the CVA vote would have been different. The court had the power to remove the modification to the CVA, but the application was for the entire CVA to be set aside. There was no basis for the court doing so where the modification was for the benefit of creditors, without any concomitant obligation on them to provide anything in return and where it did not constitute a material irregularity.

Emma Knight

Thaler v Comptroller General of Patents, Trade Marks and Designs [2021] EWCA Civ 1374

Mr Thaler filed two patent applications, for food container and a flashing light. He named the inventor, "*DABUS*", his AI machine. The IPO took issue, as he had not identified a person as the inventor or how he derived his rights from that person. Mr Thaler amended his applications to declare, "*the applicant identified no person or persons whom he believes to be an inventor as the invention was entirely and solely conceived by DABUS*". The IPO found against him. It found that DABUS is not capable of being an inventor as it is not a person. The High Court agreed.

In the Court of Appeal, Birss LJ carried out an instructive survey of the authorities, beginning with the Statute of Monopolies 1623. He considered that the Patents Acts of 1949 and 1977 treated the invention's actual deviser as concerning a person. He found that machines are not persons and their mere ability to create is not to devise inventions. Therefore, the IPO was right to have rejected the application on that basis. Birss LJ also warned advocates not to let the glamorous distract them from the banal but essential points. While the case turned in part on the question of personhood, it really concerned how the IPO should process applications. The IPO deemed Mr Thaler to have withdrawn the applications by failing to name a person as the inventor. Birss LJ found that Mr Thaler's honest but wrong belief that DABUS was the inventor was not sufficient to rebut the statutory presumption that an applicant is entitled to grant. Arnold LJ, however, found that the statement being wrong in law was indeed sufficient for the IPO to have deemed the application to be incomplete and withdrawn.

John-Paul Tettmar-Saleh

Da Silva v Heselton [2021] EWHC 3079 (Ch)

The High Court considered an appeal relating to the administration of an estate. The claimant residuary beneficiary under the will sought the removal of the first and second defendants as the deceased's executors and the appointment of the fourth defendant in their place. The first defendant had sought charges for acting as an executor which she contended she was entitled to under the charging clause of the will which included the following: "*for any of my Trustees who shall be engaged in any profession or business [to] charge and be paid (in priority to all other dispositions herein) all usual professional and other fees…*". It was unclear precisely what business the first defendant was engaged in. Deputy Master Lloyd had concluded that he was not satisfied that the first defendant's activities were done in the course of those businesses and that she was not entitled to charge the estate.

Dismissing the first defendant's appeal, the High Court held ([44]) that: "*a trustee or executor can rely upon the charging clause in the Will to charge for work done or time spent in the administration of the estate only if that work falls within the scope of their profession or business in question; that is to say if it is work of a type which would attract or incur their usual professional fees.*" This case is a salutary reminder to executors to carefully check the charging clause in the will they are administering to be sure that their specific profession or business that they undertake allows them to charge for acting in the administration of the estate.

Stephen Woodward

Park v CNH Industrial Capital Europe Ltd [2021] EWCA Civ 1766

The lesson of this case is this: don't lie in your particulars of claim. C brought a claim against P. The particulars of claim contained a statement which was untrue, and it must have been known to C at the time when they instructed their solicitors to sign the particulars of claim. P defended, but failed to comply with an unless order and his defence was struck out. C obtained default judgment. P brought new proceedings to have the judgment set aside on the ground of fraud. C applied to strike out the new claim on the basis that it was an abuse of court. This was refused by the District Judge at first instance, but a Circuit Judge was persuaded to overturn that decision on a first appeal. He held that the new claim was abusive: it was based on facts known to P at the time of the original action; there was no deception of the court; the new claim was fundamentally different from P's defence in the original action; and the alleged fraud was not the operative cause of the default judgment.

The Court of Appeal disagreed, allowing P's appeal. The lie had been an operative cause of default judgment being entered, because the action had been based on the particulars of claim. The judge's reference to it not being the operative cause applied the wrong test. What is more, the court had been deceived by that lie. The whole action was tainted by the deceit practiced in the particulars of claim (and, extraordinarily, repeated in terms in the defence to the new action). The Court of Appeal took the opportunity to clarify what is meant by "fresh evidence" in this context: it is evidence that was not deployed in the earlier proceedings, whether or not that evidence was known about at the time of the earlier proceedings.

