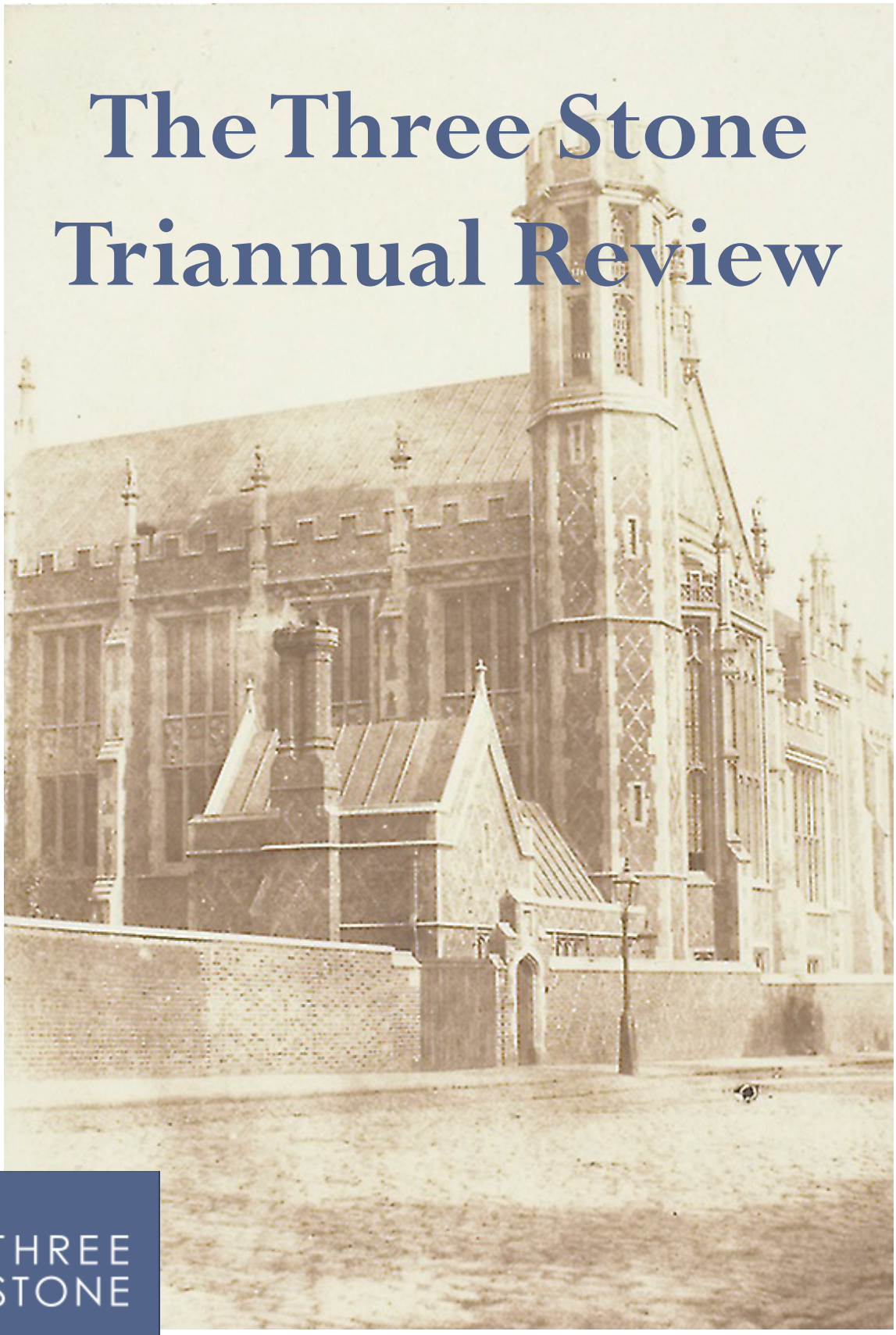
Issue 2 : January 2021

The Three Stone Triannual Review



THREE STONE

In this Issue:

Editor in Chief: Simon Hunter

Front cover image : WH Fox Talbot: *New Hall at Lincoln's Inn*, c. 1850, Art Institute Chicago, Creative Commons Zero

The Three Stone Triannual Review

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Editorial

Our cover image this Issue is one of the oldest 'photographs' taken of Lincoln's Inn. When it was taken by William Fox Talbot in about 1850, the New Hall was 5 years old, and the library extension still almost a quarter of a century in the future. It is a miracle of the photographer's art, and a reminder that, 170 years ago, technology changed the way the present, and the past, were seen and recorded.

In this Issue of the Three Stone Triannual Review too the past meets the present. Our Case Reviews include comments on cases about the National Fund (a (charitable) trust settled in 1928), a conveyance of the Bathwick estate in 1922, and section 33 of the Wills Act 1837. The Supreme Court, when considering the case of *Lehtimäki v Cooper,* the subject of Mark Baldock's article, was referred case law going back to the 1750's, but will have practical impact for thousands of charities. Tim Clarke's article begins with a reference to a judgment (still relevant today) from 1781 but then goes on to explain the temporary rules on the witnessing of wills by video link. And with renewed lockdown in England, litigation practice is again remitted to video- and telephone-link. Many of the cases noted in the Case Review were heard by such means during the last four months of 2020.

Whilst all of us are eager to see the end of the pandemic, it is to be hoped that the technological advances forced upon us by the current situation can be used as the basis for future, permanent, applications of technology to legal practice. For all that video-link hearings are imperfect at present, they save the time and cost of travelling to far-flung (depending where you start) court buildings for short hearings. They are surely here to stay.

One day video-links, like calotype photographs, will be 170 years old. Our video-link hearings will look as imperfect as Fox Talbot's photographs. But by then, remote hearings will probably be as mundane as taking a photograph on a smart phone.

On Fiduciary Membership of Charitable Companies

In this major review, **Mark Baldock** considers the important case of *Lehtimäki v Cooper,* and what it means for charitable companies.

Introduction

This article considers the recent Supreme Court decision in *Lehtimäki v Cooper* [2020] UKSC 33. The decision is significant because it decided that members of a charitable company limited by guarantee are fiduciaries. Accordingly, if the circumstances permit the court may, exercise its jurisdiction over fiduciaries and direct a member to vote in a particular way. While certainly of academic interest, the decision is also of great practical importance: there are currently 33,000 charitable companies limited by guarantee in England and Wales, including the likes of the English Heritage. Does *Lehtimäki* mean that members cannot benefit from free parking or are obliged to attend and vote at meetings? These concerns may have a material impact on an individual's decision to become a member. The Supreme Court refused to be drawn into a discussion of the implications of the decision for so-called 'mass-membership' charities. But questions such as these underline the importance of a close examination of the decision.

A. Charitable Companies

A charitable company is defined by s. 193 of the Charities Act 2011 ("the 2011 Act") as "*a charity which is a company*". As for what a "*company*" is, the answer is to be found in s. 353(1) of the 2011 Act: it means "*a company registered under the Companies Act 2006* ("the 2006 Act") *in England and Wales or Scotland*". Thus, a charitable company is something of a hybrid that sits neither squarely within the 2006 Act or the 2011 Act.

Two examples suffice to demonstrate the interface between the two statutes in the regulation of charitable companies:

Section 39 of the 2006 Act deals with a company's capacity. It abolished the so-called "ultra vires" rule established in *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) LR 7 HL 653. The effect of the abolition is that "*[t]he validity of an act done by a company shall not be called into question on the ground of a lack of capacity by reason of anything in the company's constitution*": s. 39(1) of the 2006 Act. However, s. 39(2) qualifies the application of the rule: "*[t]his section has effect subject to s. 42 (companies that are charities)*". Section 42 disapplies s. 39 save in favour of a person who has no knowledge that the company is a charity or is not a volunteer: see s. 42(1) of the 2006 Act. This means that in respect of a charitable company, there is still scope to set aside an act that is ultra vires the company's objects.

Section 21(1) of the 2006 Act permits a company to amend its articles by special resolution. Where that company is a charity, s. 21(2) of the 2006 Act makes s. 21(1) subject to ss. 197 and 198 of the 2011 Act. One of the ways the operation of s. 21 is restricted is where a charitable company seeks to amend its articles of association altering the company's objects. In those circumstances, the written prior consent of the Charity Commission is required: ss. 198(1) and (2)(a).

A guarantee company is one in which its members' liability is limited to their undertaking to contribute to the company's assets on its winding up: s. 3(3) of the 2006 Act. Many charitable companies are guarantee companies because guarantee companies have the distinct advantages of a company limited by shares (i.e. legal

personality and limited liability) but without the complexities which accompany the need to transfer shares every time a member leaves or joins. But it should be highlighted that there is no requirement that a charitable company be a company limited by guarantee. The term "*charitable company*" describes any company incorporated under the 2006 Act which is also a charity.

Charitable companies limited by guarantees, like companies limited by shares, have a two-tier governance structure: directors and members. It is worth noting that the former are often referred to as "*trustees*". But this does not affect the fact that they are subject to the provisions relating to directors in the 2006 Act.

B. The Background in Brief

In 2002, Sir Christopher Hohn and Ms Jamie Cooper founded the Children's Investment Fund Foundation (UK) ("CIFF"). CIFF is a charitable company limited by guarantee. CIFF has more than USD 4 billion in assets under management, which it applies to help children in developing countries. On its incorporation, Sir Christopher, Ms Cooper, and Dr Lehtimäki were subscribers to CIFF's memorandum and therefore were (and remained) its only members. Sir Christopher and Ms Cooper were also "trustees" (i.e. directors) of CIFF.

In time, Sir Christopher and Ms Cooper's marriage broke down. This led to CIFF becoming difficult to manage. To resolve the difficulties that had arisen, Sir Christopher and Ms Cooper agreed that CIFF should make a grant of USD 360 million to Big Win Philanthropy (the "Grant" and "BWP"). BWP is a charity founded by Ms Cooper. In consideration for the Grant, Ms Cooper would leave the membership of CIFF and resign her directorship.

Given that the making of the Grant went hand in hand with Ms Cooper's resignation as a director, it was "a payment for a loss of office … to a person connected with a director" (i.e. BWP): see s. 215 of the 2006 Act. Therefore, the Grant required approval (i) by a resolution of the members of CIFF: s. 217(1) of the 2006 Act; and in advance and in writing from the Commission: see s. 201(1)(a) and (2)(f).

In light of the circumstances, the approval of the Grant involved a conflict of interest on the part of both Sir Christopher and Ms Cooper. Therefore, Dr Lehtimäki was the only eligible member entitled to vote on the resolution required to approve the Grant.

CIFF applied to the Charity Commission for approval of the overall transaction. The Commission made an order under s. 115 of the 2011 Act authorising the bringing of proceedings to obtain the court's approval of the Grant and directions regarding the resolution under s. 217 of the 2006 Act.

