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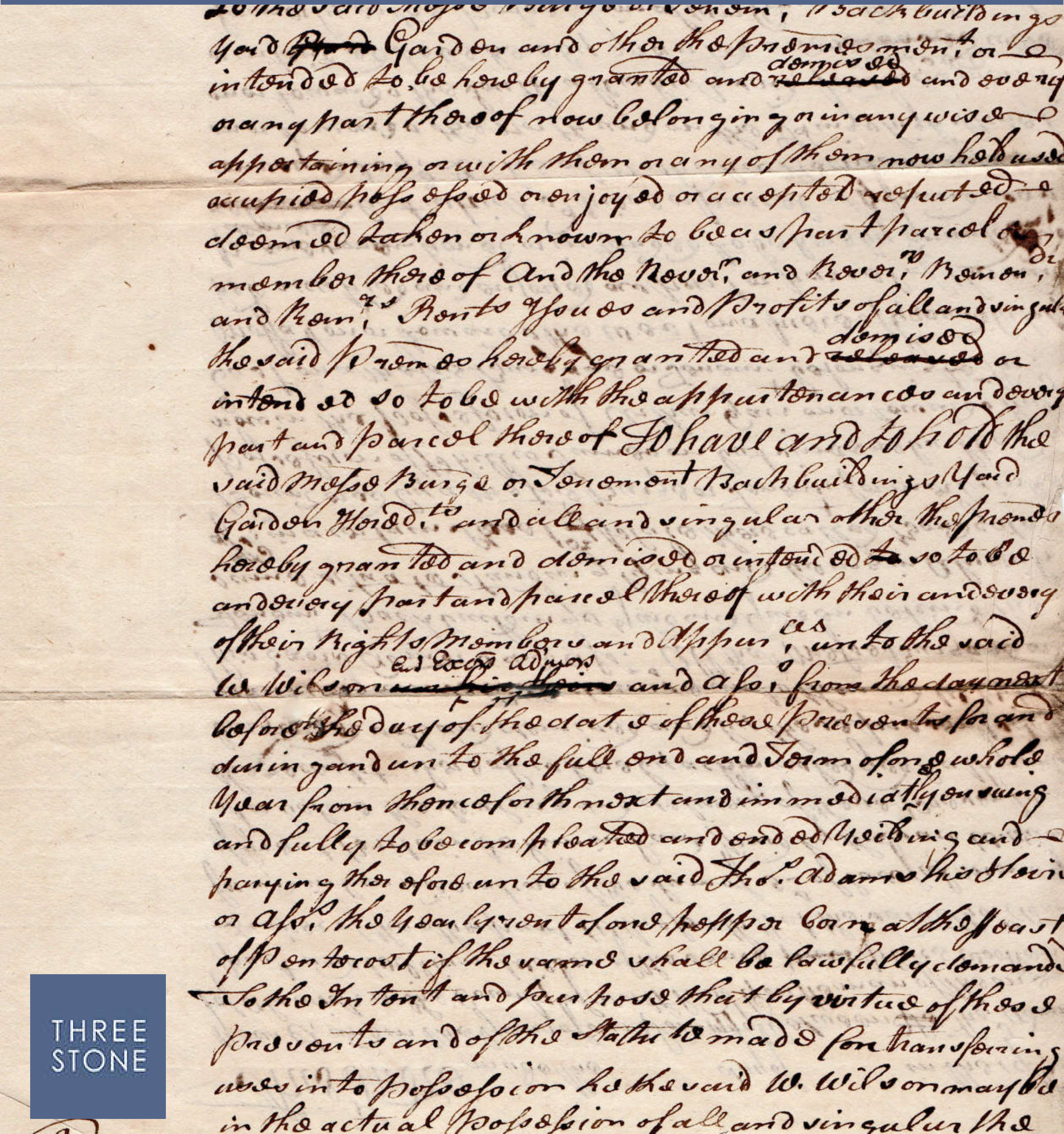
The Three Stone Triannual Review


Yard ~~Stable~~ Garden and other the premises ment. or intended to be hereby granted and ~~released~~ demised and every or any part thereof now belonging or in any wise appertaining or with them or any of them now held used occupied possessed or enjoyed or accepted reputed deemed taken or known to be as part parcel or member thereof And the Revers. and Revers. Remain. and Remain.ders Rents Issues and Profits of all and singular the said Premises hereby granted and ~~released~~ demised or intended so to be with the appurtenances and every part and parcel thereof To have and to hold the said Messe Burgage or Tenement Backbuildings Yard Garden Words. and all and singular other the premises hereby granted and demised or intended so to be and every part and parcel thereof with their and every of their Rights Members and Appurtenances unto the said W. Wilson exrs admors and ass. from the day next before the day of the date of these Presents for and during and unto the full end and term of one whole Year from thence forth next and immediately ensuing and fully to be compleated and ended Yielding and paying therefore unto the said Thos. Adams his Heirs or ass. the yearly rent of one pepper Corn at the feast of Pentecost if the same shall be lawfully demanded To the Intent and purpose that by virtue of these presents and of the Statute made for transferring uses into possession he the said W. Wilson may be in the actual Possession of all and singular the

THREE STONE

Welcome to the first issue of the new Three Stone Triannual Review. This is the first in what we hope will be a long-term series, providing readers with information about recent cases and changes in the law alongside longer articles analysing legal questions in more depth. We aim to provide articles on a diverse range of subjects right across chambers' practice areas – something, we hope, for everyone. We aim to produce three issues a year, in January, September and May, with the law stated, where possible, as at the end of the preceding month.

In this first edition Katherine Hallett writes about winding-up petitions in the wake of the Corporate Insolvency and Governance Act 2020, new member of chambers Chris Howitt considers Black Swan injunctions in the BVI, and Simon Hunter analyses in depth the Supreme Court's decision in *Marex v Sevilleja* on the reflective loss principle.

Following these in-depth articles are Case Reviews and a Practice Update. The reviews are of interesting cases which fall within the interests and practices of members of chambers, often written by those who have appeared. The update takes in changes in legislation, both primary and secondary, rule and practice direction changes, and a welter of guidance and other interesting material. We conclude with news from chambers.

In this Issue:

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Taming the knotweed

Simon Hunter describes how, in the recent decision of the court in Marex Financial Limited v Sevilleja the Supreme Court took the garden shears to the principle of reflective loss. Some of the Court would have gone further and applied the weedkiller.

"In the case-note cited by Lord Reed at para 77, Professor Tettenborn has likened the reflective loss principle to "some ghastly legal Japanese knotweed" whose tentacles have spread alarmingly and which threatens to distort large areas of the ordinary law of obligations": Lord Sales at [121]

Introduction

The rule against reflective loss has attracted academic criticism for many years, certainly since the 2000 decision of the House of Lords in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1. In the recent decision of the Supreme Court in *Marex Financial Limited v Sevilleja* [2020] UKSC 31 it was subjected to close scrutiny by a 7-panel court which was unanimous in its criticism, although not in its reasoning.

