Three Stone Triannual Review

Gateway to Lincolns Inn.

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Issue 3: May 2021

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The Three Stone Triannual Review

Issue 3 : May 2021

Editorial

It goes without saying that is always important for litigators to understand the procedural context in which their litigation arises, and to understand the procedural law that governs that context. There has been a tendency, at times, to see the Civil Procedural Rules (and others) as something to be observed in the breach. Even since the tightening up of the relief from sanctions provisions it has been possible in theory to persuade a court that even the most serious breach, incurring the most serious sanction, should be effectively passed over in the interests of justice. On one level that is clearly right – every system of procedure must have a safety valve such as CPR, r 3.9. But the mere existence of a safety valve is not a licence to ignore, forget, or fail to check the rules.

In this issue of the Three Stone Triannual Review procedural rules and related questions of good and bad practice are often to the fore. We note the case of *Bell v Brabners LLP* (see p35) in which Fordham J was highly critical of solicitors who had failed to copy correspondence sent to the court to the other side. Our Practice Note (starting on p44) notes the new rules on trial witness statements in the Business and Property Courts, and our review of *Global Display Solutions Ltd v NCR Financial Solutions Group Ltd* (p 31) notes the first judicial comment on those rules. In another context, Daria Gleyze's article (starting on p 9) discusses some of the procedural potholes and hurdles found on the journey through insolvency. In *re UR* (noted on p41) there is a rare judgment praising the good practice employed by the parties.

Alongside these procedural issues Stuart Cutting writes about bribes and secret commissions (starting on p2) and Michael Smith about open source software (starting on p 17). We hope that you all find something of interest.

"A Bribe or Not a Bribe ? That is the Question" (or is it?!)

In the Three Stone Commercial Seminar in March 2020 **Stuart Cutting** discussed the current law on secret commissions in light of Wood v Commercial First Business Ltd. Since then Stuart, led by David Lord QC, has appeared in the Court of Appeal on an appeal against that decision, conjoined with an appeal in the case of Finance 4 plc v Pengelly. Here he updates us on what the Court of Appeal found.

The original mortgagee in both Wood and Pengelly was Commercial First Business Ltd ("CF") and the broker was UK Mortgage and Financial Services Ltd (the "Broker"). In both cases the mortgages were subsequently assigned to various third parties (the "Assignees"). In the Court of Appeal the Assignees were the appellants. The appeal was dismissed in the lead judgment given by David Richards LJ (with Males LJ and Elisabeth Laing LJ in agreement). (Numbers in square brackets are references to the paragraphs of the Court of Appeal's judgment, which is found at [2021] EWCA Civ 471.)

Background Facts

Wood

Mrs Wood took out two mortgages (26 May 2006 and 12 July 2007) and a further advance under the first mortgage (30 November 2007), which were secured against Mrs Wood's farms. As the mortgages were commercial they were unregulated.

Mrs Wood paid a fee to the Broker in respect of the first mortgage and the further advance, but no broker's fee was paid in respect of the second mortgage.

The Broker received commission from CF in relation to the two mortgages and the further advance (being either 3% or 4% of the amount of the advance). CF did not disclose the fact or the amount of these payments to Mrs Wood as they required the Broker to do so.

Pengelly

Mr Pengelly took out a single mortgage (11 January 2006), which was secured against a barn on Mr Pengelly's farm. As the mortgage was commercial it was unregulated.

Mr Pengelly paid a fee to the Broker. The Broker received commission from CF in relation to the mortgages (being 3% of the amount of the advance). CF did not disclose the fact or the amount of this payment to Mr Pengelly as they required the Broker to do so .

No Requirement for a Fiduciary Relationship

If a "a fiduciary relationship" is required as a pre-condition for remedies in respect of bribes or secret commissions the inherent risk is either that civil remedies which should be available will be denied because there is not a fiduciary relationship, or that the term "fiduciary relationship" will be applied so widely as virtually to deprive it of content [46]. To ask in cases of this kind whether there is a fiduciary relationship as a pre-condition for civil liability in respect of bribes or secret commissions is an unnecessarily elaborate, and perhaps inaccurate, question [48]. It is the content of the duty, not the label attached to it, that matters, which is in accordance with the authorities as well as with principle [50]. The Court acknowledged that in a significant number of authorities, particularly recently, the liability of the payer and recipient of the bribe or secret commission was in terms of a "fiduciary duty" and an accessory liability for the payer (at [73] and [87]). However, such references were only in a "wide" and "very loose sense" ([73] and [79]).

It should be noted though in the case of a "half-secret commission" the Court of Appeal in *Hurstanger Ltd v Wilson and Anthr* [2007] 1 WLR 2351 made it clear that it is necessary to establish a fiduciary relationship [119] and [128].

Requisite Duty Owed by Payee

With there being no need for the payee to be in a "fiduciary relationship" with the borrower the question is much simpler. The payee will be "someone with a role in the decision making process in relation to the transaction in question e.g. as agent, or otherwise someone who is in a position to influence or affect the decision taken by the principal" [51] (affirming the view of Christopher Clarke LJ in *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm) at [108]).

The Court found that the emphasis on the duty to provide disinterested advice as the pre-condition to the application of the rules and remedies available in the case of bribes and secret commissions has been repeated in many cases since *Panama and South Pacific Telegraph Company and v India Rubber, Gutta Percha, and Telegraph Works Company* (1874-75) L.R. 10 Ch. App. 515 at [62] (with one striking authority being *Shipway v Broadwood* [1899] 1 QB 369 at [63]).

The straightforward and simple question to ask is:

> "Did the 'agent' [the payee] owe a duty to be impartial and to give disinterested advice, information or recommendations" [102].

If the payee was under such a duty, the payment of bribes or secret commissions exposes the payer and the payee to the applicable civil remedies. No further enquiry as to the legal nature of their relationship is required [48].

It is the duty to be honest and impartial that matters [92]. The precise scope of the payee's duties will require examination by reference to the terms of engagement [47].

In recent authorities courts have characterised the payee's duty as a "fiduciary duty of loyalty". While that may be accurate, it does not mean that the Courts need to involve themselves in complex analyses of the nature of a fiduciary relationship or the duties that may be associated with a fiduciary relationship. The Court found it would be better to avoid doing so [102].

Whether Broker Owed Requisite Duty On Facts

The Broker, on the basis of their terms and conditions, did owe the requisite duties on these facts to engage the law applicable to bribes and secret commissions. The Broker was under a duty to make a disinterested selection of mortgage product to put to its client in each case. To the extent that it was necessary, the Judges below were also correct to hold that the Broker owed a fiduciary duty of loyalty to Mrs Wood and Mr Pengelly [110].

Where the Broker only put forward a single product for the client's consideration (the so called "information-only sale"), it was the Broker and not the client, who had access to a panel of lenders and the Broker undertook to work from that panel to provide the "appropriate" product to meet the client's individual circumstances and needs. This necessarily involved judgment and choice on the part of the Broker.

Moreover, under the terms and conditions the Broker had express authority to negotiate with lenders and could thereby seek to improve the terms available to the client [113].

The High Court authority of HHJ Raynor in *Commercial First Business Ltd v Pickup and Vernon* [2017] CTLC 1 (where the Court had dismissed the half secret commission claim on the basis that no fiduciary duty was owed as there could be no expectation of "undivided loyalty" and the broker was a mere introducer) was wrongly decided [126]. On the broker's terms and conditions there was clearly intended to be an exercise of judgment on the part of the broker as to what best fitted the borrower's requirements, which was an exercise requiring an impartial and disinterested view (thereby being sufficient to impose a fiduciary duty on the broker) [125].

Half or Fully Secret?

The Broker's terms and conditions were identical for Mrs Wood and Mr Pengelly. They notified Mrs Wood and Mr Pengelly that the Broker "may" receive fees from creditors with whom it placed mortgages. The terms went on to say:

> "Before you take out a mortgage, we will tell you the amount of the fee in writing. If the fee is less than £250, we will confirm that we will receive up to this amount. If the fee is £250 or more, we will tell you the exact amount."