C. The Judgments Below

The Chancellor ([2018] Ch 371) held:

(i) The trustees (i.e. the directors) had surrendered their discretion whether to make the Grant to the court;

(ii) Emphasising the "*unique circumstances*" of this "*extremely unusual*" case, the Grant was in the best interests of CIFF because the parties should not be able to renege on a deal made in good faith. Ms Cooper would also be contributing a further USD 40 million to her new charity. Approving the Grant would therefore bring finality and avoid further costs.

(iii) As for the s. 217 resolution, Dr Lehtimäki was a fiduciary qua member of CIFF and that he therefore had to exercise his power to vote on the resolution for the benefit of CIFF (i.e. in the best interests of the charity).

(iv) It was appropriate to give a direction to Dr Lehtimäki to vote to approve the Grant because of the risk that the court's decision would be undermined if it did not and Dr Lehtimäki came to a conclusion which was different to that of the court. Making a direction also obviated the need for further, expensive litigation. Indeed, it was the only way finality could be achieved.

The Court of Appeal ([2018] EWCA Civ 1605) agreed with the Chancellor that Dr Lehtimäki was a fiduciary. But it went on to decide that the Chancellor should

not have given him the direction to vote in favour of the resolution.

Importantly, the Court of Appeal highlighted the fact that its conclusion on the fiduciary issue was consistent with the position in respect of a charitable incorporated organisation ("CIO"). A CIO has a separate legal personality, limited liability and trustee-member structure. In that regard, it is just like a charitable company. However, a CIO is registered only with the Charity Commission and not with the Registrar of Companies. It is therefore not subject to the provisions of the 2006 Act.

Section 220 of the 2011 provides:

> "*Each member of a CIO must exercise the powers that the member has in that capacity in the way that the member decides, in good faith, would be likely to further the purposes of the CIO.*"

However, in light of the subjective nature of the duty of a fiduciary-member, the Court of Appeal concluded that the court could not direct a fiduciary to substitute its view for that of his own unless there was a breach of duty. This was reinforced by s. 217 of the 2006 Act, by which Parliament had entrusted the responsibility of approving payment for loss of office (such as the Grant) to the members of a charitable company, subject only to the prior written consent of the Commission. There was no evidence that Dr Lehtimäki would be breaching his duty if he voted against approval of the Grant.

D. Issues before the Supreme Court

The overarching issue for the Supreme Court was whether the Chancellor was able to make the direction he did. Resolving this involved considering the following, related questions:

(i) Whether Dr Lehtimäki was a fiduciary in relation to the objects of the charity as a member of CIFF;

(ii) Whether circumstances had arisen in relation to the s. 217 resolution in

which the court could exercise its jurisdiction over fiduciaries in relation to Dr Lehtimäki; and

(iii) Whether s. 217 of the 2006 Act allowed the court to direct a member how to exercise his discretion when Parliament had provided for members to approve the resolution, subject to the prior written approval of the Commission.

E. The Supreme Court's Decision

Lady Arden gave the lead judgment. In essence, she agreed with the Court of Appeal on the member-fiduciary question, but disagreed with it on issues (ii) and (iii). Lord Briggs (with whom Lord Wilson and Lord Kitchen agreed) wrote a short concurring judgment, agreeing with Lady Arden's conclusions, save in respect of her reasoning on issue (ii). Lord Reed found the reasoning of the Court of Appeal more persuasive, but concurred in the order proposed "*in deference to the unanimity of the other members of the court… and bearing in mind that the facts of this case seem unlikely ever to be replicated*" ([236]).

i. The fiduciary-member question

The general rule is that members of a company are not normally fiduciaries in relation to any of their powers. The share is a right of property and therefore a member can in general vote as they please, even if that is in his own interests rather than those of the company. (The notable exception is when it comes to amending a company's articles of association. In those circumstances, the majority's power to bind the minority must be exercised bona fide for the interests of the company as a whole: see *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656.).

However, that principle is varied in relation to members of charitable guarantee companies where there are restrictions which prevent members receiving profits from the company: [78]. The duty members owe is one of single-minded loyalty to

the charitable purposes or objects of the company. In the context of a resolution under s. 217 of the 2006 Act, which involves a disposition of company property that would otherwise be available for application towards those objects, a member was required to ask himself whether the resolution should be passed by considering only the best interests of the objects of the company: see [90]

ii. The Jurisdiction Issue

The starting point is the well-established "*non-intervention principle*". The role of the court in exercising its special jurisdiction over trusts and charities is limited to ensuring that the trustees of a charity exercise their discretion properly. Therefore, the court should not interfere with the exercise of that discretion unless they act improperly or unreasonably. Therefore, absent exceptional circumstances, it is only a breach of duty (actual or threatened) that justifies the court's intervention: see *Pitt v Holt* [2013] UKSC 26, [73] and [88] per Lord Walker: see [121] – [123].

a. Breach of duty – Lord Briggs, Lord Kitchen and Lord Wilson

Like other charitable trustees, the directors of a charitable company had the power to surrender their fiduciary discretion about a particular matter to the court. As was the case here, where the court has accepted that surrender, it will exercise the discretion with a view to furthering the charitable purposes of the company. Here, the court had been asked to exercise its discretion in respect of the making of the Grant and had made a decision on the merits of the transaction. In light of that, the fiduciary's obligation was to use their powers to ensure that the decision was implemented. The court had already decided it was in the best interests of the company. It followed Dr Lehtimäki would commit a plain breach of duty if he were to decline to vote on the s. 217 resolution in accordance with the court's decision: see [208].

b. Exceptional circumstances – Lady Arden

The categories of exceptional circumstances are not closed. The Chancellor was entitled to conclude that the circumstances of this case that the court could intervene absent any breach of duty by a fiduciary. Lady Arden described these special circumstances at [137] as follows:

> "*an impasse is threatened in the performance of the trust if Dr Lehtimäki is unable to reach the same conclusion as the Chancellor has done. If he does that, the Grant cannot be made even though the arrangements which have led to the proposal for that Grant provided the means for settling an existential threat to the operation of the charity caused by deeply felt dissension between its two founders.*"

iii. Section 217 of the 2006 Act

In the case of a non-charitable company, the purpose of s. 217 is not to veto transactions in which a director or connected person has an interest but to ensure that there is adequate disclosure and approval by the company in a general meeting. The legislature has not interfered with or restricted special voting rights in relation to a s. 217 resolution. For example, a share might have special voting rights attached to it which means that one member could effectively pass or block a resolution to remove a director from office. If the protection given by Parliament can be rendered less effective by the company exercising other powers (e.g. attaching special rights to shares), there could be no policy objection from the perspective of company law why the law of charities should not enable a court to direct a member how to vote on a s. 217 resolution: [162]. Thus, the direction given to Dr Lehtimäki did not interfere: (i) with the irreducible minimum prescribed by s. 217 of the 2006 Act: i.e. that there be a resolution of the company approving the transaction ([167]) or (ii) with the requirement of s. 201 of the 2011 Act: i.e. prior written consent from the Commission (168]).

Lady Arden relied at [160] on *Bushell v Faith* [1970] AC 1099. In that case it was held that what is now s. 168 of the 2006 Act (as to the removal of directors by ordinary resolution of the members) did not prevent special voting rights being attached to shares such that a single member could effectively block the removal of a director. Parliament was only seeking to make an ordinary resolution sufficient to remove a director. It had not sought to fetter a company's right to issue a share with such rights and restrictions as it thought fit.

F. Wider Implications

A number of interesting points come out of the court's approach to the issues in the case. I focus on just three on the basis that these might be of greater interest to readers because of their practical consequences.

First, there is the question of whether the judgment applies equally to all charitable companies or only charitable companies limited by guarantee. In this regard, what Lady Arden says at [78] is important:

> "*In my view [whether Dr Lehtimäki is a fiduciary qua member of CIFF] falls to be answered in the affirmative, and what applies to Dr Lehtimäki and CIFF will apply to all other members of charitable guarantee companies which, like CIFF, contain restrictions which in general prevent members from receiving profits from the company. Moreover, such restrictions are generally contained in the memorandum and articles of association of charitable companies*".

The first underlined passage from Lady Arden's judgment suggests that the reasoning only extends as far as charitable guarantee companies which contain the relevant restrictions in their constitutional documents. This is logical, given that the issue before the court was whether a member of a charitable company limited by guarantee is a fiduciary. However, the second underlined passage may suggest that the reasoning is intended to have wider import and apply to all charitable companies in so far as their constitutional documents contain the relevant restrictions. But that point remains unclear and undecided.

Second, there is the question of so-called 'mass-membership charities' such as the English Heritage and whether its members are fiduciaries: see [105]. Lady Arden was clear that the Court of Appeal was wrong to suggest that the same principles enumerated in court's judgment did not apply to mass-membership charities. It follows that regardless of the size of the charitable company limited by guarantee, their members are fiduciaries. However, Lady Arden refused to be drawn into a discussion of the scope of any duties such members, preferring to defer the opportunity to an occasion where a defined issue arose. This leaves an area of uncertainty which will need clarification. The Supreme Court expressed a hope that the Commission could provide guidance under s. 15(2) of the 2011 Act in relation to some of these issues. As of yet there is no such guidance.

Third, the difference of opinion between Lady Arden and Lord Briggs, Lord Kitchin and Lord Wilson may have wider implications for the content of the duty of a member of a charitable guarantee company. Lady Arden's key criticism of their Lordships approach was that it involves making the content of the duty not subjective but objective and with that taking away the member's discretion to vote: [197]. This is a point which was accepted by their Lordships: see [232]. The difficulties that may arise out of this uncertainty are potentially wide-ranging. For example, might the court be called upon to intervene more readily to pronounce what is objectively in the best interests of a charitable company's objects? That is doubtless a rather unpalatable prospect for judges. But that burden may well fall on those advising on such matters first.

Mark Baldock

In the Next Issue:

Daria Gleyze on practical aspects of starting insolvency proceedings

Michael Smith on Open Source Software in insolvency

The next issue of The Three Stone Triannual Review will be published in May 2021.

Wills, Probate, and Technology

In this article, **Tim Clarke** explores the new provisions on the remote witnessing of wills, brought in to deal with the pandemic, and the amendments made to the Non-Contentious Probate Rules making provision for online applications for probate in common form.

Introduction

The arrival of Covid-19 early in 2020 prompted renewed interest in the case of *Casson v Dade* (1781) 1 Bro. C.C. 99 which concerned the attestation of a will. It predates, but is relevant to, section 9 of the Wills Act 1837 which provides that:

> "*9. No will shall be valid unless –(a) it is in writing and signed by the testator, or by some other person in his presence and at his direction; and (b) it appears that the testator intended by his signature to give effect to the will; and (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and (d) each witness either – (i) attests or signs the will; or (ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation shall be necessary.*"

In *Casson v Dade* the testator ordered her will to be prepared and went to her

attorney's office to execute it. Being asthmatic, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her: after having seen the execution, they returned into the office to attest it, and the carriage was accidentally put back to the window of the office, through which, it was sworn by a person in the carriage, the testatrix might see what passed; immediately after the attestation, the witnesses took the will to her, and one of them delivered it to her, telling her they had attested it; upon which she folded it up and put it into her pocket. It was held that, in the circumstances, the will was validly executed.