Facts

The facts in this case have not yet been established at trial. The case has made its way through the appeal processes following an application by Marex Financial Ltd to serve out of the jurisdiction on the respondent, Mr Sevilleja. An order for service out was granted, but Mr Sevilleja applied to the Commercial Court for it to be set aside on the ground that the losses claimed were reflective. Mr Justice Knowles refused to set the order aside, holding that the losses were not, in fact, reflective. The Court of Appeal partially allowed Mr Sevilleja's appeal, holding that about 90% of Marex's claim was barred by the reflective loss principle. Marex appealed to the Supreme Court: [14] (all numbers in square brackets are references to the paragraph numbers in the Supreme Court's judgment).

The matter therefore proceeded on the assumption that the facts alleged by Marex, as claimant, were correct. In short, as long ago as

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2013 Marex obtained judgment against two BVI companies owned and controlled by Mr Sevilleja. The total of the judgment was US$5.5 million, and the costs awarded after trial were agreed at £1.65 million: [16]. Immediately following the handing down to the parties of a confidential draft of the judgment on 19 July 2013, it is alleged that Mr Sevilleja paid more than US$9.5 million out of the companies' London bank accounts into off-shore accounts under his control. Within 6 weeks the companies' disclosed assets had been reduced to US$4,329.48: [17].

The companies themselves were then, in December 2013, put into liquidation in the BVI by Mr Sevilleja with debts of more than US$30 million owed to Mr Sevilleja and other persons or entities associated with him. Marex was the only truly unconnected creditor. Marex has alleged that the BVI liquidator is being funded and indemnified by an entity controlled by Mr Sevilleja, and the liquidator has certainly taken no steps to investigate these matters: [18]-[19].

The Bankruptcy Court of the Southern District of New York was unimpressed by what had happened, describing the liquidation as "a device to thwart enforcement of a $5m judgment against [the companies] that Marex won in the courts of England – and the most blatant effort to hinder, delay and defraud a creditor that this Court has ever seen": quoted at [20]. The New York Court refused to recognise the BVI liquidation as main proceedings.

In the English proceedings Marex seeks "damages in tort for (1) inducing or procuring the violation of its rights under the judgment and order of Field J dated 25 July 2013, and (2) intentionally causing it to suffer loss by unlawful means": [21]. The appeal turned on whether the losses claimed by Marex were barred as being reflective of the companies' loss.

The Supreme Court was unanimous in allowing Marex's appeal. The main judgment was given by Lord Reed, with whom Lady Black and Lord Lloyd-Jones agreed. Lord Hodge gave a concurring judgment. Lord Sales (with Lady Hale and Lord Kitchin) concurred in the outcome, but would have gone further than the majority, and differed in important ways in their reasoning.

The history of reflective loss is well chronicled in the judgment of Lord Reed. His Lordship considered the history in company law of the relationship between shareholder and company, referring to seminal cases of that area of law, such as *Foss v Harbottle* (1843) 2 Hare 461, *Salomon v A Salomon & Co Ltd* [1897] AC 22, *Macaura v Northern Assurance Co Ltd* [1925] AC 619 and *Short v Treasury Commissioners* [1948] 1 KB 116. But it is surprisingly late in the day, with *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 that the story of reflective loss really begins.

Setting the seed: Prudential Assurance v Newman Industries (No 2)

The facts of *Prudential v Newman* are stated briefly by Lord Reed in *Marex v Sevilleja* at [24]: "The case concerned a situation where the directors of a company were alleged to have made a fraudulent misrepresentation in a circular distributed to its shareholders, so as to induce them to approve the purchase of assets at an overvalue from another company in which the directors were interested. Prudential, which was a minority shareholder in the company, brought a personal and derivative action against the directors, claiming that they had committed the tort of conspiracy against the company and its members."

As is so often the way with cases which establish important principles of law, the Court of Appeal's judgment focusses on another point entirely: the derivative action, with which we are not concerned here. Interestingly, it also found (see pages 223-224 of the judgment) that Prudential were never really interested in recovering on their personal action: it was included only as a way of getting around the rule in *Foss v Harbottle*.

That rule, one of the oldest in company law, states that where damage is caused to a company the only proper person to claim for that loss is the company itself. There are, of course (this is the law, after all), a series of exceptions to the rule, of which the most important is the derivative action.

In *Prudential v Newman* the Court of Appeal held that a shareholder could not recover damages "merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a 'loss' is merely a reflection of the loss suffered by the company" (hence the name 'reflective loss'): see pp222-223. The basis for this decision is that the shareholder still has his shares, and all that a share does is entitle its holder to participate in the company on the terms of the articles of association.

The hypothetical example given by the Court of Appeal on p223 made it clear that where a wrong-doer practiced a deceit on a shareholder and, by the same act, steals assets of the company, the shareholder cannot succeed on an action for deceit. His loss becomes subsumed in the loss suffered by the company; the law does not recognise the two losses as being separate from each other.

Two things are clear from the judgment of the Court of Appeal in *Prudential v Newman*: first, the principle set out is a rule of company law based on preserving the rule in *Foss v Harbottle*; second its effect is not to prevent recovery by the shareholder but to destroy the shareholder's action.

The spreading knotweed: Johnson v Gore-Wood & Co

In 2000 the House of Lords had cause to consider the concept of reflective loss in *Johnson v Gore-Wood*. Again, Lord Reed states the facts succinctly in *Marex v Sevilleja*, at [40]: "The case concerned alleged negligence on the part of solicitors acting for a private company, which caused it to suffer losses. The company brought proceedings against the solicitors, which were settled during the sixth week of the trial for a very substantial proportion of the sum claimed… Mr Johnson, who owned virtually all the shares in the company and was its managing director, then brought proceedings against the solicitors in which he alleged that they had also acted in breach of a duty owed to him personally, and that he had suffered personal losses." The claim was struck out as abusive, Mr Johnson appealed and Gore-Wood & Co cross appealed on the ground that some of the heads of loss were reflective of loss suffered by the company. It is only with the cross-appeal that we are here concerned. Lord Bingham's speech sets out a number of uncontentious principles of company law at pp 35-36. His Lordship noted at p 36 that a court dealing with argument on this principle must "respect the principle of company autonomy" but also "be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation."

However, it is in the judgment of Lord Millett that the knotweed of reflective loss really begins its spread out from its place of germination. The problem with Lord Millet's judgment is that it starts from a fundamental misconception. (It is a brave man who accuses Lord Millett of making a fundamental error, but in this instance I feel safe in doing so as Lord Reed has already done it before me). The error is in the idea that a share "represents a proportionate part of the company's net assets": page 62. This was found not to be the case in *Maracaura v Northern Assurance*.