Simon Hunter

Boodia v Yatsyna [2021] EWCA Civ 1705

One might have thought that the Court of Appeal's repeated comments about how litigants should not use relief from sanctions as a way to score opportunistic points against each other would have sunk in by now. Sadly, this appears not to be the case. In this second appeal, the facts were as follows. C should, by 24 May 2018, have paid a trial fee for her claim (in fact there were two claims, and the dates were different, but one example will suffice). She did not. Her claim was struck out automatically. The trial, due on 18 June 2018, was adjourned because of a lack of judicial availability. The new notice of trial provided that C should pay the trial fee by 7 December 2018. She paid the fee on 5 December 2018. D raised the issue with the court before the trial, arguing that the claim was struck out. The DJ disagreed, holding that the time for payment had been retrospectively extended by the second trial listing.

C won at trial. One of the grounds of appeal brought by D was that C's claim had been struck out in May 2018 and C had not applied for relief from sanction. On the first appeal HHJ Luba QC held "*with a heavy heart*" that D was right, and that the DJ had had no jurisdiction to try the claim. For 10 principal reasons (see [73]) the Court of Appeal disagreed. The failure to pay in May had caused no prejudice to D, invalidating the trial of the claim would be wholly disproportionate, many of C's claims would now be statute-barred. So the list went on. Lewison LJ ended: "*The objection taken by [D] is, in my judgment, wholly opportunistic*." The object lesson here: just don't do it.

Simon Hunter

Axnoller Events Ltd v Brake [2021] EWHC 2539 (Ch)

This is a case about the importance of taking notes of what happens outside court. Readers of previous instalments of these Case Summaries will know that this is a long running matter in which more than 20 separate judgments have been given. The point in issue in this case is whether a particular document (a draft witness statement) was voluntarily disclosed by one counsel to another in a waiting room before a hearing. One counsel said (in a series of emails) that she had no recollection of giving a copy to her opposite number, that that would not have been her usual practice, and that she had never given him permission to photograph it. The other said (in a witness statement on which he was cross-examined) that she had given it to him and had watched him photograph it. HHJ Matthews concluded that the draft document had in fact been provided by one counsel to the other and that that act (permission or not to photograph it notwithstanding) waived the privilege in it.

Simon Hunter

Hackney London Borough Council v Grant [2021] EWHC 2548 (QB)

The court dismissed Hackney's application for, among other things, a final injunction prohibiting anti-social behaviour in respect of a group of people seeking to protest about Government policy in response to the Covid-19 pandemic. The defendants were evicted from an encampment on Hackney Downs. The application was made following complaints made by members of the public about the encampment including noise, litter, smoke, the smell of cannabis and the loss of public use of Hackney Downs. The application was intended to save the time and cost of anticipated repeated possession proceedings. Hackney was granted an interim injunction, but the court refused to grant a final injunction.

The court held that it should not be too ready to grant injunctions prohibiting activities which citizens would ordinarily be free to undertake in a public place or restricting the way they express themselves in such places. Injunctions under the Anti-Social Behaviour, Crime and Policing Act 2014 should not be lightly granted, and their terms should be carefully framed to ensure that they do not involve unnecessary or excessive interference with the rights of others. These considerations are especially potent in the context of protests. The court should not always refrain from granting an order protecting fellow citizens from alarm or distress, or other consequences of harassment or anti-social behaviour but, in this case, it was not just and convenient. The interim injunction was justified because, at that stage, there was evidence that the defendants might move elsewhere in Hackney. But there was no longer any such evidence. It appeared that the defendants were in Brighton and the risk that the defendants would return was no greater in the case of Hackney than in the case of any other urban area in the country.

Emma Knight

Windhorst v Levy [2021] EWCA Civ 1802

Eady J's first appeal judgment in this case was noted in the previous edition of the Review. Background is given in that note. In summary, Eady J concluded that a judgment obtained by L against W remained enforceable as a matter of German law, a later insolvency plan notwithstanding. She also refused a stay under the CPR. The matter has since been heard on a second appeal by the Court of Appeal. W's appeal was on 3 grounds. 2, concerning the registration and enforceability of the German judgment, were dismissed. But W succeeded on his appeal against the refusal of the stay under the CPR. Refusing the stay would put L in a better position in England than he was in in Germany, which would be unjust. However, W was ordered to provide security of $2.2m.