At the commencement of the period of lockdown earlier this year, wills were executed on windowsills and car bonnets on the basis of this case, a 21st century problem finding an 18th century solution.

A. The remote signature of wills

Notwithstanding the very significant technological advances since 1837, until the making of The Wills Act 1837 (Electronic Communications)(Amendment) (Coronavirus) Order 2020, it was not possible to witness a will remotely. Presence meant physical presence, although separation by glass was permissible. Paragraph 2 of the amending statutory instrument, made in exercise of powers conferred by sections 8 and 9 of the Electronic Communications Act 2000, makes the existing section 9 of the Wills Act into sub-section (1) and adds a new sub-section (2):

> "*(2) For the purpose of paragraphs (c) and (d) of sub-section (1), in relation to wills made on or after 31 January 2020 and on or before 31 January 2022, "presence" includes presence by means of videoconference or other visual transmission.*"

Paragraph 3 of the Order provides that: "*Nothing in this Order affects – (a) any grant of probate made; or (b) anything done pursuant to a grant of probate, prior to this Order*

coming into force."

The use of technology, however, does not make the remote witnessing of wills straightforward and, unless other aspects of the attestation process are changed in future, the execution of wills with testator and witnesses all physically present together looks likely to continue to be the ideal way to proceed. This is because the signing requirements haven't changed. What has changed, and only temporarily, is the need for the physical presence of the witnesses with the testator when the testator is signing the will. The witnesses do still need to sign the same will document that they saw the testator sign (by video link).

This can be achieved by observing the following requirements: (a) The attestation clause written on the will by the solicitor preparing the will must record the manner of execution and that the witnessing is by video link; (b) The video link must be live in real time; (c) The 'view' on the screen must be such that the witnesses can clearly see and identify the testator and see the testator sign their name on what is identifiably their will document; (d) The will must then be taken, or possibly sent, to the witnesses, and each witness must also sign the will on video link to the testator so the testator can identify the witnesses and see each of them sign the testator's will. Ideally all of this should take place on the same day; (e) It would be sensible to keep a recording of each video signing and obtain signed statements from the testator and witnesses confirming that they understood what they were doing and could see what each other was doing, in case any issues arise in the future, and keep the recording and statements safely with the will.

These temporary changes allow the use of technology to fulfil the rather demanding, execution formalities required by the Wills Act 1837. What is not addressed is whether those formalities are still appropriate or necessary in 2020. It would be unfortunate and, perhaps, a lost opportunity, if that question is not considered before this provision expires on 31 January 2022. One possible source of ideas might be the formalities required on the grant of a Lasting Power of Attorney, where only a single witness is needed, but certification must also be obtained to confirm that donor knows what they are doing and is free from undue pressure.

B. Probate in Common Form

The effects of technological change have not been limited to the execution of wills. Applications for probate in common form have also been brought into the digital age by The Non-Contentious Probate (Amendment) Rules 2020. While it has been an option since October 2019, since 30th November 2020 almost all applications for probate by solicitors or probate practitioners must be made online, in accordance with the amended Rules. The exceptions are set out in the Third Schedule and include applications for grants of administration including a grant of administration with will annexed; a second grant of probate in respect of the same estate; a grant where the person entitled has been convicted of murder or manslaughter of the deceased or has otherwise forfeited the right to apply; and a grant accompanied by an application to prove a copy of the will.

These changes are intended to make applications for common form probate simpler. Online applications can be made at any time; receipt is acknowledged immediately; the progress of the application can be tracked; and, of most significance during Covid-19 restrictions, applications can easily be made by those working remotely.

In addition, the statutory instrument adds an entirely new "*overriding objective*" paragraph 3A to the Non-Contentious Probate Rules 1987, stating that "*The overriding objective of these Rules is to enable non-contentious and common form probate business to be dealt with justly and expeditiously by the court and the registry.*" This reflects the governing principles found in the procedural rules of other civil jurisdictions.

The final change, which again brings probate practice into line with that in the other civil courts, is to allow the use of witness statements in place of affidavits. It is surprising that the use of affidavits had survived the Non-Contentious Probate (Amendment) Rules 2018, which updated various aspects of the Rules, including the replacement of oaths with statements of truth on paper applications for grants.

Conclusion

While reform of both the Wills Act 1837 and the Non-Contentious Probate Rules 1987 has been promised, it has not yet materialized. These changes, however, do at least acknowledge the existence of technology and enable those working in this field to make use of it. It is perhaps to be hoped that the need for these changes, some temporary and some permanent, will prompt a more thorough review of the law in this area before too long.

Tim Clarke

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Case Reviews

Re Wojakvoski [2020] EWHC 2737 (Ch)

In this bankruptcy petition (unusually heard by a High Court Judge, Zacaroli J) the debtor admitted that he had no way of opposing the petition. He sought an adjournment to afford him time to pay. The Judge reviewed the limited authorities on the power to adjourn petitions in such circumstances, in particular *Edginton v Sekhon* [2015] EWCA Civ 816. In general terms, the court will adjourn an undisputed bankruptcy petition only for a short time if there is a reasonable prospect of the debtor paying. The principal question that arose for consideration is what the debtor must have a reasonable prospect of paying.

The debtor said that he had a reasonable prospect of paying the petitioner, but candidly accepted that he had no reasonable prospect of paying the larger, also undisputed, sum owed to supporting creditors. He said (through leading counsel) that he only had to show that he had a reasonable prospect of paying the petitioner. The court disagreed, agreeing with counsel for the supporting creditors that he must show a reasonable prospect of paying the petition debt and any undisputed debt to a supporting creditor. For good measure, Zacaroli J found that there was insufficient evidence even to say that the debtor had a reasonable prospect of paying the petitioner. A bankruptcy order was made.

Simon Hunter

Enka Insaat Ve Sanayi SA v OOO Insurance Company Chubb [2020] UKSC 38

It is well-established that in the absence of an express or implied choice of governing law for an arbitration agreement, the English common law rules ask which law the arbitration agreement has its 'closest and most real' connection with. But how does one apply the common law test where the law governing the arbitration process (generally the law of the seat) is different from the law governing the contract or the substance of the dispute? A technical point, no doubt, but one which had previously divided the Court of Appeal and can have significant consequences in practice. When the issue came before the Supreme Court in *Enka v Chubb*, practitioners hoped for a decisive steer. It is debatable whether the Supreme Court met that challenge.

By way of background, the Russian insurer appellant (Chubb) paid out on a substantial insurance claim by the owner of a power plant in Russia which had been severely damaged by fire. Chubb thereby assumed the rights of the owner to claim compensation from third parties, including the respondent subcontractor (Enka), a Turkish engineering company which had worked on the plant. The relevant (sub)contract contained an arbitration agreement which provided for ICC arbitration in London, but no governing law. Chubb sued Enka (and others) in the Moscow Commercial Court; Enka sought to have the Russian proceedings dismissed in favour of London arbitration. Enka also brought an arbitration claim before the English High Court seeking an anti-suit injunction to restrain Chubb from continuing the Russian proceedings. The Court of Appeal overturned the High Court's decision to refuse the injunction and dismiss the claim, holding that in the absence of express choice, the general rule should be that the arbitration agreement is governed by the law of the seat as a matter of implied choice. Thus, the parties' arbitration agreement was governed by English law; thus, an anti-suit injunction should be granted against Chubb. Chubb appealed.

The majority of the Supreme Court (Lords Hamblen, Legatt and Kerr) dismissed the appeal. They held that where the parties have chosen a law to govern the contract, this will generally apply to the arbitration agreement too, even where the seat is in a different country; the Court of Appeal had erred in putting the principle of separability too high ([43]-[64]). Where the parties had not selected a law to govern the arbitration agreement (expressly or impliedly) – as here – in general, it will be most closely connected to the law of the seat ([118]-[119]). Applying those principles to the facts of Enka, English law governed the arbitration agreement (thus affirming the Court of Appeal's decision but for different reasons) and an anti-suit injunction was appropriate to uphold the parties' agreement to arbitrate ([183]). Lords Burrows and Sales dissented. On the issue of the default position where the parties had not expressly or impliedly chosen the law of the contract, the dissenters' view was that the law which an arbitration agreement has its 'closest and most real' connection with should be the proper law of the contract, here Russian law ([256]-[257], [260]). (Lord Burrows also discerned an implied choice of Russian law by the parties to govern the contract and the arbitration agreement ([228])). Post-Enka, it remains the case that if parties want certainty, they should expressly choose a governing law for their arbitration clause.

James Woolrich

Lau v Cowley [2020] EWHC 2429 (Ch)

This was a High Court appeal against a recognition order made under the Cross-Border Insolvency Regulations 2006/1030 ('the Regulations'). The first instance Deputy ICC Judge had ordered that Hong Kong bankruptcy proceedings against the Debtor be recognised as foreign main proceedings under the UNCITRAL Model Law on Cross-Border Insolvency. The Deputy Judge had also ordered that service of the recognition application be validated retrospectively, it having been sent by courier to the Debtor's Hong Kong home. The sole ground for which permission was granted on appeal was whether there was power under Sch.2 of the Regulations retrospectively to validate service of a recognition application outside England and Wales. The Debtor's case was that there was no such power because Sch.2 required an application for permission to serve out of the jurisdiction to be made prospectively and there was no provision for the grant of permission with retrospective effect. The Hong Kong Trustees in Bankruptcy argued (inter alia) that CPR, r.6.15 applied and that the Debtor had been validly served in any event without needing a permission order.

There was no suggestion that the Court must resolve the substantive issue of jurisdiction before permitting service out, so it appeared to be common ground that service performs the function of giving a debtor notice of the proceedings in good time. Service of a recognition application was not the same as satisfying the Court under section IV of CPR, Part 6 that there exists a sufficiently arguable ground for the Court to assume jurisdiction over a foreign defendant; indeed the gateway provisions of section IV were specifically disapplied. However, section II did apply, which included r.6.15 (service by alternative method or at alternative address) and r.6.16 (power to dispense with service). The appeal Judge did not agree with the Trustees that the Regulations gave an applicant freedom in the first instance as to the means of service of a recognition application, without first obtaining a direction from the Court. Para.22(1) and (2) were mandatory, prescribing what an applicant "*shall*" do by way of service as ordered. The next question was whether that application for directions as to service had to be made

prospectively. The Judge agreed with the Trustees that it did not: section 11 of CPR, Part 6 (which allows retrospective authorisation of service within the jurisdiction) was expressly applied to the Regulations, and the Court should not read sch.2 of the Regulations as depriving the Court of the power to do the same for service out. Thus, if for sufficient reason, an applicant fails to obtain directions as to service but a debtor receives the documents in good time and is able to act without detriment, the Court will likely retrospectively authorise the 'service' which occurred. Power to do that is implicit in para.22(2) of the Regulations, given that CPR, r.6.15(2) applies expressly to service within the jurisdiction and the Court's general power to give directions.