This error caused Lord Millett to see the reflective loss principle in terms of the rule against double recovery. This rule states, as its name suggests, that a wrong-doer should only have to compensate once for the loss caused by his actions. Lord Millett noted that there was no issue if either the shareholder or the company had no cause of action of their own: the other could simply sue on their loss. His Lordship went on: "The position is, however, different where the company suffers loss caused by the breach of duty owed to both the company and the shareholder. In such a case the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted."

But this takes the principle far away from its original conception. As I have noted above, the principle in *Prudential v Newman* was one which barred the whole action by denying the existence of the loss to the shareholder. Lord Millett's formulation is predicated on the rule against double recovery which is a part of the law of damages and, as Lord Reed notes in *Marex v Sevilleja* "is premised on the recognition of that loss": [52].

Unfortunately it was this construction of the law, based on the principle against double recovery, which was taken up in the years after *Johnson v Gore-Wood*. Cases include *Giles v Rhind* [2003] Ch 618, in which a company was unable to pursue its own action because it could not, as a result of the defendant's own actions meet an order for security for costs, and *Gardner v Parker* [2004] EWCA Civ 781, in which the Court of Appeal said "it is clear from those observations, and indeed from that aspect of the decision, in Johnson's case that the rule against reflective loss is not limited to claims brought by a shareholder in his capacity as such; … there is no logical reason why it should not apply to a shareholder in his capacity as a creditor of the company expecting repayment of his debt": para 70 per Neuberger LJ.

The knotweed tamed: Marex Financial v Sevilleja (the majority)

Having undertaken that historical review, Lord Reed goes on in short order to deal with the findings of the majority. Those findings are:

1. Where a shareholder brings a claim based on diminution in the value of his shareholding or distributions, that claim is barred by the principle in *Prudential v Newman*: [80];

2. The position is no different even if the wrong-doer's liability to the company is not sufficient to fully restore the value of the shares, because in such a case the shareholder's action is elsewhere, usually either in a derivative action or in an unfair prejudice petition: [81];

3. The reason for this rule is that the law does not accept that shareholder as suffered any independent loss in such a case: [83];

4. However, where a shareholder, or anyone else, brings any other kind of claim the rule against reflective loss, as found in and founded on *Prudential v Newman*, has no application;

5. The rule against double recovery does still apply, in such a case, although its application will depend on the facts of the case: [87].

The Supreme Court therefore affirmed the decision in *Prudential v Newman* and the speech of Lord Bingham in *Johnson v Gore-Wood* but, insofar as they are inconsistent with those two statements of the law, the Court overturned the remaining speeches in Johnson and the decisions in *Giles v Rind*, *Perry v Day* and *Gardner v Parker*. By the majority's decision, the rule against reflective loss has been pruned back from its Millett-inspired expansion to its root in the rule in *Prudential v Newman*, back to a simple point of company law rather than a principle of damages.

The weed-killer suggestion: Marex Financial v Sevilleja (the minority)

Lord Sales (with Lady Hale and Lord Kitchin) felt that this did not go far enough. His Lordship's interpretation of *Prudential v Newman* also differed from that of Lord Reed: "The Court of Appeal in Prudential did not lay down a rule of law that a shareholder with a claim against a third party defendant in parallel with, and reflective of, a claim by the company against the same defendant simply had to be deemed to suffer no different loss of his own which he could recover, whatever the true position on the facts. It did not purport to do so. Rather, the court set out reasoning why it thought the shareholder in such a case in fact suffered no loss": [118].

Starting from the most basic of company law premises ("A company is a legal person distinct from its shareholders…": [122]) Lord Sales builds up a convincing and coherent argument for saying that the general principle derived from *Prudential v Newman* was flawed. His Lordship's view was that that case turned not on any newly-enunciated principle of law but on the simple fact that Prudential had failed to prove that it had in fact suffered any loss in respect of the value of its shareholding: [148]. His Lordship went on to say that it should be the case that "The company can recover for its losses, eg depletion of its assets stolen by the defendant and consequential loss of profits. The claimant can recover for diminution in the value of his shares, which is a function of how the market values them, and for loss of dividends he might have received but for the wrong in relation to himself": [155], although this would be subject always to the rule against double recovery. His Lordship also opined that the court could simply manage the risk of double recovery using its case management powers: [161].

It seems to me that Lord Sales' conclusion on the principle in *Prudential v Newman*, the seed of the knotweed, can best be summed up in his own words: "In my respectful opinion, the rule would therefore produce simplicity at the cost of working serious injustice in relation to a shareholder who (apart from the rule) has a good cause of action and has suffered loss which is real and is different from any loss suffered by the company." Based as it was on this "flimsy foundation": [198], his Lordship felt that there was "dissonance between the rule and practical justice on the facts… This will put pressure on the acceptability of the rule itself."

As it did not command the support of the majority of the Supreme Court, I will not burden the reader with a fuller exposition of Lord Sales' judgment. It has very considerable force and may well lead, ultimately, to the complete eradication of the rule against reflective loss as founded on *Prudential v Newman*.

Conclusion

So, where does this leave the rule against reflective loss? Certainly it has been significantly trimmed. It is now restricted to the principle in *Prudential v Newman*, that is to say that a shareholder cannot claim from a third-party wrong-doer for the diminution in the value of his shares, nor of his dividends, arising a loss to the company caused by that wrong-doer. This rule is of really rather narrow application. It is also, as Lord Sales convincingly argues, unjust in its application. I suspect that this will not be the last time that consideration is given to how to tame this knotweed of a principle.

Simon Hunter

Swansong for the Black Swan?

The BVI's Black Swan injunction jurisdiction may be dead in the water but in this article **Chris Howitt** shows us that, with *Broad Idea* going to the Privy Council, the Black Swan might yet sing again.

The last few months have seen a flurry of activity in the BVI Courts concerning its jurisdiction to order freestanding freezing injunctions in support of foreign proceedings, commonly called "Black Swan injunctions" after the case in which the BVI Commercial Court recognised the jurisdiction for the first time: *Black Swan Investment ISA v Harvest View Ltd* (BVIHCV 2009/0399).

In *Black Swan*, the issue for the BVI Court was whether it had jurisdiction to order a freezing injunction against respondents that were subject to the jurisdiction of the BVI Court, in aid of foreign proceedings to which the respondents were not parties, and against whom there was no substantive cause of action in the BVI. The Respondents were two BVI companies. The Claimant had sought freezing orders against them in support of proceedings in South Africa against a Mr Rautenbach, who was said to be the owner or controller of the BVI companies. The Claimant had no substantive claim against the Respondents themselves in the BVI. The long-standing English rule has been that the right to an interim injunction does not exist in isolation but is dependent on the enforcement of a substantive right which usually takes the shape of a cause of action: *The Siskina* [1979] AC 210.