The evidence of Mrs Wood and Mr Pengelly was that they did not receive any subsequent written notification of the fact or amount of the Broker's commission. The Court found that the Broker's failure to make any disclosure in accordance with the terms and conditions in these cases meant that Mrs Wood and Mr Pengelly were entitled to proceed on the basis that no commission was being paid [119]. Therefore on both cases this was a case of fully secret commission [134].

Rescission

Secret payments were treated as a special category of fraud with the principal being entitled to have the relevant contract rescinded as of right at his or her election [61]. Therefore. rescission of a transaction with the third party is available as of right in cases of bribes or secret commissions, subject to making counter-restitution [101].

In such circumstances the loan agreement and any security provided will be unwound, which will mean that: (i) the borrower will have to repay the original loan to the lender together with any accrued intertest; (ii) the lender will have to repay any payments made by the borrower together with any accrued interest; (iii) the lender will have to repay the commission paid by the lender to the broker together with any accrued interest (although where the loan has been securitised the liability of the original lender is not assigned to the assignee – see *Wood v Commercial First Business Ltd* [2019] EWHC 2205 (Ch) at [162]).

Commentary

Many practitioners, particularly those acting for borrowers, considered that the law was unsatisfactory and caused fundamental difficulties in demonstrating the existence of a relationship of trust and confidence in context of the modern borrower-broker relationship where finance is fast and increasingly impersonal and often a borrower may not understand the precise role of the broker, how they are being paid or what the extent of their responsibilities are.

This inherently restrictive approach has now been overturned by the Court of Appeal in what constitutes a radical and novel departure and has effectively set aside over a decade's worth of incremental development from the lower courts relating to the assessment of secret commissions. The centrality of the 'fiduciary question' is no more. Instead, the Court preferred the altogether simpler question of:

> "Whether the payee [the broker] was under a duty to provide information, advice or recommendation on an impartial or disinterested basis."

This decision brings clarity (albeit not necessarily welcome by lender clients) on the extent of a broker's duty to disclose any commission received to the borrower. It is no longer necessary to grapple with the legal complexities of fiduciary relationships; the Court simply needs to examine the role of the broker, asking whether they are subject to a duty to provide impartial information, advice or recommendation. This test is more easily understood and avoids undue complexity. Furthermore, it resolves a conflicting line of authority that was beginning to emerge on this question.

It is likely to extend to the majority of cases where a borrower instructed a credit broker to provide them with advice regarding loans that they might be eligible for and to arrange the loan on their behalf. It could be argued that the breadth of the test would cover information-only sales, although lender clients would need to examine the extent of the relationship between the broker and borrower to see if this is the case. In this regard, the test is fact sensitive and the Court of

Appeal have given very few clues as to where to draw the line between those relationships which do impose the duty and those that do not. This will certainly be an area in the future where litigation in secret commission claims will focus to try to clarify this issue. Further, despite the significance of the Court of Appeal judgment, it remains unclear how a Court in the future would look at broker/ borrower relationships based on substantially different facts.

A decision by Judge Pickering on counter-restitution in Wood is expected shortly.

Stuart Cutting

The Long Road to Insolvency

Insolvency practice is littered with weary travellers, worn out by procedural rules and technicalities. Here, **Daria Gleyze** counsels those on that road to stay the course, and sets out some entertaining reminders, and a couple of cautionary tales, to help on the way.

As many a petitioner will know, starting insolvency proceedings is only the first step in the long, winding, and sometimes scenic road to a collective remedy. The road is usually littered with adjournments and procedural obstacles, has potholes of ultimately irrecoverable costs, and is widely exposed to the elements, including copious gusts of court discretion. The road may or may not ultimately lead to a bankruptcy or winding-up order and will only occasionally reach a destination worth the effort for either the petitioner or other creditors.

The brave of heart willing to walk this perilous road should come prepared. There are many traps along the way, and it would take an encyclopaedic article (overstretching the otherwise ample goodwill of the editor of this newsletter and probably of its readers) to even try to address them all.

Therefore, in compendious fashion, I discuss below only two of the issues troubling the insolvency traveller: where to start the journey and whom to watch out for on the road.

Where to present the petition 1: Companies

The High Court has jurisdiction to wind up any company registered in England and Wales, pursuant to s 117(1) Insolvency Act 1986. The High Court is informally known as the "Companies Court" when exercising its jurisdiction under the Companies Act and the Insolvency Act, but there is no separate or distinct court of that name.

A winding-up petition can also be brought in a county court having bankruptcy jurisdiction but there are a few caveats:

(1) The county courts within the "London insolvency district" (i.e. the areas situated within the districts of the following county courts: Barnet, Bow, Brentford, Central London, Clerkenwell & Shoreditch, Edmonton, Lambeth, Mayor's & City of London, Wandsworth, West London and Willesden) have no jurisdiction to deal with corporate insolvency proceedings, so insolvency proceedings against companies with their registered office in those areas must be commenced in the High Court.

(2) The county courts' jurisdiction is limited by s 117(2) Insolvency Act 1986 to where the company's share capital as paid up does not exceed £120,000, but the High Court retains discretion to transfer down winding-up proceedings to the county court even where the paid-up capital exceeds £120,000. The figure of £120,000 has remained unchanged since 1976 and it is out of kilter with the county courts' other jurisdictional limits, which have been increased since.

The vast majority of winding-up petitions are commenced in the High Court (either in London or in one of the district registries) and it remains a safe bet in terms of starting proceedings effectively.

However, starting winding-up proceedings in the wrong court does not invalidate them (s 118 Insolvency Act 1986). If they are started in the wrong place, they will usually be transferred to where they should have been. The court in which they were wrongly commenced has a discretion to retain them there, but only if it has the required insolvency jurisdiction and powers to deal with them (*Re Pleatfine Ltd* (1983) 1 B.C.C. 98942). The discretion is more likely to be exercised where the mistake was innocent and it would cause no prejudice to the company. If

there is prejudice or if there are reasons to believe that the petitioner has made a calculated move to start in the wrong place, the petitioner risks being penalised in costs (for example, being ordered to pay the company's costs up to when the petition is transferred to the correct court) or even, in more serious cases, seeing its petition dismissed.

Where to present the petition 2: Individuals

Broadly speaking, the jurisdiction in respect of debtors resident in the London insolvency district (see above) is split between the County Court at Central London ("CLCC") and the High Court, with cases where the petition debt is less than £50,000 being allocated to the former and higher value cases to the latter.

The general principle of jurisdiction outside of London is that the petition must be presented to the county court for the insolvency district in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation of the petition.

There is a notable exception applicable to both London and non-London cases: where the petitioner is aware that the debtor is subject to an IVA at the time of the presentation of the petition, they must present the petition to the court to which the nominee's report under s 256 Insolvency Act 1986 was submitted (regardless of the debtor's residence or place of business) (see r 10.11(6) Insolvency Rules 2016).

The pitfall of the opposed petition in the county court

Even where the petitioner has established with some certainty that the correct court to issue in is a county court outside London, they may face further difficulties. Not all county courts have insolvency jurisdiction and even those who do are not created equal.

The allocation of jurisdiction is performed by the Lord Chancellor acting by statutory instrument under powers conferred by s.374 of the Insolvency Act 1986. The primary provisions for allocation of insolvency jurisdiction are in the Civil

Courts Order 1983, as amended, read together with sch 6 to the Insolvency Rules 2016. The arrangements are variable and are revised periodically. As a rule of thumb, larger provincial county courts have insolvency jurisdiction, but practitioners should check before issuing.

One particularly absurd trap is that some county courts have can hear bankruptcy and winding-up petitions but only when they are not contested. This is because, unless the county court in question is located at a Business and Property Court, it can only hear "Local Business", which includes unopposed petitions, but not opposed ones (see paragraphs 3.6 and 3.7 of the Insolvency Practice Direction).

So, if and when a petition becomes opposed, the "Local Business"-only county court must transfer it to another county court in the same circuit which is located at a Business and Property Court (or to a specialist centre in that circuit).

At the point of issue, it will not always be obvious whether a petition will be contested, so the parties might face the prospect of attending one or multiple hearings in the original county court, only to be transferred to another county court when the debtor opposes the petition. The opposition may come quite late in the proceedings, and it is not unusual for the debtor to raise it for the first time at the final hearing (despite the requirement to give 5 days' notice of the opposition).