Katherine Hallett

AAH Pharmaceuticals Ltd v Jhoots Healthcare Ltd [2020] EWHC 2524

This is a case about the Disclosure Pilot running under PD 51U. Most of it turns on its own facts. However, at [21] HHJ Worster (sitting as a High Court Judge) reminds parties of the need to be co-operative in cases on the Pilot: "*But it does not assist the process of resolving those problems for one party to say (as the Claimants have here) we are not going to correspond with you on this issue anymore. Nor is it helpful to engage in confrontational or point scoring correspondence.*" This is a lesson that applies more widely in litigation.

Simon Hunter

R (oao Wingfield) v Canterbury City Council [2020] EWCA Civ 1588

"*The question raised by these renewed applications, put at its simplest, is this: when must an unsuccessful litigant accept "No" for an answer?*" In this case, it turns out, the answer was: "before now". The application before the Court of Appeal was to reopen two planning appeals under CPR, r 52.30. Although it sets out no really new statement of the law, this judgment does emphasise how hard it is to successfully employ r 52.30. The case must be truly exceptional. Unmeritorious applications are described as "*inimical to [access to justice] [and] an unnecessary burden on the court's resources [and] damaging to the rule of law itself.*" Of particular interest will be the reference (at [11]) to the *Hamid v SoS for the Home Department* case. Practitioners who make meritless applications under r 52.30 may find in future that the Court of Appeal is quite ready to haul in the fee-earner and the senior partner from the applicant's solicitors to explain themselves.

Simon Hunter

Re Hood (Derek) [2020] EWHC 3232 (Ch)

This appeal against a bankruptcy order considered whether a payment of the petition debt by a third party directly to the petitioning creditor by way of a loan to the debtor precluded the court from ordering a change of carriage of the petition by virtue of rule 10.29(3)(a) of the Insolvency Rules 2016 (the Rules) or a bankruptcy order under section 271(1)(a) of the Insolvency Act 1986 (the Act).

HMRC presented a bankruptcy petition against the debtor (A). The petition debt was paid off, in part, by a loan from a third party (the Loan). At the hearing of the petition, HMRC sought dismissal of the petition. A supporting creditor (R) sought carriage of the petition and a bankruptcy order. The court acceded to R's request on the basis that the Loan was void under section 284 of the Act and the court was not therefore precluded from granting a change of carriage under rule 10.29(3)(a) of the Rules or a bankruptcy order under section 271(1)(a) of the Act. A appealed. The appeal was allowed on the basis that: the Loan did not constitute "*property*" within the meaning of the Act and section 284 of the Act was not therefore engaged; there was nothing to indicate that rule 10.29(3)(a) of the Rules or section 271(1)(a) of the Act was limited to gifts; and the Loan constituted "*a disposition of property made by some person other than the debtor*" under rule 10.29(3)(a) of the Rules which precluded the court from ordering a change of carriage of the petition.

Emma Knight

Prempeh v Lakhany [2020] EWCA Civ 1422

The main question on this appeal was whether a notice given by a landlord under s 8 of the Housing Act 1988 seeking possession of a property let on an assured shorthold tenancy needed to contain the landlord's own name and address, as opposed to the name and address of the landlord's agent. The notice in question was sent by L's agent and had her name, care of the agent's address. P said that the notice was invalid as a result. In front of the deputy district judge at first instance it had been argued that the notice was a demand for rent within the meaning of s 47 of the Landlord and Tenant Act 1987, and therefore had to have the landlord's own address on it. This was rejected by the DDJ, and on appeal HHJ Lethem (a very experienced judge) had concluded that the notice was not a demand for rent at all. A second point was left open by HHJ Lethem but considered by the Court of Appeal, namely whether a failure to give the landlord's own address meant that the notice was not in the prescribed form required by s 8.

The Court of Appeal rejected both arguments. The Court noted that it would be strange if some s 8 notices (relying on, for instance, ground 8) were demands for rent within the meaning of the 1987 Act, but others were not. This notice relied on grounds 8, 10, and 11. The Court opined that it would be odd if a ground 11 notice (which does not require there to be any arrears of rent at all at the date proceedings are begun) could be characterised as a demand for rent. There was, even in the case of a ground 8 notice, no implied demand made. The Court gave fairly short shrift to the idea that a notice giving only the address of the agent was not substantially to the same effect as the prescribed form of notice, holding that it was adequate for the person signing the notice to give their address, which may be the landlord's agent. This decision is surely a victory for common sense against the technical defence.

Simon Hunter

Wormleighton v Salamander Invest A/S [2020] EWHC 2369

This case concerned two applications for directions under paragraphs 55(1) and 63 of Schedule B1 of the Insolvency Act 1986 following a rejection of administration proposals and a statutory request by the majority creditor for the convening of a creditors decision to decide whether to replace the administrators.

In respect of the first application, the court noted that in addition to the four specific, potential orders identified in paragraph 55(2) of Schedule B1 (appointment to cease; adjournment; interim order; or winding up order on a suspended petition), the court also has "*an express, unfettered discretion*" to make any other order that the court thinks appropriate. This includes a power to authorise implementation of an administrator's proposals notwithstanding opposition from a majority of creditors and a power (albeit to be exercised cautiously and exceptionally) to wind-up compulsorily notwithstanding the absence of a petition. In respect of the second application, the court concluded that there is jurisdiction to direct that a requested decision should not be sought from creditors because the court "*has an overall role both by statutory and inherent jurisdiction of supervision, control and direction in insolvencies subject to express or implied statutory provision within the relevant statutory scheme*". In exercising that discretion the court should consider all relevant circumstances including the value and nature of the debts of those supporting and opposing the requisition, the reasons for support or opposition, whether reasons are commercially rational and, if so, their weight. In this case, the court decided not to authorise the implementation of the proposals and, without proposals which would result in the administration continuing, there was no reason to implement the requested qualifying decision procedure. The prospects of avoiding or delaying compulsory liquidation in this case appeared to be thin, but the court adjourned the matter for 14 days.

Emma Knight

Keshwala v Bhalsod [2020] EWHC 2372 (QB)

This was a High Court appeal against a Circuit Judge's refusal to grant relief from forfeiture in respect of a 20-year mixed residential and commercial lease. In June 2018, due to a mistake, the tenant paid only £1,500 of the £2,000 rent due that quarter. Only the landlord appreciated the mistake. In September 2018, the landlord's agents issued an invoice for the September quarter which did not refer to the £500 June arrears. (n.b. The tenant did not subsequently make a waiver argument). In mid-September 2018, the landlord effected forfeiture by re-entry. The tenant then became aware of the arrears and arranged to pay them. There was then a hiatus of several months during which the parties did not communicate substantively, and the tenant failed to apply for relief from forfeiture. In February 2019, the landlord relet the two parts of the property separately to third parties. At the end of that month, the tenant applied for relief from forfeiture.

At first instance, the Judge considered that the landlord's decision to forfeit the lease with 10 years left to run for only £500 which had only been in arrears for a short time was harsh but lawful. However, the Judge refused to grant relief from forfeiture on the basis of the tenant's mostly unexplained delay in making the application. The Appellant tenant argued principally that the Judge had failed to appreciate that the equitable discretion to grant relief from forfeiture in the case on non-payment of rent proceeds on the footing that the proviso for re-entry is, in the eyes of equity, merely a security for the payment of rent and therefore, save in exceptional circumstances, relief ought to be granted so long as the tenant pays the rent. The High Court agreed: the Judge had erred in treating the decision as simply one involving the exercise of a general discretion. In fact, the starting point was that the proviso for re-entry was no more than security for payment of rent: relief should therefore be granted if the rent is paid or tendered, unless there is some exceptional reason why that would be unjust. The Judge should therefore have considered whether the delay comprised such exceptional circumstances. The principal guidance in that regard should have been the statutory 6-month limit for bringing a claim for relief. Although a claim may be brought more than 6

months after re-entry so long as it is made with reasonable promptitude, a claim brought within 6 months is taken as having been so brought. Thus, the delay here was not capable of amounting to exceptional circumstances such as to justify the refusal of relief. Finally, the reletting of the premises did not prevent relief: the residential premises were now vacant, and the tenant could take a reversionary lease of the commercial premises.

Katherine Hallett

Re Nationwide Accident Repair Services Ltd [2020] EWHC 2420 (Ch)

This concerned an 'urgent', out-of-hours, application to appoint administrators over a company to allow it to go into a pre-pack administration. The court made the order. Of interest is Fancourt J's criticism of the way that the matter had been brought before the court. The pre-pack had been negotiated between 30 August and 3 September. The court was notified on 1 September that a hearing might be required that day. At 7:52pm on 3 September the court was notified that a hearing was required that evening. The court said it would hear the matter at 10am the following day, only to be told that the applicants had been "informed" that if the deal was not completed that night (it was, of course, conditional on the appointment) it would fall through. When he was later told that the deadline of 11:59pm on 3 September had been included in the documents by consent Fancourt J was less than best pleased. He said at [21]: "*However, it is wholly unacceptable for clients and lawyers and other professionals acting for them to negotiate terms that have the effect of presenting the Court will an artificial ultimatum and require important matters affecting the livelihoods of thousands of people to be decided under undue pressure of time.*"

Simon Hunter

TBD (Owen Holland) Ltd v Simons [2020] EWCA Civ 1182

The Court of Appeal (Arnold LJ with whom David Richards and Newey LJJ agreed) considered a search and imaging order. In the court below ([2020] EWHC 30 (Ch)), Marcus Smith J had found that the Claimant and its solicitors had breached a search and imaging order by carrying out unauthorised inspection and keyword searches of the seized material and the computer images.

The Claimant's appeal was dismissed. The long judgment, which is worth reading for the thorough analysis of the history of the Anton Piller / search order jurisdiction [127-175] and imaging orders [176-193], covered more issues than a short note like this can analyse. The key point Arnold LJ made was to underscore that the primary purpose of a search order is to preserve evidence, not to provide early disclosure or inspection. Imaging "*can only ever be a preservation step*" because of the issues of privilege and confidentiality that inevitably arise in the indiscriminate copying of hard discs: [178]. The judgment also serves as a reminder to practitioners that for all that highly aggressive actions may please clients, they rarely play well before the bench.