The BVI Commercial Court found that it did have jurisdiction to order freestanding freezing orders in these circumstances under s. 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act, the source of the Court's power to grant interlocutory injunctions in the BVI. In his judgment Bannister J referred to Lord Nicholls' dissenting speech in the Privy Council's decision *Mercedes-Benz AG v Leiduck* [1996] AC 284, [1995] 3 All ER 929: "*the defendant's argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong Court cannot reach him. That cannot be right ... A person operating internationally cannot so easily defeat judicial process. There is not a black hole into which the defendant can escape out of sight and become unreachable ....*" Bannister J identified what he described as a "*lacuna in the authorities*" on the point before him for consideration and adopted Lord Nicholl's reasoning to fill it.

Perhaps unsurprisingly, the development was welcomed in the BVI and other offshore centres. The Eastern Caribbean Court of Appeal confirmed the existence of the jurisdiction in *Yukos CIS Investments Limited et al v Yukos Hydrocarbons Investments Limited* HCVAP2010/028. The Courts of other jurisdictions followed suit, including Belize (see, e.g., the Belize Supreme Court in *Irish Bank Resolution Corporation Limited v Galfis Overseas Limited* Claim No. 15 of 2011) and Bermuda (*ERG Resources LLC v Nabors Global Holdings II Limited* ([2012] SC (Bda) 23 Com). The Cayman Islands later put the jurisdiction on a statutory footing: s.11A of the Cayman Islands Grand Court Law (2015 Revision).

However, earlier this year the Eastern Caribbean Court of Appeal placed a check on the gradual expansion of this jurisdiction, overturning *Black Swan* in *Broad Idea International Limited v Convoy Collateral Limited (*BVICMAP 2019/0026). In *Broad Idea* the relevant factual circumstances were the same as in *Black Swan*: the Respondent was a BVI entity; the freezing injunction was sought in respect of foreign proceedings to which the Respondent was not a party (in this case, in Hong Kong), and there was no indication that it would be made a party. The purpose of the injunction sought was to freeze the respondent's assets so that the assets would be available to satisfy any money judgment in the foreign proceedings. However, the Court of Appeal reverted to the pre-*Black Swan* position, ruling that a freezing order could only be granted where the applicant had a substantive cause of action against the respondent. The Court of Appeal considered itself bound by the Privy Council's decision in *Mercedes-Benz AG v Leiduck* [1996] AC 284 and that Bannister J should have followed the majority.

One immediate consequence of the decision in *Broad Idea* was that injunctions ordered in the BVI under the *Black Swan* jurisdiction faced set aside applications. One more interesting example was the *Commercial Bank of Dubai v 18 Elvaston Place Ltd & another* (BVIHC (COM) 2020/0070), where the applicant attempted to rescue its injunction by establishing an alternative foundation for it under the Court's *Chabra* jurisdiction. The *Chabra*

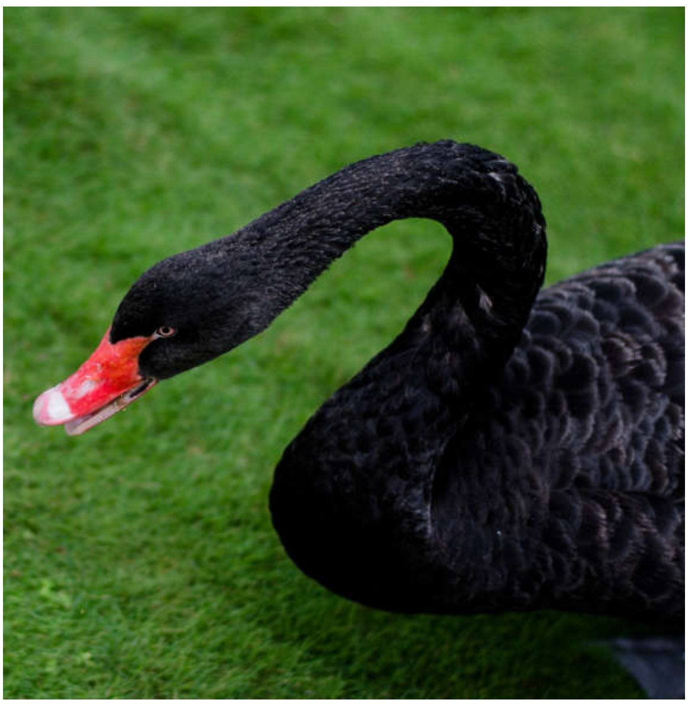

Image credit: Kasturi Laxmi Mohit on Unsplash jurisdiction is a somewhat similar jurisdiction to *Black Swan*, in that a freezing injunction may be ordered against a third party against whom the applicant has no cause of action (commonly called the non-cause of action of defendant or "NCAD"), but the injunction must be ancillary and incidental to a good arguable claim against another respondent (called the cause of action defendant or "CAD"). The Judge acknowledged the *Chabra* jurisdiction had not been questioned by the Court in *Broad Idea*. However, in *Elvaston Place* the only cause of action the applicant could identify was the potential right to enforce a judgment ordered in future in the foreign proceedings: the Judge rejected that argument on the basis that a potential right to enforce is not a presently enforceable right. The position was further complicated in that the CAD was not present in the BVI or otherwise subject to the Court's jurisdiction, so the applicant would additionally have required permission for the CAD both to be joined and served out.

The rejection of *Black* Swan has not been greeted with open arms. Indeed, the Court of Appeal acknowledged in terms that its own decision may be perceived to be "*undesirable … in modern day international commerce*", but gave its indication as to how the issue should be resolved: "[*i*]*t is for the Legislature of the BVI to step in and clothe the court with such authority*." It is therefore perhaps unsurprising that both leave to appeal to the Privy Council has been granted, and also that the BVI Bar Association has proposed draft amendments to s. 24 with a view to reviving the Black Swan jurisdiction on a statutory footing.

Until the matter is resolved, there remain awkward imbalances in BVI law. Under s. 43(2) of the BVI Arbitration Act 2013, the Courts have the power to order interim relief "*in relation to any arbitral proceedings which have been or are to be commenced in or outside the Virgin Islands*." In other words, those arbitrating their disputes have tools at their disposal in the BVI which are no longer available to litigants. And there remains the more awkward problem that users of BVI Courts will not be able to take advantage of an enforcement remedy which is widely available in the Caribbean, but not in the jurisdiction which introduced it.

Chris Howitt

The COVID test

Litigation of all sorts has been seriously affected by the COVID-19 pandemic, and this includes insolvency, where restrictions have been placed on winding up petitions, as **Katherine Hallett** describes

Introduction

On 26th June 2020, the Corporate Insolvency and Governance Act 2020 ('the 2020 Act') came into force. Section 10 directs us to Schedule 10 which contains the temporary provisions in relation to winding up petitions in Great Britain. This article considers only those relating to England and Wales, and states the law as at 25th August 2020.