Even where it is obvious from the start that a petition will be contested, for example because of longstanding litigation between the parties, or because the debtor had already unsuccessfully tried to set aside the statutory demand, the petitioner still has to start in the local court of the debtor and go through the motions until the inevitable transfer to another county court.

The author was instructed in a recent case which exemplifies the above. The petitioner had predicted (as it turned out, correctly) that the debtor would oppose the petition. Accordingly, the petitioner's solicitors tried to issue the petition directly in the relevant court with opposed bankruptcy jurisdiction (here it was CLCC) to streamline the process. CLCC refused to issue the petition and requested that the petitioner issue it in the debtor's local court, which was Kingston County Court.

The petitioner accordingly issued in Kingston County Court and the petition was listed for a final hearing. Two days before the hearing, the debtor served a notice of opposition. The parties attended the hearing only for the judge to inform them that he no longer had jurisdiction over the matter and that he had to transfer it to CLCC. The petitioner explained that, upon transfer, the petition would have gone full circle, as he had already tried to issue in CLCC but was sent to Kingston. The judge expressed sympathy but (accurately) identified that he was required to transfer it and had no discretion to retain the petition in Kingston.

The irony of the rules is that, upon transfer to the relevant court with jurisdiction over opposed petitions, a specialist judge must review the petition on the papers and, upon review, can decide to return it to the sending court "to be dealt with as if it were Local Business". Luckily, CLCC accepted jurisdiction the second time round so the parties did not have to go back to Kingston once again.

The author would be interested to hear from anyone who has had any experience with this issue and in particular how they resolved it. In the example above, it was evident that the debtor would oppose the petition as it had come after some 10 years of underlying litigation both at first instance and on appeal, followed by protracted proceedings to set aside the statutory demand which went on appeal to the High Court. Even so, CLCC declined initial jurisdiction for the petition.

It may be that, if the parties confirm in writing that it would be an opposed petition, the court with jurisdiction over opposed petitions would accept it from the start rather than send it to be issued in the court without such jurisdiction. However, debtors who cooperate with the petitioner to get matters going in the ultimately correct court are likely to be rare. Usually, it would not be in the debtor's best interest allow the petitioner to streamline the process, because this would accelerate the timeline between petition and final hearing.

This appears to be an area ripe for some reform, at least to prevent cases such as the above, where both the courts' and the parties' time is wasted and the petitioner's costs accrue for no particularly good reason.

Beware those other creditors!

Another matter to bear in mind, and often overlooked when petitioning, is the existence and actions of other creditors. The creditor intending to petition should check whether there are other ongoing petitions against the debtor. If there are, the creditor would be well advised to participate in those proceedings rather than start separate ones.

Conversely, if for some reason there are concurrent petitions against the same debtor, the petitioning creditors should give serious thought as to whether they wish to argue among themselves as to whose petition should have priority or simply discontinue their petitions and become supporting creditors to a stronger petition. As the example below shows, it may be worth abandoning one's petition in favour of supporting another's even when the former is first in time.

The author has had recent experience in insolvency proceedings where the only disputes were among the creditors themselves (*Re Zanelli*, High Court, 18 November 2020). The debtors in that case, a Mr and Mrs Z, had a business which failed to pay its dues to various emanations of the state as well as to private creditors. On 19 August 2019, HMRC commenced winding-up proceedings against the business and petitioned for the bankruptcy of Mr and Mrs Z, both in the High Court. The business was wound up without significant difficulties, but the bankruptcy petition took a rather different course. The bankruptcy petition debt to HMRC was around £300,000. Westminster City Council (who instructed the author of this article) were owed some £170,000 in unpaid business rates and had made statutory demands but, upon preparing to issue the petition, discovered that HMRC had already done so and joined as supporting creditors.

During the course of the bankruptcy proceedings, it emerged that two other creditors (let us call them "*the Electricity Supplier*" and "*the Business Creditor*") had made concurrent petitions in other courts. The Electricity Supplier (whose petition postdated HMRC's and was for some £80,000), abandoned their petition and decided to support HMRC's.

For unexplained reasons (but not altogether surprising given how notoriously overstretched HMRC are in terms of litigation resources), HMRC kept seeking

adjournments rather than pressing for a bankruptcy order to be made. Mr and Mrs Z had not participated to any significant extent in the proceedings and seemed to have disappeared from the jurisdiction, so there seemed little point in trying to settle with them. When the second such adjournment was sought, both Westminster City Council and the Electricity Supplier expressed a wish to take carriage of HMRC's petition in order to progress matters. The Court allowed a short adjournment so that one or the other of the creditors could apply to take carriage.

In the end, rather than having an argument with its (up-until-then) supporting creditors, HMRC decided to seek a bankruptcy order.

In the meantime, the Business Creditor, who had presented their petition on 14 December 2018, some 8 months before HMRC, decided to oppose HMRC and ask for the bankruptcy order to be granted on their petition. The Business Creditor's petition was initially for £23,000, gradually reduced by way of part payments to £3,900.

The final hearing lasted over 1 hour, despite being attended exclusively by creditors, with neither debtor being present and everyone agreeing that bankruptcy orders ought to be made. HMRC (and its supporting creditors) on the one hand, and the Business Creditor on the other argued in some detail as to whose petition should form the basis for the order. The main argument for the Business Creditor was that they had been first. HMRC's argument was that the Business Creditor's petition had since fallen below the minimum threshold and that their own petition (supported by the largest creditors) was a more solid basis for the bankruptcy.

The Judge, Chief Insolvency and Companies Judge Briggs, considered whether to exercise his discretion to make the order on the Business Creditor's petition despite it falling below the threshold (on the authority of *Lilley v American Express Europe* [2000] BPIR 70) because it would allow the relation back to go further back in time. The Judge held that it was unfortunate that the insolvency rules relation back would not go as far back under HMRC's petition, but this would not prevent going back at common law. The relation back was not strong enough of itself to justify going beyond the rules on minimum amount of debt. HMRC's petition

was stronger in terms of sums outstanding and support from other creditors. Therefore, he made the bankruptcy order on HMRC's petition, with the usual order for costs in the petition.

The Court making the order on HMRC's petition meant that the Business Creditor's petition stood dismissed, with the unfortunate consequence (for the Business Creditor) that they could not recover any of their costs. The Judge considered but rejected arguments that he should also allow the Business Creditor's costs in the petition. The Business Creditor had had the opportunity to support HMRC's petition but had chosen not to do so.

A final word to the weary insolvency traveller

Hang in there! More seriously, as seen from the above, it is important for would-be petitioners to do careful due diligence before issuing proceedings, follow the (somewhat overly technical) requirements of the rules and consider the realities of the other creditors' actions/involvement. That should at least save some of the expense, if not shorten the trip.

Daria Gleyze

Insolvency Issues in Open Source Software

In this article, **Michael Smith** shows us why those dealing with insolvencies should be aware of open source software, and tells us why it is only going to become more important in the future.

Introduction and some definitions

Computer software is essential in the modern world. Without it, computers would be useless lumps of silicon and metal. Nowadays, nearly all individuals and all businesses, big or small, use computer software in many daily activities.

Computers can only understand machine code - binary numbers representing processing instructions, locations in the computer memory and numerical data. Machine code is very hard for humans to understand. It is rare these days for software to be written directly in the computer's language. Instead, software code is written in languages which are easier for a human programmer to understand. Examples of those languages are C, C++, Java, BASIC, etc. The code written in these human-readable languages is called "source code".

Source code has to be translated into the computer's language before it can be used. Some languages do this by interpreting the source code on-the-fly. These are called interpreted languages. Most commercial software, however, is created by compiling or translating the source code into a file or several files containing the machine code that be understood by the computer. This is called "object code".

What is open source software?

The traditional model for commercial software was a closed-source model. The consumer was given a disk or a download of the object code and a licence to use it, but did not have access to the source code, which was often a closely guarded secret.