Michael Smith

Re Rhino Enterprise Properties Ltd [2020] EWHC 2370 (Ch)

Contributories sought permission to proceed against the Companies' former Administrators under para.75, sch.B1 of the Insolvency Act 1986 for misfeasance and breach of duty. The Administrators argued that the contributories were bound by their contrary conduct as members in approving various CVAs, and by an express undertaking not to bring any such claim, which was contained in the CVAs. The key question for the High Court (and upon which this note focuses) was whether a CVA is a contract for the purposes of the Contract (Rights of Third Parties) Act 1999 ('the 1999 Act'). The Administrators had obtained legal advice regarding potential claims the Companies had against a bank based on LIBOR manipulation and mis-selling of swaps products. That legal advice suggested a less than 50% prospect of success, whereas the contributories' own legal advice had put it at 60%. On the basis of the poor merits of a counterclaim, the Administrators accepted the bank's claim to be owed £20.9m; they also sold various properties. The Companies exited administration via CVAs, which included terms reducing the bank's debt and allowing the contributories to proceed with swaps claims against the bank. The CVA proposals contained a release clause in respect of the Administrators (albeit they were not parties): the creditors and members (including the contributories) approved the CVAs.

The contributories argued that the Administrators should not have accepted the appointment because of their close relationship with the bank, failed to exercise sufficient independence properly to investigate and pursue the swaps claims, and (had the swaps claims been properly pursued) the Companies' liabilities would have been reduced to a level which could have been refinanced. Various issues were determined by the Court but the key point here is that it rejected the submissions that a CVA is a contract, that the 1999 Act applies to CVAs so that they are enforceable by third parties, and that the release clause was directly enforceable by the Administrators: it was at least realistically arguable that a CVA

is not a contract. The 1999 Act does not define a contract. The 1986 Act refers to CVAs as arrangements, not contracts or similar. Not all features of a contract apply to CVAs. The Court's conclusion that a CVA is not a contract was merely a provisional holding because of the uncertainty on the authorities and because this was merely a permission hearing. Thus, most CVAs probably form quasi-contracts, and for some purposes are treated as contracts, but are not in all cases actual contracts.

Katherine Hallett

P v Griffith [2020] EWCOP 46

This case is a reminder, should one be needed (and it really should not), that one should not forge court orders. The respondent, G, was a relative of a person, P, who is the subject of proceedings in the Court of Protection. There was a debate between G on the one hand and the Official Solicitor (acting for P) and others in relation to P's best interests in relation to her care, treatment, and residence. The Court of Protection made an order for disclosure to the Official Solicitor of various of P's medical records from four different holders of those records. G made an application for disclosure to her of P's "*medical file*". No such order was made. On a second such application, the court expressly ordered that it was not satisfied that P's medical records should be disclosed to G.

Some 2 months later G wrote to Barts Health NHS Trust (who were not one of the 4 record-holders the subject of previous orders) attaching a purported order providing for disclosure to her of records held by them. Records were sent to G's (very newly instructed) solicitors who (thankfully) neither read them nor passed them on to G. Some 2 weeks later Cohen J made an order ordering Barts to send records to the Official Solicitor. Barts, being rather confused, said that they had already disclosed records to G's solicitors. An application for committal for contempt was made. At the hearing of the committal application G exercised her right to silence (indeed she did not attend) but the principal point made on her behalf was that it could not be proved beyond reasonable doubt that she had forged the order, which she denied. Macdonald J disagreed, holding that this had been proved to the requisite standard. He then went on to sentence her to 12 months imprisonment. A salutary lesson that should not have been needed. G's appeal to the Court of Appeal was dismissed: [2020] EWCA Civ 1675.

Simon Hunter

Bath Rugby Ltd v Greenwood [2020] EWHC 2662 (Ch)

This is a claim about the (controversial) redevelopment of the Rec, the famous rugby ground in the centre of Bath. As HHJ Matthews says in his judgment, however, it is not about the redevelopment itself or whether it should be undertaken. It is about a technical question of land law, "*perhaps one of the most technical in what is already a technical area of law.*" The question at hand is about whether there is any remaining party which can enforce a restrictive covenant in a conveyance from 1922. The claimant's claim was for a declaration under section 84(2) of the Law of Property Act 1925 that there was no party able to enforce the covenant.

The principle ground of defence (by parties who have an interest in some of the land) was that the benefit of the covenant had passed to them by annexation to their land. HHJ Matthews' judgment contains a helpful and thorough review of the case law on this question, which this note is too short to adequately summarise. The general conclusion is that, at least where the covenant concerned was created before 1926, the relevant test for the passing of the benefit of a covenant by annexation is that there was an intention to benefit identifiable land, "*it is sufficient for the conveyance to describe the land intended to be benefited in terms which enable it to be identified from other evidence*", and there is no need for the land to be "*easily ascertainable*."

Simon Hunter

Re Tokenhouse VB Ltd [2020] EWHC 3171 (Ch)

The directors of a company appointed administrators under paragraph 22 of Schedule B1 of the Insolvency Act 1986. They failed to give qualifying floating charge holders the 5 business days' notice of their intention to appoint, which is required by paragraph 26(1)(b). The key question for ICC Judge Jones was whether the lack of notice made the appointment void. He reviewed the conflicting authorities on this and analogous points. He concluded that failure to give the notice did not invalidate the appointment but was an irregularity that the court could remedy.

The judgment's analysis is thorough and its conclusion welcome. Whilst it is important to follow the rules, appointments of administrators should not be brittle. However, it is yet one more High Court judgment added to a pile of contrary reasoning. Hopefully, this point can go before the Court of Appeal in the near future to give certainty to practitioners.

Michael Smith

Three Stone Remote Seminar Series 2021

The Supremacy of the Supreme Court and Brexit

18 February 2021

James Woolrich on Brexit and Private International Law

Adam Chichester-Clark on reflective loss

Daria Gleyze on business interruption

Christopher Howitt on *Enka v Chubb*

For further information, or to be added to the attendance list please contact Bill Rice at brice@threestone.law.

Re High Street Rooftop Holdings Ltd [2020] EWHC 2572 (Ch)

This was a qualifying floating charge holder application for an administration order. The Company opposed the application on the basis that (1) no event of default had occurred because the loan contract had been varied or the Applicant was estopped from relying on its terms, and (2) it was not insolvent and would pay the Applicant in full.

The Judge held that there had been no variation to the terms of the loan contract. Firstly, it contained an anti-oral variation clause, the terms of which had not been satisfied. There was also a non-waiver clause. Secondly, none of the alleged representations made by the Applicant were sufficiently unequivocal that any variation as to payment dates was valid notwithstanding its informality. Contemporaneous emails and documents were inconsistent with the alleged representations in any event. Thirdly, a waiver letter, signed by the Company, had come into effect but contained conditions precedent which the Company never satisfied and which the Applicant was entitled to waive. The Applicant was therefore entitled to revoke the waiver and rely on the events of default as continuing. There was a disagreement as to whether, when an administrator is appointed under para.35 of Sch.B1, the applicant has to show that there is a real prospect of the statutory purpose of administration being achieved. The Judge held that this was a requirement, albeit under a para.35 application, unlike an appointment under para.11, the applicant does not have to show that the company is or is likely to become unable to pay its debts. There was insufficient evidence to show that the Applicant's debt was sufficiently secured here. In addition, on the facts, the Judge concluded that there was a real prospect of one of the statutory purposes being achieved. It was not possible on the evidence to say which was most likely: once in office, the Administrators would have to take possession of and assess the Company's books and records in order to determine that. However, there

was at least a real prospect of a distribution to the Company's secured creditors. Finally, the Judge was prepared, on the facts, to exercise his discretion to make an administration order.

Katherine Hallett

Stoffel & Co v Grondona [2020] UKSC 42, Henderson v Dorset Healthcare University NHS Foundation Trust [2020] UKSC 43

These two important cases on illegality at common law will be the subject of fuller consideration in a future edition of the Three Stone Triannual Review.

In re Totalbrand Ltd [2020] EWHC 2917 (Ch)

This application for permission to appeal, heard in Manchester by Snowden J, concerned the proper interpretiation of section 246ZD of the Insolvency Act 1986. That section permitted the assignment by liquidators of the statutory right to bring certain types of action, such as preference and transaction at an undervalue claims, which had until the amendment of the 1986 Act in 2015 been unassignable. In this case certain claims against a director had been assigned by the liquidator. The company had then been dissolved. The argument made for the director was that, as the company had been dissolved, the court could no longer make any orders on the statutory claims, because the sections themselves (sections 213, 238, and 239) provide that the court can only order the respondent to make contributions to the "*company's assets*" (section 213) or restoring the position of the company (238 and 239). As the company no longer existed, no such order could be made.

The submission had failed in front of the district judge, and did not find favour with Snowden J either. That should not be surprising. What would, one might ask, be the point of assigning these statutory rights if the proceeds all had to go back into the coffers of the company? Where would the benefit be for the assignee? As Snowden J points out at [26] "*the assignee would presumably have to bear all the costs of pursuing the claim, [but] it would not stand to obtain any direct benefit but would be dependent on receiving a distribution of part of the proceeds in some way via the insolvency…*". The conclusion, that "*such an impractical and unlikely intention*" cannot have been what Parliament intended (see [27]) must be right.

Simon Hunter

LCR v SC [2020] EWCOP 62

This is the first case brought before the courts challenging the registration of lasting powers of attorney ('LPAs') on the grounds of the future conduct of donees. The applicant is one of 4 sisters. The first 3 respondents are her 3 sisters, and between these two camps there is some considerable animosity. Two LPAs were executed by their mother. The 3 respondent sisters also executed the LPAs, but the applicant refused on the ground that she did not believe that her mother had capacity. In September 2017 the applicant issued an application objecting to the registration of the LPAs. On 3 June 2020 (the delay is not explained in the judgment) the applicant accepted that she could not rebut the presumption of capacity at the date of the execution of the LPAs.

The Official Solicitor, acting for the mother (who has now lost capacity) argued that the powers should not be registered. Submissions for the OS said that the mother's wishes were to appoint all 4 of her daughters to act together. The applicant refused to be appointed alongside her sisters. The Court was always unlikely to appoint the applicant against her wishes. There was therefore no way to accommodate the mother's wishes and act in her best interests. The court agreed, holding that there was no way that the 4 sisters could work together on a day-to-day basis to determine the mother's best interests. The court refused to register the LPAs, and appointed a property and affairs (but not health and welfare) panel deputy.