In summary: -

1. After 27th April 2020, a creditor is prohibited from presenting a winding up petitionwhere it is based on a statutory demand served between 1st March and 30th September 2020 (sch.10, para.1), and any such statutory demand is void; and

2. Between 27th April and 30th September 2020, a creditor is prohibited from presenting a winding up petition unless it has reasonable grounds for believing that the Coronavirus has not had a financial effect on the company or the relevant

ground would have applied even if the Coronavirus had not had a financial effect on the company.

The 2020 Act does not affect petitions presented on grounds other than inability to pay debts, for instance public interest petitions. The time period to which the 2020 Act applies may be extended.

Petitions

No petition may be presented between 27th April and 30th September 2020 on the basis of a relevant ground under s.123 of the 1986 Act (i.e. loosely a company's inability to pay its debts) unless the creditor has reasonable grounds for believing that the so-called Coronavirus condition is met (sch.10, paras.2 and 3). The two alternative sub-conditions are that (1) the Coronavirus has not had a financial effect on the company or (2) the relevant ground would have applied (i.e. the company would have been unable to pay its debts) even if the Coronavirus had not had a financial effect on it.

"financial effect" means "if (and only if) the company's financial position worsens in consequence of, or for reasons relating to," the Coronavirus (sch.10, para.21(3)). This definition is very wide.

In reality, the first sub-condition is almost impossible for a creditor to meet. Almost all companies' financial positions have worsened due to the Coronavirus: those which have not are perhaps unlikely to find themselves the subject of petitions based on an inability to pay their debts.

The second, alternative condition may well be difficult for a creditor to satisfy, not least because they will probably not have access to the relevant evidence in the hands of the company. A key factor may be the date the debt accrued: if it pre-dated the end of March 2020, the creditor is more likely to be able to meet the condition. Other key factors may be promises to pay or excuses given for non-payment. Given the wide definition of "financial effect", creditors must consider companies' efforts to obtain funding via third parties, not just the direct effect the Coronavirus has had on cash flow from trading.

Most petitions presented between 27th April and 26th June 2020 have now been dealt with pursuant to sch.10, para.4. The court makes such order as it thinks appropriate to restore the position to that had the petition not been presented, if satisfied that the petition was presented without the Coronavirus condition being satisfied.

Winding up orders

The court's power to make winding up orders based on petitions presented between 27th April and 30th September 2020 on the grounds of inability to pay debts is prescribed (sch.10, paras.5 and 6).

At a preliminary hearing, before advertisement, the court considers whether it appears that the Coronavirus had a financial effect on the Company before presentation. (See the new Insolvency Practice Direction relating to the 2020 Act which was published on 3rd July 2020). In *Re a Company (Application to Restrain Advertisement of a Winding Up Petition)* [2020] EWHC 1551 (Ch), ICCJ Barber held that the evidential burden in that regard is on the company but that the threshold is low (paras.40, 44).

The court can only wind up the company if satisfied that the relevant ground would have applied (i.e. the company would have been unable to pay its debts) even if the Coronavirus had not had a financial effect on it. The burden here is on the creditor (*Re a Company*, para.45).

Proposed petitions must be considered carefully, not least because creditors must confirm (sch.10, para.19(3) and PD, para.3) that the Coronavirus condition is met and provide a summary of the grounds in support. In most cases, that is risky. There is no express provision for the company to provide the necessary disclosure to allow the conditions to be fully assessed but it appears that the court will expect a certain, albeit low, level of transparency from the Company (*Re a Company*, paras.43-4). It is uncertain whether the court will order disclosure and/or cross-examination.

Winding up orders already made on the basis of inability to pay between 27th April and 26th June

2020 may be void. This is so if the Coronavirus condition in para.5 (or 6) did not apply. The retrospective nature of this raises interesting questions about who should bear the costs incurred, and what will happen given that all concerned may already have acted on the basis of the company having been validly wound up. The Official Receiver and any Liquidator are protected from liability for anything done during their period of supposed appointment (sch.10, para.7(4)). They can apply to the court for directions, which can restore the company's position to that immediately before presentation.

Modifications to time periods under 1986 Act

Sch.10, paras.9-18 modify certain time frames under the 1986 Act in cases where a petition is presented between 27th April and 30th September 2020 and the court makes a winding up order on the basis of inability to pay debts (para.8).

Para.9 modifies s.129(2) of the 1986 Act such that the commencement of the winding up is not deemed to begin at presentation as previously but rather upon the making of the order. The effect of this is that there will be no void dispositions pursuant to s.127(1) of the 1986 Act. This is an important change as it allows the company to continue to trade validly despite presentation, possibly to the detriment of creditors. Para.15 modifies the 1986 Act s.240 definitions of "relevant time" for the purposes of preferences and transactions at an undervalue. The intention appears to be to preserve something approaching the previous position, despite the modification of s.129(2) of the 1986 Act. TUVs and connected party preferences have a relevant time of the later of the day 2 years preceding presentation or the day 2 years and 6 months preceding the order. Non-connected party preferences have a relevant time of the later of the day 6 months preceding presentation or the day 12 months preceding the winding up order.

Although these restrictions are likely to come to an end soon (the end is, at the time of writing, set for the end of September, but they may be extended) it is sadly possible that they will have to be re-implemented if further large-scale lockdowns are imposed again in the future. It is as well for practitioners to know what they are so as to be ready for this eventuality.

Katherine Hallett

This is an edited and updated version of a talk given at the highly successful virtual Three Stone seminar 'Solving Insolvency', held online in July. Details of further seminars will be found on the News and Events section of chambers' website, at https://threestone.law/news. If you would like to be kept informed of future Three Stone seminars, please contact the clerks on clerks@threestone.law.

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Case Reviews

Hancock v Promontoria (Chestnut) Limited [2020] EWCA Civ 907

In this case, about a statutory demand based on a heavily-redacted Deed of Assignment, the Court of Appeal held that a court could construe a document redacted for irrelevance. The argument against was made in two ways, firstly by saying simply that a court should not engage in such an exercise because it could not construe the document as a whole; secondly by saying that that rule should be a starting point, but that a court may depart from it "by devising a bespoke solution": [72] in the interests of commercial confidentiality. The Court of Appeal noted that neither irrelevance alone, nor confidentiality alone could be sufficient grounds for redaction, but that some combination of them, or irrelevance and another ground such as privacy, may be.