Simon Hunter

Global 100 Ltd v Laleva [2021] EWCA Civ 1835

Up and down the country there must be hundreds, maybe even thousands, of possession cases decided under CPR Pt 55 every week (at least – there were before the pandemic). Not many end up in the Court of Appeal. This one did on an interesting question of interpretation: what does the phrase "*genuinely disputed on grounds which appear to be substantial*" (CPR, r 55.8(2)) actually mean? At first instance a district judge had decided that the defendant (a 'property guardian', the claimant was the property guardian company) had not passed the threshold, and so had declined to allocate the case to a track. HHJ Luba QC reversed that decision on a first appeal, holding that the bar was a relatively low one, predicating his conclusion on the use of the word "*appear*" (as opposed to 'are', for instance) in the rule. The Court of Appeal disagreed, placing much more emphasis on the word "*substantial*". Lewison LJ, giving the only substantive judgment, considered the almost identical wording found in r 10.5 of the Insolvency (England and Wales) Rules 2016, and held that the test was equivalent to the summary judgment test. If it were a lower bar, the court would be permitting a claim to proceed which would be amenable to summary judgment, which would be a waste of resources. If it were a higher bar, it would be almost impossible to formulate the test with any precision. As it happens the result was academic, because the landlord had, since the appeal was issued, obtained possession against the defendant. The Court of Appeal permitted the appeal to proceed on the basis that it was a point of general public importance and they were satisfied that it would be fully argued on both sides.

Simon Hunter

Money v AB [2021] EWHC 2999 (Ch)

When should the court anonymise a judgment where one of the parties is a protected party? In this case the question arose in the context of contempt proceedings brought against AB by M, the liquidator of 2 companies. AB breached orders made by the court in April and October 2020. Bacon J gave a judgment on liability in January 2021. The matter was adjourned for AB to get legal and medical assistance, and a sentencing hearing occurred on 5 October 2021. In the meantime, on 1 September 2021, a medical report had opined that AB lacked capacity to conduct the proceedings, and the Official Solicitor had been appointed as his litigation friend. Following receipt of the draft sentencing judgment AB, through the OS, applied for anonymisation of the judgment. This was refused by Bacon J in this judgment.

Following a brief consideration of CPR, r 39.2(4) ("*The court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness.*") and the relevant case law, Bacon J looked at the facts of the case. She held (1) that incapacity itself was insufficient to justify the anonymisation of the judgment; (2) that the fact that AB's mental health may be adversely affected by publication of the sentencing judgment was not exceptional in the general run of contempt cases; (3) that the general presumption in favour of open justice was a strong one, and (4) that a number of hearings had taken place in public with no application for anonymisation (albeit that AB was acting in person). This is a strong restatement of the principle of open justice even in the face of clearly serious mental health issues.

Simon Hunter

Re The Will of His late Royal Highness The Prince Philip, Duke of Edinburgh [2021] EWHC 77 (Fam)

The court granted an application by the Duke's executor to seal the Duke's will for 90 years. The hearing was private so as not to defeat the core purpose of the application. The court provided a public judgment in order to provide context for the convention of granting applications to seal the wills of senior members of the Royal Family and to set out the relevant factors in determining such applications.

The default position that wills are open to public inspection is subject to a discretion to restrict such inspection where it is "*undesirable or inappropriate*". This is not a high hurdle. What is in the public interest is likely to be determinative and the Attorney General is uniquely entitled to represent the public interest. There is an inherent public interest in protecting the Sovereign's dignity, and that of Her family "*in order to preserve their position and fulfil their constitutional role*" which extends to enhancing the protection afforded to truly private aspects of their lives. The general factors supporting inspection of wills, such as the avoidance of fraud or alerting others to the death of an individual so that they may make a claim, are unlikely to apply in the case of a senior member of the Royal Family. The degree of publicity that publication would be likely to attract would be very extensive and wholly contrary to the aim of maintaining the dignity of the Sovereign. Nevertheless, the court considered that sealing the will for an indefinite period was neither necessary nor proportionate. In the interest of transparency, the court intends to publish a list of all the wills that have been sealed but this is in no manner an invitation for any person or agency to apply to open any or all of those wills.