Simon Hunter

Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd [2020] EWCH 2952 (Comm)

The Commercial Court (Nicholas Vineall QC) handed down a decision on quantum of damages in relation to a dispute between a Channel-Islands based wealth manager and a BVI-incorporated introducing broker. There have been two previous decisions in the proceedings, reported at [2018] 1 WLR 314 (Teare J) and [2019] 1 WLR 4481 (Court of Appeal). The Defendant had been found to be in breach of its contract with the Claimant, but questions remained concerning the correct approach to the assessment of damages, and the quantum of damages, due to the Claimant. Of note in the latest judgment is the deputy judge's consideration of the "fair wind" principle (as discussed in *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm)) leading to a conclusion that the Claimant should be granted a fair wind, but not a free ride, when damages were assessed. The deputy judge therefore declined the Claimant's request to make wholsesale variations to the figures for the Claimant's damages prepared by the Defendant ([85]-[110]). The decision is also of interest for how the Court found itself not to be bound by judicial comment earlier in the same case, made at the liability stage of the proceedings. In the Commercial Court's liability judgment Teare J noted that the assessment of the Claimant's loss would have to take into account sums payable by the Claimant to its own sub-brokers, to avoid over-compensating the Claimant. The Claimant nevertheless sought damages in a sum which did not take into account payments to sub-brokers. Mr Vineall QC held that the decision of Teare J did not give rise to an issue estoppel, the Claimant's arguments were not an abuse of process, and that Teare J's finding on the point was obiter ([45]-[55]).

Rupert Coe

Rupert Coe appeared, led by Hodge Malek QC and James Potts, for the Defendant.

MB v RBG [2020] EWHC 3022 (QB)

This case concerns the proper interpretation of the relatively recently revised CPR, r 12.3. That rule was revised earlier this year in an attempt to make clear that default judgment could only be entered if, at the date on which default judgment was entered, no acknowledgment of service (AoS) or defence had been filed. Formerly there had been a debate about whether the court could enter default judgment if the AoS or defence was late, even if it had in fact been filed by the time the default judgment was entered. This judgment makes clear that that is now not the position and that that rule change has achieved its aim. By way of a secondary point, it also makes clear that an AoS is filed on the day that it reaches the court, and not the day on which it is posted or (in this case) put in the DX.

The underlying claim is one that will be familiar in style to anyone who has dealt with local authority litigation. A dissatisfied former tenant and applicant for homelessness accommodation sued the relevant local authority for "*extreme bullying*", "*criminal negligence*", "*racist treatment*", "*malicious falsehood*" and various other similar things. The value was put at £10.5m. For good measure the claimant also applied to commit one of the authority's legal officers for contempt and sought a freezing injunction preventing the authority from diminishing its assets below £1m. It will come as little surprise that Choudhury J, as well as setting aside the default judgment, struck out the claim, dismissed the applications for committal and a freezing injunction, certified all three as being without merit, and made an extended CRO.

Simon Hunter

HM Attorney General v Zedra Fiduciary Services (UK) Ltd [2020] EWHC 2988 (Ch)

This case concerned a fund settled in 1928 by Baring Brothers & Co known as the National Fund. The intention was that the National Fund would be retained until such time as it was sufficient to pay off the national debt, at which point it would be applied to that purpose. The original fund was £500,000, and significant further contributions were made. The last contribution was in 1982. The donor of the original £500,000 wished to remain anonymous, but his identity was revealed in the course of these proceedings.

The A-G contended that the National Fund was charitable, and could therefore be applied to the reduction of the national debt. The first defendant, the current trustee, agreed that the Fund was charitable, but said that it could not presently be applied to the reduction of the national debt. The second and third defendants were representatives of the descendants of the donors to the fund. They said that the trust was invalid, and the sums paid in were therefore held on resulting trust for the donors or their estates. Zacaroli J rejected that contention.

The second set of issues concerned whether the court could alter the trust under either its inherent jurisdiction relating to charities, or its cy-près jurisdiction, or both, and, if both, which it should exercise. The consideration of the first of these jurisdictions is short: as a result of the judge's conclusions on the meaning of the trust, given that the National Fund is not currently sufficient to pay off the national debt, any scheme which permitted payment in reduction only of the national debt would be outwith the scheme and therefore would require a cy-près scheme. The expert economists being agreed that it was vanishingly unlikely that the National Fund would ever be sufficient to discharge the national debt in full, the court

went on to consider whether to make a cy-près scheme, which it decided it had jurisdiction to do. However, in the event, the judge was persuaded to put off the question of whether to actually make the scheme to another occasion.

Simon Hunter

John McDonnell QC and Sebastian Kokelaar appeared for the Second Defendant

AMDC v AG [2020] EWCOP 58

In this case the Court of Protection gave helpful guidance on the matters that an expert should bear in mind when preparing a report into P's capacity. The list (found at [28]) should be considered in full, but the key points are: (i) reports should be related to the Mental Capacity Act and the letter of instruction; (ii) where P's capacity to make more than one kind of decision is in issue, each should be dealt with separately, and the conclusions should be consistent and coherent; and (iii) the report should set out what steps have been taken to engage with P, even if P does not engage with the expert, and steps should be taken to assist that engagement.

Simon Hunter

JSC VTB Bank v Skurikhin [2020] EWCA Civ 1337

This case concerns abuse of process and setting aside interlocutory orders on the ground of change of circumstance. The claimant bank obtained summary judgment against the defendant, and sought to enforce the judgment against properties in Italy held by a third party, an English LLP. It was alleged that the defendant has the right to call for the assets to be transferred to him, or has de facto control of them. The properties had been held on trust for the defendant, but since 2010 they had been held on trust for a Liechtenstein foundation, B. The bank applied for the appointment of receivers over the membership interests of the LLP. This was granted. The receivers then caused the LLP to put itself into administration and they were appointed administrators. The board of B then irrevocably excluded the defendant from the class of beneficiaries of the foundation and applied to discharge the receivership on the basis, inter alia, of a change of circumstances, the change being that the defendant had been excluded as a beneficiary. At first instance Patricia Robertson QC (sitting as a High Court judge) dismissed the application, holding that the fact that B had brought about the change of circumstances by its own actions made the application abusive.

B appealed to the Court of Appeal, which dismissed the appeal. Phillips LJ reviewed the law on abuse of process ([47 and following]). His Lordship held that abuse of process can exist even where there is no unlawful conduct or breach of the rules. "*Indeed, the power exists precisely to prevent the court's process being abused through the lawful and literal application of the rules*" [51]. In the event, the Court's decision is that whether the lawful and literal application of the rules amounts to an abuse turns on the facts of the case. On those facts (as the first-instance judge had found them) it was "*plainly right*" that the application was "*wholly abusive*".

Simon Hunter

David Lord QC and Sebastian Kokelaar appeared for the appellants

Re Truewood Ltd [2020] EWHC 2360

This was a case about setting aside an order barring respondents from defending a claim. In September 2014 the respondents to an directors' misfeasance application were debarred from defending it. They said that they first became aware of that order only in November 2016, and on 18 November 2016 they applied to set it aside. Given the somewhat antique nature of the proceedings, the rules to be applied were still the Insolvency Rules 1986, but in this regard there was no change in the transition to the Insolvency (England and Wales) Rules 2016.

This may be thought to be an inauspicious start for the directors. However, what follows is an object lesson in discovering a party's usual or last known address. The directors had owned 2 properties. The applicant liquidator was aware, from previous proceedings, that the directors had been living at Address 1, and renting out Address 2. In March 2013 the liquidator undertook a Land Registry search and discovered that the directors had sold the freehold of Address 1 to two other persons (in fact their two sons), but that they still owned Address 2. The liquidator therefore concluded that the directors were now living at Address 2. He therefore served the misfeasance application at Address 2 as well as the debarring order and the subsequent judgment. None were returned. Bankruptcy petitions were eventually served on the directors, ultimately at Address 1. It was only after those petitions were dismissed that, the directors said, they became aware of the debarring order. ICCJ Jones concluded that the liquidators had taken insufficient steps to ascertain where the directors were living and that no good service had been effected. There being an arguable defence of repayment (but no other arguable defence) the judge set aside the debarring order to allow the directors to run that single defence to the main application.

Simon Hunter

Re Blue Co London LLP [2020] EWHC 2385 (Ch)

In this case administrators applied under paragraph 63 of Schedule B1 of the Insolvency Act 1986 for an order that they could apply to stay certain proceedings against them in the Judicial Court of Nanterre, France, and be indemnified in respect of the costs of so applying. The companies in administration (now called Blue Co London LLP and Blue Co International LLP) were formally Ince & Co LLP and Ince & Co International LLP, firms of solicitors. The administrations were pre-packs. The dispute in France appears to be that the insolvencies were "*orchestrated*" by various parties to enable RBS and certain partners to acquire parts of the business on favourable terms. The respondents to that claim brought proceedings (what would be Part 20 proceedings in England) against the administrators and others. The administrators said, inter alia, that the French court has no jurisdiction to decide the relevant questions, as they fell within the EU Regulation on Insolvency Proceedings.

ICCJ Barber considered the nature of applications under paragraph 63, and applied by analogy the case of Public Trustee v Cooper [2001] WTLR 901 at 923, a case on applications by trustees for directions. In that case Hart J, quoting himself from Robert Walker J, identified 4 categories of situation. One of these ("*Category 2*") was where there was no real doubt as to the nature of the trustees' powers, and the trustees had decided how to exercise them, but "*because the decision is particularly momentous, the trustees wish to obtain the blessing of the court.*" The Judge decided that this was a Category 2 case, and gave her blessing to the proposed course of action.

Simon Hunter

Re PLK [2020] EWHC B28 (Costs)

This case concerns the costs of court-appointed deputies appointed by the Court of Protection. The substantive issue was whether, in assessing such costs, costs officers should follow the 2010 guideline hourly rates ("GHR") from the Guide to the Summary Assessment of Costs. 2 submissions were made for the deputies: first: Court of Protection work is specialised and not run-of-the-mill, and so the GHR were not appropriate; second, if the court uses the GHR as a starting point, the court should apply "*an empirical uplift*" based on RPI inflation and not CPI.

Master Whalan was "*satisfied that in 2020 the GHR cannot be applied reasonably or equitably without some form of monetary uplift that recognises the erosive effect of inflation and, no doubt, other commercial pressures since the last formal review in 2010*": [35] The Master went on to hold that "*if the hourly rates claimed fall within approximately 120% of the 2010 GHR, then they should be regarded as being prima facie reasonable*", and then provides (also at [35]) a helpful table setting out what the effect of a 20% uplift would be on the 2010 GHR. Given the anticipated report of Stewart J and the Hourly Rates Working Group, this will no doubt not be the last time revision of the GHR appears in these pages.

Simon Hunter

PJSC Taftnet v Bogolyubov [2020] EWHC 2437 (Comm)

This is a case about legal advice privilege and whether it can be claimed in relation to communications with a company's in-house legal department. The relevant employees of the legal department (the claimant's) were not, it was argued for the second defendant "*appropriately qualified*" foreign lawyers because they were not Advocates (a term of art in Russia), and that the privilege therefore did not apply to communications with them. Moulder J, in a comparatively short judgment, disagreed. The judge specifically disapproved of a restriction, found in *Hollander on Documentary Evidence*, that a foreign lawyer had to be "*appropriately qualified*" for the privilege to apply. Legal advice privilege therefore attaches to communications with foreign lawyers, including those in in-house legal departments, and the court will not enquire into local regulation standards. The only test is that set out by Lord Neuberger in the Prudential case: the relevant people must be "*lawyers, acting in their professional capacity, in connection with the provision of legal advice*."