Simon Hunter

Price v Flitcraft Ltd [2020] EWCA Civ 850

The Court of Appeal allowed an appeal against summary judgment in an intellectual property case. The appeal was allowed on fresh evidence, but the Court of Appeal also commented on the approach taken by the judge below to the claimants' multiple failures to comply with the mandatory provisions of Part 24. The applicable principles in respect of the procedural requirements of Part 24 appear at paragraphs [39-43] and the application of them at [85-87]. The following principles can be drawn from the judgement:

(1) The procedural safeguards in Part 24 and the practice direction are not mere "formalities", but points of critical importance to ensure a fair hearing of the application.

(2) The requirement to state that the applicant believes that on the evidence the respondent has no real prospect of successfully defending the claim is an important one which is to prevent a claimant making an application and claiming the case to be straightforward when, in truth, he knows otherwise.

(3) If an application for summary judgment is made without fairly notifying the respondent of the grounds, criticism of the respondent's failure to deal with those grounds in evidence is unlikely to be justified.

Michael Smith

Giles Maynard-Connor appeared for the Appellants. Michael Smith had appeared for the Defendants below. A longer note on this case will be found on chambers' website

Cumbria County Council v A [2020] EWCOP 38

Hayden J considered the way in which the Court of Protection should approach applications by deputies to be discharged from their deputyships. His Lordship noted that there was a real discretion to be exercised by the court, which was not bound to grant the discharge just because the deputy no longer consented to act. Inevitably, the lodestone of the exercise of the discretion will be the best interests of P, the protected party. There is also a short discussion of the (lack of) interaction between this jurisdiction and the public sector equality duty found in s 149 of the Equality Act 2010.

Simon Hunter

Case Reviews

Lees v Lloyds Bank plc [2020] EWHC 2249 (Ch)

Chief Master Marsh had little difficulty in this case in dismissing, and marking totally without merit, a Part 8 claim brought by Mr Lees against Lloyds seeking disclosure under the CPR, information under the Law of Property Act 1925, and declarations under the Data Protection Act 2018 and the GDPR. Mr Lees' underlying contention (that Lloyds, the registered charge holders, could not pursue a possession action against him as the loan had been the subject of securitisation) was obviously bad given the decision in Paragon Finance plc v Pender [2005] 1 WLR 3412. Mr Lees' attempt to rely on the decision of Marcus Smith J in Promontoria (Oak) Ltd v Emanuel [2020] EWHC 104 (Ch) (a case related to the Hancock case described above) to say that the failure to produce original documents was material was equally swiftly dispatched.

Simon Hunter

R (oao Dutta) v General Medical Council [2020] EWHC 1974

This case, from somewhat outside chambers' practice area, provides an important restatement of the rules on findings of fact and the credibility of witnesses. The Medical Practioners Tribunal ("MPT") had heard a complaint against Dr Dutta. There was some documentary evidence which tended to support the position of Dr Dutta. The MPT started from the position that no-one had challenged the credibility of the complaining patient's evidence. It then went on to say that the documentation did not preclude the fact that she was correct. It went on to say that as the patient's evidence was "emphatic and assured" and that it was "less likely that an event would be contrived in its entirety", despite the passage of 10 years since the event in question. Warby J overturned the decision on a number of grounds. His Lordship noted 3 fundamental errors in the MPT's reasoning: (1) the MPT started with the assessment of the credibility of the witness in relation to events more than 10 years ago and only then went on to consider the unchallenged contemporary documents; (2) the assessment of credibility was based almost entirely on the witnesses demeanour; (3) by testing the witness evidence against the documents the MPT had essentially reversed the burden of proof. The judgment contains (paras 39 and following) a consideration of all the leading authorities on the determination of facts.

Simon Hunter

Moorgate Industries UK Ltd v Mittal [2020] EWHC 1550

Bankruptcy petitions do not usually lead to 57-paragraph long judgments, but then few of them relate to petition debts which are in excess of £139 million. Mr Mittal and an Isle of Man company had guaranteed the debts of a company against which an award was made in the London Court of International Arbitration. In January 2018 judgment was entered against Mr Mittal in the Commercial Court on the guarantee. The sum remained largely unpaid. Amongst the points that arose, ICCJ Burton held that the petition was defective insofar as it claimed additional interest which had accrued since the date of the statutory demand: see [38]. This judicial statement is welcome, as this point arises regularly in bankruptcy proceedings. However, the ICCJ did go on to waive the defect under

Insolvency Rules, r 12.64 on the ground that there was no prejudice to the debtor. Further, there is at [54] a helpful restatement of the principles upon which the court will decide applications to adjourn bankruptcy petitions.

Simon Hunter

Stephen Ryan appeared for Mr Mittal

Bridgehouse (Bradford No.2) Ltd v BAE Systems plc [2020] EWCA Civ 759

This decision is a resounding endorsement of the prevailing orthodoxy that most disputes are capable of being arbitrated. Only very clear statutory language, or very strong countervailing public policy considerations, are capable of displacing the concept of party autonomy. The case also demonstrates that there is no appetite whatsoever to row back from the 'one-stop-shop' presumption formulated in *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40, even in cases where it seems clear from the agreement itself that the parties did not necessarily envisage that all their disputes would be resolved by a single tribunal. In order to uphold the presumption, and maximise the scope of the arbitration clause, the Court of Appeal in this case 'read down' the exclusive jurisdiction clause in the agreement as applying essentially only to the supervisory jurisdiction of the English court, thereby doing considerable violence to the wording of that clause. That is difficult to reconcile with recent decisions on contractual interpretation more generally, such as *Arnold v Britton* [2015] UKSC 36, which stress the primacy of the words used by the parties. It would appear that the *Fiona Trust* presumption is now virtually irrebuttable, except perhaps in cases where the arbitration clause states, in terms, that a particular type of dispute lies outwith its scope.

Sebastian Kokelaar

See the fuller note on chambers' website for more about this case. David Lord QC and Sebastian Kokelaar appeared for the appellants.

Rettendon Parish Council v Hart [2020] EWHC 2221 (Ch)

Few cases in this third decade of the 21st century will require consideration of awards made under the Inclosure Act 1845, nor of the provisions of the Local Government Act 1894, but this is one. It concerns the identity of the trustees of two charities which hold plots of land (it appears that one is a recreation ground and the other is allotments) in Rettendon, Essex. The claimant Council's position was that it was the sole trustee of the charities. It sought a declaration to that effect and various other relief. The defendants (current or former members of the council all) claim that they were trustees, and had the power to appoint further trustees.

This judgment is on the preliminary issue of who the current trustees of the charities were. The decision is a technical one (of the sort where the court was asked to make much of the difference between 'and' and 'or') considering the interrelation of the 1894 Act and the Charities Act 2011. The end result – that the Council was not the sole trustee, but only it could appoint the trustees – seems like something of a score draw.