The open-source model is very different. The source code is made available, often without charge, allowing consumers to customise software or to integrate it with their products. Though open-source software has been around as long as software, it became something of a movement in the early 1980s and exploded in the 1990s with Linux and the growing importance of the Internet. Now, open source software is ubiquitous. Linux, which underlies the (open source) Android mobile phone/tablet operating system and runs most of the infrastructure making up the Cloud, is now the dominant operating system by a long way.

What is the legal basis of open source software?

There is no standard legal definition of open source software or any single legal framework that defines the rights and obligations of software creators and software consumers.

Software itself may be protected by copyright and in some jurisdictions/ circumstances by patents.

Software may also contain or express confidential information. However, if the source code is made public, the confidentiality will be lost so legal issues relating to knowhow/confidential information are not likely to arise when dealing with open source software.

The legal basis of open source is usually a contractual licence. The licence is typically published alongside the code and also distributed with it. There are a number of standard contractual licences, many of which can be found at https://opensource.org/licenses. Each of them gives rights to users of the source and imposes obligations on them. The obligations in some licences are not especially burdensome. Attribution and the requirement to distribute the licence with any

product or code which incorporates the source is usually a minimum. Other licences are more onerous. So-called "copyleft" licences require a product incorporating the licensed code to be distributed with the same freedoms/permissions as the original source.

How does the licence become binding? There is surprisingly little authority on the subject. Nothing appears to be directly on point. Going back to first principles (literally), in English law this question is likely to be answered by reference to the very first case studied by any contract law student - *Carlill -v- Carbolic Smoke Ball Co* [1893] 1 Q.B. 256. Making the source available amounts to an offer to the world on the terms of the published licence, which anybody can accept by downloading the software and complying with those terms.

What has all this got to do with insolvency?

As software generally and open source software particularly become more important to businesses, insolvency officeholders are having to deal with it in more and more cases. Businesses with exposure to open source software can be put into one or more of three categories: (1) users of products containing open-source software; (2) developers of software that incorporates others' open source software; and (3) developers of open source software.

To an officeholder, a business that uses products containing open source software presents no new problems. There is little legal difference between open source software and closed source software to a user of the end product.

New problems may arise in the second category. An officeholder is unlikely to want to carry on a software business herself. But understanding the rights and restrictions imposed on the business by open source software licences can lead to better valuations, either of the business as a whole or its software assets. The intellectual property of insolvent businesses is often heavily discounted because the usual sale agreements make no warranties to title or the right to use the IP. Few sensible officeholders would give such warranties, but understanding where the true title/rights risks lie can improve a negotiating position.

In the third category, an officeholder might wonder how to monetise the open source code, particularly if it has been made available for free. The starting point is that there is still value in open source code. Owning it gives control over the direction of development. Often there are associated trade marks and knowhow. The business which owns the source has opportunities to charge for support, certification, premium options and so forth. Once again, the officeholder probably won't want to get into that business herself, but these opportunities all have a value that can be estimated and realised by a sale.

Can an officeholder seek to revoke an open source licence? The first place to look is in the licence itself for a right to revoke. Most, however, do not contain such a right. Some are expressly irrevocable, for example the Apache 2.0 licence - https://opensource.org/licenses/Apache-2.0. Even absent an express term prohibiting revocation, significant legal and practical difficulties are likely to arise implying a term allowing termination on reasonable notice and with exercising such a term. How to give reasonable notice to a person whose original notice of the contract could have arisen in innumerable ways is likely be a vexed question.

What about challenging an open source licence? An officeholder can challenge contracts in a variety of ways that the insolvent business could not prior to the insolvency. Open source software, particularly when licenced on terms that do not provide for any payment, may fall within the definition of a transaction at an undervalue under sections 238, 339 or 423 of the Insolvency Act 1986. Genuine open sourcing is now considered a legitimate commercial activity. The mere fact that a business opens its source is not likely to be enough. Consumers of that source will probably have good faith defences under, for example, sections 238(5), 342(2)(a) or 425(2)(a) of the Insolvency Act.

There will be cases, however, where there is a good claim under sections 238/338/423 and is no good faith defence. These cases are likely to arise where the major user of the open source software is a person or entity closely associated with the directors/management of the insolvent business. There may be cases where the "opening" of the source is a sham, intended to allow a connected business or a phoenix to continue to use it after the insolvency event, without paying for it. In these cases, this writer has little doubt that a court would make appropriate

orders to restore the business's position or to compensate it for the lost value.

In a corporate insolvency, a director who causes or suffers a dubious open sourcing scheme such as described in the last paragraph may also find himself facing a claim for breaching the duties he owes to the company.

Even without a scheming intention, a director who authorises an opening of his company's source code may find himself in breach of his duties to the company if no reasonable director in his shoes would have done the same. Where expensively produced code is, in effect, given away without a business case to exploit it by other means, it is hard to conceive how the director who authorises that action is promoting the success of the company as his duty requires, particularly if the company is in financial difficulties. A dedication to the principles of the open source movement is unlikely to assist him, however strongly he holds the view.

Conclusion

With the explosive growth of the computer software industry in recent years, especially with the large and growing number of micro-developers working in the field of Apps and similar small-scale software, more and more insolvencies are likely to involve software. It is increasingly important to understand the special issues that arise when open source software and insolvency meet.

Michael Smith

Case Reviews

Re TA (Recording of hearings; Communication with the court office) [2021] EWCOP 3

In this case Cobb J was persuaded to make orders restricting the right of a party to communicate with the court office. The party concerned, TA, had a history of voluminous, and often abusive, communication with authorities. The local authority and the Official Solicitor had had to implement protocols to deal with TA's communications including, in the authority's case, refusing to speak to him on the telephone. The court office had had similar experiences, and the court ordered production of a witness statement from the Operations Manager of the Court of Protection in Leeds. That showed that at times correspondence (on paper and electronically) in relation to the case was being received from TA at a rate of about 130 documents a month. Over 2020 TA also made 35 applications to the court. TA did not accept that his conduct had been excessive, inappropriate or intemperate, but Cobb J exercised his powers under s 47(1) of the Mental Capacity Act 2005 to order that TA should only communicate with the office by post, under a penal notice. An application by TA for permission to record hearings of the Court was refused.

Simon Hunter

Faiz v Burnley Borough Council [2021] EWCA Civ 55

When deciding whether or not forfeiture of a lease has been waived "the critical question is whether the date on which the rent fell due preceded or post-dated the breach, rather than the date of the landlord's knowledge; provided that, when he demanded or accepted the rent, the landlord knew that the breach had been committed". In this case, the landlord made a demand for rent and, unknown to the landlord, the tenant breached a covenant. The landlord subsequently discovered the breach and gave the tenant notice under section 146 of the Law of Property Act 1925 before sending an amended demand for rent which was paid by the tenant.

This appeal raised two issues: "First, does the acceptance of rent after a breach of covenant with knowledge of that breach waive the right to forfeit, where: i) the rent in question had accrued due and been demanded before the landlord had knowledge of the breach; but ii) the rent had accrued due and was demanded after the breach itself; and iii) the landlord accepted the rent after becoming aware of the breach? Second, was the demand for insurance rent made on 4 November 2019 a new demand for rent accruing due after the landlord had acquired knowledge of the breach?". On the first issue, although the exact date of the breach of covenant was uncertain, the tenant bore the burden of proving waiver and the tenant had failed to establish that the rent initially demanded by the landlord accrued due after the breach. Accordingly, there had been no waiver in that regard. On the second issue, on the facts, the amended demand for rent did not constitute a new demand and did not therefore amount to a waiver either.