Simon Hunter

Ashton v Brackstone (High Court, unreported, 1 October 2020)

In this case, it fell to the Court to consider whether a testamentary gift to "*such of my children as shall survive me in equal shares*" was in itself sufficient to exclude s 33 Wills Act 1837. The Court found that the Will did not exclude s 33. No extrinsic evidence was admitted under s 21 Administration of Justice Act 1982, since no part of the will was meaningless, or ambiguous or ambiguous in light of surrounding circumstances.

Accordingly, the testatrix's granddaughter, Holly Ashton, succeeded in her claim for a declaration that she was entitled to half of her grandmother's estate. Ms Ashton's claim was opposed by her uncle, David Brackstone (brother of Ms Ashton's late mother) who argued unsuccessfully that he was his mother's sole heir. The decision as to the true construction of the Will is consistent with *Ling v Ling* [2002] WTLR 553 and *Hives v Machin* [2017] EWHC 1414, which authorities the Court preferred to *Rainbird v Smith* [2012] EWHC 4276 (Ch).

Rupert Coe

Rupert Coe appeared for the Applicant. The full judgment is available on the News and Events section of Three Stone's website.

LM Associates Ltd v Gibbeson [2020] EWCA Civ 1460

This is an unusual judgment, as it is an application for permission to appeal to the Court of Appeal which was listed for hearing before a full court. Henderson, Flaux, and Asplin LJJ were called on to consider the nature of the Court of Appeal's jurisdiction to entertain an application for permission to appeal in certain procedural circumstances, on which there were conflicting views expressed.

The particular circumstances concern the situation where a High Court Judge, considering on the papers an application for permission to appeal from the County Court, marks the application as being totally without merit and makes an order under CPR, r 52.4(3) that the applicant may not request that that paper decision be reconsidered at a renewal hearing. The question for the Court of Appeal was whether that court had jurisdiction to hear an appeal against the paragraph (3) order. That appeal could neither be against the refusal of permission, nor against the marking of the application as totally without merit, for the reasons given at [3]. The Court of Appeal's conclusion was that the paragraph (3) order was "*an integral part of the order refusing [permission to appeal] itself*", and that as a result the Court of Appeal could not hear an appeal against it. As a result, the order under CPR, r 52.4(3) that an applicant may not request an oral hearing is itself as unappealable as the refusal of permission to appeal.

The court gave permission, under the Practice Direction (Citation of Authorities) 2001 for the judgment to be cited, even though it is only a permission application judgment.

Simon Hunter

Re Ide [2020] EWCA Civ 1469

This case raises three important questions of insolvency procedure. The first is whether the County Court can transfer part only of a case to the High Court. The second concerns the correct date for service of an insolvency application. The third concerns the interrelationship between that date and the law of limitation. HHJ Matthews had given the substantive judgment appealed, and had transferred a single application (among many) to the High Court and proceeded to hear the matter himself sitting as a High Court Judge. The appellant argued that the power to transfer "*insolvency proceedings*" in Insolvency Rule 12.30(2) meant that the judge could only transfer the entirety of the proceedings to the High Court, rather than, as he had considered, that he could transfer a single application only to that Court. The Court of Appeal rejected this narrow construction, holding that the County Court has the power to transfer single applications to the High Court under rule 12.30.

The second question turns on the correct interpretation of the phrase "*the application must be served, …, at least 14 days before the date fixed for its hearing*". The appellants argued that this meant 14 days before the hearing date endorsed on the application notice by the court. The respondents argued that it meant 14 days before the date ultimately fixed for the hearing. HHJ Matthews agreed with the respondents. The Court of Appeal disagreed, holding that the date for service was 14 days before the endorsed date. That brought into play the third issue, about limitation. Here the limitation period had passed. The question was whether the same principles apply to an application for an extension of time for the service of an insolvency application as apply to such an application in relation to a Part 7 claim under the CPR. The Court of Appeal held that the same principles did apply.

Simon Hunter

Ganoun v Joshi [2020] EWHC 2743 (Ch)

The mother and widow of a deceased Algerian national disagreed about where the deceased should be buried. The claimant, his mother, wished to bury him in Algeria. The defendant, his widow, wished him to be buried in the UK, where he had lived for 15 years. Since the deceased died intestate, his widow had the right to administer his estate in accordance with rule 22 of the Non-Contentious Probate Rules 1987, and the normal rule is that it is the deceased's personal representatives who have the right and duty to make arrangements for the proper disposal of the deceased's body. Burial took place in the UK on 30 September 2020, the same day the claimant made her urgent application to the Court. The deceased was buried under the name he had used in the UK, which was not his birth name. The claimant wished to pass over the defendant pursuant to section 116 of the Senior Courts Act, with the effect that the claimant would administer the estate. She also sought declarations that her son had not been buried "*decently*" and as to her son's true identity. The main purpose of the relief sought was to support an intended application to the Secretary of State to exhume the deceased's body, so that it may be repatriated to Algeria for re-burial (at [8]-[9]).

The deputy judge refused the application to appoint the claimant as administratrix. He held that the identification of "*special circumstances*" under s116 was a single process, not a two-stage test, despite earlier authority to the contrary (at [34]-[36]). On the facts, the claimant had not established the necessary special circumstances for the Court to depart from the ordinary rule of priority for the grant of letters of administration. The Court was also not satisfied it was right to make a declaration as to the decency of the burial, this not being part of any established legal test (at [15]-[16]). The Court did, however, make declarations concerning the deceased's identity (at [25]-[26]).

Rupert Coe

Minstrell Recruitment Ltd v Lockett [2020] EWHC 3537 (Ch)

The last four months have produced a surprising number of contempt of court decisions, some noted in these pages, and this is another. Snowden J's decision runs to 273 paragraphs, and can best be summarised as "*A plague o' both your houses!*" The litigation, a dispute between a recruitment agency and one of its former employees (often a bad sign), has been "*bitter*" and "*involved dishonest conduct on both sides, which has included the falsification of evidence and the alteration of documents*" (always a worse sign). The conduct complained of as contemptuous was the making of disparaging comments by the defendant in breach of an injunction made by HHJ Eyre QC. Eventually the conduct was admitted, although the defendant tried to say that he did not think that the relevant part of the order was still in force. Snowden J did not agree, sentencing him to 12 months imprisonment. However, in sentencing Mr Lockett, Snowden J took into account what he found to be a "*campaign of harassment and intimidation*" ([256]) conducted by employees of the claimant, and the fact that one of the claimant's employees had impersonated another former employee of the claimant to provoke the defendant into sending text messages, which were then relied on in the contempt application.

At the invitation of both parties, the judge also made a permanent injunction to dispose of the proceedings, but he only gave the successful claimants 50% of their costs. His Lordship's final paragraph should be a warning to all who are considering engaging in conduct such as was seen in this case "*I should also indicate that I intend to send the papers in this matter to the Greater Manchester Police and the Crown Prosecution Service for their consideration of whether any further action should be taken in light of the findings in this judgment.*"

Simon Hunter

JB v University Hospitals Plymouth NHS Trust [2020] EWCA Civ 1772

This appeal from the Court of Protection was concerned with the ever-difficult decision about continuing medical care for a patient in a coma for whom the prognosis is "*bleak*". The case, like so many of its kind, turns on its facts, but contains an important and interesting reminder of the nature of the proceedings in the Court of Protection and the need (or otherwise) for cross-examination. At its heart the case was a dispute between P's wife on the one hand and his birth family on the other. One of the grounds of appeal asserted that the judge below had erred by prohibiting cross-examination of P's wife. The ground was not pursued on the facts, but the Court of Appeal considered it briefly. The Court said (at [23-24]):"*[T]he processes of the Court of Protection are essentially inquisitorial rather than adversarial. … It is of course important that key participants are heard and feel that they have been heard but there is no absolute right to cross-examine and in a case of this kind adversarial cross-examination of family members acting in good faith is likely to be of very little value.*"

In addition, the Judge had received a letter from P's wife which she, P's wife, had asked to be kept confidential from P's birth family as it concerned certain aspects of her relationship with her husband. The argument was made that doing so was a breach of Article 6 and was a serious procedural error. The Court of Appeal disagreed, noting that there was no suggestion that the judge was influenced by the content of the letter when coming to his decision.

Simon Hunter

Re RJH Stanhope Ltd [2020] EWHC 2808 (Ch)

This was a misfeasance claim, initially against 4 directors, 3 de jure and 1 de facto. The claims against 2 of the de jure directors were settled. The claim against the de facto director (R) was the subject of a default judgment. That left over the last claim against the remaining de jure director (J). R is J's father. In July 2011 R persuaded a Ms B to pay £400,000 into the company's (RJHS) bank account. It was paid away over the next 2 months. Most of it went to a connected company (PM). In addition, payments of over £96,000 were made to discharge debts owed by R. After RJHS had gone into liquidation, Ms B obtained judgment against the company and R for £407,000-odd. She then amended her claim to bring personal claims against the 3 de facto directors, including J. A Tomlin order was entered into, on terms that provided for R to pay £475,000 to Ms B. That sum was paid on behalf of R (in fact by J). Ms B entered a revised claim in the liquidation of RJHS, which was eventually adjudicated in the sum of £87,231.

Simon Hunter

James Couser appeared for the Applicants

Practice Update

Once again, the period of this update has been dominated by Covid-19. This has led to a number of important changes, mostly of procedure. Some Brexit-related changes are also noted. The number of amendments and updates not related to one or other of these two seismic events in British society is rather small.

The largest set of updates noted in this period have been in insolvency. Perhaps, given the impact of Covid-19 on the economy that is not surprising. The County Court at Central London has a new **Protocol for Insolvency and Company Work**, which sets out what will, in the first instance, be listed for in-person hearings and what will be listed by remote means. The some parts of the temporary provisions relating to moratoria in Sch 4 to the Corporate Insolvency and Governance Act 2020, as well as the small supplier exclusion in s 15(2)(b) of that Act have been extended to 30 March 2021 by the **Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020** but others have been terminated early by the **Corporate Insolvency and Governance Act 2020 (Coronavirus) (Early Termination of Certain Temporary Provisions) Regulations 2020**. Those involved in moratoria to which Sch 4 applies would be well advised to check an up-to-date version of the schedule to see which provisions are and are not in force from time to time.