Simon Hunter

Case Reviews

Hamilton v Raja [2020] EWHC 398 (Ch)

This was an appeal against a district judge's ("the Judge") decision to adjourn the hearing of R's application to set aside H's statutory demand. R's main objection to the statutory demand was that H had not mentioned in the statutory demand that the debt was secured by way of a charging order against R's property. H's argument in response was two-fold: (1) there was no obligation to renounce security at statutory demand stage and H was undertaking to do so in the petition; (2) the security was worthless in any event as there was insufficient equity in the property. Although neither party had asked for an adjournment, the Judge proposed to adjourn as he considered that he did not have sufficient evidence to enable him to determine the value of the property for the purpose of argument (2), which he considered was the most important. Counsel for H asked the Court to decide the case on the basis of (1) alone, but the Judge refused to do so, instead giving directions for valuation evidence.

H appealed the decision to adjourn as being plainly wrong, to the extent which would justify overturning a discretionary case management decision. Although, by appealing, H lost the adjourned date, H argued that it was justified because H would have been prejudiced if they did not file valuation evidence as ordered by the Judge, which they did not wish to do because the valuation was irrelevant in the circumstances. H also asked the High Court to decide (as opposed to remitting) the application on allowing the appeal. On appeal, Sims QC, sitting as a deputy High Court judge, agreed with H, approving two authorities relied on by H, namely (1) *1st Credit (Finance) Ltd v Bartram* [2010] EWHC 2910 (Ch), where the High Court had held that it was wrong to set aside a statutory demand where creditor had stated that it would release the security in the event of a bankruptcy order being made; and (2) *Islandsbanki HF v Stanford* [2019] EWHC 307 (Ch), where the High Court had reiterated that "*it is settled law, especially in a bankruptcy context, that adjournments should be exercised sparingly*". The appeal judge considered that H had met the high threshold for successfully appealing case management decisions, allowed the appeal, and dismissed R's application to set aside.

Daria Gleyze

Daria Gleyze appeared for H, both at first instance and on appeal.

HMRC v Parry [2020] UKSC 35

During her marriage Mrs S and her husband set up a company together, and she had a pension fund with the company's occupational pension scheme. As part of an acrimonious divorce Mrs S's pension fund was first transferred to another occupational scheme, and then while she was in ill health, shortly before her death in December 2006, the fund was transferred into a personal pension plan ('PPP'). The transfer of the pension fund to the PPP ('the Transfer') was motivated by Mrs S's desire to ensure that her ex-husband did not benefit from the return to the company of any surplus in the fund on her death. Mrs S took no benefits from the PPP before her death ('the Omission'). Mrs S's two sons (who with Parry were also the executors of Mrs S's estate) were the nominated beneficiaries of the death benefits, which were held subject to the discretion of the PPP scheme administrator, and that discretion was exercised in favour of the two sons. HMRC determined that both the Transfer and the Omission were transfers of value for Inheritance Tax ('IHT') purposes and so subject to IHT.

Case Reviews

After each lower court taking a different view, the Supreme Court held by a majority on 19 August 2020 that the Transfer did not give rise to an IHT liability, but the Omission did. The Transfer was not intended by Mrs S to confer a gratuitous benefit on her sons, and so was not a transfer of value under section 10 Inheritance Tax Act 1984 ('IHTA'), but instead was motivated by a desire that her ex-husband should not profit by her death. The fact that her sons' future inheritance was enjoyed in a different legal form after the transfer did not constitute Mrs S conferring a gratuitous benefit on her sons. The Supreme Court did not accept that the Omission and the Transfer together formed a scheme which intended to confer a gratuitous benefit on the sons, but the Omission was the operative cause of an increase in the sons' estates and so triggered a charge to IHT under section 3(3) IHTA. This case should not be taken as universal grounds for carrying out any pre-death pension transfer to obtain an IHT benefit; the motivation for any such transfer is key and an omission to take pension benefits whilst in ill-health remains a key focus for HMRC investigations.

Stephen Woodward

Deacon v Yaseen [2020] EWHC 465 (Ch)

This decision, handed down just before lockdown, concerned the interrelationship of the valuation provisions of a partnership deed relating to the retirement of partners, and various parts of the law relating to general medical practitioners. Dr D and Dr Y were in partnership (initially with Dr M). In 2015 Dr Y gave notice of his intention to retire from the partnership, which he did in April 2016. That left Dr D, as continuing partner, with an option to purchase Dr Y's share in the partnership. She exercised the option, meaning that partnership accounts needed to be drawn up. The dispute that arose centred on how the lease of the partnership premises should be treated. HHJ Matthews, sitting as a deputy High Court Judge, considered the provisions of the partnership agreement, the current contract between the partners and the NHS Commissioning Board, the NHS Act 2006, and the National Health Service (General Medical Services – Premises Costs) Directions 2013. A number of questions were asked of the Court in the Part 8 Claim. The Judge agreed with Dr Y's submissions that many of these did not need to be answered as they were properly questions for the valuer (when one is appointed). On the main substantive question between the parties, Judge Matthews agreed, as Dr Y contended, that the payments made by the NHS to the practice in respect of their use of the premises were not goodwill payments (it is illegal to sell the goodwill in a GP's practice). A subsidiary question about whether Dr Y had a continuing interest in the practice premises was answered in Dr D's favour.

Simon Hunter

Simon Hunter appeared for the Defendant, Dr Yaseen

In the Next Issue:

Tim Clarke on the remote witnessing of wills

Sebastian Kokelaar on *Lehtimaki v Cooper* in the Supreme Court

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

Practice Update

Inevitably, the last few months of legal practice have been dominated by the coronavirus outbreak, which has had a significant effect on the functioning of the legal system. Legislative changes, many of them time-limited or containing review clauses, have been made at a rate to deal with the response to the pandemic.

The most significant legislative change in chambers' practice areas has been the introduction of the **Corporate Insolvency and Governance Act 2020**. This makes some temporary provisions related to the coronavirus outbreak, including a suspension of the wrongful trading provisions for actions in the period 1 March 2020 to 30 September 2020 (s 12) and restrictions on the service of statutory demands and on presentation of winding-up petitions (Sch 10), again currently slated to end on 30 September. Katherine Hallett discusses the Sch 10 provisions in her article earlier in this issue. The Secretary of State has also been given a wide-ranging but time-limited Henry VIII power to modify corporate insolvency legislation (ss 21-27).

However, the Act also makes significant permanent provisions. Of these, the most widely-touted has been the new moratorium procedure, but there is also a new Part 26A for the Companies Act 2006, dealing with restructuring plans, and statutory override of the insolvency termination provisions in a contract. Changes consequential upon the Act have also been applied to LLPs: **Limited Liability Partnerships (Amendment etc.) Regulations 2020**, to Co-operative and Community Benefit Societies: **Co-operative and Community Benefit Societies and Credit Unions (Arrangements, Reconstructions and Administration) (Amendment) and Consequential Amendments Order 2020**, and to Charitable Incorporated Organisations: **Charitable Incorporated Organisations (Insolvency and Dissolution) (Amendment) (No. 2) Regulations 2020**.