Emma Knight

CFL Finance Ltd v Gertner [2021] EWCA Civ 228

This is a rather surprising decision about the interrelationship between Tomlin Orders and the Consumer Credit Act 1974. It seems likely that it will have far-reaching effects across the legal landscape. Mr Gertner had guaranteed a loan made by CFLF to a company. The company defaulted and proceedings were issued under the guarantee against Mr Gertner. Those proceedings were defended. In September 2011 they were compromised by way of a Tomlin Order. The schedule to that order provided that Mr Gertner was to pay £2m to CFLF in quarterly instalments over 2 years, as well as a £50,000 contribution to CFLF's costs. In default of any payment a capital sum of £1.7m fell due immediately with some stringent interest provisions (including compound interest at 2.5% per month from 2008). Mr Gertner paid approximately £1.5m, but failed to pay the costs or the remaining balance. CFLF presented a bankruptcy petition in 2015, at which point the total amount due was said to be over £11m. For reasons which are not clear this petition was not heard until July 2019. At that hearing a bankruptcy order was made by CICCJ Briggs. Mr Gertner and a creditor appealed on the bases (1) that the petition should have been stayed to allow an IVA to be considered by the creditors; and (2) that the schedule to the Tomlin Order was unenforceable because it did not comply with the Consumer Credit Act 1974. This latter ground had been rejected by CICCJ Briggs, and Marcus Smith J was not convinced either. For various procedural reasons the only party present when the matter came before the Court of Appeal was Mr Gertner, so no adversarial argument was heard.

The Court of Appeal (David Richard, Newey, and Popplewell LJJ) unanimously allowed Mr Gertner's appeal. After analysing the statute and the judgments below the Court identified 2 key questions: (1) does the CCA 1974 apply to the schedule to Tomlin Orders?; and (2) did this schedule provide Mr Gertner with credit? The first question is answered quickly: the schedule to a Tomlin Order is a contract, and therefore an agreement, and there is no inherent reason why the CCA 1974 should not apply. On the second question, this is a question, of course, of fact. At

[45] the court draws together the principles derived from authorities, and Newey LJ then goes on to say at [50]: "It seems to me that there must come a point at which the existence of a debt is sufficiently clear that an agreement providing for future payment will confer "credit" within the meaning of the CCA regardless of whether the debtor has denied that anything is due." His Lordship does admit that there is "room for argument": [51] about where the dividing line is between a debt and a mere claim (the CCA 1974 would apply to the former but not the latter), but as there was no argument the Court does not decide where it lies. Here, there was no substantive defence, the debt was sufficiently clear, and the CCA 1974 bit on the schedule. It was therefore unenforceable. Anyone drafting settlement on Tomlin terms should be aware of this decision, and no doubt ingenious ways will be found to avoid its full, unfortunate, effects.

Simon Hunter

Satyam Enterprises Ltd v Burton [2021] EWCA Civ 287

Amongst the points made by the Court of Appeal in this case (an appeal against a decision of James Pickering QC sitting as a Deputy High Court Judge) is a detailed statement of principle in relation to the importance of pleadings in civil litigation. The deputy judge had found that a particular property was held on trust for a particular person. This was not part of either side's pleaded case, nor was it canvassed at trial. This formed one of the grounds of appeal. Sensibly, the respondent did not seek to uphold the decision on this basis. Despite this, Nugee LJ addressed the point. His Lordship described this, cuttingly, as "impermissible, and a misunderstanding of the judge's function": [36], and went on "Judges may sometimes think – and may even sometimes be right – that their own theory better fits the facts than that of either party, but if it is wholly outside the scope of the pleaded issues, that is nothing to the point": [38]. The appeal was allowed on that basis and because the deputy judge also "failed to make crucial findings of fact on pleaded matters that were in issue", something Lewison LJ described as "doubly regrettable": [81].

Simon Hunter

Re Bell Pottinger LLP [2021] EWHC 672 (Ch)

The question raised by this case is whether a member of a limited liability partnership ("an LLP") has to be involved in the management of that LLP for the Company Directors Disqualification Act 1986 ("the CDDA") to apply to them. The case involved the now-collapsed PR firm Bell Pottinger LLP. The applicants were more junior members of the LLP and neither was involved in the management of it. The Secretary of State's position was that the relevant regulations applying the CDDA to LLPs were unambiguous and that they said that all members of the LLP were to be treated as directors for the purpose of the CDDA. The questions for the court (Michael Green J) were (i) whether Parliament intended the CDDA to be applied to all members of an LLP and (ii) it not, where the line was to be drawn between those who were included and those who were not.

Having considered the structure of the LLP's organisation ([7]-[24]), the terms and purpose of the CDDA ([25]-[34]), and the terms of the relevant regulations ([35]-[39]) the judge turned on to the necessary process of statutory interpretation. His conclusion is involved in its reasoning, but clear in its statememt: "(1) All members of an LLP are potentially liable to face disqualification proceedings; (2) There is no qualification to the jurisdiction over all members under s.6 CDDA that the member has to be on the management board or at a level equivalent to a director in a company; (3) The conduct that can be relied on is anything that is done in the capacity of a member of the LLP." Whilst I can see the argument made by the 'junior' partners that there is a difference of application between a company (where only the very few people on the board of directors will be caught by the CDDA) and an LLP (where many more people may be caught as partners), the wording of the relevant regulations seem to me to admit of no other interpretation.

Simon Hunter

Rokken v Rokken [2021] EWHC 481 (Ch)

A testatrix, Elizabeth Rokkan, who grew up in Wales, married a Norwegian national and moved to Norway in 1952, where she became domiciled. Her husband died in 1979. Mrs Rokkan took out "deferred probate" (a process available under Norwegian inheritance law) of her late husband's estate the same year. In 1987, Mrs Rokkan returned to Wales. She died domiciled in England and Wales on 17 January 2016 leaving a will dated 11 September 2012. One legacy in her will, found at clause 5, was a gift to the Claimant of her bank balances at a Norwegian bank. Before her death, Mrs Rokkan had moved the balances from the Norwegian bank to Lloyds in the UK. At the time of the balance transfer, it was said, Mrs Rokkan lacked capacity. Two matters arose in the administration of her estate, which were decided by the High Court as preliminary issues. The first related to "deferred probate", which was defined by Mr Justice Miles in the High Court as a process "by which, in very broad terms, the surviving spouse may apply to the court for an order by which the surviving spouse is allowed to possess the whole of the joint estate of the deceased spouse and the surviving spouse and becomes subject to various obligations. The law provides that when the surviving spouse dies the joint estate is divided in two and each half passes to the heirs of the deceased spouse and the surviving spouse respectively (who may be the same)" (at [2]). The Court had to determine whether the grant of deferred probate gave rise to an enforceable obligation against Mrs Rokkan's estate. Secondly, did the legacy at clause 5 fail?

On the first issue, the Court followed the established principles of the conflict of laws. Issues of succession fall to be determined (save as to immovables) by the law of domicile on death. Mrs Rokkan had died domiciled in England and Wales, and therefore the Norwegian Inheritance Act had no application under English and Welsh private international law (at [63]). On the second issue, the Court applied the domestic law of ademption. Clause 5 referred to Norwegian deposits. No such deposits existed at death, and there was nothing on which clause 5 could bite. There was no basis for treating clause 5 as applying to anything else including

the balance at Lloyds. This position was unaffected by whether Mrs Rokkan had had capacity when making the transfer (at [91]). There is a recognised exception where a person makes a change in the character of a testator's property without the authority (and knowledge) of the testator, but there was no question of a breach of authority as the transfers were effected by Mrs Rokkan herself albeit, on the assumed facts, without capacity (at [88]).

Rupert Coe

Wood v Commercial First Business Ltd [2021] EWCA Civ 471

A longer note on this important case is found in Stuart Cutting's article in this issue of the Three Stone Triannual Review

David Lord QC and Stuart Cutting appeared for the Appellants

Re Zoom UK Distribution Ltd [2021] EWHC 800 (Ch)

This is (yet another) case about a potentially defective appointment of administrators to a company. The administrators applied for a declaration that the appointment was effective. The directors applied, out of an abundance of caution, for a retrospective appointment. Somewhat surprisingly, the purported appointment was as long ago as 5 May 2020. The defect in this case was failing to give the necessary written notice to a secured charge holder. The matter came before Stuart Isaacs QC sitting as a High Court Judge. The Judge reviewed a number of the cases, noting that "the only decision which is directly on point is that of ICC Judge Jones in Re Tokenhouse VB Ltd … [2021] BCC 107, which is not binding on this court." The Judge did, however, follow that decision, declaring the appointment valid. At [15] he said that there was "now a consensus … that the answer to the question whether non-compliance results in invalidity depends on whether Parliament intended that outcome."