The restrictions on winding up petitions found in Sch 10 to the 2020 Act have also been extended to 31 March 2021 by the **Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) (No. 2) Regulations 2020**. Practitioners should note that the extension in the first Extension of the Relevant Period regulations noted in the previous paragraph is to 30 March 2021, but that in the No. 2 Regulations noted in this paragraph is to 31 March 2021. There is no apparent logic to the difference. The wrongful trading provisions in the Insolvency Act 1986, ss 214 and 246ZA have been in

effect suspended for the period 26 November 2020 to 30 April 2021, by provision in the **Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020**, r 2 that requires the court to assume that a director is not responsible for any worsening of the financial position of a company in that period. There are exemptions contained in the same regulation. The same regulations also extend the 'relevant period' for the purposes of Sch 14 fo the 2020 Act, in this case to 30 March 2021.

Continued work has been done to apply the moratorium provisions to the various specialist insolvency regimes. In the period of this review, there have been the **Insolvency (Moratorium) (Special Administration for Energy Licensees) Regulations 2020** (on the application of the moratorium provisions of the Insolvency Act 1986, Part A1 to those holding relevant energy licences), the **Co-operative and Community Benefit Societies and Credit Unions (Arrangements, Reconstructions and Administration) (Amendment) (No. 2) Order 2020** (which apply the Insolvency Act 1986, Part A1 and the schemes of arrangement provisions in the Companies Act 2006, Part 26A to co-op and community benefit societies and credit unions), and **Pension Protection Fund (Moratorium and Arrangements and Reconstructions for Companies in Financial Difficulty) (Amendment and Revocation) Regulations 2020** (on the rights of the PPF where companies avail themselves of the rights in the Insolvency Act 1986, Part A1 and the Companies Act 2006, Part 26A).

In non-Covid-related insolvency news the Insolvency Service announced on 8 October 2020 that pre-pack sales were to face mandatory independent scrutiny. This change is much to be welcomed as the current system is, as many others have noted before, far too easily abused. It remains to be seen whether any amended system can close up some of the avenues for abuse seen in the present one.

In company and commercial news, the **Bearer Certificates (Collective Investment Schemes) Regulations 2020** prevent collective investment schemes from issuing new bearer certificates from 1 January 2021. Transitional provisions found in the schedule give 1 year (i.e. until 1 January 2022) for schemes to cancel or convert bearer certificates currently in force, and make other

transitional provision.

The judges in charge of the Commercial Court and London Circuit Commercial Court (Cockerill J and HHJ Pelling QC) noting that time estimates given for pre-reading and hearings have been "*inaccurate*". The judges note, in particular, a problem with half-day time estimates for hearing. If a hearing is listed for half a day, submissions must be complete within 1.5 – 2 hours. Written confirmation will now be required from counsel of the "*robustness of this estimate*", and there is the inevitable threat costs consequences.

In Brexit-related civil/commercial news, the government has produced guidance for legal professionals on Cross-border civil and commercial legal cases (available on the gov.uk website as at 4 January 2021). The note is in 3 parts: (1) Jurisdiction and recognition and enforcement of judgments; (2) Special European procedures; (3) Applicable law. Although the note itself is of no legal effect, it contains hyper-links to the various statutory instruments that will apply, as well as to the comparable EU guidance notes. In related news, the **Reciprocal Enforcement of Foreign Judgments (Norway) (Amendment) (England and Wales and Northern Ireland) Order 2020** amends the 1962 Order which gives effect to the agreement between the UK and Norway on recognition and enforcement of judgments. The changes are necessary to take account of the fact that the UK is not currently a member of the Lugano Convention.

The **Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020** and the **Non-Contentious Probate (Amendment) Rules 2020** are dealt with in more detail in Tim Clarke's article earlier in this review, so require no further comment here.

The pandemic has also led to restrictions on repossessions and evictions, and restrictions in that area continue in force. From 21 September 2020 possession claims have in theory been able to proceed through the courts. There is a new form 6A for the notice seeking possession of a property let on an assured shorthold tenancy, found in the schedule to the **Assured Tenancies and Agricultural Occupancies (Forms) (England) (Amendment) and Suspension (Coronavirus) Regulations 2020**. By the **Coronavirus Act**

2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2020 the requirement to given extended notice to obtain possession has been extended to 31 March 2021, although where the ground for possession is anti-social behaviour certain of the suspending provisions have themselves been disapplied. The 'relevant period' for the suspension of business tenancies (found in the Coronavirus Act 2020, s 82(12)) has been extended to 31 March 2021 by the **Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No.3) Regulations 2020**.

In civil procedure news, the **125th Practice Direction Update** to the CPR updates certain features of the Online Civil Money Claims pilot running under PD51R, including making more features standard in the process. The **126th Practice Direction Update** makes a larger number of changes, all related to Brexit and all related to competition claims. The **CPR (Amendment) (No.6) Rules 2020** amends Parts 81 (Contempt of Court) and 83 (Writs and Warrants). The changes to Part 81 are provision for contempt applications in the County Court to be heard, in certain circumstances, by district judges, and moving permission applications in the High Court to the Queen's Bench Division from the Administrative Court. The change to Part 83 is to make clear that permission is always required to issue a writ of restitution in aid of a writ of possession, whether permission was required for the original writ of possession or not.

In other legal practice news, the courts' Professional User's Access Scheme continues to be rolled out across the courts. Currently membership is only open to barristers, but it is greatly to be hoped that it will be quickly expanded to take in all legal professionals. The scheme operates (at the time of writing) at over 250 court and tribunal hearing centres, which may well be every such centre. Connected with Brexit, the **Services of Lawyers and Lawyer's Practice (Revocation etc.) (EU Exit) Regulations 2020** has repealed, with transitional provisions, the 1978 order and the 2000 regulations under which EEC/EU member state qualified lawyers could practice in this jurisdiction.

Chambers News

Neil Cadwallader and Mark Cawson QC appointed as Specialist Circuit Judges

Chambers congratulates Neil Cadwallader and Mark Cawson QC on their appointments as Specialist Circuit Judges. Neil's appointment takes effect from 2 November 2020 and Mark's from 30 November 2020. Both new judges will be based in the north-west, with HHJ Cadwallader sitting mainly in Liverpool and HHJ Cawson QC mainly in Manchester. Both Neil and Mark will be greatly missed by all in chambers, but we join in wishing them well in the next stage of their careers.

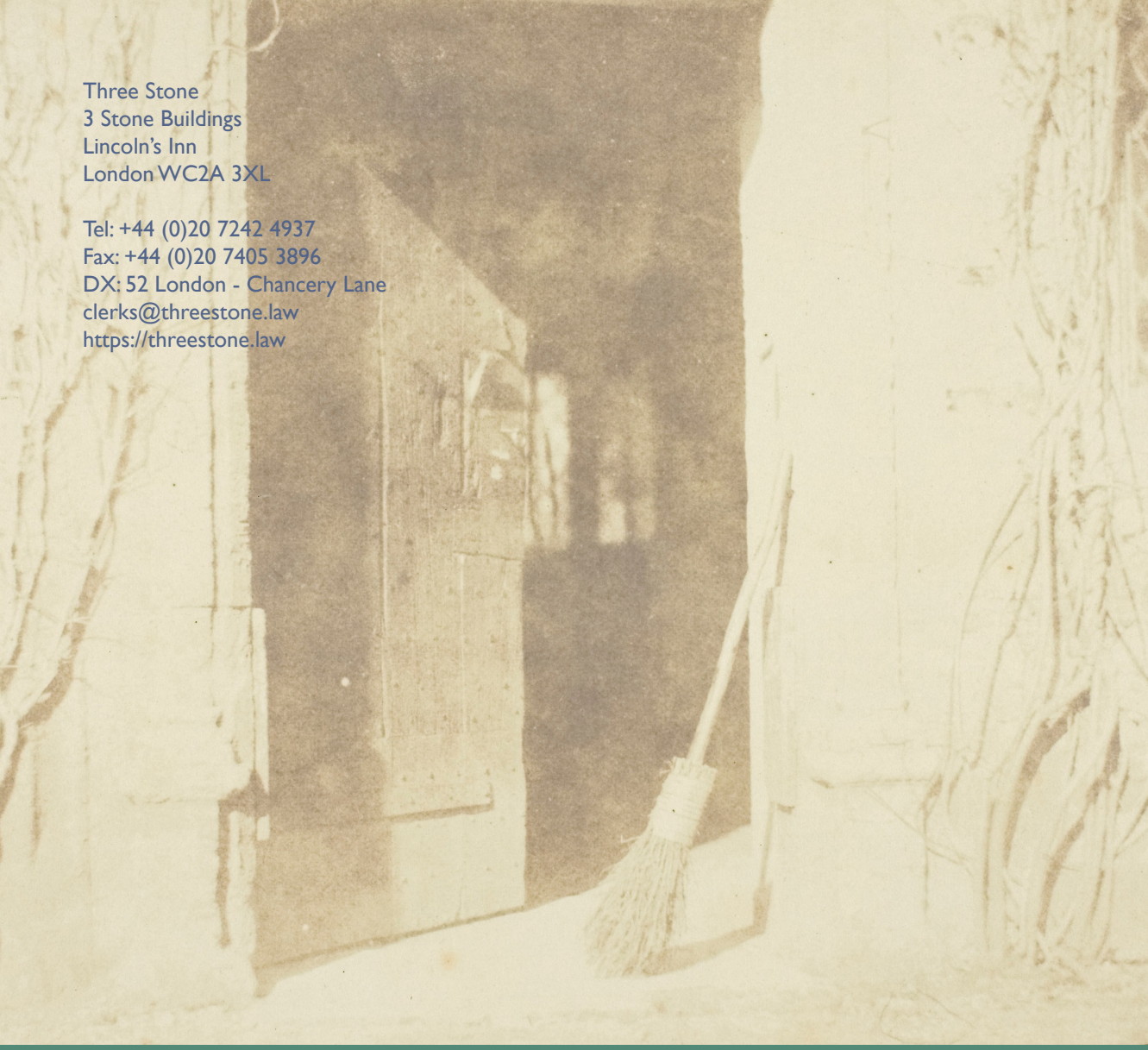
Giles Maynard-Connor takes silk

It was announced on 17 December 2020 that the Queen had appointed Giles Maynard-Connor as a Queen's Counsel. Chambers congratulates Giles on his elevation. Giles will continue to divide his practice between Three Stone and Exchange Chambers in Manchester.

Mark Baldock joins chambers as a 3rd six pupil

In January 2021 we are pleased to welcome Mark Baldock to chambers as a 3rd-six pupil. Mark joins us following a stint as judicial assistant to Mr Justice Snowden. His background includes a year at the Humboldt-Universitat zu Berlin doing an LLM in International Dispute Resolution and, before that, a double first in Classics from Cambridge. He is a much-published academic writer, and we are pleased to print his article on *Lehtimäki v Cooper* in this issue of the *Three Stone Triannual Review.*

Back cover image: WH Fox Talbot: "*The Soliloquy of the Broom*, 1843, Art Institute Chicago, Creative Commons Zero



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