Emma Knight

Partington v Rossiter [2021] EWCA Civ 1564

The deceased died domiciled in Russia in 2018. Under Clause 1 of the deceased's will the will only had effect in relation to "*UK assets*". On the date of his death the deceased held assets in Jersey and would have died partially intestate if the reference to his "*UK assets*" did not include assets situated in Jersey. The main question before the Court of Appeal was whether the UK included the Channel Islands. The Court of Appeal held that where UK was used in a private instrument such as a will that this could include the Channel Islands, but this was a question of interpretation of the private instrument in question. As both an inclusive and an exclusive interpretation were possible, and it was unlikely that the testator intended to die partially intestate, the deceased's will was ambiguous in the light of surrounding circumstances (excluding evidence of the testator's intention). As a result, direct evidence of the testator's intention was admissible.

About the testator's intention the Court of Appeal was clear ([43]):"T*he deceased's intention was beyond doubt. In the draft that he himself had prepared, he had said on the one hand that the will was only to deal with his UK property but, on the other hand, that he had intended to make specific legacies of his Jersey assets. The two were only rationally reconcilable on the basis that he had intended 'the UK' to include Jersey.*" Whilst this decision is at first sight odd given the definition of UK in Schedule 1 of the Interpretation Act 1978, where the UK does not include the Channel Islands, the Interpretation Act definition does not apply if the instrument in question includes a contrary intention.

Stephen Woodward

Walker v OR [2021] EWHC 2868 (Ch)

This case is a salutary lesson in the differences between legal and equitable title, and their impact on the vesting provisions in the Insolvency Act 1986. Land was purchased by Mr Walker ('W') in 1994. It was in W's sole name, but subject to an express declaration of trust in favour of W and his parents in three equal shares. In 1997 W was declared bankrupt. He was finally discharged in 2006. A private trustee had been appointed for some of that time, but the OR was the final trustee. In 2013 an unconnected third party approached the OR with a view to buying the land. The OR believed (but apparently did not check) that the original file had been destroyed. Enquiries were made of the private trustee and solicitors previously involved, but they had not retained anything of substance. The third party provided two valuations of the land, and a sale price of £20,000 was agreed in 2014. No notice was given to W or his parents of the proposed sale. In 2019 the third party sold the land for £175,000.

W sought compensation for the estate from the OR under s 304 of the Insolvency Act 1986. As the (former) bankrupt he required the permission of the court. This was refused by DJ Bishop in Croydon, on the basis that the OR had not been negligent and she was not satisfied that there would be a benefit to the estate. No analysis of the position about title was presented to DJ Bishop. W appealed. The appeal came on before Eason Rajah QC, sitting in the Chancery Division. He pointed out to the parties that, as a matter of law, only W's beneficial interest had vested in the estate, and that legal title remained vested in W as a trustee. The OR therefore simply had no authority to sell the land without an order under s 14 of TOLATA. Because the analysis had not been presented to her, DJ Bishop's judgment was therefore flawed. The judge overturned it and granted W permission to continue his application under s 304.

Simon Hunter

Elation Capital Ltd v Hoffgen [2021] 6 WLUK 480

This appeal judgment concerns disclosure in bankruptcy proceedings. The respondent, H, was the subject of a bankruptcy petition, said to arise out of sums due under a settlement agreement settling a claim that he had an overdrawn director's loan account. H's defence was that the settlement agreement was obtained by duress, and the payments were payments for work he had done. H sought third-party disclosure of the contents of a laptop which had been forfeited to the Metropolitan Police following an investigation. A Deputy District Judge made the order H sought, later varied to say that the Police need only provide a list of the contents for H to request copying of particular files. The petitioner appealed. Ian Karet, sitting as a deputy High Court Judge, allowed the appeal.

The deputy Judge started by noting that it was not usual practice to order disclosure in bankruptcy proceedings. Although the word is not used, the gist of the decision is that H was fishing. The class of documents that H sought ("*documents relating to the Respondent's work*") was too broad to satisfy the test for third-party disclosure. If H felt that documents existed he could request them from the petitioner and then, if they were not produced, ask the court to draw adverse inferences from their non-production.

Simon Hunter

Re CSB123 Ltd [2021] EWHC 2506 (Ch)

This judgment is a determination of an application under s 212 of the Insolvency Act 1986 against a director of the relevant company, alleging that assets and business of that company were transferred to connected parties of the director for no consideration. Such cases inevitably turn, at least at first instance, on their facts. (This one failed spectacularly, with ICCJ Barber concluding that "*It is most regrettable that [the director] and her family have been put through the stress of these proceedings*": [592].)