Tokenhouse was itself reviewed in the last edition of this Review, when Michael Smith said "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." That conclusion remains the case, although the weight of first instance authorities is now stacking up.

Simon Hunter

Global Display Solutions Ltd v NCR Financial Solutions Group Ltd [2021] EWHC 1119 (Comm)

This case is one of the first to consider the new rules in the Business and Property Courts on the drafting of witness statements (see the Practice Update in this edition of the TSTR), although it was heard before those rules came into force. Jacobs J said (at [87]) that there was "no reason why" the Defendant's witnesses should not have looked at contemporaneous documentation. His Lordship went on: "The Civil Procedure Rules were amended early in 2021, after witness statements had been served in the present litigation, so as to introduce new rules relating to the way in which witness statements should be prepared. Even under the new rules, however, it remains permissible for witnesses to refresh their memory from contemporaneous documents before setting out their evidence in witness statements: Paragraph 3.2 of PD 57AC, and the Statement of Best Practice contained in the Appendix to the Practice Direction at paragraphs 2.6 and 3.4, contemplate that witnesses will be shown contemporaneous documents, particularly those which they have previously seen when the events were fresher in their minds." The relevant witnesses in this case had not done this. Jacobs J concluded that that meant that their evidence was "far less likely to be reliable than it might otherwise have been": [88]. The balance between refreshing memory from contemporaneous documents and (re-)constructing it from those documents is a fine one, but this is an unusual case in which it appears that an over-abundance of caution was detrimental to the party's case.

Simon Hunter

Lin v Gudmandsson [2021] EWHC 820 (Ch)

Chief ICCJ Briggs heard an ex-wife's application to annul her ex-husband's bankruptcy on the basis that the original order ought never to have been made (s.282(1)(a) IA 1986) because the ex-husband and the petitioning creditor, a friend and business associate, had colluded in obtaining it so as to defeat the order for financial relief she had obtained in the divorce. The Judge dismissed the application. The ex-husband had not disputed the petition debt, which apparently arose from an unrepaid loan. The Judge distinguished cases concerning a debtor's own petition for bankruptcy and a creditor's petition: the warnings in the authorities that a party to financial relief proceedings may attempt to use the protection of bankruptcy to prevent a spouse from receiving the benefit of an order were not directed at a case where a genuine creditor petitions and the debtor cannot pay. The ex-wife bore the burden of proving that, as at the date of the bankruptcy order, the ex-husband was able to pay his debts. The Judge emphasised that each case is fact sensitive. Here, the ex-wife argued that the ex-husband had been dishonest about his dealings, which infected how the Court should view his disclosure of his financial circumstances. It was also said that he gave inconsistent information about his place of residence, telling the Family Court it was Iceland and the Insolvency Court it was England and Wales. He also admittedly lied about a hair strand drug test in the family proceedings by forging a report. However, overall, having seen the ex-husband give evidence, the Judge assessed him positively as a witness. The inconsistencies in his evidence were "more apparent than real". His failure to provide an honest drug test result did not, without more, infect the bankruptcy. Furthermore, he found that there had been no failure to disclosure financial details: the ex-husband had explained why he was unable to provide more evidence and there was no evidence to undermine that. There was evidence that the ex-husband and the petitioning creditor were in a relationship of debtor-creditor as well as friends: there was no evidence of collusion. The evidence supported a conclusion that the ex-husband was unable to pay his debts as they fell due.

Katherine Hallett

Sir Henry Royce Memorial Foundation v Hardy [2021] EWHC 817 (Ch)

This case is an important reminder, from HHJ Matthews, that litigants in person are subject to the same rules as all other litigants. The Defendant's conduct of a claim under section 117 of the Companies Act 2006 was "well out of the norm": [20]. The Claimant sought indemnity costs. The Defendant sought no order as to costs, or at worst a standard basis assessment, and reminded the court that he was not a lawyer but was acting in person. HHJ Matthews, making an indemnity basis order, said at [21]: "There are not two sets of rules for litigation in this jurisdiction, one for represented litigants and one for unrepresented. As Lord Briggs said in Barton v Wright Hassall LLP [2018] 1 WLR 1119, [42], "Save to the very limited extent to which the CPR now provides otherwise, there cannot fairly be one attitude to compliance with rules for represented parties and another for litigants in person, still less a general dispensation for the latter from the need to observe them"."

Simon Hunter

PGH Investments Ltd v Ewing [2021] EWHC 553 (Ch)

This case, which turns on its particular facts, gives important consideration to the coronavirus test arising under Schedule 10 to the Corporate Insolvency and Governance Act 2020. Under that test, there is an evidential burden on a company the subject of a winding up petition to establish prima facie that COVID-19 has had a financial effect on it. In an earlier decision ICCJ Barber described that as a "low threshold" (Re a Company Application to Restratin Advertisement of a Winding Up Petition [2020] EWHC 1551). The company in this case relied on a number of bare assertions by its director (a holding company). The petitioner argued that these bare assertions were insufficient to cross even the low bar. The company was constrained to admit that as it was a holding company the pandemic had not had a direct effect, but submitted that the indirect effect was sufficient. Deputy ICCJ Passfield accepted this submission, although he then found against the company on the facts.

Simon Hunter

Bell v Brabners LLP [2021] EWHC 560 (QB)

This was a renewed application for permission to appeal from a decision of a district judge, which had decided a preliminary issue between the parties. Much of the case therefore turns on its facts. But paragraph 4 should be required reading for all litigators. The respondents, a firm of solicitors, had sent to the court a detailed letter as to why permission to appeal should be granted. This was sent in November 2020. It was re-sent the day before the hearing. On neither occasion was it copied to the applicants or their legal representatives. Fordham J was scathing in his criticism: "I mention these circumstances because it is a cardinal principle of the conduct of proceedings before the Court that, absent an identified compelling reason, a party's communications with the Court on matters of substance or procedure (unless they are purely routine, uncontentious or administrative) must always be copied to the other parties to the proceedings. It is inappropriate, and unjust, to seek to communicate with the Court without this transparency. This cardinal principle is clearly recorded in CPR 39.8. Observance of it is important."

Simon Hunter

Re Port Finance Investment Ltd [2021] EWHC 454 (Ch)

This was a case in which the court concluded that it was appropriate to grant a media organisation access to four witness statements in relation to a proposed scheme of arrangement "in order to serve the principles of open justice". In deciding the matter, the court had "to carry out a fact-specific balancing exercise" set out in the judgment of the Supreme Court in Cape Intermediate Holdings Ltd v Dring [2019] UKSC 38. "On the one hand will be 'the purpose of the open justice principle' and 'the potential value of the information in question in advancing that purpose'. On the other hand will be 'any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others'".

Here, the court placed no weight on the fact that the applicant provided a subscription service to a limited number of organisations or that the applicant charged a subscription fee and was seeking enhance the commercial value of its services and considered that a "lack of any adverse consequences is a weighty factor supporting the conclusion that access should be permitted".

Emma Knight

Lynch v Cadwallader [2021] EWHC 328 (Ch)

In amongst a long judgment on an appeal against the admission of a proof of debt (said to arise under a guarantee) in a bankruptcy CICCJ Briggs makes some interesting comments on witness evidence. The proof had been submitted in Mr Lynch's bankruptcy by Aldermore Bank plc. Mr Lynch himself gave evidence, as did his former partner Miss Hughes. They were involved in the events in question. For the bank, none of the key personnel involved gave evidence, although some more senior officers did. They could not say with certainty what had happened in relation to the signing of the guarantee. This failure weighed against the Bank, and CICCJ Briggs found that the first-hand evidence of Mr Lynch and Miss Hughes was to be preferred. In short: direct evidence of what actually happened is always likely to be preferred over evidence of a corporate entity's usual practice.