A new PD, the **Insolvency Practice Direction relating to the Corporate Insolvency and Governance Act 2020** has been approved which deals with a new procedure for keeping winding up petitions private until the Court has reviewed them. Practitioners in this area should note that at the time of writing para 4.1 seems to contain a typographical error: the reference there to "paragraph 2 above" should surely in fact be a reference to para 3 of the PD. No doubt this will be changed soon. There is also an amended general practice direction for insolvency, the **Insolvency Practice Direction 2018**. The changes made take account of the CIG Act.

In other coronavirus-related changes, a number of filing time-limits for companies were extended by the **Companies etc. (Filing Requirements) (Temporary Modifications) Regulations 2020**. Fees payable under the Patents Act 1977, the Trade Marks Act 1994 and the Registered Designs Act 1949 have been temporarily reduced by the Patents, Trade Marks and **Registered Designs (Fees) (Coronavirus) (Amendment) Rules 2020**. The period during which landlords may not exercise their rights of re-entry or forfeiture under relevant business tenancies for non-payment of rent has been extended to 30 September 2020: **Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) Regulations 2020**. Possession proceedings under Part 55 of the CPR, and enforcement by writ or warrant of possession orders have been stayed until 20 September 2020: **Civil Procedure (Amendment No. 5) (Coronavirus) Rules 2020**, and a new PD has been made to provide a procedure for restarting them: **CPR Practice Direction 55C.** Reductions to stamp duty land tax were made by the **Stamp Duty Land Tax (Temporary Relief) Act 2020**, and run to 31 March 2021.

The government has also opened 10 temporary courts to deal with the backlog of cases caused by the pandemic. The last two of them opened on 28 August, so all 10 are now operational. 6 of them (Leeds, Fleetwood, Telford, Middlesborough, Stevenage and Chichester) will hear civil cases. One has been set up in the Knights' Chamber at Peterborough Cathedral, causing us to wonder when the last time a non-ecclesiastical case was heard in the grounds of a cathedral.

In July the Government announced that it would introduce temporary provisions, probably lasting until 2022, allowing the remote witnessing of wills. At the time of writing the draft legislation is not available, but the next issue of The Three Stone Triannual Review will have an article by Tim Clarke looking at this subject.

The **Business and Planning Act 2020** is mostly beyond the scope of this review. However, s 12 provides an carve out from the court's powers under section 140A and 140B of the Consumer Credit Act 1974, essentially preventing consideration under those sections of whether loans under the Bounce Back Loan Scheme are unfair relationships within the technical meaning of that term.

In other secondary legislation, the **Companies (Shareholders' Right to Voting Confirmations) Regulations 2020** provide a requirement on traded companies to give receipts for electronically-received votes, and to confirm, when asked, that electronically-received votes have been recorded and counted. Some minor changes relating to Brexit were made by the **Insolvency (Amendment) (EU Exit) Regulations 2020**. Brexit-related changes have also been made to the Solicitors (Disciplinary Proceedings) Rules 2019 by the **Solicitors (Disciplinary Proceedings) (Amendment) Rules 2020**.

Draft legislation providing for debt relief moratoria to give individual debtors breathing spaces and in the case of mental health crises has been published and is much to be welcomed. We will review this in more detail when it is brought into force.

The **Civil Procedure (Amendment No. 3) Rules 2020** come into force mostly on 1 October 2020. Amongst the important changes made are amendments to the procedure in contempt of court cases by a new Part 81. Changes aligning the procedure for possession cases in the High Court with those in the County Court are already in force (from 23 August 2020)

However, the CPR rules change that will have most impact on practice is that found in the **122nd Practice Direction Update** which provides (amongst other things) a completely new PD 3E. Those preparing Precedent H should pay particular regard to the table following Paragraph 10 of the new PD concerning what the phases of a budget do and, importantly, do not include. The Update also extends the Disclosure Pilot for another year.

ICSA – The Chartered Governance Institute has produced a guidance note entitled **Directors' general duties under the Companies Act 2006**, which (whilst having no force of law) will be of interest to practitioners in company law practice as it is material that will be available to directors when exercising their duties. Of particular interest may be the guidance given on the s 172 reporting duties placed on large companies

Practice Update

by the Companies (Miscellaneous Reporting) Regulations 2018.

The London Circuit Commercial Court has written to users to say that incorrectly titled draft orders will likely be rejected to be refiled as there is not judicial and administrative time to correct them. The title in the top left of the order should read, on three lines: "*In the High Court of Justice | Business and Property Courts of England and Wales | London Circuit Commercial Court (QBD)*".

In his message to users HHJ Pelling QC also reminded parties filing orders that if the order is to be made without a hearing, and is not a consent order, must contain the provision required by CPR, r 3.3(4)-(6) setting out the right of the parties to apply within 7 days to vary or set aside the order. This should apply to all such orders, not just those in the LCCC. Again, the LCCC will likely reject draft orders that do not contain it.

Finally, the Insolvency Service is trialling producing monthly (rather than quarterly) insolvency statistics to give a better view of the effect of the pandemic on insolvency numbers. The general trends seem to be that numbers are down on the same periods last year.

Chambers News

Three Stone is COVID-19 ready

Chambers continues to thrive during the COVID-19 pandemic, and continues to operate effecitvely at its usual excellent standards. This is due to the implementation of rigorous policies for clerks, members and clients to ensure that we have a safe business environment. The clerks' room and the public areas of chambers have been adated for safe access and to meet the challenges thrown up by the pandemic.

Chris Howitt joins chambers

On 22 July 2020 Three Stone was pleased to welcome Chris Howitt as a member of chambers. Chris was called to the bar in 2011 and joined chambers from Kobre & Kim, where he gained extensive experience of cross border disputes in the Caribbean. Read Chris's article on Black Swan injunctions on page 6 of this issue.

Tim Clarke appointed Diocesan Chancellor of the Diocese of Derby

Tim Clarke will become Chancellor of the Diocese of Derby from 4 December 2020. He is currently the deputy chancellor of the diocese, and takes over the role from John Bullimore, who retires after almost 40 years in post. Tim will continue in his practice from chambers, speclalising in real property, wills and estates, as well as ecclesiastical law. He also remains a non-stipendiary minister in the Diocese of Worcester.

Tim said: "I look forward to working with the bishop, archdeacons, registrar and all in the Diocese of Derby to ensure that our church communities are better enabled to meet the needs of 21st-century worship, whilst also encouraging an appreciation of the rich heritage we share."

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In this Issue:

- Simon Hunter on *Marex v Sevilleja* and reflective loss
- Chris Howitt on Black Swan injuctions in the BVI
- Katherine Hallet on winding up petitions
- Case Reviews
- Practice Updates