One point that often arises in such cases concerns the burden of proof. A slew of cases (familiar to those who have run these cases in the past) were cited to the ICC Judge. Her synthesis of those judgments is an important restatement of the principles (see [8]). Where the allegation is that the director or a connected party has taken assets etc of the company there is a two-stage process. (1) the applicant must prove that the assets etc concerned (a) belonged to the company, and (b) were transferred to the director or connected party. (2) If it is proven that assets etc belonging to the company have been so transferred, then the director bears the burden of proving that the transfer was proper. Ultimately, though the applicant bears the burden of proof on his own application.

Simon Hunter

Bailey v Dixon [2021] EWHC 2971 (QB)

The court allowed an appeal against a refusal to award A occupation rent in respect of a jointly owned property and directed that the issue be freshly determined by a different judge. Following the breakdown of the relationship between A and R, joint owners of a property, A left the property and a claim under TOLATA was brought. The court refused to grant occupation rent on the basis that A had failed to prove that she had been barred from exercising her legal right to occupy, something like a landlord's lockout. That was a legal error. The law is clear that under TOLATA a court may order credit for an occupation rent if it was just to do so having regard to the statutory factors, whether or not there was any proof of ouster.

Emma Knight

Practice Update

Insolvency

The last instalment of this Practice Update noted the coming into force of the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) Regulations 2021. By that instrument the 'old' Schedule 10 was replaced with a new version. Unfortunately, by a drafting error, the regulations repealed the 'old' Schedule 10 with effect from 29 September 2021, but only brought the new one into force on 1 October. This was relatively speedily rectified by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) (No. 2) Regulations 2021. The No.2 Regulations are identical to their immediate predecessor except that they cure this minor drafting error.

On 6 October 2021 a new Temporary Insolvency Practice Direction (confusingly given the acronym MIPD) came into force, retaining those parts of the previous temporary practice direction from June 2021 that do not relate to the COVID pandemic. The retained provisions are permanent and may, in the future, require some rule changes.

The Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act 2021 makes, with effect from 15 February 2022, important changes to the Company Directors Disqualification Act 1986. As presently drafted, the 1986 Act provides that the court will, in the circumstances set out in that Act, make a disqualification order against directors of companies "*which has at any time become insolvent*": current s 6(1)(a). That power is, by the 2021 Act, extended such that the court has an identical power in relation to persons who haven been directors of "*a company which has at any time been dissolved without becoming insolvent*": new s 6(1)(a)(ii). Consequential amendments are made to the rest of the 1986 Act. Importantly, by s 2(14) of the 2021 Act the changes apply to conduct of directors even if that conduct occurred before the enactment of the 2021 Act, and even if the company was dissolved before that enactment.

In non-legislative news the Government has proposed to "*reform and simplify*" the regulation of insolvency. The consultation, which runs until late March, is found at https://www.gov.uk/government/consultations/the-future-of-insolvency-regulation/the-future-of-insolvency-regulation.

The changes include setting up a single regulator within the Insolvency Service in lieu of the current Recognised Professional Bodies and extending the reach of the regulator from the Insolvency Practitioners to any firm that offers insolvency services. That seems, provided it can be made to work, sensible. The reality is that much work in any insolvency is done not by the IPs themselves but by their staff, and there is a good argument to be made for the regulator's reach to extend to the people in fact doing the work. The proposal for a public register of those regulated is also much to be welcomed.

At first blush, the suggestion that there is no mechanism whereby the Recognised Professional Bodies can require compensation to be paid where an error has been made is a strange one. The consultation says "*However, there is no formal mechanism for compensation for inconvenience, loss or distress where an Insolvency Practitioner has made an error or omission, whether inadvertently or knowingly, but which does not meet the threshold of dishonesty or fraud.*" But this ignores the court's powers, for instance under ss 303 and 304 of the Insolvency Act 1986. However, the reality is that in many cases there will be no person (creditor, successor IP, bankrupt, or otherwise as the case may be) prepared to put their hands in their pockets to fund the necessary application. Having a streamlined process for, in effect, a regulatory fine may, therefore, produce tangible benefits for creditors.

Property

The Coronavirus Act 2020 (Residential Tenancies and Notices) (Amendment and Suspension) (England) Regulations 2021 came fully into force on 1 October 2021. They provide, importantly, a new standard notice for use in cases under s 21 of the Housing Act 1988 and under s 83 of the Housing Act 1985. They also modify (by suspending certain provisions) Sch 29 of the Coronavirus Act 2020, with the effect that, from 1 October 2021 the period of notice that landlords are required

to give reverts to the pre-pandemic periods. Sch 29 is otherwise extended to 25 March 2022.