Simon Hunter

Edwards v Aurora Leasing Ltd [2020] EWHC 96 (Ch)

What does it mean to say that a payment, or item of property is received "for value"? That was the central question in this case on the interpretation of the statutory defence set out in s 284(4) of the Insolvency Act 1986. By s 284(1) dispositions of property made by a bankrupt in the relevant period (starting on the date of presentation of the bankruptcy petition and ending with the first vesting of his estate in a trustee in bankruptcy) are void unless ratified by the court. There is, however, a statutory defence in sub-section (4) that the property was received by the receiving party "before the commencement of the bankruptcy in good faith, for value and without notice that the … bankruptcy petition had been presented." ICC Judge Prentis's conclusion was that on the ordinary meaning of the words in the sub-section "provided the receipt was not gratuitous, which it will not be where consideration was given, value will have been provided." The Judge did not find it necessary to decide whether purely nominal value would suffice, the question not arising on the facts of this case.

Simon Hunter

Re Euro Accessories Ltd [2021] EWHC 47 (Ch)

This was the trial of a petition under s 994 of the Companies Act 2006. Like most such petitions it turns in very large part on its own facts, but it has contains one point of more general importance, which is about the meaning of "fair value" in a company's articles of association. The petitioner ("M") owned 24.99% of the shareholding in the company. The first respondent ("G") owned the rest. M was therefore a minority shareholder. The relevant provision of the company's articles said that "the consideration payable [by G] for the Sale Shares which shall be for fair value". M said that this required G to pay 24.99% of the value of the entire issued share capital of the company ("the pro rata amount"). G said that it required him to pay the value on a sale between willing buyer and willing seller, taking into account the fact that it was a minority shareholding and discounted to reflect that fact ("the discounted amount").

Snowden J reminded himself that to construe the provisions of a company's articles the court "must concentrate on the natural and ordinary meaning of the words used", when seen in the context of any readily apparent background that could reasonably be ascertained by a member of the public looking at the company's register entry. His Lordship reviewed the decision of the Privy Council in Shanda Games v Maso Capital [2020] UKPC 2, and held that the starting point was that M was entitled to be paid the discounted amount, rather than the pro rata amount. None of the 3 arguments deployed to avoid this conclusion succeeded. The case is an important reminder that "fair value" is fact- (indeed property-) specific, and minority shareholdings must be valued as such.

Simon Hunter

Mapara v Demetriou [2021] EWHC 764 (Ch)

This was the trial of a Part 8 Claim concerning burial rights in Tottenham Park Cemetery. The Claimants were the current trustees of the park's Islamic Cemetery Association, which was formed to acquire and manage burial plots for its members. The Defendant was the cemetery's current owner. The claim entered on a series of deeds entered into by a previous owner and previous trustees. The deeds granted the trustees ('the Grantees') rights to bury a certain number of bodies in certain specified plots in particular arears of the cemetery for terms of years at premiums upon grant and peppercorn rents thereafter. The Grantees ("for themselves and successors in title") agreed to comply with the rules and regulations of the cemetery; to keep the specified areas in a clean and neat condition; only to bury members of the association in their areas; and to supply their co-party and his successors in title with the names and addresses of persons buried. The Grantees were permitted to re-use the plots after the permitted statutory period. The co-party ('the Grantors') had the exclusive right to dig graves in the plots at certain costs specified for the first two years after each grant. After two years, the costs were to be "the rates of the Grantor [sic] from time to time", and there was a proviso that if the Grantor should fail to dig graves within a reasonable period of request by the Grantees so as to allow burial in accordance with their religion, then they had the right to dig the graves themselves.

A dispute arose when the present owner was said to have buried a non-association member in one of the association's areas, and to have dumped tree waste on its plots. The trustees sought declarations in respect of the parties' respective rights under the deeds. The first issue was whether the present owner had the exclusive right to dig the graves, which turned on a construction of the deeds in respect of whether "the Grantors" included successors in title on that context. The Court held that he did not. The second issue was whether the owner could insist on digging the graves (and charging therefor) pursuant to the cemetery's regulations. The Judge decided that the owner could not so insist, but only in so far as the regulations were currently drafted because of the risk of derogation from grant:

future regulations may enable him to do so. (That left open the possibility that the Court would, in future, need to determine a reasonable price for digging a grave). During argument, the owner accepted that he was not entitled to arrange or permit burials of persons who were not members of the association, and that he could not claim a right to dump rubbish which would put the trustees in default of their obligations to keep the areas clean.

Katherine Hallett

Re UR [2021] EWCOP 10

The facts of this case are, as with many cases in the Court of Protection, heart-wrenchingly sad. They concern a 68-year-old Polish woman, resident in the UK since 1977, who suffers from a persistent delusional disorder and co-morbid depression. She is separated from her husband, and at the time of the hearing was resident in a nursing home under a standard Deprivation of Liberty authorisation. The essential question for the court was whether it was in her best interests to return to Poland to be cared for by her family there or to continue to reside in the care home. Her family (a sister and niece) had expressed willingness to care for UR, UR had the funds to pay for her own care and, importantly, she had for some time expressed a desire to return. Hayden J's judgment declaring that it was not in UR's best interests to remain in the care home and approving a transportation plan for her to return to Poland is longer that he had "originally contemplated" because, as his Lordship says at [57]: "I consider the preparation and presentation of this case, by all the disciplines involved, is a beacon of good practice." The judgment refers, at many points but especially in [57] to the points of practice that have worked, and it should be referred to by any practitioner dealing with a case of permanent relocation. It is also uplifting to see a judgment setting out what has gone well for a change.

Simon Hunter

McGann v Bisping [2021] EWHC 704 (QB)

The Claimant, a sports agent/manager, alleged that the Defendant, a professional mixed martial arts fighter, had breached a management agreement between them. A trial took place in 2017, leaving an account and enquiry to be conducted: that was never concluded, and the Defendant applied for the claim to be struck out as an abuse of process, including on the basis that the Claimant had been made bankrupt in 2010 (i.e. before issue of the claim in 2012).

The Judge decided to strike out the claim on the basis that it had vested in the Claimant's Trustee in Bankruptcy. In general, contracts constitute "property" for the purposes of s.283 IA 1986, albeit there are limits to that. One exception is contracts for personal services, although that principle should be interpreted narrowly to avoid undermining the statutory policy of vesting all property in the Trustee: it is limited to cases where compliance with the contract requires the personal services of the Bankrupt. The Court concluded that the management agreement could not be said to be a contract for personal services: it provided for assignment (although this was not determinative alone), despite the imposition of obligations on the Claimant. Someone else could perform those obligations following assignment: it was irrelevant whether the Trustee could in fact perform them. It was also irrelevant that the Claimant continued to perform services for the Defendant after his bankruptcy: he may in any event have a claim in restitution.

Katherine Hallett

Re Sarjanda Ltd [2021] EWHC 210 (Ch)

The question in this case was whether the court can use the power to rescind the winding up order under r 12.59 of the Insolvency (England and Wales) Rules 2016 to achieve what in bankruptcy would be achieved by making an order under s 282(1)(b) of the Insolvency Act 1986 (annulment on the grounds that the debts and expenses of the bankruptcy have been paid in full). The answer is that it cannot. Here the application to rescind was made over 2 years after the making of the winding up order (the time limit provided by the Rules is 5 days). The liquidator produced a witness statement for the court setting out that all established debts had been paid in full with interest, the Official Receiver had been paid, and that the liquidator held sufficient funds to cover his own costs. He also said that there were no other matters that required investigation. HHJ Cooke noted, combining the effect of various authorities, that he had to consider the matter both against the principles to be applied to a rescission application (see Credit Lucky v National Crime Agency [2014] EWHC 83) and to an application for relief from sanction (see, in this context, Preston v Green [2016] EWHC 224 (Ch)). For the latter it was conceded that the breach which was serious and significant, but it was argued that there was a good reason for the breach because during the period in question there had been ongoing negotiations with the creditors. This was rejected: that would be to import the s 282(1)(b) power into winding up when Parliament had not included an equivalent provision in liquidations. Secondly the judge held that the company could not be said to be solvent (relevant to the rescission application), because the sums paid to discharge the debts and expenses had been provided by a third party. Finally, and for good measure, the judge held that the case was not exceptional and there was no good reason to rescind. So, in answer to the question: you cannot annul a winding up order using the rescission provisions, even if you have paid the debts and expenses in full.

Simon Hunter

Practice Update

In a refreshing change from the last two Practice Updates in this Review, very little of what follows relates to COVID and Brexit, although both make their appearances.