Procedure

In the period covered by this update the 135th to 138th Practice Direction Updates have come into force. The 135th update amends PD 51R (the Online Civil Money Claims Pilot) to better cater for admissions and default judgments. PD 51R has also been amended by the 138th update, which turns the OCMC into a standalone online service rather than a part of the MCOL service.

Amongst the changes made by the 137th update are (i) an extension to parts of the temporary PD 55C in relation to possession proceedings, including most importantly an extension (to June 2022) of the requirement on a claimant to state their knowledge of the effect of the pandemic on the defendant; and (ii) a postponement of the start dates for PD 51O (Electronic Working Pilot Scheme) in relation to the Court of Appeal, as the original timetable has proved too tight.

For readers of this update, though, the most significant changes are likely to be the 136th update, as amended ("*to correct an oversight*") by the 137th update. These changes make some moderately significant alterations to PD 51U (Disclosure Pilot for the BPCs). The changes are four-fold: (i) introducing a category of Less Complex Claims, for which the processes are simplified; (ii) dealing expressly with multi-hander cases and recognising that the disclosure issues that exist where there are more than two parties may differ from two-handed cases; (iii) attempting to make the process of agreeing lists of issues less contentious (for which, presumably, read: cheaper) and modifying the approach to narrative documents, to the same end; and (iv) making clear that the court can exercise its control without a hearing, if necessary.

Of these, the designation of claims as Less Complex seems the most interesting. The new Appendix 5, para 4 provides that "*if the value of a claim is less than £500,000 then unless the other factors specified in paragraph 3 above indicate to the contrary, then claim should be treated as a Less Complex Claim.*" This means that the vast majority of the smaller-end work of the BPCs is likely now to fall under the simplified

regime. But, as with any categorisation, there is the potential for this to become an invitation to indulge in satellite litigation.

In non-legislative news plenty of guidance on various subjects has been given by the court authorities. Guidance on remote hearings was given in September for the BPCs (https://www.judiciary.uk/announcements/remote-hearings-guidance-to-help-the-business-and-property-courts/), followed in November by general guidance on electronic court bundles (https://www.judiciary.uk/announcements/general-guidance-on-electronic-court-bundles/). This latter is particularly worth reading for anyone tasked with producing e-bundles. The Civil Division of the Court of Appeal has announced that it will continue to hand down judgments remotely even after the pandemic, and e-filing has now reached the Queen's Bench Division, becoming mandatory in some cases from 18 October 2021.

Finally, two court-specific guides have been issued. The trial listing practice in the Commercial and Admiralty Court was the subject of a note in December. Those courts will now list trials starting on the first day of a working week, and the listing will include the judicial reading time. (The new, 11th, edition of the Commercial Court Guide, dated February 2022 will be covered in the next edition of this review.) There is also a detailed guide (with three appendices) dealing with Business & Property Work at Central London (https://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/courts-of-the-chancery-division/cpr-guides-and-forms/, under the heading "Guides"). In particular, those working in Central London should be aware of Appendix A, which contains the standard directions template that that court will use for BPC work.

Chambers News

Important new article from Richard Nowinski

In an article published in the Journal of International Banking and Finance Law published in September ([2021] 10 JIBFL 648, linked from the News page of Three Stone's website) Richard Nowinski examined the shortcomings of the EU's attempt to regulate distributed ledgers. With the increase in litigation about crypto-currencies, the regulation of this technology is surely going to be of increasing importance in the future.

John-Paul Tettmar-Saleh to be taken on as a tenant

Chambers are pleased to announce that John-Paul Tettmar-Saleh (currently a third-six pupil in chambers) is to be taken on as a tenant at the completion of this pupillage on 1 June 2022. Chambers looks forward to welcoming John-Paul as a tenant later in the year.

Professor Subedi furthers human rights education in Nepal

We are pleased that one of our barristers, Professor Surya P. Subedi, QC, OBE, DCL, has donated his personal library to his alma mater, the Nepal Law Campus of Tribhuvan University in Kathmandu.

Professor Subedi thought that his donation would help equip current and future generations of students to contribute to the protection and promotion of human rights in Nepal – just as he has tried to do throughout his career. He also has set up a sizeable endowment so that the library can continue to expand its collection going forward.