General Practice and Procedure

The most significant practice change in the period since the last review in these pages has been the introduction of amended rules relating to the drafting of witness statements in the Business and Property Courts. The **127th Practice Direction Update** introduces, with effect from 6 April 2021, a new practice direction (57AC) on trial witness statements (with certain stated exceptions) in the BPCs. This PD reminds those drafting trial statements, importantly, that these statements are a replacement for evidence in chief, and must only contain that evidence that a witness could properly give in chief. They impose important procedural requirements on parties to indicate, by list, what documents a witness has been referred to, and sets out a best practice guide which essentially restates the well-known and oft-ignored *Gestmin* principles. There is a new, much longer, statement of truth for trial witness statements, and every statement must also be endorsed by a relevant legal representative stating that the new rules have been complied with. This is welcome as an attempt to prevent abuses of the rules of evidence, although given the fact that the rule in PD32, para 18.1(5) requiring a witness to state the process by which the witness statement has been prepared is routinely ignored even a year after it came into force, the devil in this current change will be in the enforcement.

Other changes are made by the 127th Practice Update as well, amongst which are the following. The Electronic Working Pilot Scheme has been extended until 2022. PD51U on the Disclosure Pilot has been entirely replaced. New PD70B deals with the debt respite scheme established by the Financial Guidance and Claims Act 2018, now brought into force. Finally, a new PD1A makes provision for the more effective participation of vulnerable parties and witnesses in proceedings. This last is much to be welcomed. It places an express duty on the court to consider how best to allow vulnerable people to participate, including setting ground rules for cross-examination. This is all in line with the general trajectory of change from at least the time of the Mental Capacity Act 2005, and it is to be hoped that it will be effectively applied by courts. Technical changes are made to PD51R (concerning the Online Money Claims Pilot) by the **128th Practice Direction Update**.

In other procedural and practice updates, the Senior Court Costs Office and the Queen's Bench Division have both issued new court Guides and, on 9 March 2021 the Ministry of Justice announced that plans were afoot to raise the judicial retirement age to 75.

Insolvency and Companies

In a much-anticipated decision, the temporary provisions of the Corporate Insolvency and Governance Act 2020, which place additional hurdles in the way of winding up petitions, have been extended for another year, to April 2022, by the **Corporate Insolvency and Governance Act 2020 (Coronavirus) (Change of Expiry Date) Regulations 2021**. With effect from 1 March 2021 the Chartered Association of Certified Accountants has been, at its own request, removed from the list of recognised professional bodies under the Insolvency Practitioners (Recognised Professional Bodies) Order 1986: **Insolvency Practitioners (Recognised Professional Bodies) (Revocation of Recognition) Order 2021**. With the departure from the same list in 2016 of the Law Society, there are only two remaining recognised regulatory bodies for IPs in England and Wales: the Insolvency Practitioners' Association and the ICAEW.

Consequential upon the coming into force of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020, amendments have been made to the Magistrates' Court Rules by the **Magistrates' Courts (Amendment) Rules 2021**, which provide the procedural mechanism for an application under r 7(2)(b) of the 2020 Regulations. There is also updated guidance on the gov.uk website for creditors and money advisers about breathing space moratoria. An interesting change to the enabling legislation relating to debt respite schemes, the Financial Guidance and Claims Act 2018, was made by s 35(1) of the **Financial Services Act 2021**. By that subsection, the definition of a debt respite scheme is altered. One part of that definitions was previously that a scheme was to "help individuals in debt and their creditors to devise a realistic plan for the repayment of some or all of the debts", see s 6(2)(c) of the 2018 Act. This has been amended by omission of the words "*and their creditors*", so that the purpose is now solely to help debtors to create a realistic plan. This refocussing on the debtors is important, particularly in the context of the last 12 months.

The last edition of this Review commented favourably on plans then announced to review pre-pack administrations. The government has moved quickly in this regard, and draft secondary legislation was laid before Parliament in January, which comes into force on 30 April 2021: **Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021**. In fact these regulations apply to more than just pre-packs. They apply to all dispositions, including disposals, hiring out or sale, to one or more connected persons during the period of 8 weeks starting with the commencement of the administration. Such dispositions ("*substantial disposals*" in the language of the regulations) cannot be made unless one of two conditions is met. Either the creditors must have approved the disposal, or there must have been a "*qualifying report*" from an "*evaluator*". The rules on the contents of the qualifying report are detailed. The evaluator is a person independent of the transaction (with suitable insurance in place) and is likely in many cases to be another insolvency practitioner. The report must be filed with the Registrar of Companies and sent to the creditors. This change is

welcome and, provided the evaluator's role is properly undertaken and policed, will go a long way to alleviating concerns about pre-packs.

The **Limited Liability Partnerships (Amendment etc) Regulations 2021** make further provision for the application of the Corporate Insolvency and Governance Act 2020 to LLPs and apply Part 26A of the Companies Act 2006 to LLPs. If this course is followed through for any great length of time, at some point the rules for LLPs and limited companies will become so similar that there be no effective difference between them.

On 11 March 2021 the Insolvency Service called for evidence on the operation of the Insolvency (England and Wales) Rules 2016. Responses must be received by 30 June 2021.

Property

Temporary protections brought into force to deal with COVID have been extended by the **Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2021** (the "*relevant period*" for residential tenancies, as defined in Sch 29 of the Coronavirus Act 2020 extended to 31 May 2021), the **Public Health (Coronavirus) (Protection from Eviction) (England) (No. 2) (Amendment) Regulations 2021** (the expiry of the prohibition on executing certain warrants, writs, and notices of possession extended to the same date, 31 May 2021), and the **Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) Regulations** (the "*relevant period*" for business tenancies, as defined in s 82(12) of the Coronavirus Act 2020 extended to 30 June 2021).

Other areas of practice

The (supposedly temporary) exemption from registration enjoyed by certain smaller religious charities associated with certain churches and other Christian bodies under the Charities (Exception from Registration) Regulations 1996 has been extended for another 10 years to 2031 by the **Charities (Exception from Registration) (Amendment) Regulations 2021**. These will no doubt be phased out one day, but that day will be at least 35 years after the initial legislation brought them into force.

The **Patents (European Patent with Unitary Effect and Unified Patent Court) (Repeal and Revocation) Regulations 2021** are made under the Brexit legislation to "*address failures of retained EU law to operate effectively*" and to remedy other defects arising as a result of Brexit. They relate primarily to the Agreement on the Unified Patent Court, ratification of which by the UK has now been revoked.

The full detail of the **Pension Schemes Act 2021** is well beyond the scope of this update. In the briefest of summaries it makes provisions, amongst other things, for (1) collective money purchase schemes; (2) pensions dashboards; and (3) further powers for the Pensions Regulator.

Chambers News

Matthew Marsh joins Three Stone as a Door Tenant

Three Stone is delighted to welcome Matthew Marsh, who has joined chambers as a Door Tenant from 1 May 2021 to act as a mediator and arbitrator.

Matthew was a Chancery Master for nine years and Chief Master for seven years from 2014 to 2021. He originally qualified as a solicitor and was a partner with Collyer Bristow LLP until 2012. He sat as a Recorder from 2002 to 2021. He is an accredited mediator. He is also a Fellow of the Chartered Institute of Arbitrators (1992) and holds a Diploma in International Commercial Arbitration. He has wide experience of arbitration, both domestic and international, as sole arbitrator and acting for parties.

Stephen Baister said: "The breadth of his practice and judicial experience is complemented by a calm and reassuring personality. Litigants and their advisers will find him effective in a wide range of commercial and other disputes in both capacities in which his services are available."

Prof Surya Subedi QC interviewed in Counsel magazine

Chambers was proud to see an interview with one of our members, Professor Surya Subedi, QC in Counsel magazine in April. The article highlighted Prof Subedi's contribution to international law and human rights, including to top level policy formation within and outside the UN system of human rights. It also noted his pubication record, including his recent book entitled "Human Rights in Eastern Civilisations". Prof Subedi said that he was homoured to feature in an article in such a prestigious publication.

A link to the article can be found on https://threestone.law/news.

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